

United States – Continued Dumping and Subsidy Offset Act of 2000
(WT/DS217, WT/DS234)
Recourses by the United States to Article 22.6 of the DSU

Answers of the United States to the Arbitrators’
Second Set of Questions to the Parties

June 7, 2004

Question 1. Please provide the Arbitrators (electronically in Microsoft Excel format) substitution elasticities at the 3 digit North American Industry Classification (NAIC) level. Your submission should include detailed references of the sources of the data. If your estimates are based on an industry classification that differs from the NAIC, please provide details on the concordance methodology used to develop the NAIC estimates.

1. To the best of our knowledge, no substitution elasticities have been estimated for the 3 digit level NAIC. We attach to this response papers containing two sets of recently reported substitution elasticities. One paper, “Revised Armington Elasticities of Substitution for the United States International Trade Commission (USITC) Model and the Concordance for Constructing a Consistent Set for the GTAP Model” (January, 2004), reports elasticity estimates on the basis of product definitions in the USITC’s U.S. model and in the Global Trade Analysis Project model.¹
2. The other paper, “Short-run and long-run industry-level estimates of U.S. Armington elasticities” (North American Journal of Economics, 2003, volume 14), reports elasticity estimates at the 4 digit level of SIC.² The Census Bureau of the U.S. Department of Commerce has published a concordance between NAICs and the SIC. It is available on the following internet site: <http://www.census.gov/epcd/naics/concordances>. However, these concordances do not, in and of themselves, directly lead to single concorded elasticities of substitution for each

¹ See Exhibit US-13 (attached).

² See Exhibit US-14 (attached).

three digit NAIC. For example, in some instances, to develop single concorded elasticities of substitution for each three digit NAIC, one would need to average two (or more) elasticities from the four digit level of SIC. In some studies, such concorded elasticities have been calculated using either a simple average or a trade-weighted average, though these averaging procedures have been subject to criticism. To the best of our knowledge, however, this work has not been undertaken with respect to the three-digit level NAIC. If the Arbitrators so request, the United States could calculate such concorded elasticity estimates using, where necessary, either simple averages or trade-weighted averages.

3. In the view of the United States, however, an approach relying on NAIC categorizations and concorded elasticities will not generate the most accurate estimates of the relevant trade impacts of the CDSOA. Instead, it is more appropriate to employ the substitution elasticities used by the USITC during the dumping and countervailing duty investigations that provide the basis for the CDSOA disbursements. These elasticities reflect the specific product covered by the antidumping or countervailing duty order, while NAIC, GTAP, and SIC elasticities reflect a broader product category. The USITC elasticities are most reasonably employed in conjunction with the narrow categories used by the USITC that corresponded to the products actually subject to the subsidy and dumping actions at issue. The use of broad three digit NAICs introduces products not subject to such actions into the calculation process, giving rise to possible biases and distortions in the calculation. We therefore believe the USITC product categorizations, data, and behavioral parameters used in the dumping and subsidy investigations provide a superior alternative to the use of three digit NAICs. They were selected as part of a detailed, data-oriented investigation by the USITC and its industry and economic experts. And, unlike with NAIC, SIC,

or other elasticity estimates, foreign producers and exporters had the opportunity to participate in the development of these USITC product-specific elasticity estimates.³

4. Attached as Exhibit US-15 is a list of the product-specific substitution elasticities employed in the USITC antidumping or countervailing duty investigations for most of those products that are connected with CDSOA offset payments in 2001, 2003, or 2003. The United States intends to supplement this list as soon as possible.

Question 2. Assume that, instead of using all of the CDSOA benefits to finance price reductions (as per the Requesting Parties’ assumption of 100 percent pass-through), or none of the benefits in such a way as to affect market conditions (as per the United States’ assumption of zero pass-through), the recipients used the funds in a variety of ways with differing effects on price. In this case, what in your view would be representative pass-through values, at the 3-digit NAIC level? Please support your estimates by either a statistically representative sample of firms benefitting from the CDSOA disbursements or from the empirical literature.

