> We have introduced a new principle in international economic relations. We have asked the nations of the world to confer upon an international organization the right to limit their power to retaliate. We have sought to tame retaliation, to discipline it, to keep it within bounds. By subjecting it to the restraints of international control, we have endeavoured to check its spread and growth, to convert it from a weapon of economic warfare to an instrument of international order. ... [I]t is then the function of the Organization to insure that compensatory action [(i.e., retaliation)] will not be carried to such a level that the balance [between the rights and obligations of Members] would be tipped the other way.[1]

I. Introduction

1. Over 40 years after the negotiations for the *General Agreement on Tariffs and Trade 1947*, the negotiators for the *Marrakesh Agreement Establishing the World Trade Organization* cemented in the terms of that agreement the fundamental requirement that: "The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment."[2]

2. In their requests and in their scant methodology papers in these proceedings,[3] the eight requesting parties completely fail to abide by this requirement. They make no attempt to ensure

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[1] EPCT/A/PV/6, pp. 4-5 (Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment; Verbatim Report; Sixth Meeting of Commission A, Held on Monday, 2 June, 1947 in the Palais Des Nations, Geneva; Statement from Mr. Clair Wilcox).

[2] Article 22.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

[3] For the convenience of the Arbitrators, and because the eight Article 22.2 requests and methodology papers have common elements, the United States submits its submissions in these eight disputes in the form of a single document. The United States wishes to emphasize, however, that there are eight separate arbitrations, and expects that each requesting party will only address those issues that are directly relevant to its proceeding.

that the levels are equivalent – indeed, they fail to quantify either the levels of suspension proposed or the levels of nullification or impairment suffered. They state that the levels of suspension are "to be determined" by each of them alone, after these arbitrations are completed. They intend to collect duties on imports from the United States, but fail to make any link between the collection of duties and the effect that those additional duties will have on trade.

3. Seven of the eight parties (all but Chile) want to restrict U.S. exports to their territories based on the fact that the United States has taken an impermissible "specific action against dumping" of products from *other* countries – countries that are not parties to these proceedings (although three of them are parties to these disputes). For example, while crawfish producers in the European Communities ("EC") are not subject to an antidumping or countervailing duty order in the United States (indeed, they do not even export crawfish to the United States), the EC wants to collect more than $1 million in duties on U.S. exports to the EC because the United States provides offset payments to its crawfish producers based on antidumping duties collected on crawfish imports from China.[4] These parties have not drawn any connection between these offset payments and any level of nullification or impairment they have suffered.

4. What is clear from these requests and methodology papers is that these parties have made no attempt even to determine the amount of trade affected by the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), the measure at issue in these proceedings – much less to explain to the Arbitrators the method used to make that determination. Instead, the requesting parties seem to believe that, the less information they provide, and the more audacious their

[4] And as discussed below, there is no basis for knowing what amount of trade would be affected as a result of this proposed collection of duties.

requests, the more favorable the award they will receive in these proceedings. Audacity, however, is not the standard on which to base arbitration awards. The awards must not exceed the level of nullification or impairment. There is no evidence that the CDSOA results in any nullification or impairment of the requesting parties' benefits.

II. Procedural Background

5. On January 27, 2003, the Dispute Settlement Body ("DSB") adopted its recommendations and rulings in *United States – Continued Dumping and Subsidy Offset Act of 2000*.[5] The DSB found that the CDSOA is inconsistent with Articles 18.1 and 18.4 of the *Agreement on Implementation of Article VI of the General Agreements on Tariffs and Trade 1994* ("*Antidumping Agreement*"), Articles 32.1 and 32.5 of the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*"), Articles VI:2 and VI:3 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement").[6]

6. Canada had placed these Reports, including the Reports of other complaining Members (an unprecedented step), on the DSB's agenda for adoption.[7] The DSB adopted its recommendations and rulings in these disputes and requested that the United States bring the

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[5] Dispute Settlement Body – Minutes of Meeting, WT/DSB/M/142, 27 January 2003, para. 72.

[6] Panel Reports in *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R – WT/DS234/R, 27 January 2003 ("CDSOA Panel Report"), para. 8.1. Appellate Body Report in *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R – WT/DS234/R, 27 January 2003 ("CDSOA Appellate Body Report"), para. 318.

[7] Dispute Settlement Body – Minutes of Meeting, WT/DSB/M/142, 27 January 2003.

CDSOA into conformity with its obligations under the *Antidumping Agreement*, the *SCM Agreement* and the GATT 1994.[8] At the same DSB meeting, the United States stated that it intended to implement the recommendations and rulings of the DSB in a manner that respected U.S. WTO obligations.[9] In June 2003, a WTO arbitrator awarded the United States until December 27, 2003, to implement the recommendations and rulings of the DSB in these disputes.[10]

7. On January 15, 2003, following the expiration of the "reasonable period of time," Brazil, Canada, Chile, the European Communities, India, Japan, Korea and Mexico (collectively, the "requesting parties") each requested DSB authorization to suspend the application to the United States of tariff concessions and related obligations under the GATT 1994.[11] Canada also stated that it intended to suspend the application of the obligations under Article VI of the GATT 1994 and under various articles of the *Antidumping Agreement* and *SCM Agreement* "to determine that the effect of dumping or subsidization of products from the United States is to cause or threaten material injury to an established domestic injury, or is to retard materially the establishment of a domestic industry."[12]

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[8] Dispute Settlement Body – Minutes of Meeting, WT/DSB/M/142, 6 March 2003, para. 72.

[9] Dispute Settlement Body – Minutes of Meeting, WT/DSB/M/142, 6 March 2003, para. 60.

[10] WT/DS217/14 – WT/DS234/22, 13 June 2003.

[11] *See United States – Continued Dumping and Subsidy Offset Act of 2000 – Recourse by Brazil to Article 22.2 of the DSU,* WT/DS217/20, 16 January 2004; *Recourse by Canada*, WT/DS234/25; *Recourse by Chile*, WT/DS217/21; *Recourse by the European Communities*, WT/DS217/22, *Recourse by India*, WT/DS217/23, *Recourse by Mexico*, WT/DS234/26, *Recourse by Japan*, WT/DS217/24; *Recourse by Korea*, WT/DS217/25.

[12] *See United States – Continued Dumping and Subsidy Offset Act of 2000 – Recourse by Canada*, WT/DS234/25, 16 January 2004.

8. On January 26, 2004, the United States objected to the level of suspension proposed by each of the requesting parties, pursuant to Article 22.6 of the DSU, referring the matter to arbitration.[13] And, on February 19, 2004, the United States submitted requests for preliminary rulings (1) that the requesting parties cannot suspend concessions or other obligations based on the nullification or impairment suffered by other WTO Members and, consequently, CDSOA distributions pursuant to orders applicable to products other than the requesting party's products are outside the scope of the arbitration proceeding; (2) that the requesting parties have failed to specify the level of suspension and the level of nullification or impairment in such a way that allows the Arbitrators to determine equivalence; and (3) that the requests for new levels of suspension each year are inconsistent with Article 22 of the DSU.[14]

III. The Continued Dumping and Subsidy Offset Act of 2000

9. The CDSOA provides that:

> Duties assessed pursuant to a countervailing duty order, an antidumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures. Such distribution shall be known as the 'continued dumping and subsidy offset'.[15]

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[13] *United States – Continued Dumping and Subsidy Offset Act of 2000 – Request by the United States for Arbitration under Article 22.6 of the DSU*, WT/DS217/26 (Brazil); WT/DS234/27 (Canada); WT/DS217/27 (Chile); WT/DS217/28 (European Communities); WT/DS217/29 (India); WT/DS217/30 (Japan); WT/DS217/37 (Korea); WT/DS234/28 (Mexico), 26 January 2004.

[14] *See United States – Continued Dumping and Subsidy Offset Act of 2000*, Preliminary Ruling Request of the United States, 19 February 2004, para. 5.

[15] Tariff Act of 1930, Section 754(a). The term "affected domestic producer" means: "a manufacturer, producer, farmer, rancher, or worker representative ... that – (A) was a petitioner or interested party in support of the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and (B) remains in operation. Companies, businesses, or

10. The term "qualifying expenditure" is defined as "an expenditure incurred after the issuance of the antidumping duty finding or order or countervailing duty order" in any of the following categories: manufacturing facilities, equipment, research and development, personnel training, acquisition of technology; health care benefits to employees paid for by the employer; pension benefits to employees paid for by the employer; environmental equipment, training, or technology; acquisition of raw materials and other inputs; working capital or other funds needed to maintain production.[16] Nothing in the CDSOA requires that these expenditures be incurred in connection with production in the United States. Nor, for example, does the CDSOA state that the pension expenditure be for an employee living in the United States.

