

United States – Subsidies on Upland Cotton

(WT/DS267)

**Comments of the United States of America
on the March 10, 2004, Comments of Brazil
on the U.S. Data Submitted on March 3, 2004**

March 15, 2004

Introduction

1. The United States thanks the Panel for this opportunity to respond to the March 10 comments filed by Brazil¹ relating to the data submitted by the United States on March 3, 2004, in response to the Panel's supplemental request for information. Brazil's March 10 comments consist primarily of a series of calculations using the U.S. March 3 data in each of the methodologies previously explained by Brazil in its February 18 comments. The United States has previously explained, in filings on February 11² and March 3,³ that none of these methodologies is pertinent for purposes of the Peace Clause.⁴ Therefore, we will not repeat much of that analysis in these comments but rather will refer the Panel, as appropriate, to those previous comments by the United States.

2. Brazil states that, because the U.S. March 3 data "is the best information available before the Panel," Brazil "no longer considers that relying on its '14/16th methodology would be appropriate.'"⁵ This means that, by Brazil's own statement, the only methodology that Brazil had brought forward from August 2003 until January 2004 to allegedly demonstrate a breach of the Peace Clause is irrelevant to this dispute. Moreover, it is difficult to reconcile Brazil's concession with its view that the Panel need only apply a "reasonable" methodology to calculate the support to upland cotton since Brazil alleges that the 14/16th methodology produces results that are similar to those under its other (flawed) methodologies.

3. Brazil's disavowal of its 14/16th methodology, however, does highlight the shifting nature of Brazil's Peace Clause arguments on decoupled payments. It may be of use to set out just how and how many times Brazil's theories have changed in this dispute.

4. First, Brazil argued that all payments for upland cotton base acres were "support to upland cotton." For example, in response to Question 41 from the Panel following the first session of the first substantive meeting, Brazil wrote:

- "The only U.S. domestic support measures that Brazil is aware of that would meet the test of being 'support to upland cotton' are *those that it listed* for purposes of calculating the level of support in its First Written Submission. *In the view of Brazil, these non-green box domestic support measures are the measures that constitute 'support to' upland cotton* for the purpose of Article 13(b)."⁶

The decoupled measures listed in Brazil's first written submission (paragraphs 144, 148, and 149) were all production flexibility contract payments, market loss assistance payments, direct

¹ Brazil's Comments on U.S. 3 March 2004 Data (March 10, 2004) ("Brazil's March 10 Comments").

² Comments of the United States of America on the Comments of Brazil to U.S. Data Submitted on December 18 and 19, 2003 (February 11, 2004) ("U.S. February 11 Comments").

³ Comments of the United States of America on the February 18, 2004, Comments of Brazil (March 3, 2004) ("U.S. March 3 Comments").

⁴ *Agreement on Agriculture*, Article 13 ("Agreement on Agriculture").

⁵ Brazil's March 10 Comments, paras. 2-3.

⁶ Brazil's Answer to Question 41 from the Panel, para. 58 (footnote omitted; italics added).

payments, and counter-cyclical payments *for upland cotton base acres only*. Thus, “in the view of Brazil” as of the first session of the first substantive meeting, only these payments were within the Panel’s terms of reference.⁷

5. Second, in response to U.S. criticisms, Brazil realized that, on its own terms, the theory that all payments for upland cotton base acres were “support to upland cotton” was not tenable. Brazil’s theory ignored the fact that there were fewer acres planted to upland cotton than there were upland cotton base acres, suggesting that payment recipients utilized planting flexibility to plant other crops or nothing at all.

- Thus, following the first session of the first panel meeting, Brazil introduced the so-called 14/16th methodology, which adjusted total expenditures for upland cotton base acres “by the ratio of upland cotton base acres actually planted.” In Brazil’s words, “only the portion of upland cotton [base] payments that actually benefits acres planted to upland cotton can be considered support to upland cotton.”⁸

That is, Brazil amended its theory, arguing that all upland cotton was planted “on” upland cotton base acres.

6. Third, under Brazil’s fallacious argument that receipt of decoupled payments was necessary for upland cotton producers to cover their costs, Brazil acknowledged that it was not “necessary” that upland cotton be planted on upland cotton base acres – that is, rice and peanuts base acreage also received payments that would allow these alleged costs to be covered. However, Brazil argued that the facts did not support the notion that upland cotton was “planted on” rice or peanuts base acreage.⁹ Rather, through the second session of the Panel’s first substantive meeting (that is, after the Peace Clause phase of the dispute had concluded), Brazil continued to insist that “at a minimum a significant majority of upland cotton farmers in MY 2002 were farming on upland cotton base acres.”¹⁰

7. Fourth, however, even Brazil’s own evidence indicated that not all upland cotton was planted “on” upland cotton base acres. For example, as a result of pest eradication and adoption of biotechnology, significant acres in the U.S. Southeast previously planted to peanuts, corn, and other crops were newly being planted to upland cotton.¹¹ Thus, Brazil altered its theory again and argued that “Brazil’s methodology assumes that U.S. producers of upland cotton grew

⁷ See U.S. Comment on Brazil’s Answer to Question 204 from the Panel, paras. 36-39 (providing additional citations) (January 28, 2004).

⁸ Brazil’s Answer to Question 67 from the Panel, para. 130 (table fn. 2-5) (August 11, 2003).

