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

Oral Statement of the United States

April 19, 2004

Mr. Chairman, other members of the Arbitrators,

Introduction

1. On behalf of the United States, I first would like to thank you for agreeing to serve in these arbitrations under Article 22.6 of the DSU.

2. The purpose of each of these arbitrations is to determine whether the level of suspension proposed is equivalent to the level of nullification or impairment of benefits to each requesting party. Only those benefits under the WTO Agreement provisions breached that accrue to the requesting party – and not benefits that accrue to anyone else – may serve as a basis for authorization for that requesting party to suspend concessions.

3. The requesting parties in these disputes disregard all of these principles in seeking to justify their proposed levels of suspension. They disregard the terms of DSU Article 22, and they disregard the findings of the WTO in this dispute. They even disregard the measures that were the subject of these disputes. Their proposed levels of suspension are not equivalent to the levels of nullification or impairment of each of their benefits, and the Arbitrators' awards should reflect this fact.

4. Before examining the level of suspension requested and the level of nullification or impairment, I would like to address the burden of proof and the role of Article 3.8 of the DSU in these proceedings.

Burden of Proof

5. The United States bears the burden of proof in these arbitrations, but the requesting parties misstate what that burden is. In past arbitrations, most recently the *1916 Act*, arbitrators correctly stated that the burden is to submit arguments and evidence sufficient to establish a "presumption" that the level of suspension proposed is not equivalent to the level of nullification or impairment. The United States has met that burden, as I will discuss in a few minutes.

6. The burden is not to show, as the requesting parties have argued, that the level of nullification or impairment is zero. Once the arbitrator in each of these arbitrations concludes that the requesting party's request is not equivalent to the level of nullification or impairment, the arbitrator may choose to find the level of nullification or impairment, as past arbitrators have done. In that case, the United States has attempted to assist the arbitrators by providing evidence and argument as to what that level should be. By contrast, the requesting parties have provided nothing and appear to have no intention of providing any evidence of the level of nullification or impairment, despite the fact that Canada itself asserts that "[t]he level of nullification or impairment must be based to the extent possible, on credible, factual and verifiable information, and not on speculation."[1]

[1] Written Submission of Canada, para. 23.

Article 3.8 of the DSU and the Distinction between a Breach and the Nullification or Impairment that May Result

7. In addition to misstating the burden of proof, the requesting parties also misinterpret Article 3.8 of the DSU. They argue that, because Article 3.8 provides that a breach of the rules is normally presumed to result in nullification or impairment, a breach of the rules is the same thing as nullification or impairment. That is simply not the case.

8. Article 3.8 is the starting point – not the end point – in these arbitrations. In these proceedings, it is necessary to examine the "level" of nullification or impairment. Past presumptions about the existence of nullification or impairment play no role in that examination, as the arbitrator in *Bananas (U.S.)* explained in paragraph 6.10 of its award. According to the arbitrator, "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* proving a particular level of nullification or impairment[.]"[2] Indeed, the arbitrator understood that the "level" may be determined to be "zero" in an arbitration, notwithstanding any such presumption in the underlying dispute. According to the arbitrator, although a Member has a right to pursue a WTO dispute settlement proceeding based solely on its legal interest in compliance, "a Member's legal interest in compliance by other Members does not, in our view, automatically imply that it is entitled to obtain authorization to suspend concessions under Article 22 of the DSU."[3]

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[2] Decision by the Arbitrators, *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 (U.S.)*, WT/DS27/ARB, 9 April 1999, para. 6.10.

[3] *Id.*

9. More generally, by arguing that a breach is itself nullification or impairment, the requesting parties ignore the critical and obvious distinction that the drafters of the WTO agreements have drawn between, on the one hand, a breach of a WTO commitment, and, on the other, the economic impact that is "the result of" that breach.

10. For example, Article XXIII of the GATT 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."[4] This makes clear that the breach of a commitment is a concept quite distinct from the concept of nullification or impairment of benefits that may result from that breach.

