United States – Subsidies on Upland Cotton

(WT/DS267)

Executive Summary of the First Written Submission of the United States of America

July 21, 2003

1. In this submission, the United States principally focuses on the issues involving the Peace Clause. However, three sets of measures identified by Brazil – (1) export credit guarantee measures relating to eligible U.S. agricultural commodities other than U.S. upland cotton; (2) production flexibility contract payments and market loss assistance payments; and (3) cottonseed payments – were, respectively, not the subject of consultations, had expired before consultations were requested, or had not yet been adopted at the time of the consultation and panel requests. With respect to these measures, the United States requests that the Panel make preliminary rulings that they are not within the Panel's terms of reference.

2. **General Interpretation of the Peace Clause and "Exempt from Actions"**: As set out in more previous submissions, read in accordance with the customary rules of interpretation of public international law, the key Peace Clause phrase "exempt from actions" means "not exposed or subject to" a "legal process or suit" or the "taking of legal steps to establish a claim or obtain a remedy." Relevant context in DSU Article 3.7 and 4.5 and Subsidies Agreement Article 7 supports this reading. For example, contrary to Brazil's suggestion that "action" only refers to "collective action" by the Dispute Settlement Body, DSU Article 4.5 uses the phrase "further" action. Since no "action" will have been taken by the DSB "in the course of consultations," the phrase "further action" suggests that requesting consultations is part of the action brought by a complaining party. Thus, these provisions suggest that "action" based on the relevant provisions would include all stages of a dispute, including the "bringing [of] a case," consultations, and panel proceedings and would support reading "exempt from actions" in Article 13 to mean "not subject to" the "taking of legal steps to establish a claim."

3. Prior to this point in the process, DSU rules did not afford the United States any opportunity to prevent the dispute from proceeding through consultations and panel establishment automatically, regardless of the U.S. insistence that its measures conform to the Peace Clause. As a responding party cannot prevent panel establishment from occurring, it will inevitably be forced to argue to a panel that its procedures should be structured so that the party's challenged measures are not subject, from that point on, to actions based on provisions specified in the Peace Clause. Thus, the Panel's organization of its procedures provided the first opportunity to arrest Brazil's "taking of legal steps to establish a claim."

4. **The Peace Clause Is Not an Affirmative Defense**: The Peace Clause applies *"[n]otwithstanding* the provisions of GATT 1994" and the Subsidies Agreement – that is, *in spite of* and *without regard to or prevention by* the subsidies obligations contained in those agreements. Article 21.1 of the Agriculture Agreement further clarifies that the obligations of Members under the Subsidies Agreement and GATT 1994 *only* apply "*subject to*" the provisions of the Agriculture Agreement, including the Peace Clause. There is no need to determine if a measure is inconsistent with WTO subsidies disciplines before applying the Peace Clause as would be the case if the Peace Clause were an affirmative defense to those obligations.

5. As in *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, in which the Appellate Body explained that a provision that was described as an "exception" was not an affirmative defense and in fact was "an integral part" of the arrangement under the *Agreement on Textiles and Clothing* that "reflects an equally carefully drawn balance

of rights and obligations of Members," here, too, the Peace Clause is part and parcel of the balance of rights and obligations with the subsidies disciplines of GATT 1994 and the Subsidies Agreement and explains which measures are subject to actions based on those disciplines.

6. Article 13(a)(i) establishes that green box measures are "non-actionable subsidies for purposes of countervailing duties." This obligation is not contingent on whether a Member asserts an "affirmative defense" that a particular measure is "green box"; that is, one Member is not free to impose a countervailing duty until another establishes a Peace Clause "affirmative defense." There is no textual basis to interpret the Peace Clause to be an affirmative defense under one provision (Article 13(b)(ii)) but not another. In fact, rather than a defense, the Peace Clause could be used on the *offense* (as a cause of action) if, for example, a Member imposed a countervailing duty on a "green box" measure while the Peace Clause was in force.

