ANNEX E

COMMUNICATIONS FROM PARTIES

ANNEX E-1

LETTER OF THE UNITED STATES

(7 November 2006)

The United States is in receipt of Brazil's communication dated 1 November 2006, and the Panel's 2 November 2006 invitation to comment on this communication. My authorities have instructed me to submit the following comments pursuant to the Panel's invitation.

In Brazil's 1 November communication, Brazil asks the Panel to seek all of the documents and information listed in Annex 1 to the communication – comprising more than 35 data or document requests[1] – because "*Brazil* considers that it is 'necessary and appropriate' for the compliance Panel to seek [these] documents and information."[2] For the reasons below, the United States respectfully requests that the Panel decline Brazil's request.

Brazil's request appears to be premised on the incorrect assumption that Article 13.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") authorizes panels to collect for a complaining party information that the complaining party deems to be "necessary and appropriate." This incorrect assumption is evident both in the assertion that "Brazil considers that it is 'necessary and appropriate' for the compliance Panel to seek [these] documents and information"[3] and in the requests that Brazil outlines in Annex 1 of it 1 November communication.[4] Contrary to Brazil's assumption, however, Article 13.1 is not intended for the convenience or use of the parties to a dispute. Rather, as the Appellate Body has emphasized, DSU Article 13.1 allows a panel "to seek information and advice . . . to help *it* to understand and evaluate the evidence submitted and the arguments made by the parties."[5] Indeed, the Appellate Body has cautioned against using this authority under DSU Article 13.1 "to make the case for a complaining party."[6] The United States notes the timing of Brazil's request – made even before Brazil has presented a single argument or piece of evidence, and therefore without possibly having established a *prima facie* case – and the sheer volume of documents and information that Brazil is asking the Panel to seek from the United States. In light of the foregoing, it is difficult to conceive of Brazil's request as anything but an effort to have the Panel make Brazil's case for it.

In any event, the United States notes that DSU Article 13.1 provides that Members should respond promptly and fully to any request by a panel for "such information as *the panel* considers

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[1] Brazil lists 23 separate questions that it asks the Panel to pose to the United States, many of which are comprised of numerous parts and sub-parts (for example, Question 1 requesting information about the "Direct and Counter-Cyclical Payment Program[s]" has 4 parts, (A) through (D), many of which are themselves comprised of multiple sub-parts). By the U.S. count, there are at least 35 separate data or document requests, taking into account just the major parts of the questions in the Annex.

[2] Brazil's 1 November 2006 Communication, para. 3 (emphasis added).

[3] Brazil's 1 November 2006 Communication, para. 3.

[4] In Part A of the Annex, for example, Brazil states that "*Brazil* requests updated information on upland cotton planted and base acres under the Direct and Counter-Cyclical Payment Program for each the 2003, 2004, 2005, and 2006 marketing years." Similarly, "*Brazil* also requests information on base acreage and planted acreage for other 'program crops'." And "*Brazil* requests this information in the format outlined by the Panel." Brazil's 1 November 2006 Communication, Annex 1, Part A, para. 1 (emphasis added).

[5] Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, para. 129 (adopted 19 March 1999) ("*Japan – Varietals (AB)*") (emphasis added).

[6] *Japan – Varietals (AB)*, para. 129.

necessary and appropriate" (emphasis added). It is, thus, within "the sound discretion of a panel"[7] – and not a complaining party – to decide what information is "necessary and appropriate" *for the panel's purposes*[8] within the meaning of DSU Article 13.1. "Necessary" means "[t]hat which cannot be dispensed with or done without; requisite, essential, needful,"[9] and "appropriate" means "specially suitable . . . proper, fitting."[10] Brazil fails to explain how the Panel can assess whether any of the documents and information listed in Annex 1 is "essential" or "suitable" for the Panel's objective assessment of the matter before it, and not to be used to make Brazil's *prima facie* case for it, before either party has even had the opportunity to present any arguments or any evidence in support of its case.

The United States notes that similar, premature requests by Brazil relating to DSU Article 13.1 have been rejected in other disputes. In *Canada – Aircraft* (DS70) – much like in this proceeding – Brazil submitted a letter before either party submitted its first written submission, requesting that the panel seek detailed information from Canada pursuant to DSU Article 13.1. The panel declined saying it would be "absurd" to request information "before receiving at least the first written submissions of both parties . . . since it would at once defeat the very purpose of the parties making written submissions."[11] The same consideration applies with equal force here.

The panel in *Canada – Aircraft II* (DS222) also rejected a similar request by Brazil to seek information from the responding party submitted before either party had filed any written submissions. That panel responded to Brazil's request saying that it "d[id] not consider it appropriate to seek any documents or information from either party until it has at least had an opportunity to review both parties' first written submissions."[12] Though it did ask both Brazil and Canada for

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[7] Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel, and Other Items*, WT/DS56/AB/R, para. 84 (adopted 22 April 1998) ("*Argentina – Textiles (AB)*"). In that dispute, the Appellate Body rejected Argentina's claim that the Panel erred by "not acceding to the request of the parties to seek information from, and consult with, the IMF so as to obtain its opinion on specific aspects of the matter" before it. Recalling its reasoning in earlier disputes – in particular, Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, para. 147 (adopted 13 February 1998) – the Appellate Body explained that "Article 13 of the DSU enables a panel to seek information and technical advice as it deems appropriate in a particular case, and that the DSU leaves 'to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate.' Just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all." *Argentina – Textiles (AB)*, para. 84. *See also European Communities – Trade Description of Sardines*, WT/DS231/AB/R, para. 302 (adopted 23 October 2002) (explaining that "[o]ur statements in *EC – Hormones*, [*Argentina – Textiles*], and *US – Shrimp*, all support the conclusion that, under Article 13.2 of the DSU, panels enjoy discretion as to *whether or not* to seek information from external sources.") (emphasis in original).

[8] A panel's purpose is to conduct an objective assessment of the matter before it and make such findings as will assist the DSB, as provided in Article 11 of the DSU. Contrary to Brazil's apparent belief, nowhere is a panel's purpose to make the case for one of the parties. Rather, information requested by a panel under Article 13 of the DSU could assist the Panel to understand the evidence and arguments that have been presented.

[9] The New Shorter Oxford English Dictionary, p. 1895 (Clarendon Press 1993).

[10] The New Shorter Oxford English Dictionary, p. 103.

[11] Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, para. 9.50 (adopted 20 August 1999, as upheld by Appellate Body Report) ("*Canada – Aircraft (Panel)*"). In that dispute, the panel did not request any information from Canada pursuant to DSU Article 13.1 until after the panel received the parties' *second* written and oral submissions, by which time the panel had identified certain specific information *it* needed to address the issues before it. *Canada – Aircraft (Panel)*, para. 9.53.

[12] Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R and Corr.1, para. 7.134 (adopted 19 February 2002) ("*Canada – Aircraft II (Panel)*"), para. 7.134.

information pursuant to DSU Article 13.1 after reviewing the parties' first written submissions, the panel explained that "[s]ince we are not a commission of enquiry, we did not consider it appropriate to seek additional information and/or documentation on the basis of Brazil's general request [filed before the parties had made any written submissions]. We only considered it appropriate to seek additional information/documentation from Canada *on the basis of specific information and/or arguments submitted by Brazil*."[13] By contrast, in this dispute, Brazil has yet to submit *any* "specific information and/or arguments" that could form the basis of a request by the Panel for information.

Indeed, Brazil's sole argument is that the information sought in Annex 1 is "necessary and appropriate . . . in light of the importance accorded to this information *by the panel in the original proceeding*."[14] Brazil fails to show that this assertion is even factually accurate. Brazil does not explain, for example, when the panel in the original proceeding allegedly asked for or received each of the documents and items of information to which Brazil asserts the panel "accorded importance," the context in which the panel allegedly considered this information, or the specific import it allegedly accorded to the information. Indeed, given that the bulk of the information sought by Brazil relates to periods *after* the original panel proceeding, it is unclear how this information could even have been before that panel.

Even leaving that aside, the United States notes that the issues in an Article 21.5 proceeding are not the same as those in an original proceeding. In this proceeding, the Panel is tasked with deciding disagreements between the United States and Brazil "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB.[15] These issues were not before the panel in the original proceeding; indeed, they could not have been as there were no DSB recommendations or rulings at that time and thus there was no basis, during the original panel proceeding, to evaluate whether "measures taken to comply" with those recommendations and rulings existed or were WTO-consistent. Accordingly, even if the panel in the original proceeding *had* accorded importance to particular pieces of information in Annex 1, that would not mean that the same information would necessarily be "necessary and appropriate" in this Article 21.5 proceeding. The Panel could only make such a determination after considering the parties' evidence and arguments in this dispute.

Finally, Brazil argues that the Panel must collect the information in Annex 1 "at an early stage . . . given the shortened timeframe for the panel procedure, provided for in Article 21.5 of the DSU."[16] However, there is nothing in the DSU that suggests that an Article 21.5 panel may abdicate to the parties *its* discretion to seek information *it* considers to be "necessary and appropriate" simply because an Article 21.5 proceeding involves a shorter timeframe than an original proceeding. Brazil's premature request provides no valid basis for the Panel to determine to exercise that discretion.

In light of the foregoing, the United States respectfully requests the Panel to decline Brazil's request. If Brazil were to make a request at a more appropriate time in this proceeding, Brazil would still need to explain why, in light of the evidence and arguments presented by the parties *in this proceeding*, the Panel should consider the information requested to be "necessary and appropriate" for the Panel's objective assessment of the matter. The United States has difficulty understanding how the information in the current request goes to anything other than evidence that *Brazil* is interested in having (because it hopes it may help to make Brazil's *prima facie* case for it).

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[13] *Canada – Aircraft II (Panel)*, para. 7.136 (emphasis added).
[14] Brazil's 1 November 2006 Communication, para. 3.
[15] DSU, Article 21.5.
[16] Brazil's 1 November 2006 Communication, para. 3.

ANNEX E-2

LETTER OF THE UNITED STATES

(20 November 2006)

The United States is in receipt of Brazil's 17 November 2006 first written submission. The United States notes that Brazil's submission comprises 173 pages in the main submission, a further 89 pages of argument in annexes, and 144 exhibits. Based upon an initial review over the weekend, these materials also include an econometric model that, on first impression, is substantially different from the model submitted by the same economist in the original proceeding in support of Brazil's arguments. In light of the enormous volume of the Brazilian submission, the complexity of the issues raised, and the econometric analyses advanced by Brazil, the United States respectfully requests that the time to prepare its first written submission be revised to 29 December 2006. This date is not only appropriate given the unique circumstances of this dispute, but is necessary to avoid prejudice to the United States.

Article 12.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") provides that "[i]n determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions." Further, Article 12.2 of the DSU provides that "[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process." Both provisions support the U.S. request.