⁹ See, e.g., Brazil’s Rebuttal Submission, para. 32, 38 (August 22, 2003).

¹⁰ Brazil’s Further Submission, para. 335; see also *id.*, para. 331.

¹¹ See Brazil’s Answer to Question 125(7), para. 38 (October 27, 2003) (“Testimony from NCC representatives indicated that a number of producers in the south-eastern part of the United States grew upland cotton on corn base acreage during MY1999-2001.”) (footnote omitted).

upland cotton on upland cotton base acreage,” which is “a reasonable proxy, because there will be some upland cotton that is grown on rice (and peanut) base receiving higher payments, and some upland cotton that is grown on, *e.g.*, corn base receiving somewhat lower payments. On average, Brazil’s approach would roughly cancel out the over-counting of rice and peanut payments and the under-counting of corn and any other lower-paying program crop payments.”¹²

8. Fifth, Brazil suggested in its further rebuttal submission of November 18, 2003, that “the United States has refused to generate information regarding how much and which of the contract payment base acreage was planted to upland cotton.”¹³ However, Brazil nowhere explained how such an analysis of “how much and which of the contract payment base acreage was planted to upland cotton” could be done. In fact, Brazil suggested that the Panel should request the United States to produce information and that “Brazil would be pleased *to provide the Panel with a precise list of parameters and questions that should be answered* in any such analysis.”¹⁴

9. Brazil, however, did not provide any such “precise list of parameters and questions” until the second panel meeting in December 2003. While Brazil requested certain information through its request in Exhibit BRA-369, Brazil did *not* explain to the Panel or the United States how it proposed to determine the amount of upland cotton acreage “planted on” base acreage for any particular commodity. Indeed, the Panel was compelled on January 12, 2004, to ask Brazil to “submit a detailed explanation of the method by which one could calculate total expenditures to producers of upland cotton under the four relevant programmes on the basis of the data which it seeks.”¹⁵

10. Sixth, Brazil put forward on January 20, 2004, *for the first time* its allocation methodology – that is, after further rebuttal submissions had been filed and as the “serious prejudice” phase (and indeed the dispute settlement proceeding) was concluding. Here, Brazil set out its notion of under- and over-planting of program crop base acreage, which the United States has criticized and rebutted in a series of filings over the last month.

11. Seventh, however, Brazil did not stop there. On January 28, 2004, in its comments on the U.S. December 18 and 19, 2003, data (the comments that were to have been filed on January 20), Brazil set forth yet another in-the-alternative methodology, a purported application of that December data to the Subsidies Agreement Annex IV methodology.¹⁶

¹² Brazil’s Answer to Question 125(8), para. 40 (October 27, 2003).

¹³ Brazil’s Further Rebuttal Submission, para. 50.

¹⁴ Brazil’s Further Rebuttal Submission, para. 48 (italics added).

¹⁵ Panel Communication of January 12, 2004 (Question 258).

¹⁶ The United States has elsewhere explained that Brazil has not brought forward evidence and arguments to allow the Annex IV methodology to be applied for purposes of its subsidies claims. *See, e.g.*, U.S. March 3 Comments, paras. 29-35, 45-56.

12. Eighth, Brazil put forward on February 18, 2004 – that is, in its last substantive filing in this dispute – *two more* in-the-alternative methodologies to calculate the alleged support to upland cotton from decoupled payments. First, it explained a cotton-to-cotton methodology¹⁷ under which only decoupled payments for upland cotton base acres would be deemed support to upland cotton. Second, it introduced a “modified (program crop only) annex IV methodology”¹⁸ under which decoupled payments would be allocated only to program crops in the proportions to which they contributed to the value of program crop production on a farm.

13. Given this never-ending stream of theories of how and to what extent decoupled income support payments could be support to upland cotton, it would appear that Brazil has made any argument that suited its immediate needs to maximize the purported support to upland cotton. There can be no question that Brazil's incessant in-the-alternative argumentation has prejudiced the United States by significantly increasing the burden in evaluating and responding to Brazil's theories.

14. Brazil has argued that “[w]ithout farm-specific data, there [was] no basis to develop, let alone apply, Brazil's methodology. Brazil could only develop a methodology to apply to actual data when it received the EWG data in mid-November, and when it then sought farm-specific data from the United States.”¹⁹ In this statement, however, Brazil concedes that it had not developed – because, allegedly, “there [was] no basis to develop” – its methodology until, at the earliest, mid-November 2003.

- It is simply incredible to read that a complaining party should have chosen to challenge payments which, on their face, are not product-specific support to upland cotton, yet not have developed a methodology to determine the amount of the payments it would consider “support to [that] specific commodity” until at least 6 months into the dispute.
- That is, it is rather startling that Brazil, as the complaining party, began this dispute without the evidence, *or even the legal theory*, necessary to sustain its assertions.

Further, we note that, even if Brazil *had* developed its methodology in mid-November, it did not choose to put this methodology forward until January 20, 2004 (eight months into this dispute), in response to the Panel's Question 258.

15. It is precisely this long delay in developing its Peace Clause arguments that led Brazil first to focus solely on payments for upland cotton base acres, and then only six months or more

¹⁷ Brazil's February 18 Comments, para. 46 (“Brazil first presents the results of using a slight variation of Brazil's methodology.”).

