

## ANNEX K

### COMMUNICATIONS FROM PARTIES AND THIRD PARTIES

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then that would dispose of those claims. If the Panel finds that the US measures are inconsistent with the Peace Clause, then Brazil could have recourse to the Annex V procedures with respect to its Subsidies Agreement claims on these measures. In either event, briefing and meetings of the Panel with the parties could then proceed on any claims not disposed of by the Peace Clause findings.

This procedure would satisfy the legal requirement that certain claims not be maintained while the Peace Clause is applicable and provide the Panel with a fair and orderly means of addressing the issues in this dispute. The United States notes that the Panel has broad discretion to determine its working procedures under Article 12.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), and, under DSU Article 12.2, the Panel is charged with establishing panel procedures with “sufficient flexibility so as to ensure high-quality panel reports.” Because 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. Dispute settlement panels have made use of three panel meetings to allow adequate consideration of particular issues. For example, the panel in *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* (DS276) has recently organized its proposed timetable and procedures to provide for the possibility of a panel meeting prior to the first substantive meeting in order to consider any preliminary issues. We also note that three panel meetings have been scheduled in each of the disputes under the *Agreement on the Application of Sanitary and Phytosanitary Measures* to allow a separate meeting of the panel with scientific/technical experts. Similarly, in this dispute, a meeting focused on the Peace Clause issue would assist in considering the complex matter in dispute.

We look forward to discussing this proposal with you in more detail at the organizational meeting. The United States is providing a copy of this letter directly to Brazil.

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they do not.<sup>2</sup> The decision on how to handle such preliminary objections procedurally is a matter of panel discretion. Where preliminary objections have been resolved in advance of other claims, normally they have been resolved in the panel's first meeting, on the basis of the first round of submissions and oral statements.

The threshold issues posed by AoA Article 13 are no more or less significant than other threshold issues in many WTO Agreements. There are "peace clause"-type provisions in Articles 27.2(b), 27.3, and 27.4 of the ASCM Agreement precluding prohibited subsidy claims against developing country export subsidies under certain conditions. When this provision was invoked by developing countries in prior cases, no special procedures were created by panels and these threshold issues were decided as part of the final panel report.<sup>3</sup> Similarly, no claim may be brought against a measure under the General Agreement on Trade in Services unless the measure falls within the scope of the GATS as defined in GATS Article I. No claim may be brought under Article 2 of the Agreement on Technical Barriers to Trade except in respect of a measure that is a "technical regulation" as defined by that a



from third countries and the United States on 1 April 2003 under the provisions of Annex V, paragraphs 2 and 3. Brazil has collected information from a number of third parties pursuant to these requests. The United States on 19 March in WT/DS267/8 informed the DSB that “*any requests for information pursuant to the Annex V procedures may be provided in writing to the US Mission to the World Trade Organization. The United States will gather the information to respond to any such requests and provide the responses through the US Mission*”. Unfortunately, the United States refused to answer Brazil’s questions dated 1 April 2003 during the 60-day period of the procedures that ended on 17 May 2003.

Brazil rejects any suggestion by the United States that a new Annex V procedure be conducted during the panel stage of the process to impose even further delays in this proceeding. Instead, Brazil will use the best information available to it when it files its first submission. If appropriate, Brazil will request that the Panel draw adverse inferences from any failure of the United States to provide information requested during the consultation and Annex V process.

In light of the above, Brazil strongly urges the Panel to reject the United States’ unprecedented and wasteful procedural proposal. As noted above, much of the evidence involved in demonstrating the absence of peace clause protection *also* is related to Brazil’s substantive claims. Given this overlap, the Panel should structure its work so that the peace clause issues and Brazil’s claims regarding prohibited subsidies and serious prejudice are dealt with at the same time and in the same two meetings between the Panel and the parties. Use of the normal two meetings and briefing schedule will permit the Panel to have sufficient time to consider the views of Brazil, the United States, and the 13 third parties involved in this dispute. Use of the existing procedures and timeframes will avoid significant prejudice to Brazil by avoiding it having to use its limited resources to litigate the same issues at three, not two meetings. Use of existing procedures will avoid duplication of effort by the Panel and the third parties, and avoid significant delays in the issuance of a final report regarding the subsidies Brazil challenges in this dispute.

Brazil would be pleased to provide the Panel with additional information at the organizational meeting regarding this and any other procedural issues.



## ANNEX K-3

### LETTER FROM BRAZIL

14 July 2003

Brazil would like to bring to the attention of the Panel in *United States – Subsidies on Upland Cotton* (DS267) the following matter.

The "Working Procedures for the Panel" establish in paragraph 17(b) that,

*"the parties and third parties should provide their submissions to the Secretariat by 5:30 pm on the deadline established by the Panel, unless a different time is set by the Panel"*

and in paragraph 17(d) that,

*"the parties and third parties shall provide electronic copies of all submissions to the Secretariat at the time they provide their submissions [...]".*

The electronic version of the US first submission, which was due on Friday, 11 July, 5:30 pm, was delivered after 11 pm, almost 6 hours after the deadline. Brazil had access to the hard copy only on Saturday morning. Because it was a Friday, the failure of the United States to meet the established deadline led to delays in the transmittal and reception of the submission to different Government officials in Brazil and to Brazil's legal advisors. In addition, the delay no doubt caused third parties to have less time to react to the US submission – a not insignificant delay given the fact that third parties had only two working days to respond to the US submission before filing on 15 July. The result was that Brazilian officials were unable to review the submission until Monday, 14 July.

Brazil notes that this delay is not the first in the present case. The US Comments on the initial brief by Brazil, due on 13 July, 5:30 pm, were sent electronically after 8 pm.

Brazil has been faced with extremely short deadlines in this case, including the filing on 24 June its First Submission which required extensive changes to respond to the Panel's determination of 20 June. Nevertheless, Brazil met the deadline and filed the submission prior to 5:30 pm on 24 June. Brazil expects that the United States will, like Brazil, meet its own deadlines in a timely fashion.

Brazil would like the Panel to take note of this delay and to encourage the US to respect the deadlines, with a view to ensuring procedural fairness in these proceedings.

## **ANNEX K-4**

### **LETTER FROM THE UNITED STATES REQUEST FOR EXTENSION OF DEADLINE FOR RESPONSES TO PANEL QUESTIONS**

29 July 2003

In view of the number and the complexity of the questions addressed by the Panel to the United States and Brazil (not counting subparts, it appears that the Panel has asked the United States approximately 95 questions), the United States would like to request an extension of the deadline for



## **ANNEX K-6**

### **LETTER FROM THE EUROPEAN COMMISSION**

31 July 2003

The European Communities would like to thank the Panel for the questions it has posed to the third parties, and for extending the deadlines for responses. In light of the detailed nature of the questions asked and the importance of the issues concerned, the European Communities respectfully makes two requests to the Panel.

First, it would greatly assist the European Communities (and we assume other third parties) in preparing our responses to the Panel's questions to have sight of the oral statements of the main parties to the dispute at the first substantive meeting. So doing would permit third parties to respond to arguments made by the main parties where such a response would be of relevance in answering the Panel's questions. Since the Panel has requested the third parties to answer detailed questions, the European Communities considers that allowing the third parties access to the oral statements would allow the third parties to participate in a "full and meaningful fashion" in the stages of the proceeding where the panel has requested their input.<sup>1</sup> Moreover, the European Communities considers that this would benefit the Panel since

A copy of this letter has been provided to the delegations of Brazil and the United States, and to the other third parties.

May I take this opportunity to thank you in advance for your consideration of these issues.

## ANNEX K-7

### LETTER FROM THE UNITED STATES

1 August 2003

The United States is in receipt of the letter dated 31 July 2003, from the European Communities (EC) relating to third parties' participation in the present dispute. The United States would consent to the Panel's release of its further views on the Peace Clause issue to the third parties as a sensible way forward in this dispute (although we would not necessarily endorse all of the reasoning expressed in the EC letter). Further, the United States has no objection to either party choosing to make its submissions or oral statements public – as the United States and, we understand, Brazil have decided to do. However, we see no basis in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) for the additional procedural requirements that the EC is proposing – namely, that the Panel require the parties to make available to the third parties copies of their oral statements and responses to the Panel's questions, and that the third parties comment on the parties' responses to the Panel's questions. The EC proposal appears to erase the distinction between parties and third parties for purposes of dispute settlement.

