United States – Subsidies on Upland Cotton
(WT/DS267)

Comments of the United States of America
on the Comments by Brazil and the Third Parties
on the Question Posed by the Panel

I. Overview

1. The United States thanks the Panel for this opportunity to provide its views on the comments by Brazil and the third parties on the question concerning Article 13 of the *Agreement on Agriculture* ("Agriculture Agreement") posed by the Panel in its fax of May 28, 2003.[1] The interpretation of Article 13 (the "Peace Clause") advanced by Brazil and endorsed by some of the third parties is deeply flawed. Simply put, Brazil fails to read the Peace Clause according to the customary rules of interpretation of public international law. Its interpretation does not read the terms of the Peace Clause according to their ordinary meaning, ignores relevant context, and would lead to an absurd result.

2. Brazil reads the Peace Clause phrase "exempt from actions" to mean only that "a complaining Member cannot receive authorization from the DSB [Dispute Settlement Body] *to obtain a remedy* against another Member's domestic and export support measures that otherwise would be subject to the disciplines of certain provisions of the Agreement on Subsidies and Countervailing Measures . . . or Article XVI of GATT 1994.'"[2] However, Brazil's reading simply ignores parts of the definition of "actions" that it quotes: "The dictionary definition of 'actions' is 'the *taking of legal steps* to *establish a claim* or obtain a remedy."[3] Thus, while the United States would agree that the phrase "exempt from actions" precludes "the taking of legal steps to . . . obtain a remedy," Brazil provides no explanation of why the term "exempt from actions" would not, based on its ordinary meaning, also preclude "the taking of legal steps to establish a claim."[4]

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[1] The Panel asked the parties to address: "[W]hether Article 13 of the Agreement on Agriculture precludes the Panel from considering Brazil's claims under the Agreement on Subsidies and Countervailing Measures in these proceedings in the absence of a prior conclusion by the Panel that certain conditions in Article 13 remain unfulfilled. In particular, the Panel invites the parties to explain their interpretation of the words "exempt from actions" as used in Article 13 of the Agreement on Agriculture, as well as bringing to the Panel's attention any other relevant provisions of the covered agreements and any other relevant considerations which the parties consider should guide the Panel's consideration of this issue."

[2] Brazil's Brief on Preliminary Issue Regarding the "Peace Clause" of the Agreement on Agriculture, para. 2 (5 June 2003) ("Brazil's Initial Brief") (emphasis added).

[3] Brazil's Initial Brief, para. 6 (emphasis added).

[4] *See infra* part II.A.

3. Brazil also bases its reading in part on the assertion that "[i]n a multilateral system such as the WTO (like GATT 1947 before it), 'actions' are taken collectively by Members."[5] Brazil cannot explain, however, why "actions" should be limited to *only* those actions taken collectively. Read in the context of provisions in the WTO agreements in which the term "action" does not refer to collective action by Members, "action" in the Peace Clause refers broadly to the "taking of legal steps to establish a claim or obtain a remedy."

4. In addition, Brazil's suggested reading of the Peace Clause would lead to an absurd result. If the phrase "exempt from actions" means nothing more than that "a complaining Member cannot receive authorization from the DSB to obtain a remedy," then a panel would be perfectly free to make findings that a measure that conforms to the Peace Clause is inconsistent with the relevant provisions of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") or the *Agreement on Subsidies and Countervailing Measures* ("Subsidies Agreement"). Under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the DSB would be unable to avoid adopting the panel findings of inconsistency with the Subsidies Agreement or GATT 1994 or recommendations to bring the measure into conformity, thus depriving the Peace Clause of any meaning.

5. The remainder of Brazil's arguments do not go to a proper interpretation of the Peace Clause under the customary rules of interpretation of public international law and so do not assist in answering the question posed by the Panel concerning the Peace Clause. Nonetheless, the United States addresses various of these misplaced concerns. For example, Brazil argues that the Peace Clause is not a special or additional rule set out in Appendix 2 of the DSU; however, the Peace Clause need not be a special or additional rule because the Panel may properly deal with the Peace Clause issue under normal DSU rules. Brazil also tries to cite to unrelated issues in completely distinct disputes, arguing that some of these other panels have delayed making "complex threshold findings" until final panel reports. None of these panels is relevant since none of them has been presented with the issues presented by the Peace Clause. Brazil also asserts that consideration of alleged administrative burdens should override the plain meaning of the text of the Agriculture Agreement – an obviously erroneous approach.

6. As the United States explained in its initial brief on the Panel's question,[6] the phrase "exempt from actions" (read in accordance with the customary rules of interpretation of public international law) means "not exposed or subject to" a "legal process or suit" or the "taking of legal steps to establish a claim." Therefore, Brazil cannot maintain any action – and the United States cannot be required to defend any such action – based on provisions specified in the Peace Clause since the U.S. support measures for upland cotton conform to the Peace Clause.

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[5] Brazil's Initial Brief, para. 6 (footnote omitted).

[6] Initial Brief of the United States of America on the Question Posed by the Panel, paras. 6-10 (June 5, 2003) ("U.S. Initial Brief").