7. Brazil has erroneously asserted that the Peace Clause "provides no positive obligations itself." Brazil overlooks the text of, for example, Article 13(a)(ii) and (b)(ii), which incorporates positive obligations of Annex 2 and Article 6 by reference. The Peace Clause also differs from the fifth sentence of footnote 59 to item (e) and under the second paragraph of item (k) of the Illustrative List, under which it appears that a measure otherwise prohibited under Article 3 of the Subsidies Agreement would nonetheless be permitted given the existence of circumstances detailed in those provisions. However, under the Peace Clause, conforming measures are not even exposed or subject to the taking of legal steps to establish a claim or obtain a remedy based on Peace Clause-specified provisions. Further, Subsidies Agreement Articles 3, 5, and 6 recognize that measures conforming to the Peace Clause are not subject to those disciplines by expressly excluding such measures from the scope of those obligations.

8. Brazil asserted in both its panel and consultation requests that the Peace Clause does not exempt the challenged U.S. measures from action. Brazil implicitly recognized in these documents that it must surmount the Peace Clause hurdle to bring this action against U.S. agricultural support measures. Even were the United States to present no arguments on the applicability of the Peace Clause, Article 13 would bar Brazil's claims unless Brazil made a *prima facie* case that the U.S. measures breach the Peace Clause.

9. **U.S. Direct Payments Meet Annex 2 Criteria for Decoupled Income Support and Conform to the Criteria in Article 13(a):** Pursuant to Agriculture Agreement Article 13(a)(ii) domestic support measures that "conform fully to the provisions of Annex 2 to this Agreement" are "exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement." The 2002 Act establishes several types of measures that qualify for green box protection, including one, direct payments, that is challenged by Brazil.

10. Direct payments under the 2002 Act conform fully to the basic criteria in paragraph 1, Annex 2, as well as the five "policy-specific criteria and conditions" in paragraph 6, Annex 2, for "decoupled income support." Consistent with paragraph 1, direct payments are provided by a publicly-funded government program and do not provide price support. Consistent with

paragraph 6, direct payments establish eligibility by reference to the clearly-defined criteria of factor use or production level in a defined and fixed base period. Payments are not related to production or prices or the factors of production employed in any year after the base period, and no production is required in order to receive such payments.

11. In short, direct payments do not provide support for upland cotton because they are not linked to current cotton production. These payments are made with respect to farm acreage that was devoted to agricultural production in the past, including previous upland cotton production. Direct payments, however, are made regardless of whether cotton is currently produced on those acres or whether anything is produced at all. Because all of the criteria in paragraphs 1, 5, and 6 are met, direct payments conform to the requirements of Annex 2 and are "exempt from actions" based on Part III of the Subsidies Agreement and GATT 1994 Article XVI.

12. **Applicability of Agriculture Agreement Article 13(b)(ii):** Pursuant to Agriculture Agreement Article 13(b)(ii), "domestic support measures that conform fully to the provisions of Article 6" are "exempt from actions" based on GATT 1994 Article XVI:1 and Subsidies Agreement Articles 5 and 6. Brazil does not contest that U.S. non-green box domestic support measures conform fully to the requirements of Article 6. Thus, the only question is whether U.S. non-green box domestic support measures do or do not "grant support to a specific commodity in excess of that decided during the 1992 marketing year."

13. The phrase "grant support to a specific commodity" is not explicitly defined. Read according to its ordinary meaning, this phrase means to "give" or "confer" formally a "subsidy" ("assistance, backing") "specially . . . pertaining to a particular" "agricultural crop." Read in the context of, *inter alia*, the definition of "Aggregate Measurement of Support" in Article 1(a), "support to a specific commodity" refers to support "provided for an agricultural product in favour of the producers of the basic agricultural product" or "product-specific support."

