

***United States – Subsidies on Upland Cotton***

**(WT/DS267)**

**Comments of the United States of America  
on the Comments of Brazil  
to U.S. Data Submitted on December 18 and 19, 2003**

February 11, 2004

## I. Introduction

1. The United States thanks the Panel for providing a new deadline for comments on Brazil's comments on the data submitted by the United States on December 18 and 19, 2003.<sup>1</sup> The 48-page document filed by Brazil on January 28, 2004, goes far beyond a comment on that data or even its application to Brazil's invented allocation methodology for determining "support to" upland cotton. Instead, those "comments" on the U.S. data present an attack on the good faith of the United States in responding to Brazil's requests for data, a lengthy attempt to re-write the history of this dispute, an inaccurate explanation of U.S. domestic law regarding privacy interests in planting data, a request for the Panel to draw "adverse inferences" despite the fact that Brazil could have requested aggregated data that would not have implicated privacy interests, a rather circumspect application of its invented allocation methodology to the U.S. data, and an inadequate application of the Annex IV allocation methodology<sup>2</sup> to the U.S. data. Because Brazil has seen fit to raise and argue so many issues in its comments, the United States will necessarily address those in these comments. In these comments, we proceed as follows.

2. First, we put the issue of the use of the U.S. data in its proper context. Brazil has asserted that decoupled income support payments must be allocated to upland cotton only for purposes of the Peace Clause and not for purposes of its serious prejudice claims. However, the allocation of a subsidy benefit is only mentioned in the Subsidies Agreement. The Agreement on Agriculture not only does not contain any allocation methodology, it also defines a category of support ("non-product-specific support") that consists of unallocated payments "to producers in general." Thus, Brazil gets it completely backwards: the text and context of the Peace Clause demonstrate that support is *not* to be allocated for purposes of the Peace Clause test while the text and context of Articles 5 and 6 of the Subsidies Agreement demonstrate that subsidies not tied to production of a given product (such as decoupled income support) *are* to be allocated to all of the products the recipient sells for purposes of serious prejudice claims.

3. Second, we explain the implications of Brazil's erroneous analysis and arguments, and in particular its express disavowal of any allocation methodology for purposes of its serious prejudice claims on decoupled income support payments. Brazil has failed to make a *prima facie* case on these claims; therefore, no serious prejudice findings may be made with respect to these measures, and these payments may not be included in an analysis of whether the effect of the challenged U.S. subsidies has been serious prejudice to Brazil's interests.

4. Third, although the foregoing points should end the analysis, we nonetheless examine Brazil's application of its invented methodology to the U.S.-supplied data. We recall that this Brazilian methodology has no basis in the text or context of the WTO agreements. Neither does Brazil's methodology make economic sense. It does, however, allow Brazil to allocate decoupled payments exclusively or nearly exclusively to upland cotton. Thus, Brazil's invented

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<sup>1</sup> Brazil's Comments and Requests Regarding Data Provided by the United States on 18/19 December 2003 and the U.S. Refusal to Provide Non-Scrambled Data on 20 January 2004 (28 January 2004) ("Brazil's Data Comments").

<sup>2</sup> *Agreement on Subsidies and Countervailing Measures*, Annex IV, paras. 2-3 ("Subsidies Agreement").

allocation methodology can be described as an attempt to inflate the support to be allocated to upland cotton.

5. Fourth, the United States examines Brazil's cursory attempted application of the Annex IV methodology to the U.S.-supplied data. We recall that Brazil expressly disavowed the applicability of that methodology. Brazil neither sought nor presented data to permit the Annex IV methodology to be applied. In fact, Brazil requested data relevant solely to its invented methodology, meaning there is no data before the Panel that would permit the Annex IV methodology to be applied. Finally, the calculations presented by Brazil reflect a misunderstanding of the plain meaning of that methodology and contain a number of erroneous assumptions that bias Brazil's results upwards.

6. Fifth, we correct Brazil's serious misrepresentations with respect to the data it requested and point out that the United States responded to that request as drafted and to the fullest extent permissible under U.S. law. Thus, there is no basis to draw an inference, adverse or otherwise, from the inability to provide certain information that is not relevant to an analysis of Brazil's legal claims.

## **II. Brazil Misunderstands the Relevant Analyses for the Peace Clause and for Its Serious Prejudice Claims**

### **A. Brazil's Allocation Methodology Is Inconsistent with the Definition of Product-Specific Support in the Agreement on Agriculture and, Therefore, Cannot be Used for Peace Clause Analysis**

7. As has been evident since the parties' first submissions, Brazil and the United States have offered fundamentally differing interpretations of Article 13(b)(ii) of the Agreement on Agriculture and in particular the Peace Clause proviso which reads: "provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year." The differences between the parties' approaches can be seen in the way they interpret the phrase "product-specific support" and apply that interpretation to decoupled income support payments.

8. Brazil argues that decoupled income support payments are not "truly 'decoupled'" since some recipients do produce program crops, that "the support from contract payments that can be allocated to upland cotton is product-specific support within the meaning of the Agreement on Agriculture," and that Brazil's approach – "to allocate contract payments to the program crops covered" – is "reasonable."<sup>3</sup> However, as the United States demonstrated in its comment on

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<sup>3</sup> Brazil's Data Comments, para. 73. Brazil also argues: "As the record demonstrates, none of four types of contract payments is truly 'decoupled,' given the production of program crops by the farms holding contract payment base. To the contrary, they are *intended to* and, in fact, do provide support for the production of program crops." *Id.* Brazil has in fact provided no evidence of such "intent" nor could it since the opposite is true. These

Brazil's answer to question 258, Brazil points to *no text* in the Peace Clause, the Agreement on Agriculture, nor any WTO agreement that supports its allocation methodology,<sup>4</sup> nor does that methodology make economic sense.<sup>5</sup> Brazil may consider its approach to be "reasonable," but that does not make it based on any WTO provision.

9. As just one example, Brazil apparently would require that "decoupled support" discourage recipients from producing certain crops in order to be "decoupled" while at the same time Brazil complains that the payment restriction for planting fruits and vegetables means that the support is *not* "decoupled." Brazil cannot have it both ways. If support is decoupled, then there is no requirement to produce any particular commodity. If producers choose to exercise their flexibility and plant particular crops, that is perfectly consistent with the concept of decoupled support.

10. The lack of grounding of Brazil's methodology in the WTO agreements stems from its erroneous interpretation of "support to a specific commodity." Brazil has argued that any support that is not made "to producers in general" – which Brazil takes to mean "all" or "nearly all" – is not non-product-specific and therefore must be "product-specific." As the United States has pointed out before, not only does this reading of "in general" rely on an obsolete meaning,<sup>6</sup> which therefore cannot be the ordinary meaning of the terms, but Brazil has consistently failed to read together the definitions of product-specific support and non-product-specific support in Article 1(a) of the Agreement on Agriculture. Read in conjunction with one another, non-product-specific support ("support provided in favour of agricultural producers in general") is a residual category of support that is not product-specific ("support . . . provided for an agricultural product in favour of the producers of the basic agricultural product").

11. Brazil's statement in its January 28 comments that "the support from contract payments that can be allocated to upland cotton is product-specific support within the meaning of the Agreement on Agriculture"<sup>7</sup> is significant because *it confirms that both parties interpret "support to a specific commodity" in the Peace Clause as meaning "product-specific support."* Thus, the question for the Panel is whether decoupled income support measures provide product-specific support or non-product-specific support. The definitions from Article 1(a) quoted above establish that support that is *not* "provided for a basic agricultural product in favour of the producers of the basic agricultural product" cannot be product-specific support.

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programs are intended to be decoupled. Moreover, under the Peace Clause, the "intent" of a payment is irrelevant; it is also irrelevant what a recipient decides to do with a payment. Rather, the issue is whether the payment as "decided" is "support to a specific commodity" or "support provided in favour of agricultural producers in general."

<sup>4</sup> U.S. Comments on Brazil's Answers to Panel Questions Following the Second Panel Meeting, paras. 209-217 (January 28, 2004) ("U.S. January 28 Comments").

<sup>5</sup> U.S. January 28 Comments, paras. 218-23.

<sup>6</sup> U.S. Comments on Brazil's Rebuttal Submission, para. 23 (noting that definition of "in general" as "in a body; universally; without exception" was marked "obsolete" in *New Shorter Oxford English Dictionary*).

<sup>7</sup> Brazil's Data Comments, para. 73.

- The very fact that Brazil must apply an *allocation* methodology to these decoupled income support payments to attempt to determine the “support to upland cotton” demonstrates that they are not product-specific support. Rather, they are support to whatever *products* (if any) the recipients produce, rather than “support for *a* basic agricultural product.” In addition, the recipients are “producers in general” because they are not required to be “producers of *the* basic agricultural product” the support is “provided for.”

12. While Brazil appears to be arguing that its allocation methodology conforms to the concepts of product-specific and non-product-specific support in the Agreement on Agriculture, in fact that methodology is flatly inconsistent with those concepts.<sup>8</sup> There is nothing in the Agreement that suggests that support may, at one and the same time, be both product-specific and non-product-specific. For example:

- In Article 1(a), these two terms are defined disjunctively (that is, product-specific support “or” non-product-specific support).
- In Article 6.4(a), *de minimis* levels of support not required to be included in a Member's Current Total AMS are separately given for “product-specific domestic support” and “non-product-specific domestic support.”
- Under Annex 3, paragraph 1, “an Aggregate Measurement of Support (AMS) shall be calculated on a product-specific basis for each basic agricultural product,” and, separately, “[s]upport which is non-product specific shall be totalled into one non-product-specific AMS in total monetary terms.”

Despite the fact that product-specific and non-product-specific support are kept distinct in the Agreement on Agriculture, Brazil's allocation methodology necessarily collapses the two concepts.

13. For example, under Brazil's methodology decoupled income support “payments for other crops were primarily allocated as support for these crops – up to the share of contract acreage planted to the respective crop,” but “[a]ny further payments stemming from contract acreage not planted to the respective base crop were pooled and allocated as additional support to those contract crops whose aggregate planting exceeded their aggregated base acreage.”<sup>9</sup> Brazil states that in marketing year 2001, cotton, “oats and sorghum were planted on more acreage than their respective contract base (‘overplanted’), thus[] triggering additional payments being allocated pursuant to the crop's share of total acreage being ‘overplanted.’”<sup>10</sup>

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<sup>8</sup> See U.S. January 28 Comments, paras. 225-29.

<sup>9</sup> Brazil's Data Comments, para. 80.

<sup>10</sup> Brazil's Data Comments, para. 80 fn. 159.