11. The first sentence of Article 22.8 of the DSU also makes clear that the requesting parties are wrong that "the violation of obligations is the most prominent case of 'nullification or impairment.'" Under Article 22.8, a Member shall not apply the suspension of concessions once "the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits[.]"[5] If it were true that an inconsistent measure is itself "the most prominent case" of nullification or impairment, how would it be possible to leave a WTO-inconsistent measure in place and, at the same time, provide a solution to the nullification or impairment of benefits?

[4] Emphasis added.
[5] Emphasis added.

12. It also is worth recalling the Article 25 arbitration in *United States – Section 110(5) of the US Copyright Act*. In that case, the EC stated that it was estimating the "economic value of the exclusive rights" at issue in the dispute. In footnote 42 of the award, the Arbitrator corrected the EC: "the Arbitrators note that they are not called on, in this case, to assess the economic value of the *rights* set forth in Articles 11*bis*(1)(iii) and 11(1)(ii). Rather, the mandate of the Arbitrators is to determine the economic value of the *benefits* which would arise from those rights on an annual basis."[6] That same lesson applies here: the arbitrators are not called on, in these disputes, to assess the extent to which the CDSOA "upsets the balance of *rights* and obligations". Rather, the mandate of the arbitrators is to determine the economic value of the *benefits* which would arise from those rights and that may or may not have been nullified or impaired as "a result of" the breach.

13. Let us now look at the level of suspension proposed, then look at the level of nullification or impairment, and see if they are equivalent.

Level of Suspension Proposed

14. The level of suspension proposed by each requesting party is unlimited. The requesting parties intend to collect a certain amount of duties, but the amount of duties collected bears no relation to the effect on trade. For example, if authorized to collect $1 million in duties, a party could stop all trade with the other Member by setting the rate of duty on all products from that Member at 500 percent (in which case the party would never collect the $1 million in duties since there must be trade in order to collect duties). Or, by setting the level at just below a prohibitive

[6] Award of the Arbitrators, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/ARB25/1, 9 November 2001, para. 3.23 n.42.

level of duty, the party might stop 99 percent of trade (which could amount to any amount of trade -- tens or hundreds of millions of dollars' worth, or more) to collect $1 million in duties.

15. The requesting parties have not disputed this fact. To the contrary, Chile agrees with us "that the effect of the tariff surcharge will be very different, depending on the level and the product to which it applies[.]"[7] But they argue that it does not matter what effect the suspension of concessions or other obligations will have on U.S. exports.

16. The arbitrator in the *1916 Act* rejected a similar argument. The arbitrator agreed with the United States that the EC request to adopt a measure it considered "qualitatively equivalent" to the 1916 Act did not ensure that the level of suspension would be equivalent to the level of nullification or impairment because such a measure could be applied "to an unlimited amount of US exports to the European Communities."[8] As a result, the arbitrator found that the United States met its initial burden of establishing a prima facie case or presumption that the level of suspension proposed is not equivalent to the level of nullification or impairment.

17. The same is true here. Just as "qualitative equivalence" in the *1916 Act* did not ensure a level of suspension equivalent to the level of nullification or impairment, any superficial "equivalence" between the amount of duties the requesting parties intend to collect and the amount of offset payments in these disputes does not ensure a level of suspension equivalent to the level of nullification or impairment. As a result, the United States has satisfied its initial burden in these proceedings.

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[7] Written Submission of Chile, para. 17.

[8] Decision by the Arbitrators, *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, para. 5.29.

18. This is not a question of examining the "nature" of the suspension. Just as in the *1916 Act* arbitration, the requesting parties here have not requested a level of suspension – all they have done is specify a measure that they would like to impose. Thus it is the requesting parties that ask the Arbitrators to ignore the stricture in Article 22.7 against examining the nature of the suspension, not the United States.

19. Canada takes a slightly different approach. In addition to specifying a "measure" – the collection of duties – it requests authorization to suspend the injury test in antidumping and countervailing duty investigations involving U.S. products. Again, this is not a matter of examining the "nature" of the suspension. However, Canada still has not "identif[ied] the level of suspension of concessions it proposes in a way that allows [the arbitrator] to determine equivalence."[9] Unless Canada is now arguing that the amount of payments made in the previous year equals the trade effect in the current year, and it intends to suspend concessions only up to the level of that trade effect? Of course, in that case Canada errs in claiming that the amount of payments is the same as the level of nullification or impairment.

