

Check Against Delivery

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Subsidies on Upland Cotton

(AB-2004-5)

Oral Statement of the United States of America

December 13, 2004

I. Introduction

1. The United States noted in its appellant submission that the core issues in this appeal are not complex. Brazil's appellee submission has further confirmed our view. Brazil agreed with a number of key elements of the U.S. appeal and made a number of statements that simplify your task. Obviously, it is neither possible nor desirable to respond to over 360 pages of Brazil's appellee arguments in the oral statement today, but we trust that many of them will be covered in the Appellate Body's questions. So today we will focus on a few core issues, pointing out where the parties agree, and attempting to leave the Appellate Body with a very clear understanding of the interpretive issues that remain for it.

2. This statement consists of four parts. First, we explain why the Panel erred in finding that certain U.S. decoupled income support measures are not green box measures.¹ Brazil admits that Annex 2 of the *Agreement on Agriculture* is concerned with limiting *positive* effects on production. The Panel, however, found that U.S. planting restrictions provide an incentive *not* to produce certain crops. Such negative effects on production are consistent with the fundamental requirement for green box measures. Under a proper interpretation of the green box provisions, a Member remains free to withhold support if the producer plants particular crops, whether they are illegal narcotic crops, unapproved biotech crops, environmentally damaging crops, or others. Thus, the Appellate Body should conclude that these U.S. measures are green box.

3. Second, we explain why U.S. non-green box support to a specific commodity, cotton, respected the Peace Clause proviso.² Brazil agrees with the Panel's conclusion that a price-gap methodology may be used under the Peace Clause to calculate the "support" that price-based measures "grant." Thus, the sole issue before the Appellate Body is the Panel's interpretation of "support to a specific commodity." Support that is based on past production and is paid regardless of whether there is any current production is *not* "support to a specific commodity"

¹That is, that they do not conform fully to the criterion set out in paragraph 6(b) of Annex 2 of the *Agreement on Agriculture*.

²*Agreement on Agriculture*, Article 13(b)(ii) ("provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year").

because – in the Panel’s words – the measure does not “clearly or explicitly define a commodity as one to which” it grants support. As a result, these payments must be excluded from the Peace Clause calculation, and the Appellate Body should reverse the Panel’s finding that U.S. measures breached the Peace Clause.

4. Third, we explain why the Panel was mistaken in finding that certain price-contingent payments caused significant price suppression. Brazil has conceded (1) that the primary economic decision made by farmers is the planting decision and (2) that the relevant prices for this decision are *expected* market prices. Yet nowhere in its report does the Panel examine farmers’ planting decisions *or* expected market prices. Since examining “the effect of the subsidy” on cotton production requires examining production decisions *as actually undertaken by cotton farmers*, the Appellate Body should reverse the Panel’s finding that U.S. measures caused serious prejudice.

5. Fifth, we discuss how Brazil and the Panel’s interpretation of Article 10 of the *Agreement on Agriculture* poses a serious threat to food security. Brazil would necessarily treat international food aid transactions as export subsidies, whether or not they conform with the disciplines already in place under Article 10.4. The text of the Agreement does not pose this threat. Rather, the Panel and Brazil fail to recognize that the Agreement on Agriculture treats export subsidy disciplines separately from export credit guarantees and international food aid transactions.

II. U.S. Decoupled Income Support Measures Are Consistent with Paragraph 6(b) of Annex 2 and Therefore are Entitled to Peace Clause Protection

6. With respect to the Panel’s interpretation of paragraph 6(b) of Annex 2 of the Agreement on Agriculture, the interpretive issue presented to the Appellate Body is straightforward: does conditioning payment on a recipient’s *not* producing certain products result in the “amount of such payments” being “related to” the type of “production . . . undertaken” by the producer?

Brazil does not address the ordinary meaning of these terms. At most, U.S. measures relate “the amount of such payments” to production *not* undertaken by a recipient, rather than to “production . . . undertaken,” as in paragraph 6(b).

7. Brazil expends significant effort in arguing against a distinction that the United States does not draw. Brazil argues that the U.S. position is that a list of “permitted” crops would be inconsistent with paragraph 6(b) while a list of “banned” crops would be consistent.³ Rather, the text of paragraph 6(b) establishes that the “amount” of payments cannot be “related to” the production “undertaken” – that is, the amount paid cannot be used to induce a recipient to attempt a particular type of production as when the recipient can increase the amount of payment by producing some type of product.

8. U.S. decoupled income support measures do not operate this way.⁴ A recipient *cannot* increase the amount of payment by undertaking any type of production. Rather, a payment recipient will receive payment for all her base acres by *not* undertaking production of fruits or vegetables with respect to base acres, by *not* undertaking production of illegal crops, and by *not* engaging in environmentally damaging production. Indeed, the recipient will receive the same amount of payment even if they choose not to produce at all.

