WORLD TRADE ORGANISATION
Third Participant Submission to the Appellate Body

UNITED STATES – SUBSIDIES ON UPLAND COTTON

(AB-2004-5)

THIRD PARTICIPANT SUBMISSION OF NEW ZEALAND

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1.03 The Appellate Body should reject the United States arguments that, because only the price-gap calculation focuses solely on those elements of the domestic support granted that a Member can control and thus reflects support "decided", the Panel should have used a price-gap calculation as the appropriate measurement under Article 13(b)(ii). This argument would read the term "grant" out of Article 13(b)(ii) altogether, and ignores the fact that it is Members who control or 'decide' to use forms of domestic support measures that are dependent on market prices. The Appellate Body should also reject the United States arguments that Article 13(b)(ii) requires a comparison only of product-specific support. The chapeau of Article 13(b) makes it clear that "such measures" refers to "domestic measures that conform fully to the provisions of Article 6" of the *Agreement on Agriculture* ie both product specific and non-product specific support to upland cotton. The use of the word "specific" in paragraph 13(b)(ii) only refers to the fact that the comparison is to be made on a commodity-by-commodity basis.

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1.05 The Appellate Body should reject the United States arguments relating to the Panel's finding that the gap between upland cotton producers' total production costs and market revenue demonstrates that the effect of the subsidies was to allow United States producers to sell upland cotton at a price lower than would otherwise have been necessary to cover their total costs, and thus sustain a higher level of output than would have occurred in the absence of the United States subsidies. The Panel correctly found that this increased supply had led to the price suppression that occurred in the world market for upland cotton.

1.06 The Appellate Body should reject the United States' argument that because past recurring subsidies have ceased to exist the Panel should not have included them in its assessment of serious prejudice. The practical effect of this argument is that Members would be effectively precluded from ever taking serious prejudice cases where there are recurring subsidies, despite the fact that subsidy programmes in existence for a period of years can have effects beyond only the year in which they have been paid. The Appellate Body should also reject the United States argument that a Panel should

quantify exactly the amount of the subsidy in question in a serious prejudice case. The magnitude of a subsidy may be relevant in some cases but may not, in and of itself, be determinative of the nature or extent of its effects. The Panel correctly found that the more precise quantitative concepts and methodologies found in Part V of the *SCM Agreement* are not directly applicable to an examination of an actionable subsidy claim.

1.07 The Appellate Body should uphold the Panel's finding that the term "in the same market" within the meaning of Article 6.3(c) can include a world market. It is clear from the facts that a world market for upland cotton exists. The Appellate Body should also reject the United States argument that there is no price suppression because even if the United States removed its subsidies, the world price would stay the same because new suppliers would fill market demand and maintain the world price. This argument only underlines the serious prejudice caused by the price suppressing effect of the US subsidies, as it means that non-subsidising producers produce and export less than they would otherwise. The Appellate Body should also reject the United States argument that the Panel was required to determine the extent to which processed cotton benefited from subsidies provided with respect to raw cotton. Nothing in Articles 5 and 6 of the *SCM Agreement* requires such a demonstration.

1.08 New Zealand supports the appeal and submissions of Brazil that the correct interpretation of "world market share" in Article 6.3(d) of the *SCM Agreement* is the world market share of *exports*. The adverse effect with which Article 6.3(d) is concerned is the effect of subsidies on trade. By including all production in the analysis as the Panel did, the effect of the subsidies is dissipated and may be totally eclipsed by the impact of other measures that Members adopt that are not within the scope of concern of the *SCM Agreement*. It would not then be possible to measure properly the effect of the subsidy on the world market share of the subsidising Member.

Export credit guarantee programmes

1.09 The Appellate Body should reject the United States argument that Article 10.2 of the *Agreement on Agriculture* reflects the intention of WTO Members to defer disciplines on export credit guarantee programmes. It is clear that export credit guarantee programmes that involve the granting of export subsidies clearly fall within the ordinary terms of Article 10.1. If the United States is correct, Members deliberately created a significant loophole despite the clear concern evident in Article 10.1 to prevent such circumvention of reduction commitments by the use of export subsidies not listed in Article 9.1. Article 10.2 would, itself, circumvent the anti-circumvention provisions.

1.10 The Appellate Body should also grant Brazil's appeal on the judicial economy exercised in respect of making a finding that the United States export credit guarantee programmes are export subsidies under Article 1 and Article 3 of the *SCM Agreement* because of the potentially distinct course of implementation triggered by a Member's maintenance of export subsidies within the meaning of those articles. The Appellate Body should complete the analysis and find that export credit guarantee programmes constitute export subsidies within the terms of Articles 1.1 and 3.1(a).

II INTRODUCTION

2.01 The United States appeals certain issues of law as set out in the Panel Report on "*United States – Subsidies on Upland Cotton*".[1] The measures at issue in this dispute are United States domestic support measures and export subsidies that provide support to the production and export of upland cotton.[2] Although New Zealand is not a producer or exporter of cotton, New Zealand joined this dispute as a Third Party because of its systemic interest in maintaining the integrity of the WTO disciplines applicable to agriculture negotiated during the Uruguay Round. The present dispute raises issues of interpretation and application of the provisions of the *Agreement on Agriculture* and the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"), many of which were considered by a WTO Panel for the first time in this dispute.

2.02 The disciplines on the use of domestic support and export subsidies in respect of agricultural products contained in the *Agreement on Agriculture* were a key outcome of the Uruguay Round. A key distinction is made in the *Agreement* between treatment of domestic support measures that distort trade and production (which are subject to reduction commitments), and those that do not. New Zealand is particularly concerned to ensure that Members abide by that distinction and that the integrity of the "green box" is maintained.

2.03 Under Article 13 (the "Peace Clause"), the *Agreement on Agriculture* also provides for specific exemptions for agricultural measures from the disciplines of the *SCM Agreement* provided certain conditions are met. These conditions must be rigorously applied to ensure that Members are not unduly deprived of their rights under the *SCM Agreement* to take action against prohibited subsidies and the adverse effects of actionable subsidies.

[1] Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, 8 September 2004 ("*US-Upland Cotton"*).

[2] Where New Zealand refers to US measures in this submission it is referring to those measures, as appropriate, that are described by the Panel in PartVII.C.2 of the Panel's report.

2.04 This dispute also examines the provisions of the *SCM Agreement* that define the circumstances in which a subsidy is prohibited or actionable. Members have agreed explicitly to prohibit certain kinds of subsidies (subject to the provisions of the *Agreement on Agriculture*), including export subsidies, but have also agreed that Members may not maintain other subsidies where they cause adverse effects, including serious prejudice, to the interests of other WTO Members. Underlying these provisions is a clear recognition of the harmful effects of trade-distorting subsidies. Accordingly these provisions must be interpreted and applied in such a way as to give meaningful effect to the rights that Members have under the *SCM Agreement* to address the effects of such measures on their interests.

