

ANNEX L

COMMUNICATIONS FROM THE PANEL

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ANNEX L-1.1

COMMUNICATION TO BRAZIL AND THE UNITED STATES

21 May 2003

I refer to the letter from the United States dated 21 May 2003 and addressed to the Chair of the Panel. I understand this was also copied to your delegation. The Panel wishes to ask Brazil to communicate its views, if any, in writing in response to this letter.

The Panel would appreciate if Brazil's written response could be submitted before the close of business this Friday, 23 May 2003. This is in view of the fact that the Chairman of the Panel, Mr. Rosati, is proposing to convene an organizational meeting with the parties on Monday 26 May 2003 from 11:30 a.m. The venue will be communicated to you shortly.

ANNEX L-1.2

COMMUNICATION TO BRAZIL AND THE UNITED STATES

27 May 2003

The Panel takes note of the United States' comments with respect to the Panel's timetable and working procedures, dated 21 May 2003, and Brazil's communication dated 23 May 2003.

Attached you will find the Panel's proposed **working procedures and timetable**. The Panel intends to hold an **organizational meeting with the parties at 8 a.m. on Wednesday, 28 May 2003** at room C in order to hear the parties' views on these proposals.

As indicated in the attached proposed timetable, prior to the submission by the parties of their first written submissions, the Panel intends to request the parties to address, in their initial briefs to the Panel, the following:

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

As also indicated in the attached timetable, the Panel will invite the parties to submit any written comments on each other's comments on this issue. The Panel currently wishes to signal its intention to clarify to the parties its view on these issues prior to the parties' submission of their first written submissions.

In the event that the Panel were to rule that Article 13 precludes the Panel from considering certain claims raised by Brazil prior to a conclusion that certain conditions of Article 13 remain unfulfilled, we may decide to adjust the timetable to permit the parties to make further submission(s) after the second substantive meeting and to schedule further substantive meeting(s), as necessary, with the parties.

With respect to the participation of third parties in these Panel proceedings, the Panel is aware of the provisions of Article 10.3 of the *DSU*, which states that third parties shall receive the submissions of the parties to the dispute to the first meeting of the Panel. Given the significant systemic issues in this Panel proceeding, and in exercise of our discretion to manage these Panel proceedings, we believe that it would be appropriate in this case for the third parties to have access to the parties' initial written comments (and any written comments the parties may make on each others' comments) as well as to have the ability to submit any written comments they themselves may have on the issue that we have identified above. We therefore intend to invite the parties to serve also on the third parties their initial briefs and any responding comments. At the organizational meeting, we will invite any comments you may have on this proposed approach to third party participation.

[Attachment omitted]

ANNEX L-1.3

COMMUNICATION TO BRAZIL AND THE UNITED STATES

28 May 2003

Attached you will find the timetable and working procedures adopted by the Panel for this dispute in accordance with Article 12.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"). In adopting the timetable and working procedures, the Panel has carefully considered the parties' comments at this morning's organizational meeting.

As indicated in the attached timetable, prior to the submission by the parties of their first written submissions, the Panel requests the parties to address, in their initial briefs to the Panel (to be submitted on 5 June 2003), the following:

- whether Article 13 of the *Agreement on Agriculture* precludes the Panel from considering Brazil's claims under the *Agreement on Subsidies and Countervailing Measures* in these proceedings in the absence of a prior conclusion by the Panel that certain conditions of Article 13 remain unfulfilled. In particular, the Panel invites the parties to explain their interpretation of the words "exempt from actions" as used in Article 13 of the *Agreement on Agriculture*, as well as bringing to the Panel's attention any other relevant provisions of the covered agreements and any other relevant considerations which the parties consider should guide the Panel's consideration of this issue. For greater clarity, the Panel invites the parties, during this initial stage of the proceedings, to focus on matters of legal interpretation, rather than upon the submission of any factual evidence that might be associated with the substantive elements of Article 13.

As also indicated in the attached timetable, the Panel will invite the parties to submit any written comments on each other's comments on this issue (i.e. on 13 June 2003). The Panel intends to rule on these issues on 20 June 2003, prior to the parties' submission of their first written submissions.

As has been indicated, the Panel recognizes that it may need to revisit certain aspects of its timetable and working procedures in light of developments during the course of the Panel procedures, including the nature of the Panel's ruling that is scheduled for 20 June 2003. In particular, in the event that the Panel were to rule that Article 13 precludes the Panel from considering certain claims raised by Brazil prior to a conclusion that certain conditions of Article 13 remain unfulfilled, we may decide to adjust the timetable to permit the parties to make further submission(s) after the second substantive meeting and to schedule further substantive meeting(s), as necessary, with the parties. Related amendments to the working procedures may also be made, if necessary.

With respect to the participation of third parties in these Panel proceedings, we have carefully considered the parties' comments at this morning's organizational meeting. In exercise of our discretion to manage these Panel proceedings, we continue to believe that it would be appropriate in this case for the third parties to have access to the parties' initial written comments (and any written comments the parties may make on each others' comments) as well as to have the ability to submit any written comments they themselves may have on the issue that we have identified above. The Panel considers that such third party participation in this initial stage of the Panel proceedings is appropriate for the following reasons.

The Panel is aware of the provisions of Article 10.3 of the *DSU*, which states that third parties shall receive the submissions of the parties to the dispute to the first meeting of the Panel. We would also observe that the factual circumstance that presents itself here is not itself specifically addressed by the *DSU*. In our view, the legal issue that the Panel has asked the parties to address in their initial briefs will necessarily have ramifications for the remainder of the Panel proceedings, including the scope of the first substantive meeting, at which third parties will participate.

We therefore invite the parties to serve also on the third parties their initial briefs and any responding comments. The Panel will also invite third parties to submit any written comments they might have concerning the initial phase of these proceedings. The deadline for any third party comments is 10 June 2003. The parties' comments to be submitted on 13 June may, of course, also address comments made by third parties.

[Attachment omitted]

ANNEX L-1.4

COMMUNICATION TO BRAZIL AND THE UNITED STATES AND THIRD PARTIES

20 June 2003

1. In a communication to the Panel, dated 21 May 2003, prior to the Panel's adoption of its working procedures, the United States had "propose[d] that the Panel organize its procedures to deal with the threshold Peace Clause issue at the outset of this dispute". The United States asserted *inter alia* that "[b]ecause in this dispute Brazil has made claims under 17 different provisions of the WTO Multilateral Agreements with respect to numerous US programmes under at least 12 US statutes, we believe the Panel's consideration of the critical Peace Clause issue would be aided by briefing and argumentation focused on this threshold issue". Brazil submitted a communication in response, dated 23 May 2003, opposing the US proposal.

2. On 28 May 2003, after having heard the views of the parties, we adopted our timetable and working procedures in accordance with Article 12.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").

3. At the same time, we indicated that we would consider giving a ruling on certain issues on 20 June 2003, prior to the submission by the parties of their first written submissions, in relation to the following question and we requested the parties and third parties to address us in relation to it:

"whether Article 13 of the *Agreement on Agriculture* precludes the Panel from considering Brazil's claims under the *Agreement on Subsidies and Countervailing Measures* in these proceedings in the absence of a prior conclusion by the Panel that certain conditions of Article 13 remain unfulfilled. In particular, the Panel invites the parties to explain their interpretation of the words "exempt from actions" as used in Article 13 of the *Agreement on Agriculture*, as well as bringing to the Panel's attention any other relevant provisions of the covered agreements and any other relevant considerations which the parties consider should guide the Panel's consideration of this issue. For greater clarity, the Panel invites the parties, during this initial stage of the proceedings, to focus on matters of legal interpretation, rather than upon the submission of any factual evidence that might be associated with the substantive elements of Article 13."

4. The parties submitted their initial briefs on this question on 5 June 2003. On 10 June, the following six third parties submitted briefs: Argentina; Australia; European Communities; India, New Zealand and Paraguay. The parties submitted further comments on 13 June 2003.

5. Article 13(a)(ii) of the *Agreement on Agriculture* states that domestic support measures that conform fully to the provisions of Annex 2 of the *Agreement on Agriculture* shall be exempt from actions based on Article XVI of *GATT 1994* and Part III of the *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement"). Article 13(b)(ii) of the *Agreement on Agriculture* states that domestic support measures that conform fully to certain conditions shall be "exempt from actions based on paragraph 1 of Article XVI of *GATT 1994* or Articles 5 and 6 of the Subsidies Agreement, provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year." Articles 5 and 6 of the *SCM Agreement* are each qualified by the proviso that "[t]his Article does not apply to subsidies maintained on agricultural

products as provided in Article 13 of the Agreement on Agriculture". Article 13(c)(ii) of the *Agreement on Agriculture* provides that export subsidies that conform fully to the provisions of Part V of that 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 3.1 of the *SCM Agreement*, which prohibits export subsidies, is qualified by the proviso: "Except as provided in the *Agreement on Agriculture...*". These provisions of Article 13 afford a conditional exemption from certain obligations relating to certain actionable and prohibited subsidies under the provisions of the *SCM Agreement* and Article XVI of the *GATT 1994*. This conditionality requires, *inter alia*, a comparison of facts with the applicable exemption requirements.

6. Briefly, Brazil asserts that the Panel can simultaneously consider all of the arguments and evidence on the substance of its claims under the *SCM* and *Agriculture Agreements*, while the United States asserts that the Panel is precluded from examining the SCM claims concerning prohibited and actionable subsidies in the absence of a prior ruling that the conditions of Article 13 of the *Agreement on Agriculture* are not satisfied, and, even if not, the Panel should exercise its discretion to order its proceedings in this way. All of the six third parties that made submissions support the view that the Panel is not precluded from simultaneously considering all of the arguments and evidence on the substance of Brazil's claims under the *SCM* and *Agriculture Agreements*, or, putting this another way, that conclusions on the applicability of the Article 13 exemptions do not have to be made before consideration of SCM claims in relation to the measures concerned.

7. We are faced with two questions:

- first, whether we are *required* to defer any examination of certain of Brazil's claims based on Articles 3, 5 and 6 of the *SCM Agreement* and Article XVI of the *GATT 1994* until after making a ruling or expressing views on the issue of fulfilment of *Agreement on Agriculture* Article 13 conditions; and
- second, if not, then *how* we should exercise our discretion to best structure our examination of the matter before us.

8. These questions concern the manner in which we should or must treat the claims of Brazil based on Articles 3, 5 and 6 of the *SCM Agreement* and Article XVI of the *GATT 1994* having regard to the provisions of Article 13 of the *Agreement on Agriculture*.

9. We therefore look first to the dispute settlement procedures governing disputes under the *SCM Agreement*. Article 30 of the *SCM Agreement* states: "The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein."

10. We thus turn next to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*DSU*") and to the terms of the *SCM Agreement* itself (in order to see whether or not there is anything otherwise specifically provided therein). Article 1.1 of the *DSU* is entitled "Coverage and Application". It states that "[t]he rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements")."

11. As the Appellate Body has observed, "[a]rticle 1.1 of the DSU establishes an integrated dispute settlement system which applies to all of the agreements listed in Appendix 1 to the *DSU* (the "covered agreements"). The DSU is a coherent system of rules and procedures for dispute settlement

which applies to "disputes brought pursuant to the consultation and dispute settlement provisions of" the covered agreements."¹ The *SCM Agreement* and the *GATT 1994* are Multilateral Agreements on Trade in Goods in Annex 1A of the *WTO Agreement* and are therefore "covered agreements" listed in Appendix 1 of the *DSU*. The general *DSU* rules and procedures do not set forth any specific distinct way to deal with claims under the *SCM Agreement* and the *GATT 1994* having regard to the provisions of Article 13 of the *Agreement on Agriculture*.

12. Article 1.2 of the *DSU* provides, in relevant part, that the rules and procedures of the *DSU* shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to the *DSU*.

13. We therefore examine whether Appendix 2 to the *DSU* identifies any special or additional dispute settlement rules or procedures relating to the *SCM Agreement* or to Article XVI of the *GATT 1994*.

14. Appendix 2 of the *DSU* does not identify Article XVI of the *GATT 1994* as a special or additional rule. It does identify Articles 4.2-4.12 and Articles 7.2-7.10 of the *SCM Agreement* as "special or additional rules and procedures". These provisions contain special procedures and remedies for disputes involving prohibited and actionable subsidies governed by the *SCM Agreement*. However, none of these provisions purports to confer any sort of precedence or priority for considering *SCM* remedies in a dispute involving claims under the *Agreement on Agriculture*. Furthermore, Article 7.1 of the *SCM Agreement*, which is not identified as a special or additional rule or procedure in Appendix 2 of the *DSU*, indicates that it applies: "Except as provided in Article 13 of the *Agreement on Agriculture*....". This clearly indicates to us that this provision must be read in the light of the provisions of Article 13 of the *Agreement on Agriculture*. Moreover, as noted in para. 5 above, the substantive provisions to which these remedial articles are linked – Articles 3, 5 and 6 – stipulate either that they apply "except as provided in the *Agreement on Agriculture*" (Article 3 relating to prohibited subsidies), or that they do "not apply to subsidies maintained on agricultural products as provided in Article 13 of the *Agreement on Agriculture*" (Articles 5 and 6.9 of the *SCM Agreement*, entitled "Adverse Effects" and "Serious Prejudice", respectively).

15. The cited provisions of the *SCM Agreement* refer, as just indicated, to the *Agreement on Agriculture*, and some specify more precisely Article 13 of the *Agreement on Agriculture*. We therefore examine the rules applicable to dispute settlement under the *Agreement on Agriculture*, which is also a Multilateral Agreement on Trade in Goods in Annex 1A of the *WTO Agreement* and is, therefore, a "covered agreement" listed in Appendix 1 of the *DSU*. Article 19 of the *Agreement on Agriculture* is entitled "Consultation and Dispute Settlement". It states that the provisions of Articles XXII and XXIII of *GATT 1994*, as elaborated and applied by the *DSU*, shall apply to consultations and the settlement of disputes under that Agreement.

16. Appendix 2 to the *DSU* does not identify any special or additional dispute settlement rules or procedures relating to Article 13 of the *Agreement on Agriculture*.

17. Consequently, consistent with our consideration of the relevant provisions, there is no special dispute settlement requirement foreseen in the covered agreements in respect of a panel's consideration of the fulfilment of Article 13 conditions. The issue of fulfilment of the conditions of Article 13 of the *Agreement on Agriculture* is to be resolved using generally applicable *DSU* rules and procedures. The fact that certain very specific provisions are included in Appendix 2 of the *DSU* as special or additional rules indicates that, when the drafters intended to make a particular provision

¹ Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("Guatemala – Cement I"), WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767, para. 64.

applicable as a special or additional dispute settlement rule, they did so explicitly. Therefore, their failure to include a reference to any provision of the *Agreement on Agriculture* in the text of Appendix 2 demonstrates that they did not intend to make any provision of that Agreement a special or additional dispute settlement rule. It is not necessary for us to look for any further interpretive guidance on this issue.

18. We next turn to the issue of how we should structure our procedures to consider the matter before us. As we have concluded above, this issue is subject to the *DSU* but not otherwise affected by the covered agreements. In this regard, within the overall parameters set by the *DSU* of prompt and efficient dispute resolution², we must exercise our discretion as to how best to organize our procedures. Our discretion must be guided by the instructions given to us by the *DSU*. Pursuant to Article 12.1 of the *DSU*, "[p]anels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute". Moreover, Article 12.2 provides: "Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process."

19. Article 11 of the *DSU*, entitled "Function of Panels" provides that the function of panels is to assist the DSB in discharging its responsibilities under the *DSU* and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Article 11 contemplates that a panel must make an "objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." It does not require that a panel must conduct its proceedings in any particular way, provided that its requirements are fulfilled. It is within our discretion to manage our procedures so as to best fulfil the requirements of Article 11.

20. Given the potential complexity of the claims before us, the conditional nature of certain of these claims and the volume of evidence which may be introduced by the parties in support of their claims and arguments, and in order to organize our proceedings in an orderly, effective and efficient manner which serves to facilitate an objective assessment of the matter before us, and optimizes use of our resources, we have adopted the following modifications to our procedures (as indicated in the attached timetable):

- The Panel intends to express its views on whether measures raised in this dispute satisfy the conditions in Article 13 of the *Agreement on Agriculture*, to the extent that it is able to do so, by **1 September 2003**, and will defer its consideration of claims under Articles 3, 5 and 6 of the *SCM Agreement* and Article XVI of the *GATT 1994* as those provisions are referred to in Article 13 of the *Agreement on Agriculture* until after it has expressed those views. The Panel's views may be expressed in the form of rulings which could affect the Panel's further consideration of this dispute.
- In order that third parties may participate effectively at the first meeting at which the claims under Articles 3, 5 and 6 of the *SCM Agreement* and Article XVI of the *GATT 1994* as referred to in Article 13 of the *Agreement on Agriculture* are examined (as necessary), the Panel intends to divide its first meeting into two sessions, each of which will include a third party session.

² Article 3.3 of the *DSU* provides: "The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."

- Accordingly, for the purposes of the first session of the first substantive meeting on 22-24 July 2003, the Panel does not require the parties to address claims under Articles 3, 5 and 6 of the *SCM Agreement* and Article XVI of the *GATT 1994* as referred to in Article 13 of the *Agreement on Agriculture*. Having said this, the Panel notes that this does not preclude the parties from addressing such matters in their first submissions.
- All other claims of Brazil in relation to measures which Brazil maintains do not involve a consideration of Article 13 of the *Agreement on Agriculture* should also be addressed in first submissions, in order for the other party and third parties to have an opportunity to express their views on any such claims.
- For the purposes of allowing the Panel to express its views on the exemption conditions of Article 13 of the *Agreement on Agriculture* by 1 September 2003, in relation to those measures which may be affected by Article 13, full and complete submissions on factual and legal issues related to Article 13 in this dispute will need to be provided, at the latest, in the parties' rebuttal submissions (to be submitted on 22 August 2003).

21. We recognize that we may need to revisit certain aspects of our timetable and working procedures in light of developments during the course of the Panel procedures. Related amendments to the working procedures may also be made, if necessary. We have been mindful of due process considerations in revising our timetable and will continue to ensure that the parties have reasonable time to prepare for any subsequent stages of the dispute, as appropriate.

[Attachment omitted]

ANNEX L-1.5

COMMUNICATION TO BRAZIL AND THE UNITED STATES

25 July 2003

Please find attached a communication from the Panel on the following issues:

1. The Panel's view on the preliminary ruling requested by the United States.
2. Questions from the Panel to the parties.
3. A copy of the Panel's questions to third parties (sent for your reference)

The Panel's questions are intended to facilitate the work of the Panel, and do not in any way prejudice the Panel's findings on the matter before it. Nor does the fact that the Panel has placed these questions under certain headings prejudice the Panel's findings on the matter before it. Each party is free to respond to or comment on questions posed to the other party or third parties.

Please be reminded that as stated by the Chairman of the Panel in the meeting, parties are requested to submit answers by the close of business of 4 August 2003. Subsequently, parties can submit comments to each other's responses by the close of business 22 August, the same deadline applicable to the rebuttal submissions

Panels' views on the preliminary ruling requested by the United States

1. The United States requests a preliminary ruling that:
 - (1) export credit guarantee measures relating to eligible US agricultural commodities other than upland cotton,
 - (2) production flexibility contract payments and market loss assistance payments, and
 - (3) the Agricultural Assistance Act of 2003

are not within the Panel's terms of reference.¹

2. Brazil asserts that these items are properly within the Panel's terms of reference and asks the Panel to reject the United States' request.²

3. The Panel wishes to indicate to the parties how it intends to rule on items (1) and (2), in order to assist them in deciding what argumentation and evidence to submit in their answers to questions and rebuttals.

4. The DSB established the Panel at its meeting on 18 March 2003 with the following standard terms of reference:³

"To examine, in the light of the relevant provisions of the covered agreements cited by Brazil in document WT/DS267/7, the matter referred to the DSB by Brazil in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

5. With respect to item (1), the Panel intends to rule in its report that "export credit guarantees ... to facilitate the export of US upland cotton, and other eligible agricultural commodities" as addressed in document WT/DS267/7, are within its terms of reference.

