UNITED STATES – SUBSIDIES ON UPLAND COTTON

Recourse to Article 21.5 of the DSU by Brazil

(WT/DS267)

EXECUTIVE SUMMARY OF THE REBUTTAL SUBMISSION OF THE UNITED STATES OF AMERICA

February 12, 2007

1. <u>Preliminary Ruling Requests</u> **– Brazil has failed to rebut the U.S. showing that Brazil's claims relating to GSM 102 guarantees in respect of exports of pig meat and poultry meat are outside the scope of this proceeding.** Brazil concedes that there have never been any findings of WTO inconsistency against the pig meat and poultry meat GSM 102 guarantees, and that there consequently were no DSB recommendations and rulings against these measures with which the United States was obligated to comply. Thus, the claims made by Brazil against these measures are not properly the subject of a compliance proceeding under Article 21.5 of the DSU. Although Brazil contends that "Appellate Body jurisprudence" provides it with the right to "reassert" claims under the Agreement on Agriculture and the SCM Agreement with respect to these measures, Brazil is mistaken. It simply misreads the Appellate Body's report in *EC – Bed Linen (21.5 – India)* and continues to confuse two distinct issues – (a) the scope of a compliance proceeding pursuant to Article 21.5 of the DSU and (b) when a claim against a specific measure or aspect of a measure can be considered to be "finally resolved" for purposes of WTO dispute settlement.

2. **– Brazil has no basis to assert claims against either the marketing loan or counter-cyclical payment programs whether alone or in addition to payments under the programs.** Brazil clarifies in its rebuttal submission that it makes claims against the marketing loan and counter-cyclical payment *programs*, as such, *in addition* to all payments authorized thereunder. Even if so, however, Brazil's claims are outside the scope of this proceeding. <u>First</u>, there is no legal or factual basis for Brazil's argument that "[i]n the circumstances of this dispute, a subsidy 'payment' cannot be divorced from a subsidy 'program'" and the argument is undermined by Brazil's own claims and arguments in the original proceeding. Moreover, contrary to Brazil's assertions, the original panel did not make any finding of WTO-inconsistency against the Step 2, marketing loan, and counter-cyclical payment programs alone or in addition to payments. Consequently, there was also no actionable subsidy-related DSB recommendation with respect to these measures. Brazil's claims on the basis of such a mis-characterized recommendation are not properly within the scope of this compliance proceeding.

3. <u>Second</u>, the measures that Brazil seeks to challenge – marketing loan and counter-cyclical payment programs in addition to payments – are *not* measures taken to comply. Indeed, these measures have not been changed to implement any DSB recommendations and rulings or for any other reason; they remain the same as they were in the original proceeding. Under Article 21.5 of the DSU, claims of consistency with a covered agreement can not be made in respect of measures that are *not* measures taken to comply and that are the same measures as in an original proceeding. For this reason too, Brazil's claims – whether against the marketing loan and counter-cyclical payment programs or the programs in addition to payments thereunder – are not properly within the scope of this proceeding.

4. **– Brazil's claims regarding compliance in past periods remain outside the scope of this proceeding.** Brazil has yet to identify any legitimate textual basis for its claims regarding compliance in past periods. Rather, Brazil continues improperly to conflate Article 7.9 of the SCM Agreement and Article 21.5 of the DSU. Contrary to Brazil's assertions, the former provision does not establish the date for assessing compliance with DSU recommendations and

rulings; it simply set the date on which the complaining Member can seek authorization to take countermeasures "commensurate with the degree and nature of the adverse effects determined to exist," as Brazil alleges. In addition, it is not relevant whether "the assessment [of] whether any proposed countermeasures are commensurate" is "tied to the date on which the implementation period expires." In arguing that this provides a basis for assessing *compliance* as of the date set in Article 7.9 of the SCM Agreement, Brazil confuses the mandate of an arbitrator under Article 22.6 of the DSU with that of a compliance panel under DSU Article 21.5. Neither argument provides a legitimate basis for Brazil's claims regarding compliance in past periods.

