# *United States – Subsidies on Upland Cotton*

**(WT/DS267)**

**Answers of the United States of America**
**to Questions Dated February 3, 2004, from the Panel to the Parties**
**following the Second Panel Meeting**

February 11, 2004

**259. With respect to the Privacy Act of 1974, 5 U.S.C. 552a:**

**(a) Whose interests are protected under section 552a(b) in light of the definition of "individual" in section 552a(a)(2)? Do all payment recipients, including corporations and organizations, have Privacy Act rights? If not, is the United States prevented by its domestic law from releasing such of the information requested on 12 January 2004 as relates to payment recipients without Privacy Act rights? Please explain with references to case law.**

1. We appreciate the Panel's interest in the Privacy Act interests that the United States Department of Agriculture is obligated, under U.S. domestic law, to protect. Farm-specific planting data is one such protected interest,[1] and was one since long before the inception of this dispute. We discuss this point further in response to question 259(c) below.

2. Under the Privacy Act of 1974, generally, "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person . . . ." 5 U.S.C. 552a(b). The statute provides a criminal penalty for any agency employee who willfully discloses protected records knowing that disclosure is prohibited. 5 U.S.C. 552(a)(I)(1) . A "record" is defined as "any item, collection, or grouping of information about an individual that is maintained by an agency" (5 U.S.C. 552a(a)(4)), and an "individual" is defined as "a citizen of the United States or an alien lawfully admitted for permanent residence" (5 U.S.C. 552a(a)(2)). Therefore, courts have held that the rights of the Privacy Act of 1974 do not extend to corporations or organizations. *See, e.g.*, Dresser Industries v. United States, 596 F.2d 1231 (5th Cir. 1979). While corporations do not have a personal privacy interest, closely held corporations are an exception in that the release of information about the corporation is tantamount to a release of information on the individuals involved.

3. With respect to planting information of non-closely held corporations, courts have held that information voluntarily received from a corporation is to be withheld under exemption (4) of the Freedom of Information Act (FOIA), 5 U.S.C. 552 (5 USC (b)(4)), if it is not the type of information that would customarily released by the corporation to the public. See also, Center for Auto Safety v. National Highway Traffic Safety Administration, 244 F.3d 144, 147 (DC Cir. 2001). This is the case with respect to plantings. Furthermore, the Trade Secrets Act, 18 U.S.C. 1905, prohibits the release of any information that falls within the exemption from disclosure provided by 5 U.S.C. (b)(4) unless otherwise permitted by law. CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1151-1152 (D.C. Cir. 1987).

4. The 1999-2001 plantings information of non-closely held corporations was voluntarily submitted. For 2002 and beyond the reports are required by statute. Thus, such data could presumably be released for non-closely held corporations (it would still be protected under the Privacy Act for individuals and closely-held corporations). However, determining which farms are non-closely corporations would require examining, on a case by case basis, the circumstances

[1] We discuss below an exception to this principle for farms owned by corporations other than closely held corporations.

of each operation. That would require the consideration in county offices across the cotton-growing country of some 200,000 files.

5. As explained in the U.S. letter of January 20, 2004, Brazil's insistence on receipt of contract payment and planting data identified by farm number is unnecessary to resolution of the issues in this dispute. Instead, to the extent any of this information is relevant to this dispute, given Brazil's arguments, aggregation of payment data would provide information in the appropriate format, and aggregation would moreover be consistent with U.S. law. The Panel has now requested aggregated data, and as explained elsewhere in today's submissions the United States is working to provide that.

**(b) The Panel notes that data concerning the four relevant programmes, in particular, payment amounts, identified by specific farms, is freely available on the internet. Please explain why that data can be disclosed but the requested planted acreage data cannot. Do individual recipients have Privacy Act rights with respect to their entrepreneurial activity? Please explain with references to case law.**

6. The Panel is correct to distinguish between information on government activity and government payments, and individual activity, in particular individual entrepreneurial activity. Indeed, there are long-standing and well-recognized distinctions in the United States between, on the one hand, government-generated information and conclusions formed by the government itself (such as payment amounts, bases, and yields), and, on the other hand, the private reportings of farmers (such as plantings) which do not generate any payments and which are submitted for compliance purposes only. Filings of the latter kind have long been recognized in U.S. agricultural law as being private in nature. *See, e.g.,* 7 USC 1373 and 7 USC 1502(c) (protecting such filings under the terms of the Agricultural Act of 1938 and in the crop insurance context).[2]

7. The interrelationship between the Privacy Act of 1974 and the FOIA requires an analysis balancing the privacy interest of the individual with the "core purpose" of FOIA which is to "shed light on an agency's performance of its statutory duties." United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989). Information that does not directly disclose government operations cannot be factored into the balance. Reporters Committee, 489 U.S. at 775.