14. The product-specific support granted by such Article 6 measures must be compared to "that decided during the 1992 marketing year." According to its ordinary meaning, this phrase would mean the product-specific support that was "determined" or "pronounced" during the 1992 marketing year. With reference to support or subsidies, the term "decided" is not used elsewhere in the Agriculture Agreement nor in the Subsidies Agreement. Various provisions that define the overall domestic support in favor of agricultural producers that has been, is being, and may be provided by a Member use the phrase "support *provided*" in favor of an agricultural product or agricultural producers no fewer than 13 times. Context thus suggests that the use of the term *"decided"* in Article 13(b) was deliberate so as to make the availability of the Peace Clause not dependent upon the support – for example, as measured through budgetary outlays – actually "provided" during the 1992 marketing year. This interpretation is further supported by Members' decision not to use the term "Aggregate Measurement of Support" in this part of Article 13(b)(ii). That is, Members did not choose to make the applicability of the Peace Clause contingent on comparison of a Member's product-specific Aggregate Measurement of Support.

15. The Peace Clause thus exempts from certain actions a Member's non-green box domestic support measures that conform to that Member's overall reduction commitments under Article 6, provided that such measures do not currently "give" or "confer" "product-specific support" in excess of that "determined" or "pronounced" during the 1992 marketing year. The relevant test for the applicability of Article 13(b)(ii) is to compare the product-specific support as it was decided in 1992 versus the product-specific support that existing measures currently grant.

16. **U.S. Measures Conform to the Criteria in Article 13(b) and Are Exempt from Actions**: U.S. domestic support measures under the 2002 Act were written to grant support for upland cotton within the 1992 marketing year level so that such measures would conform to the Peace Clause criteria. In particular, the 2002 Act shifts support away from the product-specific support that prevailed in 1992 to reduce support linked to the production of upland cotton.

17. **The Product-Specific Support for Upland Cotton Decided During 1992 Was To Ensure Income of 72.9 Cents per Pound**: The product-specific support in favor of upland cotton decided during the 1992 marketing year was to ensure a level of income ($0.729) for upland cotton farmers for each pound of upland cotton production. That is, U.S. domestic support measures set a *rate* of support, rather than deciding *ex ante* a level of budgetary outlay or expenditures. This support was granted by the 1990 Act through two programs: marketing loans (including marketing loan gains and loan deficiency payments) and deficiency payments.

18. Through marketing loans, the United States in effect guaranteed that cotton producers would realize income equivalent to at least 52.35 cents per pound of upland cotton produced. The United States further ensured cotton farmers would realize income equivalent to 72.9 cents per pound of upland cotton produced by making "deficiency payments." By the terms of the 1990 Act and all subsequent implementing regulations, the support "decided" (that is, "determined" or "pronounced") in favor of upland cotton was *not* expressed in terms of outlays or appropriations but rather as a *rate*: that is, through both marketing loans and deficiency payments, producer income of 72.9 cents per pound of upland cotton. Thus, budgetary outlays, which reflect the difference between the rates set out in U.S. legislation and regulations (which *were* decided by the U.S. Government) and market prices (which obviously were *not*), do not represent the product-specific support "decided" during the 1992 marketing year.

19. **U.S. Domestic Support Measures Currently Grant Product-Specific Support to Upland Cotton to Ensure Producer Income of 52 Cents per Pound**: Under the 2002 Act, product-specific support is again granted to upland cotton through the marketing loan program and through user marketing (step 2) payments. Despite a small adjustment in the user marketing (step 2) payment formula, U.S. measures currently in effect grant product-specific support to upland cotton far lower than that decided in the 1992 marketing year. Through the marketing loan program, the U.S. Government has in effect guaranteed that cotton producers will realize income equivalent to at least 52 cents ($0.52) per pound (the "2002 loan rate") of upland cotton produced. Marketing loans and loan deficiency payments are contingent on a farm's actual production of upland cotton in the current marketing year.

20. Product-specific support decided during the 1992 marketing year for upland cotton was to ensure producer income of 72.9 cents per pound; U.S. domestic support measures currently grant product-specific support only at the rate of 52 cents per pound of production. Even taking into account the minor differences in payment rates for user marketing payments, this comparison indicates that U.S. measures do not grant product-specific support to upland cotton in excess of that decided during the 1992 marketing year; in fact, current U.S. measures grant product-specific support at a rate more than 20 cents per pound *less* than that decided during 1992.