9. Brazil claims that a “‘positive’ ‘inducement’ to produce . . . listed crops” could be “achieved through a list of specifically ‘banned’ crops.” Whether or not that could be true hypothetically, it is *not* the case for the U.S. measures. Brazil states:

“The measure could simply state that payment will be made *for the planting of any crop*, other than the listed of banned crops. Again, the specific list of banned crops implicitly establishes a list of permitted crops.”⁵

³Brazil’s Appellee Submission, paras. 295-296.

⁴See, e.g., Panel Report paras. 7.215, 7.218, 7.375.

⁵Brazil’s Appellee Submission, para. 296 (italics added).

In Brazil’s hypothetical measure, the payment is expressly *coupled to planting*, so the recipient *can* increase the amount of payment by undertaking a type of production. That type of measure is not at issue in this dispute.

10. Brazil argues that the Panel “made a finding of fact” that the U.S. planting restrictions “inevitably channel[] production away from the banned crops *towards the crops that are not banned*.”⁶ In fact, however, *none* of the three Panel statements cited by Brazil finds that the U.S. planting restrictions have effects on production of non-prohibited crops.⁷ Why does Brazil repeatedly err, then, by asserting that the Panel found that the planting restrictions have production effects?⁸

11. The reason is that, before the Panel, Brazil explicitly stated that the “effects on production” at issue under Annex 2 are “effect[s] that would *increase production* by the agricultural producers of the [subsidizing] Member.”⁹ The Panel found only that the planting

⁶See, e.g., Brazil’s Appellee Submission, paras. 285-286, 298, 312-313.

⁷First, Brazil notes “the Panel found, as a matter of fact, the PFC and DP measures ‘provide a monetary incentive for payment recipients not to produce the prohibited crops.’” Brazil’s Appellee Submission, para. 286 (citing Panel Report, para. 7.386) (footnote omitted). This is not a finding that the planting restrictions have production effects on non-prohibited crops.

Second, and “[m]ore importantly, the Panel found, as a matter of fact, that the ban constitutes a ‘significant restraint . . . in certain regions on the choices of those PFC and DP payment recipients who do produce something, which the evidence shows is the overwhelming majority.’” Brazil’s Appellee Submission, para. 286 (citing Panel Report, para. 7.386) (footnote omitted; italics in original). Again, that the planting restrictions are a “significant constraint” on recipients’ choices is simply not a finding that the restrictions have production effects on non-prohibited crops.

Finally, “the Panel found that ‘there is no evidence’ that the ban ‘promote[s] fair competition or reduce[s] production- or trade-distorting effects in the markets for fruits or vegetables, or the markets for the commodities covered by the programmes or any other market.’” Brazil’s Appellee Submission, para. 286 (footnote omitted). Once again, that the planting restrictions may not “reduce production- or trade-distorting effects” is not a finding that they have production effects on non-prohibited crops.

⁸Brazil’s Appellee Submission, para. 289 & n. 322 (arguing that planting restrictions “provide financial ‘incentives’ encouraging particular types of production”); *id.*, para. 285 & n. 313. Contrary to these citations, paragraph 7.386 of the panel report provides no support for the proposition that the panel found that the planting restrictions encourage particular types of production

⁹Brazil’s First Written Submission, para. 164 (June 24, 2003) (“The ordinary meaning of ‘effects on production’ is *an effect that would increase production* by the agricultural producers of the Member providing the domestic support measure. In other words, *does the subsidy result in any measurable increase in production*, or would the removal of the subsidy result in any measurable or identifiable decrease of production?”) (italics added).

restrictions (1) provide an incentive *not* to produce certain crops and (2) may constrain production choices for certain recipients.¹⁰ Under Brazil’s own logic, such *negative* effects on production would be consistent with the fundamental requirement of Annex 2.¹¹

12. U.S. decoupled income support payments are green box measures. Such measures were therefore exempt from actions pursuant to Article 13(a) of the Agreement on Agriculture.

III. Using a Price-Gap Calculation for Price-Based Measures and Excluding Decoupled Measures That Do Not Grant Support to a Specific Commodity, U.S. Measures Did Not Breach the Peace Clause

13. Let me now turn to U.S. non-green box measures and the Peace Clause. The Panel made two distinct interpretive errors. First, that the “support” that price-based measures currently “grant” and the support “decided” during the 1992 marketing year may be calculated using budgetary outlays, which will reflect movements in market prices outside the control of Members.¹² Second, that the phrase “support to a specific commodity” captures the entire amount of payments made for acres that produced cotton during a base period, even though such payments are decoupled from current production decisions and, in fact, nearly half of current recipients do not produce upland cotton at all.¹³

14. Brazil’s appellee submission makes the Appellate Body’s task much easier. With respect to the first error, Brazil agrees that the Panel was permitted to use *either* a price-gap methodology *or* budgetary outlays to calculate the support under price-based measures.¹⁴ Since Brazil accepts

¹⁰Panel Report, para. 7.386.

