United States – Subsidies on Upland Cotton

(WT/DS267)

Comments of the United States of America
on New Material in Brazil's Rebuttal Filings and
Answer of the United States to the Additional Question from the Panel

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I. Introduction

1. The United States thanks the Panel for its prompt reply to the U.S. request of August 25, 2003, granting an opportunity to comment on new material in Brazil's rebuttal submission and Brazil's comments on the U.S. responses to questions. We also thank the Panel for its additional question. We present both the U.S. comments on new material in Brazil's submissions and our answer to that additional question below.

2. As the United States notes in these comments and answer, Brazil's Peace Clause argument depends on three issues:

- First, Brazil relies on budgetary outlays that reflect prevailing market prices that could not have been "decided" by the United States. Brazil ignores the fact that "support" does not mean "budgetary outlays"; in fact, Annex 3 recognizes that an "Aggregate Measurement of Support" for price-based support either shall[1] or can[2] be calculated using a price gap methodology, which does not rely on budgetary outlays.

- Second, Brazil conflates "non-product-specific support" with "support to a specific commodity" by attempting to allocate certain payments to upland cotton. To do so, however, Brazil relies on a reading of the definition of "non-product-specific support" in Article 1(a) that ignores the most relevant context for this term – that is, the (immediately preceding) definition of product-specific support in that same article. Indeed, Brazil's approach would appear to render the concept of "non-product specific support" so narrow that it becomes almost, if not completely, meaningless.

- Third, Brazil mischaracterizes U.S. direct payments and production flexibility contract payments as non-green box support. Brazil has not established that these measures fail to conform to the policy-specific criteria in Annex 2. In fact, Brazil has not even established – pursuant to Brazil's own reading of the first sentence of Annex 2, paragraph 1, as a stand-alone obligation – that these payments have more than "minimal[] trade-distorting effects or effects on production."[3]

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[1] In the case of market price support. In fact, Annex 3, paragraph 8, states: "Budgetary outlays made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS."

[2] In the case of non-exempt direct payments dependent on a price gap. *See* Agreement on Agriculture, Annex 3, paragraph 10.

[3] Of course, the U.S. view is that the "fundamental requirement"of the first sentence is met by a measure that conforms to the basic criteria and any applicable policy-specific criteria. In this regard, Brazil errs in claiming that the United States has "acknowledged that such effects can be presumed if the specific criteria in paragraph 6 of Annex 2 are not complied with." Brazil's Rebuttal Submission, para. 8 fn. 13. In fact, we believe the opposite. Meeting the basic and policy-specific criteria of Annex 2 establishes that a measure meets the "fundamental requirement" of paragraph 1. However, the converse is not necessarily true. So, according to Brazil's approach, Brazil would bear the burden of establishing that a measure that did not comply with the basic and policy-specific criteria in Annex 2 failed to meet the "fundamental requirement" of paragraph 1 of Annex 2.

3. The weakness of Brazil's interpretation that "support" in the Peace Clause means "budgetary outlays" can be seen in this example. Even if U.S. measures were *exactly* the same in *every year* of the implementation period as they were in the 1992 marketing year (that is, the same deficiency target price, same marketing loan rate, same acreage reduction percentage, same normal flex acres with planting flexibility,[4] etc.), under Brazil's interpretation, U.S. measures would have breached the Peace Clause in each and every year in which outlays increased due to external factors, for example, whenever market prices dipped below the 1992 level.

• Would 1999-2002 U.S. measures *identical in every respect* to those in 1992 "grant support in excess of that decided during the 1992 marketing year"?

• In other words, if a Member had decided its support during 1992 for the period through 2004 and never changed its decision, could the Member be deemed to grant support in excess of the level decided during 1992 just because outlays increased, for example, because market prices changed?[5]

We believe the answer must be "No" because market prices are not "decided" by a Member (as paragraphs 8 and 10 of Annex 3 recognize). And yet, the situation in this dispute is analogous: the United States has changed its measures to *reduce* the product-specific level of support (by eliminating deficiency payments) since 1992, and yet Brazil claims that the Peace Clause has been breached simply because lower market prices resulted in increased price-based outlays.

4. Market prices are beyond the control of the United States, and therefore the United States cannot "decide" them. Removing the effect of market prices beyond the control of the United States from the measure of support demonstrates that U.S. measures do not and did not grant support in excess of that decided during the 1992 marketing year. In fact, whether gauged (as the United States believes is compelled by the Peace Clause) via the rate of support expressed by U.S. measures,[6] *or* via the AMS for upland cotton (calculated through a price gap methodology),

[4] Recall that "under 1992 program provisions, producers of non-cotton program crops (i.e., wheat, corn, barley, grain sorghum, oats, and rice) could plant up to 25 percent of their [non-cotton] crop program base to cotton as Normal Flex Acres or Optional Flex Acres. Acreage Reduction Program compliance reports indicate that, in 1992, 447,164 acres of cotton were planted on a much larger quantity of available Normal Flex Acres and Option Flex Acres of non-cotton program base.") Exhibit US-24 (Report by Dr. Joseph Glauber, Deputy Chief Economist, U.S. Department of Agriculture). In 1992, there were 153.9 million acres of non-cotton "complying base" and 197.2 million acres of non-cotton "effective base." *See* Exhibit US-39. Thus, the marketing loan was effectively available with respect to all upland cotton production.

[5] Other factors beyond a Member's control could also influence outlays, such as whether some additional producers chose to begin participating in the support programs.

[6] Even taking into account the maximum theoretical effect on the deficiency payment effective price of the 1992 acreage reduction percentage (10 percent) and normal flex acres (15 percent) for the 1992 marketing year. Since the acreage reduction percentage was lower for 1993 marketing year (7.5 percent versus 10 percent) support, which was also decided during the 1992 marketing year, the adjusted level of support (68.27625 cents per pound) was even higher for the 1993 marketing year.

or via the erroneous calculations of Brazil's expert (but limited to product-specific support), the result is exactly the same: in no marketing year from 1999 through 2002 have U.S. measures breached the Peace Clause.