CDSOA Offset Payments Have No Discernible Effect on Production

5. At the outset, we wish to briefly summarize the reasons the United States does not believe CDSOA offset payments have any effect on production or trade. First, affected domestic producers are not required to spend a single dollar of offset payments on U.S. production. Indeed, in all likelihood, some portion of these payments have been used to increase production in other countries (including in the territories of the requesting parties) and possibly in increased imports into the United States.⁴

³ In many USITC investigations, foreign producers and exporters argue that the substitution elasticities are *lower* than the estimates developed by the staff of the USITC. In these arbitrations, however, relatively high substitution elasticities result in relatively high estimates of the trade effects of the WTO-inconsistency of the CDSOA. Thus, there is no reason to believe that the use of USITC product-specific elasticities would in any way prejudice foreign producers or exporters in these arbitrations.

⁴ See, e.g., U.S. Written Submission at para. 67.

6. Second, although affected domestic producers are required to make “qualifying expenditures” at some point in the past, this requirement does not provide a meaningful incentive to make such expenditures in the future for two reasons: (1) an expenditure qualifies if it is made at any point after an order is imposed – which, in the vast majority of cases, occurred long before the CDSOA became law; and (2) affected domestic producers typically report qualifying expenditures that vastly exceed the amount of offset payments that affected domestic producers receive. For example, Alexander & Baldwin reported approximately \$2.3 billion in qualifying expenditures, but received just \$487 in offset payments for fiscal year 2003.⁵ In fact, the only real incentive that the CDSOA has on affected domestic producers is to encourage them to produce *one unit* of their product per year in the United States.⁶

7. Third, affected domestic producers cannot predict whether they will receive offset payments and, if so, how much they will receive in any given year.⁷ Fourth, in at least two cases, offset payments flowed to companies not involved in the production or sale of a product covered by an antidumping or countervailing duty order.⁸ Finally, offset payments represent a small fraction (i.e., in most cases less than one percent and in no case more than five percent) of domestic producers’ sales or production of the relevant product. It is unlikely that such *de minimis* disbursements would have any real impact on production – and highly unlikely that such disbursements would have any discernible effect on trade.⁹

⁵ See Exhibit US-6.

⁶ See, e.g., U.S. Comments at paras. 25-26; U.S. Written Submission at para. 68.

⁷ See, e.g., U.S. Written Submission at para. 69-70.

⁸ See U.S. Written Submission at paras. 71-72.

⁹ See U.S. Written Submission at para. 73.

8. In fact, seven of the requesting parties seem to agree with us that there are at least some circumstances in which a subsidy leaves marginal costs unchanged.¹⁰ When a firm receives a “lump sum” payment not contingent on production behavior, the sum “expands ... the wealth of the firm but does not change the relationship between the marginal cost of producing the next item and the marginal revenue from selling that unit. Accordingly, its profit maximizing quantity of production is not affected.”¹¹ In our view, this describes fairly well the situation with CDSOA offset payments.

Even If Affected Domestic Producers Are Assumed to Use Payments in a Variety of Ways, the Effect of Payments on Production Is Relatively Small

9. In any event, the Arbitrators have asked us to assume that, instead of using none of the payments in such a way as to affect market conditions, the affected domestic producers used the payments in a variety of ways with differing effects on price. Based on this assumption, we were asked to estimate the pass-through value and to support this estimate using either a statistically representative sample of firms or from the empirical literature.

10. While the United States was unable to find specific studies that focus on the share of a payment to a producer that is utilized for production purposes, the nature of the CDSOA is such as to imply the loosest of connections between the CDSOA disbursements and any investment, production, or pricing decision, based largely on the reasons provided above.

