

United States – Subsidies on Upland Cotton

(WT/DS267)

**Comments of the United States of America
on the February 18, 2004, Comments of Brazil**

March 3, 2004

Introduction

1. The United States thanks the Panel for this opportunity to provide comments on the February 18 comments filed by Brazil relating to the data submitted by the United States on December 18 and 19, 2003. As an initial matter, the United States finds it odd that Brazil's February 18 comments advance a number of new arguments concerning the applicability of the Peace Clause at this late stage in the proceedings, long after the time when the Peace Clause portion of the dispute was supposed to have been concluded. This only demonstrates the shifting nature of Brazil's arguments and approach to the legal provisions at issue.

2. In these comments, we proceed as follows:

- First, the United States sets forth how Brazil's arguments on the use of the December data are mistaken because of Brazil's erroneous interpretation of the Peace Clause phrase "support to a specific commodity."
- Second, we rebut Brazil's argument that support to a specific commodity may be determined by an analysis of whether the payment in question "cover[s] (or contribute[s] to) the costs of production of a crop." Brazil's "costs of production" principle finds no support in the text of the Peace Clause or of any WTO agreement and in fact collapses when applied to its logical conclusion.
- Third, we demonstrate that Brazil's argument that decoupled income support payments are *de facto* tied to production is in error.
- Fourth, we explain that Brazil has not made a *prima facie* case under its subsidies claims with respect to decoupled payments because it has failed to advance evidence and arguments to allow for identification of the challenged subsidy and subsidized product.
- Fifth, we demonstrate that Brazil's various allocation methodologies, in addition to being irrelevant for Peace Clause Purposes and inapplicable for serious prejudice claims, are internally inconsistent and illogical and that its so-called "Annex IV" methodologies are in fact unrelated to the text of Annex IV.
- Finally, we conclude by noting that Brazil's interpretation of the Peace Clause and application of the December data would upset the balance of rights and obligations of members in the WTO agreements.

Brazil Misinterprets the Peace Clause¹ Phrase, "Support to a Specific Commodity"

¹ In paragraph 19 of Brazil's February 18 comments, Brazil in passing characterizes the Peace Clause as "now-expired." As the United States has explained earlier in this proceeding, the issue of the date of expiration of the Peace Clause is not at issue in this proceeding. Brazil accepts that the Peace Clause was in effect when the Panel was established. However, the United States has also explained that the Peace Clause has not yet expired for the United States or other Members whose relevant "year" began later in 1995, so Brazil's characterization is inaccurate as well.

3. We begin by noting that the entirety of section 2, and many other parts, of Brazil's comments are based on an argument that Brazil invents and falsely ascribes to the United States. Brazil seeks to paint the U.S. interpretation of the Peace Clause proviso as "based on" an understanding that "'support to' means 'tied to' the production of a specific commodity" – that is, that "support to" in Article 13(b)(ii) of the Agreement on Agriculture means something like "tied to the production or sale of a given product" in paragraph 3 of Annex IV of the Subsidies Agreement.² Brazil's argument, however, is not based on any submission of the United States since the United States has never linked the Peace Clause to Annex IV. Indeed, in the U.S. February 11 comments, we specifically noted that:

[T]he terms "support to a specific commodity" and "product-specific support" are not found in Part III of the Subsidies Agreement, nor in Article 1 or Annex IV. Neither are the terms "subsidy," "benefit," or "subsidized product" from the Subsidies Agreement found in the Peace Clause proviso or any supporting text. Thus, the plain language of the Peace Clause and [Subsidies Agreement] Articles 5 and 6 indicate that these provisions refer to wholly different approaches and suggest that the methodology for allocating non-tied (decoupled) payments under the Subsidies Agreement may not be relevant under the Agreement on Agriculture. The definitions of product-specific support and non-product-specific support in Article 1(a) of the Agreement on Agriculture confirm that the Annex IV allocation methodology does not apply for purposes of the Peace Clause.³

Thus, contrary to Brazil's assertions, the United States is plainly *not* inappropriately attempting to interpret the phrase "support to" in the Peace Clause in light of the phrase "tied to" in Annex IV.⁴ Having laid down a patently incorrect understanding of the U.S. argument, Brazil proceeds never to address the true bases for the U.S. interpretation of the Peace Clause phrase "support to a specific commodity."

4. Although Brazil correctly suggests that the Panel should look to the ordinary meaning of the phrase "support to a specific commodity," it *only* provides a dictionary definition for one term in the phrase, "support" ("assistance, backing").⁵ Brazil's reliance on "support" is misplaced. When Brazil states: "The issue under Article 13(b)(ii) is whether a particular commodity receives 'backing' or support' from a domestic support measure," Brazil

² Brazil's February 18 Comments, para. 3.

³ U.S. February 11 Comments, para. 20 (footnote omitted).

⁴ Similarly, we are puzzled by Brazil's lengthy argument in section 4 of its comments that it is the U.S. position that "only Annex IV of the SCM Agreement offers any useful context" to finding some methodology to apply to decoupled payments for purposes of the Peace Clause analysis. Brazil's February 18 Comments, paras. 38-41. As set out above, the Peace Clause determination is made on the basis of its text in its context; the United States does not rely on Annex IV as context or otherwise for interpretation of the Peace Clause; and no methodology to allocate non-product-specific support to a specific commodity can be found in the Agreement on Agriculture.

⁵ Brazil's February 18 Comments, para. 3.

fundamentally misunderstands the issue.⁶ “Non-product-specific support” is also “support” to various agricultural commodities. The simple fact that it supports those commodities (on a non-specific basis) does not thereby convert that support into support to a “specific commodity” for purposes of Article 13(b)(ii). In addition, by solely defining “support,” Brazil avoids the ordinary meaning of the phrase as a whole – that is, “assistance” or “backing” “specially . . . pertaining to a particular” “agricultural crop”⁷ – a meaning which runs directly contrary to Brazil’s approach under which support to multiple commodities is at the same time support to particular commodities. Brazil not only fails to look to the ordinary meaning of *all* of the terms in this phrase,⁸ it also fails to read the phrase “support to a specific commodity” in light of any other provision of the Agreement on Agriculture (the most immediate context for the Peace Clause) that contains any of the terms “support,” “specific,” or “commodity.”⁹

5. For example, the phrase “support to a specific commodity” contains elements found in the phrases product-specific and non-product-specific support – but Brazil denies that those concepts have any relevance to the Peace Clause.¹⁰ Brazil also fails to discuss (and therefore presumably believes irrelevant) the similarities between the phrase “*support to a specific commodity*” and the phrases “*support . . . provided for an agricultural product* in favour of the producers of the basic agricultural product” (Article 1(a)) and “*support for basic agricultural products*” (Article 1(h)), which, respectively, define and refer to product-specific support (without using those exact words). Brazil’s interpretation of the Peace Clause phrase “support to a specific commodity,” in addition to ignoring the ordinary meaning of the phrase as a whole, ignores relevant context as well – that is, those phrases in the Agreement on Agriculture that, because of their close similarities, must inform a valid interpretation.

6. As we have previously noted, “support to a specific commodity” must be read not only according to the ordinary meaning of the terms, but also in light of the structure of the Agreement on Agriculture. Brazil asserts that Members would have used the exact phrase “product-specific support” instead of “support to a specific commodity” if they had meant the two to be read as

⁶ Brazil’s February 18 comments, para. 6.

⁷ See U.S. First Written Submission, para. 77 (July 11, 2003) (citing dictionary definitions of each term).

⁸ According to the customary rules of interpretation of public international law, the Agreement is to “be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” See Vienna Convention on the Law of Treaties, Article 31 (General rule of interpretation).

⁹ See, e.g., Agreement on Agriculture, Articles 1(a), 1(d), 1(f), 6.4, and Annex 3 (paragraphs 1 and 7).

¹⁰ Instead, Brazil claims that all of its arguments relating to product-specific support and non-product-specific support have been arguments “*in the alternative*.” Brazil also faults the United States for “falsely assert[ing] that Brazil has ‘conceded that ‘support to a specific commodity’ refers to ‘product-specific support.’” Brazil’s February 18 Comments, paras. 9-10. The United States notes that the Brazilian statement previously referred to by the United States (that is, “the support from contract payments that can be allocated to upland cotton is product-specific support within the meaning of the Agreement on Agriculture,” Brazil’s January 28 Comments, para. 73) did *not* contain any indication that it was made “*in the alternative*.” Nonetheless, in these comments, the United States proceeds as if Brazil’s February 18 comments are its final position.

having the same meaning,¹¹ but Brazil sets up a false dichotomy. The Agreement elsewhere defines (Article 1(a)) and refers to (Article 1(h)) this concept without using that exact phrase. Indeed, the Agreement on Agriculture *nowhere* uses the exact phrase “product-specific support”. A close approximation is the phrase “product-specific domestic support” in Article 6.4(a)(i); in Annex 3, paragraph 1, the term “product-specific” is used in the context of describing the AMS to be calculated for each basic agricultural product.¹² Despite the absence in the text of the exact phrase “product-specific support,” even Brazil has no difficulty recognizing that such a concept exists in the Agreement on Agriculture; thus, that the exact phrase “product-specific support” was not used in the Peace Clause is no bar to finding that this is the correct interpretation of “support to a specific commodity.”¹³

7. In addition, Brazil's suggestion that “support to a specific commodity” was intended to clarify that the Peace Clause test involves only “support to an individual commodity, not a *group* of commodities such as grains or even all commodities,”¹⁴ does not withstand scrutiny.