II. Brazil's AMS Calculation Is Flawed and, Had It Consistently Reflected a Price Gap Calculation, Would Demonstrate No Peace Clause Breach

5. We recall that Brazil has argued that budgetary outlays are the only measurement of "support" for purposes of the Peace Clause proviso comparison, without any foundation in the Peace Clause text and despite the context provided by Annex 3, which explicitly indicates that Members have agreed "support" *can* be measured without using budgetary outlays. Brazil itself concedes that U.S. measures do not decide support on the basis of budgetary outlays:

> Brazil acknowledges that *the United States could not possibl[y] determine its expenditures* as they would depend to a certain extent on *market prices* that were also influenced by factors *outside the control of the U.S. Government*.[7]

The United States agrees with this statement by Brazil and believes that this statement demonstrates that Brazil's approach to the Peace Clause comparison is not based on the text nor is it realistic. Instead, in order to hope to succeed, Brazil's claims *require* Brazil to use budgetary outlays and so to take into account low prevailing market prices. An Aggregate Measurement of Support calculation using a price gap methodology – that is, that eliminates the effect of market prices and reflects instead the eligible production and applied administered price decided by a Member – reveals that in no year from 1999-2002 have U.S. measures breached the Peace Clause.

6. Brazil has argued that "there are only two types of methodologies that would allow an expression in monetary terms of a decision (or decisions) taken by the United States in MY 1992 regarding its level of support to upland cotton. The first is budgetary expenditures. The second is the calculation of AMS for a particular commodity."[8] In both its table of expenditures[9] and its AMS table,[10] Brazil has attempted to allocate non-product-specific support to a specific commodity. There is no basis in Annex 3 to do so. Annex 3, paragraph 1, explicitly requires an AMS to be calculated "on a product-specific basis for each basic agricultural product" and separately requires that non-product-specific support be calculated and "totalled into one non-product-specific AMS in total monetary terms." The point bears emphasis: "for each basic agricultural product," Annex 3 states that an AMS "shall be calculated on a product-specific

[7] Brazil's Comments on U.S. Answers, para. 66 fn. 49.

[8] Brazil's Rebuttal Submission, para. 71.

[9] Brazil's Rebuttal Submission, para. 73.

[10] Brazil's Rebuttal Submission, para. 76.

basis." Similarly, were "support to a specific commodity" (upland cotton) to be calculated using an Aggregate Measurement of Support, it *must* be calculated "on a product-specific basis."

7. As a result, both Brazil's expenditure table and its AMS table run counter to the terms of Annex 3. Were the Panel to calculate an AMS for upland cotton for marketing years 1992 and 1999-2002, the United States has set forth a calculation consistent with Annex 3 in its rebuttal submission.[11] By using a price-gap methodology for both deficiency payments and marketing loan payments,[12] the upland cotton AMS in 1992 is far higher than in any marketing year from 1999 to 2002, reflecting the U.S. decision to move away from the high support levels of product-specific deficiency payments.

8. In fact, we note that the AMS data presented in paragraph 115 of the U.S. rebuttal submission understates the AMS for marketing year 1992. For example, the United States reduced the price gap calculation for 1992 basic deficiency payments by an adjustment factor (approximately .875) to replicate the calculation used in G/AG/AGST/USA, p. 18. Without the adjustment, which is not called for by paragraphs 10 and 11 of Annex 3, the 1992 deficiency payment calculation would have been $858 million, rather than $755 million as reported in paragraph 115.[13] (In case of interest, we also present below the deficiency payment calculation in more detail, reflecting more accurate data, which would increase the deficiency payment calculation slightly, to $867 million.)[14] This calculation, moreover, uses the actual payment

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[11] U.S. Rebuttal Submission, paras. 114-118.

[12] Brazil has stated (with respect to deficiency payments) that "the formula approach under Annex 3, paragraphs 10-11 of the Agreement on Agriculture [is] warranted for upland cotton AMS calculations." Brazil's Rebuttal Submission, para. 73 fn. 172. Because the Peace Clause proviso comparison must compare the support that challenged measures grant to "that decided during the 1992 marketing year," the price gap methodology is the only AMS approach that reflects only the United States' decisions and not market prices beyond the United States' control. For the same reason, it is equally appropriate to use the price gap methodology for marketing loan payments.

[13] Total deficiency payments calculated via the price gap methodology equal unadjusted basic deficiency payments ($724 million / 0.875) + 50/92 deficiency payments ($30 million) – that is, $858 million. *See* U.S. Rebuttal Submission, para. 115 fn. 144.

[14] To calculate the deficiency payment support using the price gap methodology and consistent with the 1995 U.S. WTO notification and G/AG/AGST/USA, we made the following calculations.

Total deficiency payments are equal to basic deficiency payments plus 50/92 payments. Basic deficiency payments are equal to eligible production times a price gap measured as the difference between the target price and a fixed reference price. Eligible production is measured as eligible base acreage times average program yield. Eligible base acreage is equal to participating base acreage minus Acreage Conservation Reserve acres minus Normal Flex Acres minus acres enrolled in the 50/92 program. The fixed reference price is the1986-88 average of the higher of the market price or loan rate for each year.

Payments for the 50/92 program were calculated in a similar fashion by multiplying base acres in the 50/92 program times the average program yield times 92 percent of the price gap.

In 1992, the target price was 72.9 cents per pound and the fixed reference price for 1986-88 was 57.9 cents per pound. This gives a price gap of 15.0 cents per pound. Eligible production for basic deficiency payments in 1992 was equal to 5,544 million pounds (9.226 million acres times the average program yield of 601 pounds per

acreage (that is, acres planted for harvest or participating in the 50/92 program on which payment was received) to calculate the "eligible production." Using instead the base acreage minus the 10 percent acreage reduction figure and the 15 percent normal flex acres (14.9 million effective base acres[15] *x* .75 = 11.175 million acres) and multiplying by the program yield (602 pounds per acre), the "quantity of production eligible to receive the administered price"[16] is 6,727 million pounds, yielding a price gap deficiency payment calculation of $1,009 million. Thus, the figure in paragraph 115 of the U.S. rebuttal reflected a conservative approach that understated the support resulting from a price gap calculation.

9. In this regard, the United States notes Brazil's argument with respect to the 1995 Statement of Administrative Action, which explained that Peace Clause protection would apply "unless the AMS for the particular commodity exceeds the level decided in the 1992 marketing year."[17] We agree with Brazil that this reference to "AMS" is "non-textual[]" because the Peace Clause uses the term "support decided" and not "AMS."[18] However, to the extent that the Panel were to examine "the AMS for the particular commodity" – that is, the upland cotton AMS – the

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acre). Multiplying the price gap times eligible production gives basic deficiency payments equal to $832 million.

The same formula is used to calculate deficiency payments under the 50/92 program. For 1992, the price gap is the same as that calculated for the basic deficiency payments (15 cents per pound). Eligible production under the 50/92 program was 254 million pounds (404 thousand acres times the average program yield of 50/92 participants of 628 pounds per acre). Deficiency payments under the 50/92 program were thus equal to $35 million (0.92 times 254 million times $0.15).