8. Information concerning planted acreage does not demonstrate anything regarding the government's operation – it only demonstrates what a producer is doing. Accordingly it is protected from disclosure. By contrast, information regarding payment amounts relate to the

[2] It would be odd, to say the least, to say that such planted acreage information would be protected for crop insurance purposes but then releaseable by some other avenue.

government's implementation of farm programs, and this outweighs any privacy interest on the part of the producer.[3]

9. With respect to the final part of the Panel's question, while there is a split of authority in U.S. courts as to whether individuals have Privacy Act rights with respect to their entrepreneurial activities, the Department of Agriculture has determined that an individual acting in an entrepreneurial capacity is protected by the Privacy Act of 1974. *See* Metadure Corporation v. United States, 490 F. Supp. 1368 (S.D.N.Y. 1980); Campaign for Family Farms v. Glickman, 200 F.3d 1180 (8th Cir. 2000).

**(c) Please provide any further available evidence of the USDA's long-standing policy that planted acreage information will not be released.**

10. Exhibit US-144 is a notice dated December 1, 1998, from the Acting Administrator of the Farm Service Agency ("FSA") to all FSA employees setting out "FSA's policy on information that can be released" to the public and "exclusions to FSA's policy on releasing lists of names and addresses. Page 2 of the notice states that "[a]creage, production data, and other producer-related information, without any personal identifiers attached, may be released when grouped . . . unless the request would be able to identify an individual producer from the information provided."

11. Exhibit US-143 is a September 18, 1998, memorandum from the Director of the Legislative Liaison Staff for FSA, to State Offices. In this document, the author seeks to correct any misunderstandings that may have arisen after the Washington Post district court decision regarding what information may be releaseable under the Freedom of Information Act. The memorandum makes clear that, unlike the payment data at issue in that case, planted acreage information is not releaseable information under FOIA.

12. The Panel will see from these document that the positions taken by the Department of Agriculture here predate this dispute by several years.

**260. On 27 August 2003, in its response to Question No. 67 bis, the United States indicated that "it does not maintain information on the amount of expenditures made under the cited programs to U.S. upland cotton producers". On 12 January 2004, the Panel requested the United States to provide information "to permit an assessment of the total expenditures of PFC, MLA, CCP and direct payments by the U.S. Federal Government to upland cotton producers in the relevant marketing years". On 20 January 2004, the United States informed the Panel that "the data**

[3] This sort of weighing process was the basis of the decision in Washington Post Company v. United States Department of Agriculture, 943 F.Supp. 31 (D.D.C. 1996). There, the court found some privacy interest in payment information, but found that interest to be both minimal and outweighed by a "substantial" public interest in identifying "fraud and conflict of interest." 943 F. Supp. at 37.

**already provided by the United States to Brazil and the Panel would permit an assessment of total expenditures of decoupled payments to farms planting upland cotton." Is the latest statement responsive to the Panel's request? If so, how can it be reconciled with the first statement?**

13. It is important to distinguish between information on plantings and information on production. The United States maintains some information on plantings, but does not maintain information on individual farm production. The August 27, 2003 statement concerned production, while the January 20, 2004 statement concerned plantings. Brazil has all of the payment data and, for every "cotton farm" (as defined in Exhibit BRA-369), all of the yield data and all of the base data. In addition, the summary files that the United States prepared also present total cropland data for these "cotton farms." However, the United States does not maintain information on whether farms that planted cotton produced (i.e., harvested) that cotton or abandoned it. For cotton, abandonment rates can be significant.

**261. Please confirm that each record in the actual planting database relates to a specific farm (Filenames: rPFCplac and rDCPplac in Exhibits US-111 and US-112). For example, in the data from rDCPplac:**

**First line:**
**Field9;Field16;Field22;Field28;Field34;Field40;Field46;Field52;Field58;Field64;Field70;Field76;Field82;Field88;Field94;Field100**

**Second line:**
**237.10;23059.80;5566.20;0.00;0.00;0.00;0.00;0.00;0.00;0.00;0.00;0.00;0.00;0.00;0.00;0.00**

**Does the second line represent data on plantings by the same farm?**

14. Yes, we can confirm that the panel's understanding of the files is correct. That is, for the detailed farm-by-farm text files, each farm was given its own line, with fields separated by semi-colons. The last field would not be followed by any mark; rather, after the last field for a given farm, a new line was started, indicating a new farm entry.