The United States recalls that in the context of a panel proceeding a third party is welcome to express its interests under any covered agreement at issue in the dispute. Thus, the DSU ensures that third parties may express those interests by providing "an opportunity to be heard by the panel and to make written submissions" (DSU Article 10.2) and the right to "receive the submissions of the parties to the dispute to the first meeting of the panel" (DSU Article 10.3). These requirements have been met in every prior dispute by providing third parties the opportunity to receive the first submissions of the parties, to make one written submission, and to present statements at a third-party session of the first meeting of the panel.

We are aware of no dispute in which third parties have been granted the additional rights now sought by the EC. It would represent a fundamental change in the role of third parties in dispute settlement. Changes of this nature are being discussed in the context of the ongoing negotiations on clarifications and improvements to the DSU, and that is the proper forum for Members to consider these changes.

In addition, on a practical note, if the parties have to deal with the additional work of responding to comments by potentially more than a dozen third parties on (1) each others' answers to the Panel's third-party questions as well as (2) the parties' answers to more than 100 questions from the Panel, the already ambitious timetable established by the Panel will become totally untenable.

Finally, the United States recalls that, like all WTO Members and the public, the EC already has access to US submissions and oral statements on our website. (Indeed, we have already provided a copy of our oral statement directly to the EC at their request.) We also understand that Brazil is making its submissions public within two weeks of filing as contemplated by the parties' agreement and reflected in the Panel's Working Procedures. We would welcome Brazil's making its submissions public upon filing but do not see a basis in the DSU for requiring disclosure of those submissions to the third parties.

The United States is providing a copy of this letter directly to Brazil and the third parties.

## ANNEX K-8

### LETTER FROM BRAZIL

1 August 2003

Brazil received a letter dated 31 July 2003 from the European Communities requesting the Panel:

- (i) to ask the parties to the dispute to provide third parties with copies of their oral statements and copies of their responses to the Panel's questions;
- (ii) to invite the third parties to comment upon the responses of the parties to the dispute to the Panel's questions, and those posed by the other party;
- (iii) to make the "Panel's expression of views on Article 13 of the *Agreement on Agriculture* and associated issues", scheduled for 5 September 2003, available to the third parties.

2. With respect to the EC's requests, Brazil would like to make the following comments.

3. In light of the Timetable for Panel Proceedings, the Working Procedures for the Panel, and DSU Articles 10.2 and 10.3, Brazil considers that the third parties to the present dispute are entitled to be provided with copies of the parties' First Written Submission and parties' Further Submission only. In Brazil's view, these are the only documents that constitute "submissions of the parties to the dispute to the first meeting of the panel" in accordance with DSU Article 10.3.

4. Brazil further notes that the parties to the dispute did not make any oral statements during the session of the substantive meeting of the Panel set aside for the third parties to present their views (24 July 2003). Thus, there are no oral statements of which the third parties should receive written versions. As a matter of fact, the oral (opening and closing) statements made by Brazil and the US were delivered exclusively at the closed session of the substantive meeting of the Panel which the third parties did not have access to. Again, there would be no reason for providing third parties with copies of those oral statements.

5. As is the case for the oral statements, Brazil submits that third parties need not be given copies of the parties' responses to the Panel's questions. The Panel's questions were put to Brazil and the US in the context of the closed session of the first substantive meeting with the parties, as were the preliminary responses given by both parties to the dispute. Moreover, such responses do not constitute "submissions" within the meaning of DSU Article 10.3.

6. Finally, with regard to the "Panel's views on certain issues", Brazil agrees with the EC that the document should be available also to third parties.

## **ANNEX K-9**

### **LETTER FROM THE EUROPEAN COMMISSION**



delivered. In that light, the European Communities recalls its arguments in favour of provision of the statements as delivered, set out in its letter of 31 July 2003.

A copy of this letter has been provided to the delegations of Brazil and the United States, and to the other third parties.

Thank you in advance for your consideration of these issues.





The inability or unwillingness of the United States to provide complete answers should not prejudice Brazil. The United States now has the benefit of Brazil's complete answers together with extensive additional documentation to comment on in its rebuttal submission. This is particularly true with respect to issues related to export credit guarantees and issues related to Professor Sumner's analysis. Brazil is entitled the same right.

Brazil requests that it be provided until 28 August to file any such comments. In light of the fact that Brazil provided complete answers to the Panel's questions, there is no basis for the Panel to provide the United States with any corresponding right. Its due process rights have not been adversely impacted.

## ANNEX K-11

### LETTER FROM THE UNITED STATES

20 August 2003

The United States has received a copy of the letter to the Panel from Brazil of 14 August 2003. We have also received your communication of yesterday, responding to Brazil's requests for additional time to submit its rebuttal. The United States does wish to record its views on Brazil's letter, and my authorities have therefore instructed me to convey their surprise that Brazil would send such a letter and their regret over any burden that it may have placed on the Panel in what is already a very difficult and complicated dispute.

The United States would first like to thank the Panel for agreeing to extend the deadline for the responses to the Panel's questions. The United States appreciates the depth and level of understanding of the issues represented by the Panel's extensive and broad-ranging questions. Without an extension of the deadline, it would have been completely impossible for the United States to have provided responses in a timely manner. Even with the extension, the drafting, compiling, consulting internally with the various relevant officials, and finalizing the responses all required supreme effort and personal sacrifice on the part of the entire US delegation. The United States did provide responses by the August 11 deadline, although it was not possible to accommodate the 5:30 pm filing guideline despite the best efforts of the United States to do so.<sup>1</sup>

The same burden was not placed on Brazil and the outside legal counsel that Brazil has employed for this dispute. As a result, it is not surprising that Brazil found the deadline to be less demanding and resource-intensive. We would note that, if one only counts the main questions and not any of the subquestions, there were 104 questions posed to the United States, but only 63 posed to Brazil.<sup>2</sup> With all respect, the United States has considerable difficulty with Brazil's complaints about the time within which the United States filed its response in light of the total amount of work required, and effort that the United States expended, to provide its answers to the Panel's questions.<sup>3</sup>

The United States also could not understand how Brazil could ask for an additional opportunity to respond to new material in the rebuttal submissions while at the same time asking that the Panel deny any such opportunity to the United States. (After all, one would expect that Brazil will

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<sup>1</sup> On the one hand, the United States is flattered that Brazil credits the United States with the ability to finalize its own responses while simultaneously reviewing Brazil's responses filed earlier in the evening. On the other hand, the United States is, to say the least, taken aback that Brazil would suggest that the United States would do so. In any event, the press of finalizing the US responses completely consumed the US delegation and no one was able to spare time to look at Brazil's responses at any point that day, let alone before the US responses were filed.

<sup>2</sup> The difference in the number of questions for each party means that Brazil had nearly 6-1/2 hours to prepare its responses to each question posed to it, whereas the United States had less than four hours per question. (Counting the subquestions would increase the disparity since a preliminary check indicates that there were more subquestions for the United States than for Brazil.) As a result, Brazil had approximately 65 percent more time to prepare its responses. Had the United States taken the same amount of time as Brazil to prepare each response, its responses would have taken 28 days to file (they would have been finished on August 22).

<sup>3</sup> The United States also failed to understand the reference in Brazil's letter to Brazil's "good faith and cooperation" in extending the deadline by seven days. In fact, Brazil did not "cooperate" in the Panel's decision to grant a seven-day extension. Brazil instead objected to any extension beyond three days.

also provide new material in its rebuttal submission on topics covered in the Panel's questions, and not just repeat material it has already submitted.) Such a one-sided approach would not have achieved the "procedural fairness" that Brazil has said it seeks. In this connection, the United States considers that the approach taken by the Panel in its communication yesterday achieves a fair balance of the parties' interests.

In conclusion, the United States would like to thank the Panel for the approach it has taken on Brazil's request, as well as for its work to date on the many issues presented by this dispute. The United States is also providing a copy of this letter directly to Brazil.

## ANNEX K-12

### LETTER FROM BRAZIL

23 August 2003

The Government of Brazil is in receipt of the Communication from the Panel dated 19 August 2003. Brazil only received this morning the *Rebuttal Submission of the United States of America*, dated 22 August 2003 ("US Rebuttal Submission"). Brazil notes that consistent with all of its earlier written submissions, the United States filed its Rebuttal Submission 6 hours late. This delay has prejudiced Brazil and prevented it from providing comments re

## **Domestic Support Issues**

Para. 43

*Subject:* US argument regarding the growing of illegal crops, etc.