2.05 With the exception of those findings of the Panel that are subject to appeal by Brazil,[3] New Zealand considers that the Appellate Body should uphold the Panel's findings in respect of the United States subsidies to upland cotton challenged by Brazil. In this submission New Zealand will put forward the grounds and legal arguments in support of this position, including through addressing arguments raised by the United States in its Appellant Submission.[4]

2.06 New Zealand considers that the Panel correctly concluded that the United States measures at issue are not exempt from action under the *SCM Agreement*. In reaching this conclusion the Panel interpreted the relevant provisions of the *Agreement on Agriculture* consistently with their object and purpose. In this submission New Zealand highlights particular reasons why this was the right conclusion.

2.07 New Zealand also considers that the Appellate Body should uphold the Panel's findings that United States measures have adversely affected Brazil's interests. In this submission New Zealand addresses particular arguments that the United States makes

[3] As outlined in *United States – Subsidies on Upland Cotton* (WT/DS267), Brazil's Other Appellant Submission to the Appellate Body, 2 November 2004 ("Brazil's Other Appellant Submission").

[4] *United States – Subsidies on Upland Cotton* (AB-2004-5), Appellant's Submission of the United States, October 28, 2004 ("US Appellant Submission").

regarding the Panel's finding that United States subsidies cause serious prejudice to Brazil's interests. In making its findings as to the existence of serious prejudice the Panel conducted a thorough analysis of the effects of the United States subsidies and correctly concluded that these had caused significant price suppression in the same world market within the meaning of Article 6.3(c) of the *SCM Agreement*.

2.08 Finally, New Zealand considers that the Appellate Body should uphold the Panel's findings that certain United States measures constitute export subsidies used in a manner inconsistent with the provisions of the *Agreement on Agriculture* and prohibited subsidies under the *SCM Agreement*.

III LEGAL ARGUMENTS

A The Panel correctly found that United States domestic support measures providing support to upland cotton are not exempt from action under Articles 5 and 6 of the *SCM Agreement*

1 United States Production Flexibility Contract Payments and Direct Payments do not conform fully to the provisions of Annex 2 of the *Agreement on Agriculture*

3.01 The Panel found that Production Flexibility Contract (PFC) Payments and Direct Payments (DP) and the legislative and regulatory provisions that establish and maintain the DP programme, are not green box measures.[5] This conclusion was based on the Panel's finding that these payments do not fully conform with paragraph 6(b) of Annex 2 of the *Agreement on Agriculture*, which requires that the amount of payments shall not be related to the type of production undertaken by the producer.

3.02 Given this finding the Panel therefore correctly included PFC and DP payments in its consideration under Article 13(b)(ii) as to whether the United States non-green box measures met the requirements for exemption from action under Articles 5 and 6 of the *SCM Agreement*.

3.03 Having reached its conclusion based on the non-conformity of PFC and DP payments with paragraph 6(b), the Panel did not proceed to make a finding on the conformity of direct payments under the US Farm Security and Rural Investment (FSRI) Act 2002 with other criteria in paragraph 6 on Annex 2 of the *Agreement on Agriculture*, including the requirement in paragraph 6(a) that payments must be determined by reference to a "defined and fixed" base period. New Zealand supports Brazil's conditional appeal of the Panel's use of judicial economy in declining to make a finding in respect of paragraph 6(a).[6] As Brazil has outlined, the Panel made a number of factual findings that would enable the Appellate Body to complete the

[5] Panel Report, *US-Upland Cotton*, para 7.413.
[6] Brazil's Other Appellant Submission, para 239.

analysis.[7] In New Zealand's view these factual findings clearly establish that the DP payments cannot be green box payments because the 2002 FSRI Act provided farmers with an opportunity to update base acreage in direct violation of paragraph 6(a) of Annex 2.

3.04 The language and context of paragraph 6 of Annex 2 clearly contemplates one base period that is fixed and unchanging. Paragraph 6(a) establishes this requirement directly ("a defined and fixed base period"), and the subsequent paragraphs 6(b)-(d) are based on this premise (ie "after *the* base period"). The requirement that eligibility for income support payments must be determined by criteria in one fixed base period is designed to ensure that such support is clearly de-linked from production. To conclude otherwise would be to create an internal inconsistency in paragraph 6. If under paragraph 6(a) a Member was not required to define and fix one base period, a Member could avoid the obligations in paragraphs 6(b), (c) and (d) not to link payments to production, prices or factors of production employed in subsequent years, simply by establishing a new base period from time to time. The Appellate Body should rule out such an interpretation, which would allow for open circumvention of the requirements of paragraphs 6(b)-(d) and effectively permit Members to exempt from their reduction commitments income support payments that are clearly linked to production. The proper interpretation of paragraph 6(a), and one that is fundamental to the effective operation of paragraph 6 as a whole, is that a defined and fixed base period is required.

3.05 Applying the proper interpretation of paragraph 6(a) to the facts as established by the Panel provides a clear basis upon which to determine that the DP payments do not conform fully to Annex 2 and thus are not green box measures. The Panel found that the PFC and DP programmes are "successor" programmes sharing certain structural elements.[8] In substance, while there are some minor differences and the programme has a different name, the Panel considered the PFC and DP programmes to be the same income support programme for which the base period has been changed. The Panel

[7] Brazil's Other Appellant Submission, para 243-245.
[8] Panel Report, *US-Upland Cotton*, para 7.398.

found that there had been an opportunity to update base acres receiving payments since the PFC programme was established in 1996, namely by virtue of Section 1101(a)(1)(A) of the FSRI Act 2002 whereby a recipient of the payments was permitted to update base acres for all covered commodities.[9]

3.06 Accordingly the United States income support provided by the DP programme does not meet the criteria required by paragraph 6(a) that eligibility for payments shall be determined by criteria in a fixed and defined base period. The FSRI Act 2002 permitted producers receiving PFC payments to increase the amount of "base acreage" by allowing them to count all of the acreage they had planted to upland cotton during the MY 1998-2001 period, thereby establishing a new payment base. The result was that payments under the programme increased as a result of increased production of upland cotton,[10] collapsing the separation between production and support required for green-box measures. New Zealand supports Brazils contention that, should the Appellate Body overturn the Panel's finding that the PFC and DP payments do not meet the requirements of paragraph 6(b), the Appellate Body should find that DP payments do not meet the criteria set out in paragraph 6(a).

2 The Panel correctly found that United States non-'green box' domestic support measures are not exempt from action within the meaning of Article 13(b) of the *Agreement on Agriculture*

3.07 The Panel devoted a considerable segment of its analysis to determining the appropriate interpretation of the proviso set out in Article 13(b) of the *Agreement on Agriculture* that non-green box domestic support measures are exempt from action providing they "do not grant support to a specific commodity in excess of that decided during the 1992 marketing year".