First, in light of the complexity, length, and volume of the materials Brazil submitted as part of its first submission, the three-week period set out in the current timetable for the U.S. first written submission does not "provide sufficient time" for the United States to prepare that submission. Indeed, the U.S. ability to defend itself against Brazil's claims would be seriously prejudiced without additional time to review and prepare a response to Brazil's first written submission.

To put the U.S. request in perspective, a review of the submissions in all but two of 20 proceedings under DSU Article 21.5 reveals that Brazil's submission in this dispute is the most voluminous first written submission ever filed in such a proceeding. Indeed, as shown in the table below, there have been at least three Article 21.5 proceedings in which the responding party was given *more* time to prepare its first written submission than the timetable currently affords the United States. In each of those disputes, however, the complaining party's first written submission was approximately *one-fifth or less* the size of Brazil's first submission.

Dispute	**Complaining Party First Sub (Pages)**	**Time for Responding Party First Sub (Days)**
United States – Lumber (21.5 – Canada) (DS277)	55	30
Japan – Apples (21.5 – United States) (DS245)	34	24
United States – Shrimp (21.5 – Malaysia) (DS58)	46*	23
***United States – Upland Cotton* (21.5 – Brazil) (DS267)**	**262***	**21**

* main submission plus annex(es)

Just as significantly, none of those disputes in which the responding party was given more time to prepare its first written submission than the timetable currently affords the United States

involved the diversity and complexity of claims, the volume of exhibits, or the complex economic issues (including econometric analyses) that have been put forward by Brazil in its first submission in this dispute.

Indeed, Brazil's first written submission is more comparable, both in size and complexity, to the first submission recently filed by the United States, as the complaining party, in *European Communities – Measures Affecting Trade in Large Civil Aircraft* (DS316). That U.S. submission involved 249 pages of text and, as in this dispute, involved claims of both prohibited and actionable subsidies.[1] In the DS316 dispute, however, the European Communities has more than *12 weeks* to prepare its first written submission. It is the firm belief of the United States that both parties – and, further, all Members that have a systemic interest in the dispute – gain when panels have access to the full facts and arguments from the parties, and the arguments of each party are subjected to proper scrutiny. The United States expects that Brazil agrees and, therefore, finds it difficult to understand Brazil's opposition in this proceeding to the United States being given a reasonable opportunity for response.[2]

This U.S. request is the minimum period that would afford "sufficient time" for each party to prepare its submissions, which in turn would assist the Panel in its task to make an objective assessment of the matter (DSU Article 11) and produce a high-quality panel report (DSU Article 12.2). Further, the U.S. request would "not unduly delay[] the panel process." The United States is not requesting 12 weeks as the responding party received in DS316; it is requesting less than half that time.

The U.S. request would also not affect the overall timetable of the proceeding. Indeed, even if the subsequent filing dates are modified to accommodate the U.S. request while maintaining the time periods set out in the current timetable, there will still be two weeks between the last submission and the meeting with the Panel, permitting the latter to remain as scheduled.[3]

In addition, as the Panel will recall, by a communication dated 1 November 2006, Brazil asked the Panel to make more than 35 data and document requests of the United States, ostensibly pursuant to Article 13.1 of the DSU, asserting that "Brazil considers that it is 'necessary and appropriate' for the compliance Panel to seek [these] documents and information."[4] Upon consideration of that request, and U.S. comments in response, the Panel indicated that it would not decide on Brazil's request until it had an opportunity to review Brazil's first written submission.[5] Upon a preliminary review of that submission, the United States notes that Brazil has not explained why the Panel should consider that each of the items listed in Brazil's November 1 communication is "necessary and appropriate" within the meaning of DSU Article 13.1. Indeed, Brazil has not even

[1] However, Brazil in this dispute also advances claims under the *Agreement on Agriculture*.

[2] For example, Brazil argued in the organizational meeting that the United States should be limited only to *two* weeks to respond, even though it must have known (or had a very good sense) at that time of the size and scope of its first written submission. It is difficult to reconcile Brazil's position with its statement at the same meeting that it wishes to assist the Panel in producing a high-quality panel report. By contrast, the United States did not object to Brazil's request for additional time to prepare its first submission, even though Brazil has always been in control of the timing of the commencement of this proceeding.

[3] The new dates would be as follows: (a) U.S. first written submission (29 December); (b) Third Party submissions (5 January); (c) Brazil's rebuttal submission (11 January); and (d) U.S. rebuttal submission (30 January). The meeting with the Panel would remain as scheduled on 13 and 14 February. In the event the WTO is not able to receive a submission on 29 December, the U.S. first written submission could be due on the next WTO working day.

[4] 1 November 2006 Communication from Brazil, para. 3.

[5] 7 November 2006 Communication from the United States.

referred to most of the items it has requested that the Panel seek.[6] Given that Brazil has not considered these items as important to its own *prima facie* case, the United States assumes that Brazil has abandoned its request with respect to them.

On that basis alone, Brazil's requests can be rejected or dismissed. In addition, the United States expects to have in the U.S. first written submission further comments relevant to the documents and information requested by Brazil. The United States respectfully submits that these comments, and the evidence and arguments that the United States will itself submit, will assist the Panel in determining whether any information is "necessary and appropriate" for the Panel's purposes within the meaning of DSU Article 13.1.

This is precisely what the panels noted in the two *Canada – Aircraft* disputes (DS70 and DS222) in which Brazil submitted similarly premature requests relating to DSU Article 13.1. For example, in *Canada – Aircraft* (DS70), the panel explained that it would be "absurd" to request information "before receiving at least the first written submissions *of both parties* . . . since it would at once defeat the very purpose of the parties making written submissions."[7] Similarly, the panel in *Canada – Aircraft II* (DS222) stated that it "d[id] not consider it appropriate to seek any documents or information from either party until it has *at least* had an opportunity to review *both parties' first written submissions*."[8] The reasoning of those panels – that there is no basis to use Article 13.1 of the DSU to preempt the normal briefing process – is equally compelling in this proceeding.

[6] Indeed, the only reference that Brazil makes to its request to the Panel to collect data under DSU Article 13.1 is in respect of a few of the items in Part A of the Annex to its 1 November communication (regarding base and planted acres). Brazil does not even mention the 25 data and document requests in Part B of the Annex to its 1 November communication.

[7] Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, para. 9.50 (adopted 20 August 1999, as upheld by Appellate Body Report) (italics added).

[8] Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R and Corr.1, para. 7.134 (adopted 19 February 2002) (italics added).

ANNEX E-3

LETTER OF THE UNITED STATES

(21 November 2006)

The United States is in receipt of the 8 November 2006 communication from the Panel inviting the United States to comment on possible logistical arrangements for opening to the public a portion of the panel meeting at which parties are invited to appear.[1] My authorities have instructed me to submit the following comments pursuant to the Panel's invitation.

As a threshold matter, the United States continues to invite Brazil to join the United States in its request that the panel meeting be made open to the public. In the meantime, the United States has invoked its right under Article 18.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* to make statements of its own positions public and, as an appropriate means to do this, has requested that the Panel exercise its authority to open to the public the U.S. statements and U.S. answers to questions presented in the panel meeting.

The United States believes that the logistical arrangements to accomplish this could be relatively straightforward while providing meaningful access to other Members and the public. As the United States noted in the 6 November 2006 organizational meeting, open meetings have successfully been held in the current *Hormones Compliance* disputes brought by the European Communities against the United States (DS320) and Canada (DS321). In those disputes, the first and second panel meetings with the parties, and the meeting with scientific experts, utilized a closed-circuit television broadcast of the panel meetings to a separate viewing room in the WTO where WTO Members and the public were able to observe the proceeding. The United States believes that the procedures used in those disputes could be adapted and used effectively in this dispute as follows:

- The logistical approach in the *Hormones Compliance* disputes required two rooms (one for the panel meeting, one for viewing the broadcast), a camera in the meeting room, a broadcast link between the two rooms, and technical support.

- In the first panel meeting with the parties in the *Hormones Compliance* dispute, room W was used for the panel meeting, and room CR was used as the viewing room. For the second panel meeting with the parties and the meeting with scientific experts, room CRI was used for the panel meeting, and room CRII was used as the public viewing room. The United States understands, based on its preliminary inquiries, that rooms CRI and CRII are available for use on 13-14 February 2007, the days on which the panel meeting in this dispute is currently scheduled.

- In the *Hormones Compliance* meetings, a camera was used to send video and audio feed (including audio feed of simultaneous translations) via closed-circuit from the meeting room to the public viewing room. The United States envisions that the same modalities could be used here.[2]

[1] The panel meeting at which parties are invited to appear is referred to in paragraph 2 of the Panel's working procedures.

[2] Video and audio recording was not allowed in the *Hormones Compliance* disputes. The United States envisions that they would also not be permitted here.

- As Brazil has not yet agreed to open to the public its own statements and answers to questions, the audio and video feed would be turned off when Brazil makes its presentations. One option would be to link the audio and video feed to a single switch that could be turned on and off as necessary. The Panel could request that a member of the Secretariat assist in performing this task during the meeting.

- It is not yet clear that any confidential information will be at issue in this proceeding. To the extent that it is, any portions of the U.S. statements or answers to questions dealing with confidential information would not be open to the public. Additional safeguards to provide against the disclosure of confidential information could be undertaken. For example, it may be possible to include a delay in the broadcast to ensure that there would be no inadvertent disclosure of confidential information.

- The United States envisions that third parties would retain their ability to decide whether their submissions and statements are public. Any confidential statements would not be broadcast.

- In the *Hormones Compliance* disputes, the Secretariat ensured that at least two seats were reserved for each WTO Member delegation in the viewing room. It is the U.S. understanding that a number of delegations, including that of Brazil, availed themselves of the opportunity to view one or both of the panel meetings or the meeting with scientific experts. Delegations interested in reserving additional seats were requested to indicate this to the Secretariat. A certain number of additional seats were reserved for the public and allocated by the Secretariat on a first-come-first-serve basis upon receipt of a completed registration form. The Secretariat advertised the open meeting on its website and also made available on-line the forms for registration using the same notice and registration methods of the WTO's Public Symposium. Some days before the event the WTO External Affairs Office processed attendee applications that were received and issued badges to attendees. A similar approach could be used in this dispute.

As noted, these proposed logistical arrangements are based on those used successfully in the *Hormones Compliance* disputes. The United States remains prepared to continue to work with Brazil, the Panel, and the Secretariat to develop further any necessary arrangements for purposes of this dispute.

ANNEX E-4

LETTER OF BRAZIL

(22 November 2006)

1. Brazil is in receipt of a letter dated 20 November 2006 from the United States seeking to delay this panel proceeding by requesting additional time to file its First Written Submission. The United States also requests that the Panel not exercise its discretion, under Article 13 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), to request the United States to produce information set out in Brazil's letter dated 1 November 2006.