Multiple Levels of Suspension

20. Next, we wish to briefly address several points made by the requesting parties regarding their requests to impose multiple "levels" of suspension, with a different level each year that the CDSOA remains in effect.

21. The requesting parties emphasize that the level of nullification or impairment that results from the CDSOA will change from year to year, so it must be necessary to establish a new level

[9] *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, para. 20.

of suspension from year to year as well. However, the level of nullification or impairment presumably changes from year to year in every dispute. Without doubt, the level of nullification or impairment that resulted from the EC's bananas and hormones regimes varied and has varied from year to year, depending on a wide variety of factors, such as consumer tastes and preferences and the nature of the regime. Nevertheless, the arbitrators in those and other disputes set "the" (single) level of suspension, based on the level of nullification or impairment experienced at the end of the reasonable period of time rather than based on speculation of what might occur after the Article 22.6 proceedings.

22. In fact, Chile admits that in cases regarding "market access" (such as *Bananas* and *Hormones*), "the level of suspension of concessions is fixed by determining the level of nullification or impairment on the date of expiry of the reasonable period for compliance with the DSB's recommendations."[10] We agree that in these cases, which occur under Article 22.6 of the DSU, it is necessary to "fix" the level of suspension by determining the level of nullification or impairment right after the expiration of the RPT. But we disagree that these disputes over the CDSOA – which also arise under Article 22.6 of the DSU – are any different. There is absolutely no textual basis in Article 22 for differentiating between "market access" cases (which is an undefined term), and other cases such as so-called "rules" cases (which is another undefined term). This is a wholly fabricated distinction. Either the level of suspension is fixed in every dispute, or it is not. There is no room in the DSU for disregarding the rules when it suits a requesting party or parties.

[10] Written Submission of Chile, para. 71.

23. In addition, Canada and Chile argue that if the United States does not like the way the requesting parties set a new level of suspension in the future, the United States can seek recourse to the appropriate dispute settlement procedures, as the arbitrator stated in the *1916 Act*. However, Canada and Chile miss the point. In Article 22.7, the drafters established one final, expedited arbitration proceeding to resolve the level of suspension. The drafters did not authorize arbitrators to speculate as to what levels might be equivalent in the future and then force parties to engage in new dispute settlement proceedings to decide if the arbitrator's guesses were correct. Rather, the arbitrator under Article 22.7 is to determine, based on the terms of reference for the arbitration, the level that is equivalent based on the facts and data as they exist at the time the matter is referred to arbitration. The requesting parties' approach is directly at odds with the text of the DSU.

The Level of Nullification or Impairment

24. The United States and the requesting parties seem to agree that 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. The United States believes any nullification or impairment of benefits in each of these disputes should be measured in terms of the particular effect that the CDSOA, as a non-permissible "specific action against dumping" or a subsidy, has on the trade of each individual requesting party.

25. While the requesting parties criticize the United States for relying on the "trade effects" test, they fail to identify any alternative basis to measure the nullification or impairment resulting from the CDSOA. Instead, they simply confuse the concept of a breach with the concept of the nullification or impairment of benefits that can result from a breach. As explained earlier, these

are distinct concepts under the WTO agreements. No matter how many times the requesting parties state that the CDSOA is a violation and, therefore, upsets the "balance of rights and obligations", they will still not have identified the level of nullification or impairment of the benefits accruing to them as a "result of" these violations of rights and obligations. Further, they argue that a violating measure, by upsetting the "proper balance between the rights and obligations of Members", "nullifies or impairs benefits".[11] However, not once do they attempt to quantify the level of nullification or impairment, which is, of course, the purpose of these proceedings and a prerequisite for a proper request to suspend concessions or other obligations under Article 22.