3.08 The Panel rejected United States arguments that only product-specific support should be included in the calculation and that where payments were dependent on a

[9] Panel Report, *US-Upland Cotton*, paras 7.401, 7.404 and 7.405.
[10] Panel Report, *US-Upland Cotton*, para 7.396.

price gap the Panel should use only the AMS price-gap methodology. Instead the Panel found first that all support to a specific commodity should be included in the comparison,[11] and second that AMS methodology provided a choice between using a methodology based on budgetary outlays only, or a price gap combined with budgetary outlays,[12] and that on the facts of this case budgetary outlays provided the appropriate measures.[13]

3.09 The Panel therefore concluded that, on the facts of this case, the proviso in Article 13(b)(ii) required a comparison between budgetary outlays in respect of all non-green box support measures that bestow or confer support to upland cotton in the benchmark year of the 1992 marketing year, and in the marketing years 1999-2002 during the implementation period. The outcome of that comparison was a finding by the Panel that "implementation period support exceeds the MY1992 benchmark in every year under review".[14]

3.10 The United States appeals the Panel's finding on the basis that the Panel did not properly measure the support granted and decided by United States measures, specifically that the Panel should have used a price-gap calculation to determine what support was provided by price-based measures[15] and should not have included non-product specific support in its calculation.[16]

3.11 New Zealand will comment on both elements of the United States arguments and submits that they should be rejected by the Appellate Body and the Panel's findings under Article 13(b)(ii) that the United States measures at issue are not exempt from action under the *SCM Agreement* upheld. However before doing so it is useful to recall

[11] Panel Report, *US-Upland Cotton*, para 7.494.
[12] Panel Report, *US-Upland Cotton*, para 7.555.
[13] Panel Report, *US-Upland Cotton*, para 7.581.
[14] Panel Report, *US-Upland Cotton*, para 7.597.
[15] US Appellant Submission, paras 69-79.
[16] US Appellant Submission, paras 80-118.

what was intended by WTO Members when they adopted Article 13(b)(ii) and place consideration of the issues in this appeal firmly in that context.

3.12 The intention of the drafters of the proviso in Article 13(b) is self-evident and the evidence before the Panel on the history of the proviso confirms that. Members were concerned to protect their existing domestic support programmes from becoming actionable under the *SCM Agreement*. The quid pro quo for continuing protection however was that domestic support would stay at the level it was when this agreement was struck or be reduced from that level. Implicitly Members agreed to tolerate any adverse effects resulting from such measures during the implementation period, but not without limits. It was agreed that Members could seek redress for adverse effects caused by such measures if support to any specific commodity exceeded 1992 levels. It is clear that Members were principally concerned to limit the effect of these measures on trade. Therefore the manner in which "support" is identified and calculated in the comparison required by paragraph 13(b)(ii) must reflect Members' intentions to limit the effects of such measures to those that existed in MY1992 and ensure that measures are not exempted when their effect is a significantly higher level of trade distortion in the implementation period than in MY1992.

(a) The Panel correctly interpreted the proviso in Article 13(b)(ii) to require, on the facts of this dispute, a comparison between budgetary outlays

3.13 According to the United States, "the focus of the Peace Clause comparison is on the support a Member decides".[17] The United States argues that the use of the word "decided" determines the appropriate methodology for measuring support under Article 13(b)(ii), specifically that only a price-gap calculation as set out in paragraphs 10 and 11 of Annex 3 of the *Agreement on Agriculture* (on how to calculate AMS) can reflect support "decided" by United States price-based measures.[18] That is because, according to the United States, this methodology focuses solely on those elements of the domestic

[17] US Appellant Submission, para 66.
[18] US Appellant Submission, para 72.

support granted that a Member can control. Movements in market prices, the United States argues, are clearly not something that a Member can control, and yet price-based measures are, by their nature, determined by market prices.

3.14 The United States argument would read the term "grant" out of Article 13(b)(ii) altogether. It also ignores the fact that it is Members who control or 'decide' to use forms of domestic support measures that are dependent on market prices. In doing so a Member must expect that those market prices will fluctuate, indeed responding to changes in market price is an integral aspect of the design of price-based measures. When adopting such measures, Members are also equally aware of their obligations under the *Agreement on Agriculture*. It is simply not acceptable for a Member to seek to justify a failure to meet those requirements on the grounds that it has adopted measures that are reliant on factors outside their control and that may or may not lead to the Member breaching the Peace Clause requirements. If a Member adopts a non-green box domestic support measure that determines the amount of support provided on the basis of factors a Member cannot control, then the Member must accept the risk inherent in such a measure that support could be granted in excess of that in MY 1992. That is exactly the situation that faced the Panel in this case.

3.15 For this reason New Zealand considers that the Appellate Body should reject the United States appeal and uphold the Panel's finding that, on the facts of this case, the appropriate measure to make the comparison required by Article 13(b)(ii) was that of budgetary outlays. The Panel's decision to use budgetary outlays in this dispute established a methodology for applying the proviso in Article 13(b)(ii) that was both workable and ensured that the full extent of support to upland cotton formed the basis of the calculation made.

(b) The Panel correctly interpreted the term "support to a specific commodity" in Article 13(b)(ii)

3.16 Turning to the second part of the United States arguments, in New Zealand's view the Panel correctly found that "support to a specific commodity" means all support to a commodity whether "product specific" or not. The Panel's explicit finding was that measures that "identify and allocate support based on an express linkage to specific commodities" provide support to those commodities within the meaning of subparagraph (b)(ii).[19] Accordingly even a measure that provides support to a number of different commodities also provides support to specific commodities individually.

3.17 This is an entirely correct interpretation of subparagraph (b)(ii). Not only do the words "product specific support" not appear in subparagraph (b)(ii), the concept of product specific support is equally not relevant to the determination required. That is because Article 13(b)(ii) requires a fundamentally different type of analysis to those under the *Agreement on Agriculture* that distinguish between product specific support and non-product specific support.

3.18 Those provisions begin with an assessment of the nature of the measure. By contrast the starting point for an assessment of compliance with the proviso in Article 13(b)(ii) is the specific commodity at issue. By inserting "upland cotton" in Article 13(b)(ii) instead of "a specific commodity" this becomes clear. The requirement established by Article 13(b)(ii) in the present dispute is that "such measures do not grant support to upland cotton in excess of that decided during the 1992 marketing year." As the Panel found, there is nothing in Article 13(b) that suggests "such measures" only includes those that provide product specific support. It is clear from the chapeau of paragraph 13(b) that "such measures" refers to "domestic measures that conform fully to the provisions of Article 6" of the *Agreement on Agriculture*. That includes measures providing both product specific and non-product specific support to upland cotton. The

[19] Panel Report, *US-Upland Cotton*, para 7.484

use of the word "specific" in paragraph 13(b)(ii) only refers to the fact that the comparison is to be made on a commodity-by-commodity basis.

