

*United States – Subsidies on Upland Cotton*  
(WT/DS267)

**Opening Statement of the United States of America  
at the First Meeting of the Panel with the Parties**

July 22, 2003

1. Mr. Chairman, it is disappointing that we are here before you today. Disappointing, first, because the United States has stayed within the disciplines and acted consistently with its WTO obligations negotiated and agreed in the Uruguay Round and, second, because we see Brazil seeking to gain through litigation what it has not been able to gain through negotiation. We note at the outset that we share many of Brazil's objectives with respect to reform of measures that affect agricultural trade – including the three pillars of market access, domestic support, and export subsidies. However, we obviously do not endorse the means by which Brazil is attempting to obtain changes to WTO-consistent U.S. support measures for upland cotton. Brazil wants this Panel to impose obligations not found in the text of the WTO agreements – for example, to by-pass the Peace Clause through a patently faulty interpretation of that text or to mischaracterize export credit guarantees as export subsidies by ignoring text making clear that disciplines on those measures are still to be negotiated. Brazil thus seeks to impose disciplines and achieve results through this litigation that were not agreed in the Uruguay Round.

2. As noted in our first submission, the United States has attempted to help the Panel with the task of making sense of the rather sprawling case Brazil has put before you. To do so, we have, first, made requests for preliminary rulings that the Panel find that three sets of measures

identified by Brazil are not within the Panel's terms of reference. These are: (1) export credit guarantee measures relating to eligible U.S. agricultural commodities other than U.S. upland cotton – these are measures which were not the subject of consultations, and which were not in fact consulted on; (2) production flexibility contract payments and market loss assistance payments – these measures are no longer in effect and had, in fact, terminated and been replaced by the 2002 Act before Brazil's consultation and panel requests; and (3) subsidies provided under the Agricultural Assistance Act of 2003 – these are measures that were not even in existence at the time of Brazil's panel request. As the measures were not and could not have been consulted upon, the United States requests that the Panel make preliminary rulings that none of these measures is within its terms of reference. Should the Panel have questions regarding this request, we would be happy to provide answers.

3. Respectfully, we would also request that the Panel clarify the time frame within which it anticipates making its ruling. The timing of the panel's preliminary ruling raises significant issues for the preparation of our rebuttal submission and potentially for our rights of defense. For example, with respect to the export credit guarantee programs relating to eligible agricultural commodities other than upland cotton, U.S. export subsidy commitments and reduction commitments are expressed on a product-by-product basis – thus potentially raising Peace Clause issues with respect to each and every one of those commodities for which the United States has reduction commitments.

4. I will not repeat all of the arguments made by the United States in its first submission, for example, that Brazil bears the burden of proof on the Peace Clause, that the phrase “exempt from actions” in the Peace Clause means exempt from “actions” and not “actions by the Dispute Settlement Body.” Instead, I would like to highlight some issues of interpretation involving the Peace Clause that we believe the Panel may face and then ask my colleague to highlight some issues relating to Step 2 and export credit guarantees.

5. The U.S. support measures at issue in this dispute are exempt from actions pursuant to the Peace Clause. With respect to non-green-box domestic support measures, the proviso to Article 13(b)(ii) reads, “provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year.” This text indicates that the relevant test is to compare the product-specific support “decided” during the 1992 marketing year versus the product-specific support that the challenged measures currently in effect grant.

6. The level of support that U.S. measures currently grant to upland cotton is far lower now than in 1992. The amount of support decided in 1992 was 72.9 cents per pound of upland cotton production. The amount of support that current measures grant for the 2002 crop is only 52 cents per pound. This reflects a deliberate choice by the United States to set payment rates to stay within the Peace Clause limit. Thus, all of the U.S. non-green box domestic support measures at issue in this dispute are exempt from actions based on Peace Clause-specified provisions.

7. Brazil erroneously suggests that whether a Member's measures are in breach of the Peace Clause should be judged by comparing the *aggregate outlays* that may be *attributed* to a commodity (or producers of the commodity) to the aggregate outlays that were made during the 1992 marketing year that, again, may be attributed to that commodity. Brazil's interpretation of Article 13(b)(ii) fails to read this provision according to its ordinary meaning, in its context, and to make sense of the text actually agreed by Members. We believe Brazil's erroneous analysis stems from three interpretive missteps.

8. First, with respect to measures currently in effect, Brazil mistakenly suggests that support under previous measures in past years is relevant to the Peace Clause comparison. The proviso, however, is written in the present tense (“provided that such measures *do not grant support*”) and thus, with respect to measures *currently* in effect, calls for a determination of the support that challenged measures *currently* grant. Brazil *nowhere* explains how the support in any previous years is relevant to the present-tense criterion that Peace Clause-exempted measures “do not grant support” in excess of a certain level. In fact, Brazil's analysis of the ordinary meaning and context of the phrase “grant support” assigns no meaning to Members' choice of verb tense. Thus, Brazil's interpretation would ignore the ordinary meaning of the text of the Peace Clause.