- First, the phrase “support to a commodity,” without the use of the word “specific,” conveys the same meaning as “support to an individual commodity” (Brazil's proffered interpretation); thus, Brazil's interpretation renders the use of the term “specific” inutile.
- Second, under Brazil's interpretation of the Peace Clause, support to “a group of commodities” or “even all commodities” could be support to a specific commodity because the payments may be allocated to an individual commodity depending on what the recipient produces. Thus, Brazil's own Peace Clause interpretation contradicts this distinction between “support to an individual commodity” and support “to a group of commodities.”

In addition, Brazil's suggestion that “the *chapeau* of Article 13(b)(ii) confirms this broader meaning of ‘support,’ because it includes all types of non-green box measures,”¹⁵ simply begs the question. “Domestic support measures that conform fully to the provisions of Article 6” (the language in the *chapeau*) may be either product-specific or non-product-specific, and even Brazil would agree that non-product-specific support is not “support to a specific commodity.” Thus,

¹¹ Brazil's February 18 Comments, para. 5 (“Negotiators presumably knew what they intended when they used the very particular term ‘product-specific support.’ They used the term repeatedly in the Agreement on Agriculture, and even defined ‘non-product-specific support in Article 1(a) – yet they declined to use ‘product-specific support’ in Article 13(b)(ii)”).

¹² See Agreement on Agriculture, Annex 3, para. 1 (“Subject to the provisions of Article 6, an Aggregate Measurement of Support (AMS) shall be calculated on a product-specific basis for each basic agricultural product receiving market price support, non-exempt direct payments, or any other subsidy not exempted from the reduction commitment (‘other non-exempt policies’).”).

¹³ For convenience sake, the United States will use the term “product-specific support” as a shorthand for the concept of support to a specific commodity, in contrast to “non-product-specific support.”

¹⁴ Brazil's February 18 Comments, para. 5.

¹⁵ Brazil's February 18 Comments, para. 4.

just because a measure falls within the Article 13(b)(ii) chapeau does not assist in determining whether that measure provides “support to a specific commodity.”

8. What may be most striking about the Brazilian critique of the U.S. reading of the Peace Clause is that it nowhere presents nor rebuts the basis for the U.S. interpretation. The basis for the U.S. interpretation is set out plainly in the U.S. February 11 comments:

The lack of grounding of Brazil's methodology in the WTO agreements stems from its erroneous interpretation of “support to a specific commodity.” *Brazil has consistently failed to read together the definitions of product-specific support and non-product-specific support in Article 1(a) of the Agreement on Agriculture.* Read in conjunction with one another, non-product-specific support (“support provided in favour of agricultural producers in general”) is a residual category of support that is not product-specific (“support . . . provided for an agricultural product in favour of the producers of the basic agricultural product”).¹⁶

Brazil nowhere addresses the U.S. argument relating to the definition of product-specific support in Article 1(a) of the Agreement on Agriculture. In fact, whereas in Brazil's Peace Clause submissions it serially misquoted the definition of product-specific support in Article 1(a), dropping key words,¹⁷ in its February 18 comments Brazil avoids that inconvenient definition *by simply never mentioning it*.¹⁸ At the same time, however, Brazil relies heavily on the definition of non-product-specific support in Article 1(a).¹⁹ Thus, once again, Brazil invites the Panel to commit legal error in interpreting the phrase “non-product-specific support provided in favour of agricultural producers in general” devoid of the context provided by the immediately preceding definition of product-specific support.

9. That Brazil's position is untenable is demonstrated by comparing Annex 3, entitled “Calculation of Aggregate Measurement of Support,” with Article 1(a), which defines “Aggregate Measurement of Support” or “AMS.” Paragraph 1 of Annex 3 specifies that two different types of AMS shall be calculated:

- First, “an Aggregate Measurement of Support (AMS) shall be calculated *on a product-specific basis* for each basic agricultural product.” Second, “[s]upport *which is*

¹⁶ U.S. February 11 Comments, para. 10 (emphasis added).

¹⁷ See U.S. Rebuttal Submission, para. 82 (August 22, 2003); U.S. Comments on Brazil's Rebuttal Submission, para. 23 n.30 (August 27, 2003).

¹⁸ See, e.g., Brazil's February 18 Comments, para. 9 (“Brazil has argued that the meaning of ‘product-specific’ AMS must be governed by the only term providing some guidance as to what it means – the definition of ‘non-product-specific support’ in Article 1(a) of the Agreement on Agriculture.”).

¹⁹ See, e.g., Brazil's February 18 Comments, paras. 9, 12, and 18.

non-product specific shall be totalled into one non-product-specific AMS in total monetary terms.”

Thus, Annex 3 distinguishes and calls for the separate calculation of non-product-specific support and product-specific support, which together comprise the AMS. Article 1(a), defining AMS, contains the identical distinction. While only non-product-specific support is identified by name, the structure of the AMS definition – which parallels Annex 3, paragraph 1 – demonstrates that product-specific and non-product-specific support together comprise the AMS:

- “‘Aggregate Measurement of Support’ and ‘AMS’ mean the annual level of support, expressed in monetary terms, [1] provided for an agricultural product in favour of the producers of the basic agricultural product *or* [2] non-product-specific support provided in favour of agricultural producers in general . . . [bold and italics added].”²⁰

That is, just as the calculation of AMS (which uses the term “product-specific”) distinguishes product-specific from non-product-specific support, logically, so too does the definition of AMS (which does not use that term).²¹ Thus, it is simply not credible for Brazil to refer to the definition of “non-product-specific support” in Article 1(a) but to ignore the immediately preceding definition of product-specific support.²²

10. Further, Brazil’s discussion of the meaning of the term “in general” in the definition of non-product-specific support is disappointing because Brazil mischaracterizes the U.S. position and presents the Panel with an interpretation that is not the ordinary meaning of the term. In so doing, Brazil renews a faulty argument advanced in its Peace Clause submissions. In case there were any confusion, the United States clarifies the issue here.

- Brazil has, in fact, never used a dictionary definition of “in general,” the exact phrase in the definition of non-product-specific support. Rather, Brazil has attempted to define “in general” by providing definitions of the word “*general*” as “relating to a whole class of objects” and “*not* partial, local or sectional.”²³ However, in the same dictionary from which Brazil quotes, there is a definition of “in general,” which Brazil continues to avoid.²⁴

²⁰ Agreement on Agriculture, Article 1(a).

²¹ See also Agreement on Agriculture, Article 6.4(a) (for purposes of *de minimis* support, distinguishing “product-specific domestic support” from “non-product-specific domestic support”).

²² See, e.g., Brazil’s February 18 Comments, para. 12 (“One interpretive guide to determine whether support is ‘product-specific’ is found in the definition of ‘non-product-specific support’ in Article 1(a) of the Agreement on Agriculture. Brazil demonstrated that *only non-product-specific support is actually defined . . .*”) (emphasis added).

²³ Brazil’s February 18 Comments, para. 12 (footnote omitted); Brazil’s Answer to Question 40 from the Panel (para. 54) (defining “general” as “‘including, involving, or affecting all or nearly all the parts of a (specified or implied) whole’”).

²⁴ See U.S. Rebuttal Submission, para. 83 (August 22, 2003).

- The definition of “in general” that comes closest to Brazil’s use (for example, “including, involving, or affecting all or nearly all the parts of a (specified or implied) whole”) is “in a body; universally; without exception.” *However, that definition of “in general” is marked “obsolete” in Brazil’s own dictionary.*²⁵
- Thus, Brazil errs when it argues that the United States has asserted “that Brazil’s definition of ‘general’ is obsolete.” Rather, the United States has asserted that Brazil has advanced a reading of the phrase “*in general*” that employs an obsolete meaning.²⁶
- In contrast, the non-obsolete definition of “in general” is “in general terms, generally.”²⁷

Thus, the ordinary meaning of “non-product-specific support provided in favour of agricultural producers in general” in Article 1(a) would be support *not* “specially . . . pertaining to a particular”²⁸ product provided in favor of agricultural producers “generally.”

11. Brazil uses its faulty definition of non-product-specific support to conclude that U.S. decoupled payments are not non-product-specific. However, Brazil recognizes that decoupled income support payments do not require any production;²⁹ a recipient may produce nothing at all or may produce any of numerous commodities. Thus, decoupled income support payments are non-product-specific because they do not “specially . . . pertain[] to a particular” product and are support “generally” to producers of whatever commodities they choose to produce (if any).

12. We also pause to note that Brazil argues that the EC, New Zealand, and Argentina believe that decoupled income support in the form of counter-cyclical payments are product-specific.³⁰ However, Brazil points to nothing in the arguments of these third parties that differs from its own flawed interpretation, which the United States has thoroughly rebutted. Moreover, Brazil now explicitly argues that the Peace Clause “may require the application of an allocation methodology for . . . domestic support measures that may provide support to more than one commodity.”³¹

²⁵ U.S. Comments on Brazil’s Rebuttal Submission, para. 23 (noting that the definition of “in general” as “in a body; universally; without exception” was marked “obsolete” in *The New Shorter Oxford English Dictionary*).

²⁶ U.S. February 11 Comments, para. 10 (“As the United States has pointed out before, *not only does this reading of ‘in general’ rely on an obsolete meaning, which therefore cannot be the ordinary meaning of the terms, but Brazil has consistently failed to read together the definitions of product-specific and non-product-specific support in Article 1(a) of the Agreement on Agriculture.*”) (emphasis added; footnote omitted).

²⁷ “In general” means “in general terms, generally” and “as a rule, usually.” *The New Shorter Oxford English Dictionary*, vol. 1, at 1073 (1993 ed.).

²⁸ *The New Shorter Oxford English Dictionary*, vol. 2, at 2972 (“specific”: second definition); *see also id.* (fifth definition: “Clearly or explicitly defined; precise, exact, definite.”).

²⁹ Brazil’s February 18 Comments, para. 4 (“Brazil and the United States agree that the contract payments, which do not *require* production . . .”).

³⁰ Brazil’s February 18 Comments, para. 15 & n.22, para. 16 & n. 26.

