

United States – Subsidies on Upland Cotton

(WT/DS267)

**Answers of the United States of America
to the Questions from the Panel to the Parties
following the First Session of the First Substantive Panel Meeting**

August 11, 2003

UPLAND COTTON

1. Please confirm that all information and data that you have provided to the Panel relating to "cotton" in fact relates to upland cotton only. BRA, USA

1. The United States can confirm that, with the exception of export credit guarantees, all of the information and data we have provided to-date relates to upland cotton only. With respect to export credit guarantees, the Commodity Credit Corporation does not maintain data to distinguish transactions involving different types of cotton (for example, upland cotton versus extra-long staple (ELS) cotton). However, the United States has no reason to believe that types of cotton other than upland cotton constitute a material percentage of such transactions.

PRELIMINARY ISSUES

Product scope of Panel's terms of reference relating to Brazil's export credit guarantee claims

3. If the request for consultations in this dispute omitted certain products in relation to export credit guarantees, on what basis is it argued that it failed to identify the measures at issue in accordance with Article 4.4 of the DSU? USA

2. The only export credit guarantee measures identified in the Brazilian consultation request were those in respect of upland cotton. The request for consultations did not identify export credit guarantee measures for any other agricultural commodities.

3. The request for consultations identified the measures subject to consultations in a single sentence:¹

The measures that are the subject of this request are prohibited and actionable subsidies provided to US producers, users and/or exporters of upland cotton¹, as well as legislation, regulations, statutory instruments and amendments thereto providing such subsidies (including export credits), grants, and any other assistance to the US producers, users and exporters of upland cotton ("US upland cotton industry").

¹ Except with respect to export credit guarantee programs as explained below.

Another sentence followed this one, setting out (in a page and a half) a listing of measures that were included within the identification in the first sentence.

4. Apart from the footnote, the first two lines of the sentence quoted in the previous paragraph address "subsidies provided to U.S. producers, users and/or exporters of upland cotton"; thus, apart from the footnote, it is clear that subsidies provided to U.S. producers of, say, soybeans are not included within the scope of the request. Equally, apart from the footnote, it is

¹WT/DS267/1, at 1.

clear that subsidies provided to, say, banks that finance U.S. cotton exports (but do not produce, use or export cotton) are not included within the scope of the request. To give an example from another part of the request, Brazil’s consultation request identified “[e]xport subsidies provided to exporters of US upland cotton under the FSC Repeal and Extraterritorial Income Exclusion Act of 2000” as a challenged measure. Having identified that measure at issue for purposes of DSU Article 4.4 as subsidies provided to upland cotton exporters under that legislation, Brazil could not then have included in its panel request such subsidies provided to exporters of all agricultural commodities or all industrial goods.

5. Brazil, however, contends that “[t]he footnote clarifies that Brazil’s request with respect to export credit guarantees is *not* limited to upland cotton.”² Brazil’s contention is incorrect. The footnote does nothing more than direct the reader of the consultation request to look “below” for an explanation. The footnote by itself does not contain any “identification of [a] measure at issue” as required by DSU Article 4.4, and therefore cannot itself bring any additional measures within the scope of the consultation request. Any such additional measures would have to be found -- if anywhere -- in an explanation “below.”

6. However, as described in the first U.S. submission, no such explanation or identification of additional measures ever appears. In fact, though Brazil devoted several paragraphs to this issue in its oral statement, it has never pointed to any explanation of any kind -- or any other identification of additional measures -- “below.”

7. In addition, the statement of evidence attached to Brazil’s consultation request did not include any evidence related to measures other than those for upland cotton. For Brazil to now argue that its consultation request was broader than its statement of evidence is for Brazil to admit that its consultation request was in breach of Article 7.2 of the Subsidies Agreement. Brazil cannot have it both ways.³

8. In summary, while Brazil’s consultation request did identify measures at issue for purposes of DSU Article 4.4, the measures it actually identified did not include export credit guarantees for agricultural commodities other than cotton. Thus, the latter measures were not within the scope of consultations, were not consulted upon, and could not have been included in Brazil’s panel request.

4. Is it argued that the export credit guarantee programmes concerning upland cotton are each a separate or independent measure, in that they operate independently? USA

²Brazil’s Opening Oral Statement, para. 90.

³In light of the Panel’s intended finding on the scope of Brazil’s consultation request with respect to export credit guarantees, the United States will be making a request for a preliminary ruling on this point.

9. The CCC export credit guarantee program (GSM-102), the CCC intermediate export credit guarantee program (GSM-103), and the Supplier Credit Guarantee Program (SCGP) each constitute separate programs. The distinct operation of the programs themselves is manifested in both the terms of the particular programs as well as in the nature of the obligation guaranteed. The GSM-102 and GSM-103 programs guarantee obligations of banks. SCGP extends exclusively to obligations of importers. Obligations guaranteed under the GSM-102 program may not extend beyond three years. SCGP guarantees a far lower percentage of principal (65%).

10. Within each program, allocations are made by country, by commodity, and by amount.⁴ Thus, discrete programming decisions are made in connection with each such country, commodity, program, and amounts (in terms of a guarantee value).⁵ As a result, for the last 10 fiscal years, for example, as described in the First Written Submission of the United States, no cotton transactions occurred under the GSM-103 program.

11. Furthermore, each export credit guarantee issued is a separate measure. Under DSU Article 4.4, it is incumbent upon Brazil to identify in its consultation request “the measures at issue.” Here, Brazil identified the measure as “export credit guarantees . . . to facilitate the export of US upland cotton,” and the United States may, and did, rely on that consultation request (including the attached statement of evidence) for notice.

5. Is there a specification in any legislation or regulation (or any other official government document) which limit or restrict the export credit guarantee programmes at issue exclusively to upland cotton? USA

12. Program announcements issued pursuant to applicable program regulations (7 C.F.R. §§ 1493.10(d), 1493.400(d)) serve to limit the availability of CCC export credit guarantees. These limitations are expressed in terms of one or more of the following criteria: commodities, total guarantee value for individual commodities, destination, and time within which export must occur. Examples of such program announcements are included as Exhibit US-12. Thus, export credit guarantee offerings through program announcements may be limited to cotton, pursuant to the authority of program regulations.

6. For the purposes of the Panel's examination of Brazil's claims relating to GSM-102, GSM-103 and SCGP under the Agreement on Agriculture and the SCM Agreement, is accurate data and information available with respect to these export credit guarantee programmes concerning upland cotton alone (e.g. with respect to "long-term operating costs and losses")? In this respect, the Panel also directs the parties' attention to the specific questions below relating to the programmes. USA

⁴See 7 C.F.R. §§ 1493.4, 1493.5 (setting forth allocation criteria). These criteria also apply to SCGP. 7 C.F.R. § 1493.400.

⁵See Exhibit US-12.

13. The United States endeavored to provide precisely such data with respect to cotton alone in paragraph 173, and associated tables, in its First Written Submission.

7. Are commitments with respect to export subsidies under the Agreement on Agriculture commodity-specific? How, if at all, is this relevant? BRA, USA

14. Export subsidy commitments under the Agriculture Agreement are, indeed, commodity specific. Each Member may have a schedule of reduction commitments with respect to specified commodities. To illustrate, the export subsidy reduction commitment schedule of the United States is attached as Exhibit US-13. As reflected in that schedule, for each of the 12 scheduled commodities, the United States has a reduction commitment with respect to both budget outlays and subsidized quantities. Other Members have similar schedules involving different commodities and reduction commitments. In all cases, however, the budgetary and quantitative commitments are unique to each commodity on each Member's respective schedule of export subsidy reduction commitments.

15. An individual Member, therefore, could apply an export subsidy program with respect to all commodities for which it has undertaken reduction commitments. By operation of such an export subsidy program, however, a Member may be in conformity with none, some, or all of its commodity-specific reduction commitments. So long as a Member applies such export program in a given year in accordance with the commodity-specific reduction commitment for each year, such export subsidy program is permitted with respect to each commodity and conforms fully with respect to Part V of the Agreement on Agriculture. The fact that commitments are taken on a product-specific basis confirms that alleged export subsidy measures can be defined on a product-specific basis – and that is exactly what Brazil did here.

16. In contrast, for those specific commodities for which such Member does not have a reduction commitment, then such Member may not provide export subsidies at all in connection with such specific commodities. As a result, the same program that, as applied, may be entirely in conformity with that Member's reduction commitment vis-à-vis one commodity may be a prohibited subsidy with respect to another commodity.

8. Does the United States confirm that the questions referred to by Brazil in paragraph 92 of Brazil's oral statement were posed to the United States in the consultations? USA

17. Yes. When Brazil posed them during the consultations, the United States immediately objected to questions about commodities other than cotton as being outside the scope of the consultations (as paragraph 94 of Brazil's oral statement acknowledges).

9. How does the United States respond to paragraph 94 of Brazil's oral statement? USA

18. It is incumbent on the complaining party to identify the specific measure at issue, and it should not fall to the responding party to intuit that measures not specified in the request for consultations are considered included by the complaining party. This deprives the responding party of an opportunity to understand the measures that are at issue and to enjoy the benefit of appropriate consultations. In the final analysis, Brazil essentially argues that its consultation questions and statement at consultations could expand the scope of the measures at issue as identified in its consultation request beyond “export credit guarantees . . . to facilitate the export of US upland cotton.” This is not the case. (For further information, please refer to the U.S. answer to Question 3.)

10. What actual prejudice, if any, has the United States suffered as a result of the alleged omission of products other than upland cotton from the request for consultations? USA

19. The issue of prejudice is not relevant to the question of whether a measure not consulted upon may be the subject of panel proceedings. The requirement of consultations at the beginning of a dispute is a central characteristic of the dispute settlement system, and is reflected throughout DSU Article 4. Consultations serve a number of important functions, including helping the parties to understand each others’ concerns and aiding in efforts to resolve the dispute. The DSU affirms the importance of consultations and *requires* that a Member cannot proceed to a panel unless the Member has consulted on that measure.

20. Article 4.4 delimits the scope of the consultations through its requirement that the complaining Member identify the measures at issue. In light of the jurisdictional nature of the consultation requirement, Article 4.4’s explicit requirement that the measures be identified serves the useful role of establishing a bright line as to the matters which are within the scope of the consultations and the dispute. Any resort to an analysis of what topics were actually discussed at the consultations – beyond conflicting with the DSU Article 4.6 requirement that consultations “shall be confidential,” designed to facilitate the resolution of the dispute – would invite litigation over the unverifiable recollections of each party.

21. The United States notes that in past disputes in which the scope of the dispute was at issue, it was accepted as a given that the consultation request defined the scope of the consultations. For example, in the *U.S. – Import Measures* dispute, the European Communities did not assert that U.S. actions taken on April 19, 1999 were the subject of consultations even though consultations took place two days later, on April 21, 1999. Instead, accepting that its March 4, 1999, consultation request delimited the scope of the consultations, and could not have covered measures taken after that time, the EC argued (unsuccessfully) that the April 19th actions were the same measure as that identified in the March 4 consultation request.⁶

⁶ Appellate Body report, *United States - Import Measures on Certain Products of the European Communities*, WT/DS165/AB/R, adopted January 10, 2001, para.70.

22. Brazil's consultation request identified export credit guarantees on upland cotton as the sole export credit guarantee measures within the scope of the consultations and, hence, the dispute. Had it wished to include export credit guarantees with respect to other products within the scope of the consultations, Brazil could have re-filed its consultation request to include these guarantees, much as other Members have re-filed consultation requests when they have wished to expand the scope of the dispute.⁷ Brazil chose not to, instead apparently hoping to be relieved of the procedural requirements of the DSU, requirements enforced with respect to, and taken seriously by, other Members.⁸

23. While prejudice is not relevant to whether the scope of this dispute includes export credit guarantees for products other than upland cotton, the United States observes that, not only *has* it suffered prejudice as a result of Brazil's omission of allegations concerning products other than upland cotton, but more importantly, the United States *will* suffer even further prejudice if it is compelled to respond to allegations that Brazil never properly included in its request for consultations. The United States has suffered an inability to prepare, respond, and consult with respect to allegations on measures never presented to the United States in accordance with the DSU. The United States was entitled to rely on the measures identified by Brazil in its request for consultations and also rely on that which Brazil declined to put at issue by its failure to so state in its request. This justifiable reliance is furthered by Brazil's failure to amend its request for consultations after ample notice from the United States of its reasonable understanding of Brazil's request.

24. Consequently, the U.S. has not had proper opportunity to consult with respect to the application of the three separate export credit guarantee programs and their specific application to the myriad of commodities exported in connection with these programs nor with respect to the conformity of the WTO obligations of the United States with the application of such programs to such commodities. If export credit guarantees with respect to other eligible commodities were now included in this dispute, the United States will suffer the prejudice of having to prepare and defend its actions in a severely compressed time frame without the benefit of any consultations whatsoever.

11. Does the United States agree that Brazil's request for establishment of the Panel can be understood to indicate that Brazil's export credit guarantee claims

⁷ See, e.g., WT/DS204/1 & WT/DS204/1/Add.1 (consultation request supplemented to add measures); WT/DS174/1 & WT/DS174/1/Add.1 (consultation request to add consultations under additional covered agreement).

⁸ The United States refers the Panel to the preliminary ruling of the panel in the *Canada Wheat Board* dispute, WT/DS276/12, which necessitated the refiling of the U.S. panel request and establishment of a second panel. Likewise, the United States refers the panel to India's refiling of its panel request in the *U.S. Rules of Origin* dispute (WT/DS243/5/Rev.1) when made aware of deficiencies in that request at the DSB meeting at which the request was considered. See also WT/DS210/2 & WT/DS210/2/Rev.1.

relates to products other than upland cotton? How, if at all, is this relevant? USA

25. Brazil's panel request changed the language relating to export credit guarantees to include the words "other eligible agricultural commodities." However, Brazil may not unilaterally alter the scope of the "measures at issue" in its panel request simply by adding measures not previously identified. Thus, while Brazil would have been free to add additional *claims* in its panel request, it was not free to broaden the scope of the challenged *measures*.

26. Indeed, Brazil and at least one third party have argued that in two SPS disputes between the United States and Japan panels found that a complaining party may introduce new claims in its panel request that were not included in its consultation request. In both of these cases, Japan argued that the United States could not introduce new claims (cite to new legal provisions) not in its consultation request. The United States argued, and both panels agreed, that every legal claim need not be included in the consultation request. However, these disputes are not relevant here because they did not involve identifying a new *measure* in the panel request. As noted in the 3d party oral statement of Benin, "claims" and "measures" are distinct concepts; indeed, the distinction between "claims" and "measures" is fundamental.⁹

12. Please address issues and submit evidence regarding the three export credit guarantee programmes concerned relating to upland cotton and other eligible agricultural commodities in your answers to questions and rebuttal submissions. BRA, USA

27. In light of the Panel's preliminary ruling and without prejudice to the U.S. position that these measures are not within the scope of this dispute, the United States will respond to Brazil's arguments in the U.S. submissions.

13. Please include any argumentation and evidence to support your statement during the Panel meeting that the inclusion of such other eligible agricultural commodities would create additional "work" for the Panel with respect to each of these commodities under Article 13 of the Agreement on Agriculture. USA

28. Article 10.2 defers disciplines on, *inter alia*, export credit guarantees until such time as internationally agreed disciplines are reached – as Members hope to do in the Doha Development Round. Therefore, export credit guarantees are not export subsidies within the meaning of the Agriculture Agreement, and Article 13(c) does not apply. However, for purposes of argument, we note that Article 13(c)(ii) of the Agreement on Agriculture provides that:

(c) export subsidies that conform fully to the provisions of Part V

⁹See, e.g., Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, para. 72.

of this Agreement, as reflected in each Member's schedule, shall be:

* * * * *

(ii) exempt from actions based on Article XVI of GATT 1994 or Articles 3, 5, and 6 of the Subsidies Agreement.

Pursuant to Article 13(c)(ii), to the extent a Member *is* providing export subsidies in conformity with its reduction commitments under Part V of the Agreement on Agriculture, such export subsidies are exempt from action under Article XVI of the GATT and Articles 3, 5, and 6 of the SCM Agreement.

29. Article 13(c) is not relevant with respect to export subsidies granted in connection with commodities not subject to reduction commitments in the applicable schedule of the Member. For example, the United States does not have a reduction commitment with respect to upland cotton. Therefore, the United States may not provide any export subsidy for upland cotton. The Peace Clause protection of Article 13(c) therefore cannot apply to any theoretical export subsidy of the United States for upland cotton.

30. In contrast, however, the United States has reduction commitments for 12 commodities. (Please refer to the response of the United States to Question 7 for a description of how the export subsidy reduction commitments – and therefore export subsidy obligations – of the United States and all other members are, therefore, commodity specific.) Because such commitments are commodity specific, the extent to which Article 13(c)(ii) may apply to export subsidy measures of the United States is also commodity specific. Conformity with WTO obligations and the application of Article 13(c)(ii) to export credit guarantees with respect to those twelve commodities could only be evaluated by an examination of *each* commodity subject to reduction commitments.

Expired measures

14. Please submit evidence regarding the programmes under the 1996 FAIR Act, in particular, production flexibility contract payments and market loss assistance payments, to the extent that they would be relevant to the Panel's determination under Article 13 of the Agreement on Agriculture in your answers to questions and rebuttal submission. USA

31. The United States will present evidence and arguments regarding payments under the 1996 Act as may be relevant to the Panel's Peace Clause analysis with respect to those measures.

15. Do the parties agree that it is beyond a Panel's power to recommend a remedy for an expired measure? Could the Panel be required to examine

**"expired measures" in order to conduct its assessment of the matter before it?
How, if at all, is Article 7.8 of the SCM Agreement relevant to these matters? BRA,
USA**

32. The United States agrees that it is beyond a panel’s power to recommend that a Member bring into conformity a measure that no longer exists¹⁰ However, more fundamentally, the issue is whether the expired measures in this dispute could have been measures affecting the operation of any covered agreement within the meaning of DSU Article 4.2 or “measures at issue” within the meaning of DSU Article 6.2. Because the production flexibility contract payments and market loss assistance payments were completed, the programs terminated, and the statutory instruments providing them superseded before Brazil’s consultation and/or panel requests were filed, they could not have been “measures at issue,” and they could not properly have been consulted upon or brought within the terms of reference of the Panel. This is a broader concern than whether the Panel may recommend a remedy since findings cannot be made with respect to such expired measures.

33. To determine whether past subsidies may currently be challenged, it is useful to distinguish between recurring and non-recurring subsidies. A non-recurring subsidy is a measure that continues in existence for the duration of the allocation of the subsidy to production.¹¹ For example, a subsidy to acquire capital stock to be used in future production would be non-recurring and allocated over the useful life of the stock. Where a subsidy is non-recurring and is allocated to future production,¹² the measure (subsidy) may continue to be actionable even if the authorizing program or legislation has expired. For example, in the *Indonesia – Autos* dispute, where a non-recurring subsidy was provided, the panel deemed the measure to continue even though the subsidy program had allegedly been terminated (and it is worth noting that the termination allegedly occurred well after the panel and consultation requests— in fact, after the second panel meeting).

34. In contrast, a recurring subsidy is typically provided year-after-year and is made in respect of current rather than future production. Once production has occurred and the measure been replaced or superseded, there would no longer be any measure in existence to challenge. Accordingly, a Report by the Informal Group of Experts to the Committee on Subsidies and Countervailing Measures suggested that recurring subsidies – such as grants for purposes other than the purchase of fixed assets and price support payments – should be expensed, or attributed

¹⁰Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, para. 81.

¹¹*See, e.g.*, Report by the Informal Group of Experts to the Committee on Subsidies and Countervailing Measures, G/SCM/W/415, para. 12 (25 July 1997) (“Whether a subsidy is oriented towards production in future periods, consists of equity, or is carried forward in the recipient’s accounts were viewed as related to the question whether its benefits persist beyond a single period, and hence whether it should be allocated to future periods.”).

