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

Answers of the United States
to the Arbitrators' Questions to the Parties

April 28, 2004

Question 10. **Could the United States explain further why a requesting party cannot suspend concessions or obligations in an amount that is equivalent to the level of nullification or impairment suffered (a) by other WTO Members, (b) by parties to the dispute, (c) by parties to the arbitration, in addition to itself? Please address in particular the situation where an underlying ruling of the DSB is that a law, as such, is WTO-inconsistent, independently of whether it is applied to exports of the requesting party or exports of other Members (i.e., where a ruling is not country-specific).**

1. The task of an Article 22.6 arbitrator is to determine whether the level of suspension proposed by a Member is equivalent to the level of nullification or impairment of benefits accruing *to that Member* as a result of a breach of a WTO obligation. In our preliminary ruling request,[1] we explained that Article XXIII:1 of the *General Agreement on Tariffs and Trade* ("GATT 1994"), Article 3.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement"), and Article 7.2 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") all make clear that "nullification or impairment" in Article 22 of the DSU refers to the nullification or impairment of a benefit accruing *to the specific requesting WTO Member* directly or indirectly under a WTO agreement.[2] Article 30 of the SCM Agreement provides that the provisions of

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[1] *See* Preliminary Ruling Request of the United States at paras. 7-17.

[2] Of course, this is only a partial list of such provisions. Article 10.4 of the DSU provides that, if a third party considers that a measure already the subject of a panel proceeding "nullifies or impairs benefits *accruing to it* under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding" (emphasis added). Similarly, Articles 26.1 and 26.2 of the DSU refer to the situation where a party

XXIII:1 of the GATT 1994 "as elaborated and applied by" the DSU apply to disputes under the SCM Agreement. Accordingly, the text of Article XXIII:1, which refers to benefits "accruing to" the complaining party, is directly applicable to these proceedings. Similarly, Article 17.3 of the Antidumping Agreement also refers to benefits "accruing to" the complaining party and is also directly applicable to these proceedings. The other provisions cited are context that support the fact that the "nullification or impairment" in DSU Article 22 is the nullification or impairment of a benefit accruing *to the specific requesting WTO Member*.

2. We also explained that the arbitrator in *Bananas* addressed this issue and found that "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."[3] Indeed, no Article 22.6 arbitrator has ever found that a requesting party can suspend concessions or other obligations in an amount equivalent to the level of nullification or impairment suffered by *other* WTO Members or non-Members. The requesting parties simply have not responded to these arguments.

3. Just the contrary, from the earliest days of the GATT 1947, it was clear that the nullification or impairment was to be measured in terms of the trade effect on the requesting party. In the November 8, 1952 determination by the GATT CONTRACTING PARTIES in the

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to the dispute considers that "any benefit accruing to it" directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure.

[3] Article 22.6 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, 9 April 1999 ("*Bananas* Arbitration Award (U.S. Request)"), para. 6.14.

"Netherlands Measures of Suspension of Obligations to the United States" (BISD 1S/33) the GATT Contracting Parties determined that they were to "have regard to" the "value of the trade involved" and the "impairment suffered by the Netherlands" even though the Contracting Parties on the same day had recognized that "many contracting parties have indicated that they are still suffering serious damage" and confirmed that "concessions granted" to contracting parties have been "nullified or impaired."[4]

4. This conclusion (i.e., that a Member may only suspend concessions or other obligations to the extent that benefits accruing to it have been nullified or impaired) applies regardless of whether the underlying dispute involved a challenge to a law "as such" or to a specific application of that law. In either case, a WTO Member may invoke dispute settlement procedures only in connection with nullification to its own benefits. The fact that a measure, whether as such or as applied, may nullify or impair the benefits of another Member is irrelevant. As DSU Article 10.4 of the DSU explains, if a third party considers that a measure already the subject of a panel proceeding "nullifies or impairs benefits *accruing to it* under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding."[5] That Member may not circumvent normal dispute settlement procedures by

[4] November 8, 1052 resolution of the GATT 1947 Contracting Parties (BISD 1S/31-32). *See also* for example, Panel Report, *European Communities - Refunds on Exports of Sugar*, L/4833, adopted on 6 November 1979, BISD 26S/290,319, where the Panel concluded that "No detailed submission had been made as to exactly what benefits *accruing to Australia* under para.V(i) of the General Agreement had been nullified or impaired or as to which objective of the General Agreement had been impeded, and the Panel did not consider these questions."

[5] Article 10.4 of the DSU (emphasis added).

having another Member suspend concessions on its behalf, nor may a party to the dispute presume to do so.