- That is, decoupled income support payments for base acreage with respect to other program crops (other than upland cotton, oats, and sorghum) would, under Brazil's approach in this dispute, first be "product-specific support" to each of those program crops to the extent of planted acreage.
- Then, the payments on "excess" base acreage would be "product-specific" support simultaneously to upland cotton, oats, and sorghum.

Logically, then, such payments would be support to "four different commodities" (whichever happen to be 'underplanted'), not "support to a *specific* commodity." Further, payments allegedly supporting four different commodities would not be "provided for a basic agricultural *product* in favour of the producers of *the* basic agricultural *product*."

14. Thus, decoupled income support payments are support to "agricultural producers in general" – that is, support to recipients who may decide (as Brazil has confirmed) to produce any of multiple commodities in general. Because such payments are non-product-specific, they may not at the same time be deemed to be product-specific. Brazil's methodology for purposes of the Peace Clause would result in non-product-specific support being allocated to the specific products the recipients produce, contrary to the separation of these concepts in the Agreement on Agriculture. As Brazil concedes that "support to a specific commodity" refers to "product-specific support within the meaning of the Agreement on Agriculture,"<sup>11</sup> it follows that decoupled income support payments must be deemed to be non-product-specific within the meaning of Article 1(a) of the Agreement on Agriculture and therefore not part of the Peace Clause test under Article 13(b)(ii).

**B. Challenged U.S. Measures Do Not Grant Support to a Specific Commodity in Excess of That Decided During the 1992 Marketing Year**

15. As Brazil has conceded that the Peace Clause proviso refers to "product-specific support," the question for the Panel becomes: do challenged U.S. measures grant product-specific support in excess of that decided during the 1992 marketing year? The United States has previously demonstrated in exhaustive detail that, removing non-product-specific support (that is, decoupled income support measures and crop insurance payments) from the Peace Clause comparison, U.S. measures do not. We will not repeat the extensive arguments on this point, for example, relating to how the United States "decided" its support.

16. We do recall, however, that as the United States by design shifted the support it provided to its agricultural sector from product-specific amber box support (in the form of deficiency payments) to green box support (production flexibility contract payments and direct payments)

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<sup>11</sup> Brazil's Data Comments, para. 73.

and non-product-specific support (market loss assistance payments and counter-cyclical payments), the result was that the product-specific support to upland cotton declined substantially. The only way Brazil can overcome this fact is to argue that the only way to gauge “support to a specific commodity” is through budgetary outlays,<sup>12</sup> which in the case of marketing loan payments will reflect through high outlays the record low cotton prices in marketing years 2001 and 2002 that the United States did not decide and could not control – as Brazil has conceded.<sup>13</sup>

17. As the United States has shown,<sup>14</sup> any measurement of the product-specific support for upland cotton that eliminates the effect of market prices and instead gauges the support “decided” by the United States demonstrates that upland cotton product-specific support was higher in marketing year 1992 than in any marketing year from 1999-2002. That is, whether the analysis is (as the United States believes is compelled by the Peace Clause text) the rate of support as decided in U.S. measures,<sup>15</sup> or the upland cotton AMS measured through a price-gap methodology,<sup>16</sup> or the “expected rate of per unit support” calculated by Brazil’s expert,<sup>17</sup> the result is the same: challenged U.S. measures are not in breach of the Peace Clause.

**C. Under the Subsidies Agreement, Allocation of a Non-Tied Subsidy is Necessary to Identify the Amount of Subsidy and the Subsidized Product**

18. Brazil seeks to allocate support not tied to the production of a specific commodity for purposes of the Peace Clause, despite the fact that the Agreement on Agriculture explicitly distinguishes and keeps separate product-specific and non-product-specific support. There is no mention of an allocation methodology in that Agreement because there is no need to allocate support – in fact, allocation is contrary to the very structure of the agreement. Ironically, Brazil

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<sup>12</sup> In making this argument, Brazil ignores the fact that “support” does not mean “budgetary outlays.” In fact, Annex 3 recognizes that an “Aggregate Measurement of Support” for price-based support either shall or can be calculated using a price-gap methodology, which does not rely on budgetary outlays. *See, e.g.*, Agreement on Agriculture, Annex 3, paragraph 8 (“Budgetary outlays made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS.”); *id.*, para. 10.

<sup>13</sup> *See* Brazil’s Comments on U.S. Answers, para. 66 fn. 49 (August 22, 2003) (“Brazil acknowledges that the United States could not possibl[y] determine its expenditures as they would depend to a certain extent on market prices that were also influenced by factors outside the control of the U.S. Government.”).

<sup>14</sup> *See, e.g.*, U.S. Rebuttal Submission, paras. 110-30.

<sup>15</sup> In marketing year 1992, 72.9 cents per pound; in marketing years 1999-2001, 51.92 cents per pound; in marketing year 2002: 52 cents per pound. U.S. Rebuttal Submission, paras. 110-13.

<sup>16</sup> In marketing year 1992, \$1,079 million; in 1999, \$717 million; in 2000, \$484 million; in 2001, \$264 million; and in marketing year 2002 (as of the date of panel establishment, March 18, 2003), \$205 million. U.S. Rebuttal Submission, paras. 114-17.

<sup>17</sup> In marketing year 1992, 60.05 cents per pound; in marketing year 1999, 53.79 cents per pound; in marketing year 2000, 55.09 cents per pound; in marketing year 2001, 52.82 cents per pound; and in marketing year 2002, 56.32 cents per pound. U.S. Rebuttal Submission, paras. 120-22. Removing the 1999 and 2002 marketing year cottonseed payments the Panel has determined to be not within its terms of reference results in support of 52.82 cents per pound in marketing year 1999 and 55.71 cents per pound in marketing year 2002.

then seeks *not* to allocate such a non-tied payment for purposes of its serious prejudice claims when there *is* an allocation methodology set out in Annex IV and when there *is* a need to identify the subsidized product as well as the subsidy amount. Brazil's approach ignores the text and context of Articles 5 and 6 of the Subsidies Agreement.<sup>18</sup>

19. Brazil has argued that it “strongly disagrees that this [Annex IV methodology for allocating non-tied payments] is a required or appropriate methodology under Part III of the SCM Agreement or under GATT Article XVI (or even under Article 13(b)(ii) of the Agreement on Agriculture).”<sup>19</sup> However, Brazil has not provided any basis to conclude that the term “subsidy” can mean one thing in the context of Articles 5 and 6 and another in Article 1.1 (subsidy requires a “benefit” to recipient), Article 14 (“calculation of the amount of a subsidy in terms of the benefit to the recipient”) and Article 15.5 (causal link necessary between injury and the subsidized imports “through the effects of subsidies”), all of which suggest that an evaluation of “the effect of the subsidy” requires an identification of the “benefit” the subsidy is alleged to provide. Further, Brazil has not provided any basis to conclude that a “subsidized product” for purposes of Articles 6.3(c), 6.3(d), 6.4, and 6.5 can be read in isolation from the methodology for determining the “subsidization” of a “product” set out in Annex IV. Therefore, the Subsidies Agreement – and Part III in particular – calls for an “allocation methodology” to determine the products that benefit from a subsidy that is not tied to production or sale of a given product.

20. Brazil denies the applicability to the Peace Clause analysis of the Annex IV methodology for allocating non-tied payments across the value of the recipients' production. However, even had Brazil suggested that the Annex IV methodology could be used for Peace Clause analysis, its interpretation would be plainly wrong. First, the phrase “support to a specific commodity” means “product-specific support” – as Brazil has conceded – and thus must be interpreted in light of the terms product-specific support and non-product-specific support in the Agreement on Agriculture (as set out above). Second, the terms “support to a specific commodity” and “product-specific support” are not found in Part III of the Subsidies Agreement, nor in Article 1 or Annex IV.<sup>20</sup> Neither are the terms “subsidy,” “benefit,” or “subsidized product” from the Subsidies Agreement found in the Peace Clause proviso or any supporting text. Thus, the plain language of the Peace Clause and Articles 5 and 6 indicate that these provisions refer to wholly different approaches and suggest that the methodology for allocating non-tied (decoupled) payments under the Subsidies Agreement may not be relevant under the Agreement on Agriculture. The definitions of product-specific support and non-product-specific support in Article 1(a) of the Agreement on Agriculture confirm that the Annex IV allocation methodology does not apply for purposes of the Peace Clause.

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<sup>18</sup> U.S. Comment to Brazil's Answer to Question 258, paras. 209-17.

<sup>19</sup> Brazil's Data Comments, para. 85 n. 171.

<sup>20</sup> The term “support” appears in Article 1.1(a)(2) of the Subsidies Agreement, which gives one definition of “subsidy” as “any form of income or price support in the sense of Article XVI of GATT 1994.”

21. Thus, allocating a non-tied payment across the value of the recipient's production is not pertinent for Peace Clause purposes but is necessary for the Panel to be able to attempt to gauge "the effect of the subsidy" for purposes of Brazil's serious prejudice claims. We discuss Brazil's failure to bring forward evidence and arguments relating to this issue in the next section.

**III. Because Brazil Expressly Disavows Any Allocation Methodology for Purposes of its Serious Prejudice Claims on Decoupled Income Support Payments, Brazil Has Failed to Make a *Prima Facie* Case on these Claims**

**A. Brazil Has Presented No Evidence or Arguments Supporting the Annex IV Methodology to Allocate Decoupled Income Support Payments for Purposes of its Serious Prejudice Claims**

22. As we have noted, because Brazil has chosen to include subsidies that are not tied to the production or sale of a given product within its serious prejudice claims, the Annex IV methodology is necessary to determine the subsidized product and the amount of the challenged non-tied subsidy that benefits upland cotton. Brazil recognizes that *some* allocation methodology is necessary to identify the decoupled income support payments within the scope of its panel request ("subsidies to producers, users, and/or exporters of upland cotton")<sup>21</sup> but relies on its wholly invented methodology (allocating decoupled payments for crop base in "excess" of planted acreage of the respective crop solely to those program crops planted on less acreage than their respective base acreage). That methodology finds no support in the text or context of the Subsidies Agreement or any other WTO agreement.

23. The result is that Brazil has not provided the Panel with evidence or arguments sufficient to establish a *prima facie* case that the effect of such decoupled payments is to cause serious prejudice to the interests of Brazil. Brazil has never sought or presented evidence and made arguments that would allow the Panel to evaluate properly "the effect of the subsidy" (decoupled income support payments) – for example, to identify the "subsidized product" through the Annex IV methodology and the "subsidy" in terms of the "benefit" to those recipients named in Brazil's panel request. Logically, if Brazil has not even identified the subsidized product with respect to such payments or the amount of the challenged subsidy, the Panel cannot evaluate "the effects."