³¹ Brazil’s February 18 Comments, para. 6.

- However, in the Peace Clause phase of this dispute, Brazil had asserted that “[t]he use of the word ‘specific’ [in “support to a specific commodity”] makes clear that AoA [Agreement on Agriculture] Article 13(b)(ii) addresses actionable subsidy challenges made on a product-by-product basis, *as opposed to* challenges regarding *support for multiple commodities*.”³²
- Further, we recall that the European Communities argued that “support which is provided to a number of crops cannot at the same time be considered ‘support to a specific commodity’. Such support is ‘support to several commodities’ or ‘support to more than one commodity.’”³³

Thus, the European Communities has set out an understanding of “support to a specific commodity” in the Peace Clause that *directly contradicts* Brazil’s current allocation methodology. Had Brazil revealed (or conceived of) its allocation methodology during the Peace Clause phase of the dispute, the third parties would have been in a better position to provide their informed opinions as to Brazil’s Peace Clause interpretation and characterization of particular measures.

13. We also note that the context to which Brazil cites in support of its allocation methodology for Peace Clause purposes lends no support to its interpretation. First, Brazil argues that “[f]urther context for the existence of some sort of an allocation methodology in the Agreement on Agriculture is Annex 3, paragraph 7.”³⁴ However, even if this provision were to suggest “*some sort of* an allocation methodology” in the Agreement on Agriculture, it only applies to calculate AMS with respect to measures directed at processors and does not suggest any methodology that would allocate non-product-specific support as “support to a specific commodity.” Brazil also suggests that paragraphs 7, 8, 12, and 13 of Annex 3 “include as ‘product-specific’ many types of domestic support not tied to the production of a particular commodity.”³⁵ The United States has noted that it is Brazil that has put forward this “tied to the production” definition; the U.S. position is that product-specific support means what Article 1(a) says it does: “support . . . provided for an agricultural product in favour of the producers of the basic agricultural product.” That said, none of the paragraphs cited by Brazil speak to an allocation of non-product-specific support as product-specific support. That is, whether measures referred to in those provisions are product-specific or non-product-specific must be determined on the basis of the definition found in Article 1(a).³⁶

³² Brazil’s First Submission, para. 136 (June 24, 2003) (emphasis added).

³³ Oral Statement by the EC at the First Panel Meeting, para. 21. The same logic would apply to crop insurance payments: support is provided to multiple commodities through premium payments for approved insurance products. *See, e.g.*, U.S. Rebuttal Submission, paras. 93-98 (August 22, 2003).

³⁴ Brazil’s February 18 Comments, para. 13.

³⁵ Brazil’s February 18 Comments, para. 14.

³⁶ For example, Brazil cites to paragraph 8 of Annex 3 on the calculation of “market price support.” This provision refers to “the quantity of *production* eligible to receive the applied administered price”; assuming that “the applied administered price” relates to production of one product, such a measure would be product-specific.

14. Finally, Brazil argues that “Article 13(b)(ii) of the Agreement on Agriculture does not provide explicit guidance on how to count up the amount of support for contract or any other types of payments. But this does not mean that no counting methodology can be used. The absence of explicit guidance on implementing more general provisions has not stopped WTO panels or parties from proposing and using methodologies to tabulate the amount of subsidies, costs, and volumes of trade impacted.”³⁷ We disagree with Brazil’s diagnosis and remedy.

- First, the Peace Clause is not a “general provision[.]” lacking “explicit guidance on how to count up the amount of support.” In fact, the Peace Clause provides “explicit guidance” through the phrase “support to a specific commodity.” Read according to its ordinary meaning and in its context, this phrase refers to product-specific support as defined in Article 1(a) of the Agreement on Agriculture. The definitions in Article 1(a) establish a methodology by which product-specific support is included in “count[ing] up the amount of support” for Peace Clause purposes while non-product-specific is not.
- Second, given the balance struck in concluding the Uruguay Round between the need to achieve binding reduction commitments on agricultural support and the need of Members to be able to design measures to conform to those commitments – a point to which we return later – it is difficult to imagine that Members would have left the issue of how to calculate the “support to a specific commodity” for Peace Clause purposes undefined, putting the Panel in the difficult position of “proposing and using [a] methodolog[y]” on such a crucial issue. In fact, the Peace Clause provides a methodology for calculating that support. The *measures* to be included in the calculation are identified by the phrase “support to a specific commodity,” as explained in the preceding bullet. The *unit of measure* to be used in the Peace Clause comparison is identified by the way in which the Member “decided” support during the 1992 marketing year.³⁸

Thus, Members did not put the Panel in the untenable position of “adopt[ing] a reasonable methodology” with respect to its Peace Clause findings. Rather, they agreed to language that provides an explicit methodology both for the Panel’s purposes as well as for the purposes of Members who wished to ensure their measures would conform to the Peace Clause. Neither Brazil’s allocation “methodology [n]or some variant of its methodology” – however “reasonable”

Paragraph 12 of Annex 3 refers to “[n]on-exempt direct payments which are based on factors other than price” being measured using budgetary outlays; paragraph 13 refers to the measurement of the value of other non-exempt direct payments; neither provision speaks to the distinction between non-product-specific support and product-specific support nor to the allocation of the former to the latter.

³⁷ Brazil’s February 18 Comments, para. 34.

³⁸ Thus, in the case of the United States, the support “decided during the 1992 marketing year” was a rate of support provided by the target price for deficiency payments of 72.9 cents per pound and the marketing loan rate of 52.35 cents per pound. *See* U.S. February 11 Comments, paras. 15-17.

Brazil may believe those to be – can serve those purposes or find any basis in the Peace Clause and the Agreement on Agriculture.

15. Thus, we end where we began: the interpretation of the Peace Clause phrase “support to a specific commodity” we have provided is based on its ordinary meaning and in light of the context provided by relevant provisions of the Agreement on Agriculture,³⁹ in particular, the definition of product-specific support in Article 1(a). Brazil, on the other hand, does not read this phrase according to the ordinary meaning of all of its terms, ignores the context provided by those provisions of the Agreement on Agriculture that use the terms “support,” “specific,” and “commodity,” ignores the definition of product-specific support in Article 1(a), and instead points to provisions that do not provide any relevant context.

16. The Panel may ask itself: can a methodology that (as Brazil's tortured allocation methodology would have it) results in a payment sometimes being considered as support to *no* commodity (if the recipient produces nothing), sometimes as support to *one* commodity (if the recipient has planted a number of acres of a crop at least equal to the number of recipient's base acres of that crop), or sometimes as support to *multiple* commodities (if the recipient plants fewer acres of any crop for which the recipient has base acres) provide any meaningful interpretation of the phrase “support to a specific commodity”? The United States believes that the answer is no. Brazil has, at best, appreciated the *reality* of the payments in question: they are paid to producers in any of the situations it has described. Such support is not “support to a specific commodity” under the ordinary meaning of the terms (assistance or backing specially pertaining to a particular agricultural crop) or the Article 1(a) definition (support provided for an agricultural product in favour of the producers of the basic agricultural products). Rather, it is non-product specific support (support not specially pertaining to a particular product provided in favor of agricultural producers generally).

Brazil's Costs of Production Approach to Determine Whether Payments are “Support to a Specific Commodity” Does Not Withstand Scrutiny

17. In the foregoing section, the United States set out the textual and contextual basis for reading the Peace Clause phrase “support to a specific commodity” according to the definition of product-specific support in Article 1(a). We also pointed out that it is not the United States that has attempted to apply Subsidies Agreement concepts to the Peace Clause analysis as Brazil incorrectly asserted. Rather, it is Brazil that has attempted to apply an (incorrect) allocation methodology as might be relevant for purposes of actionable subsidies claims under the Subsidies Agreement to the Peace Clause analysis. In so doing, Brazil has asserted a principle for determining whether a subsidy provides support to a commodity – that is, whether “they cover (or contribute to) the costs of production of a crop”⁴⁰ – that is unworkable and illogical.

³⁹ See, e.g., Agreement on Agriculture, Articles 1(a), 1(d), 1(f), 6.4, and Annex 3 (paragraphs 1 and 7).

⁴⁰ Brazil's February 18 Comments, para. 3.

18. First, we note that Brazil defines “support” as relating to the recipient, but later elides this into support for a crop. For example, Brazil writes: “[T]he word ‘support’ has a more general sense of ‘backing up’ a *group of agricultural farmers* producing a specific commodity. For example, subsidies that cover costs of production when a farmer chooses to grow a crop, ‘back up’ or ‘support’ *that farmer*.”⁴¹ However, the Peace Clause text is “support to a *specific commodity*,” not support to *farmers* producing a specific commodity. This distinction is also found in the Article 1(a) definition of product-specific support: “support . . . provided *for an agricultural product* in favour of the producers of the basic agricultural product.” The difference is that income support provided to farmers is not “support to a specific commodity” because the support is not “provided for an agricultural product” over any other; the farmer can (in Brazil’s words), “choose[] to grow a crop,” choose to grow no crop, or choose to grow multiple crops. Even if all recipients of a decoupled payment chose to produce one crop in particular, the payment would still not be support “for an agricultural product”; the support is “for” no specific product but rather is support not “specially . . . pertaining to a particular” product that supports producers generally. It is those producers, in turn, who may choose to produce one crop in particular.

19. Brazil then, without further explanation, links the notion that support has a “sense” of backing up a farmer who “chooses to grow a crop” to the notion that such support is “support to a specific commodity” by asserting that “all of these subsidies at issue in this dispute ‘support’ production of upland cotton because they cover (or contribute to) the costs of production of a crop.”⁴² Brazil nowhere provides any basis in the text of the Peace Clause or the Agreement on Agriculture for this test. Neither does Brazil explain the necessary implications of its approach.