¹²Subsidies Agreement, Annex IV, para. 7 (referring to “[s]ubsidies . . . the benefits of which are allocated to future production”).

to a single year, rather than allocated over some multi-year period.¹³

35. In the case of production flexibility contract payments and market loss assistance payments, these measures were subsidies allocated to a particular crop or fiscal year by the respective authorizing legislation. Pursuant to the 1996 Act, the last production flexibility contract payment was made for fiscal year 2002 (October 1, 2001 - September 30, 2002) “not later than” September 30, 2002.¹⁴ Pursuant to legislation enacted on August 13, 2001, the last market loss assistance payment was for the 2001 marketing year (August 1, 2001 - July 31, 2002), that is, for market conditions prevailing in that year.¹⁵ Once the relevant fiscal year and marketing year, respectively, had been completed, these measures would no longer exist. Thus, by the time of Brazil’s consultation and/or panel requests, there were no measures to consult upon nor to be at issue under the DSU; production flexibility contracts and market loss assistance payments therefore do not fall within the Panel’s terms of reference.

Agricultural Assistance Act of 2003

16. What, if any, prejudice in terms of the presentation of its case does the United States allege, should the Panel proceed to consider the measures constituting the cottonseed payments under the Agricultural Assistance Act of 2003? USA

36. It has been a fundamental characteristic of both the GATT 1947 and the WTO dispute settlement systems that proposed measures may not be the subject of dispute settlement. This has meant that dispute settlement proceedings, including consultations, could not begin until the measure at issue actually came into existence. In seeking to bring into the scope of this dispute the Agricultural Assistance Act of 2003, Brazil is seeking to fundamentally expand and change the nature of WTO dispute settlement. This issue goes well beyond the question of whether a particular responding party is prejudiced in a particular dispute and cannot be resolved on the basis of whether such prejudice has occurred. The reasons that the United States would be prejudiced if the Panel considered any measure under the Agricultural Assistance Act of 2003, including a cottonseed payment under that Act, are the reasons that the dispute settlement system has been organized to only allow proceedings on actual, not proposed, measures. First, the responding party would have lost the benefit of consultations on these measures. Consultations serve a number of important functions, including helping the parties to understand each others’ concerns and aiding in efforts to resolve the dispute. The DSU affirms the importance of consultations and *requires* that a Member cannot proceed to a panel unless the Member has

¹³G/SCM/W/415, paras. 1-12; *id.*, Recommendation 1, at 26-27.

¹⁴Federal Agriculture Improvement and Reform Act of 1996, § 112(d)(1), Public Law No. 104-127 (April 4, 1996); 7 U.S. Code § 7212(d)(1).

¹⁵Public Law No. 107-25, § 1(a) (Aug. 23, 2001) (“The Secretary of Agriculture . . . shall, to the maximum extent practicable, use \$ 4,622,240,000 of funds of the Commodity Credit Corporation to make a market loss assistance payment to owners and producers on a farm that are eligible for a final payment for fiscal year 2001 under a production flexibility contract for the farm under the Agriculture Market Transition Act.”).

consulted on that measure. Likewise, the DSU requires that the “measures at issue” be identified in the panel request, and non-existent measures quite simply are not measures at all.

37. Apart from reflecting the importance Members have placed on consultations, the DSU’s requirement that a measure exist before it can be the subject of dispute settlement proceedings avoids a waste of resources since anticipated measures may never come into effect, or may, when enacted, be in substantially changed form. Further, allowing challenges to measures not yet in existence would effectively authorize panels to issue advisory opinions. Should Members desire to expand the scope of the dispute settlement system in this manner, they may do so – indeed could only do so – through amendment of the DSU. The DSU now requires the existence of a measure before consultations may be requested or a panel established.

38. Finally, were the issue of the specific prejudice to the United States relevant in deciding whether a panel’s terms of reference could include a measure not in existence at the time of consultations or the panel request, the United States notes that this dispute is already complex, with multiple measures at issue involving multiple claims. To require the United States to address Brazil’s allegations on the Agricultural Assistance Act of 2003 would detract from the time and resources available to respond to questions and make arguments relating to those measures that *are* properly within the terms of reference.

17. (a) What is the relationship of the Agricultural Assistance Act of 2003 to other legislation in the request for establishment of the Panel? BRA, USA

(b) Do the legal instruments follow directly one after another, or are there temporal gaps? Are payments authorized under a broad legislative authority or are they specific to each legal instrument? BRA, USA

(c) Please provide any implementing regulations. Do these implementing regulations resemble those relating to previous programmes or payments? Are payments made retrospectively? How if at all is this relevant? BRA, USA

39. (a) The Agricultural Assistance Act of 2003¹⁶ was part of a large piece of legislation covering a diverse range of topics. The Act had several disaster provisions including some relief for sugar interests and more generalized relief for persons who lost other crops. One of the provisions provided for a cottonseed payment to be applied to the 2002 cotton crop (the crop that was harvested in that calendar year):

Sec. 206. COTTONSEED. The Secretary shall use \$ 50,000,000 of funds of the Commodity Credit Corporation to provide assistance to producers and first-handlers of the 2002 crop of cottonseed.

¹⁶Public Law No. 108-7 (Feb. 23, 2003).

No law compelled or authorized the cottonseed payment for the 2002 crop except for the 2003 Act, which bears no relation to other legislation cited by Brazil.

40. There was no cottonseed payment authorized in either 2002 or 2001 for the 2001 crop. Cottonseed payments were made for the 1999 and 2000 crops. Of the three pieces of legislation authorizing cottonseed payments for the 1999 and 2000 crops, only one arguably may be found in Brazil’s consultation and panel requests. Brazil identifies the “Crop Year 2001 Agricultural Economic Assistance Act (August 2001)” as a challenged measure. The Emergency Agricultural Assistance Act, Public Law No. 107-25 (August 13, 2001), authorized a cottonseed payment of \$85 million. In addition, Section 204(e) of Public Law No. 106-224, enacted June 20, 2000, directed the Secretary to use \$100 million of Commodity Credit Corporation (CCC) funds to provide assistance to producers and first handlers of the 2000 crop of cottonseed. Finally, the cottonseed payment for the 1999 crop was authorized by section 104(a) of Public Law No. 106-113, enacted Nov. 19, 1999; \$79 million in residual funds were used for the 1999 crop program.

41. (b) The temporal gaps between the various cottonseed payments are indicated in the answer to (a), above. That is, no cottonseed payments were made in 2001 or 2002 for the 2001 crop (nor prior to 1999). This gap serves to emphasize that these payments are *ad hoc*, and there was no legislative guarantee that there would be a payment for any of the years involved until the payment was actually authorized. Thus, what Brazil has termed the “cottonseed program” is readily distinguished from those programs under the 2002 Act that recur for each crop harvested from 2002 through 2007.¹⁷ In contrast, the legal authority for each cottonseed payment was separate and distinct; no underlying piece of legislation mandated that cottonseed payments be made.

42. (c) We note that each time a cottonseed payment is authorized, new rules must be issued to disburse the funds because there is no ongoing cottonseed “program”; thus, when new rules are issued, the old rules are either removed at the same time or had been removed previously. That is, there is no publication that included rules for all three programs.

43. The cottonseed payment under the 2003 Agricultural Assistance Act is not related to the other cottonseed payments except by subject matter. As indicated at the panel hearing, the text in the Agricultural Assistance Act (quoted above) is broad and simple, leaving much to the Department of Agriculture. Because of the discretion vested in the Secretary to disburse the 2002 crop cottonseed payment, and for reasons of administrative convenience, the 2003 regulations borrow from the regulations that implemented the cottonseed payments for the 2000

¹⁷Farm Bills are initiated by Agricultural Committees of the U.S. Congress and recur every 5 or 6 years. Programs provided for in a Farm Bill are generally not tied to finite amounts of money but rather make use of the funds of the Commodity Credit Corporation (CCC), which has borrowing authority in the U.S. Treasury. See 15 U.S. Code § 713 a-11 *et seq.* As a result, no appropriation is needed. By contrast, cottonseed payments (similar to other disaster payments) are *ad hoc* with targeted monies.

crop and for the 1999 crop. On April 25, 2003, the Department published regulations at 68 Federal Register 20331 to disburse funds in respect of the 2002 crop.¹⁸ The regulations to disburse the 2000 crop cottonseed payment were published at 65 Federal Register 65718 (November 2, 2000).¹⁹ The regulations to disburse the 1999 crop cottonseed payment were published on June 8, 2000 at 65 Federal Register 36550.²⁰

ARTICLE 13(B): DOMESTIC SUPPORT MEASURES

"exempt from actions"

20. In paragraph 8 of its initial brief (dated 5 June, 2003), the United States argued that the word "actions" as used in the phrase "exempt from actions" in Article 13 of the Agreement on Agriculture includes the "bringing of a case" and consultations. In paragraph 36 of its first written submission (dated 11 July, 2003), the United States stated as follows:

"[P]rior to this point in the process, the DSU rules did not afford the United States any opportunity to prevent the dispute from proceeding through consultations and panel establishment automatically, regardless of the U.S. insistence that its measures conform to the Peace Clause."

Is it the United States' understanding that the drafters used the phrase "exempt from actions" knowing that under the DSU it would not be possible fully to exempt "actions", as the United States interprets that term? USA

44. There is a difference between a commitment to exempt from action and the mechanism to enforce that commitment, just as there is a difference between rights and obligations under the WTO and the mechanism to enforce those rights and obligations. For example, where one Member breaches a tariff binding, another Member will need to resort to dispute settlement in order to resolve the issue. This does not mean that it is not possible to fully obligate the Member to observe its tariff bindings. The similar situation arises with respect to procedural obligations as well.

45. When responding Members have been confronted by situations in which they considered that complaining parties did not meet requirements for invoking dispute settlement procedures, those responding Members can voice their objections at consultations and the DSB meetings at which panel establishment has been considered, but then must accept that the issue will ultimately be decided by the panel. For example, notwithstanding that the DSU requires

¹⁸Exhibit US-14.

¹⁹Exhibit US-15.

²⁰Exhibit US-16.

consultations on a measure before a panel may be established, there is no mechanism available to address a complaining party's failure to consult absent resolution by a panel.

46. Responding Members have allowed jurisdictional issues to go to the panel for resolution as a practical way forward that offers sufficient protection for their interests while also protecting the integrity of the dispute settlement system. This does not mean that responding Members in any way lost their rights, for example, to consult on the measures at issue before being subject to panel proceedings; it has simply been practical to allow the issue to be decided by panels.

47. Likewise, in this dispute, the fact that Brazil has attempted improperly to invoke dispute settlement procedures notwithstanding the Peace Clause – and the fact that the United States has accepted that the issue should be resolved by the Panel – does not and cannot diminish the right of the United States to be exempt from Brazil's action. The fact that Members may disregard their obligations, or act based on a misunderstanding of the facts or obligations, does not affect those obligations. In this case, Brazil considers that the Peace Clause is inapplicable. As our argumentation to date indicates, we disagree and consider that, based on a correct reading of the law and facts, the Peace Clause is applicable, and Brazil was obliged not to bring this dispute. Upon making a finding on this issue in our favor, the Panel would effectively be concluding that Brazil's invocation of dispute settlement was improper – even if undertaken in good faith – just as panels have in the past concluded that complaining parties have improperly included measures that were not consulted upon in their panel requests or claims that were not within the panel's terms of reference in their argumentation.

21. In US - FSC and US - FSC (21.5) the Appellate Body made findings under the SCM Agreement relating to export subsidies in respect of agricultural products without making a finding in respect of Article 13 of the Agreement on Agriculture. How is this relevant to the United States' interpretation of the phrase "exempt from actions" as used in Article 13? USA

48. The FSC findings are not relevant since they do not address the Peace Clause issue. The issue was not raised by either party, and so neither the panel nor the Appellate Body made any finding with respect to Article 13, nor did they offer any reasoning on this issue. Indeed, in the absence of any party raising or arguing this issue, it would be difficult to see how the panel or Appellate Body could have made any findings concerning Article 13. Those DSB recommendations and rulings thus provide no guidance for purposes of this dispute.

"such measures" and Annex 2 of the Agreement on Agriculture

22. Please explain the difference, if any, between the meaning of "defined" and the meaning of "fixed" in the phrase "a defined and fixed base period" in paragraph 6(a) of Annex 2 of the Agreement on Agriculture. BRA, USA

49. These terms should be interpreted according to the customary rules of interpretation of

public international law. The ordinary meaning of “defined” is “clearly marked, definite” and “set out precisely.”²¹ “Fixed” means “stationary or unchanging in relative position.”²² Thus, as used in paragraph 6(a), a “defined and fixed base period” means a base period that is “set out precisely” and “stationary or unchanging in relative position.” That is, the “definite” base period must not be “changing in relative position”; for example, the “base period” for purposes of determining “base acres” for the deficiency payments under the 1990 Act was a farm’s average acreage over the three most recent years,²³ and so, was not a “fixed” base period but a moving one. On the other hand, U.S. direct payments satisfy this criterion because eligibility is determined by historical production of any of a number of crops (including upland cotton) in a base period that is “definite” (set out in the 2002 Act) and “stationary or unchanging in a relative position” (does not change in relative position for the duration of the 2002 Act).

23. Please explain the meaning of "a" in "a defined and fixed base period" in paragraph 6(a) of Annex 2 of the Agreement on Agriculture, the meaning of "the" in "the base period" in paragraphs 6(b), (c) and (d), and the difference between these and the phrase "based on the years 1986-88" in Annex 3. BRA, USA

50. Paragraph 6(a) establishes that eligibility for payments under a decoupled income support measure shall be determined by clearly-defined criteria in “a defined and fixed base period.” That is, paragraph 6(a) does not mandate that any particular base period be used for a decoupled income support measure and does not mandate that the same base period be used for all decoupled income support measures. This contrasts with the use of the phrase “the base period” in paragraph 9 of Annex 3, which is defined in that same paragraph as “the years 1986 to 1988.”²⁴

51. Paragraphs 6(b), (c), and (d) use the term “the base period.” As these subparagraphs all follow paragraph 6(a), in which eligibility is set in “a” defined and fixed base period, the later references to “the base period” should be read to refer to the base period used for eligibility under paragraph 6(a). Again, because paragraph 6(a) does not mandate that any particular base period be used (as opposed to paragraph 9 of Annex 3), “the base period” for paragraphs 6(b), (c), and (d) will be the “defined and fixed base period” used for purposes of eligibility under the decoupled income support measure. The definite article “the” is commonly used to refer back to a member of a indefinite set identified by the indefinite article “a.” For example, it would be

²¹*The New Shorter Oxford English Dictionary*, vol. 1, at 618 (1993 ed.).

²²*The New Shorter Oxford English Dictionary*, vol. 1, at 962 (1993 ed.).

²³See U.S. First Written Submission, para. 101 n. 92.

²⁴Agriculture Agreement, Annex 3, paragraph 9 (“The fixed external reference price shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period.”) (emphasis added). See also *id.*, Annex 3, paragraph 5 (“The AMS calculated as outlined below for the base period shall constitute the base level for the implementation of the reduction commitment on domestic support.”) (emphasis added). Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R - WT/DS169/AB/R, adopted 10 January 2001, paras. 115-16.

common grammatically to say: “A Member may take action if the Member makes the appropriate notification to the WTO.”

24. How often can a Member define and fix a base period in accordance with paragraph 6 of Annex 2 of the Agreement on Agriculture? BRA, USA

52. Paragraph 6 establishes policy-specific criteria applying to a decoupled income support measure. Under paragraph 6(a), eligibility for payments under such a measure shall be determined by criteria “in a defined and fixed base period.” Other policy-specific criteria under paragraph 6 establish that the amount of payments under a decoupled income support measure shall not be related to or based on the type or volume of production, the prices, or the factors of production employed in any year after the base period used for purposes of determining eligibility under paragraph 6(a). Thus, with respect to a decoupled income support measure, the base period used must be “defined and fixed.”

53. There is no requirement in paragraph 6 that a *particular* base period be used for a decoupled income support measure nor that the *same* base period be used for purposes of every decoupled income support measure. Thus, so long as the base period for a particular measure is “defined and fixed,” this element of the policy-specific criteria in paragraph 6 will be met.

54. For purposes of this dispute, the base period for U.S. direct payments under the 2002 Act is defined by the 2002 Act and fixed for the duration of the 2002 Act – that is, for marketing years 2002-2007. Thus, one “defined and fixed base period” applies for payments under the U.S. direct payment program for the six-year period to which the 2002 Act applies.

25. Does the United States consider that there is any ambiguity in the term "type of production" as used in paragraph 6(b) of Annex 2 of the Agreement on Agriculture? USA

55. When read according to the customary rules of interpretation of public international law, the United States does not consider that the meaning of the term “type . . . of production” as used in paragraph 6(b) is ambiguous or obscure. This paragraph establishes that the amount of decoupled income support payments may not be “based on, or linked to, the type or volume of production . . . undertaken in any year after the base period.” Interpreted according to the ordinary meaning of the terms, in context, and in light of the object and purpose of the Agriculture Agreement, this provision means that a decoupled income support measure may not base or link payments to production requirements, whether by type or volume.

26. Can the United States confirm Brazil's assertions in paragraph 174 of its first written submission that the implementing regulations for direct payments prohibit or limit payments if base acreage is used for the production of certain crops? If so, can the United States clarify the statement in paragraph 56 of its first written submission that direct payments are made regardless of what is currently

produced on those acres? Can the United States confirm the same point in relation to production flexibility contracts? USA

56. The 2002 Act allows any commodity or crop to be planted on base acres on a farm for which direct payments are made with limitations regarding certain commodities. Those commodities are fruits, vegetables (other than lentils, mung beans, and dry peas), and wild rice. Planting of those commodities on base acres is prohibited, except: (1) in a region with a history of double-cropping those commodities with those crops the historical production of which makes acres eligible for direct payments, double-cropping is permitted; (2) on a farm with a history of planting those commodities, planting is permitted, and direct payments would be reduced for every acre so planted; and (3) for a producer with a history of planting those commodities, planting is permitted, and direct payments would be reduced for every acre so planted.²⁵

57. To be more precise, the third sentence of paragraph 56 of the U.S. first submission should have used the phrase “whether upland cotton” in place of “what.” As the United States has previously indicated,²⁶ direct payments are not “related to, or based on, the type or volume” of current production because there is *no requirement* that a recipient produce upland cotton or any other crop in order to receive these payments. Direct payments are made with respect to farm acreage that was devoted to agricultural production in the past. In its rebuttal submission, the United States will describe production flexibility contract payments, which would share these characteristics but not others with direct payments, and explain why production flexibility contract payments are “green box” measures.

29. Please explain the meaning of the words "the fundamental requirement" as used in paragraph 1 of Annex 2 of the Agreement on Agriculture. USA

58. “Fundamental” means “[s]erving as the base or foundation” and “primary, original; from which others are derived.”²⁷ A “requirement” is “[s]omething called for or demanded.”²⁸ Thus, the “fundamental requirement” that measures for which exemption from reduction commitments under Article 6 is claimed must have “no, or at most minimal, trade-distorting effects or effects on production” is “something called for or demanded” “from which others are derived.”

²⁵Farm Security and Rural Investment Act of 2002, § 1106 (“2002 Act”) (Ex. US-1).

²⁶U.S. First Submission, para. 22 (“These [direct] payments are made with respect to farm acreage that was devoted to agricultural production in the past; the payments, however, are made regardless of whether upland cotton is currently produced on those acres or whether anything is produced at all.”); *id.*, para. 24 (“As stated, no current production of upland cotton (or any other crop) is required to receive payment – or, put another way, the payment is the same regardless of how much, or any, upland cotton is produced.”); *id.*, para. 67 (“Not only is there no requirement that a direct payment recipient engage in any particular type or volume of production, a recipient need not engage in any current agricultural production in order to receive the direct payment.”); U.S. Opening Statement at the First Panel Meeting, para. 18 (“The payments, however, are made regardless of whether cotton is currently produced on those acres or whether anything is produced at all.”).

²⁷*The New Shorter Oxford English Dictionary*, vol. 1, at 1042 (1993 ed.)

²⁸*The New Shorter Oxford English Dictionary*, vol. 2, at 2557 (1993 ed.)