**262. The Panel has noted the two CD-ROMs delivered by the US in the evening of 23 December 2003. They are marked "US-111" and "US-112" respectively, but the contents actually do not correspond to the indication. The Panel also takes note of**

**the US letter dated 28 January 2004 and the CD-ROM delivered together with it. For the record, please clarify the correct CD-ROMs and provide corresponding descriptions of their contents with exhibit numbers.**

15. The United States originally prepared and submitted six data files. The files designated "PFCby.txt" (the base acreage and yield file for the PFC payment era)[4] and "DCPby.txt" (the base acreage and yield file for the DCP payment era)[5] set out all base acres for each "program crop" on every identified farm and the associated program yield. For the Panel's and Brazil's convenience, the United States also calculated the payment units (bushels or pounds) for each "program crop."

16. The United States also provided farm-by-farm planted acreage information, with farm-identifying information removed, in the files "PFCplac.txt" (planted acreage for the PFC payment era)[6] and "DCPplac.txt" (planted acreage for the DCP payment era).[7] The United States has explained that, under U.S. law, it could not provide the farm-by-farm planted acreage information in a format that would permit identification of a specific farm.[8]

17. Finally, to assist the Panel and Brazil in interpreting the voluminous data provided, the United States prepared and submitted summary files setting out aggregate cropland, base acreage, base yield, payment units, and planted acreage. These summaries were labeled "PFCsum.xls" (for the PFC payment era) and "DCPsum.xls" (for the DCP payment era).

18. On January 28, 2004, the United States submitted revised data files to the Panel that corrected for certain programming errors that inevitably resulted in the rush to provide nearly 220 megabytes of data within the limited time available to reply to Brazil's request for data. As set out in the U.S. letter of January 28, the file names are identical to those previously submitted but with an "r" preceding the original file name. Thus, the files are now titled "rDcpsum.xls" (aggregate data file), "rDcpby.txt' (farm-by-farm base and yield data file), "rDcpplac.txt" (planted acres file), "rPfcsum.xls" (aggregate data file), "rPfcby.txt" (base and yield data file), and "rPfcplac.txt" (planted acres file).

19. In Exhibit US-145 that is being submitted today, the United States sets out the contents of the four revised farm-by-farm ".txt" files (that is, not the summary files) that were submitted to

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[4] A description of the file contents for the "PFCby.txt" file was submitted as Exhibit US-109.

[5] We note that Exhibit US-111 set out a description of the file contents (by field number and heading) for the "DCPby.txt" file. Any marking of a CD-ROM delivered on December 23, 2003, as "Exhibit US-111" was therefore in error.

[6] A description of the file contents for the "PFCplac.txt" file was submitted as Exhibit US-110.

[7] We note that Exhibit US-112 set out a description of the file contents for the "DCPplac.txt" file. Therefore, any marking of a CD-ROM delivered on December 23, 2003, as "Exhibit US-112" was in error. We apologize for any confusion that may have been caused.

[8] *See* U.S. Letter to Panel of December 18, 2003; U.S. Letter to Panel of January 20, 2004; U.S. Answers to Questions 259(a), (b), (c) from the Panel (February 11, 2004).

the Panel on January 28, 2004, on CD-ROM. (We note that, in each of the four ".txt" files, the fields are separated by colons and field labels are set out within the file, with each farm having its own line, just as in the corresponding ".txt" files submitted on December 18 and 19, 2003.) These four revised files follow the same fields and formats as the files originally submitted on December 18 and 19, 2003. As explained on January 28, those revised electronic files were prepared and submitted after the United States became aware of certain errors in the original data files submitted.

**263. The Panel has noted that the United States' response to Question No. 214 refers to Exhibits US-117 and US-118. Are these the correct documents to which the United States intended to refer in that response? If not, please provide a copy of regulations regarding the marketing loan programme and loan deficiency payments published at 58 Federal Register 15755, dated 24 March 1993.**

20. The exhibits submitted in response to Question 214 were in error. A copy of the March 24, 1993, Federal Register notice is attached as Exhibit US-263. The United States regrets any inconvenience its error may have caused.