20. For example, if a decoupled payment is “support to a specific commodity” if it “cover[s] (or contribute[s] to) the costs of production of a crop” then the same payment will be product-specific for some producers but not others. Brazil has pointed to survey data from 1997 – that the United States has explained is technologically and structurally out-of date⁴³ – for the notion that average total costs of production for U.S. producers are \$0.73 per pound. On this basis, Brazil has (incorrectly) claimed that decoupled payments were necessary to cover the gap between market revenue and costs. Putting aside the extensive U.S. critique of Brazil’s argument (such as its reliance on total costs instead of operating costs),⁴⁴ however, the out-of-date per

⁴¹ Brazil’s February 18 Comments, para. 3 (italics added).

⁴² Brazil’s February 18 Comments, para. 3.

⁴³ U.S. Further Rebuttal Submission, paras. 123-33.

⁴⁴ The United States has presented a detailed critique of Brazil’s alleged costs of production vs. total revenue “gap” in paragraphs 105-41 of its further rebuttal submission of November 18, 2003. As further confirmation that Brazil’s “average total costs of production” argument is wrong, we note that Brazil silently has de-emphasized its assertion that, to cover their high costs of production, upland cotton producers *must* have planted upland cotton “on” upland cotton, rice, or peanut base acreage to reap decoupled payments for these base acres. *See, e.g.*, Brazil’s Closing Statement at the Second Session of the First Panel Meeting, Annex I (summary of evidence demonstrating that upland cotton producers in MY 1999-2002 produced upland cotton on upland cotton, rice, or

pound total average cost on which Brazil relies is just that, an average. In claiming that all decoupled payments received by upland cotton producers (satisfying its complicated allocation methodology) are support to upland cotton, Brazil takes no account of the distribution of costs across farms. That is, some farms produce at costs below the average and some produce at costs above the average.⁴⁵ Brazil attempts no analysis of whether decoupled payments received by producers who produce cotton at costs below the average “cover (or contribute to) the costs of production of” upland cotton.

- However, *under Brazil's own rationale*, if the decoupled payments do *not* “cover (or contribute to) the costs of production of a crop,” then those payments do not support production of that crop and *are not support to a specific commodity*.

Thus, those payments could not form part of Brazil's Peace Clause analysis, but Brazil has not accounted for this.

21. Consider further Brazil's argument that “[w]ithout direct and counter-cyclical payments in MY 2002, the average U.S. cotton farmer would have lost 14.36 cents per pound. With these two payments, they earned a ‘profit’ of 4.2 cents per pound with the cotton DP and CCP payments.”⁴⁶ But Brazil has asserted that payments are “support to a specific commodity” only if they “cover (or contribute to) the costs of production of a crop.”

- Thus, *under Brazil's own rationale*, the 4.2 cents per pound of “profit” – that is, returns above and beyond total costs of production – that Brazil attributes to decoupled payments cannot be “support to” upland cotton.

Brazil, of course, fails to carry through its rationale to this extent because this would reduce the decoupled payments it has calculated as support to upland cotton under its own (incorrect) approach.

peanut base acreage) (October 9, 2003). In fact, without having repudiated its earlier argument, Brazil's January 28 calculations demonstrate that Brazil's allocation methodology results in payments for many other program crops being allocated to cotton. For example, for farms producing cotton and having cotton base, in marketing year 1999, payments for *wheat, oats, rice, corn, and sorghum* are allocated to cotton; in marketing year 2000, payments for *wheat, rice, corn, sorghum, and barley* are allocated to cotton; and in marketing year 2001, payments for *wheat, rice, corn, and barley* are allocated to cotton, oats, and sorghum. Brazil's February 18 Comments, Annex A, paras. 15-19 (Tables 2.5-2.8). That is, under Brazil's January 20 allocation methodology, upland cotton is allegedly “planted on” base acres for each of the program crops just listed, not the cotton, rice, or peanut acres in Brazil's costs argument. Brazil has never explained the contradiction in its two arguments.

⁴⁵ For example, the 1997 study shows that in that year the 25 percent of U.S. cotton farms with the lowest cost (accounting for 36 percent of cotton production) had average operating costs of \$0.31 cents per pound and average total costs of \$0.55 cents per pound. Exhibit BRA-16, at tbl. 2.

⁴⁶ Brazil's February 18 Comments, para. 24 (third bullet) (footnote omitted).

22. In addition, Brazil's argument that payments are "support to a specific commodity" only if they "cover (or contribute to) the costs of production of a crop" carried through to its logical end would not only run contrary to the definitions of product-specific support and non-product-specific support in Article 1(a) of the Agreement on Agriculture but would produce illogical results. Consider the situation of marketing loan payments for soybeans:

- In the U.S. view, there is no question that these payments are "support to a specific commodity" within the meaning of the Peace Clause because they are "support . . . provided for an agricultural product in favour of the producers of the basic agricultural product" (Article 1(a)).
- Under Brazil's rationale, however, marketing loan payments for soybeans might *not* be "support to" soybeans because they might not "cover (or contribute to) the costs of production of [that] crop."
- To determine whether, under Brazil's theory, those marketing loan payments for soybeans are "support to" soybeans or "support to" some other commodity (such as upland cotton) "requires an examination of the record evidence concerning the extent to which the payments *de facto* support or maintain the production of a specific commodity."⁴⁷
- Under some combination of facts, then, marketing loan payments for soybeans could be deemed, under Brazil's theory, to be support to upland cotton (or some other commodity).

This cannot be the right result since, if the marketing loan payments provide any incentive to production (which will depend on the expected harvest season prices at planting), they provide an incentive to plant soybeans, not upland cotton (and if payments are made, they are made to producers of soybeans, not upland cotton). A correct reading of the Peace Clause does produce the right result since such payments are "support to a specific commodity," soybeans,⁴⁸ regardless of "the record evidence concerning the extent to which the payments *de facto* support or maintain the production of a specific commodity."

23. Finally, as a factual matter, we would note that Brazil has not addressed the most telling data that contradicts its assertion that decoupled payments "directly maintain the production of"

⁴⁷ Brazil's February 18 Comments, para. 22; *see also id.*, para. 32 ("In sum, the proper allocation methodology under Article 13(b)(ii) of the Agreement on Agriculture must be consistent with the extent to which the domestic support payments directly maintain the production of a specific commodity.").

⁴⁸ Under Article 1(a), marketing loan payments for soybeans are "support . . . provided for an agricultural product [soybeans] in favour of the producers of the basic agricultural product." Under the ordinary meaning of the terms "support to a specific commodity," marketing loan payments for soybeans are "assistance" or "backing" "specially . . . pertaining to a particular" "agricultural product": soybeans.

upland cotton. This is the significant amount of upland cotton acreage planted by farms without any upland cotton base acres.

- Under the 1996 Act, farms without any upland cotton base acres planted 1.0 million acres of upland cotton in marketing year 1999, 1.2 million acres of upland cotton in marketing year 2000, 1.3 million acres in marketing year 2001, and 1.5 million acres in marketing year 2002.⁴⁹
- After new base acreages were established in the 2002 Act (for purposes of direct and counter-cyclical payments), farms without any upland cotton base acres planted 0.5 million acres of upland cotton in marketing year 2002.

Under Brazil's theory, none of these acres should have been planted since without decoupled payments for upland cotton base acres, these producers "would have lost \$332.79 per acre between MY 1997-2002" and "would have lost 14.36 cents per pound" in marketing year 2002.⁵⁰ The fact that such large numbers of acres *were* planted without decoupled payments for upland cotton base acres demonstrates that, as a factual matter, U.S. upland cotton producers can and do plant upland cotton without the allegedly indispensable decoupled payments for upland cotton base acres.⁵¹

24. Thus, the principle Brazil advances to determine whether and to what extent decoupled payments are support to a specific commodity – that is, whether they "cover (or contribute to) the costs of production of a crop" – must fail. This principle is not applied by Brazil to its logical ends because to do so would reduce the amount of support to upland cotton Brazil has calculated to upland cotton. Most importantly, Brazil's costs of production principle finds no support in the text of the Peace Clause or any WTO agreement (such as the definition of product-specific support in Article 1(a)). Thus, the Panel should reject Brazil's erroneous approach.

⁴⁹ U.S. Letter to Panel (January 28, 2004) (file "rPFCsum.xls": category 3 under column "cotton planted acres").

⁵⁰ Brazil's February 18 Comments, para. 24 (second and third bullets).

⁵¹ The data submitted in response to the Panel's supplementary request for information further proves the point. In marketing year 2002, for example, the 52,504 farms in category B planted 7.0 million acres of upland cotton and had, in the aggregate, 5.4 million base acres of upland cotton; the 7,420 farms in category C planted 0.5 million acres of upland cotton and had 0 base acres of upland cotton. In marketing year 2001, the 61,854 farms in category B planted 10.0 million acres of upland cotton and had 6.4 million base acres of upland cotton; the 20,322 farms in category C planted 1.3 million acres of upland cotton and had no upland cotton base acres. In marketing year 2000, the 62,557 farms in category B planted 9.8 million acres of upland cotton and had 6.4 million base acres of upland cotton; the 18,001 farms in category C planted 1.2 million acres of upland cotton and had no upland cotton base acres. In marketing year 1999, the 59,793 farms in category B planted 9.0 million acres of upland cotton and had 6.0 million base acres of upland cotton; the 15,812 farms in category C planted 1.0 million acres of upland cotton and had no upland cotton base acres. *Under Brazil's theory, none of the tens of thousands of category B farms should have planted more upland cotton acres than their respective quantities of upland cotton base acres, and none of the tens of thousands of category C farms should have planted upland cotton at all.*

Brazil's Argument that Decoupled Income Support Payments Are *De Facto* Tied to Production Is Wrong

25. Brazil argues that the decoupled income support measures at issue in this dispute cannot be allocated across “the total value of the recipient firm’s sales” under paragraph 2 of Subsidies Agreement Annex IV because the payments are “*de facto* tied to upland cotton production.”⁵² Brazil also argues that the amount of subsidies that support upland cotton cannot be determined under Annex IV, paragraph 3, and therefore “Annex IV does not assist the Panel in determining the amount of support to upland cotton, within the meaning of Article 13(b)(ii) of the Agreement on Agriculture.”⁵³ On this latter point, we are in agreement with Brazil: as set out above, the Peace Clause establishes the relevant support through the ordinary meaning of the phrase “support to a specific commodity” in its context, not by way of Annex IV. Under a correct reading of the phrase “support to a specific commodity,” *no* allocation methodology may be applied to allocate non-product-specific support as “support to a specific commodity.” Here, however, we note that Brazil’s argument relating to the alleged *de facto* tie of payments to production does not hold.