3.19 New Zealand notes that the United States asserts that counter-cyclical payments (CCP) and market loss assistance (MLA) payments are decoupled and therefore cannot be included in the analysis under Article 13(b)(ii).[20] However the Panel states that the United States had not asserted before them that CCP payments are green box because they are granted due to low prevailing market prices.[21] MLA payments had been notified by the United States as non-green box support measures.[22] The Panel therefore found that the only measures in respect of which there was disagreement as to whether they were non-green box support were PFC and DP payments.[23] As the Panel recognised, the amount of the payment under the CCP programme is clearly linked to current prices, which means that CCP payments fail to meet the green box criteria set out in paragraph 6 of Annex 2 of the *Agreement on Agriculture*. Accordingly there is no basis upon which to exclude either MLA or CCP payments from coverage by Article 13(b)(ii).

[20] See for example the table provided at page 59 of the US Appellant Submission, and paras 201-207 in Section IV.B.4 of the US Appellant Submission.

[21] Panel Report, *US-Upland Cotton*, para 7.356.

[22] Panel Report, *US-Upland Cotton*, para 7.356.

[23] Panel Report, *US-Upland Cotton*, para 7.357.

B The Panel correctly found that United States measures cause serious prejudice to Brazil's interests within the meaning of Articles 5 and 6 of the *SCM Agreement*

1 The Panel correctly found that the effect of the United States subsidies is significant price suppression within the meaning of Article 6.3(c)

3.20 The Panel concluded that the effect of the mandatory price-contingent United States subsidy measures – marketing loan programme payments, user marketing (Step 2) payments, MLA payments and CCP payments – is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*, constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*.[24] The United States appeals this conclusion, suggesting that the Panel made certain "legal" errors.[25] In reality the United States appears to be doing little more than repeating arguments considered and rejected by the Panel, and relitigating the Panel's factual conclusions. For the reasons outlined below, New Zealand submits that the Appellate Body should reject the United States appeal and uphold the Panel's finding that United States measures cause serious prejudice to the interests of Brazil within the meaning of Articles 5 and 6 of the SCM Agreement.

(a) The Panel correctly analysed the effect of the United States price contingent subsidies

3.21 The Panel found that, with respect to marketing loan programme payments, the operation of this programme meant that "the further the adjusted world price drops, the greater the extent to which United States upland cotton producers' revenue is insulated from the decline, numbing United States production decisions from world market signals."[26] The Panel also found that "… the structure, design and operation of the marketing loan programme has enhanced production and trade-distorting effects. The payments stimulate production and exports and result in lower world market prices than

[24] Panel Report, *US-Upland Cotton*, paras 7.1109 - 7.1416 and 8.1(g)(i).
[25] US Appellant Submission, Part IV.
[26] Panel Report, *US-Upland Cotton*, para 7.1294.

would prevail in their absence."[27] The Panel reached similar conclusions with respect to the other price-contingent subsidies (Step 2, MLA and CCP payments).[28]

3.22 The United States argues that the Panel's analysis of the effect of the subsidy measures in question is flawed because the Panel did not analyse the relevant production decision faced by a farmer – the decision on what to plant, which relates to the price that the farmer expects to receive when the crop is harvested.[29]

3.23 The United States argument is not borne out by a careful examination of the Panel Report. The Panel did not disregard the impact of the subsidies on farmers' planting decisions. In fact the effect of the subsidies on planting decisions is a key aspect of the Panel's analysis under Article 6.3(c), particularly with respect to the nature of the price-contingent subsidies.

3.24 Implicit in the United States argument is the view that the subsidies do not impact on farmers' decisions to plant cotton. The United States says that the subsidies did not lead farmers to plant more upland cotton and therefore they could not "stimulate production."[30] According to the United States, farmers' planting decisions were influenced, not by the United States payments, but by what the farmer expects to receive when the crop is harvested. However nowhere in its arguments does the United States address the fact that farmers' expectations about what they will receive when the crop is harvested are strongly shaped by the fact that the subsidies provide farmers who plant cotton with what is essentially a guaranteed minimum price for their crops.

3.25 In its thorough analysis of the nature of the United States subsidies the Panel is directly concerned with the impact of the payments on the expectations of farmers as to their expected revenue for their crop. For example, the Panel finds in respect of CCP

[27] Panel Report, *US-Upland Cotton*, para 7.1295.
[28] Panel Report, *US-Upland Cotton*, paras 7.1300, 7.1302.
[29] Panel Report, *US-Upland Cotton*, paras 151-226.
[30] US Appellant Submission, para 159.

payments that "in the price range from the loan rate up to the target price minus the DP payment rate, changes in producer revenues due to changes in market prices are partly offset by the countercyclical payments if the base acreage crop is planted, thereby reducing total revenue risk associated with price variability."[31] The Panel also considers the marketing loan programme and finds that "where producers repay at less than the loan rate, there is patently a financial contribution supplementing the income of the producer."[32] In respect of the user marketing (Step 2) payments the Panel found that "they contribute to artificially higher prices for United States upland cotton in the way of eliminating any positive difference between United States internal prices and international prices of upland cotton."[33] On the basis of these and other relevant factual findings about the effect of the subsidies on prices that upland cotton producers receive, consistent with the clear econometric evidence before it, the Panel concluded that the price contingent United States subsidies stimulate production and exports.

3.26 This is the right conclusion. The United States subsidies operate to ensure that producers know, when they plant their crops, what minimum income they can expect to receive if they plant upland cotton. If they plant upland cotton they will effectively receive at least the income representing their production valued at the CCP target price, and even more if market prices exceed the target price. On the other hand, if they decide not to plant upland cotton, their only guarantee is to receive the DP. Even if they plant another crop, such as wheat, they have no certainty of receiving any more than a potentially low wheat price (and the DP). United States producers are thus strongly influenced by government programme benefits associated with planting upland cotton (as well as being influenced by market prices).[34] Unsubsidised producers in other parts of the world only receive the market price and therefore expectations as to market prices are the key determinant in their planting decisions.

[31] Panel Report, *US-Upland Cotton*, para 7.1302.
[32] Panel Report, *US-Upland Cotton*, para 7.1292.
[33] Panel Report, *US-Upland Cotton*, para 7.1298.
[34] Brazil's Further Submission, Annex I para 17.

3.27 To conclude, even if a producer's expectation is that market prices for upland cotton will be low at the time of harvest, they may still chose to produce cotton rather than another crop, because it is only if they produce upland cotton that they have a guaranteed level of income. In fact, even when their expectation is that other crops may return a higher market price than upland cotton at the time of harvest, a United States producer may still opt for the certainty of the minimum income that producing upland cotton guarantees as a result of government programmes.