5. The United States notes that, even when a DSB ruling against a measure is based on an "as such" challenge, the DSB ruling is nevertheless country-specific, in the sense that it relates only to the rights of the complaining party to the dispute.[6] WTO dispute settlement results apply only to the parties to the proceeding, and not to other WTO Members. Even when a second Member chooses to challenge a measure already found, "as such," to be inconsistent with a WTO obligation, the second Member must establish a *prima facie* case of a breach. While the second panel could take into account the earlier panel and/or Appellate Body findings, that second panel would "not [be] *bound* by previous decisions of panels or the Appellate Body even if the subject-matter is the same."[7]

6. Moreover, DSB rulings are always country-specific, even in the case of an "as-such" challenge, in the sense that a prevailing complaining party may only suspend concessions with respect to the nullification or impairment it has itself experienced. The arbitrator in *Bananas* determined that the level of nullification or impairment of U.S. benefits with respect to trade in goods was zero, even though the EC breach of GATT 1994 Article XIII was an "as such" finding. The arbitrator in *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

[6] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, page 14 ("[Adopted panel reports] are not binding, except with respect to resolving the particular dispute between the parties to that dispute.").

[7] Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complaint brought by EC)*, WT/DS79/R, adopted 22 September 1998, para. 7.30 (italics in original).

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.[8] Indeed this is hardly surprising since otherwise a responding Member could find itself faced with multiple claims for the same nullification or impairment. For example, if a complaining party were to be entitled to suspend concessions for the nullification and impairment suffered by other WTO Members, then a later complaining party would either have to impose a "double" suspension (thereby exceeding the level of nullification or impairment) or have no recourse.

7. The conclusion that a Member may only suspend concessions or other obligations to the extent that benefits accruing to it have been nullified or impaired also applies regardless of whether the other WTO Member is or is not a party to a dispute or arbitration. While these disputes have been handled through common procedures for reasons of efficiency and for the convenience of all concerned, the rights of the two parties to each of the disputes are precisely the same as they would have been had the proceedings been separate. With respect to the underlying dispute, DSU Article 9.2 makes clear that the rights of parties to a dispute involving multiple complaints are the same as those they "would have enjoyed had separate panels examined the complaints." Likewise, the fact that multiple arbitrations are being considered on a common schedule and a common hearing does not change the fact this proceeding consists of a series of *bilateral* arbitrations on the requests of each of the requesting parties. And in each of those arbitrations, the relevant issue is the level of nullification or impairment of the benefits of

[8] 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).

the particular requesting Member. The fact that a measure may or may not nullify or impair the benefits of another Member is irrelevant.

Question 11. Is the United States claiming that the nullification or impairment arising from the CDSOA is zero because that is the quantified effect, or is the claim that quantification is too difficult, hence zero should be assumed?

8. The nullification or impairment arising from the CDSOA is zero because that is the quantified effect, based on the evidence before us. The United States is not aware of any evidence – and the requesting parties have not provided any evidence – that CDSOA offset payments adversely affect the trade of the requesting parties. To the contrary, the United States has submitted evidence that indicates CDSOA offset payments do not affect production or, as a result, the trade of the requesting parties.[9]

9. What is clear from the requesting parties' scant methodology papers and submissions is that these parties have made no attempt to calculate the extent to which the CDSOA has nullified or impaired benefits accruing to each of these parties. Such a calculation is a prerequisite for requesting authorization to suspend concessions or other obligations. A requesting party, acting in good faith, cannot simply pull an arbitrary number out of a hat and then assert that the "burden of proof" lies elsewhere.

Question 12. Considering its reasoning in paragraphs 15 to 19 of its written submission and more generally its position on nullification or impairment, could the United States give an example of a situation where a law *as such* would cause more than "zero" nullification or impairment?

10. Previous arbitrations applying the standard in Article 22.6 involved situations in which a law "as such" caused more than "zero" nullification or impairment.

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[9] *See, e.g.,* Written Submission of the United States at paras. 66 through 74.

11. For example, the arbitrator in the Article 25 arbitration on *U.S. - Section 110 of the Copyright Act* dispute found a level of nullification or impairment above zero in a challenge to a law as such, and not as applied. The DSB rulings in that dispute only dealt with the statutory provisions as such, and not how the application of those provisions in any particular year implicated U.S. obligations. Nevertheless, the arbitrator found the level of nullification or impairment to be US$1.1 million per year, based on an analysis of lost royalty collections from the types of establishments exempt from such payments under the WTO-inconsistent elements of the U.S. law. As evidence, the arbitrator considered as a starting point collections in the period immediately prior to the passage of the Section 110 legislation into law, adjusted to account for the evolution of the market up to the point when the arbitrator was appointed.[10]

12. Likewise, in the *EC - Hormones* dispute, the complaining parties made no allegation that the application in any particular year of the EC's ban on imports of beef from cattle treated with growth hormones breached WTO rules. The challenge was to the ban "as such," and the DSB rulings reflected this. Nevertheless, the arbitrator on the U.S. complaint found a level of nullification or impairment to be US$116.8 million for the United States, based on the arbitrator's analysis of what U.S. imports would have been in the absence of the ban. As evidence of what those imports would have been, for high quality beef, the arbitrator considered, among other things, that the U.S. would have exported up to the limit of its quota, based on the recent experience of other beef exporters to the EC, that the U.S. share of the quota would have been 92%, based on the recent market shares of U.S. and Canadian exports in various markets,

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[10] *See* 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, para. 4.70.

and that prices would have been greater than those of recent U.S. exports to the EC because they would be of higher quality beef.[11] For the other beef products, the arbitrator considered, among other things, imports from a representative period prior to the imposition of the ban as a starting point, then adjusted that level downwards based on recent EC consumption. The arbitrator also applied a price derived from prices during a recent representative period.[12]

13. In the present dispute, the level of nullification is zero not because the CDSOA was "as such" found inconsistent with U.S. WTO obligations. Rather, it is zero because the evidence supports that conclusion.