2. Brazil strongly opposes these two requests for the reasons set forth below.

Request to Delay Filing of U.S. First Written Submission

3. Brazil objects to the United States attempt to seek more than three weeks to produce its First Written Submission.

4. First, Brazil notes that the Panel indicated in its communication of 8 November 2006 that it might change its timetable "in light of unforeseen developments." However, neither the length nor the substance and content of Brazil's First Written Submission are an "unforeseen development," within the meaning of that footnote. Indeed, the core issues raised in the Brazil's First Written Submission are not new. As the Panel and the Secretariat are well aware, the United States and Brazil already exhaustively briefed the key legal, factual, and economic issues raised before the original panel and the Appellate Body during the period 2003-2004. In particular, the United States and Brazil filed many hundreds of pages of submissions addressing in detail numerous aspects relating to the nature and economic effects of the price-contingent subsidy measures at issue in this compliance proceeding – the Step-2 program, the marketing loan program, and the counter-cyclical payment program in the Farm Security and Rural Investment Act ("FSRI Act") of 2002, as they apply to upland cotton. Similarly, in these submissions, the United States and Brazil exhaustively briefed issues relating to the U.S. export credit guarantee programs that constitute export subsidies circumventing the United States export subsidy reduction commitments and that are, therefore, prohibited export subsidies

5. That extensive briefing resulted in detailed findings by the original panel that were upheld by the Appellate Body. The numerous cross-references in Brazil's First Written Submission to the report of the original panel and its findings of fact attest to the similar, if not identical, nature of most questions at issue in this compliance proceeding.

6. Second, the United States has been on notice of the issues that Brazil would raise in its First Written Submission for many months. Before the Dispute Settlement Body ("DSB"), Brazil emphasized several times that it considered that the marketing loan and counter-cyclical payment programs of the FSRI Act of 2002 were unchanged by the U.S. implementation measures and that it considered that they were continuing to cause serious prejudice to the interests of Brazil. Brazilian and United States trade officials held a number of informal discussions in Washington and Brasilia related to specific Brazilian concerns with the failure of the United States to implement the specific measures set out in Brazil's First Written Submission. If there were any doubts, the extensive questions submitted to the United States prior to the informal consultation held on 19 July provided additional notice to the United States that Brazil was focusing its attention on U.S. marketing loan, counter-cyclical payment and Step-2 programs, as well as the U.S. agricultural export credit guarantee programs. There is, therefore, nothing "unforeseen" in Brazil's First Written Submission that warrants granting the United States additional time.

7. Third, Brazil recalls that this panel operates under Article 21.5 of the DSU. While Article 12.9 of the DSU normally accords panels 6 months from the date of composition to issue a final report to the parties, Article 21.5 of the DSU provides that compliance panels "shall circulate its report within 90 days after the date of referral of the matter to it." Article 21.5 provides for fast-track proceedings aimed at the rapid resolution of a dispute that is already subject to recommendations and rulings of the DSB. Brazil agreed (along with the United States) at the time the Panel's procedures were adopted that the proceeding would take longer than 90 days, However, Brazil also emphasized at that time that this proceeding continues to operate under the fast-track rules consistent with the goal of an expedited resolution of the matter in this dispute.

8. In fact, the object and purpose of the accelerated panel proceeding under Article 21.5 of the DSU is to provide relief to complaining Members from the continued violation of WTO commitments by a defending Member following the expiry of the time period for implementation of the recommendations and rulings of the DSB. As Brazil's First Written Submission indicates, the United States has continued to heavily subsidize upland cotton and has actually increased the magnitude of marketing loan and counter-cyclical payments since the original panel's determination as well as increased the production, export and U.S. world export share of upland cotton. It also continues to provide export credit guarantee export subsidies in violation of its commitments under the *Agreement on Agriculture* and the *Agreement on Subsidies and Countervailing Measures.* The United States' request for further time seeks solely to prolong this situation of non-compliance.

9. In the course of these procedures, the United States will have multiple opportunities to present extensive arguments in response to Brazil's arguments set out in its First Written Submission. In addition to the U.S. First Written Submission due on 8 December 2006, the United States also has an opportunity to file a rebuttal submission on 9 January 2007. Further, the United States has the right to present a detailed oral statement at the hearing on 13 February 2007. The United States also will be given the opportunity to make a closing statement on 13 or 14 February 2007 before the Panel. Further, based on past experience, it is highly likely that United States will be asked a number of questions by the Panel and be given an opportunity to provide written answers to such questions after the panel meeting. These numerous opportunities to address arguments fully protect the U.S. (and Brazil's) due process rights in these expedited Article 21.5 proceedings.

10. It should also be noted that the timetable established by the Panel has guided the parties planning and scheduling. Based on the legitimate expectations that it will be followed, Brazil has planned and organized its participation in the different stages of this proceeding in accordance with this timetable. Any changes in the timetable would be particularly disruptive and would have a very negative impact on Brazil's participation, as they would require a rescheduling of activities over the end of the year period.

11. For the reasons set out above, Brazil requests that the Panel maintain the timetable as provided to the parties on 8 November 2006.

Production of Information Pursuant to Article 13.1 of the DSU

12. Brazil also disagrees with the United States assertion that it is not appropriate for the Panel to request the United States to produce certain information, as detailed in Brazil's letter of 1 November 2006. The Panel indicated in its communication of 8 November 2006 that it would communicate its decision on this matter following the receipt of Brazil's First Written Submission. In its First Written Submission of 17 November 2006, Brazil has presented its *prima facie* case that the United States' measures taken to comply either do not exist or, to the extend they exist, result in inconsistency with the covered agreements.

13. Based on the evidence and arguments presented by Brazil in its First Written submission[1], the Panel can confirm that the information requested in Brazil's letter dated 1 November 2006 will assist the Panel to make an objective assessment of the matter before it, in accordance with Article 11 of the DSU. The Panel is therefore in a position, as indicated in its 8 November 2006 communication to the parties, to decide on Brazil's request.

14. Moreover, and contrary to the United States assertion, Brazil does not ask the Panel to make its case for it. Rather, following the receipt of the information from the United States, Brazil will analyze these data and documents and present their relevance to the Panel.

15. In sum, Brazil continues to consider that it is appropriate and necessary for the Panel to exercise its discretion to request the United States to produce the information referenced in Brazil's 1 November 2006 letter. Brazil's First Written Submission provides a more than sufficient basis for the Panel to evaluate, in light of the findings by the original panel and the Appellate Body and the rulings and recommendations of the DSB, the likely relevance of this information in these proceedings. Given the expedited timeframes under Article 21.5 of the DSU, the Panel should not delay the exercise of its discretion to request the United States to produce the information. Any postponement of a decision might lead to an unwarranted delay of the circulation of the Panel's report.

[1] *See* for example para. 117 of Brazil's First Written Submission.

ANNEX E-5

LETTER OF BRAZIL

(24 November 2006)

Brazil is in receipt of a letter from the United States, dated 21 November 2006, commenting on potential logistical arrangements to open the meeting of the compliance Panel with the Parties to the public. In a communication dated 22 November 2006, the compliance Panel invited Brazil to submit comments on the U.S. letter, by close of business on 24 November 2006. Brazil thanks the compliance Panel for the opportunity to comment on the U.S. letter.

At the outset, Brazil recalls its position, noted by the compliance Panel in its communication of 8 November 2006, that it does not agree to the opening of the compliance Panel's meeting with the Parties to the public. Brazil's position remains unchanged. Therefore, Brazil cannot accept the proposal set out by the United States in its letter of 21 November 2006.

Brazil notes that in the dispute mentioned by the United States – DS320 and DS321 – the decision by the panel to open the hearing to the public followed a "common" request from the parties to the dispute (the European Communities, United States and Canada).[1] As pointed out above, however, this is distinctly not the case in the present dispute. Brazil objects to allowing public access to any part of the proceedings, by closed-circuit television broadcast or otherwise.[2]

In addition, Brazil wishes to draw the compliance Panel's attention to the fact that in DS320 and DS321 the meeting of the panel with third parties remained closed, as not all the third parties agreed to have it open for observation by the public.[3]

Thus, where any objection to opening the meeting to the public remained, the panel in DS320 and DS321 kept that portion of the hearing closed. The Panel did not allow broadcast while delegates from third parties agreeing to public access spoke, and switched off broadcast while delegates from third parties not agreeing to public access spoke. Rather, it kept the third party session closed altogether, given objections from some of the third parties.

The panel report in DS320 and DS321 has not yet been circulated, and we do not, therefore, have the benefit of its detailed reasoning on the legal basis for its decision to open its meeting with the parties to the public. Nonetheless, it is evident that the assent of *all* interested parties to the opening of the relevant portions of the meeting was a central element for that panel's decision to open the meeting with the parties. Where unequivocal consensus did not exist with respect to the meeting with the third parties, that panel elected not to open the meeting to the public, and, instead, followed the practice of every other panel to date, under paragraph 2 of the standard panel Working Procedures.[4]

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[1] WT/DS320/8 and WT/DS321/8.

[2] Moreover, Brazil notes that paragraph 2 of the compliance Panel's Working Procedures provides that the compliance Panel "shall meet in closed session," other than when it invites the parties and third parties to appear.

[3] WT/DS320/8 and WT/DS321/8.

[4] The panel in *EC – Aircraft* (DS316), again following an agreement between the parties to the dispute, has also accepted to open its hearings to the public. As of today, however, the only practical experience with opening WTO panel meetings to the public remains the meeting of the DS320 and DS321 panel with the parties in that dispute.

The United States evokes Article 18.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") to claim a right to have at least some portions of the meeting with the Panel open to the public. Furthermore, the United States characterizes its proposal as "an appropriate means" to disclose statements of its own positions to the public. Brazil disagrees with the United States on both accounts.

First, nothing in Article 18.2 mandates or implies that to effect a Member's right to disclose its own positions or statements, panels must agree to open meetings to public observation. Members have at their disposal a myriad of "transparency" tools to make their positions known to the public, such as publicly-available webpages and press conferences or releases. Members are not dependent on open panel meetings to achieve any transparency goals.

Second, a Member's right to disclose its own positions cannot prejudice another Member's right to confidentiality. Such prejudice would arise were the compliance Panel to accept the U.S. proposal. A partial opening, as suggested by the United States, is not "appropriate", as it would compromise Brazil's interest in retaining confidentiality of the proceedings and, at the same time, would lead to an unbalanced and biased picture of the parties' arguments. By contrast, Brazil's position would not deprive the United States of resorting to other (and more "appropriate", given Brazil's objection) means to make its statements and submissions available to whomever the United States deems appropriate, while preserving Brazil's right to protect the confidential nature of this compliance proceeding.