3.28 Accordingly United States farmers are not affected by world prices in the same way as unsubsidised producers of upland cotton. As the Panel puts it they are "insulated" by the fact that the United States subsidies provide them with a guaranteed minimum price. As the Panel highlighted, the effect of that "insulation" can be significant when, for example, the subsidy may be greater than the market value of the product itself.[35]

3.29 The Panel considered the United States argument that planting decisions are not limited only to benefits derived from United States subsidies, but include expected prices for the upcoming crop year. However the Panel concluded, "United States producers continued to grow upland cotton due to United States subsidies rather than market prices of expected market revenue".[36] The evidence before the Panel showed that, had United States farmers been subject to market prices and their revenue determined solely by those prices, United States upland cotton producers would on average have lost money for each planted acre in every year since MY 1998 and made a small profit in MY1997.[37] Under those circumstances, what rational farmer would have chosen to continue season after season to plant upland cotton? That they did so reflects the effect that the subsidy payments had on their planting decisions.

[35] Panel Report, *US-Upland Cotton*, para 7.1294.
[36] Panel Report, *US-Upland Cotton*, para 7.1362.
[37] Panel Report, *US-Upland Cotton*, para 7.1354.

3.30 The United States argues that United States cotton acreage rises and falls commensurately with cotton acreage in the rest of the world, and that the United States share of world production has remained stable over the period examined,[38] and therefore United States farmers respond to market signals just as their competitors do in the rest of the world.[39] This argument is flawed, because it takes no account of the role that the subsidies play in maintaining the United States position in the world market. In order to show that United States producers react to market signals just as their competitors do in the rest of the world, the United States would have to eliminate the effect of the subsidies to create a counterfactual situation where United States producers were solely subject to market conditions. The economic modelling analysis submitted by Brazil has created that counterfactual situation and found that, without the subsidies, United States exports of upland cotton would have been 41% less in MY1999-2002.[40] Even if the United States is right that changes in United States harvested acreage have tended to follow changes in world harvested acreage,[41] it is still far from the situation that would have been the case in the absence of those subsidies, which is the relevant comparator for the purpose of assessing a serious prejudice claim.

3.31 The United States also unreasonably distorts the Panel's statement that the subsidies numb the response of United States producers "to production adjustment decisions when prices are low"[42] to somehow imply that the Panel expected United States farmers to tear up their crops mid season and plant something else on the basis of expected world prices.[43] It is clear from the context of the Panel's comments, where the assessment of the effect of the subsidies was over a period of several marketing years - and therefore several opportunities for farmers to chose to plant a different crop – that the Panel was not envisaging the "factory line" fictional scenario the United States

[38] US Appellant Submission, para 137.

[39] US Appellant Submission, para 138.

[40] *United States – Subsidies on Upland Cotton*, Brazil's Further Submission to the Panel, 9 September 2003 ("Further Submission of Brazil"), para 288.

[41] US Appellant Submission, paras 174-176.

[42] Panel Report, *US-Upland Cotton*, para 7.1308.

[43] US Appellant Submission, paras 162-164.

posits.[44] Furthermore, the United States argument ignores the fact that United States farmers know in advance whether they could cover the costs of harvesting and other production inputs even if market prices should fall, because they know when they make their planting decisions what their guaranteed minimum income from the crop will be.

(b) The Panel did not err in its consideration of the divergence between the total cost of producing upland cotton and revenue from sales of upland cotton as evidence of a causal link between upland cotton subsidies and significant suppression of world upland cotton prices

3.32 One of the grounds upon which the Panel found that a causal link exists between the United States price-contingent subsidies at issue – the marketing loan programme payments, user marketing (Step 2) payments, MLA payments and CCP payments – and the significant suppression of world cotton prices, was the Panel's finding that the gap between upland cotton producers' total production costs and market revenue demonstrated that the effect of the subsidies was to sustain a higher level of output than would have occurred in the absence of those United States subsidies.[45] The Panel found that this increased supply had led to the price suppression that occurred in the world market for upland cotton.[46] Without those subsidies, United States upland cotton producers would not have been economically capable of remaining in the production of upland cotton. The effect of the subsidies was to allow United States producers to sell upland cotton at a price lower than would otherwise have been necessary to cover their total costs.[47]

3.33 The United States appeals this finding on a number of grounds, including that the relevant measure producers use when making planting decisions is actually variable costs of production, not total costs of production.[48] The United States also states that the total cost of production test elaborated by the Appellate Body in *Canada* –

[44] US Appellant Submission, para 162.
[45] Panel Report, *US-Upland Cotton*, para 7.1354.
[46] Panel Report, *US-Upland Cotton*, paras 7.1309-7.1310.
[47] Panel Report, *US-Upland Cotton*, para 7.1353.
[48] US Appellant Submission, para 215.

Measures Affecting the Importation of Milk and the Exportation of Dairy Productions (*Canada – Dairy*)[49] is only relevant to determine whether a "payment" exists under Article 9.1(c) of the *Agreement on Agriculture*, and not to evaluate the effect of the subsidy as the Panel has done so in this dispute.[50]

3.34 The United States argument that the Panel erred in having reference to the divergence between the total costs of producing upland cotton and revenue from sales of upland cotton, because producers base their planting decisions on variable costs of production, is based on an assumption that what is relevant is the farmer's decision of 'whether or not to produce in the short run' and what 'expenses must be covered in the short run'.[51]

3.35 However, contrary to the United States' claims, the Panel in fact was concerned with a medium to long-term period as evidenced by their comparison of total cost of productions with revenue over a six-year period during which the data clearly showed that revenue was much lower than total costs of production. Over the medium to long term producers need to cover total, not just variable, costs of production in order to avoid sustaining losses. This has been confirmed in *Canada – Dairy* where the Appellate Body elaborated its "total cost of production" test on the basis that if producers fail to recoup their total costs of production over time, they will make a loss. In *Canada - Dairy* the Appellate Body found that to the extent that the producer charges prices that do not recoup the total cost of production over time, then the loss must be financed from some other source.[52] In the present dispute the "other source" is clear.

[49] Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Second Recourse to Article 21.5 of the DSU by New Zealand and the United States* WT/DS103/RW2, WT/DS113/RW2 (*Canada – Dairy (21.5) II*), adopted 17 January 2003 as modified by the Appellate Body Report WT/DS103/AB/RW2, WT/DS113/AB/RW2.

[50] US Appellant Submission, para 222.

[51] US Appellant Submission, para 218.

[52] Report of the Appellate Body, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW, WT/DS113/AB/RW (*Canada – Dairy (21.5) I)*, adopted 18 December, para 87.

The Panel's factual findings clearly demonstrate that those losses were financed by the United States subsidies at issue that provide support to upland cotton.

