

*United States – Subsidies on Upland Cotton*  
**Recourse to Article 21.5 of the DSU by Brazil**  
**(WT/DS267)**

**Third Participant's Submission of Australia**

**Geneva, 5 January 2007**

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<i>Brazil – Aircraft (Article 21.5 – Canada I)</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS46/AB/R, adopted 4 August 2000, DSR 2000:VIII, 4067
<i>Brazil – Aircraft (Article 21.5 – Canada I)</i>	Panel Report, <i>Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS46/RW, adopted 4 August 2000, as modified by the Appellate Body Report, WT/DS/46/AB/R, DSR 2000:IX, 4093
<i>Canada – Aircraft (Article 21.5 - Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
<i>Chile – Price Band System (Article 21.5 - Argentina)</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products - Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/RW, 8 December 2006
<i>EC – Bed Linen (Article 21.5 - India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
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<i>US – Softwood Lumber IV (Article 21.5 - Canada)</i>	Appellate Body Report, <i>United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada - Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005
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<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, and Corr.1, adopted 21 March 2005, modified by Appellate Body Report, WT/DS/267/AB/R

## INTRODUCTION

1. Australia considers that these proceedings under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) raise a number of issues of systemic importance and legal interpretation, which Australia will address in this written submission. These issues are:
  - (a) The scope of Article 21.5 proceedings, in relation to the United States requests for preliminary rulings;
  - (b) the order of analysis concerning Articles 1.1 and 3.1(a) and item (j) of the Illustrative List of the *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*), in relation to the prohibited subsidies claims, including whether an *a contrario* interpretation of item (j) is permissible; and
  - (c) in relation to the actionable subsidies claims, whether the United States, by repealing the Step 2 payment programme, but maintaining the two other price-contingent subsidies (payments under the marketing loan and counter-cyclical payment programmes), has taken appropriate steps to remove the adverse effects of the subsidies or to withdraw the subsidies, within the meaning of Article 7.8 of the *SCM Agreement* in accordance with the recommendations and rulings of the Dispute Settlement Body (DSB) with respect to those subsidies.

Australia reserves the right to raise other issues in the third-party hearing with the Panel.

### A. SCOPE OF ARTICLE 21.5 PROCEEDINGS – REQUESTS FOR PRELIMINARY RULINGS

2. The United States, in its First Written Submission, requests a number of preliminary rulings that raise important systemic issues concerning the scope of Article 21.5 proceedings and require careful consideration of relevant jurisprudence of the Appellate Body and Article 21.5 Panels.
3. Australia recalls that Article 21.1 expressly provides that “prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.” Thus, one of the objectives of Article 21.5 is to “avoid a complaining Member having to initiate dispute settlement proceedings afresh when an original measure found to be inconsistent has not been brought into conformity with the recommendations and rulings of the DSB.”<sup>1</sup> Australia submits that were the United States requests for preliminary rulings to be granted, Brazil would be forced to initiate dispute settlement proceedings afresh in respect of claims which properly would fall within the scope of these Article 21.5 proceedings.

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<sup>1</sup> *US - Softwood Lumber IV* (Article 21.5 – Canada), para. 72.

4. Australia recalls that the scope of proceedings under Article 21.5 is to determine “the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings” of the DSB. The use of the disjunctive ‘or’ makes clear that Article 21.5 proceedings can address two different situations. The first is the ‘existence’ of measures taken to comply with DSB recommendations and rulings. Accordingly, a panel may consider a claim that a Member has not taken measures to comply. The second is the ‘consistency’ with a covered agreement of measures taken to comply with DSB recommendations and rulings. Accordingly, a panel may consider a claim that implementing measures taken by a Member are inconsistent with a covered agreement.<sup>2</sup>

5. In considering the phrase ‘measures taken to comply’, the Appellate Body in *Canada – Aircraft (Article 21.5 – Brazil)* expressed the view that:

... the claims, arguments and factual circumstances which are pertinent to the "measure taken to comply" will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply", as required by Article 21.5 of the DSU.<sup>3</sup>

6. Moreover, a Panel constituted under Article 21.5 of the DSU should consider the new measure “in its totality.”<sup>4</sup> The fulfilment of this task requires that a panel consider both the measure itself and the measure’s application provided that the specific claim has been made by the complainant when the matter is referred by the DSB for an Article 21.5 proceeding.<sup>5</sup>

7. The Appellate Body has identified situations where measures fall outside the scope of Article 21.5 proceedings. It has held that:

[i]t would be incompatible with the function and purpose of the WTO dispute settlement system if a claim could be reasserted in Article 21.5 proceedings after the original panel or the Appellate Body has made a finding that the challenged aspect of the original measure is *not* inconsistent with WTO obligations, and that report has been adopted by the DSB.<sup>6</sup>

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<sup>2</sup> See *EC – Bed Linen (Article 21.5 - India)*, para. 79.