11. Examples of disbursement programs that clearly are contingent on performance underscores the relative disconnect between the CDSOA offset payments and production

¹⁰ See Comments of the United States on the Answers of the Requesting Parties to the Questions of the Arbitrators, May 4, 2004, at paras. 22-26.

¹¹ Answers of Brazil, Canada, the European Communities, India, Japan, Korea and Mexico to the Questions of the Arbitrator, April 28, 2004, at para. 22.

decisions. In the case of the U.S. Foreign Sales Corporation program (“FSC”), the U.S. tax break was strictly contingent on export, of a known value and in a known time-frame for receipt.

Exporters who met the requirements of the FSC knew they would receive the tax break and could be expected to factor the tax break in their decisions about exporting. Yet even with respect to this program (or, more specifically, its predecessor, the Domestic International Sales Corporation program), Horst and Pugel (1977) found the pass-through of subsidy to price to be about 75 percent, with the remaining 25 percent going to enhanced profits for companies in imperfectly competitive markets.¹²

12. The Arbitrators might also be interested in a recent study of investment tax incentives, in which the author finds that 60 percent of an investment tax credit is received by the recipients, while 40 percent is bid away by capital suppliers through higher prices.¹³

13. Neither of these articles directly reflects the situation represented by the CDSOA, but in both the disbursement program under review is contingent on the recipient’s performance (e.g., export or investment) to a much greater degree than is the CDSOA program. For these reasons, the United States believes these pass-through estimates (i.e., 75 percent and 60 percent) exceed the level of pass-through that one can expect under the CDSOA program. While the economic literature does not point us toward any one specific value for pass through, the United States believes a pass-through level of 25 percent is reasonable, if one were to assume that CDSOA recipients used the funds in a variety of ways. (In its answer to Question 4, the United States

¹² See Exhibit US-16 (Thomas Horst and Thomas Pugel, “The Impact of DISC on the Prices and Profitability of U.S. Exports,” *Journal of Public Economics*, vol. 7 (1977), 73-87) (attached).

¹³ See Exhibit US-17 (Austan Goolsbee, “Investment Tax Incentives, Prices and the Supply of Capital Goods,” *The Quarterly Journal of Economics*, vol. 113, no. 1 (Feb. 1998), 121-148) (attached).

uses this figure as an input in a model used to estimate the trade effects of the CDSOA on each of the requesting parties.)

Question 3. Are the estimates of the substitution elasticities and price reduction provided in response to the above questions time-sensitive in the sense that an estimate for 2004 would necessarily differ from estimates for the years 2001, 2003 and 2003? If so, please submit to the Arbitrators a methodology that they can use to develop estimates for 2004.

14. Elasticity estimates are typically made through regression analysis in which a number of years are examined. Such elasticities are not specific to a single given year. Substitution elasticities represent real preferences that in most cases, though not always, are likely to change slowly over time. They are likely to be somewhat time sensitive comparing shorter time spans, more time sensitive comparing longer time spans. The use of the class of models employing substitution elasticities is not for precise measurement, but for magnitude estimates of the effects of changes in trade policy. Reflecting this fact is that, quite aside from the issue of timing, economists routinely apply elasticities estimated for one country to the analysis of another country, as a best available approximation. As explained in the answer to Question 1, the USITC has already identified what we believe are likely to be the most appropriate elasticities for estimating the effects of the CDSOA disbursements on trade in a specific product covered by an antidumping or countervailing duty order.

15. With regard to estimating elasticities for 2004, it would not be possible to add 2004 to a data series for the estimation of substitution elasticities in the time-frame of these arbitrations because relevant additional data are not currently available.

Question 4. If the Arbitrator were to determine Nullification or Impairment from the CDSOA on the basis of a trade effects approach, could the Arbitrator use the economic model submitted by the Requesting Parties in Box 1 of their Responses to Questions from the Arbitrator? If not, the parties should submit a model (electronically in Microsoft Excel format) that they consider would be reasonable. The parties should also submit with this model their estimate of the trade effect for the years 2001, 2002 and 2003 based on their responses to the request for estimates of pass-through from the CDSOA disbursements and the estimates of the elasticity of substitution.