6. With respect to item (2), the Panel intends to rule in its report that production flexibility contract payments and market loss assistance payments as addressed in document WT/DS267/7 are within its terms of reference. This is without prejudice to the relevance, if any, of those payments under Article 13(b) of the *Agreement on Agriculture*, Articles 5, 6 and 7 of the *SCM Agreement* and Article XVI of *GATT 1994*.

7. The Panel has not yet decided upon its approach to item (3) and asks the parties not to exclude consideration of the Agricultural Assistance Act of 2003 in responding to the Panels' written questions and in rebuttal submissions.

¹ US First Written Submission, para. 218.

² Brazil's Oral Statement at the First Substantive Meeting, paragraphs 90, 144 and 145.

³ WT/DSB/M/145 (paragraph 35)

Questions from the Panel to the parties –
First session of the first substantive Panel meeting

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**

PRELIMINARY ISSUES

Note to parties: As indicated in the cover note, the Panel has expressed its views in respect of the three United States requests for preliminary rulings. The Panel's questions reflected in this compilation relating to the requested preliminary rulings on which the Panel has expressed its views are those that were posed in the course of the first session of the first Panel meeting. This is to give an opportunity for the parties to transpose into writing their oral responses.

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

2. Is Brazil's claim in relation to export credit guarantees against the measures said to constitute the GSM-102, GSM-103 and SCGP programmes in their entire application, or against the measures said to constitute the GSM-102, GSM-103 and SCGP programmes in their application to upland cotton, or both? **BRA**
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**
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**
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**
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**
7. Are commitments with respect to export subsidies under the *Agreement on Agriculture* commodity-specific? How, if at all, is this relevant? **BRA, USA**
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**
9. How does the United States respond to paragraph 94 of Brazil's oral statement? **USA**
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**

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

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**

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**

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**

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**

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**

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**

18. If the Panel is correct in understanding that cottonseed payments are divided between processors and producers, how is this reflected in Brazil's calculations? **BRA**

Measures at issue

19. The Panel notes that Brazil's panel request refers, *inter alia*, to alleged "subsidies" and "domestic support" "provided" in various contexts. Please specify the measures, in particular, the legislative and regulatory provisions, by number and letter, in respect of which Brazil seeks relief and indicate where each is referred to in the panel request. **BRA**

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**

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**

"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**

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**

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**

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**

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**

27. Does Brazil argue that any United States measure that does not comply with the fundamental requirement of paragraph 1 of Annex 2 of the *Agreement on Agriculture* is actionable independently of any failure of that measure to comply with the basic or policy-specific criteria in Annex 2? **BRA**

28. Please explain the meaning of the word "criteria" in Articles 6.1 and 7.1. What effect, if any, does the use of the word "Accordingly" in paragraph 1 of Annex 2 of the *Agreement on Agriculture* have on the meaning of the preceding sentence? **BRA**

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**

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**

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**

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**

"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 respect of that measure under the *DSU*? **USA**

34. Does Brazil interpret the word "grant" as used in Article 13(b)(ii) of the *Agreement on Agriculture* to mean payment made *in* a specific year or payment made *in respect of* a specific year? **BRA**

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**

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**

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

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**

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 XVI of *GATT 1994*? **USA**

40. In relation to which other provisions in the *Agreement on Agriculture* is it relevant to disaggregate non-product specific support in terms of specific commodities? **BRA**

41. What is the position of Brazil with regard to certain other domestic support measures not cited by Brazil that were notified by the United States as non-product-specific (e.g. G/AG/N/USA/43), some of which presumably deliver support to upland cotton (e.g. state credit programmes, irrigation subsidies etc). Why have budgetary outlays for such measures related to upland cotton not been included in the comparison of support with 1992? **BRA**

42. If the word "specific" were deleted from Article 13(b)(ii), would this change the meaning of the subparagraph? **BRA**

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**

44. Do you allege that counter-cyclical payments could be considered product-specific? **BRA**

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 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**

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**

"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**

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

49. Brazil claims that the terms "grant" and "decided" in Article 13(b)(ii) have broadly the same meaning. If so, why did the drafters not use the same term? **BRA**

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**

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**

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**

53. Assume, for arguments sake, that the only "decision" made in the United States in 1992 was the target price. How would Brazil make the comparison *vis-à-vis*, for example, the year 2001? **BRA**

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**

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**

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**

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**

58. Please comment on the argument advanced by the EC, in paragraph 17 of its oral statement that: "Had WTO Members intended a limitation to the support provided or granted in 1992 the word 'for' would have been used in place of 'during'." **BRA**

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**

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**

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

62. According to Prof. Sumner's calculation, the per pound support increased by approximately 24% from 1992 to 2002. On the other hand, the Panel understands that the total budget outlay, according to Brazil, increased more than that. What, in Brazil's view, is the reason for this difference in the rate of increase? **BRA**

63. In relation to Prof. Sumner's presentation at the first session of the first substantive meeting, please elaborate on the reasons behind the increase in the figures (from 1992 to 2002) concerning Loan Support and Step 2 payments. **BRA**

64. Do the figures cited in Prof. Sumner's presentation at the first session of the first substantive meeting indicate amount available or amount spent? Can the Panel derive amount spent from these figures? If Article 13(b)(ii) requires a rate of support comparison, is the rate of support the "rate" of support available or the "rate" at which the support was spent? **BRA**

65. Does Brazil consider that adjustment for inflation is relevant in the context of the comparison under Article 13 (b)(ii) ? **BRA**

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**

(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**

- (c) Per unit rate of support (United States approach): How should changes in acreage, eligibility and payment limitations per farm(s) (commodity certificate programs) be factored into this approach? **BRA**
- (d) Per unit rate of support for upland cotton (Prof. Sumner's approach at the first session of the first substantive meeting). **USA**

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**

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**

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**

EXPORT CREDIT GUARANTEE PROGRAMMES

70. How does Brazil respond to the United States' assertion that Brazil is trying to realize through litigation what it could not achieve in past negotiations ? **BRA**

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, and the United States response thereto? **BRA, USA**

72. Could Brazil expand on why, as indicated in paragraph 118 of its oral statement, it does "not agree" with the United States arguments relating to the viability of an *a contrario* interpretation of item (j) of the Illustrative List of Export Subsidies in Annex 1 of the *SCM Agreement*? **BRA**

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**

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**

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**

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**

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**

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**

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**

80. In Brazil's view, why did the drafters of the *Agreement on Agriculture* not include export credit guarantees in Article 9.1? **BRA**

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

- (a) paragraph 122 (rescheduled guarantees)
- (b) paragraph 123 (interest on debt to Treasury)
- (c) paragraphs 125 ff. (guaranteed loan subsidy)
- (d) paragraphs 127-129 (re-estimates, etc.)
- (e) Exhibits BRA-125-127
- (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"?
- (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**

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

83. Could Brazil explain how the procedure in Annex V of the *SCM Agreement* would be relevant to its claims concerning agricultural export subsidies, prohibited subsidies and agricultural domestic support? (e.g. note 301 in Brazil's first submission and paragraph 4 of Brazil's oral statement at the first session of the first substantive meeting). **BRA**

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**

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**

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**

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**

- (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**
- (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 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**

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

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**

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**

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**

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**

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**

94. Is the Panel correct in understanding that Brazil alleges an inconsistency with Article 3.1(b) of the *SCM Agreement* only with respect to Step 2 *domestic* payments? **BRA**

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**

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**

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**

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*? **USA**

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**

100. How does Brazil respond to the statement in note 119 of the United States' first written submission that "...to the extent a consumer that had intended to export instead opens the bale, then that consumer could still obtain the Step 2 payment upon submission of the requisite documentation". The Panel notes that Step 2 payments all involve upland cotton produced in the United States. What are the two distinct factual situations that Step 2 payments involve? Other than the panel report in *Canada-Dairy* and the findings of the Appellate Body in *US-FSC (21.5)*⁴, do any other dispute settlement reports offer guidance on this issue? For example, how, if at all is the Appellate Body's report in *Canada-Aircraft* relevant here?⁵ **BRA**

101. How does Brazil respond to the United States' assertion at paragraph 22 of its oral statement that the programme involves "eligible users" who constitute the "entire universe" of potential purchasers of upland cotton? **BRA**

102. How does Brazil respond to the United States' assertion at paragraph 129 of its first written submission, that "[t]he program is indifferent to whether recipients of the benefit of this programme are exporters or parties that open bales for the processing of manufacturing raw cotton into cotton products in the United States." **BRA**

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

⁴ "We recall that the ETI measure grants a tax exemption in two different sets of circumstances: (a) where property is produced *within* the United States and held for use *outside* the United States; and (b) where property is produced *outside* the United States and held for use outside the United States. Our conclusion that the ETI measure grants subsidies that are export contingent in the first set of circumstances is not affected by the fact that the subsidy can also be obtained in the second set of circumstances. The fact that the subsidies granted in the second set of circumstances *might* not be export contingent does not dissolve the export contingency arising in the first set of circumstances.⁴ Conversely, the export contingency arising in these circumstances has no bearing on whether there is an export contingent subsidy in the second set of circumstances. Where a United States taxpayer is simultaneously producing property within and outside the United States, for direct use outside the United States, subsidies may be granted under the ETI measure in respect of both sets of property. The subsidy granted with respect to the property produced within the United States, and exported from there, is export contingent within the meaning of Article 3.1(a) of the *SCM Agreement*, irrespective of whether the subsidy given in respect of property produced outside the United States is also export contingent."

² ⁵ There, the Appellate Body stated that,

"the fact that some of TPC's contributions, in some industry sectors, are *not* contingent upon export performance, does not necessarily mean that the same is true for all of TPC's contributions. It is enough to show that one or some of TPC's contributions do constitute subsidies "contingent ... in fact ... upon export performance".⁵

substantiate your response, including by reference to any applicable statutory or regulatory provisions.
USA

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

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 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**

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**

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**

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**

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**

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 31 July 2008, " .. the Secretary shall issue marketing certificates or cash payments, at the option of 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 "programme" 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

- (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**

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**

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**

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

114. With respect to the last sentence of paragraph 22 of Brazil's closing oral statement, could Brazil elaborate on the circumstances in which a local content subsidy would comply with Article 3.1(b) of the *SCM Agreement*? **BRA**

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**

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**

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**

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

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)?⁶

⁶That panel stated: "It can thus be concluded that panels are not *bound* by previous decisions of panels or the Appellate Body even if the subject-matter is the same. In examining dispute WT/DS79 we are not legally bound by the conclusions of the Panel in dispute WT/DS50 as modified by the Appellate Body report. However, in the course of "normal dispute settlement procedures" required under Article 10.4 of the *DSU*, we will take into account the conclusions and reasoning in the Panel and Appellate Body reports in WT/DS50. Moreover, in our examination, we believe that we should give significant weight to both Article 3.2 of the *DSU*, which stresses the role of the WTO dispute settlement system in providing security and predictability to the multilateral trading system, and to the need to avoid inconsistent rulings

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**

120. Concerning its claims on the ETI Act, Brazil relies on the *US – FSC* case. However, it appears that the United States did not raise the issue of the Peace Clause in that case, nor did the United States appear to invoke Article 6 of the *Agreement on Agriculture*. If the Panel's understanding is correct, how, if at all, are these differences relevant here? Could you direct the Panel to any relevant findings or conclusions by the panel or Appellate Body in that case? **BRA**

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**

[Attachment on questions to Third Parties omitted]

(which concern has been referred to by both parties). In our view, these considerations form the basis of the requirement of the referral to the "original panel" wherever possible under Article 10.4 of the *DSU*." (footnote omitted)

ANNEX L-1.6

COMMUNICATION TO BRAZIL AND THE UNITED STATES

30 July 2003

The Panel is in receipt of the communication from the United States, dated 29 July, requesting an extension of the deadline for the submission of the parties' responses to questions, as well as the response from Brazil, dated 30 July.

Taking these communications into account, the Panel has decided to extend the deadline for the submission of the parties' responses to questions from Monday 4 August to **Monday 11 August**. The Panel reminds the parties that paragraph 17(b) of the Panel's working procedures indicates that the responses should be submitted by **17:30** (Geneva time).

The Panel has also decided upon the following additional changes to its schedule:

Panel's views on certain issues:	5 September 2003
Further submission of Brazil:	9 September 2003
Further submission of the US:	23 September 2003
Further submission of the third parties (as necessary):	29 September 2003

For the time being, all other dates remain unchanged. This includes the deadline for the submission of the parties' comments on each other's responses, as well as the submission of the parties' rebuttal submissions (i.e. 22 August). It also includes the dates for the resumption of the first substantive meeting (as necessary) and the second substantive meeting (i.e. 7-9 October).

ANNEX L-1.7

COMMUNICATION TO BRAZIL AND THE UNITED STATES AND THE THIRD PARTIES

5 August 2003

1. The Panel has received a letter from the European Commission, dated 31 July 2003, in which the European Communities ("EC"):

- seeks clarification of the Panel's procedures for its expression of views on 5 September 2003 in relation to Article 13 of the *Agreement on Agriculture*; and
- makes two requests for additional third party rights.

2. The Panel sought the views of the parties to the dispute on these requests, which it received in letters dated 1 August 2003. Neither party objects to the Panel communicating its views to the third parties on 5 September 2003, but neither party agrees that the Panel should accept the EC's requests for additional third party rights. The EC responded to the parties' letters in a further letter dated 4 August 2003.

1. Panel's procedures for its expression of views on 5 September 2003 in relation to Article 13 of the *Agreement on Agriculture*

3. The Panel confirms that, in accordance with its communication dated 20 June 2003, as amended on 30 July 2003, it intends to express its views on whether measures raised in this dispute satisfy the conditions in Article 13 of the *Agreement on Agriculture*, to the extent that it is able to do so, by 5 September 2003. Those views will be communicated to third parties, as well as to the parties to the dispute, in order to enable them to participate, as necessary and appropriate, in any second session of the first substantive meeting in a full and meaningful fashion.

2. EC requests for additional third party rights

4. The EC requests the following additional third party rights: (a) access to the oral statements of the parties to the dispute at the first session of the first substantive meeting held on 22-24 July 2003, and (b) the opportunity to comment on their responses to the Panel's questions, or questions that they have posed to each other.¹

5. Third parties have certain rights in panel proceedings under Article 10 of the DSU, which a panel may not deny. The grant of third party rights beyond those provided in the DSU lies within the discretion and authority of a panel. That discretion is limited by the requirements of due process. Article 10.1, 10.2 and 10.3 of the DSU provides as follows:

¹ The Panel notes that the parties to the dispute have not posed any written questions to each other, and therefore does not need to address the request to allow third parties to comment upon the responses to such questions.

Third Parties

"1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

"2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

"3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel."

6. In our view, written versions of the parties' oral statements and the parties' responses to the Panel's questions do not form part of "the submissions of the parties to the dispute to the first meeting of the Panel", as provided for in Article 10.3 of the DSU. Articles 10.2 and 12.6 and the working procedure in paragraph 3 of Appendix 3 use the terms "written submissions" and "submissions" interchangeably. Appendix 3 distinguishes between "written submissions" in paragraphs 3, 4 and 10 and "a written version of ... oral statements" in paragraph 9. Under the standard panel working procedures set out in Appendix 3 of the DSU, third parties may only attend the third party session and are not present during the rest of the panel's meetings. The granting of access by the Panel to written versions of the parties' oral statements would run counter to the standard practice under the DSU of holding the sessions at which those statements are made in the absence of the third parties.

7. As the Panel indicated in its communication dated 20 June 2003, the first meeting in this dispute is to be held in two separate sessions two months apart, as necessary. The issues under consideration at each session are distinct, so that the written versions of oral statements at the first session cannot be considered submissions to the second session. The Panel's working procedures currently envisage that third parties will receive the parties' written submissions to any second session of the first meeting, and will have an opportunity to present their views at any such session. Thus, with respect to the issues that form the subject of each session of the first meeting, each third party will receive the rights provided for in Article 10.2 and 10.3 of the DSU.

8. Therefore, in our view, third parties have no entitlement under the DSU to the additional rights requested by the EC, and we also note that there is no agreement between the parties that such additional rights should be granted. In any case, the EC indicates in its letter dated 4 August 2003 that this was not the thrust of its requests but, rather, it would be a "reasonable exercise of the Panel's discretion" to allow the third parties also to comment on the responses of the parties to the dispute to the Panel's questions.

9. The Panel must consider whether it should grant such additional rights as part of its duty to ensure due process of law for third parties, or within its discretion to grant or refuse the rights requested as it believes appropriate, keeping firmly in mind the Panel's duty to ensure an objective assessment of the matter before it in accordance with Article 11 of the DSU, and the requirement that the interests of the parties to the dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process, in accordance with Article 10.1.

10. The EC has argued that access to oral statements would permit third parties to respond to arguments made by the parties to the dispute where such a response would be of relevance in answering the Panel's questions to third parties, and that this would benefit the Panel since the third

parties would be able to provide more complete responses to the Panel's questions. It also argues that the third parties' comments on each others' responses to questions will be more full and meaningful, and consequently more beneficial to the Panel, if it is also possible for them to comment on the responses of the parties to the dispute.

11. In addition to the issues raised by the EC, the Panel is keenly aware of the implications of this particular dispute for third parties, including the systemic importance of the interpretation of Article 13 of the *Agreement on Agriculture* and its trade policy impact.

12. In fact, the Panel has already taken into account, to a certain extent, the systemic implications of this dispute and the issues now raised by the EC. The Panel has posed a large number of questions to third parties, including 39 questions addressed specifically to the EC. Through the third parties' responses to these questions, the Panel hopes to receive their views on the merits and systemic considerations presently at issue in this dispute, which it will take into account in its assessment of the matter before it. The questions are detailed precisely to ensure that third parties' views are fully taken into account in what is a complex case. The Panel believes that, through the questions that it has posed to the parties to the dispute and to third parties, it has ensured that it will benefit from third parties' input and that nothing prevents them from participating in a full and meaningful fashion.

13. This is not the only opportunity for third parties to express their views in this dispute. The Panel specifically sought the views of third parties on the issue of whether Article 13 of the *Agreement on Agriculture* precludes the Panel from considering Brazil's claims under the Agreement on Subsidies and Countervailing Measures in these proceedings in the absence of a prior conclusion by the Panel that certain conditions of Article 13 remain unfulfilled. Six third parties, including the EC, made submissions to the Panel on that issue, which the Panel took into account.

14. Nothing precludes the Panel from posing further questions to the parties to the dispute or third parties as the Panel deems necessary or appropriate throughout the course of these proceedings. The Panel may also seek the views of third parties in further questions at any second session of the first meeting that may be held, by posing questions on the issues under consideration at that session.

15. The Panel notes that none of the third parties, including the EC, requested any additional rights prior to the first meeting, even after the Panel's communication of 20 June 2003, in which it announced that the first meeting would be held in two sessions, as necessary. The parties to the dispute therefore delivered their oral statements at that meeting in closed session without third parties present, as is the usual procedure under Article 12 and Appendix 3 of the DSU, on the basis that the confidentiality of those statements was within their own respective control. The Panel is therefore unwilling to direct the parties to grant access to written versions of those statements after the event.

16. The Panel notes that nothing in the DSU or the Panel's working procedures precludes a party to the dispute from disclosing statements of its own positions to the public, as foreseen in Article 18.2 and paragraph 3 of the working procedures, and that the United States has indicated that it makes its oral statements available on its website and has already provided a copy directly to the EC.

17. For the reasons set out above, the Panel denies both the EC's requests for additional third party rights. Nonetheless, in view of the phased nature of the first meeting, the Panel directs the parties to the dispute to make best efforts to ensure that their submissions to any second session of the first meeting are understandable either on their own or in conjunction with the submissions to the first session of the meeting. In particular, such submissions should not refer to any document to which the third parties do not have access without, at the very least, a summary, explanation or description of the contents of that document (or a citation indicating where that document may be found on the public record).