5. <u>Export Subsidies</u> **– The United States is not providing export credit guarantees in contravention of Articles 10.1 and 8 of the *Agreement on Agriculture.*** The United States has demonstrated that even before (1) elimination of the GSM-103 program; (2) cessation of the Supplier Credit Guarantee Program ("SCGP"); (3) removal of the highest risk countries from program eligibility and (4) an average fee increase of 46 percent, premia collected for the GSM-102, GSM-103, and SCGP were more than adequate to cover the long-term operating costs and losses of the programs. Indeed, the current U.S. budget data now reflects that for the cohorts 1992-2005, the applicable total net negative present value amount is **$166,549,780** (*i.e.*, reflecting a 'profit' – excluding administrative costs – to the United States government). Brazil's argument in response – asserting that these results were "specifically created by the United States for purposes of this litigation" – are entirely baseless. Moreover, Brazil's attempts to have the Panel disregard the budget data is inconsistent with the approach taken by the original panel as well as Brazil's positions in the original proceeding. Brazil's own constructed "cash-basis accounting methodology," which Brazil seeks to have the Panel use instead of the budget data provided by the United States, was not accepted by the original panel and is deeply flawed.

6. – **Contrary to Brazil's assertions, the GSM-102 Program is structured and designed to cover long-term operating costs and losses.** <u>First</u>, the size of the cash recoveries in conjunction with the substantial modifications to the export credit guarantee programs belie Brazil's assertion that "the GSM 102 program is not structured or designed to meet long-term operating costs and losses." Contrary to Brazil's assertions, the fact that CCC borrows from the U.S. Treasury in connection with the export credit guarantee programs does *not* mean the programs cannot satisfy the item (j) test. In addition, the fact that there remains a statutory one percent cap on fees under the export credit guarantee programs also does not affect the analysis; CCC has accounted for this fact by eliminating from eligibility **22 countries** with respect to which participation in the program might require fees in excess of the statutory maximum. And, finally, Brazil has no basis to argue that "prudent fiscal management" requires no only imposing the tight exposure limits that CCC employs, but also applying different fees for different banks, as Brazil would prefer.

7. <u>Second</u>, Brazil is incorrect to assert that CCC predicts every year, including for FY 2006 and 2007, that the export credit guarantee programs will incur losses. Brazil assumes (1) the specific experience of the CCC programs in particular are the historical experience used in the calculation of the original subsidy rates and (2) CCC itself provides the principal factors used in

the calculation of the original subsidy rates. Both of these assumptions are false. It is the Office of Management and Budget ("OMB") that determines expected loss rates for CCC – and other government agencies – on a government-wide basis. These rates – which are applied to virtually all U.S. agencies providing international credits – are based on assumptions regarding risk and recovery rates involving the highest-risk countries and overstate possible losses in respect of CCC's export credit guarantees programs.

8. **– Whether or not any debt has been rescheduled under the SCGP is irrelevant to whether the United States has "withdrawn" any subsidy under the program.** There are currently no claims "outstanding" under the SCGP. This means that the United States has paid all claims that were payable and is no longer exposed to any further potential liability under the SCGP. Brazil's argument to the effect that claims may still be outstanding under the program if the United States has rescheduled debt under the program either before or after July 1, 2005 are baseless. They betray a fundamental misunderstanding of the nature of rescheduled debt, which is a *receivable*, pursuant to which CCC expects to *receive – not pay* – money; rescheduled debt is *not* an outstanding *claim*.

9. **– The GSM 102 Program does not confer any benefit under Articles 1 and 3 of the SCM Agreement.** Although Brazil continues to pursue its "claim" under item (j) in the "alternative," it provides no textual basis for doing so. Brazil's approach does not comport with the text of the SCM Agreement or Brazil's own arguments in other disputes that, in the case of measures identified in the Illustrative List, it is the specific provisions of the Illustrative List – and not the general subsidy provisions in Articles 1.1 and 3.1(a) – that govern when the measures may be considered export subsidies. Nonetheless, the United States also shows that GSM 102 export credit guarantees do not confer a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. This further confirms the fact that item (j) correctly illustrates that GSM 102 export credit guarantees are not export subsidies.