21. **U.S. Payments That Brazil Has Mischaracterized As Providing Support to a Specific Commodity Do Not Form Part of the Peace Clause Comparison**: Direct payments, counter-cyclical payments, and crop insurance are not product-specific support for upland cotton and are therefore irrelevant to the 1992 to 2002 Peace Clause comparison. Direct payments are green box support because they conform to the applicable general and policy-specific criteria under Annex 2 of the Agriculture Agreement. As green box measures, direct payments are not part of the comparison of "product-specific" support under Article 13(b)(ii). Because direct payments are based on quantities of acreage that historically produced certain commodities, including upland cotton, and there is no requirement to produce upland cotton to receive these payments, however, direct payments are non-product-specific.

22. With respect to counter-cyclical payments, the United States notes that these measures do not grant product-specific support to upland cotton. Product-specific support is "provided for an agricultural product" for the benefit of "the *producers* of the basic agricultural product." The payment formula for counter-cyclical payments demonstrates that these payments are not "provided for an agricultural product" because it is not current production of upland cotton that qualifies a recipient to receive payment. In addition, it is not "the producers of the basic agricultural product" – that is, current upland cotton growers – that are entitled to receive the counter-cyclical payments but rather persons (farmers and landowners) on farm acres with *past histories* of producing covered commodities, including upland cotton. Because counter-cyclical payments are not product-specific support for upland cotton, such payments are not properly part of the Peace Clause comparison under Article 13(b)(ii).

23. Neither does crop insurance grant product-specific support to upland cotton. A variety of insurance plans are now subsidized and reinsured by the United States. The basic program provisions for crop insurance are generic, not commodity-specific. For example, the U.S. Government provides an incentive to participate in the crop insurance program by subsidizing the premium paid by the farmer. This premium subsidy is available to a broad array of commodities around the country and does not vary by commodity. Thus, while the United States notifies crop insurance as "amber box" domestic support subject to U.S. reduction commitments, crop insurance is "non-product-specific support in favour of agricultural producers in general."

24. **Conclusion: U.S. Non-Green Box Domestic Support Measures Are Exempt from Brazil's Subsidies Agreement and GATT 1994 Article XVI Action**: Brazil has asserted that U.S. domestic support measures breach the Peace Clause by comparing U.S. budgetary outlays

for the 1992 marketing year to U.S. budgetary outlays for marketing years 1999-2001 and its "reasonable" estimates of U.S. outlays for the 2002 marketing year. As noted above, Brazil's interpretation of the Peace Clause and resulting analysis is fundamentally in error. Because the level of income support granted to upland cotton producers is far lower now than the support decided in marketing year 1992, Brazil may not maintain this action and advance claims under GATT 1994 Article XVI:1 or Subsidies Agreement Articles 5 and 6 with respect to U.S. non-green box domestic support measures – marketing loan program payments, user marketing (step 2) certificates, counter-cyclical payments, and crop insurance subsidies.

25. **U.S. Step 2 Payments Are Not an Export Subsidy for Upland Cotton**: User marketing (Step 2) payments are made to users of upland cotton. Under section 1207 of the 2002 Act, the Secretary of Agriculture is authorized to issue marketing certificates or cash payments *to domestic users and exporters* of upland cotton *for documented purchases by domestic users and sales for export by exporters*. The program is indifferent to whether recipients of the benefit of this program are parties that open bales for the processing of manufacturing raw cotton into cotton products in the United States or exporters. Accordingly, the United States reports the benefits conferred under the Step 2 program as product-specific amber box domestic support.

26. The Step 2 program is not an export subsidy under Agriculture Agreement Article 9.1 and not an export subsidy in circumvention of the U.S. obligation not to confer an export subsidy with respect to cotton, contrary to Article 10.1. Article 1(e) of the Agriculture Agreement states that "'export subsidies' refers to subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement." Consequently, to constitute an "export subsidy" for any purposes of the Agreement, the subsidy must first be "contingent on export performance." The benefits of the Step 2 program are not contingent on export performance.