<sup>3</sup> *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41. See also *US - FSC (Article 21.5 – EC II)*, para. 93.

<sup>4</sup> *US - Shrimp, (Article 21.5 - Malaysia)*, para. 87.

<sup>5</sup> *Ibid.*

<sup>6</sup> *EC – Bed Linen (Article 21.5 - India)*, para. 98.

**1. Request relating to GSM 102 programme in respect of pig meat and poultry meat**

8. Taking this jurisprudence into account, Australia submits that Brazil's claims relating to General Sales Manager (GSM) 102 guarantees issued by the United States Commodity Credit Corporation in respect of exports of pig meat and poultry meat may properly be considered by the Panel.
9. Australia does not agree with the United States' submission that because there is neither a finding that GSM 102 guarantees in respect of pig meat and poultry meat are WTO-inconsistent nor that they are the subject of a DSB recommendation, that Brazil's claims concerning the application of the new measure in respect of pig meat and poultry meat fall outside the scope of Article 21.5 proceedings.<sup>7</sup>
10. The situation in the present case is not that of a measure that was not challenged in the original proceedings or, if challenged, was addressed in those proceedings and not found to be WTO-inconsistent.<sup>8</sup> The claim specifically made by Brazil in its request for establishment of this Panel relates to the WTO-consistency of a new measure – guarantees issued under the revised GSM 102 programme – the revisions to which, as the United States acknowledges, were implemented in response to the rulings and recommendations of the DSB.<sup>9</sup> Brazil is entitled to request, and the Article 21.5 Panel is required to consider, the new measure in its totality, including the measure's application. Thus, while Brazil alleges that it is "entitled to re-assert" its claim concerning actual circumvention with respect to pig meat and poultry meat, in effect Brazil's claim relates to the WTO consistency of a new measure (the revised GSM 102 programme) implemented in response to the DSB rulings and recommendations which was not before the original panel.<sup>10</sup>
11. Australia therefore submits that the United States' request that the Panel reject Brazil's claims relating to GSM 102 guarantees in respect of exports of pig meat and poultry meat should be refused.

**2. Request concerning Brazil's claims against the marketing loan and counter-cyclical payment programmes**

12. The United States also seeks a preliminary ruling that Brazil's claims against the marketing loan and counter-cyclical payment (CCP) programmes fall outside the scope of the Article 21.5 proceedings on two grounds – that the two programmes were not subject to any finding of WTO-inconsistency or any DSB recommendations, and those programmes were not "measures taken to comply" within the meaning of Article 21.5.

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<sup>7</sup> United States First Written Submission, paras. 27 and 28.

<sup>8</sup> Compare with *Chile – Price Band System (Article 21.5 – Argentina)*, in which the Panel, at para. 7.141, set out the conditions under which an Article 21.5 panel may consider new claims which were not raised before the original panel.

<sup>9</sup> United States First Written Submission, para. 72.

<sup>10</sup> Compare with *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 36-37.

13. The United States argues that the marketing loan and the counter-cyclical payment programmes are not measures to which the DSB recommendations and rulings were addressed since those recommendations and rulings concerned the programmes as applied and not as such, and therefore that Brazil's claims in relation to those programmes fall outside the scope of Article 21.5 proceedings.
14. Australia agrees that the Panel's findings of WTO inconsistency contained in paragraph 8.1(g)(i) of its Report related to the "mandatory price-contingent United States subsidy measures – marketing loan programme payments, user marketing (Step 2) payments, MLA [marketing loan assistance] payments and CCP payments" rather than to the programmes *as such*.<sup>11</sup>
15. However, Australia does not agree with the United States that Brazil is seeking to challenge the marketing loan and counter-cyclical payment programmes *per se*. Australia is of the view that the focus of the case under Articles 5 and 6 of the *SCM Agreement* is the continuing effects of the unamended programmes (that is, payments made under the programmes) rather than the programmes *as such*. Australia submits that it is impossible to analyze the price-contingent subsidy measures (marketing loan programme payments and CCP payments) still in existence in isolation from the programmes that govern those measures. In so far as a consideration of those programmes is necessary to determine whether the continuing price-contingent subsidy measures cause significant price suppression causing serious prejudice to Brazil's interests, then Australia submits that such programmes may properly be considered by the Article 21.5 Panel.
16. Australia further submits that the fact that the marketing loan and counter-cyclical payments programmes have not changed does not prevent them from being considered by an Article 21.5 Panel in the context referred to above, when determining the existence or consistency of measures taken to comply with the recommendations and rulings concerning payments made under those programmes (the measures at issue in the original proceedings).
17. Australia therefore submits that the United States' requests concerning the marketing loan and counter-cyclical payment programmes should be refused.