10. Although it purports to make a showing under Article 14(c) of the SCM Agreement, Brazil has made no attempt to make a particularized showing that the overall cost, including fees, of *a loan* guaranteed by the government is less than that the firm receiving the guarantee would pay on a *comparable* commercial loan. Instead, Brazil seeks to advance a flawed "severable 'benefit'" approach that ignores the fundamental fact that costs are distributed among the parties involved. Because costs and potential benefits can both be shared in various ways among all participants in a loan transaction covered by a government guarantee, Article 14(c) focuses on the overall costs of the loan, including the guarantee fees, rather than any single "severable" component of the entire transaction. Brazil's approach is, thus, undermined by the text itself.

11. Unlike Brazil, the United States has provided specific information to demonstrate that sources of financing and guarantees comparable to GSM-102 guarantees are available in the marketplace. Brazil's attempts to discredit the specific, real-world evidence submitted by the United States are entirely unavailing. For example, Brazil attempts to dismiss the numerous examples of commercial products offered by the International Finance Corporation ("IFC"),

Inter-American Development Bank ("IDB"), and the European Bank for Reconstruction and Development ("EBRD") that are directly comparable to GSM 102 guarantees. Brazil asserts that, by definition, anything that the IDB, IFC, and EBRD do in the market cannot be commercial and cannot be considered as a benchmark. Once again, Brazil's argument is baseless as a matter of logic and – given the clear evidence of the commercial and profitable nature of these organizations – as a matter of fact.

12. <u>**Actionable Subsidies**</u> **– Brazil's arguments about the "relatively modest" effects of the elimination of the Step 2 program continue to be unsubstantiated and inconsistent with its earlier positions.** Brazil's fails to substantiate its arguments aimed at minimizing the effects of eliminating the Step 2 program. <u>First</u>, regardless of whether one considers Brazil's "present" or "threat" of serious prejudice claims, there is no merit to Brazil's suggestion that an increase in counter-cyclical payments will offset any positive impacts of terminating the Step 2 program. To the contrary, terminating the Step 2 program *does* result in a decline in marketing loan payments in the few remaining years in which marketing loans are even projected to be paid. Moreover, any increase is counter-cyclical payments is unlikely to take place in the "present" marketing year (MY 2006) and, in future marketing years, it is unlikely to be substantial. This is irrelevant, in any regard, as both marketing loan and counter-cyclical payment programs are scheduled to expire at the end of MY 2007.

13. <u>Second</u>, Brazil continues to argue that the termination of the Step 2 program has had allegedly "relatively modest" *effects* because of the relatively smaller *size* of outlays under the Step 2, marketing loan, and counter-cyclical payment programs. However, Brazil fails to explain why *size* is the determinative consideration in assessing their *effects*, especially given Brazil's arguments to the contrary to the Appellate Body as well as the *disproportionate* effects that Brazil attempted to attribute to the Step 2 program in the original proceeding.

14. <u>Third</u>, Brazil's new emphasis on the allegedly "modest revenue-enhancing effects" of the Step 2 program is undermined by its own arguments to the original panel that effects on revenue are only one way in which, in Brazil's view, Step 2 payments could have affected world market prices. Brazil argued before that "the *export-enhancing nature* of the Step 2 program" was the other, primary, way in which the Step 2 program affected world marketing prices. Indeed, although Brazil now attempts to downplay its attribution of an "export-enhancing" effect to the Step 2 program, these arguments are simply not credible.

15. <u>Finally</u>, data showing historically low export levels for MY 2006 continue to undermine Brazil's theory of a "relatively modest" impact of eliminating the Step 2 program. Brazil points to the importance of other factors – including the "specific needs of China" – in assessing changes in the world cotton market since MY 2006. However, even taking into consideration the impact of China's demand, U.S. exports appear to be at unusually low levels. Moreover, U.S. *share* of China's imports following termination of the Step 2 program are at unusually low levels. Similarly, the data do not support Brazil's suggestion that the low export levels can be explained by "a temporary surge of U.S. exports in the months just prior to the elimination of the Step 2 subsidy with exporters cleaning out the stocks in their warehouses to take advantage of

the Step 2 subsidy."