*Good cause:* This is a new argument that should have been but was not raised in the United States' 11 August response to questions 25 and 26 from the Panel.

Paras. 96-98

*Subject:* US argument regarding crop insurance notifications of other Members.

*Good cause:* This is a new argument referring to new WTO documents not raised in earlier submissions.

Paras. 114-117

*Subject:* US argument regarding a price gap methodology for marketing loans.

*Good cause:* This is a new argument that should have been but was not raised in the United States' 11 August response to question 67 from the Panel, and that is directly contradictory to information provided by the United States in paragraphs 128-134 of that response.

Paras. 123-127 and Exhibit US-24

*Subject:* US new challenge to Professor Dan Sumner's analysis.

*Good cause:* This is a new argument and exhibit that should have been but was not provided in the United States' 11 August response to question 61(d) from the Panel.

## **Export Credit Guarantee Issues**

Paras. 135-146 and Exhibits US-25 through US-29

*Subject:* New US arguments concerning the negotiating history of Article 10.2 AoA.

*Good cause:* These arguments should have been but were not raised in the United States' 11 August response to questions 88(a) and 88(b) from the Panel.

Paras. 147-152

*Subject:* New US argument that had it intended to subject export credit guarantees to the AoA and the SCM Agreement, it would have included them in the calculation of its reduction commitments.

*Good cause:* This argument should have been but was not raised in the United States' 11 August response to questions 88(a) and 88(b) from the Panel.

Paras. 156-157, 160-162, and Exhibits US-31 and US-32





## **ANNEX K-13**

### **LETTER FROM THE UNITED STATES**

25 August 2003

In the Panel's fax dated 19 August 2003, the Panel noted the possibility that a party might lack sufficient opportunity to comment on information, argumentation and documents submitted by the other party in its rebuttal submission, and the Panel invited the parties to request the opportunity to comment on specific material after receiving each other's rebuttal submissions. My authorities have instructed me to submit this letter requesting such an opportunity.

Because of Brazil's tactical decision to defer presenting its entire case with respect to Peace Clause issues, the United States is once again put in the difficult position of attempting to respond to



Paras. 55-59: With respect to crop insurance payments, Brazil introduces new evidence (for example, relating to availability of specific policies) and arguments to claim that these payments are product-specific support to cotton.<sup>8</sup> Brazil could have presented this evidence and argument in its previous submissions and statements.

Paras. 73, 75-77: Brazil introduces revised data and calculations relating to alleged budgetary expenditures for upland cotton and an AMS for upland cotton.<sup>9</sup>

Paras. 88, 90-94: Brazil misstates the US position with respect to the Peace Clause analysis for support provided in past marketing years. Brazil also asserts, erroneously, the US Peace Clause interpretation is inconsistent with the position taken by the United States in previous WTO dispute settlement proceedings. These arguments could have been presented by Brazil earlier -- for instance, during its first oral statement to the Panel<sup>10</sup> or in its answers to the Panel's questions.<sup>11</sup>

#### Brazil's Comments on U.S. Answers

Paras. 44-45: Brazil for the first time presents an argument claiming that the US interpretation of paragraph 6(b), made in both its opening and closing oral statements at the first panel meeting, would render paragraph 6(e) a nullity. These arguments could have been presented in Brazil's Tw ( or in its answers to the Panel<sup>10</sup> Tc829 Tc 29to the P2 TcSd9graph 6st nteeb Tc829 ao Tc8cT3a7 25 -



working procedures given their repeated violations of such procedures over the past three months. Nevertheless, the United States ignores the Panel's Determination of 20 June, in which it stated, in paragraph 20, last bullet:

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* luh.\*tues exempti-8

Paragraphs 36-46:

This evidence was presented by Brazil in rebuttal to US arguments that direct payments do not constitute support to upland cotton. The US does not assert that there would have been a question by the Panel to which this evidence and arguments would be responsive. Therefore, the US request should be rejected.

Paragraphs 48-50:

This evidence was presented by Brazil in rebuttal to US arguments that counter-cyclical payments do not constitute support to upland cotton. The US does not assert that there would have been a question by the Panel to which this evidence and arguments would be responsive. Therefore, the US request should be rejected.

Paragraphs 55-59:

This evidence was presented by Brazil in rebuttal to US arguments that crop insurance payments do not constitute support to upland cotton. The US does not assert that there would have been a question by the Panel to which this evidence and arguments would be responsive. Therefore, the US request should be rejected.





practice in other panel proceedings and this Panel's timetable for the interim review in this dispute, two weeks should be sufficient time to comment.

The United States would be happy to provide further elaboration or to respond to any questions the Panel may have with respect to this request.

The United States is providing a copy of this submission directly to Brazil.

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instead prejudice those rights. For the same reason, it could be perceived as circumventing the provisions of Article 15.2 of the DSU to issue substantive findings on the claims made (and that have effect on the parties) without an opportunity for the parties to comment prior to the findings having an effect.

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Brazil believes that its procedural rights will be fully protected by the existing procedural safeguards provided by the interim review process. The United States has provided no legitimate reasons why its rights would not also be protected. Both parties will have an equal opportunity to comment on any decision by the Panel regarding the peace clause at that time.

In sum, Brazil requests that the Panel reject the United States request to establish an interim review process to the Panel's 5 September ruling.



Brazil has failed to present a basis for denying the parties a timely and effective opportunity to exercise their right to comment on the Panel's findings. Accordingly, the United States respectfully renews its request that the Panel provide Brazil and the United States with the Panel's September 5 Peace Clause findings in an interim form and provide the parties an opportunity to comment on the Panel's findings.

The United States is providing a copy of this submission directly to Brazil.

## **ANNEX K-18**

### **LETTER FROM BRAZIL**

29 August 2003

**ANNEX K-19**

## ANNEX K-20

### LETTER FROM THE UNITED STATES COMMENTS RE REVISED TIMETABLE

9 September 2003

In the Panel's communication of 5 September 2003, the Panel invited the parties to comment on the draft further revised timetable attached to the communication. My authorities have instructed me to submit the following comments on the draft timetable and, in addition, to request that the further submission of the United States be due on 2 October rather than 23 September.

With respect to the draft timetable, the United States notes that the Panel provides separately for comments on answers to questions, due on 27 October, one week after the rebuttal submissions and answers to questions. The United States appreciates the value of an opportunity for the parties to comment on each others' answers to questions. However, in this case that opportunity comes at the cost of adequate time to prepare the rebuttal submissions and answers to questions themselves. Given the number and complexity of issues in this dispute, and the opportunity available at the second substantive meeting for parties to comment on each other's submissions<sup>1</sup> and responses, it would be best to dispense with the 27 October comments, and instead have 30 October – three weeks after 9 October – as the due date for rebuttal submissions and answers to questions. The first substantive meeting may finish as late as 9 October, leaving less than two weeks for rebuttals and answers to questions<sup>2</sup> if they are due on 22 October. The United States notes that DSU Appendix 3 provides as a guideline for 2-3 weeks between the first substantive meeting and rebuttal submissions. Given the scope and scale of argumentation that has prevail<sup>25</sup> 1rm50.9946Tw (October, pute, andlik6.25n eacg anud States no



against<sup>4</sup>, and the burdens imposed by this dispute clearly warrant at least a three-week response period.

Preparing the submission in three weeks would likely be extremely challenging under any circumstances. However, the timing for this submission involves unusual circumstances. Many of the US officials involved in this dispute are attending the Fifth Ministerial Conference in Cancun this week and are therefore unavailable to assist with preparation of the submission. At the same time, the head of the US litigation team in this dispute became a father three weeks ahead of schedule. As a result, he will have limited time over the next week (at least) to prepare the US response. For all of these reasons, the United States respectfully requests that its next submission be due no earlier than 2 October.<sup>5</sup>

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<sup>4</sup> Indeed, in the DSU negotiations many Members have indicated that this is too short a period of time

## **ANNEX K-21**

### **LETTER FROM BRAZIL COMMENTS RE REVISED TIMETABLE**

10 September 2003

Brazil is in receipt of a letter dated 9 September 2003 from the United States commenting on the proposed timetable and requesting to be able to file their Further Submission on 2 October.