Total deficiency payments under the price gap methodology were thus equal to $867 million ($832 million plus $35 million). *Sources:* U.S. Department of Agriculture, Compliance Report for 1992 Acreage Reduction Program (1993) (Exhibit US-39); Commodity Credit Corporation Commodity Estimates Book for the FY 1995 President's Budget (February 1994); G/AG/AGST/USA, p. 18.

[15] *See* Exhibit Bra-105, Annex 2 (1st source document: U.S. Department of Agriculture, *Provisions of the Federal Agricultural Improvement and Reform Act of 1996*, at 142) (giving 1992 effective base acreage of 14.9 million acres); *id.*, Annex 2 (2nd source document: Daniel A. Sumner, *Farm Programs and Related Policy in the United States*, at 4) (same).

[16] Agreement on Agriculture, Annex 3, para. 10.

[17] We also note that Brazil never quotes that passage in full since the first half reflects the U.S. view throughout this dispute that "exempt from actions" means not liable to a legal process or suit. *See* 1995 Statement, at 68 ("Under Article 13(b)(ii) and (iii), governments *may not initiate* adverse effects, serious prejudice or non-violation nullification and impairment *challenges* in the WTO . . . .") (emphasis added). There are numerous other statements in the 1995 Statement that Brazil similarly does not draw to the Panel's attention. *See id.* at 67 ("Article 13, commonly referred to as the peace clause, reflects *an agreement among WTO countries to refrain from challenging* certain of each other's agricultural subsidy programs . . . *through WTO dispute settlement procedures* . . . .") (emphasis added); *id.* ("*Article 13(b) addresses possible challenges* to domestic support measures falling outside the green box in circumstances in which the WTO member providing the subsidy is meeting its total AMS commitments.") (emphasis added).

[18] Brazil's Opening Statement, para. 35; Brazil's Rebuttal Submission, para. 75; *see also* 1995 Statement of Administrative Action, at 68 (subsequently in same paragraph quoted by Brazil stating "a WTO Member will not be protected by the Peace Clause if its support for the product is above that decided during the 1992 marketing year.") (emphasis added).

United States has demonstrated that in no year from 1999-2002 does that AMS exceed the 1992 level.

III. The U.S. Level of Support Argument Does Take Into Account All Product-Specific Support That Challenged U.S. Measures Grant

10. Brazil has argued that "the United States '72.9 methodology' does not – and cannot account for cottonseed payments, Step 2 payments, storage payments and interest rate subsidies," which the United States has identified as product-specific support.[19] Brazil then alleges that the U.S. methodology "would sanction the cover-up of hundreds of millions – if not billions – of dollars of expenditures."[20] Over-heated rhetoric aside, Brazil's argument is simply erroneous.

11. Brazil argues that the United States has not accounted for Step 2 payments. The United States directs the Panel's attention to the U.S. rebuttal submission, paragraphs 111 and 113, and the U.S. first written submission, paragraph 111. The United States has noted that, because the availability of Step 2 payments is contingent on certain price conditions existing during the marketing year, the level of support decided must relate to the payment parameters. While these have changed slightly with the 2002 Act, these minor adjustments do not alter the revenue ensured for producers by the marketing loan rate of 52 cents per pound because Step 2 merely provides an alternative avenue of providing support (through processors rather than directly to producers). In addition, these minor adjustments cannot overcome the greater than 20 cents per pound difference in product-specific support between marketing years 1992 and 1999-2002.

12. Brazil argues that the United States has not accounted for cottonseed payments. The United States directs the Panel's attention to the U.S. rebuttal submission, paragraph 111 fn. 136, 137 and paragraph 113. While the United States maintains that these measures are not within the Panel's terms of reference,[21] we note that cottonseed payments for the 1999, 2000, and 2002 crops ranged in value between 0.6 to 2.3 cents per pound (factoring expenditures – the way these measures were decided – over production). Thus, given the greater than 20 cents per pound difference in product-specific support between marketing years 1992 and 1999-2002, cottonseed payments too do not materially affect the comparison between marketing year 1992 and any other year.

13. With respect to storage payments and interest rate subsidies, we note that these are U.S. Government estimates of support provided through activities relating to operating the upland

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[19] Brazil's General Comment on U.S. Answers to Questions 47-69 from the Panel (para. 55).

[20] Brazil's General Comment on U.S. Answers to Questions 47-69 from the Panel (para. 56).

[21] *See* U.S. Rebuttal Submission, paras. 106-09.

cotton marketing loan program.[22] This support is already captured, however, in the level of support expressed by the marketing loan rate. Were these costs not borne by the United States, the costs to the producer would reduce the guaranteed revenue below the loan rate. In fact, Annex 3 of the Agreement on Agriculture explains that, for purposes of market price support calculated using a price gap, "[b]udgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS." Similarly, where the support provided by marketing loans is measured using a price gap methodology (the only appropriate AMS calculation for purposes of the Peace Clause)[23], "payments made to maintain this gap," such as storage payments and interest rate subsidies, should not be counted separately.

IV. Brazil's New Green Box Arguments Are in Error

14. In its rebuttal submission and comments on U.S. answers to questions from the Panel, Brazil advances two novel arguments. First, Brazil for the first time responds to the U.S. argument that Brazil's interpretation of paragraph 6(b) would create an inconsistency between that provision and the fundamental requirement of the first sentence of Annex 2, paragraph 1.[24] Second, Brazil argues that the U.S. interpretation of Annex 2, paragraph 6(b), would render paragraph 6(e) of that Annex a nullity. Neither of these arguments withstands scrutiny.

15. First, Brazil misunderstands the U.S. argument that Brazil's reading of paragraph 6(b) creates an inconsistency between that paragraph and the fundamental requirement of the first sentence of Annex 2, paragraph 1, and therefore its arguments go astray. The United States has noted that if payments under a decoupled income support measure were reduced or eliminated if a recipient were to produce any commodity, then the amount of payments would be (on Brazil's reading) linked to the type of production and therefore inconsistent with paragraph 6(b), even though such a measure would meet the fundamental requirement of Annex 2. Brazil does not contest that such a measure would meet that fundamental requirement but instead argues that "requiring no production, *i.e.*, on all base acres is not a 'type of production'" because "[t]he notion of 'type of production' in paragraph 6(b) is necessarily linked to the amount of payment to some 'type' of commodity that is 'produced' and not to a production requirement itself."[25]

16. With respect, if one were to credit this argument, then Brazil would appear to have misunderstood its own objection to U.S. direct payments and production flexibility contract payments. That is, in the U.S. example, payments are reduced or eliminated if a recipient

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[22] For example, for storage payments we estimate expenses incurred with respect to upland cotton put under loan and pledged as collateral.