7. In light of the correct interpretation of the Peace Clause, the United States affirms that it respectfully requests the Panel to organize its procedures to first determine whether Brazil may maintain any action based on provisions exempted by the Peace Clause. Bifurcation of the legal issues in this proceeding is not only required under the Peace Clause but, as an exercise of the Panel's discretion to organize its procedures, would assist the Panel in resolving the complex issues involved in this dispute in a logical and orderly fashion.

II. Brazil's Initial Brief Does Not Read the Peace Clause According to the Customary Rules of Interpretation of Public International Law and Leads to Absurd Results

A. The Ordinary Meaning of "Exempt from Actions" Does Not Support Brazil's Reading

8. According to the customary rules of interpretation of public international law,[7] the terms of the Peace Clause should be interpreted according to their ordinary meaning in their context, in light of the object and purpose of the Agriculture Agreement.[8] The United States agrees completely with Brazil in terms of the dictionary definition of "actions." Under that definition, "action" means "the *taking of legal steps to establish a claim* or obtain a remedy."[9] As the Panel's question has highlighted, one of the key issues in this dispute is whether the Peace Clause permits Brazil to "take legal steps" so Brazil can "establish" its Subsidies Agreement "claims."

9. Yet, as soon as Brazil provides the correct definition of "action," Brazil urges an approach that would ignore it. Combining this definition with that for the word "exempt,"[10] Brazil reads the term "exempt from actions" to mean "that a complaining Member cannot receive

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[7] *See* DSU Article 3.2 (The dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.").

[8] The customary rules of interpretation of public international law are reflected in part in Article 31(1) of the Vienna Convention, which reads: "A treaty shall 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."

[9] Brazil's Initial Brief, para. 6 (emphasis added).

[10] Brazil has quoted the definition of the word "exempt" when used as a verb. *See The New Shorter Oxford English Dictionary*, vol. 1, at 878 (1993 ed.) (first definition as transitive verb: "Grant immunity or freedom from or *from* a liability to which others are subject") (italics in original). However, if used as a verb in the Peace Clause, the correct form of "exempt" would be "shall be *exempted* from actions." *See id.*, vol. 1, at 878 (examples for first definition of "exempt" as verb: "J. A. FROUDE Clergy who committed felony were no longer *exempted* from the penalties of their crimes. R. D. LAING I was *exempted* from military service because of asthma.") (italics added). As used in the Peace Clause in the construction "shall be . . . *exempt* from actions," "exempt" is an adjective. *See id.*, vol. 1, at 878 (examples of "exempt" as used in first definition as adjective: "R.C. TRENCH They whom Christ loves are no more *exempt* than others *from* their share of earthly trouble and anguish. J. BERGER He is *exempt* on medical grounds *from* military service.") (italics added). Therefore, the correct definition of "exempt" as used in the Peace Clause is "[n]ot exposed or subject to something unpleasant or inconvenient; not liable to a charge, tax, etc. (Foll. by *from, of*.)." *Id.*, vol. 1, at 878 (first definition as adjective) (italics in original).

authorization from the DSB to obtain a remedy against another Member's domestic or export support measures that are 'peace clause' protected."[11] Strikingly, neither Brazil nor any of the third parties who share this interpretation[12] provides any basis in the text of the Peace Clause for ignoring that portion of the definition of "actions" that refers to "the *taking of legal steps* to *establish a claim*."[13]

10. As the United States has demonstrated, the ordinary meaning of "action" encompasses not only the "taking of legal steps to . . . obtain a remedy" but also the "taking of legal steps to establish a claim." Other dictionary definitions of "action" – such as "the right to institute a legal process," "[a] legal process or suit," "a lawsuit brought in court," "a formal complaint," "a legal or formal demand of one's right," and "all the formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such court"[14] – provide additional support for this reading. Thus, while the United States agrees that the phrase "exempt from actions" would also preclude "the taking of legal steps to . . . obtain a remedy,"[15] the United States disagrees with Brazil that one may ignore that "exempt from actions" also precludes "the taking of legal steps to establish a claim." Nothing in the text of the Peace Clause authorizes

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[11] Brazil's Initial Brief, para. 9; *see id.*, para. 8.

[12] Regrettably, *none* of the third parties (save Australia) even attempts to read the Peace Clause – and in particular the phrase "exempt from actions" – according to the customary rules of interpretation of public international law. Australia does offer an interpretation of "exempt from actions based on" purportedly using the ordinary meaning of the terms, but it appears that Australia has interpreted "exempt from actions" merely by quoting a definition for "exempt." *Compare* Comments of Australia on Question Posed by Panel, para. 7 & n. 3, *with Black's Law Dictionary* at 593 (7th ed. 1999) (definition of "exempt" as adjective: "Free or released from a duty or liability to which others are held."). That is, Australia's interpretation ascribes no meaning to the words "from actions," reducing them to inutility. In addition to failing to provide any definition for "actions," Australia also fails to examine any context for that term in the DSU and the Subsidies Agreement. *See* U.S. Initial Brief, paras. 7-10.