Brazil opposes the US request that it be granted until 2 October to file its Further Submission for the reasons set out below:

First, the United States has been on notice of Brazil's claims and arguments on the adverse effects portion of this dispute for almost one year when Brazil filed its 27 September 2002 request for consultations (WT/DS 267/1). The Annex to this comprehensive consultation request set forth in detail arguments, facts, and evidence (mostly consisting of US Government documents) that were available to Brazil. The great majority of these arguments and evidence are now found in Brazil's Further Submission. If this information and the three sessions of the consultations discussing these issues were not enough, Brazil's First Submission at paragraphs 1-15 outlined in summary form many of the principle arguments (and evidence) supporting Brazil's adverse effects claims. All of these arguments are again repeated in Brazil's Further Submission. Paragraphs 26-106 of Brazil's First Submission's First



## **ANNEX K-22**

### **LETTER FROM THE UNITED STATES RE DRAFT REVISED TIMETABLE**

11 September 2003

My authorities have instructed me to respond to Brazil's letter of 10 September 2003, objecting to the US request for an extension to file its Further Submission.

In this letter, Brazil suggests first that its request for consultations offered sufficient notice of Brazil's arguments that the United States does not now require sufficient time to respond to the Brazilian Further Submission – a submission so extensive that it had to be divided in two for electronic transmission, and which in addition included extensive economic annexes. According to

At the same time, the United States notes that Brazil has asked the Panel to postpone the date of the second meeting. The United States has no objection in principle to this request, but would request that it be consulted on any new dates that might be possible in light of the panelists' schedules. Brazil is not the only one with "complicated schedules."

Brazil also notes that Appendix 3 provides *as a guideline* 2-3 weeks for a responding party's first submission, and states that the US request exceeds that period (by two days). Brazil ignores not only the fact that a panel is free to adjust these time frames, but that a panel is required to adjust these time frames. Article 12.4 of the DSU states that panels must "provide sufficient time for the parties to the dispute to prepare their submissions." Indeed, in the past several disputes in which the United States has been a *complaining* party, panels have on average provided five weeks for the *responding* party to prepare its first written submission, twice the average called for under the DSU.<sup>1</sup> Article 12.4 applies fully to this proceeding, and the time requested by the United States to prepare its submission is more than justified.

In light of the above, and now with confirmation that Brazil's Further Submission does in fact contain "extensive evidence" and "extensive new argumentation", as foreshadowed by the US letter of 9 September, 2003<sup>2</sup>, the United States respectfully renews its request that the Panel provide it until 2 October 2003, to submit its Further Submission. We thank the Panel once again for its

## **ANNEX K-23**

### **LETTER FROM BRAZIL**

16 September 2003

Brazil thanks the Panel for its "Proposed revision to timetable for Panel Proceedings" of 12 September 2003.

Brazil notices that the second hearing with the parties is scheduled for 2 and 3 December, receipt of answers to Panel's questions for 22 December and receipt of parties' comments on each other's answers for 19 January 2004. Brazil also appreciates that establishing the timetable with the parties, the panelists and the Secretariat requires considerable coordination.

In light of the several changes made to the original schedule and also of the length of time between the second hearing and the answers to questions from the Panel, Brazil would like to suggest that these answers be delivered on 15 December (instead of 22 December) and that the parties' comments on the answers be due on 22 December (instead of 19 January). This would allow for the completion of the parties' main substantive work still in 2003 (the next step would then be the comments on the descriptive part).

Furthermore, Brazil notices that Article 12.9 of the DSU establishes that "in no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months". The new proposed timetable of the Panel foresees that circulation of the final report to the WTO Members will take place after 19 May, that is, more than 5 months in excess of the strict time limit set up in DSU Article 12.9. Therefore, Brazil would stress that any changes in the schedule should not postpone the conclusion of the proceedings.

## **ANNEX K-24**

### **LETTER FROM THE UNITED STATES COMMENTS ON REVISED TIMETABLE**

16 September 2003

The United States thanks the Panel for its invitation to comment on the draft further revised timetable attached to its communication of 12 September 2003. My authorities have instructed me to submit the following comments.

The new dates of December 2 and 3 for the second substantive meeting are acceptable to the United States. We note, however, that there is approximately one month between the receipt of the further rebuttals (currently due November 3) and the second substantive meeting. We believe that this one month would be better allocated for the parties to consider and draft responses to LET080y aS 9t -1ueH -

## ANNEX K-25

### LETTER FROM BRAZIL

17 September 2003

1. The Government of Brazil is in receipt of a letter from the United States dated 16 September commenting on the proposed further revised timetable attached to the Panel's communication of 12 September.
2. Brazil would like to express its opposition to the alterations suggested by the United States. In our view the dates proposed by the Panel on 12 September ensure the parties will have the appropriate amount of time to respond to the Panel's further questions and to elaborate their further rebuttal submissions. Brazil notes, in particular, that between the last day of the resumed second session of the first substantive meeting (9 October) and the deadline for delivering their further rebuttal submissions (3 November), parties will have almost 30 days to prepare such documents. This is more than the amount of time the United States requested on 9 September to elaborate its further submission (previously due on 22 September).
3. Therefore, Brazil submits that parties need not be granted any extension of deadlines as suggested by the United States. Nonetheless, were the Panel inclined to change the timetable to accommodate the US concerns, Brazil would reiterate that any modifications in the schedule should not result in further delays of the proceedings (whose current timetable already exceeds by more than five months the time limit set out in DSU Article 12.9).



## **ANNEX K-26**

### **LETTER FROM THE UNITED STATES**

17 September 2003

My authorities have instructed me to respond to Brazil's letter of 16 September 2003, suggesting that the parties' answers to the Panel's questions related to the second substantive meeting be due 15 December instead of 22 December, and that the comments on these answers be due 22 December instead of 19 January 2004. The United States opposes these suggestions.

As it currently stands, the issues in this dispute are both wide-

## **ANNEX K-27**

### **LETTER FROM THE UNITED STATES**

23 September 2003

As the Panel may be aware, hurricane Isabel hit the mid-Atlantic region of the East Coast of the United States last Thursday and Friday, bringing with it significant flooding, property damage, and extended loss of electricity to hundreds of thousands of homes and businesses. The hurricane forced all US Government offices in the Washington, D.C., area to be closed on Thursday and Friday,

## **ANNEX K-28**

### **LETTER FROM BRAZIL**

23 September 2003

The Government of Brazil is in receipt of a letter from the United States dated 23 September asking for a further extension of time until 2 October 2003 to respond to Brazil's Further Submission. The most recent US request for an extension of time would mean that the Panel, Brazil, and the Third Parties would have only two working days – Friday 3 October and Monday 6 October – to review and draft an oral statement in response to the US Further Submission. Brazil would have no working days to review the numerous third party submissions.

The Panel must balance out the rights of Brazil and the Third Parties with those of the United States. The United States has been in receipt of Brazil's Further Submission for over two weeks. The United States will have a number of opportunities, including in its 7 October Oral Statement and in answering questions posed by the Panel, to clarify and expand on its responses to issues raised in Brazil's Further Submission. Under these circumstances, Brazil requests that the Panel maintain the current schedule requiring the United States to provide its Further Submission on 29 September 2003.

## **ANNEX K-29**

### **LETTER FROM BRAZIL**

2 October 2003

As the Panel may be aware, for the sixth consecutive time in the present proceedings the United States failed to deliver a document by the time expressly determined by the Panel in the Working Procedures and constantly reiterated to the United States in specific communications of the Panel. Instead of abiding by the 5h30 p.m. (Geneva time) deadline, the United States delivered the electronic version of its Further Submission around 11h45 p.m. on 30 September 2003, again more than 6 hours after the deadline. No hard copy of the document, also due on the same day by 5h30 p.m., was available to Brazil before 1 October.

Brazil will not repeat here the whole set of arguments showing the prejudices and obstacles caused by the US tactic to the rights of Brazil. We note however that this sixth delay is particularly egregious given the fact that the Panel provided the United States with two separate extensions of time to prepare its Further Submission. Therefore, Brazil cannot at this time only ask the Panel to take note of the problem and to encourage the United States to respectn around 11h4imber 2003, again more83

each of the violations of the working procedures by the United States in the factual section of its Final Report so that the record of misconduct may be available to the full WTO Membership.

## **ANNEX K-30**

### **LETTER FROM THE UNITED STATES**

6 October 2003

The United States received on Friday, 3 October 2003, a copy of the letter to the Panel from Brazil dated 2 October 2003, and my authorities have instructed me to submit this reply. The United States regrets that Brazil once again distracts the Panel and the United States from the work required to prepare for the second session of the first panel meeting.