24. Indeed, Brazil expressly disavows any allocation or even identification of the size of the subsidy for purposes of its serious prejudice claims:

- "Brazil maintains that no allocation methodology is warranted under Part III of the SCM Agreement. Rather, it is the effect of the subsidies that is the subject of scrutiny."<sup>22</sup>

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<sup>21</sup> WT/DS267/7, at 1.

<sup>22</sup> Brazil's Data Comments, para. 85 n. 168.

- “Brazil strongly disagrees that this is a required or appropriate methodology under Part III of the SCM Agreement or under GATT Article XVI (or even under Article 13(b)(ii) of the Agreement on Agriculture.”<sup>23</sup>
- “Again, Brazil notes that this allocation is not required under Part III of the SCM Agreement and GATT Article XVI:3. Both provisions deal with the effect of subsidies, and not their amount or subsidization rate.”<sup>24</sup>

25. Further, Brazil has never sought nor presented information relating to the total value of the recipients’ sales as would be necessary to apply the Annex IV methodology to decoupled income support payments.<sup>25</sup> Brazil has only sought base and planted acreage information to support its own invented methodology (and only for Peace Clause purposes).<sup>26</sup>

26. In this dispute, then, Brazil cannot have made its *prima facie* case with respect to the effect of decoupled income support payments. To find otherwise would mean a complaining party in a serious prejudice case could satisfy its burden merely by asserting that some unidentified amount of payments are received by producers of the relevant product.

**B. The Japan – Agricultural Products Appellate Body Report Confirms that in Such a Situation a Panel May not “Make the Case for a Complaining Party”**

27. Brazil includes a discussion of the Appellate Body report in *Japan – Agricultural Products*, suggesting that the report is “inapposite” and that Brazil has advanced relevant claims and arguments such that the Panel could in no event relieve Brazil of its burden of establishing a *prima facie* case of inconsistency with WTO obligations. However, a careful reading of both Brazil’s arguments as well as that report reveals that, were the Panel to seek and obtain data to apply, for purposes of its serious prejudice analysis, the allocation methodology set out in Annex IV of the Subsidies Agreement to the challenged decoupled income support payments, the Panel would be making Brazil’s case for it.

28. We begin by examining Brazil’s artfully drafted arguments. Brazil alleges that the U.S. argument is that the *Japan – Agricultural Products* report “would have prevented the Panel from using the information the United States refused to provide to calculate the amount of contract payments across the ‘total value of the recipient’s production.’”<sup>27</sup> Brazil’s assertion is wrong. First, the U.S. argument is that the Panel may not seek and apply information to use the Annex

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<sup>23</sup> Brazil’s Data Comments, para. 85 n. 171.

<sup>24</sup> Brazil’s Data Comments, para. 98 n. 199.

<sup>25</sup> Subsidies Agreement, Annex IV, paras. 2-3 (for a subsidy not tied to the production or sale of a given product, the subsidized product is “the total value of the recipient firm’s sales”).

<sup>26</sup> See Exhibit Bra-369; Brazil’s Data Comments, para. 3 (“The purpose of Brazil’s request for *contract acreage and planted acreage* for each farm producing upland cotton was . . . .”) (italics added).

<sup>27</sup> Brazil’s Data Comments, para. 99.

IV methodology for decoupled income support payments because (as set out in the bulleted quotes above) Brazil has *expressly disavowed* any allocation or even identification of the size of the subsidy for purposes of its serious prejudice claims. As Brazil has brought forward no evidence or arguments to support findings on decoupled payments, it has not made its *prima facie* case.

29. Second, the United States has not “refused to provide” information to allocate decoupled payments according to the Annex IV methodology for the simple reason that *Brazil never sought this information*. Brazil merely asked for planted acreage and base acreage (and yield) information.<sup>28</sup> With respect to the farm-by-farm planted acreage data that the United States was unable under U.S. law to provide in a format allowing matching with farm-specific base acreage data, that data is simply irrelevant for purposes of the Annex IV methodology. Thus, while the Panel has the authority under DSU Article 13 to seek information “as the panel considers necessary and appropriate,” the inability of the United States to provide that data in the farm-by-farm format requested on 12 January 2004 is ultimately of no moment in this dispute since Brazil’s allocation methodology using planted and base acreage data finds no support in any WTO text. The situation is quite different with respect to the Annex IV methodology that is found in the WTO agreements but that has been disavowed by Brazil.

30. Thus, it is Brazil that errs when it suggests that the Panel could seek and apply any information at all without making Brazil’s case for it since Brazil has advanced relevant claims and arguments.<sup>29</sup> With respect to the allocation of non-tied (decoupled) payments across the total value of the recipients’ sales for purposes of identifying the amount of the subsidy and the subsidized product, Brazil has not sought such information, has not made arguments to support use of that methodology, and has in fact argued that no allocation or identification of the subsidy amount is warranted under Part III of the Subsidies Agreement. Thus, the Panel would in fact be making Brazil’s case for it were it to seek to apply the Annex IV methodology.

31. To put the issue in better perspective, we turn to the *Japan – Agricultural Products* Appellate Body report. There, the Appellate Body reversed a panel finding of inconsistency with Article 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (“SPS Agreement”) “because this finding was reached in a manner inconsistent with the rules on burden of proof.”<sup>30</sup> Specifically, the Appellate Body found that “it was for the United States to establish a *prima facie* case . . . of inconsistency with Article 5.6. Since the United States did not even claim before the Panel that the ‘determination of sorption levels’ is an alternative measure which meets the three elements under Article 5.6, we are of the opinion that the United States did not establish a *prima facie* case that the ‘determination of sorption levels’ is an alternative measure within the meaning of Article 5.6.”<sup>31</sup>

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<sup>28</sup> See Exhibit BRA-369.

<sup>29</sup> See Brazil’s Data Comments, para. 103-04.

<sup>30</sup> WT/DS76/AB/R, para. 130.

<sup>31</sup> WT/DS76/AB/R, para. 126.

32. Brazil argues that this reversal was based on the fact that “the complaining party (the United States) did not ‘claim’ in its request for establishment of a panel that there was an alternative measure (determination of sorption levels) that was less trade restrictive.”<sup>32</sup> However, in making this argument, Brazil itself (as it later asserts of the United States) “reveals a profound misunderstanding of the difference between a ‘claim’ and an ‘argument.’”<sup>33</sup> The United States agrees with Brazil (and the Appellate Body report in *EC – Hormones*) that “there is a distinction between legal claims reflected in a panel’s terms of reference, and arguments used by a complainant to sustain its legal claims.” There is no question, however, that the United States advanced a legal *claim* that Japan’s varietal testing measure was inconsistent with Article 5.6 of the SPS Agreement.<sup>34</sup> The issue was whether the United States had presented evidence and arguments relating to an alternative measure that satisfied its burden of making a *prima facie* case with respect to its Article 5.6 claim.<sup>35</sup> Thus, the Appellate Body concluded that “the Panel was correct to seek information and advice from experts to help it to understand and evaluate the evidence submitted and arguments made by the United States and Japan with regard to the alleged violation of Article 5.6” but the panel erred “when it used that expert information and advice for a finding of inconsistency with Article 5.6 since the United States did not establish a *prima facie* case of inconsistency with Article 5.6 based on claims relating to the ‘determination of sorption levels.’”<sup>36</sup>

33. A similar situation would occur here were the Panel to seek and apply information to apply the Annex IV methodology to decoupled income support payments.<sup>37</sup> Brazil has neither sought nor presented any evidence relating to the total value of the recipient firms’ sales. Brazil has also not only *not* argued that the Annex IV methodology is necessary to identify the subsidized product and the subsidy benefit, Brazil has also continually argued against use of the Annex IV methodology since, in its view, no allocation of the payment or quantification of the benefit is warranted under Part III of the Subsidies Agreement. Thus, it would appear that Brazil has resisted making the necessary legal arguments and refused to submit any evidence relating a proper analysis of its claims.

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<sup>32</sup> Brazil’s Data Comments, para. 100.

<sup>33</sup> Brazil’s Data Comments, para. 103.

<sup>34</sup> See, e.g., WT/DS76/AB/R, para. 123 (“In this dispute, the United States claimed that the varietal testing requirement is more trade restrictive than required to achieve Japan’s appropriate level of protection and is, therefore, inconsistent with Article 5.6.”); Panel Report, *Japan – Agricultural Products*, WT/DS76/R, paras. 1.2, 4.178, 8.64.

<sup>35</sup> WT/DS76/AB/R, para. 124 (“As noted above, the United States argued that ‘testing by product’ is an alternative measure which meets the three cumulative elements under Article 5.6.”); *id.*, para. 125 (“We note that the Panel explicitly stated that the United States, as complaining party, did *not specifically argue* that the ‘determination of sorption levels’ met any of the three elements under Article 5.6.”).

<sup>36</sup> WT/DS76/AB/R, para. 130.

<sup>37</sup> See U.S. Answer to Question 256 from the Panel, paras. 183-86 (December 22, 2003).

34. With respect to Brazil's refusal to recognize the relevance of the Annex IV methodology for purposes of its serious prejudice claims, and its resulting refusal to present evidence and arguments with respect to the application of that methodology to its claims, the findings of the Appellate Body in *Japan – Agricultural Products* remain highly relevant:

- “Article 13 of the DSU . . . suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU . . . to help it understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.”<sup>38</sup>

In this case, Brazil has not submitted evidence and made arguments sufficient to make its case that the effect of decoupled income support payments is to cause serious prejudice to Brazil's interests. In fact, Brazil's arguments have seemingly been designed to prevent the Panel from ascertaining even what is the amount of the subsidy being challenged. In such a circumstance, Brazil has not established a *prima facie* case of inconsistency with Articles 5 and 6 of the Subsidies Agreement with respect to these payments, and the Panel cannot make findings of serious prejudice.

#### **IV. Brazil's Invented Methodology Has No Basis in the WTO Agreements and Represents an Effort to Maximize the Payments Allocated to Upland Cotton**

35. The foregoing analysis suffices to demonstrate that Brazil has not made a *prima facie* case under its serious prejudice claims with respect to decoupled income support measures. Simply put, based on the evidence and arguments brought forward by Brazil, the Panel cannot make findings on those measures under Articles 5 and 6 of the Subsidies Agreement (as well as GATT 1994 Article XVI) without making Brazil's case for it. In this section of these comments, we nonetheless examine Brazil's application of its invented methodology to the U.S.-supplied data.