[13] Argentina reads "exempt from actions" as meaning that "a finding of inconsistency with Articles XVI of GATT 1994 or Articles 3, 5 and 6 of SCM Agreement will not be possible if the legal requirements for the exemption are fulfilled." Comments by Argentina on Question Posed by Panel, para. 5. However, in making this assertion, Argentina neither provides nor attempts to distinguish the ordinary meaning of "action" as the "taking of legal steps to establish a claim or obtain a remedy." Nor does Argentina explain why, if Members only meant to preclude "a finding of inconsistency" with specified provisions, they did not simply use the word "finding" – for example, "measures . . . shall be . . . exempt from findings based on" certain specified provisions – when the term "finding" is used at least 12 times in the DSU. *See, e.g.*, DSU Article 7.1 (standard panel terms of reference include "mak[ing] such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)"); DSU Article 11 (panel should make an objective assessment of matter before it, including "such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements"); DSU Article 12.7 (panel "shall submit its findings in the form of a written report to the DSB"). There is no basis in the text or context of the Peace Clause to read "actions" to be limited to "panel findings."

[14] U.S. Initial Brief, para. 7.

[15] Indeed, this necessarily follows from the fact that, if a party cannot take legal steps to establish a claim, it will also be precluded from obtaining a remedy.

departing from the ordinary meaning of the Peace Clause phrase "exempt from actions" to narrow this text to refer *solely* to "obtaining a remedy."[16]

B. The Context for "Exempt from Actions" Does Not Support Brazil's Reading

11. In its analysis of the phrase "exempt from actions," Brazil quickly moves beyond the ordinary meaning of the term "action" it quotes (which encompasses "the taking of legal steps to establish a claim") to examine what it deems relevant context for the term. Brazil asserts that "[i]n a multilateral system such as the WTO (like GATT 1947 before it), 'actions' are taken collectively by Members,"[17] citing DSU Article 2.1 (last sentence), GATT 1994 Article XVI:1, and DSU Article 22,[18] and concludes: "In sum, 'actions' are multilaterally agreed decisions of WTO bodies including the DSB."[19] Brazil's argument overlooks the fact that there are numerous instances in various WTO agreements in which the term "action" is used to refer to action by an individual Member, not just collective action by Members.

12. Brazil notes that the term "actions" is sometimes used in the DSU to refer to collective "decisions or actions" by the DSB.[20] This observation is accurate, but the conclusion that Brazil draws from it is a *non sequitur*. The fact that the term "action" can mean "collective decision or action by the DSB" does not imply that the term "action" can mean *only* "collective decision or action by the DSB."

13. Brazil has moreover failed to consider those instances in which the term "action" is used to refer to individual action by Members.[21] For example, Article 3.7 of the DSU, which states that "[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful," does not by its terms refer to "multilaterally agreed decisions of WTO bodies including the DSB." Similarly, Article 4.5 of the DSU states: "*In the course of consultations* in accordance with the provisions of a covered agreement, before resorting to

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[16] We also note that Brazil's approach of interpreting "exempt from actions" as "cannot receive authorization . . . to obtain a remedy" appears to overlook the "taking of legal steps" component of even the "remedy" portion of the definition of "action."

[17] Brazil's Initial Brief, para. 6 (footnote omitted).

[18] Brazil also asserts that "'[a]ctions' include decisions made by the Dispute Settlement Body (DSB) to adopt rulings and recommendations of panels and the Appellate Body" but provides no reference to a provision of the DSU to support the assertion. Neither DSU Article 16.4 (on adoption of panel reports) nor DSU Article 17.14 (on adoption of Appellate Body reports) uses the term "action" to describe a DSB decision to adopt panel and Appellate Body rulings and recommendations.

[19] Brazil's Initial Brief, para. 6.

[20] For example, Brazil quotes DSU Article 2.1, which states that "[w]here the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute."

[21] *See* U.S. Initial Brief, paras. 8-9.

further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter" (emphasis added). In the Subsidies Agreement, subsidies are divided into prohibited, actionable, and non-actionable categories, and a Member may impose countervailing duties against prohibited and "actionable" subsidies without first obtaining authorization through a "multilaterally agreed decision[] of WTO bodies including the DSB."[22] Brazil's interpretation is at odds with all of these provisions – for example, since during consultations the DSB will not have taken *any* action with respect to a dispute, how could a Member attempt to settle a matter before resorting to *further* action? These provisions make clear that, read in the context of the DSU and the Subsidies Agreement, "actions" has a broader scope than Brazil would like: as indicated by its ordinary meaning, "actions" refers to "the taking of legal steps to establish a claim or obtain a remedy," encompassing all stages of a dispute – obtaining DSB authorization for retaliation would only constitute one, final step.[23]

14. Indeed, had Members intended the scope of the Peace Clause to be limited solely to collective decisions taken by the DSB, they could have used in the Peace Clause the same construction as used in DSU Article 2.1 – for example, "measures . . . shall be . . . exempt from actions taken by the DSB based on" specified provisions. Members did not do so, however.