The Arbitrators Should Not Use the Economic Model Submitted by the Requesting Parties

16. In Box 1 of their first set of answers, seven of the requesting parties estimate the trade effects of a price subsidy “with limited information”, using aggregate substitution elasticities from the Global Trade Analysis Project (“GTAP”) model and aggregate data on total U.S. manufacturing imports, exports, and shipments.

17. The United States has already identified and described in some detail four fundamental flaws with this approach.¹⁴ In short, the requesting parties (1) improperly included the amount of *all* CDSOA offset payments in calculating each party’s level of nullification or impairment; (2) simply assumed that the price reduction on U.S. production is equivalent to the size of the CDSOA payments; (3) used aggregate data on U.S. manufacturing, rather than specific data on those industries subject to antidumping and countervailing duty orders and ignored non-manufactured products such as agricultural products; and (4) used the high end of the substitution elasticity range found in the aggregate GTAP model, rather than the product-specific USITC elasticities that were part of the antidumping or countervailing duty investigations. For these

¹⁴ See U.S. Comments on Answers of Requesting Parties at paras. 33-38.

reasons, the Arbitrators should not use the economic model submitted by the seven requesting parties.

A Product-Specific, Country-Specific Economic Model Provides the Best Method for Determining the Level of Nullification or Impairment of Each Requesting Party

18. The United States wishes to reiterate that, for the reasons described in response to Question 2 above and in our previous submissions, the United States does not believe CDSOA offset payments have any effect on production or trade. If the Arbitrators should conclude otherwise, however, the United States submits that the economic model that it is providing with these answers more reasonably reflects the effects of the CDSOA.

19. The requesting parties seem to admit that a “detailed calculation of the trade effects on an industry-by-industry, country-by-country basis” would be necessary to accurately model the trade effects of the CDSOA.¹⁵ The United States agrees and has provided such a model in Exhibits US-18 through US-29.¹⁶ The following briefly describes that model, provides an example of how the model would operate, and estimates the trade effect for each requesting party for the years 2001, 2002, and 2003, as requested by the Arbitrators.

¹⁵ Answers of Brazil, Canada, the European Communities, India, Japan, Korea and Mexico to the Questions of the Arbitrator, April 28, 2004, at paras. 29-30.

¹⁶ Specifically, Exhibit US-18 contains a methodological summary and description of the model. Exhibit US-19 contains the specific formulas in this model in Quattro Pro format by cell. (We intend to convert the model to the Microsoft Excel format and to submit the model in that format as soon as possible.) Exhibit US-20 contains data to determine whether a specific grouping of CDSOA offset payments are *de minimis*. Exhibit US-21 contains import statistics for products subject to antidumping or countervailing duty orders. Exhibits US-22 through US-29 contain the country-specific results of the model, in alphabetical order. We have also submitted electronically the spreadsheets that relate to Exhibits US-22 through US-29. Note that one electronic file, “CDSOA Disbursements Affecting Production Calculation,” contains data that are included within the hard copy files of Exhibits US-22 through US-29. Specifically, the spreadsheet named “The 8 Cases” contains the information used to determine the amount of disbursements that are used as inputs in the model.

An Overview of the Model

20. To estimate the effect that CDSOA offset payments have on the trade of each product of each requesting party, the United States used a three-country partial equilibrium Armington trade model.¹⁷ This type of model provides the analyst the ability to conduct a simple comparative static exercise where the effects of removing the CDSOA offset payments are estimated. This exercise provides an answer to the “counterfactual” question inherent in these Article 22.6 arbitrations: in a given year, how much lower would U.S. production have been, and how much higher would exports from each requesting party have been, had the CDSOA program not been in place?