[23] *See* U.S. Rebuttal Submission, paras. 114-17.

[24] Brazil's Rebuttal Submission, paras. 4-9.

[25] Brazil's Rebuttal Submission, para. 6. Brazil concludes the thought: "Otherwise, it logically could not be a 'type' of production. It would be nothing at all."

produces *any type* of commodity. Similarly, Brazil's objection to U.S. green box payments is that payments are reduced or eliminated if a recipient produces *certain types* of commodities. Thus, in the former example, the amount of payment is "based on" (in the sense of being reduced by) "the type" of production undertaken by the producer – for example, production of upland cotton, fruits, vegetables, or wild rice – just as in Brazil's argument on U.S. green box payments, the amount of payment is "based on" (in the sense of being reduced by) "the type" of production undertaken by the producer – that is, fruit, vegetable, or wild rice production. Brazil's objection to U.S. green box payments under paragraph 6(b) would therefore apply with equal force to the U.S. example,[26] again, posing an inconsistency between Brazil's interpretation of paragraph 6(b) and the fundamental requirement of Annex 2.[27]

17. Brazil also argues that the U.S. interpretation of paragraph 6(b) "would render Annex 2, paragraph 6(e)[,] a nullity" because the "U.S. interpretation of paragraph 6(b) as not requiring the production of 'certain crops' is the same as 6(e)'s prohibition on not requiring production of 'any crops.'"[28] Brazil's own re-phrasing of the U.S. argument, however, points to the distinction between the obligations contained in these two provisions. Paragraph 6(e) establishes that under a green box measure: "No production shall be required in order to receive such payments." Thus, there can be no production requirement "in order to receive such payments," but the provision is silent with respect to the *amount* of such payments at any particular time and any links to the "type or volume of production." That is, were paragraph 6(e) alone part of Annex 2, a Member could arguably link the amount of payments to requirements on the "type or volume of production" so long as payment eligibility were not contingent on production.

18. Paragraph 6(b) forecloses that option by prohibiting a green box measure from linking the "amount of such payments in any given year" to "the type or volume of production." That is, not only may a green box measure not require production, but the measure may not require a particular "type or volume of production" in order to obtain a payment amount. As the United States has noted, both direct payments and production flexibility contract payments meet that test because no "type or volume of production" is required to receive payments. For example, with respect to the fruits, vegetables, and wild rice planting flexibility issue, a payment recipient need not undertake any "type or volume of production" in order to receive the full "amount of payments" to which the farm's base acres are entitled. Rather, the recipient need only *desist* from planting certain commodities. Thus, Brazil's objection is nothing more than a statement

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[26] *See* Brazil's Rebuttal Submission, para. 4 ("The relevant text of paragraph 6(b) prohibits any linkage of the 'amount of payments' to *any* 'type of production' of an agricultural product.") (emphasis added).

[27] Brazil's reference to paragraph 6(e) does not answer this objection. Brazil argues that "negotiators addressed any possible misunderstanding in this regard by including the very concept of prohibiting the requirement to produce in paragraph 6(e)." Brazil's Rebuttal Submission, para. 6. However, as Brazil immediately points out, conformity with paragraph 6(e) "does not exempt . . . payments from conforming to the requirement of paragraph 6(b)."

[28] Brazil's Comment on U.S. Answer to Question 32 from the Panel (para. 44).

that, under U.S. green box measures, the amount of payments is linked to production *not* undertaken by the producer.

19. Finally, we note that Brazil's reading of paragraph 6(b) could prevent Members from imposing on decoupled income support payment recipients any conditions relating to the type of production – for example, the planting of illegal crops or production of unapproved biotech varieties or environmentally damaging production. As a practical matter, no Member could accept not being able to impose any such conditions on payment recipients. The result of Brazil's reading, then, would be to read decoupled income support out of Annex 2. This may be a favorable result from the Brazilian perspective, but the Panel should not adopt an interpretation of paragraph 6(b) not required by the text, not consistent with its context (in particular, the fundamental requirement of Annex 2), and with such potentially far-reaching results.

V. Answer to Additional Question 67*bis* from the Panel

67*bis*. Please state the annual amount granted by the US government in each of the 1999, 2000, 2001 and 2002 marketing years (as applicable) to US upland cotton producers, per pound and in total expenditures, under each of the following programs: production flexibility contract payments, market loss assistance payments, direct payments and counter-cyclical payments.

20. The Panel's question would require ascertaining for each program the amount of upland cotton produced by recipients of payments under the program. However, the United States does not maintain and cannot calculate this information – that is, it does not maintain information on the amount of expenditures made under the cited programs to U.S. upland cotton producers. This is because the payments do not relate to, and do not depend on, what crop, if any, is actually produced. Instead, each of these programs makes payments with respect to *past* production on base *acreage* in a fixed and defined base period, not with respect to whether one is currently a producer.

21. Thus, the United States did track total expenditures with respect to base acres of wheat, corn, barley, grain sorghum, oats, upland cotton, and rice under the expired production flexibility contract payments and market loss assistance payments and does track total expenditure with respect to base acres of wheat, corn, barley, grain sorghum, oats, upland cotton, rice, peanuts, soybeans, sunflower seed, canola, rapeseed, safflower, flaxseed, mustard seed, crambe, and sesame seed under the direct payments and counter-cyclical payments.[29] However, the fact that a recipient at one time produced one of these crops says nothing about what crops the recipient is currently producing, if any. In other words, payments made on the basis of past production of upland cotton do not tell anything about whether the recipient is currently producing cotton, corn,

[29] *See* U.S. First Written Submission, para. 57 fn. 46.

livestock, hay, or any other crop or is not producing at all. As a result, it is not possible to derive from these payments whether the payment is being received by an upland cotton producer.

22. The Panel's question points to a fundamental difficulty with Brazil's approach. Brazil would have the Panel allocate "support to a specific commodity" – upland cotton – on the basis that certain of these measures determine payment amounts (for base acres) based on current or recent market prices for that commodity. However, how could the payment be "support to a specific commodity" (support "provided for an agricultural product in favour of the producer of the basic agricultural product") if there need be no production of upland cotton in order to receive payment?