59. The United States, perhaps in distinction from the European Communities, does not view this “requirement” (“something called for or demanded”) as merely setting out in hortatory terms the objective of Annex 2. However, as suggested by the use of the word “fundamental” (“from which others are derived”) and the structure of Annex 2 (that is, beginning the second sentence with the word “accordingly”), compliance with the fundamental requirement of the first sentence will be demonstrated by conforming to the basic criteria of the second sentence plus the applicable policy-specific criteria of paragraph 6 through 13. Relevant context supports this interpretation: Articles 6.1, 7.1, and 7.2 refer to measures which are not subject to reduction commitments because they qualify under “*the criteria set out in Annex 2.*” Article 18.3 requires a Member to notify “details of the new or modified measure and its conformity with the *agreed criteria* as set out either in Article 6 or in Annex 2.” Annex 2 itself, in describing the policy-specific criteria that must be met under paragraphs 2 and 5, emphasizes that measures must meet the “*basic criteria set out in paragraph 1*” rather than the “fundamental requirement” of that paragraph.

60. The text and context of paragraph 1 is also confirmed by the object and purpose of the Agriculture Agreement. Members need to be able to design green box measures with certainty that these measures will be exempt from reduction commitments so that they can meet their binding commitments on domestic support in furtherance of the goal of “substantial progressive reductions in agricultural support . . . sustained over an agreed period of time.”²⁹ Assessing the conformity of a claimed green box measure against the “fundamental requirement” of the first sentence in isolation would be a difficult, if not impossible task, for a Panel. Members foresaw the problem and therefore provided guidance on how a measure would fulfill that fundamental requirement – that is, if the measures “conform to the . . . basic criteria” of the second sentence plus any applicable policy-specific criteria, they shall be deemed to have met the fundamental requirement of the first sentence of Annex 2.

30. Do the parties consider that direct payments and production flexibility contract payments meet or met the basic criteria referred to in paragraph 1 of Annex 2 of the Agreement on Agriculture? BRA, USA

61. The “basic criteria” referred to in paragraph 1 of Annex 2 are: (a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers and (b) the support in question shall not have the effect of providing price support to producers. Direct payments under the 2002 Act meet these basic criteria, and the expired production flexibility contract payments under the 1996 Act met these criteria as well.

62. As noted in the U.S. first written submission, direct payments under the 2002 Act are

²⁹Agriculture Agreement, preamble.

support provided through a publicly-funded government program not involving transfers from consumers. Under Section 1103 of the 2002 Act, the Secretary of Agriculture “shall make direct payments to producers on farms [including landowners where no production occurs] for which payment yields and base acres are established,” and, under Section 1601 of the Act, the Secretary “shall use the funds, facilities, and authorities of the Commodity Credit Corporation to carry out this title.” Thus, no transfers from consumers are involved.³⁰

63. Direct payments under the 2002 Act also do not have the effect of providing price support to producers. Direct payments augment the income of persons on farms based on historic acres and yields. They are not made to support any “applied administered price” for upland cotton (or that for any other commodity), for example, by increasing upland cotton demand or reducing upland cotton supply.³¹ To-date, Brazil has not contested that U.S. direct payments satisfy both “basic criteria” under paragraph 1.

64. As set out in the U.S. answer to Question 15 from the Panel, the expired production flexibility contract payments are not within the Panel’s terms of reference. Nonetheless, as we shall explain in more detail in our rebuttal submission, these payments too satisfy the “basic criteria” referred to in paragraph 1 of Annex 2. Production flexibility contract payments provide support through a publicly-funded government program not involving transfers from consumers.³² In addition, production flexibility contract payments did not have the effect of providing price support to producers; these payments augmented the income of persons on farms based on historic acres and yields but were not made to support any “applied administered price” for upland cotton (or that for any other commodity). Again, Brazil has not contested that U.S. production flexibility contract payments satisfy both “basic criteria” under paragraph 1.

31. If the first sentence of paragraph 1 of Annex 2 is not a stand-alone obligation, then must new, non- or minimally trade-distorting measures that do not conform to the criteria listed in Annex 2 be classified as non-Green Box? BRA, USA

65. As set out in the U.S. answer to Question 29 from the Panel, the United States views the first sentence of paragraph 1 as an obligation in that it establishes a “fundamental requirement” for green box measures under Annex 2. This obligation is met when measures conform to the basic criteria of the second sentence plus the applicable policy-specific criteria of paragraphs 6 through 13. If a new measure does not conform to the basic and applicable policy-specific criteria in Annex 2, it will not have the benefit of the presumption that it meets the fundamental requirement of the first sentence.

³⁰See U.S. First Written Submission, para. 65.

³¹See U.S. First Written Submission, para. 66.

³²Federal Agricultural Improvement Act of 1996, Title I, § 161(a) (“Use of Commodity Credit Corporation. — The Secretary shall carry out this title through the Commodity Credit Corporation.”); *id.*, Title I, § 111 (providing for production flexibility contract payments).

32. If the first sentence of paragraph 1 of Annex 2 expresses a general principle which informs the interpretation of the criteria in Annex 2, please explain how this affects the assessment of the direct payments programme's compliance with paragraph 6 of Annex 2. USA

66. As set out in the U.S. answer to Question 29 from the Panel, the United States does not view the first sentence of paragraph 1 as merely setting out a general principle; according to its term, it establishes a “fundamental requirement” for green box measures under Annex 2. However, Annex 2 also indicates that measures that conform to the basic criteria of the second sentence plus the applicable policy-specific criteria of paragraphs 6 through 13 comply with that fundamental requirement. Thus, the first sentence of paragraph 1 provides important context for the interpretation of other provisions of Annex 2.

67. U.S. direct payments satisfy the criteria set out in Annex 2 and therefore comply with the fundamental requirement of the first sentence of paragraph 1. As explained in the U.S. answer to Question 30, U.S. direct payments satisfy the two basic criteria under the second sentence of paragraph 1. In addition, as set out in the U.S. first written submission,³³ direct payments satisfy the five policy-specific criteria set out in paragraph 6 of Annex 2 for decoupled income support.

68. The context provided by the first sentence of paragraph 1 indicates that Brazil's argument that direct payments do not satisfy paragraph 6(b) because payments are eliminated or reduced if payment recipients harvest certain fruits or vegetables is wrong.³⁴ Brazil's argument essentially is that paragraph 6(b) precludes a Member from requiring a recipient *not* to produce certain crops, rather than precluding a Member from requiring a recipient *to* produce certain crops. As indicated above, however, Brazil's interpretation leads to a conflict between paragraph 6(b) and the fundamental requirement of the first sentence. That is, a measure that demonstrably meets that fundamental requirement (there are no trade-distorting effects or effects on production because production of no crop is allowed) would be inconsistent with paragraph 6(b) (the amount of payment would be based on the type of production – production of no crops – in a year after the base period). In the context of the first sentence of paragraph 1, then, paragraph 6(b) should be read to prevent a Member from requiring a recipient *to produce* certain crops. U.S. direct payments do not require a recipient to produce upland cotton or any other crop in order to receive payment.

"do not grant support to a specific commodity"

33. According to the United States' interpretation of the word "grant", when can a Member claim that a measure is not exempt from action under Article 13(b)? What if the measure is enacted annually? Can the Member obtain a remedy in

³³U.S. First Written Submission, para. 67.

³⁴See also U.S. Answer to Question 25 from the Panel.

respect of that measure under the DSU? USA

69. The United States has interpreted the word “grant” according to its ordinary meaning: to “bestow as a favour” or “give or confer (a possession, a right, etc.) formally.”³⁵ Because the phrase “such measures do not grant support to a specific commodity” is expressed in the present tense, we have explained that this criterion indicates that whether measures currently in effect are exempt from actions depends upon the support they currently grant.³⁶ For example, whether payments under the 2002 Act can be challenged in the WTO at this time requires an examination of the product-specific support such measures currently grant (understood to be as of the date of the panel request or panel establishment), not the support measures granted 1, 2, or 3 years ago. A finding of a Peace Clause breach by current measures would allow a Member to proceed with an action based on Peace Clause-specified provisions and potentially obtain remedies with respect to those current subsidies.

70. A Member can make the claim that a measure is not exempt from action under Article 13(b) when the Member believes the measures at issue fail to conform to the Peace Clause, including that the Member believes the measure provides support in excess of that decided in 1992. It would not matter whether the measure were enacted annually. If there were a finding of a breach of the Peace Clause, then the complaining party could obtain a remedy in the form of a recommendation to bring the measure into conformity with the WTO agreements.

71. The issue of when a Member can claim that a measure is not exempt from action highlights the difficulty in adopting Brazil’s interpretation that *only* budgetary outlays are relevant to the Peace Clause comparison. In the case of U.S. domestic support measures, budgetary outlays are not known ahead of time. Accordingly, Brazil could only provide *estimates* of marketing year 2002 budgetary outlays in its first submission, explaining that “the evidence to tabulate the support granted to upland cotton during MY 2002 is not yet complete as the marketing year does not end until 31 July 2003.”³⁷ Brazil has not demonstrated that U.S. product-specific budgetary outlays for upland cotton exceeded marketing year 1992 outlays as of the time of its panel request, as of the time of panel establishment, nor, indeed, as of today.³⁸

72. This problem is not presented when one looks at the support *as decided by* U.S. domestic support measures. Because those measures, both in 1992 and today, set a rate of support (72.9 cents per pound during marketing year 1992; 52 cents per pound during marketing year 2002), the level of support is known at the outset (or even in advance) of the relevant crop year in which payments are made, permitting a rapid challenge and perhaps panel findings before a given crop year is over. Thus, a Member *would* be able to claim that a current measure is not exempt from action under Article 13(b) and *would* be able to obtain a remedy under the DSU.

³⁵*The New Shorter Oxford English Dictionary*, vol. 1, at 1131 (fourth & fifth definitions).

³⁶U.S. First Written Submission, paras. 79-81.

³⁷Brazil’s First Written Submission, para. 149.

³⁸See U.S. Answer to Question 67 from the Panel.

35. Does a failure by a Member to comply in a given year with either the chapeau of Article 13(b) or the proviso in subparagraph (ii) of Article 13(b) impact its entitlement to benefit in an earlier or a later year from the exemption from action provided by Article 13(b)? BRA, USA

73. A failure by a Member to comply in a given year with either the chapeau of Article 13(b) or the proviso in subparagraph (ii) of Article 13(b) would only lift the exemption from action for those measures for the year of that breach. Measures (subsidies) in a later year would remain exempt from action so long as those measures in the given year comply with the conditions in Article 13(b)(ii).

74. This conclusion flows from the text of the Peace Clause as well as the nature of the subsidies challenged by Brazil. The universe of measures exempt from actions under Article 13(b)(ii) is “domestic support measures that conform fully to the provisions of Article 6 of this Agreement including direct payments that conform to the requirements of paragraph 5 thereof, as reflected in each Member's Schedule, as well as domestic support within *de minimis* levels and in conformity with paragraph 2 of Article 6.” Because the fundamental commitment under Article 6 is to limit domestic support as measured by the Current Total Aggregate Measurement of Support to a Member’s final bound commitment level, and that commitment is judged on a year-by-year basis,³⁹ a Member may breach its commitments under Article 6 in one year and come back into compliance in the following year. Thus, conformity with this element of Article 13 must be judged on a year-by-year basis.

75. The proviso to Article 13 states that such measures shall be exempt from actions “provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year.” Thus, with respect to past subsidies (and putting aside the issue of whether there is a measure that can be challenged under the DSU), the Peace Clause proviso would require an examination of the support those measures were granting as of the time such measures were in existence. Were the Peace Clause breached in any particular year, a Member could bring an action against such measure (subsidy), but only for the year of the breach. For example, where subsidies were provided on a yearly basis, a Member could breach the Peace Clause in one year in which the support such measures grant is in excess of that decided during the 1992 marketing year but could be in conformity in the following year if support were again within the 1992 marketing year level. Only the subsidies for the year in which the Peace Clause were breached would not be exempt from actions.

76. Finally, we note that payments under the 2002 Act are recurring subsidies, expensed in

³⁹Agriculture Agreement, Article 6.3 (“A Member shall be considered to be in compliance with its domestic support reduction commitments *in any year* in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule.”) (emphasis added).

the crop year to which they apply and superseded by new payments in the following crop year.⁴⁰ (So too were past payments under the expired 1996 Act.) Thus, whether such measures conform fully to Article 6 and do not grant support in excess of that decided during the 1992 marketing year – that is, whether such measures are exempt from action under Article 13(b) – must be judged on a year-by-year basis. A breach of the Peace Clause in any particular year would allow a Member to bring an action against such measures, but only for the year of the breach.

36. Does a failure by a Member to comply with Article 13(b) in respect of a specific commodity impact its entitlement to benefit in respect of other agricultural products from the exemption from action provided by Article 13(b)? BRA, USA

77. No. For example, were the Panel to find a breach of the Peace Clause because the product-specific support U.S. measures grant for upland cotton is in excess of that decided during the 1992 marketing year, this would not remove Peace Clause protection for support for soybeans (or any other commodity). In any subsequent action, a complaining Member would have to demonstrate that the challenged measures breach the Peace Clause with respect to that commodity and support.

37. In the United States' view, why did the drafters not use the exact term "product-specific" in Article 13(b)(ii)? USA

78. It is not possible to determine exactly why the drafters of Article 13(b)(ii) did not use the term "product-specific support" in place of "support to a specific commodity." Nonetheless, the phrase "support to a specific commodity" must be interpreted according to its ordinary meaning, in context, and in light of the object and purpose of the Agreement. As the United States has explained, this phrase means "product-specific support."⁴¹ We note that while it is no doubt a good *drafting* rule to use one and only one term for any given concept in an agreement, the drafters' failure to follow that rule does not alter a treaty *interpreter's* obligation to interpret under the customary rules of public international law the words that actually are in the treaty.

79. Further, it is not surprising that this exact phrase is not used in the Peace Clause. The phrase "product-specific support" is not a defined term to be found in Agriculture Agreement Article 1. Not surprisingly, then, in different provisions the Agriculture Agreement uses different words to describe the concept of product-specific support. For example, in Article 1(a), the basic definition of product-specific support (although not identified as such) is given as "support . . . provided *for* an agricultural product in favour of the *producers* of the basic agricultural product." In Article 1(h), the Agreement again refers to product-specific support not by using that term but by using the words "support for basic agricultural products."⁴² None of these references to

⁴⁰See U.S. Answer to Question 15 from the Panel.

⁴¹U.S. First Written Submission, paras. 77-78.

⁴²Similarly, in Annex 3, paragraph 6, the Agreement refers to a "product-specific" AMS not by using those words but by using the phrase "for each basic agricultural product, a specific AMS shall be established."

“product-specific support” even uses the term “specific” whereas the phrase “support to a specific commodity” contains all three elements of that phrase (that is, product, specific, and support), using “commodity” in place of “support.”⁴³ The use of the phrase “support to a specific commodity” in the Peace Clause to refer to “product-specific support” is not remarkable in light of these multiple examples of different words in the Agreement that describe the same concept.⁴⁴

38. Given the fact that subsidies available for more than one product could have various effects on production, how does the United States demarcate between product-specific support and non-product specific support ? USA

80. The phrase “support to a specific commodity” in the Peace Clause proviso, read according to its ordinary meaning, in context, and in light of the object and purpose of the Agreement, means “product-specific support.” The United States finds the demarcation between product-specific and non-product-specific support in the Agriculture Agreement. Specifically, Article 1(a) defines the universe of support making up the Aggregate Measurement of Support as follows:

“Aggregate Measurement of Support” and “AMS” mean the annual level of *support*, expressed in monetary terms, *provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general*, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement . . . (italics added).

Article 1(h), which defines the “Total Aggregate Measurement of Support,”⁴⁵ and paragraph 1 of Annex 3, explaining the calculation of the Aggregate Measurement of Support,⁴⁶ also distinguish

⁴³Again, the use of the term “commodity” in place of “product” may result from the unique negotiating history of the Peace Clause. While the term “product” is used exclusively elsewhere in the Agreement, in the course of the Uruguay Round agriculture negotiations, the term “commodity” had been commonly used. *See, e.g.*, Framework Agreement on Agriculture Reform Programme, Draft Text by the Chairman, MTN.GNG/NG5/W/170, paras. 3, 5, 6, Annex I (11 July 1990). Despite the fact that the Peace Clause uses “commodity” in place of “product,” Brazil has not suggested that “commodity” should be interpreted as anything other than agricultural “products” subject to the Agreement.

⁴⁴The United States also notes that under paragraph 1 of Annex 3, non-product-specific support is to be aggregated into one separate AMS, which supports the notion that non-product-specific support is *not* to be allocated to specific products, contrary to what Brazil urges the Panel to do here.

⁴⁵Agriculture Agreement, Article 1(h) (“‘Total Aggregate Measurement of Support’ and ‘Total AMS’ mean the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of *support for basic agricultural products*, all *non-product-specific aggregate measurements of support* and all equivalent measurements of support for agricultural products . . .”).

⁴⁶Agriculture Agreement, Annex 3, paragraph 1 (“Subject to the provisions of Article 6, an Aggregate Measurement of Support (AMS) shall be calculated *on a product-specific basis for each basic agricultural product* receiving market price support, non-exempt direct payments, or any other subsidy not exempted from the reduction

between product-specific and non-product-specific support, without providing additional detail to that found in Article 1(a).

81. Article 1(a), therefore, provides the basic demarcation between product-specific and non-product-specific support; as mentioned at the first panel meeting, Brazil has not contested this point. Product-specific support, then, is “support . . . provided for an agricultural product in favour of the producers of the basic agricultural product.” This definition contains two elements. First, the support must be provided “*for an agricultural product*,” which suggests that the subsidy is given “in favour of”⁴⁷ a product and not in respect of criteria not related to the product or in respect of multiple products. Second, such support is “in favour of the *producers of the basic agricultural product*,” which suggests that subsidy benefits those who produce the product – that is, production is necessary for the support to be received.

82. Article 1(a) explains non-product-specific support as “support provided in favour of agricultural producers in general.” That is, non-product-specific support is not support provided “for *an agricultural product*” and is not support in favor of “the *producers of the basic agricultural product*” but rather is support in favor of agricultural producers “generally.”⁴⁸ Thus, read according to its ordinary meaning and in the context of Article 1(a), non-product-specific support is a residual category of support covering those measures that do not fall within the more detailed criteria set out in the definition of product-specific support.

83. Finally, we note Brazil’s argument that “[t]he term ‘product-specific’ that the United States seeks to read into Article 13(b)(ii) has a very technical and particular meaning as set out in Article 6(4), and Annex 3 to the Agreement on Agriculture.”⁴⁹ As explained above, while both of these provisions use the term “product-specific” as well as “non-product-specific,” the Panel will search these provisions in vain for a “technical and particular meaning” of either of these terms. Brazil fails to direct the Panel’s attention to the only explanation of the meaning of those terms, Article 1(a), perhaps because this explanation of the “technical and particular meaning” of product-specific support suggests that several of the measures challenged by Brazil provide non-product-specific support and are not part of the comparison under the Peace Clause proviso.

39. If "such measures" in Article 13(b)(ii) refers to all those in the chapeau of Article 13(b), why are they not all included in the potential comparisons with 1992? In what circumstances can measures which grant non-product specific support lose exemption from action under Articles 5 and 6 of the SCM Agreement and Article

commitment (‘other non-exempt policies’). *Support which is non-product specific shall be totalled into one non-product-specific AMS in total monetary terms.* (emphasis added).

⁴⁷*The New Shorter Oxford English Dictionary*, vol. 1, at 996 (1993 ed.) (definition of “for”: “in favour of”; “[w]ith the purpose or result of benefitting”).

⁴⁸“In general” means “in general terms, generally” and “as a rule, usually.” *The New Shorter Oxford English Dictionary*, vol. 1, at 1073 (1993 ed.).

⁴⁹Brazil’s Opening Oral Statement at the First Panel Meeting, para. 16.

XVI of GATT 1994? USA

84. The introductory phrase of Article 13(b) establishes the full universe of measures that are potentially exempt from actions under this provision – that is, domestic support measures “that conform fully to the provisions of Article 6.” The phrase “such measures” in Article 13(b)(ii) occurs in the proviso, and the use of the word “such” refers back to those measures identified in the introductory phrase. However, the type of support that must be compared pursuant to the proviso is set out by the *text* of the proviso: the comparison is not between the *total* (product-specific and non-product-specific) support provided by all measures that existed in 1992 versus those that exist currently; rather, the proviso comparison is between the “support to a specific commodity” that challenged measures grant versus that decided during the 1992 marketing year.