21. To run the model for each requesting party and for each relevant product, the United States collected data on the following model inputs: (1) the amount of CDSOA offset payments that is attributable to imports of the dumped or subsidized product of that Member, (2) an estimate of the extent to which the payment affects production, (3) the market value of U.S. shipments of the like U.S. product, (4) the requesting party’s exports to the United States and “rest of world” exports of the product, and (5) the elasticities of substitution, of U.S. supply, of import supply, of “rest of world” supply, and of market demand.

22. The United States placed three general parameters on the model. First, we did not analyze those cases in which the CDSOA offset payment represented an insignificant (i.e., *de*

¹⁷ For a more detailed description of the model used by the United States in these arbitrations, see Exhibit US-18. For a further general discussion of Armington models see Paul Armington, *A Theory of Demand for Products Distinguished by Place of Origin*, IMF Staff Papers, 1969, 16, pp. 159-178; and Joseph F. Francois and H. Keith Hall, “Partial Equilibrium Modeling” in *Applied Methods for Trade Policy Analysis: A Handbook* edited by Joseph F. Francois and Kenneth Reinert, 1997, p. 122-155.

minimis) fraction of U.S. production of that product.¹⁸ Second, we only considered those offset payments that were attributable to imports of the dumped or subsidized product of the requesting party under review. Finally, we did not consider offset payments attributable to imports of the dumped or subsidized product of the requesting party under review if the antidumping or countervailing duty order for the product under review had previously been revoked.

23. To better understand the last two parameters, it is necessary to recall the findings of the Dispute Settlement Body. The Appellate Body upheld the findings of the panel that the CDSOA is a non-permissible “specific action against dumping” or a subsidy. As a result, the level of nullification or impairment should be measured in terms of the effect the CDSOA has on producers/exporters subject to antidumping or countervailing duty orders. Specifically, the Appellate Body found that the CDSOA was an action “against” dumping because it “has the effect of dissuading the practice of dumping or the practice of subsidization, or creates an incentive to terminate such practices.”¹⁹ In other words, a foreign producer or exporter is less inclined to dump its product because it knows the antidumping duties assessed on its product will be handed over to a U.S. competitor (i.e., an “affected domestic producer), and the form of this “dissuasive effect” is not permissible under the WTO agreements. Thus, the level of nullification or impairment can be measured in terms of the effect CDSOA payments to affected domestic

¹⁸ See U.S. Written Submission at para. 73. Please refer to Exhibit US-10 for information on the relative size of offset payments to U.S. producers’ sales or production of a relevant product.

¹⁹ Appellate Body Report in *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R – WT/DS234/R, 27 January 2003, para. 254.

producers harm the requesting party’s exports of the dumped product upon which those duties were assessed.²⁰

24. As we explained in paragraphs 53 through 56 of our written submission, what follows from these findings is that a Member cannot suffer nullification or impairment as a result of a non-permissible “specific action against dumping” (or against a subsidy) if no order is in place and no duties can be collected on that Member’s products. As a result, when determining the level of nullification or impairment suffered by one Member, one should examine only those offset payments that are attributable to the imports of the dumped or subsidized product from that Member. Offset payments attributable to imports of dumped or subsidized products from other countries are not relevant to the analysis.

25. Moreover, as we explained in paragraphs 57 and 58 of our written submission, if there is no antidumping or countervailing duty order in place, any payments received by an affected domestic producer cannot be considered a “specific action against dumping” or against subsidization and, as a result, cannot nullify or impair any benefits related to Article 18.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* or Article 32.1 of the *Agreement on Subsidies and Countervailing Measures*. As a result, there is no need to consider the effect of an offset payment if the underlying antidumping or countervailing duty order has already been revoked.

²⁰ In this regard, of course, it is necessary to distinguish the dissuasive effects of the CDSOA from the dissuasive effects of the antidumping (or countervailing) duty order.