23. Brazil attempts to avoid this result by arguing that various U.S. payments (direct, counter-cyclical, production flexibility contract, and market loss assistance payments) are *not* non-product-specific support because they are not payments to "producers in general." The United States has addressed this erroneous interpretation in detail in its rebuttal submission. In short, Brazil's reading requires ignoring the definition of product-specific support in Article 1(a) (that is "support . . . provided for an agricultural product in favour of the producers of the basic agricultural product"), which Brazil has not interpreted, in over 450 pages of submissions and statements, even once.[30] In fact, Brazil's reading of the definition of non-product-specific support ("support provided in favour of agricultural producers in general") reads the phrase "in general" as meaning "in a body; universally; without exception." However, this dictionary definition is considered "obsolete"[31] and so would hardly be the "ordinary meaning" of the term.

24. As Brazil has conceded, moreover, payments made with respect to upland cotton base acres are not necessarily in favor of upland cotton producers since those acres may not be planted to upland cotton – indeed, may not be planted at all. We note that Brazil has adjusted its entire AMS calculation to reflect its belated realization that, under its own theory, "only the portion of . . . payments [on "upland cotton" base acres] that actually benefits acres planted to upland cotton can be considered support to upland cotton."[32] But Brazil's adjustment is not enough. Brazil simply takes the ratio of actual upland cotton acreage to "upland cotton" base acreage under a given program. However, there is no reason why upland cotton acreage need be planted on "upland cotton" base acreage. Consider this example:

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[30] *See, e.g.*, Brazil's Rebuttal Submission, para. 19 (again misquoting the definition of product-specific support in Article 1(a) by eliminating the phrase support provided "for an agricultural product" and failing to interpret that definition according to the customary rules of interpretation of public international law); Brazil's Comments on U.S. Answer to Question 43 from the Panel (paras. 58-60) (criticizing U.S. interpretation of product-specific support but failing to interpret that definition according to the customary rules of interpretation of public international law); Brazil's Comments on U.S. Answer to Question 38 from the Panel (paras. 48-49) (same).

[31] *See The New Shorter Oxford English Dictionary*, vol. 1, at 1073 (first definition of "in general": "† (*a*) in a body; universally; without exception"); *id.*, vol. 1, at xv (sec. 4.5.2: Status symbols) ("The dagger [†] indicates that a word, sense, form, or construction is obsolete. It is placed before the relevant word(s) or relevant sense number.").

[32] *See, e.g.*, Brazil's Answer to Question 67 from the Panel (table, fn. 2, 3, 4, 5).

• One farm could have 100 base acres of upland cotton and currently plant those 100 acres to corn; direct and counter-cyclical payments would be made on those 100 "upland cotton" base acres that actually are planted to corn.

• Another farm could have 100 base acres of corn and currently plant those 100 acres to upland cotton; direct and counter-cyclical payments would be made on those 100 "corn" base acres that actually are planted to upland cotton.

• Brazil's approach (dividing upland cotton planted by upland cotton base acres) would simply say that *all* of the direct and counter-cyclical payments on "upland cotton" base acres are "support to upland cotton" because there are 100 "upland cotton" base acres on which payments were made and 100 acres currently planted to upland cotton, even though these are found on completely separate farms.

Thus, Brazil's ratio does not identify, *even on Brazil's own terms*, the alleged support to upland cotton (that is, "payments that actually benefit[] acres planted to upland cotton") under these programs.[33]

25. Brazil's own approach would require Brazil to match up payments for upland cotton base acres with the amount of upland cotton production on those base acres, but Brazil has not done so.[34] At best, Brazil speculates as to the *likelihood* of a person with cotton base acres actually producing upland cotton on those base acres, and even that speculation is flawed.[35] However,

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[33] We also would reiterate that such payments would not be "support to a specific commodity" as explained in Article 1(a) and reflected in Annex 3.

[34] For example, Brazil admits that "this acknowledged legal flexibility to grow other crops does not answer the question of whether the producers planting 14.2 million aces of upland cotton in MY 2002 received direct and counter-cyclical payments. Nor does it answer the question of whether the 14.2 million acres planted to upland cotton in MY 2002 were planted on *upland cotton* base acreage." Brazil's Rebuttal Submission, para. 38 (emphasis in original). The United States agrees completely, and while Brazil's approach would require that these questions be answered, Brazil has not answered them, even though under Brazil's approach, Brazil would have the burden of proof in this regard. Rather, Brazil tries to construct a series of assumption based on what Brazil considers "likely" or "maybe" or "probably."

[35] *See* Brazil's Rebuttal Submission, paras. 24-50. Brazil makes a lengthy presentation of new data and calculations, including some with respect to crops other than upland cotton, to assert that these four payments are support for upland cotton because without them upland cotton farmers could not cover their costs. However, Brazil's approach is flawed in terms of its facts and the premises on which it relies. In the time available we have not been able to identify and describe all the flaws and inaccuracies in Brazil's presentation of the data. Simply by way of example, however, we note that (1) Brazil includes a figure for cottonseed payments in its graph purporting to show MY 2001 market revenue and government support (Rebuttal Submission, paragraph 30), but Brazil's own table at paragraph 84 of its rebuttal submission reflects that there were no cottonseed payments for the 2001 marketing year; (2) Brazil's theory would appear to be that cotton production on cotton base acres are "necessary" because without government payments costs of production would not be covered, but Brazil presents information only with respect to one year, marketing year 2001, with record low prices - Brazil does not explain its theory or present any

such an approach amounts to little more than speculation and, even if Brazil's erroneous interpretation were used, does not meet Brazil's burden of establishing a *prima facie* case.

26. In addition, under Brazil's own approach, the payments made in relation to corn base acres would be support for *corn* even if planted to upland cotton. However, Brazil's approach would appear to result in double counting the support – the same payment would be support to corn (because it was related to corn base acres) and support to upland cotton (because cotton was produced on base acres eligible for payments). In other words, Brazil is trying to have it both ways:

- First, Brazil argues that payments made based on production on base acres during a base period is support to the crop that was produced during that base period, regardless of what is actually produced currently (that is, payments made for upland cotton base acreage is support to upland cotton even if the producer is now growing corn on that acreage).

- Second, Brazil argues that payments made under these programs are support to the crop that is currently being produced, even if the crop being produced is different from the base crop (that is, payments made for corn base acreage is support to upland cotton if upland cotton is being produced on the corn base).