¹⁸ Brazil's February 18 Comments, para. 50 (“Brazil also applied the revised U.S. summary data to a modified ‘Annex IV’ methodology allocating total contract payments to farms producing upland cotton over the value of *contract payment* crops produced on these farms.”).

¹⁹ Brazil's February 18 Comments, para. 84.

into the dispute to seek to bring in payments for non-upland cotton base acres. As the United States has argued, Brazil did not identify these payments that are not within the Panel's terms of reference²⁰ and which, if included in this dispute, would prejudice U.S. rights of defense.²¹ Furthermore, that Brazil had not crafted its methodology for Peace Clause purposes until six or eight months into this dispute undermines Brazil's Peace Clause interpretation: that is, Brazil has cast and recast its Peace Clause theories in order to find a theory that would result in U.S. support exceeding the 1992 level. As the United States has demonstrated, however, non-product-specific support (whether green box or not) cannot be allocated as "support to a specific commodity" within the ordinary meaning of that phrase and as defined in Article 1(a) of the Agreement on Agriculture.²² Thus, there is no basis to allocated decoupled income support payments to upland cotton for purposes of Peace Clause. Brazil various theories also rely on a "budgetary outlays" approach, which, for all the reasons the United States has explained previously, is not found in the Peace Clause text and is the wrong approach for Peace Clause purposes.

Brazil's Attempt to Resurrect a Basis for the Use of Adverse Inferences Is Unsustainable

16. After stating that the U.S. March 3 data "is the best information available before the Panel" and that "the United States appears to have provided *complete summary base and complete summary planted data covering all crops for which data was requested by the Panel and all farms covered by the Panel's request*,"²³ Brazil nonetheless faults the United States for "certain problems" with the data and argues, in the alternative, that the alleged U.S. "refusal" to provide certain data "would permit the Panel to draw the adverse inferences that this data – if produced – would have shown even higher payments being allocated to upland cotton."²⁴ Brazil's effort to resuscitate its request for "adverse inferences" to be drawn is misguided. First, in its February 13 letter, Brazil stated that "by producing the complete aggregated information, there would no longer be a need to draw adverse inferences."²⁵ As noted, Brazil has in its March 10 comments stated that the United States has produced "complete summary base and complete summary planted data covering all crops for which data was requested by the Panel and all farms covered by the Panel's request." Therefore, Brazil has implicitly conceded that there is no basis to draw adverse inferences, and its suggestion otherwise is yet another in-the-alternative argument that only serves to add needlessly to the complexity of this dispute.

17. This conclusion is confirmed by examining the data that the United States allegedly "refused" to provide. First, Brazil faults the United States for providing data with respect to

²⁰ U.S. February 11 Comments, paras. 47-50.

²¹ See U.S. Comments on Brazil's Answer to Question 204 from the Panel, paras. 34-42 (January 28, 2004).

²² See, e.g., U.S. March 3 Comments, paras. 3-16.

²³ Brazil's March 10 Comments, paras. 3-4 (italics added).

²⁴ Brazil's March 10 Comments, para. 10 fn. 14.

²⁵ Brazil February 13, 2004, Letter to the Panel, at 5.

farms that had upland cotton base acres but planted no upland cotton within Category A.²⁶ We note that the Panel's supplementary request for information asked for information on farms with "fewer upland cotton planted acres than upland cotton base acres, or equal numbers of each,"²⁷ which does not exclude farms with no planted acres from its ambit. Indeed, as Brazil points out, on January 28, 2004, and on December 19, 2003, the United States had provided planted and base acreage information relating to (1) farms that both planted upland cotton and had upland cotton base acres and (2) farms that did not plant upland cotton and had upland cotton base acres.²⁸ It is not apparent from the text of item (b) of the Panel's supplementary request for information that the Panel was seeking the same information that had previously been provided. Because the United States provided the information requested under item (b) with respect to Category A farms, there is no basis for any adverse inference to be drawn.

18. Second, Brazil argues that the U.S. March 3 data "does not provide contract payment yield or payment[] units." However, Brazil itself immediately concedes that "the Panel's 3 February 2004 Request does not ask for this information."²⁹ Thus, as the payment yield information was not requested by the Panel, the United States could not have refused to provide it, and there is no basis for any adverse inference to be drawn.³⁰

19. Third, Brazil states that "the United States did not produce any information that would allow the calculation of 'producer-based' soybean market loss assistance [that is, "oilseed payments" for soybean producers³¹] and peanut direct and counter-cyclical payments received by producers operating upland cotton farms."³² However, Brazil does not contest that these payments were made to producers and that there were no base acres for these payments on any farms for the relevant years (soybeans in 1999 and 2000, peanuts in 2002). The United States recalls that the Panel's supplementary request for information related to "farms" with upland cotton base acres and/or upland cotton planted acres.³³ Thus, the Panel's request did not ask for

²⁶ Given Brazil's repeated complaints in this dispute, it is ironic that Brazil now, in effect, complains that the United States has provided too much information.

²⁷ Panel's Supplementary Request for Information, item (b) (February 3, 2004).

²⁸ Brazil's March 10 Comments, para. 6 & fn. 5.

²⁹ Brazil's March 10 Comments, para. 7.