An Example: the Nullification or Impairment of Benefits to Japan resulting from CDSOA Payments under the Antidumping Duty Order on Ball Bearings

26. Ball bearings from Japan provide the largest source of CDSOA offset payments attributable to dumped or subsidized imports from any of the requesting parties in these arbitrations, and the antidumping duty order on Japanese ball bearings remains active. We use these payments to illustrate the model, using data from 2001.

27. The first stage in the analysis is to determine whether the offset payments represent more than a *de minimis* percentage of U.S. ball bearing production. In 2001, \$74.546 million in antidumping duties were assessed against ball bearings from all sources. We estimate that U.S. ball bearing production in 2001 was \$1.943 billion. As a result, offset payments represent approximately four percent of U.S. shipments. If the Arbitrator were to accept a five percent *de minimis* level, it would end the analysis there and find that Japan is not suffering any discernible nullification or impairment as a result of the CDSOA – at least not based on the evidence with respect to trade in ball bearings. (The United States believes a five percent *de minimis* threshold is appropriate in these arbitrations and notes that Article 6.1(a) of the *Agreement on Subsidies and Countervailing Measures* and Article 6.4(a) of the *Agreement on Agriculture* both rely on a five percent threshold.²¹) If, however, the Arbitrator were to accept a one percent *de minimis* level, as provided in Article 11.9 of the *Agreement on Subsidies*, it would proceed with the analysis.

28. The second stage in the analysis is to determine the amount of CDSOA offset payments that actually affect U.S. shipments of ball bearings. In 2001, \$51.4 million in antidumping duties

²¹ See U.S. Written Submission at para. 73, n. 69.

were assessed against ball bearings from Japan. However, in this case, affected domestic producers of ball bearings did not receive all of these payments. One affected domestic producer, The Torrington Company, received \$34.8 million in CDSOA offset payments on Japanese ball bearings in 2001. However, Ingersoll-Rand, the former parent company of Torrington, retained 100 percent of the payments that were due to Torrington when Ingersoll-Rand sold the Torrington business to The Timken Company, another affected domestic producer of ball bearings.²² Because the payments to Torrington in 2001 could not have affected U.S. production of ball bearings (Ingersoll-Rand does not produce ball bearings), these payments should be deducted from the total. This leaves \$16.7 million in CDSOA offset payments. Next, we reduced the amount of this payment by 8.73 percent (to \$15.2 million), to account for the share of U.S. production exported. This adjustment was necessary because offset payments that affect exports do not affect the U.S. market for ball bearings. Then, based on our response to Question 2, we assumed that 25 percent of this payment (\$3.8 million) “passed through” to affect U.S. production.

29. At the third stage of the analysis, it is possible to run the partial equilibrium model. The inputs in the model are as follows. First, as explained above, the CDSOA disbursement affecting production is \$3.8 million. Second, the “cost wedge” (i.e., the extent to which the disbursement affecting production reduces production costs) is 0.23 percent. This figure is calculated by dividing the amount of the disbursement affecting production (\$3.8 million) by the amount of U.S. shipments (\$1.691 billion). Third, to determine the relative effects of offset payments on

²² See U.S. Written Submission at para. 71 and Exhibit US-5.

various market participants, it is necessary to determine the market share held by (a) U.S. imports from countries with active orders; (b) U.S. imports from countries not subject to orders; and (c) shipments of the domestic product (i.e., U.S. shipments). In most cases, as explained in Exhibit US-18, this information is publicly available. Fourth, it is necessary to input elasticities of substitution, of U.S. supply, of import supply, and of market demand. Again, this information is publicly available, typically from USITC investigations.²³ Finally, in order to determine the effect of the CDSOA offset payments on Japan, it is necessary to determine Japan’s share of active order imports (in this case, 72.2 percent).

