

January 20, 2004

Mr. Dariusz Rosati
Chairman
United States – Subsidies on Upland Cotton (DS267)
World Trade Organization
Centre William Rappard
154 Rue de Lausanne
1211 Geneva 21

Dear Mr. Chairman:

The United States is in receipt of a request for information from the Panel pursuant to Article 13 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* transmitted on January 12, 2004. In its request, the Panel “requests the United States to provide the same data that it agreed to provide in its letters dated 18 and 22 December 2003 but in a format which permits matching of farm-specific information on contract payments with farm-specific information on plantings.”¹ The Panel’s request states that “[d]isclosure is sought to permit an assessment of the total expenditures of PFC, MLA, CCP and direct payments by the U.S. Federal Government to upland cotton producers in the relevant marketing years” and invites the United States to “protect the identity of individual producers by, for example, using substitute farm numbers which still permit data-matching.” My authorities have instructed me to submit this response.

With respect to the Panel’s explanation that “disclosure is sought to permit an assessment of the total expenditures of PFC, MLA, CCP and direct payments by the U.S. Federal Government to upland cotton producers in the relevant marketing years,” the United States notes that it has previously provided data that permits calculation of “total expenditures” for all decoupled payments made to farms planting upland cotton with respect to historical base acres (whether upland cotton base acres or otherwise). In particular, for the production flexibility contract payment era, we provided a farm-by-farm file (“Pfcby.txt”) with base acreage and yield data for all program crops for all “cotton farms” as defined in BRA-369 and data file (“Pfcsum.xls”) that aggregated this data for ease of use.² The “program payment units” field

¹ The Panel’s request references U.S. letters dated December 18 and 22, 2003, providing certain information from Brazil. The United States understands the latter reference to be to the December 19 letter to Brazil that was transmitted to the Panel and the Brazilian Mission to the WTO on December 22, 2003.

² These files were provided, per Brazil’s request, to the Brazilian Embassy in Washington, D.C., on December 18, 2003 via CD-ROM. The U.S. letter was filed with the Panel on December 18, and the CD-ROM was delivered via courier to Geneva and filed with the Panel on December 23, 2003.

allows for easy calculation of “total expenditures” to farms planting upland cotton in any given year by multiplying payment units by the applicable payment rate. Similarly, for the direct and counter-cyclical payment era, the United States provided a farm-by-farm file (“Dcpby.txt”) with base acreage and yield data and an aggregate data file (“Dcpsum.xls”).³ Again, the “program payment units” field allows for easy calculation of total expenditures by multiplying payment units by the applicable payment rate. Thus, 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.

The United States has studied the Panel’s request for certain farm-specific data as well as its suggestions with respect to protecting U.S. producers’ privacy interests. The United States thanks the Panel for recognizing the important confidentiality concerns which arise from Brazil’s request to receive, by farm number, contract payment and planting information. The Panel will recall that at the second panel meeting the U.S. delegation expressly inquired of the Brazilian delegation whether the United States could provide the requested data in some format that also protected the identity of individual producers. The Brazilian delegation refused to answer and insisted that the requested information be provided with farm numbers, as set out in Exhibit BRA-369. In response to Brazil’s request, the United States therefore provided all of the data that it could without violating the privacy interests of U.S. producers, as required under the Privacy Act of 1974.

The United States has studied the Panel’s request and has concluded that it is not possible to “protect the identity of individual producers” while providing the requested data in a format that permits data-matching. This results because the United States has already provided, by farm number, farm-specific contract information, including base acreage, base yield, and payment units, for each program crop for each requested year. For example, for each and every “cotton farm” (as defined in the Brazilian request) identified by its FSA farm number, the United States has provided 96 separate data fields relating to 2002 direct and counter-cyclical contract payments. These 96 fields of contract data form a unique combination, such that – even in the absence of farm numbers – disclosing the farm-specific plantings that correspond to each unique combination of contract data would allow each farm’s plantings to be connected to the FSA farm numbers through the farm-by-farm files previously provided. Thus, as a result of Brazil’s insistence on receiving data with the FSA farm numbers and refusal to consider any alternative that would respect the privacy interests of U.S. producers, unfortunately there would not appear to be a way to provide the requested data and “protect the identity of individual producers” given the data already provided. Under the Privacy Act of 1974, the United States could not disclose this information without the consent of the submitter.⁴ Thus, the existence of confidentiality

³ These files were provided to the Brazilian Embassy in Washington, D.C., on December 19, 2003 via CD-ROM. The U.S. letter was filed with the Panel on December 22, and the CD-ROM was delivered via courier to Geneva and filed with the Panel on December 23, 2003.