85. With respect to Article 13(b), then, the Peace Clause has two tiers of analysis and effect. First, non-green box domestic support measures collectively lose Peace Clause protection if they do not conform fully to the provision of Article 6 – that is, if they exceed a Member’s domestic support commitment level. Second, even if a Member’s Current Total Aggregate Measurement of Support is within the reduction commitment, the support to a specific commodity can still lose its Peace Clause protection if it exceeds the level decided during marketing year 1992. This second tier was intended to prevent a Member from increasing its non-green box support to a specific commodity while staying within the domestic support commitment level. When a Member *has* disciplined its product-specific support, however, by staying within the level decided during the 1992 marketing year (as the United States has done), it is entitled to the benefit of observing that commitment.

86. Finally, we note that Brazil’s interpretation of the proviso calls for allocating support from all non-green box measures to an agricultural product regardless of whether that support is product-specific or non-product-specific. This analysis has no foundation in the Agriculture Agreement. In fact, Brazil has not followed its own approach through to its logical conclusion: as alluded to by Question 41 from the Panel, presumably Brazil could have taken *all* non-product-specific support provided by the United States and allocated some portion of that support to upland cotton producers. Brazil has not done so, but there is no basis in the Agreement to distinguish the non-product-specific support Brazil excluded from the non-product-specific support Brazil *included* for purposes of its Peace Clause analysis (for example, counter-cyclical payments and crop insurance). The only basis to distinguish whether a measure provides “support to a specific commodity” that is found in the Agriculture Agreement is to rely on the distinction between product-specific and non-product-specific support as explained in Article 1(a).

43. What are the precise differences between deficiency payments and counter-cyclical payments that lead you to classify the former as product-specific and the latter as non-product specific? How do you classify market loss assistance payments? USA

87. As indicated in the U.S. answer to Question 38 from the Panel, Article 1(a) of the Agriculture Agreement provides the demarcation between product-specific and non-product-specific support. The definition of product-specific support contains two elements. First, the support must be provided “*for an agricultural product,*” which suggests that the subsidy is given in respect of a product and not in respect of criteria not related to the product or in respect of multiple products. Second, such support is “in favour of the *producers of the basic agricultural product,*” which suggests that subsidy recipients are those who produce the product – that is, production is necessary for the support to be received. Non-product-specific support is a residual category of “support provided in favour of agricultural producers in general” – that is, “generally.”

88. In light of these definitions, it follows that deficiency payments under the 1990 Act were product-specific support whereas counter-cyclical payments are non-product-specific. The relevant differences may be summarized as follows:

Deficiency Payments	Counter-Cyclical Payments
Farmer must plant upland cotton to receive payment	No requirement to plant upland cotton (or any crop)
Payment based on acres “planted for harvest” to upland cotton in that crop year	Payment based on historical “base acres” irrespective of acres currently planted to upland cotton

In short, deficiency payments required production of upland cotton whereas counter-cyclical payments do not. Thus, deficiency payments were support *for* upland cotton in favor of *the producers* of upland cotton.

89. In order to receive a deficiency payment, a producer was *required* to plant upland cotton for harvest. The “farm program payment acreage” for an individual farm – that is, the acres on the farm for which the producer would receive a deficiency payment in a given crop year – was defined as “the smaller of the maximum payment acreage or *the acreage planted to the crop on the farm for harvest* within the permitted acreage of the crop of the farm.”⁵⁰ That is, a farmer would be paid on the acres planted to upland cotton for harvest up to the maximum payment acreage. Under the program regulations, “crop acreage planted for harvest” was generally defined as “[t]he acreage harvested.”⁵¹ Thus, in a given crop year, production was required to

⁵⁰ Code of Federal Regulations § 1413.108(d) (Jan. 1, 1993) (emphasis added) (Exhibit US-3); 7 U.S. Code § 1444-2(c)(1)(B)(i) (1992 Supp.) (January 4, 1993) (Exhibit US-5).

⁵¹ Code of Federal Regulations § 1413.4(b) (Jan. 1, 1993) (Exhibit US-3). Under the 1990 Act, there were so-called 50-92 provisions, under which a producer could devote part of the maximum payment acreage (that is, 85 percent of the established crop acreage base less any acreage under an acreage reduction program) to conserving uses and still receive deficiency payments on the acreage. To take advantage of that provision, the producer was still required to plant upland cotton for harvest on *at least* 50 percent of the maximum payment acreage. 7 U.S. Code § 1444-2(c)(1)(D)(ii) (1992 Supp.) (Jan. 4, 1993) (“To be eligible for payments . . . the producers on a farm must actually plant upland cotton for harvest on at least 50 percent of the maximum payment acres for cotton for the

receive a deficiency payment, and the amount of the deficiency payment was based on the acreage on which upland cotton was harvested. Thus, both elements of the definition of product-specific support in Article 1(a) are satisfied. The deficiency payment was support for an agricultural product in favor of the producers of the product because recipients had to have planted upland cotton for harvest to receive payment in a given crop year.

90. On the other hand, counter-cyclical payments are decoupled from production requirements. Counter-cyclical payments are made to persons with farm acres that were devoted to production of any of a number of crops, including upland cotton, during an historical base period. That base period was defined in the 2002 Act and is fixed for the life of the legislation (that is, for marketing years 2002-2007).⁵² However, a person with “upland cotton base acres” need not produce upland cotton (nor any other particular crop) to receive the counter-cyclical payment. A person with “upland cotton base acres” also need not produce any crop at all. Thus, counter-cyclical payments do not satisfy the definition of product-specific support: they are not payments for an agricultural product in favor of the producers of the product since *no production of any product, including upland cotton, need occur for payment.*

91. As indicated in our 1999 WTO domestic support notification (G/AG/N/USA/43), the United States believes that market loss assistance payments are non-product-specific amber box support. As with production flexibility contract payments, market loss assistance payments were made to persons with farm acres that previously had been devoted to production of certain crops, including upland cotton, during an historical base period. No production of upland cotton or of any other crop was required to receive payment, and no production was required at all. Thus, these payments do not meet the definition of product-specific support in Annex 1(a).

92. However, the United States did notify these payments as amber box because they were made in response to low prevailing commodity prices. As such, the United States does not consider that they conform to the criterion in paragraph 6(c) of Annex 2 that the amount of decoupled income support payments “in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.” We note that while Brazil has included market loss assistance payments in its Peace Clause comparison, it has not contested the U.S. position (as evidenced by G/AG/N/USA/43) that these payments are non-product-specific amber box support.⁵³

45. If the Panel considered that Step 2 payments paid to exporters were an export subsidy, would the United States count them as domestic support measures

farm.”) (Exhibit US-5).

⁵²By way of contrast, under the deficiency payment program, “base acres” were determined by a farmer’s yearly upland cotton planting decisions. Base acres were defined as “the average of the acreages planted and considered planted to such crop for harvest on the farm in each of the 3 crop years preceding such crop year.” 7 Code of Federal Regulations § 1413.7(c) (Jan. 1, 1993) (Exhibit US-3).

⁵³See Brazil’s First Written Submission, paras. 60-62.

for the purposes of Article 13(b)? Please verify Brazil's separate data for Step 2 export payments and Step 2 domestic payments in Exhibit BRA-69 or provide separate data. BRA, USA

93. If the Panel were to conclude that the Step 2 program and payments made thereunder could be separated into domestic and export components, and the export component were deemed to be an export subsidy, logically, that component would no longer constitute domestic support. Therefore, that measure would not form part of an analysis under Article 13(b), but rather would fall under Article 13(c). For data relating to Step 2 payment by fiscal year and use, please see the U.S. answer to Question 104 from the Panel.

46. What is the relevance, if any, of the concept of "specificity" in Article 2 of the SCM Agreement and references to "a product" or "subsidized product" in certain provisions of the SCM Agreement to the meaning of "support to a specific commodity" in Article 13(b)(ii) Agreement on Agriculture? BRA, USA

94. The concept of specificity in Article 2 of the Subsidies Agreement is entirely unrelated to the meaning of "support to a specific commodity" in Article 13(b)(ii) of the Agreement on Agriculture. Generally, under Article 2 of the Subsidies Agreement, a subsidy is specific if it is limited, in law or in fact, to "an enterprise or industry or group of enterprises or industries." The relevant context for "support to a specific commodity" is found in Articles 1(a), 1(h), 6.4, and Annex 3 of the Agriculture Agreement.

"in excess of that decided during the 1992 marketing year"

47. Where does Article 13(b)(ii) require a year-on-year comparison? BRA, USA

95. Please see the U.S. answer to Question 35 from the Panel for a reply to this question.

48. Does Article 13(b)(ii) require a comparison of support granted with support decided? How could such a comparison be made? BRA, USA

96. The proviso to Article 13(b)(ii) requires a comparison of the product-specific support that challenged measures grant (in this case, for upland cotton) to the product-specific support decided during the 1992 marketing year. The United States agrees with Brazil that the Peace Clause proviso requires an apples-to-apples comparison. However, while Brazil's proposed comparison (the budgetary outlays that may be allocated to a commodity, whether product-specific or non-product-specific) has no grounding in the text or context of the Peace Clause, the United States believes the basis for this comparison is established by the use of the word "decided."

97. The term "decided" is not explicitly defined in the Agreement and is not used elsewhere in the Agriculture Agreement nor in the Subsidies Agreement to refer to support or subsidies.

Members’ unique choice of words must be given meaning. “Decide” means to “[d]etermine on as a settlement, pronounce in judgement” and “[c]ome to a determination or resolution *that, to do, whether.*”⁵⁴ Thus, the basis for the comparison under the Peace Clause proviso is the product-specific support that was “determined” or “pronounced” during the 1992 marketing year. U.S. measures “decided” product-specific support for upland cotton in terms of a rate of 72.9 cents per pound through the combination of marketing loans and deficiency payments. Thus, to make an apples-to-apples comparison, this rate of support must be compared to the rate of support that challenged measures “grant.”

98. Contrary to Brazil’s assertion, the use of the term “grant” does not compel an examination of budgetary outlays. The ordinary meaning of “grant” is to “bestow as a favour” or “give or confer (a possession, a right, etc.) formally.”⁵⁵ Thus, the use of the term “grant” would permit an evaluation of the rate of support that challenged measures “give or confer . . . formally.” Brazil’s reference to footnote 55 of the Subsidies Agreement⁵⁶ is not pertinent as this is one of several Subsidies Agreement references to a *Member* granting a *subsidy*,⁵⁷ which differs from the Peace Clause phrase, “such *measures* do not grant support.” More importantly, Members did not choose to use the word “granted” in place of “decided,” and a valid interpretation must make sense of that choice rather than reading it out of the Agreement. In addition, had Members intended the Peace Clause comparison to be made *solely* on the basis of budgetary outlays, they could have used that term. After all, “budgetary outlays” is a defined term in Article 1(c) and repeatedly referred to in the Agreement.⁵⁸

99. Thus, the comparison of the product-specific support “decided” during the 1992 marketing year to the support challenged measures “grant” must be made on the terms established by U.S. measures themselves. The United States decided to ensure producer support at a rate of 72.9 cents per pound of upland cotton during the 1992 marketing year. In this case,

⁵⁴*The New Shorter Oxford English Dictionary*, vol. 1, at 607 (first and third definitions) (italics in original).

⁵⁵*The New Shorter Oxford English Dictionary*, vol. 1, at 1131 (fourth & fifth definitions).

⁵⁶See Subsidies Agreement, fn. 55 (“For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.”).

⁵⁷See, e.g., Subsidies Agreement, Article 2.1(c) (“Such factors are: . . . the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy”); *id.*, Article 3.2 (“A Member shall neither grant nor maintain [prohibited] subsidies referred to in paragraph 1.”); *id.*, Article 4.1 (“Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member.”); *id.*, Article 7.1 (“Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member.”); *id.*, Article 9.2 (“Upon request for consultations under paragraph 1, the Member granting or maintaining the subsidy programme in question shall enter into such consultations as quickly as possible.”); *id.*, Article 25.2 (“Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.”).

⁵⁸See Agriculture Agreement, Articles 3.3, 9.2; *id.*, Annex 3, paras. 2, 10, 12, 13; *id.*, Annex 4, para. 2.

the comparison presents no difficulty because the challenged measures also grant a rate of support (52 cents per pound). Because the latter is not in excess of the former, challenged U.S. domestic support measures are exempt from actions pursuant to Article 13(b)(ii).

50. Please provide any written drafting history which could shed light on why the proviso was added to what is now Article 13(b)(ii) and, in particular, why both words "grant" and "decided" were used. USA

100. The United States is not aware of any written drafting history on this point.

51. Could the United States please comment on the interpretation advanced by the EC, in paragraphs 16 and 18 of its oral statement, of the words "decided during the 1992 marketing year"? USA

101. The United States agrees with parts of the interpretation advanced by the EC. The Communities too see the use of the term “decided” in the Peace Clause as notable and suggest that it compels an examination of “an amount of support adopted by some form of decision.” The Communities argues that a Member cannot be deemed to have “decided” all of the “applications for support under a particular programme” (as is implied by an examination of budgetary outlays) and that the term “decided” cannot “set up a comparison between domestic support [actually] granted in 1992 and domestic support granted in a more recent period.” The United States agrees with these statements.

102. The Communities also advance argumentation that may not flow from the ordinary meaning of the term “decided.” For example, the Communities suggests that the term “implies a one-off decision,” without further explanation. It would appear that the support “decided” during a marketing year could be made through more than one decision, however. In addition, the Communities suggests that this decision is one “in which support for a specific product is decided and allocated for future years.” While it may be that a Member decided support for a future year during the 1992 marketing year, forming the benchmark for the comparison under the Peace Clause proviso, it would also appear likely that a Member decided on a level of support for the marketing year during that marketing year. Thus, the support decided during the 1992 marketing year would not appear to be necessarily limited to support for future years.

52. Please comment on an interpretation of the words "decided during" in Article 13(b)(ii) that would read them as synonymous with the words "authorized during". BRA, USA

103. The ordinary meaning of the words “decided during” would be “determined or pronounced during” or “having come to a determination or resolution that or to do during.” The United States understands that the term “decided during” was intended to capture not just a decision during 1992 for 1992, but also, as the EC indicates, a decision in 1992 of the support to be granted in a future year, in particular the EC’s decision during 1992 for future years. The term

“authorized during” would not appear to capture all of these dimensions of the term “decided during.” In fact, a measure could be “authorized” during 1992 based on a “decision” during an earlier year so the two terms are not synonymous.

54. Please identify all United States legal and regulatory and administrative instruments decided during the marketing year 1992, with the respective dates of decision, that decided support for upland cotton. BRA, USA

104. The level of support decided during marketing year 1992 was to ensure a rate of return to producers of 72.9 cents per pound. Numerous legal, regulatory, and administrative instruments “determined” or “pronounced” this support. This level of support was first determined or pronounced by the 1990 Act, which covered the 1991-1995 marketing years. This legislation stated that “[t]he established price for upland cotton shall not be less than \$0.729 per pound” for deficiency payments⁵⁹ and promised to make up the difference between that price and the higher of the (1) marketing loan rate or (2) market price. The 1990 Act was enacted on November 28, 1990. We note that the established price was set at “not less than” 72.9 cents per pound; that is, the Secretary of Agriculture was given some discretion to set the effective price so long as this did not fall below 72.9 cents. The Secretary, in fact, did not decide to alter this effective price prior to, during, or after the 1992 marketing year.

105. The Secretary decided on the marketing loan rate applicable for the 1992 crop via a series of regulations. A proposed rule was published on September 13, 1991, at 56 Federal Register 46574. The final decision on a loan rate of 52.35 cents per pound was announced on October 31, 1991, published on April 20, 1992, at 57 Federal Register 14326.⁶⁰ Those determinations applied to all marketings during marketing year 1992.

106. The United States decided to maintain the effective price for deficiency payments and loan rate for marketing loans at those levels during the 1992 marketing year as reflected in several published documents. The January 1, 1993, Code of Federal Regulations (Exhibit US-3) codified these levels of support.⁶¹ The 1992 Supplement to the U.S. Code also codified the legislated effective price of “not less than” 72.9 cents per pound. In addition, the Department of Agriculture published an upland cotton fact sheet in September 1992 announcing that “[t]he 1992 target price [for deficiency payments] is 72.9 cents per pound” and the “1992 loan rate . . . is 52.35 cents per pound.”⁶²

107. Finally, we note that in anticipation of the 1993 crop year the Department of Agriculture also initially pronounced the level of support for the 1993 crop year during the 1992 marketing year. On March 24, 1993, regulations were published at 58 Federal Register 15755 setting the

⁵⁹7 U.S. Code § 1444-2(c)(1)(B)(ii) (1992 Supp.) (Jan. 4, 1993) (Exhibit US-5).

⁶⁰Exhibit US-2.

⁶¹7 Code of Federal Regulations § 1413.104(a) (Jan. 1, 1993) (Exhibit US-3).

⁶²U.S. Department of Agriculture, Upland Cotton Fact Sheet, at 2 (September 1992) (Exhibit US-17).

marketing loan rate at 52.35 cents per pound and leaving undisturbed the effective price for deficiency payments at 72.9 cents per pound.⁶³ Thus, the support decided for the 1993 crop was the same as that decided for the 1992 crop: to ensure producer support of 72.9 cents per pound of upland cotton.⁶⁴

55. Please provide a copy of the instrument in which the rate of support for upland cotton during the marketing year 1992 was decided, indicating the date of the decision. USA

108. As indicated in the U.S. answer to Question 54 from the Panel, the United States has provided copies of multiple legal, regulatory, and administrative instruments and publications reflecting the rate of support decided during marketing year 1992. These multiple decisions stem from the fact that an effective price and marketing loan rate were first published in advance of the 1992 marketing year in order to allow producers to become familiar with the programs; subsequently, the Secretary of Agriculture decided not to change either the effective price (72.9 cents per pound) or the marketing loan rate (52.35 cents per pound), despite having the authority to do so.

56. Could the United States please explain how support granted under legislation that dates back to 1990 can have been support "decided during the marketing year 1992"? USA

109. Payments during the 1992 marketing year were made pursuant to the 1990 Act, which directed the Secretary of Agriculture to make marketing loan payments and deficiency payments (as well as Step 2 payments). The 1990 Act, however, was only the first decision on the level of support. The Act provided that the marketing loan rate could “not be reduced below 50 cents per pound.”⁶⁵ The 1990 Act also stated that the “established price for upland cotton shall not be less than \$0.729 per pound.”⁶⁶ Thus, the Secretary had discretion to alter those rates of support.

110. The Secretary decided to set the marketing loan rate at 52.35 cents per pound in April 1992 but also decided not to change the implementing regulations establishing the effective price for deficiency payments. Similarly, during the 1992 marketing year, the Secretary had the discretion *to raise* the deficiency payment target price above 72.9 cents per pound and *to raise* the marketing loan rate above 52.35 cents per pound but decided not to. Documents published during 1992 evidence this decision: the 1992 supplement to the United States Code published in January 1993 reflects the decision not to alter the statutory provisions relating to upland cotton

⁶³A proposed rule for the 1993 crop was published on September 29, 1992. The 1993 rates were announced on November 2, 1992, and published in the March 24 Notice.

⁶⁴We note that one distinction made by the March 24, 2003 regulations between the 1993 crop and the 1992 crop was that the acreage reduction program percentage was lowered from 10 percent in 1992 to 7.5 percent in 1993.

⁶⁵U.S.C. 1444-2(a)(1), (2)(A) (1992 Supp.) (Jan. 4, 1993) (Exhibit US-5).

⁶⁶U.S.C. 1444-2(c)(1)(B)(ii) (1992 Supp.) (Jan. 4, 1993) (Exhibit US-5).

rates. The 1993 Code of Federal Regulations was published in January 1993 and also reflects the decision not to alter the regulatory rate provisions. Finally, when the upland cotton fact sheet was published in September 1992, the effective price and marketing loan rate were left unchanged, reflecting the Secretary’s decision not to change the level of support.

111. In this case, the support determined or pronounced by U.S. measures during the 1992 marketing year was also the support determined or pronounced for the 1992 marketing year. This result is entirely consistent with the Peace Clause text; in fact, it provides certainty to both Members seeking to provide support within Peace Clause limits and Members seeking to understand whether the Peace Clause has been breached.

112. Thus, the 1990 Act initially established a level of support applicable to the 1991-95 crops. The U.S. Congress could have changed the 72.9 cents per pound level at any time during MY 1992, but it decided not to. The Secretary of Agriculture also had discretion to alter the level of support (that is, to raise it) but also decided not to. Thus, 72.9 cents per pound was decided and remained decided as the level of support for each day of the 1992 marketing year.