11. Under the CDSOA, the Commissioner of the Bureau of Customs and Border Protection ("CBP") (1) establishes in the Treasury of the United States a "special account" with respect to each order or finding, (2) deposits into such account all the duties collected under that order, and (3) distributes all funds (including interest earned) from the collected duties received in the preceding fiscal year ("FY") to affected domestic producers.[17]

12. The CDSOA and regulations prescribe that (1) if the total amount of the certified net claims filed by affected domestic producers does not exceed the amount of the offset available, the certified net claim for each affected domestic producer will be paid in full, and (2) if the

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person that have ceased the production of the product covered by the order or finding or who have been acquired by a company or business that is related to a company that opposed the investigation shall not be an affected domestic producer." Tariff Act of 1930, Section 754(b)(1).

[16] Tariff Act of 1930, Section 754(b)(4).

[17] Tariff Act of 1930, Sections 754(d)(2) and (3) and 754(e). The fiscal year of the U.S. Government ends September 30.

certified net claims exceed the amount available, the offset will be made on a *pro rata* basis based on each affected domestic producer's total certified claim.[18]

13. In fact, however, the procedure is more complicated and less predictable than the text of the CDSOA would suggest. Although the CDSOA provides that funds are to be distributed no later than 60 days after the beginning of the following fiscal year (i.e., by November 29)[19], distributions of offset payments often take much longer. For example, in FY 2003, while the CBP collected approximately $240 million in antidumping and countervailing duties, by December 31, 2003, CBP had only distributed approximately $150 million. The remaining $90 million was withheld pending the outcome of litigation.[20] To date, $190 million of duties assessed in FY 2003 have been transferred to affected domestic producers.

14. A further complication in the administration of offset payment distributions is that CBP in some cases has required affected domestic producers to reimburse it for previous offset overpayments. According to the Office of Inspector General of the U.S. Department of Treasury,

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[18] Tariff Act of 1930, Section 754(d)(3).

[19] Tariff Act of 1930, Section 754(c).

[20] In a Federal Register notice issued on July 14, 2003, CBP described this litigation: "On April 8, 2003, the U.S. Court of International Trade (CIT) issued a decision concerning a successor company claim for a distribution under the CDSOA. *Candle Corporation of America and Blyth, Inc. v. United States*, No. 02-00751 Slip Op. 03-40 (Ct. Int'l Trade April 8, 2003), appeal docketed, No. 03-1348 (Fed. Cir. April 28, 2003). The CIT found that the Candle Corporation of America (CCA) response to a 1986 ITC questionnaire 'clearly indicates that CCA did not support the petition.' Slip Op at 13. The CIT reasoned that, although CBP regulations permit a 'successor company' to file a certification to claim an offset on behalf of its predecessor, the 'eligibility for certification under the regulation is subject to the limitations imposed by 19 U.S.C. 1675c, which requires that a claimant (1) have [petitioned] or supported the petition, and (2) remain in operation.' Consequently, the CIT held that it was not arbitrary, capricious, an abuse of discretion or otherwise contrary to law for CBP to deny CCA's claim. An appeal to the Federal Circuit has been filed. A final decision may affect future distributions. Assuming an appeal remains pending, CBP may evaluate whether interim adjustments to future distributions would be prudent." *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 68 Fed. Reg. 41,597, 41,599 (July 14, 2003).

"As a result of inadequate internal controls, affected domestic producers received, in aggregate, overpayments [for fiscal year 2002] of at least $25 million, and likely more. The overpayments were comprised of (1) $24 million resulting from an error in the computation of the amount available to reimburse, and (2) $1 million resulting from overpaying two domestic producers and excluding another."[21] Once discovered, the overpayments were billed to those domestic producers in 2003.

IV. The CDSOA is the Measure at Issue in These Disputes, Not Any Payments Made

15. The complaining parties in these disputes challenged the CDSOA "as such" rather than "as applied." Indeed, at the time the Panel was established in these disputes, there had been no payments made. Accordingly, no challenge could have been made to any CDSOA payments. Not surprisingly then, the DSB's recommendations and rulings in these disputes related only to the CDSOA as such. No DSB recommendations or rulings have been made with respect to any payments made pursuant to the CDSOA.

16. Accordingly, an examination of the actual disbursements made under the CDSOA would go beyond the terms of reference in the underlying disputes – while placing the burden of proof in this *expedited proceeding* on the *defending* party (i.e., the United States). Because these applications of the CDSOA were outside of the terms of reference in the underlying disputes, these applications are not part of the "measure found to be inconsistent with a covered

[21] *See* Exhibit US-1 (Office of Inspector General of the U.S. Dept. of Treasury, *Financial Management: Bureau of Customs and Border Protection Needs to Improve Compliance With The Continued Dumping and Subsidy Offset Act of 2000 (CDSOA)*, OIG-03-085, at 8-9 (June 17, 2003)).

agreement" under Article 22.2 of the DSU. As a result, they cannot form the basis for suspending concessions or for determining the level of nullification or impairment. Therefore, any dispute as to the effect of an actual and specific disbursement should be addressed through normal dispute settlement procedures.

17. Yet the Requesting Parties simply assume that CDSOA payments constitute the nullification or impairment at issue in these proceedings. They do not. A successful challenge to a law as such involves a finding that the law, by its mere existence, is inconsistent with a Member's WTO obligations. There is no need to examine any specific application of the law, but, as a consequence, the resulting findings do not cover any such application. Moreover, in the absence of findings with respect to a specific application of a law, it is not permissible under the DSU to assume that the application breaches any WTO obligation or nullifies or impairs any benefit.[22]

18. The requesting parties make this assumption, and fail to identify how the mere existence of the CDSOA, as distinct from applications of the CDSOA, nullifies or impairs any WTO benefit. They propose levels of suspension based on specific applications of the CDSOA. For this reason alone, the levels of suspension which they propose are not equivalent to the level of nullification or impairment.

19. This is separate and distinct from applications of that law, which may separately be challenged in dispute settlement proceedings to the extent they breach WTO rules.

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[22] *See* DSU Art. 23.2(a).

V. The Requesting Parties Failed to Propose a Level of Suspension Equivalent to the Level of Nullification or Impairment

20. Pursuant to Article 22.4 of the DSU, the DSB will not authorize the suspension of concessions or other obligations unless "the level" of suspension is "equivalent" to the level of nullification or impairment. Arbitrators in the past have recognized that "equivalence" is an exacting standard:

> [T]he ordinary meaning of the word "*equivalence*" is "equal in value, significance or meaning", "having the same effect", "having the same relative position or function", "corresponding to", "something equal in value or worth" , also "something tantamount or virtually identical."[23]

21. In their requests, the requesting parties have failed to specify the level of suspension in a way that would allow the Arbitrators to determine either the "level" of suspension proposed or the "level" of nullification or impairment. But, no matter how these vague requests are interpreted, it is clear that the requesting parties' requests greatly exceed the level of nullification or impairment of those parties' benefits. Moreover, the requesting parties have ignored the text of Article 22 of the DSU by proposing multiple "levels" of suspension, with alterations from year to year.

A. The Requesting Parties Have Failed to Specify the Level of Suspension and the Level of Nullification or Impairment in a Way that Allows the Arbitrators to Determine Equivalence

22. The DSB has no basis to grant a requesting party authorization to suspend concessions or other obligations if that party fails to provide the Arbitrators with the information they need to fulfill their mandate under Article 22:

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[23] Arbitration Award in *EC – Bananas (United States)*, para. 4.1.

> [A]s a prerequisite for ensuring equivalence between the two levels, [the arbitrator has] to be able to determine, not only the "level of the nullification or impairment", but also the "level of the suspension of concessions or other obligations". To give effect to the obligation of equivalence in Article 22.4, the Member requesting suspension thus has to identify the level of suspension of concessions it proposes in a way that allows [the arbitrator] to determine equivalence.[24]

23. In fact, the arbitrator in *Bananas* found that, because Article 22.2 requests serve the same "due process objectives" as requests under Article 6.2 of the DSU, the specificity standards that WTO panels have applied under Article 6.2 are relevant to Article 22.2 requests:

> The DSU does not explicitly provide that the specificity requirements, which are stipulated in Article 6.2 for panel requests, apply *mutatis mutandis* to arbitration proceedings under Article 22. However, we believe that requests for suspension under Article 22.2, as well as requests for referral to arbitration under Article 22.6, serve similar due process objectives as requests under Article 6.2. First, they give notice to the other party and enable it to respond to the request for suspension[.] Second, a request under Article 22.2 by a complaining party defines the jurisdiction of the DSB in authorizing suspension by the complaining party.[25]

24. In their Article 22.2 requests and their subsequent "methodology" papers, the requesting parties failed to provide the Arbitrators with the information needed to determine equivalence.