¹¹U.S. Appellant Submission, paras. 29-35 (noting, for example, that resource and producer retirement payments under paragraphs 9 and 11 of Annex 2 necessarily result in negative effects on production and yet satisfy the fundamental requirement of Annex 2).

¹²*See, e.g.*, U.S. Appellant Submission, paras. 59-61, 64-79.

¹³*See, e.g.*, U.S. Appellant Submission, paras. 62, 80-118.

¹⁴Panel Report, para. 7.555, 7.561, 7.567.

that a price-gap calculation may be used,¹⁵ the Appellate Body should apply the price-gap methodology, as calculated by the Panel, to price-based measures and move on to the issue of “support to a specific commodity.”

15. Since payments decoupled from production are *not* “support to a specific commodity,” Brazil has failed to carry its burden of showing that the challenged U.S. measures breached the Peace Clause.¹⁶

16. Brazil never addresses the ordinary meaning of “support to a specific commodity” as “assistance” or “backing” to a “precise, exact, definite” “agricultural crop.”¹⁷ Brazil’s reluctance to address the ordinary meaning is understandable: a measure that is decoupled from production does *not* “confer formally” “assistance” or “backing” to a “precise, exact, definite” product. The products, in fact, supported are whatever, if anything, a recipient chooses to produce. Thus, the products supported are imprecise, inexact, and indefinite. They cannot be known without further information on recipients’ production choices and without devising some allocation methodology for assigning support to any production undertaken. Thus, the Panel’s finding that U.S. decoupled measures “grant support to a specific commodity,” upland cotton, should be reversed as contrary to the ordinary meaning of those terms.

17. The Panel’s view, with which Brazil agrees,¹⁸ was that the “specific commodity” to which a measure grants support must be “defined . . . in the measures themselves”¹⁹ and that only “non-green box measures that clearly or explicitly define a commodity as one to which they bestow or confer support must be included in the calculation of . . . support.”²⁰ Thus, following the logic of

¹⁵See, e.g., Brazil’s Appellee Submission, paras. 333-337, 345, 349-350.

¹⁶U.S. Appellant Submission, paras. 119-121.

¹⁷Compare Brazil’s Appellee Submission, para. 385, with U.S. Appellant Submission, paras. 84-86.

¹⁸Brazil’s Appellee Submission, para. 385 (“Brazil agrees with the Panel’s detailed analysis of the ordinary meaning, context, object and purpose and negotiating history” of “support to a specific commodity”).

¹⁹Panel Report, para. 7.481 (“However, the place in which commodities will always be defined is in the measures themselves under which the support is granted. In the Panel’s view, that is the place where a commodity must be specified for it to be relevant to the additional condition in Article 13(b)(ii).”).

²⁰Panel Report, para. 7.579, 7.481.

the Panel and Brazil: If the Appellate Body agrees that the U.S. decoupled measures do not themselves “clearly or explicitly define a commodity as one to which” they grant support, the Appellate Body should reverse the Panel’s finding.

18. The basis to reverse the Panel’s finding is evident (in the Panel’s words) “in the measures themselves.” Because a recipient is free to produce no, one, or multiple products, the measures themselves do *not* “clearly or explicitly define a commodity as one to which” they grant support. Indeed, both the Panel and Brazil have effectively recognized this.

- For example, the Panel wrote: “The Panel agrees with the United States that base acres are not physical acres, and that money is fungible and that *under these [decoupled] programs it can subsidize whatever the recipient chooses to produce.*”²¹
- Similarly, Brazil acknowledged that, “in this case, *the U.S. government makes mandatory PFC, DP, MLA and CCP payments without controlling what producers will be growing and, therefore, for which product these payments provide support.*”²²

Since the products in fact supported will be “whatever the recipient chooses to produce,” and the payments do not control “for which product these payments provide support,” the Panel and Brazil effectively recognize that these measures do not “clearly or explicitly define a commodity as one to which” they grant support. The Appellate Body should therefore reverse the Panel’s finding that U.S. decoupled measures grant support to a specific commodity, upland cotton.

19. The Panel found that payments to recipients *who do not produce upland cotton at all* nonetheless are support to upland cotton. In the panel proceeding, Brazil recognized that this result was untenable and withdrew its support for this interpretation.²³ Brazil does not even

²¹Panel Report, para. 7.644 (italics added).

²²Brazil’s Appellee Submission, para. 423 (italics added).

²³See U.S. Appellant Submission, para. 82 & n. 89.

attempt to explain why it rejected the Panel’s interpretation during the panel proceedings but finds it correct now.