9. Second, Brazil misunderstands the support that is relevant to the Peace Clause comparison because it misreads the phrase “support to a specific commodity.” Brazil in its first submission first reads “grant support” and then separately reads “specific commodity,” but this phrase must be read as a whole: the Peace Clause proviso links “support” with “a specific

commodity.” New Zealand has asserted that, had Members intended for the phrase “support to a specific commodity” to mean “product-specific support,” they would have used the latter phrase. With respect, this pushes the general interpretive aid of reading different word choices to carry different meanings too far. It ignores the relevant task for an interpreter, which is to read the text according to its ordinary meaning, in context, and in light of the object and purpose of the agreement. The ordinary meaning of the phrase “support to a specific commodity,” in the context of the Agriculture Agreement, is “product-specific support.” We note that the Agriculture Agreement suggests that domestic support consists, in part, of product-specific support and non-product-specific support. Brazil’s interpretation of “support to a specific commodity,” however, would apparently also capture “non-product-specific support.” Absent a clear indication that such a contrary-to-logic result was intended, the interpreter should read “support to a specific commodity” to exclude “non-product-specific support.” Here, the only measures at issue currently in effect that provide “support to a specific commodity” are marketing loans and user marketing (Step 2) certificates. The other measures challenged by Brazil (counter-cyclical payments and crop insurance) do not provide “support to a specific commodity”; they are non-product-specific support.

10. Third, in a 135-page submission that was supposed to be devoted to the Peace Clause, Brazil ignores the way in which the United States “decided” (that is, “determined” or “pronounced”) the product-specific support for upland cotton during the 1992 marketing year. Brazil simply asserts that the “only ‘decision’ that could be said to have been made ‘during’ MY 1992 with respect to upland cotton was *to provide appropriations and continued funding for*

upland cotton pursuant to the 1990 FACT Act.” That is, Brazil fails to explain to the Panel how U.S. measures *actually* decided support during the 1992 marketing year in favor of Brazil’s pre-baked conclusion that the “term ‘decided during the 1992 marketing year’ requires an examination of the *amount or quantity of support . . .* for a specific commodity that a WTO Member ‘decided’ to provide during the 1992 marketing year.” In fact, as indicated in the first U.S. submission, U.S. measures “decided” support in the 1992 marketing year by ensuring upland cotton producer income at a rate of 72.9 cents per pound. Brazil avoids reaching this conclusion only by ignoring the plain meaning of the word “decided” in the Peace Clause text.

11. As the United States has explained in detail in its first submission, U.S. domestic support measures did *not* decide on an outlay or expenditure amount in favor of upland cotton. Rather, those U.S. measures “determined” a level of income support during the 1992 marketing year that the U.S. Government ensured that upland cotton farmers would receive for each unit of production – that is, *the measures set a rate of support: \$0.729 per pound of upland cotton.* Thus, no amount of outlays was “decided” (“determined” or “pronounced”) during the 1992 marketing year; indeed, Brazil nowhere explains how U.S. domestic support measures could have “decided” the amount of outlays since those outlays resulted from the difference between the income support level and world prices during Marketing Year 1992 beyond the U.S. Government’s control.

12. As a result, Brazil’s interpretation of the Peace Clause and resulting analysis focusing on outlays are fundamentally in error. In fact, the level of support granted to upland cotton

producers is far lower now than in 1992. Because the product-specific support that challenged U.S. measures grant to upland cotton is not in excess of that product-specific support to upland cotton decided during the 1992 marketing year, U.S. non-green box domestic support measures are “exempt from actions based on paragraph 1 of Article XVI of GATT 1994 or Articles 5 and 6 of the Subsidies Agreement.” As a result, Brazil may not maintain this action and advance claims under the specified provisions with respect to the product-specific U.S. non-green box domestic support measures for cotton – marketing loan program payments and user marketing (Step 2) certificates or the non-product-specific U.S. non-green box domestic support measures, counter-cyclical payments, and crop insurance subsidies.

13. Brazil commented that the U.S. approach would create an annual “statute of limitations” for purposes of the applicability of the Peace Clause and further argues that the problem with this approach is budgetary outlays are not known until after a given marketing year is completed. This comment points out the difficulties of Brazil’s approach that only budgetary outlays may be examined under the Peace Clause. Brazil effectively concedes that under its approach there would be no certainty for Members whether measures are exempt from actions pursuant to the Peace Clause. For example, it would be so difficult to know whether budgetary outlays under the 2002 Act exceeded 1992 outlays as of Brazil’s panel request in February 2003.