1. **The Requesting Parties Have Not Quantified Either the Level of Suspension or the Level of Nullification or Impairment**

25. The requesting parties have failed to quantify either the level of suspension or the level of nullification or impairment. In their requests and their methodology papers, they replace specific values with general concepts.[26] They ask the Arbitrators to determine that the amount of nullification or impairment (whatever that amount may be) is equal to the amount of offset

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[24] Arbitration Award in *EC – Hormones (United States)*, para. 20.

[25] Arbitration Award in *EC – Bananas (Ecuador)*, para. 20.

[26] In fact, in its methodology paper, Chile describes its analysis as a "conceptual approach" – and none of the requesting parties makes the slightest attempt to value the amounts they have in mind.

payments (whatever that amount may be) and that the requesting parties may suspend concessions and other obligations "up to a level equivalent, *at a minimum*, to the level of the disbursements made by the United States." Thus, the Arbitrators are asked to determine that two amounts are equivalent to one another – without knowing what those amounts are. The requesting parties have completely failed to provide the information to substantiate their requests. They disavow any connection between their requests and the level of nullification or impairment, and decline to provide any information on the level of suspension requested or to base their requests on trade effects.

26. As discussed further below, the requesting parties' use of the amount of payments is disconnected from the trade effects and hence of no value in these proceedings. However, as a side note, even that amount is uncertain due to a number of factors, including agency or court proceedings, accounting errors, and overpayments that need to be returned to the government.

27. For example, in FY 2002, according to the Office of Inspector General of the U.S. Department of Treasury, CBP overpaid certain affected domestic producers approximately $25 million. Once discovered, those domestic producers, in 2003, were required to repay CBP.[27]

2. The Requests to Collect "Additional Duties" Based on Offset Payments Place No Limit on the Level of Suspension Proposed

28. The requesting parties generally seek to impose additional import duties on U.S. products and state that "the rate of the additional duty will be set so as to collect" over one year additional

[27] *See* Exhibit US-1, at 8-9.

duties equivalent to certain offset payments under CDSOA.[28] They fail, however, to identify (and, as a result, *set no limit on*) the amount of trade that would be covered by their requests. Instead, they simply propose the imposition of an unidentified "additional duty" (on imports of an unidentified list of products) until they collect a sum that is equivalent to the amount of offset payments. The effect that this "additional duty" will have on trade will depend, of course, on the amount of the additional duty: an additional duty of one percent generally would restrict trade by much less than would an additional duty of 100 percent, which often has been assumed to be "prohibitive."[29] Thus, without more information, it is impossible to determine the "level" of suspension proposed. Indeed, if the requesting parties set a high additional duty rate (e.g., 50 percent), the impact on imports from the United States could exceed by many multiples any impact that CDSOA offset payments have on imports from these requesting parties.

29. These suspension proposals stand in stark contrast to the proposals that arbitrators approved in previous Article 22.6 proceedings. For example, the arbitrator in *Bananas* found that Ecuador's Article 22.2 request was sufficiently specific because it "sets out the specific amount of US$450 million as the level of proposed suspension of concessions or other obligations."[30] Similarly, the arbitrator in *Bananas* found that the level of suspension proposed by the United States "is clearly discernible in respect of the overall amount (US$520 million) suggested by the

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[28] It is not clear from the Article 22.2 requests of Canada, Chile and Mexico whether the intent is to set the duty rate "so as to collect" additional duties, or, instead, whether the intent is to set the duty rate at a prohibitive level and base the level of suspension on the amount of lost imports from the United States.

[29] The amount of the difference in trade effects would depend on the specific product and the various market parameters for that product (i.e., elasticities of demand, substitution, and supply).

[30] Arbitration Award in *EC – Bananas (Ecuador)*, para. 22.

United States as well as in terms of the product coverage envisaged."[31] In each of these requests, the requesting party set a clear level on the amount of suspension proposed by identifying the maximum amount of trade that would be affected by an increase in duties above bound rates. This is the standard practice when a party intends to suspend tariff concessions.[32]

30. The United States made the above arguments in its requests for preliminary rulings. However, despite the fact that the United States expressed this concern at the outset of these proceedings – before the requesting parties submitted their "methodology papers," these parties have made no attempt to clarify in their methodology papers the level of suspension they proposed by collecting "additional duties".

3. **Canada's Special Request Fails to Specify the Level of Suspension and the Level of Nullification or Impairment in a Way that Allows the Arbitrator to Determine Equivalence**

31. Canada intends to take measures in the form of "one or both of the following:

(1) the imposition of additional import duties above bound customs duties on products

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[31] Arbitration Award in *EC – Bananas (United States)*, para. 4.2.

[32] *See, e.g., Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse by New Zealand to Article 22.2 of the DSU*, WT/DS113/17, 19 February 2001 (New Zealand and the United States each proposed suspending the application to Canada of tariff concessions "covering trade in the amount of US$35 million."); *Australia – Measures Affecting Importation of Salmon – Recourse by Canada to Article 22.2 of the DSU*, WT/DS18/12, 15 July 1999 (Canada proposed suspending the application to Australia of tariff concessions and related obligations "covering trade in the amount of Can $45 million."); *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse by Canada to Article 22.2 of the DSU*, WT/DS48/17, 20 May 1999; *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse by the United States to Article 22.2 of the DSU*, WT/DS26/19, 18 May 1999 (Canada proposed suspending the application to the EC of tariff concessions "covering trade in the amount of $75 million[,]" while the U.S. proposal would "cover[] trade in an amount of US$202 million."); *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse by the United States to Article 22.2 of the DSU*, WT/DS27/43, 14 January 1999; *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse by Ecuador to Article 22.2 of the DSU*, WT/DS27/52, 9 November 1999 (The United States proposed the suspension of tariff concessions "covering trade in an amount of US$520 million[,]" while Ecuador stated in its request that the level of nullification or impairment was "US$450 million," which was equivalent to "50 per cent of all exports of goods by the EC to Ecuador.").

originating in the United States. ...

(2) the suspension of the application of the obligations under Article VI of GATT 1994, Articles 3, 5, 7, 8, 9, 10, 11 and 12 of the Anti-dumping Agreement, and Articles 11, 12, 15, 17, 18, 19, 20, 21 and 22 of the SCM Agreement to determine that the effect of dumping or subsidization of products from the United States is to cause or threaten material injury to an established domestic injury, or is to retard materially the establishment of a domestic industry."

32. The second part of this proposal leaves much to the imagination. In fact, in *Brazil – Export Financing Programme for Aircraft*, an arbitration under Article 4.10 of the *SCM Agreement*, Brazil objected when Canada stated a similar intention. The Arbitrator acknowledged Brazil's concern that, "it is not clear how the impact of these measures will be assessed in terms of the value of the Brazilian trade to be affected."[33] However, because the arbitrator did not require specificity, in issuing its award it was placed in the rather awkward position of having to "urge" Canada "to make sure that, if it decides to proceed with the suspension of certain obligations ... other than the 100 per cent surtax, this will be done in such a way that the maximum amount of countermeasures ... will be respected."[34]

33. The mandate of the Arbitrator in the present proceedings is to *ensure*, rather than to urge, that the level of suspension is equivalent to the level of nullification or impairment. The second part of Canada's request, and its subsequent methodology paper, fails to provide any information as to the level of suspension proposed.

34. To be sure, an Arbitrator would exceed its mandate and would violate Article 22.7 of the

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[33] Arbitration Award in *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement,* WT/DS46/ARB, 28 August 2000 ("Arbitration Award in *Brazil – Aircraft*), para. 3.17.

[34] Arbitration Award in *Brazil – Aircraft*, para. 4.2.

DSU if it were to determine that "the nature" of the suspension proposed was inappropriate. The Arbitrator is only to determine whether the "level" of suspension proposed – regardless of its "nature" – is equivalent to the level of nullification or impairment. However, to determine equivalence, the Arbitrator needs to evaluate the impact that a suspension proposal will have. And, to do that, it needs to know what the requesting party intends to do.

35. It is not clear what Canada intends to do in the second part of its Article 22.2 request, in which it seeks authorization to suspend eight articles, in their entirety, of the *Antidumping Agreement* and nine articles, in their entirety, of the *SCM Agreement*. (And Canada's "methodology paper" makes no mention of the second part of its proposal.) At this point, we must assume that Canada intends only to suspend its practice in antidumping and countervailing duty investigations of determining whether dumping or subsidization causes or threatens material injury to a domestic industry (or causes or threatens to retard materially the establishment of a domestic industry).

36. But even if this assumption were correct, it is not clear how Canada would measure the impact the suspension of an injury test would have on imports from the United States. Perhaps Canada would take the annual value of an imported product from the United States before an antidumping or countervailing duty order is imposed and subtract the value of those imports after the antidumping or countervailing duty order is imposed. Despite the fact that Canada has had ample opportunity to explain itself, the Arbitrator and the United States are left guessing what Canada intends to do.