27. Furthermore, because payments under the cited programs are made with respect to historic acres and yields during a base period, it is not possible to calculate the "annual amount granted by the US government . . . to US upland cotton producers, per pound." Counter-cyclical payments, for example, determine the payment rate for base period production as the difference between a target price and the sum of the direct payment rate plus the higher of the market price or the loan rate. However, the per pound payment rate for upland cotton base acres applies only for base period production (base acres *x* payment yields), not current production. Thus, to express these payments per pound begs the question: "Per pound of what?" Any production figure used – whether base period production or production in any year from 1999 through 2002 – results in a highly artificial per pound rate since (as noted above) these payments will be or were (as the case may be) received by a recipient regardless of whether he or she produced any upland cotton production.

28. We are able to provide to the Panel the total outlays under the cited programs with respect to upland cotton base acreage:

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data with respect to other years with more typical prices; (3) Brazil asserts that upland cotton production "is produced only in particular regions . . . and producers tend to specialize and not readily switch to other crops" – whereas cotton is produced in 17 of the 50 United States and, for all U.S. cotton farms, average cotton area is approximately 38 percent of a farm's acres (469 of 1,222 acres) (U.S. Department of Agriculture, Characteristics and Production Costs of U.S. Cotton Farms (October 2001).)

Total Outlays Under Certain Programs with respect to Upland Cotton Base Acres (millions US$)				
Payments[36]	MY1999	MY2000	MY2001	MY2002
Production flexibility contract	614	575	474	452
Market loss assistance	613	612	524	NA
Direct	NA	NA	NA	not yet available[37]
Counter-cyclical	NA	NA	NA	not yet available[38]

VI. Payments With Respect to Base Period Production of Certain Commodities But Not Others Are Not Inherently Product-Specific Support

29. Brazil has argued that production flexibility contract payments, market loss assistance payments, direct payments, and counter-cyclical payments are product-specific support. The United States had addressed some infirmities in Brazil's approach in response to Additional Question 67*bis* from the Panel and in previous submissions.[39] The United States now briefly addresses two arguments presented by Brazil.

30. First, Brazil argues that each of these payments is product-specific because base acreage is defined as acreage on which only some commodities were historically produced during a defined and fixed base period. This argument, again, rests on an "obsolete" definition of "in general" (in the definition of non-product-specific support) as "universal" or "without exception" and a determined refusal to quote accurately and interpret the definition of product-specific support in Article 1(a).[40] That these payments are made with respect to base acreage for only

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[36] *See* Exhibit US-38 (http://www.fsa.usda.gov/dam/BUD/bud1.htm) (for crop years 1999, 2000, and 2001).

[37] The U.S. Department of Agriculture estimates that direct payments for the 2002 marketing year with respect to upland cotton base acres will total $173 million. Exhibit US-18 (www.fsa.usda.gov/dam/BUD/estimatesbook.htm).

[38] The U.S. Department of Agriculture estimates that counter-cyclical payments for the 2002 marketing year with respect to upland cotton base acres will total $873 million. Exhibit US-18 (www.fsa.usda.gov/dam/BUD/estimatesbook.htm).

[39] *See, e.g.*, U.S. Rebuttal Submission, paras. 79-92, 99-105.

[40] We note that, once again, Brazil has misquoted the definition of product-specific support in Article 1(a). Brazil quotes that definition as follows: "For support not provided to agricultural producers *in general*, the test is whether the support is 'provided in favour of the producers of the basic agricultural product.'" Brazil's Rebuttal Submission, para. 19. The actual text of Article 1(a), in pertinent part, reads: "support . . . provided *for an agricultural product* in favour of the producers of the basic agricultural product" (emphasis added). What Brazil describes as "the narrow U.S. Article 13(b)(ii) specificity standard" in fact flows from an interpretation of Article 13 that makes sense of the *entire* text of Article 1(a) and not just selected parts of it.

some commodities is not relevant to the question whether they are support "provided for an agricultural product in favour of the producers of the basic agricultural product."[41] None of these payments satisfies either part of this definition: they are neither provided "for an agricultural product" (rather, they are made with respect to historic production of several products) nor "in favour of the producers of the basic agricultural product" (no production is necessary for payments to be made).

31. Brazil also appears to now argue that the requirement under paragraph 6(a) of Annex 2 that eligibility for payments under a decoupled income support measure "shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period" requires that these payments be made to *all* producers for *all* commodities. This approach would seriously limit the ability of Members to move to decoupled income support. It is not clear that any Member would be willing to switch to decoupled income support if it required expanding support to whole new classes of producers or commodities. We can find no basis for this approach in the text of paragraph 6(a). This definition does not require comprehensive coverage of all or nearly all production in "a defined and fixed base period"; it merely requires "clearly-defined criteria." Thus, under Brazil's reading, a measure could satisfy the requirement of Annex 2, paragraph 6(a), and yet qualify as product-specific support under Article 1(a).

32. Second, Brazil again selectively quotes the statutory definition of "producers" to suggest that recipients of these payments had to be growers who "shared in the risk of producing a crop."[42] As the United States has previously noted, the statute defines "producers" (those eligible in the first instance to receive payment) as persons who "would have shared had the crop been produced."[43] Thus, both the 2002 and 1996 Acts make clear that a payment recipient need not produce any crop (including upland cotton) to receive payment. It is thus a serious error to imply

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[41] Indeed, Brazil's argument in paragraph 36 of its rebuttal submission rests on a *non sequitur*. Brazil's statement is that: "Thus, direct payments are *not* available to the great majority of U.S. producers of agricultural commodities, *i.e.*, they are not provided to U.S. agricultural producers *in general*." (Emphasis in original.) The illogic in Brazil's statement is that, by removing the requirement to produce any particular crop or any crop at all in order to receive these payments, the United States does in fact make the payments available to producers in general. Recipients are free to produce a broad range of commodities, and so are producers of agricultural commodities "in general." Brazil appears to acknowledge that the payments are not in fact tied to current production when, in paragraph 50, Brazil concedes that the payments are made to "upland cotton base acreage holders" rather than to upland cotton *producers*.

[42] *See* Brazil's Rebuttal Submission, paras. 24 (quoting first half of definition), 29 ("Thus, as with PFC payments, market loss assistance payments were not paid to agricultural producers *in general* but rather to only a select group of U.S. producers), 36 ("Direct payments are targeted support to "producers" farming, *inter alia*, on upland cotton base acreage."), 48 ("But the evidence demonstrates that CCP funds in MY 2002 paid to "historic" (i.e., 1998-2001 or 1993-1995) upland cotton producers are paid to a tiny fraction of total U.S. producers of agricultural commodities.").

[43] U.S. Rebuttal Submission, paras. 36-38.

that a payment recipient is necessarily a "producer" in the Agreement on Agriculture rather than a "producer" (meaning "recipient") in the statutory sense.