The United States takes seriously the time lines established by the Panel and has expended considerable resources and dedicated tremendous personnel time and effort to accommodate each of them.<sup>1</sup> As a result, the United States has filed each of its submissions on the date specified by the Panel. At the same time, the Panel will appreciate that the issues are not only complicated and difficult, but that there are a very large number of them – and that the materials that Brazil has submitted are voluminous.

As the complaining party in this dispute, Brazil has had the advantage of months and months in preparing its case far in advance.<sup>2</sup> Brazil has, however, consistently sought to deny to the United States sufficient time to prepare its own submissions, and Brazil's letter of last week

The exchange at the organizational meeting was only the first example of a Brazilian approach to this dispute that combines extremely lengthy material with procedural inflexibility. The most recent example was Brazil's unwillingness to contemplate an extension for the filing of the US Further Submission in response to the circumstances in Washington, D.C., brought about by Hurricane Isabel (letter of 23 September 2003).

As the United States noted in its letter of 11 September 2003, the timetable that the Panel has established in this dispute for the filing of the US submissions are much shorter than the amount of time that has been provided to other WTO Members.<sup>3</sup> The length and complexity of Brazil's

## **ANNEX K-31**

### **LETTER FROM THE UNITED STATES**

14 October 2003

As discussed during the second session of the first panel meeting, the United States is providing in the attachment a written description of materials relating to Dr. Sumner's model that Brazil has agreed to provide to the Panel and the United States. The United States looks forward to receiving these materials at Brazil's earliest opportunity, with a view to permitting the United States to undertake its review of these materials in a timely fashion and without delay.

The United States is also providing in the attachment, as agreed, the two remaining exhibits referred to in its opening statement at the second session of the first panel meeting.



## ATTACHMENT

### Request from the United States to Brazil

Please provide the following information relating to the model used by Dr. Sumner in his analysis presented in Annex I to Brazil's further submission:

- (a) Electronic copies of the actual models used for the baseline and each of the seven scenarios described in Annex I.
- (b) Printed copies of the exact equation specifications used for the baseline and for each of the seven scenarios described in Annex I, including all parameter estimates. (If no such printed copies currently exist, please develop and provide.)
- (c) Documentation of all adaptations to the original FAPRI modelling system made or used by Dr. Sumner for his analysis presented in Annex I. (If no such documentation currently exists, please develop and provide.)

**ANNEX K-32**

## ANNEX K-33

### LETTER FROM THE UNITED STATES

11 November 2003

The United States is in receipt of Brazil's letter of 5 November 2003, in which it indicates that it expects to submit during the week of November 10 certain evidence relating to the analysis of Dr. Sumner presented in Annex I to Brazil's further submission. My authorities have instructed me to submit this response.

The United States is disappointed that Brazil claims not to be able to provide electronic copies of the actual model used in that analysis. In our experience, it is common for electronic copies of econometric models to be disclosed to substantiate claimed model results, even in the context of WTO dispute settlement. Brazil's failure to make electronic copies available will hinder the ability of the Panel and the United States to analyze Dr. Sumner's claimed results.<sup>1</sup>

Brazil states that it will be providing printed copies of the exact equation specifications and documentation of all adaptations to the original FAPRI modelling system. This evidence is expected to be substantial and complex. Brazil has previously stated that its economic model "is built upon hundreds of linear supply, demand and related equations for major commodities - and in particular upland cotton - in the United States" and that "[t]hese equations are linked to a system of equations covering the demand and supply of upland cotton internationally".<sup>2</sup> This substantial new evidence relates to the core of Brazil's case relating to price suppression, as evidenced by the frequent invocation of those results in Brazil's further submission, at the second session of the first panel meeting, and in Brazil's answers to the Panel's further questions.

We note that the Panel and the United States had asked for this evidence during the first panel meeting, nearly five weeks ago. The United States expected this evidence to be submitted by the conclusion of the first panel meeting, or, at the latest, shortly after the United States provided Brazil with a written version of the information requested. Brazil, however, has now indicated that it will submit some of this new evidence mere days before the parties' rebuttal submissions are due.

The United States notes that, pursuant to paragraph 13 of the Panel's working procedures, the United States must be provided sufficient time to respond in writing to any new evidence submitted by Brazil. This paragraph reflects the Panel's obligation under Article 12.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* to "provide sufficient time for the parties to the dispute to prepare their submissions." Had Brazil presented that new evidence relating to Dr. Sumner's analysis no later than during the first panel meeting on 7-9 October 2003, as

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<sup>1</sup> The offer by FAPRI to run simulations at the United States request for a fee is not an acceptable substitute. It is unprecedented that a party to a dispute should put another party in the position of not being able to gain access to that party's evidence, and its only recourse is to pay a private entity in order to gain even partial access.

<sup>2</sup> See

contemplated by the Panel's working procedures, under the current timetable the United States would have been afforded nearly 6 weeks to examine and respond to that evidence.<sup>3</sup>

Given the anticipated complexity of the information and the fact that it will not be provided in electronic form, the United States will need sufficient time to be able to analyze and respond to Brazil's complex and substantial new evidence. To this end, and on the assumption that Brazil meets its expectation of submitting that evidence early this week, the United States would request that the rebuttal submissions be due on 22 December 2003, the current date for answers to panel questions. Remaining items on the timetable set out by the Panel could then be rescheduled accordingly. Adjusting the timetable in light of Brazil's late submission of new evidence is necessary to preserve US rights of defence by providing sufficient opportunity to analyze and critique that new evidence as well as by allowing the United States to present its response to that evidence in its rebuttal submission and at the second panel meeting.<sup>4</sup>

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<sup>3</sup> Had Brazil presented this evidence as part of Annex I to its further submission of 9 September 2003, moreover, the United States would have been afforded 10 weeks to review and respond to that evidence.

<sup>4</sup> See Working Procedures for the Panel, para. 7 ("Formal rebuttals shall be made at a second substantive meeting of the Panel. . . . The parties shall submit, prior to that meeting, written rebuttals to the Panel.") (28 May 2003).

## ANNEX K-34

### LETTER FROM BRAZIL

12 November 2003

The Government of Brazil is in receipt of a letter from the United States dated 11 November requesting yet another lengthy delay in this panel proceeding. Brazil requests the Panel to reject this request and maintain the current schedule including the deadline for rebuttal submissions of 18 November and the second Panel meeting on 2-3 December for the reasons set forth below.

The United States' letter attempts to leave the impression that there will be a tremendous amount of new evidence that will be provided to them in *written* form in response to their request of 14 October. This is incorrect. The bulk of the requested information is in *electronic* form which has been available for the United States to examine, review, and use since 5 November. Attached to this letter are (1) Professor Sumner's *written* adaptations to the FAPRI model for each of the seven scenarios described in Annex I to Brazil's Further Submission (Exhibit Bra-313), and (2) Professor Sumner's summary description of the equations in the FAPRI domestic model and the CARD international cotton model (Exhibit Bra-314). As the Panel can see from Exhibit Bra-313, this document reflecting Professor Sumner's adaptations is not lengthy and does not contain hundreds of equations as the US letter suggests. The "hundreds of equations" referred to in the US letter are those of the *FAPRI/CARD*



**ANNEX K-35**

**LETTER FROM THE UNITED STATES**

13 November 2003

*Fourth*, Brazil is in error when it claims that "the United States waited until 14 October to file its request for this information from Brazil". In fact, both the United States and the Panel Chairman verbally requested access to Brazil's model on 7 October 2003, at the conclusion of opening statements on the first day of the second session of the first panel meeting. Brazil has provided no explanation for why it should have delayed providing any information in response to that request for nearly five weeks, which merely related to the very model that Dr. Sumner asserts to have employed.

*Fifth*, Brazil also claims that "Brazil's letter of 5 November provided the United States with an offer of complete access to the electronic version of the exact same model used by Professor Sumner" and "Professor Babcock's offer provides the United States with complete access to the electronic version of all of the equations and analysis performed by Professor Sumner *and the United States had access to them since 5 November*" (italics added). Presumably, Brazil is referring to its suggestion that the United States pay to *run* the model employed by Brazil<sup>1</sup>, since FAPRI did not offer to disclose – either to the United States or the Panel – the equations underlying that model, whether for pay or otherwise (and we assume Brazil was also offering to the Panel this opportunity to pay to obtain Brazil's evidence). As stated in the US letter of 11 November, Brazil's suggestion that the responding party (and presumably the Panel) must pay for evidence on which the complaining party so heavily relies is unprecedented.