³⁰ Brazil's comment that the United States should have provided information on payment units in "good faith" as it did in its data submissions of December 18 and 19, 2004, and January 28, 2004, fails to mention that Brazil's request for data specifically asked for contract yields to be provided. Exhibit BRA-369 (second paragraph, fourth bullet: requesting "payment yield for each program crop") (3 December 2003). The United States has responded to all requests for data in this dispute in "good faith" by providing all the data (within the limits of U.S. law) requested.

³¹ See, e.g., Response of the United States of America to the Panel's February 3, 2004, Data Request, As Clarified on February 16, 2004, paras. 10-13.

³² Brazil's March 10 Comments, para. 8.

³³ See Panel's Supplementary Request for Information, item (b) (first solid bullet: "How many farms had fewer upland cotton planted acres than upland cotton base acres, or equal numbers of each? We refer to these as 'Category A' farms."; second solid bullet: "How many farms had more upland cotton planted acres than upland cotton base acres? We refer to these as 'Category B' farms."; third solid bullet: "How many farms had upland cotton

“payments received by producers operating upland cotton farms,” and there is no basis to draw an adverse inference from an alleged “failure” to provide information not requested.

20. In sum, Brazil's in-the-alternative renewed request concerning adverse inferences has no basis in fact; either the Panel's supplementary request for information did not request the information or the United States properly responded to the request as drafted. Furthermore, to the extent that Brazil argues that the contract payment yield data or soybeans or peanuts payments received by producers operating upland cotton farms were “necessary” for its Peace Clause analysis, this would demonstrate not that any adverse inference should be drawn but rather that Brazil, as the complaining party bearing the burden of proof, has failed to bring forth evidence to make a *prima facie* case.

Brazil's Allocation Methodologies Are Irrelevant for Peace Clause Purposes and, in any event, Continue to Suffer from Conceptual and Methodological Flaws

21. The United States has set forth in other comments the reasons that no allocation methodology may be employed for purposes of a Peace Clause analysis since the only relevant support is “support to a specific commodity” – that is, “assistance” or “backing” “specially pertaining to a particular” “agricultural crop” (in the ordinary meaning of the terms) or “support . . . provided for a basic agricultural product in favour of the producers of the basic agricultural product” (read in the context of the definition of product-specific support in Article 1(a) of the Agreement on Agriculture).³⁴

22. Further, we have explained that for purposes of Brazil's serious prejudice claims, the Annex IV methodology³⁵ would be necessary to identify the subsidy benefit and subsidized product for each of the challenged decoupled income support measures – and Brazil has not brought forward evidence and arguments to allow the Annex IV methodology to be used.³⁶

23. Finally, we have previously presented comments on each of Brazil's allocation methodologies.³⁷ As the calculations in Brazil's March 10 Comments are substantially similar to those it set out earlier, our comments on Brazil's new calculations are limited but also substantially similar to those we have previously provided. In particular, we note that Brazil has simply ignored the U.S. criticisms of its pseudo-“Annex IV” methodology and excluded any sales from fruits and vegetables production, non-crop on-farm activities, and all other off-farm economic activity.

Cotton-to-Cotton Methodology

planted acres but no upland cotton base acres? We refer to these as ‘Category C’ farms.”) (February 3, 2004).

³⁴ See U.S. March 3 Comments, paras. 3-16; U.S. February 11 Comments, paras. 7-14.

³⁵ *Agreement on Subsidies and Countervailing Measures*, Annex IV, paras. 2-3 (“Subsidies Agreement”).

³⁶ See, e.g., U.S. March 3 Comments, paras. 29-35; U.S. February 11 Comments, paras. 18-21.

³⁷ See, e.g., U.S. March 3 Comments, paras. 36-56; U.S. February 11 Comments, paras. 35-60.

24. The United States has previously set out its criticism of this methodology, under which decoupled payments for upland cotton base acres on a farm that are equal to or less than the number of upland cotton planted acres are deemed to be support to upland cotton. Indeed, Brazil has never responded to the U.S. explanation that “there are no physical ‘base acres’ on a farm. Crop base acres are an accounting fiction that do not represent any particular acres on a farm.”³⁸ Thus, the very notion that base acres are “planted to” any particular crop (or, conversely, that a crop is “planted on” any particular base acre) is illusory.

25. We do note that the application of this erroneous methodology to the March 3 data does result in significant downwards revisions in the calculations Brazil previously presented, ranging from \$58 million (MY2001 PFC) to \$122 million (MY2002 CCP).³⁹

Brazil's Methodology

26. Again, the United States has previously set out at length its criticisms of Brazil's methodology. The inconsistencies and logical flaws in this methodology are striking and demonstrate the *post hoc* nature of Brazil's attempt to force an allocation methodology onto decoupled payments. For example:

- There is no physical or economic basis to consider that decoupled payments for base acres of a crop are support to current production of that crop or to other (underplanted) program crops. Base acres are not physical acres and are not “planted to” anything. A decoupled income support recipient may produce no, one, or multiple products; since money is fungible, those payments in economic terms (but not for purposes of Peace Clause) may be attributed to all (if any) of the recipient's sales.
- Brazil has never examined whether decoupled payments for non-upland cotton base acres “support or maintain” the production of those non-upland cotton program crops – and thus has demonstrated no basis (on its own theory) for allocating such payments to those crops first.
- Brazil argues that base acres are “planted to” a particular commodity, one-for-one, but has no explanation for how an upland cotton planted acre can also be deemed to be “planted on” multiple base acres at once, as occurs when “underplanted” base acres are totaled and allocated proportionally to all “excess” planted acres (including cotton).⁴⁰

³⁸ See, e.g., U.S. March 3 Comments, paras. 37-38.