30. Based on these inputs, we run the model to determine the level of nullification or impairment suffered by Japan as a result of CDSOA offset payments to affected domestic

²³ Note that we assumed the U.S. import supply elasticity for products from countries with active orders was 100 (in essence, perfectly elastic), to reflect the fact that these producers are not able to adjust their prices, based on the fact that they are subject to an antidumping duty order.

producers of ball bearings. The level of nullification or impairment in this case is \$1.149 million. The following charts summarize the inputs and results of the modeling.

Ball Bearings from Japan (2001): Model Inputs

Disbursements Affecting Production (\$Million)	Cost Wedge	Imports from Countries with Active Orders (\$ Million)	U.S. Shipments (\$ Million)	Imports from Other Countries	Demand Elasticity	Active Order Elast. of Supply	U.S. Elast. of Supply	Rest of World Elast. of Supply	Substitution Elasticity
3.808	0.23%	\$429.38	\$1,691.1	\$451.91	-0.625	100	4.5	10	4

Ball Bearings from Japan (2001): Key Results (\$ Million)

Change in Value of Imports from Countries with Active Orders	Change in Value of U.S. Production	Change in Value of Imports Not Subject to an Order	Japan’s Share of Active Order Imports (Input)	Japan’s Share of Change in Value of Imports from Countries with Active Orders
-\$1.59	\$1.88	-\$1.36	72.2%	\$1.149

31. As the chart above demonstrates, the model concludes that U.S. production increased by \$1.88 million as a result of the CDSOA offset payments at issue, while the value of imports from countries with active orders declined by \$1.59 million. Because Japan held a 72.2 percent share of these imports, the model concludes that the loss in trade to Japan was \$1.149 million.

Estimates of the Effect the CDSOA Has on the Trade of Each of the Requesting Parties

32. Based on the data and the economic model provided in Exhibits US-18 through US-29, the United States estimates the effect of the CDSOA on the trade of each requesting party as follows:

The Level of Nullification or Impairment			
(Actual U.S. Dollars)			
Country	2001	2002	2003
Brazil	\$7	\$177,142	\$124,264
Canada	\$342,364	\$0	\$0
Chile	\$0	\$0	\$0
EC	\$834,718	\$218,548	\$265,951
India	\$317	\$86,667	\$47,472
Japan	\$1,172,697	\$1,090,254	\$1,082,991
Korea	\$137,315	\$94,032	\$96,790
Mexico	\$0	\$0	\$203
Total	\$2,487,418	\$1,666,643	\$1,617,671

33. The above chart assumes that 25 percent of disbursements are “passed through” to production and relies on a one percent *de minimis* level. (If the Arbitrators were to rely on a five percent *de minimis* level, as they should, the level of nullification or impairment for each of the requesting parties would be zero.) Exhibits US-22 through US-29 provide country-specific details of each of these calculations.

Question 5. Could the Arbitrator use the data on CDSOA disbursements for 2001-2003 to predict the future value and industrial distribution of such disbursements? Please explain.

34. The United States does not believe it is necessary for the Arbitrators to attempt to predict the future value or industrial distribution of any future CDSOA offset payments. The measure at issue in the underlying disputes was the CDSOA “as such”. The Dispute Settlement Body was not asked to make, and did not make, any findings about any specific CDSOA offset payments.

35. Because the CDSOA as such was found to be a non-permissible specific action against dumping or a subsidy, a central purpose of these arbitrations is to determine the level of nullification or impairment that results from the WTO-inconsistency of the CDSOA as such. While CDSOA payments themselves do not constitute nullification or impairment, they may serve as *evidence* in the calculation of the level of nullification or impairment caused by the WTO-inconsistent nature of the CDSOA as such.

36. In the view of the United States, actual evidence based on recent experience – rather than predictions and speculation about what the future may hold (e.g., the amount of future CDSOA offset payments or the products affected by the CDSOA) – provides a better approach for measuring the effect of the WTO-inconsistency of the CDSOA as such.