3.36 While in *Canada - Dairy* the Appellate Body was concerned as to whether there was a subsidy within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, its findings also provide guidance on the effect of such subsidies. The Appellate Body found that a comparison between the total cost of production and the selling price of the product was the appropriate benchmark because it gave an indication of the "crucial question, namely, whether Canadian export production has been given an advantage."[53] Accordingly, where a subsidy enables a producer to finance losses from selling its products at less than it costs to produce them, the effect of the subsidy is to give that production an advantage. This finding is highly relevant to the present dispute. The United States subsidies enable producers of upland cotton to export or otherwise sell upland cotton at less than the total cost of producing it. The effect of the subsidy therefore is to advantage United States upland cotton production by sustaining a higher level of output than would be possible without the subsidies. As the Panel found, this increased supply led to significant price suppression.[54] Accordingly the Panel's finding to this effect, and its conclusion that there is a causal link between the United States subsidies and the significant price suppression, should be upheld.

(c) The Panel correctly included the effects of past recurring subsidies in its assessment of serious prejudice

3.37 The United States argues that the Panel erred in making serious prejudice findings with respect to past recurring subsidies that no longer exist.[55] The essence of the United States argument is that these subsidies have ceased to exist and, therefore, cannot be withdrawn and could no longer be having adverse effects.[56] In the context of

[53] Report of the Appellate Body, *Canada – Dairy (21.5) I*, para 84.
[54] Panel Report, *US-Upland Cotton*, paras 7.1309-7.1310.
[55] Panel Report, *US-Upland Cotton*, paras 275-300.
[56] Panel Report, *US-Upland Cotton*, para 300.

this dispute, the United States argues that subsidies prior to MY 2002 can have no effect within the meaning of Article 6.3(c) of the *SCM Agreement*.

3.38 New Zealand recalls and restates the position that it took in its Further Third Party Submission to the Panel.[57] The practical effect of the United States argument, given the nature of the evidence that is required and the timelines for WTO dispute settlement, is that Members would be effectively precluded from ever taking serious prejudice cases where there are recurring subsidies. New Zealand submits that this defeats the object and purpose of the WTO disciplines on actionable subsidies by creating an unwarranted exemption in the *SCM Agreement* for recurring subsidies, the very subsidies which are the most distorting over time. In addition, the United States approach ignores the fact that subsidy programmes are in existence for a period of years and have effects on the decisions of producers beyond only the year in which they have been paid. Producers' expectations of continued subsidies are central to planting decisions, and in context of this dispute, it is clear that United States cotton farmers expect ongoing subsidies, as they have been legislatively mandated until MY 2007. Accordingly, New Zealand submits that the United States' appeal on this issue should be rejected.

(d) The Panel correctly found that the provisions of the *SCM Agreement* did not require it to quantify the amount of the subsidies

3.39 The Panel concluded that the *SCM Agreement* does not require a Panel to quantify exactly the amount of the subsidy in question in a serious prejudice case.[58] The United States argues that the Panel erred in making this finding.[59] New Zealand submits that the Appellate Body should uphold the Panel's finding.

[57] *United States – Subsidies on Upland Cotton*, Further Third Party Submission of New Zealand, 3 October 2003, paras 2.28-2.30.

[58] Panel Report, *US-Upland Cotton*,, paras 7.1159-7.1194.

[59] US Appellant Submission,, paras 240-263.

3.40 The Panel based its finding on its broader assessment that "the more precise quantitative concepts and methodologies found in Part V of the *SCM Agreement* are not directly applicable" to an examination of an actionable subsidy claim under Part III of the *SCM Agreement*.[60] New Zealand agrees with the Panel that the nature of actionable subsidy claims can be contrasted with countervailing duty investigations under Part V of the Agreement and that there are broader considerations at play in a serious prejudice analysis such that it calls for "a qualitative, and to some extent quantitative analysis of the existence and nature of the subsidy and the serious prejudice caused."[61]

3.41 In particular, New Zealand endorses the Panel's conclusion that "while the magnitude of a subsidy may be relevant in some cases where such information is probative and readily available, the magnitude of a subsidy may not, in and of itself, be determinative of the nature or extent of its effects. A massive ("inefficient") subsidy of a certain design may have relatively minuscule effects, whereas a smaller subsidy of a different nature may have relatively greater effects."[62]

3.42 In the context of this case, there is no doubt that Brazil proved, and that the Panel was correct in concluding, that the price-contingent subsidy measures in question had the effect of causing serious prejudice to Brazil's interests. Brazil also showed that this case is not dealing with mere trifling subsidies, and the Panel itself noted that the subsidies could be greater than the market value of the product itself[63] and "involve very large amounts of United States government money benefiting United States upland cotton production."[64] The establishment of the precise amount of the subsidy would not have provided any additional assistance to the Panel in reaching its conclusion.

[60] Panel Report, *US-Upland Cotton*, para 7.1167.
[61] Panel Report, *US-Upland Cotton*, para 7.1173.
[62] Panel Report, *US-Upland Cotton*, para 7.1190.
[63] Panel Report, *US-Upland Cotton*, para 7.1294.
[64] Panel Report, *US-Upland Cotton*, para 7.1349.

(e) The Panel correctly found that the term "in the same market" within the meaning of Article 6.3(c) can include a world market

3.43 The Panel interpreted the phrase "in the same market" in Article 6.3(c) as including a "world market".[65] The United States appeals this finding, arguing that "same market" cannot possibly include a world market.[66]

3.44 New Zealand supports the Panel's analysis of the interpretation of "in the same market" in Article 6.3(c). The Panel correctly determined that the term "market" may refer to a geographical area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices.[67] The United States does not appear to dispute that the term as used in Article 6.3 has a geographical aspect to it. Instead, the key United States argument on this point seems to be that the fact that there may be a number of different national markets for a product means that there cannot also possibly be a unified world market in that product.[68]

3.45 The Panel correctly observes that in deciding that a world market exists for upland cotton, it is not constructing a "monolithic" world market that excludes any other connotation of market under Article 6.3(c).[69] It is still possible to inquire into other geographical areas that meet the definition of "same market", for example a domestic market. But the logic of using the world market is that it reflects and summarises the effects in those individual domestic markets. Except in those cases where domestic markets are isolated from trade (in which case Brazil and the United States will not, by definition, be competing) there is competition between all trading partners in the case of a homogenous product such as upland cotton. And those effects in totality are reflected in the indicator world prices as found by the Panel.

[65] Panel Report, *US-Upland Cotton*, paras 7.1236-7.1244.
[66] US Appellant Submission, paras 307-321.
[67] Panel Report, *US-Upland Cotton*, para 7.1237.
[68] US Appellant Submission, para 312.
[69] Panel Report, *US-Upland Cotton*, para 7.1247.

3.46 Furthermore, the Panel was appropriately deliberate and careful in its assessment that a world market for cotton exists. It noted that there might not always be a world market for any given product. Like the identification of any other 'market', the prevailing conditions of competition in the world would have to manifest some degree of homogeneity.[70] In this dispute, the Panel considered that the nature of the trade in cotton was such that a world market exists for upland cotton. Upland cotton is a fungible commodity that does not rapidly spoil, and is readily transportable and traded in large quantities all over the world. The key participants in this market are producers and consumers of upland cotton.[71] In addition, there is a world price for upland cotton.[72] In these circumstances, the Panel was entirely correct in establishing that a world market exists for cotton. The United States argument on this issue is without substance and should be rejected.