ANNEX E-6

LETTER OF BRAZIL

(18 December 2006)

As with the majority of its submissions in the initial proceedings in this dispute and, increasingly, its submissions to panels and the Appellate Body in other disputes, the United States has failed once again to file its submission to the compliance Panel by the deadline of 5:30 p.m. on Friday, 15 December. The United States instead filed the electronic version of its submission 12 hours late, on Saturday, 16 December at 5:24 a.m. Moreover, as filed, the electronic version of the submission is corrupt; it does not include paragraph numbers, and, critically, ends 1.5 pages into its rebuttal arguments concerning Brazil's actionable subsidies claims.[1]

Despite the compliance Panel's generosity in granting the United States an extension to file its submission (from 8 December to 15 December), the United States failed to respect a deadline that it has known about for many weeks. Moreover, when the United States finally decided to file 12 hours after the deadline, it filed an unreadable document.[2] Neither in the letter covering the submission, nor in the email in which it transmitted the electronic version of the submission, does the United States offer any explanation or show good cause for untimely filing. In Brazil's view, the only explanation available for this increasingly common U.S. practice is hubris. The United States has essentially claimed for itself the right to decide when to file submissions in dispute settlement proceedings, in flagrant and unacceptable defiance of the Panel's authority.

In addition, such contemptuous behaviour seriously prejudices Brazil's rights. Because the time granted to prepare Brazil's rebuttal submission straddles a holiday period, the importance of preserving every day on either side of the holiday period is particularly paramount. The United States has exacerbated the problem not only by failing to file on time, but, additionally, by failing even belatedly to file a readable electronic version of its submission (or electronic versions of its exhibits) that could be transmitted to Brasilia. Cutting short the available time in advance of the holiday period prejudices Brazil's right to prepare a response; merely granting Brazil additional time to file its rebuttal submission will not resolve this problem. There is, obviously, no way to add additional days between now and the holiday period.

For these reasons – and as would be the case in virtually any domestic judicial or administrative proceedings of which Brazil is aware – Brazil requests that the compliance Panel reject the United States' submission as not timely filed. The deadline was clear and is expressed both in the compliance Panel's 28 November 2006 timetable and in paragraph 17(b) of the compliance Panel's Working Procedures. Panels have previously rejected evidence as not timely filed[3]; Brazil sees no reason why the same principle should not apply to the more egregious failure to file a submission by the deadline. In our view, this would be the only fair remedy under the present circumstances.

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[1] Brazil opened the file using Word Perfect, Microsoft Word and Interwoven Viewer, none of which were able to repair the file. At Brazil's request, the United States, notwithstanding the assertion that the problem to read the electronic version of the document sent on 16 December would be attributable to Brazil's word processing program, sent an electronic version of its first submission in PDF format on Sunday, 17 December.

[2] Nor did the United States extend Brazil the now common courtesy of providing its exhibits in electronic form, despite the fact that Brazil provided the exhibits for its own first written submission to the United States on time and electronically – an error of judgment that Brazil will not repeat in future. The U.S. exhibits are surely *available* electronically, as they were likely transferred electronically from USTR in Washington, D.C. to the U.S. Mission in Geneva.

[3] *See* Panel Report, *Canada – Wheat*, para. 6.140; Panel Report, *Australia – Salmon*, para. 8.4.

ANNEX E-7

LETTER OF THE UNITED STATES

(19 December 2006)

My authorities have instructed me to offer the following response to Brazil's 18 December 2006 letter requesting that the Panel reject the first written submission of the United States.

The United States sincerely regrets any inconvenience caused to the Panel, Brazil, or the third parties by the delay in providing its first written submission from the close of business on Friday to the early hours on Saturday morning. At the same time, the United States notes that Brazil's letter continues what has unfortunately become a familiar approach in this dispute. Brazil continually resists providing the United States sufficient time to prepare a response to Brazil's lengthy and multiply-flawed submissions and then, when the United States has nonetheless made extreme efforts to meet the very tight deadlines, Brazil complains in inaccurate and overheated rhetoric if the submission is not filed by 5:30 pm. It is very difficult to resist the conclusion that Brazil is doing this as a litigation tactic rather than any genuine effort to assist the Panel's work.

Brazil has repeatedly sought to deny the United States even the minimum time needed to present the Panel with the U.S. response. In its 20 November 2006 letter, the United States provided a detailed explanation of the size and complexity of the task before it in preparing a response to Brazil's first submission. Brazil, as the complaining party, had many months to prepare its 173 page first submission, which contained an additional 89 pages of argument in annexes and 144 exhibits, and included an econometric model that was substantially different from the model submitted in the original proceeding.[1] Brazil objected to the United States having even one additional day to prepare its response. The United States appreciates that the Panel agreed to provide additional time, and the United States can assure the Panel that the United States sought to make the most of the time available.

Officials of the United States worked nights and weekends to prepare the first U.S. written submission, including working all through the night on Thursday and Friday.[2] Brazil cannot seriously be suggesting that the United States expended this effort at sacrifice of families and health in order to "defy" a deadline.

To the contrary, Brazil once more seeks to distort or misrepresent events and deny the United States the opportunity to present facts and argument to respond to Brazil. In this latest iteration, Brazil argues that the Panel should simply summarily reject the U.S. submission.[3] Apparently for Brazil, it is Brazil and Brazil alone that should be able to present its case to the Panel and it is important for Brazil to block the United States from being able to respond.[4]

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[1] Brazil filed its panel request on 18 August 2006, 3 months before its first submission was due, and of course Brazil was able to work on preparing its submission well before that.

[2] In light of the effort required of the United States to seek to meet the deadline, the United States has substantial difficulty with Brazil's complaint that receiving a submission early on Saturday morning rather than at 5:30 pm on Friday has affected Brazil's ability to enjoy a holiday.

[3] Letter from Brazil at 3 (18 December 2006).

[4] Brazil does not seem to want the Panel to know important facts that would help it to resolve the issues in dispute; for example, that contrary to Brazil's claims U.S. producers and exporters respond to market signals in the same way as their foreign counterparts; that U.S. producers and exporters are not "insulated" from these signals by the marketing loan and counter-cyclical payments programs; that the inflated results of Brazil's

Despite this, the United States has attempted to cooperate with Brazil. Brazil informed the United States that it was having difficulty opening the electronic version of the first U.S. submission on Saturday, 16 December. The problem Brazil raises appears only to occur when using a different word processing program (Microsoft Word) to open the document than was used to create it (WordPerfect).[5] Separate tests have shown that there was nothing wrong with the version as transmitted by the United States. Nonetheless, the United States copied the U.S. submission into a format requested by Brazil and resent the document to Brazil, the Panel, and the third parties, on Sunday, 17 December.

In addition, although the United States did not provide copies of exhibits to anyone electronically, Brazil asked on 16 December whether it could obtain an electronic version of exhibits. The U.S. representative in Geneva responded that he would pass Brazil's question back to capital for confirmation and immediately did so. However, in the morning of Monday, 18 December, shortly after opening of business in Washington and before U.S. authorities even had an opportunity to arrange to provide electronic versions to Brazil, Brazil submitted its 18 December letter accusing the United States of denying Brazil this "common courtesy"[6] and asserting that it would no longer repeat the "error in judgement" of submitting its own exhibits electronically.[7] Leaving aside Brazil's unfounded accusations, the United States notes that it is willing to provide electronic copies of its exhibits if the Panel considers that this would be helpful.

In any event, contrary to Brazil's request, the DSU does not authorize the "rejection" of submissions for the inability of a Member to meet precisely the time by which parties "should provide their submissions" according to a panel's working procedures.[8] To the contrary, the DSU provides that "[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process." There is, thus, no basis for Brazil's request that the Panel "reject" the U.S. first submission. Indeed, the panel rejected similar requests by Brazil even in the original proceeding in this dispute.[9]

Nor is there any logic behind Brazil's allegation that it has been "seriously prejudice[d]" by the delay in receiving the U.S. submission and, thus, "the only fair remedy" is for the Panel to reject the U.S. written submission. To the extent that Brazil does consider it has been "seriously prejudice[d]" by not having the U.S. submission by close of business on Friday, 15 January, but

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econometric modeling result from assumptions that are not generally accepted and are out of line even with Brazil's own assumptions in the model used in the original proceeding; or that Brazil ascribes planting, production, export and price effects to the U.S. marketing loan and counter-cyclical payment programs that are "the effect" of other factors, including, *inter alia*, China's net cotton trade and its trade policy. These arguments and more are supported at length in the U.S. first written submission.

[5] The United States has opened without difficulty the document as sent to Brazil using WordPerfect. Accordingly, the United States is perplexed by Brazil's claim that the document was unreadable in WordPerfect.

[6] The United States is not certain of the basis for Brazil's characterization of this as "common courtesy." In the multiple disputes in which the United States has been involved, practice has varied considerably in this regard. Indeed, in the original proceeding in this dispute, the parties did not exchange electronic versions of all of their exhibits. Nor had the parties discussed exchanging electronic versions of exhibits in this proceeding.

[7] Letter from Brazil at 3, n. 2 (18 December 2006).

[8] This explains why Brazil is not able to point to any previous panel that has rejected altogether a submission made after the time for filing. Brazil instead relies on panel reports relating to untimely submission of evidence, for example, at the interim review stage, long after written submissions and oral presentations have been completed.

[9] *See* Communication from the Panel to Parties, para. 3 (13 October 2003).

rather, early Saturday morning, it would seem that an appropriate "remedy" could be to extend by an equivalent period Brazil's time to file its rebuttal submission.

The United States thanks the Panel for its consideration. The United States is providing a copy of this letter directly to Brazil and is providing a version of this letter with certain Brazilian confidential information redacted to the third parties.

ANNEX E-8

LETTER OF BRAZIL

(22 January 2007)

Brazil is in receipt of the United States responses to questions from the Panel, dated 19 January 2007. In its responses, the United States asserts that it provided data, in Exhibit US-64, that is fully responsive to Brazil's request for certain data, as set forth in Part A of Annex 1 of Brazil's communication to the Panel of 1 November 2006 ("1 November Request").

In this letter, Brazil corrects an error in its o m 19 January 2007 responses to the compliance Panel's questions, and corrects misstatements in the United States' responses.

First, Brazil notes that it inadvertently identified the relevant period for its data request as encompassing marketing years ("MY") 2002-2005.[1] In fact, Brazil's 1 November Request asked the compliance Panel to seek data for MY 2003-2006. Brazil asks that the compliance Panel seek the relevant data from the United States, in electronic form, for MY 2003-2006.

Second, Brazil directs the compliance Panel to certain misstatements in the United States' responses, submitted on 19 January 2007.

Contrary to its assertion in its 19 January responses, the United States has not provided data that is sufficiently responsive to Brazil's 1 November Request. While the United States appears to have given up its objection to providing this data[2], there are numerous deficiencies in the format and scope of the data in Exhibit US-64, rendering them incomplete and largely unusable (Brazil notes that the United States did not explicitly cite Exhibit US-64 anywhere in its First Written Submission.). Brazil brings three deficiencies to the attention of the compliance Panel:

1. Data provided for MY 2005 only

To begin, the data included in Exhibit US-64 are incomplete, as they are limited to marketing year ("MY") 2005. Brazil requested that the United States provide data for MY 2003-2006. Providing data for one out of four years hardly constitutes a complete response on the part of the United States to Brazil's 1 November Request.