57. If the United States decided on a rate of support for MY1992, does that not mean that it decided on whatever budgetary outlay was required to meet that rate of support, even if the exact amount was not known at that time? USA

113. The Peace Clause proviso establishes the benchmark for comparison: the support “decided” during the 1992 marketing year. To say that the United States “determined” or “pronounced” an indefinite amount of budgetary outlays would not fit those meanings of the term. The United States could also not have come to a “determination or resolution” to make any budgetary outlay since that outlay would be determined by market prices during the year, *not* by the U.S. Government. To read support “decided” as encompassing not only the explicit rate of support set out in U.S. measures but also “whatever budgetary outlay was required to meet that rate of support, even if the exact amount was not known at the time,” would also appear to make the Peace Clause comparison impossible. That is, because both during the 1992 marketing year and under the 2002 Act the support decided would be “whatever budgetary outlay was required to meet that rate of support,” both budgetary outlay “decisions” by the United States would appear to be unlimited, and one could not be in excess of the other. Alternatively, one could reason that a decision to provide whatever budgetary outlays would be necessary implies that the 1992 decided level would be higher because, even if prices fell to zero, the higher nominal level in 1992 would mean higher budgetary outlays.

114. The only support “decided” by the United States was the 72.9 cents per pound level of support. In effect, the United States provided a revenue floor for producers by guaranteeing a rate of income for plantings. The United States has never exceeded that level of incentive “for the commodity.” Brazil’s approach, which would ascribe to the United States a decision to make budgetary outlays resulting from differences between market prices and the level of support, is an effort to impose something akin to an AMS limit on U.S. support for upland cotton. (We note,

however, that Brazil cannot simply argue for calculating an AMS for upland cotton because that would exclude non-product-specific support, which Brazil wishes to include in the Peace Clause comparison, and would not require that support be measured through budgetary outlays.) Members considered and rejected any product-specific AMS limits in the Uruguay Round, however, and such a concept may not be overlaid onto the Article 13 language. The United States has introduced payments decoupled from production precisely to lower the incentive to produce the marginal pound of cotton and avoid exceeding the product-specific level of support of 72.9 cents per pound.

59. Should the rate of support as indicated in Article 13(b)(ii) include the market price? If so, why is it appropriate to include it in the comparison under Article 13(b)(ii)? BRA, USA

115. No, the market price is not relevant for purposes of the Peace Clause comparison. As indicated in the U.S. answers to Questions 48 and 57 from the Panel, the benchmark for that comparison is the support “decided” during the 1992 marketing year. That support was decided by the United States as a rate of support: 72.9 cents per pound. The actual amount of expenditures necessary to provide that support depended on the market prices during the marketing year. However, these prices were not “determined” or “pronounced” by the United States and therefore cannot have been (or be) part of any U.S. decision.

60. Can you provide information on support decided in 1992 and the years with which you believe it should be compared, on a per support programme / per unit of production / per annum basis? If possible, please specify how, if at all, budget outlays may be transposed into units of production, and which units of production are best to use. BRA, USA

116. The United States has explained that the product-specific support decided during the 1992 marketing year for upland cotton was 72.9 cents per pound through the combined effect of the target price for deficiency payments and the loan rate for marketing loans. This rate was the only support “decided” by the United States as evidenced by the relevant legislation, regulations, and program announcements. By comparison, the product-specific support that upland cotton support measures currently grant is only 52 cents per pound through the loan rate for the marketing loan program.

117. The United States believes that any analysis that takes budgetary outlays into account necessarily will not reflect the support “decided” by the United States. Because U.S. domestic support measures are largely dependent on a price-gap, budgetary outlays will reflect prevailing market prices during the applicable marketing year, prices the United States cannot decide. Budgetary outlays will also reflect, for the product-specific support that marketing loans grant, various *producer* decisions on program participation, timing of receipt of payments, and production levels. Again, these factors cannot be decided by the United States. Thus, given the way in which the challenged U.S. measures decide the level of support, the Peace Clause

comparison may only be made on the basis of rates of support, not budgetary outlays.

61. Does the United States consider that Article 13(b)(ii) permits a comparison on any basis other than a per pound basis? USA

118. Article 13(b)(ii) requires that the benchmark for comparison be the support “decided” during the 1992 marketing year. The United States decided on an a rate of support of 72.9 cents per pound during the 1992 marketing year. Therefore, the evaluation must be whether challenged measures grant product-specific support in excess of that decided during the 1992 marketing year – that is, in excess of the 1992 rate of support. Were the relevant U.S. domestic support measures structured differently, the term “decided” might imply a different comparison.

66. Could you please comment on the relative merits of each of the following calculation methods for the purposes of the comparison of support to upland cotton with 1992, irrespective of whether a particular measure should be included or excluded:

(a) Total budgetary outlays (Brazil's approach). USA

119. As stated in the U.S. answer to Question 60 from the Panel, the United States believes that any analysis that takes budgetary outlays into account necessarily will not reflect the support “decided” by the United States. Because some U.S. domestic support measures are dependent on a price-gap (for example, marketing loans), budgetary outlays will reflect prevailing market prices during the applicable marketing year, prices the United States cannot decide. Budgetary outlays will also reflect, for the product-specific support that marketing loans grant, various *producer* decisions on program participation, timing of receipt of payments, and production levels. Again, these factors cannot be decided by the United States. Thus, given the way in which the challenged U.S. measures decide the level of support, the Peace Clause comparison may only be made with respect to these measures on the basis of rates of support, not budgetary outlays.

(b) Budgetary outlays per unit of upland cotton: Could you please calculate and provide an estimate for the marketing years 1992 and 1999-2002, respectively, and draw attention to any factors/qualifications that the Panel would need to be aware of. BRA, USA

120. For the reasons stated in response to Question 66(a), any analysis involving budgetary outlays necessarily will not reflect the support “decided” by the United States. A budgetary outlays per unit of upland cotton approach thus would not only be based on a faulty premise, but to calculate outlays per unit might also necessitate an *ex post* or retrospective analysis. Again, this cannot reflect the support “decided” by the United States.

(d) Per unit rate of support for upland cotton (Prof. Sumner's approach at the

first session of the first substantive meeting). USA

121. The United States continues to examine Mr. Sumner’s approach to calculating a per-unit subsidy rate. We will present a detailed critique of Mr. Sumner’s analysis in our rebuttal submission. Here, we limit our comments to two points.

122. First, as with the budgetary outlays approach favored by Brazil, this per unit rate of support analysis ascribes to the United States choices made by producers themselves. For example, the first line of Sumner’s analysis of the deficiency payment program stated: “The following qualifications and adjustments must [] be made to the level of support provided by the deficiency payment program: (1) payments were made *only if a farm chose to participate* in the deficiency payment program; in 1992, farms representing 11 percent (1.64 million acres) of the total ‘effective’ upland cotton acreage base (14.9 million acres) *did not agree to participate in the program* and hence cotton production on this land could not receive support.”⁶⁷ Sumner makes a similar argument and adjustment for the 1992 loan rate.⁶⁸

123. Attempting to adjust the per unit rate of support to take account of producers that chose not to participate in the program is a serious conceptual error. In economic terms, a farmer that participated in the upland cotton program received full program benefits; a farmer who chose not to participate did not. Averaging these numbers produces a “per unit rate of support” that no cotton farmer ever could have expected to receive.

124. Nor could a Member have “decided” such a level of support. In legal terms, an individual producer’s choices on program participation do not reflect any decision by the U.S. Government. Thus, estimated rates of support that reflect these producer decisions are not relevant to the Peace Clause analysis under Article 13(b)(ii). We will discuss other conceptual errors in Sumner’s approach in our rebuttal submission.

125. In reviewing Sumner’s analysis, the United States was particularly struck by another point. The Panel may recall Brazil commenting at the first panel meeting that Sumner’s calculations were not entirely unfavorable to the U.S. position. A look at Appendix Table 1 to Sumner’s statement (Exhibit BRA-105) reveals why.

126. Even using Sumner’s flawed calculations, if one excludes the non-product-specific support that Brazil is attempting to “allocate” to upland cotton from the table, Sumner’s analysis supports the United States, not Brazil. That is, Sumner’s estimated per unit rate of support was *lower* in every year from marketing year 1999 through marketing year 2002 than the level of support during marketing year 1992:

⁶⁷Exhibit BRA-105 (Statement of Mr. Daniel Sumner, para. 10) (emphasis added).

⁶⁸Exhibit BRA-105 (Statement of Mr. Daniel Sumner, para. 12).

Product-Specific Support in Sumner’s per Unit Subsidy Rates (Cents per Pound) by Program and Year					
	MY1992	MY1999	MY2000	MY2001	MY2001
Marketing Loan	44.34	50.36	50.36	50.36	52.00
Deficiency	13.25	na	na	na	na
Step 2	2.46	2.46	2.46	2.46	3.71
Cottonseed	na	0.97	2.27	na	0.61 ⁶⁹
Total	60.05	53.79	55.09	52.82	56.32

127. Thus, even were one to accept for purposes of argument Sumner’s approach, comparing the product-specific support the challenged measures grant to the product-specific support decided during marketing year 1992 reveals that *in no marketing year from 1999 through 2002 did the level of support exceed the marketing year 1992 level*. Under Article 13(b)(ii), then, Sumner’s own analysis reveals that U.S. domestic support measures that conform fully to the provisions of Article 6 are exempt from actions based on Peace Clause-specified WTO subsidies provisions.

67. The Panel requests the parties to calculate and submit estimates of the AMS for upland cotton for marketing years 1992, 1999, 2000, 2001 and 2002. For this purpose the parties are each requested to submit AMS calculations for upland cotton (using the budgetary-outlay/non-price gap methodology employed by the United States in respect of cotton in its DS Notifications (e.g., G/AG/N/USA/43) and using the formats and supporting tables in document G/AG/2) on the same basis as would be the case in calculating a product specific AMS for the purposes of the calculation of the "Total Current AMS" in any year in accordance with the relevant provisions, including as appropriate Article 1(a), (b) and (h), Article 6 and Annex 3 to the Agreement. BRA, USA

128. The United States has calculated a product-specific Aggregate Measurement of Support for upland cotton for marketing years 1992, 1999, 2000, 2001, and 2002, as explained below. This table summarizes the results of those calculations, and the following paragraphs provide additional detail:

⁶⁹The United States includes the cottonseed amount from the table without prejudice to our preliminary ruling request that the Panel find the 2003 cottonseed payment not to be within the scope of this dispute.

U.S. Upland Cotton Aggregate Measurement of Support	
Marketing Year	AMS (U.S. \$, millions)
1992	2,085
1999	2,262
2000	1,057
2001	2,804
2002 ⁷⁰	970

129. For marketing year 1992, the United States has used official data on budgetary outlays⁷¹ to calculate the upland cotton Aggregate Measurement of Support, except for other product-specific support in the form of storage payments and interest subsidies. The latter payment amounts are based on estimates by the U.S. Department of Agriculture. The calculations, in millions of U.S. dollars, are as follows:

Crop year 1992 (estimate)	Payments	Source
Deficiency payments	1,017	U.S. Department of Agriculture (USDA), Upland Cotton Fact Sheet (Ex. Bra-4)
Marketing loan gains / Certificate exchange gains	476	USDA budget data (Ex. Bra-6)
Loan deficiency payments	268	USDA budget data (Ex. Bra-76)
User marketing certificates	207	USDA, Upland Cotton Fact Sheet (Ex. Bra-4)
Commodity loan forfeit	(5)	USDA estimate
Other payments	122	USDA estimate of storage payments & interest subsidy
<i>Product-Specific AMS</i>	2,085	

130. To calculate the upland cotton Aggregate Measurement of Support for marketing year 1999, the United States has used official budgetary outlays data for loan deficiency payments, marketing loan gains, certificate exchange gains, user marketing certificates, and the 1999 crop year cottonseed payment. For storage payments and interest subsidies, we have used estimates by the U.S. Department of Agriculture as notified to the WTO. The calculations, in millions of U.S. dollars, are as follows:

⁷⁰As explained further below, the United States has calculated the 2002 Aggregate Measurement of Support for upland cotton as of the date of panel establishment, March 18, 2003.

⁷¹In light of the question from the Panel, we have used budgetary outlays to estimate payments.

Crop year 1999	Payments	Source
Marketing loan gains/ Certificate exchange gains	860	USDA budget data (Ex. Bra-55)
Loan deficiency payments	685	USDA, Upland Cotton Fact Sheet (Ex. Bra-4)
User marketing certificates	422	USDA, Upland Cotton Fact Sheet (Ex. Bra-4)
Cottonseed payments	79	G/AG/N/USA/43
Other payments	216	USDA estimate of storage payments & interest subsidy (G/AG/N/USA/43)
<i>Product-Specific AMS</i>	2,262	

131. To calculate the upland cotton Aggregate Measurement of Support for marketing year 2000, the United States has again used official budgetary outlays data for loan deficiency payments, marketing loan gains, certificate exchange gains, and user marketing certificates; the amounts set by legislation for the 2000 crop year cottonseed payments; and estimates by the U.S. Department of Agriculture for storage payments and interest subsidies. The calculations are as follows:

Crop year 2000 (estimate)	Payments	Source
Marketing loan gains	61	USDA budget data (www.fsa.usda.gov/dam/BUD/estimatesbook.htm) ⁷²
Loan deficiency payments	152	USDA, Upland Cotton Fact Sheet (Ex. Bra-4)
User marketing certificates	236	USDA, Upland Cotton Fact Sheet (Ex. Bra-4)
Cottonseed payments	185	Public Law 106-224, § 204(e) (June 20, 2000); Public Law 107-25, § 6 (Aug. 13, 2001)
Certificate exchange gains	360	USDA budget data (www.fsa.usda.gov/dam/BUD/estimatesbook.htm)
Other payments	63	USDA estimate of storage payments & interest subsidy
<i>Product-Specific AMS</i>	1,057	

132. For marketing year 2001, the United States has used estimates by the U.S. Department of Agriculture for storage payments and interest subsidies and official data on budgetary outlays for all other payments to calculate the upland cotton Aggregate Measurement of Support. The calculations, in millions of U.S. dollars, are as follows:

⁷²Exhibit US-18.

Crop year 2001 (estimate)	Payments	Source
Marketing loan gains	47	USDA budget data (www.fsa.usda.gov/dam/BUD/estimatesbook.htm)
Loan deficiency payments	744	USDA budget data (Ex. Bra-76)
User marketing certificates	196	USDA, Upland Cotton Fact Sheet (Ex. Bra-4)
Certificate exchange gains	1,750	USDA budget data (www.fsa.usda.gov/dam/BUD/estimatesbook.htm)
Other payments	68	USDA estimate of storage payments & interest subsidy
<i>Product-Specific AMS</i>	2,805	

133. For crop year 2002, the United States has provided unofficial data on budgetary outlays as of March 18, 2003, the date of establishment of the Panel, for marketing loan gains, certificate exchange gains, loan deficiency payments, and user marketing certificates. Because the crop year has just ended (as of July 31, 2003), official budgetary outlay data is not yet available. For the 2002 crop year cottonseed payment, the United States has used the amount set by legislation (\$50 million). We use a crop-year’s-end estimate by the U.S. Department of Agriculture for storage payments and interest subsidies. The calculation, in millions of U.S. dollars, is as follows:

Crop year 2002 (estimate as of panel establishment)	Payments	Source
Marketing loan gains/ Certificate exchange gains	563	USDA unofficial data (www.fsa.usda.gov/pscad/answer82rnat.asp (March 18, 2003)) ⁷³
Loan deficiency payments	202	USDA unofficial data (www.fsa.usda.gov/pscad/answer82rnat.asp (March 18, 2003))
User marketing certificates	137	USDA unofficial data
Other payments	68	USDA estimate of storage payments & interest subsidy
<i>Product-Specific AMS</i>	970	

134. We note that it would not be appropriate for the Panel to examine payments made after the date of panel establishment, on which the Panel’s terms of reference were set. Measures taken after the Panel was established cannot be within the Panel’s terms of reference. However, for the Panel’s convenience, we have also estimated an Aggregate Measurement of Support for the entire crop year 2002, using U.S. Department of Agriculture projections of all payments with respect to the 2002 crop year. These projections show no dramatic change from the unofficial budgetary outlays as of March 18. The full-year 2002 crop year estimate, in millions of U.S. dollars, is as follows:

⁷³See Exhibit US-19 (Marketing Year 2002 Loan Deficiency Payment and Price Support Cumulative Activity As of 3/12/2003). Upland cotton data is shown in the row marked “UP.” The loan deficiency payment amount is shown in the third column, and the marketing loan gain and certificate exchange gain amounts are shown in the eighth column (second from left). This Report, the PSL-82R, provides weekly, unofficial data. Brazil provided the same report as Bra-55 but chose to present the report with data as of June 13, 2003.

Crop year 2002 (full-year estimate)	Payments	Source
Marketing loan gains	11	USDA estimate (www.fsa.usda.gov/dam/BUD/estimatesbook.htm) ⁷⁴
Loan deficiency payments	206	USDA estimate (www.fsa.usda.gov/dam/BUD/estimatesbook.htm)
User marketing certificates	217	USDA estimate (www.fsa.usda.gov/dam/BUD/estimatesbook.htm)
Cottonseed payments	50	Public Law 108-7, § 206 (Feb. 24, 2003)
Certificate exchange gains	701	USDA estimate (www.fsa.usda.gov/dam/BUD/estimatesbook.htm)
Other payments	65	USDA estimate of storage payments & interest subsidy
<i>Product-Specific AMS</i>	1,250	

68. Could you please clarify the result of the calculations of, and the meaning of the title, in Appendix Table 1 "Estimated per unit Subsidy Rates by Program and Year" in Annex 2 to Exhibit BRA-105, page 12. Why are the numbers calculated for marketing loans considered to be subsidies? Could the Panel, for example, read the "total level of support" (bottom line of the table) as the effective support price for upland cotton or the maximum rate of support for upland cotton? BRA, USA

135. The United States looks forward to reviewing Brazil’s explanation of its Appendix Table 1 to Annex 2 to Exhibit BRA-105.

69. Can the United States confirm that the "marketing year" for upland cotton is 1 August to 31 July? Can the United States confirm the Panel's understanding that USDA data for the "crop year" corresponds to the "marketing year"? USA

136. The United States confirms that the "marketing year" for upland cotton is 1 August to 31 July.⁷⁵ In response to a question from the Panel at the first meeting, we also communicate that payments listed in the Upland Cotton Fact Sheet (Ex. Bra-4) are for monies spent with respect to cotton harvested in a particular crop year, not necessarily for payments made during the marketing year.

EXPORT CREDIT GUARANTEE PROGRAMMES

71. (a) Is an export credit guarantee a financial contribution in the form of a "potential direct transfer of funds or liabilities (e.g. loan guarantee)" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement? Why or why not? Does it confer a benefit within the meaning of Article 1.1(b)? Why or why not? If so, to whom? USA

(b) How, if at all, would these elements be relevant to the claims of Brazil,

⁷⁴Exhibit US-19.

⁷⁵7 Code of Federal Regulations 1412.103.

and the United States response thereto? BRA, USA

137. (a) For the reasons stated in its first written submission⁷⁶ and in response to Question 71(b), the United States does not believe that the appropriate analysis of the U.S. export credit guarantee program should begin with the Subsidies Agreement, much less Article 1 of that Agreement. The text of Article 10.2 defers WTO obligations for export credit guarantees until disciplines are internationally agreed, such as within the OECD or WTO. Under the Agriculture Agreement, the provisions of the Subsidies Agreement “apply subject to the provisions of this Agreement,”⁷⁷ and the export subsidy disciplines of Article 3.1(a) of the Subsidies Agreement expressly apply “[e]xcept as provided in the Agreement on Agriculture.”⁷⁸ Thus, the appropriate analysis would begin and end with Agriculture Agreement Article 10.2.

138. Even were the Subsidies Agreement relevant to U.S. export credit guarantees, given that export credit guarantees are covered by item (j) of the Illustrative List of Export Subsidies, the appropriate mode of analysis under the Subsidies Agreement is to examine whether the program is covering its long-term operating costs and losses.