20. Brazil has also argued, at length, that the Panel allegedly “relied” on certain factual findings it made on two of the many methodologies put forward by Brazil in this dispute to calculate “support to a specific commodity.”²⁴ Brazil’s assertion is erroneous. In fact, *three times* the Panel states that it is *not* finding that an allocation of support based on what recipients choose to plant can be used for purposes of the Peace Clause.²⁵ Indeed, that approach would fundamentally contradict the Panel’s own Peace Clause interpretation. Thus, the panel report does not support Brazil’s argument that the Panel “relied” on factual findings on Brazil’s methodologies to support its Peace Clause findings, and the Appellate Body need not consider that argument by Brazil further.

21. The Panel correctly rejected Brazil’s methodologies for Peace Clause purposes. In its submissions, the United States set out at length the numerous reasons why Brazil’s methodologies are internally inconsistent and illogical.²⁶ We also agree with the Panel’s logic

²⁴Brazil’s Appellee Submission, paras. 396-403, 411-433; *id.*, para. 396 (“Brazil begins with further background on the Panel’s factual findings regarding the various methodologies on which it relied.”); *id.*, para. 397 (“The Panel made three findings of fact relevant to the amount of [decoupled] payments constituting implementation period ‘support to’ upland cotton for purposes of Article 13(b)(ii).”)

²⁵In footnote 754 of the Panel Report, “This does not imply any view on whether such an allocation of support is appropriate under the *Agreement on Agriculture*.” In Panel Report, para. 7.634: “*The Panel has found in paragraph 7.580 and following that it is appropriate to include in its measurement of support all payments calculated with respect to upland cotton base acreage for the purposes of Article 13(b)(ii) of the Agreement on Agriculture. Without prejudice to those findings, . . . the Panel sets out in this Attachment certain additional findings of fact concerning the relationship between base acreage and upland cotton plantings and Brazil’s allocation of an amount of payments calculated with respect to base acreage to upland cotton. Certain of these factual findings provide support for findings in Section VII:G [on serious prejudice] of this report.*” (italics added; footnote omitted) “The factual findings in this Attachment do not imply any view as to whether evidence as to how domestic support measures which specify commodities in terms of eligibility criteria and payments rates actually deliver support to a particular commodity is a relevant consideration under Article 13(b)(ii) and (iii) of the Agreement on Agriculture.” Panel Report, para. 7.647.

²⁶*See, e.g.*, U.S. Comments on Brazil’s March 10, 2004, Comments, paras. 21-29 (March 15, 2004); U.S. Comments on Brazil’s February 18, 2004, Comments, paras. 17-24, 37-44 (March 3, 2004); U.S. Comments on Brazil’s Comments on U.S. Data, paras. 35-43 (February 11, 2004); U.S. Comments to Brazil’s Answer to Panel Question 258, paras. 207-29 (January 28, 2004).

that were “the [Peace Clause] proviso focused on where support was spent due to reasons beyond the control of the government, such as producer decisions on what to produce within a programme, it would introduce a major element of unpredictability into Article 13,” which would “undermine the security and predictability of the multilateral trading system.”²⁷ Even more fundamentally, the basis for rejecting Brazil’s methodologies – as the Panel did – is the Peace Clause text of “support to a specific commodity.”²⁸ Simply put, both of Brazil’s methodologies rely on what payment recipients choose to plant to determine what products are supported by the decoupled measures. Such an allocation of support does not (in the Panel’s words) look to whether the decoupled measures themselves “clearly or explicitly define a commodity as one to which” they grant support.

22. Excluding decoupled payments from the Peace Clause analysis and using a price-gap methodology to calculate the support price-based measures grant, U.S. measures did not breach the Peace Clause for any of the marketing years 1999-2002.²⁹

IV. The Panel’s Serious Prejudice Finding Fails Because the Panel Committed Legal Error in Determining the Effect of the Subsidy without Examining Farmers’ Planting Decisions

23. The Panel’s serious prejudice findings should be reversed on the basis of the Peace Clause alone. However, those serious prejudice findings are deeply flawed.

24. Many of the substantive issues raised in connection with serious prejudice should be familiar to the Appellate Body from the work it has done in the context of disputes involving safeguards and anti-dumping and countervailing measures. These include issues such as causation, benefit, pass-through, and others.

²⁷Panel Report, para. 7.487.

²⁸U.S. Appellant Submission, para. 118.

²⁹U.S. Appellant Submission, para. 119-121.

25. However, a major difference between this dispute and prior trade remedy disputes is that the serious prejudice determination under review here was not made by a Member's domestic authorities. In this dispute, the Panel sat in the shoes of a domestic authority, acting as the initial investigator and decision-maker. In this situation, one would expect that the Panel would have approached its task with at least as much rigor as has been required of domestic authorities.