⁴ 5 U.S.C. 552a(b) (“No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . .”).

procedures would still not permit the United States to release each farm's planting information associated with the farm's particular contract payment data (given the previous submission of contract data in association with farm, county, and state numbers).⁵

With respect to the Panel's reference to the release of certain farm-specific planting data by the Farm Services Agency to a member of the Brazilian delegation, the United States has explained in its December 18 letter to the Panel that this release was in error. We have requested that Brazil assist the United States in curing this breach of confidentiality by returning all copies of the erroneous release but have yet to receive a response.

The Panel makes reference to a weighing of "the public interest in disclosure" against a payment recipient's privacy interests. The question of whether the information could be released – and even whether the "public interest" is a relevant consideration – is a complicated issue under U.S. domestic law. In the first instance, the U.S. Department of Agriculture has determined that it is prohibited under U.S. law from releasing this information without the consent of each submitter. In any event, we note that the Panel states that it requests these data "to permit an assessment of the *total expenditures* of PFC, MLA, CCP and direct payments . . . to upland cotton producers." Thus, the information relevant to the Panel's assessment would not be *farm-specific data* but rather some *aggregation* of data to permit this "assessment of . . . total expenditures." As noted above, the United States has provided both farm-specific and aggregated contract data that would permit an assessment of total expenditures of decoupled payments to farms planting upland cotton.

The United States further notes the Panel's statement that "[a] refusal by the United States to provide the information as requested without an adequate explanation may lead to adverse inferences being drawn." As explained, the United States does not have the authority to provide the farm-specific planting information in the format requested. Further, the United States has provided both farm-specific and aggregated contract data that would permit the Panel to make the assessment it identifies, that is, an assessment of total expenditures of decoupled payments to farms planting upland cotton. The situation here is thus very different from the one in *Canada - Aircraft* where the Appellate Body first opined that "a panel should be willing expressly to remind parties – during the course of dispute settlement proceedings – that a refusal to provide information requested by the panel may lead to inferences⁶ being drawn about the

⁵ Moreover, because contract data by farm number may be releasable information – as we have done here with respect to Brazil's specific request – a request to release contract data associated with a farm's planting information would raise the same privacy concerns because of the potential to link such data back to farm and recipient information that could be separately obtained.

⁶ The United States notes that in the same report the Appellate Body was careful to distinguish "adverse" inferences from other "inferences," remarking that: "We note, preliminarily, that the 'adverse inference' that Brazil believes the Panel should have drawn is not appropriately regarded as a punitive inference in the sense of a 'punishment' or 'penalty' for Canada's withholding of information. It is merely an inference which in certain circumstances could be logically or reasonably derived by a panel from the facts before it." *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, para. 200 ("*Canada – Aircraft*").

inculpatory character of the information withheld.”⁷ There is no basis for an “inference” of any kind, adverse or otherwise.⁸

Finally, we of course recognize that the Panel has the right to seek information which it deems appropriate pursuant to Article 13.1 of the DSU. We wish to recall, however, that panels must take care not to use the information gathered under this authority to relieve a complaining party from its burden of establishing a *prima facie* case of WTO inconsistency based on specific legal claims asserted by it. In *Japan – Measures Affecting Agricultural Products*, the Appellate Body explained that it is for a complaining party to make arguments supporting its specific legal claims and that the panel had erred in using information it had obtained to make a finding of inconsistency on the basis of an argument and claim not explicitly advanced by the complaining party.⁹ In this dispute, Brazil has not advanced legal claims and arguments that decoupled payments should attribute across the total value of the recipients’ production, nor has Brazil advanced claims and arguments setting forth *any* methodology for calculating the total amount of payments it challenges, as reflected in Question 258 from the Panel to Brazil. The Panel may not relieve Brazil of its burden of advancing and establishing claims and arguments relating to the value of decoupled payments benefitting upland cotton, a crucial element in Brazil’s *prima facie* case under Articles 5 and 6 of the *Agreement on Subsidies and Countervailing Measures*.

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

Sincerely,

Steven F. Fabry
Senior Legal Advisor

cc: H.E. Mr. Luiz Felipe de Seixas Corrêa, Permanent Mission of Brazil

⁷ *Canada – Aircraft*, WT/DS70/AB/R, para. 204.

⁸ The United States also notes that it is even less appropriate to draw “adverse inferences” in this dispute than in *Canada - Aircraft* in that Annex V, which was referred to by the Appellate Body in *Canada - Aircraft*, was rendered inapplicable by the Peace Clause in this dispute.

⁹ Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, paras. 129-30.