**3. Request concerning Brazil's claims that there were no measures taken to comply between 21 September 2005 and 31 July 2006**

18. The United States seeks a preliminary ruling to the effect that Brazil's claims that there were no measures taken to comply in a past period (21 September 2005 to 31

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<sup>11</sup> In an exercise of judicial economy, the Panel did not address Brazil's *per se* claims relating to the measures [allegedly mandatory legislative provisions and implement regulations providing for the payment of Step 2 payments, marketing loan programme payments, direct payments, counter-cyclical payments and crop insurance payments] under Articles 5(c) and 6.3(c) and (d) of the *SCM Agreement* and Articles XVI:1 and XVI:3 of the *GATT 1994: US – Cotton*, para. 7.1511.

July 2006) are not within the scope of these Article 21.5 proceedings. The United States argues that “DSU Article 21.5 does not provide that the task of the Panel is to decide – or, rather, declare – whether measures were taken to comply ‘in a timely fashion.’ In fact, DSU Article 21.5 does not refer to the issue of “timeliness” of implementation at all.”<sup>12</sup>

19. Australia notes that the role of an Article 21.5 Panel is to examine the existence or consistency of measures taken to comply, and submits that an examination of “existence” of measures taken to comply can encompass a finding that no measures taken to comply exist within the meaning of Article 21.5 of the DSU. Such a finding was made by the Panel in *Australia – Salmon (Article 21.5 – Canada)*. In that case, the Panel found that because the date of entry into force of measures taken to comply by Australia occurred subsequent to the date upon which the reasonable period of time for implementation expired, for the period of time that the new measures did not apply subsequent to that date, “no measures taken to comply existed ... in the sense of Article 21.5.”<sup>13</sup>
20. Australia submits that a preliminary ruling cannot be granted in a way that would void rights under Article 22 of the DSU. This is because Article 3.2 of the DSU makes clear that “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” Pursuant to Article 1.2 of the DSU, the rules and procedures of the DSU, including those contained in Article 22, apply to disputes brought under the covered agreements “subject to such special or additional rules and procedures on dispute settlement ... as are identified in Appendix 2.” Australia notes that both Articles 7.8 and 7.9 of the *SCM Agreement* are listed in Appendix 2 to the DSU as “special or additional rules and procedures” on dispute settlement contained in the covered agreements. These Articles do not preclude the application of Article 22 of the DSU. Indeed, Article 22 rights would logically ensue from findings of inconsistency with Articles 7.8 and 7.9 of the *SCM Agreement*,<sup>14</sup> which are findings that are entirely within the Panel’s mandate to make.
21. Australia therefore submits that the Panel should refuse the request of the United States for preliminary rulings with respect to Brazil’s claim concerning the United States’ failure to take measures to comply within the period 21 September 2005 – 1 August 2006, as this could diminish Brazil’s rights under Article 22 of the DSU.

**B. CLAIMS CONCERNING EXPORT CREDIT GUARANTEES (EXPORT SUBSIDIES)**

22. Brazil alleges that despite changes introduced by the United States on 1 July 2005 to the General Sales Manager 102 (GSM 102) export credit guarantee programme, that

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<sup>12</sup> United States First Written Submission, para. 51.

<sup>13</sup> *Australia – Salmon (Article 21.5 - Canada)*, para. 7.30.