16. **– Brazil has failed to make a *prima facie* case of "present" serious prejudice within the meaning of Articles 5(c) and 6.3(c) of the SCM Agreement.** As a preliminary matter, the United States notes that the marketing year relevant to Brazil's "present" serious prejudice claims is MY 2006. Where there is reliable data available for MY 2006, or any part thereof, there is no reason why the Panel should not consider that data and Brazil has no basis for suggesting that the data is not relevant.

17. <u>*Brazil has not provided evidence regarding the structure, design, and operation of the marketing loan and counter-cyclical payment programs that supports its claims of significant price suppression:*</u> Brazil has yet to submit any credible evidence confirming the significant production effects from counter-cyclical payments or marketing loan payments that it alleges. Moreover, Brazil has failed to rebut the U.S. evidence showing, with respect to the counter-cyclical payment program, that the recent studies show, at most, minimal production effects. Brazil attempts to discredit the U.S. studies by arguing, *inter alia*, that the studies do not deal specifically with upland cotton production. However, that is not a reason to preclude the Panel from considering the studies as being highly probative. Moreover, Brazil submits *no empirical evidence* of its own relating to upland cotton production that supports it claims. Indeed, the only study that it submits that even deals with counter-cyclical payments is not based on empirical evidence but, instead, was conducted in a computer lab at the University of Wyoming to test the responses of economics students under certain parameters that were necessarily abstracted from actual features of the 2002 Farm Act and imposed a number of limiting assumptions that the authors themselves recognized affected the results of the study.

18. In addition, Brazil fails to rebut the evidence showing that a substantial amount of government payments, including counter-cyclical payments, are "passed-through" to non-operator landowners in the form of higher land rent. Brazil's response confuses the issues and asserts, without basis, that uncertainty about receiving payments precludes capitalization into land values. That argument is inconsistent with the economic literature, Brazil's own arguments regarding U.S. producers' decisions to plant on the expectation of counter-cyclical payments, and the original panel's own findings. Brazil's assertions about the "relatively minor" effects of decoupled payments on land values are equally unfounded.

19. Brazil also fails to rebut the acreage data showing that, in fact, *holding upland cotton base acreage has not induced upland cotton production* as Brazil alleges. Brazil's attempts to dismiss these facts as "unimportant" are inexplicable and baseless. In fact, these facts *are* "important" and undermine Brazil's theory of significant production effects, especially Brazil's unfounded assertions regarding producing for the possibility of base updating.

20. With respect to marketing loan payments, Brazil fails to demonstrate that – taking into account the particular structure and design of the marketing loan program, and the way that it operates under the current market conditions – payments thereunder *are* in fact causing production effects that are so significant as to be suppressing the world market price for cotton.

In particular, Brazil fails to analyze properly the planting decisions made by U.S. producers in light of the market conditions and considerations that they *actually* faced at the time of planting, even as Brazil concedes that this is the appropriate inquiry. Moreover, while Brazil attempts to discredit the U.S. analysis of producers' planting decisions, it has provided no legitimate basis for its arguments.

21. <u>*Brazil fails to provide any credible evidence showing that U.S. producers and exporters do not respond to market signals:*</u> The empirical evidence fatally undermines Brazil's theory that marketing loan and counter-cyclical payments insulate U.S. producers and exporters from market signals. Brazil has yet to provide any credible answer to the fundamental question in this regard: *if U.S. producers continue to plant and produce, and U.S. exporters continue to export, in circumstances where "any rational non-subsidized producer" would have "reduced plantings, production, and exports,"* <u>*why has U.S. share of world production and world exports not increased over the life of the FSRI Act of 2002?*</u> Rather, Brazil attempts to confuse the issues by suggesting that the determinative question is whether marketing loan and counter-cyclical payments provide *income* support to U.S. producers. It is not; in fact, there is no WTO obligation to abstain from providing such support. The question is whether a subsidy causes one or more of the four types of "effects" reflected in Article 6.3 of the SCM Agreement. Brazil has submitted *no* empirical evidence that the marketing loan and counter-cyclical payments causes these effects and, indeed, the empirical evidence that the United States has submitted flatly contradicts Brazil's arguments in this regard. Brazil's attempts to rebut that evidence – for example, by asserting that the stability in U.S. share of world production and exports are themselves evidence of significant price suppression – are entirely unfounded.