*Sixth*, Brazil also claims that "it will not be difficult for the United States to quickly analyze Professor Sumner's limited adaptations to the standard FAPRI/CARD models with which they are familiar." If it is the case that Professor Sumner has made only "limited adaptations to the standard FAPRI/CARD models," a claim we are not in a position to confirm, then again the question arises why Brazil should have delayed five weeks in providing these new materials. Presumably, Professor Sumner knew of and had documented those adaptations prior to submitting his analysis to the Panel as part of Brazil's further submission on 9 September.

The United States respectfully requests the Panel to defer the parties' rebuttal submissions as set out in its letter of 11 November 2003. The United States is providing a copy of this letter directly to Brazil.

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<sup>1</sup> See Brazil's Letter of 5 November 2003, p. 2 (quoting FAPRI letter as saying that FAPRI "would be willing to run USTR-requested scenarios using the FAPRI/CARD modeling system along with the operational additions and adaptations that comprise [Professor Sumner's] model of cotton policy. Our researchers would have to be compensated for the time it would take to run the model and we would have to work out the timing and other logistics of running the model.").





schedule at the University of California at Davis as well as previous speaking commitments posed additional difficulties in completing this assignment.

*Fifth*, the United States again demonstrates that it has made no efforts to take advantage of the offer to gain access to *everything* that Professor Sumner did and analyzed, which is contained in the electronic version at the University of Iowa in the care of Professor Babcock. It appears to Brazil that the United States' conduct suggests it may be more interested in delaying this proceeding than in gaining access to Professor Sumner's analysis.

*Sixth*, the United States claims that it has only a small amount of time to change their rebuttal submission. Brazil notes that on 24 June 2003, it filed a lengthy submission after only being given 4 days notice of what it was required to file. Brazil, at great effort, met that deadline. Further, the additional ten days proposed by Brazil (until 28 November) provide the United States with an opportunity to react to and respond to Professor Sumner's documents delivered on 12 and 13 November. The United States will have additional time to prepare further responses for their oral statement on 2 December. Finally, as Brazil's 12 November letter indicated, both Brazil and the United States will have until 22 December and 19 January to file additional answers to questions and comments relating, *inter alia*, to the econometric models at issue in this dispute.

*In conclusion*, the Panel has to balance the right of the United States to have sufficient time to prepare a rebuttal to Professor Sumner's analysis with Brazil's right to obtain a timely panel decision. Brazil believes that its suggestion to provide the United States with an additional 10 days to prepare its rebuttal – until 28 November – is an appropriate result which is fair and protects each of the parties' due process rights. However, the request by the United States for another five weeks to prepare their rebuttal and to delay this proceeding by at least as much time, if not more, is grossly out of proportion. Brazil requests the Panel to avoid yet another long delay in these proceedings.

## ANNEX K-37

### LETTER FROM THE UNITED STATES

18 December 2003

In a communication dated 8 December 2003, the Panel afforded to the United States the opportunity to respond by 18 December 2003, to the request that Brazil had made through the Panel for certain information in Exhibit BRA-369.<sup>1</sup> The United States has completed work on 3 electronic files containing approximately 135 megabytes of requested data related to the production flexibility contract payment era, which are being transmitted with this letter. Work on the data files relating to the direct and counter-cyclical payment era is continuing, and the United States is endeavouring to provide this data by close of business Friday, 19 December.

However, as the United States preliminarily advised Brazil and the Panel at the second panel meeting, 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.<sup>2</sup> This is consistent with the position of the United States in Freedom of Information Act<sup>3</sup> appeals raising this issue. One such decision is attached as Exhibit US-104.<sup>4</sup> Although the United States cannot provide planted acreage information associated with an individual farm, in an effort to be as fully responsive as possible, we are providing, for all programme crops and for each marketing year: (1) planted acreage data aggregated for all cotton farms and (2) farm-level planted acreage data without any fields that could identify the particular farm.

The United States is providing all of the pieces of data requested by Brazil in data files organized as follows:<sup>5</sup>

First, a file with aggregate data for yields, bases, cropland, and plantings for all "cotton farms" for all programme crops as defined in the data request, using three categories: (1) farms with "cotton base" but no cotton plantings; (2) farms with cotton plantings but no "cotton base," and (3) farms with cotton plantings and "cotton base."

Second, a farm-by-farm file (with particular farm identification information) with all of the requested data (plus additional data regarding payment quantities) but not including planted acres and cropland.

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<sup>1</sup> See Exhibit US-102.

<sup>2</sup> See 5 USC 552a U4 Tc 0.5053 Tw ( 5 USC 552a) Tj 51 0 TD -0.0223i3c 0.ej 3.75 0 TD 0.62y the particu





In a letter dated 18 December 2003, to the Chairman of the Panel in the WTO dispute settlement proceeding *United States*







## ANNEX K-40

### LETTER FROM BRAZIL

23 December 2003

The Government of Brazil is in receipt of a letter from the Panel dated 23 December enclosing a number of new questions to Brazil (eight) and to the United States (five) with a deadline set for 12 January. These questions address new interpretations by the Appellate Body, are very comprehensive, and in the view of Brazil will require a significant allocation of resources to complete properly.

Brazil notes that in addition to answering these questions, it must also respond to an extensive US critique of Professor Sumner's analysis, as well as provide comments and analysis on the US 18 December 2003 data, by 12 January. Because Brazil was not aware that the Panel would be filing these new questions, its representatives made severely tight travel and professional commitments that try to accommodate the upcoming holidays bearing in mind the original two deadlines for 12 January (Sumner and 18 December rebuttals).

In consideration of the above, Brazil requests that the Panel push the schedule back by only one week. The original 12 January deadline would be mbac1r61ht trava8ve, an, Br5dWla5625sP08 37.25 -12.7

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## ANNEX K-41

### LETTER FROM THE UNITED STATES

23 December 2003

At the Panel's invitation, my authorities have instructed me to provide the following comments on Brazil's letter of 23 December 2003, in which Brazil requests that the upcoming schedule of filings be delayed.

The United States is amenable to Brazil's extension request, with the alternations suggested below, because it is well aware of the burdens that the very tight time frame established in this dispute has imposed on the parties (and the Panel), particularly in light of the complexity of the matter before the Panel and the volume of materials necessary to examine that matter. In fact, the United States has in the past three business days alone:

- Filed via two letters dated 18 and 19 December 2003, approximately two hundred megabytes of data requested by Brazil. Attempting to collect, prepare, and file these data within the time set out by the Panel in its 8 December communication required enormous efforts on the part of the United States, necessarily affecting preparations of the US answers to the Panel's questions and the US comments on Brazil's econometric model.
- Filed answers to approximately 51 questions from the Panel, within the same time that Brazil had to answer approximately 32 questions. (Indeed, given Brazil's comment that the "eight" new questions directed to it "in the view of Brazil will require a significant allocation of resources to complete properly" and therefore justify an extension of time, Brazil should now understand – if it did not before – the significantly greater burdens placed on the United States in responding to approximately 20 more questions than Brazil was asked to respond to.)
- Filed comments on Brazil's econometric model. In making this filing, the United States was faced with examining, and preparing and filing comments on the FAPRI model transmitted to the United States by Dr. Bruce Babcock, per the Panel's communication dated 8 December 2003, within the time originally set out by the Panel only to address Brazil's exhibits and models.

Had the United States focused its energies only on the answers to the Panel's questions and the comments on Brazil's economic modelling, the filing of those documents would not have been delayed, but the United States chose to make best efforts to comply with all of the requests and time frames set by the Panel in this dispute. It is only due to tremendous efforts by US personnel in Washington, Kansas City, and Geneva that Brazil is even in a position to cite the need to respond to the data submitted by the United States as part of the reason a delay in the schedule is needed.

In light of the foregoing, the United States would be willing to agree to an extension of time. However, instead of Brazil's proposal, the United States would ask that the schedule be altered as follows: First, we would ask that the filing of the parties' responses to the additional questions from the Panel (dated 23 December 2003), as well as Brazil's comments originally scheduled for 12 January 2004, be moved to 21 January (to take into account the fact that 19 January is a US Federal holiday). We would then request that the parties' comments on each other's answers be

moved to 2 February. The reason for this latter proposal is because, in addition to filing comments on Brazil's answers to the Panel's additional questions on that date, the United States will also be filing – per the Panel's communication of 8 December 2003 – comments on (1) Brazil's comments on the data provided by the United States on 18 and 19 December 2003, as well as (2) Brazil's comments on the US comments on Brazil's economic model. Given Brazil's confirmation in its letter that its submissions on these matters will require four weeks to prepare, the United States and the Panel can expect that those comments will be extensive. Thus, one week to respond to Brazil's three submissions would understandably be insufficient; for due process reasons, the United States believes at least two weeks would be needed to respond to Brazil's four weeks worth of comments and answers.