<sup>14</sup> Australia notes that this position is consistent with the actions of both Brazil and the United States with respect to Brazil’s request for authorization to take countermeasures pursuant to Article 22.2 of the DSU and Article 7.9 of the *SCM* (WT/DS267/26) and the United States’ request for arbitration under Article 22.6 of the DSU and Article 7.10 of the *SCM Agreement* (WT/DS267/27).

programme and the guarantees issued thereunder continue to constitute export subsidies under Articles 1, 3.1(a) and 3.2 of the *SCM Agreement*, as well as under item (j) of the Illustrative List of Export Subsidies included as Annex 1 to the *SCM Agreement* (“Illustrative List”). Further, since 1 July 2005, Brazil alleges that the United States has applied those export subsidies in a manner that results in circumvention of the United States’ export subsidy commitments for unscheduled products and three scheduled products – rice, pig meat and poultry meat, in violation of Articles 10.1 and 8 of the *Agreement on Agriculture*.<sup>15</sup> Brazil argues that the Panel should only consider its claim under item (j) in the Illustrative List in the alternative, if the Panel finds that GSM 102 export credit guarantees are not export subsidies under Articles 1.1 and 3.1(a) of the *SCM Agreement*. The United States argues that the analysis of the revised GSM 102 programme should proceed from item (j) of the Illustrative List.

23. Australia submits that as the complaining party, Brazil has the right to identify a measure as an export subsidy according to a particular definition (for example, pursuant to Articles 1.1 and 3.1(a) of the *SCM Agreement*) and then to argue under another definition “in the alternative”. Australia therefore submits that the Panel should address the argument made by Brazil relating to item (j) “in the alternative” after the principal claim under Articles 1.1 and 3.1(a) of the *SCM Agreement*.<sup>16</sup>
24. Australia further submits that even if the United States’ approach were to be adopted, a finding by the Panel that the GSM 102 programme, as amended, did not fall within the terms of item (j) of the Illustrative List would not necessarily be determinative of whether the GSM 102 programme otherwise constituted an export subsidy under the relevant provisions of the *SCM Agreement*. In other words, an *a contrario* interpretation of item (j) is not permissible,<sup>17</sup> and the Panel would not be precluded by such a finding from examining the consistency of the revised GSM 102 with Articles 1.1 and 3.1(a) of the *SCM Agreement*.<sup>18</sup> As has been recognized in a number of proceedings, the Illustrative List is just that – it is a purely illustrative list and does not, as the United States acknowledges, purport to be an exhaustive list of export subsidies.<sup>19</sup>

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<sup>15</sup> Brazil First Written Submission, paras. 348-350.

<sup>16</sup> In *US – FSC*, the Appellate Body at para. 89 found no legal error in the Panel adopting the order in which the European Communities as claimant had presented its arguments under Articles 1 and 3 of the *SCM Agreement*, and rejected the United States’ assertion that the analysis should have proceeded from footnote 59 to item (e) of the Illustrative List.

<sup>17</sup> *Korea – Vessels*, para. 7.207. In that case, the Panel found that Korea had failed to demonstrate that item (j) was applicable as an affirmative defence for those measures that were found to be in violation of Article 3.1(a) of the *SCM Agreement*: *ibid.* para. 7.202. In reaching its conclusions, the Panel adopted the approach taken by the Panel in *Brazil – Aircraft (Article 21.5 - Canada I)* at paras. 6.37 *ff.*

<sup>18</sup> In *Brazil – Aircraft (Article 21.5 - Canada I)*, the Panel acknowledged that it was legally possible that there existed prohibited export subsidies within the meaning of Article 3.1(a) that did not fall within the scope of Annex I: *see* para. 6.30.

<sup>19</sup> *Ibid.*

**C. CLAIMS CONCERNING ACTIONABLE SUBSIDIES**

25. Australia submits that in relation to Brazil's actionable subsidies claims, the Panel should consider whether the United States, by repealing the Step 2 payment programme, but maintaining the two other price-contingent subsidies (payments under the marketing loan and counter-cyclical payment programmes), has taken appropriate steps to remove the adverse effects of the subsidies or to withdraw the subsidies, within the meaning of Article 7.8 of the *SCM Agreement* in accordance with the DSB's recommendations and rulings with respect to those subsidies.