ANNEX L-1.8

COMMUNICATION TO BRAZIL AND THE UNITED STATES

19 August 2003

The Panel has received a communication from Brazil dated 14 August 2003 in which Brazil draws attention to the timing and format of service of the United States' responses to the Panel's questions, in light of paragraphs 17(b) and (d) of our Working Procedures, and in which it raises issues of procedural fairness.

The Panel has taken note of the matters raised in the communication from Brazil and draws them to the United States' attention. The Panel recalls that, at its meeting with the parties on 22 July 2003, it also drew the attention of the United States to these issues as raised by Brazil in connection with the filing of the United States' first written submission and comments on Brazil's initial brief.

In its communication dated 14 August 2003, Brazil also requested the right to comment on any new information, arguments or documents presented for the first time in the United States' rebuttal submission with respect to specific questions posed by the Panel. It raised considerations of due process and requested that the Panel provide it until 28 August 2003 to file any such comments without granting the United States any corresponding right.

The Panel has a duty to ensure the fairness of its proceedings, which requires that the parties receive sufficient opportunity to comment on information, argumentation and documents submitted. Due to the phasing of the first meeting, a party might lack sufficient opportunity to comment on such material presented for the first time in a rebuttal submission before the Panel expresses its views on certain issues in dispute. However, this will depend on what the rebuttal submissions actually contain.

Accordingly, when each party receives the other party's rebuttal submission, it is invited, without delay, to draw the Panel's attention to any specific material on which it has not had an opportunity to comment and to show cause why it needs such an opportunity. Upon a showing of good cause, the Panel will permit that party to comment in writing by 27 August 2003. The Panel is willing to grant such permission on Saturday, 23 August 2003, if necessary.

ANNEX L-1.9

COMMUNICATION TO BRAZIL AND THE UNITED STATES

23 August 2003

The Panel has received a communication from Brazil dated 23 August 2003 in which Brazil requests the opportunity to comment on specific paragraphs of the United States' rebuttal, and exhibits thereto, as the parties were invited to do by the Panel in its communication dated 19 August 2003.

The Panel considers that Brazil has not had sufficient opportunity to comment on new material specifically listed in its communication of 23 August 2003. The Panel notes that the argument raised in paragraph 123 of the United States' rebuttal is not new but was raised earlier in the United States' response to question 66(d) posed by the Panel and in section 2.3.2 of Brazil's rebuttal.

Accordingly, the Panel permits Brazil to comment in writing on such new material by 27 August 2003. The procedures regarding service of documents set out in paragraph 17 of the Panel's working procedures shall apply.

ANNEX L-1.10

COMMUNICATION TO BRAZIL AND THE UNITED STATES

25 August 2003

The Panel has received a communication from the United States dated 25 August 2003 in which the United States requests the opportunity to comment on specific paragraphs of Brazil's rebuttal, and comments on responses to questions, as the parties were invited to do by the Panel in its communication dated 19 August 2003. The Panel has also received a response to that communication from Brazil, also dated 25 August 2003, in which Brazil submits that the United States' request should be rejected.

The Panel considers that the United States has not had sufficient opportunity to comment on new material specifically listed in its communication of 25 August 2003, other than the alleged misstatements in paragraphs 88, 90-94 of Brazil's rebuttal which the Panel can check against the cross-referenced United States' responses and Panel report, if necessary.

Accordingly, the Panel permits the United States to comment in writing on such new material by 27 August 2003. The procedures regarding service of documents set out in paragraph 17 of the Panel's working procedures shall apply.

The Panel notes that the United States welcomes the opportunity to respond to any further questions that the Panel may have. Therefore, the Panel poses the following additional question to the United States and seeks a response by 27 August 2003:

67bis. 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.

ANNEX L-1.11

COMMUNICATION TO BRAZIL AND THE UNITED STATES AND THIRD PARTIES

5 September 2003

1. On 20 June 2003, the Panel communicated to the parties and third parties that:

"Given the potential complexity of the claims before us, the conditional nature of certain of these claims and the volume of evidence which may be introduced by the parties in support of their claims and arguments, and in order to organize our proceedings in an orderly, effective and efficient manner which serves to facilitate an objective assessment of the matter before us, and optimizes use of our resources, we have adopted the following modifications to our procedures ..."
2. The first modification to our procedures was as follows:

"The Panel intends to express its views on whether measures raised in this dispute satisfy the conditions in Article 13 of the *Agreement on Agriculture*, to the extent that it is able to do so, by 1 September 2003, and will defer its consideration of claims under Articles 3, 5 and 6 of the *SCM Agreement* and Article XVI of the *GATT 1994* as those provisions are referred to in Article 13 of the *Agreement on Agriculture* until after it has expressed those views. The Panel's views may be expressed in the form of rulings which could affect the Panel's further consideration of this dispute."
3. In a fax dated 30 July 2003, the Panel decided to modify the date for expression of its views to 5 September 2003.
4. The Panel takes note of the correspondence from the parties dated 27, 28 and 29 August 2003 and declines to make findings at this stage as to whether measures raised in this dispute satisfy the conditions in Article 13 of the *Agreement on Agriculture*, for the reasons given in its communication dated 20 June 2003. The Panel's findings on that issue will be included in its interim report, on which the parties will have the right to comment in accordance with Article 15.2 of the *DSU*.
5. The Panel has now had the opportunity to consider the parties' and third parties' evidence and arguments to date. At this stage, the Panel cannot conclude its assessment of the matter before it on the basis that the measures raised in this dispute satisfy the conditions in Article 13 of the *Agreement on Agriculture*. The expression by the Panel of this view is without prejudice to the Panel's eventual findings, and is subject to paragraph 6 below. In this context, the Panel is of the view that consideration, as appropriate, of Brazil's claims under Articles 3, 5 and 6 of the *SCM Agreement* and Article XVI of the *GATT 1994*, as those provisions are referred to in Article 13 of the *Agreement on Agriculture*, is warranted in order for the Panel properly to discharge its responsibilities under the *DSU* and the relevant covered agreements. Therefore, the Panel will consider those claims at a second session of the first substantive meeting.
6. The Panel also wishes to inform the parties that, on the basis of the evidence and arguments presented to date, it is unable to form any view on whether the ETI Act satisfies the relevant provisions of the *Agreement on Agriculture*.

7. Regarding the Panel's procedures:

- (a) the Panel invites the parties to address in further submissions, due on 9 and 23 September respectively, the claims referred to in paragraph 5 above;
- (b) the Panel also invites the parties to address further the issue whether the export credit guarantee programs at issue constitute export subsidies for the purposes of the *Agreement on Agriculture*;
- (c) the Panel confirms that items (o), (p) and (q) of its timetable will be necessary, and confirms the following dates:

Further submissions of the third parties: 29 September 2003;

First substantive meeting with the parties (resumed second session) : 7, 8 and (as necessary) 9 October 2003;

Third party session: **8 October** 2003 ¹;

- (d) the Panel invites the third parties to address in their further submissions the claims referred to in paragraph 5 above;
- (e) the Panel intends to postpone the second substantive meeting; and
- (f) the Panel invites the parties to comment on the attached draft further revised timetable. Such comments should be submitted no later than close of business on Tuesday, 9 September 2003.

[Attachment omitted]

¹ The Panel wishes to inform parties and third parties that due to the availability of meeting rooms, the third party session, previously scheduled for 9 October, will now be held on Wednesday, 8 October. The Panel will continue its meeting with the parties after the third party session and also on 9 October, as necessary.

ANNEX L-1.12

COMMUNICATION TO BRAZIL AND THE UNITED STATES AND THIRD PARTIES

12 September 2003

Having carefully considered the parties' comments received on 9, 10 and 11 September, the Panel intends to follow the revised timetable, as attached.

In this connection, the Panel would like to inform the United States that the deadline for its "further submission" is **15h00 (i.e. 3 pm) Geneva time** on Monday, 29 September.

The Panel also wishes to draw the attention of **third parties** that the **deadline for their further submissions** has been changed to **3 October**.

In light of the US request for an opportunity to comment on the new dates of the second meeting, now rescheduled to be 2 and 3 December 2003, the Panel invites the US and Brazil to submit comments, if any, on these dates. Such comments, which should focus on the date of the second substantive meeting and other dates directly affected by this date, should be submitted no later than close of business on **Tuesday, 16 September**.

[Attachment omitted]

ANNEX L-1.13

COMMUNICATION TO BRAZIL AND THE UNITED STATES AND THIRD PARTIES

18 September 2003

The Panel has received letters from Brazil and the US dated 16 September and 17 September, in which they submit further comments on certain dates we indicated in our fax dated 12 September.

Having carefully considered the views of both parties, the Panel amends the dates indicated in the 12 September fax as follows:

- The deadline for the receipt of answers to Panel's questions (previously, 22 October) will be changed to **27 October**.
- The deadline for the receipt of further rebuttals of the parties (previously, 3 November) will be changed to **18 November**.

In respect of items (u) and (v), the Panel notes Brazil's preference for "the completion of the parties' main substantive work still in 2003". The Panel reminds the parties that, as indicated in the 12 September fax, items (u) and (v) are deadlines that would apply "as necessary". They may, therefore, depend upon various factors, including the number and nature of any questions the Panel may actually pose to one or both parties at that juncture. Therefore, at least for the time being, the Panel prefers to leave these dates as indicated (22 December and 19 January, respectively).

All other dates indicated in the fax of 12 September remain unchanged, and are now confirmed.

ANNEX L-1.14

COMMUNICATION TO BRAZIL AND THE UNITED STATES AND THIRD PARTIES

24 September 2003

The Panel has received a letter from the United States dated 23 September, in which it informs the Panel of delays in the preparation of its further submission caused by hurricane Isabel, as well as a response from Brazil, also dated 23 September. Having carefully considered the views of both parties, the Panel further amends the dates we indicated in our fax of 12 September as follows:

deadline for the US's further submission: **30 September, 2003 (by 17:30 Geneva time)**

All other dates and deadlines indicated in the fax of 12 September (and subsequently amended in the fax of 18 September) including the deadline for the "further submission from third parties" (3 October), **remain unchanged**.

The Panel notes that the time for the third parties to review the US's "further submission" before making their respective written submissions is limited. The Panel reminds third parties that they are free to present arguments in addition to those set out in their written submissions in their oral statements to be presented on 8 October.

ANNEX L-1.15

COMMUNICATION TO BRAZIL AND THE UNITED STATES

13 October 2003

1. Please find attached the Panel's questions to the parties following the resumed session of the first substantive Panel meeting. Parties are reminded that responses are due by **27 October 2003**.
2. The Panel's questions are intended to facilitate the work of the Panel, and do not in any way prejudice the Panel's findings on the matter before it. Nor does the fact that the Panel has placed these questions under certain headings prejudice the Panel's findings on the matter before it. Each party is free to respond to or comment on questions posed to the other parties or third parties.
3. The Panel takes note of Brazil's request in its letter dated 2 October 2003 regarding the late receipt of submissions, and the US response in its letter dated 6 October 2003. In accordance with paragraph 17(b) of the Panel's working procedures, the Panel sets the following time for the provision of submissions by the parties: 11:59 pm, Geneva time on the dates concerned. This time refers to *receipt* of submissions by the other party and the Secretariat and not to commencement of transmission. For greater clarity, this time for receipt of submissions also refers to the time of completion of receipt of any Exhibits and service of all Exhibits (if necessary, electronically) to the other party and to the Secretariat as envisaged in paragraphs 17(a)-(d) of the Panel's working procedures. All other provisions of the Working Procedures remain unchanged. The Panel confirms the dates in the revised timetable, as revised in its communication of 18 September 2003.
4. The Panel has set this time in light of the repeated service of submissions by the United States after 5.30 p.m. and in order to ensure due process and secure a balance between the two parties. The Panel stresses its expectation that the parties will respect all of the rules and procedures set out in the *DSU* and in the working procedures, including the new time set by the Panel above for the dates in question.
5. The Panel takes note of the United States' request in section II of its further submission for three preliminary rulings, regarding interest subsidies and storage payments; cottonseed payments; and export credit guarantees for products other than upland cotton. The Panel is not currently in a position to rule on these issues. The Panel will make rulings as necessary and appropriate in the course of this proceeding and hopes to be in a position to express its views, or give a ruling, on these requests, as appropriate, by 3 November (that is, shortly after the date of receipt of written responses to questions). Meanwhile, the Panel requests the parties not to exclude consideration of these issues in their responses to questions.

Questions from the Panel to the Parties –
Resumed first session of the first substantive Panel meeting

A. REQUEST FOR PRELIMINARY RULINGS

122. Does Brazil allege that cottonseed payments, interest subsidies and storage payments are included in the subsidies that cause serious prejudice? Do they appear in the economic calculations? **BRA**

123. Does Brazil's request for the establishment of the Panel name the statute authorizing cottonseed payments for the 1999 crop? **BRA**

B. EXEMPTION FROM ACTIONS

124. According to its revised timetable, the Panel will issue its report to the parties after the end of the 2003 calendar year. Does this have any impact on "exempt[ion] from actions" under Article 13(b)(ii) and 13(c)(ii) of the *Agreement on Agriculture*? **BRA, US**

C. IDENTIFICATION OF THE SUBSIDIZED PRODUCT

125.

(1) In view of requirements in the FAIR Act of 1996 and the FSRI Act of 2002 that contract acreage remain in agricultural or conservation uses and which impose penalties if the producer grows fruits or vegetables, how likely is it that the producer with upland cotton base acreage will not use his or her land to produce programme crops or covered commodities? **US**

(2) Brazil has submitted that "The record suggests that *historic* producers are *current* producers." It points to factors including the specialization of upland cotton producers, the need to recoup expensive investments in cotton-specific equipment, and the geographic focus and climatic requirements of upland cotton production in the "cotton belt". (Brazil's rebuttal submission, footnote 98, on page 24)

(a) Regarding the specialization of upland cotton producers and the geographic focus of upland cotton production, how does Brazil take account of the fact that cotton is produced in 17 of the 50 states of the United States and that average cotton area is approximately 38% of a cotton farm's acres? (This information is taken from the US's response to question 67*bis*, footnote 35). **BRA**

(b) Regarding the geographic focus of upland cotton production, how many other crops can upland cotton producers viably grow in the cotton belt, other than fruits and vegetables? **US**

(c) Regarding the high cost of upland cotton production, can Brazil show that farms who planted upland cotton could only have covered their costs by receiving upland cotton, rice or peanut payments in every year from 1999 through 2002? **BRA**

(d) Regarding the need to recoup investments in cotton-specific equipment, is it important to planting decisions that upland cotton producers cannot run any other crop through their cotton-pickers? How does this affect the likelihood that they will grow other crops? **US**

(3) In calculating the amount of PFC, MLA, direct and counter-cyclical payments that went on upland cotton, Brazil made an adjustment for the ratio of current acreage to base acreage (see its

answer to question 67, footnotes 2, 3, 4 and 5). Is this an appropriate adjustment for the particular factors referred to above? Why or why not? **BRA, US**

(4) Dr. Glauber has alleged that there are statistical problems in comparing planted acres to programme acres because of abandonment of crops and also because planted acres are only survey estimates, not reported figures (See Exhibit US-24, the first full paragraph in P2). Would it be more appropriate to divide harvested acreage by base acreage? What margin of error is there between the survey estimates and reported figures? **BRA, US**

(5) Do the acreage reports under section 1105(c) of the FSRI Act of 2002 indicate or assist in determining the number or proportion of acres of upland cotton planted on upland cotton base acres? Was there an acreage reporting requirement for upland cotton during MY1996 through 2002? **BRA, US**

(6) Please prepare a chart showing upland cotton base acreage, planted acreage and harvested acreage for MY1996 through 2002. Does the planted acreage fluctuate within a broad band? If not, does this indicate any stability in decisions to plant the same acres to upland cotton? **BRA, US**

(7) Brazil states that one third of all US farms with eligible acreage decided to update their base acreage under the direct payments and counter-cyclical payments programmes using their MY1998-2001 acreage. What is the proportion of the current base acreage for upland cotton resulting from such updating? Is the observed updating of base acreage consistent with Brazil's argument that it is only profitable to grow upland cotton on base acreage (and peanut and rice base acreage)? **BRA**

(8) How could one take account of upland cotton producers who receive PFC, MLA, direct and counter-cyclical payments for other covered commodity base acreage? **BRA, US**

(9) Assuming that Brazil's payment figures were to amount to a *prima facie* case, please answer the following questions: **US**

(a) How would the United States calculate or estimate the proportion of upland cotton producers who receive subsidy payments for upland cotton base acreage?

(b) Should any adjustment estimates be made for any factors besides those listed by Brazil?

(c) What adjustment estimate would it be appropriate to make?

(d) How could one take account of upland cotton producers who receive decoupled payments for other programme crop base acreage?

(e) Could the US specifically indicate what, in its view, are the flaws in the approach summarized in paras. 6-7 of Brazil's closing oral statement¹ on 9 October (i.e. the use of the ratio of 0.87 to adjust the amount of total upland cotton direct and CCPs for the MY to obtain the amount of subsidies received by upland cotton producers)? Can the US suggest an alternative approach that would yield reliable results in its view?

¹ All of the paragraph numbers in relation to oral statements (opening statement and closing statement) cited in this document corresponds to the numbering made in the version available to the Panel on the date of the statement.

D. "LIKE PRODUCT"

126. Does the US agree that the product at issue is upland cotton lint and that Brazilian upland cotton lint is "like" US upland cotton lint within the meaning of Article 6.3(c) of the *SCM Agreement* in that it is a separate like product that is identical or has characteristics similar to the upland cotton lint from the United States? (e.g. Brazil's further submission, para. 81) **US**

E. "SUBSIDIES"

127. The Panel notes that the US contests that export credit guarantees constitute "subsidies". The Panel recalls that the US agrees that Step 2 payments are "subsidies" and wishes to have confirmation that it is correct in understanding that the US does not disagree that the following are "subsidies" for the purposes of Article 1 of the *SCM Agreement*: marketing loan/loan deficiency payments, PFC, direct payments, market loss assistance and CCP payments, crop insurance payments, cottonseed payments, storage payments and interest subsidy (without prejudice to the Panel's rulings on the US requests for preliminary rulings on the latter two payments). **US**

F. PROHIBITED SUBSIDIES

128. Could the US respond to Brazil's assertions relating to the meaning and effect of the introductory phrase of Article 3 ("Except as provided in the *Agreement on Agriculture...*")? Would the meaning/effect change if Article 13 of the *Agreement on Agriculture* did not exist? **BRA, US**

G. SPECIFICITY / CROP INSURANCE

129. In the event that the Panel does not consider that the alleged prohibited subsidies fall within the provisions of Article 3 and are therefore, pursuant to Article 2.3, "deemed to be specific", are there any other grounds on which Brazil would rely in order to support the view that such measures are "specific" within the meaning of Article 2 of the *SCM Agreement* (see, for example, fn 16 of Brazil's further submission)? **BRA**

130. Does Brazil agree that the US insurance premium subsidy is available in respect of all agricultural products? Please cite relevant portions of the record. **BRA**

131. How should the concept of specificity – and, in particular, the concept of specificity to "an enterprise or industry or group of enterprises or industries" -- in Article 2 of the *SCM Agreement* apply to subsidies in respect of agricultural commodities? Please answer the following questions, citing the principles in Article 2 of the *SCM Agreement*. **BRA, US**

- (a) is a subsidy in respect of all agricultural, but not other, products specific?
- (b) is a subsidy in respect of all agricultural crops (i.e. but not to other agricultural commodities, such as livestock) specific?
- (c) is a subsidy in respect of certain identified agricultural products specific?
- (d) is a subsidy in respect of upland cotton, but not other products, specific?
- (e) is a subsidy in respect of a certain proportion of the value of total US commodities (or total US agricultural commodities) specific?
- (f) is a subsidy in respect of a certain proportion of total US farmland specific?