27. A WTO dispute settlement panel has already determined that such facts do not involve an export subsidy for purposes of both Articles 9 and 10 of the Agriculture Agreement, because the subsidy is not "contingent on export performance." The panel in *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products* concluded that where a subsidy was available in connection with the exported product but also to processors producing for the domestic market, "access to milk under such other classes is not 'contingent on export performance.' We therefore find that such other milk classes do not involve an export subsidy under Article 9.1(a)." For precisely the same reasons, the panel also found that "these other milk classes do not involve an export subsidy in the sense of Article 10.1." Similarly, the Step 2 program is not an export subsidy inconsistent with Articles 9 and 10 of because the subsidy is not contingent on export performance and therefore is not an export subsidy.

28. **Brazil Bears the Burden of Proof to Demonstrate the Existence of an Export Subsidy for Upland Cotton**: Brazil as complainant bears the burden of proof with respect to any export subsidy claim relating to upland cotton. Brazil cites Agriculture Agreement Article 10.3 to assert that the United States bears this burden. However, the burden-shift set forth in Article 10.3 is only applicable with respect to exports in excess of a *reduction* commitment level.

As Brazil correctly points out, the United States does not have such a *reduction* commitment level with respect to upland cotton. Article 10.3 therefore does not apply with respect to U.S. cotton exports. With respect to products for which a Member has no scheduled export subsidy reduction commitments, the burden of proof remains with the complainant.

29. **U.S. Step 2 Payments Are Not a Prohibited Subsidy Under Article 3 of the Subsidies Agreement:** With respect to domestic support, the negotiators of the Agriculture Agreement devised the novel concept of "Aggregate Measurement of Support" (AMS), defined in Article 1(a). As the definition provides, all annual domestic support provided for an agricultural product, like cotton, in favor of the producers of that product that is not otherwise exempt under the "green box" (Annex 2) from reduction commitments, or as otherwise provided in Articles 6.4 and 6.5 of the Agreement, is included in the AMS. The definition further contemplates that support provided during any one year is to be calculated in accordance with the provisions of Annex 3. Paragraph 7 of Annex 3 requires that "measures directed at agricultural processors shall be included [in the AMS] to the extent such measures benefit the producers of the basic agricultural products."

30. Accordingly, Step 2 user payments, directed at upland cotton processors and other users but intended to benefit U.S. producers of upland cotton, are included in the annual AMS calculation of the United States. As a result, such payments are subject to reduction commitments applicable to the United States. Agriculture Agreement Article 6.3 provides that "a Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favor of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule." Where a particular program exists in favor of agricultural producers within such Current Total AMS, the Agriculture Agreement is entirely agnostic as to the method of delivery of such support.

31. The United States is in compliance with its domestic support reduction commitments, of which support in the form of the Step 2 program is a constituent part, as provided in the Agriculture Agreement. Articles 3.1(a) and 3.1(b) of the Subsidies Agreement apply "except as provided in the Agreement on Agriculture." The conformity of the Step 2 programs with the terms, object and purpose of the Agriculture Agreement – and in particular the domestic support reduction commitments – constitute precisely the kind of exception contemplated in the introductory words of Article 3. Inasmuch as Articles 3.1(a) and (b) do not apply to Step 2 payments, the Step 2 program also cannot violate Subsidies Agreement Article 3.2.

32. **U.S. Step 2 Payments Are Not Inconsistent with GATT 1994 Article III:4**: As contemplated by the terms of the Step 2 program itself, as well as Annex 3 of the Agriculture Agreement, the Step 2 program provides benefits in favor of U.S. upland cotton producers. As noted above, the Step 2 program is in conformity with Agriculture Agreement Article 6. In addition, Agriculture Agreement Article 3.1 provides that the domestic support commitments in Part IV of each Member's Schedule are made an integral part of GATT 1994. The domestic

support commitments of the United States are therefore an integral part of GATT 1994 itself, and Agriculture Agreement Article 21.1 expressly states that "the provisions of GATT 1994 . . . shall apply subject to the provisions of this Agreement."