³⁹ Compare Brazil's March 10 Comments, para. 15 with Brazil's February 18 Comments, para. 47.

⁴⁰ For example, in Exhibit BRA-433, Brazil presents calculations for allocating payments under its methodology for the different categories of farms set out in the Panel's supplementary request for information. For marketing year 2002, Category B2 farms planted 2,703,663 acres of cotton and had 2,035,335 base acres of cotton. Thus, Brazil calculates that there were 668,329 overplanted cotton acres eligible for allocated payments. Base acreage for other program crops for Category B2 farms exceeded planted acreage for those crops by 1,197,785 acres,

- Brazil has never provided any logical explanation for why decoupled income support payments would be attributed to program crops but not to other crops or other on-farm or off-farm economic activities (as economics and the Annex IV methodology would suggest is necessary).
- Neither has Brazil attempted to apply its own rationale that decoupled payments are “support to a specific commodity” when such payments “cover (or contribute to) the costs of production” of that commodity⁴¹ to any other product produced by payment recipients, thus invalidating its own methodology, under which payments for base acreage is first support to the crop to which the acreage corresponds and then to other program crops. Using Brazil’s own “cost of production” principle, there is no basis to assert that order of analysis since Brazil has presented no evidence that such payments “cover (or contribute to) the costs of production” of those commodities but not others.

The United States has explored at some length these and other logical inconsistencies in Brazil’s purported methodology for allocating decoupled payments to particular commodities. Although there is no basis in the Peace Clause to allocate non-product-specific support as support to a specific commodity, we nonetheless invite the Panel to consider these reasons why Brazil’s methodology cannot serve as a neutral means to allocate decoupled payments.⁴²

27. We also pause to recall that one of Brazil’s primary responses to the U.S. criticism that its methodology would result in different subsidization rates for upland cotton on a single farm and would result in the allocation of multiple non-upland cotton base acres per cotton planted acre was that “both of these alleged problems . . . do not exist from MY 2002. This is because Brazil’s methodology allocates for each planted acre[] of upland cotton only one upland cotton base acre.” Brazil then went on to suggest that because in MY 2002 greater than 99 percent of direct and counter-cyclical payments received by upland cotton producers were for upland cotton base acres and because upland cotton base exceeded upland cotton planted acreage, “the two main U.S. criticisms affect . . . at most, 0.9 percent of the payments at issue for MY 2002.”⁴³

28. However, Brazil’s March 10 comments tell quite a different story. There, Brazil calculates “the amount of upland cotton planted acres for which there exists a corresponding upland cotton base acre [by] farm category.”⁴⁴ The percentage of upland cotton planted acreage for which an upland cotton base acre exists is 72.87 percent in marketing year 1999,

and no other program crop was planted in excess of its base acreage. Thus, Brazil allocated the total payments “free to be allocated” (\$21,290,090) from the non-upland cotton base acreage entirely to upland cotton. This means that the 668,329 overplanted cotton acres were “planted on” 1,197,785 “excess” base acres for other program crops, or each “excess” acre of cotton was “planted on” 1.79 non-upland cotton base acres.

⁴¹ Brazil’s February 18 Comments, para. 3.

⁴² See U.S. March 3 Comments, paras. 37-44; U.S. February 11 Comments, paras. 35-43; U.S. Comments to Brazil’s Answer to Question 258 from the Panel, paras. 207-29 (January 28, 2004).

⁴³ Brazil’s February 18 Comments, para. 60.

⁴⁴ Brazil’s March 10 Comments, para. 20.

70.03 percent in marketing year 2000, 68.06 percent in marketing year 2001, and 84.33 percent in marketing year 2002.

- That is, in any given year, approximately 15 to 22 percent of upland cotton planted acres – between 2.1 million and 4.9 million acres – were allocated payments for non-upland cotton base acres and would be subject to the U.S. criticisms dismissed by Brazil as *de minimis*. Brazil simply ignores this issue in its March 10 comments.

Furthermore, we recall that Brazil stated that “[a]s for some of the U.S. criticisms that might affect the results (except for MY2002), Brazil will control for these effects once the United States provides aggregate data in the manner requested by the Panel.”⁴⁵ The United States is not aware of any explicit recognition by Brazil of “U.S. criticisms that might affect the results” nor any effort by Brazil in its March 10 comments to “control for these effects.”

29. Finally, we note that the application of Brazil’s erroneous methodology to the March 3 data again results in significant downwards revisions in the calculations Brazil previously presented, ranging from approximately \$43 million (MY2001 PFC) to \$120 million (MY2002 CCP).⁴⁶

Modified U.S. Annex IV methodology

30. Brazil presents largely unchanged “modified Annex IV” calculations, for example, excluding both soybeans (marketing years 1999 and 2000) and peanuts (marketing year 2002) as a program crop.⁴⁷ Under this “modified Annex IV” methodology, Brazil allocated total contract payments to upland cotton “according to the share of upland cotton crop value of the total value of contract payment crop production.”⁴⁸ Thus, the U.S. view of this “modified” methodology

⁴⁵ Brazil’s February 18 Comments, para. 67.