132. Please state the amount and percentage of upland cotton acreage covered by each crop insurance programme and/or policy under the ARP Act of 2000. **US**

133. Concerning Brazil's arguments in its oral statement, para. 7, can the US indicate if any producers of livestock outside a pilot programme are covered by the crop insurance programme? **US**

134. Please state the annual amount of premiums paid or contributions made by US upland cotton farmers relating to each of the crop insurance programmes and/or policies supported by the US Risk Management Agency and the Federal Crop Insurance Corporation in each year from 1992 through 2002. **US**

135. Please state the annual amount of insurance indemnity payments made by the US government; or insurance companies participating in crop insurance programmes and/or policies under the ARP Act of 2000 to upland cotton farmers in each year from 1992 through 2002. **US**

136. Is the US arguing that crop insurance subsidies corresponding to "over 90 per cent of insured cotton area" (US 7 October oral statement, para. 46) in MY1999 through 2002 are consistent with paragraph 8(a) of Annex 2 of the *Agreement on Agriculture*? Is it correct that in the past these subsidies were nonetheless notified to the Committee on Agriculture as non-product specific AMS (see, for example, G/AG/N/USA/43 in Exhibit BRA-47)? **US**

H. EXPORT CREDIT GUARANTEES

137. Please elaborate the meaning of "net losses" as is used in paragraph 70 of Brazil's 7 October oral statement. **BRA**

138. Please comment on Brazil's views stated in paragraph 70 of its 7 October oral statement. **US**

139. In the context of export credit guarantees, is the Panel correct in understanding that Brazil's claims of inconsistency with the *Agriculture Agreement* involve GSM 102, GSM 103 and SCGP, but that it limits its "serious prejudice" allegations in respect of export credit guarantee programmes to the GSM 102 programme, and does not challenge GSM 103 and SCGP in this respect? If so,

(a) could Brazil please explain why it did so, and confirm that all the data relied upon in its further submissions (e.g. in Table 13) relate to the GSM 102 programme rather than to GSM 102, GSM 103 and SCGP (and, if the data needs to be adjusted to take account of a narrower "serious prejudice" focus, supply GSM-102-relevant data)? **BRA**

(b) for the purposes of Article 13(c)(ii) of the *Agreement on Agriculture*, is it necessary for the Panel to examine only GSM 102 or should the Panel's examination include also GSM 103 and SCGP? Why or why not? **BRA**

140. Could Brazil explain how, if at all, it has treated export credit guarantees for the purpose of Table 1 of its further submission? **BRA**

141. The Panel notes the US argument, *inter alia* in its further submission, that the export credit guarantee programmes are "self-sustaining". Recalling that item (j) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement* refers to "premium rates", could the US expand upon how it takes into account the premium rates for the export credit guarantee programmes in its analysis. **US**

142. The US has pointed out that there are many limitations on granting export credit guarantees and that there is no requirement to issue any particular guarantee (US further submission, paras 153-

156). Can the Commodity Credit Corporation decline to grant an export credit guarantee even in cases where the programme conditions are met? **US**

143. Brazil agrees with National Cotton Council estimates of the effects of the GSM 102 programmes (Brazil's further submission, para. 190) but it also cites a different conclusion by Prof. Sumner (paragraph 192). Brazil cites other estimates by Prof. Sumner throughout its further submission. Does Brazil adopt Prof. Sumner's conclusions and estimates as part of its submission? **BRA**

I. STEP 2 PAYMENTS

144. Is the Panel correct in understanding that the US does not dispute that Step 2 (domestic) payments are contingent upon import substitution, and that it argues that such measures are permitted due to the operation of the provisions of the *Agreement on Agriculture*? How is that relevant to a claim under Articles 5 and 6 of the *SCM Agreement*? **US**

J. ACTIONABLE SUBSIDIES

145. The Panel notes that different remedies are available in respect of prohibited and actionable subsidies under Articles 4.7 and 7.8 of the *SCM Agreement*. If the Panel were to conclude that a subsidy was prohibited and were to make a recommendation under Article 4.7 of the *SCM Agreement* to withdraw the subsidy without delay, can the Panel:

- (a) also conclude that the same subsidy had resulted in adverse effects to the interests of another Member? If so, what would be the value of such a conclusion in terms of the settlement of the matter before the Panel? **BRA, US**
- (b) take into account the effects of the interaction of those prohibited subsidies with other, allegedly, actionable subsidies? If so, how is this relevant to the issue of causation under Article 5 of the *SCM Agreement*? **BRA, US**

146. Brazil acknowledges that there are some interaction effects that may increase or decrease the overall effects of the subsidies (Brazil's further submission, para. 225). How would your analysis under Articles 5(c) and 6.3 of the *SCM Agreement* and Article XVI of *GATT 1994* differ if it excluded, for example, crop insurance subsidies, PFC and/or direct payments? **BRA**

147. Does the US agree that subsidies provided under the marketing loan programme, counter-cyclical payments and market loss assistance are or were more than minimally trade-distorting? If so, please elaborate on the type of effects which are more than minimally trade-distorting within the meaning of Annex 2 of the *Agreement on Agriculture* but less than adverse effects within the meaning of Article 5 of the *SCM Agreement*. **US**

148. How should the significance of price suppression or depression be assessed under Article 6.3(c) of the *SCM Agreement*? In terms of a meaningful effect? Or another concept? **BRA, US**

149. What is the meaning of "may" in the chapeau of Article 6.3(c) in the context of Brazil's assertion that there is no need to conduct a distinct analysis of "serious prejudice" under Article 5(c) after having made a finding under 6.3(c) or (d)? (Brazil's further submission, paras 437 ff). How, if at all, are Articles 6.2 and 6.8 relevant in this context? What context should the Panel use for assessing serious prejudice under Article 5(c) of the *SCM Agreement* if the Panel takes the view that Article 6.3(c) and (d) are permissive conditions for a determination of serious prejudice? **US**

150. Is the list in Article 6.3 of the *SCM Agreement* exhaustive, or could serious prejudice arise in circumstances other than those listed in paragraphs (a) through (d)? **US**

151. Where in the text of Article 6.3(d) of the *SCM Agreement* is there a basis to take into account that 1998 may be a "misleading" year for the purposes of comparison? For example, unlike the text of Article XVI:3 of the GATT 1994, there does not seem to be a general reference to "special factors". **US**

152. If the US is correct in asserting that the Article 13(b)(ii) *Agreement on Agriculture* analysis is a year-by-year analysis, how would this affect the Panels examination of Brazil's claims of serious prejudice, including the three year period and the trend period in Article 6.3(d) of the *SCM Agreement*? **US**

153. Would the conditions in Article 6.3(d) of the *SCM Agreement* be satisfied in respect of time periods other than the one specified? What relevance, if any, would this have for Brazil's claims? **BRA**

154. Does the US agree that upland cotton is a "primary product or commodity" within the meaning of Article 6.3(d) of the *SCM Agreement*? (ref. Brazil's further submission, para. 262) and within the meaning of Article XVI:3 of the GATT 1994? **US**

155. Please respond to Brazil's identification of the seven-year period beginning with MY1996 (following the passage of the FAIR Act of 1996) as the "most representative period" for the purposes of Article 6.3(d)? (ref. Brazil further submission, para. 269) **US**

156. Does the US agree that "...footnote 17 [of the *SCM Agreement*] does not carve out upland cotton from the scope of Article 6.3(d) of the *SCM Agreement*"? (ref. Brazil further submission, para. 275). **US**

157. Does the reference to "trade" in footnote 17 of the *SCM Agreement* have any impact on the interpretation of "world market share" in Article 6.3(d)? If so, what is it? **US**

158. Please respond to Brazil's assertion that "...the absence of any payment, production or expenditure limitations in the US marketing loan programme is analogous to the EC sugar regime that was challenged in *EC – Sugar Exports II (Brazil)* and *EC – Sugar Exports I (Australia)*." (ref. Brazil further submission, para. 317) **US**

159. The EC, in its oral statement (paras 9 and 10), disagrees with the US interpretation of the terms "same market". Can the US comment on the EC's view? **US**

160. Without prejudice to the meaning of "world market share" as used in Article 6.3(d) of the *SCM Agreement*, can you confirm the world export share statistics provided in Exhibit BRA-206? **US**

161. Would a finding of serious prejudice under Article 5(c) of the *SCM Agreement* be determinative for a finding under Article XVI:1 of the GATT 1994? Why or why not? What, if any, is the role of footnote 13 of the *SCM Agreement* in this context? **BRA, US**

162. Can the US confirm that marketing loan/LDP, step 2 and counter-cyclical payments are mandatory if the price conditions are fulfilled? **US**

163. Are US cotton producers able to cover the fixed and variable costs without subsidies? Please provide substantiating evidence. Of what relevance is this, if any, to Brazil's actionable subsidy claims? **US, BRA**

K. CAUSATION

164. When the US points, in its oral statement of 7 October, to the alleged "bias" of Prof. Sumner's model, is it arguing that US subsidies are irrelevant to the movement in prices and production (acreage) of upland cotton? **US**

165. Please comment (and submit substantiating evidence) on the US assertion that the FAPRI model has been designed and developed for prospective analysis, and is not suitable for retrospective counterfactual analysis. What is the reliability of past FAPRI-produced analyses when compared with actual data for the period covered by them? Is there any other instrument that can be used to try to identify the effect of subsidies already granted, or of their removal? **BRA, US**

166. The US states that "futures prices demonstrate that market participants predict increasing upland prices over the course of the marketing year" (US 7 October oral statement, para. 62). Please elaborate on this argument including citing specific futures prices. **US**

167. How does Brazil react to Exhibit US-44? **BRA**

168. Please confirm that the production figures cited in Exhibit US-47 are for upland cotton only and do not include textiles. **US**

169. Can the US confirm the accuracy of the facts and figures cited in the four bullet points in paragraph 12 of Brazil's 7 October oral statement? **US**

170. Brazil quotes a report that states that a 10% increase in soybean prices reduces upland cotton acreage by only 0.25% (Brazil's 7 October oral statement, para. 27). Could Brazil indicate if this analysis is done on a short-run basis or a long-run basis? **BRA**

171. In paragraphs 22 and 23 of its further submission, we understand that the US is, in short, claiming that increased total supply (i.e. including polyester) drove prices down. On the other hand, we note that, according to the figures in the chart in paragraph 22 of the same submission, the world production of cotton during this period has basically been steady. Do all polyester fibres as represented by these figures compete directly with cotton? That is to say, do these figures for polyester fibres include, for example, those that are used for textiles that technically cannot be substituted by cotton? **US**

172. Please estimate the price effect, in cents per pound, of the growth in the US retail market which it is said has directly contributed to strengthening world cotton prices. **US**

173. The US asserts that "burgeoning US textile imports ... shifted the disposition of US cotton production from domestic mills to export markets" (US further submission, para. 20). A similar description appears in paragraph 33, together with the explanation that "the share of world cotton consumption supplied by US cotton has been roughly the same since 1991/92". Why have sales of US cotton for export increased and sales of cotton imported into the US increased? **US**

174. How, if at all, did the Asian financial crisis affect the United States' world market share? Did it disproportionately affect the US as compared to other exporters? **US**

175. With reference to paragraphs 57-58 and the related table on page 21 of the US further submission, could you please clarify the arguments regarding the ratio of the soybean futures to the cotton futures prices since in the table the inverse ratio is used? **US**

176. With reference to Figure 4 of Brazil's Further Submission, how does Brazil explain the apparent decrease in prices in 2001 and the increase of the A-Index in recent months, despite the continued use of US subsidies on upland cotton? **BRA**

177. Could the United States further elaborate on paragraph 50 of its 7 October oral statement? **US**

178. The Panel notes Exhibit US-63. Could the US please provide a conceptually analogous graph concerning US export sales during the same period? **US**

179. Could Brazil comment on the argument that decoupled payments and other subsidies to upland cotton are largely being capitalized into land values and that removing these subsidies would reduce the cost of production of upland cotton producers (US 7 October oral statement, para. 48). What would be the net effect of these adjustments? **BRA**

180. Please describe the precise formula as to how USDA determines the "adjusted world price" using the Liverpool A-Index, the NY futures price and any other relevant price indicators. Please submit substantiating evidence. **BRA, US**

181. Please provide a side-by-side chart of the weekly US adjusted world price, the Liverpool A-Index, the NY futures price, and spot market prices from 1996-present. What, if anything, does this reveal? **BRA, US**

182. Please explain why the US can be taken to be price *leaders*, or price *setters*, (and not just takers) when US producers receive large subsidy payment to support the difference between *world prices* and their own costs? **BRA**

L. ARTICLE XVI OF GATT 1994

183. Why does Brazil believe that the appropriate "previous representative period" is the term of the previous Farm Bill, MY1996-2002? (Brazil's further submission, para. 282) **BRA**

184. Why does Brazil believe that an "equitable share" is one which factors out all subsidies? To the extent that domestic support and export subsidies are permitted by the *Agreement on Agriculture*, why should they not be accepted as being normal conditions in analyzing an equitable market share? (See Brazil's further submission, paras 288-289) **BRA**

185. Please respond to the following questions concerning the relationship between Article XVI:3 of the GATT 1994, the disciplines on export subsidies and domestic support in the *Agreement on Agriculture* and the disciplines on prohibited export subsidies and actionable subsidies in Articles 3, 5(c) and 6.3(d) of the *SCM Agreement*. **BRA, US**

(a) Are agricultural domestic support programmes challengeable under Article XVI:3 of the GATT 1994? How, if at all, is the title of Section B of Article XVI ("Additional provisions on *export subsidies*" (emphasis added)) relevant? How, if at all, are Articles 13 and 21.1, or any other provisions of the *Agreement on Agriculture*, relevant?

(b) Are the requirements of Article XVI:3 of the GATT 1994 reflected in, developed by or subsumed by the requirements in Article 6.3(d) of the *SCM Agreement*, or in any other

provisions of the covered agreements? Of what relevance, if any, is the Appellate Body Report in *US-FSC*, para. 117² here?

- (c) Of what relevance, if any, is the fact that the definition of "subsidy" in Article 1 of the *SCM Agreement* and the prohibition on subsidies contingent upon export in Article 3.1(a) were introduced in the Uruguay Round, but did not exist at the time that the GATT 1947 was negotiated?

186. Could the United States please expand upon its statement that "[t]hese are the types of considerations that led to the negotiation of the Subsidies Agreement..." (US further submission, para. 109)? Is there any relevant material, including, for example, drafting history that might support this statement? **US**

M. THREAT CLAIMS

187. Please provide USDA's projections of marketing loan/LDP payments, direct payments and counter-cyclical payments to be made during MY2003 through 2007 based on the most recent USDA baseline projection. **US**

² WT/DS108/AB/R, para 117:

"... the provisions of the *SCM Agreement* do not provide explicit assistance as to the relationship between the export subsidy provisions of the *SCM Agreement* and Article XVI:4 of the GATT 1994. In the absence of any such specific textual guidance, we must determine the relationship between Articles 1.1(a)(1) and 3.1(a) of the *SCM Agreement* and Article XVI:4 of the GATT 1994 on the basis of the texts of the relevant provisions as a whole. It is clear from even a cursory examination of Article XVI:4 of the GATT 1994 that it differs very substantially from the subsidy provisions of the *SCM Agreement*, and, in particular, from the export subsidy provisions of both the *SCM Agreement* and the *Agreement on Agriculture*. First of all, the *SCM Agreement* contains an express definition of the term "subsidy" which is not contained in Article XVI:4. In fact, as we have observed previously, the *SCM Agreement* contains a broad package of new export subsidy disciplines that "go well beyond merely applying and interpreting Articles VI, XVI and XXIII of the GATT 1947". Next, Article XVI:4 prohibits export subsidies only when they result in the export sale of a product at a price lower than the "comparable price charged for the like product to buyers in the domestic market." In contrast, the *SCM Agreement* establishes a much broader prohibition against *any* subsidy which is "contingent upon export performance". To say the least, the rule contained in Article 3.1(a) of the *SCM Agreement* that all subsidies which are "contingent upon export performance" are prohibited is significantly different from a rule that prohibits only those subsidies which result in a lower price for the exported product than the comparable price for that product when sold in the domestic market. Thus, whether or not a measure is an export subsidy under Article XVI:4 of the GATT 1947 provides no guidance in determining whether that measure is a prohibited export subsidy under Article 3.1(a) of the *SCM Agreement*. Also, and significantly, Article XVI:4 of the GATT 1994 does not apply to "primary products", which include agricultural products. Unquestionably, the explicit export subsidy disciplines, relating to agricultural products, contained in Articles 3, 8, 9 and 10 of the *Agreement on Agriculture* must clearly take precedence over the *exemption* of primary products from export subsidy disciplines in Article XVI:4 of the GATT 1994."

188. Can the United States comment on the FAPRI projections for cotton provided in Exhibit BRA-202? **US**

N. CLARIFICATIONS

189. Please indicate whether the correct figure in paragraph 37 of Brazil's 7 October oral statement is 38.1% or 38.3%? **BRA**

190. Please confirm that the figure "17.5" in paragraph 43 of Brazil's 7 October oral statement, is "percentage point". **BRA**

191. Brazil clarify its statement in para. 12 of its 9 September further submission: "Alternatively crop insurance is **not specific** because the 2000 ARP Act denies benefits to commodities representing more than half of the value of US agriculture. Further US crops represent only 0.8 per cent of total US GDP." (emphasis added) **BRA**

ANNEX L-1.16

COMMUNICATION TO BRAZIL AND THE UNITED STATES

3 November 2003

1. The Panel recalls that paragraph 5 of its 13 October 2003 communication reads as follows:

"The Panel takes note of the United States' request in section II of its further submission for three preliminary rulings, regarding interest subsidies and storage payments; cottonseed payments; and export credit guarantees for products other than upland cotton. The Panel is not currently in a position to rule on these issues. The Panel will make rulings as necessary and appropriate in the course of this proceeding and hopes to be in a position to express its views, or give a ruling, on these requests, as appropriate, by 3 November (that is, shortly after the date of receipt of written responses to questions). Meanwhile, the Panel requests the parties not to exclude consideration of these issues in their responses to questions."

2. Accordingly, please find attached a communication from the Panel.

Panel's views on the preliminary ruling requested by the United States
in its further written submission of 30 September 2003

1. In its further written submission of 30 September 2003, the United States requests a preliminary ruling that:

- (1) Brazil may not advance claims under either Article 4 or Article 7 of the *SCM Agreement* with respect to export credit guarantee measures relating to eligible US agricultural commodities other than upland cotton, because it did not include a statement of available evidence with respect to these measures as required by Articles 4.2 and 7.2 of the *SCM Agreement*;
- (2) cottonseed payments made for the 1999 and 2000 crops are not within the Panel's terms of reference; and
- (3) storage payments and interest subsidies referred to as "other payments" for upland cotton are not within the Panel's terms of reference.¹

2. Brazil asks the Panel to reject the United States' request. In respect of item (1), Brazil asserts that the US request is not new and is untimely, groundless and "mooted by" the Panel's 25 July communication indicating that the Panel intended to rule that export credit guarantees to facilitate the export of US upland cotton and other eligible agricultural commodities are within the Panel's terms of reference.² Brazil asserts that items (2) and (3) are properly within the Panel's terms of reference.³

3. The Panel wishes to indicate to the parties how it intends to rule on items (1) and (2), in order to assist them in deciding what argumentation and evidence to submit in their further rebuttal submissions.

4. With respect to item (1), assuming *arguendo* that the US request was timely,⁴ the Panel intends to rule in its report that Brazil provided a statement of available evidence with respect to export credit guarantee measures relating to eligible US agricultural commodities other than upland cotton, as required by Articles 4.2 and 7.2 of the *SCM Agreement*. As previously indicated in the Panel's communication of 25 July 2003, the Panel also intends to rule that "export credit guarantees ... to facilitate the export of US upland cotton, and other eligible agricultural commodities" as addressed in document WT/DS267/7, are within its terms of reference.

5. With respect to item (2), the Panel intends to rule that cottonseed payments made under Public Laws 106-224 and 107-25 (in respect of the 2000 crop) are within its terms of reference, but that cottonseed payments made under Public Law 106-113 (in respect of the 1999 crop) are not within its terms of reference. This is without prejudice to the relevance, if any, of the cottonseed payments in respect of the 1999 crop to the conditions set out in Article 13(b) of the *Agreement on Agriculture*.

