

## ANNEX K

### COMMUNICATIONS FROM PARTIES AND THIRD PARTIES

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## ANNEX K-1

### LETTER FROM THE UNITED STATES

21 May 2003

The Panel in this dispute will soon meet with the parties to discuss the Panel's timetable and working procedures. In this regard, we draw to the Panel's attention Brazil's decision to raise claims under the *Agreement on Subsidies and Countervailing Measures* ("Subsidies Agreement") prior to the expiration of the Peace Clause (Article 13 of the *Agreement on Agriculture*) together with its desire to have recourse to the Annex V procedures of the Subsidies Agreement from the outset of this dispute.

Brazil's claims raise procedural and substantive questions that have not previously been faced by a dispute settlement panel. The most fundamental of these is whether Brazil may proceed with claims under the Subsidies Agreement against US support measures, notwithstanding that these claims are barred by the Peace Clause. The United States clearly maintains that Brazil may not.<sup>1</sup> The United States is submitting this letter in advance of the organizational meeting in order to propose a process to resolve these novel issues in an orderly and logical fashion.

Brazil has not contested that, if US support measures conform to the Peace Clause, they are protected from action based on claims of adverse effects or serious prejudice. In fact, Brazil implicitly recognizes that the Peace Clause bars its claims unless Brazil can demonstrate that the US measures are in breach of the Peace Clause – in both its panel request (WT/DS267/7, at 3) and its consultation request (WT/DS267/1, at 3), Brazil asserts that the Peace Clause does not exempt the challenged US measures from action. Thus, Brazil may not maintain this action based on its claims of adverse effects and serious prejudice under the Subsidies Agreement and GATT 1994 Article XVI unless the Panel has found that US support measures for upland cotton do not conform to the Peace Clause.

Accordingly, the United States proposes that the Panel organize its procedures to deal with the threshold Peace Clause issue at the outset of this dispute. We would suggest that the Panel first receive written submissions from both parties on the applicability of the Peace Clause, to be followed by a meeting of the Panel with the parties on this issue, and then rebuttal submissions. The Panel would then make findings on whether any US measure is in breach of the Peace Clause. If the Panel agrees that Brazil has failed to establish that the US measures are inconsistent with the Peace Clause,

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<sup>1</sup> In this dispute, Brazil is claiming that US support measures for upland cotton have caused adverse effects (including serious prejudice) to Brazil's interests, within the meaning of Articles 5 and 6 of the Subsidies Agreement and GATT 1994 Article XVI. Both the Agriculture Agreement and the Subsidies Agreement make clear that such claims are precluded as long as the measures conform to the Peace Clause. The Peace Clause states that domestic support measures that conform fully to the criteria in Annex 2 of the Agriculture Agreement ("green box" support) "shall be . . . exempt from actions based on," *inter alia*, claims of adverse effects, including serious prejudice. Similarly, the Peace Clause states that domestic support measures that conform fully to the criteria in Article 6 of the Agriculture Agreement (for example, "amber box" support) "shall be . . . exempt from actions based on," *inter alia*, claims of adverse effects, including serious prejudice, "provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year." The final sentences of both Article 5 (on adverse effects) and Article 6 (further explaining serious prejudice) of the Subsidies Agreement use identical language to recognize the protection afforded by the Peace Clause: "This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture." Thus, domestic support measures that conform to the criteria specified in the Peace Clause are protected against actions claiming adverse effects and serious prejudice.

then that would dispose of those claims. If the Panel finds that the US measures are inconsistent with the Peace Clause, then Brazil could have recourse to the Annex V procedures with respect to its Subsidies Agreement claims on these measures. In either event, briefing and meetings of the Panel with the parties could then proceed on any claims not disposed of by the Peace Clause findings.

This procedure would satisfy the legal requirement that certain claims not be maintained while the Peace Clause is applicable and provide the Panel with a fair and orderly means of addressing the issues in this dispute. The United States notes that the Panel has broad discretion to determine its working procedures under Article 12.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), and, under DSU Article 12.2, the Panel is charged with establishing panel procedures with “sufficient flexibility so as to ensure high-quality panel reports.” Because in this dispute Brazil has made claims under 17 different provisions of the WTO Multilateral Agreements with respect to numerous US programmes under at least 12 US statutes, we believe the Panel’s consideration of the critical Peace Clause issue would be aided by briefing and argumentation focused on this threshold issue. Dispute settlement panels have made use of three panel meetings to allow adequate consideration of particular issues. For example, the panel in *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* (DS276) has recently organized its proposed timetable and procedures to provide for the possibility of a panel meeting prior to the first substantive meeting in order to consider any preliminary issues. We also note that three panel meetings have been scheduled in each of the disputes under the *Agreement on the Application of Sanitary and Phytosanitary Measures* to allow a separate meeting of the panel with scientific/technical experts. Similarly, in this dispute, a meeting focused on the Peace Clause issue would assist in considering the complex matter in dispute.

We look forward to discussing this proposal with you in more detail at the organizational meeting. The United States is providing a copy of this letter directly to Brazil.

## ANNEX K-2

### LETTER FROM BRAZIL

23 May 2003

The Government of Brazil is in receipt of a letter dated 21 May 2003 from the US Mission, proposing that the Panel's working procedures provide for a special advance proceeding to deal with issues relating to Article 13 of the Agreement on Agriculture (AoA), commonly known as the "peace clause". The United States proposes two rounds of submissions by the parties, a meeting of the Panel with the parties, a special "discovery" proceeding and Panel issuance of a separate ruling on these issues. All other work in this dispute would be suspended until after the Panel has issued findings and a preliminary panel report. Brazil opposes these unprecedented and unnecessary procedures, which would impose significant financial and human resource burdens on Brazil and significantly delay this proceeding. Brazil asks that the Panel proceed expeditiously with this case using normal dispute settlement procedures and timeframes, for the reasons set forth below.

Brazil urges the Panel to take full account of Article 3.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which provides: "The *prompt settlement* of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and to the maintenance of a proper balance between the rights and obligations of Members." DSU Article 12.9 contemplates that panel proceedings will be completed within six months. DSU Article 12.2 provides that "panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, *while not unduly delaying the panel process*". The US suggested procedure would unduly delay the panel process to the detriment of Brazil's rights.

The United States has singled out AoA Article 13 as a "special" provision which allegedly requires special and unprecedented procedural treatment. Yet DSU Appendix 2, the closed list of "special and additional" rules and procedures that trump the normal rules of dispute settlement, does not include Article 13 or any other AoA provision, nor does it include the cross-references to the AoA in Articles 3.1 and 7.1 of the Agreement on Subsidies and Countervailing Measures (ASCM). There is no support in the DSU, in the Agreement on Agriculture, or elsewhere in the WTO Agreement for the proposition that a separate "mini-trial" on peace clause issues is required before any claim can be made against subsidies under the Agreement on Agriculture. Acceptance of this proposition would invent a substantial new obstacle to future claims by any government against agricultural subsidy programs, altering the rights of Brazil and many other Members, in contradiction to Article 3.2 of the DSU.

The US notion that two rounds of submissions and a special meeting are required before the parties perform any further work on the case is unprecedented. As the Panel is aware, the concept of preliminary objections is not new. There are many WTO cases in which a defending party has made preliminary objections that a claim or a panel request has not met the requirements of DSU Article 6.2, and has requested an early ruling. Sometimes panels make an early ruling,<sup>1</sup> and sometimes

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<sup>1</sup> US – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS213/R, fn. 224.

they do not.<sup>2</sup> The decision on how to handle such preliminary objections procedurally is a matter of panel discretion. Where preliminary objections have been resolved in advance of other claims, normally they have been resolved in the panel's first meeting, on the basis of the first round of submissions and oral statements.

The threshold issues posed by AoA Article 13 are no more or less significant than other threshold issues in many WTO Agreements. There are "peace clause"-type provisions in Articles 27.2(b), 27.3, and 27.4 of the ASCM Agreement precluding prohibited subsidy claims against developing country export subsidies under certain conditions. When this provision was invoked by developing countries in prior cases, no special procedures were created by panels and these threshold issues were decided as part of the final panel report.<sup>3</sup> Similarly, no claim may be brought against a measure under the General Agreement on Trade in Services unless the measure falls within the scope of the GATS as defined in GATS Article I. No claim may be brought under Article 2 of the Agreement on Technical Barriers to Trade except in respect of a measure that is a "technical regulation" as defined by that agreement. Claims under the Agreement on Government Procurement may only be brought concerning procurement of an entity covered by Annex I of that agreement. Many more examples exist.

Following the US proposal, panels would be *required* in any case involving such threshold issues to provide for special submissions, special meetings and preliminary panel decisions on admissibility of claims before reaching the substance, adding a month or two to each panel proceeding. The same procedure would be required whenever a defending party makes a preliminary objection under DSU Article 6.2. Resolving such issues, the United States would presumably argue, would be necessary to avoid wasteful litigation of unnecessary claims. But like the Agreement on Agriculture, none of these agreements contain any special procedural provisions for resolution of these threshold issues, and there is no reference to such procedures in Appendix 2 of the DSU. Negotiators could have provided for the type of bifurcated dispute settlement process suggested by the United States for these types of issues. But they did not.

The United States notes that special meetings have been held with experts in cases involving the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). However, these meetings were held pursuant to Article 11.2 of the SPS Agreement that gives the panel the authority to "seek advice from experts chosen by the panel in consultation with the parties to the dispute." With such authority comes an implied need for the Panel to *meet* with the experts. It also creates an expectation of additional delay from the normal panel schedule to accommodate obtaining such advice. Nothing in the AoA contains any similar authority to address peace clause issues.

The peace clause issues in this dispute are not just technical procedural issues (as the US implies in its letter) that can be quickly disposed of without extensive briefing or the presentation of considerable factual evidence and expert econometric testimony. They require careful deliberation by the Panel on the basis of the entire body of evidence submitted by the parties. The peace clause issues are also intertwined with the substance of Brazil's claims regarding prohibited and actionable subsidies under the Agreement on Subsidies and Countervailing Measures. For example:

Among the issues presented by the peace clause are whether three of the six actionable US domestic support subsidies (Production Flexibility Payment Contract Payments, Direct Payments, and Counter-Cyclical payments) are properly in the "green" or "amber/blue" box of the AoA. To resolve these issues involves, *inter alia*,

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<sup>2</sup> US – Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan, WT/DS184/R, fn. 16 to para. 7.1.

<sup>3</sup> Brazil – Export Financing Program for Aircraft, WT/DS46/R (20 August 1999), paras. 7.56-57; Indonesia – Certain Measures Affecting the Automobile Industry, WT/DS54/R (23 July 1998), para. 14.52

the presentation of econometric analysis of the trade distorting or production enhancing effects of each of these subsidies to determine whether or not they are properly green box subsidies within Annex 2 AoA. If they are not, then these three subsidies are included in the amount of support in marketing years 1999-2002 for the purpose of comparing against the level of support decided by the United States for marketing year 1992 under Article 13(b)(ii) AoA. However, Brazil's econometric and other extensive documentary evidence regarding the production enhancing effects of such subsidies for the purposes of the peace clause is *exactly* the same evidence Brazil presents for these three referenced subsidies to demonstrate its serious prejudice claims under ASCM Articles 5(c), 6.3(b), 6.3(c), 6.3(d), and Article XVI of GATT 1994.

Brazil has made claims under the AoA and the ASCM regarding prohibited export subsidies under the US Step-2 programme and US export credit guarantee programmes. Brazil will demonstrate in its first submission that these two export subsidies do not "conform fully to the provisions of Part V of this Agreement" in the sense of AoA Article 13(c); obviously, Brazil's evidence and argument regarding the lack of conformity of these two measures with Part V of the AoA largely overlaps with the evidence and argument necessary to demonstrate a violation of ASCM Articles 3.1(a) and (b).

The close relationship between these "threshold" issues and the merits of Brazil's case can be seen by considering the possible outcome of the Panel's preliminary rulings. For instance, if the Panel rules that Brazil may bring its export subsidy claims because the US export subsidies are inconsistent with AoA Part V, it will have decided up front a key issue regarding the merits. But would the United States accept such a ruling and not attempt to re-litigate the same issues raised in the context of the ASCM Agreement? The answer is obvious. It highlights that a preliminary mini-trial of the sort sought by the United States will not save time, expense, and trouble for the Panel or for the parties, and will simply serve to increase the length and expense of this panel proceeding.

The Panel must also consider the position of the 13 interested third parties in this dispute. Many of these third parties may wish to provide their views on the interpretation and application of AoA Article 13 given the implications of any decision for future disputes. If the panel were to decide to request submissions and/or hold a hearing in advance of its first meeting with the parties, third parties will probably claim that they must be accorded the same opportunities for participation as in normal panel proceedings. These opportunities are particularly important since the "mini-trial" called for by the United States would decide key substantive issues relating to the facts and merits of Brazil's complaint.

Brazil would also be prejudiced because the United States proposal would require it to use limited resources to bring its Brazilian counsel and its US econometric experts to Geneva for the proposed special meeting. Further, Brazil would be required to prepare essentially four additional written submissions (a first and rebuttal written submissions, an oral statement submission, and written answers to the Panel's questions) for the proposed special briefing and meeting. The acceptance of the US proposal will create travel, hotel, legal, and human resource expenditures that are particularly burdensome for a developing country with limited financial and human resources such as Brazil. In sum, the US proposal would impair Brazil's rights under WTO rules.

Finally, the United States proposes even more delay in this proceeding with its suggestion in the letter that "Brazil could have recourse to the Annex V procedures with respect to its Subsidies Agreement claims" after the determination by the Panel pursuant to the special procedures. Brazil initiated Annex V procedures on 18 March as the DSB established the panel pursuant to Brazil's request for the establishment of a panel that invoked ASCM Article 7.4. Brazil sought information

from third countries and the United States on 1 April 2003 under the provisions of Annex V, paragraphs 2 and 3. Brazil has collected information from a number of third parties pursuant to these requests. The United States on 19 March in WT/DS267/8 informed the DSB that “*any requests for information pursuant to the Annex V procedures may be provided in writing to the US Mission to the World Trade Organization. The United States will gather the information to respond to any such requests and provide the responses through the US Mission*”. Unfortunately, the United States refused to answer Brazil’s questions dated 1 April 2003 during the 60-day period of the procedures that ended on 17 May 2003.

Brazil rejects any suggestion by the United States that a new Annex V procedure be conducted during the panel stage of the process to impose even further delays in this proceeding. Instead, Brazil will use the best information available to it when it files its first submission. If appropriate, Brazil will request that the Panel draw adverse inferences from any failure of the United States to provide information requested during the consultation and Annex V process.

In light of the above, Brazil strongly urges the Panel to reject the United States’ unprecedented and wasteful procedural proposal. As noted above, much of the evidence involved in demonstrating the absence of peace clause protection *also* is related to Brazil’s substantive claims. Given this overlap, the Panel should structure its work so that the peace clause issues and Brazil’s claims regarding prohibited subsidies and serious prejudice are dealt with at the same time and in the same two meetings between the Panel and the parties. Use of the normal two meetings and briefing schedule will permit the Panel to have sufficient time to consider the views of Brazil, the United States, and the 13 third parties involved in this dispute. Use of the existing procedures and timeframes will avoid significant prejudice to Brazil by avoiding it having to use its limited resources to litigate the same issues at three, not two meetings. Use of existing procedures will avoid duplication of effort by the Panel and the third parties, and avoid significant delays in the issuance of a final report regarding the subsidies Brazil challenges in this dispute.

Brazil would be pleased to provide the Panel with additional information at the organizational meeting regarding this and any other procedural issues.

## ANNEX K-3

### LETTER FROM BRAZIL

14 July 2003

Brazil would like to bring to the attention of the Panel in *United States – Subsidies on Upland Cotton* (DS267) the following matter.

The "Working Procedures for the Panel" establish in paragraph 17(b) that,

*"the parties and third parties should provide their submissions to the Secretariat by 5:30 pm on the deadline established by the Panel, unless a different time is set by the Panel"*

and in paragraph 17(d) that,

*"the parties and third parties shall provide electronic copies of all submissions to the Secretariat at the time they provide their submissions [...]".*

The electronic version of the US first submission, which was due on Friday, 11 July, 5:30 pm, was delivered after 11 pm, almost 6 hours after the deadline. Brazil had access to the hard copy only on Saturday morning. Because it was a Friday, the failure of the United States to meet the established deadline led to delays in the transmittal and reception of the submission to different Government officials in Brazil and to Brazil's legal advisors. In addition, the delay no doubt caused third parties to have less time to react to the US submission – a not insignificant delay given the fact that third parties had only two working days to respond to the US submission before filing on 15 July. The result was that Brazilian officials were unable to review the submission until Monday, 14 July.

Brazil notes that this delay is not the first in the present case. The US Comments on the initial brief by Brazil, due on 13 July, 5:30 pm, were sent electronically after 8 pm.

Brazil has been faced with extremely short deadlines in this case, including the filing on 24 June its First Submission which required extensive changes to respond to the Panel's determination of 20 June. Nevertheless, Brazil met the deadline and filed the submission prior to 5:30 pm on 24 June. Brazil expects that the United States will, like Brazil, meet its own deadlines in a timely fashion.

Brazil would like the Panel to take note of this delay and to encourage the US to respect the deadlines, with a view to ensuring procedural fairness in these proceedings.

## **ANNEX K-4**

### **LETTER FROM THE UNITED STATES REQUEST FOR EXTENSION OF DEADLINE FOR RESPONSES TO PANEL QUESTIONS**

29 July 2003

In view of the number and the complexity of the questions addressed by the Panel to the United States and Brazil (not counting subparts, it appears that the Panel has asked the United States approximately 95 questions), the United States would like to request an extension of the deadline for the parties' responses until Friday, 15 August 2003. In particular, a number of the questions address new issues and request extensive additional information. Given the issues and volume of information involved, as well as the travel schedules of key members of the US delegation, an extension of the deadline originally proposed by the Panel would assist the parties in providing thorough responses.

While extending the deadline for answers would necessarily shorten the period for commenting on those answers, the parties would still have one week to prepare those comments. The United States considers that both the initial answers and subsequent comments would benefit if proportionately more time were allocated to ensuring that the initial answers are as complete and clear as possible.

## **ANNEX K-5**

### **LETTER FROM BRAZIL**

29 July 2003

Brazil received a letter dated today from the United States requesting until Friday 15 August to provide answers to the Panel's questions. Brazil cannot agree to this request.

Brazil has been working diligently every day since 25 July to comply with the Panel's deadline and is prepared to provide its answers to the Panel's questions by 4 August. A delay until 15 August will prejudice Brazil by not providing it with sufficient time to comment on the US answers or to prepare its Rebuttal Submission.

Brazil also notes that the Panel's questions do not raise new issues. Instead, they address issues either raised to a large extent in the First Written Submissions or that have been dealt with extensively during the first substantive meeting with the parties.

However, in the spirit of cooperation and in recognition of the fact that the Panel did request more questions of the United States than Brazil, Brazil would have no objection if the Panel were to extend the deadline to 7 August for the Parties and the Third Parties to answer the Panel's and each other's questions.

## ANNEX K-6

### LETTER FROM THE EUROPEAN COMMISSION

31 July 2003

The European Communities would like to thank the Panel for the questions it has posed to the third parties, and for extending the deadlines for responses. In light of the detailed nature of the questions asked and the importance of the issues concerned, the European Communities respectfully makes two requests to the Panel.

First, it would greatly assist the European Communities (and we assume other third parties) in preparing our responses to the Panel's questions to have sight of the oral statements of the main parties to the dispute at the first substantive meeting. So doing would permit third parties to respond to arguments made by the main parties where such a response would be of relevance in answering the Panel's questions. Since the Panel has requested the third parties to answer detailed questions, the European Communities considers that allowing the third parties access to the oral statements would allow the third parties to participate in a "full and meaningful fashion" in the stages of the proceeding where the panel has requested their input.<sup>1</sup> Moreover, the European Communities considers that this would benefit the Panel since the third parties will be able to provide more complete responses to the Panel's questions.

Second, the European Communities welcomes the Panel's decision to allow the third parties to comment on the response of the other third parties. However, it is not clear to the European Communities whether the third parties will also be able to comment upon the responses of the main parties to the Panel's questions, or questions the main parties have asked of each other. Once more, the European Communities considers that the third parties comments will be more full and meaningful, and consequently more beneficial to the Panel, if it is also possible to comment on the responses of the main parties in addition to commenting upon the other third parties responses.

Accordingly, the European Communities requests the Panel to ask the main parties to provide the third parties with copies of their oral statements and copies of their responses to the Panel's questions, when lodged. The European Communities also requests the Panel to invite the third parties to comment upon the responses of the main parties to the Panel's questions, and those posed by the other party.

Finally, the European Communities would also respectfully ask you to clarify the treatment of the Panel's expression of views on Article 13 of the *Agreement on Agriculture* and associated issues, scheduled for 5 September 2003. Given that the Panel's findings on this issue may be considered similar to a preliminary ruling, and that the third parties will be asked to provide the Panel with further comments on 29 September 2003, the European Communities considers that, in order to protect third parties' due process rights, the Panel's expression of views should be available to the third parties. The European Communities would be obliged if you could confirm this understanding.

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<sup>1</sup> Para. 249, Article 21.5 Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* ("United States – FSC (21.5)"), WT/DS108/AB/RW, adopted 29 January 2002.

A copy of this letter has been provided to the delegations of Brazil and the United States, and to the other third parties.

May I take this opportunity to thank you in advance for your consideration of these issues.