26. The requesting parties also err when they claim that the analysis relates to "any" benefits under the WTO. The DSB made findings only with respect to the benefits under specific provisions of the WTO Agreements. There are no findings that any other provisions have been breached, and thus no basis for claiming that benefits under any other provisions have been nullified or impaired. The requesting parties cannot assume that the CDSOA is inconsistent with any other provision of the covered agreements, and given the requirements of Article 23 of the DSU, the United States would be surprised if the requesting parties have made any determination that the CDSOA breaches any other provision.

27. Because the DSB found that the CDSOA is 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

[11] *See* Written Submission of Brazil, the EC, India, Japan, Korea, and Mexico, para. 32.

orders. As we explained in our submission, if there is no antidumping or countervailing duty order in place when a domestic producer receives payment, any payment received 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. In fact, in many cases, 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.

Reasons to Apply the "Trade Effects" Test

28. Any nullification or impairment is to 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, for a variety of reasons.

29. First, the findings of the Panel and Appellate Body support this approach. The Panel and Appellate Body found that the CDSOA is a non-permissible "specific action against" dumped or subsidized imports into the United States. This leads to the obvious conclusion that the nullification or impairment of benefits caused by the CDSOA are to be measured in terms of the effect the CDSOA has on those imports. Indeed, as we explained in our submission, the Appellate Body stated that the CDSOA was "against" dumping because it "dissuades the practice of dumping or the practice of subsidization[.]"[12] It also noted that recipients could use the

[12] Appellate Body Report, *Continuing Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, para. 256.

payments "to bolster their competitive position vis-a-vis their competitors, including the foreign competitors subject to anti-dumping or countervailing duties."[13] All of this indicates that a "trade effects" approach is warranted.

30. Second, past practice makes abundantly clear that nullification or impairment is measured in terms of trade effects. All prior arbitrations to determine equivalence – from the arbitrations in *Bananas*, to the arbitrations in *Hormones*, to the arbitration in *Section 110(5)* – have focused exclusively on the "trade effect" of the WTO-inconsistent measure. Even in the *1916 Act* dispute, the arbitrator specifically endorsed a "trade or economic effects" test,[14] although it is entirely unclear how it applied that test.

31. Indeed, the requesting parties point to only one report, by the GATT 1947 panel in *Japanese Measures on Imports of Leather*,[15] that in any way suggested nullification or impairment should be measured by anything other than the effect on trade. But, even in that dispute, the panel's primary concern was in fact the effect "on the volume of trade"; and its secondary concerns – increased "transaction costs" and effects on "investment plans" – were closely related to its primary concern. However, its comments on this point were, at best, brief; and in any event, that panel was not even tasked with determining the level of suspension of concessions or the level of nullification or impairment.

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[13] *Id.*, para. 255.

[14] Decision by the Arbitrators, *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, para. 5.23.

[15] Report of the Panel, *Japanese Measures on Imports of Leather*, L/5623, adopted 15/16 May 1984, BISD 31S/94.

32. Third, in considering how to measure the benefits nullified or impaired, it is worth recalling that the WTO is about trade and the benefits under the WTO agreements relate to the benefits to trade. This fact is only underscored by the title of each major agreement under the WTO umbrella, beginning with the Marrakesh Agreement Establishing the World Trade Organization. Indeed, the only annex without the term "trade" in its title is the Understanding on the Rules and Procedures Governing the Settlement of Disputes – and Article 3.2 of the DSU states that the dispute settlement system "is a central element in providing security and predictability to the multilateral trading system."

33. Thus, the level of nullification or impairment in this case is to be measured through the traditional "trade effects" test. The United States has followed a consistent conceptual methodology for assessing trade effects, whether they be of foreign trade measures against the United States, or, as in this case, of U.S. trade measures found to be inconsistent with a trade obligation. The methodology applied is a "comparative static analysis," with reference to a "counterfactual" situation in which the WTO-inconsistent measure is brought into conformity within the reasonable period of time.

34. To determine the trade effect of the CDSOA, it is not appropriate to simply assume that the level of the disbursement is equal to the trade effect. Rather, one must determine the relevant level of disbursements that actually affects U.S. production and how any change in the conditions of competition between like products translates into reduced sales in the U.S. market for all participants that did not receive the disbursements.