B. The Requests Exceed the Levels of Nullification or Impairment

37. Despite the failures of the requesting parties to state with specificity the levels of suspension proposed, it is clear that, no matter how these requests are interpreted, they exceed the levels of nullification or impairment.

38. Pursuant to Article 22.7 of the DSU, the arbitrator "shall determine whether the level of ... suspension is equivalent to the level of nullification or impairment." Thus, the starting point in any analysis of a suspension proposal is to determine the extent to which a Member's failure to bring its WTO-inconsistent measure into conformity with the DSB's rulings nullifies or impairs benefits accruing to the requesting party.

39. It is the WTO-inconsistency of the measure, rather than the measure itself, that forms the basis for a claim of nullification or impairment.[35] In determining the trade that would flow were the measure to be brought into compliance with the WTO ruling, it is necessary to focus on the provisions with which that measure was found to be inconsistent.[36] Furthermore, only benefits that can reasonably be expected to accrue to the requesting party under the provision violated

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[35] For example, in *EC – Bananas*, the arbitrators explained that "[i]t would be the WTO-inconsistency of the revised EC regime that would be the root cause of any nullification or impairment suffered by the United States." Arbitration Award in *European Communities – Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU (United States)*, WT/DS27/ARB, 9 April 1999 ("Arbitration Award in *EC – Bananas (United States)*"), para. 4.8; *see also* Arbitration Award in *United States – Section 110(5) of the U.S. Copyright Act – Recourse to Arbitration under Article 25 of the DSU,* WT/DS160/ARB25/1, 9 November 2001 ("Arbitration Award in *United States – Section 110(5)*"), para. 3.20 ("Having addressed the nature of the benefits which should accrue to the European Communities under Articles 11*bis*(1)(iii), the Arbitrators next turn to the issue of the *level* of benefits which the European Communities could expect to accrue to it under those Articles. Put another way, the next issue confronting the Arbitrators relates to the level of royalty income which EC right holders could expect to receive if the United States were to comply with its obligations under Articles 11*bis*(1)(iii) and 11(1)(ii).").

[36] For example, the trade effect for a measure found to be inconsistent because it taxed like imported products 0.05 percent more than like domestic products would presumably be different than if the same measure had been found inconsistent because it banned imports from Members who shared a common border with the Member maintaining the measure.

may serve as a basis for authorization to suspend concessions.[37]

40. Thus, an analysis of the level of nullification or impairment must focus on the "benefit" allegedly nullified or impaired "as a result of" the failure of the Member to carry out its obligations – i.e., as a result of the infringement or breach found by the DSB.[38] Arbitrators in past proceedings have uniformly based their determinations on hard evidence and have refused to "accept claims that are 'too remote', 'too speculative', or 'not meaningfully quantified.'"[39] As the arbitrator found in *Hormones*, "[W]e need to guard against claims of lost opportunities where the causal link with the inconsistent [measure] is less than apparent, i.e. where exports are allegedly foregone not because of the [inconsistent measure] but due to other circumstances."[40]

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[37] *See* Arbitration Award in *United States – Section 110(5)*, para. 3.24 ("The Arbitrators consider that the benefits which they should take into account in this case are those which the European Communities could reasonably expect to accrue to it under [the Articles found to be violated].").

[38] The concept of nullification or impairment derives from the GATT 1994 Article XXIII. The GATT 1994 Article XXIII provides: "If any contracting party should consider that *any benefit* accruing to it directly or indirectly under this Agreement *is being nullified or impaired ... as a result of ... the failure of another contracting party to carry out its obligations* under this Agreement ... the matter may be referred to the CONTRACTING PARTIES." For example in *US – Section 110(5),* the arbitrators agreed with the US position that the "nullification-or-impairment analysis must focus on what benefits the EC would receive if the measure at issue – Section 110(5)(B) – were modified in accordance with the DSB recommendation." *See US – Section 110(5),* Oral Statement to the Arbitrators (September 5, 2001), para. 22; Arbitration Award in *United States - Section 110(5)*, paras. 3.20-3.35.

[39] Arbitration Award in *United States – Anti-Dumping Act of 1916 (Original Complaint by the European Communities) – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS136/ARB, 24 February 2004 ("Arbitration Award in *United States – 1916 Act*"), para. 6.10; *see also* paras. 5.54 and 5.69 ("In determining the level of nullification or impairment ... we need to rely, as much as possible, on credible, factual, and verifiable information. We cannot base any such estimates on speculation. ... We are of the view that any claim for a deterrent or 'chilling effect' by the European Communities in the present case would be too speculative, and too remote.").

[40] Arbitration Award in *European Communities – Measures Concerning Meat and Meat Products (Hormones) (Original Complaint by the United States)– Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999 ("Arbitration Award in *EC – Hormones (United States)"*), para. 41; *see also* para. 77 (Refusing to consider, as "too speculative", lost exports that would have resulted from foregone marketing campaigns.).

41. In previous proceedings, the arbitrator has compared the actual amount of exports that are affected by the WTO-inconsistent measure to the amount of exports in a "counterfactual" (in which the responding party brought the WTO-inconsistent measure into conformity within the reasonable period of time). The difference in the amount of exports to the responding party under these two situations typically represents the "level" of nullification or impairment.

1. The Level of Nullification or Impairment Should Be Based on the CDSOA's Effect on Imports Subject to Antidumping or Countervailing Duty Orders

42. To determine the level of nullification or impairment that results from the WTO inconsistency found by the DSB, it is first necessary to review the DSB findings. These findings make clear that the level of nullification or impairment should be based on the CDSOA's effect on imports subject to antidumping and countervailing duty orders.

43. The Appellate Body upheld the Panel's finding that the CDSOA constitutes a non-permissible "specific action against dumping" or subsidy.[41] It agreed with the Panel that the CDSOA is a "specific" action related to dumping or a subsidy because "there is a clear, direct and unavoidable connection between the determination of dumping and CDSOA offset payments."[42] It found that the CDSOA is "against" dumping or subsidization because it "dissuades the practice of dumping or the practice of subsidization, and because it creates an incentive to terminate such practices[.]"[43] It reached this conclusion based on the following

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41 CDSOA Appellate Body Report, para. 318.

42 CDSOA Appellate Body Report, para. 242, quoting CDSOA Panel Report, para. 7.21.

43 CDSOA Appellate Body Report, para. 256.

analysis:

> The CDSOA effects a transfer of financial resources from the producers/exporters of dumped or subsidized goods to their domestic competitors. This is demonstrated by the following elements of the CDSOA regime. *First*, the CDSOA offset payments are financed from the anti-dumping or countervailing duties paid by the foreign producers/exporters. *Second*, the CDSOA offset payments are made to an "affected domestic producer"[.] ... [T]he United States confirmed that the "affected domestic producers" ... are necessarily competitors of the foreign producers/exporters subject to an anti-dumping or countervail order. *Third*, ... the "qualifying expenditures" ... [generally] "must be related to the production of the same product that is the subject of the related order or finding[.]" *Fourth*, ...there is no statutory or regulatory requirement as to how a CDSOA offset payment to an affected domestic producer is to be spent, thus indicating that the recipients of CDSOA offset payments are entitled to use this money to bolster their competitive position vis-a-vis their competitors, including the foreign competitors subject to anti-dumping or countervailing duties.[44]

44. Before proceeding with an analysis of these findings, it is important to note, as a matter of fact, that antidumping and countervailing duties are *not* paid by foreign producers/exporters. Instead, they are paid by importers in the United States. Indeed, if a foreign producer/exporter reimburses an importer for antidumping or countervailing duties paid, that reimbursement is factored into the calculation of the dumping margin.[45] Indeed, prior to liquidation, U.S. importers must file a certification with the District Director of Customs which states: "I hereby certify that I (have)(have not) entered into any agreement or understanding for the payment or for the refunding to me, by the manufacturer, producer, seller, or exporter, of all or any part of the antidumping duties or countervailing duties assessed upon the [imported product]."[46] Accordingly, the Appellate Body findings would not appear to be applicable to the CDSOA. As

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[44] CDSOA Appellate Body Report, para. 255.

[45] *See* 19 CFR section 351.402(f).

[46] 19 CFR section 351.402(f).

a result, the CDSOA does not nullify or impair benefits in the manner discussed in these findings by the Appellate Body.

45. The Appellate Body also found that it "was not necessary, nor relevant," for the Panel to examine the actual "conditions of competition" under which domestic products and dumped/subsidized imports compete. "An analysis of the term 'against', in our view, is more appropriately centred on the design and structure of the measure; such an analysis does not mandate an economic assessment of the implications of the measure on the conditions of competition under which domestic product and dumped/subsidized imports compete."[47] However, the purpose of these Article 22.6 arbitration proceedings *is* to assess (rather than to assume, based on the "design and structure" of the CDSOA) the actual economic implications of the CDSOA on the conditions of competition.