## ANNEX K-7

### LETTER FROM THE UNITED STATES

1 August 2003

The United States is in receipt of the letter dated 31 July 2003, from the European Communities (EC) relating to third parties' participation in the present dispute. The United States would consent to the Panel's release of its further views on the Peace Clause issue to the third parties as a sensible way forward in this dispute (although we would not necessarily endorse all of the reasoning expressed in the EC letter). Further, the United States has no objection to either party choosing to make its submissions or oral statements public – as the United States and, we understand, Brazil have decided to do. However, we see no basis in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) for the additional procedural requirements that the EC is proposing – namely, that the Panel require the parties to make available to the third parties copies of their oral statements and responses to the Panel's questions, and that the third parties comment on the parties' responses to the Panel's questions. The EC proposal appears to erase the distinction between parties and third parties for purposes of dispute settlement.

The United States recalls that in the context of a panel proceeding a third party is welcome to express its interests under any covered agreement at issue in the dispute. Thus, the DSU ensures that third parties may express those interests by providing “an opportunity to be heard by the panel and to make written submissions” (DSU Article 10.2) and the right to “receive the submissions of the parties to the dispute to the first meeting of the panel” (DSU Article 10.3). These requirements have been met in every prior dispute by providing third parties the opportunity to receive the first submissions of the parties, to make one written submission, and to present statements at a third-party session of the first meeting of the panel.

We are aware of no dispute in which third parties have been granted the additional rights now sought by the EC. It would represent a fundamental change in the role of third parties in dispute settlement. Changes of this nature are being discussed in the context of the ongoing negotiations on clarifications and improvements to the DSU, and that is the proper forum for Members to consider these changes.

In addition, on a practical note, if the parties have to deal with the additional work of responding to comments by potentially more than a dozen third parties on (1) each others' answers to the Panel's third-party questions as well as (2) the parties' answers to more than 100 questions from the Panel, the already ambitious timetable established by the Panel will become totally untenable.

Finally, the United States recalls that, like all WTO Members and the public, the EC already has access to US submissions and oral statements on our website. (Indeed, we have already provided a copy of our oral statement directly to the EC at their request.) We also understand that Brazil is making its submissions public within two weeks of filing as contemplated by the parties' agreement and reflected in the Panel's Working Procedures. We would welcome Brazil's making its submissions public upon filing but do not see a basis in the DSU for requiring disclosure of those submissions to the third parties.

The United States is providing a copy of this letter directly to Brazil and the third parties.

## ANNEX K-8

### LETTER FROM BRAZIL

1 August 2003

Brazil received a letter dated 31 July 2003 from the European Communities requesting the Panel:

- (i) to ask the parties to the dispute to provide third parties with copies of their oral statements and copies of their responses to the Panel's questions;
- (ii) to invite the third parties to comment upon the responses of the parties to the dispute to the Panel's questions, and those posed by the other party;
- (iii) to make the "Panel's expression of views on Article 13 of the *Agreement on Agriculture* and associated issues", scheduled for 5 September 2003, available to the third parties.

2. With respect to the EC's requests, Brazil would like to make the following comments.

3. In light of the Timetable for Panel Proceedings, the Working Procedures for the Panel, and DSU Articles 10.2 and 10.3, Brazil considers that the third parties to the present dispute are entitled to be provided with copies of the parties' First Written Submission and parties' Further Submission only. In Brazil's view, these are the only documents that constitute "submissions of the parties to the dispute to the first meeting of the panel" in accordance with DSU Article 10.3.

4. Brazil further notes that the parties to the dispute did not make any oral statements during the session of the substantive meeting of the Panel set aside for the third parties to present their views (24 July 2003). Thus, there are no oral statements of which the third parties should receive written versions. As a matter of fact, the oral (opening and closing) statements made by Brazil and the US were delivered exclusively at the closed session of the substantive meeting of the Panel which the third parties did not have access to. Again, there would be no reason for providing third parties with copies of those oral statements.

5. As is the case for the oral statements, Brazil submits that third parties need not be given copies of the parties' responses to the Panel's questions. The Panel's questions were put to Brazil and the US in the context of the closed session of the first substantive meeting with the parties, as were the preliminary responses given by both parties to the dispute. Moreover, such responses do not constitute "submissions" within the meaning of DSU Article 10.3.

6. Finally, with regard to the "Panel's views on certain issues", Brazil agrees with the EC that the document should be available also to third parties.

## ANNEX K-9

### LETTER FROM THE EUROPEAN COMMISSION

4 August 2003

The European Communities refers to its letter to the Panel of 31 July 2003, and the responses of the United States and Brazil of 1 August 2003.

The European Communities would like first to welcome the agreement of both the United States and Brazil that the Panel's views on the Peace Clause and related issues should be communicated to the third parties.

However, in the view of the European Communities, both the United States and Brazil misunderstand the thrust of the EC's letter of 31 July. Both parties enter into a discussion of whether the third parties are entitled to be given access to, and the chance to comment upon, the responses to the Panel's questions of the main parties. Both argue that the documents which the third parties have received are the only documents which the third parties are entitled to. However, these arguments miss the point of the European Communities request.

The European Communities central point was that, given the detailed questions which the third parties have received from the Panel, and given the Panel's decision to permit third parties to comment upon the responses of the other third parties, it would be a reasonable exercise of the Panel's discretion to organise its procedures so as to allow the third parties also to comment upon the responses of the main parties. The European Communities considers that this would be beneficial to the Panel, and would allow the third parties to participate completely, given the extent to which the Panel has already invited the third parties to participate.

The European Communities does not consider that this would set an unfavourable precedent because a panel would always have the discretion, in the light of its own procedures and the dispute before it, to decide whether to grant third parties such possibilities. Moreover, the European Communities sees no possible impairment of the due process rights of the main parties, and indeed neither the United States nor Brazil have alleged any such impairment would result from the Panel acceding to the request of the European Communities.

The European Communities is aware of the practical concerns raised by the United States. However, the European Communities notes that a party always has a choice whether to comment upon responses, and that these practical concerns weigh equally on both parties.

Finally, the European Communities is, of course, aware that the United States makes its oral statements public (and is grateful that the US officials involved in this dispute have provided a copy directly to the EC delegation). We also note that the Panel's procedures provide for the submission of non-confidential summaries within 14 days of filing which could be made public.<sup>1</sup> However, the European Communities is not aware, first, whether such summaries shall also be provided to the third parties, and second, whether such summaries can be considered equivalent to the oral statements as

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<sup>1</sup> Para. 3 – Panel's Working Procedures.

delivered. In that light, the European Communities recalls its arguments in favour of provision of the statements as delivered, set out in its letter of 31 July 2003.

A copy of this letter has been provided to the delegations of Brazil and the United States, and to the other third parties.

Thank you in advance for your consideration of these issues.

## ANNEX K-10

### LETTER FROM BRAZIL

14 August 2003

Once more, Brazil is faced with the need to detract from its substantive work relating to the dispute *United States – Subsidies on Upland Cotton* (DS267) to bring to the attention of the Panel a new US failure to abide by the “Working Procedures for the Panel” concerning the timing for delivery of documents required by the Panel.

As it had already done on two previous occasions<sup>1</sup>, the US did not deliver its answers to the Panel’s questions following the first substantive meeting with the parties by the time established in paragraphs 17(b) and (d) of the “Working Procedures”.<sup>2</sup> Brazil recalls that the deadline for submitting the parties’ answers to the Panel was expressly confirmed by the Panel on its communication dated 30 July 2003 informing about the extension of the deadline for the submission of the parties’ responses<sup>3</sup>.

As a matter of fact, the electronic version of the US answers, which was due on 11 August, 5:30 pm, was delivered around 11:30 pm, more than 6 hours after the deadline, more than 6 hours after Brazil delivered both its electronic version and hard copies to the Secretariat and the US. Brazil further notes that no hard copy of the US answers was made available either to the Secretariat or to Brazil by the deadline.

Brazil regrets that the US has decided to adopt such a strategy. In this particular case, the US behavior is even more egregious because the deadline – at request of the US and with the good faith and cooperation of Brazil – had been extended by 7 days by the Panel (from 4 August to 11 August).

As stated, the failure of the US to meet the established deadline provided US officials an opportunity to examine Brazil’s answers before submitting their own responses more than 6 hours later. Moreover, the US failure led to delays in the transmittal and reception of the US answers to different Government officials in Brazil and to Brazil’s legal advisors, diminishing an already short period for Brazil to comment upon the US responses. Due to the 5 hour time zone difference between Brasilia and Geneva, the US delay prevented work by Brazilian officials on the 11<sup>th</sup> of August. US official, however, had no such impairment since the USTR representatives in Geneva had the Brazilian answers to the Panel by 11:30 a.m. Washington D.C. time on that same date.

Needless to repeat that Brazil – a developing country with serious budgetary and human resources constraints – has been faced with extremely short deadlines in this case, including the filing on 24 June of its First Submission which required extensive changes to respond to the Panel’s

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<sup>1</sup> Also the US Comments on the initial brief by Brazil, due on 13 June 2003, and the US First Written Submission, due on 11 July 2003, were delivered after the deadline (see Brazil’s letter to the Panel on 14 July 2003).

<sup>2</sup> WP, paragraph 17(b): “*the parties and third parties should provide their submissions to the Secretariat by 5:30 pm on the deadlines established by the Panel, unless a different time is set by the Panel.*” WP, paragraph 17(d): “*the parties and third parties shall provide electronic copies of all submissions to the Secretariat at the time they provide their submissions [...]*”.

<sup>3</sup> “*The Panel reminds the parties that paragraph 17(b) of the Panel’s working procedures indicates that the responses should be submitted by 17:30 (Geneva time).*”

determination of 20 June. However, Brazil has been meeting the deadlines established, and will continue to do so. Although the facts do not recommend Brazil to be very optimistic, Brazil continues to expect that the US will, like Brazil, meet its own deadlines in a timely fashion from now on.

Brazil respectfully asks the Panel to take note of this new delay and to encourage, again, the US to respect the deadlines, with a view to ensuring procedural fairness in these proceedings.

In addition, Brazil would like to bring to the Panel's attention an issue regarding certain of the United States' Answers to the Panel's Questions. In certain answers, the United States has indicated it will provide responsive arguments and information in its rebuttal submission. In other answers, it made allegations without providing any documentary support that would permit Brazil to challenge the accuracy and credibility of allegations. The answers in question are the following:

Answer to Questions 14 and 26: no detailed information or arguments were provided in the US answers regarding either production flexibility contracts or market loss assistance payments. The last sentence of paragraph 57 of the U.S. answers indicates US will discuss production flexibility contract payments only in the rebuttal submission.

Answer to questions 60 and 66(a): The United States provided no responsive information or calculations to respond to the Panel's questions.

Answer to Questions 66(d): In paragraph 121, the United States indicates that "it will provide a detailed critique of Mr. Sumner's analysis in our rebuttal submission." In paragraph 124 it states: "We will discuss other conceptual errors in Sumner's approach in our rebuttal submission."

Answer to Question 73: Other than an undocumented allegation in US answer to Question 76, the United States provided no information or argument concerning Articles 1 and 3 of the SCM Agreement. Instead, the United States stated in paragraph 140 that it would "review Brazil's submissions, including its responses to these questions, and provide any further response in the US submission".

Answers to Questions 12, 71-88: The United States provided only two exhibits (US-12 and US-20) and no other documentation in support of arguments or allegations.

Brazil recalls that the purpose of scheduling the filing of the answers to the Panel's questions 11 days before the submission of the rebuttal submission was to permit the parties to review each other's answers and supporting documentation and then to comment on those answers in the rebuttal submissions. Brazil cooperated in this process by providing complete and comprehensive answers to all of the Panel's questions together with extensive documentation. As demonstrated above, for certain questions, the United States did not provide complete answers or documentation that would have allowed Brazil the opportunity to comment and rebut in its rebuttal submission.

Brazil will be prejudiced if it does not have the opportunity to comment on information, arguments, and documents the United States makes or provides for the first time in their rebuttal submission that *would have been* responsive to those Panel questions listed above. Accordingly, Brazil requests the right, only with respect to the questions above, to comment on any new information, arguments, or documents presented for the first time in the U.S. rebuttal submission.

Providing Brazil with this right is consistent with basic notions of due process. Otherwise, Brazil will not have another opportunity prior to the Panel's 5 September decision on peace clause issues, to comment on any new information, documents, or arguments presented by the United States.

The inability or unwillingness of the United States to provide complete answers should not prejudice Brazil. The United States now has the benefit of Brazil's complete answers together with extensive additional documentation to comment on in its rebuttal submission. This is particularly true with respect to issues related to export credit guarantees and issues related to Professor Sumner's analysis. Brazil is entitled the same right.

Brazil requests that it be provided until 28 August to file any such comments. In light of the fact that Brazil provided complete answers to the Panel's questions, there is no basis for the Panel to provide the United States with any corresponding right. Its due process rights have not been adversely impacted.

## ANNEX K-11

### LETTER FROM THE UNITED STATES

20 August 2003

The United States has received a copy of the letter to the Panel from Brazil of 14 August 2003. We have also received your communication of yesterday, responding to Brazil's requests for additional time to submit its rebuttal. The United States does wish to record its views on Brazil's letter, and my authorities have therefore instructed me to convey their surprise that Brazil would send such a letter and their regret over any burden that it may have placed on the Panel in what is already a very difficult and complicated dispute.

The United States would first like to thank the Panel for agreeing to extend the deadline for the responses to the Panel's questions. The United States appreciates the depth and level of understanding of the issues represented by the Panel's extensive and broad-ranging questions. Without an extension of the deadline, it would have been completely impossible for the United States to have provided responses in a timely manner. Even with the extension, the drafting, compiling, consulting internally with the various relevant officials, and finalizing the responses all required supreme effort and personal sacrifice on the part of the entire US delegation. The United States did provide responses by the August 11 deadline, although it was not possible to accommodate the 5:30 pm filing guideline despite the best efforts of the United States to do so.<sup>1</sup>

The same burden was not placed on Brazil and the outside legal counsel that Brazil has employed for this dispute. As a result, it is not surprising that Brazil found the deadline to be less demanding and resource-intensive. We would note that, if one only counts the main questions and not any of the subquestions, there were 104 questions posed to the United States, but only 63 posed to Brazil.<sup>2</sup> With all respect, the United States has considerable difficulty with Brazil's complaints about the time within which the United States filed its response in light of the total amount of work required, and effort that the United States expended, to provide its answers to the Panel's questions.<sup>3</sup>

The United States also could not understand how Brazil could ask for an additional opportunity to respond to new material in the rebuttal submissions while at the same time asking that the Panel deny any such opportunity to the United States. (After all, one would expect that Brazil will

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<sup>1</sup> On the one hand, the United States is flattered that Brazil credits the United States with the ability to finalize its own responses while simultaneously reviewing Brazil's responses filed earlier in the evening. On the other hand, the United States is, to say the least, taken aback that Brazil would suggest that the United States would do so. In any event, the press of finalizing the US responses completely consumed the US delegation and no one was able to spare time to look at Brazil's responses at any point that day, let alone before the US responses were filed.

<sup>2</sup> The difference in the number of questions for each party means that Brazil had nearly 6-1/2 hours to prepare its responses to each question posed to it, whereas the United States had less than four hours per question. (Counting the subquestions would increase the disparity since a preliminary check indicates that there were more subquestions for the United States than for Brazil.) As a result, Brazil had approximately 65 percent more time to prepare its responses. Had the United States taken the same amount of time as Brazil to prepare each response, its responses would have taken 28 days to file (they would have been finished on August 22).

<sup>3</sup> The United States also failed to understand the reference in Brazil's letter to Brazil's "good faith and cooperation" in extending the deadline by seven days. In fact, Brazil did not "cooperate" in the Panel's decision to grant a seven-day extension. Brazil instead objected to any extension beyond three days.

also provide new material in its rebuttal submission on topics covered in the Panel's questions, and not just repeat material it has already submitted.) Such a one-sided approach would not have achieved the "procedural fairness" that Brazil has said it seeks. In this connection, the United States considers that the approach taken by the Panel in its communication yesterday achieves a fair balance of the parties' interests.

In conclusion, the United States would like to thank the Panel for the approach it has taken on Brazil's request, as well as for its work to date on the many issues presented by this dispute. The United States is also providing a copy of this letter directly to Brazil.

## ANNEX K-12

### LETTER FROM BRAZIL

23 August 2003

The Government of Brazil is in receipt of the Communication from the Panel dated 19 August 2003. Brazil only received this morning the *Rebuttal Submission of the United States of America*, dated 22 August 2003 (“US Rebuttal Submission”). Brazil notes that consistent with all of its earlier written submissions, the United States filed its Rebuttal Submission 6 hours late. This delay has prejudiced Brazil and prevented it from providing comments responsive to the Panel’s 19 August 2003 letter until today. Brazil notes that the United States received its copy of Brazil’s Rebuttal Submission, along with Brazil’s Comments to the US Answers, consistent with the 5:30 p.m. deadline established in the Panel’s Working Procedures.

In accordance with your communication of 19 August 2003, Brazil has reviewed the US Rebuttal Submission to determine “whether there is any specific material on which it has not had an opportunity to comment”, and which it would like to address in a 27 August submission. Brazil identifies below the specific US arguments, data and documents on which it would like to comment. Brazil also shows below good cause why it should be granted the opportunity to address each specific argument, data and document.

Brazil recalls that its original 14 August 2003 request to the Panel to afford it this opportunity was triggered by explicit indications by the United States, in its 11 August responses to Panel questions, that it was not providing full responses to the Panel’s questions and would instead address a number of issues for the first time in its Rebuttal Submission. Brazil argued that it would be prejudiced by this conduct. The list below is consistent with the spirit of Brazil’s 14 August request. Brazil’s list only includes specific issues that should have been but were not addressed in the United States’ 11 August responses, or specific issues related to new documents relied on by the United States for the first time in its Rebuttal Submission.

There are a number of new arguments or re-packaging of earlier arguments presented by the United States in its Rebuttal Submission. Most of these arguments do not require a further response, since Brazil’s various earlier submissions and exhibits addressed or anticipated the new or re-packaged US arguments or issues raised by those arguments. In this regard, Brazil notes that the United States’ Rebuttal Submission does not respond to a number of arguments made in earlier submissions by Brazil. Brazil would object to any opportunity given to the United States to provide such a response in its 27 August submission. Brazil is of the view that the purpose of this exercise is not to provide the Parties with a whole-scale opportunity to rebut every point raised in either the United States’ or Brazil’s Rebuttal Submissions. The Panel should limit the United States to comments on specific issues that should have been but were not addressed in Brazil’s 11 August responses, or specific issues related to new documents relied on by Brazil for the first time in its Rebuttal Submission.

Should the Panel grant the United States an opportunity to comment on issues beyond this narrow scope, Brazil reserves its right to revisit the list of material it includes in the list below.

In accordance with the above understanding, Brazil requests leave to comment on the following specific material:

### **Domestic Support Issues**

Para. 43

*Subject:* US argument regarding the growing of illegal crops, etc.

*Good cause:* This is a new argument that should have been but was not raised in the United States' 11 August response to questions 25 and 26 from the Panel.

Paras. 96-98

*Subject:* US argument regarding crop insurance notifications of other Members.

*Good cause:* This is a new argument referring to new WTO documents not raised in earlier submissions.

Paras. 114-117

*Subject:* US argument regarding a price gap methodology for marketing loans.

*Good cause:* This is a new argument that should have been but was not raised in the United States' 11 August response to question 67 from the Panel, and that is directly contradictory to information provided by the United States in paragraphs 128-134 of that response.

Paras. 123-127 and Exhibit US-24

*Subject:* US new challenge to Professor Dan Sumner's analysis.

*Good cause:* This is a new argument and exhibit that should have been but was not provided in the United States' 11 August response to question 61(d) from the Panel.

### **Export Credit Guarantee Issues**

Paras. 135-146 and Exhibits US-25 through US-29

*Subject:* New US arguments concerning the negotiating history of Article 10.2 AoA.

*Good cause:* These arguments should have been but were not raised in the United States' 11 August response to questions 88(a) and 88(b) from the Panel.

Paras. 147-152

*Subject:* New US argument that had it intended to subject export credit guarantees to the AoA and the SCM Agreement, it would have included them in the calculation of its reduction commitments.

*Good cause:* This argument should have been but was not raised in the United States' 11 August response to questions 88(a) and 88(b) from the Panel.

Paras. 156-157, 160-162, and Exhibits US-31 and US-32

*Subject:* New US arguments and data concerning the ICRA formula and the reestimate process.

*Good cause:* These arguments and data should have been but were not raised in the United States' 11 August response to questions 81(d)-(g) from the Panel.

Para. 169 and Exhibit US-33

*Subject:* New US assertion that rescheduled debt is not in arrears.

*Good cause:* This argument and evidence should have been but was not raised in the United States' 11 August response to question 81(a) from the Panel.

Paras. 172, 174-175:

*Subject:* US argument that item (j) does not require recovery of long-term losses.

*Good cause:* This argument should have been but was not raised in response to the United States' 11 August responses to questions 74 and 77 from the Panel.

Paras. 186-191, and Exhibits US-34 through US-37

*Subject:* US argument that “forfeiting” is analogous to CCC export credit guarantee programs for agricultural commodities.

*Good cause:* This argument should have been but was not raised in the United States' 11 August response to question 76 from the Panel (as well as questions 71(a) and 73).

Brazil notes that the United States has for the first time addressed Brazil's “threat of circumvention” claims under Article 10.1 AoA (paras. 180-183). In particular, Brazil notes new US arguments contrasting CCC guarantee programs from FSC (and the panel and Appellate Body decisions concerning the *United States – FSC* dispute), asserting that there is no legal entitlement to CCC guarantees, and asserting (*via* new data) compliance with scheduled quantitative reduction commitments. Consistent with the purpose of this exercise – offering an opportunity to comment solely on arguments that should have been addressed in the United States' 11 August responses to questions and to new documents proffered by the United States for the first time in its Rebuttal Submission – Brazil is not asking for an opportunity to address the US “circumvention” arguments in its 27 August submission. Brazil would be pleased, however, to address any questions the Panel has concerning these new US arguments.