139. (b) Article 3 of the SCM Agreement specifically states that Article 3.1(a), prohibiting export subsidies, applies “[e]xcept as provided in the Agreement on Agriculture.” Article 21.1 of the Agriculture Agreement states that “[t]he provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.” Under Article 10.2 of the Agreement on Agriculture, the negotiators specifically deferred the application of export subsidy disciplines on agricultural export credit guarantee programs like those of the United States. Any incidental “benefit” of any such measures is therefore irrelevant. Similarly, even if a particular (non-export credit) measure comprised a contribution and conferred a benefit for purposes of the Subsidies Agreement, to the extent the resulting subsidy was contingent on export performance, such export subsidy might nevertheless be permitted under the Agreement on Agriculture if within a Member’s applicable reduction commitment.

73. The Panel could arguably take the view that Articles 1 and 3 of the SCM Agreement were relevant in assessing the WTO-consistency of United States export credit guarantees. The United States has yet to submit any evidence or argumentation on this point, either as potential context for interpretation of the terms in Article 10 of the Agreement on Agriculture or in relation to Brazil's claims under the SCM Agreement. The Panel would therefore appreciate United States views in respect of this situation, and invites the United States to submit relevant argumentation and evidence. USA

⁷⁶U.S. First Written Submission, paras. 167-170.

⁷⁷Agriculture Agreement, Article 21.1.

⁷⁸Subsidies Agreement, Article 3.1.

140. The United States does not believe that Brazil has submitted evidence and argumentation that would establish a *prima facie* case in favor of Brazil's claims, in particular in light of Article 10.2 of the Agriculture Agreement. However, the United States will review Brazil's submissions, including its responses to these questions, and provide any further response in the U.S. submission.

74. If the Panel decides to refer to provisions of the SCM Agreement for contextual guidance in the interpretation of the terms in Article 10 of the Agreement on Agriculture, should the Panel refer to item (j) or Articles 1 and 3 of the SCM Agreement or both? BRA, USA

141. As the United States has argued, the first point of analysis is Article 10.2 of the Agreement on Agriculture, in which Members agreed that they would only provide export credit guarantees in conformity with internationally agreed disciplines, which they undertook to develop. That is, Article 10.2 indicates that no "internationally agreed disciplines" currently exist. The obligation with respect to export credit guarantees is, in effect, a work program to establish a future discipline. Brazil has not contested that challenged U.S. export credit guarantee programs are within the scope of Article 10.2. Therefore, neither item (j) nor Articles 1 and 3 of the Subsidies Agreement are relevant to the Panel's analysis of Article 10.2. We do note, however, that item (j) of the Illustrative List of Export Subsidies was agreed in the Uruguay Round, and, in fact, had previously formed part of the Illustrative List under the Tokyo Round Subsidies Code. Thus, the fact that Members had agreed on item (j) and yet, in Article 10.2, agreed to "undertake to work toward *the development* of internationally agreed disciplines to govern the provision of export credits, export credit guarantees" and, once agreed, only to provide export credit guarantee programs "in conformity with" such developed and agreed disciplines, suggests that item (j) does *not* impose disciplines on export credit guarantees for agricultural goods.

142. Context for Article 10 is found in Article 9.1 of the Agreement on Agriculture, which describes specific practices that constitute export subsidies for purposes of the Agreement on Agriculture. Export credit guarantees were not listed among such practices. As to the practices described in Article 9.1, no recourse is necessary to Articles 1 and 3 of the SCM Agreement to determine whether a particular practice is an export subsidy. Article 1(e) of the Agreement on Agriculture defines an export subsidy only as a subsidy contingent on export performance. To determine the applicability of Article 10.1 to a particular measure not described in Article 9.1 first requires a determination whether a subsidy exists. In this regard, Article 1 of the SCM Agreement would provide relevant context.

75. The Panel's attention has been drawn to Article 14(c) of the SCM Agreement (see e.g. written third party submission of Canada) and to the panel report in DS 222 Canada- Export Credits and Loan Guarantees. How and to what extent are Article 14(c) of the SCM Agreement, and the cited panel report, relevant to the issue of whether or not the United States export credit guarantee programmes confer a

"benefit"? What would be the appropriate market benchmark to use for any comparison? Please cite any other relevant material. BRA, USA

143. For reasons set out in more detail in the U.S. answer to Question 71(b) and Question 71(c) from the Panel, the United States does not believe that Article 14(c) is relevant to the Panel's analysis. An appropriate analysis of the U.S. export credit guarantee program begins and ends with Article 10.2 of the Agreement on Agriculture. Even were the Subsidies Agreement relevant to U.S. export credit guarantees, the only appropriate mode of analysis under the Subsidies Agreement is to examine whether U.S. export credit guarantee programs are covering their long-term operating costs and losses under item (j) of the Illustrative List of Export Subsidies.

76. How does the United States respond to Brazil's statement that : "...export credit guarantees for exports of agricultural exports [sic] are not available on the marketplace by commercial lenders."? USA

144. Brazil is incorrect. Commercial insurers do offer export credit insurance covering agricultural commodities. According to a background paper on export credits prepared by the WTO Secretariat, "While guarantees could be unconditional, they usually have conditions attached to them, so that in practice there is little distinction between credits which are guaranteed and credits which are subject to insurance."⁷⁹ However, for the sake of completeness we wish to note that such private insurance is structured differently than CCC credit guarantees. Most commonly, private insurers offer portfolio coverage, covering multiple customers and transactions for a particular exporter. Because the coverage is not based on individual transactions (like CCC's coverage), it may be difficult or impossible to discern which particular transactions involve agricultural commodities.

77. How does the United States interpretation of "long term operating costs and losses" in item (j) as claims paid give meaning to both "costs" and "losses"? Do claims paid represent "losses" or "costs" or both? If claims paid is represented by "losses", what would go into the "cost" element of item (j)? Could the United States expand on why it disagrees with the items which Brazil identifies for inclusion in the examination to be conducted under item (j)? USA

145. Item (j) applies to three different types of programs: export credits, export credit guarantees, and insurance. In the case of the latter two types of programs, the provider will necessarily incur claims from time to time. In the case of direct export credits (the first type of program), the provider will experience defaults on occasion. To the extent such claims or defaults exceed revenue from whatever source it may be derived, the net result would be a loss arising from operations. In an accounting sense such result would constitute an "operating loss."

⁷⁹See *Export Credits and Related Facilities*, G/AG/NG/S/13 (26 June 2000).

146. In addition, it is appropriate to identify and allocate costs necessary to operate such programs. For example, the United States agrees that certain administrative expenses should be allocated to the operation of the export credit guarantee programs, and an annual figure is attributed as administrative expense in the budget of the United States. Other costs necessary for the operation of a program would constitute "operating costs" of such program.

147. Were item (j) to be relevant in this dispute, therefore, that item compels an examination of losses derived from the operation of the program plus the costs necessarily allocable to the program for its operation. In the case of U.S. export credit guarantee programs, as reflected in paragraph 173 and accompanying tables of the U.S. first written submission, the Commodity Credit Corporation (CCC) charges and receives premiums from applicants. In addition, CCC receives post-claim revenue through late payments and rescheduling. As reflected in the tables, with respect to cotton, such revenue exceeds the relevant claims experience. The United States has, therefore, not incurred an operating loss.

148. It is appropriate to allocate operating costs of the program in the final analysis within the meaning of item (j). The United States disagrees, however, with the allegation of Brazil concerning interest allocation and the manner in which it attempts to ascribe figures from the U.S. budget to operating costs for purposes of item (j). These items are addressed specifically in the U.S. response to Question 81 from the Panel.

78. Can the United States provide supporting documentation for data used relating to "costs and losses" in paragraph 173? Could the United States confirm that the figures cited in paragraph 173 of its first written submission relate to the SCGP? Why did the United States cite these figures after stating that it is not possible to make any assessment of the long-term operating costs and losses of this programme? USA

149. The United States maintains a comprehensive electronic data base of export credit guarantee program activity. The data base is updated on a regular basis and is the source of the data shown in paragraph 173 and accompanying table. Data is recorded in the system at the time of each transaction. These include such items as claim payments, recoveries, rescheduling agreements, and fees received.

150. As indicated in the tables accompanying paragraph 173, the figures shown in paragraph 173 relate to GSM-102 in the first table and SCGP in the second table. During the ten fiscal years reflected in the tables, no GSM-103 export credit guarantees were issued with respect to cotton.

79. In respect of what time periods does Article 13(c) require an assessment of conformity with Part V of the Agreement on Agriculture? How does this affect, if at all, your interpretation of Article 13(b)? BRA, USA

151. Article 13(c) applies to “export subsidies that conform fully to the provisions of Part V of th[e Agriculture] Agreement, as reflected in each Member's Schedule.” Part V of the Agreement, and in particular Article 8, establishes that “Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule.” Those export subsidy reduction commitments, which are expressed in both export quantity and budgetary outlay terms, apply on a yearly basis.⁸⁰ Accordingly, a Member may be in conformity one year and not in conformity in another with regard to any particular commodity subject to reduction commitments.

152. If a Member has provided export subsidies to a particular commodity in any one year in excess of the applicable reduction commitments, then export subsidies for that commodity during such year would not “conform fully to the provisions of Part V,” and those subsidies would not have Peace Clause protection. In a subsequent year, a Member may again comply with its export subsidy commitments. Its export subsidies would then conform fully to Part V of the Agreement and would again receive Peace Clause protection.

153. Similarly, a failure by a Member to comply in a given year with the criteria in Article 13(b) would lift the exemption from action for those domestic support measures only for the year of the breach. Measures (subsidies) in a later year would remain exempt from action so long as those measures in the given year comply with the conditions in Article 13(b)(ii). This conclusion flows from the text of the Peace Clause (measures must conform to Article 6, and Members’ final bound commitment levels are expressed in yearly terms) as well as the nature of the subsidies challenged by Brazil (recurring subsidies that are provided yearly and expensed in the year given). For further explanation of the U.S. interpretation of Article 13(b), please see the U.S. answers to Questions 33 and 35 from the Panel.

81. How does the United States respond to the following in Brazil's oral statement: USA

(a) paragraph 122 (rescheduled guarantees)

154. Brazil is correct to assert "debt rescheduling does not involve any reduction in the value of outstanding debt." A rescheduling does not involve debt forgiveness. As reflected in the terms of the various rescheduling agreements, outstanding interest is capitalized, and interest accrues on such capitalized interest as well as on outstanding principal. Further, the United States expects to recover in full pursuant to such rescheduling.

155. Therefore, from an accounting perspective, rescheduled amounts are counted as *receivables*, not losses, and are reflected as such in paragraph 173 of the U.S. First Written Submission. Contrary to the assertion of Brazil, the United States does in fact collect on the

⁸⁰With the exception of Agriculture Agreement Article 9.2(b), which is no longer applicable.

rescheduling. The history of rescheduled Commodity Credit Corporation (CCC) export credit guarantee claims over the long-term (the 10-year period 1993-2002) confirms this position. All rescheduled claims are currently performing. In other words, all payments due up to this point under these agreements have been received.

(c) paragraphs 125 ff. (guaranteed loan subsidy)⁸¹

156. The Credit Reform Act of 1990 establishes the procedures and parameters for U.S. credit and credit guarantee programs. In accordance with the provisions of that Act, the budgeting and accounting for U.S. credit programs, including the CCC export credit guarantee programs, are based on the estimated lifetime costs to the Federal Government of making the credit available. In the case of credit guarantees, those costs are based on estimated payments by the Government to cover defaults and delinquencies, interest subsidies, and other requirements, and payments to the Government, including origination and other fees, penalties, and recoveries.

157. In presenting the annual budget, the subsidy costs of the program reflect an *estimate* of the long-term costs to the Government. This estimate reflects various assumptions regarding credit risk, interest costs, and other factors that will apply over the lifetime period of the credit. At the time the budget is prepared, these costs are presented as estimates as of the date the budget is prepared – that is, they are a snapshot of the estimated costs. In fact, Brazil acknowledges in paragraph 125 of its oral statement that the "guaranteed loan subsidy" entry in the annual U.S. budget is an estimate of the cost of the guarantees projected to be issued.

158. A fundamental tenet of credit reform accounting is the requirement that the performance of the credit be tracked over its lifetime. This is accomplished by tracking each cohort of credit until the credit period has expired or lapsed. A cohort consists of all transactions associated with each type of guarantee issued during a particular year – for example, all guarantees issued during fiscal year 2002 comprise a distinct cohort.

159. Activity (disbursement, repayment, claims, etc.) occurs within a given cohort over the life of all guarantees that were disbursed against that cohort. To view the data and activity strictly on an annual basis and not by cohort limits the utility of the data and distorts the costs of the program. Not until the cohort is closed can one make an assessment as to whether or not that particular cohort represents a cost to the Federal Government.

160. All cohorts for the CCC export credit guarantee programs under credit reform are still open although cohorts for 1994 and 1995 should close this year. At present, the 1994 cohort has a total net downward subsidy re-estimate of \$116 million. The original subsidy cost estimate for the 1994 program was \$123 million; thus, applying the downward re-estimate, the net cost of the program to the U.S. Government is currently projected at \$7 million. The 1995 cohort has a total

⁸¹The U.S. answer to Question 81(b) follows the answer 81(d), which discusses budget re-estimates.

net downward subsidy re-estimate of \$149 million, versus an original subsidy estimate of \$113 million. Thus, the net cost of the 1995 program is a receipt of \$36 million to the U.S. Government. For 1994 and 1995 together, the total net receipt to the U.S. Government is \$29 million.

161. The experience of 1994 and 1995 is viewed as representative of the costs of the CCC export credit programs generally, and it is expected that, once the cohorts for other years of credit activity are closed, they will follow closely the experience of the 1994 and 1995 programs.

(d) paragraphs 127-129 (re-estimates, etc.)

162. As discussed in response to Question 81(c), it is necessary to understand the difference between activity that occurs on a fiscal year basis as opposed to the estimates and re-estimates of subsidy that calculate net present value over the life of the program. Although estimates and re-estimates are made annually for each cohort, these include both actual data to date and estimates of future activity for the remainder of the life of the cohort.

163. With the exception of 2002, all cohorts for annual export credit programming since the inception of credit reform accounting in 1992, have a cumulative downward re-estimate. The net total for all cohorts for guarantees issued since 1992 currently stands at a downward re-estimate of \$1.9 billion. This experience with re-estimates indicates that performance under the program has been better than originally projected and that the original cost estimates for those programming years as presented in the annual U.S. budget were too high. This experience also demonstrates that the assertion by Brazil at paragraph 129 of its oral statement that the original estimate of "guaranteed loan subsidy" line in the budget is an "ideal basis" for determining the costs of the program is in error. Those estimates will be re-estimated on an annual basis until each cohort is closed and, as demonstrated above, to date the re-estimates for each cohort on a net basis have been almost exclusively downward.

(b) paragraph 123 (interest on debt to Treasury)

164. Under the guidelines for credit reform budgeting as established in the Credit Reform Act of 1990, there are two kinds of interest calculations that affect the CCC export guarantee programs. These calculations are "snapshots" in time and will change annually for a cohort until the cohort has closed. Therefore, any one number shown in the budget for a given year is an estimate. The actual cost of the program can be determined only when all financial activity for the cohort is completed.

165. An interest rate re-estimate is a component of the annual re-estimates of a cohort, which are made for as long as the guarantees are outstanding. The interest rate re-estimate calculates the difference between the estimated interest at the time the guarantee program was budgeted and the actual interest at the time the guarantee is disbursed. If the actual interest is higher, the additional cost is shown in the program account as a re-estimate. It should be noted that this cost

would change with subsequent re-estimates in future years depending on the timing of the guarantee disbursement.

166. Interest on borrowings occurs in the financing account only if additional funds beyond those budgeted for a cohort is needed to pay claims. Again, these costs will vary from year to year as borrowings with a particular cohort change and the interest rate varies.

167. It is important to understand that should any interest on borrowings occur, they would be fully reflected in the costs attributed to the individual cohort. Thus, as the costs of the cohort are adjusted during the period it is active, any costs associated with the interest on borrowings are fully reflected in the program costs. It is, therefore, incorrect to state as Brazil asserts in paragraph 123 that those payments are not fully reflected in the operating costs of the CCC export credit guarantee programs.

(e) Exhibits BRA-125-127

168. Exhibits BRA-125-127 are pages from the Budget Estimates for the United States Government for fiscal years 1994, 1995, and 2004. These particular pages show one aspect of the budgeting for the CCC export credit guarantee programs, the Export Loans Program Account. In and of themselves, they do not reflect all aspects of the budgeting and financing transactions for the programs. For example, Exhibit 127 for the fiscal year 2004 budget estimates excludes the Export Guarantee Financing Account, which appears on the following page. The data presented in the financing account is important because it presents information on both downward and upward re-estimates for the program.

(f) the chart on page 53 of Brazil's oral statement at the first session of the first Panel meeting relating to "Guaranteed Loan Subsidy and Administrative Expenses of US Export Credit Guarantee Programs GSM-102 GSM 103 and SCGP"?

169. The table on page 53 of Brazil's oral statement at the first panel meeting presents information on budget estimates for the CCC export credit programs for fiscal years 1992 through 2004. The data presented in the table are correct. However, as discussed previously in the answers to questions 81(c) and 81(d) above, the "guaranteed loan subsidy" is a snapshot estimate of the lifetime costs of the guarantees issued during the course of a given fiscal year. As the cohorts for those guarantees are reviewed annually over their lifetime, those estimates will change and, until the cohorts are closed out, the estimated costs of the programs are simply that, estimates. Accordingly, Brazil is incorrect in asserting in paragraph 132 of its oral statement that, because the guaranteed loan subsidy line of the annual budget has always reflected a positive net present value, that fact indicates the programs are "extending a subsidy to borrowers". That statement misinterprets and misrepresents the information presented in the budget.

170. In addition, Brazil makes a statement in paragraph 131 of its oral presentation with regard

to the table on page 53 that likewise is incorrect. Brazil asserts that the column heading in the budget for the last completed fiscal year represents "actual" costs for the program for that particular year. In fact, the numbers appearing in that column simply represent the latest, revised *estimate* of the costs of the program for the fiscal year just completed. The estimate of those costs will change over the lifetime of the credit as the cohort for that year is tracked. The term "actual" is used in the column because the revised estimate is based on an actual level of guarantees issued by CCC during the year just completed.

171. Frequently, the level of guarantees issued by CCC in any given year is less than the level projected in the original budget for that year. In the case of the 2002 budget that was released in February 2001, it projected that \$3.9 billion of guarantees would be issued by CCC during that year. However, only \$3.4 billion of guarantees were actually issued. Thus, the estimate of program costs in 2002 column of the 2004 budget has been revised to reflect that actual level of activity. Nevertheless, the cost presented in the column remains an estimate, and the estimate will continue to be revised as long as the cohort for 2002 remains active.

172. With respect to the "administrative expenses" that are displayed in the table on page 53 of Brazil's oral statement, the United States has noted elsewhere that those are imputed costs ascribed to the operation of the CCC export credit programs as a whole.

(g) In respect of (a)-(f) above, how and to what extent do the information and data presented for the export guarantee programmes concerning "program" and "financing", "summary of loan levels", "subsidy budget authority", "outlay levels", etc., in particular in Exhibits BRA-125-127, reflect "actual costs and losses" of the GSM-102, GSM-102 and SCGP export credit guarantee programmes (see e.g. Brazil's closing oral statement at the first session of the first substantive meeting, paragraph 24)? USA

173. The closing oral statement of Brazil at the first session of the first substantive meeting of the Panel, and paragraph 24 in particular, display a fundamental misunderstanding of the budget and accounting for the CCC export credit programs. Contrary to what is asserted in that paragraph, the information presented in the annual budget of the United States does in fact represent estimates of the lifetime costs of the programs. Those estimates are being revised annually to reflect actual performance and, until the cohorts for the annual programs have been closed out, the actual costs cannot be determined definitively. However, as demonstrated in response to Question 81(d), the re-estimates thus far have resulted in a net reduction in the estimated costs of these programs of over \$1.9 billion since the inception of credit reform budgeting in fiscal year 1992.

174. Further, as discussed in response to Question 81(c), the combined net costs of the cohorts associated with the 1994 and 1995 guarantee programs, which are expected to close this year, are a receipt of \$29 million to the Federal Government. Based on those results, the Brazilian claim in paragraph 24 that "operating costs and losses for GSM 102, GSM 103, and SCGP have

outpaced premiums collected in every single year since the United States started applying the formula in 1992" is not supportable.