26. In fact, the evidence does not support Brazil’s argument that decoupled income support payments are “tied to the production or sale of a given product.”⁵⁴ These payments are received by recipients that may choose to produce no, one, or many different products. The evidence presented by the United States – fully consistent with the Environmental Working Group data presented by Brazil⁵⁵ – is that approximately 47 percent of upland cotton farms eligible for decoupled income support payments planted no cotton in marketing year 2002.⁵⁶ Thus, payments are not “tied to the production or sale of a given product” since nearly half of the recipients do not plant even a single acre of cotton.

27. Brazil points to evidence that it asserts demonstrates the “crucial role that each of the four contract payments plays in maintaining the production of U.S. upland cotton.”⁵⁷ That is, Brazil argues that without the decoupled income support payments, many U.S. producers would not have been able to continue producing cotton. However, Brazil’s argument is not, as in Annex IV, that “the subsidy is tied to the production or sale of a given product,” but rather that the production or sale of a given product is tied to the subsidy. The two statements are not

⁵² Brazil’s February 18 Comments, para. 39.

⁵³ Brazil’s February 18 Comments, para. 41.

⁵⁴ Subsidies Agreement, Annex IV, para. 3.

⁵⁵ Brazil’s Further Rebuttal Submission, para 23 (EWG data showed that 46, 45, and 45 percent of farms receiving upland cotton contract payments received no marketing loan payments in 2000, 2001, and 2002, respectively).

⁵⁶ U.S. Oral statement at Second Panel Meeting, para. 56 (December 2, 2003); U.S. Answer to Panel Question 125(9).

⁵⁷ Brazil’s February 18 Comments, para. 32.

equivalent. That an upland cotton farmer could not produce upland cotton without a subsidy payment (an argument which the United States has rebutted) does not mean that the payment is “tied to the production or sale of a given product” if recipients may produce or sell other than a given product. This is precisely the case with respect to decoupled income support payments: there is no “tie” to the production or sale of upland cotton because payment recipients can choose not to produce upland cotton (or any other crop).

28. Thus, Brazil has not established that the decoupled income support payments are “*de facto* tied to upland cotton production”; rather, the facts that demonstrate that nearly half of the payment recipients choose not to plant upland cotton at all *de facto* contradict Brazil’s argument.

Brazil Has Not Made a *Prima Facie* Case under its Subsidies Claims with respect to Decoupled Payments

29. The United States has previously explained that Brazil has not properly interpreted the Peace Clause proviso and has not demonstrated that the challenged U.S. measures are in breach of the Peace Clause. This ends the analysis with respect to Brazil’s subsidies claims under Subsidies Agreement Articles 5 and 6 and GATT 1994 Article XVI:1. However, even if the Panel were to look beyond the Peace Clause to Brazil’s subsidies claims, Brazil has not established a *prima facie* case with respect to decoupled payments.⁵⁸

30. Brazil now argues that, while “Part III of the Subsidies Agreement does not require detailing the precise amount of the subsidies,” Brazil “has presented evidence and argument, in the alternative, regarding the size and subsidization rate of the subsidies challenged.”⁵⁹ Brazil further claims that it “has offered the contract payment quantities (as well as the other subsidies) established in the peace clause phase of the proceedings as the ‘amount of subsidization,’ to the extent this is required, in the serious prejudice phase.” In light of Brazil’s repeated disavowals of any need to identify the amount of the subsidy for purposes of its subsidies claims,⁶⁰ the United

⁵⁸ The United States has elsewhere explained that Brazil has not demonstrated serious prejudice, or threat thereof, from upland cotton marketing loan payments or any other challenged U.S. measures. *See, e.g.*, U.S. Further Rebuttal Submission, paras. 1-177; U.S. Further Submission, paras. 16-133.

⁵⁹ Brazil’s February 18 Comments, para. 78. The United States continues to be surprised by Brazil’s denial of the significance of the amount of the subsidy for purposes of determining “the effect of the subsidy” under its serious prejudice claims. For example, had the DSB initiated the Annex V information-gathering process, that process would have been concerned, in part, with establishing “the amount of subsidization,” Subsidies Agreement, Annex V, para. 2, and “the amount of the subsidy in question,” *id.*, Annex V, para. 7. Brazil’s position that “the effect of the subsidy” may be evaluated without identifying the amount of the subsidy is akin to saying that one can determine “the effect of eating” without knowing how much is being eaten.

⁶⁰ *See, e.g.*, U.S. February 11 comments, para. 24.

States does not believe that this and two other comments referenced by Brazil demonstrate that Brazil has argued and advanced evidence relating to identification of the challenged subsidy.⁶¹

31. Nonetheless, even if the Panel were to find that Brazil's comments dated January 28, 2004, and February 11, 2004 – that is, more than eight months into this dispute and after scheduled panel meetings and written submissions have been concluded⁶² – advanced an argument in the alternative, Brazil still would not have made a *prima facie* case with respect to decoupled payments. As set out in the U.S. February 11 comments,⁶³ Brazil has never presented evidence nor made arguments that would allow the Panel to evaluate “the effect of the subsidy [decoupled income support payments].” In particular, Brazil has never presented information relating to the total value of the recipients' sales as would be necessary to determine the amount of these subsidies benefitting upland cotton that are not tied to the production or sale of a given product. The reason for this omission is simple: Brazil has never believed, nor does it today, that the Annex IV methodology is necessary or even relevant to identify the subsidy benefit and subsidized product.⁶⁴ Because Brazil believes Annex IV is irrelevant for the Peace Clause but has offered its Peace Clause calculations (again, in the alternative) “as evidence of the amount of such subsidy payments,”⁶⁵ logically, Brazil must believe that Annex IV “does not assist the Panel in determining the amount of [the subsidy].”⁶⁶

⁶¹ See Brazil's Comment on U.S. Answer to Question 214 from the Panel, para. 216 (January 28, 2003) (“Detailing the precise amount of the financial contribution ending up in the bank accounts of U.S. upland cotton producers is not a legal pre-requisite to Brazil's actionable subsidy claims. If the Panel finds that Brazil is legally required to examine the exact *amount* of the subsidies in order to assess their ‘effects,’ . . . Brazil refers the Panel to evidence and the allocation of the amount of ‘support to upland cotton’ it has presented in the peace clause portion of its various submissions. This evidence is part of the record pursuant to Brazil's alternative arguments and is offered as evidence of the amount of such subsidy payments.”); Brazil's Opening Statement at the Second Panel Meeting, para. 5 (“In any event, Brazil has demonstrated a collective subsidization rate averaging 95 percent and subsidies in the amount of \$12.9 billion.”).

⁶² Article 12 and Appendix 3 of the DSU contemplates a process which all WTO dispute settlement proceedings must follow in order to ensure due process for the parties involved. Such a process requires that the parties “present the facts of the case, their arguments and their counter-arguments” before the first substantive meeting of the panel (*see* para. 4 of the Working Procedures of the Panel), present their case at the first substantive meeting of the panel (*see* para. 5 of the Working Procedures of the Panel), and then present their formal rebuttals by the second substantive meeting of the panel (*see* para. 6 of the Working Procedures of the Panel). In this regard, for Brazil to present new arguments for the first time now, or to use recently submitted U.S. data to try to meet Brazil's initial burden of proof now, outside of the confines of the established panel process and without allowing the United States to provide counter-arguments or rebuttals, would appear contrary to the due process safeguards provided by the DSU and the Working Procedures of the Panel.

⁶³ U.S. February 11 Comments, paras. 22-34.

⁶⁴ *See, e.g.*, Brazil's February 18 Comments, para. 38 (“[A] close look at the text of Annex IV reveals that it is ill-equipped to address the tabulation of support issue before the Panel.”); *id.*, para. 41 (“Thus, Annex IV does not assist the Panel in determining the amount of support to upland cotton, within the meaning of Article 13(b)(ii) of the Agreement on Agriculture.”).

⁶⁵ *See* Brazil's Comment on U.S. Answer to Question 214 from the Panel, para. 216.

⁶⁶ Brazil's February 18 Comments, para. 41 (“Thus, Annex IV does not assist the Panel in determining the amount of support to upland cotton, within the meaning of Article 13(b)(ii) of the Agreement on Agriculture.”).