Brazil thanks the Panel and the Secretariat for its consideration of this request and for its continuing work on this dispute.

## ANNEX K-13

### LETTER FROM THE UNITED STATES

25 August 2003

In the Panel's fax dated 19 August 2003, the Panel noted the possibility that a party might lack sufficient opportunity to comment on information, argumentation and documents submitted by the other party in its rebuttal submission, and the Panel invited the parties to request the opportunity to comment on specific material after receiving each other's rebuttal submissions. My authorities have instructed me to submit this letter requesting such an opportunity.

Because of Brazil's tactical decision to defer presenting its entire case with respect to Peace Clause issues, the United States is once again put in the difficult position of attempting to respond to extensive, wholly new evidence and arguments in an extremely compressed time frame. Furthermore, we note the comment of Brazil in its rebuttal submission that it "provides *additional evidence* establishing that under *a variety of interpretations and methodologies* the US level of support granted to upland cotton in MY 1999-2002 was far greater than the support decided in MY 1992".<sup>1</sup>

Under paragraph 13 of the Panel's working procedures, all evidence was supposed to have been submitted no later than during the first substantive meeting, except evidence necessary for purposes of rebuttals or answers to questions. Brazil has not explained why it could not have presented this evidence by the first Panel meeting or why this evidence is necessary for purposes of rebuttal. A quick review of the "additional evidence" appears to indicate that this is all evidence that should have been presented no later than the meeting with the Panel. Accordingly, unless Brazil can show "good cause" for withholding this evidence from the Panel and the parties until now, the United States would respectfully request the Panel to disregard this evidence.

In light of the shortness of time, the United States requests the opportunity to comment with respect to a number of issues raised for the first time in Brazil's rebuttal submission and comments on answers to questions, as listed below. With respect to each such issue, the United States demonstrates that there is good cause to permit such comments. The United States is requesting the opportunity to comment (even though some of this evidence may be disregarded by the Panel in response to the US request) so as to avoid further delay, pending the Panel's finding in response to the request to disregard the evidence.

#### Rebuttal Submission:

Paras. 4-9: Brazil for the first time responds to the US argument, made in both its opening and closing oral statements at the first panel meeting, that Brazil's interpretation of paragraph 6(b) would create an inconsistency between that provision and the fundamental requirement of the first

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<sup>1</sup> Rebuttal Submission of Brazil, para. 1 (22 August 2003) (emphasis added). We also note that Brazil had indicated in its answers to the Panel's questions that it was deferring presenting its case on several issues pending receipt of the answers to the questions by the United States and in at least one instance by the European Communities (see *e.g.*, paragraph 80 of Brazil's answers to the Panel questions). Brazil's rebuttal submission for the first time now presents this material.

sentence of Annex 2, paragraph 1. This is a new argument not previously made to the Panel, for example, in either of Brazil's oral statements or in its answers to questions from the Panel.<sup>2</sup>

Paras. 24-26: On the basis of a previously submitted exhibit, Brazil now advances for the first time the argument that production flexibility contract payments may be considered "support to upland cotton" on the basis that such payments were not made "in favour of agricultural producers in general" because payments were linked to acres that produced any of seven crops during a fixed and defined base period.<sup>3</sup> This argument could have been made in Brazil's first submission, either of Brazil's oral statements, or in Brazil's answers to questions from the Panel.<sup>4</sup>

Paras. 29-35: In these paragraphs, Brazil for the first time advances an argument for market loss assistance payments that parallels the argument made for the first time in paragraphs 24-26 with respect to production flexibility contract payments: that market loss assistance payments may be considered "support to upland cotton" on the basis that such payments were not made "in favour of agricultural producers in general" because payments were linked to acres that produced any of seven crops during a fixed and defined base period. In addition, Brazil introduces a raft of assertions, new data, and calculations, including some with respect to crops other than upland cotton, to assert that production flexibility contract payments and market loss assistance payments are support for upland cotton because of costs for upland cotton farmers.<sup>5</sup> Brazil could have presented these data, calculations, and arguments in its previous submissions and statements.

Paras. 36-46: As with production flexibility contract payments and market loss assistance payments, Brazil argues (again for the first time) that direct payments may be considered "support to upland cotton" on the basis that such payments were not made in favor of all agricultural producers, and Brazil introduces a raft of assertions, new data, and calculations, including some with respect to crops other than upland cotton, to assert that direct payments are support for upland cotton because of costs for upland cotton farmers.<sup>6</sup> Brazil could have presented these data, calculations, and arguments in its previous submissions and statements.

Paras. 48-50: Brazil makes a nearly identical argument for counter-cyclical payments as for those indicated above: that is, these payments may be considered "support to upland cotton" on the basis that such payments were not made "in favour of agricultural producers in general" and on the basis of the same or similar assertions, new data, and calculations with respect to costs and subsidies for upland cotton and other crops.<sup>7</sup> Brazil could have presented these data, calculations, and arguments in its previous submissions and statements.

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<sup>2</sup> See, e.g., Brazil's Answer to Question 27 from the Panel (para. 39 failed to make any such argument in the course of the answer alleging that US decoupled income support has more than a minimal effect on production (and thus is inconsistent with the fundamental requirement of the first sentence of Annex 2, paragraph 1) because such support "limit[s] payments based on the type of production").

<sup>3</sup> Indeed, none of the citations provided by Brazil in these paragraphs discloses the argument Brazil now advances. See Brazil's Rebuttal Submission, paras. 24-35 fn. 38-44.

<sup>4</sup> See Brazil's Answer to Question 23 from the Panel (paras. 25, 27: noting base acreage and addition of crops to base acreage under direct payments program but failing to argue that limitations on base acreage render measure product-specific).

<sup>5</sup> See, e.g., Brazil's Rebuttal Submission, para. 31 fn. 68, 69 (both of these footnotes contain new evidence that should have been presented by the first Panel meeting); *id.*, para. 33 fn. 71 (disclosing new calculation).

<sup>6</sup> See, e.g., Brazil's Rebuttal Submission, para. 39 fn. 84 (this footnote contains new evidence that should have been presented by the first Panel meeting), 85.

<sup>7</sup> See, e.g., Brazil's Rebuttal Submission, para. 50 fn. 112, 113, 114 (all of this is new evidence that should have been presented by the first Panel meeting).

Paras. 55-59: With respect to crop insurance payments, Brazil introduces new evidence (for example, relating to availability of specific policies) and arguments to claim that these payments are product-specific support to cotton.<sup>8</sup> Brazil could have presented this evidence and argument in its previous submissions and statements.

Paras. 73, 75-77: Brazil introduces revised data and calculations relating to alleged budgetary expenditures for upland cotton and an AMS for upland cotton.<sup>9</sup>

Paras. 88, 90-94: Brazil misstates the US position with respect to the Peace Clause analysis for support provided in past marketing years. Brazil also asserts, erroneously, the US Peace Clause interpretation is inconsistent with the position taken by the United States in previous WTO dispute settlement proceedings. These arguments could have been presented by Brazil earlier -- for instance, during its first oral statement to the Panel<sup>10</sup> or in its answers to the Panel's questions.<sup>11</sup>

#### Brazil's Comments on U.S. Answers

Paras. 44-45: Brazil for the first time presents an argument claiming that the US interpretation of paragraph 6(b), made in both its opening and closing oral statements at the first panel meeting, would render paragraph 6(e) a nullity. These arguments could have been presented in Brazil's answers to the Panel's questions. (*See also* paragraphs 4-9 of Brazil's Rebuttal Submission, discussed above.)

Paras. 54-56: In the guise of a "general comment" to questions 47-69, Brazil asserts for the first time that the US argument relating to the level of support decided by US measures does not account for various forms of product-specific support. This erroneous assertion could have been presented as early as Brazil's oral statements at the first panel meeting or in its answers to the Panel's questions.

The United States thanks the Panel for its consideration of these requests. In addition, like Brazil, we would of course also welcome the opportunity to respond to any further questions the Panel may have. Moreover, should the Panel consider it useful to hear further argumentation from the Parties, we would of course be pleased to make additional submissions or appear before the Panel on this complicated and sensitive matter.

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

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<sup>8</sup> *See, e.g.*, Brazil's Rebuttal Submission, para. 56 fn. 131, 132.

<sup>9</sup> *See, e.g.*, para. 73 fn. 172.

<sup>10</sup> *See, e.g.*, Brazil's Oral Statement at First Panel Meeting, paras. 40-43.

<sup>11</sup> *See, e.g.*, Brazil's Answer to Question 15 from the Panel.

## ANNEX K-14

### LETTER FROM BRAZIL

25 August 2003

The Government of Brazil is in receipt of a letter from the United States dated 25 August. Brazil received that letter at 6 p.m. today. Brazil requests the Panel to take the following action as set forth below.

#### *Rejection of US request as untimely:*

Brazil requests that the Panel disregard the United States' request to have the Panel grant it permission to offer rebuttal arguments to Brazil's 22 August rebuttal submission and comments on the US answers. This letter, like *all* prior US submissions to the Panel, was not timely filed. This latest request was made at least 60 hours too late. The Panel's Communication of 19 August 2003 stated:

when each party receives the other party's rebuttal submission, it is invited, *without delay* to draw the Panel's attention to any specific material on which it has not had an opportunity to comment . . . ."

The Communication further stated that "the Panel is willing to grant such permission on Saturday, 23 August 2003, if necessary."

Brazil interpreted this Communication as requiring it to make the request on Friday evening, 22 August, immediately after reviewing the US Rebuttal Submission. Unfortunately, the US Rebuttal Submission was sent shortly before midnight on Friday, 22 August and could only be accessed by the Brazilian Mission in Geneva at 9:00 a.m. Geneva time on Saturday, 23 August. Brazil informed the Secretariat on Friday evening that it could not make its request that evening since it had not received the US Rebuttal Submission. Brazil further informed the Secretariat on Saturday morning that it would file a request by 2:00 p.m. on Saturday.

By contrast, the United States received Brazil's 22 August Rebuttal Submission and Brazil's 22 August Comments to the US Answers and Brazil's exhibits at 5:30 p.m. Geneva time on Friday, 22 August. Regardless, the United States waited more than 72 hours to file its request that the Panel strike certain information in Brazil's 22 August submissions, and its request for leave to file comments on those Brazilian submissions.

Brazil has endured repeated violations by the United States of the Panel's procedural deadlines over the past three months. If the Panel's procedures are to mean anything, they must be enforced. There is no doubt that this latest request by the United States is well out of time. It was not made "without delay". There is no basis offered by the United States for such delay. There is none. Accordingly, the Panel should reject the United States request as untimely.

#### *Reject US Request to Strike Brazil's Rebuttal Evidence and Argument*

The United States also requests the Panel to strike large amounts of Brazil's Rebuttal Submission and Brazil's documents with the argument that Brazil allegedly violated paragraph 13 of the Panel's working procedures. Brazil notes the irony of the United States invoking the Panel's

working procedures given their repeated violations of such procedures over the past three months. Nevertheless, the United States ignores the Panel's Determination of 20 June, in which it stated, in paragraph 20, last bullet:

For the purposes of allowing the Panel to express its views on the exemption conditions of Article 13 of the *Agreement on Agriculture* by 1 September 2003, in relation to those measures which may be affected by Article 13, *full and complete submissions on factual and legal issues related to Article 13 in this dispute will need to be provided, at the latest, in the parties' rebuttal submissions (to be submitted on 22 August 2003).*

Brazil interpreted this ruling as permitting it to provide no later than 22 August all of its evidence and argument that had not already been provided in its earlier submissions. This is the manner in which it treated the new evidence and arguments presented by the United States in its Rebuttal Submissions. Therefore, Brazil did not, in its 23 August letter to the Panel, seek to "strike" new US evidence included in the US 22 August Rebuttal Submission, but simply asked to be provided with an opportunity to respond to that evidence.

Therefore, there is no basis for the US request.

*Response to US requests to comment on Brazil's 22 August Submissions*

The United States complains at several points in its letter that Brazil is presenting for the first time, in its 22 August Rebuttal Submission, responses to US arguments made in the US opening and closing oral statements at the first panel meeting. Unless particular questions from the Panel offered Brazil the opportunity to respond to arguments made by the United States in the US statements at the first panel meeting, however, Brazil's first opportunity to respond to the US arguments was in Brazil's 22 August Rebuttal Submission.

Brazil has listed below its comments to the requests by the United States:

*Brazil's 22 August Rebuttal Submission*

Paragraphs 4-9:

These arguments were made by Brazil in rebuttal of US and EC arguments advanced in their first submissions, oral statements and answers to questions, or reflect summaries of earlier arguments made by Brazil. The Panel should, therefore, reject the US request to comment on them.

Paragraphs 24-26:

This evidence and arguments are based on exhibits presented previously and rebut US arguments that PFC payments do not constitute support to upland cotton. Contrary to the US assertion, there is no question by the Panel to which this evidence and arguments would be responsive. Therefore, the US request should be rejected.

Paragraphs 29-35:

This evidence was presented by Brazil in rebuttal to US arguments that market loss assistance payments do not constitute support to upland cotton. The US does not assert that there would have been a question by the Panel to which this evidence and arguments would be responsive. Therefore, the US request should be rejected.

Paragraphs 36-46:

This evidence was presented by Brazil in rebuttal to US arguments that direct payments do not constitute support to upland cotton. The US does not assert that there would have been a question by the Panel to which this evidence and arguments would be responsive. Therefore, the US request should be rejected.

Paragraphs 48-50:

This evidence was presented by Brazil in rebuttal to US arguments that counter-cyclical payments do not constitute support to upland cotton. The US does not assert that there would have been a question by the Panel to which this evidence and arguments would be responsive. Therefore, the US request should be rejected.

Paragraphs 55-59:

This evidence was presented by Brazil in rebuttal to US arguments that crop insurance payments do not constitute support to upland cotton. The US does not assert that there would have been a question by the Panel to which this evidence and arguments would be responsive. Therefore, the US request should be rejected.

Brazil's 22 August Comments on US Answers

Paragraphs 44-45:

These arguments were made in rebuttal of US arguments that the restrictions on planting flexibility contained in the US PFC and direct payment programmes are consistent with Annex 2, paragraph 6. Therefore, the US request should be rejected.

Paragraphs 54-56:

These arguments are a direct reaction and comment to new information provided by the United States in response to Question 67. It is entirely appropriate to react to this information and include it in the peace clause calculation. Therefore, the US request should be rejected.

Brazil would like once more to thank the Panel for the consideration of these requests.

## ANNEX K-15

### LETTER FROM THE UNITED STATES

27 August 2003

Attached please find the US comments on new material in Brazil's rebuttal filings and answer to the additional question from the Panel in the dispute, *United States – Subsidies on Upland Cotton* (DS267). The United States wishes to take this opportunity to thank the Panel for its rapid consideration of, and response to, the US request to file these comments.

In Brazil's letter to the Panel of 14 August 2003, Brazil raises the concern that "basic notions of due process" require providing parties the opportunity to comment on new material. Brazil's concern and the exchanges with the Panel and the parties over the days since that letter have highlighted a particular aspect of the unique proceedings in this panel process. As a result, my authorities have instructed me to draw another matter to the Panel's attention. The United States notes that the Panel intends to express its views on the issue of the Peace Clause by 5 September 2003. No prior panel nor the Appellate Body has made findings on the Peace Clause. The submissions and material provided to the Panel to date have demonstrated that the issues involved in the Panel's findings on the Peace Clause are fact-intensive, complex and sensitive.

While prior panels have made preliminary rulings on procedural issues, no prior panel has been confronted with the situation presented in this dispute. Here, the Panel will be making substantive findings on key provisions of the covered agreements. In this connection, the United States takes note of the Panel's observation that the fairness of panel proceedings may require ensuring that the parties receive sufficient opportunity to comment on new material.<sup>1</sup> The United States also takes note of the provisions of paragraph 2 of Article 15 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* in which Members have agreed that parties should have an opportunity to comment on a panel's findings before they are final.

In this dispute, the Panel's findings on the Peace Clause are presumably intended to be dispositive of substantive claims and arguments of the parties for the remainder of the panel proceedings. Because of the substantive nature of those findings, the Panel's findings on 5 September will need to provide the factual basis and basic rationale underlying the findings. Both parties have a significant interest in those findings, in terms not just of the ultimate conclusion reached, but also in terms of the factual findings, rationale underlying those findings, and an understanding of the scope of those findings.<sup>2</sup> Accordingly, in keeping with Article 15.2 of the DSU, and in order to be fair to both parties, the United States respectfully requests that the Panel provide Brazil and the United States with the Panel's 5 September Peace Clause findings in an interim form and provide the parties an opportunity to comment on the Panel's findings.<sup>3</sup> The United States suggests that, in keeping with the

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<sup>1</sup> In the Panel's letter of 19 August 2003.

<sup>2</sup> Recent experience in the DSU with panel preliminary rulings has demonstrated the significant effect they can have on the parties and the course of the panel proceedings.

<sup>3</sup> The United States assumes that the Panel will also include its findings on the Peace Clause in its interim report issued towards the end of the panel proceedings. However, at that point the findings would have already determined the course of the remainder of the panel proceedings and it would be too late for either party to provide comments in a timely manner that would help ensure the accuracy of the facts on which the findings were based or to facilitate a clear understanding of the legal basis for those findings. Accordingly, the opportunity to comment at that stage would be inadequate to preserve the rights of both parties and could

practice in other panel proceedings and this Panel's timetable for the interim review in this dispute, two weeks should be sufficient time to comment.

The United States would be happy to provide further elaboration or to respond to any questions the Panel may have with respect to this request.

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

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instead prejudice those rights. For the same reason, it could be perceived as circumventing the provisions of Article 15.2 of the DSU to issue substantive findings on the claims made (and that have effect on the parties) without an opportunity for the parties to comment prior to the findings having an effect.

## ANNEX K-16

### LETTER FROM BRAZIL

28 August 2003

The Government of Brazil is in receipt of a letter from the United States dated 27 August. Brazil notes that the US Comments to Brazil's 22 August Rebuttal Submission were filed five hours *after* the deadline of 5:30 p.m. In the covering letter to those Comments, the United States requests that the Panel provide the Parties with an opportunity to comment on an interim form of the Panel's 5 September rulings regarding peace clause-related issues.

Brazil opposes this request for the reasons stated below.

The Panel's ruling of 20 June 2003 revising the timetable for this dispute did so in order to "organize [its] proceedings in an orderly, effective and efficient manner". This 20 June 2003 decision, in the view of Brazil, addressed the concerns of Brazil that the extra briefing and meeting proposed by the United States on peace clause issues would not result in an overly lengthy delay of the resolution of Brazil's serious prejudice claims. To that end, the Panel established the date of September 1 for the Panel's decision and September 4 for Brazil to file its "Further Submission." Those dates were later extended to September 5 and 9 respectively pursuant to a 30 July Panel decision to accommodate a request of the United States for additional time to answer the Panel's questions.

Brazil is ready to file its Further Submission no later than 5:30 p.m. on 9 September. Establishing an unprecedented "interim review" for the peace clause preliminary finding will unquestionably delay Brazil's filing of its Further Submission and the Second meeting of the Panel scheduled for 79 October. This request will upset the balance created by the Panel's 20 June proceeding and negatively impact Brazil's rights to a speedy resolution of this dispute pursuant to DSU Article 3.3. The Panel was established more than five months ago and Brazil has yet to file its first submission on many of its claims.

Brazil notes further that DSU Article 15.2 provides an opportunity for the parties to request the panel to review "precise aspects of the interim report prior to the circulation of the final report to the Members". This actual text is contrary to the US statement that Article 15.2 provides Members "an opportunity to comment on a panel's finding before they are final". The parties' rights under Article 15.2 are explicitly recognized and preserved by paragraph 16 of the Panel's Working Procedures.

The US letter argues that the Panel must set forth its complete and full reasoning and factual findings in its 5 September decision. Brazil notes that paragraph 20 of the Panel's 20 June Decision stated that it would "express its views on whether measures raised in this dispute satisfy the conditions in Article 13 of the Agreement on Agriculture" and would "express its views in the form of ruling...". Brazil does not and would not presume or suggest what form the Panel's "ruling" will or should take. However, it is within the Panel's discretion, as with many previous panels, to provide the basic rulings on the preliminary issue and then to further elaborate such rulings in the final determination.

As the United States recognizes, there will be an opportunity for the parties to comment on the interim report that the Panel will issue following the second meeting of the Panel with the Parties.

Brazil believes that its procedural rights will be fully protected by the existing procedural safeguards provided by the interim review process. The United States has provided no legitimate reasons why its rights would not also be protected. Both parties will have an equal opportunity to comment on any decision by the Panel regarding the peace clause at that time.

In sum, Brazil requests that the Panel reject the United States request to establish an interim review process to the Panel's 5 September ruling.

## ANNEX K-17

### LETTER FROM THE UNITED STATES

29 August 2003

By letter of 28 August 2003 Brazil objects to the US request in the dispute *United States – Subsidies on Upland Cotton* (DS267) that the Panel provide Brazil and the United States with the Panel's September 5 Peace Clause findings in an interim form and provide the parties an opportunity to comment on the Panel's findings. My authorities have instructed me to submit this response to Brazil's letter.

The United States has reviewed carefully the concerns raised by Brazil in its letter. Brazil's objection appears solely to be based on the concern that granting this request would mean that the parties would have time to review and provide comments to assist the Panel in finalizing the Panel's findings on this key element of the dispute. Brazil expresses concern that the time for comment may result in some shifting of the schedule for the remainder of the dispute.<sup>1</sup>

Brazil acknowledges that the parties have the right under the DSU to comment on the Panel's Peace Clause findings before they are made final. The only apparent concern for Brazil is when that right to comment can be exercised. For Brazil, the comments should only be provided when they are too late to be effective. According to Brazil's approach, while it is to be expected that the Panel could alter any part of its findings in response to a party's comments, that alteration would come after the Panel's proceedings had already taken place on the basis of the preliminary findings. Any alteration would be unable to affect the past proceedings. The United States is unable to understand how this could possibly mean, as Brazil asserts, that a party's "procedural rights will be fully protected by the existing procedural safeguards provided by the interim review process".