46. In any event, two conclusions follow from the findings and reasoning of the DSB. First, any nullification or impairment should be measured in terms of the effect that the CDSOA, as a non-permissible "specific action against dumping" or a subsidy, has on the trade of each requesting party. A change in the "conditions of competition" arising from a government payment to producers is different from a subsidies analysis since, as noted above, there has been no finding against the CDSOA as an "actionable subsidy."

47. This focus on the "trade effect" of the CDSOA is, as a general matter, consistent with past practice in Article 22.6 arbitrations. As the *Antidumping Agreement*, the *SCM Agreement*, and the GATT 1994 are part of the Multilateral Agreements on Trade in Goods, benefits deriving

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[47] CDSOA Appellate Body Report, para. 257.

from them necessarily concern the trade in goods.[48] With one possible exception[49], all prior arbitrations to determine equivalence under Article 22.7 of the DSU and involving the Multilateral Agreements on Trade in Goods have focused on the "trade effect" of the WTO-inconsistent measure. For example, as the arbitrator in *EC – Hormones (Canada)* stated, "What we have to do is to estimate the nullification or impairment caused by [the WTO-inconsistent measure]. To do so in the present case, we have to focus on trade flows. We must estimate trade foregone due to the ban's continuing existence beyond [the expiration of the reasonable period of time].[50] Similarly, the arbitrators in *EC – Bananas* calculated what the level of Ecuadorian imports would be but for the EC's discriminatory regime.[51]

48. The second conclusion that follows from these findings is that, as the CDSOA was found to be a non-permissible "specific action against dumping" or a subsidy, the level of nullification or impairment must be measured in terms of the effect the CDSOA has on producers/exporters subject to antidumping or countervailing duty orders. As explained above, the Appellate Body found that the CDSOA constituted a "specific" action against dumping because "there is a clear,

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[48] *See* WTO Agreement, List of Annexes (listing as Annex 1A, the "Multilateral Agreements on Trade in Goods" which includes the GATT 1994, the *Antidumping Agreement* and the *SCM Agreement*).

[49] *See* Arbitration Award in *United States – 1916 Act*, paras. 5.23, 5.58-5.5.63 (considering it "necessary to determine the trade or economic effects on the European Communities of the 1916 Act" but then assuming without explanation that "final judgments" and settlements under the 1916 Act have trade effects on the European Communities equal to the value of those judgments and settlements).

[50] Arbitration Award in *European Communities – Measures Concerning Meat and Meat Products (Hormones) (Original Complaint by Canada)– Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999 ("Arbitration Award in *EC – Hormones (Canada)"*), para. 41.

[51] Arbitration Award in *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, 24 March 2000 ("Arbitration Award in *EC – Bananas (Ecuador)*"), paras. 168-169.

direct and unavoidable connection between the determination of dumping and CDSOA payments." It also concluded the CDSOA was an action "against" dumping based on the connection between CDSOA payments and determinations of dumping.

2. The Requesting Parties Have Overstated the Amount of Relevant Offset Payments

49. Each of the requesting parties have failed to identify or quantify the level of suspension they propose. But, no matter how one interprets the phrase "the amount of offset payments made to affected domestic producers in the latest annual distribution"[52], it is clear that this amount exceeds the amount of payments that would be relevant even under the requesting parties' approach.

50. Just one rough example of the fallacies underlying the requesting parties' approach, would be to (rather generously) assume that each of the parties (1) would suspend concessions or other obligations this year based on FY 2003 CDSOA disbursements made to affected domestic producers by the end of 2003 (i.e., a total amount of $150 million)[53] and (2) intends to collect the amount of duties in a manner that would equate the duties collected with the impact these duties have on trade.[54] Also, assume that Canada would only impose additional duties on imports from the United States, rather than suspending the injury test in antidumping and countervailing duty

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[52] *See, e.g., United States – Continued Dumping and Subsidy Offset Act of 2000 – Recourse by the European Communities to Article 22.2 of the DSU*, WT/DS217/22, 16 January 2004.

[53] According to CBP, a detailed description of these payments will be available the week of March 15, 2004 at www.customs.gov/xp/cgov/import. In addition, the United States intends to provide the Arbitrators and the requesting parties with copies of this report by March 15, 2004.

[54] As explained above, the actual level of trade affected would be expected to be far greater than this amount, depending on the rate of duty imposed. If, for example, the requesting parties were to set the rate of duty high, a great deal of imports from the United States would be lost before the requesting parties collect the amount of duties authorized.

investigations.

51. Based on these assumptions, the requesting parties' requests would mean:

Requesting Party	Request
Brazil	$5,953,798
Canada	$8,563,660
Chile	$813,976
European Communities	$18,100,111
India	$6,653,933
Japan	$85,039,661
Korea	$18,790,636
Mexico	$8,647,205

52. Even under the requesting parties' approach, these amounts far exceed the amount of offset payments that would be relevant to these disputes. As explained above, the DSB decided that the CDSOA constitutes a "specific action against dumping" or a subsidy because of the *combined effect* of offset payments and an antidumping or countervailing duty order. The Appellate Body noted that the CDSOA is a "specific" action against dumping because "there is a clear, direct and unavoidable connection between the determination of dumping and CDSOA offset payments."[55] It also found that affected domestic producers "are necessarily competitors of the foreign producers/exporters subject to an anti-dumping or countervail order" and "that the recipients of CDSOA offset payments are entitled to use this money to bolster their competitive position vis-a-vis their competitors, including the foreign competitors subject to anti-dumping or

[55] CDSOA Appellate Body Report, para. 242, quoting CDSOA Panel Report, para. 7.21.

countervailing duties.[56] Thus, under the Appellate Body's analysis, any effect that CDSOA offset payments might have on competitors that are *not* subject to antidumping or countervailing duties (i.e., other U.S. producers and foreign producers/exporters not subject to an AD/CVD order) was not relevant to the findings of the Panel and Appellate Body under Article 18.1 of the *Antidumping Agreement* and Article 32.1 of the *SCM Agreement*. The Panel's analysis further confirms this point.[57]

a. Orders on Imports from Other Countries

53. Seven of the requesting parties (all but Chile) include in their proposals an amount that corresponds to duties collected on dumped and subsidized products from all *other* countries – including non-WTO Members and WTO Members who either were not complainants in the underlying disputes or who were complainants but did not request authorization to suspend obligations under Article 22.2 (i.e., Australia, Indonesia and Thailand).

54. As explained above, 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. Indeed, no "action against dumping" – permissible or not – has been taken with respect to imports of that Member's products.

55. In fact, each of the requesting parties concedes the need to draw a connection between, on the one hand, disbursements to affected domestic producers and, on the other, the assessment of duties on that party's products. All of the requesting parties claim an *exclusive* right to suspend

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[56] CDSOA Appellate Body Report, para. 255.

[57] *See* CDSOA Panel Report, para. 7.39.

concessions in an amount equivalent to offset payments attributable to its *own* dumped or subsidized products.

56. Nevertheless, if only to illustrate what little respect these seven requesting parties have for the rule of equivalence, it is worth examining this aspect of the seven requesting parties' requests in more detail. In their minimalist joint "methodology paper," the seven requesting parties state that they would add to that level "a share of the remaining annual illegal disbursements. Those requesting parties consider that this share should be 1/7 for each of them."[58] Under this formulation, it would not matter what the level of *trade* was for the requesting party. For example, India and the EC would each collect the exact *same* additional amount of $4.5 million – and it would not matter that the EC's exports to the United States ($244.8 billion in 2003) are almost 20 times more than India's ($13.1 billion).[59] As this disparity makes clear, the requesting parties have not even *attempted* to relate the levels of suspension proposed to the level of nullification or impairment suffered.[60]

b. Revoked Orders

57. In a similar vein, special accounts that relate to revoked orders are not relevant because there is no "link" between offset payments and an antidumping or countervailing duty order. Regardless of whether a foreign producer was, at some point in the past, subject to an order, there

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[58] *See* Methodology Paper of Brazil, Canada, the European Communities, India, Japan, Korea, and Mexico, February 23, 2004, para. 4.

[59] Official data from U.S. Department of Commerce.

[60] Moreover, according to these parties, "[i]f, at any time other Members seek authorization to suspend concessions or other obligations..., this [amount] would be reduced accordingly[.]" Methodology Paper of Brazil, Canada, the European Communities, India, Japan, Korea, and Mexico, February 23, 2004, para. 4, n. 6. If this "proportionate amount" of other offset payments really were relevant to these parties' *own* levels of nullification or impairment, it is unlikely that they would forfeit their own rights to suspend concessions so easily.

was no finding that it engaged in dumping or received a subsidy in 2003 – and that producer was free to set its prices however it wished, without the concern that a low price could result in the assessment of antidumping or countervailing duties.[61] Thus, if there is no antidumping or countervailing duty order in place, any payments received by an affected domestic producer in 2003 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 *Antidumping Agreement* or Article 32.1 of the *SCM Agreement*.