**264. The Panel asks the United States to clarify certain aspects of Exhibit US-128:**

**(a) Is the Panel correct in understanding that -- as Brazil asserts in footnotes 290 and 291 of Brazil's 28 January 2004 comments on US responses to questions -- Exhibit US-128, all data are presented on a cohort-specific basis? If so, please also present the information originally requested by the Panel in another chart containing programme (as opposed to cohort-specific) activity by fiscal year.**

21. The data presented in Exhibit US-128 is presented on a cohort-specific basis. However, a cohort by definition reflects activity related to guarantees issued within a specific fiscal year. Exhibit US-128 also presents such data with respect to each of the individual programs (GSM-102, GSM-103, and SCGP), as well as their cumulative totals. This data reflects actual performance of the programs, unlike the data in the U.S. budget to which Brazil alludes in its footnote 290, which, as the United States has repeatedly explained, are based on estimates and re-estimates required under the Federal Credit Reform Act of 1990.

22. Although the data in Exhibit US-128 is already presented by program (as well as cumulatively), the United States infers from the Panel's question that it nevertheless would like to see a different presentation of the same data. Accordingly, Exhibit US-147 presents the same data, except Columns D (Claim Payments), E (Claims Recovered), F (Claims Rescheduled), G (Claims Outstanding), L (interest collected on claims recovered), and M (interest collected on reschedulings) are presented on a chronological basis (i.e., instead of applying the particular activity back to the cohort of the guarantee related to such activity, the cash-flows are set out in the fiscal year in which they occurred).

**(b) Does the US agree with the statement in paragraph 135 of Brazil's 28 January 2004 comments on US responses to questions that the difference between the $1,148 billion in the chart at para. 165 of Brazil's 11 August answers to questions and the $666 million amount in Exhibit US-128 ($1.75 billion) closely corresponds to the total "Claims rescheduled" figure reported by the US in Exhibit US-128 (column F)?**

23. The United States is examining the cited figures and expects to be able to provide an answer within the same period as its response to the Panel's supplemental request for information.

**(c) Does the US agree that from the formula in column G (that is: (Column (D) minus (E) minus (F)), it follows that a rescheduled claim no longer constitutes an outstanding claim at the moment the terms of the re-scheduling are agreed and that a rescheduling is treated as 100 per cent recovered, as Brazil states in footnote 292 of Brazil's 28 January 2004 comments on US responses to questions?**

24. The Panel's understanding is correct. However, other than interest collected on reschedulings, Exhibit US-128 does not reflect the receipt of payments under the reschedulings. Consequently, no principal payments received under reschedulings are reflected in Exhibit US-128. As the principal amounts rescheduled are set forth in Column F and subtracted from Claims Outstanding in Column G, to include such principal payments as received would constitute double-counting.

**(d) Is the Panel correct in understanding that the amount of $888,984,792.04 in column F in Exhibit US-128 under "ALL" for 1992 represents the total continuing amount of unrecovered claims for the 1992 cohort, and that the amount of 387,692,219.39 represents the total continuing amount of unrecovered claims for the 1993 cohort, etc? Please indicate and substantiate how much principal and/or interest has actually been paid/recovered/rescheduled annually 1992-2003 in respect of each of the amounts shown in Columns D, E & F in the table.**

25. The Panel's understanding is not correct. The figures in column F to which the question refers do *not* reflect a continuing amount of unrecovered claims. As reflected in the response to question 264(c) these figures do not in any way reflect payment performance under the reschedulings themselves and therefore do not reflect a "continuing amount of unrecovered claims." Although Column M of Exhibit US-128 reflects interest collected on reschedulings, neither payment of original principal nor payments of capitalized interest are reflected in Exhibit US-128. Column M reflects only payments of interest on such original principal or on such capitalized interest.

26. Exhibit US-148 reflects, with respect to the same data as originally included in Exhibit US-128, principal and interest "paid/recovered/rescheduled" annually for 1992-2003, on a chronological cash basis.

**265. In connection with the US response to Question No. 225, please also provide amounts actually "written off" and "forgiven" annually for each post-1992 cohort, with annual details of country and amount (principal/interest).**

27. The response to Question 225 was intended to be comprehensive. CCC financial records indicate that no amounts have been "written off" or "forgiven" with respect to any post-1992 cohort.

**266. What are the precise terms, conditions and duration of each rescheduling reflected in column F in Exhibit US-128?**

28. Exhibit US-153 summarizes the principal terms, conditions, and duration of each rescheduling reflected in column F in Exhibit US-128. In each instance in which a Paris Club Agreed Minute is noted, the terms of the U.S. rescheduling adhere to the multilateral terms agreed within the Paris Club. In no instance does the debt owed the United States and rescheduled in accordance with Paris Club terms pertain exclusively to debt arising from CCC export credit guarantee transactions.