15. Finally, the United States notes that Brazil has asserted that GATT 1994 Article XVI:1 and DSU Article 22 provide relevant context for the term "actions." However, neither of these provisions uses the term "action" at all,[24] and they do not support Brazil's assertion that "actions" in the Peace Clause must be read to refer solely to "multilaterally agreed decisions of WTO bodies including the DSB." Similarly, Brazil refers to GATT 1994 Article XXV, entitled "Joint

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[22] Members are obligated to "take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement." Subsidies Agreement, Article 10 (footnote omitted). *See also* GATT 1994 Article VI:6 (requiring multilateral approval of certain exceptional anti-dumping and countervailing duties).

[23] We note that Argentina implicitly concedes that relevant context in the Subsidies Agreement for the phrase "exempt from actions" suggests that the term is not limited to decisions or actions taken by the DSB. Argentina recognizes that "[i]t is true that Article 7 of the SCM Agreement states that the request of consultations is subject to Article 13 of the AoA." Argentina's Third Party Initial Brief, para. 13. This would appear to contradict its reading of "the word 'actions' in the context of Article 13 of the AoA [as] refer[ring] to decisions of WTO competent bodies, such as the DSB when it discharges its duties by establishing a panel," *id.*, para. 6. That is, if the Peace Clause precludes a request for consultations by a Member under Article 7 of the Subsidies Agreement, the term "actions" in the Peace Clause cannot solely refer to "decisions of WTO competent bodies."

[24] *See, e.g.,* GATT 1994 Article XVI:1 ("In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or contracting parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization."); DSU Article 22.6 ("When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request.").

Action by the Contracting Parties." The fact that the drafters referred to this one kind of "action" as *joint* action only reinforces that the term "action" by itself is not intended to be limited to *only* "joint" or "collective" action. The phrase "contracting parties acting jointly" in Article XXV would be unnecessary if Brazil's interpretation of "action" were correct.[25]

C. Brazil's Interpretation of the Peace Clause Would Lead to Absurd Results

16. Brazil's suggested reading of the Peace Clause would rob this provision of any real meaning. Brazil would expose measures that conform to the Peace Clause to finding of inconsistency with the relevant GATT 1994 and Subsidies Agreement provisions and would expose them to retaliation *unless* the complaining party were to agree *not* to adopt the findings or authorize retaliation.

17. Under Brazil's interpretation, the phrase "exempt from actions" means only that "a complaining Member cannot receive authorization from the DSB to obtain a remedy" – that is, the Peace Clause would exempt conforming measures from actions taken by the DSB to authorize remedies but not from findings by the Panel. A panel would therefore be perfectly free to make findings in its final report that a challenged measure that conforms to the Peace Clause is inconsistent with, *inter alia*, the Subsidies Agreement. Under the DSU, the DSB would be unable to avoid adopting the panel findings of inconsistency with the relevant GATT 1994 or Subsidies Agreement provisions or recommendations to bring the measure into conformity.[26] Panel reports are adopted automatically by the DSB under the "negative consensus" rule[27] and authorization to retaliate is also automatically given unless the DSB decides by consensus against this.[28] As a result, the DSB could not decline to adopt the report or authorize remedies unless the complaining party agreed. Thus, under Brazil's reading, the phrase "measures . . . shall be . . . exempt from actions" in the Peace Clause would exempt conforming measures from DSB authorization to retaliate, but *only if* the complaining Member itself agreed not to authorize a

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[25] *See* GATT 1994 Article XXV ("Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES.").

[26] Under DSU Article 19, "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." DSU Article 19 (emphasis added) (footnote omitted).

[27] Under DSU Article 16, a panel report "shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report." DSU Article 16.4 (footnote omitted).

[28] When a Member "fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings" and compensation cannot be agreed, the complaining party Member may request authorization from the DSB to suspend concessions, DSU Article 22.2, and "the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request," DSU Article 22.6.

remedy. This would be a strange and strained interpretation of the Peace Clause indeed and would effectively render it inutile, contrary to customary rules of treaty interpretation.

18. This absurd result would also conflict with the object and purpose of the Peace Clause and the Agriculture Agreement: namely, to exempt agricultural subsidies, under certain conditions, from the subsidies disciplines of the Subsidies Agreement and GATT 1994 while Members continue negotiations to move towards the "long-term objective . . . to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time."[29] Brazil also has not explained why, on its reading, Members would have chosen to allow actions, with all of their attendant burden on Members' (and the WTO's) resources, up to but not including authorization for retaliation.

III. Brazil's Initial Brief Raises a Number of Misguided Concerns Which Cannot Upset the Balance of Rights and Obligations of Members Under the Peace Clause and Do Not Support Considering Both the Applicability of the Peace Clause and Brazil's Substantive Claims Together

19. Brazil has advanced a number of other arguments, which relate neither to the ordinary meaning and context of the phrase "exempt from actions" nor to the object and purpose of the Peace Clause and the *Agreement on Agriculture*. These arguments are thus not relevant to the Panel's task of clarifying the meaning of the Peace Clause in accordance with customary rules of interpretation of public international law. Nonetheless, an examination of each of Brazil's arguments reveals that none of these concerns is well-founded.