3.47 The United States additionally argues that the Panel never found that United States and Brazilian cotton were actually "in the same market" that it identified - that is, the world market.[73] This argument is misleading and false. The Panel carefully evaluated the relative shares of the world market that the United States and Brazil possess.[74] Given the Panel's finding that there is in fact a world market for upland cotton, the fact that they are both participating in this market inexorably leads to the conclusion that upland cotton from the two countries is in competition in that market. This point is perhaps best made by the United States itself in its submission when it states that "logically, U.S. exports to that 'market', the world, must compete with Brazilian exports to that 'market'."[75] Nothing in the Panel Report contradicts this logic. For these reasons, New Zealand submits that the United States appeal on this issue should be dismissed.

[70] Panel Report, *US-Upland Cotton*, footnote 1357.
[71] Panel Report, *US-Upland Cotton*, para 7.1245.
[72] Panel Report, *US-Upland Cotton*, para 7.1274.
[73] US Appellant Submission, para 320.
[74] Panel Report, *US-Upland Cotton*, paras 7.1281-7.1285.
[75] US Appellant Submission, para 312.

(f) The Panel correctly rejected United States arguments that there is no price suppression because new suppliers would fill market demand and maintain the world price

3.48 On a related point, the United States argues that the Panel was incorrect in finding the existence of serious prejudice as, even if the United States removed its subsidies, the resulting reduction of United States production would be offset by other producers in the market increasing their production. Therefore, the United States argues, there would be no price suppression as the world price would stay the same, and so there can be no serious prejudice to Brazil's interests.[76]

3.49 New Zealand submits that this argument by the United States, rather than undermining the Panel's finding of serious prejudice, simply reinforces it. In making this argument the United States recognises that the effect of the United States subsidies is that the United States exports more upland cotton than it would have without the subsidies. The effect of this is price suppression. This price suppression means that non-subsidising producers produce and export less than they would otherwise have. Thus in the absence of United States subsidies distorting the world market for upland cotton, other producers of upland cotton would compete on a level playing field and there would be increased demand for their products. The United States arguments only support the Panel's finding that the effect of the subsidies is serious prejudice to Brazil's interests as a producer and exporter of upland cotton.

(g) The Panel correctly found that it was not required to determine the extent to which the benefit of the subsidies are passed through to processed cotton

3.50 The United States argues that the Panel erred in failing to determine the extent to which processed cotton benefited from subsidies provided with respect to raw cotton.[77]

[76] US Appellant Submission, paras 236-237.
[77] US Appellant Submission, para 301.

In essence, the United States is arguing that the Panel should have conducted a thorough pass-through analysis in the manner of a countervailing duty investigation.[78]

3.51 However nothing in Articles 5 and 6 of the *SCM Agreement* requires demonstrating the extent to which processed cotton benefits from subsidies provided to raw cotton in order to show that the subsidies cause serious prejudice. The effect of the subsidies – increased United States production - is passed directly through the processor and exporter to the world market, where, as the Panel has found, it suppresses prices for upland cotton in that market. Accordingly, New Zealand submits that the United States appeal on this issue should be dismissed.

2 The Panel erred in its finding that "world market share" in Article 6.3(d) refers to the share of the world market supplied by the subsidising Member

3.52 The Panel concluded that the term "world market share" of the subsidising Member in Article 6.3(d) of the *SCM Agreement* refers to the share of the world market supplied by the subsidising Member of the product concerned. On the basis of this interpretation, the Panel decided that Brazil had not made out a prima facie case of violation of Article 6.3(d) of the *SCM Agreement*.[79] Brazil appeals this decision on the basis that the correct interpretation of "world market share" is the world market share of *exports*.[80]

3.53 New Zealand supports the appeal and submissions of Brazil on the proper interpretation and application of Article 6.3(d) of the *SCM Agreement*.[81] New Zealand draws special attention to the fact that the Panel has overemphasised the importance of production and failed to take account of the focus on trade in Part III of the *SCM Agreement*. Trade in this context represents the interaction between Members which takes place via imports and exports.

[78] US Appellant Submission, para 304.
[79] Panel Report, *US-Upland Cotton*, paras 7.1464-7.1465.
[80] Brazil's Other Appellant Submission, para 271.
[81] Brazil's Other Appellant Submission, paras 263-315.

3.54 Subsidies are the concern of WTO Members to the extent that they distort trade. This is a foundation principle of the disciplines on subsidies in the *SCM Agreement* and is reflected in the prohibition on export subsidies and the formulation of the disciplines on actionable subsidies, in particular the serious prejudice requirement. The logical consequence of this is that the adverse effect with which Article 6.3(d) is concerned is the effect of subsidies on trade. Specifically, it is concerned with adverse effects caused to other Members when one Member uses subsidies in order to increase its share of trade for a particular product.

3.55 By contrast, defining "world market share" to include all production would distract from the trade focus of the *SCM Agreement*. Subsidies can only have an effect on other markets if those markets are open to trade. By including all production in the analysis, the effect of the subsidies is dissipated and may be totally eclipsed by the impact of other measures that Members adopt that are not within the scope of concern of the *SCM Agreement*. It would not then be possible to measure properly the effect of the subsidy on the world market share of the subsidising Member.

3.56 Another illustration in favour of interpreting "world market share" as referring to exports, is that it may be that a subsidy could cause serious prejudice to the interests of another Member through increasing the subsidising Member's share of world export trade in the product, but the subsidy could result in no overall increase in the subsidising Member's share of world production. This could occur where, for example, the increase in exports was offset by a decrease in domestic consumption, as might be the case where a Member adopted an export incentive to deal with an excess of domestic supply. To not permit a finding of serious prejudice in such circumstances would make it almost impossible to ever prove a breach of Article 6.3(d) even where the interaction between Members – trade – is fundamentally affected by subsidies.