22. In addition, Brazil's attempts to demonstrate an alleged absence of a "link" between "prices, on the one hand, and [U.S.] planted acreage, production, and exports, on the other hand" do not withstand scrutiny. Every comparison that Brazil has made in this regard has been fundamentally flawed, including its latest attempt to plot U.S. *planted* acreage against foreign *harvested* acreage and upland cotton futures; an approach that (a) improperly compares planted and harvested acreage, (b) ignores the fact that producers look at more than upland cotton futures prices in determining what to plant, and (c) attempts to capitalize on differences that appear to exist solely because of the particular graph utilized. Brazil's attempts to compare *changes* in U.S. *planted acreage*, changes in foreign *harvested* acreage, and *changes* in the futures prices for upland cotton are equally flawed. What that comparison shows is that *neither* U.S. nor foreign harvested acreage moves closely with futures prices of cotton *alone*. Nonetheless, even if the comparison were valid (and it is not), it would show that, where changes in U.S. and foreign area diverge, U.S. harvested acreage tends to react *more conservatively* than foreign acreage to increasing prices.

23. Finally, Brazil continues to assert incorrectly that *increases* in the absolute levels of U.S. production over the period from MY 2002-2005 were the effect of the marketing loan and counter-cyclical payment programs. Brazil's arguments in this regard are not even internally consistent, let alone supported by the facts.

24. *Brazil Fails to Show Any "Discernible Temporal Coincidence":* Contrary to its assertions, Brazil had not "reinforce[d] the original panel's finding . . . of a discernible temporal coincidence of suppressed world market prices and the price-contingent U.S. subsidies." To the contrary, the factors considered by the original panel do *not* support finding of a "discernible temporal coincidence" between the marketing loan and counter-cyclical payment programs and any "present" significant price suppression. Brazil's new assertion that it should be excused from making even the minimum showing of a "discernible temporal coincidence" as conducted by the original panel would effectively eviscerate the balance of rights and obligations struck in Articles 5(c) and 6.3(c) of the SCM Agreement and the requirement that a complaining party make a *prima facie* case of breach.

25. *Brazil has not shown that U.S. producers would switch to other crops or exit cotton farming without marketing loan and counter-cyclical payments:* There is no basis for Brazil's argument that marketing loan and counter-cyclical payments are necessary to fill an alleged "gap" between costs of production and market revenue, without which U.S. producers would cease farming cotton. First, the economic literature makes clear that producers make year-to-year planting decisions with reference primarily to *variable* costs of production (among other factors) and that *total* costs (among other factors) are relevant with respect to longer-term decisions, such as whether to exit the cotton sector. Second, the evidence shows that U.S. producers *covered their variable costs* in every year that the FSRI Act has been in effect and that, therefore, it was economically rational for U.S. producers to have produced upland cotton in these years. Brazil efforts to inflate variable costs by including land, labor, and capital recovery costs as variable costs are not supported by the economic literature. Further, Brazil has not shown that farmers actually take these costs – for example, an "imputed cost of unpaid labor" – into account in each year in deciding between planting cotton or some other crop or putting the land to some other use.

26. Third, Brazil's arguments against adjusting the seed cotton (i.e., cotton lint plus cottonseed) costs and revenues to isolate the revenue and costs for cotton lint (the product that is at issue under Brazil claims) are baseless. Contrary to Brazil's assertions, the evidence shows the common practice in the United States of paying ginning costs out of the proceeds gained by the gin from sale of the cottonseed separated out in the ginning process. This supports the U.S. approach of excluding both ginning costs and revenue from sale of cottonseed. However, even using a more conservative methodology that (a) excludes ginning costs only up to the amount of cottonseed revenue; and (b) including hired labor as a variable cost shows that U.S. producers have not only made their variable costs in all years but their total costs in many years as well.