26. Perhaps the most important requirement imposed on decision-makers in trade remedy cases is that they provide reasoned and adequate explanations for their determinations.³⁰ In a serious prejudice dispute, it is equally important that a panel provide such explanations for its determinations, so as to enable the Appellate Body to assess the panel's compliance with the relevant requirements of the *SCM Agreement*. As the Appellate Body has observed in the context of safeguards disputes, a panel cannot conclude that a competent authority has fulfilled the requirements for a safeguard measure if the authority has not provided a reasoned and adequate explanation to support its determination.³¹ By the same token, the Appellate Body is not in a position to conclude that a panel has fulfilled the requirements for a serious prejudice finding if the panel has not provided reasoned and adequate explanations to support its findings.

27. In this dispute, with respect to key aspects of its findings, the Panel utterly failed to provide the type of reasoned and adequate explanations that have been required for domestic authorities. For that reason alone, the Appellate Body should reverse the Panel's finding of serious prejudice.

28. The United States has advanced numerous claims of error that we will not have to discuss in this statement. Our focus today is on a key issue relating to causation – what is “the effect of the subsidy” – since this issue alone compels reversal of the Panel's finding. The Panel erred as

³⁰ See, e.g., Appellate Body Report, *US – Lamb*, para. 107; and Appellate Body Report, *US – Steel Safeguards*, paras. 302-303.

³¹ Appellate Body Report, *US – Steel Safeguards*, para. 303.

a matter of law in concluding that “the effect of the subsidy” was significant price suppression resulting from increased production. The Panel reached that conclusion without analyzing the impact of the challenged payments on farmers’ planting decisions, which is the primary economic decision that drives production. Simply put, the Panel could not have made the legal finding that “the effect of the subsidy” was increased production if it did not examine this decision to plant.

29. We would emphasize that this is not, contrary to Brazil’s arguments, an allegation that the Panel failed to make an objective assessment of the matter, including the facts, under DSU Article 11. Rather, it is a claim that the Panel erred in concluding that the “four main, cumulative, grounds” it examined were sufficient to find that “the effect of the subsidy” was significant price suppression. The Panel’s legal error was in *not* examining farmers’ planting decisions as a necessary element to establish “the effect of the subsidy.”

30. Helpfully, Brazil in its appellee submission has acknowledged key elements of the U.S. appeal.

- First, Brazil conceded that the primary economic decision made by farmers is the planting decision because “production is a function of planting and yields, with yields being affected by numerous factors outside the control of the producers.”³²
- Second, Brazil has conceded that the relevant prices for this planting decision are *expected* market prices for the harvested crop.³³ Brazil’s own economic model was premised on changes in planted acreage resulting from “expectations that U.S. upland

³²Brazil’s Appellee Submission, para. 686 (footnote omitted).

³³See Brazil’s Appellee Submission, para. 688 (“[T]he United States focuses solely on the part of Professor Sumner’s statement related to expected price.”); *id.*, para. 696 (“[E]xpected net returns do not depend solely on expected market prices . . . but, instead, on the expected net return, *i.e.*, the difference between expected production costs and expected revenue from the market and government subsidies.”).

cotton farmers have about market prices and government program benefits associated with upland cotton.”³⁴

Thus, the United States and Brazil agree that the relevant economic decision taken by the farmer is the decision to plant and that the relevant prices for that decision are expected prices for the harvested crop.³⁵

31. Indeed, we note that the panel in the recent report *European Communities – Export Subsidies on Sugar* recognized this basic point about agricultural production, even though causation was not at issue in that dispute: “*Farmers make crop planting and livestock production decisions on the basis of expected prices and profits.*”³⁶ In contrast, *nowhere* in its report does the Panel examine farmers’ planting decisions *or* expected market prices.

32. As Brazil explains, an examination of farmers’ planting decisions would “depend on [examining] projected or expected net returns from planting cotton, as compared to planting some other crop.”³⁷ There is no analysis in the panel report of *any* expected market prices for harvested cotton, for example, through the use of “futures prices” which Brazil agrees “in general, play a role in forming the market price expectations of producers”³⁸ and “contain valuable information for producers’ planting decisions.”³⁹ Further, there is no analysis in the panel report of the relative attractiveness of cotton and competing crops during the planting decision period in any marketing year.

³⁴Brazil’s Appellee Submission, para. 688.

³⁵U.S. Appellant Submission, paras. 161, 166, 169, 170.

³⁶Panel Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/R, para. 7.286 (Complaint by Australia) (circulated 15 October 2004).

³⁷Brazil’s Appellee Submission, para. 686.

³⁸Brazil’s Appellee Submission, para. 698.

³⁹Brazil’s Appellee Submission, para. 730.