82. Please explain each of the following statements and any possible significance it may have in respect of Brazil's claims about GSM-102 and GSM-103 (7 CFR 1493.10(a)(2), Exhibit BRA-38): BRA, USA

(a) "The programs operate in cases where credit is necessary to increase or maintain U.S. exports to a foreign market and where U.S. financial institutions would be unwilling to provide financing without CCC's guarantee. (7 CFR 1493.10(a)(2), Exhibit BRA-38)

175. The export credit guarantee programs are generally made available in connection with middle-tier economies in which liquidity is constricted. In such cases, cash sales for all suppliers are not occurring readily. U.S. financial institutions may face requirements regarding loan-loss reserves that impede their ability to lend.

(b) "The programs are operated in a manner intended not to interfere with markets for cash sales. The programs are targeted toward those countries where the guarantee is necessary to secure financing of the exports but which have sufficient financial strength so that foreign exchange will be available for scheduled payments." (7 CFR 1493.10(a)(2) Exhibit BRA-38)

176. The export credit guarantee programs are intended to operate and indeed are applied in a manner not to displace cash sales. As liquidity improves in certain countries, the use of the program recedes. This explains, in part, the dramatic reduction in U.S. export credit guarantees since the years immediately preceding the inception of the WTO Agreement.

177. The following table shows the dollar value of guarantees provided by the United States in U.S. fiscal years 1992-1994, along with the average value of guarantees for fiscal years 1995 - 2002:

Fiscal Year(s)	Guarantee Value (Millions of USD)
1992	\$5,671.8
1993	\$3,853.7
1994	\$3,177.4
1995 - 2002	\$3,061.9

(c) "In providing this credit guarantee facility, CCC seeks to expand market opportunities for U.S. agricultural exporters and assist long-term market development for U.S. agricultural commodities." (7 CFR 1493.10(a)(2) Exhibit BRA-38)

178. Although the goal of the export credit guarantee programs is to expand market opportunities, such goal alone has no bearing on the proper characterization of the programs, the measures in dispute, or the conformity of the application of such programs with the WTO obligations of the United States. Moreover, the United States is statutorily compelled to be mindful not to provide any such guarantees in connection with any country that the Secretary of Agriculture determines cannot adequately service the debt associated with such sales, nor does the United States provide guarantees in connection with any foreign bank that it has not approved and with respect to which it has not established an exposure limit.

84. Is the Panel correct in understanding that, under the GSM-102 and GSM-103 programmes, the exporter pays a fee calculated on the dollar amount guaranteed, based on a schedule of rates applicable to different credit periods? How and on what basis are the fee rates fixed? Do the fee rates ever change? If so, how and for what reason? Would it be necessary to amend the legislation and/or regulations in order to adjust the fee rates? USA

179. Fees paid by an exporter participating in either the GSM-102 or GSM-103 program vary by the guaranteed dollar value of the transaction, the repayment period, and the principal repayment interval (annual or semi-annual). A schedule of current fees is attached as Exhibit US-20. Section 211(b)(2) of the Agricultural Trade Act of 1978, 7 U.S.C. 5641(b)(2), limits the origination fee in connection with transactions under the GSM-102 program, except for those transactions under the CCC Facility Guarantee Program, to no more than 1 percent of the amount of credit to be guaranteed. There is no other legislation or regulation addressing the specific fee rates.

180. Other than the legislative restriction noted above, the CCC sets and changes the fee rates as it deems appropriate. Fee rates are changed via a press announcement to the public. The most recent change in guarantee fee rates occurred on October 1, 2002, at which time the fee schedule was modified to include rates for transactions with 30- and 60-day repayment periods. Previously, the fee schedule had been adjusted to accommodate variable interest rates as opposed to fixed rates. Legislative amendment is not required to change the fee rates unless the rates for the GSM-102 program are to exceed 1 percent of the guaranteed dollar value of a transaction. Neither is it necessary to amend the program regulations in order to change the fee rates.

85. Is the Panel correct in understanding that, under the SCGP, the exporter pays a fee for the guarantee calculated on the guaranteed portion of the value of the export sales? How and on what basis are the fee rates fixed? Do the fee rates ever change? If so, how and for what reason? Would it be necessary to amend the legislation and/or regulations in order to adjust the fee rates? Please explain any "risk" assessment involved in the programme. USA

181. Under the SCGP, the exporter pays a fee to CCC based on the guaranteed dollar value of

the export transaction and the repayment period. The current guarantee fee rates are \$0.45 per \$100 of coverage for credit terms up to 90 days, and \$0.90 per \$100 of coverage for credit terms up to 180 days. Section 211(b)(2) of the Agricultural Trade Act of 1978, 7 U.S.C. 5641(b)(2), limits the origination fee in connection with transactions under the SCGP to no more than 1 percent of the amount of credit to be guaranteed. There is no other legislation or regulation addressing the specific fee rates.

182. Other than the legislative restriction noted above, the CCC sets and changes the fee rates as it deems appropriate. For example, fee rates for the SCGP were changed in U.S. fiscal year 2000 (beginning October 1, 1999) and set at their current level. Prior to that time, the fee rate was \$0.95 per \$100 of coverage regardless of the repayment period. The fee rates were changed to give exporters and importers an incentive to negotiate repayment terms of less than 180 days. Legislative amendment is not required to change the fee rates unless the rates for the SCGP are to exceed 1 percent of the guaranteed dollar value of a transaction. It is not necessary to amend the program regulations in order to change the fee rates.

183. CCC carries out a country risk assessment for each country prior to announcing its eligibility for SCGP participation. Country risk assessment entails a review of the economic and political situation in each country to ensure there is a reasonable expectation that the country's importers will be able to repay debts incurred under the program. CCC does not determine the creditworthiness of importers participating in the SCGP. CCC provides a guarantee covering 65% of the export transactions under the program; the exporter or his assignee (U.S. bank) must accept the remaining 35% of the transaction's risk. This "risk sharing" between CCC and the exporter/assignee is intended to ensure that due diligence is performed in assessing an importer's creditworthiness before undertaking a transaction with that importer.

86. Is there a risk categorization in relation to three export credit guarantee programmes (GSM-102, GSM-103 and SCGP)? Does this have any impact on premiums payable and the ability of the CCC to on-sell the guarantees ? USA

184. All countries eligible for any of the CCC export credit guarantee programs are categorized according to risk. CCC categorization of countries is based on a U.S. government internal risk classification system. This system is administratively controlled and may not be released outside of the U.S. Government. A country's risk classification has no impact on the premiums payable under the U.S. export credit guarantee programs. There is no secondary market for CCC guarantees; therefore, CCC does not "on-sell" the guarantees.

87. What proportion of CCC (export-related and total) long term operating costs and losses are represented by GSM-102, GSM-103 and SCGP programmes? USA

185. With the advent of the Credit Reform Act, the export guarantee programs are not financed out of the Commodity Credit Corporation. While the programs continue to be run through the authorities and facilities of the CCC, all budget authority (funding) for the guarantee programs is

provided directly to accounts for those programs from the U.S. Treasury.

88. (a) Is the Panel correct in understanding that the United States' argument is that, at present, by virtue of Article 10.2 of the Agreement on Agriculture, there are no disciplines on agricultural export credit guarantees under the Agreement on Agriculture (or the SCM Agreement)? USA

186. Article 10.2 provides: “Members undertake to work toward the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes and, after agreement on such disciplines to provide export credits, export credit guarantees or insurance programmes only in conformity therewith.” Article 10.2 imposes an obligation on Members to work toward “internationally agreed disciplines” and, upon agreement on such disciplines, to provide export credit guarantees only in conformity with such disciplines. This was the purpose of the negotiations in the OECD that followed the Uruguay Round, and which now are occurring under the aegis of the WTO. If and when such disciplines are agreed upon, they are WTO obligations under the Agreement on Agriculture.⁸²

187. Brazil's argument is that such "internationally agreed disciplines" already apply. If export credit guarantee programs were already subject to export subsidy disciplines, then Article 10.2 would be unnecessary. That is, Members would *already* have “to provide . . . export credit guarantees . . . only in conformity” with the internationally agreed disciplines of the WTO. In Brazil’s oral statement, Brazil attempts to avoid this implication of its reading by repeatedly attempting to insert the word "specific" into the text of Article 10.2 – that is, “undertake to work toward the development of *specific* internationally agreed disciplines . . .”⁸³ That word is not there, however. The United States' interpretation of Article 10.2 gives meaning to the text of Article 10.2 as drafted and agreed by Members whereas Brazil's reading would effectively read it out of the Agreement on Agriculture.

(b) Does the United States agree with the following proposition: a WTO Member may therefore extend agricultural export credit guarantees without charging a premium, and for an indefinite period, in addition to any other terms and conditions it may wish? How would this reconcile with the title of Article 10 of the Agreement on Agriculture ("Prevention of Circumvention on Export Subsidy

⁸²This is similar to other work programs that continued beyond the close of the Uruguay Round. See U.S. First Written Submission, paras. 154-66.

⁸³See, e.g., Brazil’s Oral Statement, para. 100 (“Article 10.2 instead announces Members’ intent to work toward negotiations on *specific* disciplines for export credits.”) (italics in original); *id.* (“In the meantime, while those *specific* disciplines are being discussed . . .”) (emphasis added); *id.*, para. 102 (“Under the first part of Article 10.2, therefore, WTO Members have pledged to work toward the development of *specific* disciplines . . .”) (emphasis added); *id.*, para. 103 (“If Members do conclude an agreement on these *specific* disciplines . . .”) (emphasis added); *id.* (Brazil and the United States agree that there has been no agreement on any such *specific* disciplines . . .”) (emphasis added).

Commitments"), and with other commitments contained in the Agreement on Agriculture? Please cite any relevant material, including any past WTO dispute settlement cases. How would this reconcile with the United States' own statement, at paragraph 21 of its closing oral statement that "of course, the United States may not provide subsidies without any limit". USA

188. Article 10.2 applies only to export credit guarantees (and export credits and insurance programs) properly characterized as such. In the case of the United States, export credit guarantees are offered pursuant to programs which charge premiums; impose limits on tenor; impose limits on exposure to individual bank obligations; impose limits on exposure to risk of default from different countries; define shipping periods; and issue allocations (value limitations) of potential guarantee availability for specific commodities to be exported to specific destinations. The United States also guarantees only a relatively small portion of interest. Consequently, participants remain exposed to a significant component of the over-all risk of default.

189. The United States submits that the deferral of disciplines under Article 10.2 properly applies to export credit guarantees offered pursuant to a program with such characteristics; indeed, Brazil has not contested that U.S. export credit guarantee programs are encompassed by the terms of Article 10.2. Illegitimate attempts to characterize export subsidy programs as export credit guarantee programs would be subject to the anti-circumvention provisions of Article 10.1 and the other commitments of the Agreement on Agriculture.⁸⁴

190. The U.S. interpretation of Article 10.2 presents no conflict with the title of Article 10, which provides relevant context in interpreting the provisions of Article 10. Article 10 is entitled "Prevention of Circumvention on Export Subsidy Commitments." Article 10.2 contributes to the prevention of circumvention of export subsidy commitments by imposing two obligations on Members: first, they must undertake to work toward the development of internally agreed disciplines on export credit guarantees; second, "after agreement on such disciplines," they must provide export credit guarantees "only in conformity therewith." Thus, Members agreed that those internationally agreed disciplines would constrain the provision of export credit guarantees, which in turn would contribute to the goal of Article 10, to prevent the circumvention of export subsidy commitments.

191. Although the language quoted from paragraph 21 of the United States' closing oral

⁸⁴For example, the United States could not simply change the name of the FSC Repeal and Extraterritorial Income Exclusion Act to the "FSC Repeal and Extraterritorial Income Exclusion Export Credit Guarantee Program" and successfully assert that the deferral of disciplines contemplated by Article 10.2 applies to such re-named program.

statement was intended to address concerns involving domestic support for upland cotton,⁸⁵ it also applies in the case of export subsidies. The United States also cannot provide export subsidies without limit. It has a schedule of export subsidy reduction commitments for 12 commodities. For these commodities, export subsidies can only be provided in accordance with such schedule. For the remainder of agricultural commodities, the United States cannot provide export subsidies at all.

192. Although internationally agreed disciplines on export credit guarantee programs have yet to be agreed, the characteristics of such programs and the discipline inherent in the risk-sharing aspects of such programs impose an internal constraint on their use. Indeed, the use of U.S. export credit guarantee programs has *declined* since the period before the inception of Uruguay Round commitments. As shown in the U.S. answer to Question 82(b), the dollar value of guarantees provided by the United States in U.S. fiscal year 1992 was \$5,671.8 million, in fiscal year 1993 was \$3,853.7 million, and in fiscal year 1994 was \$3,177.4 million. In contrast, the average value of guarantees for fiscal years 1995 - 2002 was only \$3,061.9 million. Any concerns about unchecked use of export credit guarantee programs, then, are not supported by the post-Uruguay Round experience.

(c) If, as the United States argues, there are no disciplines on export credit guarantees in the Agreement on Agriculture, how could export credit guarantees "conform fully to the provisions of Part V" of the Agreement on Agriculture within the meaning of Article 13 (how can you assess "conformity" or non-conformity when there are allegedly no disciplines against which such an assessment could occur)? USA

193. U.S. export credit guarantee programs provide "export credit guarantees" within the meaning of Article 10.2 and therefore will be subject to disciplines only as contemplated by that Article. Because no such disciplines currently exist, these programs cannot be out of compliance with Part V of the Agriculture Agreement. Moreover, export credit guarantees are not export subsidies within the meaning of either Article 9.1 or 10.1, and since they are not export subsidies, Article 13(c) does not apply to them.

(d) Is the United States advocating the view that its own export credit guarantee programmes, which pre-dated the Uruguay Round, are effectively "grandfathered" so as to benefit from some sort of exemption from the export subsidy disciplines of the Agreement on Agriculture? How, if at all, is it relevant that the SCGP did not, according to the United States, become relevant for upland cotton until the late

⁸⁵The statement itself was intended to note that the United States is subject to the limit set forth in its domestic support reduction commitments for the Current Total Aggregate Measurement of Support. This amount, across all U.S. commodities, is \$19.1 billion. In addition, a very specific limit applies with respect to domestic support for upland cotton under the Peace Clause. It may not exceed the rate of 72.9 cents per pound, as decided in 1992, without removing the Peace Clause protection of Article 13 of the Agreement of Agriculture.

1990's (i.e. after the entry into force of the WTO Agreement)? USA

194. It is not entirely clear what is meant by the term “grandfathering” in this connection. Agriculture Agreement Article 10.2 defers the imposition of disciplines on export credits, export credit guarantees, and insurance programs until internationally agreed disciplines are reached, and in that sense the export subsidy disciplines of the Agreement do not apply to the export credit guarantee programs at issue in this dispute.

195. The SCGP began in 1996, and no transactions occurred under this program in connection with cotton until fiscal year 1998, which began in September 1997. Although the negotiators obviously could not have considered the application of this specific program, it is substantially similar in its operation to other U.S. export credit guarantee programs. Again, Brazil has not contested that SCGP provides export credit guarantees within the meaning of Article 10.2. Thus, the deferral of disciplines under Article 10.2 similarly applies.

STEP 2 PAYMENTS

89. Does the United States confirm Brazil's statement in paragraph 331 of its first submission that "The conditions and requirements for Step 2 domestic payments remain unchanged with the passage of the 2002 FSRI Act"? What is the relevance of this, if any, to this dispute? USA

196. While the Step 2 program under the 2002 Act is largely consistent with the program under the 1996 Act, there have been some modifications since the inception of the program, relating to the precise nature of the price differential formula and the price ceiling for the Step 2 payments. The 2002 program was unchanged from the 1996 Act program, as amended, except for suspending the 1.25 cent differential. In the end, this is inconsequential because it does not materially affect the levels of support decided in marketing year 1992 (72.9 cents per pound) or that measures currently grant (52 cents per pound).

90. Does the United States confirm Brazil's statement in paragraph 235 of its first submission that the changes concerning Step 2 export payments from the 1996 FAIR Act to the 2002 FSRI Act are: increase in the amount of the subsidy by 1.25 cents per pound and the removal of any budgetary limits that applied under the 1996 FAIR Act? What is the relevance of this, if any, to this dispute? USA

197. As noted in the U.S. answer to Question 89, the 2002 Act suspended the 1.25 cents differential, but the United States disagrees with the assertion of increased budgetary exposure for the program. First, we note that Step 2 for the 1992 crop and marketing years was covered by the provisions of the 1990 Act, which had no limit on the amount of expense that could be undertaken in Step 2. For the 1996 Act, which covered the 1996-20002 crops until supplanted by the 2002 Act, there was a limit of \$701 million for the six-year duration of the Act, and in fact that money did run out in December 1998. However, the Congress removed the budgetary limit

of the 1996 Act as of October 1999 (Public Law No. 106-78, Oct. 22, 1999). Therefore, neither the 2002 Act, nor the 1996 Act (as of October 1999), nor the 1990 Act had budgetary limits on Step 2 expenditures.

198. While the potential step 2 payment (when price conditions in the statute are met) is higher in the 2002 Act than under the 1996 Act by as much as (but not more than) 1.25 cents per pound, step 2 merely changes the vehicle of support.

91. What is the significance of the elimination of the 1.25 cent threshold payment in the 2002 FSRI Act pertaining to Step 2 payments? USA

199. Please see the U.S. answers to Question 89, 90, and 117.

92. Does the United States confirm that Exhibit BRA-65 represents a sample contract for exporters of eligible upland cotton to conclude with the CCC under the FSRI 2002, and that an application form (Exhibit BRA-66) needs to be filled out with data on weekly exports and submitted to the USDA FAS. Is Exhibit BRA-66 - Form CCC 1045-2 - also a valid example? If not, please identify any differences or distinctions. USA

200. The Brazilian exhibits appear to be accurate versions of old Step 2 program documents. Some of the documents in the exhibit are for domestic handlers and involved program payment assignments. We also note that, in making an export claim, other documentation like bills of lading may be needed.

201. The official documents for the upland cotton step 2 program can be found at the Farm Services Agency website (www.fsa.usda.gov/daco, click on "cotton" and on "upland cotton user marketing certificate program.") There is a common contract that exists for both domestic users and exports under the Step 2 program, CCC Form CCC-1045UP. Because of the different nature of uses and therefore applications, there are separate reporting forms: CCC-1045UP-1 for domestic users and CCC-1045UP-2 for Exporter Users. Recently updated documents used for this program are attached as Exhibit US-21.

93. Please elaborate why the United States deems that Step 2 payments upon submission of proof of export are not subsidies contingent upon export. Is it the US contention that, in order to be contingent on export, exportation must be the exclusive condition for receipt of the payment? USA

202. As the United States has indicated, all upland cotton produced in the United States is eligible for the benefit of the Step 2 cotton subsidy. If the statutory price condition applies, all U.S. upland cotton used during the applicable period of time will received the subsidy. "Use" in domestic manufacture or export constitutes the universe of potential use of U.S. upland cotton. The United States submits that when the entirety of production of a good in a country is eligible

to receive a subsidy, no contingency on export exists. The Step 2 subsidy is entirely distinct in this regard from a hypothetical situation in which a subsidy is theoretically available for domestic use, but in reality is exclusively or nearly exclusively available in connection with exports.

95. Do the criteria in 7 CFR 1427.103(c)(2) (Exhibit BRA-37) that Step 2 "eligible upland cotton" must be "not imported cotton" apply to both domestic and export payments? USA

203. Only domestic cotton is eligible for Step 2 payment, which is made if the statutory price conditions are met and requisite proof of use is submitted.

96. Is a domestic sale a "use" for the purposes of Step 2 payments? Is a sale for export, or export, considered a "use"? USA

204. A sale is not a use for purposes of the Step 2 subsidy. For domestic manufacture, opening the cotton bale constitutes use. For exports, similarly, the sale alone does not itself constitute use; the exporter must demonstrate actual exportation.⁸⁶

97. How does the United States respond to Brazil's assertion, at paragraph 70 of Brazil's oral statement at the first session of the first substantive meeting, that "It is obvious that a single bale of cotton cannot be both exported and used domestically." Is this a relevant consideration? USA

205. It is unclear what Brazil's assertion is intended to demonstrate. The Step 2 program makes payments to documented users of U.S. upland cotton. If a bale cannot be both opened domestically and exported (although it is not clear why that would be so), that amounts to arguing that a single bale cannot be "used" twice. The fact remains that *either* opening the bale domestically *or* exporting it – that is, the universe of activities resulting in use of U.S. upland cotton – is entitled (given certain market conditions) to a Step 2 payment.