Brazil would compound the problem by suggesting that findings on key substantive claims may be made in just a basic form, with none of the underlying factual basis or legal reasoning. Brazil asserts that would be in keeping "with many previous panels". Brazil's assertion has no foundation. No previous panel has ever been in the current situation, nor has any previous panel made findings part-way through a dispute on the Peace Clause or on any substantive issue, let alone one as factually complex with so many legal questions of first impression. The Panel's situation is unprecedented, thus it is no surprise that there are no precedents on which to draw. However, there *is* the text of the DSU on which to draw. As the United States explained in its 27 August 2003, letter, Article 15.2 of the DSU provides the parties with a right to comment on findings in an interim form. Brazil argues for an approach that would render that right largely hollow.

The United States has difficulty perceiving the basis for Brazil's objections. As the United States has argued, Brazil is barred by virtue of the Peace Clause from pursuing most of its claims in this dispute. It is strange then that Brazil would not want an opportunity to comment on any finding as to whether the Panel should hear evidence and argument on Brazil's claims.

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<sup>1</sup> However, granting the request would not appear necessarily to mean any change in the date of circulation of the Panel's final report.

Brazil has failed to present a basis for denying the parties a timely and effective opportunity to exercise their right to comment on the Panel's findings. Accordingly, the United States respectfully renews its request that the Panel provide Brazil and the United States with the Panel's September 5 Peace Clause findings in an interim form and provide the parties an opportunity to comment on the Panel's findings.

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

## **ANNEX K-18**

### **LETTER FROM BRAZIL**

29 August 2003

The Government of Brazil is in receipt of a letter from the United States dated 29 August responding to Brazil's letter of 28 August. Brazil regrets the US continuation of the debate over its unprecedented "interim review" proposal that distracts the Panel and Brazil from substantive work on this dispute. In response, Brazil refers to the arguments set forth in its letter of 28 August that provides the Panel with the basis to reject the US request for a special interim review procedure.

Brazil notes that the United States does not deny that the proposed new interim procedure would result in additional delay. This is apparently not a concern to the United States. But it is a concern to Brazil. The United States ignores the balance in the Panel's June 20 decision that struck the balance protecting Brazil's rights under Article 3.3 of the DSU.

Reviewing the Panel's decision in the Article 15.2 existing procedures will not, as the United States claims, render the parties rights "largely hollow." The practical purpose of the interim review exercise under Article 15.2 is for parties to point out any particular errors of fact or citations that the Panel may wish to correct in the final report. Thus, the "timely and effective right to comment on the Panel's finding" can be accomplished in this case -- as Brazil suggests -- through the use of the normal Article 15.2 procedures in the normal timeframe for making such comments.

## **ANNEX K-19**

### **LETTER FROM BRAZIL COMMENTS RE REVISED TIMETABLE**

9 September 2003

1. Brazil welcomes the invitation to comment on the draft further revised timetable, as attached to the Panel's communication of 5 September 2003. In this respect, Brazil recognizes that the Panel must be given all the time necessary to make the best and most objective examination of the matter before it in order to provide the Parties to the dispute with a report founded on a sound legal basis and an accurate scrutiny of the facts. Nonetheless, the proposed date for the second substantive meeting with the Parties poses a difficulty for Brazil given commitments previously scheduled by members of the legal team according to the earlier adopted timetables. Indeed, the Brazilian team would face serious difficulties to participate in meetings in Geneva from 12 to 19 November 2003.
2. Brazil would further recall that any adjustments to the draft further revised timetable should take into account the time limits established in DSU Articles 12.8 and 12.9.
3. That said, Brazil would kindly request the Panel to examine the possibility of modifying the date for the second substantive meeting with the Parties. The subsequent deadlines would be adjusted accordingly.

## ANNEX K-20

### LETTER FROM THE UNITED STATES COMMENTS RE REVISED TIMETABLE

9 September 2003

In the Panel's communication of 5 September 2003, the Panel invited the parties to comment on the draft further revised timetable attached to the communication. My authorities have instructed me to submit the following comments on the draft timetable and, in addition, to request that the further submission of the United States be due on 2 October rather than 23 September.

With respect to the draft timetable, the United States notes that the Panel provides separately for comments on answers to questions, due on 27 October, one week after the rebuttal submissions and answers to questions. The United States appreciates the value of an opportunity for the parties to comment on each others' answers to questions. However, in this case that opportunity comes at the cost of adequate time to prepare the rebuttal submissions and answers to questions themselves. Given the number and complexity of issues in this dispute, and the opportunity available at the second substantive meeting for parties to comment on each other's submissions<sup>1</sup> and responses, it would be best to dispense with the 27 October comments, and instead have 30 October – three weeks after 9 October – as the due date for rebuttal submissions and answers to questions. The first substantive meeting may finish as late as 9 October, leaving less than two weeks for rebuttals and answers to questions<sup>2</sup> if they are due on 22 October. The United States notes that DSU Appendix 3 provides as a guideline for 2-3 weeks between the first substantive meeting and rebuttal submissions. Given the scope and scale of argumentation that has prevailed to date, and that is likely to continue, the United States believes that at least the three week guideline provided for in Appendix 3 is necessary for the parties to have adequate time to prepare their rebuttal submissions and answers.

The United States also wishes to request that it have until 2 October to prepare its further submission. Brazil noted in its submission of 24 June 2003 that its submission due today would include "extensive evidence"<sup>3</sup>, and we expect that it will also include extensive new argumentation. It is therefore likely to require significant effort and time for the preparation of a response. Brazil has had months to prepare this submission, which is a first written submission for purposes of this part of the proceedings. Appendix 3 provides for 2-3 weeks for a first submission of the party complained

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<sup>1</sup> The United States notes as well that comments on rebuttal submissions could be of equal importance or value, and those will be presented at the Panel meeting.

<sup>2</sup> The United States assumes that the questions may be at least as comprehensive at this stage as they were in connection with the Peace Clause, and therefore require significant time and care to research, develop and consult on the answers to those questions.

<sup>3</sup> Brazil stated in paragraph 18 of its submission of 24 June 2003,

**Consistent with the Panel's decision of 20 June decision, and because (1) Brazil's claim under GATT Article XVI:3 involves export subsidies conditionally exempt from action and (2) Brazil's actionable subsidy claims under ASCM Articles 5 and 6 involve domestic support and export subsidies conditionally exempt from action, Brazil will only present its extensive evidence in support of those claims in its "further submission".**

against<sup>4</sup>, and the burdens imposed by this dispute clearly warrant at least a three-week response period.

Preparing the submission in three weeks would likely be extremely challenging under any circumstances. However, the timing for this submission involves unusual circumstances. Many of the US officials involved in this dispute are attending the Fifth Ministerial Conference in Cancun this week and are therefore unavailable to assist with preparation of the submission. At the same time, the head of the US litigation team in this dispute became a father three weeks ahead of schedule. As a result, he will have limited time over the next week (at least) to prepare the US response. For all of these reasons, the United States respectfully requests that its next submission be due no earlier than 2 October.<sup>5</sup>

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<sup>4</sup> Indeed, in the DSU negotiations many Members have indicated that this is too short a period of time and that the timeframes suggested in Appendix 3 of the DSU for first submissions should be reversed between complaining parties and responding parties.

<sup>5</sup> The United States notes that the third party submissions could then be due on 6 October.

## ANNEX K-21

### LETTER FROM BRAZIL COMMENTS RE REVISED TIMETABLE

10 September 2003

Brazil is in receipt of a letter dated 9 September 2003 from the United States commenting on the proposed timetable and requesting to be able to file their Further Submission on 2 October.

Brazil opposes the US request that it be granted until 2 October to file its Further Submission for the reasons set out below:

First, the United States has been on notice of Brazil's claims and arguments on the adverse effects portion of this dispute for almost one year when Brazil filed its 27 September 2002 request for consultations (WT/DS 267/1). The Annex to this comprehensive consultation request set forth in detail arguments, facts, and evidence (mostly consisting of US Government documents) that were available to Brazil. The great majority of these arguments and evidence are now found in Brazil's Further Submission. If this information and the three sessions of the consultations discussing these issues were not enough, Brazil's First Submission at paragraphs 1-15 outlined in summary form many of the principle arguments (and evidence) supporting Brazil's adverse effects claims. All of these arguments are again repeated in Brazil's Further Submission. Paragraphs 26-106 of Brazil's First Submission also set out comprehensive facts upon which Brazil relies but not repeated in its Further Submission. Thus, in view of the transparency of Brazil's earlier submissions, the United States' claims concerning the alleged "complexity" of this dispute as justifying more time to prepare is somewhat disingenuous.

Second, Brazil and the Third Parties need sufficient time between the filing of the US Further Submission to prepare their oral statements for the second session of the First Meeting on 7-9 October. Providing the United States until 2 October to file its Further Submission will not provide the Panel, Brazil, or the third parties enough time to prepare for the hearing on 7-9 October. Given the previous practice of the United States to file its submissions six hours late (the equivalent of unilaterally granting itself an additional working day to file each submission, and of giving Brazil one less day to respond), the US request to file on 2 October probably means that Brazil will not be able to review the submission until 3 October.

Third, Brazil (and no doubt some of the third parties) has relied upon the long-standing date of 7-9 October for the resumed session of the First Meeting. Brazil notes that while the United States' letter does not ask to reschedule the date of the resumed Second Session of the First Substantive meeting, the effect of its request to file its Further Submission on 2 October does just that. Brazil strongly opposes any delay in the resumed session of the First Meeting. Brazil intends to present at least three witnesses at the resumed session - Professor Daniel Sumner, Andrew Macdonald, and an upland cotton producer from Brazil. Each of these individuals (as well as the Brazilian delegation travelling from Brasilia) have complicated schedules and they have for some time rearranged their schedules to attend the hearing on 7-9 October.

Fourth, the working procedures of the DSU provide for 2-3 weeks for the Party complained against to file its First Written Submission and 2-3 weeks for the Parties to file their Rebuttal submissions. The United States' request to file on 2 October is beyond that maximum amount of time.

However, in the spirit of compromise, and particularly in view of circumstances set out in the fourth sentence of the last full paragraph of the US letter, Brazil could agree to an extension of time *no later than* Thursday, 25 September 2003 at 5:30 p.m. *Geneva* time. In this regard, Brazil notes that both the United States and Brazil will have, under the revised timetable for Panel proceedings, numerous opportunities to brief the various issues in the adverse effects portion of this dispute and thus to fully articulate, expand, and clarify their arguments and supporting evidence.

The United States also requests that the parties be provided until 30 October to file their rebuttal submissions. Brazil has no objection to this request but believes it is important to keep the 22 October date for answering questions intact. Under Brazil's proposed procedure – which was used in the “peace clause” portion of the proceedings – the parties could use their Rebuttal Submissions as the vehicle for commenting on the Parties' answers to the questions.

## ANNEX K-22

### LETTER FROM THE UNITED STATES RE DRAFT REVISED TIMETABLE

11 September 2003

My authorities have instructed me to respond to Brazil's letter of 10 September 2003, objecting to the US request for an extension to file its Further Submission.

In this letter, Brazil suggests first that its request for consultations offered sufficient notice of Brazil's arguments that the United States does not now require sufficient time to respond to the Brazilian Further Submission – a submission so extensive that it had to be divided in two for electronic transmission, and which in addition included extensive economic annexes. According to Brazil, the consultation request and additional summaries of Brazil's arguments render the US reference to the complexity of the issues raised by Brazil "disingenuous."

Brazil appears to be making the implausible suggestions that it is possible to respond to arguments that have not yet been written, and that complex issues become less complex if summarized in advance. One need only note again the size of Brazil's submission to conclude that Brazil itself did not consider its previous summaries to adequately present its arguments; yet Brazil considers that those summaries should have provided a sufficient basis for the United States to prepare its response. It is a statement of the obvious that Brazil's 214-page Further Submission represents the first time Brazil has set forth its detailed arguments and evidence (including the lengthy economic analysis found in the annexes). It is this Brazilian submission, and not anticipatory summaries, to which the United States must have the ability to respond. Brazil's suggestion that the United States need not have adequate time to respond to Brazil's massive submission on the basis that Brazil's argumentation cannot, under the circumstances, be considered "complex," strains credulity.

Brazil also objects to the US extension request on the ground that Brazil and third parties need adequate time to prepare for the second session of the first panel meeting. As regards Brazil, this amounts to an argument that while one week is not enough time for it to prepare for the panel meeting, two weeks must be considered sufficient for the US to respond to Brazil's 214-page submission and economic annexes. Apparently, Brazil considers it fair that, after having had months to prepare its Further Submission, the amount of time for the US response (two weeks) should be no greater than that provided to Brazil to prepare for the first panel meeting. While the United States appreciates that the time for third-party submissions will be limited, this is frequently the case in disputes given party and panel schedules. Further, third parties are free to use the third-party session to elaborate on their written statements.

Brazil is correct when it notes that the United States has not asked the Panel to postpone the date of the first panel meeting. However, it errs when it says that the US request would require a change in the date of that meeting. To the contrary, the United States made its requests for modification of the timetable in consideration of the dates of the panel meetings and on the assumption that it might be difficult for the Panel to change that date in light of the panelists' differing schedules. Indeed, but for seeking to accommodate the panelists' schedules by retaining the meeting dates, the United States would have requested a longer response period appropriate to the argumentation and evidence Brazil has submitted.

At the same time, the United States notes that Brazil has asked the Panel to postpone the date of the second meeting. The United States has no objection in principle to this request, but would request that it be consulted on any new dates that might be possible in light of the panelists' schedules. Brazil is not the only one with "complicated schedules."

Brazil also notes that Appendix 3 provides *as a guideline* 2-3 weeks for a responding party's first submission, and states that the US request exceeds that period (by two days). Brazil ignores not only the fact that a panel is free to adjust these time frames, but that a panel is required to adjust these time frames. Article 12.4 of the DSU states that panels must "provide sufficient time for the parties to the dispute to prepare their submissions." Indeed, in the past several disputes in which the United States has been a *complaining* party, panels have on average provided five weeks for the *responding* party to prepare its first written submission, twice the average called for under the DSU.<sup>1</sup> Article 12.4 applies fully to this proceeding, and the time requested by the United States to prepare its submission is more than justified.

In light of the above, and now with confirmation that Brazil's Further Submission does in fact contain "extensive evidence" and "extensive new argumentation", as foreshadowed by the US letter of 9 September, 2003<sup>2</sup>, the United States respectfully renews its request that the Panel provide it until 2 October 2003, to submit its Further Submission. We thank the Panel once again for its consideration of this and previous requests.

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<sup>1</sup> Indeed, of the last 23 panels to which the United States has been a party, the single shortest time period for preparing a responding submission has been the 17 days provided in this proceeding, a marked contrast from the over 35 days provided to responding parties when the United States has been the complaining party.

<sup>2</sup> US letter of September 9, 2003, para. 3.

## **ANNEX K-23**

### **LETTER FROM BRAZIL**

16 September 2003

Brazil thanks the Panel for its "Proposed revision to timetable for Panel Proceedings" of 12 September 2003.

Brazil notices that the second hearing with the parties is scheduled for 2 and 3 December, receipt of answers to Panel's questions for 22 December and receipt of parties' comments on each other's answers for 19 January 2004. Brazil also appreciates that establishing the timetable with the parties, the panelists and the Secretariat requires considerable coordination.

In light of the several changes made to the original schedule and also of the length of time between the second hearing and the answers to questions from the Panel, Brazil would like to suggest that these answers be delivered on 15 December (instead of 22 December) and that the parties' comments on the answers be due on 22 December (instead of 19 January). This would allow for the completion of the parties' main substantive work still in 2003 (the next step would then be the comments on the descriptive part).

Furthermore, Brazil notices that Article 12.9 of the DSU establishes that "in no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months". The new proposed timetable of the Panel foresees that circulation of the final report to the WTO Members will take place after 19 May, that is, more than 5 months in excess of the strict time limit set up in DSU Article 12.9. Therefore, Brazil would stress that any changes in the schedule should not postpone the conclusion of the proceedings.

## **ANNEX K-24**

### **LETTER FROM THE UNITED STATES COMMENTS ON REVISED TIMETABLE**

16 September 2003

The United States thanks the Panel for its invitation to comment on the draft further revised timetable attached to its communication of 12 September 2003. My authorities have instructed me to submit the following comments.

The new dates of December 2 and 3 for the second substantive meeting are acceptable to the United States. We note, however, that there is approximately one month between the receipt of the further rebuttals (currently due November 3) and the second substantive meeting. We believe that this one month would be better allocated for the parties to consider and draft responses to the Panel's questions and prepare their rebuttal submissions. Therefore, the United States proposes that the due date for receipt of answers to Panel's questions be changed to Friday, 31 October 2003, and that the due date for the rebuttal submissions be changed to Friday, 21 November 2003. This would leave approximately 10 days before the second Panel meeting (which would be within the DSU guideline of one to two weeks between rebuttal submissions and the second panel meeting).

There also remains some concern with the 3 p.m. deadline for filing the US further submission on 29 September. While we – as always – will try our best to accommodate this deadline, we note that the time difference between Geneva and Washington (opening of business time in Washington would be 3 p.m. Geneva time) may cause additional difficulties with respect to finalizing the US submission in capital. We nonetheless appreciate the Panel's understanding in this regard.

## ANNEX K-25

### LETTER FROM BRAZIL

17 September 2003

1. The Government of Brazil is in receipt of a letter from the United States dated 16 September commenting on the proposed further revised timetable attached to the Panel's communication of 12 September.
2. Brazil would like to express its opposition to the alterations suggested by the United States. In our view the dates proposed by the Panel on 12 September ensure the parties will have the appropriate amount of time to respond to the Panel's further questions and to elaborate their further rebuttal submissions. Brazil notes, in particular, that between the last day of the resumed second session of the first substantive meeting (9 October) and the deadline for delivering their further rebuttal submissions (3 November), parties will have almost 30 days to prepare such documents. This is more than the amount of time the United States requested on 9 September to elaborate its further submission (previously due on 22 September).
3. Therefore, Brazil submits that parties need not be granted any extension of deadlines as suggested by the United States. Nonetheless, were the Panel inclined to change the timetable to accommodate the US concerns, Brazil would reiterate that any modifications in the schedule should not result in further delays of the proceedings (whose current timetable already exceeds by more than five months the time limit set out in DSU Article 12.9).

## ANNEX K-26

### LETTER FROM THE UNITED STATES

17 September 2003

My authorities have instructed me to respond to Brazil's letter of 16 September 2003, suggesting that the parties' answers to the Panel's questions related to the second substantive meeting be due 15 December instead of 22 December, and that the comments on these answers be due 22 December instead of 19 January 2004. The United States opposes these suggestions.

As it currently stands, the issues in this dispute are both wide-ranging and complicated. Therefore, it is unrealistic to expect that the parties would need only 10 days to answer the Panel's questions, and only 7 days to comment on each other's answers. Moreover, Brazil's sole justification for its suggestion, *i.e.*, that this "would allow for the completion of the parties' main substantive work still in 2003," is a *non sequitur*, particularly in light of the fact that Brazil does not object to the rest of the Panel's further revised timetable.

## **ANNEX K-27**

### **LETTER FROM THE UNITED STATES**

23 September 2003

As the Panel may be aware, hurricane Isabel hit the mid-Atlantic region of the East Coast of the United States last Thursday and Friday, bringing with it significant flooding, property damage, and extended loss of electricity to hundreds of thousands of homes and businesses. The hurricane forced all US Government offices in the Washington, D.C., area to be closed on Thursday and Friday, 18 and 19 September 2003. Further, several members of the US delegation were without power through the weekend and were unable to access materials for this dispute. During this time the United States delegation was unable to work on the US further submission that is due on 29 September. As result, the United States has been significantly impeded in its preparation of that submission. At the same time, we are mindful of the October 7 through 9 dates for the next meeting with the Panel.

Accordingly, the United States would like to request a modification of the deadline for submitting its further submission so that it would be due on Thursday, 2 October. In order to provide additional time for the Panel and the parties to review the third party further submissions, currently scheduled to be submitted on Friday, October 3, the deadline for these submissions could be changed to the opening of business on Monday, 6 October 2003.

## **ANNEX K-28**

### **LETTER FROM BRAZIL**

23 September 2003

The Government of Brazil is in receipt of a letter from the United States dated 23 September asking for a further extension of time until 2 October 2003 to respond to Brazil's Further Submission. The most recent US request for an extension of time would mean that the Panel, Brazil, and the Third Parties would have only two working days – Friday 3 October and Monday 6 October – to review and draft an oral statement in response to the US Further Submission. Brazil would have no working days to review the numerous third party submissions.

The Panel must balance out the rights of Brazil and the Third Parties with those of the United States. The United States has been in receipt of Brazil's Further Submission for over two weeks. The United States will have a number of opportunities, including in its 7 October Oral Statement and in answering questions posed by the Panel, to clarify and expand on its responses to issues raised in Brazil's Further Submission. Under these circumstances, Brazil requests that the Panel maintain the current schedule requiring the United States to provide its Further Submission on 29 September 2003.

## ANNEX K-29

### LETTER FROM BRAZIL

2 October 2003

As the Panel may be aware, for the sixth consecutive time in the present proceedings the United States failed to deliver a document by the time expressly determined by the Panel in the Working Procedures and constantly reiterated to the United States in specific communications of the Panel. Instead of abiding by the 5h30 p.m. (Geneva time) deadline, the United States delivered the electronic version of its Further Submission around 11h45 p.m. on 30 September 2003, again more than 6 hours after the deadline. No hard copy of the document, also due on the same day by 5h30 p.m., was available to Brazil before 1 October.