In agreeing to Brazil's extension request, with the above caveats, the United States notes that it is simply seeking to advance the goal of WTO dispute settlement – that is, the effective resolution of disputes, rather than pursuing litigation tactics designed merely to disadvantage the other party procedurally. In this regard, we regret Brazil's second letter of 23 December, requesting that certain US documents "be disregarded by the Panel". The United States has in a communication earlier today expressed its regret for any inconvenience that may have resulted to the Panel and Brazil due to the

## **ANNEX K-42**

### **REPLIES OF THE UNITED STATES TO ARTICLE 13 REQUEST**

20 January 2004

The United States is in receipt of a request for information from the Panel pursuant to Article 13 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* transmitted on 12 January 2004. In its request, 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”.<sup>1</sup> The Panel’s request states that “[d]isclosure 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” and invites the United States to “protect the identity



The United States further notes the Panel's statement that "[a] refusal by the United States to provide the information as requested without an adequate explanation may lead to adverse inferences being drawn". As explained, the United States does not have the authority to provide the farm-specific planting information in the format requested. Further, the United States has provided both farm-specific and aggregated contract data that would permit the Panel to make the assessment it identifies, that is, an assessment of total expenditures of decoupled payments to farms planting upland cotton. The situation here is thus very different from the one in *Canada - Aircraft* where the Appellate Body first opined that "a panel should be willing expressly to remind parties – during the course of dispute settlement proceedings – that a refusal to provide information requested by the panel may lead to inferences<sup>6</sup> being drawn about the inculpatory character of the information withheld".<sup>7</sup> There is no basis for an "inference" of any kind, adverse or otherwise.<sup>8</sup>

Finally, we of course recognize that the Panel has the right to seek information which it deems appropriate pursuant to Article 13.1 of the DSU. We wish to recall, however, that panels must

## ANNEX K-43

### LETTER FROM THE UNITED STATES

28 January 2004

Enclosed with this letter the United States is providing a CD containing revised versions of the 6 electronic data files relating to the production flexibility contract era and the direct and counter-cyclical payment era that were transmitted to Brazil on 18 and 19 December 2003, and to the Panel on 18 and 22 December 2003. The enclosed CD contains six revised data files. The file names are identical to those previously submitted but with an "r" preceding the original file name. Thus, the files are now titled "rDcpsum.xls" (aggregate data file), "rDcpby.txt" (farm-by-farm base and yield data file), "rDcpplac.txt" (planted acres file), "rPfcsum.xls" (aggregate data file), "rPfcby.txt" (base and yield data file), and "rPfcplac.txt" (planted acres file). We have prepared these revised electronic files after becoming aware of certain errors in the original data files submitted.

In the limited time available to reply to Brazil's request for data, certain programming errors appear to have resulted. As indicated in our letter of 18 December to the Panel, responding to the Brazilian request involved extracting pertinent information from approximately 10 million data files; because that request sought information relating to up to 10 programme crops on nearly 250,000 farms, the information provided by the United States ultractringn pannd Searly 252 migatbytes uf -

## ANNEX K-44

### LETTER FROM THE UNITED STATES

30 January 2004

The United States is in receipt of a document filed by Brazil with the Panel on 28 January 2004, providing Brazil's comments regarding data provided by the United States on 18 and 19 December 2003, and related matters. Brazil's filing of these comments was made 8 days after the deadline set by the Panel in communications dated 8 December and 24 December 2003, and on the date that had been established by the Panel for the United States to comment on Brazil's materials. Accordingly, my authorities have instructed me to respectfully request the Panel to specify the new date for the United States to file comments. The United States further suggests that since the Panel had originally provided that the United States would have eight days to provide its comments, the US comments could now be due eight days from the date the Panel establishes the new deadline.

As you know, on 8 December 2003, the Panel communicated to the Parties a revised schedule following the second panel meeting. The second paragraph of that coverfax and timetable reads: "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." The third paragraph reads: "The parties may submit any further comments on each other's comments by **19 January 2004**."

On 24 December 2003, the Panel amended the timetable, stating that "all submissions originally due 12 January 2004 would now be due **Tuesday, 20 January 2004**" and "all submissions originally due 19 January 2004 would now be due **Wednesday, 28 January 2004**." Thus, Brazil had until 20 January 2004, to file its comments on the US data, and the United States had until 28 January 2004, to file its comments on Brazil's comments.

Brazil did not file its comments on 20 January, nor did it seek an extension of time from the Panel. Instead, Brazil simply delayed filing its 48 pages of detailed comments (with accompanying exhibits) until 28 January.<sup>1</sup> Providing the United States eight days to comment from the date of the Panel's communication of the new deadline would preserve the procedural balance originally established by the Panel.

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<sup>1</sup> The United States finds Brazil's eight-day delay in meeting the Panel's deadline particularly ironic in light of Brazil's letters, such as its letter of 23 December 2003, complaining about the time of US filings.



## **ANNEX K-45**

### **LETTER FROM BRAZIL**

2 February 2004

The Government of Brazil is in receipt of a letter from the United States dated 30 January 2004 requesting an additional eight days to respond to Brazil's 28 January 2004

Fifth, Brazil notes that the U.S. letter of 28 January 2004 provides Brazil and the panel with “revised” data files to correct for “certain errors” in the original data submitted forty days earlier on 18 December 2003. None of these “corrections” provide any useable farm-specific contract payment base and current planting data. Thus, the United States continues to violate the Panel’s 8 December 2003 and 12 January 2004 requests for such information. Further, the 28 January 2004 revised data continues to suffer from the various aggregation problems identified in paragraphs 8-15, 22, 76-81, 90-98, of *Brazil’s Comments*. Nor does the corrected data include complete information on market loss assistance payments (as identified in paragraphs 20, 22, 43, 82 and 95 as well as notes 40, 43, 75, 163, 164, 166, 195 and 197 of *Brazil’s Comments*)

## ANNEX K-46

### LETTER FROM THE UNITED STATES

3 February 2004

The United States is in receipt of a letter filed by Brazil on 2 February 2004, commenting on the US request for the Panel to establish a new deadline for the United States to file comments on Brazil's comments regarding data provided by the United States on 18 and 19 December 2003, and related matters.

My authorities have instructed me to inform the Panel that the United States welcomes Brazil's statement that it has no objection to the Panel establishing a new deadline for the United States to comment on Brazil's comments. Brazil, however, objects to the United States being given eight days from the Panel's communication establishing the new deadline, arguing that it would "violate Brazil's due process rights if the United States were given more time to comment on these documents than Brazil had to comment on the failure of the United States to provide the information on 20 January 2004". With respect, this fundamentally misstates the issue.

Brazil had access to the 18 and 19 December data for nearly *six weeks* before filing its comments, due on 20 January but submitted on 28 January, and evidently used that time in order to prepare quite lengthy and detailed comments (over 50 pages plus exhibits). Yet Brazil objects to the Panel providing the United States with notice that it has eight days to prepare its response. Brazil would have the Panel upset the balance of time set out in its communications for the preparation of the respective comments of Brazil and the United States.

We also note Brazil's argument that the Panel's 12 January letter "necessarily mooted, at least temporarily", the 20 January date for the filing of Brazil's comments. It is ironic, to say the least, that Brazil should have complained about delays (measured in minutes) in filing certain US documents and then unilaterally have decided that it was entitled to an additional *eight days* in filing its comments since, in Brazil's view, "[i]t would have made little sense" for Brazil to comply with the Panel's 20 January deadline. Brazil did not request the Panel to modify the deadlines as a result of the Panel's 12 January letter. Brazil simply decided not to abide by the deadlines established by the Panel. Indeed, Brazil should have filed its comments on the 18 and 19 December data on 20 January as scheduled and has provided no reason why it was unable to do so.