¹ US Further Written Submission, Sections II and XIII.

² Brazil's Oral Statement at the Resumed First Substantive Meeting, paragraphs 73-78.

³ Brazil's Oral Statement at the Resumed First Substantive Meeting, paragraphs 79-81.

⁴ The Panel recalls paragraph 12 of its working procedures but, in light of its intended ruling, does not need to address the issue of timeliness here.

6. The Panel has not yet decided upon its approach to item (3) and asks the parties not to exclude consideration of these other payments in their further rebuttal submissions.

ANNEX L-1.17

COMMUNICATION TO BRAZIL AND THE UNITED STATES

14 November 2003

1. The Panel takes note of the United States' written request of 14 October 2003 for certain information relating to the quantitative simulation model used by Dr. Sumner in his analysis presented in Annex I to Brazil's 9 September 2003 further written submission. The Panel also takes note of the parties' related communications dated 5, 11, 12 and 13 November 2003, and the submissions by Brazil on 12 and 13 November 2003.
2. The Panel confirms the dates in its existing timetable, subject to the following.
3. The Panel does not require the parties' 18 November further rebuttal submissions, nor their oral statements during the second Panel meeting, to address the methodology, equations or parameters underlying the quantitative modelling simulation in Annex I to Brazil's further written submission which are directly linked to the information requested by the United States on 14 October 2003 and the submissions by Brazil on 12-13 November 2003. Having said this, the parties are not precluded from doing so.
4. Mindful of the requirements of Article 12.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* and in keeping with its duty to conduct an objective assessment of the matter before it, the Panel invites the United States to submit, on 22 December, in conjunction with its responses to any questions following the second Panel meeting, any comments that it may have on Brazil's submissions of 12-13 November 2003. Brazil may submit any comments on any such US comments by 12 January 2004, and the United States may submit any further comments by 19 January 2004. If necessary, at the discretion of the Panel, a further Panel meeting with the parties may be held to address this specific material.
5. This decision is without prejudice to the relevance and significance which the Panel may ascribe to the quantitative simulation model and related evidence and argumentation in its report.
6. Finally, the Panel wishes to ask the United States to respond, by 22 December, to the following:

Is the Panel correct in understanding that the US government (including the United States Department of Agriculture) does not have a license or any other form of permission (standing or otherwise; free of charge or otherwise) to run, electronically, the FAPRI/CARD model and/or Professor Sumner's adaptations thereto?

ANNEX L-1.18

COMMUNICATION TO BRAZIL AND THE UNITED STATES

8 December 2003

1. Please find attached:
 - a communication from the Panel concerning its views on one of the preliminary ruling requests from the United States.
 - a communication from the Panel concerning the FAPRI model, the essence of which was communicated to the parties by the Chairman of the Panel on 3 December 2003. As indicated therein, any US comments are due by **22 December**. Brazil will be given until **12 January 2004**, to comment on the US comments.
 - the questions from the Panel. As was indicated earlier, responses to these questions are to be submitted by **22 December**.
2. As stated by the Chairman on 3 December, the United States will be given until **18 December** to respond to Brazil's request made in Exhibit BRA-369. Brazil will be given until **12 January 2004**, to comment on the US response.
3. The parties may submit any further comments on each other's comments by **19 January 2004**.

Panels' views on the preliminary ruling requested by the United States
regarding the Agricultural Assistance Act of 2003

7. The United States requests a preliminary ruling that any measure under the Agricultural Assistance Act of 2003, including a cottonseed payment under that Act, is not within the Panel's terms of reference.¹
8. Brazil asserts that that Act is properly within the Panel's terms of reference and asks the Panel to reject the United States' request.²
9. The Panel wishes to indicate to the parties how it intends to rule on this item in order to assist them in deciding what argumentation and evidence to submit in their answers to questions.
10. The Panel intends to rule that cottonseed payments made under the Agricultural Assistance Act of 2003 are not within its terms of reference. This is without prejudice to the relevance, if any, of those cottonseed payments to the conditions set out in Article 13(b) of the *Agreement on Agriculture*.
11. The Panel notes that it has not expressed a view concerning the United States' request for a preliminary ruling that storage payments and interest subsidies referred to as "other payments" for upland cotton are not within the Panel's terms of reference.³ The Panel has not yet decided upon its approach to this item and asks the parties to respond to its written questions relevant to these payments, and not to exclude consideration of these payments in their answers to other questions.

¹ US First Written Submission, paras 217, 218; US Further Submission, para. 8.

² Brazil's Oral Statement at the first session of the First Substantive Meeting, para. 145; Brazil's Response to Panel Question No. 17 and comments on US Response to Panel Question No. 17.

³ US Further Written Submission, Sections II and XIII.

Panels' communication concerning the FAPRI model

1. The Panel has been advised by Brazil that, to the best of Brazil's knowledge and belief, all of the information used by FAPRI to generate the various results presented in Brazil's submissions concerning the effects of the subsidies, and their removal, has been provided to the US in an electronic format. Conceptually speaking, the information is in two parts: (a) the model used as the basis for generating the results ("the FAPRI model"), and (b) adaptations to the model and other specific pieces of information which effect the calculations made by the model ("the Brazil information"). FAPRI has possession of the FAPRI model and the Brazil information. Brazil only has possession of the Brazil information. Brazil instructed FAPRI as to the use of the Brazil information that FAPRI then used to generate the various results presented by Brazil to the Panel.

2. We say that the US has all of the information (ie both the FAPRI model and Brazil's information) "to the best of Brazil's knowledge and belief" because Brazil itself has never had access to all of the data comprising the FAPRI model, which is voluminous. FAPRI considers the model to be its own work product. At the request of Brazil, FAPRI has made all of the information available to the US. Why it has done this in the case of the US, but not Brazil, relates to the relationship (commercial or otherwise) between FAPRI (which receives US funding for its work) and the US Government. FAPRI has provided all of the information to the US on the express stipulation that the model not be provided to the Panel or Brazil ("the FAPRI stipulation").

3. At para 74 of its Opening Statement at the Second Panel Meeting, the US asks this of the Panel:

"[W]hether it intends the United States to comment on this new model, documentation, and results by the original 22 December deadline to file comments on the methodology underlying the Annex I model."

4. During the Second Panel Meeting, Brazil advised the Panel that it had no objection, then, to the US looking at the information provided to it by FAPRI, notwithstanding the FAPRI stipulation. The Panel acknowledges this, but also notes that it would be open to Brazil to reconsider its position depending on anything that the US may wish to present to the Panel about the FAPRI model.

5. The Panel's view in these circumstances is that the US should comment on the FAPRI model, if it believes that it needs to do so in the interests of presenting its case to the Panel, by **22 December**. The FAPRI stipulation does not, in the Panel's view, affect the Panel's ability to make an objective assessment of the matter before it in the terms of Article 11 of the DSU. The Panel will assess the reliability and relevance of the FAPRI model on the basis of the evidence presented to it by the parties.

6. Brazil will be given until **12 January 2004**, to comment on the above US comments.

Questions from the Panel to the Parties –
second substantive Panel meeting

A. TERMS OF REFERENCE

192. Regarding the interest subsidies and storage payments listed by the United States in its response to the Panel's Question No. 67:

- (a) Please provide a copy of the regulations under which they are currently provided and under which they were provided during the marketing years 1996-2002;
- (b) Please indicate whether there are any such payments which are not provided to implement the repayment rate for upland cotton within the marketing loan programme. **USA**

193. Are interest subsidies and storage payments already included in the amounts shown in your submissions to date for payments under the marketing loan programme? Has there been any double-counting? **BRA**

194. Does the United States maintain its position stated in response to the Panel's Question No. 67 that "it would not be appropriate for the Panel to examine payments made after the date of panel establishment"? If so, please explain why. Can Brazil comment on this statement? **BRA, USA**

B. ECONOMIC DATA

195. Does the United States wish to revise its response to the Panel's Question No. 67*bis*, in particular, its statement that "the United States ... does not maintain information on the amount of expenditures made under the cited programmes to US upland cotton producers"? Did the United States make enquiries of the FSA in the course of preparing its original answer? **USA**

196. Please provide the latest data for the 2002 marketing year on payments under the marketing loan, direct payments, counter-cyclical payments, user marketing certificate (step 2) programmes and export credit guarantee programmes. **BRA, USA**

197. Please provide actual data for 2002/2003 for US exports, US consumption and per cent of world consumption to replace the projected data in Exhibit US-47. If available, please provide projected data for 2003/2004 to replace the forecast data. **USA**

198. Please comment on the respective merits of the price-gap calculations of MY1992 deficiency payments in US comments of 27 August, footnote 14 (\$867 million), and Brazil's response to the Panel's Question No. 67 (\$812 million). **BRA, USA**

199. What is the composition of the A-Index? We do note footnote 19 and, for example, Exhibit BRA-11, but please explain more in detail how this index is calculated. **BRA**

200. Concerning the chart on page 37 of Brazil's further rebuttal submission, why did Brazil use a futures price at planting time? Is this a relevant measure for assessing acreage response? **BRA**

201. Is data available to show the proportion of US upland cotton production sold under futures contracts, and the prices under those contracts, at different times during the marketing year? If so,

please provide summarized versions to the Panel. How does a futures sale impact the producer's entitlement to marketing loan programme payments? **BRA, USA**

202. Concerning paragraph 7 of the US oral statement, are the expected cash prices shown for February only? Can the US provide the prices for January and March of each year as well? **USA**

203. Please provide information concerning the organization, mandate, credentials and standing of FAPRI. **BRA**

204. Which support to upland cotton is not captured in the EWG data referred to in Brazil's 18 November further rebuttal submission? **BRA**

205. Does the United States accept or agree with the EWG data submitted by Brazil? If not, please explain your reasons. **USA**

206. Please explain how the graph in paragraph 40 of the US further rebuttal submission was derived. In so doing, please clarify whether the figures are on a cents per pound basis or some other basis. What averaging method was used? Can you prepare individual charts showing average US and Brazilian cotton prices for each of those third country markets? **USA**

207. Please indicate whether any of the measures challenged in this dispute *obliges* cotton farmers to harvest their crop in order to receive the benefit of the programme (subsidy). **USA**

208. Please provide data for the marketing years 1992 and 1999-2002 of the "quantity of production to receive the applied administered price" (*Agreement on Agriculture*, Annex 3, paragraph 8) for purposes of a price-gap calculation of support through the marketing loan programme. **USA**

209. It is understood that the data in the graph in paragraph 5 of the US oral statement are as at harvest time, while the data in the graph in paragraph 39 of Brazil's oral statement are as at planting time. Please explain why the trend of US acreage increase/decrease differs between these two graphs. **BRA, USA**

210. Are worldwide planted acreage figures available? **BRA, USA**

211. Brazil presents a graph in paragraph 59 of its further rebuttal submission indicating the increasing cumulative loss incurred by cotton producers. Please comment on the argument that US cotton producers could not continue operating without subsidies. In particular:

- (a) to what extent does the use of 1997 survey technological coefficients with annually updated values affect the results?
- (b) to what extent do producers base planting decisions on their ability to cover operating costs but not whole farm costs? **USA**

212. Brazil states in paragraph 37 of its oral statement that studies of Westcott and Price found that the effect of the programme on cotton is to add an additional 1 to 1.5 million acres during marketing years 1999-2001 and to suppress US prices by 5 cents per pound. Does the US reject these findings? Why or why not? **USA**

213. What differences, if any, can be observed in the results of econometric models in the literature which use lagged prices and those which use futures prices to analyse the effect of prices on planting decisions? **BRA, USA**

C. DOMESTIC SUPPORT

.... 214. Please provide a copy of regulations regarding the marketing loan programme and loan deficiency payments published at 58 Federal Register 15755, dated 24 March 1993. What does this regulation indicate about the target price? **USA**

215. Please expand or comment on the statement at paragraph 91 of the US further rebuttal submission that the counter-cyclical target price ceases to be paid when the farm price rises above 65.73 cents per pound. In this scenario, should the Panel disregard Direct Payments? **BRA, USA**

216. How many times have upland cotton producers been able to update their base acres since 1984? How do upland cotton producers come to note the possibility of future updating? Please provide examples of relevant material. **BRA, USA**

217. What is the reason for reducing payments under the PFC and direct payments programmes for planting and harvesting fruit, vegetables and wild rice on certain base acreage? Please comment on the statements by the European Communities that "the reduction in payment for fruit and vegetables, if the EC understands correctly, is in fact designed to avoid unfair competition within the subsidising Member." (EC oral statement at first session, first substantive meeting, paragraph 29) and "To find otherwise would not permit a WTO Member wishing to introduce decoupled payments to take account of important elements of internal competition (...)" (EC response to Panel third party Question No. 5). **USA**

218. Please comment on the testimony of USDA Chief Economist Keith Collins cited in paragraph 36 of Brazil's oral statement regarding the trade-distorting and production-distorting nature of the marketing loan payments. **USA**

D. EXPORT CREDIT GUARANTEES

219. Under the *Agreement on Agriculture* the general position is that the use of export subsidies, both those listed in Article 9.1 as well as those within the scope of Article 1(e) which are not so listed, may only be used within the limits of the product specific reduction commitments specified in Part IV of Members' Schedules. One might therefore have expected that Article 3.3 of the *Agreement on Agriculture* would have prohibited the use of both listed and non-listed export subsidies in excess of reduction commitment levels in the case of scheduled products and, in the case of non-scheduled products, would have simply prohibited the use of any export subsidy. Instead, the Article 3.3 prohibition is limited in both cases to export subsidies listed in Article 9.1. What significance, if any, does this contextual aspect have for how Article 10.2 might be interpreted having regard, *inter alia*, to:

- (a) the fact that export performance-related tax incentives, which like subsidised export credit facilities were considered as a possible candidate for listing as an Article 9.1 export subsidy in the pre-December 1991 Draft Final Act negotiations, have been held (for example, in *United States – Tax Treatment for Foreign Sales Corporations*, WT/DS108) to be subject to the anti-circumvention provisions of Article 10.1; and
- (b) the treatment of international food aid and non-commercial transactions under Article 10? **USA**

220. What will be the relevance of Articles 9 and 10.1 of the *Agreement on Agriculture* to export credit guarantees when disciplines are internationally agreed? **BRA**

221. In respect of the table in paragraph 161 of the US August 22 rebuttal submission (concerning the cohort specific treatment of export credit guarantees), the Panel notes the subsequent US agreement (footnotes 82 and 96 in US further submission of 30 September 2003; footnote 160 in US 18 November further rebuttal submission) to Brazil's assertion (footnote 67 in Brazil's 27 August 2003 comments on US rebuttal submission) that the total figure net of re-estimates should be \$230,127,023 instead of the figure which originally appeared (\$381,345,059).

- (a) Please submit a corrected table reflecting all of the necessary information to produce this result, to the extent this is possible for the reasons indicated in footnote 96 in US further submission of 30 September 2003.
- (b) Please clarify whether and how the Panel should treat the figures in Exhibit BRA-182 for the net lifetime re-estimates for each respective cohort.
- (c) The Panel notes that the CCC 2002 financial statement in Exhibit BRA-158 refers to annual "administrative" expenses of \$4 million, and that the US has also referred to this figure in its submissions (e.g. US first written submission, paragraph 175). Please confirm whether the figures in the table in paragraph 161 of the US August 22 rebuttal submission (or a corrected version thereof) includes "administrative expenses", of approximately \$4 million per year over the period 1992-2002, and explain why (or why not) this affects the substantive result.
- (d) Please identify what is considered an "administrative expense" for this purpose.
- (e) The Panel notes the US statement in paragraph 160 of its answers to Panel questions following the first meeting that all cohorts are still open although the 1994 and 1995 cohorts will close this year. Is this still an accurate statement? If not, please indicate whether any cohorts have since "closed" for the period 1992-2002.
- (f) The Panel notes the current "high" figures for 1997 and 1998 indicated in the original US chart. Pending their confirmation and/or updating by the US, why does the US assert that a cohort will *necessarily* reach a "profitable" result (for example, the 1994 cohort, which has almost closed still indicates an outstanding amount)? Do "re-estimates" reflect also expectations about a cohort's future performance?
- (g) Why should the Panel "eliminate" the 2001 and 2002 cohorts from its examination, as suggested in paragraph 198 of the US further rebuttal submission?
- (h) Why should the Panel "eliminate", in addition, the 2000 cohort, as also suggested in paragraph 198 of the US further rebuttal submission for which information is presumably more "complete"?
- (i) Under the US approach, at what point in time could a Panel ever make an assessment of the programme, if it had to wait for each cohort to be completed before it could be "properly" assessed? Why is it inappropriate for the Panel to include these "most recent years" in its evaluation, as the US suggests in paragraph 199 of its 18 November further rebuttal submission? **USA**

222. For GSM 102, 103 and SCGP, please provide year-by-year amounts from 1992 to 2003 with respect to: (i) cumulative outstanding guarantees; (ii) claims paid; (iii) recoveries made; (iv) revenue from premiums; (v) other current revenue, including interest earned; (vi) interest charges paid; and (vii) administrative costs of running the programmes. Please indicate any allocation methodologies used to calculate administrative costs. **USA**

223. Are the premium rates applicable to GSM 102, 103 and SCGP subject to regular review as to their adequacy in enabling the operating costs and losses associated with these programmes? If so, what criteria or benchmarks are taken into consideration for this purpose? Secondly, how do the premium rates applied compare with the implicit cost of forfeiting transactions and with premiums for export credit insurance? **USA**

224. Please indicate how the CCC's cost of borrowing was treated in the 2002 financial statement of the CCC, in Exhibit BRA 158. **USA**

225. Please indicate whether there was any instance where the CCC "wrote off" debt and, if so, please indicate the accounting regulation or principle used. If a "written off" debt is subsequently recovered, do the CCC's accounts reflect both the interest cost and interest received in relation to the debt during the time it was "written off"? **USA**

226. If a debt was "written off" more than ten years ago, does it still create a cost to the programme? If so, how is this reflected in the 2002 financial statement of the CCC, in Exhibit BRA 158 (or any other material)? **USA**

227. The United States has indicated that Brazil continues to "mischaracterize" the amount of \$411 million in the 2002 financial statement of the CCC, in Exhibit BRA 158, pp. 18 & 19. Can the United States please indicate how it believes this amount – referred to on p. 19 of the Exhibit as "Credit Guarantee Liability-End of Fiscal Year" - should be properly characterized? How, if at all, does it represent CCC operating costs or losses? **USA**

228. What accounting principles should the Panel use in assessing the long-term operating costs and losses of these three programmes? For example, if internal US Government regulations require costs to be treated differently to generally accepted accounting principles, is it incumbent on the Panel to conduct its analysis in accordance with that treatment? **BRA, USA**

E. SERIOUS PREJUDICE

229. What is the meaning of the words "may arise in any case where *one or several* of the following apply" (emphasis added) in Article 6.3 of the *SCM Agreement*? Please comment on the possibility that these words indicate that one of the Article 6 subparagraphs may not be sufficient to establish serious prejudice and that serious prejudice should be considered an additional or overriding criterion to the factors specified in the subparagraphs. **BRA**

230. Please comment on Brazil's views on Article 6.3 of the *SCM Agreement* as stated in paragraphs 92-94 of its further submission. **USA**

231. Do you believe that the now-expired Article 6.1 and/or Annex IV of the *SCM Agreement* are relevant context for the Panel's interpretation of Article 6.3? **USA**

232. How, if at all, should the Panel take into account the effects of other factors in its analysis of the effects of US subsidies under Article 6.3? If the Panel should compare the effects of other factors to establish the relative significance of one compared to others, how would this be done? What would be relevant "factors" for this purpose? **BRA**

233. In Brazil's view, what is or are the "same market(s)" for the purposes of Article 6.3(c)? Does Brazil's view of "world market" imply that regardless of which domestic (or other) "market" is examined, price suppression will be identifiable? **BRA**