Brazil will not repeat here the whole set of arguments showing the prejudices and obstacles caused by the US tactic to the rights of Brazil. We note however that this sixth delay is particularly egregious given the fact that the Panel provided the United States with two separate extensions of time to prepare its Further Submission. Therefore, Brazil cannot at this time only ask the Panel to take note of the problem and to encourage the United States to respect the deadlines. After six consecutive and totally unjustifiable delays, a more compelling action by the Panel appears to be necessary.

The strict observance of the deadlines is a centerpiece of any procedurally fair proceedings in all legal systems where the due process principle is expected to apply. Consequently, disrespect of the deadlines constitutes a fundamental breach of due process requirements, undermining the procedural fairness in the conduct of the examination of the matter in dispute. In other words, deadlines cannot be taken lightly. This is reinforced by DSU Article 12.5, which states: "Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines."

In WTO dispute settlement procedures a Panel, together with the Appellate Body, must act as the guardian of the procedural fairness and, in order to act in this capacity, it is accorded the authority and discretion to establish its own working procedures, in addition to those set out in DSU Appendix 3, as recognized by the Appellate Body.<sup>1</sup> The working procedures are, in effect, the means by which a Panel exercises its authority and discretion to ensure that due process is respected and parties to the dispute have equal opportunities of defense. Brazil is fully aware that the term "working procedures" has been interpreted differently by WTO Members, but it is undeniable that the setting out and enforcement of deadlines is within the boundaries of the Panel's authority to establish its own working procedures.

In view of the fact that Brazil's rights have been systematically impaired by the US contempt of the established rules, and taking into consideration the Panel's authority to set up procedural rules to guarantee the respect for due process requirements, Brazil requests the Panel to determine that in the next steps of the present proceedings any unjustified delay in document delivery by the US results in such document being disregarded by the Panel. In addition, Brazil requests that the Panel reflect

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<sup>1</sup> See for instance *Australia – Measures Affecting Importation of Salmon* (DS18), Report of the Appellate Body, para. 272.

each of the violations of the working procedures by the United States in the factual section of its Final Report so that the record of misconduct may be available to the full WTO Membership.

## ANNEX K-30

### LETTER FROM THE UNITED STATES

6 October 2003

The United States received on Friday, 3 October 2003, a copy of the letter to the Panel from Brazil dated 2 October 2003, and my authorities have instructed me to submit this reply. The United States regrets that Brazil once again distracts the Panel and the United States from the work required to prepare for the second session of the first panel meeting.

The United States takes seriously the time lines established by the Panel and has expended considerable resources and dedicated tremendous personnel time and effort to accommodate each of them.<sup>1</sup> As a result, the United States has filed each of its submissions on the date specified by the Panel. At the same time, the Panel will appreciate that the issues are not only complicated and difficult, but that there are a very large number of them – and that the materials that Brazil has submitted are voluminous.

As the complaining party in this dispute, Brazil has had the advantage of months and months in preparing its case far in advance.<sup>2</sup> Brazil has, however, consistently sought to deny to the United States sufficient time to prepare its own submissions, and Brazil's letter of last week regrettably continues an approach it appears to have adopted at the beginning of this dispute: to employ procedural tactics in an attempt to reduce the material and arguments that the United States could submit to the Panel to respond to Brazil's arguments, to correct factual errors by Brazil, and to explain the legal inaccuracies and omissions committed by Brazil. Those procedural tactics include in particular seeking imbalances between itself and the United States in the time provided to prepare submissions. These imbalances have been manifest from early in this dispute, as Brazil has simultaneously been submitting extraordinarily lengthy and complicated submissions and been resisting every effort of the United States to ensure that, as provided by Article 12.4 of the DSU, "the panel ... provide sufficient time for the parties to the dispute to prepare their submissions."

The United States recalls the very first example of Brazil's approach. During the organizational meeting Brazil objected to the US request that the time for the first US submission be increased beyond the two weeks contemplated in the Panel's draft timetable of 27 May. In that same meeting, however, Brazil objected to the suggestion that it have less than two weeks after filing its first submission to submit the executive summary of that submission. As the United States commented at the time, it seemed implausible that the United States could prepare a *substantive response* to a submission in two weeks if Brazil was unable to prepare a *summary* of that submission in less than that time. Brazil's attempt to hold the United States to a two-week period to reply to the first Brazilian submission is particularly telling given that, during that organizational meeting, the Panel had not yet decided to bifurcate the parties' initial submissions. Brazil thus must have hoped to force a response in two weeks to the over 350 pages of material contained in both its first submission (24 June 2003) and in its further written submission (9 September 2003).

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<sup>1</sup> The United States also wishes to note that it arranged with the Brazilian Mission in Geneva to transmit a copy of its Further Submission directly to Brasilia upon filing in order to enable the Brazilian authorities to begin reviewing the document as soon as possible. The United States wishes to take this opportunity to express once again its thanks to the Brazilian Mission for its courtesy and cooperation in this connection.

<sup>2</sup> The document "properties" of Brazil's further submission to the Panel suggest quite clearly that Brazil began preparing its submission in April of 2002 -- i.e., more than a year before filing it.

The exchange at the organizational meeting was only the first example of a Brazilian approach to this dispute that combines extremely lengthy material with procedural inflexibility. The most recent example was Brazil's unwillingness to contemplate an extension for the filing of the US Further Submission in response to the circumstances in Washington, D.C., brought about by Hurricane Isabel (letter of 23 September 2003).

As the United States noted in its letter of 11 September 2003, the timetable that the Panel has established in this dispute for the filing of the US submissions are much shorter than the amount of time that has been provided to other WTO Members.<sup>3</sup> The length and complexity of Brazil's submissions makes it increasingly difficult to consider that the United States has had sufficient time to prepare its submissions or that the United States does not suffer prejudice in this proceeding as a result.<sup>4</sup>

It is also difficult, in the circumstances of this dispute, to credit the Brazilian suggestion that it is *Brazil* that has suffered an "impairment" of its "rights" when the United States has filed each of its written submissions on the date specified by the Panel. Brazil's sole complaint is with the time, not the date, of filing. There is certainly no basis (and indeed Brazil has not suggested one) for Brazil's astonishing suggestion that the Panel should not consider the views of the United States in the future. Brazil's suggestion is particularly startling in light of the numerous occasions on which Brazil has made extra submissions to the Panel that were nowhere provided for in the Panel's working procedures. Brazil appears to believe that it may ignore the Panel's working procedures at its convenience.<sup>5</sup>

Brazil's suggestion that "the Panel reflect each of the violations of the working procedures by the United States in the factual section of its Final Report" continues Brazil's one-sided approach to presenting material in these proceedings. First, of course, there is no basis for Brazil's characterization of the proceedings to date nor is there any basis for Brazil to seek to use the Panel's report<sup>6</sup> for Brazil's own purposes. Second, the United States notes that Brazil carefully seeks to censor out any reference to Brazil's disregard for the Panel's working procedures. Third, Brazil also would appear to want to avoid any record of the US responses to Brazil's allegations, an approach which would seem to be in keeping with Brazil's attempts throughout this proceeding to limit any material that might refute Brazil's flawed claims.

In conclusion, the United States would like to thank the Panel for its work to date on the many issues presented by this dispute. We look forward to our discussions of the parties' further submissions this week.

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

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<sup>3</sup> The United States noted then that in the most recent 23 panel proceedings to which it had been a party, the single shortest time period for preparing a responding submission has been the 17 days provided in this proceeding -- roughly one-half the average time period that respondents had been given when the United States was the complaining party.

<sup>4</sup> The United States would also like to take this opportunity to thank the Panel for agreeing to extend the deadline for the rebuttal submissions; we would hope that this extended time will help in the completion of that submission.

<sup>5</sup> The United States has to date in this dispute deliberately refrained from requesting that the Panel disregard Brazil's extra-procedural material.

<sup>6</sup> The purpose of the Panel's report is supposed to be to help resolve the dispute in accordance with the terms of reference for the Panel, and the content of the report is specified in Articles 12.7 and 19.1 of the DSU. Brazil neglects to refer to these provisions.

## **ANNEX K-31**

### **LETTER FROM THE UNITED STATES**

14 October 2003

As discussed during the second session of the first panel meeting, the United States is providing in the attachment a written description of materials relating to Dr. Sumner's model that Brazil has agreed to provide to the Panel and the United States. The United States looks forward to receiving these materials at Brazil's earliest opportunity, with a view to permitting the United States to undertake its review of these materials in a timely fashion and without delay.

The United States is also providing in the attachment, as agreed, the two remaining exhibits referred to in its opening statement at the second session of the first panel meeting.

## **ATTACHMENT**

### **Request from the United States to Brazil**

Please provide the following information relating to the model used by Dr. Sumner in his analysis presented in Annex I to Brazil's further submission:

- (a) Electronic copies of the actual models used for the baseline and each of the seven scenarios described in Annex I.
- (b) Printed copies of the exact equation specifications used for the baseline and for each of the seven scenarios described in Annex I, including all parameter estimates. (If no such printed copies currently exist, please develop and provide.)
- (c) Documentation of all adaptations to the original FAPRI modelling system made or used by Dr. Sumner for his analysis presented in Annex I. (If no such documentation currently exists, please develop and provide.)

## ANNEX K-32

### LETTER FROM BRAZIL

5 November 2003

In a letter to the Panel dated 14 October 2003, the United States requested from Brazil electronic and documentary information concerning Professor Sumner's econometric model (items a, b and c of the Annex).

In order to collect and compile that information, Professor Sumner, at the request of Brazil, has been working diligently to provide the United States with the "printed copies" of the exact equation specifications in paragraph (b) of the Annex and the "documentation of all adaptations to the original FAPRI modelling system made or used by Dr. Sumner for his analysis" as requested in paragraph (c). This process is now about to be completed and Brazil expects to provide the United States and the Panel with this information early in the week of 10 November.

As regards the request in paragraph (a) of the Annex for electronic copies of the FAPRI/CARD model used by Professor Sumner, Professor Sumner has contacted Professor Bruce Babcock of the Centre for Agricultural and Rural Development at the Iowa State University, which "owns" the FAPRI model. You will realize by the attached exchange of correspondence between Professor Sumner and Professor Babcock, that "[they] are unable to respond to your request for a simple 'electronic copy' of the FAPRI model used for the baseline and each of the seven scenarios described in Annex I because they literally do not exist".

Brazil notes, however, the last paragraph of Professor Babcock's letter which provides as follows:

"[W]e would be willing to run USTR-requested scenarios using the FAPRI/CARD modeling system along with the operational additions and adaptations that comprise [Professor Sumner's] model of cotton policy. Our researchers would have to be compensated for the time it would take to run the model and we would have to work out the timing and other logistics of running the model".

It is thus our understanding that this paragraph means that the "electronic version" of the model used by Professor Sumner is presently available for use by the US Government upon coordination with FAPRI staff."

## ANNEX K-33

### LETTER FROM THE UNITED STATES

11 November 2003

The United States is in receipt of Brazil's letter of 5 November 2003, in which it indicates that it expects to submit during the week of November 10 certain evidence relating to the analysis of Dr. Sumner presented in Annex I to Brazil's further submission. My authorities have instructed me to submit this response.

The United States is disappointed that Brazil claims not to be able to provide electronic copies of the actual model used in that analysis. In our experience, it is common for electronic copies of econometric models to be disclosed to substantiate claimed model results, even in the context of WTO dispute settlement. Brazil's failure to make electronic copies available will hinder the ability of the Panel and the United States to analyze Dr. Sumner's claimed results.<sup>1</sup>

Brazil states that it will be providing printed copies of the exact equation specifications and documentation of all adaptations to the original FAPRI modelling system. This evidence is expected to be substantial and complex. Brazil has previously stated that its economic model "is built upon hundreds of linear supply, demand and related equations for major commodities - and in particular upland cotton - in the United States" and that "[t]hese equations are linked to a system of equations covering the demand and supply of upland cotton internationally".<sup>2</sup> This substantial new evidence relates to the core of Brazil's case relating to price suppression, as evidenced by the frequent invocation of those results in Brazil's further submission, at the second session of the first panel meeting, and in Brazil's answers to the Panel's further questions.

We note that the Panel and the United States had asked for this evidence during the first panel meeting, nearly five weeks ago. The United States expected this evidence to be submitted by the conclusion of the first panel meeting, or, at the latest, shortly after the United States provided Brazil with a written version of the information requested. Brazil, however, has now indicated that it will submit some of this new evidence mere days before the parties' rebuttal submissions are due.

The United States notes that, pursuant to paragraph 13 of the Panel's working procedures, the United States must be provided sufficient time to respond in writing to any new evidence submitted by Brazil. This paragraph reflects the Panel's obligation under Article 12.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* to "provide sufficient time for the parties to the dispute to prepare their submissions." Had Brazil presented that new evidence relating to Dr. Sumner's analysis no later than during the first panel meeting on 7-9 October 2003, as

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<sup>1</sup> The offer by FAPRI to run simulations at the United States request for a fee is not an acceptable substitute. It is unprecedented that a party to a dispute should put another party in the position of not being able to gain access to that party's evidence, and its only recourse is to pay a private entity in order to gain even partial access.

<sup>2</sup> See Brazil's Further Submission, para. 218 ("The econometric model is built upon *hundreds of linear supply, demand and related equations* for major commodities - and in particular upland cotton - in the United States, but also accounts for regionally varying supply and demand responses in the United States. *These equations are linked to a system of equations* covering the demand and supply of upland cotton internationally.") (emphasis added).

contemplated by the Panel's working procedures, under the current timetable the United States would have been afforded nearly 6 weeks to examine and respond to that evidence.<sup>3</sup>

Given the anticipated complexity of the information and the fact that it will not be provided in electronic form, the United States will need sufficient time to be able to analyze and respond to Brazil's complex and substantial new evidence. To this end, and on the assumption that Brazil meets its expectation of submitting that evidence early this week, the United States would request that the rebuttal submissions be due on 22 December 2003, the current date for answers to panel questions. Remaining items on the timetable set out by the Panel could then be rescheduled accordingly. Adjusting the timetable in light of Brazil's late submission of new evidence is necessary to preserve US rights of defence by providing sufficient opportunity to analyze and critique that new evidence as well as by allowing the United States to present its response to that evidence in its rebuttal submission and at the second panel meeting.<sup>4</sup>

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<sup>3</sup> Had Brazil presented this evidence as part of Annex I to its further submission of 9 September 2003, moreover, the United States would have been afforded 10 weeks to review and respond to that evidence.

<sup>4</sup> See Working Procedures for the Panel, para. 7 ("Formal rebuttals shall be made at a second substantive meeting of the Panel. . . . The parties shall submit, prior to that meeting, written rebuttals to the Panel.") (28 May 2003).

## ANNEX K-34

### LETTER FROM BRAZIL

12 November 2003

The Government of Brazil is in receipt of a letter from the United States dated 11 November requesting yet another lengthy delay in this panel proceeding. Brazil requests the Panel to reject this request and maintain the current schedule including the deadline for rebuttal submissions of 18 November and the second Panel meeting on 2-3 December for the reasons set forth below.

The United States' letter attempts to leave the impression that there will be a tremendous amount of new evidence that will be provided to them in *written* form in response to their request of 14 October. This is incorrect. The bulk of the requested information is in *electronic* form which has been available for the United States to examine, review, and use since 5 November. Attached to this letter are (1) Professor Sumner's *written* adaptations to the FAPRI model for each of the seven scenarios described in Annex I to Brazil's Further Submission (Exhibit Bra-313), and (2) Professor Sumner's summary description of the equations in the FAPRI domestic model and the CARD international cotton model (Exhibit Bra-314). As the Panel can see from Exhibit Bra-313, this document reflecting Professor Sumner's adaptations is not lengthy and does not contain hundreds of equations as the US letter suggests. The "hundreds of equations" referred to in the US letter are those of the *FAPRI/CARD* model used by Professor Sumner and summarized in Exhibit Bra-314. Brazil believes that the US econometric experts who deal with the FAPRI model on a regular basis will not have any difficulty understanding Exhibit Bra-313. Professor Sumner, of course, will be prepared to provide any additional follow-up information and clarifications, as necessary, at the Panel meeting on 2-3 December for which he has made arrangements in his schedule to attend.

Brazil has been informed by Professor Sumner that he is working as quickly and thoroughly as he can in completing this work in addition to his other many responsibilities as the Director of the Agricultural Issues Centre at the University of California at Davis. Professor Sumner indicates he expects to be able to provide the relevant equations for the CARD international cotton model by the close of business on 13 November. This will complete Brazil's response to the US request of 14 October. Because Professor Sumner made no adaptations to the CARD international cotton model, the information to be provided will simply be the equations for a model that is much-used and well-known to USDA economists.

Brazil notes that the United States waited until 14 October to file its request for this information from Brazil. Brazil's letter of 5 November provided the United States with an offer of complete access to the electronic version of the exact same model used by Professor Sumner. The United States then waited almost a week to reply to Brazil's 5 November letter with full knowledge that the date for the Further Rebuttal Submission was 18 November. It appears as if the United States has *not* used the week since 5 November to take advantage of its ability to review and analyze the complete electronic version of everything that Professor Sumner has done in his analysis. As the last paragraph of Professor Babcock's letter of 31 October stated, upon request, the United States will be provided full and immediate access to the FAPRI and CARD models and Professor Sumner's adaptations that are available in electronic form.

Contrary to the US unsupported assertion, Brazil has not "put the United States in the position of not being able to gain access to that party's evidence." Rather, Professor Babcock's offer provides

the United States with complete access to the electronic version of *all* of the equations and analysis performed by Professor Sumner and the United States had access to them since 5 November.

Brazil further notes that it was required to use the FAPRI/CARD model for a fee, that neither Brazil nor Professor Sumner owns or can copy this model, and as explained by Professor Babcock, that there is no "written version" of the FAPRI model. The United States can, however, make arrangements with FAPRI officials to use the model and it would certainly not be unprecedented for the United States Government (or other governments or private entities) to compensate FAPRI for the use of the FAPRI model.

Brazil notes that USDA economists and officials use the FAPRI model frequently and are well aware of its parameters (for which the USDA provided it with its highest honorary award in 2002). Therefore, it will not be difficult for the United States to quickly analyze Professor Sumner's limited adaptations to the standard FAPRI/CARD models with which they are familiar. Brazil also notes that the FAPRI project is financed in large part by the US Congress

With respect to the existing schedule, Brazil considers that there is no legal or due process basis for the Panel to again delay the proceedings. Indeed, the existing schedule has considerable flexibility to provide the United States with more than sufficient time to prepare any rebuttal of Professor Sumner's analysis. In order to avoid further delay, Brazil suggests that the United States and Brazil file their rebuttal submissions on 18 November and the Panel hold the second meeting of the Panel with the Parties on 2-3 December as originally scheduled.

If the United States determines that it does not have sufficient time to (a) use the exact same FAPRI/CARD electronic model as adapted by Professor Sumner (as offered by Professor Babcock) and (b) to analyze Professor's Sumner's written equations and explanations of adaptations to the FAPRI model by 18 November, then Brazil would have no objection to the United States providing its rebuttal to Professor Sumner's analysis by 28 November, a few days prior to the Panel meeting on 2-3 December. This rebuttal, however, would be in addition to the 18 November Rebuttal on the multitude of other issues in this proceeding that do not relate in any way to Professor Sumner's analysis.

Brazil notes that the current schedule is also flexible enough to allow for rebuttal and counter-rebuttal by the Parties of the US analysis of Professor Sumner's results, *i.e.*, until the 22 December and 19 January deadlines for answering and then commenting on the Answers to the Panel's Questions. Of course, if the Panel determines that the United States and Brazil need additional time to comment on the econometric models or other issues, then the Panel has the discretion to allow for this for periods after 19 January 2004.

Brazil believes that this proposal will protect the United States' and Brazil's due process rights without yet again delaying this proceeding. It will allow the Panel and the Parties to maintain their current travel and business schedules which have now been in place for some time. Brazil notes that its delegation has scheduled a number of meetings and travel with a view towards the 2 3 December meeting date.

Finally, Brazil stresses that any changes in the schedule must not further delay the date of issuance of the final report to the parties, since the time limits of DSU Articles 12.8 and 12.9 have already been breached.

## ANNEX K-35

### LETTER FROM THE UNITED STATES

13 November 2003

My authorities have instructed me to respond to Brazil's letter of 12 November 2003, in which Brazil objects to the US request for an extension of time for the filing of rebuttal submissions in this dispute. Brazil ignores the Panel's working procedures and the arguments in our letter of 11 November 2003, in dismissing the possibility that the United States would be prejudiced if the briefing schedule were not adjusted to take into account Brazil's decision to submit new evidence relating to the analysis of Dr. Sumner nearly five weeks after the conclusion of the first panel meeting. Brazil's 12 November letter cannot change the fact that United States will be prejudiced if it is not given adequate time to analyze the materials Brazil is only now providing.

*First*, Brazil simply does not discuss either the requirements of DSU Article 12.4, which provides that "[i]n preparing the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions," or the provisions of paragraph 13 of the Panel's working procedures, pursuant to which the United States must be provided sufficient time to respond in writing to any new evidence submitted by Brazil.