36. The United States has previously explained, both in these comments and in its comments to Brazil's answer to Question 258, that the Brazilian allocation methodology has no basis in the text or context of the WTO agreements.<sup>39</sup> We do not repeat that detailed critique of Brazil's invented methodology here, other than to note that Brazil seeks to *apply* an allocation methodology for purposes of Peace Clause – despite the fact that the definitions of product-specific support and non-product-specific support (and their application in the Agreement on Agriculture) do not permit any such allocation – while at the same time Brazil seeks to *deny* any

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<sup>38</sup> WT/DS76/AB/R, para. 129 (italics added).

<sup>39</sup> See, e.g., U.S. Comments to Brazil's Answer to Question 258 from the Panel, paras. 207-29 (January 28, 2004).

allocation methodology for purposes of serious prejudice – despite the fact that an allocation methodology is set forth explicitly in Annex IV reflecting core Subsidies Agreement concepts relating to subsidy benefits and the subsidized product. Thus, Brazil invites the Panel to adopt a legally erroneous approach that does violence to the existing texts of the Agreement on Agriculture and the Subsidies Agreement.

37. We have also previously explained that Brazil's invented allocation methodology does not make economic sense. Decoupled payments by their nature provide income support not tied to the production or sale of any given commodity;<sup>40</sup> therefore, there is no more reason to attribute \$1 in income support to upland cotton production on a farm than there is to attribute that \$1 in income support to production of any other product (soybeans, corn, etc.). Brazil's approach, however, makes just such an arbitrary attribution, producing illogical results:

- The same crop (for example, upland cotton) produced on a farm could be deemed to be subsidized at different rates. For example, planted acres of upland cotton up to the amount of upland cotton base acres will be deemed to be subsidized at a rate corresponding to decoupled payments for upland cotton base acres. Planted acres of upland cotton in excess of the amount of upland cotton base acres will be deemed to be subsidized at a different rate – perhaps higher if sufficient payments corresponding to base acres for other crops are available, perhaps lower or even zero if few or no payments for “excess” base acres are available. From an economic perspective, there is no basis to say that some income support dollars are going to a certain portion of the crop but not others.<sup>41</sup>
- In addition, because payments on all the “excess” base acreage are allocated to whatever program crop has planted acres in excess of base acreage, the subsidization of the “excess” planted acreage can be far higher than for other acres of that crop or for acreage of other crops that may be more heavily planted. (For example, if a farm has 100 base acres of soy, 10 planted acres of soy, and 1 planted acre of cotton, the 90 “excess” base acres of soy will be allocated to the 1 acre of cotton, resulting in a cotton subsidy and subsidization rate far higher than that for soy, despite the fact that soy plantings outstrip cotton plantings 10 to 1.)<sup>42</sup>
- Brazil's approach simply ignores the existence of crops other than “program crops,” much less other farming or non-farm economic activities the subsidy recipient may undertake. Again, there is no economic reason to attribute income support payments to

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<sup>40</sup> See, e.g., Brazil's First Written Submission, para. 51 (under direct payment program, the “amount of payment is not dependent upon current production” of any particular commodity).

<sup>41</sup> See U.S. Comment on Brazil's Answer to Question 258, para. 221.

<sup>42</sup> See U.S. Comment on Brazil's Answer to Question 258, para. 221.

some (program) crops but not others and some (crop production) economic activities but not others.<sup>43</sup>

38. Fundamentally, Brazil's approach is in error because it assumes that there is a tie between the decoupled payments and current plantings. Brazil attributes payments for base acres to currently planted crops by describing the current crop as "planted on" base acres. The reality is that there are no physical "base acres" on a farm; crop base is an accounting concept that is limited by the farm's cropland. (For example, the farm may have 100 base acres of upland cotton, but if it currently plants 100 acres of cotton, that cotton may physically be "planted on" any land on the farm.) But Brazil does not carry through its own concept of crops "planted on" base acres.

- For example, in the example given above of a farm with 100 base acres of soy and current plantings of 10 acres of soy and 1 acre of cotton, under Brazil's approach, payments on the 90 "excess" base acres of soy are allocated to the 1 acre of upland cotton. But 1 acre of upland cotton could only be "planted on" 1 base acre of soy.
- Thus, for planted acreage *up to* the crop's base acreage, Brazil uses the concept of a crop "planted on" base acreage. But for planted acreage *beyond* the crop's base acreage, Brazil would allocate more than (or less than) one base acre per planted acre. In the preceding example, the one acre of upland cotton could not be deemed to be "planted on" 90 acres of soy.

Brazil's allocation methodology thus is not even internally consistent.

39. Given that Brazil's invented allocation methodology has no basis in the text or context of the Peace Clause, much less in the Subsidies Agreement or any other WTO agreement, given that its methodology does not make economic sense, and given that its methodology is internally inconsistent, one is left to wonder how Brazil arrived at its methodology. One answer may be that Brazil developed this methodology because it allows Brazil to allocate certain decoupled payments exclusively or nearly exclusively to upland cotton. That is, Brazil's invented allocation methodology can be described as an attempt to maximize the payments to be allocated to upland cotton, regardless of the legal or commonsense objections.

40. Consider the information set out in footnote 159 to paragraph 80 of Brazil's Data Comments. Brazil notes that "[f]or MY 1999 and 2000, *only upland cotton plantings exceeded the crop base acreage*; thus, *all additional payments were allocated to upland cotton* [italics added]. For MY 2001, also oats and sorghum were planted on more acreage than their respective contract base ('overplanted'); thus, triggering additional payments being allocated pursuant to the crop's share of the total acreage being 'overplanted.'" Restated, in marketing year 2001, all

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<sup>43</sup> See U.S. Comment on Brazil's Answer to Question 258, para. 222.

“excess” contract payments were allocated to upland cotton, oats, and sorghum, but the latter two crops accounted for only a small share of plantings on farms that planted upland cotton.<sup>44</sup>

- Thus, for cotton plantings up to the amount of cotton base, Brazil would allocate payments on upland cotton base acres to cotton.
- For cotton plantings in excess of the amount of cotton base, Brazil's allocation methodology results in all “excess” contract payments for program crops being allocated to upland cotton in marketing years 1999-2000 and almost all “excess” contract payments being allocated to upland cotton in marketing year 2001.

In this way, Brazil seeks to maximize the payments being allocated to upland cotton, regardless of the illogic of its approach. The Panel should reject Brazil's legally erroneous and economically unsound approach to allocation issues.

41. Brazil attempts to apply its unsound methodology to the summary data provided by the United States on December 18 and 19, 2003. (We note that Brazil did not request the summary data in Exhibit BRA-369. The United States generated this summary in order to assist the Panel and Brazil in viewing the aggregated results.) Brazil asserts that “Using the U.S. aggregate base acreage data and aggregate planting data to allocate contract payments will most likely trigger distortions of the results due to the allocation problem.”<sup>45</sup> However, we note that Brazil does not explain to the Panel that the results using the aggregated data will likely be biased upwards, overstating the decoupled payments allocated to upland cotton.

42. In Brazil's allocation methodology, a farm that plants less acreage of upland cotton than its cotton base acreage must always produce a drop in support because some payments on upland cotton base acres will not be allocated to cotton. A farm that plants more cotton acreage than its cotton base acreage, on the other hand, may still enjoy support for the “excess” planted acres but only if there are also “excess” non-upland cotton base acres on the farm. However, when all of the base acreage and planted acreage data are aggregated, Farm A's cotton planted acreage in excess of upland cotton base acres may effectively be allocated support from Farm B's “excess base acreage” in another program crop (or more than one). Thus, while Brazil is correct that applying its methodology to the summary data will not necessarily produce the same results as a farm-by-farm calculation, Brazil fails to recognize that the results presented by Brazil in paragraph 83 of its data comments applying its invented allocation methodology to the summary data are biased upwards.

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<sup>44</sup> See U.S. Letter to Panel (January 28, 2004) (file rPFCsum.xls: for farms planting upland cotton in MY2001 upland cotton planted acreage was 15.5 million acres, oats planted acreage was 0.19 million acres, and sorghum planted acreage was 2.4 million acres).

<sup>45</sup> Brazil's Data Comments, para. 76.

43. In sum, the United States has shown that Brazil's allocation methodology is not based on any WTO agreement text, does not make economic sense, and is not internally consistent. Based on the categorical U.S. rejection of Brazil's methodology, the Panel should take Brazil's statement that "Brazil's methodology is rather conservative compared to an allocation based on the U.S. summary data, *which the United States seems to endorse as a valid base for calculating support to upland cotton*"<sup>46</sup> as another gross distortion by Brazil. Unlike Brazil, the United States has taken a consistent position in this dispute that "support to a specific commodity" means "product-specific support" and that such support must be gauged by looking at the support "decided" by a Member through its measures.

#### **V. Brazil's Application of the Annex IV Methodology to the U.S. Data Is Inadequate and Flawed**

44. In this section, the United States examines Brazil's cursory application of the Annex IV methodology to the U.S.-supplied data.<sup>47</sup> We note that Brazil's analysis is patently insufficient to carry Brazil's burden with respect to decoupled income support payments. First, Brazil has neither sought nor presented relevant data. Brazil requested data relevant only to its invented methodology, and there is no data before the Panel that would permit the Annex IV methodology to be applied. Brazil's complaint that the United States has "refuse[d] to provide" the information that would permit the Panel to calculate the payments under the U.S. methodology<sup>48</sup> – while erroneous<sup>49</sup> – is also misplaced. It is not the United States' responsibility to make Brazil's *prima facie* case, and Brazil's argument reflects an impermissible effort to shift the burden onto the responding party.

45. Brazil has also not presented arguments sufficient to carry its burden. Brazil has repeatedly and expressly disavowed the applicability of the Annex IV methodology for purposes of identifying the subsidized product or quantifying the subsidy benefit for non-tied (decoupled) payments. Perhaps for that reason, the calculations presented by Brazil reflect a misunderstanding of the plain meaning of the Annex IV methodology and contain a number of erroneous assumptions that bias Brazil's results upwards.

46. Under the Annex IV methodology, a subsidy not tied to a particular product is allocated to all of the recipients' sales. That is, since money is fungible, the subsidy benefit is deemed to inure to all of the products the recipient produces; a neutral way of attributing the subsidy to particular products is according to their proportion of the firm's sales. Thus, allocating to upland cotton those Production Flexibility Contract (PFC) payments, Market Loss Assistance (MLA)

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<sup>46</sup> Brazil's Data Comments, para. 84 (italics added).

<sup>47</sup> See Brazil's Data Comments, § 10.

<sup>48</sup> Brazil's Data Comments, para. 87.