33. Brazil asserts that the Panel “was well aware of” the issue of farmers’ planting decisions and found that U.S. farmers continued to produce due to subsidies, not expected market revenue.⁴⁰ It is worth considering the relevant portion of the report in its entirety:

“Furthermore, during MY 1999-2002, we have found a strongly positive relationship between upland cotton base acres and continued production of upland cotton. Thus, it is reasonable to conclude that United States producers continued to grow upland cotton due to United States subsidies rather than market prices or expected market revenue.”⁴¹

That is the extent of the Panel’s consideration of planting decisions. That is, there is *nothing* in this passage to indicate that, in fact, the Panel *analyzed* those decisions or expected market prices for cotton and other competing crops. Rather, the Panel explained the basis on which it felt it was “reasonable to conclude” that it *need not* undertake that analysis.

34. Examining what is “the effect of the subsidy” on cotton farmers’ production requires examining production decisions *as actually undertaken by those farmers*. Because the Panel did not analyze farmers’ planting decisions and what “the effect of the subsidy” would be on those decisions, the Appellate Body should reverse the Panel’s finding of serious prejudice.

35. Brazil criticizes the United States for allegedly focusing solely on the statement of its economic consultant that plantings relate to expected prices, ignoring the suggestion that plantings can be affected by “government program benefits associated with planting cotton.”⁴² However, we not only quoted that statement in full,⁴³ but we expressly indicated that an analysis

⁴⁰Brazil’s Appellee Submission, para. 685.

⁴¹Panel Report, para. 7.1362. Earlier in the same paragraph, the Panel introduced the U.S. argument thus: “Finally, the United States asserts that upland cotton planting decisions that [sic] are not limited only to benefits derived from United States subsidies, but rather are driven by other factors such as . . . (2) the relative movement of upland cotton prices vis-a-vis prices of competing crops, which affect upland cotton producers’ planting decisions and (3) the expected prices for the upcoming year.”

⁴²Brazil’s Appellee Submission, para. 688-690.

⁴³U.S. Appellant Submission, paras. 161, 169, 190.

of “the effect of the subsidy” would examine the *projected* returns from planting upland cotton with government programs and without.

36. To this end, in our submission (as well as our filings before the Panel) we compared the expected prices for harvested cotton during the planting decision period for each marketing year (as reflected in futures prices) with the marketing loan rate per pound of harvested cotton.⁴⁴ Thus, *the United States* accurately conveyed the relevant analysis, but *the Panel* did not undertake that analysis.

37. Since Brazil criticizes the U.S. argument that Chart 2 in the panel report vividly demonstrates the Panel’s failure to analyze farmer’s planting decisions, we ask the Appellate Body to examine that chart in more detail. In Chart 2 (attached as figure 1 to this statement), the Panel set out its basis for concluding that “[t]he further the adjusted world price drops, the greater the extent to which United States upland cotton producers’ revenue is insulated from decline, numbing United States production decisions from world market signals.”⁴⁵ There are three flaws with this analysis.

- First, it assumes that cotton production decisions are made continuously throughout the marketing year – as if farmers could decide to turn off production at any given time. Or, if we believe Brazil that by “production” the Panel actually meant “planting,”⁴⁶ it assumes that planting decisions occur continuously throughout the year.
- Second, it does not identify the planting decision period for each marketing year.
- Third, it does not identify the expected harvest season prices at the time of that planting decision.

⁴⁴U.S. Appellant Submission, paras. 191-195.

⁴⁵Panel Report, para. 7.1294.

⁴⁶Brazil’s Appellee Submission, para. 686.

38. What would Chart 2 have looked like if the Panel had been analyzing the effect of the subsidy on planting decisions? In figure 2, we show the same chart with the expected price at the time of the planting decision indicated for each marketing year.⁴⁷ As you can see, the gap between the marketing loan rate and the adjusted world price the Panel focused on has nothing to do with farmers' price expectations. The figure shows that, in every year but one, the expected price *exceeded* the income guarantee set by the marketing loan rate, suggesting that "the effect of the subsidy" on the planting decision was minimal. After these oral statements, we would ask that, if nothing else, you consider this figure and why the Panel failed to undertake this analysis. Of course, we would be pleased to discuss this issue with you further.

39. Brazil's further counter-arguments do not withstand scrutiny.⁴⁸ For lack of time, we cannot address these in detail now, but we would encourage and be pleased to answer any questions you may have.

40. In sum, none of Brazil's arguments change the fact that the Panel did not analyze cotton farmers' planting decisions and "the effect of the subsidy" on that decision. Accordingly, the Appellate Body should reverse the Panel's finding that "the effect of" the price-contingent U.S. measures was to increase production resulting in significant price suppression and serious prejudice.

⁴⁷See U.S. Appellant Submission, paras. 191-195.

⁴⁸For example, Brazil criticizes the United States for analyzing expected market prices on the basis of the December futures contract at the time of farmers' planting decisions, but the evidence before the Panel referred specifically to the December futures contract to reflect cotton farmers' price expectations.