*Second*, Brazil states that it "would have no objection to the United States providing its rebuttal to Professor Sumner's analysis by 28 November, a few days prior to the Panel meeting on 2-3 December" and that "the current schedule is also flexible enough to allow for rebuttal and counter-rebuttal by the Parties of the US analysis of Professor Sumner's results, i.e., until the 22 December and 19 January deadlines for answering and then commenting on the Answers to the Panel's Questions". The United States cannot agree to this proposal. Indeed, this suggestion by Brazil would make it appear that Dr. Sumner's analysis was an issue of secondary importance to Brazil's allegations, such that the US response is not important to the Panel's evaluation. The reality, of course, is that Brazil's main economic conclusions rest on Dr. Sumner's analysis. If not, there would have been no reason for Brazil to reference that analysis repeatedly in its further submission, to attach Dr. Sumner's analysis as a 52-page annex to that submission, to call upon Dr. Sumner to deliver a 16-page statement as part of its opening statement and a four-page statement as part of its closing statement at the second session of the first panel meeting, nor to continue referencing Dr. Sumner's analysis in its answer to the Panel's further questions. It is simply not credible for Brazil to suggest that no prejudice would result to the United States if it were compelled to prepare and file a rebuttal submission without having had sufficient opportunity to examine and critique Brazil's new evidence relating to the very model which allegedly underlies Dr. Sumner's analysis.

*Third*, Brazil has also indicated that it will file *even more* new evidence on 13 November relating to Dr. Sumner's analysis. In addition to the prejudice that would result from not being able to prepare our rebuttal submission and prepare for the second panel meeting with sufficient time to analyze this new evidence, the United States notes that it has already been prejudiced because preparation of the US rebuttal submission over the last several weeks has been based on the materials which we have had at hand, that is to say, neither the materials included with Brazil's 12 November letter nor those it says will be forthcoming on 13 November. Elements of the US rebuttal could be superseded or confirmed on the basis of Brazil's new information. Thus, without an extension of time, the United States will be forced either to reply to Dr. Sumner's analysis in the absence of complete information or to defer responding to the centrepiece of Brazil's case.

*Fourth*, Brazil is in error when it claims that "the United States waited until 14 October to file its request for this information from Brazil". In fact, both the United States and the Panel Chairman verbally requested access to Brazil's model on 7 October 2003, at the conclusion of opening statements on the first day of the second session of the first panel meeting. Brazil has provided no explanation for why it should have delayed providing any information in response to that request for nearly five weeks, which merely related to the very model that Dr. Sumner asserts to have employed.

*Fifth*, Brazil also claims that "Brazil's letter of 5 November provided the United States with an offer of complete access to the electronic version of the exact same model used by Professor Sumner" and "Professor Babcock's offer provides the United States with complete access to the electronic version of all of the equations and analysis performed by Professor Sumner *and the United States had access to them since 5 November*" (italics added). Presumably, Brazil is referring to its suggestion that the United States pay to *run* the model employed by Brazil<sup>1</sup>, since FAPRI did not offer to disclose – either to the United States or the Panel – the equations underlying that model, whether for pay or otherwise (and we assume Brazil was also offering to the Panel this opportunity to pay to obtain Brazil's evidence). As stated in the US letter of 11 November, Brazil's suggestion that the responding party (and presumably the Panel) must pay for evidence on which the complaining party so heavily relies is unprecedented.

*Sixth*, Brazil also claims that "it will not be difficult for the United States to quickly analyze Professor Sumner's limited adaptations to the standard FAPRI/CARD models with which they are familiar." If it is the case that Professor Sumner has made only "limited adaptations to the standard FAPRI/CARD models," a claim we are not in a position to confirm, then again the question arises why Brazil should have delayed five weeks in providing these new materials. Presumably, Professor Sumner knew of and had documented those adaptations prior to submitting his analysis to the Panel as part of Brazil's further submission on 9 September.

The United States respectfully requests the Panel to defer the parties' rebuttal submissions as set out in its letter of 11 November 2003. The United States is providing a copy of this letter directly to Brazil.

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<sup>1</sup> See Brazil's Letter of 5 November 2003, p. 2 (quoting FAPRI letter as saying that FAPRI "would be willing to run USTR-requested scenarios using the FAPRI/CARD modeling system along with the operational additions and adaptations that comprise [Professor Sumner's] model of cotton policy. Our researchers would have to be compensated for the time it would take to run the model and we would have to work out the timing and other logistics of running the model.").

## ANNEX K-36

### LETTER FROM BRAZIL

13 November 2003

Brazil is in receipt of a letter from the United States dated 13 November. Brazil reiterates its request that the Panel adhere to the existing schedule along with the suggested modifications proposed by Brazil in its letter of 12 November. Brazil responds to the numbered paragraphs of the US 13 November letter below using the same paragraph numbers.

*First*, Brazil notes that with respect to DSU Article 12.4, the normal amount of time for a rebuttal submission set out in Annex 3 of the DSU is 2-3 weeks from the date of the First Substantive meeting. The Panel in this case provided the parties with a period of six weeks to prepare rebuttal submissions. Based on Brazil's suggestion that the United States have until 28 November to prepare a rebuttal on a single aspect of Brazil's evidence, the United States will have had **23 days** (from 5 November or more than three weeks) to examine, use, and analyze the full electronic version of everything that Professor Sumner examined. In addition, the United States would have **16 days** from 12 November to examine Professor Sumner's written adaptations to the FAPRI/CARD model and **15 days** (from November 13) to examine the full CARD international cotton model. All of these time frames either exceed or are within the 2-3 week period for rebuttal submissions set out in Annex 3 to the DSU. Therefore, there is no basis for the United States to claim any violation of either its due process rights or of DSU Article 12.4.

*Second*, Professor Sumner's analysis is not the "centrepiece" of Brazil's adverse effects case that the United States claims. Brazil has placed an enormous amount of evidence before the Panel that exists independently of Professor Sumner's analysis. Brazil has repeatedly emphasized in this dispute that Professor Sumner's analysis confirms econometrically what common sense and the overwhelming body of other evidence already conclusively demonstrates. The Panel need only examine paragraph 105 of Brazil's Further Submission to appreciate this point. Even Professor Sumner's econometric analysis is only one of many such analyses of the impact of US upland cotton subsidies that is referenced in Brazil's submissions. Professor Sumner has functioned for Brazil in these proceedings as a dual expert – as one who is expert in US subsidy programs and the US agricultural system, as well as an expert in econometric analysis.

*Third*, Brazil attaches as Exhibit Bra-315 the documentation for the CARD international cotton model.<sup>1</sup> This model is well-known to USDA economists and has not been changed for Professor Sumner's analysis. Therefore, this information will not be "new" to the United States or is something that it could not otherwise have already anticipated in preparing their arguments.

*Fourth*, the United States did not provide in writing, exactly what evidence it wanted from Professor Sumner until 14 October. Brazil provided access to the complete electronic version of Professor Sumner's analysis – which *only* exists in electronic form – on 5 November. This was not five weeks after receipt of the US request as the US claims. The additional information provided on 12 and 13 November required Professor Sumner to expend considerable amount of time. His busy

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<sup>1</sup>Brazil is also providing herewith an electronic version of the CARD international cotton model via email.

schedule at the University of California at Davis as well as previous speaking commitments posed additional difficulties in completing this assignment.

*Fifth*, the United States again demonstrates that it has made no efforts to take advantage of the offer to gain access to *everything* that Professor Sumner did and analyzed, which is contained in the electronic version at the University of Iowa in the care of Professor Babcock. It appears to Brazil that the United States' conduct suggests it may be more interested in delaying this proceeding than in gaining access to Professor Sumner's analysis.

*Sixth*, the United States claims that it has only a small amount of time to change their rebuttal submission. Brazil notes that on 24 June 2003, it filed a lengthy submission after only being given 4 days notice of what it was required to file. Brazil, at great effort, met that deadline. Further, the additional ten days proposed by Brazil (until 28 November) provide the United States with an opportunity to react to and respond to Professor Sumner's documents delivered on 12 and 13 November. The United States will have additional time to prepare further responses for their oral statement on 2 December. Finally, as Brazil's 12 November letter indicated, both Brazil and the United States will have until 22 December and 19 January to file additional answers to questions and comments relating, *inter alia*, to the econometric models at issue in this dispute.

*In conclusion*, the Panel has to balance the right of the United States to have sufficient time to prepare a rebuttal to Professor Sumner's analysis with Brazil's right to obtain a timely panel decision. Brazil believes that its suggestion to provide the United States with an additional 10 days to prepare its rebuttal – until 28 November – is an appropriate result which is fair and protects each of the parties' due process rights. However, the request by the United States for another five weeks to prepare their rebuttal and to delay this proceeding by at least as much time, if not more, is grossly out of proportion. Brazil requests the Panel to avoid yet another long delay in these proceedings.

## ANNEX K-37

### LETTER FROM THE UNITED STATES

18 December 2003

In a communication dated 8 December 2003, the Panel afforded to the United States the opportunity to respond by 18 December 2003, to the request that Brazil had made through the Panel for certain information in Exhibit BRA-369.<sup>1</sup> The United States has completed work on 3 electronic files containing approximately 135 megabytes of requested data related to the production flexibility contract payment era, which are being transmitted with this letter. Work on the data files relating to the direct and counter-cyclical payment era is continuing, and the United States is endeavouring to provide this data by close of business Friday, 19 December.

However, as the United States preliminarily advised Brazil and the Panel at the second panel meeting, the release of planted acreage information associated with a particular farm, county, and state number is confidential information that cannot be released under US domestic law, in particular the Privacy Act of 1974.<sup>2</sup> This is consistent with the position of the United States in Freedom of Information Act<sup>3</sup> appeals raising this issue. One such decision is attached as Exhibit US-104.<sup>4</sup> Although the United States cannot provide planted acreage information associated with an individual farm, in an effort to be as fully responsive as possible, we are providing, for all programme crops and for each marketing year: (1) planted acreage data aggregated for all cotton farms and (2) farm-level planted acreage data without any fields that could identify the particular farm.

The United States is providing all of the pieces of data requested by Brazil in data files organized as follows:<sup>5</sup>

First, a file with aggregate data for yields, bases, cropland, and plantings for all "cotton farms" for all programme crops as defined in the data request, using three categories: (1) farms with "cotton base" but no cotton plantings; (2) farms with cotton plantings but no "cotton base," and (3) farms with cotton plantings and "cotton base."

Second, a farm-by-farm file (with particular farm identification information) with all of the requested data (plus additional data regarding payment quantities) but not including planted acres and cropland.

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<sup>1</sup> See Exhibit US-102.

<sup>2</sup> See 5 USC 552a(b) (Exhibit US-107).

<sup>3</sup> Exhibit US-103.

<sup>4</sup> We note that no final denial of a release may be made by the US Department of Agriculture without the concurrence of USDA's Office of General Counsel. See 7 CFR 1.14 (Exhibit US-105). The attached appeal determination is consistent with USDA's long-standing policy that planted acres will not be released. For example, the policy against release has been stated explicitly since 1997 in FSA's FOIA Handbook. (See Exhibit US-106.)

<sup>5</sup> In addition to the data requested by Brazil, the United States has provided total cropland and programme payment units (base acreage x base yield x .85) to allow for more meaningful aggregation.

Third, farm-by-farm files for planted acres only for all programme crops, but with no other data and with the order of the farms scrambled in order to prevent any matching of farms.

The three files have been copied to a CD. The base and yield data are a text file named "Pfcby.txt." A description of that file and its 118 fields is found at Exhibit US-109. Planted acres are in "Pfcplac.txt". A description of that file is found at Exhibit US-110. Finally, the aggregate data file is named "Pfcsum.xls". That file is an Excel file and the headings within the file should be self-explanatory.

The information that we are providing is also sensitive. We do not consent to release of this information to the public domain and expect that it will be used solely for purposes of this dispute settlement proceeding. Therefore, pursuant to paragraph 3 of the Panel's working procedures, we designate this information as confidential and must exceptionally insist that this information not be disclosed outside of the delegation of the Brazilian Government and the Panel.

During the Panel meeting, Brazil referred to information released by the United States in connection with rice. This release was an error. Apparently, the Kansas City office of the Farm Services Agency (FSA) believed at some point that the Washington FOIA office had approved the release of planted acres so long as names and addresses were left out. FSA Washington personnel were not aware of that misunderstanding. It has been corrected. The farm number is unique and can be linked back to the name and address of persons on the farm using the FSA-supplied Environmental Working Group (EWG) payment and name and address files.<sup>6</sup> The payment files will allow a match by farm number. This leads, by the same file, to the "customer number". That number leads, in the name and address file, to the name and address of the farm owner. At the second Panel meeting, Brazil indicated that the rice request was theirs. We ask accordingly that Brazil and its agents return all copies of the erroneous rice release.<sup>7</sup>

The United States also notes that responding to Brazil's request has not been a simple undertaking. Because of the extensive nature of the request, it was necessary to run through approximately 10 million files to extract the pertinent information. There are approximately 2 million farms involved. For the production flexibility contract ("PFC") payment era under the 1996 Act, there were 7 programme crops. In the direct payment and counter-cyclical ("DCP") payment era under the 2002 Act, there are 10 programme crops (counting "other oilseeds", such as rapeseed, canola, etc., as one "programme crop" only). The PFC file alone, if each field for each farm was considered a cell, contains 25 million cells of information. The task involved is a far bigger, far more complicated task than the erroneous rice release. More than 250,000 farms fit the "cotton farm" definition at work in this exercise. The United States has expended a significant amount of time and resources to respond to this data request.<sup>8</sup>

Per Brazil's request, the United States is providing a copy of this letter, associated exhibits, and three electronic data files relating to the production flexibility contract payment era directly to Brazil through the Brazilian Embassy in Washington, D.C. Because of their size, the electronic data files will be couriered to Geneva for transmission to the Panel.

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<sup>6</sup> See Exhibit US-108 (excerpt of BRA-316).

<sup>7</sup> Regarding that release, the United States notes, too, that no member of the US delegation at the second panel meeting in Geneva was aware of the rice release. On inquiry, no one at FSA in Washington was aware of it either. The rice data was sent to an address in Geneva identified by the requester, a member of the Brazilian delegation, who the Kansas City office was led to understand had "relatives" there.

<sup>8</sup> There may well be limitations in the data output since the output depends on the completeness and accuracy of input from the FSA county offices. Moreover, not all farms file crop reports and not all plantings are plantings of programme crops. These are merely some examples.

## **ANNEX K-38**

### **LETTER FROM THE UNITED STATES**

22 December 2003

Further to the letter of the United States to the Panel on 18 December 2003, attached please find a letter from the United States to the Embassy of Brazil in Washington, D.C., dated 19 December 2003, transmitting directly to Brazil the completed electronic data files relating to the direct and counter-cyclical payment era. Please also find attached Exhibits US-111 and US-112. This letter, the electronic data files, and the two exhibits were received by the Embassy of Brazil on 19 December. The electronic data files are presently en route to Geneva, and will be transmitted to the Brazilian Mission to the WTO and to the Panel shortly.

In a letter dated 18 December 2003, to the Chairman of the Panel in the WTO dispute settlement proceeding *United States – Subsidies on Upland Cotton* (DS267), the United States indicated that it would endeavour to provide additional information responding to the request of Brazil conveyed in Exhibit BRA-369 by Friday, 19 December. In particular, we indicated that preparation of certain direct and counter-cyclical payment era electronic files was continuing. Those files have now been completed and are being transmitted with this letter.

There are three direct and counter-cyclical payment era files, containing approximately 85 megabytes of requested data, on the enclosed CD. These three files correspond to the three production flexibility contract payment era files transmitted previously. First, there is a farm-by-farm base and yield data file ("Dcpby.txt"); a description of that file and its 99 fields is found at Exhibit US-111. Second, there is a planted acres file ("Dcpplac.txt"); a description of that file is found at Exhibit US-112. For the reasons set forth in the 18 December letter to the Chairman, we note that the order of the records in the planted acre file is not the same as in the base and yield file. Finally, there is an aggregate data file ("Dcpsum.xls"); that file is an Excel file, and the headings within the file should be self-explanatory.

As indicated in the 18 December letter to the Chairman, the information that we are providing is sensitive. We do not consent to release of this information to the public domain and expect that it will be used solely for purposes of this dispute settlement proceeding. Therefore, pursuant to paragraph 3 of the Panel's working procedures, we designate this information as confidential and must exceptionally insist that this information not be disclosed outside of the delegation of the Brazilian Government and the Panel.

The United States is providing a copy of this letter, associated exhibits, and three electronic data files relating to the direct and counter-cyclical payment era directly to the Panel.

## ANNEX K-39

### LETTER FROM BRAZIL

23 December 2003

As per its Communication of 8 December 2003, the Panel established 22 December as a deadline for the delivery by Brazil and the United States of the Answers to Questions from the Panel and also for the delivery of the US comments on Brazil's econometric model.

In its Communication of 13 October, the Panel established that "*In accordance with paragraph 17 (b) of the Panel's working procedures, the Panel sets the following time for the provision of submissions by the parties: 11.59 p.m., Geneva time on the dates concerned. This time refers to receipt of submissions by the other party and the Secretariat and not to commencement of transmission. For greater clarity, this time for receipt of submissions also refers to the time of completion of receipt of any Exhibits and service of any Exhibits (if necessary electronically) to the other party and to the Secretariat as envisaged in paragraphs 17 (a)-(d) of the Panel's working procedures. All other provisions of the Working Procedures remain unchanged*".

The "Working Procedures for the Panel" establish in paragraph 17 b that

*"the parties and third parties should provide their submissions to the Secretariat by 5:30 pm on the deadlines established by the Panel, unless a different time is set by the Panel"*

and in paragraph 17 d that,

*"the parties and third parties shall provide electronic copies of all submissions to the Secretariat at the time they provide their submissions [...]"*.

The US submissions were not delivered within the deadline of 11.59 p.m. provided by the Panel, which is already an exception to the generally observed deadline of 5:30pm. Neither the paper nor the electronic versions of the submissions were delivered on 22 December until 11.59 p.m.. As duly registered at the form provided by the Secretary to the Panel, the US submission had not been delivered until 0.35 a.m. and it was apparently delivered as late as 1.08 a.m.. The electronic version was sent at 0.47 a.m. and received by Brazil at 1.34 a.m.

Brazil notes that, apart of the impairment of Brazil's rights under the DSU, the delay by the US also involves significant administrative constraints for the Brazilian Delegation in Geneva, which maintains human resources active until such a time as the US delivers the documents

This is already the seventh time the United States fails to deliver a document by the time expressly determined by the Panel. This issue has also been addressed during the panel hearing on 7 to 9 October and the Panel has already explicitly requested the United States to respect the deadlines of the dispute – "in order to ensure due process and secure a balance between the two parties" (Panel's Communication of 13 October). In its letter of 2 October, Brazil had requested the Panel to "determine that in the next steps of the present proceedings any unjustified delay in document delivery by the US results in such document being disregarded by the Panel".

Brazil therefore hereby requests that the documents delivered today by the United States, in renewed disrespect of the established deadline, be disregarded by the Panel.

Please accept, Sir, the assurances of my highest consideration.

## **ANNEX K-40**

### **LETTER FROM BRAZIL**

23 December 2003

The Government of Brazil is in receipt of a letter from the Panel dated 23 December enclosing a number of new questions to Brazil (eight) and to the United States (five) with a deadline set for 12 January. These questions address new interpretations by the Appellate Body, are very comprehensive, and in the view of Brazil will require a significant allocation of resources to complete properly.

Brazil notes that in addition to answering these questions, it must also respond to an extensive US critique of Professor Sumner's analysis, as well as provide comments and analysis on the US 18 December 2003 data, by 12 January. Because Brazil was not aware that the Panel would be filing these new questions, its representatives made severely tight travel and professional commitments that try to accommodate the upcoming holidays bearing in mind the original two deadlines for 12 January (Sumner and 18 December rebuttals).

In consideration of the above, Brazil requests that the Panel push the schedule back by only one week. The original 12 January deadline would be moved to 19 January, and the 19 January deadline for comments on the answers to the Parties' questions would be moved to 26 January. Other aspects of the schedule would be adjusted accordingly by the Panel, but with no more than a one week delay for the issuance of the final report, if this should be deemed necessary by the Panel.

Please accept, Sir, the assurances of my highest consideration.

## ANNEX K-41

### LETTER FROM THE UNITED STATES

23 December 2003

At the Panel's invitation, my authorities have instructed me to provide the following comments on Brazil's letter of 23 December 2003, in which Brazil requests that the upcoming schedule of filings be delayed.

The United States is amenable to Brazil's extension request, with the alternations suggested below, because it is well aware of the burdens that the very tight time frame established in this dispute has imposed on the parties (and the Panel), particularly in light of the complexity of the matter before the Panel and the volume of materials necessary to examine that matter. In fact, the United States has in the past three business days alone:

- Filed via two letters dated 18 and 19 December 2003, approximately two hundred megabytes of data requested by Brazil. Attempting to collect, prepare, and file these data within the time set out by the Panel in its 8 December communication required enormous efforts on the part of the United States, necessarily affecting preparations of the US answers to the Panel's questions and the US comments on Brazil's econometric model.
- Filed answers to approximately 51 questions from the Panel, within the same time that Brazil had to answer approximately 32 questions. (Indeed, given Brazil's comment that the "eight" new questions directed to it "in the view of Brazil will require a significant allocation of resources to complete properly" and therefore justify an extension of time, Brazil should now understand – if it did not before – the significantly greater burdens placed on the United States in responding to approximately 20 more questions than Brazil was asked to respond to.)
- Filed comments on Brazil's econometric model. In making this filing, the United States was faced with examining, and preparing and filing comments on the FAPRI model transmitted to the United States by Dr. Bruce Babcock, per the Panel's communication dated 8 December 2003, within the time originally set out by the Panel only to address Brazil's exhibits and models.

Had the United States focused its energies only on the answers to the Panel's questions and the comments on Brazil's economic modelling, the filing of those documents would not have been delayed, but the United States chose to make best efforts to comply with all of the requests and time frames set by the Panel in this dispute. It is only due to tremendous efforts by US personnel in Washington, Kansas City, and Geneva that Brazil is even in a position to cite the need to respond to the data submitted by the United States as part of the reason a delay in the schedule is needed.