33. Pursuant to Article 6.3 of the Agriculture Agreement, "a Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favor of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule." Annex 3, paragraph 7, specifically requires that "[m]easures directed at processors shall be included" in the calculation of AMS to subject these measures to the domestic support reduction commitments established for the first time in the Agriculture Agreement. The Step 2 program exists in favor of agricultural producers within such Current Total AMS, and the text of the Agriculture Agreement does not prohibit any particular form of delivery of such amber box domestic support.

34. The Agriculture Agreement imposed for the first time rigorous disciplines on agricultural support. The domestic support reduction commitments of the United States constitute an integral part of GATT 1994. A coherent reading of the Agriculture Agreement with the GATT 1994 indicates that the Step 2 program does not violate GATT 1994 Article III:4.

35. **The Commodity Credit Corporation Export Credit Guarantee Programs are Not Export Subsidies Under the Agriculture Agreement**: During the Uruguay Round, negotiators did not reach agreement on disciplines on all areas that had been the subject of negotiations, in several cases agreeing to continue negotiating after the close of the Round and the entry into force of the WTO Agreement. The simple fact is that during the Uruguay Round WTO Members did not agree on disciplines to be applicable to export credits, export credit guarantees, and insurance programs. Unable to reach agreement on such disciplines within the Uruguay Round, Members opted to continue discussions in an appropriate forum, deferring the imposition of substantive disciplines until a consensus was achieved.

36. Following the entry into force of the WTO Agreement, numerous WTO Members commenced negotiations under the auspices of the OECD to achieve such internationally agreed disciplines. When such negotiations failed to achieve an agreement, negotiations on disciplines for export credits and export credit guarantees have subsequently continued both under the reform process contemplated under Article 20 of the Agriculture Agreement and the mandate of the Doha Ministerial Declaration.

37. The scope and detail of the current agriculture negotiations as reflected in the Harbinson text demonstrate that the Members are currently engaged in active negotiations on disciplines for export credits and credit guarantees. Among the areas under active discussion include disciplines on the relationship between premiums, term, and long-term operating costs and losses. These discussions would be unnecessary if existing disciplines applied to such programs in agriculture. The Panel should not pre-empt such negotiations.

38. The text of Article 10.2 of the Agriculture Agreement reflects the deferral of disciplines on export credit guarantee programs contemplated by WTO Members. As simply reflected in the structure and text of the Agriculture Agreement, Members came to no agreement with respect to substantive disciplines on export credit guarantee programs. Article 10.2 stands in stark contrast to Article 9.1. Article 9.1 sets forth a list of six very specific practices known to the drafters and deemed to constitute export subsidies under the Agriculture Agreement. Significantly, the Illustrative List of Export Subsidies in the Subsidies Agreement explicitly addresses export credit and credit guarantee practices in its item (j). Conspicuously absent in Article 9.1 is any provision addressing such practices, even though U.S. export credit guarantee programs had been in existence for nearly fifteen years preceding the inception of obligations under the WTO.

39. To include U.S. export credit guarantee programs within the ambit of Article 10.1 or within the definition of export subsidy under Article 1(e) of the Agreement would render the work program envisioned by Article 10.2 unnecessary. Further, to adhere to the approach that Brazil advocates would allow for the utter irrelevance of Article 10.2. Indeed, Brazil unabashedly makes not one reference to Article 10.2 in its initial submission.