234. Does "significant" price suppression under Article 6.3(c) necessarily amount to "serious" prejudice within the meaning of Article 5(c)? Could the level of "significance" of any price suppression under Article 6.3(c) determine whether any prejudice under Article 5(c) rises to the level of "serious prejudice"? **USA, BRA**

235. Please comment on paragraphs 8, 9 and 10 of the US 2 December oral statement, in particular, why the average Brazilian price is shown as lower than the average US price. **BRA**

236. The Panel notes Exhibit US-47 (and the chart in paragraph 13 of the US 2 December oral statement). Please provide a conceptually analogous chart to Exhibit US-63 with respect to data relating to the US interpretation of "world market share". **USA**

237. Could a phenomenon that remains at approximately the same level over a given period of time be considered a "consistent trend" within the meaning of Article 6.3(d)? Do parties have any suggestions as to how to determine a "consistent trend", statistically or otherwise? **BRA, USA**

238. According to the US interpretation of the term "world market share":

- (a) should the domestic consumption of closed markets be added into the denominator?
- (b) if US production and consumption increased by the same percentage, whilst the rest of the world's production and consumption remained steady, would this imply an increase in the US "world market share" by a different percentage?
- (c) does Saudi Arabia have a small world market share for oil? **USA**

239. How does the US respond to Brazil's assertions that, under the US interpretation of the term "world market share":

- (a) there would be no WTO disciplines on production-enhancing subsidies that increase a Member's world market share of exports? (see paragraph 64 of Brazil's 2 December oral statement);
- (b) a Member's exports would have to be disregarded in calculating their "world market share" in terms of "world consumption"? (see e.g. paragraph 65 of Brazil's 2 December oral statement) **USA**

240. Does Article XVI:3 of GATT 1994 provide context in interpreting Article 6.3(d) of the *SCM Agreement*? Do these provisions apply separately? If not, could it indicate that "world market share" is intended to mean the same as "share of world export trade"? **USA**

241. How does the US reconcile its data on consumption for 2002 in US Exhibit 40, Table 1 with the "consumption" data it refers to in its 30 September submission, paragraph 34, Exhibit US-47 or US-71? **USA**

242. How much of the benefits of PFC, MLA, CCP and Direct Payments go to land owners? If not all of the benefits go to land owners, what proportion goes to producers? **USA**

243. Can the Panel assume that any support at all, even marketing loan programme payments, benefits upland cotton if an upland cotton producer has other agricultural production besides upland cotton? **USA**

244. What proportion of the 2000 cottonseed payments benefited *producers of upland cotton*, given that payments were made to *first handlers*, who were only obliged to share them with the producer to the extent that the revenue from sale of the cottonseed was shared with the producer? (see 7 CFR §1427.1104(c) in Exhibit US-15). **BRA**

245. Can a panel take Green Box subsidies into account in considering the effects of non-Green Box subsidies in an action based on Articles 5 and 6 of the *SCM Agreement*? **BRA, USA**

246. Can a panel take prohibited subsidies into account in considering the effects of subsidies in an action based on Articles 5 and 6 of the *SCM Agreement*? **BRA, USA**

247. Can the Panel take into account trends and volatility in market and futures prices of upland cotton after the date of establishment of the Panel? If so, how do they affect the analysis of Brazil's claim of a threat of serious prejudice? **BRA, USA**

F. STEP 2

248. In respect of the level of Step 2 payments in certain time periods, the Panel notes, *inter alia*, footnote 129 in the US first written submission; footnote 33 in the US 18 November further rebuttal submission; and Exhibit BRA-350. Have Step 2 payments ever been zero since the elimination of the 1.25 cent per pound threshold in the FSRI Act of 2002? In what circumstances could a Step 2 payment be zero? How does the elimination of the 1.25 cent per pound threshold in the FSRI Act of 2002 affect your response? **BRA, USA**

249. The Panel notes that the definition of eligible "exporter" in 7 CFR 1427.104(a)(2) includes "a producer":

- (a) How does this reconcile with Brazil's argument that Step 2 "export payments" do not directly benefit the producer?⁴ How, if at all, would this be relevant for an analysis of the issue of export contingency under the *Agreement on Agriculture* or the *SCM Agreement*? **BRA**
- (b) How does this reconcile with Dr. Glauber's statement in Exhibit US-24, p. 3 (referring to "the 1990 Farm Bill and subsequent legislation") that Step 2 payments do *not* go directly to the producer? **USA**
- (c) What proportion of Step 2 "export payments" go to producers? Please supply supporting evidence. **USA**

G. REMEDIES

250. Does Brazil seek relief under Article XVI of *GATT 1994* in respect of expired measures? What type of recommendation would the Panel be authorized to make? (Brazil further submission, paragraph 471 (iii)) **BRA**

251. In light, *inter alia*, of Article 7.8 of the *SCM Agreement*, if the Panel were to find that any subsidies have resulted in adverse effects to the interests of another Member within the meaning of Article 5 of the *SCM Agreement*, should it make any recommendation other than the one set out in the first sentence of Article 19.1 of the DSU? **BRA**

⁴ For example, Brazil's response to Panel Question 125, paragraph 14.

252. Without prejudice to any findings by the Panel, if the Panel were to find that any of the challenged measures constitute prohibited subsidies within the meaning of Article 3 of the *SCM Agreement*, what are the considerations that should guide the Panel in making a recommendation under Article 4.7 of the *SCM Agreement* relating to the time period "within which the measure must be withdrawn"? What should that time period be? **BRA**

H. MISCELLANEOUS

253. Regarding the adjustment authority related to Uruguay Round compliance in s.1601(e) of the FSRI Act of 2002 (the so-called "circuit-breaker provision"):

- (a) Does it relate to export credit guarantees, crop insurance and cottonseed payments?
- (b) Does it relate only to compliance with AMS commitments?
- (c) Is the authority discretionary? If so, can its exercise be limited by the legislative branch of government?
- (d) How would the Secretary exercise her authority to prevent serious prejudice to the interests of another Member? How would she exercise her authority to prevent a threat of serious prejudice to the interests of another Member? At what time and on the basis of what type of information would she exercise her authority?
- (e) What does "to the maximum extent practicable" mean? In what circumstances would it not be practicable for the Secretary to exercise her adjustment authority? **USA**

254. Would payments made after the date of panel establishment be *mandatory* under the marketing loan, direct payments, counter-cyclical payments and user marketing certificate (step 2) programmes, but for the circuit-breaker provision? **USA**

255. How does Brazil respond to US assertions concerning the circuit-breaker provision? (see US 2 December oral statement, paragraph 82). Does this mean that US subsidies cannot be "mandatory" for the purposes of WTO dispute settlement? **BRA**

256. The United States submits that the Panel cannot make rulings without allocating precise amounts of payments to upland cotton production. However, to the extent that such precise data is not on the Panel record, to what extent can the Panel rely on less precise data, and on reasonable assumptions, in fulfilling its duty under Article 11 of the *DSU* in this case? **USA**

ANNEX L-1.19

**COMMUNICATION TO BRAZIL
AND THE UNITED STATES**

23 December 2003

Please find attached additional questions from the Panel.

We would ask the parties to provide their responses by **12 January 2004**. The parties may submit any comments on each other's responses by **19 January 2004**.

Additional Questions from the Panel to the parties –
following the second substantive Panel meeting

257. The Panel takes note of the Appellate Body Report in *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* (DS244), which was circulated to WTO Members on 15 December 2003. The Panel is aware that this report has yet to be adopted by the Dispute Settlement Body. Nevertheless, the Panel asks the parties to respond to the following related questions.

- (a) In that report, the Appellate Body cautioned against the "mechanistic" application of the so-called "mandatory/discretionary distinction" and stated that the import of this distinction may vary from case to case (para. 93). For the Appellate Body, the question of whether a measure is mandatory or not is relevant "if at all" only as part of the assessment of whether the measure is, as such, inconsistent with particular obligations. How, if at all, are these statements and the related findings concerning the mandatory/discretionary distinction in that Appellate Body Report relevant to:
- (i) the legal standard and elements Brazil sets out to establish its export and prohibited subsidy claims under the provisions of the *Agreement on Agriculture* and Articles 3.1(a) and (b) of the *SCM Agreement*, concerning: **BRA**
 - Step 2 payments (see, e.g. paras. 244-245 & 250 Brazil's first written submission; Panel Question 109 and parties' responses/comments thereon); and
 - export credit guarantee programmes: GSM-102, GSM-103 and SCGP (see, e.g., para. 90 Brazil's oral statement at second Panel meeting).
 - (ii) the legal standard and elements Brazil sets out to establish its serious prejudice and "threat of serious prejudice" claims, and in particular, its designation of marketing loan; crop insurance; counter-cyclical payments; direct payments and Step 2 as "mandatory"? **BRA**
 - (iii) the legal standard and elements Brazil sets out to establish its "*per se*" "serious prejudice" claims (e.g. Brazil's 9 September further submission, para. 417 *ff*; US oral statement at second Panel meeting, para. 86 *ff*)? **BRA**
- (b) How and to what extent are the legal and regulatory provisions cited in paras. 415 and 423 of Brazil's 9 September further submission "normative" in nature and treated as binding within the US legal system (see, e.g., para. 99 of the Appellate Body Report)? Does your response differ depending on whether the payments are dependent upon market price conditions? **BRA**
- (c) Does Brazil challenge as "mandatory" the "subsidies" themselves, the subsidy programmes or the legal/regulatory provisions for the grant or maintenance of those subsidies, or something else? **BRA**
- (d) Does the "requirement" upon the CCC to make available "not less than" \$5.5 billion annually in guarantees have a normative character and operation? (see, e.g. Brazil's response to Panel Question 142; Exhibit BRA-297, 7 USC 5641(b)(1); 7 USC 5622(a) & (b); paragraph 201 of US 18 November further rebuttal submissions). Is this requirement "mandatory"? If so, how does the CCC have "discretion" not to make this amount of guarantees available in a given year? **USA**

- (e) Does the US agree that, under the Budget Enforcement Act of 1990, the Office of Management and Budget classifies the export credit guarantee programs as "mandatory" (see Brazil's response to Panel Question 142, para. 89)? Does this exempt the programmes from the requirement to receive new Congressional budget authority before it undertakes new guarantee commitments (*e.g.* Exhibit BRA-117 (2 USC 661(c)(2)))? **USA**

ANNEX L-1.20

COMMUNICATION TO BRAZIL AND THE UNITED STATES

24 December 2003

The Panel has received a letter from Brazil dated 23 December (numbered 760), in which it requests extension of certain deadlines. The Panel has also received a response from the US, dated 23 December. Having carefully considered the views of both parties, the Panel notifies the parties that it would amend the four immediate deadlines and schedules as follows:

- (1) all submissions originally due 12 January 2004 would now be due **Tuesday, 20 January 2004**
- (2) all submissions originally due 19 January 2004 would now be due **Wednesday, 28 January 2004**.
- (3) issuance of descriptive part of the report to parties (currently scheduled for 26 January) would be rescheduled to **Wednesday, 4 February 2004**.
- (4) receipt of comments by parties on the descriptive part of the report (currently scheduled for 19 February) would be rescheduled to **Monday, 1 March 2004**.

All subsequent dates remain unchanged. However, please be reminded that such dates may be changed in light of further developments.

ANNEX L-1.21

COMMUNICATION TO BRAZIL AND THE UNITED STATES

12 January 2004

The Panel takes note that, as stated in its letters dated 18 and 22 December 2003, the United States provided certain data requested by Brazil, but deleted from farm-level planted acreage data any fields that could identify individual farms. Brazil commented on this in its answer to Panel Question No. 196. The United States stated in its letter dated 18 December 2003 that "the release of planted acreage information associated with a particular farm, county and state number is confidential information that cannot be released under US domestic law, in particular the Privacy Act of 1974."

The Panel has reviewed the material submitted in support in Exhibits US-102 through 107, and makes the following observations:

- in the sample Freedom of Information Act ("FOIA") determination submitted to the Panel, the FSA appears to have relied on the fact that the acreage requested concerned a single producer only and that there was no public interest in disclosure of records which did not directly reveal the operations or activities of the US Federal Government;
- in that sample FOIA determination, the FSA applied the relevant US domestic law and expressly acknowledged that disclosure of individual data on commodity programme recipients can be released where the recipients' privacy interests in that information are outweighed by the public interest in disclosure;
- the information which the US asserts that it cannot disclose is relatively generic, concerning planted acreage, and does not relate to one individual but to tens of thousands of business people, and can be protected under the DSU and our working procedures;
- farm-specific information on contract payments is already available free of charge on the internet on the EWG database, having been disclosed under the FOIA; and
- comprehensive farm-specific information concerning rice, including planted acreage data associated with particular farm, county and state numbers, was provided on request under the FOIA to a member of the public who was assisting Professor Sumner in the presentation of Brazil's case to the Panel. A sample of this data is set out in Exhibit BRA-369.

Article 13.1 of the DSU relevantly provides as follows:

"A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information."

Pursuant to Article 13 of the DSU, the Panel requests the United States to provide the same data that it agreed to provide in its letters dated 18 and 22 December 2003 but in a format which permits matching of farm-specific information on contract payments with farm-specific information

on plantings. The Panel considers it both necessary and appropriate to seek this information in a suitable format in order to undertake its mandate to assist the DSB in discharging its responsibilities under the DSU and the covered agreements. Disclosure is sought to permit an assessment of the total expenditures of PFC, MLA, CCP and direct payments by the US Federal Government to upland cotton producers in the relevant marketing years.

The United States may again designate the data as confidential in accordance with paragraph 3 of the Panel's working procedures. Disclosure can be limited to Brazil's delegation, the Panel and Secretariat staff assisting the Panel. The United States may also protect the identity of individual producers by, for example, using substitute farm numbers which still permit data-matching.

A refusal by the United States to provide the information as requested without an adequate explanation may lead to adverse inferences being drawn.

The Panel reminds Brazil that it may not disclose the above information outside its delegation in this proceeding if it is designated by the United States as confidential.

The Panel also wishes to pose the following additional question to Brazil:

258. Please submit a detailed explanation of the method by which one could calculate total expenditures to producers of upland cotton under the four relevant programmes on the basis of the data which it seeks.

The Panel asks the parties to provide the respective information requested by 20 January 2004.

ANNEX L-1.22

COMMUNICATION TO BRAZIL AND THE UNITED STATES

3 February 2004

Please find attached the Panel's supplementary request to the United States for information pursuant to Article 13 of the DSU, as well as additional questions to both parties. The Panel would like to ask the parties to provide the information requested and responses to the additional questions by **Wednesday 11 February 2004**. The Parties are invited to submit, by **Wednesday 18 February 2004**, any comments on material submitted on 11 February by the other party.

In light of the above development, the Panel intends to postpone the issuance of the descriptive part until **Friday 20 February 2004**. The remainder of the Panel's schedule remains unchanged for the time being.

The Panel recalls that it indicated, in its communication dated 14 November, that "[i]f necessary, at the discretion of the Panel, a further Panel meeting with the parties may be held" to address the issue of econometric models. The Panel would like to indicate that, at this stage, it does not see the need to hold such a meeting.

The Panel has noted the US letter dated 30 January, Brazil's response dated 2 February, and a further letter from the US dated 3 February 2004. Keeping in mind the dictates of due process and relevant provisions of the covered agreements -- including Article 12.2 of the DSU which requires Panel procedures to provide sufficient flexibility so as to ensure high-quality panel reports while not unduly delaying the panel process -- the Panel is of the view that the above revisions to the timetable provide the United States and Brazil sufficient opportunity to comment on each other's comments. Accordingly, the US is free to submit its comments on Brazil's above mentioned submission by 11 February (**but no later**).

This is without prejudice to any definitive view of the Panel on the characterization of any of the above communications by the parties and, in particular, of the document submitted by Brazil entitled "Brazil's Comments and Requests Regarding Data Provided by the United States on 18/19 December 2003 and the US Refusal to Provide Non-scrambled Data on 20 January 2004".

PANEL'S SUPPLEMENTARY REQUEST FOR INFORMATION PURSUANT TO ARTICLE 13 OF THE DSU AND ADDITIONAL QUESTIONS

The Panel has reviewed the United States' letters dated 18 December 2003 and 20 January 2004, and the material submitted in support in Exhibits US-102 through 107, and Brazil's response to Question No. 258.

Pursuant to Article 13 of the DSU, the Panel requests the United States to provide:

- (a) such of the information requested on 12 January 2004 in the format requested, as regards payment recipients who do not have interests protected under the Privacy Act 1974, if any; and
- (b) the following information for each of the PFC, MLA, CCP and direct payments programmes for each of the 1999, 2000, 2001 and 2002 marketing years, showing as many of the underlying calculations as possible:
 - How many farms had fewer upland cotton planted acres than upland cotton base acres, or equal numbers of each? We refer to these as "Category A" farms. What was the total of their upland cotton base acreage? What was the total of their upland cotton planted acreage?
 - How many Category A farms did not plant any other covered commodities? What was the total of their upland cotton base acreage? What was the total of their upland cotton planted acreage?
 - How many farms had more upland cotton planted acres than upland cotton base acres? We refer to these as "Category B" farms. What was the total of their base acreage for each covered commodity, including upland cotton? What was the total of their planted acreage for each covered commodity, including upland cotton? Please also provide the following information concerning these farms:
 - How many Category B farms had equal numbers of acres planted to all covered commodities and base acres for all covered commodities? We refer to these as "Category B-1" farms. What was the total of the base acreage of Category B-1 farms for each covered commodity, including upland cotton? What was the total of the planted acreage of Category B-1 farms for each covered commodity, including upland cotton?
 - How many Category B farms had fewer acres planted to all covered commodities than base acres for all covered commodities? We refer to these as "Category B-2" farms. How much was the total acreage of Category B-2 farms planted to all covered commodities less than their base acreage for all covered commodities? What was the total of the base acreage of Category B-2 farms for each covered commodity, including upland cotton? What was the total of the planted acreage of Category B-2 farms for each covered commodity, including upland cotton?
 - How many Category B farms had more acres planted to all covered commodities than base acres for all covered commodities? We refer to these as "Category B-3" farms.

How much did the total acreage of Category B-3 farms planted to all covered commodities exceed their base acreage for all covered commodities? What was the total of the base acreage of Category B-3 farms for each covered commodity, including upland cotton? What was the total of the planted acreage of Category B-3 farms for each covered commodity, including upland cotton?

- How many farms had upland cotton planted acres but no upland cotton base acres? We refer to these as "Category C" farms. What was the total of the base acreage of Category C farms for each covered commodity? What was the total of the planted acreage of Category C farms for each covered commodity, including upland cotton?
- In addition, for the marketing year 2002, please reply to the above questions with respect to all crops on cropland covered by the acreage reports, not simply commodities covered by the programmes.
- In addition, please provide all of the above information on a state-by-state basis.

You may wish to present your responses regarding acreage for each covered commodity in a table as follows:

TABLE

Programme:
Marketing year:
Category of Farm:

	Covered commodities								
	Upland Cotton	Barley	Corn	Oats	Rice	Sorghum	Wheat	Soybeans*	Other Oilseeds*
Base acres									
Planted acres									

* Where applicable.

The Panel considers it both necessary and appropriate to seek this information to undertake its mandate to assist the DSB in discharging its responsibilities under the DSU and the covered agreements. However, the Panel reserves its views as to the extent to which any methodology might be appropriate to determine support provided to upland cotton in the circumstances of this case.

A refusal by the United States to provide the information as requested without an adequate explanation may lead to adverse inferences being drawn.

The Panel also wishes to pose the following additional questions to the United States (Nos. 259 – 275) and to Brazil (No. 276):

259. With respect to the Privacy Act of 1974, 5 U.S.C. 552a:

(a) Whose interests are protected under section 552a(b) in light of the definition of "individual" in section 552a(a)(2)? Do all payment recipients, including corporations and organizations, have Privacy Act rights? If not, is the United States prevented by its domestic law from releasing such of the information requested on 12 January 2004 as relates to payment recipients without Privacy Act rights? Please explain with references to case law.