33. Nowhere in Brazil's submission is there any suggestion of how its approach can be found in the Agreement on Agriculture. It does not make sense of the definitions of product-specific support and non-product-specific support in Article 1(a), which Brazil has recognized guide the interpretation of the phrase "support to a specific commodity" in the Peace Clause. In sum, Brazil's argument provides ample evidence that the phrase "support to a specific commodity" in the Peace Clause must be interpreted in the context provided by the Agreement on Agriculture. To divorce it from that context may result in an unworkable and illogical interpretation along the lines suggested by Brazil.

VII. Brazil's New Arguments Relating to Crop Insurance Do Not Demonstrate that Crop Insurance Payments Are Product-Specific Support

34. Brazil presents a number of arguments claiming that crop insurance payments are "support to a specific commodity." In part, this argument relies on the notion that such payments are not support provided to agricultural producers "in general" and, hence, not non-product-specific support. We note, however, that in making these arguments Brazil avoids any reference to the definition of product-specific support in Article 1(a). This is a fundamental interpretive error: Brazil cannot claim that payments are not support to "agricultural producers in general" under Article 1(a) without providing an interpretation of the other component of support in Article 1(a), namely, product-specific support (support "provided for an agricultural product in favour of the producers of the basic agricultural product"). In fact, given that crop insurance support is available to approximately 100 agricultural commodities, representing approximately 80 percent of U.S. area planted and greater than 85 percent of the value of all U.S. crops, crop insurance payments are not support "provided for *an* agricultural product."[44] The support to these approximately 100 commodities is the same: that is, the crop insurance premium subsidies do not vary by commodity or plan of insurance.

35. Brazil's specific arguments fail to address the definition of product-specific support in Article 1(a); thus, each fails to demonstrate that crop insurance payments are "support to a specific commodity" rather than "support to several commodities."

36. First, Brazil argues that certain policies (and accompanying premiums) on irrigation failures are available only to upland cotton and a few other commodities. The United States has previously addressed this argument and directs the Panel's attention to that argument.[45]

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[44] U.S. Rebuttal Submission, paras. 93-98.

[45] *See* U.S. Rebuttal Submission, para. 54.

37. Second, Brazil argues that a larger pool of types of insurance policies are offered to upland cotton than most other crops. Brazil has not explained how the types of crop insurance policies offered by private companies[46] can affect whether U.S. crop insurance payments (premium subsidies that do not vary by commodity or insurance plan) are product-specific or not. Brazil's "facts" are also misleading in some instances and erroneous in others. For example, Brazil suggests that "in many instances, the policies available for cotton enterprises are not available for other crops."[47] However, we note that commodities other than upland cotton can be insured under the same types of policies as upland cotton.[48]

38. Third, Brazil argues that are there specific upland cotton provisions in certain policies.[49] This is true – an insurance product offered by a private company must be tailored for the situation and desires of the insurance purchasers – but also irrelevant as the policies are generally similar in underwriting rules and share the same subsidy schedule.

39. Fourth, Brazil argues that upland cotton producer participation rates in the crop insurance program "is much higher that for other crops."[50] We first note that Brazil neglects to mention that participation rates for the major field crops are generally quite high (over 75 percent of insurable acres). Any producer who received disaster assistance was required to purchase federal crop insurance in the following year; cotton participation may be slightly higher because of

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[46] Under the Agricultural Risk Protection Act, new insurance products must be developed by the private sector and approved by the Board of Directors of the Federal Crop Insurance Corporation. The U.S. Department of Agriculture is expressly prohibited from conducting research and development on new products. Thus, the variety and availability of insurance products reflects the fact that private companies, not the U.S. Government, have developed and offered these products.

[47] Brazil's Rebuttal Submission, para. 55.

[48] Upland cotton producers can insure their crops under the following types of policies: Actual Production History, Group Risk Plan, Income Protection, Crop Revenue Coverage, and Revenue Assurance. Other crops that are eligible for the policies include:
for Actual Production History – Alfalfa seed, all other grapefruit, almonds, apples, avocados, barley, blueberries, cabbage, canola, cigar binder tobacco, cigar filler tobacco, cigar wrapper tobacco, corn, cotton, ELS cotton, crambe, cranberries, cultivated wild rice, dry beans, dry peas, early and midseason oranges, figs, flax, forage production, fresh apricots, fresh freestone peaches, fresh market tomatoes, fresh nectarines, grain sorghum, grapefruit, grapes, green peas, late oranges, lemons, macadamia nuts, mandarins, Maryland tobacco, millet, Minneola tangelos, mint, mustard, navel oranges, oats, onions, Orlando tangelos, peaches, peanuts, pears, plums, popcorn, potatoes, processing apricots, processing beans, processing cling peaches, processing freestone, prunes, rice, Rio Red and Star Ruby grapefruit, Ruby Red grapefruit, rye, safflower, soybeans, sugar beets, sugarcane, sunflowers, sweet corn, sweet oranges, sweet potatoes, table grapes, tomatoes, Valencia oranges, walnuts, wheat;
for Group Risk – corn, cotton, forage production, grain sorghum, rangeland, soybeans, wheat;
for Income Protection – barley, corn, cotton, grain sorghum, soybeans, wheat; and
` for Revenue Assurance – barley, canola, cotton, grain sorghum, rice, soybeans, sunflowers, wheat.
See http://www3.rma.usda.gov/apps/sob/current_week/crop2003.pdf.

[49] Brazil's Rebuttal Submission, para. 55.

[50] Brazil's Rebuttal Submission, para. 57.

droughts that have hit cotton regions in recent years. More importantly, that cotton producers may choose to take up crop insurance more than producers of other commodities might is irrelevant to whether the payments are provided "for an agricultural product." Again, the crop insurance premium subsidy is identical for all commodities and for each plan of insurance.

40. Fifth, Brazil argues that tracking the cost of reinsurance provided to private companies is "further evidence that USDA treats crop insurance for upland cotton separately from crop insurance provided to other crops."[51] Of course, the way the U.S. Department of Agriculture "tracks cost[s]" is irrelevant to the analysis of whether crop insurance payments provide support "for an agricultural product." Brazil also misinterprets the Standard Reinsurance Agreement between the U.S. Government and private insurers. Under that Agreement, net underwriting gains and losses for each insurer are calculated *at the state level* over *all crops*, not separately for individual crops (such as upland cotton).[52] Thus, Brazil errs when it claims that reinsurance provides evidence that crop insurance for upland cotton is treated separately from crop insurance provided to other crops.