206. The United States notes, moreover, that it may actually be possible (economic realities aside) that the same bale could be exported and then brought back into the country and opened for domestic use. (Please see the U.S. answer to Question 98 for more detail.) The U.S. Department of Agriculture's position would be that the payment should be made on the bale once only. The purpose of the program is to provide support to upland cotton farmers. Once the bale has been purchased by an upland cotton user, there would be no additional support for upland cotton farmers from providing Step 2 payments on additional "uses" of the same bale.

98. How many Step 2 payments are received if a bale of upland cotton is exported, and then opened by a domestic user in the United States, or vice versa?

⁸⁶ Code of Federal Regulations 1427.103(a).

USA

207. If a bale were exported and then imported and opened up (or vice versa) it would be the U.S. position that only one payment would be made. It does not appear that this situation has ever arisen in fact, but we note that the Step 2 regulations specifically provide that "imported" cotton is not eligible for payment. Such cotton may include any cotton that was imported, even if it had been produced in the United States.

99. How does the United States respond to Brazil's arguments in paragraphs 71-75 of Brazil's oral statement at the first session of the first Panel meeting concerning the relevance of the Appellate Body Report in US-FSC (21.5). USA

208. In contrast to the facts of the *United States – FSC (21.5)* dispute, in this dispute all of the product is produced in the United States; all of the product is eligible to receive the benefit of the subsidy; and all of the potential uses of the product are similarly eligible. If the statutory formula of price conditions applies, all U.S. upland cotton used during that time – regardless of how such use is manifested – will receive the subsidy. This case involves only one factual situation: use of cotton during a particular period of time. The only factual distinction applicable here is whether the applicable price conditions are on or off. Brazil's emphasis on the "different instructions" in the program regulations is misplaced. Such instructions are simply to demonstrate the requisite use and to assure payment is made to the proper party. If upland cotton could be used in a third or fourth way, this would not change the eligibility for subsidy but would necessitate a parallel third or fourth set of instructions to demonstrate that form of use as well.

103. Is the Step 2 programme fund a unified fund that is available for either domestic users or exporters, without a specific amount earmarked for either domestic users or exporters? Please substantiate your response, including by reference to any applicable statutory or regulatory provisions. USA

209. The upland cotton user marketing certificate program (Step 2) makes no differentiation between funds for payments to exporters and domestic handlers – it is all one program. The first paragraph of the Step 2 rule states:

These regulations set forth the terms and conditions under which CCC shall make payments, in the form of commodity certificates or cash, to eligible domestic users and exporters of upland cotton who entered into an Upland Cotton Domestic User/Exporter Agreement with CCC to participate in the upland cotton user marketing certificate program under section 1207 of the Farm Security and Rural Investment Act of 2002.⁸⁷

⁸⁷ Code of Federal Regulations 1427.100(a).

The Step 2 rule was published on October 18, 2002, at 67 Federal Register 64454, and is codified at 7 Code of Federal Regulations 1427.100-.108.

210. As with other U.S. domestic support measures, Step 2 payments are funded through the Commodity Credit Corporation, which has a borrowing authority in the Treasury and as such does not rely on appropriations. This is provided for in Sections 1207 and 1601(a) of the 2002 Act and codified at 7 U.S. Code 7937 and 7991.

104. How does the United States respond to the data presented in Exhibit BRA-69? Is it accurate? Please substantiate. USA

211. The data in Exhibit BRA-69 is not official U.S. Government data, and Brazil has not indicated the source of the information. Thus, we cannot confirm its reliability. The United States has tried in any event to obtain information in the format of Bra-69, which is not maintained and published by the U.S. Government in that manner. The following data has been collected by the U.S. Department of Agriculture and attempts to designate (as in Bra-69) Step 2 payments by fiscal year⁸⁸ and use.

⁸⁸The U.S. fiscal year runs from October 1 - September 30, such that the 2002 fiscal year would run from October 1, 2001, through September 30, 2002.

User Marketing Certificate (Step 2) Payments, by Fiscal Year and Use		
Fiscal Year	Mill Use (U.S. \$)	Export Use (U.S. \$)
1991	4,311,991	17,259
1992	102,769,543	30,852,107
1993	113,401,813	89,095,640
1994	28,251,613	178,266,742
1995	17,571,224	75,200,203
1996	0	34,798,579
1997	6,201,540	2,875,936
1998	255,502,154	158,924,004
1999	165,831,362	113,521,476
2000	260,075,318	185,273,956
2001	144,849,807	90,903,021
2002	72,425,112	105,415,152

A comparison with Exhibit BRA-69 suggests that the Brazilian data is inaccurate.

212. During the first panel meeting, the Panel asked about the figures shown for fiscal year 1996, which showed a zero payment for mill use and a positive number for export use. We suggested that perhaps appropriated amounts had suddenly run out, but our suggestion was not accurate. Rather, the odd numbers for fiscal year 1996 resulted because, at the time, payments for export use accrued when the contract for export was made. However, such payments were not paid until the export actually took place, at which time the exporter would be paid based on the Step 2 rates that applied when the contract was made. As the Panel is aware, Step 2 payments can be made only when there is a difference between world and U.S. prices for cotton for a certain time period. In the case of fiscal year 1996, these prices did not satisfy the Step 2 conditions, but there were some payments that were made during that fiscal year because they had accrued by an export contract made in the previous fiscal year. That rule is now changed⁸⁹ so that the rate that applies for export use is the rate that is in effect when the export is made not when the contract for export was made.

105. Why is the Step 2 programme separated into "domestic users" and "exporters"? Apart from differentiating between exporters and domestic users, with consequential differentiation as to the forms that must be filled out and certain

⁸⁹See 61 Federal Register 37544, 37548 (July 18, 1996).

other conditions that must be fulfilled, are the eligibility criteria for Step 2 payments identical? Are the form and rate of payment, as well as the actual payment made, identical? USA

213. U.S. law does not separate the Step 2 program into domestic users and exporters. There is but one Step 2 statute – codified at 7 U.S. Code 7937 – and but one Step 2 rule for all users – found at 7 Code of Federal Regulations 1427.100-.108. The statute and rule do identify “domestic users” and “exporters” as the universe of *bona fide* users of upland cotton and thus potential recipients for Step 2 payments. Therefore, the only distinction drawn between these recipients is the proof of use: domestic handlers are paid when they open a bale, and exporters are paid when they export. The form and rate of payment are identical.

106. With respect to paragraph 139 of the United States' first written submission, are Step 2 export payments included in the annual reduction commitments of the United States? If so, why? USA

214. The United States does not distinguish between the uses of U.S. upland cotton for purposes of reporting the subsidy because the subsidy is not contingent on export performance. All Step 2 payments are reported as product-specific domestic support for upland cotton and are included within the Total Aggregate Measurement of Support calculation for purposes of *domestic support* reduction commitments.

107. Please comment on any relevance, to Brazil's de jure claims of inconsistency with the provisions of the Agreement on Agriculture, of Exhibit BRA-69, which shows Step 2 payments made to (i) domestic users and (ii) exporters. This Exhibit shows that, from FY 91/92 through 02, the Step 2 payments for exporters exceeded those for domestic users in FY 94; FY 95; FY 96 (in fact there were no domestic payments in FY 96); and FY 02. In the other years, the domestic payments are greater than export payments. BRA, USA

215. Without commenting on the accuracy of the specific numbers set forth in Exhibit BRA-69, it is entirely possible that in certain years one type of user happened to receive a larger share of payments than another type of user. This would entirely be a function of market conditions and relative demand for manufacture or for export. That is, differences in amounts paid to exporters and domestic users during any time period are happenstance based on actual use of U.S. upland cotton.

216. The United States notes that payments to exporters were previously made based on when exporters finalized the sale contract, not on when the cotton was actually exported. In the specific case of fiscal year 1996, it appears that payments for exported upland cotton *accrued* during a period when Step 2 payments were allowed by the statute, but that the payments were actually made at a time when market conditions no longer met the statutory criteria for payment.

The rule has been changed,⁹⁰ and that situation can no longer recur.

108. At paragraph 135 of its first written submission, the United States states : "[T]he subsidy is not contingent upon export performance..." (emphasis added). Again, in the course of the first Panel meeting, the United States admitted that the Step 2 payments were "subsidies". Does the United States thus concede that Step 2 payments constitute a "subsidy" within the meaning of the WTO Agreement? USA

217. The United States has always maintained that Step 2 payments are subsidies that provide domestic support in favor of U.S. agricultural producers.

109. How does the United States respond to Brazil's arguments concerning a mandatory/discretionary distinction and the allegation that certain United States measures (including s.1207(a) of the 2002 FSRI Act) are mandatory? (This is referred to, for example, in paragraph 28 of Brazil's first written submission). Does the United States agree with the assertion that (subject to the availability of funds) the payment by the Secretary of Step 2 payments is mandatory under section 1207(a) FSRI upon fulfilment by a domestic user or exporter of the conditions set out in the legislation and regulations? If not, then why not? To what extent is this relevant here? What determines the "availability of funds"? Please cite any other relevant measures or provisions which you consider should guide the Panel in respect of this issue. USA

218. The United States does not disagree that, subject to the availability of funds (that is, the availability of CCC borrowing authority), Step 2 payments must be made to all those who meet the conditions for eligibility. With respect to the well-accepted mandatory/discretionary distinction reflected in GATT 1947 and WTO panel and Appellate Body reports, the United States notes that the distinction is the natural consequence of the fact that there can be no presumption of bad faith in WTO dispute settlement, a fact that numerous Members, including the European Communities, have emphasized.⁹¹ Thus, to the extent that a Member retains discretion under a measure to act in accordance with a WTO obligation, it may not be presumed that the Member will violate that obligation, or to conclude that the measure itself – separately from the measure's application in a specific instance – may be found inconsistent with that obligation.

110. Section 1207(a) of the 2002 FSRI Act provides that during the period beginning on the date of the enactment of the FSRI Act through July 31 2008, " .. the Secretary shall issue marketing certificates or cash payments, at the option of

⁹⁰See 61 Federal Register 37544, 37548 (July 18, 1996).

⁹¹See Appellate Body Report, *United States - Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, para. 259.

the recipient, to domestic users and exporters for documented purchases by domestic users and sales for export by exporters...". The Panel notes that Brazil does not appear to distinguish between the treatment of (i) cash payments and (ii) marketing certificates in terms of the issue of whether or not a "subsidy" exists. The United States refers to "benefits" and "payments" and "program" in asserting that Step 2 is not export contingent (paragraphs 127-135 of the United States' first written submission).

(a) Do the parties thus agree that there is no need to draw any distinction between the treatment of (i) cash payments and (ii) marketing certificates in terms of the issue of whether or not a "subsidy" exists for the purposes of the Agreement on Agriculture? BRA, USA

219. The United States agrees that there is no need to draw a distinction between cash payments and marketing certificates in terms of whether a subsidy exists for purposes of the Agreement on Agriculture.

(b) Why would a domestic user or an exporter select to receive a marketing certificate over a cash payment? What is the proportion of cash payments vs. marketing certificates granted under the programme? USA

220. A user of upland cotton that elects to receive payment in the form of a marketing certificate is entitled to redeem that certificate for an equivalent amount of upland cotton held by the Commodity Credit Corporation (CCC). Although authorized by statute, no Step 2 payments have been made in recent times in the form of certificates. Marketing certificates in lieu of cash payments for Step 2 were last used heavily in the early to mid-1990s. The CCC does not currently maintain high upland cotton inventories from which such certificates if issued could be redeemed.

111. Does the United States maintain its argument that actions based on Article 3.1(b) of the SCM Agreement are conditionally "exempt from actions" due to the operation of Article 13 of the Agreement on Agriculture? USA

221. Article 13(c) provides that "export subsidies that conform fully to the provisions of Part V of this Agreement, as reflected in each Member's Schedule, shall be . . . exempt from actions based on Article XVI of GATT 1994 or Articles 3, 5 and 6 of the Subsidies Agreement." Article 13(b), which applies to domestic support measures, does not reference Subsidies Agreement Article 3. Brazil has advanced claims under Article 3.1(b) of the Subsidies Agreement only with respect to Step 2 payments, which are domestic support measures and not export subsidies. Thus, on the U.S. view the Peace Clause would not appear to be applicable; however, to the extent Brazil asserts that Step 2 payments (or some part thereof) are export subsidies, Article 13(c) would be relevant.

222. We also note that paragraph 7 of Annex 3 requires that support in favor of domestic agricultural producers that is provided through payment to processors shall be included in the AMS of the Member. If payments are made in connection with both domestic and foreign product then such payments are not support in favor of domestic agricultural producers. Consequently, the Agriculture Agreement necessarily contemplates that support paid to processors may be paid solely with respect to domestic production. Under Article 6.3 of the Agriculture Agreement, if a Member is providing support within its domestic support reduction commitments, then such support may not be challenged under Article 3.1(b) because that Article applies “[e]xcept as provided in the Agreement on Agriculture.” If a Member exceeds its domestic support reduction commitments, on the other hand, then such support paid to processors would be actionable under Article 3.1(b).

112. In the event that the Panel finds that Article 6.3 of the Agreement on Agriculture does not preclude an examination of Brazil's claims under Article 3.1 of the SCM Agreement and Article III:4 of GATT 1994, how does the United States respond to the merits of Brazil's claims relating to Step 2 payments under those provisions? USA

223. As indicated in the U.S. answer to Question 111 from the Panel, and as the European Communities has noted in its third party submission, inasmuch as paragraph 7 of Annex 3 of the Agreement on Agriculture requires support in favor of agricultural producers that is paid to processors to be included in the Member's Aggregate Measurement of Support, then the Agreement on Agriculture necessarily contemplates that such payments to processors may apply solely with respect to domestic product. Otherwise, as in the case of Step 2 payments, domestic cotton producers would not receive the relative price benefit conferred by the payment. Consequently, such discrimination in favor of domestic production is permitted under the Agreement on Agriculture and, under Article 21.1 of that Agreement, the provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement are expressly “subject to the provisions of [the Agriculture] Agreement.” For that reason, neither Article 3.1(b) of the Subsidies Agreement nor GATT 1994 Article III:4 precludes such payments to users of U.S. upland cotton, unless the United States exceeds its domestic support reduction commitments.

113. Is it necessary for measures directed at agricultural processors included in AMS to discriminate on the basis of the origin of goods? USA

224. The United States does not express an opinion whether it is necessary in all circumstances for all Members with respect to all commodities. However, paragraph 7 of Annex 3 of the Agreement on Agriculture certainly contemplates that support in favor of domestic producers provided by payments to processors is included in the Aggregate Measurement of Support. In the case of Step 2 payments on upland cotton, if payments were provided in favor of all upland cotton, whether domestic or foreign, used by domestic mills or exporters, the price benefit for U.S. producers would not be achieved. Without such a benefit to U.S. producers, these payments

would not need to be included in the Aggregate Measurement of Support. The Agreement on Agriculture does not preclude payments that solely benefit domestic producers; indeed, paragraph 7 contemplates such discriminatory subsidy payments. Accordingly, the United States reports all Step 2 payments as domestic support in favor of U.S. producers of upland cotton.

115. What is the meaning and relevance (if any) to Brazil's claims under Article 3 of the SCM Agreement and Article III:4 of GATT 1994 of the phrase "measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products" in the Agreement on Agriculture? BRA, USA

225. The United States directs the Panel's attention to the U.S. answers to Questions 111, 112, and 113 from the Panel.

116. With respect to paragraph 32 of the oral statement of the EC, are subsidies contingent on the use of domestic goods consistent with the Agreement on Agriculture? Does the phrase "provide support in favour of domestic producers" in Article 3.2 of the Agreement on Agriculture refer to, and/or permit such subsidies? BRA, USA

226. Subsidies contingent on the use of domestic goods may be consistent with the Agreement on Agriculture. Paragraph 7 of Annex 3 of the Agreement requires the United States to include its Step 2 payments in favor of domestic upland cotton producers, even though such payments are made to processors, within its calculation of its Aggregate Measurement of Support. The United States has complied with its domestic support reduction commitments. Therefore, Step 2 payments to upland cotton users that provide support to domestic producers contingent on the use of domestic goods is consistent with the Agreement on Agriculture. If Members could not discriminate in favor of domestic producers when making subsidy payments through processors, there would be no reason for paragraph 7 of Annex 3. Such payments that are not limited to domestic products would not be in favor of domestic producers because the relative economic benefit of the subsidy vis-à-vis foreign production would not exist.

117. What is the relationship between Step 2 payments to exporters and the marketing loan payments, both of which appear to compensate for the price differences relative to the Liverpool A-Index? For example, is there double compensation? Or is one of the explanations that these export-related price compensatory payments are paid to different operators (namely, the producer, on the one hand under the marketing loan arrangements, and the processor/users (Step 2 programme) arrangements on the other? USA

227. Both marketing loan payments and Step 2 payments are domestic support for upland cotton, but the marketing loan payment is made directly to the producer whereas the Step 2 payment is made to users of the cotton. The marketing loan repayment formula, in section 1204

of the 2002 Act, and the Step 2 payment formula in section 1207 of the 2002 Act, differ by their terms and are simply different forms of support, the latter (Step 2) being a form of support that can facilitate higher market prices for U.S. cotton. We will address this more fully in our rebuttal submission.

118. Can the United States confirm that it does not rely on Article III:8 of GATT 1994? USA

228. The United States can confirm that the Step 2 payment is not made exclusively to domestic producers.

ETI ACT

119. How does the United States respond to Brazil's reference to the panel report in India - Patents (EC) (at paragraph 138 of its oral statement at the first session of the first substantive meeting)? How, if at all, should the Panel take this report into account in considering the issues raised by Brazil's claims relating to the ETI Act? USA

229. We agree with the passage quoted from the *India – Patents* dispute and consider it relevant to the extent that: Brazil has identified the challenged measure; Brazil has argued why the reasoning of the panels and Appellate Body are relevant in determining that the measure is inconsistent; and the Panel finds the reasoning in *FSC/ETI* persuasive. Our argument in the first written submission went to whether Brazil had carried its burden of bringing a *prima facie* case, in order to assist the Panel to fulfill its obligation under DSU Article 11 to make an objective assessment of the matter before it. Brazil may consider that it should not have to meet this burden, but under DSU rules as currently agreed, it must.⁹² Finally, we note our statement in the first submission that “[w]hile the United States cannot specify the precise date on which this will occur, the United States is confident that the ETI Act will be repealed in the reasonably near future.”⁹³

121. How do you respond to the reference in paragraph 43 of EC third party oral statement with respect to the relevance of Article 17.14 of the DSU, and, in particular, the phrase "a final resolution to that dispute" (emphasis added)? Please explain the use, and relevance (if any) of the term "disputes" in Articles 9.3 and 12 and Appendix 3 of the DSU, and please cite any other provisions you consider relevant. USA, BRA

⁹²See TN/DS/W/45 (Brazilian proposal in ongoing DSU review: "Brazil understands that one of the drawbacks of the current dispute settlement mechanism is the necessity for a Member to litigate a case *de novo* through all the established phases even if the same measure nullifying or impairing benefits of this Member has already been found WTO inconsistent in previous panel or appeal proceedings initiated by another Member.").

⁹³U.S. First Written Submission, para. 189.

230. The United States considers the EC's references to be irrelevant to the resolution of this dispute. As noted in the U.S. first written submission, the United States intends to implement the DSB's recommendations and rulings in the *FSC/ETI* dispute. Further, the issues raised in the U.S. first written submission related solely to whether Brazil had met its burden of argumentation in this dispute and not to the substantive correctness and applicability, or lack thereof, of the adopted findings in *FSC/ETI*. Nor did the U.S. arguments relate to the breadth of the U.S. obligation to implement the DSB's rulings and recommendations in that dispute. The United States considers that Brazil's burden in this dispute requires, at a minimum, that it identify those aspects of the measure which are WTO-consistent and explain why that is the case.