35. In this case, there is no evidence that CDSOA offset payments have in reality affected requesting parties' dumped or subsidized trade. There is no requirement that these payments

must be invested in production, and it is almost impossible for producers to predict whether they will receive such payments and, if so, the amount of the payments. And, in at least two cases, the offset payments flowed to companies that do not even produce the product that is being imported under an antidumping or countervailing duty order.

36. Our delegation is available to answer any questions you may have about how to assess the trade effect of the CDSOA.

No Member Has the Right to Retaliate on Behalf of Another WTO Member

37. As we explained in our preliminary ruling request and our submission, only the nullification or impairment actually experienced to the benefits of each individual requesting party is relevant to the calculation of that party's level of nullification or impairment. Various provisions of the WTO agreements make clear that the issue is the level of nullification or impairment of a benefit *to that specific Member* requesting authorization. For example, Article XXIII:1 of the GATT provides that, if any contracting party should consider that "any benefit accruing to it ... is being nullified or impaired", that party may engage the dispute settlement process. The arbitrator in *Bananas* also made this perfectly clear when it said, "there is no right and no need under the DSU for one WTO Member to claim compensation or request authorization to suspend concessions for the nullification or impairment suffered by another WTO Member with respect to goods bearing the latter's origin[.]"[16]

[16] Decision by the Arbitrators, *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 (U.S.)*, WT/DS27/ARB, 9 April 1999, para. 6.14.

38. Thus, the requesting parties' request to suspend concessions in connection with offset payments related to antidumping and countervailing duty orders on products not of their origin are not relevant to these proceedings.

The CDSOA "As Such"

39. Before leaving the subject of the level of nullification or impairment, we wish to note that the requesting parties mis-characterize the U.S. position regarding the relationship between the CDSOA "as such" and the offset payments that are made under the CDSOA. The issue in these proceedings is what is the level of nullification or impairment, if any, of the benefits caused by the CDSOA. A payment under the CDSOA is not the same measure as the CDSOA. None of the disbursements under the CDSOA were within the terms of reference of the panel in these disputes. That is simply a statement of fact. Yet the requesting parties seek to re-write the recommendations and rulings of the DSB and have them apply to future payments under the CDSOA, even though these measures are not even in existence. It is inconceivable that the requesting parties can obtain an award with respect to the future level of payments under the CDSOA. Essentially the requesting parties are asking the Arbitrators to act as though the DSB has already examined these measures and made recommendations and rulings concerning them, something that clearly has not occurred.

40. Contrary to the characterization of the requesting parties, the U.S. position is simply that there is no legal basis for the arbitrators in these disputes to make an award for alleged nullification or impairment supposedly caused by measures not even in existence. Yet that is what the requesting parties seek in asking that the level of nullification or impairment be determined today to equal the level of disbursements not even made yet, and should vary in the

future according to these measures that were not the subject of the DSB's recommendations and rulings. The simple fact is: there is no recommendation or ruling by the DSB concerning any payments made under the CDSOA, and certainly no recommendation or ruling by the DSB about payments that do not exist currently. Article 23 of the DSU is clear – the requesting parties are not entitled to determine that a breach has occurred unless they make that determination consistent with the DSB's findings. Similarly, the requesting parties are not entitled to suspend concessions or other obligations except with respect to the DSB's recommendations and rulings. There are no recommendations and rulings concerning these separate measures – indeed there could not be since they do not even exist yet. Accordingly the requesting parties have no legal basis to request an award in these proceedings to suspend concessions with respect to any new measures that may come into existence.

Other Misconceptions of the Requesting Parties

41. Before closing, I wish to respond to three of the most serious misconceptions of the requesting parties about these arbitrations.