32. We do note that Brazil has argued that, “as an alternative argument, Brazil attempted in its 28 January 2004 Comments to apply the Annex IV paragraph 2 non-tied subsidy allocation methodology to the U.S. summary data.”⁶⁷ We later set out in more detail the infirmities in Brazil’s calculations. Here, we note that, Brazil evidently believes that by liberally assigning the “in the alternative” label, it will be able to assert that it has advanced evidence and arguments relating to whatever methodology the Panel adopts. Such an approach speaks volumes to Brazil’s confidence in its approach to its serious prejudice claims, but it is also not enough to meet its *prima facie* case. A party may not make an argument, even if “in the alternative,” for the first time nine months into briefing in a dispute, in its February 18 “Comments on U.S. 11 February Comments on Brazil’s 28 January ‘Comments and Requests Regarding Data Provided by the United States on 18/19 December 2003 and the U.S. Refusal to Provide Non-Scrambled Data on 20 January 2004,” in order to later claim to have carried its burden of making a *prima facie* case should the Panel decide to rely on this new argument. (The Panel will appreciate the irony that the party that has been complaining incessantly about delay in the proceedings has now been reduced to improperly trying to take advantage of that delay.) To allow this would deny the United States due process – as the entire dispute has been argued on other grounds and enormous amounts of time and resources have been devoted to defending against the arguments Brazil *did* make – and deprive the Panel of the opportunity to receive fully considered briefing with respect to those issues.

33. Finally, through its belated and patently inadequate arguments and evidence relating to Annex IV, Brazil has put the Panel in the inappropriate position of “mak[ing] the case for the complaining party” were it to base any serious prejudice findings on decoupled payment subsidies allocated using the Annex IV methodology. As we stated in the February 11 comments:

- “Brazil has neither sought nor presented any evidence relating to the total value of the recipient firms’ sales. Brazil has also not only *not* argued that the Annex IV methodology is necessary to identify the subsidized product and the subsidy benefit, Brazil has also continually argued against use of the Annex IV methodology since, in its view, no allocation of the payment or quantification of the benefit is warranted under Part III of the Subsidies Agreement. Thus, it would appear that Brazil has resisted making the necessary legal arguments and refused to submit any evidence relating a proper analysis of its claims.”⁶⁸

Brazil chose to challenge decoupled income support payments not tied to production or sale of a given product but also chose not to seek, develop, and present evidence relating to the total value of the recipients’ sales. In fact, Brazil has not presented evidence that would allow that

⁶⁷ Brazil’s February 18 Comments, para. 69.

⁶⁸ U.S. February 11 Comments, para. 33.

methodology to be applied.⁶⁹ Therefore, due to its own litigation choices, Brazil has not established the amount of the challenged subsidies and therefore has not established a *prima facie* case that the effect of decoupled income support payments is to cause serious prejudice to Brazil's interests. The United States respectfully requests the Panel to so find.

34. The United States has reviewed Brazil's new comments regarding the *Japan – Agricultural Products* Appellate Body report and believes that Brazil continues to misread that report. In fact, Brazil does not address any of the facts relating to the "claims" and "arguments" made by the United States in that dispute, instead relying on generalizations as to "the proposition" that that report "stands for."⁷⁰ The United States refers the Panel to its previous comments on this report for a more complete analysis.⁷¹

35. The United States does note that Brazil argues that any evidence sought by the Panel that would allow an Annex IV calculation to be made "was entirely consistent" with the U.S. proposal of that methodology and Brazil's in the alternative argument. We have already shown that Brazil's "in the alternative" evidence and arguments are patently insufficient, and this was done without the need for additional information or the need to run any Annex IV calculations. Further, it requires no information to understand and evaluate the U.S. rebuttal that Brazil had not brought forward evidence and arguments relating to the Annex IV methodology necessary for Brazil to identify the subsidy benefit and subsidized product. In other words, Brazil cannot use a U.S. defense as rationale to insist that the Panel seek information and make all the Annex IV calculations necessary to make Brazil's *prima facie* case for Brazil.

Brazil's Various Allocation Methodologies, In Addition to Being Irrelevant for Peace Clause Purposes and Inapplicable for Serious Prejudice Claims, Are Internally Inconsistent and Illogical

36. The United States here addresses Brazil's revised, and in some cases new, allocation methodologies. Brazil advances all of these allocation calculations for purposes of the Peace Clause (and, in the alternative, to identify the amount of the challenged subsidies). For purposes of the Peace Clause, as set out above, the United States believes that no allocation methodology may be employed since the only relevant support is product-specific. For purposes of Brazil's serious prejudice claims, we have already explained that the Annex IV methodology 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. Nonetheless, here we present certain additional comments on Brazil's allocation methodologies.

⁶⁹ See U.S. February 11 Comments, paras. 44-60.

⁷⁰ Brazil's February 18 Comments, para. 88.

⁷¹ U.S. February 11 Comments, paras. 31-34.

Brazil's Allocation Methodology Is Internally Inconsistent and Not Applied Consistently

37. In its February 18 comments, Brazil reaffirms that “its methodology allocates support paid for upland cotton base that is ‘planted to’ upland cotton. It further allocates proportionally any other contract crop base payments that are not allocated to plantings of the respective contract payments crop.”⁷² We note that Brazil inserted quotation marks around “planted to” in the phrase “upland cotton base that is ‘planted to’ upland cotton.” The reason for this is, as the United States has explained, there are no physical “base acres” on a farm. Crop base acres are an accounting fiction that do not represent any particular acres on the farm.⁷³ Thus, base acres cannot be physically “planted to” any crop; this expression merely means that a quantity of acres has been planted that corresponds to (are equal to or less than) a farm’s quantity of base acres. Thus, at the outset, there is no physical basis to say that decoupled payments for base acres of a crop must be “support to” that crop to the extent that the quantity of planted acres is less than or equal to the quantity of base acres – but that is exactly the first step in Brazil’s flawed methodology.⁷⁴

38. There is also no economic basis to conclude that (in Brazil’s words) payments for base acres of a crop “planted to” that crop are support to that planted crop. Because a recipient of a decoupled income support payment is free to plant no crop, plant one crop, plant multiple crops, or engage in other economic activities, that payment is a subsidy to all of the recipient’s economic activities (if any). Brazil’s “planted to” approach does not take into account the fungible nature of money: if the payment recipient chooses to produce only upland cotton, that would be the sole “subsidized product,” but if the recipient chooses to produce upland cotton and other products, all of those products are the “subsidized product” since the payment could have been applied to any of those activities. (In fact, recipients of decoupled payments *do* engage in a myriad of other activities; for example, in marketing year 2002, the 137,160 cotton farms falling in Category A as defined by the Panel (that is, that planted fewer cotton acres than their quantities of upland cotton base acres) planted over 1 million acres of fruits and vegetables and nearly 7 million acres of “other crops” as compared to nearly 6 million acres of upland cotton.)⁷⁵

39. Further, we note that Brazil’s reason for treating decoupled income support payments for upland cotton base acres as “support to” upland cotton was allegedly based on the *de facto* tie between such payments and upland cotton production. That is, Brazil argued that such payments

⁷² Brazil’s February 18 Comments, para. 57.

⁷³ U.S. February 11 Comments, para. 38.

⁷⁴ Applied to decoupled payments for upland cotton base acres, this first step in Brazil’s methodology is the “cotton-to-cotton” alternative methodology set out by Brazil. *See, e.g.*, Brazil’s February 18 Comments, Annex A, para. 3 (“Under this approach, only upland cotton payments for upland cotton base acres that are *actually planted to* upland cotton would be considered support to upland cotton.”) (italics added). As set out in the text above, base acres are not “actually planted to” anything; thus, in addition to not accounting for the fungible nature of money, the cotton-to-cotton methodology is not based on any physical reality.

⁷⁵ *See* file “DCP02-2W.xls” (Category A farms, “Total” row).

were necessary to support or maintain upland cotton production.⁷⁶ But Brazil does not apply that analysis throughout its methodology.

- Brazil also allocates decoupled income support payments for non-upland cotton base acres *first* to the respective program crops.⁷⁷
- However, Brazil has made *no analysis* of whether such decoupled payments for non-upland cotton base acres support or maintain the production of the respective program crop to which they are allocated by Brazil.

Therefore, *even under its own Peace Clause analysis*, Brazil has provided no basis to a key step in its allocation methodology – that is, the allocation of payments for non-upland cotton base acres first to the respective program crops.

40. Brazil's current Peace Clause allocation methodology also directly contradicts its position earlier in this dispute. First, Brazil argued that all payments for upland cotton base acres were support to upland cotton. Then, Brazil amended its argument and asserted that, in order to cover their total costs, upland cotton producers must have planted upland cotton "on" upland cotton base acres. Subsequently, Brazil changed that argument to upland cotton must be "planted on" base acres for upland cotton, rice, or peanuts.⁷⁸ Thus, the latter two of these arguments were predicated on the notion that each planted acre of upland cotton corresponded to one base acre. Now, however, Brazil's allocation methodology could assign payments from multiple base acres to a single planted acre of upland cotton.⁷⁹

41. Tellingly, Brazil has no response to this critique of its methodology, other than to assert that "they affect, at most, 0.9 percent of the payments at issue for MY 2002"⁸⁰ and a vague statement 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."⁸¹

⁷⁶ See, e.g., Brazil's February 18 Comments, paras. 22-28.

⁷⁷ See, e.g., Brazil's February 18 Comments, Annex A, Tables 2.5-2.7; *id.*, Annex A, para. 15 n. 175 ("The subsidy allocated is the entire amount of contract payments for that crop if planted acreage exceeds or equals base acreage. The subsidy allocated is [the] amount of contract payments for that crop adjusted by the ratio of planted acreage to base acreage if planted acreage is below base acreage.").

⁷⁸ See, e.g., Brazil's Closing Statement at the Second Session of the First Panel Meeting, Annex I (summary of evidence demonstrating that upland cotton producers in MY 1999-2002 produced upland cotton on upland cotton, rice, or peanut base acreage) (October 9, 2003).

⁷⁹ See U.S. February 11 Comments, para. 38 (providing example of farm with 100 base acres of soy, 10 planted acres of soy, and 1 planted acre of cotton; under Brazil's methodology, the 1 acre of cotton would be "planted on" (receive payments related to) 90 base acres of soy).

⁸⁰ Brazil's February 18 Comments, para. 60.