A. The Panel May Examine the Applicability of the Peace Clause Under Normal DSU Rules

20. Brazil argues that because Article 13 is not a special or additional rule set out in Appendix 2 of the DSU, Peace Clause issues must be resolved using normal DSU rules and procedures, which Brazil believes would prohibit reaching the Peace Clause issue first. Brazil errs on two counts. There was no need to designate Article 13 of the Agriculture Agreement as a special or additional rule *precisely because* the Panel may properly deal with the Peace Clause issue using the flexibility inherent in the normal DSU rules. The DSU, in Articles 12.1 and 12.2, provides the Panel with all the authority it needs to organize its working procedures as it considers best to resolve the matter in dispute.[30] Under DSU Article 12.1, the Panel is given the

[29] Agriculture Agreement, preamble (third paragraph).

[30] *See* Comments by the European Communities on certain issues raised on an initial basis by the Panel, para. 8 ("In conclusion, the Panel has substantial discretion in deciding how it will manage these issues. Article 12.1 DSU makes it quite clear that the Working Procedures set out in Appendix 3 of the DSU may be departed from if the Panel decides this is appropriate.").

authority to determine its own working procedures "after consulting the parties to the dispute."[31] Under DSU Article 12.2, moreover, the Panel is charged with establishing panel procedures with "sufficient flexibility so as to ensure high-quality panel reports."[32]

21. Brazil itself has conceded the Panel's broad authority to establish its procedures in its letter of May 23, 2003, when it wrote of objections relating to the scope of a panel request under DSU Article 6.2: "The decision on how to handle such preliminary objections procedurally *is a matter of panel discretion.*"[33] Thus, Brazil implicitly recognizes that the Panel already has the flexibility and the authority under normal DSU rules to organize its procedures to consider and dispose of the Peace Clause issue first. There is no need for the Peace Clause to be listed as a "special or additional rule and procedure" in DSU Appendix 2 because under normal DSU rules the Panel may bifurcate the proceedings in order to respect the balance of rights and obligations of Members under the Peace Clause and the Agriculture Agreement – that is, to ensure that conforming U.S. measures are "exempt from actions based on" provisions specified in the Peace Clause.

22. The United States notes that the Appellate Body has urged panels to adopt working procedures providing for preliminary rulings to deal with threshold jurisdictional issues,[34] even though there are no "special and additional rules" in the DSU providing for these. In addition, we note that Article 10.3 of the Agriculture Agreement (the same agreement at issue here) is not listed as a "special and additional rule," but panels and the Appellate Body have made clear that this provision nonetheless governs dispute settlement proceedings by shifting the burden of proof to the responding party.[35]

23. Finally, Brazil relies on Article 11 of the DSU – pursuant to which a panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" – to support its position. Brazil's reliance on Article 11 is misplaced as shown by a simple

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[31] DSU Article 12.1 ("Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting with the parties to the dispute.").

[32] DSU Article 12.2 ("Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.").

[33] Letter from Ambassador Luiz Felipe de Seixas Corrêa, Permanent Mission of Brazil, to Mr. Dariusz Rosati, Chairman of Panel, at 3 (23 May 2003) (emphasis added). The carry-over paragraph continues: "Where preliminary objections have been resolved in advance of other claims, normally they have been resolved in the panel's first meeting, on the basis of the first round of submissions and oral statements."

[34] *See* Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para. 144.

[35] *See* Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, paras. 67-75 (second recourse to DSU Article 21.5).

examination of the text of Article 11. Article 11 provides the standard of review for panels; it does not guide the procedure used by panels. According to Brazil, DSU Article 11 somehow mandates that a panel review "all the facts including rebuttal facts," hold two panel meetings, and allow for the exchange of rebuttal submissions.[36] Brazil's argument is untenable; it would read Article 11 to *mandate* a particular series of meetings and submissions when Article 11 does *not* set out *any* particular procedural steps through which a panel "should make an objective assessment of the matter before it." At the same time, Brazil argues that the Panel *may not*, consistent with Article 11, consider the applicability of the Peace Clause first because "Article 11 contains no requirement for a special briefing, meeting or determination by a panel to resolve such applicability or exemption."[37] Of course, there is nothing in the text of Article 11 that supports reading this provision to preclude the Panel's bifurcating the proceeding to respect the balance of rights and obligations in the Peace Clause. However, to be consistent with its own argument, Brazil should also read Article 11 not to mandate any particular number or sequence of procedural steps (such as those set out in DSU Appendix 3) that are not required under its terms.

B. No Previous Panel Report Has Examined the Peace Clause, and Other Procedural Provisions Cited by Brazil Do Not Contain the Phrase "Shall Be . . . Exempt from Actions"

24. Brazil suggests that deciding the issue of the applicability of the Peace Clause in advance of Brazil's substantive Subsidies Agreement and GATT 1994 claims is "contrary to the practice of earlier panels."[38] Of course, there is no such practice since this is the first dispute to face this issue.

