

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

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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

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

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

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 claims under the *SCM* and *Agriculture Agreements*, while the Panel is precluded from examining the *SCM* claims concerning the measures 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 proceed in this way. All of the six third parties that made submissions are not precluded from simultaneously considering all of the arguments and claims of Brazil's claims under the *SCM* and *Agriculture Agreements*, or, in reaching its conclusions on the applicability of the Article 13 exemptions do not preclude the examination of *SCM* claims in relation to the measures concerned.

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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 rules and procedures on dispute settlement relating to the *SCM Agreement* or to Article XVI of the *GATT 1994*.

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

- 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. as first viewsricuany
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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 plac

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

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.

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

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**

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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 phrase 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

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**

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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?1 and iLp guidance in

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 *dd re C84 Tw.75 TD -0.1383 Tc 0.7007i69(whee C84 Tj8o80 -12.743 Tc 0.1818 Tw 25 Thel*

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*

- (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.

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-1.7

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.

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

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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

The Panel's

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

ANNEX L-1.11

COMMUNICATION

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-1.12P a g e L

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

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 "exemption from actions" under Article 13(b)(ii) and 13(c)(ii) of the *Agreement on Agriculture*? **BRA, US**

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-

D. "LIKE PRODUCT"

126.

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, is

(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**

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

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**

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 Exue taj 309187ase d -0.1416 14.25 0 TD /#0 11.25 Tf 0 Tc 0.1875 ready gdoes I
1

166.

166. When t he used t3

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 evidence -~~

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 assistance payments, direct payments and counter-cyclical payments to be made during MY2007-2009, 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 text of these 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 export subsidy provisions of the *SCM Agreement*, and, in particular, from the export subsidy provisions of the *SCM Agreement* and the *Agreement on Agriculture*. First of all, the *Agreement on Agriculture* contains an express definition of the term "subsidy" which is not contained in Article XVI:4. In fact, as we have observed previously, the *Agreement on Agriculture* contains a broad package of new export subsidy disciplines that go well beyond merely applying and interpreting Articles VI, XVI and XVII of the GATT 1994. Article XVI:4 prohibits export subsidies that result in the sale of a product at a price lower than the price that would have been obtained on2f

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 w6pexpress220,eer the3.1871

Panel's views on the preliminary ruling requested by the United States

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 FAF2.iI.

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

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.

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

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

- (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**

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

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?

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 froh7US

(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

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 2r88 Tc Ror 0.9307 Tw (re2805 cOlpoE4onsider the US) T -0.13/" commod

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-1.26

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.

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 wo

EC 3 991 6 TDD / F a 0 i a T A r l g e W t h n a 2 5 C l o n 3 0 , E C , N Z

United States of America, Canada, EC, NZ, Australia, Argentina, China, Korea, Malaysia, Mexico, Philippines, Thailand, Viet Nam, EC, NZ, Australia, Argentina, Canada, EC, NZ12. Where does Article 13(b) require a year-on-year comparison of the number of persons in the industry? Australia, Argentina, Canada, China, EC, NZ13.

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

- (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

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

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**

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