⁴⁶ Compare Brazil’s March 10 Comments, para. 19 with Brazil’s February 18 Comments, para. 49.

⁴⁷ We note that the rice prices used by Brazil in its calculations in Exhibit BRA-434 are incorrect. Brazil has mistakenly divided the average rice farm price, reported in dollars per hundredweight (i.e., 100 pounds), by 220.46 instead of by 100 to obtain a price expressed in dollars per pound.

	Brazil 1/	WASDE 2/
MY1999	\$0.027	\$0.0593
MY2000	\$0.025	\$0.0561
MY2001	\$0.019	\$0.0425
MY2002	\$0.019	\$0.0449

1/ Exhibit BRA-434

2/ *World Agricultural Supply and Demand Estimates*, available at: <http://www.usda.gov/agency/oce/waob/wasde/wasde.htm>.

⁴⁸ Brazil’s March 10 Comments, para. 24.

remains unchanged: Brazil's approach is fundamentally inconsistent with Annex IV, paragraph 2, under which the subsidy is allocated over "the total value of the recipient firm's sales." Furthermore, there is no plausible basis to maintain that decoupled income support payments are support only to contract payment crops. Brazil also improperly includes the total value of contract payments in its calculation when only payments for upland cotton base acres are within the scope of this dispute.

"U.S. Annex IV Methodology"

31. Brazil offers no new analysis in its March 10 comments but just repeats the calculations presented in its February 18 filing. Thus, Brazil's "US Annex IV methodology" does not reflect the "U.S." interpretation of Annex IV, which is based on the text of Annex IV. That text establishes that, if a payment is not "tied to the production or sale of a given product," the subsidized product is all of the recipient firm's sales, and the subsidy for any one product is that product's share of "the total value of the recipient firm's sales."⁴⁹ Brazil does not use "the total value of the recipient firm's sales" in its "U.S. Annex IV calculation" and does not even attempt to calculate total sales of upland cotton producers.

32. Because Brazil reiterates its February 18 calculations, Brazil's March 10 calculations are similarly flawed. First, Brazil errs by omitting the value of fruits and vegetables in calculating the total value of non-program crop production. As the U.S. March 3 data shows, in marketing year 2002 alone, 1.2 million acres were planted to fruits and vegetables on farms that reported cotton base acreage.⁵⁰ As pointed out in the U.S. comments of February 11,⁵¹ excluding fruits and vegetables biases significantly downward the value of non-program crop acreage. For example, the United States estimated the per-acre value of non-program crops *including* fruits and vegetables was estimated at \$281⁵² for 2002 – that is, 138 percent higher than the \$118 per acre Brazil calculated when fruits and vegetables are excluded.⁵³

33. Brazil suggests that it was not able to make any adjustment to its calculations because of its inability to separate those farms with no planted acres of cotton from Category A. However, Brazil does not explain why it was unable to use the actual planted acreage data, including that for fruits and vegetables, for Category B farms.⁵⁴ Nor does Brazil explain why it was unable to use the state-by-state information on plantings to make any adjustment to its use of "the average

⁴⁹ Subsidies Agreement, Annex IV, paras. 2-3.

⁵⁰ See file "DCP02-2W.xls" ("Grand Total (Farms A - C)" row).

⁵¹ See U.S. February 11 Comments, para. 54.

⁵² See Exhibit US-154.

⁵³ Brazil's February 18 Comments, Annex A, Table 4.5.

⁵⁴ Category C farms had no upland cotton base acres and thus received no decoupled payments within the scope of this dispute. To the extent Brazil disagrees, however, the same criticism of Brazil's failure to use the actual planted acreage data applies.

per-acre value of production of non-program crops in that marketing year *in the entire United States*.”⁵⁵

34. Further, Brazil has not taken any account of the value of on-farm production other than crops, and has presented no data that would allow that calculation to be made. Again, the 1997 ARMS cotton costs of production survey suggested that, had Brazil taken into account the value of non-crop on-farm production, the share of cotton as a percent of total farm sales would be lower still. For 1997, when the value of cotton was high, the 1997 ARMS cotton costs of production survey reported that cotton accounted for only 44.5 percent of the total value of agricultural production on cotton farms.⁵⁶

35. Brazil also fails to include off-farm economic activity, which can be substantial, in its calculation. Annex IV, paragraph 2, establishes that the non-tied subsidy is allocated over “the *total value* of the recipient firm’s sales,” not merely its *farm* sales. As we have previously noted, cotton operations earn almost 30 percent of income from off-farm sources.⁵⁷

36. Finally, Brazil continues not to make any adjustment for the fact that landowners capture the subsidy benefit of payments on rented acres. As the United States has noted, Brazil has previously conceded that, as of marketing year 1997, 34 to 41 cents per dollar of production flexibility contract payments were capitalized into land rent.⁵⁸ Furthermore, certain missing pages from Exhibit BRA-276 report that, during 1998-2000, the capture by landowners through increased rent of production flexibility contract payments increased to an estimated average of 81 to 83 percent.⁵⁹ Thus, Brazil’s own evidence does not support its decision not to adjust the subsidy benefit to upland cotton producers downwards to reflect the two-thirds of cotton acres that are rented by producers, not owned.