(b) The Panel notes that data concerning the four relevant programmes, in particular, payment amounts, identified by specific farms, is freely available on the internet. Please explain why that data can be disclosed but the requested planted acreage data cannot. Do individual recipients have Privacy Act rights with respect to their entrepreneurial activity? Please explain with references to case law.

(c) Please provide any further available evidence of the USDA's long-standing policy that planted acreage information will not be released.

260. On 27 August 2003, in its response to Question No. 67 *bis*, the United States indicated that "it does not maintain information on the amount of expenditures made under the cited programmes to US upland cotton producers". On 12 January 2004, the Panel requested the United States to provide information "to permit an assessment of the total expenditures of PFC, MLA, CCP and direct payments by the US Federal Government to upland cotton producers in the relevant marketing years". On 20 January 2004, the United States informed the Panel that "the data already provided by the United States to Brazil and the Panel would permit an assessment of total expenditures of decoupled payments to farms planting upland cotton." Is the latest statement responsive to the Panel's request? If so, how can it be reconciled with the first statement?

261. Please confirm that each record in the actual planting database relates to a specific farm (Filenames: rPFCplac and rDCPplac in Exhibits US-111 and US-112). For example, in the data from rDCPplac:

First line:

Field9;Field16;Field22;Field28;Field34;Field40;Field46;Field52;Field58;Field64;Field70;Field76;Field82;Field88;Field94;Field100

Second line:

237.10;23059.80;5566.20;0.00;0.00;0.00;0.00;0.00;0.00;0.00;0.00;0.00;0.00;0.00;0.00

Does the second line represent data on plantings by the same farm?

262. The Panel has noted the two CD-ROMs delivered by the US in the evening of 23 December 2003. They are marked "US-111" and "US-112" respectively, but the contents actually do not correspond to the indication. The Panel also takes note of the US letter dated 28 January 2004 and the CD-ROM delivered together with it. For the record, please clarify the correct CD-ROMs and provide corresponding descriptions of their contents with exhibit numbers.

263. The Panel has noted that the United States' response to Question No. 214 refers to Exhibits US-117 and US-118. Are these the correct documents to which the United States intended to refer in that response? If not, please provide a copy of regulations regarding the

marketing loan programme and loan deficiency payments published at 58 Federal Register 15755, dated 24 March 1993.

264. The Panel asks the United States to clarify certain aspects of Exhibit US-128:

(a) Is the Panel correct in understanding that -- as Brazil asserts in footnotes 290 and 291 of Brazil's 28 January 2004 comments on US responses to questions -- Exhibit US-128, all data are presented on a cohort-specific basis? If so, please also present the information originally requested by the Panel in another chart containing *programme* (as opposed to cohort-specific) activity by fiscal year.

(b) Does the US agree with the statement in paragraph 135 of Brazil's 28 January 2004 comments on US responses to questions that the difference between the \$1,148 billion in the chart at para. 165 of Brazil's 11 August answers to questions and the \$666 million amount in Exhibit US-128 (\$1.75 billion) closely corresponds to the total "Claims rescheduled" figure reported by the US in Exhibit US-128 (column F)?

(c) Does the US agree that from the formula in column G (that is: (Column (D) minus (E) minus (F)), it follows that a rescheduled claim no longer constitutes an outstanding claim at the moment the terms of the re-scheduling are agreed and that a rescheduling is treated as 100 per cent recovered, as Brazil states in footnote 292 of Brazil's 28 January 2004 comments on US responses to questions?

(d) Is the Panel correct in understanding that the amount of \$888,984,792.04 in column F in Exhibit US-128 under "ALL" for 1992 represents the total continuing amount of unrecovered claims for the 1992 cohort, and that the amount of 387,692,219.39 represents the total continuing amount of unrecovered claims for the 1993 cohort, etc? Please indicate and substantiate how much principal and/or interest has actually been paid/recovered/rescheduled *annually* 1992-2003 in respect of each of the amounts shown in Columns D, E & F in the table.

265. In connection with the US response to Question No. 225, please also provide amounts actually "written off" and "forgiven" annually for each *post*-1992 cohort, with annual details of country and amount (principal/interest).

266. What are the precise terms, conditions and duration of each rescheduling reflected in column F in Exhibit US-128?

267. Is the Panel correct in understanding that "interest collected on reschedulings" in Column M in Exhibit US-128 refers not to amounts that have been actually collected by the CCC but rather to interest capitalized in conjunction with the rescheduling? If so, what are the terms, conditions and duration of the arrangements pertaining to these amounts?

268. Concerning Column N in Exhibit US-128, please elaborate upon "Interest earned from US Treasury on uninvested funds". What is the source and authority for these funds and for the interest thereon to be part of the CCC total revenues? What are the terms, conditions and duration of the arrangements pertaining to these amounts?

269. The Panel notes the table submitted by the US in its answer to Question No. 224 (CCC Financing Account Payments of Interest on Borrowings from Treasury and Interest Earned on Uninvested Funds). Is the Panel correct in understanding that the figures in this table correspond to the "ALL" figures in Columns I and N of Exhibit US-128?

270. With respect to Column I in Exhibit US-128, ("Interest paid on borrowing from US Treasury") and Note 8, p. 25 of Exhibit US-129:

(i) please provide the total annual amounts (interest bearing and non-interest bearing) borrowed by the CCC from the US Treasury (annually since 1992), as well as the terms, conditions, interest rate (where applicable) and duration of such borrowing. Please provide details of any other amount borrowed by the CCC from the US Treasury during this period that may not have formed part of the regular annual borrowings.

(ii) Please explain the nature of "CCC's permanent indefinite borrowing authority from Treasury" referred to in Note 8, p. 25 of Exhibit US-129.

(iii) What determines the level of CCC export credit guarantee borrowing (interest-bearing and non-interest-bearing)? Is the interest-free borrowing up to the amount of unreimbursed realized losses?

(iv) Why are repayments applied to non-interest bearing notes first, as indicated at Note 8, p. 25 of Exhibit US-129?

271. Note 8, p. 25 of Exhibit US-129 states that "In fiscal year 2003, CCC was fully reimbursed for its prior year net realized losses." Please indicate the amounts of prior year net realized losses (annually, since 1992) for which the CCC has been fully reimbursed.

272. With respect to the US response to Question No. 226, is the Panel correct in understanding that the reflection of write-offs as part of the operating loss of the CCC which in turn was replenished through the annual appropriations process ended with the entry into force of the FCRA in fiscal year 1992? If not, what amounts have been replenished through this process annually since fiscal year 1992?

273. With respect to the US response to Question No. 225, what criteria does the CCC apply to "independently determine" that a debt is uncollectible? For post-1992 cohorts, what are these uncollectible amounts (annually) and how, if at all, are such "uncollectible amounts" shown in Exhibit US-128?

274. The Panel notes the US statement in the US response to Question No. 81 that "All rescheduled claims are currently performing "and that "all payments due up to this point under [rescheduling] agreements have been received". However, the Panel also notes Exhibit US-129 (in particular, Note 5 on p. 22) and Brazil's reference thereto in Brazil's 28 January comments on the US response to Question No. 222. In this connection:

(a) How does the US respond to Brazil's statement in Brazil's 28 January comments that Exhibit US-129 confirms that rescheduling of export credit guarantee receivables cover both principal and interest, thereby confirming that not all of the rescheduled debt performs and that additional interest charges were also rescheduled?

(b) In Note 5 on p. 22 of Exhibit US-129, what is the definition of "non-performing"? What is the meaning of "delinquent"? What is the current principal balance and amount of interest of the three CCC export credit guarantee programme "receivables" in a non-performing status (individually and together, for GSM 102, GSM 103 and SCGP)? What is the amount of interest on non-reporting "receivables"?

(c) The Panel notes the US reference to the "Paris Club" in US response to Question No. 225. What is the P.L. 480 programme referred to in Note 5 on p. 22 of Exhibit US-129 (including the Paris Club debt reduction process and the HIPC Initiative)? To what extent is the P.L. 480 programme and Paris Club process relevant to the export credit guarantee programmes at issue in this dispute? Please identify and give the amounts of all CCC export credit guarantee debt subject to the P.L. 480 debt reduction (or other similar) process since 1992.

(d) Can the US explain the process referred to in the second column of Note 5 on p. 22 ("CCC is awaiting an apportionment from the Office of Management and Budget before the transaction can be completed. Until such time, however, there is a 100% subsidy allowance established against the relevant debt as of September 30, 2003.") Please provide details of all such "apportionments" relating to the three export credit guarantee programmes in fiscal years 1992-2003.

275. Please provide evidence (or cite relevant portions of the record) that the premium rates for the export credit guarantee programmes are "reviewed annually" as stated in US 28 January comments on response to Question No. 223 (see also US 22 December response to Question No. 107; Brazil's 28 January 2004 comments on responses to Question No. 223.).

The Panel wishes to pose the following additional question to Brazil:

276. The Panel notes the parties' responses and comments relating to Question No. 252 concerning the time period within which any prohibited measure must be withdrawn within the meaning of Article 4.7 of the *SCM Agreement*. Please supplement your original response, taking into account the particular nature of each alleged prohibited subsidy measure (i.e. "Step 2" payments under Section 1207(a) of the 2002 FSRI Act, export credit guarantee programmes and the ETI Act) and the functioning of the US legal and regulatory system in respect of these measures.

ANNEX L-1.23

COMMUNICATION TO BRAZIL AND THE UNITED STATES

16 February 2004

1. The Panel is in receipt of the letter from the U.S. dated 11 February, the response from Brazil dated 13 February and another US letter dated 16 February.
2. On page 2 of the United States letter of 11 February, with respect to item (b) of the Panel's supplementary request for information, the United States asks the Panel to specify which commodities are "covered commodities". We would like to clarify that "covered commodities" and "commodities covered", as used in the bullet points and sub-bullets, refer to wheat, corn, grain sorghum, barley, oats, upland cotton, rice, soybeans, "other oilseeds" as defined in Section 1001(9) of the FSRI Act of 2002, and peanuts, except that soybeans do not apply to PFC payments and "other oilseeds" and peanuts do not apply to PFC or MLA payments.
3. The Panel also confirms that the additional information sought for marketing year 2002 "with respect to all crops on cropland covered by the acreage reports" refers to the reports filed under Section 1105(c) of the FSRI Act of 2002. The relevant portions of the "above questions" are those that ask for planted acreage information for each Category of farms. All crops other than "covered commodities" as defined in Section 1001(4) of the FSRI Act of 2002 and peanuts may be aggregated as "other crops".
4. In relation to the third point the US raises in its letter dated 11 February, the Panel informs the parties as follows:
 - (a) Without prejudice to whether any further comments are necessary, we would consider the US request for another opportunity to comment if Brazil submits any such comments on the US submission entitled "Comments of the United States of America on the Comments of Brazil to US data Submitted on 18 and 19 December 2003" (submitted 11 February).
 - (b) The US would be granted until **Tuesday 3 March**, at the latest, to submit all remaining data that was requested by the Panel in its communication dated 3 February.
 - (c) The issuance of the descriptive part would be changed to **Friday 5 March**.
 - (d) The remainder of the Panel's schedule remains unchanged for the time being.
5. The Panel notes that the data submitted by the United States, as described in Exhibit US-145, does not include data on MLA and CCP payments. The Panel asks the United States to address these payments and include this information in its response to the supplementary request for information.
6. The Panel also notes that the US response to Panel Question No. 263 refers to Exhibit US-263. Could the United States please confirm that this should refer to Exhibit US-146.

7. The Panel further notes Brazil's request for an opportunity to comment after the United States has submitted the data referred to in paragraph 4(b) above. The Panel will consider this request after it has had the opportunity to review data submitted by the United States.

ANNEX L-1.24

COMMUNICATION TO BRAZIL AND THE UNITED STATES

20 February 2004

1. The Panel refers to its communication dated 16 February. Item 4 (a) of this communication deals with the request made by the United States (in its letter dated 11 February) that it be provided another opportunity to comment on a certain submission from Brazil. The Panel has informed parties in the same 4 (a) that it would consider this request if Brazil submits any such comments. The Panel has received on 18 February a submission entitled "Brazil's Comments on United States 11 February Comments on Brazil's 28 January 'Comments and Requests Regarding Data Provided by the United States on 18/19 December 2003 and the US Refusal to Provide Non-scrambled Data on 20 January 2004'". The Panel understands that this submission corresponds to what the United States was requesting to be given another opportunity to comment on. The Panel would now allow the United States to submit, if it so wishes, comments on this specific submission from Brazil by **Wednesday 25 February**. The Panel informs parties that it does not see, at this time, the need to have further opportunities to comment on this submission (if any) from the United States.

2. The Panel also takes note of Brazil's observation in paragraph 33 of its 18 February "Comments on US 11 February 2004 Answers to Additional Questions from the Panel Following the Second Meeting of the Panel with the Parties" that "...the Panel did not respond to Brazil's request that it deny the United States' efforts to decide at what pace it wishes to offer responses to the Panel's questions". The Panel also recalls the United States' original statement in connection with Question 264(b) that it "expects to be able to provide an answer within the same time period as its response to the Panel's supplemental request for information." In this connection, we wish to draw the parties' attention to our statement in item 4(b) of the 16 February communication, and to clarify that that statement also pertains to the United States response to Question 264(b). Thus, the United States has until **3 March**, at the latest, to submit its response. We further note that Brazil states in the same paragraph 33 that it "reserves the right to comment" on the United States response to Question 264(b). In line with what we mentioned in paragraph 7 of our communication dated 16 February, we would decide whether it is appropriate to give Brazil the opportunity, *after* we have had the opportunity to review the response from the United States.

ANNEX L-1.25

COMMUNICATION TO BRAZIL AND THE UNITED STATES

24 February 2004

The Panel is in receipt of the letter from the United States dated 23 February 2004.

After carefully considering the views of the United States, we now change the date by which the United States is expected to submit its comment from the date originally designated as 25 February in our communication dated 20 February, to **3 March 2004**.

All other statements in our communication dated 20 February remain unchanged.

ANNEX L-1.26

COMMUNICATION TO BRAZIL AND THE UNITED STATES

4 March 2003

The Panel is in receipt of the submissions from the United States dated 3 March. The Panel reminds parties of our communications dated 16, 20 and 24 February 2004, especially in relation to our intention to consider whether or not to allow Brazil to comment on certain US submissions. After carefully examining yesterday's submission from the United States, the Panel informs parties of the following amendment to the current timetable.

1. Brazil is granted until **10 March 2004** to submit comments, if any, on (a) the data supplied by the United States, dated 3 March, in the form of a CD-ROM (i.e. 8 data files therein) and (b) the submission entitled "Answers of the United States of America to Questions 264(b) Dated 3 February 2004, from the Panel to the Parties following the Second Panel Meeting". The Panel does not see the need to grant Brazil the opportunity to comment on any other submission from the United States.
2. The United States is granted until **15 March 2004** to submit comments, if any, on the submission from Brazil to be received by 10 March 2004.
3. The descriptive part will be issued on **16 March 2004**.
4. Comments on the descriptive part is to be received by **30 March 2004**.
5. The rest of the timetable remains unchanged for now.

ANNEX L-1.27

COMMUNICATION TO BRAZIL AND THE UNITED STATES

7 April 2004

The Panel informs the parties of the following change in the timetable for this dispute. As indicated, the Panel now intends to issue the interim report to the parties on Monday 26 April 2004.

Issuance of the interim report, including the findings and conclusions, to the parties:	26 April 2004
Deadline for parties to request review of part(s) of report:	10 May 2004
Interim review meeting with the parties, if requested. If interim review meeting not requested, the deadline for comments on each others' comment.	3 June 2004 (if a review meeting is to be held, 4 June as well as 3 June, as necessary.)
Issuance of final report to the parties:	18 June 2004
Circulation of the final report to Members:	[after translation]

ANNEX L-2.1

COMMUNICATION TO THIRD PARTIES

28 May 2003

Your delegation has reserved its rights to participate as a third party in the Panel *United States - Subsidies on Upland Cotton (DS267)*- Complaint by Brazil - established by the DSB on 18 March 2003. The Panel has now started its work.

Attached you will find the timetable and working procedures adopted by the Panel for this dispute in accordance with Article 12.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").

As indicated in the attached timetable, prior to the submission by the parties of their first written submissions in these proceedings, the Panel has requested the parties to address, in their initial briefs to the Panel (to be submitted on 5 June 2003), the following:

- whether Article 13 of the *Agreement on Agriculture* precludes the Panel from considering Brazil's claims under the *Agreement on Subsidies and Countervailing Measures* in these proceedings in the absence of a prior conclusion by the Panel that certain conditions of Article 13 remain unfulfilled. In particular, the Panel invites the parties to explain their interpretation of the words "exempt from actions" as used in Article 13 of the *Agreement on Agriculture*, as well as bringing to the Panel's attention any other relevant provisions of the covered agreements and any other relevant considerations which the parties consider should guide the Panel's consideration of this issue. For greater clarity, the Panel invites the parties, during this initial stage of the proceedings, to focus on matters of legal interpretation, rather than upon the submission of any factual evidence that might be associated with the substantive elements of Article 13.

As also indicated in the attached timetable, the Panel will invite the parties to submit any written comments on each other's comments on this issue (i.e. on 13 June 2003). The Panel intends to rule on these issues on 20 June 2003, prior to the parties' submission of their first written submissions.

We have invited the parties to serve also on the third parties their initial briefs and any responding comments. The Panel also invites third parties to submit any written comments they might have concerning the initial phase of these proceedings. **The deadline for any initial third party comments on the specific issue identified above is 10 June 2003.**

Moreover, as also indicated in the attached timetable, the Panel invites your delegation to present its views at a meeting with the parties to the dispute and other third parties, which is scheduled for 24 July 2003. The exact time and venue will be communicated to you in due time.

The Panel would appreciate it if your delegation could provide the Panel with your written submission by 5.30 p.m. on 15 July 2003. If you so wish, this written statement may take the place of an oral presentation to the Panel. The Panel would appreciate the submission being kept as short as possible. I would appreciate it if you would advise the Panel before 1 July 2003 through me as Secretary to the Panel (telephone 022/739 6419) whether your delegation will be represented at the meeting and whether your delegation will require interpretation services into and out of English.

[Attachment omitted]

ANNEX L-2.2

COMMUNICATION TO THIRD PARTIES

25 July 2003

Please find attached a communication from the Panel on the following issues:

1. The Panel's view on the preliminary ruling requested by the United States.
2. Panel's questions to third parties.

The Panel's questions are intended to facilitate the work of the Panel, and do not in any way prejudice the Panel's findings on the matter before it. Nor does the fact that the Panel has placed these questions under certain headings prejudice the Panel's findings on the matter before it. Each third party is free to respond to or comment on questions posed to the other third parties.

Please be reminded that you are requested to submit answers by the close of business of 4 August 2003. Subsequently, third parties can submit comments to other's responses by the close of business 22 August.