Further, it appears that the United States withheld the requested data for MY 2003 and 2004, despite the fact that it had collected the data and presented selective summary information for these years in its First Written Submission. Brazil notes that the U.S. table in Section VI.A.(c) of its

[1] Brazil's Answers to Questions from the Panel Regarding Brazil's Request for Data Pursuant to Article 13.1 of the DSU, 19 January 2007, para. 10.

[2] Brazil originally requested the data on 29 June 2006. See Question 3 of Annex 2 b of Brazil's data request submitted on 1 November 2006. The United States' 19 January 2007 responses mark some progress, compared to the United States' refusal to provide such data in consultations with Brazil nearly six months ago, and in its initial reaction to Brazil's 1 November Request. See U.S. Communication to the Panel, dated 7 November 2006, para. 2.

First Written Submission[3] demonstrates that the United States has collected information on base and planted acreage in MY 2003 and 2004.

2. Data not provided in electronic form

Second, the document in Exhibit US-64 was printed out from an Excel file[4], demonstrating that the United States easily could have provided the data electronically, for use and analysis by the Panel, the Third Parties and Brazil.

Brazil requested that the United States provide the data in the same format as in the original proceedings.[5] As noted by the United States, the data presented to the original panel were included in an electronic spreadsheet on a CD-ROM.[6] The U.S. assertion that it "submitted precisely the same data in precisely the same format as that submitted in response to the original panel's Article 13 request"[7] is, therefore, inaccurate.

3. Data partially unreadable

Third, even on the paper version of the MY 2005-only data provided by the United States, information in certain cells is not readable, as the United States failed to accommodate the width of the column to the size of the number in these cells.[8] These problems could have been avoided had the United States provided the data in electronic format.

In sum, the data in Exhibit US-64 are deficient in both scope and form. Brazil reiterates its request of 19 January 2007 that the Panel request the United States to provide data on base and planted acreage fully responsive to Brazil's 1 November Request.[9] Brazil requests that the compliance Panel ask the United States to provide data in electronic form for MY 2003-2006.

[3] U.S. First Written Submission, para. 224.

[4] The document lists its file name in the bottom right hand corner of each page as "US-64 REPLACEMENT dcp 2005 sub sum.xls." The file name ending on ".xls" indicates that the source file is an Excel spreadsheets. *See* Exhibit US-64 (2005 Crop Year Subcategories)

[5] Part A of Annex 1 of Brazil 1 November Request, para. 1.

[6] U.S. Communication to the Panel, dated 17 January 2007, para. 2, footnote 3.

[7] U.S. Communication to the Panel, dated 17 January 2007, para. 2.

[8] *See, e.g.*, page 3 of Exhibit US-64 (2005 Crop Year Subcategories).

[9] Brazil's Answers to Questions from the Panel Regarding Brazil's Request for Data Pursuant to Article 13.1 of the DSU, 19 January 2007, para. 10.

ANNEX E-9

LETTER OF BRAZIL

(7 February 2007)

Consistent with its prior submissions in the above-referenced disputes, the United States has failed once again to file a submission *(i.e.*, its Rebuttal Submission) to the compliance Panel by the deadline of 5:30 p.m. on Monday 5 February. The United States instead filed the electronic version of its submission more than 6 hours late - at 11:39 p.m. on Monday 5 February. Neither in the letter covering the submission, nor in the email in which it transmitted the electronic version of the submission, does the United States offer any explanation or show good cause for untimely filing. This late filing is particularly egregious in view of the compliance Panel's 20 December 2006 Communication reminding the United States of its obligation under paragraph 17(b) of the Working Procedures to file all submissions to the Secretariat by 5:30 p.m., and in view of the extension granted the United States in the compliance Panel's 22 December 2006 Communication.

Unfortunately, the United States continues to act in a unilateral fashion in disregard of the rules and procedures of the DSU and in defiance of the compliance Panel's authority. As a result of various U.S. requests for extensions, the amount of time allotted Brazil to prepare a response to the U.S. rebuttal submission for the upcoming meeting with the compliance Panel has already been reduced from five weeks, under the original timetable, to three weeks, under the version of the timetable currently in effect. The late filing of the U.S. rebuttal submission has eliminated yet another day from the time allotted Brazil to prepare for the meeting.

For these reasons - and as would be the case in virtually any domestic judicial or administrative proceedings of which Brazil is aware - Brazil requests that the compliance Panel reject the United States' submission as not timely filed. The deadline was clear, and is expressed both in paragraph 17(b) of the compliance Panel's Working Procedures, and reiterated in the Panel's 20 December 2006 Communication. Indeed, Panels have previously rejected evidence as not timely filed[1]; Brazil sees no reason why the same principle should not apply to the more egregious failure to file a submission by the deadline. In our view, this would be the only fair remedy under the present circumstances. Given the systemic implications of the recurring United States' refusal to respect the timetable established by the Panel, I would like to inform you that it is Brazil's intention to raise this issue before the Dispute Settlement Body.

[1] *See* Panel Report, *Canada - Wheat*, para. 6.140*;* Panel Report, *Australia -Salmon*, para. 8.4.

ANNEX E-10

LETTER OF THE UNITED STATES

(12 February 2007)

My authorities have instructed me to offer the following response to Brazil's 8 February 2007 letter requesting that the Panel "reject" the rebuttal submission of the United States. The United States respectfully requests that the Panel reject Brazil's request.

The United States sincerely regrets any inconvenience caused by the delay in transmission of the U.S. submission from 5:30 p.m. to 11:30 p.m. on Monday, 5 February 2006. The United States was required to respond in a very limited time[1] to close to 220 pages of argumentation by Brazil[2] and over 1,000 pages of exhibits (in 61 separate exhibits). While staff in Geneva and Washington worked intensively during that time, including all weekend and around the clock on Sunday and Monday to do so, the United States was, regrettably, unable to compile and transmit the submission – including providing courtesy electronic copies of all 43 exhibits filed with the submission (as requested by Brazil) – precisely by 5:30 p.m. on 5 February.[3]

Nonetheless, Brazil's complaints in this regard are unfounded and ironic when one considers that, even with almost 4 weeks to respond to the U.S. first written submission, Brazil asked for an additional 8 days (*i.e.*, for a total of almost 5 weeks) to respond to the U.S. 11-page preliminary ruling request. And even more ironic is Brazil's complaint that: "As a result of various U.S. requests for extensions, the amount of time allotted Brazil to prepare a response to the U.S. rebuttal submission for the upcoming meeting with the compliance Panel has already been reduced from five weeks, under the original timetable, to three weeks, under the version of the timetable currently in effect." Not only were the extensions *requested by Brazil* (not the United States)[4], but that three-week period is the same amount of time that the United States had to respond to Brazil's rebuttal submission. Apparently, Brazil's view is that Brazil should be afforded more time than the United States at every stage of this proceeding. In addition, Brazil's request for the Panel to disregard the U.S. submission makes it once again apparent that Brazil considers that it should be the only party with the opportunity to present its views in this proceeding.

In any event, Brazil has no basis for its request that the Panel reject the U.S. rebuttal submission. Moreover, the United States regrets this latest effort by Brazil to divert the attention of the Panel and the United States and to deny the United States a meaningful opportunity to respond. As the meeting with the Panel and the close of this proceeding draw near, the United States hopes that Brazil will consider a more cooperative approach.

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[1] The United States had slightly more than three weeks (25 days) to respond to the main submission and annex and less than three weeks (20 days) to respond to Brazil's reply to the U.S. requests for preliminary rulings.

[2] Including a main submission, annex, and separate reply to U.S. requests for preliminary rulings.

[3] The United States has not only attempted to ensure that the Panel (and Brazil) have the most complete arguments well in advance of the meeting with the Panel but has also attempted to address the various complaints that Brazil has made along the way in this process, including complaints about receiving all exhibits in an electronic medium simultaneously with submissions. *See* Letter from Brazil, para. 2, n. 2 (18 December 2006).

[4] Indeed, the deadline for the U.S. rebuttal submission was shifted from 30 January to 5 February 2007, to accommodate the additional time granted to Brazil, at its request, which cut into the period available for the U.S. rebuttal submission, not because the United States sought additional time for that submission, as Brazil suggests.

ANNEX F

COMMUNICATIONS FROM THE PANEL TO PARTIES

[*] This communication was sent to the Parties as well as to the Third Parties.

ANNEX F-1

COMMUNICATION TO BRAZIL AND THE UNITED STATES

(8 November 2006)

Please find attached the Panel's final working procedures and timetable. [*Attachment omitted.*]

The Panel takes this opportunity to clarify the following:

1. The Panel has noted Brazil's request made in its letter dated 1 November as well as the comments of the United States, contained in the letter dated 7 November, on this request. The Panel declines to make a decision on Brazil's request at this point of time. The Panel will communicate to the parties its decision on this request after having received and considered Brazil's first submission. In this connection, the Panel reserves its right to amend the timetable (and the working procedures, as necessary) in relation to this issue.

2. The Panel has also noted that the United States stated in the organizational meeting that it may request a special procedure for the protection of certain information if the Panel decides to pose the questions requested by Brazil. We will revert to that issue if we actually decide to pose the questions.

3. In relation to paragraph 2 of the working procedures, the Panel has noted that the United States wishes to open up the portion of the meeting where it presents its own views and statements, while Brazil opposes opening the meeting to the public. The Panel draws the attention of the parties that opening up of any portion of the Panel meeting entails logistical considerations. The Panel invites the United States to submit comments, by close of business of Tuesday 21 November, on how exactly it envisages such opening to be logistically meaningful. The Panel reserves its right to amend the working procedures in relation to this matter.

4. In relation to paragraph 13 of the working procedures, the Panel has noted that Brazil proposed at the organizational meeting that the exhibits be numbered sequentially starting from the last exhibit number of the original panel proceeding. While the Panel does not oppose this idea, we do not find it necessary to oblige parties to do so. We will leave it up to the discretion of parties how to abide by paragraph 13 of the working procedures on the condition that any references to exhibits of the original panel proceeding will not create confusion with references to exhibits in this proceedings.[1] At any rate, the Panel clarifies that if parties intend to refer the Panel to an exhibit submitted in the original panel proceeding, it expects parties to attach such exhibits in its submission, and not just cite the exhibit number.

[1] For example, if the United States chooses not to follow Brazil's suggestion, it could number their exhibits in this proceeding starting from US (21.5)-1, or the US could ensure that whenever it refers to exhibits in the original proceedings, it is always clearly stated that the exhibit is from the original proceedings.