**267. Is the Panel correct in understanding that "interest collected on reschedulings" in Column M in Exhibit US-128 refers not to amounts that have been actually collected by the CCC but rather to interest capitalized in conjunction with the rescheduling? If so, what are the terms, conditions and duration of the arrangements pertaining to these amounts?**

29. The Panel's understanding is *not* correct. As noted in the response to Question 264(d), Column M of Exhibit US-128 reflects only interest collected on reschedulings. It does not reflect either payment of original principal nor payments of capitalized interest. At the inception of a rescheduling some outstanding interest may be capitalized or interest may be capitalized during the term of the rescheduling. Such capitalized interest is not itself reflected in any way in Exhibit US-128. Column M reflects only payments of interest on original principal or on such capitalized interest.

**268. Concerning Column N in Exhibit US-128, please elaborate upon "Interest earned from US Treasury on uninvested funds". What is the source and authority**

**for these funds and for the interest thereon to be part of the CCC total revenues? What are the terms, conditions and duration of the arrangements pertaining to these amounts?**

30. Section 505(c) of the Federal Credit Reform Act (2 USC Section 661d(c)) applies to "Treasury transactions with financing accounts." In relevant part, it provides:

> The Secretary of the Treasury shall borrow from, receive from, lend to, or pay to the financing accounts such amounts as may be appropriate. The Secretary of the Treasury may prescribe forms and denominations, maturities, and terms and conditions for the transactions described above, except that the rate of interest charged by the Secretary on lending to financing accounts [...] and the rate of interest paid to financing accounts on uninvested balances in financing accounts shall be the same as the rate determined pursuant to [2 USC section 655(b)] [.....] This subsection shall apply to transactions related to direct loan obligations or loan guarantee commitments made on or after October 1, 1991 [...] Cash balances of the financing accounts in excess of current requirements shall be maintained in a form of uninvested funds and the Secretary of the Treasury shall pay interest on these funds.

31. Such section 655(b) provides: "In estimating net present values, the discount rate shall be the average interest rate on marketable Treasury securities of similar maturity to the cash flows of the direct loan or loan guarantee for which the estimate is being made."

32. Exhibit US-149 is Treasury Financial Manual I TFM 2-4600 (December 2003). This document, promulgated by the U.S. Department of Treasury, prescribes Treasury reporting instructions for Federal credit program agencies in accordance with Federal credit reform legislation. Section 4640 of that document addresses "Interest on Uninvested Funds". That section provides, in part: "Uninvested funds in the financing account consist of fund balances with Treasury from borrowings and/or offsetting collections that have not been disbursed. This balance earns interest from Treasury as determined by the disbursement-weighted average interest rate or single effective rate for each cohort in the financing account."

33. Agencies must report interest revenue and expense separately. Interest income becomes part of the cash balance in the financing account and is available to fund future disbursements.

**269. The Panel notes the table submitted by the US in its answer to Question No. 224 (CCC Financing Account Payments of Interest on Borrowings from Treasury and Interest Earned on Uninvested Funds). Is the Panel correct in understanding**

**that the figures in this table correspond to the "ALL" figures in Columns I and N of Exhibit US-128?**

34. Yes. Column I of Exhibit US-128 corresponds to "Interest on Borrowings" found in the table associated with the response to Question 224, and Column N corresponds to "Interest Earned" in that same table.

**270. With respect to Column I in Exhibit US-128, ("Interest paid on borrowing from US Treasury") and Note 8, p. 25 of Exhibit US-129:**

**(i) please provide the total annual amounts (interest bearing and non-interest bearing) borrowed by the CCC from the US Treasury (annually since 1992), as well as the terms, conditions, interest rate (where applicable) and duration of such borrowing. Please provide details of any other amount borrowed by the CCC from the US Treasury during this period that may not have formed part of the regular annual borrowings.**

35. The Panel's Question 270 in its various sub-parts suggests that the Panel may have a misunderstanding regarding the scope of Note 8, p. 25 of Exhibit US-129. As the Panel is aware, CCC has extensive domestic and foreign operations. Note 8 reflects Debt to the Treasury with respect to myriad activities of CCC, the preponderance of which is associated with borrowings from Treasury to carry out programs other than the export credit guarantee programs.