<sup>49</sup> For example, the United States has collected no information on "the recipient firm's sales" for marketing years 1999-2002.

payments, Direct Payments (DP) and Counter-Cyclical Payments (CCP) for upland cotton base acres would be done as follows:

- PFC payments for upland cotton base \* (cotton gross sales/total sales)
- MLA payments for upland cotton base \* (cotton gross sales/total sales)
- DP payments for upland cotton base \* (cotton gross sales/total sales)
- CCP payments for upland cotton base \* (cotton gross sales/total sales)<sup>50</sup>

The “total value of the recipient firm’s sales” (Annex IV, para. 2) would include all economic activities by the firm (e.g., other farm and non-farm related activities). Thus, Brazil errs in limiting the denominator in its calculations to the estimated value of crops produced by the payment recipients.<sup>51</sup> Further, Brazil has presented no evidence relating to the total value of the recipient firm’s sales that would permit the Annex IV methodology to be applied.

47. In its calculated apportionment, Brazil makes several errors that result in an overestimate of the payment value allocated to cotton. First, Brazil allocates decoupled payments for all crop base (e.g., wheat PFC payments, corn MLA payments) to upland cotton. As the United States has explained,<sup>52</sup> Brazil impermissibly seeks to bring within the scope of this dispute payments that Brazil did not identify and that have not been at issue throughout this dispute.

48. In this regard, Brazil’s argument that these programs are within the Panel’s terms of reference by virtue of the reference in Brazil’s panel request to “payments . . . providing direct or indirect support to the U.S. upland cotton industry”<sup>53</sup> is not sustainable. Article 6.2 of the DSU requires that the panel request “identify the specific measures at issue.” Brazil’s statement fails to meet this requirement; indeed, Brazil affirmatively emphasizes that its list of payments is “unqualified,” and that it “is more than broad enough to encompass any type of payment.”<sup>54</sup> In other words, Brazil by its own admission has provided virtually no information that would allow identification of the specific measures at issue.

49. Moreover, to the extent that Brazil in any way qualifies this list, it does so based on *legal* conclusions. Rather than identifying the payment measures by describing their characteristics or by citing any specific provision of U.S. law,<sup>55</sup> Brazil seeks to draw into the scope of this dispute an uncircumscribed and unidentified list of measures limited only by whether the *legal*

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<sup>50</sup> Arguably, one could include all economic activities by the firm (e.g., other farm and non-farm related activities.)

<sup>51</sup> Brazil’s Data Comments, paras. 85-98.

<sup>52</sup> See U.S. Comment on Brazil’s Answer to Question 204 from the Panel, paras. 34-42 (January 28, 2004).

<sup>53</sup> Para. 18.

<sup>54</sup> Para. 19.

<sup>55</sup> Brazil’s reference to payment programs provided under the 2002 FSRI Act, the 1996 FAIR Act, and the 1998 -2001 Appropriations Acts in no way provides the required specificity. These laws provided for a myriad of payment programs, and it is impossible through these references to determine the payment programs Brazil now seeks to include within the dispute.

conclusion may be drawn that the measure provides “direct or indirect support to the U.S. upland cotton industry.” Brazil might just as well have stated that it was challenging, “any U.S. law that is inconsistent with U.S. WTO obligations.” In neither case would the description allow an identification of which measure is subject to the case, and in neither case would it be possible to determine whether a measure is within the scope of the case until the legal issues in the dispute are fully adjudicated. Indeed, the Appellate Body has criticized a panel for blurring the distinction between legal claims and measures when it read the term “measures” as synonymous with alleged violations, and thereby failed to require identification of the specific measure at issue.<sup>56</sup>

50. The DSU requirement to allow identification of the measures at issue is not a hollow one, and panels have not hesitated to conclude that measures fall outside the scope of a dispute because they are not adequately described.<sup>57</sup> Brazil’s “unqualified” panel request does not bring non-cotton contract payments into the scope of this dispute.

51. While decoupled payments for upland cotton base account for the majority of decoupled income support payments to farms that planted cotton, including total decoupled payments in the allocation overstates the value of decoupled payments to be allocated.

Decoupled payments:	1999 <sup>1</sup>	2000 <sup>1</sup>	2001 <sup>1</sup>	2002
Payments on cotton base	515,280,580	482,302,565	387,870,741	1,520,701,136
Total payments	695,912,510	650,579,667	520,230,908	1,681,630,034
Cotton as percent of total	74.0%	74.1%	74.6%	90.4%

<sup>1</sup> Does not include Market Loss Assistance payments.

Source: Exhibit Bra-424; also provided electronically as “allocation calculations.xls”

52. Second, in calculating crop values for purposes of the total value of the recipient firm’s sales,<sup>58</sup> Brazil calculates crop values based on planted, not harvested, acreage. For cotton, abandonment rates can be significant. In the U.S. response to Question 209 from the Panel, the United States demonstrated that harvested acreage differed significantly from planted acreage over the period 1999-2002. The use of the smaller harvested acreage figure would lower the total value of cotton by as much as 16 percent from what Brazil calculated.<sup>59</sup>

<sup>56</sup> Report of the Appellate Body, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, para. 69.

<sup>57</sup> See, e.g., Preliminary Ruling by the Panel, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/12, circulated 21 July 2003, paras. 28, 32.

<sup>58</sup> See Subsidies Agreement, Annex IV, para. 2.

<sup>59</sup> Brazil inadvertently uses the all cotton crop yield in their calculations rather than the yield for upland cotton only.

**Planted and Harvested Upland Cotton Acres (1,000 acres)**

Crop year	Planted acres	Harvested acres	Abandoned acres	Rate of abandonment
1999	14,584	13,138	1,446	9.9%
2000	15,347	12,884	2,463	16.0%
2001	15,499	13,560	1,939	12.5%
2002	13,714	12,184	1,530	11.2%

Source: USDA, National Agricultural Statistics Service, *Acreage*, various issues.

53. Third, Brazil underestimates the value of crop sales on cotton farms. To calculate the value of program crops, Brazil multiplies acres planted to that crop (as provided electronically by the United States on December 18 and 19) times average crop yield times average farm price. For cropland not planted to program crops, Brazil “assumed that the value of the crops produced on this 20 percent of farmland is the average per-acre value of production of non-program crops in that marketing year in the entire United States, as reported by USDA.”<sup>60</sup> Brazil has claimed repeatedly that upland cotton production is “concentrated” in several U.S. States,<sup>61</sup> but now that the issue matters, Brazil ignores its long-standing position. Under Brazil’s approach to the Annex IV methodology, it is the per-acre value of production in cotton-producing states that would be relevant (rather than including, say, the per acre value of production of crops grown in Alaska in its average).

54. To calculate the average per-acre value of non-program crops, moreover, Brazil also excludes the value of all fruits, tree crops, vegetables and melons, arguing that their exclusion is justified on the basis that, if fruits or vegetables are grown, “contract payments are eliminated.”<sup>62</sup> However, this argument ignores the fact that producers may grow such crops on any cropland on the farm in excess of the farm’s base acreage without any effect on payments.<sup>63</sup> As previously noted by Brazil, non-program base accounts for 20 percent of total cropland on farms that planted cotton over the period or about 6 million acres. Ignoring fruits and vegetables thus underestimates the value of non-program crops and, as a consequence, overestimates the percent of total crop value accounted for by cotton.<sup>64</sup>

<sup>60</sup> Brazil’s Data Comments, para. 90.

<sup>61</sup> See, e.g., Brazil’s Answer to Question 125(2)(a) from the Panel, para. 13 (27 October 2003).

<sup>62</sup> See Brazil’s Data Comments, paras. 73, 92.

<sup>63</sup> See, e.g., Brazil’s First Written Submission, para. 45 (PFC payments are reduced or eliminated if fruits or vegetables are grown “on ‘base acreage’” but not on total cropland).

<sup>64</sup> Brazil also appears to have inadvertently copied the incorrect acreage numbers for cotton planted on farms with no cotton base for 2000 and 2001. (The 1999 figure was copied to 2000 and 2001. From the spreadsheet “Raw Data 1999-2001” the correct numbers are:

1999	1,033,617.7
2000	1,222,180.1
2001	1,347,140.2

55. Fifth, as Brazil concedes,<sup>65</sup> in estimating the total value of crop sales, Brazil excluded sales of (high value) livestock and livestock products. We would also note that Brazil excluded any other farm-related income. Brazil has put no data on the record that would allow for these sales to be included in the Annex IV allocation.

56. Finally, Brazil fails to make any adjustment in the amount of payment to reflect the proportion of cotton planted acreage that is rented or owned.<sup>66</sup> However, those “subsidies” to cotton producers that are the subject of Brazil’s panel request must “benefit” producers.<sup>67</sup> Brazil itself has conceded that land rental rates as of marketing year 1997 – that is, one year after introduction of the decoupled production flexibility contract payments – reflect the capture of more than one-third of the subsidy by landowners.<sup>68</sup> Thus, only those cotton producers who are also landowners of base acreage for which decoupled payments are made would benefit from those payments.<sup>69</sup>

57. The cumulative effect of these omissions and erroneous assumptions is to bias upwards Brazil’s allocation of decoupled payments to upland cotton. In the following table, we have recalculated an estimated value of cotton production compared to the value of all crops produced on farms using corrected values for harvested acres, upland cotton yields, and per-acre value of non-program crops.<sup>70</sup> Because Brazil has not put relevant data on the record, we have not been able to correct its calculations by including the value of all economic activities by the firm, for example, livestock and livestock products, other farm-related activities, and non-farm economic activities in the denominator. However, even without those necessary adjustments, the incomplete (undervalued) data show that cotton accounted for only about half of the total value of crop production on recipient farms planting upland cotton over the period.

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<sup>65</sup> Brazil’s Data Comments, fn. 173.

<sup>66</sup> See U.S. Answer to Question 195 from the Panel, paras. 6-11 (December 22, 2003).

<sup>67</sup> See Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R, adopted 7 June 2000, paras. 6.65 and 6.66 (quoting and agreeing with *Canada – Aircraft* panel: “A “benefit” does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a “benefit” can be said to arise only if a person . . . has in fact received something.”).

<sup>68</sup> See, e.g., Brazil’s Further Rebuttal Submission, para. 154 (“[S]ome portion of the contract payments do find their way into increased rent and cost of land”) (footnote omitted).

<sup>69</sup> Indeed, the 2002 Act implicitly recognized that decoupled income support payments ultimately benefit landowners by giving to the landowner the authority to choose whether to update his or her base acres on the farm. See 2002 Act, § 1101(a)(1) (“For the purpose of making direct payments and counter-cyclical payments with respect to a farm, the Secretary shall give an owner of the farm an opportunity to elect 1 of the following as the method by which the base acres of all covered commodities on the farm are to be determined.”); see also *id.*, § 1101(b), 1101(c), 1101(e)(1), (3), (5) (Exhibit US-1).