Conclusion: Brazil Can Only Prevail on the Peace Clause Under an Incorrect Interpretation of the Peace Clause

37. The United States has demonstrated that Brazil’s reading of the Peace Clause is not tenable; instead, Brazil invents the concept that non-product-specific support must be allocated to specific commodities. This concept runs directly contrary to the ordinary meaning of the Peace Clause text and directly contrary to its context, including the fundamental separation of product-specific and non-product-specific support in the Agreement on Agriculture.

⁵⁵ Brazil’s January 28 Data Comments, para. 90 (italics added).

⁵⁶ U.S. March 3 Comments, para. 50; U.S. February 11 Comments, para. 55.

⁵⁷ See U.S. March 3 Comments, para. 51.

⁵⁸ Brazil’s Answer to Question 179 from the Panel, para. 165 (October 27, 2003); Brazil’s Opening Statement at the Second Panel Meeting, para. 57.

⁵⁹ U.S. March 3 Comments, paras. 52-54; Exhibit US-155, at 106.

38. The United States has also demonstrated that Brazil's approach to its "serious prejudice" claims is misguided. As mentioned previously, Brazil's notion that "the effect of the subsidy" may be analyzed without knowing the amount of the challenged subsidy is akin to saying that "the effect of eating" may be determined without knowing how much is being eaten.⁶⁰ Of course, to determine "the effect of eating" one must also determine "what" is being eaten (in addition to "how much"); similarly, "the effect of the subsidy" will depend on the nature of the challenged subsidy.⁶¹ Thus, the United States believes that Brazil has failed to make a *prima facie* case with respect to decoupled income support payments (direct and counter-cyclical payments)⁶² under its serious prejudice claims because it has not identified either the subsidy benefit or the subsidized product(s) using the Annex IV methodology. In addition, Brazil has failed to establish that the *effect* of these challenged payments is "serious prejudice"; to the contrary, the United States has demonstrated that the effect of these decoupled measures is no more than minimal.⁶³

39. Finally, the United States has demonstrated that using any measurement that reflects the support "decided" by the United States – rather than factors (such as market prices) beyond the United States' control – U.S. support to upland cotton in marketing years 1999-2002 has not exceeded the 1992 marketing year level.⁶⁴ Brazil's proposed approach suffers from the key flaws (among others) that it relies on the argument that:

(1) budgetary outlays must be used, despite the fact that the United States never "decided" an expenditure level (a point confirmed by Brazil's own reliance on the marketing loan rate and counter-cyclical target price for purposes of its *per se* and threat of serious prejudice claims⁶⁵); and

⁶⁰ U.S. March 3 Comments, para. 30 fn. 59.

⁶¹ See Subsidies Agreement, Article 7.2 (request for consultations under Article 7.1 "shall include a statement of available evidence with regard to (a) the existence *and nature* of the subsidy in question") (italics added).

⁶² Only direct and counter-cyclical payments were measures in existence at the time the Panel was established during marketing year 2002. Both production flexibility contract payments and market loss assistance payments were recurring subsidies paid with respect to past production that had terminated by the time of the panel request and panel establishment.

⁶³ See, e.g., U.S. Comments on Brazil's Comments on U.S. Comments Concerning Brazil's Econometric Model, paras. 4-9 (January 28, 2004).

⁶⁴ See, e.g., U.S. February 11 Comments, paras. 15-17.

⁶⁵ See Brazil's Further Submission, para. 432 ("The existence of the 72.4 cents per pound support price under the 2002 FSRI Act alone causes production-enhancing and price-suppressing effects. The single fact that these programs exist ensures a guaranteed revenue amount from the production of upland cotton. This revenue floor is a guaranteed entitlement. That guaranteed revenue floor has the effect of removing any uncertainty and risk about the revenue farmers will receive for the crop. It means that regardless of the actual price development during the marketing year, a farmer knows that he or she will receive at the very least the loan rate for their product, plus price-triggered revenue support granted by the CCP program.").

(2) decoupled income support measures – the green box direct payments and the non-product-specific counter-cyclical payments⁶⁶ – can and must be allocated as “support to a specific commodity,” despite the ordinary meaning of those terms in their context in the Agreement on Agriculture.

40. That both of these conditions must be met is evident if one examines the four tables setting out Brazil's Peace Clause comparisons.⁶⁷

- For example, even using budgetary outlays, if decoupled income support payments are removed from Brazil's Peace Clause comparisons, *U.S. measures did not breach the Peace Clause in marketing years 2002 and 2000*. The 1992 support would be \$2,117.0 million, and the 2002 and 2000 levels would be \$1,557.1 million and \$1,218.7 million, respectively.⁶⁸

- On the other hand, even if decoupled income support measures were allocated according to any of Brazil's four erroneous methodologies, *U.S. measures did not breach the Peace Clause in marketing year 2001* if a price-gap calculation is used in place of outlays for marketing loan payments. A price-gap calculation eliminates the effect of market prices on the support provided.⁶⁹ U.S. measures conform to the Peace Clause in marketing year 2001 under two different Brazilian allocation methodologies if a price-gap calculation is used.⁷⁰

⁶⁶ Were the Panel to examine the terminated payments prior to the 2002 Farm Act, production flexibility contract payments would be green box, and the market loss assistance payments would be non-product-specific, as notified to the WTO.