36. Column I of Exhibit US-128 sets forth the total annual amount of interest paid on borrowing from the U.S. Treasury with respect to GSM-102, GSM-103, and SCGP for the periods described. All references to "non-interest bearing" debt or repayments in Note 8, p. 25 of Exhibit US-129 are unrelated to the export credit guarantee programs.

**(ii) Please explain the nature of "CCC's permanent indefinite borrowing authority from Treasury" referred to in Note 8, p. 25 of Exhibit US-129.**

37. This borrowing authority does not apply to the export credit guarantee programs. Similar to "non-interesting bearing" debt or repayments noted in the preceding response, "CCC's permanent indefinite borrowing authority from Treasury" is not available with respect to export credit guarantee programs and activities and has not been available since the advent of the Federal Credit Reform Act of 1990. It has therefore not been available with respect to any cohorts from 1992 to the present.

38. The permanent indefinite borrowing authority to which the question and Note 8, p. 125 of Exhibit US-129 refer is available to finance and carry out many (but not all) activities of the CCC, including, for example, certain domestic commodity and conservation programs, but not including the export credit guarantee programs. CCC may incur realized losses in the course of

carrying out such other activities, and such net realized losses are restored through the annual Federal appropriations process.

**(iii) What determines the level of CCC export credit guarantee borrowing (interest-bearing and non-interest-bearing)? Is the interest-free borrowing up to the amount of unreimbursed realized losses?**

39. As noted in the preceding responses no "non-interest bearing" or "interest-free" borrowing is available with respect to the export credit guarantee programs.

40. Generally speaking, the principal determinant of the level of CCC export credit guarantee financing will be the estimated program activity in a particular fiscal year. Budget authority is based on estimates of all anticipated program activity such as dollar value of guarantees projected to be issued, premia to be collected, payments to be received, and claims to be paid. Infrequently, borrowing from Treasury is also used if CCC has insufficient cash on hand to pay claims.

**(iv) Why are repayments applied to non-interest bearing notes first, as indicated at Note 8, p. 25 of Exhibit US-129?**

41. As noted in the previous responses, activity with respect to non-interest bearing notes is wholly unrelated to the export credit guarantee programs.

**271. Note 8, p. 25 of Exhibit US-129 states that "In fiscal year 2003, CCC was fully reimbursed for its prior year net realized losses." Please indicate the amounts of prior year net realized losses (annually, since 1992) for which the CCC has been fully reimbursed.**

42. As indicated in the responses to Questions 226 (December 22, 2003) and 272 below, such reimbursement is unrelated and inapplicable to the CCC export credit guarantee programs since the inception of the Federal Credit Reform Act of 1990, which corresponds to fiscal year 1992. The table comprising Exhibit US-152 displays CCC net realized losses and all appropriations to restore those losses for fiscal years 1992 through 2003, but the United States hastens to reiterate that these figures have no relation to the export credit guarantee programs. Such reimbursements for net realized losses do not include any portion attributable or allocable to the export credit guarantee programs.

**272. With respect to the US response to Question No. 226, is the Panel correct in understanding that the reflection of write-offs as part of the operating loss of the CCC which in turn was replenished through the annual appropriations process**

**ended with the entry into force of the FCRA in fiscal year 1992? If not, what amounts have been replenished through this process annually since fiscal year 1992?**

43. The Panel's understanding is correct.

**273. With respect to the US response to Question No. 225, what criteria does the CCC apply to "independently determine" that a debt is uncollectible? For post-1992 cohorts, what are these uncollectible amounts (annually) and how, if at all, are such "uncollectible amounts" shown in Exhibit US-128?**

44. With respect to post-1992 cohorts, no amounts have been determined uncollectible and therefore none are reflected in Exhibit US-128.

45. The determinations of uncollectability reflected in the response to Question No. 225, were based on the following facts. In the Argentine case, two private sector banks entered Argentine insolvency proceedings and were subsequently liquidated. CCC, after collecting a portion of the outstanding debt, received advice from the U.S. Embassy that CCC would never receive further collection. Accordingly, the outstanding debt was written off. In the case of the Russian debt, certain debt of a private sector bank was not included in Paris Club rescheduling of debt of the former Soviet Union. The Russian Federation was therefore not liable for this debt. CCC received payments from the private sector bank but made an internal error in properly accounting for these payments. Certain late interest was not paid as a result, and CCC opted to deem such amount uncollectible. CCC has so far been unable to locate records pertaining to the Nigerian write-off.