37. Such an approach is also consistent with the practice of the arbitrators in *United States – Section 110(5) of the Copyright Act, European Communities – Hormones*, and *European Communities – Bananas*, as we have explained in our previous submissions.²⁴ Indeed, in *United*

²⁴ See U.S. Replies to Arbitrators’ Questions, paras. 10-13; U.S. Comments on Answers of Requesting Parties, paras. 16-21; U.S. Written Submission, paras. 80-91. We explained in our written submission why the arbitrator’s statement in *United States – 1916 Act* that the level of suspension need not be “frozen in time” as of the date of the Article 22.2 request was erroneous. See U.S. Written Submission, paras. 85-90.

States – Section 110(5) of the Copyright Act, the arbitrator used a three-year average as a starting point for its calculation because that approach “offers the advantage of providing us with a starting point grounded on historical, verified facts” and “has the advantage of limiting the number of assumptions necessary.”²⁵ In choosing a three-year period, the Arbitrators further noted that “under GATT practice the most recent three-year period not distorted by restrictions has been used in assessing the consistency of a measure.”²⁶

38. Moreover, it is extremely difficult, if not impossible, to predict with any precision the future value and industrial distribution of such disbursements. The level of CDSOA payments will vary each year depending on the amount of antidumping and countervailing duties assessed over the course of the preceding fiscal year.²⁷ The amount of duties assessed depends on a number of factors, including the timing of Customs’ liquidation of entries, number of orders, extent of continued dumping or subsidization, volume of trade where continued dumping or subsidization continue, etc. The timing of Customs’ liquidation of entries also depends on a number of factors, including the conclusion of any court appeals concerning the entries. As explained in our written submissions, distributions after entry can take anywhere from two to ten years depending on whether there are appeals, the length of such appeals, remands to the agency,

²⁵ See Arbitration Award in *United States – Section 110(5) of the Copyright Act – Recourse to Arbitration under Article 25 of the DSU*, WT/DS160/ARB25/1, 9 November 2001, paras. 4.3, 4-6-4.8, 4.10, 4.44-4.46, 4.50. See also *id.* at para. 4.15 (“[S]ince they considered it more appropriate to use figures grounded on facts than deductions or inferences, the Arbitrators generally gave preference to approaches which relied as much as possible on historical data.”).

²⁶ Arbitration Award in *United States – Section 110(5) of the Copyright Act*, para. 4.45, citing Report of the Panel in *EEC – Restrictions on Imports of Applies from Chile*, BISD 27S/98, adopted Nov. 10, 1980, para. 4.8; Arbitration Award in *EC – Bananas (US)*, paras. 5.24, *et seq.*

²⁷ 19 U.S.C. § 1675c(d)(3).

etc.²⁸ However, because the U.S. is not a new user of trade remedies, the timing and amounts of distributions going forward are reasonably predicted by the experience of the last three years. Thus, a three-year average CDSOA distribution level of \$120.7 million would be a reasonable proxy for future distributions.

39. Indeed, if anything, use of the three-year average would likely overstate the level of likely assessments and distributions. The annual number of antidumping and countervailing duty orders issued on which duties can be assessed has decreased significantly over the last decade from 58 in 1993 to 18 in 2003.²⁹ At the same time, a significant number of orders with distributions in FY2001, 2002, and 2003 were revoked effective 2000 or earlier. Because antidumping and countervailing duties cannot be collected or distributed on post-revocation imports, such orders are a declining potential source of distributions, while new orders (smaller in number) are still typically years away from generating any assessments that can be distributed.

²⁸ See US Oral Statement Before Appellate Body at para. 34 (November 28, 2002); US Written Submission at para. 26.

²⁹ Information on the number of U.S. antidumping and countervailing duty orders issued is collected by the U.S. Department of Commerce and available at <http://ia.ita.doc.gov/stats/ad-1980-2003.html> and at <http://ia.ita.doc.gov/stats/cvd-1980-2003.html>