58. In fact, in the vast majority of cases in which a special account relates to a revoked antidumping or countervailing duty order, the order was revoked even before Congress enacted the CDSOA on October 28, 2000. It is particularly difficult to fathom how the CDSOA could have dissuaded foreign producers/exporters from dumping or from receiving subsidies in these cases, when the CDSOA did not even exist at the time these producers/exporters were operating under an order.

c. Remaining Payments

59. The table below shows the results of deducting from the amounts requested by the requesting parties offset payments that relate to antidumping or countervailing duty orders (1) on products of *other* countries not involved in these disputes,[62] and (2) that were revoked before the

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[61] *See* CDSOA Panel Report, para. 7.39 ("We conclude ... that the CDSOA has a specific adverse impact on the competitive relationship between domestic products and dumped imports which does not apply to other products. While non-"affected domestic producers" and foreign producers/exporters not subject to orders are able to lower their prices in order to meet the improved competitive position of the 'affected domestic producers' ..., the fact that the offset subsidies are combined with anti-dumping orders means that foreign producers/exporters subject to orders are unable to do so.").

[62] *See* Exhibit US-2.

offset payments were made.[63] The following chart reflects both of these deductions as well as the original amounts of duties requested to be collected.

Requesting Party	Request	Offset Payments Reflecting Deductions
Brazil	$5,953,798	$1,431,494
Canada	$8,563,660	$4,164,029
Chile	$813,976	$170,254
European Communities	$18,100,111	$11,642,140
India	$6,653,933	$1,585,260
Japan	$85,039,661	$27,823,916
Korea	$18,790,636	$12,426,050
Mexico	$8,647,205	$4,121,763

3. The Amount of Payments Does Not Equal the Level of Nullification or Impairment

60. One cannot simply assume, as the requesting parties have, that the level of relevant CDSOA offset payments automatically affects imports from the requesting parties by an equal amount. Putting aside for the moment the fact that the payments were outside the terms of reference of these disputes, one would need to determine the effect – if any – these disbursements have on trade.

61. As discussed below, there is no evidence that these payments have any effect on trade. The DSB has found that the CDSOA does not cause "adverse effects" within the meaning of the *SCM Agreement*. And there is no evidence that CDSOA offset payments have any discernible

[63] *See* Exhibit US-3.

impact on imports subject to antidumping or countervailing duty orders.

a. The DSB Found the CDSOA Causes No Adverse Effects

62. The DSB found that the CDSOA constitutes an impermissible specific action against dumping and subsidization because, in essence, CDSOA offset payments – or, as the Panel called them, "offset subsidies" – could be used by affected domestic producers to bolster their competitive position, which would have the effect of dissuading dumping and subsidization. In this proceeding, the Arbitrators are to determine whether these "offset subsidies" nullify or impair any benefits under the covered agreements.

63. This may give the Arbitrators a sense of *deja vu*. In the underlying dispute, Mexico asserted that the CDSOA is an actionable subsidy, because it nullified or impaired benefits under Articles II and VI of the GATT 1994, inconsistent with Article 5(b) of the *SCM Agreement*, which provides:

> No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:
>
> * * *
>
> (B) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of the GATT 1994[12]
>
> [12] The term "nullification or impairment" is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

64. The DSB disagreed. In addition to concluding there was "no basis for us to find that the CDSOA *per se* is 'specific' within the meaning of Article 2.1(a) of the *SCM Agreement*"[64], the

[64] CDSOA Panel Report, para. 7.115.

Panel found that Mexico failed to establish the necessary elements for either a "violation" or a "non-violation" nullification or impairment claim:

> [B]ecause the Panel is examining the CDSOA *per se*, rather than actual disbursements made under the CDSOA, ... there is no certainty that the grant of offset payments under the CDSOA will systematically offset or counteract benefits accruing to Mexico under Articles II and VI of the GATT 1994.[65]

This finding was not appealed.

65. Thus, the DSB found that, although the CDSOA is a subsidy, that subsidy does not nullify or impair any benefits under Article VI of the GATT 1994. This finding is controlling in these proceedings. The measure at issue is the CDSOA *per se*, "rather than actual disbursements made under the CDSOA", and the CDSOA *per se* does not nullify or impair any benefits under the covered agreements.

b. CDSOA Offset Payments Have No Effect on Imports of Products Subject to Antidumping or Countervailing Duty Orders

66. There is no evidence that CDSOA offset payments have in reality affected requesting parties' dumped or subsidized trade. To the contrary, there are a number of reasons to believe these payments do not affect such trade.

67. First, there is no requirement under the CDSOA for how offset payments are to be used. A producer is free to do whatever it wishes with the payment: it could distribute the money to shareholders in the form of a dividend, make a charitable donation, or use the money to assist its production outside the United States or to invest in a plant overseas – including a plant located in the territory of a requesting party.

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[65] CDSOA Panel Report, para. 7.132.

68. Second, the fact that the CDSOA treats a "qualifying expenditure" as a prerequisite for the receipt of an offset payment has no bearing on whether offset payments are used in a manner that affects dumped or subsidized competition. In fact, a substantial share of the qualifying expenditures reported reflect expenditures made "after the issuance of the antidumping duty finding or order or countervailing duty order" – but long before Congress even enacted the CDSOA. For example, although the U.S. government revoked the antidumping duty order on television receivers from Japan (A-588-015) on January 1, 2000 (i.e., almost ten months before Congress enacted the CDSOA), in FY 2002 affected domestic producers of television receivers claimed more than $23 billion in qualifying expenditures and received more than $9 million in offset payments.[66]

69. Third, it is impossible for affected domestic producers to predict whether they will receive offset payments and, if so, how much they will receive in any given year. In 2001 and 2002, there were no disbursements in 34 percent and 36 percent of all claims made, respectively, because no collections were released (either due to no trade in the specified product, or due to unresolved administrative reviews or legal actions). CBP estimates that, on average, three years pass from the date duties are collected from importers to the date disbursements are made to affected domestic producers, and that roughly 50 percent of disbursements in a given year relate to duties that were collected in previous years.

70. The amount of payments depends (1) on the extent to which foreign producers export dumped or subsidized product into the United States – something over which affected domestic

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[66] *See* Exhibit US-4 (Final Annual Report, CDSOA FY 2002 Disbursements).

producers have no control, and (2) the extent to which other affected domestic producers seek such payments and claim qualifying expenditures. As a result, affected domestic producers will have trouble planning any business activity that could affect dumped or subsidized competition based on these payments.

71. Fourth, the United States is aware of at least two cases in which offset payments flowed to companies not involved in the production or sale of a product covered by an antidumping or countervailing duty order. One of these producers is The Torrington Company ("Torrington"), a producer of various kinds of bearings and one of the largest recipients of offset payments in 2001 ($62 million) and 2002 ($72 million). In February 2003, one of the largest recipients of offset payments, The Timken Company ("Timken") acquired Torrington from Torrington's parent, the Ingersoll-Rand Company Limited ("Ingersoll-Rand"). According to the Annual Report that Timken filed with the U.S. Securities and Exchange Commission for its fiscal year ending on December 31, 2002, "Ingersoll-Rand retained 100 percent of all such payments received in 2001 and 2002. Under the purchase agreement with Ingersoll-Rand, [Timken] will be obligated to pay to Ingersoll-Rand 80% of any payments Torrington receives under the CDSOA in 2003 and 2004."[67] Thus, the single largest share of offset payments through 2004 will flow to Ingersoll-Rand, a company that, to the best of our knowledge, does not produce any product subject to an antidumping duty or countervailing duty order and in fact is not a U.S. company.

72. The other company, Green Tree Chemical Technologies received offset payments in FY 2002 and FY 2003 in connection with orders on imports of industrial nitrocellulose, but after

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[67] *See* Exhibit US-5.

qualifying for the payments has ceased its production of industrial nitrocellulose. On December 31, 2003, Nitro Quimica, a Brazilian exporter of nitrocellulose requested the revocation of the antidumping duty order (A-351-804) because, according to this exporter, "no domestic producer of industrial nitrocellulose currently exists. ... Nitro Quimica further contends that Green Tree has closed its U.S. production facility on about November 26, 2003."[68] Green Tree has confirmed that the company has discontinued production. Thus, the payments made to Green Tree had no effect on production of nitrocellulose, and, as a result, have no effect on dumped or subsidized nitrocellulose imports.