⁸¹ Brazil's February 18 Comments, para. 67.

- That is, Brazil has *no logical explanation* for the internal inconsistency in its methodology, that one upland cotton base acre should be allocated to one upland cotton planted acre while multiple non-upland cotton base acres could be allocated to one upland cotton planted acre.

This internal inconsistency suggests that Brazil's methodology is an effort to assign the maximum amount of payments to upland cotton, regardless of whether it provides any economically neutral method to allocate decoupled payments (as Annex IV, paragraph 2, does).

42. As the United States has previously pointed out, moreover, there is no economic reason to attribute decoupled income support payments to some crops (program crops) but not others and some economic activities (program crop production) but not others.⁸² Brazil's February 18 calculations demonstrate the point. For farms with *no* upland cotton base acres, Brazil treats all upland cotton planted acres as "overplanted base" (that is, planted acres in excess of base acres) eligible for an allocation of the total subsidies available from "excess" base acres for other program crops.⁸³

- However, non-program crops are in the *identical position* to upland cotton: that is, all non-program crops also have base acreage equal to zero.⁸⁴
- Even on Brazil's methodology, there is no reason (other than Brazil's assertion that it is so) to treat decoupled payments for non-upland cotton base acres as subsidizing upland cotton when a farm has overplanted its (zero) upland cotton base but *not* to non-program crops that also (necessarily) have "overplanted" their base.

43. Finally, we note that, had Brazil desired to make its invented allocation methodology consistent with other arguments in its February 18 comments, it should have allocated "excess" base acres *not* to program crops with "overplanted base" but rather to any crop (program or not) produced by a payment recipient for which such payments "cover (or contribute to) the costs of production".⁸⁵ Where payments "cover (or contribute to) the costs of production," according to Brazil, payments *must* be "support to [that] specific commodity."⁸⁶ Further, if Brazil has *not*

⁸² See U.S. February 11 Comments, para. 37.

⁸³ See, e.g., Brazil's February 18 Comments, Tables 2.17 & 2.18 (upland cotton base acres: 0; upland cotton planted acres: 518,837.0; planted acres over which "excess" subsidy allocated: 518,837.0).

⁸⁴ The data submitted in response to the Panel's supplementary request for information reveals that in marketing year 2002 (after base acres were established under the 2002 Act) farms planting upland cotton and having no upland cotton base acres planted substantial amounts of non-program crop acreage, for example, 64,917 acres of fruits and vegetables, 9,664 acres of tobacco, and 169,480 acres of other crops. See "DCP02-2W.xls" file, Category C farms, "Total" row.

⁸⁵ Brazil's February 18 Comments, para. 3.

⁸⁶ Recall that it is for purposes of the Peace Clause that Brazil asserts its allocation methodology; in the alternative, Brazil argues that its Peace Clause methodology would also calculate the amount of the subsidy for its serious prejudice claims.

analyzed whether the challenged payments “cover (or contribute to) the costs of production” of other products produced by payment recipients, Brazil cannot assert that any payments must be “support to” one commodity over another since the payment might be necessary to “cover (or contribute to) the costs of production” of more than one product. That Brazil was unwilling to apply its “costs of production” principle throughout its allocation methodology suggests that Brazil’s approach to Peace Clause interpretation has been a *post hoc* exercise in rationalization.

44. In sum, Brazil’s allocation methodology is irrelevant to the Peace Clause because the only relevant support is product-specific. Unlike the Annex IV methodology, moreover, it is not a neutral and economically rational methodology for allocating a non-tied subsidy (such as decoupled payments) in order to identify the subsidized product and the amount of the subsidy. Finally, it is internally inconsistent and even contradicts other arguments Brazil has put forward in this dispute, for example, its argument that a payment is “support to a specific commodity” if it “cover[s] (or contribute[s] to) the costs of production” of that commodity.

Brazil’s “Annex IV” Methodologies Are Nothing Like the Methodology Set Out in Annex IV

45. Brazil presents two other methodologies, a “modified Annex IV” calculation and a “US Annex IV calculation.” Neither of these methodologies could serve as a basis to identify the amount of subsidy and subsidized product for purposes of Brazil’s serious prejudice claims. The correct methodology is neither a “modified” nor a “U.S.” methodology; rather, it is the methodology set out in 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.”⁸⁷ Brazil does not use “the total value of the recipient firm’s sales” in its “Annex IV calculations” and does not even attempt to calculate total sales of upland cotton producers. Thus, neither of these methodologies can fairly be called an “Annex IV” calculation.

46. With respect to Brazil’s “modified Annex IV” methodology, we note that Brazil allocated total contract payments to farms producing upland cotton “over the value of *contract payment* crops produced on the farms” based on the assumption that “contract payments are support only to contract payment crops.”⁸⁸ This 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.” Further, the United States has set out above a rebuttal of Brazil’s assertion that decoupled income support payments could be considered “support only to contract payment crops.” For example, such an approach ignores the fungible nature of money and contradicts Brazil’s argument that payments are support to those crops whose costs are covered by the payments.

⁸⁷ Subsidies Agreement, Annex IV, paras. 2-3.

⁸⁸ Brazil’s February 18 Comments, para. 50.

47. With respect to Brazil's "U.S. Annex IV methodology," the United States has explained above that Brazil has not made a *prima facie* case with respect to decoupled payments because it has not presented evidence and arguments sufficient to allow an Annex IV calculation to be made. Brazil also has not corrected for errors in its calculations that the United States previously pointed out in its February 11 comments.

48. For example, Brazil's "U.S. Annex IV methodology" errs in omitting the value of fruits and vegetables in calculating the total value of non-program crop production. Brazil justifies this stance by asserting that fruits and vegetables could not possibly be "beneficiaries" of decoupled payments because they may not be grown on base acres. Again, this argument by Brazil ignores Annex IV, paragraph 2, under which the subsidy is allocated over "the total value of the recipient firm's sales" and ignores the non-tied (decoupled) nature of these payments. The aggregate data submitted today demonstrates that, in marketing year 2002 alone, 1.2 million acres were planted to fruits and vegetables on farms that reported cotton base acreage.⁸⁹ As pointed out in the U.S. comments of February 11,⁹⁰ excluding fruits and vegetables biases significantly downward the value of non-program crop acreage. For example, the per-acre value of non-program crops including fruits and vegetables was estimated at \$281⁹¹ for 2002 – that is, 138 percent higher than the \$118 per acre Brazil calculated when fruits and vegetables are excluded.⁹²

49. Including fruits and vegetables in the total value of crop production gives a more accurate reflection of the share of upland cotton as a percent of the total value of crop production on farms that planted upland cotton. As noted previously,⁹³ had Brazil included fruits and vegetables in the value of non-program crop cropland, upland cotton would have accounted for approximately 48.4 percent to 56.7 percent of the total value of crop production on farms that planted cotton in 1999-2002.

50. Moreover, 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, Brazil's approach is inconsistent with Annex IV, paragraph 2, pursuant to which the subsidy is allocated over "the total value of the recipient firm's sales." Brazil asserts that its "decision not to include any livestock value" is supported by the 1997 ARMS cotton costs of production survey, but that survey only shows that a small number of cotton farms in the survey year "specialized" in livestock production. Brazil does not define what "specialization" in livestock production would entail, but it would seem that a farm may have sales of a product without "specializing" in that product. The evidence suggests 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 example, in the 1997 ARMS cotton costs of production survey, the U.S. Department of Agriculture found

⁸⁹ See file "DCP02-2W.xls" ("Grand Total (Farms A - C)" row).

⁹⁰ See U.S. February 11 Comments, para. 54.

⁹¹ See Exhibit US-154.

⁹² Brazil's February 18 Comments, Annex A, Table 4.5.

⁹³ See U.S. February 11 Comments, para. 57.

that, for 1997 when the value of cotton was high, cotton accounted for only 44.5 percent of the total value of agricultural production on cotton farms.⁹⁴

51. 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”; there is no basis in that provision to limit the sales over which the subsidy is allocated to *farm* sales. Brazil’s refusal to apply the Annex IV methodology in full introduces yet another serious distortion in its calculation as cotton operations earn almost 30 percent of income from off-farm sources.⁹⁵

52. Finally, Brazil contests the notion that, in calculating the amount of subsidy benefitting upland cotton, it must take account of the fact that decoupled payments for base acres are capitalized into higher land values and cash rents, thus benefitting land owners, not necessarily those farming the land, referring the Panel to its January 28 comments.⁹⁶ There, Brazil asserts that it is for the United States to demonstrate that payments on rented acres are capitalized into rents, thus impermissibly seeking to shift its burden of establishing the amount of challenged subsidies to the United States as responding party. Brazil also cites aggregate state-level data on cash rents to show that average cash rents in some cotton-producing states increased by less than the rate of inflation over the 1996-2002 period.⁹⁷ Such analysis, however, ignores the aggregation bias introduced by averaging (1) cash rents from farmland *with* program base with (2) cash rents from farmland *without* program base.

53. We recall that 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.⁹⁸ Brazil now argues that there is no evidence that further (increased) shares of production flexibility contract payments were capitalized in subsequent years. The Commission on the Application of Payment Limitations for Agriculture, to which Dr. Sumner presented testimony, reached conclusions on this very issue, however, and Brazil submitted this report as Exhibit BRA-276. The United States was therefore disappointed to see that Brazil’s exhibit was missing pages 89-122, which precisely includes the portion of Chapter 5 of the Report entitled “Effects of Further Payment Limitations on Farmland Values.” We attach as Exhibit US-155 the missing pages from the report.

54. The analysis of the *Report of the Commission on the Application of Payment Limitations for Agriculture* directly contradicts Brazil’s conclusion that cash rent data “do [not] appear to

⁹⁴ See Exhibit BRA-16, table 3.