If Brazil wanted a further opportunity from the Panel to comment on any response to the Panel's 12 January letter, it could have so requested. Brazil did not do so. Instead it simply ignored the Panel's deadline and used a nearly six-week period to provide comments on the US data. Thus, Brazil's February 2 letter continues to evince its one-sided tactics on procedural issues, in which Brazil seeks (or simply provides to itself) substantial periods of time to prepare its filings but seeks to deny adequate time to the United States to prepare its responses.<sup>1</sup>

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<sup>1</sup> For example, the United States recalls that at the panel organizational meeting, Brazil objected to the United States having more than two weeks to prepare its first submission while at the same arguing that Brazil would need a full two weeks to prepare the executive summary of its own first submission. (Brazil did not volunteer that it had already drafted a first submission that would ultimately turn out to be more than 135 pages in length, with over 100 exhibits.) As the United States noted at the time, it seemed implausible that the United States could prepare a *substantive response* to a submission in two weeks if Brazil was unable to prepare a *summary* of that submission in less than that time.

We note Brazil's request that the Panel *ex ante* "limit the scope of the US 'Comments' to arguments [to which] the United States has not yet had an opportunity to respond" and prevent the United States from "present[ing] positive evidence". However, the Panel had previously established that the United States "may submit any further comments on [Brazil's] comments" by 19 January, 2004<sup>2</sup>, later revised to 28 January 2004.<sup>3</sup> Therefore, Brazil's request does not comport with the Panel's previous communication, would prejudge what comments the United States may

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With respect to item (b) of the Panel's supplementary request for information, the United States would seek clarification of that request. First, the United States would ask the Panel to specify which commodities are "covered commodities" as that term is used in several of the bullet points and subbullets. Second, the United States would seek confirmation that, with respect to the information sought for marketing year 2002 "with respect to all crops on cropland covered by the acreage reports",

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why did the United States wait 8 days to bring this to the Panel's attention if it was truly puzzled by this condition of the Panel's request?

With respect to the enormous amount of time the United States claims it will take to produce information in response to part (b) of the Panel's 3 February 2004 Request, Brazil notes that the format of the Panel's Request was very similar to the *rice* FOIA request that is set out in Exhibit Bra-368. The testimony of Mark Somers before the Panel on 3 December 2003 indicated that the rice FOIA documents showed that USDA took less than a week to process the data and respond to the rice FOIA request once USDA's statistical experts began work on the project (and the time from filing the request to issuance of the data was 15 days). Indeed, Brazil was easily able to calculate the aggregate rice farm-specific base and acreage information in just a few days as set forth in Christopher Campbell's statement in Exhibit Bra-368. With its access to a number of USDA statistical experts, not to mention the centralized database with all of the records already inputted, it is simply not credible for the United States to claim that it needs more than five weeks to respond to the Panel's request.

As the Panel knows from reviewing Exhibit Bra-368, the data delivered by USDA's Kansas City office permitted the ready tabulation of the exact number of rice farms holding contract acreage and the amount of their rice acreage. The Panel's request for contract and planted acreage information on farms planting cotton is not fundamentally different from the rice request in terms of the type of data files at issue. The raw data in the contract and planted acreage (for all planted commodities) files that the United States would use to respond to the Panel's 3 February 2003 typ



Therefore, Brazil strongly believes that the United States has been given more than sufficient time (seven months) and opportunities (five) to produce the requested contract payment information in one form or another. If the Panel agrees, however, that the required balance between ensuring high-quality panel reports and not unduly delaying the panel process requires providing yet another opportunity to the United States to provide the data requested in part (b) of the Panel's 3 February 2004 Request, then Brazil has the following additional comments. If the United States provides the complete information requested in part (b) of the 3 February 2004 Request, then Brazil's 28 January Data Comments would be rendered moot. The purpose of the Data Comments was to (a) demonstrate the inadequacy of the US methodology, (b) request the US to provide the data, (c) demonstrate the inadequacy of the US methodology, and (d) to apply the US methodology to the data. Because the US 11 February 2004 comments and the US 28 January 2004 Data Comments are only relevant to these underlying Brazilian claims, the US 11 February 2004 Comments will also be largely rendered moot if the United States provides the data requested in part (b) with the original and complete data, the Panel would be in the position to apply the methodology and determine if it is acceptable. Further, by providing the complete aggregated information, the US would no longer need to draw adverse inferences. Nor, would there be a need for a comment on the quality of the incomplete and inadequate data in applying the US methodology.

Accordingly, if the Panel provides the United States with additional time to provide the data (which Brazil opposes), then the US 11 February 2004 comments and the US 28 January 2004 Data Comments would be rendered moot.

## ANNEX K-49

### LETTER FROM THE UNITED STATES

16 February 2004

The United States is in receipt of a letter from Brazil dated 13 February 2004, requesting the Panel not to afford the United States additional time to provide certain requested information and the opportunity to respond to Brazil's anticipated 18 February 2004, comments on certain data submitted by the United States. My authorities have instructed me to make the following reply to these issues.

The United States has communicated to the Panel that work continues in response to the Panel's supplemental request for information and that the United States expects to complete this work within four weeks from the date the Panel provides certain clarifications to its request. The United States provided this time estimate on the basis of its work completed to date and questions that arose with respect to the Panel's request (the subject of our request for clarifications).<sup>1</sup> We also noted that item (a) in the Panel's request presented the challenge of seeking some means by which to review the identities of payment recipients on approximately 250,000 farms within the scope of the request, a task which was impossible to complete within the eight days the Panel had requested. Finally, in producing this time estimate, United States reflected on its experience in producing data for this dispute in December 2003. That data was provided within 15 days of its request, and, on subsequent review, contained a number of inaccuracies that had to be cured by a subsequent filing.<sup>2</sup> In addition to explaining the reasons supporting our estimate, we also made clear that "should the United States complete its preparation of the requested information prior to that date, we would make that information available to the Panel and Brazil at that time".<sup>3</sup>

If anything, the data requested by the Panel on 3 February 2004, is more extensive than the information requested in December as it requests that additional data be sought and that different aggregations be provided. By way of example, for marketing year 2002, we understand that the Panel has requested planted acreage data for all "crops" for each Category of farm set out in the request.<sup>4</sup> The Panel will recall that in marketing year 2002, the "crops" for which crop insurance premium subsidies were available included:

Almonds, apples, avocado, avocado trees, barley, blackberries, blueberries, burley tobacco, cabbage, canola, cherries, chile peppers, cigar binder tobacco, cigar filler

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<sup>1</sup> With respect to the first point of clarification sought by the United States, Brazil points to a table in the Panel's supplemental request for information. We note that two of the headings in that table, "soybeans" and "other oilseeds", are marked with an asterisk, which denotes "[w]here applicable". See Panel's



example, Brazil asserted in paragraph 135 of its 28 January 2004, comments on US answers that “the difference between the chart provided by the United States in Exhibit US-128 and Brazil's chart in para. 165 of its 11 August Answers lies in the treatment of rescheduled debt”. To provide a helpful answer would seem to require that the United States examine what goes into each of the figures that are represented in Brazil's chart. The United States was not able to complete that analysis within the eight days provided – but was able to generate and provide in its 11 February answers copious amounts of numbers and data in response to the 29 Panel questions. Rather than seek an extension with respect to *all* questions, we provided the data we could on 11 February and will provide any other data in response to Question 264(b) within the time indicated (and sooner if the data can be collected and examined in less time).

## **ANNEX K-50**

### **LETTER FROM THE UNITED STATES**

23 February 2004

The United States thanks the Panel for its communication of 20 February 2004, in which the Panel extends to the United States the opportunity to respond to Brazil's 18 February submission relating to certain data provided by the United States on 18 and 19 December 2003. The United States would like to confirm that it does wish to comment on this Brazilian submission. The Panel has asked the United States to file any comments within five days, that is, by Wednesday, 25 February. In light of the extensive material submitted by Brazil and US efforts to respond simultaneously to the Panel's supplemental request for information, the United States would like to ask the Panel to extend the deadline to provide these comments, to Wednesday, 3 March, the same due date for the US response to the Panel's supplemental request for additional information.

This extension would greatly assist the United States in providing useful comments for the Panel on Brazil's lengthy 18 February comments, which totalled 79 pages. Of these 79 pages, 41 pages were devoted to setting forth results of numerous calculations. The personnel who would need to review these calculations are also involved in the ongoing US efforts to provide data in response to the Panel's supplemental request for additional information. The extension requested would permit these personnel to better advance US efforts to respond fully and accurately to the Panel's supplemental request while simultaneously reviewing and providing comments on Brazil's 18 February submission.

In addition, we note that the extension requested would not impact any other dates set by the Panel in this proceeding. Thus, the United States respectfully requests the Panel to extend the deadline to provide the US comments, to Wednesday, 3 March.

The United States is providing a copy of this letter directly to Brazil.