73. 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. It may be interesting to note that Article 11.9 of the *SCM Agreement* provides that for countervailing duty cases: "There shall be immediate termination in cases where the amount of a subsidy is *de minimis*, or where the volume of subsidized imports, actual or potential, ... is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be *de minimis* if the subsidy is less than 1 per cent ad valorem."[69]

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[68] *See Industrial Nitrocellulose from Brazil: Notice of Initiation of Changed Circumstances Review and Consideration of Revocation of the Antidumping Duty Order*, 69 Fed. Reg. 8,626-8,627 (February 25, 2004).

[69] *See also* Article 6.1(a) of the *SCM Agreement* (Serious prejudice shall be deemed to exist in the case of "total ad valorem subsidization of a product exceeding 5 per cent".); *and* Article 6.4(a) of the *Agreement on Agriculture* ("A Member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce: (i) product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of that Member's total value of production of a basic agricultural product during the relevant year[.]").

74. For these reasons, there is no evidence that CDSOA offset payments have any discernible impact on imports of dumped or subsidized products from any of the requesting parties.

c. There Is No Bar to a Finding of a "Zero" Nullification or Impairment in an Article 22.6 Proceeding

75. Given the absence of any evidence of nullification or impairment, the Arbitrators should find that the level of nullification or impairment is zero, even though, based on Article 3.8 of the DSU, the Panel presumed in the underlying disputes that the CDSOA caused an adverse impact on other Members. This "zero" level is not inconsistent with Article 3.8. The presumption that exists in proceedings before a panel or the Appellate Body that a WTO-inconsistent measure results in nullification or impairment can be rebutted in proceedings before arbitrators acting pursuant to DSU Article 22.6. As the arbitrators explained in *EC – Bananas*:

> The presumption of nullification or impairment in the case of an infringement of a GATT provision as set forth by Article 3.8 of the DSU cannot in and of itself be taken simultaneously as evidence providing a particular level of nullification or impairment allegedly suffered by a Member requesting authorization to suspend concessions under Article 22 of the DSU[.]... The review of the level of nullification or impairment by Arbitrators from the objective benchmark foreseen by Article 22 of the DSU, is a separate process that is independent from the finding of infringements of WTO rules by a panel or the Appellate Body.[70]

76. Moreover, "a Member's legal interest in compliance by other Members does not ... automatically imply that it is entitled to obtain authorization to suspend concessions under Article 22 of the DSU."[71] In other words, not every violation of the WTO Agreement will result

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[70] Arbitration Award in *EC - Bananas (US)*, para. 6.10.

[71] Arbitration Award in *EC – Bananas (US)*, para. 6.10.

in a measurable level of nullification or impairment. Indeed, the DSU itself recognizes this possibility in providing that the responding Member may "rebut the charge" that the inconsistent measure has "an adverse impact."[72] Nowhere does the DSU specify in which proceeding that rebuttal must occur. Therefore, there will be certain WTO-inconsistent measures for which the level of nullification or impairment caused is, in fact, zero.

77. Language in the recent *US –1916 Act* arbitration decision does not require a different view. Although there the arbitrator stated that the level of nullification or impairment "cannot be"[73] zero (because of the Article 3.8 presumption in the underlying dispute), it then found that, in fact, the level of nullification or impairment at present *is* zero. The level of suspension to which the EC was entitled was, at the time of the award, zero because the EC had failed to demonstrate nullification or impairment (in the form of final judgments or quantifiable settlements under the 1916 Act).[74] The mere maintenance of the WTO-inconsistent measure did not give rise to an automatic "level" of nullification or impairment.[75]

78. The 1916 Act arbitrators' statement that the level of nullification or impairment cannot be zero because it would be contrary to the "clear findings of the original Panel that the 1916 Act nullifies and impairs benefits" misapprehends that panel's findings.[76] The original 1916 Act

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[72] DSU Article 3.8.

[73] Arbitration Award in *United States – 1916 Act*, para. 5.48.

[74] Arbitration Award in *United States – 1916 Act*, paras. 6.4-6.5.

[75] After correctly concluding that "it is necessary to determine the trade or economic effects on the European Communities of the 1916 Act" (para. 5.23), the Arbitrator simply assumed that final judgments and settlements "against EC companies or their subsidiaries" (para. 5.58) would have trade or economic effects on the European Communities.

[76] Arbitration Award in *United States – 1916 Act*, paras. 5.50, 7.6.

panel found the 1916 Act as such violated various provisions of the GATT 1994 Article VI and the AD Agreement as well as WTO Agreement Article XVI:4. The panel then stated:

> Since Article 3.8 of the DSU provides that "In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment" and as the United States *has adduced no evidence to the contrary*, we conclude that the 1916 Act nullifies or impairs benefits accruing the European Communities under the WTO Agreement.[77]

As this quotation makes clear, the original panel did not make any independent findings that the 1916 Act nullified or impaired benefits. Rather, the panel merely recited the language of DSU Article 3.8 – an Article which in itself recognizes that "there is *normally* a *presumption* that a breach of the rules has an adverse impact" but that the responding Member can "*rebut* the charge" – and the fact that the United States had not offered evidence that if the 1916 Act constituted a violation, it nonetheless did not cause nullification or impairment. At the time of the Article 22.6 arbitration, however, the United States did provide such evidence and did rebut the charge as the identified "trade effect" of the offending measure – court judgements and public settlement awards payable by foreign producers/exporters – had not been realized, thus resulting in the arbitrator's *de facto* finding of zero nullification or impairment.

79. The arbitrators' decision in *EC – Bananas* additionally supports the point that, in certain circumstances, the level of nullification or impairment of benefits as a result of a WTO-inconsistent measure can be zero. In *EC – Bananas*, the arbitrators recalled that in the

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[77] Panel Report in *United States – Anti-Dumping Act of 1916 – Complaint by the European Communities* WT/DS136/1, 31 March 2000, para. 6.227 (emphasis added).

proceeding before the panel, the United States had argued that, even if there were no immediate trade effects, a violation could still be found.[78] Although the arbitrators in *EC – Bananas* agreed with the US position as it concerned proceedings before the panels or the Appellate Body, this did not "automatically imply" that a measure found inconsistent with the WTO Agreement resulted in an identifiable level of nullification or impairment.[79] Accordingly, the arbitrators in *EC – Bananas* explained that although the measure at issue violated the terms of the GATT 1994, because the United States was not an exporter of bananas, it was not entitled to count lost exports of bananas or exports used in the cultivation or production of Latin American bananas in calculating the level of nullification or impairment.[80]

C. The Arbitrators Should Establish a Single "Level" of Suspension for Each Requesting Party

80. Each of the eight requesting parties has requested authorization to alter the level of suspension of concessions each year. They request authority to suspend concessions or other obligations by an amount "to be determined" each year based on offset payments made in the latest annual distribution under the CDSOA. The Arbitrators should find (1) that the DSU does not permit a requesting party to alter the level of suspension in the future; and (2) in this

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[78] Arbitration Award in *EC - Bananas (United States)*, para. 6.9; Appellate Body Report in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, September 25, 1997, para. 89 (summarizing the US position that "even if the United States did not have a potential export interest, its internal market for bananas could be affected by the EC regime because of the potential effect on world prices"); *see also European Communities – Regime for the Importation, Sale and Distribution of Bananas (United States)*, U.S. Rebuttal Submission to the Panel (October 23, 1996), paras. 37-46.

[79] Arbitration Award in *EC – Bananas (United States)*, para. 6.10.

[80] Arbitration Award in *EC – Bananas (United States),* paras. 6.12-6.19 (rejecting both US claims of lost exports of goods – one based on lost exports of goods used in Latin American banana production and one based on lost exports of goods incorporated into Latin American bananas).

particular case, it is impossible to create a "formula" that would ensure that varying levels of suspension in the future would be equivalent to varying levels of nullification or impairment.

1. Requests for a New Level of Suspension Each Year Are Inconsistent with the DSU and with Past Practice

81. The requesting parties' proposal to alter the level of suspension from year to year is inconsistent with the DSU and with past practice. First, the terms of reference of an Article 22.6 arbitration are established when the matter is referred to arbitration.[81] As a result, "the level" of nullification or impairment must also be determined at that time. Otherwise, the requesting party would be able arbitrarily to pick some point in the past, present, or future for setting the level of nullification or impairment.

82. Second, Article 22.4 of the DSU makes clear that the DSB authorizes "the level" of suspension of concessions or other obligations. Similarly, Article 22.7 of the DSU provides that the arbitrator is to determine whether "the level" of suspension is equivalent to the level of nullification or impairment. Further, Article 23.2(c) of the DSU requires that Members follow the procedures set forth in Article 22 to determine "the level" of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions. The ordinary meaning of "the level" is a single and definite amount,[82] and the DSU provides no basis for the authorization of multiple, varying and indefinite "levels"

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[81] *See* Arbitration Award in *EC – Bananas (Ecuador)*, para. 20 ("[A] request for arbitration under Article 22.6 defines the terms of reference of the Arbitrators.").