25. Brazil also argues that there are "a number of other threshold issues in WTO Agreements" but that "none of these provisions have special and additional rules to provide for extraordinary preliminary briefings, meetings, and determinations prior to a panel hearing on all of the claims presented."[39] Brazil's invocation of previous panel proceedings is inapt. Brazil has not asserted that any of the "threshold" provisions in other WTO agreements that it cites or that have been interpreted by previous panels contain the same language as the Peace Clause (that is,

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[36] *See* Brazil's Initial Brief, paras. 11-16.

[37] Brazil's Initial Brief, para. 16; *see id.*, para. 11 ("Thus, resolution of the 'peace clause' issues . . . must be resolved using normal DSU rules and procedures.").

[38] Brazil's Initial Brief at 7 (heading IV).

[39] Brazil's Initial Brief, para. 21.

"shall be . . . exempt from actions").[40] Indeed, it is striking that Brazil studiously avoids comparing the text of any of these provisions with the text of the Peace Clause.[41]

26. Given the fact that *none* of the other provisions cited by Brazil contains Peace Clause-like language, these provisions have little relevance for the Panel's interpretation of the Peace Clause. At most, the relevance of these provisions lies in the fact that such "threshold" provisions do *not* use language that certain measures "shall be . . . exempt from actions." This suggests that the distinct language of the Peace Clause was intended to provide a distinct right, and one that differs from rights provided by these other WTO provisions.

27. We also note Brazil's argument that in the "closest case to the peace clause issue presented here" – that is, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R – there was "never a suggestion or finding that the panel erred by not conducting a special briefing and special determination" on the "threshold issue whether Brazil was in compliance with Article 27.4" of the Subsidies Agreement. From the Appellate Body report, it would appear that the Appellate Body did not address it because no party suggested that this threshold issue had to be taken up as a first stage of the proceeding. Nonetheless, the Appellate Body found that the panel erred in not considering the threshold Article 27.4 issue first. The Peace Clause language ("measures . . . shall be . . . exempt from actions") is different and even stronger in requiring that the Peace Clause be taken up first and separately, with findings, prior to any consideration of the relevant GATT 1994 and Subsidies Agreement provisions.

C. Brazil Will Not Be Prejudiced by Separate Hearings and Briefings on the Peace Clause Issue

28. Brazil, referring to its May 23 letter, argues that it will be prejudiced if the Panel considers separately the issue of the applicability of the Peace Clause from Brazil's substantive claims as this will disrupt "Brazil's efforts to make a coherent and unified presentation of its case"[42] and result in greater expense to Brazil "in having to bring its legal and economic experts

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[40] For example, arguments that a particular claim is not within a panel's terms of reference under DSU Article 6.2 do not involve any textual mandate that measures "shall be . . . exempt from actions." What Brazil calls the "closest case to the peace clause issue presented here" involved Articles 27.2(b) and 27.4 of the Subsidies Agreement, neither of which says that measures "shall be . . . exempt from actions based on" specified provisions. *See* Brazil's Initial Brief, para. 19 (quoting Appellate Body discussion of Subsidies Agreement Articles 27.2(b) and 27.4 in *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R; Subsidies Agreement Article 27.2 states that the "prohibition of paragraph 1(a) of Article 3 shall not apply to" developing country Members in compliance with Article 27.4). Other provisions cited by Brazil (Article 1 of the *General Agreement on Trade in Services*, Article 2 of the *Agreement on Technical Barriers to Trade*, and Annex I of the *Agreement on Government Procurement*) similarly do not provide a legal right not to be subject to actions.

[41] *See* Brazil's Initial Brief, paras. 18-21.

[42] Brazil's Initial Brief, para. 17.

to Geneva for an extra meeting."[43] Of course, any concerns that Brazil's presentation of its case may be affected cannot supersede the rights and obligations of Members as set out in the covered agreements – including the Peace Clause. In fact, the Peace Clause resolves any issue of how to account for burdens on parties since it provides that the responding party's measures are exempt from any action based on the relevant GATT 1994 and Subsidies Agreement provisions – it exempts the responding party from the burden of having to respond to the complaining party's claims. Brazil ignores this aspect of the Peace Clause. In any event, we note that bifurcating this proceeding to ensure that these conforming U.S. measures are exempt from action based on Peace Clause-specified provisions will *reduce*, rather than increase, the amount of work involved for *both* parties. Here, dealing with the Peace Clause issue first will resolve that part of the dispute, saving both parties further work, since the U.S. measures conform to the Peace Clause. And in general, such an approach simply means that a panel would deal in sequence with the issues it would otherwise have to confront in a dispute. Because no additional issues would be covered (and needless work on certain claims might be avoided), it would not appear that additional effort on the part of a panel or the parties would be required.