42. First, we would like to take a moment to comment on the requesting parties' reliance on the concept of "inducing compliance." These parties repeatedly stress that there has been a violation and that that violation itself upsets "the balance of rights and obligations" – regardless of the actual effect the violation has on trade or anything else. The implication of the requesting parties' reasoning is clear: because the very existence of a WTO-inconsistent measure is "illegal" and upsets the "balance of rights and obligations", the requesting parties should be allowed to do whatever it takes to "induce compliance." For example, ignoring altogether the strict standard of "equivalence" under Article 22, six of the requesting parties argue that they should be given a

"margin of discretion on how they construe the suspension of concessions ... in order to achieve the ultimate goal of terminating a WTO-violation by another Member."[17]

43. The requesting parties must take the DSU as they find it, which is that any suspension of concessions must be equivalent in level to the level of nullification or impairment. The DSU does not state what the purpose of the suspension of concessions is. Instead, the requesting parties are simply speculating on the purpose, which could just as easily be to even out the bargained-for reciprocal level of concessions. Or there could be multiple purposes. But the basis for awards in these arbitrations is the text of the DSU. That text is crystal clear that the level of suspension must be equivalent to the level of nullification or impairment – regardless of whether that level does or does not induce compliance. The requesting parties are not free to obtain a "windfall" under which they can withdraw a higher level of benefits than the level actually nullified or impaired by the measure found inconsistent. Such an approach could easily lead to protectionism by a requesting party in the name of inducing another party's compliance.

The FSC Arbitration

44. Second, the requesting parties' countless subtle and sometimes not so subtle references to the *FSC* arbitration are not appropriate. The CDSOA is not a prohibited export subsidy, and these arbitrations are not governed by Article 4.10 of the SCM Agreement with its own unique legal standard and requirements.

45. Indeed, the similarities between the reasoning of the requesting parties and the reasoning of the arbitrator in the *FSC* dispute are striking – and disturbing to anyone who wishes to respect

[17] Written Submission of Brazil, the EC, India, Japan, Korea and Mexico, para. 12.

the different legal standards contained in the texts of Article 4.10 of the SCM Agreement and Article 22 of the DSU. In fact, the arbitrator in *FSC* went to great lengths to give meaning to the differences between arbitrations under Article 4.10 of the SCM Agreement and arbitrations under Article 22.6 of the DSU and Article 7.9 of the SCM Agreement. For the requesting parties to now argue that the conclusions reached by the arbitrator in *FSC* apply "by analogy" to the CDSOA in these Article 22.6 arbitrations only highlights their utter disregard for the terms of the DSU and the SCM Agreement.

46. The arbitrator in *FSC* recognized a number of important distinctions between Article 4.10 arbitrations and arbitrations under Article 22.6 of the DSU and under Article 7.9 of the SCM Agreement, but three distinctions are particularly noteworthy in these proceedings.

47. First, the arbitrator in *FSC*, while claiming that SCM Article 4.10 does not include the standard of "nullification or impairment," clearly understood that DSU Article 22.6 proceedings and SCM Article 7.9 proceedings do:

> [A]s far as prohibited subsidies are concerned, there is no reference whatsoever in remedies foreseen under Article 4 to such concepts as "trade effects", "adverse effects", or "trade impact". Yet, by contrast, such a concept is to be found very clearly in the context of remedies under Article 7, through the notion of "adverse effects."[18]

48. Again, the notion of "adverse effects" under Article 7 includes within it the notion of "nullification or impairment of benefits." And, as the arbitrator in *FSC* recognized, the notion of "adverse effects" (including nullification or impairment of benefits) is synonymous with the concept of "trade effects" or "trade impact".

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[18] Decision of the Arbitrator, *United States – Tax Treatment for "Foreign Sales Corporations": Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement* WT/DS108/ARB, 30 August 2002, para. 5.33 (emphasis added).

49. The second important distinction recognized in the *FSC* dispute was between the relatively inexact legal standard of "not disproportionate countermeasures" in SCM Article 4.10 and the stringent standard of "strict equivalence imposed under Article 22.4 of the DSU".[19] The arbitrator "saw nothing in the plain language of [the text of Article 4.10] which, on its face, dictates that the term "appropriate countermeasures" must be *limited* in its meaning to "equivalence" or correspondence (or some synonym) with the 'trade impact' on the complaining Member."[20] Again, the arbitrator quite clearly was contrasting Article 4.10 with Article 7.9 and Article 22.6 of the DSU.