<sup>70</sup> Further calculations are presented in Exhibit US-154..

**Value of Upland Cotton as Percent of All Crops on Farms Planting Upland Cotton**

	1999	2000	2001	2002
Upland cotton	\$3,056,169,795	\$3,707,427,799	\$2,554,264,280	\$3,351,712,385
All crops	\$5,940,836,757	\$6,543,259,828	\$5,277,060,069	\$6,280,154,911
Percent	51.4%	56.7%	48.4%	53.4%

58. In the table that follows, we present recalculated figures for decoupled payments on upland cotton base using the corrected value of upland cotton sales and per-acre value for non-program crops in calculating the total value of crop sales to use in the denominator of the formula: decoupled payments received by recipient firms \* (upland cotton gross sales / total crop sales). Again, contrary to Annex IV, paragraph 2, this calculation does not include in the denominator the value of *all* economic activities by the recipient firms. Nor have we adjusted the value of the decoupled payments for upland cotton base acres downwards to reflect the fact that two-thirds of cotton acreage is rented, not owned, and that landowners will capture the benefit of those payments for base acres on farms worked by tenants.

59. Nonetheless, the table shows that the “14/16” methodology proposed by Brazil, as well as the estimates purporting to apply the Annex IV methodology provided in section 10 of Brazil’s data comments (reproduced below), are grossly inflated.

**Partially Corrected Results of Calculations Allocating Decoupled Payments for Upland Cotton Base Acres to Upland Cotton Using Incomplete Annex IV Methodology**

	1999	2000	2001	2002
PFC Payments	265,077,970	273,273,870	187,741,729	na
MLA Payments	263,787,006	290,909,042	259,309,589	na
DP Payments	na	na	na	253,021,210
CCP Payments	na	na	na	558,575,463
Total	528,864,975	564,182,912	447,051,318	811,596,673

**Brazil's Erroneous Calculations Allocating Decoupled Payments for all Contract Base to Upland Cotton Using Incomplete Annex IV Methodology** (Brazil's Data Comments, para. 96.)

	1999	2000	2001	2002
PFC Payments	\$477,692,236	\$473,744,959	\$333,295,919	na
MLA Payments	\$475,365,813	\$504,317,125	\$460,349,591	na
DP Payments	na	na	na	\$416,216,862
CCP Payments	na	na	na	\$714,424,543
Total	\$953,058,049	\$978,062,084	\$793,645,510	\$1,130,641,406
<b>Minimum Percent Overstated</b>	<b>80.2</b>	<b>73.4</b>	<b>77.5</b>	<b>39.3</b>

**Brazil's Allocation of Decoupled Payments for all Contract Base to Upland Cotton Using Its Erroneous 14/16 Methodology** (Brazil's Data Comments, para. 97)

	1999	2000	2001	2002
PFC Payments	\$547,800,000	\$541,300,000	\$453,000,000	na
MLA Payments	\$545,100,000	\$576,200,000	\$625,700,000	na
DP Payments	na	na	na	\$454,500,000
CCP Payments	na	na	na	\$935,600,000
Total	\$1,092,900,000	\$1,117,500,000	\$1,078,700,000	\$1,390,100,000
<b>Minimum Percent Overstated</b>	<b>106.7</b>	<b>98.1</b>	<b>141.3</b>	<b>71.3</b>

That is, when the results of Brazil's calculations are compared to the results obtained by the United States correcting for certain but not all of Brazil's errors and omissions, it appears that *Brazil dramatically overstates the decoupled payments that would be allocated to upland cotton* by 39.3 to 80.2 percent for its incomplete Annex IV calculations and by 71.3 to 141.3 percent for its erroneous 14/16 calculations.

60. Had Brazil put other data on the record necessary to apply the Annex IV methodology, for example, the value of any livestock and livestock products, other farm-related activities, and non-farm economic activities of recipient firms, moreover, *the decoupled payments allocated to upland cotton would be reduced even further*. Had Brazil further adjusted the value of the decoupled payments for upland cotton base acres downwards to reflect the capture of two-thirds of the benefit of those payments by landowners who are not cotton producers, *the decoupled payments allocated to upland cotton would be reduced even further*. Rather than confront the fact that the Annex IV methodology and Subsidies Agreement concepts would dramatically reduce the value of decoupled payments deemed to benefit upland cotton (and hence, would

dramatically reduce the supposed “\$12.9 billion” in support provided to upland cotton between marketing years 1999-2002), Brazil chose to argue that *no* allocation of non-tied payments is necessary and that *no* quantification of the subsidy benefit to upland cotton is necessary. Brazil also chose *not* to seek or put on the record information relevant to this determination. Thus, as explained earlier, Brazil has deliberately chosen a course of action that results in its failure to make a *prima facie* case on its serious prejudice claims with respect to decoupled payments.

## **VI. Brazil Misrepresents Both the Scope of Its Own Requests for Data as well as the U.S. Response**

61. Finally, in this portion of its comments, the United States responds to inaccurate assertions by Brazil relating to what information it sought and what information the United States provided. The United States also responds to Brazil's arguments that certain “adverse inferences” should be drawn from its inaccurate portrayal of what was requested and provided. The United States notes that these issues are of relatively minor importance given that Brazil's allocation methodology, for which it sought farm-by-farm planted and base acreage data:

(1) may not be applied for purposes of determining the product-specific support to upland cotton for purposes of the Peace Clause analysis because the methodology inappropriately conflates product-specific and non-product-specific support and

(2) may not be applied for purposes of determining the subsidized product or the subsidy benefit for decoupled income support payments because that methodology has no basis in the WTO agreements and Brazil expressly disavows its use for purposes of its serious prejudice claims.

Nonetheless, we undertake this review of Brazil's assertions because Brazil grossly distorts the record of the dispute in an effort to make the United States appear uncooperative (at best). The truth is that the United States has expended an unprecedented amount of time and resources in responding to the fullest extent under U.S. law to the requests for information made of it. Given our experience in WTO dispute settlement to date, we question whether other Members would have responded so fully and promptly to similarly burdensome requests.

### **A. Brazil Grossly Distorts the Record of This Dispute by Suggesting that the United States Has Failed to Cooperate**

62. Brazil make a number of spurious accusations regarding U.S. participation in this dispute and simple misstatements of the record. Although we regret the imposition on the Panel's time and attention, we do feel it necessary to set the record straight.

63. Brazil First Asked for this Data in December 2003, Not November 2002: First, Brazil asserts that it “first requested this information in November 2002.”<sup>71</sup> “This information” refers to the request for information “set out in Exhibit BRA-369” for “contract acreage and planted acreage for each farm producing upland cotton.”<sup>72</sup> Brazil’s claim is false. There is no request in Exhibit BRA-101 (Brazil’s consultation questions) for “contract acreage and planted acreage for each farm producing upland cotton.” Further, there is no reference in Brazil’s consultation questions to decoupled income support payments for non-upland cotton base acres. For example, Consultation Question 3.6 (not referenced by Brazil in footnote 2 of its data comments) was expressly directed at payments made “in connection with upland cotton for each of the marketing years 1992 through 2002.” When the United States answered those questions by referring (where appropriate) to payments made with respect to upland cotton base acres, Brazil at no point asserted that it sought information with respect to “other crop contract payments.”

64. Brazil Misrepresents the Panel’s Request for Information: Second, Brazil asserts that the “Panel requested [this data] in August, October, and December 2003, as well as in January 2004.” The Panel well knows what it has requested, but the United States notes that the Panel’s questions too did not request contract and planted acreage information. Question 67 *bis* in August 2003 requested information about annual amounts granted to upland cotton producers per pound and in total expenditures under each of the decoupled payment programs, not information on planted or base acreage. As previously explained, the United States accurately answered that it does not maintain information on expenditures to upland cotton producers because the United States collects no farm-specific production (harvesting) data.<sup>73</sup> Question 125(9) in October 2003 requested, *inter alia*, information on any adjustments to make for decoupled payments for upland cotton base acreage, not for information on planted and base acreage. In its December 8, 2003, communication, the Panel did not request planted and base acreage information from the United States; rather, it stated that “the United States will be given until **18 December** to respond to *Brazil’s request* made in Exhibit BRA-369.”<sup>74</sup> Finally, the January 12, 2004, communication from the Panel *did* request the planted acreage and base acreage information as set out in Exhibit BRA-369, and the United States explained that it was not able to provide this information farm-by-farm under the U.S. Privacy Act. Thus, Brazil misrepresents the facts when it asserts that the Panel has requested “this data” four times.

65. Brazil Falsely Alleges that the United States Denied Having Certain Data: Brazil then accuses the United States of “falsely stat[ing] that it did not maintain contract and planted acreage information for each farm.”<sup>75</sup> As just explained, the United States did not “falsely state”

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<sup>71</sup> Brazil’s Data Comments, para. 4 (footnote referencing BRA-101 omitted).

<sup>72</sup> Brazil’s Data Comments, para. 3.

<sup>73</sup> See, e.g., U.S. Answer to Question 195 from the Panel, paras. 6-11 (December 22, 2003).

<sup>74</sup> The United States notes but does not understand the reference in fn.3 to paragraph 4 of Brazil’s data comments to the “second bulleted point” in the Panel’s December 8 communication; that bullet point referred to “a communication from the Panel concerning the FAPRI model.”

<sup>75</sup> Brazil’s Data Comments, para. 4.

that it did not maintain that information because it was not asked for that information until the Panel on December 8, 2003, invited it to respond to Brazil's request made in Exhibit BRA-369. In its December 18 and 19, 2003, replies to that request, the United States explained that under U.S. law it could not provide (as Brazil specifically requested and insisted upon) planted acreage information together with base acreage and yield information and FSA farm numbers.

66. We also recall, as explained in the U.S. comments on Brazil's answers,<sup>76</sup> that it was the United States itself at the second session of the first panel meeting (that is, before "late November 2003" and the presentation of Exhibit BRA-369 at the second panel meeting) that brought to the Panel's and Brazil's attention the acreage reporting requirement that was introduced by Section 1105 of the 2002 Act (7 USC 7915). We trust that the fact that the United States *offered* this information to Brazil and the Panel will lay to rest the unwarranted suggestion that the United States sought to obscure it instead.