29. We also note in any event that Brazil's concerns about duplication of its factual presentation and increased expense seem overstated. Even if this were a dispute where the relevant measures did not conform to the Peace Clause, Brazil misunderstands the process. The fact that some of the same evidence might be relevant to Peace Clause as well as Subsidies Agreement claims does *not* mean that the evidence would have to be introduced twice. Once Brazil's factual evidence were introduced, if it were relevant to later stages of the proceeding, it could of course be used for that purpose.[44] Thus, there should be no duplication of its factual presentation and no additional burden to Brazil on that count. Similarly, with respect to concerns about the additional expenditure of resources should the Panel bifurcate this proceeding, the full-time presence of Brazil's private-sector counsel in Geneva should alleviate some of the expense that extra meetings (which there is no reason to assume would be needed since the U.S. measures conform to the Peace Clause) might entail. In any event, however, the United States finds it difficult to believe that Brazil would bring an action with claims under 17 different provisions of the WTO agreements with respect to programs under at least 12 U.S. statutes and not expect that the resulting dispute would involve additional complications and all the accompanying demands for time and resources.

30. Finally, the United States notes that Brazil has raised the issue that separate hearings and briefing on the Peace Clause issue "would cause it prejudice because there would be significant[] delays in the resolution of its claims – many of which do not implicate the peace clause."[45] While, on its face, Brazil's list of "non-peace clause claims" appears to include claims based on

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[43] Brazil's Initial Brief, para. 22.

[44] To put it simply, "Brazil exhibit 419" (for example) would remain "Brazil exhibit 419" – it would not change simply because it was now being cited in a different argument.

[45] Brazil's Initial Brief, para. 23.

provisions specified in the Peace Clause,[46] Brazil's point is not raised by the Panel's question. If the Panel requests the parties to give their views on the question of what should happen with any claims in this action based on provisions not specified by the Peace Clause, the United States would be pleased to do so.

IV. Were the Panel to Consider that the Peace Clause Does Not Require that the Panel Determine Whether U.S. Measures Are Exempt from Actions Before Considering Brazil's Subsidies Agreement and GATT 1994 Article XVI Action, the Panel Should Exercise Its Discretion to Bifurcate the Proceeding

31. Putting aside the arguments related to prejudice and expense which have been discussed above, the United States notes that, in the course of allegedly discussing the "context" for the Peace Clause, Brazil makes an argument that speaks not to any relevant context but to the Panel's exercise of its discretion to organize its procedures. Brazil argues that the "close overlap of proof for both peace clause and actionable and prohibited subsidy claims highlights the need for the Panel to examine all the 'facts of the case' together."[47] First, in this context, the United States has noted, and Brazil and the European Communities apparently agree, that the Panel enjoys significant discretion under DSU Articles 12.1 and 12.2 to organize its working procedures as it considers best to resolve the matter in dispute.

32. However, even were the Panel to conclude that Article 13 does not require the Panel to determine whether U.S. measures are in breach of the Peace Clause and no longer "exempt from actions based on" specified provisions, the significance and wording of the Peace Clause in this dispute would mean that the Panel should exercise its discretion to bifurcate this proceeding. The Peace Clause would remain a significant, decisive issue. As noted above, bifurcating the proceedings would save both parties as well as the Panel significant time and work since it will render it unnecessary to address the relevant GATT 1994 and Subsidies Agreement claims.

33. Furthermore, given that Brazil has signaled that its Peace Clause arguments alone will involve "the presentation of considerable factual evidence and expert econometric testimony,"[48] it would appear that to hear Brazil's substantive claims at the same time would significantly complicate the Panel's work. The apparent complexity of Brazil's Peace Clause evidence also calls into significant question the likelihood that the timetable requested by Brazil is realistic with respect to the legitimate interests of the United States to defend its position. Finally, we

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[46] Brazil argues that its "non-peace clause claims include . . . Article XVI:3 of GATT 1994 involving all domestic and export subsidies challenged by Brazil." Brazil's Initial Brief, para. 23. However, the Peace Clause explicitly states that conforming "export subsidies . . . shall be . . . exempt from actions based on Article XVI of GATT 1994." Agriculture Agreement, Article 13(c)(ii).

[47] Brazil's Initial Brief, para. 15.

[48] Letter from Ambassador Luiz Felipe de Seixas Corrêa, Permanent Mission of Brazil, to Mr. Dariusz Rosati, Chairman of Panel, at 4.

note that, by seeking to have the Panel consider both the Peace Clause issue and Brazil's substantive claims at the same time, Brazil may be attempting to prejudice the U.S. rights of defense – particularly since, even on Brazil's mis-reading of the Peace Clause, the U.S. measures are "exempt from actions," Brazil is not entitled to obtain any remedy from the DSB.[49]

34. The United States also disagrees in any event that the "close overlap of proof for both peace clause and actionable and prohibited subsidy claims highlights the need for the Panel to examine all the 'facts of the case' together." For example, to establish its "serious prejudice" claims, Brazil must present evidence showing that the United States has caused "adverse effects" through "the use of any subsidy" (Subsidies Agreement, Article 5(c)) and evidence on "the effect of the subsidy" (Subsidies Agreement, Article 6.3(b), (c), (d)). Neither of these showings is relevant to the issue of whether U.S. measures have breached the Peace Clause.