41. Sixth, Brazil claims that "the 2000 ARP Act denies subsidies to producers of other agricultural products."[53] It is true that there are certain products for which policies have not been developed. However, development of new policies is ongoing; for example, provisions of the Agricultural Risk Protection Act of 2000 allow for the development of livestock insurance products. A number of livestock products are currently available on a pilot basis, including price insurance for hogs and feeder cattle and gross margin insurance. We also note that producers may currently insure livestock and dairy revenue as part of whole farm insurance offered through the Adjusted Gross Revenue Insurance.[54] Finally, Brazil's argument here again reads domestic producers "in general' to mean "universally" or "without exception"; as noted above, that definition is now considered obsolete.

42. Finally, with respect to Brazil's references to the literature on the effects of crop insurance on production,[55] the findings are (contrary to what Brazil has claimed) mixed. While several studies (such as those cited by Brazil) have suggested crop insurance payments may have a slight effect on acreage, the effects on *production* are less clear.[56] If crop insurance encourages

[51] Brazil's Rebuttal Submission, para. 58.

[52] The provisions of the Standard Reinsurance Agreement are available on the Risk Management Agency website at: http://www.rma.usda.gov/pubs/ra/98SRA.pdf.

[53] Brazil's Rebuttal Submission, para. 59.

[54] More information on Adjusted Gross Revenue Insurance can be found on the Risk Management Agency website at: http://www.rma.usda.gov/pubs/2003/PAN-1667-06rev.pdf.

[55] Brazil's Rebuttal Submission, paras. 60-67.

[56] The U.S. Department of Agriculture, Economic Research Service, studies cited by Brazil only examine the effects of crop insurance subsidies on acreage. They do not consider effects on crop yields.

moral hazard problems (as claimed by Brazil), crop yields will be adversely affected as producers attempt to increase crop insurance indemnities. If moral hazard and adverse selection problems are severe, crop insurance support could potentially have a *negative* effect on production.[57] The potential production effects of crop insurance payments, moreover, goes to whether such payments are "amber box" support but does not figure in the question whether such payments (which are offered at the same rate across commodities and policies) can be support "for an agricultural product."

VIII. Brazil May Not Act Unilaterally on Procedural Matters

43. The United States takes note of Brazil's statement in its 25 August 2003 letter to the Panel[58] that, concerning paragraph 20 of the Panel's determination of 20 June 2003, "Brazil interpreted this ruling as permitting it to provide no later than 22 August all of its evidence and argument that had not already been provided in its earlier submissions. This is the manner in which it treated the new evidence and arguments presented by the United States in its Rebuttal Submissions." The United States is unable to reconcile Brazil's position concerning its own ability to provide evidence and arguments at any time up through August 22 with Brazil's repeated assertions that the United States "should have" provided particular material in its replies to the Panel's questions.[59] There is of course no basis for Brazil's assertions that particular material "should have been" provided in replies to questions rather than in a rebuttal submission. There is no basis for Brazil to dictate to another Member what it may or may not include in its rebuttal submission. Brazil is fabricating an obligation and attempting to impose it on the United States at the same time that it exempts itself from this obligation. In this, Brazil's approach is

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[57] Recent studies by Smith and Goodwin (1996), Babcock and Hennessy (1996) and Goodwin and Smith (2003) suggest that farms with more insurance tend to use less inputs like fertilizer and pesticides and vice versa. This demonstrates a potential moral hazard problem with crop insurance that suggests that crop insurance participation may have a negative effect on yields. *See* Babcock, B. and D. Hennessy. "Input Demand Under Yield and Revenue Insurance" *American Journal of Agricultural Economics* 78(1996):416-27; Goodwin, B. and V. Smith. "An Ex Post Evaluation of the Conservation Reserve, Federal Crop Insurance, and other Government Programs: Program Participation and Soil Erosion." *Journal of Agriculture and Resource Economics* 28(2003):201-216; Smith, V. and B. Goodwin. "Crop Insurance, Moral Hazard and Agricultural Chemical Use." *American Journal of Agricultural Economics* 78(1996):428-38.

[58] The United States also notes that the Panel's communication of 19 August 2003 had not indicated that the parties would have an opportunity to comment on each other's requests to comment. Had there been such an opportunity, the United States would have been happy to comment on Brazil's request of 23 August 2003. Perhaps Brazil could reconsider whether it has a basis to assert a right to decide that it may unilaterally provide comments to the Panel while denying the United States the same procedural rights. Under Brazil's approach, it would not have needed to request permission from the Panel to file comments on Wednesday, August 27, but could have simply provided those comments, unsolicited, while denying equal access for the United States. The United States is grateful that the Panel's extremely prompt reply to the U.S. request obviated any need to respond to Brazil's unauthorized and out of order comments on that request.

[59] *See* Brazil's 23 August 2003 letter to the Panel.

similar to its repeated attempts in this dispute to add to the obligations in the Agreement on Agriculture and the Subsidies Agreement.

IX. Conclusion

44. The United States has demonstrated that using any measurement that reflects the support "decided" by the United States rather than factors (such as market prices) beyond the United States' control, U.S. support to upland cotton in marketing years 1999-2002 has not exceeded the 1992 marketing year level. The question then is whether the Panel will find that the United States has breached the Peace Clause simply because market prices were lower in some recent years than they were in 1992.

45. The United States submits that the Peace Clause must be interpreted in a way that permits Members to comply in good faith – that is, Members must be able to tell if they will breach the Peace Clause or not. Brazil's budgetary outlays approach does not do that. Brazil's approach would mean that Members could not know if they had complied with the Peace Clause until it was too late to do anything about it. The best way to interpret the Peace Clause in a way that allows Members to comply is to use the "support" as "decided" by a Member during the 1992 marketing year as the basis for comparison. Recognizing, as the United States believes is required by the Peace Clause text, that "decided" and "grant" cover only those parameters over which Members exercise control would also be consistent with this approach of allowing "good faith" compliance since it would permit Members to control whether their measures conformed to their obligations.

46. The United States has disciplined itself to grant support not in excess of that decided during the 1992 marketing year. Therefore, we are entitled to the protection of the Peace Clause, and we respectfully request the Panel to find that Brazil may not maintain this action challenging these conforming U.S. measures.

List of Exhibits

US-38 U.S. Department of Agriculture, Fiscal Year Actual Budgetary Expenditures by Crop Year (http://www.fsa.usda.gov/dam/BUD/bud1.htm)

US-39 U.S. Department of Agriculture, Compliance Report for 1992 Acreage Reduction Program