67. It may be worth repeating that the United States never asserted that it did not have contract base acreage and yield information. The focus of the Panel's question 67 *bis* and Brazil's argumentation has naturally been on the amount of decoupled income support payments to upland cotton producers. The United States has explained that it does not track decoupled payments by recipients' production and thus does not maintain information on the payments made for upland cotton base acres (or any other base acres) to upland cotton *producers*. The farm-by-farm planted acreage and base acreage and yield data sought by Brazil in Exhibit BRA-369 and by the Panel in its request of January 12, 2004, does not provide information on the payments made to upland cotton *producers*. Rather, putting aside issues of the appropriate methodology to identify the amount of the subsidy, this planted and base information would allow the calculation of the amount of decoupled payments made to farms that reported *planting* upland cotton.

68. Brazil Incorrectly Accuses the United States of Refusing to Provide Data on Non-Upland Cotton Base: Brazil also argues that the United States "refused to provide" farm-specific data on the amount of other contract base acreage on farms producing upland cotton with no upland cotton base acreage.<sup>77</sup> The omission of non-upland cotton base acreage from the data submitted by the United States in December 2003 was inadvertent and the result of programming errors, as explained in the U.S. letter of January 28, 2004 transmitting revised data files. Thus, Brazil's extensive protestations that the United States "withheld that information" are misplaced.

69. We do note, however, that the United States continues to believe that such decoupled payments for non-upland cotton base acreage are not within the Panel's terms of reference and that Brazil's effort to include these payments at the end of this proceeding would deprive the

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<sup>76</sup> U.S. Comment on Brazil's Answer to Question 196 from the Panel, paras. 15-18 (January 28, 2004).

<sup>77</sup> Brazil's Data Comments, para. 17.

United States of fundamental rights of due process.<sup>78</sup> That such payments for non-upland cotton base acreage was not even considered by Brazil earlier in this proceeding is nowhere more clear than in Brazil's own words:

- “Brazil requested the United States during the Annex V procedure to provide information on the total amount of *upland cotton base acreage and yield* under the CCP (and DP) program.”<sup>79</sup>

Indeed, the accuracy of Brazil's own description of its questions is amply supported by the text of those questions relating to “Deficiency Payments / Production Flexibility Contract Payments / Direct Payments”:<sup>80</sup>

- “Please state the number of U.S. upland cotton farms updating their *upland cotton base acreage* for the purposes of calculating Direct Payments under the 2002 FSRI Act. Please also provide the percentage of all U.S. farmers producing upland cotton that updated *their upland cotton base acreage*.” (Question 3.1 (italics added))
- “Please state the annual amount of Deficiency Payments made by the U.S. Government in connection with *upland cotton base* for each of the marketing years 1992 through 1996.” (Question 3.4 (italics added))
- “Please state the annual amount of Production Flexibility Contract Payments made by the U.S. Government in connection with *upland cotton base* for each of the marketing years 1996 through 2002.” (Question 3.6 (italics added))
- “Please state the total amount of Direct Payments made by the U.S. Government in connection with *upland cotton base* in marketing year 2002.” (Question 3.7 (italics added))
- “Please state the amount of *upland cotton base acreage* and the *average upland cotton base yield* applicable on this acreage under the Deficiency Payment Program during each of the marketing years 1992 through 1996.” (Question 3.8 (italics added))
- “Please state the amount of *upland cotton base acreage* and the *average upland cotton base yield* applicable on this acreage under the Production Flexibility Contract Payment Program.” (Question 3.9 (italics added))

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<sup>78</sup> See U.S. Comments on Brazil's Answer to Question 204 from the Panel, paras. 34-42 (January 28, 2004).

<sup>79</sup> Brazil's First Written Submission, para. 68 (emphasis added). We note in passing that the DSB did not initiate the Annex V procedures and that Brazil's statement that it asked the United States questions “during the Annex V procedure” is therefore incorrect.

<sup>80</sup> See Exhibit BRA-49 (Brazil's questions for purposes of the Annex V procedure).

- “Please state the amount of *upland cotton base acreage* and the *average upland cotton base yield* applicable on this acreage for the Direct Payment Program.” (Question 3.10 (italics added))

Thus, Brazil's assertion that it has argued all along that decoupled payments for non-upland cotton base acres are challenged measures is flatly contradicted by its own questions set out above. Brazil sent these questions on April 1, 2003, a mere 14 days after the DSB established the panel to consider this matter. If Brazil had considered that payments for non-upland cotton base acreage were within the scope of this dispute, surely it would have requested information with respect to those payments as well. The sheer number of references to upland cotton base acreage and yields demonstrates Brazil's view, at the time of panel establishment, of the scope of the decoupled payments it challenged.<sup>81</sup>

70. Market Loss Assistance Data Was Not Requested But Was Provided: Brazil argues that the United States “has not provided the requested data for market loss assistance payments received by the farms listed for MY 1999-2001.” Brazil's argument is confused. Exhibit BRA-369 requested planted acreage and base acreage (and yield) for marketing years 1999-2002, and the United States provided that, farm-by-farm. The base acreage did not differ for production flexibility contract payments and market loss assistance payments so there was no need to set out base data for market loss assistance payments separately.

71. It is ironic that Brazil would accuse the United States of failing to provide certain “data for market loss assistance payments” since Exhibit BRA-369 *did not even identify market loss assistance payments by name*. Instead, it defined “program crop” as “any crop that was assigned base acreage and payment yields under the Production Flexibility Contract (MY 1999-2001). Brazil inserts a question mark for MLA payments in its table at paragraph 22 of its comments, arguing that “[t]he United States has not provided any specific information on market loss assistance payments,” but again Brazil ignores its own data request. Nowhere in Exhibit BRA-369 did Brazil request actual *payment* amounts for any of the decoupled income support programs, and in any event Brazil well knows that market loss assistance payments were calculated in the same proportion as the production flexibility contract payments.<sup>82</sup>

72. Soybeans Were Not Within Brazil's Data Request: Next, Brazil argues that “since market loss assistance payments were also made for soybean base (that otherwise was not eligible to receive PFC payments), this allocation methodology [based on PFC payments] may

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<sup>81</sup> The United States has previously set out further evidence that decoupled payments for non-upland cotton base acres are not within the Panel's terms of reference and that Brazil did not consider these payments to be measures within the Panel's terms of reference. See U.S. Comments to Brazil's Answer to Question 204 from the Panel, paras. 32-42 (January 28, 2004).

<sup>82</sup> See Brazil's First Written Submission, para. 60 (“Between MY 1998-2001, upland cotton producers thereby received an additional amount of money, which was calculated based on their respective share of total upland cotton base times the amount of budgetary outlays allocated for upland cotton.”).

significantly underestimate the amount of market loss assistance payments that constitute support to upland cotton.”<sup>83</sup> The existence of soybeans market loss assistance payments is simply irrelevant to the data Brazil requested from the United States. Exhibit BRA-369 requested planted acreage and base acreage (and yield) information for “program crops.” Soybeans, however, were not a program crop (or “contract commodity”) under the 1996 Act,<sup>84</sup> and no soybean base acreage was assigned to farms before marketing year 2002. In fact, in the very statutes that provided sections that provided for payments designated as marketing loss assistance, there were separate provisions for payments for soybeans in marketing years 1999 and 2000; these payments were not designated as market loss assistance and were provided for current soybeans producers (and oilseed producers of all types).<sup>85</sup> Contrary to market loss assistance payments, soybeans producers received payments not based on the farm history, but their own production history (as explained in the June 8, 2000 rule), no matter where they planted the soybeans. Thus, no soybeans data was included in the U.S. response to Exhibit BRA-369 because no soybeans data was requested. Indeed, Brazil later implicitly concedes that soybeans data could *not* have been included in its request since soybeans were not a program crop.<sup>86</sup>

73. Peanuts Were Not Within Brazil's Data Request: Finally, Brazil argues that “the 19 December 2003 U.S. data concerning MY 2002 does not contain any information regarding the amount of direct and counter-cyclical payments made on peanut base.” Brazil asserts that “the missing data on peanut contract payments for MY 2002 would cause lower aggregate payments allocated as support to upland cotton.”<sup>87</sup> Again, Brazil makes assertions that do not follow from its own data request. The marketing year 2002 data contains no peanut information because no farm had peanut base in marketing year 2002; it follows that there were no payments made on any farm base. No peanut base existed for farms in marketing year 2002 because decoupled payments for peanut base acreage was brand new, and the base was not assigned by Section 1302 of the Farm Bill to a farm but to “historical peanuts producers”. The statute did not require an assignment of the base acreage to a farm until the 2003 crop. In fact, the United States expressly noted in Exhibits US-111 (describing contents of farm-by-farm DCP base and yield file) and US-112 (describing contents of farm-by-farm DCP planted acres file) that “[p]eanut figures were not

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<sup>83</sup> Brazil's Data Comments, para. 20.

<sup>84</sup> See 1996 FAIR Act, § 102(5) (Exhibit BRA-28).

<sup>85</sup> The 1999 crop soybean program was provided for by a statute, PL 106-78, enacted Oct. 22, 1999. In fact, the USDA's program rules were not issued until June 8, 2000, at 65 FR 36550. The amount provided in that statute was \$475 million for all oilseeds, not just soybeans. As for the 2000 crop, the soybean payments were allowed by PL 106-224, in the amount of \$500 million for all oilseeds, with rules that did not issue until 65 F.R. 5709 in November 2000. The amount paid was amplified for the 2000 crop by the addition of monies, long after, in PL 107-25, enacted in August of 2001. It is worth noting that all of these payments occurred well after plantings, again contradicting the contention of Brazil that non-upland cotton payments cause farmers to plant cotton.

<sup>86</sup> See Brazil's Data Comments, para. 90 fn. 177 (“The lower figures for MY 1999-2001 are explained by the fact that soybeans were not a contract program crop.”).

<sup>87</sup> Brazil's Data Comments, para. 21.

run as peanut bases were not farm-specific in 2002.” Thus, the United States could not have provided farm-specific planted acreage and base acreage information with respect to peanuts because there was no peanuts base acreage for farms in marketing year 2002. Again, Brazil's complaints are without merit.

74. Conclusion: Brazil's Accusations Are Spurious and Complicate the Panel's Task Needlessly: In conclusion, the United States notes that not only has Brazil sought to put the United States in a difficult position through its overbroad data request and unreasonable approach to privacy issues under U.S. law, but the lack of clarity in Brazil's approach has added considerable confusion to this proceeding. For example, Brazil at one and the same time faults the United States for not providing the farm-specific information as requested in Exhibit BRA-369 but then also faults it for not producing the information using “a substitute number protecting the alleged confidentiality rights of farmers.”<sup>88</sup> Despite refusing to consider any deviation from BRA-369 at the second panel meeting, Brazil now asserts that the United States should have noticed a newfound flexibility in a passing reference within a Brazilian answer and on that basis produced an entirely new set of data. It was entirely reasonable for the United States to consider Exhibit BRA-369 as Brazil's request since Brazil's refusal to consider alternatives compelled the United States to make tremendous efforts to produce that requested information while simultaneously preparing answers to more than 50 panel questions and comments on Brazil's econometric evidence. (Further, as the United States explained in its January 20, 2004, letter to the Panel, the sheer number of fields involved in Brazil's request would make possible identification of specific farms based on a unique combination of planted and base acreage, even with substitute farm numbers.)