ANNEX F-2

COMMUNICATION TO BRAZIL AND THE UNITED STATES

(27 November 2006)

The Panel refers to the communication of Brazil dated 1 November asking the Panel to exercise its discretion under Article 13 of the DSU, and to the communication of the United Stated (dated 7 November) commenting on this request, as well as the communication of Brazil (dated 22 November) referring to this issue. The Panel notes that in the context of its argument regarding the significance of the magnitude of the marketing loan and counter-cyclical payments as a factor supporting the existence of a causal link between these two subsidies and significant price suppression for upland cotton, Brazil, in its first submission, reiterates its request originally submitted in a letter dated 1 November that the Panel ask the United States to provide certain information needed to allocate counter-cyclical payments to upland cotton production in MY 2003-2005.[1] In the same context, Brazil provides an estimate of the "counter-cyclical payments allocated to current upland cotton producers growing upland cotton on upland cotton or other crop base acreage" based on the MY 2002 ratio of allocated upland cotton counter-cyclical payments to total upland cotton counter-cyclical payments, multiplied by the total upland cotton counter-cyclical payments in MY 2003-2005.[2] The Panel is of the view that it cannot conclude at this stage that it is necessary and appropriate within the meaning of Article 13 of the DSU to seek the information requested by Brazil before the Panel has had the opportunity to review the arguments and supporting evidence, if any, that will be presented by the United States in response to Brazil's argument regarding the causal relationship between certain subsidies and price suppression for upland cotton.

In addition, the Panel refers to the request of the United States, dated 20 November, concerning the change of certain deadlines in the Panel's current timetable as well as Brazil's comments on this request, received 22 November. After carefully considering the request of the United States and the comments of Brazil, the Panel has decided to change the first portion of the timetable as follows. The Panel will inform the parties of the rest of the timetable in due course.

First submission of the United States:	15 December 2006
Submission of the Third Parties:	5 January 2007
Rebuttal submission of Brazil:	11 January 2007
Rebuttal submission of the United States:	30 January 2007

[1] First Submission of Brazil, para. 117.
[2] First Submission of Brazil, para. 118.

ANNEX F-3

COMMUNICATION TO BRAZIL AND THE UNITED STATES

(28 November 2006)

The Panel refers to, and follows up its communication sent to parties yesterday (27 November). Attached please find the full timetable containing all the relevant dates, which the Panel will now follow. [*Attachment omitted*.]

In addition, the Panel refers to the letter dated 21 November submitted by the United States, in response to the invitation from the Panel, offering its explanation to the request to open up the Panel's meeting to the public those parts that relate to US statements and US answers to questions. After carefully considering this letter as well as the letter from Brazil dated 24 November commenting on this US's letter, we inform parties as follows.

The Panel notes, first, that there is no precedent in WTO dispute settlement practice for a decision to open a (portion of) a panel meeting to the public based on a request by one party to a dispute that is opposed by another party.[1] Second, the Panel has carefully considered the argument of the United States in its letter dated 21 November that in requesting the Panel to open to the public US statements and US answers to questions presented in the panel meeting the United States is exercising its right under Article 18.2 of the DSU, second sentence. The Panel considers that there are various possible ways in which a party can disclose its statements to the public and that the United States has not explained why procedures the United States normally uses to disclose its statements in WTO dispute settlement proceedings to the public would not be adequate in this case. Furthermore, the right of party to disclose its statements of its positions must also be reconciled with the obligation of confidentiality in the third sentence of Article 18.2. Finally, the Panel considers that the practical arrangements proposed by the United States in its letter of 21 November 2006 pose serious practical and logistical difficulties.

For the above reasons, we decline to grant the request made by the United States.

[1] In the disputes in *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* (WT/DS320) and *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* (WT/DS321), the Panels decided that its meeting with the parties would be open for observation by the public through a closed-circuit broadcast based on a common request received from the parties to those disputes. Significantly, the Panels in those disputes also decided that their meetings with third parties would remain closed as not all third parties had agreed to open those meetings for observation by the public.

ANNEX F-4

COMMUNICATION TO THE PARTIES AND THE THIRD PARTIES

(20 December 2006)

The Panel confirms receipt of the letter from Brazil dated 18 December on the late timing of the US submission, as well as the letter from the US dated 19 December commenting on this Brazil's letter. The Panel confirms that the electronic version of the US submission was, according to the record on the computer, sent at 5:25 am on Saturday 16 December.[1] Parties will recall that paragraph 17(b) of the Working Procedures provides that the submission be made "by 5:30 pm on the due date[]". The due date for this particular US submission was Friday 15 December.

The Panel notes that Brazil requests the Panel to "reject the United States' submission as not timely filed". The Panel declines to do so. However, the Panel regrets this delay by the United States, and requests the United States to abide by the deadlines established by the Panel concerning its future submission(s).

The Panel also notes that Brazil pointed out the issue about the readability of the electronic version of the submission initially sent (*i.e.* sent 5:25am).[2] On this matter, the Panel would like to inform the United States that it had the same problem as Brazil did.

The Panel does not expect any more communications from the Parties on this specific issue.

[1] While there is no record as to when the paper version was received, the Panel secretary confirms that the submission had not arrived as of 22:00 on Friday 15 December.

[2] The Panel further notes that Brazil regrets the lack of electronic version of exhibits.

ANNEX F-5

COMMUNICATION TO BRAZIL AND THE UNITED STATES

(17 January 2007)

The Panel has noted that Brazil reiterates, in its rebuttal submission submitted on 11 January 2007, its request that the Panel request, pursuant to Article 13.1 of the DSU, the United States to provide certain data.[1]

Mindful of our communications dated 8 November 2006[2] and 27 November 2006[3], before informing the Parties of the Panel's views on this issue, the Panel poses the following questions to the Parties:

> Question 1 (to Brazil): Does Brazil deem that the questions posed in Part B[4] of Annex 1 of its request submitted on 1 November 2005 ("1 November request" hereafter) are now unnecessary?
>
> Question 2 (to Brazil): Is Brazil asking the United States to respond to all of the questions posed in Part A of its 1 November request?
>
> Question 3 (to the United States): If the United States is of the view that the Panel should not pose to the United States any or all of the questions in Part A of Brazil's 1 November request, please cite the reasons for that view.
>
> Question 4 (to the United States): If the United States is of the view that the United States cannot respond to any or all of the questions (or any part thereof) in Part A of Brazil's 1 November request, please explain that view, bearing in mind the fact that the United States did provide the data to the original Panel.[5]

The Panel invites Parties to submit their responses to the above questions by close of business on 19 January 2007. Parties are free, if they so wish, to submit comments on a question posed to the other Party.

This communication from the Panel is without prejudice to the position of the Panel on the US request that the Panel make a preliminary ruling that the claims of Brazil against the marketing loan program and the counter-cyclical payment program are outside the scope of this dispute.

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[1] See paragraph 514 of Brazil's rebuttal submission, referring to Sections 2.3.1.3.3 and 2.3.2 of the same submission.

[2] Paragraph 1 of the communication to the Parties dated 8 November.

[3] First paragraph of that communication.

[4] Concerning Export Guarantee Programs.

[5] See section VII A 4 of the report of the original panel (WT/DS267/R).

ANNEX F-6

COMMUNICATION TO BRAZIL AND THE UNITED STATES

(22 January 2007)

The Panel has carefully considered the United States' request for preliminary rulings and the arguments it makes in support of its view that some of Brazil's claims are outside the scope of this proceeding.[1] The Panel has also considered the arguments submitted by Brazil[2] and by the third parties[3] in response to the United States' request.

The Panel considers that the United States' request for preliminary rulings will be more appropriately addressed in our final report, after we have had the benefit of further submissions by the parties and third parties on the issues raised by the United States.

Thus, we do not consider that this is a case where the panel proceedings would be better served by an early ruling from the Panel on the United States' request. We therefore decline to grant the United States' request for preliminary rulings at this point.

[1] United States' First Submission and Request for Preliminary Rulings of 15 December 2006, paras. 22-56. The United States indicates in paras. 30, 44, 48 and 56 the specific findings it seeks from the Panel.

[2] In particular, Brazil's submission dated 16 January 2007.

[3] Australia, Canada, China, Japan and New Zealand addressed this issue in their submissions submitted on 5 January 2007.

ANNEX F-7

COMMUNICATION TO BRAZIL AND THE UNITED STATES

(16 February 2007)

In this communication, the Panel addresses two issues: (a) the issue raised by Brazil in its letter dated 7 February 2007 and (b) the conveying of the Panel's questions.

1. Brazil's letter dated 7 February 2007

The Panel acknowledges receipt of Brazil's letter dated 7 February, concerning the late filing of the United States submission on 5 February. The Panel has noted, *inter alia*, that Brazil requests that the Panel "reject the United States' submission as not timely".[1] The Panel has also taken note of the United States' letter dated 12 February asking the Panel to reject Brazil's request.

The Panel regrets that the United States has missed the deadline for the second time in this Article 21.5 proceeding. The Panel finds it extraordinary that the United States has missed so many deadlines in the original proceeding as well as in this Article 21.5 proceeding.[2]

On the other hand, the Panel considers that there is no provision in the DSU that allows a panel to simply reject an entire submission as not timely. The Panel does not consider that the two cases cited by Brazil support Brazil's request. Thus, we decline to grant the request made by Brazil.

2. Questions from the Panel

In accordance with paragraph 7 of the Working Procedures, the Panel poses the attached questions [*attachment omitted*] to the parties. The deadline for written responses is the morning of 27 February[3] for questions in sections A-C, and close of business of 6 March for the remaining questions. Please note that the Panel may pose some of the attached questions orally during the panel meeting.

Each party is free to respond to or comment on questions posed to the other party.

[1] Para. 3 of Brazil's letter dated 7 February.
[2] Section VII:A:5(a) of the original panel report (WT/DS267/R) describes this issue in detail.
[3] That is, when the meeting with the parties starts.

ANNEX F-8

COMMUNICATION TO BRAZIL AND THE UNITED STATES

(21 March 2007)

The Panel refers to the communication of Brazil dated 1 November 2006 requesting the Panel to exercise its discretion under Article 13 of the DSU to seek certain information and to the communications of the Panel on this issue dated 8 and 27 November 2006 and 17 January 2007. The Panel notes that Brazil's request was made prior to the filing of the written submissions in this case and that information on certain items identified in that request has since been provided to the Panel. The Panel also expects to receive information on issues raised in Brazil's request in response to the questions posed by the Panel on 15 March 2007. The Panel considers that at this juncture it is not necessary to seek more information in respect of issues identified in Brazil's request. The Panel may, however, decide to request this information at a later stage of this proceeding and may ask questions to the parties at any time, in accordance with paragraph 7 of the Panel's working procedures.

ANNEX G

WORKING PROCEDURES AND TIMETABLE OF THE PANEL

ANNEX G-1

WORKING PROCEDURES FOR THE PANEL

1. In its proceedings, the Panel shall follow the relevant provisions of the Dispute Settlement Understanding (DSU). In addition, the following working procedures shall apply.

2. The Panel shall meet in closed session. The parties to the dispute, and interested third parties, shall be present at the meetings only when invited by the Panel to appear before it.

3. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the substantive meeting of the Panel with the parties to the dispute, the parties shall transmit to the Panel first written submissions, and subsequently written rebuttals, in which they present the facts of the case, and their arguments and their counter-arguments, respectively. Third parties may transmit to the Panel written submissions after the first written submissions of the parties have been submitted but before the rebuttals of the parties have been submitted.