Further, Brazil labels the cotton to soybeans futures ratio too simplistic to gauge the relative attractiveness of planting cotton, but the evidence before the Panel referred specifically to the very cotton to soybean ratio (December cotton to November soybeans) presented by the United States. What is more, this simple cotton to soy futures ratio does the best job of predicting U.S. planted acreage movements of all the economic analysis presented to the Panel.

In addition, Brazil argues that U.S. acreage does not change commensurately with that of non-U.S. farmers, but, although Brazil presents a graph labeled "Percent Change in Planted Acres," footnote 993 of its appellee submission admits that the "non-U.S. planted acreage is approximated by using non-U.S. harvested acreage."

V. Brazil’s Arguments with Respect to Export Credit Guarantees Heighten Concern for International Food Aid Transactions, Would Unduly Subject the Programs to Triple Discipline, and Ignore the Specific Provenance of Article 10.2

41. With respect to the export credit guarantee programs, the relevant context for the interpretation of Article 10.1 of the *Agreement on Agriculture* is within Article 10 itself, including Articles 10.2 and 10.4, and not the *SCM Agreement*.⁴⁹ In Article 10, export credit guarantee programs received treatment apart from the export subsidy disciplines of Articles 3, 8, and 10.1, just as international food aid transactions received separate treatment in Article 10.4.

42. The United States has pointed out that a necessary consequence of the Panel’s interpretive approach is that all international food aid constitutes an export subsidy subject to the full array of export subsidy disciplines under Article 10.1.⁵⁰ Contrary to Brazil’s assertion, the United States does not argue that Article 10.4 presents a threat to international food aid.⁵¹ Rather, it is the Panel’s *interpretation* of Article 10 and the position Brazil advocates that present an assault on food security.

43. Brazil’s appellee submission only serves to confirm the validity of this concern. Brazil unabashedly asserts that food aid is subject to *both* the “specific disciplines in Article 10.4 [] as well as to the general disciplines in Article 10.1.”⁵² Brazil similarly argues that Article 10.4 provides no exception from the otherwise applicable export subsidy disciplines, and international food aid is therefore fully subject to the export subsidy disciplines of Article 10.1.⁵³

44. Brazil apparently attempts to distinguish food aid transactions from other export subsidies by asserting that food aid does not have to provide a benefit to agricultural producers in donor

⁴⁹ U.S. Appellant Submission, paras. 336-340, 349, 356

⁵⁰ *See, e.g.*, U.S. Appellant Submission, para. 349

⁵¹ Appellee Submission of Brazil, para. 88

⁵² Appellee Submission of Brazil, paras. 940, 946

⁵³ Appellee Submission of Brazil, para. 950

countries.⁵⁴ Regardless of the recipient, however, under Brazil's analysis and the Panel's approach, all international food aid would constitute an export subsidy. Under either the *Agreement on Agriculture* or the *SCM Agreement*, to constitute an export subsidy does not require that a specific party (such as agricultural producers) receive a benefit, only that a benefit be conferred contingent on export performance.⁵⁵ Brazil acknowledges that, in its view, food aid involves a subsidy from donor governments to others.⁵⁶

45. The implications of this interpretive approach are stark. Brazil disingenuously asserts that Members can provide as much food aid as they want, provided that in so doing they adhere to the requirements of both Articles 10.4 and 10.1.⁵⁷ However, this would have major implications for recipients of food aid provided by the United States and other Member donors. For example, this year alone the United States has provided 300,000 metric tons of corn and 142,000 metric tons of cornmeal in food aid to such countries as Angola, Benin, Burkina Faso, Burundi, Cameroon, Congo, Cote d'Ivoire, and 17 more. In 2004, the United States donated over 212,000 metric tons of corn-soy blends to 28 countries and over 90,000 metric tons of peas to 30 countries. As the United States has no export subsidy reduction commitments for these commodities, all of this food aid would be prohibited under Brazil's approach. In addition, because of the applicability of export subsidy reduction commitments, 52 countries would not have received a combined amount of over 100,000 metric tons of vegetable oil, and 28 countries would not have received a combined amount of over 165,000 metric tons of rice provided in this year's U.S. food aid. Brazil's interpretive approach would render all of this food aid presumptively WTO-inconsistent, despite the conformity of such aid with the obligations of Article 10.4.

⁵⁴Appellee Submission of Brazil, para. 938

⁵⁵Agreement on Agriculture, Article 1(e); SCM Agreement Articles 1.1(b), 3.1(a)

⁵⁶Appellee Submission of Brazil, para. 942

⁵⁷Appellee Submission of Brazil, para. 940

46. Brazil is required to advocate for this startlingly implausible result, with severe consequences for recipient Members, because to do otherwise would compel recognition that the *Agreement on Agriculture* expressly contemplates treatment for international food aid transactions and export credit guarantees, under Articles 10.4 and 10.2 respectively, separate and apart from otherwise applicable export subsidy disciplines under Article 10.1. Contrary to the assertion of Brazil, the United States is not seeking to deprive Article 10.1 of effect⁵⁸ but rather to give proper effect to Article 10.1 and both Articles 10.2 and 10.4.