[1st attachment omitted]

Questions from the Panel to the third parties –
First session of the first substantive Panel meeting

ARTICLE 13 OF THE *AGREEMENT ON AGRICULTURE*

1. Australia has argued that Article 13 of the *Agreement on Agriculture* is an affirmative defence. How do you reconcile this with your view that the conditions in Article 13 are a "prerequisite" to the availability of a right or privilege? **Australia** Would other third parties have any comments on Australia's assertion? **3RD parties, in particular Argentina, Benin, China, Chinese Taipei**

ARTICLE 13(B) OF THE *AGREEMENT ON AGRICULTURE*: DOMESTIC SUPPORT MEASURES

2. 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*. **3rd parties, in particular Australia, Argentina, Canada, EC, NZ**

3. 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. **3rd parties, in particular Australia, Argentina, Canada, EC, NZ**

4. How often can a Member define and fix a base period in accordance with paragraph 6 of Annex 2 of the *Agreement on Agriculture*? **3rd parties, in particular Australia, Argentina, Canada, China, EC, NZ**

5. Do you agree that a payment penalty based on crops produced is "related to type of production"? **EC**

6. Please explain the meaning of the word "criteria" in Article 6.1 and 7.1. What effect, if any, does the use of the word "Accordingly" in paragraph 1 of Annex 2 of the *Agreement on Agriculture* have on the meaning of the preceding sentence? **3rd parties, in particular Australia, Argentina, Canada, EC, NZ**

7. Please explain the meaning of the words "the fundamental requirement" as used in paragraph 1 of Annex 2 of the *Agreement on Agriculture*. **3rd parties, in particular Australia, Argentina, Canada, EC, NZ**

8. In your oral statement, you emphasize the use of the word "criteria" in other parts of the *Agreement on Agriculture*, as distinct from the reference to "fundamental requirement" in the first sentence of paragraph 1 of Annex 2. Is it the case that sub-paragraphs (a) and (b) of paragraph 1 of Annex 2 are also "criteria"? **EC**

9. If the first sentence of paragraph 1 of Annex 2 is a stand-alone obligation, does this allow effects-based claims of non-compliance with Annex 2? If so, how does this affect the purpose of Article 13(b)? **3rd parties, in particular Australia, Argentina, Canada, EC, NZ**

10. 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? **3rd parties, in particular Australia, Argentina, Canada, EC, NZ**

11. 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. **3rd parties, in particular, Australia, Argentina, Canada, EC, NZ**

12. Where does Article 13(b) require a year-on-year comparison? **3rd parties, in particular Australia, Argentina, Canada, China, EC, NZ**

13. 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)? **3rd parties, in particular Australia, Argentina, Canada, China, EC, NZ**

14. Does a failure of 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)? **3rd parties, in particular Australia, Argentina, Canada, China, EC, NZ**

15. Is there any basis on which counter-cyclical payments could be considered product-specific? **3rd parties, in particular Australia, Argentina, Canada, China, EC, NZ**

16. If the word "specific" were deleted from Article 13(b)(ii), would this change the meaning of the subparagraph? **3rd parties, in particular Australia, Argentina, Benin Canada, China, EC, NZ**

17. 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*? **3rd parties, in particular Australia, Argentina, Canada, China, EC, NZ**

18. Benin's oral statement considers the phrase "support to a specific commodity" in Article 13(b)(ii) of the *Agreement on Agriculture*. How does Benin believe that phrase is best interpreted. Please substantiate your response, commenting on other submissions by parties and third parties as you believe appropriate. **Benin**

19. Where does Article 13(b)(ii) require a year-on-year comparison? **3rd parties, in particular Australia, Argentina, Canada, EC, NZ**

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

21. Please comment on Brazil's assertion that the terms "grant" and "decided" in Article 13(b)(ii) have broadly the same meaning. If so, why did the drafters not use the same term? **3rd parties, in particular, Australia, Argentina, Canada, China, EC, NZ**

22. What is the meaning of "support" in *Agreement on Agriculture* 13(b)(ii) ? Why would it be used differently from Annex 3, where it refers to total outlays? **3rd parties, in particular, Australia, Argentina, Canada, China, EC, NZ**

23. Should support be compared under Article 13(b)(ii) in terms of unit of production or total volume of support or both? **3rd parties, in particular, Australia, Argentina, Canada, China, EC, NZ**

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

25. 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". **3rd parties, in particular Australia, Argentina, Canada, China, EC, NZ**

26. Under Article 13(b)(ii), a comparison is required between support at different times. One of the issues which is contested between the parties is whether the only later period that the Panel can consider is the present one (i.e. the period underway at the time of the request for establishment of the Panel). This argument is based on the present tense of the words "do not grant" in the English text. The Panel asks whether there is any difference in the verb tense as used in the Spanish-language text, or any other difference which might aid the Panel in interpreting these words? **Argentina, EC, Paraguay, Venezuela**

27. If the 1992 "decision" led to or was the funding source for the money provided in 1992 and later years, is it the full amount of all that funding that constitutes the "support" decided in 1992? If the answer to this question is that it is the full amount of all the support provided pursuant to the "decision" that must be taken into account, must this be compared with the total amount of support that will or might flow from the decision made in the more recent period for the purposes of the comparison required under Article 13(b)(ii)? If a Member did not make a "decision" (however that may be interpreted) in 1992 about "support", is it the case that the Member has a zero base for the purposes of the comparison required under Article 13(b)(ii)? **EC**

28. In paragraph 13 of Australia's oral statement, you state that a "question" is: "could conditions of price competition for the purposes of a non-violation or impairment claim be assessed solely on the basis of budgetary outlay figures, as argued by Brazil, or on the basis of a rate of payment, as argued by the United States? In Australia's view, both factors put forward by Brazil and the United States would properly form a part of that assessment, but not the whole." Could you please clarify this statement (indicating other elements which would complete the "whole" and explain its relevance for the purposes of our consideration of Article 13 of the *Agreement on Agriculture*)? **Australia, EC**

EXPORT CREDIT GUARANTEE PROGRAMMES

29. (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? **3rd parties, in particular, Argentina, Canada, EC, NZ**

(b) How, if at all, would this be relevant to the claims of Brazil? **3rd parties, in particular, Argentina, Canada, EC, NZ**

30. 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 Panel would therefore appreciate third party views on this situation, including with respect to the viability of an *a contrario* interpretation of item (j) of the Illustrative List (as addressed in paragraphs 180-183 of the United States' first written submission). **3rd parties, in particular, Argentina, Canada, EC, NZ**

31. If the Panel decides to refer to provisions of the *SCM Agreement* for contextual guidance in the interpretation of the terms in Article 10 *Agreement on Agriculture*, should the Panel refer to item (j) or Articles 1 and 3 of the *SCM Agreement* or both? . **3rd parties, in particular, Argentina, Canada, EC, NZ**

32. The Panel's attention has been drawn to Article 14(c) of the *SCM Agreement* (see 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 the appropriate market benchmark be to use for any comparison? Please cite any other relevant material. . **3rd parties, in particular, Argentina, Canada, EC, NZ**

33. What is the relevance (if any) of Brazil's statement that : "...export credit guarantees for exports of agricultural exports [sic] are not available on the marketplace by commercial lenders." . **3rd parties, in particular, Argentina, Canada, EC, NZ**

34. Comment on the United States' view of the meaning of "long term operating costs and losses" in item (j) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement* as meaning "claims paid" under the export credit guarantee programmes. Does the United States' interpretation give meaning to both "costs" and "losses"? Do claims paid represent "losses"? **3rd parties, in particular, Argentina, Canada, EC, NZ**

35. Did the drafters of the *Agreement on Agriculture* include export credit guarantees in Article 9.1 of the *Agreement on Agriculture*? Why or why not? **3rd parties, in particular, Argentina, Canada, EC, NZ**

36. Please explain any possible significance the following statements may have in respect of Brazil's claims about GSM102 and 103 (7 CFR 1493.10(a)(2), Exhibit BRA-38) **3rd parties, in particular, Argentina, Canada, EC, NZ**

- (a) "The programmes operate in cases where credit is necessary to increase or maintain US exports to a foreign market and where US financial institutions would be unwilling to provide financing without CCC's guarantee. (7 CFR 1493.10(a)(2) Exhibit BRA-38)
- (b) "The programmes are operated in a manner intended not to interfere with markets for cash sales. The programmes 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)
- (c) "In providing this credit guarantee facility, CCC seeks to expand market opportunities for US agricultural exporters and assist long-term market development for US agricultural commodities." (7 CFR 1493.10(a)(2) Exhibit BRA-38)

37. The United States seems to argue 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*).

- (a) Comment on 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 Commitments"), and with other commitments contained in the *Agreement on Agriculture*? Please cite any relevant material, including any past WTO dispute settlement cases. **3rd parties, in particular, Argentina, Canada, EC, NZ**

- (b) 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 with non-existent disciplines)? **3rd parties, in particular, Argentina, Canada, EC, NZ**

STEP 2 PAYMENTS

38. Please comment on the statement in note 119 of the United States' first written submission that "...to the extent a consumer that had intended to export instead opens the bale, then that consumer could still obtain the Step 2 payment upon submission of the requisite documentation". The Panel notes that Step 2 payments all involve upland cotton produced in the United States. What are the two distinct factual situations that Step 2 payments involve? Other than the panel report in *Canada-Dairy* and the findings of the Appellate Body in *US-FSC* (21.5)¹, do any other dispute settlement reports offer guidance on this issue? For example, how, if at all is the Appellate Body's report in *Canada-Aircraft* relevant here?² . **3rd parties, in particular, Australia, Argentina, NZ, Paraguay**

39. Please comment on the United States assertions at paragraph 129 of its first written submission, that "[t]he programme is indifferent to whether recipients of the benefit of this programme are exporters or parties that open bales for the processing of manufacturing raw cotton into cotton products in the United States." . **3rd parties, in particular, Australia, Argentina, NZ, Paraguay**

40. With respect to paragraph 32 of the oral statement of the EC, are subsidies contingent on the use of domestic goods consistent with the *AoA*? Does the phrase "provide support in favour of domestic producers" refer to, and/or permit such subsidies? What is the meaning and relevance of this (if any) to Brazil's claims under Article 3 of the *SCM Agreement* and Article III:4 of the GATT 1994.. **3rd parties, in particular, Australia, Argentina, EC, NZ, Paraguay**

¹ "We recall that the ETI measure grants a tax exemption in two different sets of circumstances: (a) where property is produced *within* the United States and held for use *outside* the United States; and (b) where property is produced *outside* the United States and held for use outside the United States. Our conclusion that the ETI measure grants subsidies that are export contingent in the first set of circumstances is not affected by the fact that the subsidy can also be obtained in the second set of circumstances. The fact that the subsidies granted in the second set of circumstances *might* not be export contingent does not dissolve the export contingency arising in the first set of circumstances.¹ Conversely, the export contingency arising in these circumstances has no bearing on whether there is an export contingent subsidy in the second set of circumstances. Where a United States taxpayer is simultaneously producing property within and outside the United States, for direct use outside the United States, subsidies may be granted under the ETI measure in respect of both sets of property. The subsidy granted with respect to the property produced within the United States, and exported from there, is export contingent within the meaning of Article 3.1(a) of the *SCM Agreement*, irrespective of whether the subsidy given in respect of property produced outside the United States is also export contingent."

3. ² There, the Appellate Body stated that,

"the fact that some of TPC's contributions, in some industry sectors, are *not* contingent upon export performance, does not necessarily mean that the same is true for all of TPC's contributions. It is enough to show that one or some of TPC's contributions do constitute subsidies "contingent ... in fact ... upon export performance".²

ETI ACT

41. Concerning its claims on the ETI Act, Brazil relies on the *US – FSC* case. However, it appears that the United States did not raise the issue of the Peace Clause in that case, nor did the US appear to invoke Article 6 of the *Agreement on Agriculture*. If the Panel's understanding is correct, how, if at all, are these differences relevant here? **Argentina, China, EC, NZ**

42. How do you view the reference in paragraph 43 of the EC's 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. **Argentina, China, EC, NZ**

ANNEX L-2.3

COMMUNICATION TO THIRD PARTIES

30 July 2003

Taking into account a 29 July 2003 communication received from the United States, and Brazil's 30 July response, the Panel has decided to extend the deadline for the submission of the parties' and third parties' responses to questions from Monday 4 August to **Monday 11 August (17h30 (Geneva time))**.

The Panel has also decided upon the following additional changes to its schedule:

Panel's views on certain issues:	5 September 2003
Further submission of Brazil:	9 September 2003
Further submission of the US:	23 September 2003
Further submission of the third parties (as necessary):	29 September 2003

For the time being, all other dates remain unchanged. This includes the deadline for the submission of the parties' and third parties' comments on responses. It also includes the dates for the resumption of the first substantive meeting and the third party session (as necessary) and the second substantive meeting (i.e. 7-9 October).

ANNEX L-2.4

COMMUNICATION TO THIRD PARTIES

13 October 2003

Please find attached the Panel's questions to third parties following the resumed first session of the first substantive Panel meeting.

The Panel's questions are intended to facilitate the work of the Panel, and do not in any way prejudice the Panel's findings on the matter before it. Nor does the fact that the Panel has placed these questions under certain headings prejudice the Panel's findings on the matter before it. Each third party is free to respond to or comment on questions posed to the other third parties.

You are requested to submit answers by close of business on **27 October 2003**. All provisions of the existing working procedures, including the time specified in paragraph 17(b) of the Panel's existing working procedures for service of submissions by third parties, are confirmed.

Questions from the Panel to the third parties –
resumed first session of the first substantive Panel meeting

A. QUESTIONS TO INDIVIDUAL THIRD PARTIES

43. Please elaborate, citing figures, on your statement that polyester fibre prices actually follow cotton prices. **Argentina**

44. Please explain how Articles 5 and 6 of the *SCM Agreement* and Article XVI of the GATT 1994 would permit or require the Panel to take account of any effects of the subsidies in question on the interests of Members other than the complaining party. **Benin and Chad**

45. In relation to the term "same market" in Article 6.3(c) of the *SCM Agreement*, the EC states in paragraph 10 of its oral statement that a "world market" cannot exist if there are significant trade barriers between Members. On the other hand, the Panel notes that in relation to cotton, the EC takes the position in paragraph 14 of its further submission that the term "same market" in Article 6.3(c) should be read to include the domestic market of the subsidising Member. In light of the fact that many domestic cotton markets, possibly including that of China, have significant trade barriers, how can the EC reconcile these two positions? **EC**

46. Should the Panel prefer a concept of allocation of the benefit of subsidies to later years, to a concept of fully expensing subsidies to the year in which the benefit was provided? **EC**

47. In the EC further submission, it is said that significantly different conditions of competition in regional markets may prevent the Panel from arriving at the conclusion that there is a world market. Is the payment of a subsidy a "condition of competition" and, if so, how should that impact upon the Panel's analysis? **EC**

48. In the further submission of India, it is stated that "there is "no obligation under the *SCM Agreement* to demonstrate serious prejudice separately after establishing that one of the effects of a subsidy listed under Article 6.3 applies, as the effects listed in Article 6.3 themselves equate to serious prejudice". How does this view relate to Article 6.3(d), which appears to contain no element of degree? **India**

B. QUESTIONS TO ALL THIRD PARTIES

49. What is the meaning and effect of the introductory phrase of Article 3 of the *SCM Agreement* ("Except as provided in the *Agreement on Agriculture*...")? **All third parties**

50. According to its revised timetable, the Panel will issue its report to the parties after the end of the 2003 calendar year. Does this have any impact on "exempt[ion] from actions" under Article 13(b)(ii) and 13(c)(ii) of the *Agreement on Agriculture*? **All third parties**

51. How should the concept of specificity – and, in particular, the concept of specificity to "an enterprise or industry or group of enterprises or industries" -- in Article 2 of the *SCM Agreement* apply to subsidies in respect of agricultural commodities? Please answer the following questions, citing the principles in Article 2 of the *SCM Agreement*. **All third parties**

- (a) is a subsidy in respect of all agricultural, but not other, products specific?
- (b) is a subsidy in respect of all agricultural crops (i.e. but not to other agricultural commodities, such as livestock) specific?
- (c) is a subsidy in respect of certain identified agricultural products specific?
- (d) is a subsidy in respect of upland cotton, but not other products, specific?
- (e) is a subsidy in respect of a certain proportion of the value of total US commodities (or total US agricultural commodities) specific?
- (f) is a subsidy in respect of a certain proportion of total US farmland specific?

52. The Panel notes that different remedies are available in respect of prohibited and actionable subsidies under Article 4.7 and 7.8 of the *SCM Agreement*. If the Panel were to conclude that a subsidy was prohibited and were to make a recommendation under Article 4.7 of the *SCM Agreement* to withdraw the subsidy without delay, can the Panel:

- (a) also conclude that the same subsidy had resulted in adverse effects to the interests of another Member? If so, what would be the value of such a conclusion in terms of the settlement of the matter before the Panel? **All third parties**
- (b) take into account the effects of the interaction of those prohibited subsidies with other, allegedly, actionable subsidies? If so, how is this relevant to the issue of causation under Article 5 of the *SCM Agreement*? **All third parties**

53. Would a finding of serious prejudice under Article 5(c) of the *SCM Agreement* be determinative for a finding under Article XVI:1 of the GATT 1994? Why or why not? What, if any, is the role of footnote 13 of the *SCM Agreement* in this context? **All third parties**

54. Are US cotton producers able to cover the fixed and variable costs without subsidies? Please provide substantiating evidence. Of what relevance is this, if any, to Brazil's actionable subsidy claims? **All third parties**

55. In light of the fact that certain third parties have provided submissions about the price effect of claimed US subsidies, which Member or Members is, or are, the "other party" under Article 6.3(c) ("*another Member*") for the purposes of these proceedings? **All third parties**

56. Please respond to the following questions concerning the relationship between Article XVI:3 of the GATT 1994, the disciplines on export subsidies and domestic support in the *Agreement on Agriculture* and the disciplines on prohibited export subsidies and actionable subsidies in Articles 3, 5(c) and 6.3(d) of the *SCM Agreement*. **All third parties**

- (a) Are agricultural domestic support programmes challengeable under Article XVI:3 of the GATT 1994? How, if at all, is the title of Section B of Article XVI ("Additional provisions on *export subsidies*" (emphasis added)) relevant? How, if at all, are Articles 13 and 21.1, or any other provisions, of the *Agreement on Agriculture*, relevant?
- (b) Are the requirements of Article XVI:3 of the GATT 1994 reflected in, developed by or subsumed by the requirements in Article 6.3(d) of the *SCM Agreement*, or in any other provisions of the covered agreements? Of what relevance, if any, is the Appellate Body Report in *US-FSC*, para. 117¹ here?
- (c) Of what relevance, if any, is the fact that the definition of "subsidy" in Article 1 of the *SCM Agreement* and the prohibition on subsidies contingent upon export in

¹ WT/DS108/AB/R, para 117:

"... the provisions of the *SCM Agreement* do not provide explicit assistance as to the relationship between the export subsidy provisions of the *SCM Agreement* and Article XVI:4 of the GATT 1994. In the absence of any such specific textual guidance, we must determine the relationship between Articles 1.1(a)(1) and 3.1(a) of the *SCM Agreement* and Article XVI:4 of the GATT 1994 on the basis of the texts of the relevant provisions as a whole. It is clear from even a cursory examination of Article XVI:4 of the GATT 1994 that it differs very substantially from the subsidy provisions of the *SCM Agreement*, and, in particular, from the export subsidy provisions of both the *SCM Agreement* and the *Agreement on Agriculture*. First of all, the *SCM Agreement* contains an express definition of the term "subsidy" which is not contained in Article XVI:4. In fact, as we have observed previously, the *SCM Agreement* contains a broad package of new export subsidy disciplines that "go well beyond merely applying and interpreting Articles VI, XVI and XXIII of the GATT 1947". Next, Article XVI:4 prohibits export subsidies only when they result in the export sale of a product at a price lower than the "comparable price charged for the like product to buyers in the domestic market." In contrast, the *SCM Agreement* establishes a much broader prohibition against *any* subsidy which is "contingent upon export performance". To say the least, the rule contained in Article 3.1(a) of the *SCM Agreement* that all subsidies which are "contingent upon export performance" are prohibited is significantly different from a rule that prohibits only those subsidies which result in a lower price for the exported product than the comparable price for that product when sold in the domestic market. Thus, whether or not a measure is an export subsidy under Article XVI:4 of the GATT 1947 provides no guidance in determining whether that measure is a prohibited export subsidy under Article 3.1(a) of the *SCM Agreement*. Also, and significantly, Article XVI:4 of the GATT 1994 does not apply to "primary products", which include agricultural products. Unquestionably, the explicit export subsidy disciplines, relating to agricultural products, contained in Articles 3, 8, 9 and 10 of the *Agreement on Agriculture* must clearly take precedence over the *exemption* of primary products from export subsidy disciplines in Article XVI:4 of the GATT 1994."

Article 3.1(a) were introduced in the Uruguay Round, but did not exist at the time that the GATT 1947 was negotiated?