⁹⁵ See U.S. Further Rebuttal Submission, para. 137.

⁹⁶ Brazil’s February 18 Comments, para. 75.

⁹⁷ See Brazil’s Comments on U.S. Answer to Panel Question 242, paras. 204-206 (January 28, 2003).

⁹⁸ 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.

reflect to any considerable extent the effects of PFC or other contract acreage payments.”⁹⁹ To the contrary, the Commission's Report explained:

In early 1997, professional farm managers indicated that in areas where competition for rental land was intense, *PFC payments were almost immediately captured by landowners and reflected in rental rates and land values*. Given the intense competition for leased land in many areas, tenants operating on cash leases found their lease rates being bid up until the landowner had captured most of the tenant's share of PFC payments. Producers with share leases reported that some landowners reduced their share of expenses, retained a larger crop share, or converted from share leases to cash leases. However, in areas where competition for rental land was less intense, tenants retained much of their PFC payments (Ryan et al). *Goodwin and Mishra estimate that each additional dollar per acre of PFC payments increased U.S. average rents by \$0.81 to \$0.83 per acre during 1998-2000.*¹⁰⁰

Thus, the missing pages from Brazil's own exhibit reports that, during 1998-2000, an estimated average of 81 to 83 percent of production flexibility contract payments were captured by landowners through increased rent.¹⁰¹ This conclusion is consistent with the U.S. position that land owners capture the benefit of decoupled payments for base acres made to producers on rented land.¹⁰² The Report also extends its conclusions to market loss assistance payments, direct payments, and counter-cyclical payments.¹⁰³

55. We also note Brazil's argument that counter-cyclical payments could not be captured by landowners through increased rent because the payments are “triggered on a year-by-year basis depending on low prices for upland cotton,” and a landowner “cannot know in what amount CCP

⁹⁹ Brazil's Comments on U.S. Answer to Panel Question 242, para. 208 (January 28, 2004).

¹⁰⁰ Exhibit US-155, at 106 (italics added).

¹⁰¹ We also note that this information directly contradicts Brazil's previous argument that “contrary to the premise of the Panel's question [179], th[e] evidence suggests that PFC payments are somewhat, but not ‘largely capitalized’ into land rents.” Brazil's Answer to Question 179 from the Panel, para. 165 (October 27, 2003).

¹⁰² Brazil also attempts to draw a distinction between land that is cash-rented versus share-rented. However, the Commission's Report describes a “non-operator landlord” as including those who “receiv[e] rent in the form of the crop produced on the land.” Exhibit US-155, at 104. Thus, the Report's conclusions that the benefits of government payments largely accrue to non-operator landlords would appear to apply to owners who share-rent their land as well.

¹⁰³ See, e.g., Exhibit US-155, at 106 (“Barnard et al. (2001) estimated that \$62 billion or 20 percent of the value of land producing the 8 major program crops . . . was due to PFC payments, market loss assistance, disaster payments, and marketing loan benefits.”); *id.* at 106 (“The effects of farm commodity payments on cropland values vary geographically, reflecting differences in . . . payments for crops eligible for direct and counter-cyclical payments and marketing loan benefits . . .”); *id.* at 111 (“Government payments in the form of direct payments, counter-cyclical payments, and marketing loan benefits affect the value of farmland and land rents. Several studies indicate that government payments in recent years have increased farmland values nationally by 15-25 percent.”)

payments will be made.”¹⁰⁴ As noted, the Commission's Report does not support Brazil's position on counter-cyclical payments. However, Brazil does not draw the logical conclusion from its assertion: if that statement is true, then counter-cyclical payments cannot have effects on cotton farmers' planting decisions and production because farmers (and therefore landowners) cannot anticipate receiving those payments. On the other hand, to suggest that counter-cyclical payments *do* have production effects, Brazil has also argued that farmers *do* anticipate counter-cyclical payments being made.¹⁰⁵ If that is true, then Brazil's own evidence demonstrates that those payments will be capitalized. Brazil cannot have it both ways.

56. In sum, Brazil's two “Annex IV” methodologies are wholly inadequate because Brazil does not even attempt to apply the methodology actually set out in Annex IV: that is, to allocate the value of a non-tied subsidy across “the total value of the recipient firm's sales.” Brazil has never sought nor presented the value of *total sales* of the recipients (upland cotton producers) of the challenged decoupled income support payments. Brazil's inadequate calculations cannot meet its burden of establishing a *prima facie* case on decoupled income support payments for purposes of its serious prejudice claims.

Conclusion: Brazil's Interpretation of the Peace Clause Would Upset the Balance of Rights and Obligations of Members in the WTO Agreements

57. Throughout this dispute, we have noted that Brazil's Peace Clause interpretation is without foundation in the text and context of that provision and would upset the balance of rights and obligations set out in the Agreement on Agriculture. Brazil asserts that “[h]ad the United States been concerned about the certainty of its peace clause ‘protection,’ it would not have been difficult for Congress, in the 1996 FAIR Act or even the 2002 FSRI Act, to include a ‘circuit breaker’ provision directing the USDA Secretary to stop funding any upland cotton budgetary outlays in excess of the 1992 levels.”¹⁰⁶ Of course, the United States has disciplined itself to grant support not in excess of that decided during the 1992 marketing year by shifting away from the product-specific deficiency payments with high target prices under the 1990 Act and instead to provide a mix of decoupled income supports that are green box (direct payments) or non-product-specific (counter-cyclical payments) and product-specific marketing loan payments. But Brazil's assertion raises a number of questions:

¹⁰⁴ Brazil's Comments on U.S. 22 December 2003 Answers, para. 209 (January 28, 2003). Brazil goes on to say: “Further, as Brazil has demonstrated repeatedly, given the high non-land-related production costs involved in producing cotton, most U.S. producers simply could not profitably produce cotton without CCP payments. Therefore, there is little, if any, basis for a non-producing landlord to demand increased rents to capture CCP payments.” *Id.* The United States is puzzled by this assertion. It would appear that Brazil is saying that landlords would not charge higher rental rates because producers “could not profitably produce cotton without CCP payments.” This is not our understanding of how landlords choose to set rental rates.

¹⁰⁵ For example, in Dr. Sumner's model, acreage is a function of the net return to planting cotton, which includes prospective counter-cyclical payments. See Brazil's Further Submission, Annex I, para. 28 (equation (1)).

¹⁰⁶ Brazil's February 18 Comments, para. 85.

- How could the United States have known how to cap the budgetary outlays under the decoupled income support measures to stay within the 1992 levels?
- How could the United States have known what payments would be considered “support to upland cotton” under Brazil’s methodology, which only appeared on January 20, 2004?
- Which of Brazil’s five in-the-alternative methodologies – the “cotton-to-cotton methodology,” “Brazil’s methodology,” the “modified Annex IV methodology,” the “U.S. Annex IV methodology,” or “Brazil’s 14/16th methodology”¹⁰⁷ – should the United States have been applying to ensure that budgetary outlays did not exceed the 1992 level?

Indeed, Brazil has ended this dispute taking the position that “the Panel needs to adopt a *reasonable* methodology to be applied for purposes of the peace clause in assessing the amount of support to upland cotton from the four contract payment programs.”¹⁰⁸ It is difficult to imagine how that standard could have been incorporated into the design of the challenged decoupled income support measures to ensure Peace Clause compliance.

58. The United States submits that the Peace Clause must be interpreted in a way that permits Members to comply in good faith – that is, Members must be able to tell if they will breach the Peace Clause or not. Putting legal interpretive issues aside, Brazil’s budgetary outlays approach does not do that since, with price-based support such as marketing loan payments, the United States cannot “decide” market prices.¹⁰⁹ Brazil’s allocation methodology also does not do that because the United States does not “decide” what a decoupled income support recipient chooses to produce (or not to produce).¹¹⁰ Brazil’s approach to Peace Clause issues would rob Members of the ability to design price-based and income support measures to conform to the Peace Clause and mean that Members could not know if they had complied with the Peace Clause until it was too late to do anything about it.

59. 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

¹⁰⁷ See, e.g., Brazil’s February 18 Comments, para. 55. We note that the range of budgetary outlays Brazil calculates under these five in-the-alternative methodologies range from, for 2002 direct payments, \$383.1 million to \$466.8 million, and for 2002 counter-cyclical payments, from \$640.4 million to \$988.3 million.

¹⁰⁸ Brazil’s February 18 Comments, para. 42 (italics added).

¹⁰⁹ We have previously noted that “support” does not mean “budgetary outlays.” U.S. February 11 Comments, para. 16 n.12. In addition, it is ironic that Brazil criticizes the U.S. interpretation on the grounds that the Peace Clause does not read “product-specific support” when the Peace Clause also does not read “budgetary outlays”; however, the latter *is* a defined term in Article 1(b) of the Agreement on Agriculture while the former is not, suggesting that Members’ decision not to use “budgetary outlays” in the Peace Clause was deliberate.

¹¹⁰ As set out above, no allocation methodology can be applied to the Peace Clause as the only support that is relevant to that determination is support to a specific commodity, read according to its ordinary meaning and in context.

the 1992 marketing year level.¹¹¹ The question then is whether the Panel will find that the United States has breached the Peace Clause simply because market prices were lower in some recent years than they were in 1992. We have demonstrated that the United States has disciplined itself to grant support not in excess of that decided during the 1992 marketing year.¹¹² Therefore, we are entitled to the protection of the Peace Clause and respectfully request the Panel to so find.

¹¹¹ *See, e.g.*, U.S. February 11 Comments, paras. 15-17.

¹¹² Recognizing, as the United States believes is required by the Peace Clause text, that “decided” and “grant” cover only those parameters over which Members exercise control would also be consistent with this approach of allowing “good faith” compliance since it would permit Members to control whether their measures conformed to their obligations.