26. Australia recalls that the Panel found that:

the effect of the mandatory price-contingent United States subsidy measures – marketing loan programme payments, user marketing (Step 2) payments, MLA [marketing loan assistance] payments and CCP [counter-cyclical payment] payments – is significant price suppression in the same world market within the meaning of Articles 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*.<sup>20</sup>

27. In the light of this conclusion, the Panel recalled that, pursuant to Article 7.8 of the *SCM Agreement* “upon adoption of this report, the United States is under an obligation to ‘take appropriate steps to remove the adverse effects or ... withdraw the subsidy’”.<sup>21</sup>

28. Australia notes that the United States eliminated the Step 2 payments in response to the DSB's recommendations and rulings. The other two “mandatory price-contingent United States subsidy measures” that were the subject of the Panel's findings remain in existence. Australia therefore submits that in so far as these measures still exist, the Panel may properly consider whether the United States has fulfilled its obligations under Article 7.8 of the *SCM Agreement*.

29. Australia recalls that in making the findings referred to above, the original Panel examined each price-contingent subsidy measure in turn<sup>22</sup> and made a number of findings relating to the effect of each measure individually, before considering the collective operation of those measures. It is clear from the Panel's analysis that each of the price-contingent measures individually were found to have a trade-distorting effect.<sup>23</sup> With respect to the marketing loan programme payments, the Panel stated that:

We have no doubt that the payments stimulate production and exports and result in lower world market prices than would prevail in their absence. Moreover, the text of the measure indicates that the payments are mandatory, where certain market conditions prevail.<sup>24</sup>

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<sup>20</sup> *US – Cotton*, para. 8.1(g)(i); *see also* para. 7.1416.

<sup>21</sup> *Ibid.*, para. 8.3(d).

<sup>22</sup> *Ibid.*, para. 7.1290.

<sup>23</sup> *Ibid.*, paras. 7.1290–1303.

<sup>24</sup> *Ibid.*, para. 7.1291 (footnote omitted).

The Panel further 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 would prevail in their absence.<sup>25</sup>

On counter-cyclical payments, the Panel concluded that:

... CCPs may influence production decisions indirectly by reducing total and per unit revenue risk associated with price variability in some situations ... We have confirmed a strong positive relationship between upland cotton (base acre) producers receiving annual payments and upland cotton production. Moreover, the payments are mandatory, under certain market conditions.<sup>26</sup>

Australia submits that these findings remain relevant to the present proceedings.

30. Australia therefore submits that the present Panel should, as part of its consideration of whether the United States has complied with its obligations under Article 7.8, determine whether the continued existence of the two price-contingent subsidy measures that were the subject of the original Panel's finding cause significant price suppression constituting serious prejudice to the interests of Brazil.

31. In other words, the Panel should examine whether repeal of the Step 2 programme together with the continued existence of the other two price-contingent subsidy measures resulted in full compliance with the United States' obligation to remove the adverse effects or withdraw the subsidies found by the Panel to exist with respect to all three price-contingent subsidies. Australia submits that this is consistent with the approach that Brazil has taken in this dispute.

## **CONCLUSION**

### **A. Scope of Article 21.5 proceedings - requests for preliminary rulings**

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

- (a) refuse the United States' request that the Panel reject Brazil's claims relating to GSM 102 guarantees in respect of exports of pig meat and poultry meat;
- (b) refuse the United States' requests for preliminary rulings concerning the marketing loan and counter-cyclical payment programmes; and
- (c) refuse the request of the United States for preliminary rulings with respect to Brazil's claim concerning the United States' failure to take measures to comply within the period 21 September 2005 – 1 August 2006.

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<sup>25</sup> *Ibid.*, para. 7.1295.

<sup>26</sup> *Ibid.*, para. 7.1302.

**B. Claims concerning export credit guarantees (export subsidies)**

33. For the reasons set out in this submission, Australia submits that the Panel should address the argument made by Brazil relating to item (j) “in the alternative” after the principal claim under Articles 1.1 and 3.1(a) of the *SCM Agreement*.
34. If, however, the Panel were to adopt the order of analysis proposed by the United States, a finding by the Panel that the GSM 102 programme, as amended, did not fall within the terms of item (j) of the Illustrative List would not preclude the Panel from examining the consistency of the revised GSM 102 with Articles 1.1 and 3.1(a) of the *SCM Agreement*.

**C. Claims concerning actionable subsidies**

35. For the reasons set out in this submission, Australia submits that in so far as the price-contingent subsidy measures still exist, the Panel may properly consider whether the United States has fulfilled its obligations under Article 7.8 of the *SCM Agreement*. As part of its consideration of whether the United States has complied with its obligations under Article 7.8, Australia further submits that the Panel should determine whether the continued existence of the two price-contingent subsidies that were the subject of the original Panel's finding cause significant price suppression constituting serious prejudice to the interests of Brazil.