50. A third difference that the *FSC* arbitrator drew between the standards of "appropriate countermeasures" in Article 4.10 and "equivalence" in Article 22 is that, according to the arbitrator, a certain countermeasure may be "appropriate" even if it greatly exceeds the level of nullification or impairment suffered by the requesting party, so long as the countermeasure is necessary to induce compliance.[21] By contrast, the DSB cannot authorize such a measure under Article 22.

51. Thus, by its own terms, the arbitration in the *FSC* dispute and the approach taken there is in no way relevant in determining whether the level of suspension proposed by each of the requesting parties is equivalent to the level of nullification or impairment experienced by each of these parties.

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[19] *Id.*, para. 5.30 n. 55.
[20] *Id.*, para. 5.30.
[21] *See id.*, paras. 5.61-5.62; *see also id.*, paras. 5.24, 5.41 and 5.47.

52. Instead of these clear distinctions between Article 4.10 and Article 22.6, Chile and the six other requesting parties (all but Canada) try to draw some other distinction, between "market access" measures (which they say include the measures in *Bananas* and *Hormones*) and "measures on rules" (which they say include not only measures under Article 4.10, but also the CDSOA). This is an artificial, meaningless and self-serving distinction with no basis in the DSU. Its only purpose is to justify the obviously unjustifiable approach of conducting an SCM Article 4.10, rather than DSU Article 22.6 analysis in this proceeding.

53. In this regard, we were surprised that Chile cited with approval a recent book by Robert Lawrence.[22] In discussing the *FSC* arbitration, Professor Lawrence notes that, "in the case of [Article 4.10 of the SCM Agreement], particularly unclear language has allowed the adoption of an expansive interpretation that is a radical departure from the rest of the system." (P. 60, emphasis added) (Incidentally, Professor Lawrence also notes that "[n]ullification is ... understood to reflect the amount of lost trade." (49)) Indeed, the requesting parties propose nothing short of a "radical departure" from the text of Article 22, from consistent past practice under Article 22, and from common sense.

The 1916 Act Arbitration

54. Finally, the six requesting parties state that the arbitrator in the *1916 Act* dispute "concluded that the envisaged EC measure was in principle justified[.]"[23] This is simply false. In fact, the Arbitrator agreed with the United States that it does not have, and I quote, "the jurisdiction to approve the adoption of *measures* by the complaining party. At this stage,

[22] Written Submission of Chile, para. 27.
[23] Written Submission of Brazil, the EC, India, Japan, Korea, and Mexico, para. 12.

therefore, we simply take note, as a factual matter, of the European Communities' statements that it intends to implement any authorized suspension of obligations through a proposed 'mirror' regulation. However ... we decline to examine such a regulation."[24] Thus, the arbitrator in no way "justified" or otherwise placed any stamp of approval on the EC measure. To the contrary, the arbitrator concluded that since the EC's proposal constituted a request for an unlimited level of suspension of concessions, it was not equivalent to the level of nullification or impairment in that dispute.

Conclusion

55. WTO members have carefully considered and negotiated how to address non-compliance. They have drawn a clear distinction between the breach of an obligation and the trade effect – the "nullification or impairment" – that may result from that breach. They have made quite clear in Article 22 of the DSU that the level of suspension cannot, under any circumstance, exceed the level of nullification or impairment. Article 22 provides no exception to this rule.

56. The WTO dispute settlement system has been effective not because arbitrators have done whatever it takes to "induce compliance." It has been effective because WTO Members believe that panels, the Appellate Body, and arbitrators will follow the carefully negotiated rules of the DSU. If the DSB were to authorize the requesting parties the "margin of discretion" they seek "to achieve the ultimate goal of terminating a WTO-violation by another Member," that

[24] Decision by the Arbitrators, *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, paras. 5.42 - 5.43.

authorization would have the paradoxical effect of undermining the dispute settlement system. We urge you to reject that approach.

57. Thank you for your attention. We look forward to your questions.