3.57 For these reasons, New Zealand submits that to construe "world market share" as referring to a Member's share of world production of a product would therefore

completely subvert the underlying rationale of Article 6.3(d). New Zealand supports the arguments of Brazil that, given the factual information available in the Panel's findings, the Appellate Body should complete the analysis under Article 6.3(d) and find that serious prejudice to the interests of Brazil exists under this provision.[82]

C The Panel correctly found that United States export credit guarantee programmes are export subsidies that do not conform with Part V of the *Agreement on Agriculture* and are not exempt from actions based on Article 3 of the *SCM Agreement*

1 The Panel correctly concluded that export credit guarantee programmes are subject to the non-circumvention obligation in Article 10.1 of the *Agreement on Agriculture*

3.58 The Panel found that the general disciplines on export subsidies included in the *Agreement on Agriculture* (and subject to the provisions of Article 13(c) and the terms of the *SCM Agreement*, the export subsidy prohibition in Article 3 of the *SCM Agreement*) apply to export credit guarantee programmes.[83] The Panel rejected United States arguments that the effect of Article 10.2 of the *Agreement on Agriculture* was to exempt such programmes from the scope of the export subsidy disciplines of that Agreement and found that there was "no textual support for the United States assertion that Article 10.2 serves to 'defer disciplines' or to 'except' export credit guarantee programmes from export subsidy disciplines".[84]

3.59 The United States appeals this finding on the basis that the Panel erred in its interpretation of Article 10.2 of the *Agreement on Agriculture*, which the United States says reflects the intention of WTO Members to defer disciplines on export credit guarantee programmes.[85] According to the United States, in Article 10.2 Members simply agreed to negotiate disciplines and be bound by them at some point in the future.

[82] Brazil's Other Appellant Submission, paras 296-315.
[83] Panel Report, *US-Upland Cotton*, para 7.911.
[84] Panel Report, *US-Upland Cotton*, para 7.904.
[85] US Appellant Submission, para 342.

The United States argues that the deletion of the explicit reference to export credit guarantees from Article 9.1 in the course of drafting the subsidy disciplines in the *Agreement on Agriculture* shows that Members had not agreed that export credit guarantees constitute export subsidies to agricultural products that should be subject to export subsidy disciplines.[86]

3.60 However the fact that Members did not include export credit guarantee programmes in the Article 9.1 list of export subsidies that are subject to reduction commitments does not lead logically to the conclusion that Members did not consider that they were export subsidies or that they should not be subject to disciplines under the Agreement at all. All it signifies is that Members chose not to make such programmes subject to reduction commitments.

3.61 As the Panel rightly noted, the proper starting point for interpreting the "intention of WTO Members", is the ordinary meaning of the treaty text, read in light of its object and purpose, in accordance with the customary rules of treaty interpretation. The treaty text in the current context could not be clearer. Under Article 10.1 "export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in … circumvention of export subsidy commitments." Export credit guarantee programmes that involve the granting of export subsidies clearly fall within the ordinary terms of Article 10.1.

3.62 Contrary to the assertions of the United States, and as the Panel correctly found, nothing in the words, the object, the purpose, or the drafting history of Article 10.2 contradicts the clear meaning of Article 10.1. Indeed, quite the opposite. The object and intention of Article 10.1 would be undermined if the United States interpretation were to prevail.

3.63 There is no dispute that export credit guarantee programmes may or may not provide export subsidies, depending on their structure and design. In the context of the

[86] US Appellant Submission, para 378.

SCM Agreement, Members have agreed on characteristics of export credit guarantee programmes that would render those programmes export subsidies. Items (j) and (k) of the Illustrative List reflect two situations in which such programmes would be export subsidies. Where Items (j) and (k) are not applicable, such a programme may be found to deliver a subsidy if it fulfils the definition of an export subsidy in Article 1.

3.64 Accordingly WTO members were well aware of the potential for export credit programmes to provide export subsidies, and they were clearly aware of the potential for such programmes to be used to effectively undermine the core disciplines under the *Agreement on Agriculture*. If the United States is correct, and there are currently no disciplines on the use of export credit programmes for agricultural products, then Members could effectively circumvent their reduction commitments through the use of such programmes and thus undermine a key outcome of the Uruguay Round. If the United States is correct, Members deliberately created a significant loophole despite the clear concern evident in Article 10.1 to prevent such circumvention of reduction commitments by the use of export subsidies not listed in Article 9.1. Article 10.2 would, itself, circumvent the anti-circumvention provisions.

3.65 New Zealand submits that the Appellate Body should uphold the Panel's finding that Members had no such intention, and that, contrary to the arguments of the United States, Members intended to subject export credit programmes to the non-circumvention obligation in Article 10.1 until such time as any disciplines further governing their use could be agreed. Accordingly the Panel was correct to find that the United States export credit programmes did provide export subsidies that did breach Article 10.1 and thus were not exempt from action under the *SCM Agreement*.

2 The Appellate Body should grant Brazil's appeal on the Panel's judicial economy in respect of making a finding that the United States export credit guarantee programmes are export subsidies under Article 1 and Article 3 of the *SCM Agreement*

3.66 In its Other Appellant Submission Brazil argues that the Panel should have made findings that the United States export credit guarantee programmes constitute export subsidies under the terms of Articles 1.1 and 3.1(a) of the *SCM Agreement*.[87] New Zealand supports the arguments of Brazil that such a finding is necessary because of the potentially distinct course of implementation triggered by a Member's maintenance of export subsidies within the meaning of Article 1.1 and 3.1(a), such that 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). New Zealand supports Brazil's arguments that the Appellate Body should complete the analysis and find that export credit guarantee programmes constitute export subsidies within the terms of Articles 1.1 and 3.1(a).

[87] Brazil's Other Appellant Submission, paras 15-41.

IV CONCLUSION

4.01 In conclusion, New Zealand reiterates that this appeal raises issues of fundamental importance that go to the heart of Members' rights and obligations in respect of domestic support measures and export subsidies under the *Agreement on Agriculture* and the *SCM Agreement*.

4.02 New Zealand considers that the Panel correctly found that the United States domestic support measures providing support to upland cotton have no Peace Clause protection and are therefore not exempt from action under Articles 5 and 6 of the *SCM Agreement*. The United States appeal on this issue should be dismissed. New Zealand also supports Brazil's conditional appeal of the Panel's use of judicial economy in declining to make a finding in respect of paragraph 6(a) of Annex 2 of the *Agreement on Agriculture*.

4.03 New Zealand also considers that the Panel was correct in its conclusion that United States measures at issue in this appeal cause serious prejudice to the interests of Brazil within the meaning of Articles 5 and 6 of the *SCM Agreement*. In addition, New Zealand supports Brazil's appeal of the Panel's conclusion in relation to Article 6.3(d), and considers that the Appellate Body should interpret "world market share" in accordance with the object and purpose of the *SCM Agreement* to mean "world market share of exports".

4.04 Finally, New Zealand submits that the Panel correctly found that export credit programmes are subject to the non-circumvention obligation in Article 10.1 of the *Agreement on Agriculture*, and are therefore not exempt from actions based on Article 3 of the SCM. New Zealand also supports Brazil's appeal on the Panel's exercise of judicial economy in respect of making a finding that export credit programmes are export subsidies under Article 1 and Article 3 of the *SCM Agreement*.

4.05 For the reasons set out in this submission New Zealand considers that the Appellate Body should reject the arguments made by the United States in its Appellant Submission and, with the exception of the Panel's findings appealed by Brazil, requests that the Appellate Body uphold the findings and recommendations of the Panel.