**274. The Panel notes the US statement in the US response to Question No. 81 that "All rescheduled claims are currently performing " and that "all payments due up to this point under [rescheduling] agreements have been received". However, the Panel also notes Exhibit US-129 (in particular, Note 5 on p. 22) and Brazil's reference thereto in Brazil's 28 January comments on the US response to Question No. 222. In this connection:**

**(a) How does the US respond to Brazil's statement in Brazil's 28 January comments that Exhibit US-129 confirms that rescheduling of export credit guarantee receivables cover both principal and interest, thereby confirming that not all of the rescheduled debt performs and that additional interest charges were also rescheduled?**

46. The United States would first point out that the references to reschedulings in Note 5, p. 22, of Exhibit US-129 are not limited to reschedulings associated with the export credit guarantee programs, nor to post-1991 transactions. The substantial majority of the amounts rescheduled by CCC pertain to activities related to the P.L. 480 foreign food assistance program.

47. Brazil misinterprets Exhibit US-129, Note 5, p. 22. Citing that reference, Brazil states: "Indeed, the CCC's Financial Statement for FY 2002 and 2003 confirm that rescheduling of export credit guarantee receivables covered both principle [*sic*] and interest, thereby confirming that not all of the rescheduled debt performs and that additional interest charges were also rescheduled."[9] Brazil is presumably referring to the second full paragraph of that page 22, particularly its second sentence. The full paragraph reads as follows:

> Direct credit and credit guarantee principal receivables under rescheduling agreements as of September 30, 2003 and 2002, were $7,532 million and $7,494 million, respectively. During fiscal years 2003 and 2002, CCC entered into agreements with debtor countries to reschedule their delinquent debt owed to CCC. These reschedulings totaled $591 million in delinquent principal and $196 million in delinquent interest during fiscal year 2003, and $152 million in delinquent principal and $55 million in delinquent interest during fiscal year 2002.

48. The second sentence refers primarily to delinquent debt under original obligations, not under outstanding reschedulings. All rescheduled export credit guarantee debt is currently performing.

> **(b) In Note 5 on p. 22 of Exhibit US-129, what is the definition of "non-performing"? What is the meaning of "delinquent"? What is the current principal balance and amount of interest of the three CCC export credit guarantee programme "receivables" in a non-performing status (individually and together, for GSM 102, GSM 103 and SCGP))? What is the amount of interest on non-reporting "receivables"?**

49. Page 4 of Note 1 (Significant Accounting Policies) of Exhibit US-129 provides in relevant part under the paragraph entitled "Interest Income on Direct Credits and Credit Guarantees": "A non-performing direct credit or credit guarantee receivable is defined as a repayment schedule under a credit agreement, with an installment payment in arrears more than 90 days." "Delinquent" would apply to anything past due.

50. With respect to post-1991 cohorts, the principal balance of non-performing credit guarantee receivables as of September 30, 2003 is as follows:

| | |
|---|---|
| GSM-102: | $181 million |
| GSM-103: | - 0 - |
| SCGP: | 21 million |
| Total: | $202 million |

[9] Brazil's Comments on U.S. 22 December Answers (28 January 2004), para. 135.

With respect to pre-1992 cohorts:

GSM-102: $2,237 million
GSM-103: 11
SCGP: -not applicable-

Total: $2,248 million

51. With respect to the last question, the United States assumes that the Panel intended to refer to "non-performing 'receivables', rather than "non-reporting 'receivables'". The interest receivable on "non-performing 'receivables' is $146 million and is entirely related to pre-1992 GSM-102 principal.

**(c) The Panel notes the US reference to the "Paris Club" in US response to Question No. 225. What is the P.L. 480 programme referred to in Note 5 on p. 22 of Exhibit US-129 (including the Paris Club debt reduction process and the HIPC Initiative) ? To what extent is the P.L. 480 programme and Paris Club process relevant to the export credit guarantee programmes at issue in this dispute? Please identify and give the amounts of all CCC export credit guarantee debt subject to the P.L. 480 debt reduction (or other similar) process since 1992.**

52. The P.L. 480 program is a foreign food-aid program, under which assistance can be provided on either a grant or concessional financing basis. That program is wholly distinct from the export credit programs at issue in this dispute. Consequently, no CCC export credit guarantee debt overlaps with debt subject to P.L. 480 debt reduction. As the United States has noted in its prior submissions, virtually all of the rescheduling of debt in connection with the CCC export credit guarantee programs is done in concert with a multilateral Paris Club debt rescheduling process. In addition, some debt has also been forgiven under the HIPC initiative. With reference to the United States' response to Question 225, all of the debt in the table reflecting "debt forgiveness" in paragraph 114 was associated with the Paris Club (Poland, Former Yugoslavia) or HIPC (Honduras, Tanzania, Yemen).