14. Brazil also told you that this text resulted from the EC’s desire to protect from challenge measures decided in 1992 for purposes of CAP reform – that is, looking at support as decided by the EC during marketing year 1992 rather than support as provided during marketing year 1992.

That is precisely the approach we suggest to you: examine the product-specific support decided during marketing year 1992 and compare it to the product-specific support that measures currently in effect currently grant.

15. With respect to U.S. direct payments, the United States and Brazil disagree on whether direct payments are “green box” measures. If direct payments are green box measures, they are “exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement” pursuant to Article 13(a)(ii) of the Agriculture Agreement. This issue turns on whether direct payments “conform fully to the provisions of Annex 2” to the Agriculture Agreement.

16. Brazil argues that U.S. direct payments do not satisfy the “fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production” under the first sentence of paragraph 1 of Annex 2. However, as explained in the U.S. first written submission, the text of Annex 2 indicates that “domestic support measures” shall be deemed to have met this “fundamental requirement” if the measures “conform to the . . . basic criteria” of the second sentence plus any applicable policy-specific criteria by beginning the second sentence with “accordingly.” This interpretation is supported by relevant context in the Agreement; as the European Communities notes in its third party submission, Articles 6.1, 7.1, and 7.2 refer to the measures “which are not subject to reduction commitments because they qualify under the *criteria* set out in Annex 2.” Brazil does *not* contest that U.S. direct payments meet the basic criteria under the second sentence of Annex 2, paragraph 1, that (1) the support be provided

through a publicly-funded government program not involving transfers from consumers and (2) the support not have the effect of providing price support to producers.

17. Brazil and the United States apparently agree that U.S. “direct payments” should be considered against the criteria for “direct payments to producers” of “decoupled income support.” Thus, U.S. direct payments must also conform to “the 5 policy-specific criteria and conditions” set out in paragraph 6 of Annex 2.

18. As we have noted in our first submission, direct payments under the 2002 Act conform fully to these criteria because they are not linked to current upland cotton production. These payments are made with respect to farm acreage that was devoted to agricultural production in the past, including acreage previously devoted to upland cotton production. The payments, however, are made regardless of whether cotton is currently produced on those acres or whether anything is produced at all.

19. Brazil brings forward two arguments that direct payments do not satisfy the criterion under paragraph 6(b) of Annex 2 that the amount of payments not be related to, or based on, production undertaken in any year after the base period. Brazil argues that by eliminating or reducing payments if recipients harvest certain fruits or vegetables, payments are related to production in a year after the base period. However, no particular type of production is required in order to receive such payments – indeed, no production is necessary at all. Brazil’s argument, moreover, proves too much. Under Brazil’s analysis, *any* limitation on a producer’s choices in a

year after the base period that would alter the amount of payment would be inconsistent with paragraph 6(b). However, a requirement that a recipient of direct payments produce *nothing at all* (or see the payment reduced or eliminated) *would* link the amount of payment to the type or volume of production in the current year. Such a requirement would also *ensure* that such payments meet the “fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production” because there would be no production at all. Thus, under Brazil’s analysis, paragraph 6(b) would *prevent* a payment that would demonstrably achieve the “fundamental requirement” of Annex 2. This absurd result is not required by the text of paragraph 6(b) and should be avoided.

20. Second, Brazil argues that direct payments are based on production in a year after the base period because once one type of direct payment to producers under Annex 2 has been made, *all* subsequent measures providing direct payments must be made with respect to the same base period. The Annex 2 text does not support such a reading, however. Annex 2 says that “[d]omestic support measures for which exemption from the reduction commitments is claimed” shall meet the fundamental requirement of the first sentence through the relevant basic and policy-specific criteria of the second sentence. For example, in the case of decoupled income support, the particular “domestic support measure” must meet “policy-specific criteria and conditions as set out” in paragraph 6. Paragraph 6(a), (b), (c), and (d) relate “such payments” to “a defined and fixed base period.” Thus, payments with respect to a given “domestic support measure for which exemption from the reduction commitments is claimed” must satisfy conditions relating to “a defined and fixed base period.” There is no textual requirement that *all*

domestic support measures for which exemption from the reduction commitments is claimed utilize the *same* “defined and fixed base period.” Brazil reads paragraph 6 as though the text were “*the* defined and fixed base period.” However, this is not what the text says nor what the negotiators agreed.