[82] A "level" is defined as "[a] position (on a real or imaginary scale) in respect of amount, intensity, extent, etc.; a relative height, amount, or value." New Shorter Oxford English Dictionary at 1573 (1993 edition). "The" is defined as the "definite article," "[d]esignating one or more persons or things already mentioned or known, particularized by context or circumstances, inherently unique, familiar, or otherwise sufficiently identified." New Shorter Oxford English Dictionary at 3269.

of suspension.

83. Indeed, until now, requesting parties *without exception* have understood that Article 22 established a single "level" of suspension. Not one previous request under Article 22.2 of the DSU included a proposal to determine a new level of suspension on a yearly basis. For example, in *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, New Zealand requested authorization to suspend tariff concessions "covering trade in the amount of US$35 million. *This level* of suspension is equivalent on an annual basis to the level of nullification or impairment of benefits accruing to New Zealand resulting from Canada's failure to bring its export subsidy measures concerning dairy products into compliance ... with the Agreement on Agriculture[.]"[83]

84. Just as DSU Articles 22.4 and 22.6 provide for the determination of a single "level" of suspension, DSU Articles 22.6 and 22.7 provide a single opportunity to adjudicate the question of whether the level of suspension of concessions is equivalent to the level of nullification or impairment. Indeed, DSU Article 22.7 provides, "The parties shall accept the arbitrator's decision as final and . . . shall not seek a second arbitration." However, this presupposes that the requesting party cannot modify the level of suspension subsequent to arbitration and DSB authorization, for DSU Article 22.7 would be devoid of meaning were it read to protect the rights only of the requesting party, and not those of the objecting party.

2. The Arbitration Award in *United States – 1916 Act*

85. In its Article 22.2 request concerning *United States – 1916 Act*, the EC sought the

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[83] *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse by New Zealand to Article 22.2 of the DSU*, WT/DS113/17, 19 February 2001 (emphasis added).

authority to adopt so-called "mirror legislation" – not to determine a new level of suspension on a yearly basis. In fact, at no point during the proceeding did the EC ever argue it had the right to alter the level of suspension from year to year.[84] Nevertheless, the Arbitrator found that the EC's right to suspend obligations need not "be frozen in time as of the date it made its request under DSU Article 22.2."[85]

86. The arbitrator distinguished the "present situation ... from a case in which the measure of the responding party had been found by the original panel to be WTO-inconsistent only 'as applied.'" The arbitrator referred to the arbitration award in *Canada – Export Credits and Loan Guarantees for Regional Aircraft* ("*Canada – Aircraft*")– to date, the only arbitration under either Article 22.6 of the DSU or Article 4.11 of the *SCM Agreement* based on a challenge to a measure "as applied." In that case, the arbitrator refused to increase the level of countermeasures so as to deter Canada from applying its subsidy regime to future sales of regional jets. The arbitrator found that it was not allowed to address the possibility of future applications of the subsidy program because neither those future applications, nor the subsidy program "as such," were the subject to the WTO-inconsistency found by the panel.

87. This finding in *Canada – Aircraft* (that the arbitrator *could not* consider the future) provided the sole basis for the finding in *United States – 1916 Act* that the arbitrator *could* permit a requesting party to increase in the future its level of suspension. The arbitrator cited no other authority, either from the text of the DSU or from previous disputes, for the proposition that the

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[84] The EC argued that the amount of any treble damage awards it imposed on imports from the United States from year to year was irrelevant. What mattered was that, in the EC's view, its proposed legislation was "qualitatively" equivalent to the 1916 Act. The arbitrator rejected that argument.

[85] Arbitration Award in *United States – 1916 Act*, para. 6.14.

level of suspension in cases involving "as such" challenges could be altered from year to year.

88. The distinction the arbitrator in *United States – 1916 Act* drew between "as such" and "as applied" challenges is particularly curious, given that the arbitrators in *all* previous Article 22.6 arbitrations to determine "equivalence" also considered challenges to measures "as such" – but, without exception, set a *single and unalterable* "level" of suspension.[86] For example, in *United States – Section 110(5) of the US Copyright Act*, the panel found that section 110(5)(B) of the U.S. Copyright Act "as such" was inconsistent with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention, as incorporated into Article 9.1 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*.[87] The arbitrator then determined that "the level of EC benefits which are being nullified or impaired as a result of the operation of Section 110(5)(B) amounts to 1,219,900 euros per year."[88]

89. The arbitrator in *United States – 1916 Act* did not attempt to distinguish the situation in that proceeding from the situation in previous Article 22.6 arbitrations involving other "as such" challenges, and the United States has been unable to conceive of any legitimate distinction. However, one difference between the situation in *United States – 1916 Act* and previous arbitrations involving "as such" challenges is that, in *United States – 1916 Act*, there was no quantifiable level of nullification or impairment as of the date of the Article 22.2 request (or, for

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[86] *See* Arbitration Award in *EC – Bananas (United States)*; Arbitration Award in *EC – Bananas (Ecuador)*; Arbitration Award in *EC – Hormones (United States)*; Arbitration Award in *EC – Hormones (Canada)*; Arbitration Award in *United States – Section 110(5)*.

[87] Panel Report in *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, 27 July 2000, para. 7.1(b).

[88] Arbitration Award in *United States – Section 110(5)*, para. 5.1.

that matter, as of the date of the arbitrator's award). Such a situation had not arisen before that case. As a result, the arbitrator was unwilling to set the level of suspension for all future points in time at the present level of nullification or impairment (i.e., zero). While the United States does not believe this distinction forms a legitimate basis for ignoring the text of Article 22 or for parting with past practice, we note that such a distinction cannot be made in the present case: affected domestic producers have received CDSOA offset payments for the past three years, and the level of nullification or impairment can be quantified on the basis of those payments. There is no need to look into the future in this case.

90. In the view of the United States, the difference between challenges to a measure "as such" versus challenges to a measure "as applied" does not permit alterations to the "level" of suspension from year to year. Instead, in the case of challenges to a measure "as such," this difference permits the *ongoing* suspension of concessions, at a single *annual* level until the WTO-inconsistent measure is brought into conformity with the DSB's rulings and recommendations. Setting a single, unalterable annual level of suspension is consistent with the text of the DSU and with past practice.[89]

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[89] *See* Arbitration Award in *EC – Bananas (United States)*, para. 8.1 (deciding that the suspension of tariff concessions and related obligations "covering trade in a maximum amount of US$191.4 million *per year* would be consistent with Article 22.4 of the DSU.")(emphasis added); Arbitration Award in *EC – Hormones (Canada)*, para. 73 (determining that the suspension of tariff concessions and related obligations "covering trade in a maximum amount of CDN$11.3 million *per year* would be consistent with Article 22.4 of the DSU.") (emphasis added); Arbitration Award in *EC – Hormones (United States)*, para. 84 (deciding that the suspension of tariff concessions and related obligations "covering trade in a maximum amount of US$ 116.8 million *per year* would be consistent with Article 22.4 of the DSU.") (emphasis added); Arbitration Award in *EC – Bananas (Ecuador)*, para. 173(a) (Ecuador may obtain authorization by the DSB to suspend concessions and other obligations "of a level not exceeding US$201.6 million *per year*[.]") (emphasis added); Arbitration Award in *United States – Section 110(5)*, para. 5.1 (determining that "the level of EC benefits which are being nullified or impaired as a result of the operation of Section 110(5)(B) amounts to 1,219,900 euros *per year*.") (emphasis added).

3. It Is Not Possible in this Case to Formulate a Varying Level of Suspension that Would Be Equivalent to the Level of Nullification or Impairment

91. Even if the DSU were amended so as to permit alterations to the level of nullification or impairment in appropriate cases (i.e., where a simple formula could be developed and followed by a requesting party to ensure equivalence), such alterations would not be appropriate in this case. First, the challenge (and the DSB findings) related only to the CDSOA "as such." The CDSOA "as such" is not a law that varies year to year. Furthermore, even putting aside the fact that payments under the CDSOA were not within the scope of the DSB's recommendations and rulings, not only is it not possible to specify in advance the trade effects from the CDSOA in the future (since that would depend on a number of factors, including the level of trade in the affected products), it is not even possible to specify the level of payments under the CDSOA given the uncertainties described above. If the requesting parties were permitted to refigure and revise on their own the levels of suspension on an annual basis, these arbitrations would generate, rather than resolve, disputes between the parties.

VI. Conclusion

92. For the foregoing reasons, each of the Arbitrators should conclude that the levels of suspension proposed by each of the requesting parties is not equivalent to the levels of nullification or impairment caused by the CDSOA as a non-permissible "specific action against dumping" or a subsidy. Instead, the Arbitrator should find that, for each requesting party, the level of nullification or impairment is zero.