40. **CCC Export Credit Guarantees are Not Prohibited Export Subsidies Under the Subsidies Agreement**: Brazil has alleged that the CCC export credit guarantee programs are prohibited subsidies under Article 3.1(a) of the Subsidies Agreement. The very first words of Article 3.1 of the Subsidies Agreement, however, are: "Except as provided in the Agreement on Agriculture." Article 10.2 of the Agriculture Agreement, as noted above, provides for the deferral of disciplines unless and until internationally agreed disciplines are in fact achieved. Brazil has conveniently ignored both Article 10.2 and the explicit introductory words of the Subsidies Agreement Article 3.1 in its first submission. However, Brazil concedes that the export credit guarantees are "exempt from action under ASCM Article 3.1(a) if they fully conform to the provisions of [Agreement on Agriculture] Part V." These programs are in conformity with Article 10.2, which is within such Part V. In addition, Article 21.1 explicitly provides that the Multilateral Trade Agreements in Annex 1A to the WTO Agreement, which include the Subsidies Agreement, shall apply *subject* to the Agriculture Agreement.

41. Brazil alleges that the export credit guarantee programs constitute an export subsidy for purposes of the Subsidies Agreement because such programs fall within item (j) of the Illustrative List of Export Subsidies. Brazil alleges the United States provides export credit guarantees for cotton "at premium rates which are inadequate to cover the long-term operating costs and losses of the programs" and that a ten-fiscal-year period "fulfills the criterion of being 'long-term' within the meaning of item (j)." Quite simply, with respect to cotton, for the last 10 fiscal years for which complete data is available, premiums paid exceed claims paid. As with any other insurance-type program, moreover, a proper analysis of "losses" should involve the calculation of the net result of premiums collected, plus claims amounts repaid or rescheduled, minus claims paid. Such calculation would properly reflect the net position of the program.

42. For the 10-year period from fiscal year 1993 through fiscal year 2002, premiums collected total $16,026,202 and losses incurred via claims total $4,768,096. Consequently, even *before* any post-default recoveries, premiums exceeded claims paid. Of claims incurred, $1,015,365 were subsequently directly recovered, and an additional $8,175,570 have been rescheduled. Brazil argues that the United States "must at the very least recover their operating costs by virtue of fees or premiums collected." Without conceding that this is the applicable test by which the conformity of export credit guarantee programs with WTO obligations should be assessed, nevertheless, the U.S. programs for cotton satisfy this Brazilian suggestion.

43. Brazil, like any complainant, bears the burden of establishing that export credit programs fall within the terms of item (j). Brazil, the United States, and the Appellate Body would apparently agree, however, that *a contrario*, to the extent a WTO Member provides, as the United States has already demonstrated with respect to cotton, export credit guarantees at premium rates which *do* cover long-term operating costs and losses of the programs, then it is *not* an export subsidy within the meaning of item (j) and the Subsidies Agreement. Premiums collected for U.S. export credit guarantees in connection with cotton transactions over the last 10 fiscal years exceed long-term operating costs and losses. Under the criteria of item (j) alone, these programs do not constitute a prohibited export subsidy within the meaning of the Subsidies Agreement and are not prohibited under Article 3.1(a) nor inconsistent with Article 3.2.

44. **Brazil Has Failed to Make a Prima Facie Case Regarding the FSC Repeal and Extraterritorial Income Exclusion Act of 2000**: With respect to its claims concerning the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 ("ETI Act"), in its first submission Brazil has not presented any evidence regarding the ETI Act itself and does nothing more than "reiterate[] the claims brought by the European Communities under the [Agriculture Agreement] and the Subsidies Agreement in *U.S. – FSC (21.5)*, and ask[] the Panel to apply the reasoning as developed by the panel and as modified by the Appellate Body in that case *mutatis mutandis*." In so doing, Brazil has failed to make a *prima facie* case with respect to the ETI Act. Brazil's approach would put the Panel in the position of having to violate its obligation under DSU Article 11 to "make an *objective assessment of the matter* before it, including an *objective assessment of the facts* of the case and the *applicability of and conformity with* the relevant covered agreements." As a result of Brazil's approach, the Panel is in no position to exercise its judgment to follow, or decline to follow, prior reports concerning the ETI Act, nor even in a position to make factual findings concerning the Act. In the absence of a *prima facie* case by Brazil, the Panel should reject Brazil's claims concerning the ETI Act.