27. Fourth, with respect to longer-term decisions, such as whether to continue or exit upland cotton farming, the United States has explained that the total cost of producing upland cotton is not the *sole* consideration. As the economic literature confirms, whole-farm costs and revenues – including off-farm revenue and revenue from other sources – are also important considerations in making those kinds of decisions. Brazil's attempts to show that U.S. producers would have exited upland cotton production in the long-term solely on the basis of a comparison of costs and revenues for cotton are, thus, not sound. To date, Brazil has not submitted any literature, study,

report, or empirical evidence that contradicts the evidence submitted by the United States regarding the consideration of whole-farm costs and revenues. Nor has Brazil provided any evidence taking into account whole-farm costs and revenues that show that, absent the marketing loan and counter-cyclical payment program, U.S. upland cotton producers would have exited upland cotton farming.

28. *Neither Brazil's New Modeling Exercise Nor the Studies It Selectively and Misleadingly Cites Supports Its Claim of Significant Price Suppression:* Brazil's new econometric model – on which most of Brazil's arguments critically depend – substantially overstates any possible effects on world market prices from the removal of the marketing loan and counter-cyclical payment programs. It is based on a series of untenable economic assumptions that are *not* consistent with those used by FAPRI or USDA economists and were not even used *by Brazil* in its own analysis before the original panel. When certain basic assumptions in the model are changed to *actually* reflect FAPRI and other well-established parameters, the effects predicted by Brazil's model decline sharply.

29. Brazil now attempts to justify its novel modeling assumptions by criticizing the FAPRI-based model – and assumptions – that it used in the original proceeding as being "unnecessarily complicated and cumbersome" and "not directly appropriate to the issue at hand." These assertions directly contradict the arguments made by Brazil to the original panel. Moreover, their grossly inflated nature is evident when one considers that Brazil has – by using this new model – increased the asserted price effects *almost three-fold*. There is no reason for this other than the use by Brazil of unreasonable, unsupported modeling assumptions for purposes of this proceeding.

30. Brazil's efforts to justify its flawed modeling results by comparing them to the results of studies examining completely different factual scenarios are logically unsound. In fact, it is evidence of the *unreasonableness* of Brazil's approach that Brazil ascribes to marketing loan and counter-cyclical payments, alone, similar (or in some cases, *greater*) price effects than (a) a 2006 World Bank study estimates for the elimination of *all* subsidies and tariffs across *all* countries; (b) a 2004 study by the Overseas Development Institute ("ODI") estimates for the elimination of domestic supports in China, Greece, Spain, and the United States; (c) and a study by FAO estimates for the elimination of all domestic support in all countries. Even less persuasive is Brazil's attempt to place its results "in the mid-range" of the studies surveyed by the FAO, World Bank, and International Food Policy Research Institute ("IFPRI"), all of which examine the effects of a much different "basket" of measures that those examined by the Panel here. Finally, Brazil does not undermine recent studies showing that the marketing loan and counter-cyclical payment programs likely only have *minimal effects* on world market price.

31. *Brazil Has Not Ensured that the Price Effects Of Other Factors Are Not Attributed to the Marketing Loan and Counter-cyclical Payment Programs:* Brazil fails to undertake any meaningful assessment of the world upland cotton market, of actual world market prices, or of the factors that are observed to be affecting U.S. and foreign supply and demand and, ultimately, world market prices. The Appellate Body underscored the importance of such an assessment in

this dispute, explaining that in order to prove a claim under Article 5(c) and 6.3(c) of the SCM Agreement, "it is necessary to ensure that the effects of other factors on prices are not improperly attributed to the challenged subsidies." *Upland Cotton (AB)*, para. 437. Brazil has not carried its burden in this regard.

32. For example, although China is the world's *largest producer* of upland cotton, the world's *largest consumer* of upland cotton, and the world's *largest importer* of upland cotton, Brazil does not assess and distinguish any impacts of China's trade on world market prices. Instead, Brazil seeks to mischaracterize the U.S. arguments as being against the original panel's finding that the United States exerts a substantial proportional influence on the world market price of upland cotton. Moreover, Brazil argues that the United States is confusing Brazil's claims of price *suppression* with claims of price *depression*. Neither argument is valid; the former is simply erroneous and the latter overlooks the fact that the market reports and data that the United States submits are relevant to price *suppression*, not price *depression*. By contrast, Brazil has submitted no empirical evidence itself that confirms its claims of price suppression. And Brazil's attempts to dismiss the evidence showing the importance of China's trade on world market prices are without merit.