35. Frankly, if Brazil's Peace Clause arguments will involve extensive factual and econometric evidence, it is difficult to understand why the Panel would be *better* served by considering this "considerable" evidence and testimony at the same time that it receives even *more* evidence and testimony on other, unrelated issues. Thus, even if one hypothesized that the Peace Clause does not require the Panel to consider the issue of its applicability prior to examining Brazil's substantive claims and that the Panel solely needed to consider how to take the Peace Clause issue into account in exercising its discretion to organize its procedures, the United States submits that the Panel's work would be facilitated by focusing on the legally and logically distinct Peace Clause issue first.[50]

V. Other Arguments by Third Parties

A. Given DSU Rules, the Panel's Organization of Its Procedures Represents the First Opportunity to Arrest Brazil's Action

36. India and the European Communities have suggested that, taken to its logical extreme, reading "actions" as the "taking of legal steps to establish a claim" would require a complaining party to bring two actions: first, an action to establish that the Peace Clause does not apply to certain measures, and second, if a panel were to find the Peace Clause inapplicable, an action challenging the measures based on the provisions specified in the Peace Clause. While this issue

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[49] *See* Brazil's Initial Brief, para. 9 ("In sum, 'exempt from actions' means that a complaining Member cannot receive authorization from the DSB to obtain a remedy against another Member's domestic or export support measures that are 'peace clause' protected.").

[50] *See* Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, paras. 142-44 (finding that panel should have considered threshold Article 27.4 issue before examining whether export subsidy had been provided under Subsidies Agreement Article 3.1(a)); *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para. 144 (noting that panels would be better served by adopting working procedures providing for preliminary rulings to deal with threshold jurisdictional issues).

is not pertinent to the Panel's question concerning Article 13, the United States notes that it has not advanced such an interpretation by, for example, asking the Panel to find that it could not be established.[51] Thus, this issue is not before the Panel, and India's and the EC's arguments are irrelevant. Rather, we have requested more modestly that the Panel, consistent with the Peace Clause, structure its procedures so that U.S. measures will in fact be exempted from Brazil's action based on provisions specified in the Peace Clause at the earliest possible juncture under the DSU.

37. As these third parties apparently fail to appreciate, prior to this moment, DSU rules provided for the dispute to proceed through consultations and panel establishment automatically, regardless of the U.S. insistence that its measures conform to the Peace Clause. Although the United States has maintained at each and every stage that the challenged measures conform to the Peace Clause, the United States could not have stopped Brazil from asking for consultations,[52] nor could it reasonably have been expected to refuse an entire request for consultations because it contains a request contrary to the Peace Clause, nor could the United States have prevented the establishment of this Panel. As a responding party cannot prevent panel establishment from occurring, it will inevitably be forced to argue to a panel that the panel's procedures should be structured so that the party's challenged measures are not subject, from that point on, to actions based on provisions specified in the Peace Clause. Thus, given the automaticity in DSU rules relating to consultations and panel establishment, the Panel's organization of its procedures provides the first opportunity to arrest Brazil's "taking of legal steps to establish a claim," and this is all the United States has asked the Panel to do.

B. Contrary to the Suggestion by Several Third Parties, the Peace Clause Is Not an Affirmative Defense

38. Australia and the European Communities have each asserted that the Peace Clause is an affirmative defense.[53] The United States believes that they are in error. However, this issue is

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[51] We also note that this potential question relating to whether a panel could have been established given the applicability of the Peace Clause could arise even under Brazil's interpretation of "exempt from actions." Brazil states that "actions are multilaterally agreed decisions of WTO bodies including the DSB." However, "exempt from actions" would then seem to reach DSU Article 6.1, under which the DSB takes a "multilaterally agreed decision" to establish a panel to consider a matter. Thus, under Brazil's own logic, "exempt from actions" in the Peace Clause should also preclude a decision by the DSB to establish a panel and not just a decision to authorize remedies. Argentina implicitly concedes the point when it states that it "agrees with Brazil's statement in paragraph 6 of its Brief that the word 'actions' in the context of Article 13 of the AoA refers to decisions of WTO competent bodies, *such as the DSB when it discharges its duties by establishing a panel*." Argentina's Third Party Initial Brief, para. 6 (emphasis added).

[52] However, the United States notes that Argentina (in paragraph 13 of its "Third Party Initial Brief") accepts that under Article 7 of the Subsidies Agreement, a Member is not to request consultations on measures conforming to the Peace Clause.

[53] *See* Comments by Australia, para. 4 (10 June 2003); Comments by the European Communities on certain issues raised on an initial basis by the Panel, para. 6 (dated 10 June "2002" on first page, 2003 in the heading).

not raised by the Panel's question concerning Article 13, and there is no need to discuss it further at this time.

VI. Conclusion: Brazil May Not Bring, and the Panel May Not Adjudicate, a Subsidies Agreement or GATT 1994 Article XVI Action Against U.S. Measures Conforming to the Peace Clause

39. For the reasons set out above and in its initial brief on the Panel's question concerning the Peace Clause, the United States respectfully requests the Panel to find that measures that conform to the Peace Clause are exempt from any action, including action under the DSU, based on the corresponding provisions of the Subsidies Agreement and the GATT 1994. As a result, the United States is not required to defend those measures in any action based on Brazilian claims exempted by the Peace Clause.