5. All third parties which have notified their interest in the dispute to the Dispute Settlement Body shall be invited in writing to present their views during a session of the substantive meeting of the Panel set aside for that purpose. All such third parties may be present during the entirety of that session.

6. At its substantive meeting with the parties, the Panel will ask Brazil to present its case. Subsequently, and still at the same meeting, the Panel will ask the United States to present its point of view. The Panel thereafter will ask third parties to present their views at the separate session of the same meeting set aside for that purpose. The parties will then be allowed an opportunity for final statements, with Brazil presenting its statement first.

7. The Panel may at any time put questions to the parties and to the third parties, and ask them for explanations either in the course of the substantive meeting with the parties or in writing. Answers to questions shall be submitted in writing by the date specified by the Panel.

8. The parties to the dispute and any third party invited to present its views shall make available to the Panel and the parties and other third parties a written version of their oral statements, preferably at the end of the meeting with the Panel, and in any event not later than the day after the meeting. Parties and third parties are encouraged to provide the Panel and other participants at the meeting with a provisional written version of their oral statements at the time that the statements are made.

9. In the interest of full transparency, the oral presentations shall be made in the presence of the parties. Moreover, each party's written submissions, including responses to questions put by the Panel, shall be made available to the other party. Third parties shall receive copies of the parties' first written submissions and rebuttals.

10. The parties shall provide the Secretariat with an executive summary of the claims and arguments contained in their written submissions, and, if necessary, oral presentations and answers to questions. These executive summaries shall not serve in any way as a substitute for the submissions of the parties. The summaries of the first written submission and rebuttal submission shall be limited to ten (10) pages each. The Panel will determine the page limit for executive summaries of parties' oral presentations and responses to questions, if necessary and as appropriate. The executive summaries shall be submitted to the Secretariat within one week of the original submission, or, if necessary, presentation and/or written replies concerned. Paragraph 17 shall apply to the service of executive summaries.

11. Parties shall submit any requests for preliminary rulings not later than in their first written submissions to the Panel. If Brazil requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Brazil shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure will be granted upon a showing of good cause.

12. Parties shall submit all factual evidence to the Panel no later than in their first written submissions to the Panel, other than evidence necessary for purposes of rebuttals and answers to questions. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comment on the newly submitted evidence, as the Panel deems appropriate.

13. To facilitate the maintenance of the record of the dispute, and to maximize the clarity of submissions, in particular, the references to exhibits submitted by parties, it is suggested that parties sequentially number their exhibits throughout the course of the dispute.

14. The descriptive part of the Panel's report will include the procedural and factual background to the present dispute. There will be no description of the main arguments of the parties and third parties as such. Instead, the Panel will attach to its report the parties' submissions (executive summaries thereof, as appropriate) including first written submissions and rebuttal submissions, written versions of the oral statements, and each parties' replies to questions from the other party and from the Panel. Upon request of a party, specific portions of a submission designated by that party as confidential at the time of its submission will not be included in the submission attached to the Panel's report.

15. The parties and third parties to this proceeding have the right to determine the composition of their own delegations. The parties and third parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to confidentiality of the proceedings. Each party and third party shall provide a list of the members of its delegation before or at the beginning of the meeting with the Panel.

16. Following issuance of the interim report, the parties shall have the time, as established by the timetable of the Panel, to submit written requests to review precise aspects of the interim report. Following receipt of any written requests for review, each party shall have the opportunity, within a period specified by the timetable of the Panel, to submit written comments on the other party's written requests for review. Such comments shall be strictly limited to commenting on the other party's written request for review.

17. The following procedures regarding service of documents shall apply:

(a) Each party shall serve its submissions directly on the other party. Each party shall, in addition, serve its first written submission and rebuttal submission on the third parties. Each third party shall serve its submission on the parties and other third parties. Each party and third party shall confirm in writing that copies have been served as required, at the time it provides each submission to the Panel.

(b) The parties and third parties should provide their submissions to the Secretariat by 5:30 p.m. on the due dates established by the Panel, unless a different time is set by the Panel.

(c) The parties and third parties shall provide the Panel with eight (8) paper copies of their submissions. All of these copies shall be filed with the Dispute Settlement Registrar, Mr. Ferdinand Ferranco (office number 2150).

(d) At the time that they provide the paper versions of their submissions, the parties and third parties also shall provide to the Panel, the other party and, as appropriate, third parties electronic versions of all submissions, in a format compatible with that used by the Secretariat, either on a diskette or as an e-mail attachment. E-mail attachments shall be sent to the Dispute Settlement Registry (DSRegistry@wto.org) with a copy to Mr. Hiromi Yano (hiromi.yano@wto.org).

ANNEX G-2

TIMETABLE FOR THE PANEL[1]

Panel established on 28 September 2006
Panel composed on 25 October 2006

a.	First written submissions of the parties:		
	1.	Complaining party (Brazil)	17 November 2006
	2.	Party complained against (United States)	15 December 2006
	3.	Third parties	5 January 2007
b.	Rebuttal submission from Brazil[2]		11 January 2007
c.	Rebuttal submission from the United States		5 February 2007
d.	Date of meetings with the parties and third party session		27 February 2007 (28 February, if necessary)
e	Issuance of the interim report, including descriptive part, findings and conclusions, to the parties		27 July 2007
f	Written comments on the interim report		3 September 2007
g	Parties' comments on each other's comments on the interim report		17 September 2007
h.	Issuance of the report to the parties		15 October 2007
i.	Circulation of the final report to the Members		after translation

[1] As actually followed.
[2] Brazil's responses to the US request for preliminary ruling was due 16 January 2007.

ANNEX H

REQUEST FOR THE ESTABLISHMENT OF A PANEL

ANNEX H-1

WORLD TRADE ORGANIZATION

WT/DS267/30
21 August 2006

(06-3966)

Original: English

UNITED STATES – SUBSIDIES ON UPLAND COTTON

Recourse to Article 21.5 of the DSU by Brazil

Request for the Establishment of a Panel

The following communication, dated 18 August 2006, from the delegation of Brazil to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

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1. On 21 March 2005, the Dispute Settlement Body ("DSB") adopted the Appellate Body report and the Panel report[1], as modified by the Appellate Body report, in *United States – Subsidies on Upland Cotton*, WT/DS267.[2]

A. Relevant Findings, and Recommendations and Rulings

2. Brazil summarizes below the findings of the Appellate Body and the Panel, and the recommendations and rulings of the DSB, that are relevant to this communication. Those findings, and recommendations and rulings, relate to (i) actionable subsidies and (ii) prohibited export subsidies.

3. The Panel and Appellate Body found, *inter alia*, that the price-contingent US marketing loan, counter-cyclical and Step 2 programs in the Farm Security and Rural Investment Act ("FSRI Act") of 2002 caused significant price suppression in the world market for upland cotton in violation of Articles 5(c) and 6.3(c) of the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*").[3] In paragraph 8.1(g)(i) of its report, the Panel found that:

> "[T]he effect of the mandatory price-contingent United States subsidy measures – marketing loan programme payments, user marketing (Step 2) payments, MLA payments and CCP payments – is significant price suppression in the same world market within the meaning of Article 6.3(c) of the *SCM Agreement* constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*."

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[1] WT/DS267/AB/R ("Appellate Body Report, *US – Upland Cotton*"); WT/DS267/R ("Panel Report, *US – Upland Cotton*").

[2] WT/DSB/M/186.

[3] Panel Report, *US – Upland Cotton*, paras. 8.1(g)(i) and 7.1416.

The recommendations and rulings adopted by the DSB directed the United States, under Article 7.8 of the *SCM Agreement*, to remove the adverse effects caused by these subsidies, or to withdraw the subsidies, by 21 September 2005.[4]

4. The Panel found that three export credit guarantee ("ECG") programs maintained by the United States to support the export of US agricultural products – the General Sales Manager 102 ("GSM 102"), General Sales Manager 103 ("GSM 103") and Supplier Credit Guarantee ("SCGP") Programs[5] – constitute export subsidies under Article 10.1 of the *Agreement on Agriculture*. The Panel further found that these three ECG programs are export subsidies applied in a manner that results in actual circumvention of US export subsidy commitments for rice, and other products – including upland cotton – for which the United States has not undertaken export subsidy reduction commitments ("unscheduled" products) and which were supported by the ECG programs. The Panel therefore concluded that these three ECG programs are inconsistent with Articles 10.1 and 8 of the *Agreement on Agriculture*.

5. Having found that these three ECG programs constitute export subsidies for purposes of its analysis of Brazil's claims under the *Agreement on Agriculture*, the Panel also found that for purposes of Brazil's claims under Part II of the *SCM Agreement*, the programs are similarly prohibited subsidies under Articles 3.1(a) and 3.2 of the *SCM Agreement*.[6]

6. As a result of these findings, the Panel recommended that the United States bring these three ECG programs, with respect to upland cotton and other unscheduled supported products, and to rice, into conformity with the *Agreement on Agriculture*.[7] Pursuant to Article 4.7 of the *SCM Agreement*, the Panel additionally recommended that the United States withdraw these prohibited subsidies without delay, and by no later than 1 July 2005.[8]

7. The Appellate Body affirmed these recommendations.[9] In addition, the Appellate Body reversed the Panel's finding that Brazil had failed to make a *prima facie* case that the United States had applied ECGs in a manner that resulted in actual circumvention of its export subsidy commitments with respect to pig meat and poultry meat, within the meaning of Article 10.1 of the *Agreement on Agriculture*; however, the Appellate Body was unable to complete the analysis for this claim.[10]

B. Measures Taken by the United States to Comply

8. To implement the recommendations and rulings of the DSB, the United States took the following actions:

(i) On 3 February 2006, the United States Congress approved a bill that repeals the Step 2 subsidy program for upland cotton.[11] The bill was signed into law on 8 February 2006,[12] and took effect on 1 August 2006.

[4] Panel Report, *US – Upland Cotton*, para. 8.3(d).
[5] *See* 7 U.S.C. § 5622; 7 CFR Part 1493.
[6] Panel Report, *US – Upland Cotton*, para. 8.1(d)(i).
[7] Panel Report, *US – Upland Cotton*, para. 8.3(a).
[8] Panel Report, *US – Upland Cotton*, para. 8.3(b).
[9] Appellate Body Report, *US – Upland Cotton*, paras. 763, 764.
[10] Appellate Body Report, *US – Upland Cotton*, para. 763(f)(i).
[11] Deficit Reduction Act of 2005, US Public Law 109-171, Section 1103.

(ii) The US Department of Agriculture ("USDA") announced that as of 1 July 2005, it would no longer take applications for ECGs under GSM 103;[13]

(iii) As of 1 July 2005, USDA amended the fee schedules for ECGs issued under the GSM 102 and SCGP programs.[14]

C. Non-existence of Measures, and Omissions/Deficiencies of Existing Measures

9. Brazil believes that measures taken by the United States to comply with the recommendations and rulings of the DSB in some respects do not exist, and to the extent they do exist, are not consistent with the *Agreement on Agriculture* and the *SCM Agreement*. Brazil identifies below instances in which US measures do not exist, as well as omissions and deficiencies with respect to those measures taken to comply that do exist.