33. *Brazil Fails To Provide Any Evidence or Arguments Regarding "Significant" Price Suppression In Its Rebuttal Submission:* The United States explained in its first written submission that Brazil has not demonstrated either through empirical evidence, or through its modeling exercise, that the marketing loan and counter-cyclical payment programs have had any appreciable impacts on price in MY 2005, let alone caused any "significant" price suppression within the meaning of Article 6.3(c) of the SCM Agreement. Brazil does not even address the question of "significance" in its rebuttal submission and, thus, fails to prove a critical element of its claims of "significant" price suppression under Articles 5(c) and 6.3(c) of the SCM Agreement.

34. **– Brazil has failed to make a *prima facie* case of breach under Articles 5(c) and 6.3(d) of the SCM Agreement.** Brazil had not made a *prima facie* case that the marketing loan and counter-cyclical payment programs breach Articles 5(c) and 6.3(d) of the SCM Agreement. First, Brazil provides no legitimate empirical evidence to support its assertion that the slight increase in the U.S. share of the world market in MY 2005 over the average for MY 2002-2004 was "the effect" of the marketing loan and counter-cyclical payment programs. Moreover, Brazil analysis is premised on the incorrect assumption that Article 6.3(d) is concerned with absolute market share and whether or not, in any given year, a Member's market share would have been lower if subsidies were removed. It is not; by its terms, Article 6.3(d) applies only in those situations where there is an increase from the previous three-year average and it is this *increase* over time that is "the effect" of subsidies. Thus, Brazil's argument is entirely off the mark.

35. Second, Brazil's arguments assume that Article 6.3(d) requires a showing of an *upward trend* in market share. However, Article 6.3(d) requires a showing that "this increase" – *i.e.,* "the increase in the world market share of the subsidizing Member . . . as compared to the average

share it had during the previous period of three years" – "follows a consistent trend over a period when subsidies have been granted." Brazil does not even provide relevant data in this regard, let alone make the required demonstration. Nor could it; there simply is no such "consistent trend." Brazil has, thus, failed even to submit a proper analysis, let alone established a *prima facie* case of breach under Articles 5(c) and 6.3(d) of the SCM Agreement.

36. **– Brazil has failed to make a *prima facie* case of threat of serious prejudice under Articles 5(c) and 6.3(c) of the SCM Agreement.** Brazil's claims of "threat" of serious prejudice fail because they are based on a legally erroneous standard and are factually unsubstantiated. First, there is no basis for Brazil's argument that "the precedent interpreting the terms 'threat' and 'threaten' suggests that the appropriate standard of threat in Part III [of the SCM Agreement] is one in which there is a significant likelihood, based on the nature of subsidies and particular conditions of competition, that serious prejudice will occur in the future." This "significant likelihood" standard is not found in the text of the SCM Agreement. Moreover, even leaving aside that there is no basis to attempt to interpret a treaty in accordance with "precedent" rather than "in accordance with customary rules of interpretation of public international law," Brazil does not in fact identify any "precedent" that "suggests" that the appropriate standard for "threat" of serious prejudice is "a significant likelihood." As Brazil's claims are based on an erroneous legal standard, Brazil fails to make a *prima facie* case of threat of serious prejudice within the meaning of Article 5(c) and footnote 13 of the SCM Agreement.

37. Moreover, Brazil's threat claims are also factually unfounded. For example, given the prices that are expected to prevail in MY 2007 (well above 52 cents/lb), it is unlikely that marketing loans will have any significant effects on planting, production, exports, or world market prices in MY 2007. Indeed, recent estimates project that any marketing loan payments are likely to be small in MY 2007 and not even paid out in MY 2008. Moreover, counter-cyclical payments are likely to be paid in near-fixed sums at least through MY 2007 (i.e., meaning that they are likely to behave much like fixed, direct payments which have been found not to cause any significant price suppression). Projections for MY 2007 U.S. plantings, production, and exports – all of which show declines – also undermine Brazil's claims of "threat of serious prejudice." Moreover, cost data for future marketing years show that U.S. producers will likely cover their variable, or operating, costs as well as a large share of total costs in MY 2007.