75. As another example, Brazil's request was so broad that (as set out above) Brazil itself appears not to have understood the precise scope of the information it requested. This continual overbroad argumentation wastes the time and resources of the United States and the Panel that would be better spent on issues actually pertinent to this dispute. In addition, Brazil faults the United States for “misunderstanding [] Brazil's allocation methodology,” when that methodology was not set out until Brazil filed its answer to Question 258 on January 20, 2004 – that is, more than one month after the United States provided the data requested in Exhibit BRA-369 (to the extent permissible under U.S. law) and more than eight months into this proceeding. In this regard, Brazil's litigation tactics have impacted the ability of the United States to address Brazil's claims, arguments, and evidence and have complicated this Panel's task immensely and needlessly.<sup>89</sup>

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<sup>88</sup> See Brazil's Data Comments, paras. 38-39 (referencing Brazil's December 22 Answers to Questions, para. 7).

<sup>89</sup> Indeed, the United States has cooperated in good faith in this dispute and expended extraordinary resources to do so, but Brazil put the United States in the position of violating U.S. law or providing requested data. Brazil now seeks to have the Panel draw adverse inferences when its own request for information was over-broad in that Brazil could simply have asked the United States to apply its methodology (which, as of December 3, 2003, it had not yet disclosed, and would not until forced to do so by the Panel on January 20, 2004). The Panel should

**B. U.S. Law Prohibits Disclosing Planted Acreage Information Without the Prior Consent of the Farmer**

76. The United States has explained in its letters dated December 18, 2003, December 19, 2003, and January 20, 2004, that under U.S. law it may not disclose planting information in which a farmer has a privacy interest. This has been consistent U.S. Department of Agriculture policy and is not contradicted by the *Washington Post* district court decision referenced by Brazil (which dealt with disclosure of payment information – similarly, the United States has provided contract data on a farm-by-farm basis). The United States also explains these matters in more detail in its answer to Questions 259(a), (b), and (c).

77. Brazil's views on how U.S. law operates in the FOIA context are not relevant to the U.S. Department of Agriculture's statutory responsibility to respect the privacy interests of U.S. farmers in the planted acreage data. However, Brazil's discussion of Washington Post v. United States Department of Agriculture, 943 F.Supp. 31 (D.D.C. 1996), does not support Brazil's arguments that the United States need not protect this data.

78. The U.S. position on the privacy interests in plantings is not *post hoc* since, as we showed in the attachments to the U.S. letter of December 18, 2003, the position on planted acres has been the same since at least 1997 – that is, after the Washington Post decision. Brazil neglects to mention that all that was at issue in the Washington Post case was crop *payments*, not farmer plantings. Hence, that case fit within the FOIA precept of disclosure of the activities of the government, which was what was of concern to the court. 943 F. Supp. at 33, 36. Plantings are quite a different matter, involving a farmer's activities, not that of the government. Moreover, such producer-supplied information, not government-generated, has long been recognized as having special privacy concerns. *See, e.g.*, 7 USC 1373 and 7 USC 1502. Thus, under specific provision of the 1938 Act and provisions of the Crop Insurance Act, the U.S. government has long considered plantings separate matters not subject to disclosure. A similar outcome results from an analysis under the Privacy Act and to some degree the Trade Secrets Act.

79. Regarding the rice matter, Brazil argues that “USDA’s FOIA representatives necessarily must have determined that because the request did not focus on an individual producer’s farm, the interests of the public in understanding and evaluating the operation of the contract payment schemes outweighed any privacy interests.” However, the rice matter involved one office, and that disclosure was contrary to clearly established national policy. We have explained fully what

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consider that it was Brazil at the second panel meeting that refused to cooperate and consider alternative means to request information that could have protected U.S. farmers’ privacy interests. If there is an “adverse inference” to be drawn, it may be that Brazil withheld its methodology until the end of the proceeding because it knew it could not withstand a full analysis and review and because Brazil sought to distract from Brazil’s failure to provide evidence and data necessary to support its arguments based on its methodology.

the problem was and what FSA policy is. The concerns here are much greater than in the Hill decision, moreover, because the privacy interests of 200,000 farmers are involved.

### **C. There Is No Basis to Draw Any Inference, Much Less an “Adverse Inference”**

80. Brazil has asked the Panel to draw certain adverse inferences from the alleged failure of the United States to cooperate fully and provide requested data. As noted in the U.S. letter of January 20 and explained above, the United States did not have the authority to provide the farm-specific planting information in the format requested by the Panel's January 12, 2004. However, the United States did provide both farm-specific and aggregated contract data that would permit the Panel and Brazil to assess the total expenditures of decoupled payments to farms planting upland cotton.<sup>90</sup> Brazil itself admits that “the data provided by the United States appears to be complete” with respect to both contract acres and planted acres<sup>91</sup> – therefore, the willingness of the United States to provide information within the limits set by U.S. law cannot be questioned. Further, the Panel on February 3 requested certain additional aggregated information, which therefore does not implicate privacy interests of farmers and which the United States is endeavoring to provide.

81. The situation here is thus very different from the one in *Canada - Aircraft* where the Appellate Body first opined that “a panel should be willing expressly to remind parties – during the course of dispute settlement proceedings – that a refusal to provide information requested by the panel may lead to inferences<sup>92</sup> being drawn about the inculpatory character of the information withheld.”<sup>93</sup> There is no basis for an “inference” of any kind, adverse or otherwise.

82. This is particularly so in this dispute as the farm-specific planted and base acreage information was sought for purposes of Brazil's allocation methodology, which is without any textual basis in the WTO agreements. For purposes of Peace Clause, Brazil's methodology is inapplicable because Brazil concedes that “support to a specific commodity” means “product-specific support” – and yet, Brazil's allocation methodology would contradict the meaning of product-specific support and non-product-specific support set out in the Agreement on Agriculture. Further, Brazil's methodology is inapplicable for purposes of its serious prejudice

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<sup>90</sup> The United States notes that it had no basis to provide any other aggregation of the data than that which it provided since it was not aware of Brazil's allocation methodology until Brazil filed its answer to Question 258 on January 20, 2004.

<sup>91</sup> Brazil's Data Comments, para. 27 fn. 55.

<sup>92</sup> 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*”).

<sup>93</sup> *Canada – Aircraft*, WT/DS70/AB/R, para. 204.

claims because Brazil argues that no allocation of decoupled payments or identification of subsidy benefits or the subsidized product is necessary under Part III of the Subsidies Agreement. Further, the only allocation methodology set out in the Subsidies Agreement is that of Annex IV, for which the farm-specific planted and base acreage information would be irrelevant. Thus, there is no need to draw an inference of any sort in this dispute.

83. Brazil's proposed "adverse inferences" also do not follow logically from the data before the Panel. Brazil first suggests that farm-by-farm data would have resulted in payments higher than Brazil's 14/16 methodology. However, Brazil cannot escape the fact that it has not brought forward evidence and arguments to support findings under the Annex IV methodology.

84. Second, Brazil suggests that the Annex IV methodology would have produced higher payments than Brazil's 14/16 methodology. The United States is not in exclusive possession of relevant information with respect to an Annex IV methodology, but the incomplete data and calculations above demonstrate that in fact the Annex IV methodology would produce a far *lower* subsidy amount than Brazil's 14/16 methodology.

85. Third, Brazil suggests that "the information withheld" by the United States "would have been detrimental" to U.S. arguments that decoupled payments are non-product-specific support. As set out previously, the farm-by-farm planted acreage data that the United States could not provide under U.S. law is simply irrelevant to the issue whether decoupled payments are "product-specific support." Brazil appears to overreach, moreover, in suggesting that a "detrimental" inference be drawn since the *Canada – Aircraft* report found that the inferences to be drawn were not punitive but factual in nature.

## VII. Conclusion

86. Brazil has asserted that decoupled income support payments must be allocated to upland cotton only for purposes of the Peace Clause and not for purposes of its serious prejudice claims. However, Brazil's analysis is completely backwards: the text and context of the Peace Clause demonstrate that support is *not* to be allocated for purposes of the Peace Clause test while the text and context of Articles 5 and 6 of the Subsidies Agreement demonstrate that subsidies not tied to production of a given product (such as decoupled income support) *are* to be allocated to all of the products the recipient sells for purposes of serious prejudice claims.

87. The implication of Brazil's erroneous analysis and arguments, and in particular its express disavowal of any allocation methodology for purposes of its serious prejudice claims on decoupled income support payments, is that Brazil has failed to make a *prima facie* case on these claims. As a result, no findings may be made with respect to these measures, and these payments may not be included in an analysis of whether the effect of the challenged U.S. subsidies has been serious prejudice to Brazil's interests.

### List of Exhibits

- US-143 Memorandum from Larry Mitchell, USDA Farm Services Agency, to Various FSA Offices, Administrators, and Divisions on Release of Restricted Information under the Freedom of Information Act (September 18, 1998)
- US-144 USDA Farm Services Agency, Notice INFO-16: Releasing Lists of Names and Addresses in Response to Requests Under FOIA (December 1, 1998)
- US-145 Contents of 4 corrected data files submitted on January 28, 2004
- US-146 USDA, Commodity Credit Corporation, 58 Federal Register 15755-15756 (March 24, 1993).
- US-147 Data in response to Panel Question 264(a): Exhibit US-128 on a Fiscal Year/ Cash Basis
- US-148 Data in response to Panel Question 264(d): Claim Payments/ Recoveries/ Reschedulings on a Fiscal Year/ Cash Basis
- US-149 United States Department of the Treasury Financial Manual I TFM 2-4600 (December 2003)
- US-150 "Annual Review of Fees for USDA Credit Programs," March 25, 2003 and April 8, 2002.
- US-151 United States Office of Management and Budget Circular No. A-129 (November 2000), Table of Contents, General Information, Appendix A, Sections I and II.
- US-152 Commodity Credit Corporation Realized Losses and Appropriations to Restore Such Losses for Fiscal Years 1992-2003
- US-153 Summary of Principal Terms, Conditions, and Duration of Each Rescheduling Reflected in Column F of Exhibit US-128
- US-154 Partially Corrected Calculations Allocating Decoupled Payments for Upland Cotton Base Acres to Upland Cotton Using Incomplete Annex IV Methodology