In light of the foregoing, the United States would be willing to agree to an extension of time. However, instead of Brazil's proposal, the United States would ask that the schedule be altered as follows: First, we would ask that the filing of the parties' responses to the additional questions from the Panel (dated 23 December 2003), as well as Brazil's comments originally scheduled for 12 January 2004, be moved to 21 January (to take into account the fact that 19 January is a US Federal holiday). We would then request that the parties' comments on each other's answers be

moved to 2 February. The reason for this latter proposal is because, in addition to filing comments on Brazil's answers to the Panel's additional questions on that date, the United States will also be filing – per the Panel's communication of 8 December 2003 – comments on (1) Brazil's comments on the data provided by the United States on 18 and 19 December 2003, as well as (2) Brazil's comments on the US comments on Brazil's economic model. Given Brazil's confirmation in its letter that its submissions on these matters will require four weeks to prepare, the United States and the Panel can expect that those comments will be extensive. Thus, one week to respond to Brazil's three submissions would understandably be insufficient; for due process reasons, the United States believes at least two weeks would be needed to respond to Brazil's four weeks worth of comments and answers.

In agreeing to Brazil's extension request, with the above caveats, the United States notes that it is simply seeking to advance the goal of WTO dispute settlement – that is, the effective resolution of disputes, rather than pursuing litigation tactics designed merely to disadvantage the other party procedurally. In this regard, we regret Brazil's second letter of 23 December, requesting that certain US documents "be disregarded by the Panel". The United States has in a communication earlier today expressed its regret for any inconvenience that may have resulted to the Panel and Brazil due to the delay in submitting the US comments and its answers to questions from the Panel, noting largely the same reasons Brazil is now relying on to support its extension request. Indeed, this delay resulted in large measure from the US determination to make best efforts to respond to Brazil's request for certain information while simultaneously preparing its comments and answers. In this connection, we find it interesting that Brazil is seeking to have the Panel "disregard[]" the US answers and comments, but not the extensive data requested by Brazil, which was provided on 19 December, one day after the date set out in the Panel's 8 December communication. The significant burdens on all parties to a WTO dispute, and this dispute in particular, are well-understood. The effective functioning of the dispute settlement system and the resolution of disputes are not served through one-sided approaches that only recognize the burdens place on one party but not the other.

## ANNEX K-42

### REPLIES OF THE UNITED STATES TO ARTICLE 13 REQUEST

20 January 2004

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

With respect to the Panel’s explanation that “disclosure is sought to permit an assessment of the total expenditures of PFC, MLA, CCP and direct payments by the US Federal Government to upland cotton producers in the relevant marketing years”, the United States notes that it has previously provided data that permits calculation of “total expenditures” for all decoupled payments made to farms planting upland cotton with respect to historical base acres (whether upland cotton base acres or otherwise). In particular, for the production flexibility contract payment era, we provided a farm-by-farm file (“Pfcby.txt”) with base acreage and yield data for all programme crops for all “cotton farms” as defined in BRA-369 and data file (“Pfcsum.xls”) that aggregated this data for ease of use.<sup>2</sup> The “programme payment units” field allows for easy calculation of “total expenditures” to farms planting upland cotton in any given year by multiplying payment units by the applicable payment rate. Similarly, for the direct and counter-cyclical payment era, the United States provided a farm-by-farm file (“Dcpby.txt”) with base acreage and yield data and an aggregate data file (“Dcpsum.xls”).<sup>3</sup> Again, the “programme payment units” field allows for easy calculation of total expenditures by multiplying payment units by the applicable payment rate. Thus, the data already provided by the United States to Brazil and the Panel would permit an assessment of total expenditures of decoupled payments to farms planting upland cotton.

The United States has studied the Panel’s request for certain farm-specific data as well as its suggestions with respect to protecting US producers’ privacy interests. The United States thanks the Panel for recognizing the important confidentiality concerns which arise from Brazil’s request to receive, by farm number, contract payment and planting information. The Panel will recall that at the second panel meeting the US delegation expressly inquired of the Brazilian delegation whether the

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

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

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

United States could provide the requested data in some format that also protected the identity of individual producers. The Brazilian delegation refused to answer and insisted that the requested information be provided with farm numbers, as set out in Exhibit BRA-369. In response to Brazil's request, the United States therefore provided all of the data that it could without violating the privacy interests of US producers, as required under the Privacy Act of 1974.

The United States has studied the Panel's request and has concluded that it is not possible to "protect the identity of individual producers" while providing the requested data in a format that permits data-matching. This results because the United States has already provided, by farm number, farm-specific contract information, including base acreage, base yield, and payment units, for each programme crop for each requested year. For example, for each and every "cotton farm" (as defined in the Brazilian request) identified by its FSA farm number, the United States has provided 96 separate data fields relating to 2002 direct and counter-cyclical contract payments. These 96 fields of contract data form a unique combination, such that – even in the absence of farm numbers – disclosing the farm-specific plantings that correspond to each unique combination of contract data would allow each farm's plantings to be connected to the FSA farm numbers through the farm-by-farm files previously provided. Thus, as a result of Brazil's insistence on receiving data with the FSA farm numbers and refusal to consider any alternative that would respect the privacy interests of US producers, unfortunately there would not appear to be a way to provide the requested data and "protect the identity of individual producers" given the data already provided. Under the Privacy Act of 1974, the United States could not disclose this information without the consent of the submitter.<sup>4</sup> Thus, the existence of confidentiality procedures would still not permit the United States to release each farm's planting information associated with the farm's particular contract payment data (given the previous submission of contract data in association with farm, county, and state numbers).<sup>5</sup>

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

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

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

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

The United States further notes the Panel's statement that "[a] refusal by the United States to provide the information as requested without an adequate explanation may lead to adverse inferences being drawn". As explained, the United States does not have the authority to provide the farm-specific planting information in the format requested. Further, the United States has provided both farm-specific and aggregated contract data that would permit the Panel to make the assessment it identifies, that is, an assessment of total expenditures of decoupled payments to farms planting upland cotton. The situation here is thus very different from the one in *Canada - Aircraft* where the Appellate Body first opined that "a panel should be willing expressly to remind parties – during the course of dispute settlement proceedings – that a refusal to provide information requested by the panel may lead to inferences<sup>6</sup> being drawn about the inculpatory character of the information withheld".<sup>7</sup> There is no basis for an "inference" of any kind, adverse or otherwise.<sup>8</sup>

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

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

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

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

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

## ANNEX K-43

### LETTER FROM THE UNITED STATES

28 January 2004

Enclosed with this letter the United States is providing a CD containing revised versions of the 6 electronic data files relating to the production flexibility contract era and the direct and counter-cyclical payment era that were transmitted to Brazil on 18 and 19 December 2003, and to the Panel on 18 and 22 December 2003. The enclosed CD contains six revised data files. The file names are identical to those previously submitted but with an "r" preceding the original file name. Thus, the files are now titled "rDcpsum.xls" (aggregate data file), "rDcpby.txt" (farm-by-farm base and yield data file), "rDcpplac.txt" (planted acres file), "rPfcsum.xls" (aggregate data file), "rPfcby.txt" (base and yield data file), and "rPfcplac.txt" (planted acres file). We have prepared these revised electronic files after becoming aware of certain errors in the original data files submitted.

In the limited time available to reply to Brazil's request for data, certain programming errors appear to have resulted. As indicated in our letter of 18 December to the Panel, responding to the Brazilian request involved extracting pertinent information from approximately 10 million data files; because that request sought information relating to up to 10 programme crops on nearly 250,000 farms, the information provided by the United States ultimately spanned nearly 220 megabytes of data. Because that data was not the product of any established procedure with a protocol for cross-checking and verification, it was perhaps inevitable that certain errors should have occurred.

In preparing comments on Brazil's answer to question 258 from the Panel, the United States became aware that certain fields in the aggregate data files ("Pfcsum.xls" and "Dcpsum.xls") that the United States had prepared to assist the Panel and Brazil in interpreting the voluminous data in the farm-by-farm files contained no data (indicated by a zero ("0") or a dash ("-")). For example, looking at the original summary file for the direct and counter-cyclical payment era ("Dcpsum.xls"), those farms that in marketing year 2002 had upland cotton base acreage (4.7 million acres) but planted no cotton at all (0 acres), are also listed as having planted no acres of wheat, oats, rice, corn, sorghum, barley, flax, sunflower, safflower, soybeans, rapeseed, mustard, canola, crambe, or sesame on 15.9 million acres of cropland.

The United States has now expended significant effort correcting for programming errors and re-running the pertinent search. These efforts revealed that, while the cotton data continues to be correct (that is, farms with 4.7 million base acres of upland cotton planted not a single acre of cotton in marketing year 2002), in fact these farms planted approximately 10.3 million acres of these other crops and not zero as originally reported.

The corrected programming and new search generally corrected for instances in which the original search apparently failed to capture relevant data. The most significant revisions relate to (1) additional planted acres for other crops for those farms with upland cotton base acres that planted no cotton and (2) additional base acres for other crops for those farms without any upland cotton base acres that did plant cotton.

## ANNEX K-44

### LETTER FROM THE UNITED STATES

30 January 2004

The United States is in receipt of a document filed by Brazil with the Panel on 28 January 2004, providing Brazil's comments regarding data provided by the United States on 18 and 19 December 2003, and related matters. Brazil's filing of these comments was made 8 days after the deadline set by the Panel in communications dated 8 December and 24 December 2003, and on the date that had been established by the Panel for the United States to comment on Brazil's materials. Accordingly, my authorities have instructed me to respectfully request the Panel to specify the new date for the United States to file comments. The United States further suggests that since the Panel had originally provided that the United States would have eight days to provide its comments, the US comments could now be due eight days from the date the Panel establishes the new deadline.

As you know, on 8 December 2003, the Panel communicated to the Parties a revised schedule following the second panel meeting. The second paragraph of that coverfax and timetable reads: "As stated by the Chairman on 3 December, the United States will be given until **18 December** to respond to Brazil's request made in Exhibit BRA-369. Brazil will be given until **12 January 2004**, to comment on the US response." The third paragraph reads: "The parties may submit any further comments on each other's comments by **19 January 2004**."

On 24 December 2003, the Panel amended the timetable, stating that "all submissions originally due 12 January 2004 would now be due **Tuesday, 20 January 2004**" and "all submissions originally due 19 January 2004 would now be due **Wednesday, 28 January 2004**." Thus, Brazil had until 20 January 2004, to file its comments on the US data, and the United States had until 28 January 2004, to file its comments on Brazil's comments.

Brazil did not file its comments on 20 January, nor did it seek an extension of time from the Panel. Instead, Brazil simply delayed filing its 48 pages of detailed comments (with accompanying exhibits) until 28 January.<sup>1</sup> Providing the United States eight days to comment from the date of the Panel's communication of the new deadline would preserve the procedural balance originally established by the Panel.

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<sup>1</sup> The United States finds Brazil's eight-day delay in meeting the Panel's deadline particularly ironic in light of Brazil's letters, such as its letter of 23 December 2003, complaining about the time of US filings.

## ANNEX K-45

### LETTER FROM BRAZIL

2 February 2004

The Government of Brazil is in receipt of a letter from the United States dated 30 January 2004 requesting an additional eight days to respond to Brazil's 28 January 2004 *Comments and Requests Regarding Data Provided by the United States on 18/19 December 2003 and the US Refusal to Provide Non-Scrambled Data on 20 January 2004* ("Brazil's Comments"). Brazil would comment on the US request as follows:

First, the US 30 January 2004 letter suggests that Brazil was late in filing *Brazil's Comments*. This is incorrect. The US letter ignores the fact and the effect of the Panel's 12 January 2004 Communication, in which the Panel requested the United States to produce complete and unscrambled data concerning contract payment base and current plantings of upland cotton farms. This Communication necessarily mooted, at least temporarily, any comments by Brazil on the 18/19 December 2003 US "scrambled" data. It would have made little sense for Brazil to comment on the data deficiencies (and the implications thereof) on 20 January 2004, since Brazil trusted that the United States would have lived up to the Panel's repeated request and produced the data by 20 January 2004, as required by DSU Article 13.1. Only after the United States failed to produce the requested data was Brazil able to properly comment on the US data – and it did so on 28 January 2004 (in a much shorter time - 8 days - than originally foreseen by the Panel's 12 January 2004 deadline).

Second, the United States requests the opportunity to comment on Brazil's Comments and requests eight days to do so. Brazil is of the view that eight days from 28 January would be acceptable, which would make the US submission due on 5 February 2004. The United States already has had access to Brazil's Comments for five days (since 28 January 2004). The US request for what would amount to essentially two weeks to respond would further delay these proceedings. It would also violate Brazil's due process rights if the United States were given more time to comment on these documents than Brazil had to comment on the failure of the United States to produce the information on 20 January 2004.

Third, in order to preserve Brazil's due process rights, the Panel should limit the scope of the US "Comments" to responding to arguments that the United States has not yet had an opportunity to respond. For example, Sections 4, 5, 11 of *Brazil's Comments* simply respond to arguments and facts already presented in US letters of 18 December 2003 and 20 January 2004 in which the United States sought to justify the refusal to produce farm-specific data. The United States should not be given yet another opportunity to comment on Brazil's comments.

Fourth, the Panel should reject any attempt by the United States to present positive evidence in any comments without also giving Brazil an opportunity to respond. For example, the United States never presented the Panel with *any* application of its own proposed methodology for calculating and allocating the amount of contract payments to current upland cotton farmers. It would be manifestly unfair for the United States to present, in its last submission, positive evidence based on incomplete (non-farm specific data) in support of its defence when it has refused to provide any calculation, or even an estimate, for thirteen months – let alone produced the requested data that would permit Brazil or the Panel to do so.

Fifth, Brazil notes that the U.S. letter of 28 January 2004 provides Brazil and the panel with “revised” data files to correct for “certain errors” in the original data submitted forty days earlier on 18 December 2003. None of these “corrections” provide any useable farm-specific contract payment base and current planting data. Thus, the United States continues to violate the Panel’s 8 December 2003 and 12 January 2004 requests for such information. Further, the 28 January 2004 revised data continues to suffer from the various aggregation problems identified in paragraphs 8-15, 22, 76-81, 90-98, of *Brazil’s Comments*. Nor does the corrected data include complete information on market loss assistance payments (as identified in paragraphs 20, 22, 43, 82 and 95 as well as notes 40, 43, 75, 163, 164, 166, 195 and 197 of *Brazil’s Comments*), or information on MY 2002 peanut base payments (as identified in paragraphs 21-23, 43 and 98 as well as notes 75, 132, 161, 166, 195 and 196 of *Brazil’s Comments*). Thus, Brazil does not believe that this “revised” data, arriving *after* the 11<sup>th</sup> hour, is either timely or useful. If, however, the Panel believes that it would be useful for Brazil to provide revised calculations (based on the revised US summary data) replacing those set out in paragraphs 83 and 96 of *Brazil’s Comments*, or comment in any other way on the revised US “scrambled” data, Brazil will be pleased to do so. Brazil recalls, however, that it provided the figures in those two paragraphs based on the flawed US summary data to demonstrate the existence of further support for its “14/16<sup>th</sup>” methodology estimated figures.

## ANNEX K-46

### LETTER FROM THE UNITED STATES

3 February 2004

The United States is in receipt of a letter filed by Brazil on 2 February 2004, commenting on the US request for the Panel to establish a new deadline for the United States to file comments on Brazil's comments regarding data provided by the United States on 18 and 19 December 2003, and related matters.

My authorities have instructed me to inform the Panel that the United States welcomes Brazil's statement that it has no objection to the Panel establishing a new deadline for the United States to comment on Brazil's comments. Brazil, however, objects to the United States being given eight days from the Panel's communication establishing the new deadline, arguing that it would "violate Brazil's due process rights if the United States were given more time to comment on these documents than Brazil had to comment on the failure of the United States to provide the information on 20 January 2004". With respect, this fundamentally misstates the issue.

Brazil had access to the 18 and 19 December data for nearly *six weeks* before filing its comments, due on 20 January but submitted on 28 January, and evidently used that time in order to prepare quite lengthy and detailed comments (over 50 pages plus exhibits). Yet Brazil objects to the Panel providing the United States with notice that it has eight days to prepare its response. Brazil would have the Panel upset the balance of time set out in its communications for the preparation of the respective comments of Brazil and the United States.

We also note Brazil's argument that the Panel's 12 January letter "necessarily mooted, at least temporarily", the 20 January date for the filing of Brazil's comments. It is ironic, to say the least, that Brazil should have complained about delays (measured in minutes) in filing certain US documents and then unilaterally have decided that it was entitled to an additional *eight days* in filing its comments since, in Brazil's view, "[i]t would have made little sense" for Brazil to comply with the Panel's 20 January deadline. Brazil did not request the Panel to modify the deadlines as a result of the Panel's 12 January letter. Brazil simply decided not to abide by the deadlines established by the Panel. Indeed, Brazil should have filed its comments on the 18 and 19 December data on 20 January as scheduled and has provided no reason why it was unable to do so.

If Brazil wanted a further opportunity from the Panel to comment on any response to the Panel's 12 January letter, it could have so requested. Brazil did not do so. Instead it simply ignored the Panel's deadline and used a nearly six-week period to provide comments on the US data. Thus, Brazil's February 2 letter continues to evince its one-sided tactics on procedural issues, in which Brazil seeks (or simply provides to itself) substantial periods of time to prepare its filings but seeks to deny adequate time to the United States to prepare its responses.<sup>1</sup>

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<sup>1</sup> For example, the United States recalls that at the panel organizational meeting, Brazil objected to the United States having more than two weeks to prepare its first submission while at the same arguing that Brazil would need a full two weeks to prepare the executive summary of its own first submission. (Brazil did not volunteer that it had already drafted a first submission that would ultimately turn out to be more than 135 pages in length, with over 100 exhibits.) As the United States noted at the time, it seemed implausible that the United States could prepare a *substantive response* to a submission in two weeks if Brazil was unable to prepare a *summary* of that submission in less than that time.

We note Brazil's request that the Panel *ex ante* "limit the scope of the US 'Comments' to arguments [to which] the United States has not yet had an opportunity to respond" and prevent the United States from "present[ing] positive evidence". However, the Panel had previously established that the United States "may submit any further comments on [Brazil's] comments" by 19 January, 2004<sup>2</sup>, later revised to 28 January 2004.<sup>3</sup> Therefore, Brazil's request does not comport with the Panel's previous communication, would prejudice what comments the United States may provide (and perhaps preclude relevant comments on new information presented by Brazil), and would impose a limitation with respect to arguments and evidence on the United States that was not imposed on Brazil.

Finally, Brazil continues to mischaracterize the situation when it asserts that the United States should have breached US law regarding the protection of individual privacy in order to produce additional data relating to planting and contract payment information on a farm-by-farm basis. We have previously explained in our letters of 20 January 2004, and 18 December, 2003 why under US law we are unable to provide the data requested. In part, this results from Brazil's refusal at the second panel meeting to allow *any* deviation from the request set out in Exhibit BRA-369, which specifically requested that the data be provided by farm with its associated FSA farm number. The United States responded to that request to the maximum extent permissible under US law.

In sum, the Panel had intended for the United States to provide comments and have 8 days from the 20 January deadline for Brazil's comments to do so. However, Brazil seeks to impose limitations that were not applied to its own comments, and which would significantly impair the information available to the Panel in evaluating the material before it and US rights of defence. We request that the Panel reject Brazil's unbalanced suggestions and suggest that the US comments be due eight days from the Panel's confirmation of the new deadline for filing those comments.

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<sup>2</sup> Panel Communication of 8 December 2003.

<sup>3</sup> Panel Communication of 24 December 2003.

## ANNEX K-47

### LETTER FROM THE UNITED STATES

11 February 2004

Attached please find answers of the United States to 29 additional questions from the Panel following the second substantive meeting in the dispute *United States – Subsidies on Upland Cotton* (DS267) and the comments of the United States on Brazil's 28 January 2004 comments and new arguments on the extensive data provided by the United States.

The United States wishes to inform the Panel that it continues to work on preparing information requested by the Panel in its supplementary request for information pursuant to Article 13 of the DSU as well as certain information requested under the Panel's additional questions. Unfortunately, the very extensive nature of those requests for information have rendered it impossible for the United States to prepare and provide that information within the eight days requested by the Panel.

- For example, the Panel has requested that the United States provide “such of the information requested on 12 January 2004 in the format requested, as regards payment recipients who do not have interests protected under the Privacy Act [of] 1974, if any”.<sup>1</sup> More than 250,000 farms fell within the farm criteria set out in Brazil's request in Exhibit BRA-369<sup>2</sup>, to which the Panel's January 12 request referred. While it would not be possible to examine singly the records relating to each of these 250,000 farms, the United States continues to seek some means by which the identities of payment recipients who may not have protectable privacy interests could be identified. Eight days has not been sufficient time to complete that effort.
- In addition, the Panel has asked for a very substantial amount of acreage information for “covered commodities” over four marketing years under four different programmes and for all commodities for which planting information is maintained in marketing year 2002. A significant amount of time was required to generate the data in response to the Panel's earlier requests. That effort and the programming errors encountered in that response demonstrate that the response to the supplemental request also requires more than eight days.

Thus, the United States continues to work on responses to item (a) and all the bulleted subparts of item (b) of the Panel's supplementary request for information, as well as to Question 264(b) of the Panel's additional questions. Based on the work completed to date, our current understanding of the scope of the Panel's requests, and our experience completing (and revising) a similar, but smaller, computerized search for electronic files in December, the United States estimates that it would be able to provide the requested information by four weeks from the date the Panel provides the clarifications requested below. Of course, should the United States complete its preparation of the requested information prior to that date, we would make that information available to the Panel and Brazil at that time.