**(d) Can the US explain the process referred to in the second column of Note 5 on p. 22 ("CCC is awaiting an apportionment from the Office of Management and Budget before the transaction can be completed. Until such time, however, there is a 100% subsidy allowance established against the relevant debt as of September 30, 2003.") Please provide details of all such "apportionments" relating to the three export credit guarantee programmes in fiscal years 1992-2003.**

53. The transaction to which the cited reference applies involves an agreement between the United States and Pakistan to reduce debt incurred under the P.L. 480 program, which is not within the scope of this dispute. It involves only P.L. 480 direct credits and does not involve any of the export credit guarantee programs. It therefore does not involve transactions under federal

credit reform provisions applicable to the export credit guarantee programs. The cited reference is intended to note that although a debt reduction agreement had been signed, the requisite documentation from the Office of Management and Budget authorizing such reduction on the books of CCC had not yet been received as of the statement date.

54. The procedure in the above P.L. 480 instance is distinct from that which would apply in the case of export credit guarantee apportionments. The response of the United States to Panel Question 225 indicated three cases of debt "write-off" and five cases of debt forgiveness. Seven of those eight cases involved pre-1992 debt. Under the Federal Credit Reform Act of 1990, an apportionment is ordinarily not necessary with respect to pre-1992 transactions. In fact, only one such apportionment has ever occurred, and that was in fiscal year 1992 to establish the particular budgetary account (the "liquidating account") under which the budgetary accounting occurs for all activity associated with pre-1992 transactions. That apportionment did not reflect any debt reduction or write off.

55. The only other instance was the write-off of $13,000 owed from the Former Soviet Union/ Russia. This particular write-off did not involve a sufficiently large amount to require an apportionment. The Office of Management and Budget database rounds to the nearest million dollars, and therefore the write-off of $13,000 would not alter the relevant entries in the database for the particular budgetary account (the "financing account") applicable to post-1991 cohort transactions.

**275. Please provide evidence (or cite relevant portions of the record) that the premium rates for the export credit guarantee programmes are "reviewed annually" as stated in US 28 January comments on response to Question No. 223 (see also US 22 December response to Question No. 107; Brazil's 28 January 2004 comments on responses to Question No. 223.).**

56. Exhibit US-150 is comprised of the two most recent internal USDA documents entitled "Annual Review of Fees for USDA Credit Programs," dated March 25, 2003, and April 8, 2002, respectively. In addition, Exhibit US-151 are Sections I and II of U.S. Office of Management and Budget Circular No. A-129, dated November 2000, entitled "Policies for Federal Credit Programs and Non-Tax Receivables." Section II.2.b mandates such annual review.

## List of Exhibits

US-143 Memorandum from Larry Mitchell, USDA Farm Services Agency, to Various FSA Offices, Administrators, and Divisions on Release of Restricted Information under the Freedom of Information Act (September 18, 1998)

US-144 USDA Farm Services Agency, Notice INFO-16: Releasing Lists of Names and Addresses in Response to Requests Under FOIA (December 1, 1998)

US-145 Contents of 4 corrected data files submitted on January 28, 2004

US-146 USDA, Commodity Credit Corporation, 58 Federal Register 15755-15756 (March 24, 1993).

US-147 Data in response to Panel Question 264(a): Exhibit US-128 on a Fiscal Year/ Cash Basis

US-148 Data in response to Panel Question 264(d): Claim Payments/ Recoveries/ Reschedulings on a Fiscal Year/ Cash Basis

US-149 United States Department of the Treasury Financial Manual I TFM 2-4600 (December 2003)

US-150 "Annual Review of Fees for USDA Credit Programs," March 25, 2003 and April 8, 2002.

US-151 United States Office of Management and Budget Circular No. A-129 (November 2000), Table of Contents, General Information, Appendix A, Sections I and II.

US-152 Commodity Credit Corporation Realized Losses and Appropriations to Restore Such Losses for Fiscal Years 1992-2003

US-153 Summary of Principal Terms, Conditions, and Duration of Each Rescheduling Reflected in Column F of Exhibit US-128

US-154 Partially Corrected Calculations Allocating Decoupled Payments for Upland Cotton Base Acres to Upland Cotton Using Incomplete Annex IV Methodology