1. Non-existence and omissions/deficiencies regarding the actionable subsidy-related recommendations and rulings of the DSB

10. With respect to the actionable subsidy-related recommendations and rulings of the DSB, Brazil believes that the United States has failed to take appropriate steps to remove the adverse effects or withdraw the subsidies found to cause adverse effects. The United States' failure to take these steps results in US subsidies for upland cotton causing serious prejudice to the interests of Brazil, within the meaning of Articles 5(c) and 6.3 of the *SCM Agreement*.

11. Brazil divides its concerns regarding the US failure to take appropriate steps to remove the adverse effects or withdraw the subsidies into two parts: the non-existence of measures taken to comply, and the consistency of those measures taken to comply with the covered agreements.

(a) Non-existence of measures taken to comply

12. First, the only measure taken by the United States to comply with the adverse effects-related recommendations and rulings of the DSB (*i.e.*, the repeal of the Step 2 program, cited as measure taken to comply (i) in Section B above), did not take effect until 1 August 2006, or over 10 months following the expiry of the implementation period, on 21 September 2005. At least during the period 21 September 2005 through 31 July 2006, measures taken to comply did not exist, within the meaning of Article 21.5 of the DSU.

13. Second, the United States has taken no measures whatsoever to comply with the recommendations and rulings of the DSB concerning the US marketing loan and counter-cyclical

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[12] WT/DSB/M205, 17 February 2006, para. 91.

[13] *See* "USDA announces changes to export credit guarantee programs to comply with WTO Findings," USDA FAS Online News Release, 30 June 2005, available at http://www.fas.usda.gov/scriptsw/PressRelease/pressrel_dout.asp?PrNum=0092-05. *See also* "Notice to GSM-103 Program Participants", USDA FAS Program Announcement, 30 June 2005, available at http://www.usda.gov/documents/0094GSM103Notice.doc.

[14] *See* "USDA announces changes to export credit guarantee programs to comply with WTO Findings," USDA FAS Online News Release, 30 June 2005, available at http://www.fas.usda.gov/scriptsw/PressRelease/pressrel_dout.asp?PrNum=0092-05. *See also* "USDA changes its fees to risk-based method for the GSM-102 and Supplier Credit Guarantee programs", USDA FAS Online News Release, 30 June 2005, available at http://www.fas.usda.gov/scriptsw/PressRelease/pressrel_dout.asp?PrNum=0093-05. *See also* GSM-102 Fee Schedule, available at www.fas.usda.gov/excredits/gsm102fees.html. and SCGP Fee Schedule, available at www.fas.usda.gov/excredits/scgpfees.html.

payment programs under the FSRI Act of 2002, as amended, as well as payments made under these programs. In this respect, measures taken to comply do not exist, within the meaning of Article 21.5 of the DSU.

14. As a consequence of these two failures, the United States has failed, as directed by the recommendations and rulings of the DSB, to take appropriate steps to remove the adverse effects of or to withdraw the subsidies from the US marketing loan, counter-cyclical and Step 2 payment programs under the FSRI Act of 2002, as amended, as well as payments made under these programs. These failures mean that, as in previous marketing years, the US marketing loan, counter-cyclical and Step 2 payment programs under the FSRI Act of 2002, as amended, taken alone and/or considered together, as well as payments made under these programs, cause:

- significant price suppression in the world market for upland cotton, within the meaning of Article 6.3(c) of the *SCM Agreement*; and

- an increase in the US share in the world market for upland cotton in marketing year 2005, within the meaning of Article 6.3(d) of the *SCM Agreement*.

(b) Inconsistency of measures taken to comply with the covered agreements

15. The measure taken by the United States to comply with the adverse effects-related recommendations and rulings of the DSB, identified as item (i) in Section B above, is deficient, because it fails to remove the adverse effects or withdraw the subsidies, and results in inconsistencies with Articles 5 and 6.3 of the *SCM Agreement*. Specifically, the deficiency manifests itself in three inconsistencies:

(i) Serious prejudice, with Step 2

16. Brazil believes that the US marketing loan, counter-cyclical and Step 2 payment programs under the FSRI Act of 2002, as amended, taken alone and/or considered together, as well as payments made under these programs, cause:

- significant price suppression in the world market for upland cotton within the meaning of Article 6.3(c) of the *SCM Agreement*; and

- an increase in the US share in the world market for upland cotton in marketing year 2005, within the meaning of Article 6.3(d) of the *SCM Agreement*.

(ii) Serious prejudice, without Step 2

17. Notwithstanding the US measure taken to comply with the actionable subsidy-related recommendations and rulings of the DSB (*i.e.*, the repeal of the Step 2 program effective 1 August 2006, cited as measure taken to comply (i) in Section B above), Brazil considers that the US marketing loan and counter-cyclical payment programs under the FSRI Act of 2002, as amended, as well as payments made under those programs, cause serious prejudice to the interests of Brazil, within the meaning of Article 5(c) and 6.3 of the *SCM Agreement*.

18. Specifically, irrespective of the effects of the Step 2 program or payments thereunder, the US marketing loan and counter-cyclical payment programs under the FSRI Act of 2002, as amended, as well as payments made under those programs, cause:

- significant price suppression in the world market for upland cotton within the meaning of Article 6.3(c) of the *SCM Agreement*; and

- an increase in the US share in the world market for upland cotton in marketing year 2005, within the meaning of Article 6.3(d) of the *SCM Agreement*.

(iii) Threat of serious prejudice

19. Finally, Brazil believes that the United States threatens to cause serious prejudice to the interests of Brazil, within the meaning of Articles 5(c) and 6.3 of the *SCM Agreement*, and footnote 13 thereto, by failing to take appropriate steps to remove the adverse effects or withdraw WTO-inconsistent subsidies for upland cotton.

20. Specifically, Brazil believes that the US marketing loan and counter-cyclical payment programs under the FSRI Act of 2002, as amended, as well as payments mandated to be made thereunder, threaten to cause significant price suppression in the world market for upland cotton in marketing years 2006[15] and until the expiry or repeal of these programs.

2. Non-existence and omissions/deficiencies regarding the ECG-related recommendations and rulings of the DSB

21. Brazil believes that despite the measures taken to comply cited as items (ii) and (iii) in Section B above, the United States has failed to implement the DSB's recommendation that it withdraw the prohibited ECG-related export subsidies without delay, under the *SCM Agreement*, and otherwise bring itself into conformity with its obligations, under the *Agreement on Agriculture*. Specifically, Brazil believes that measures taken to comply with the recommendations and rulings of the DSB with respect to the ECG programs do not exist in some respects, and to the extent they exist, are not consistent with the *Agreement on Agriculture* and the *SCM Agreement*. In either case, the United States has failed to withdraw fully the ECG-related prohibited subsidies subject to the recommendations and rulings of the DSB.

22. Brazil divides its concerns regarding the US failure to withdraw fully the ECG-related prohibited subsidies into two parts: the non-existence of measures taken to comply, and the consistency of those measures taken to comply with the covered agreements.

(a) Non-existence of measures taken to comply

23. Brazil believes that with respect to ECGs issued under the GSM 102, GSM 103 and SCGP programs prior to 1 July 2005, but still outstanding subsequent to 1 July 2005, the United States has taken no action whatsoever to withdraw the subsidy and otherwise bring itself into conformity with its obligations. With respect to these outstanding ECGs, measures taken to comply do not exist, within the meaning of Article 21.5 of the DSU.

24. In this respect, Brazil's concerns with the US failure to take measures to comply extend to ECGs issued under the GSM 102, GSM 103 and SCGP programs prior to 1 July 2005, but still outstanding subsequent to 1 July 2005, to support the export of: upland cotton and other unscheduled products; and, rice.

[15] Marketing year 2006 lasts from 1 August 2006 until 31 July 2007.

(b) Inconsistency of measures taken to comply with the covered agreements

25. Brazil believes that the United States provides export subsidies (under Articles 1, 3.1(a) and 3.2 of the *SCM Agreement*, as well as under item (j) to the Illustrative List of Export subsidies included as Annex I to the *SCM Agreement* (the "Illustrative List")) through the GSM 102 and SCGP programs, and ECGs provided under these programs, and has applied those export subsidies subsequent to 1 July 2005 in a manner that results in circumvention of the United States' export subsidy commitments. In this respect, the United States' measures taken to comply are not consistent with Articles 10.1 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*.

26. Specifically, and notwithstanding the US measures taken to comply cited as items (ii) and (iii) in Section B above, the GSM 102 and SCGP programs, and ECGs provided thereunder, are export subsidies under the *Agreement on Agriculture* and the *SCM Agreement*, based on the following two grounds:

- The programs and ECGs provided thereunder provide and constitute financial contributions (loan guarantees) that confer benefits on recipients, within the meaning of Article 1 of the *SCM Agreement*, and that are contingent upon export performance, within the meaning of Article 3.1(a) of the *SCM Agreement*; and, separately and independently,

- The programs do not levy premium rates adequate to cover the long-term operating costs and losses of the GSM 102 and SCGP programs, within the meaning of item (j) of the Illustrative List.

27. Further, subsequent to 1 July 2005, ECGs under the GSM 102 and SCGP programs have been applied to circumvent US export subsidy commitments, within the meaning of Article 10.1 of the *Agreement on Agriculture*. Brazil is concerned that ECGs under the GSM 102 and SCGP programs have been provided subsequent to 1 July 2005 to support the export of: upland cotton and other unscheduled products; and, rice, pigmeat and poultry meat, in excess of US reduction commitment levels for those products.[16]

28. As a result and to the extent of this violation of Article 10.1 (and, as a consequence, Article 8) of the *Agreement on Agriculture*, the GSM 102 and SCGP programs, and ECGs provided thereunder, are subject to the prohibition against export subsidies included in Articles 3.1 and 3.2 of the *SCM Agreement*. On the grounds cited in paragraph 26 above, Brazil believes that the GSM 102 and SCGP programs, and ECGs provided thereunder, are prohibited export subsidies, within the meaning of Articles 3.1(a) and 3.2 of the *SCM Agreement*.

D. Conclusion

29. Accordingly, because there is disagreement as to the existence and consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB, within the meaning of Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of

[16] Exports that benefited from GSM 102 and SCGP ECGs subsequent to 1 July 2005 are currently reflected in the July 2005 and September 2005 (fiscal year end), as well as July 2006 "Monthly Summary of Export Credit Guarantee Activity," USDA FAS Online, available at http://www.fas.usda.gov/excredits/Monthly/ecg.html.

Disputes ("DSU"), Brazil seeks recourse to dispute settlement under this provision.[17] Brazil requests that the DSB refer the matter to the original panel, if possible, pursuant to Article 21.5 of the DSU.

[17] Brazil notes that informal discussions regarding this matter were held with the United States on 19 July 2006; however, consultations within the meaning of Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") were not held.