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<sup>1</sup> Panel's Supplementary Request for Information Pursuant to Article 13 of the DSU, item (a) (3 February 2004).

<sup>2</sup> See US Letter to the Panel at 3 (December 18, 2003).

With respect to item (b) of the Panel's supplementary request for information, the United States would seek clarification of that request. First, the United States would ask the Panel to specify which commodities are "covered commodities" as that term is used in several of the bullet points and subbullets. Second, the United States would seek confirmation that, with respect to the information sought for marketing year 2002 "with respect to all crops on cropland covered by the acreage reports", the relevant portions of the "above questions" are those that ask for planted acreage information for each Category of farm. Clarifications of these points will assist the United States greatly in preparing data responsive to the Panel's request.

Finally, the United States notes that the Panel's communication of 3 February invites the parties "to submit, by Wednesday 18 February 2004, any comments on material submitted on 11 February by the other party". The United States understands this procedure to mean that, with respect to Brazil's 28 January comments on the data submitted by the United States on 18 and 19 December 2003, Brazil would be permitted to file comments on the US comments filed today. If this is not the case, the United States would appreciate the Panel providing clarification to the parties at its earliest convenience.

However, to the extent that the Panel has given Brazil the opportunity to file a reply on 18 February to the US comments filed today, and Brazil chooses to do so, the United States would request an opportunity to respond to Brazil's comments. The procedure set out by the Panel in its communications of 8 and 24 December 2003, originally set out one opportunity for Brazil to comment on the US data (on 20 January 2004) and one opportunity for the United States to respond to Brazil's comments (on 28 January 2004). As the responding party, the United States believes that it is important that it have the opportunity to respond to Brazil's arguments, particularly in this dispute where Brazil's arguments and legal positions have changed from submission to submission. To the extent that Brazil as complaining party is now being provided two opportunities to comment on the US data, the United States would feel bound to request a similar second opportunity to comment. We suggest that the deadline for the US reply could be set for Wednesday, 25 February.

## ANNEX K-48

### LETTER FROM BRAZIL

13 February 2004

The Government of Brazil is in receipt of a letter from the United States dated 11 February 2004 in which it informs the Panel that it is not providing the requested information by the 11 February 2004 deadline. Further, the letter requests (1) four additional weeks to provide data, and (2) the opportunity to respond to Brazil's 18 February 2004 comments on the "US data". Brazil asks the Panel to reject both of these requests.

In putting these requests into perspective, Brazil recalls that the entire contract payment exercise is to provide the Panel with sufficient data to determine and calculate (using whichever methodology the Panel deems appropriate) the amount of "support to" upland cotton for MY 1999-2002. The best way for the Panel to do this is if it has the actual data to calculate the amount of contract payments received by producers that planted cotton in MY 1999-2002. As the Panel knows, it does not yet have this actual data. Any objective assessment of the record indicates that Brazil has sought this contract payment information since November 2002, and that the Panel has sought it since it posed Question 67 *bis* to the United States in August 2003.

The immediate focus of this lengthy exercise is the Panel's 3 February 2004 "Supplementary request for information pursuant to Article 13 of the DSU and additional questions." ("3 February 2004 Request"). In part (a) of that request, the Panel asked for "such information requested on 12 January 2004 in the format requested, as regards payment recipients who do not have interests protected under the Privacy Act of 1974, if any". In a completely separate request (not conditioned on the Privacy Act), the Panel asked in part (b) for summary *aggregated* information that required the United States to compare farm-specific contract acreage data with farm-specific planting data. Data provided in response to part (b) could not possibly include any confidential information since it is aggregated.

The United States letter of 11 February 2004 states that it needs four additional weeks to complete the part (a) analysis. Brazil notes that because the United States apparently intends only to provide farm-specific information for far less than the total amount of farms (*i.e.*, those that are not held by "individuals") this information will be useless for calculating the exact amount of *total* contract payments. Therefore, Brazil does not believe that the United States should be given any additional time to produce this information. In this regard, it is important to stress that even if part of the farm-specific information were confidential under US law (which Brazil believes is not the case), the United States would still be required to produce the information requested by the Panel on 8 December 2003 and 12 January 2004 subject to WTO confidentiality procedures.

With respect to part (b) of the Panel's 3 February 2004 Request, the United States also claims it needs four additional weeks to complete this analysis. And it asks the Panel to "clarify" its request regarding what are "covered commodities" and "with respect to all crops on cropland covered by the acreage reports". The Panel's 3 February 2004 Request provided a chart which listed the "covered commodities". If the United States had any questions despite the clarity of this chart, then why did it wait 8 days to raise these questions? Further, the request for "crops on cropland covered by the acreage reports *not simply commodities covered by the programmes*" could not be clearer. Again,

why did the United States wait 8 days to bring this to the Panel's attention if it was truly puzzled by this condition of the Panel's request?

With respect to the enormous amount of time the United States claims it will take to produce information in response to part (b) of the Panel's 3 February 2004 Request, Brazil notes that the format of the Panel's Request was very similar to the *rice* FOIA request that is set out in Exhibit Bra-368. The testimony of Mark Somers before the Panel on 3 December 2003 indicated that the rice FOIA documents showed that USDA took less than a week to process the data and respond to the rice FOIA request once USDA's statistical experts began work on the project (and the time from filing the request to issuance of the data was 15 days). Indeed, Brazil was easily able to calculate the aggregate rice farm-specific base and acreage information in just a few days as set forth in Christopher Campbell's statement in Exhibit Bra-368. With its access to a number of USDA statistical experts, not to mention the centralized database with all of the records already inputted, it is simply not credible for the United States to claim that it needs more than five weeks to respond to the Panel's request.

As the Panel knows from reviewing Exhibit Bra-368, the data delivered by USDA's Kansas City office permitted the ready tabulation of the exact number of rice farms holding contract acreage and the amount of their rice acreage. The Panel's request for contract and planted acreage information on farms planting cotton is not fundamentally different from the rice request in terms of the type of data files at issue. The raw data in the contract and planted acreage (for all planted commodities) files that the United States would use to respond to the Panel's 3 February 2003 request are the same raw data files that have been in the centralized Kansas City database throughout this dispute. If there were any doubt about this, the United States demonstrated that it examined all the farm-specific data in its 18/19 December 2003 responses (albeit producing them in a scrambled format). Thus, part (b) of the Panel's 3 February 2004 Request did not involve any new data files – simply the writing of a programme that would allow the production of the data in an aggregated, non-confidential summary form, as defined and requested by the Panel.

Brazil believes that the Panel should not provide the United States with any additional time to respond to part (b) of its 3 February 2004 Request. The United States stood by and waited while the deadline approached without making any effort to request additional time or to seek clarifications. Yet, the United States had no difficulty during the same 8-day period in making extensive comments on Brazil's 28 January 2004 Comments and Requests Regarding Data Provided by the United States on 18/19 December 2003 and the US Refusal to Provide Non-Scrambled Data on 20 January 2004. ("Brazil's 28 January Data Comments"). The United States provides no legitimate explanation why it could not complete part (b) of the Panel's request within the Panel's deadline. Indeed, the United States – in a non-litigation context – demonstrated in the rice FOIA request just how easy and fast it is to provide this information.

The Panel is now only one month away from the one-year anniversary of its establishment, and almost two months *beyond* the nine-month deadline for completing its work set out in DSU Article 12.9. Brazil has not objected to the Panel's laudable attempts to coax the United States into producing the actual non-scrambled data that would permit calculation of the amount of support provided to upland cotton producers from the four different contract payments. Brazil was willing to go along with the delays that each of these requests necessitated because it, presumably like the Panel, wanted the Panel to make use of the most complete and accurate information available to decide these important issues. Starting with its Question 67 *bis*, the Panel has now asked for contract payment information data on *five* separate occasions (Question 125(9) and 8 December 2003, 12 January 2004 and 3 February 2004 Requests). The Panel now has before it a pattern of delay by the United States that is seriously impinging on Brazil's due process rights to receive a timely resolution of its claims in this dispute.

Therefore, Brazil strongly believes that the United States has been given more than sufficient time (seven months) and opportunities (five) to produce the requested contract payment information in one form or another. If the Panel believes, however, that the required balance between ensuring high-quality panel reports and not unduly delaying the panel process requires providing yet another opportunity to the United States to produce the data requested in part (b) of the Panel's 3 February 2004 Request, then Brazil has the following additional comments. If the United States provides the complete information requested in part (b) of the 3 February 2004 Request, then most of Brazil's 28 January Data Comments would be rendered moot. The purpose of those comments was to (a) demonstrate the inadequacy of the US data production, (b) request the drawing of adverse inferences, and (c) in the absence of the actual data, to apply the inadequate summary data. Because the US 11 February 2004 comments on Brazil's 28 January 2004 Data Comments are only relevant to these underlying Brazilian comments, the US 11 February 2004 Comments will also similarly be largely rendered moot *if* the United States provides the data requested in part (b). With the actual and complete data, the Panel would be in the position to apply any methodology it determines to be acceptable. Further, by producing the complete aggregated information, there would no longer be a need to draw adverse inferences. Nor, would there be any need for Brazil to comment on the US use of the incomplete and inadequate data in applying the US methodology.

Accordingly, if the Panel provides the United States with additional time to provide the data (which Brazil opposes), it should allow Brazil the opportunity to file comments, to the extent any are still relevant, to the United States 11 February 2004 Comments to Brazil's 28 January 2004 Data Comments until 8 days *after* the United States has provided the information responsive to part (b) of the Panel's 3 February 2004 Request. By using this modified procedure, Brazil hopes to alleviate some of the considerable legal costs it has incurred in this extraordinary process. It would deny Brazil's due process rights to incur such unnecessary expenses by filing a response which would not assist the Panel in resolving the relevant issues in this dispute, assuming the United States provides the complete data requested in part (b).

Brazil also opposes the unjustified attempt by the United States to further delay this proceeding by seeking yet another opportunity to comment on Brazil's 18 February 2004 Comments. Brazil notes that the United States 11 February 2004 Comments to Brazil's 28 January 2004 Data Comments go far beyond what are legitimate comments on Brazil's original 28 January 2004 Data Comments. In particular, in a number of instances, the US 11 February 2004 Comments address issues raised in Brazil's 28 January 2004 Comments on US Answers to Questions Posed by the Panel Following the Second Substantive Meeting of the Panel.

Thus, the United States, having already abused the Panel's procedures, now seeks yet another opportunity to comment. The Panel's 3 February 2004 Communication made it clear that the deadline for the United States to comment would be 11 February 2004. The US request would only serve to further delay these proceedings, to the detriment of Brazil.

Finally, Brazil asks the Panel to reject the United States' unilateral decision to take additional time to respond to Question 264(b). There is absolutely no legitimate reason for the United States to have failed to respond to this question; nor has the United States indicated any such reasons. The Panel's question in no sense called for a complicated analysis, and a response could readily have been provided within the 8-day response period. After reviewing the US response, Brazil was able to set up a table comparing the US and Brazilian figures in less than an hour.

## ANNEX K-49

### LETTER FROM THE UNITED STATES

16 February 2004

The United States is in receipt of a letter from Brazil dated 13 February 2004, requesting the Panel not to afford the United States additional time to provide certain requested information and the opportunity to respond to Brazil's anticipated 18 February 2004, comments on certain data submitted by the United States. My authorities have instructed me to make the following reply to these issues.

The United States has communicated to the Panel that work continues in response to the Panel's supplemental request for information and that the United States expects to complete this work within four weeks from the date the Panel provides certain clarifications to its request. The United States provided this time estimate on the basis of its work completed to date and questions that arose with respect to the Panel's request (the subject of our request for clarifications).<sup>1</sup> We also noted that item (a) in the Panel's request presented the challenge of seeking some means by which to review the identities of payment recipients on approximately 250,000 farms within the scope of the request, a task which was impossible to complete within the eight days the Panel had requested. Finally, in producing this time estimate, United States reflected on its experience in producing data for this dispute in December 2003. That data was provided within 15 days of its request, and, on subsequent review, contained a number of inaccuracies that had to be cured by a subsequent filing.<sup>2</sup> In addition to explaining the reasons supporting our estimate, we also made clear that "should the United States complete its preparation of the requested information prior to that date, we would make that information available to the Panel and Brazil at that time".<sup>3</sup>

If anything, the data requested by the Panel on 3 February 2004, is more extensive than the information requested in December as it requests that additional data be sought and that different aggregations be provided. By way of example, for marketing year 2002, we understand that the Panel has requested planted acreage data for all "crops" for each Category of farm set out in the request.<sup>4</sup> The Panel will recall that in marketing year 2002, the "crops" for which crop insurance premium subsidies were available included:

Almonds, apples, avocado, avocado trees, barley, blackberries, blueberries, burley tobacco, cabbage, canola, cherries, chile peppers, cigar binder tobacco, cigar filler

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<sup>1</sup> With respect to the first point of clarification sought by the United States, Brazil points to a table in the Panel's supplemental request for information. We note that two of the headings in that table, "soybeans" and "other oilseeds", are marked with an asterisk, which denotes "[w]here applicable". See Panel's Supplemental Request for Information, at 2 (3 February 2004). The United States has requested clarification of the Panel's supplemental request because, even with that table, the precise scope of the term "covered commodity" and where soybeans and other oilseeds are "applicable" are not clear.

<sup>2</sup> See US Letter to Panel of 28 January 2003 (transmitting CD-ROM with revised data files).

<sup>3</sup> See US Letter to Panel of 11 February 2004, at 2.

<sup>4</sup> Whether the data sought was planted acreage only for farms falling within each Category of farm was the second point of clarification raised by the United States. See US Letter to Panel of 11 February 2004, at 2. The United States was not asking for a list of "crops" covered by that request, a point which Brazil evidently misunderstands. Brazil's Letter to the Panel of 13 February 2004, at 2 ("Further, the request for 'crops on cropland covered by the acreage reports *not simply commodities covered by the programmes*' could not be clearer.").

tobacco, cigar wrapper tobacco, citrus (grapefruit, lemons, limes, mandarins, murcotts, navel orange dollar, oranges, tangelos, tangerines), citrus trees, corn, cotton, cotton extra long staple, crambe, cranberries, cultivated clams, cultivated wild rice, dark air tobacco, dry beans, dry peas, figs, fire-cured tobacco, flax, Florida fruit trees, carambola, flue-cured tobacco, forage production, forage seed, forage seeding, fresh apricots, fresh nectarines, fresh market beans, fresh market sweet corn, fresh market tomatoes, grain sorghum, grapes, green peas, hybrid corn seed, hybrid sorghum seed, macadamia nuts, macadamia trees, mango trees, Maryland tobacco, millet, mint, mustard, nursery, oats, onions, peaches, peanuts, pears, pecans, peppers, plums, popcorn, potatoes, processing apricots, processing beans, processing cucumbers, prunes, raisins, rangeland, rapeseed, raspberries, rice, rye, safflower, soybeans, stonefruit (processing apricots, processing cling peaches, processing freestone), strawberries, sugar beets, sugarcane, sunflowers, sweet corn, sweet potatoes, table grapes, tomatoes (canning and processing), walnuts, wheat, and winter squash.<sup>5</sup>

Thus, this one element of the Panel's supplemental request would seem to require the United States to gather and organize a substantial amount of information not previously provided.

We do note again that the Panel's request for aggregated acreage data does not involve privacy issues and thank the Panel for seeking the data in this format, which allows the United States both to provide data in a manner consistent with its domestic law and to do so in a way that may be of assistance to the Panel. Had Brazil requested data in a similar aggregated format or responded positively to the US request at the second panel meeting for alternatives that would allow farmer privacy interests to be protected, a brief delay would not be necessary while the United States seeks to provide the requested data. Brazil did not respond positively to that request, insisted on receiving the data in a format that would reveal farmer identities, and never requested the Panel to seek data from the United States in aggregated form – despite the fact that *only Brazil was aware of its invented methodology until it responded to the Panel's Question 258 on 20 January 2004*. Had Brazil included its methodology in its first submission on Peace Clause issues (on 24 June 2003), all the time now being devoted to these topics could quite likely have been saved. Brazil's complaint that the United States is responsible for any perceived delays in the Panel's schedule would thus appear to be sorely misdirected.

We note Brazil's suggestion that, should the Panel accept the data the United States is preparing in response to item (b) of the Panel's supplemental request for information, "then most of Brazil's 28 January Data comments would be rendered moot".<sup>6</sup> We are not exactly sure what that statement means or how it relates to Brazil's objection to the United States requiring additional time to provide a response to the information that the Panel has requested. However, Brazil further states that "by producing the complete aggregated information, there would no longer be a need to draw adverse inferences".<sup>7</sup> The United States welcomes this belated recognition by Brazil that disclosure of farm-specific information of contract acreage and planted acreage is *not* necessary under Brazil's invented allocation methodology.

Brazil also questions the United States' comment that it will require additional time to respond to Question 264(b), saying that "Brazil was able to set up a table comparing the US and Brazilian figures in less than an hour." It does not appear to the United States that the Panel's question simply called for "set[ting] up a table" to compare the data referenced in that question. For

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<sup>5</sup> Exhibit Bra-62 (US Department of Agriculture, Crops Covered Under the 2002 Crop Insurance Programme) ([www.rma.usda.gov/policies/02croplist.html](http://www.rma.usda.gov/policies/02croplist.html)).

<sup>6</sup> Brazil's Letter to Panel of 13 February 2004, at 5.

<sup>7</sup> *Id.*

example, Brazil asserted in paragraph 135 of its 28 January 2004, comments on US answers that “the difference between the chart provided by the United States in Exhibit US-128 and Brazil's chart in para. 165 of its 11 August Answers lies in the treatment of rescheduled debt”. To provide a helpful answer would seem to require that the United States examine what goes into each of the figures that are represented in Brazil's chart. The United States was not able to complete that analysis within the eight days provided – but was able to generate and provide in its 11 February answers copious amounts of numbers and data in response to the 29 Panel questions. Rather than seek an extension with respect to *all* questions, we provided the data we could on 11 February and will provide any other data in response to Question 264(b) within the time indicated (and sooner if the data can be collected and examined in less time).

With respect to comments by the Parties on the materials that the United States is preparing, we would not object to the Panel granting Brazil an opportunity to comment on the data to be provided by the United States in response to item (b) of the Panel's supplemental request. However, we cannot understand nor accept Brazil's suggestion that the United States should not be afforded an opportunity to reply to Brazil's comments. Since Brazil is seeking another opportunity to comment (eight days after the United States has provided the information in response to item (b)), there would be no significant “further delay in these proceedings, to the detriment of Brazil” were the United States to file its reply to Brazil's comments within, say, one week of those comments. In this respect, we note that Brazil continues its one-sided approach to procedural issues by seeking to provide itself with an opportunity to comment but to deny the same to the United States. Since this would be the first time Brazil's comments on the item (b) data would be presented, the United States as responding party must be given an opportunity to respond.<sup>8</sup>

Finally, the United States regrets that Brazil has repeated its suggestion that the United States should provide data protected by the Privacy Act and that the United States should rely on WTO confidentiality provisions in doing so. Apart from the fact that the United States is not able under its domestic law simply to ignore US persons' Privacy Act interests on that basis, the growing number of press articles revealing non-public information about this dispute makes that suggestion even less tenable.<sup>9</sup>

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<sup>8</sup> In this connection we would like to draw the Panel's attention to a previous proceeding in which Brazil's last-minute submission of evidence and legal argumentation raised difficulties for the other party involved. Report of the Arbitrator in *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, Recourse to Arbitration by Canada, WT/DS222/ARB, paras. 2.14 and 2.16. We recall that in the present dispute, Brazil first failed to explain its invented allocation methodology until 20 January 2004 – eight months into this dispute – when compelled to do so by the Panel. Then, Brazil delayed submitting its comments on the US December data until 28 January 2004 – eight days after the deadline set by the Panel. Now, Brazil would seek to have an opportunity to comment on the item (b) data – despite the necessary “delay in the proceeding” that would entail – but simultaneously seeks to deprive the United States of its “right – as respondent – to speak last.” In this dispute, it would be singularly inappropriate to allow Brazil the final chance to comment.

<sup>9</sup> The most recent example contains a reference to the statement in a Panel communication to the United States that a failure to provide certain requested information without adequate explanation could lead to adverse inferences being drawn. (Exhibit US-155.) As far as the United States is aware, any communication from the Panel to the parties are subject to the confidentiality rules of the proceeding.

## **ANNEX K-50**

### **LETTER FROM THE UNITED STATES**

23 February 2004

The United States thanks the Panel for its communication of 20 February 2004, in which the Panel extends to the United States the opportunity to respond to Brazil's 18 February submission relating to certain data provided by the United States on 18 and 19 December 2003. The United States would like to confirm that it does wish to comment on this Brazilian submission. The Panel has asked the United States to file any comments within five days, that is, by Wednesday, 25 February. In light of the extensive material submitted by Brazil and US efforts to respond simultaneously to the Panel's supplemental request for information, the United States would like to ask the Panel to extend the deadline to provide these comments, to Wednesday, 3 March, the same due date for the US response to the Panel's supplemental request for additional information.

This extension would greatly assist the United States in providing useful comments for the Panel on Brazil's lengthy 18 February comments, which totalled 79 pages. Of these 79 pages, 41 pages were devoted to setting forth results of numerous calculations. The personnel who would need to review these calculations are also involved in the ongoing US efforts to provide data in response to the Panel's supplemental request for additional information. The extension requested would permit these personnel to better advance US efforts to respond fully and accurately to the Panel's supplemental request while simultaneously reviewing and providing comments on Brazil's 18 February submission.

In addition, we note that the extension requested would not impact any other dates set by the Panel in this proceeding. Thus, the United States respectfully requests the Panel to extend the deadline to provide the US comments, to Wednesday, 3 March.

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