21. In fact, we note that Brazil and the rest of the Cairns Group seek to address this very issue by proposing in the ongoing agriculture negotiations that Annex 2, paragraph 6, be amended to change the reference from “a defined and fixed base period” to “a defined, fixed *and unchanging historical* base period.” The revised Harbinson text, in Attachment 8, incorporates this Cairns Group proposal by proposing adding to paragraphs 5, 6, 11, and 13 of Annex 2 the text: “Payments shall be based on activities in a *fixed and unchanging historical* base period.” Again, Brazil is seeking to gain through litigation what it has not yet gained through negotiation.

22. Thus, U.S. direct payments are a green box measure that conform to the criteria set out in Annex 2 and are exempt from actions pursuant to Article 13(a)(ii) of the Agriculture Agreement. Further, U.S. non-green box measures do not grant product-specific support in excess of that decided during the 1992 marketing year – that is, 72.9 cents per pound of upland cotton – are thus exempt from actions pursuant to Article 13(b)(ii). The limit established by the Peace Clause with respect to U.S. support measures is 72.9 cents per pound of upland cotton production, and the United States has disciplined its product-specific support to stay within that limit.

23. I now would invite my colleague to highlight some issues with respect to Step 2 payments and export credit guarantee programs.

24. The Step 2 program is an integrated program in support of U.S. upland cotton producers. Subject to appropriation by Congress for the program, all sales of U.S. upland cotton are eligible for this payment. Since its inception in 1990, the Step 2 program has been constructed and implemented in a manner to support the price paid to U.S. upland cotton producers by purchasers of their product. Step 2 is a single program that provides for payments on all sales of all upland cotton produced in the United States in a given marketing year - whether those sales are for export or for domestic consumption. Step 2 payments are provided to merchandisers or manufacturers who use upland cotton, as they represent the first step in the marketing chain where these payments could be made and have the greatest impact on producer prices.

25. The authorizing statute plainly does not state that the Step 2 payment is contingent upon export. The statute provides for Step 2 payments to a class of eligible users who constitute the entire universe of potential purchasers of upland cotton from producers. Payment occurs upon demonstration of the requisite use of the cotton.

26. Unlike the facts of *United States - FSC (Recourse to Article 21.5)*, the Step 2 subsidy involves a universally available subsidy on sales of one agricultural product produced entirely in the United States, not tied to exportation or foreign commerce. Stated most simply, U.S. upland cotton does *not* have to be exported to receive the payment. Assuming the conditions in the

payment formula are met, all U.S. upland cotton is sold with an entitlement to the Step 2 subsidy, whether it leaves the United States or is consumed there.

27. Addressing export credit guarantees briefly: The two main agricultural export credit guarantee programs of the United States have existed since 1980. For nearly 15 years before the inception of obligations under the Agreement on Agriculture, as well as since that time, the core features of the GSM-102 and GSM-103 programs have remained substantially the same.

28. They are well-known and well-established export credit guarantee programs, specifically discussed by negotiators during the Uruguay Round, as well as in the OECD, and in the current Doha Round.

29. Article 9.1 of the Agriculture Agreement identifies and lists specific export subsidy programs, also well-known to the negotiators, who wanted to assure that such specific practices were embraced within the definition of an export subsidy for purposes of the Agreement on Agriculture.

30. Other export subsidies are captured within the anti-circumvention provision of Article 10.1. In contrast, export credit guarantees were not included in either Article 9.1 or 10.1. Instead, as part of the balance struck in the Uruguay Round, negotiators opted to extend the negotiations on this subject but determined to hold Members to a commitment that if and when internationally agreed disciplines emerged, the United States, like all other WTO Members,

could only grant export credit guarantees in conformity with such disciplines. To do otherwise would at that time constitute a violation of the Member's obligations under the Agreement on Agriculture.

31. Article 10.2 expresses the two commitments of the Members in this regard: (1) to engage in such negotiations notwithstanding the conclusion of the Uruguay Round and (2) upon development of internationally agreed disciplines to render them WTO commitments through the portal of Article 10.2.

32. Article 10.2 does not state that export credit guarantees shall be subject to such future negotiated disciplines in addition to the anti-circumvention provisions of Article 10.1. To the contrary, Article 10.2 and the reference to export credit guarantees is juxtaposed to Article 10.1 to reflect the intention of the drafters to distinguish export credit guarantee programs from other programs that otherwise would be export subsidies subject to Article 10.1.

33. For the foregoing reasons and those set out in our first written submission, the United States believes that U.S. non-green box measures are exempt from actions pursuant to Agriculture Agreement Article 13(b)(ii); U.S. direct payments are exempt from actions pursuant to Agriculture Agreement Article 13(a)(ii); and U.S. export credit guarantee programs for upland cotton and Step 2 payments are consistent with our WTO obligations.