47. The United States has pointed out that the negotiating history of the *Agreement on Agriculture* further supports the interpretation that agricultural export credit guarantees are not subject to export subsidy disciplines. In response, Brazil alleges that “Members repeatedly expressed an intent to subject these measures to export subsidy disciplines,”⁵⁹ including in the Draft Final Act, yet Brazil contradicts itself when it acknowledges that the final text of Article 10.2 emerged because the Members were “unable to agree on specific disciplines on these measures.”⁶⁰

48. Brazil argues that removal of disciplines from the text nevertheless somehow preserved disciplines, because “the shift does not [] indicate any intent that, all of a sudden, Members no longer saw a need for any multilateral disciplines pending the conclusion of these negotiations.”⁶¹ Brazil asserts that it is “implausible to deduce that Members decided, at the very last moment of the negotiations, to abandon multilateral disciplines on export credit measures for the time being.”⁶²

49. This analysis ignores the specific provenance of the language of Article 10.2. This language emerged in the Blair House Agreement of November 1992 that culminated from the

⁵⁸Appellee Submission of Brazil, para. 906

⁵⁹Appellee Submission of Brazil, para. 90

⁶⁰Appellee Submission of Brazil, para. 969 (italics added).

⁶¹Appellee Submission of Brazil, para. 970

⁶²Appellee Submission of Brazil, para. 972

bilateral negotiations between the United States and the European Communities to break the logjam of the then-deadlocked Uruguay Round negotiations.⁶³ It was among several bilaterally agreed changes to the Draft Final Act that ultimately became part of the *Agreement on Agriculture*. Contemporaneous documents reveal that the Blair House Agreements were perceived by Members, specifically including Brazil, as necessary to achieve a multilateral accord but also as “weakening of the Draft Final Act.”⁶⁴ The treatment of export credit guarantees separate from the export subsidy disciplines was part of the bargain struck between Europe and the United States to which other Members acquiesced to achieve a deal.

50. Brazil further mischaracterizes the argument of the United States concerning the gross injustice that would be perpetrated by applying export subsidy disciplines to the export credit guarantee programs. The United States does not say “export credit guarantees cannot be subject to the disciplines because they are not listed in Article 9.1 of the Agreement on Agriculture.”⁶⁵ Rather, it is the converse: they are not listed because no agreement was achieved to subject them to export subsidy disciplines.

51. Brazil argues that as part of the deal the United States struck it wilfully agreed to exclude export credit guarantees from the export subsidy base on which reduction commitments could be based.⁶⁶ Brazil offers no support for this assertion, which begs the question why the United States would have acknowledged approximately \$1 billion annually of other export subsidies subject to discipline.

52. The implausible deal to which the United States agreed, according to Brazil, would be as follows: First, the United States agreed that all of its export credit guarantee activity during the

⁶³The Blair House Agreements can be found here: <http://www.fas.usda.gov/itp/agreements/oilseeds.html>

⁶⁴See, e.g., MTN.TNC/28 (13 January 1993)(Brazil itself describes the Blair House Agreement as a breakthrough in paragraph 20; Pakistan notes a “weakening of the decisions on export subsidies” in paragraph 27); NUR 065 (14 September 1993); MTN.TNC/W/115 (Montevideo Declaration of the Rio Group, including Brazil) (27 September 1993); MTN.TNC/34 (27 October 1993)

⁶⁵Appellee Submission of Brazil, para. 86, 930

⁶⁶Appellee Submission of Brazil, para. 931

relevant base period would not and could not count toward the export subsidy reduction commitments. Second, despite the inability to count its program activity within the reduction commitment base amounts, unlike every well-known agricultural export subsidy, and despite the language of Article 10.2, the U.S. export credit guarantees were nevertheless subject to the discipline of Article 10.1. The result would be to prohibit outright export credit guarantees for a wide array of commodities. Third, despite these draconian disciplines, the United States agreed to bind itself to negotiate and abide by yet *further* disciplines as provided in Article 10.2. Neither the text nor the negotiating history supports an interpretation of a negotiated result in which the United States' programs alone would be subject to the joint application of three distinct disciplines, which are not combined for any acknowledged export subsidy.

VII. Conclusion

53. For all of the foregoing reasons, as well as those set out in our written submission, we respectfully request the Appellate Body to find that, despite the Panel's best efforts to deal with the sprawling dispute Brazil put before it, the Panel made crucial interpretive missteps that compel reversal of its findings.