⁶⁷ Brazil's March 10 Comments, paras. 35-38.

⁶⁸ See Brazil's March 10 Comments, paras. 35, 37. This calculation ignores the inappropriate inclusion of crop insurance payments (non-product-specific), cottonseed payments (not in existence at time of panel establishment), and “other payments” (not identified in Panel request). We also note that the marketing year 1999 budgetary outlay level would be \$2,431.6 million if decoupled support is excluded. Brazil has alleged that some portion of Step 2 payments are prohibited export subsidies, rather than domestic support, and the United States has argued that “other payments” are not within the Panel's terms of reference. The Panel's view of these issues could result in the 1999 budgetary outlay level too being below the 1992 level.

⁶⁹ See U.S. Rebuttal Submission, paras. 114-17. By holding the external reference price fixed, support measured using a price-gap calculation shows the effect of changes in the level of support (the applied administered price) decided by the United States, rather than changes in outlays that may result from forces beyond our control, such as market prices.

⁷⁰ For marketing year 2001, support measured using a price-gap calculation for price-based measures and budgetary expenditures for other payments results in \$1,251 million. For methodologies (1) (“cotton-to-cotton”) and (4) (“U.S. Annex IV methodology”), support was \$1,240.9 million and \$1,183.8 million. Again, these calculations do not remove crop insurance payments (non-product-specific), any portion of “Step 2” payments, or “other payments” (not within the scope of the dispute).

- Indeed, even without making any changes to Brazil's data, under two of its current "reasonable" methodologies, U.S. measures did not breach the Peace Clause in 2000, the year with the highest market prices and therefore the lowest marketing loan payments.⁷¹

41. The United States believes that a proper interpretation and application of the Peace Clause must reflect the way in which the United States "decided" support in marketing years 1992 and 2002⁷² – and, in the case of U.S. measures, the support to upland cotton as "decided" was a rate of support. However, the United States has demonstrated that even an AMS calculation that reflects the support decided by the United States rather than market prices beyond our control would also demonstrate that U.S. measures conform to the Peace Clause. Brazil's revised budgetary outlay calculations also support this view.

- If neither condition set out above is met – that is, decoupled income support measures are properly excluded from the Peace Clause analysis and price-based marketing loan payments are calculated using a price-gap methodology – *U.S. measures did not breach the Peace Clause in any marketing year between 1999 and 2002.*
- Support in marketing year 1992 would be \$1,384 million,⁷³ well above the revised support levels are \$659.1 million for marketing year 2002, \$458.9 million for marketing year 2001, \$582.7 million for marketing year 2000, and \$670.6 million for marketing year 1999.⁷⁴
- Again, these lower levels of support "decided" in recent years reflects the United States' decision after the Uruguay Round to move away from the product-specific deficiency payments with high target prices and instead to supplement producer income with a mix of decoupled income supports that are green box (direct payments) or non-product-specific (counter-cyclical payments).

⁷¹ Brazil's March 10 Comments, para. 37 (1992 budgetary outlays were \$2,117.0 million; 2000 outlays under the cotton-to-cotton methodology were \$2,068.8 million; 2000 outlays under the "U.S. Annex IV Methodology" were \$2,112.6 million).

⁷² The measures (subsidies) provided with respect to marketing years 1999-2001 were no longer in existence at the time of Brazil's panel request and panel establishment. To the extent the Panel were to examine these measures, however, the same analysis would apply.

⁷³ This figure uses the same \$1,017.4 expenditure amount that Brazil used for deficiency payments. This figure is not markedly different from the \$1,009 price-gap figure calculated by the United States using eligible acreage, but even if actual payment acreage were used, the price-gap payment total would be \$867 million. U.S. Comments on New Material in Brazil's Rebuttal Filings, para. 8 (August 27, 2003). Thus, the 1992 level of support would still be higher than in marketing years 1999-2002.

⁷⁴ These revised figures exclude decoupled payments and use the price-gap calculation for marketing loan payments, which results in a zero level of support since the marketing loan rate was below the fixed reference price. See U.S. Rebuttal Submission, para. 117 & fn. 148 (August 22, 2003). However, these revised figures do not even remove crop insurance payments (non-product-specific), any portion of "Step 2" payments (which Brazil alleges are, in part, prohibited export subsidies), or "other payments" (not within the scope of the dispute).

42. Were the Panel to reach the question of serious prejudice or threat thereof, the United States has demonstrated that Brazil has not made a *prima facie* case that the challenged U.S. measures have had that effect. However, the Panel should not even reach that question as the facts demonstrate that the United States has disciplined itself to grant support not in excess of that decided during the 1992 marketing year. Brazil must argue that non-product-specific support can be allocated as support to a specific commodity and must argue that support “decided” means budgetary outlays because without those conditions, it cannot demonstrate a Peace Clause breach. The United States has demonstrated, however, that Brazil’s approach is legally unsound and internally inconsistent. It would, moreover, provide no certainty for Members who seek to conform to their WTO obligations. Brazil’s constantly shifting methodologies reflect its desire to find an approach to maximize the dollars it could argue are support to upland cotton but do not reflect the legal texts, structure, and concepts found in the Agreement on Agriculture and the Subsidies Agreement.