Question 13. Please provide detailed evidence on the use of the CDSOA payments by US firms beyond the cases provided on pages 30-34 of the US written submission.

14. The United States has been unable to determine how affected domestic producers use CDSOA payments, beyond the information provided on pages 30-34 of our written submission. However, we wish to reiterate that the single largest share of offset payments in 2003 ($31.4 million) flowed to Ingersoll-Rand, a company that does not produce any product subject to an antidumping duty order. The requesting parties have not disputed that fact – or any other fact contained in pages 30-34 of our written submission.

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[11] 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 ("*Hormones* Arbitration Award (U.S. Request)"), paras. 54-65.

[12] *Hormones* Arbitration Award (U.S. Request), paras. 67-71.

Question 14. **Is it the contention of the United States that the distribution of payments by the US government will not affect the domestic price of the products which the receiving company manufactures? Please explain.**

15. As a theoretical matter, the United States believes it is possible for government payments to affect the domestic price of the products which the receiving company manufactures, but whether they do in fact would depend on a number of factors. In these disputes, the United States is not aware of any evidence that would indicate that CDSOA offset payments have had any effect on the production or pricing of any product subject to an antidumping or countervailing duty order. To the contrary, the United States has submitted evidence demonstrating that, in some cases, such payments simply cannot affect production or pricing (because the recipient does not produce the product), and, in others, the payments are *de minimis* and would have, at most, only a negligible effect on production or pricing.[13]

Question 15. **What type of economic model would be appropriate to justify the claim of the United States that the level of nullification and impairment is zero? If the United States has such a model, it should be provided to the Arbitrator with complete documentation including the source and values of the relevant elasticities.**

The Level of Nullification or Impairment is Zero

16. As discussed in the United States' first written submission, there are a number of reasons to believe that the CDSOA disbursements have no impact on imports of products subject to antidumping or countervailing duty orders. In paragraphs 66 though 74 of our Written Submission, we explained that (1) the CDSOA does not restrict a producer's use of CDSOA offset payments; (2) producers are unable to predict the amount of offset payments and, as a result, offset payments do not affect production and marketing plans; (3) in at least two cases, the

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[13] *See* U.S. Written Submission at paras. 71-73.

recipient of the offset payments is not a producer of the product covered by the antidumping or countervailing duty order; and (4) *de minimis* disbursements are unlikely to have any real impact on production.

17. Based on these facts, there is no reason to believe that CDSOA offset payments result in any increase in production. As a result, the level of nullification and impairment to the requesting parties is zero.

Potential Model for Estimating Trade Effects

18. This result is confirmed by the application of an economic model to measure the theoretical impact, if any, of payments on production and, in turn, on the requesting parties' exports to the United States for that product.

19. One such model is a simple three-country partial equilibrium Armington trade model.[14] Armington trade models are now relatively standard in trade policy modeling. In these models, buyers have well-established preferences for products differentiated by their country of origin. Moreover, while products are differentiated, markets are still assumed to be competitive. This type of model provides the analyst the ability to conduct a simple comparative static exercise where the effects of removing the CDSOA offset payments are estimated. Therefore, the model could be used to answer the counterfactual question of how much lower would U.S. production have been in the base year, 2002 for example, had the CDSOA program not been in place. Similarly, the model can show how much higher the requesting parties' exports of dumped or

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[14] For further discussion of Armingtion models see Paul Armington, *A Theory of Demand For Products Distinguished By Place of Origin*, IMF Staff Papers, 1969, 16, pp. 159-178 and Joseph F. Francois and H. Keith Hall, "Partial Equilibrium Modeling" in *Applied Methods for Trade Policy Analysis: A Handbook* edited by Joseph F. Francois and Kenneth Reinert, 1997, pp. 122-155.

subsidized products to the United States would have been without the CDSOA offset payments to the U.S. domestic industry.

20. The inputs required for the model are as follows: (1) an *ad valorem* measure of the part of the CDSOA distribution that affects production; (2) a current market value for U.S. shipments, requesting party exports to the United States, and "rest of world" exports to the United States for each of the products; (3) an estimate of the substitutability of the different products for each other (the elasticity of substitution); (4) an estimate of the price sensitivity of supply for each product (the elasticity of U.S. supply, complaining party import supply, and rest-of-the-world import supply); and (5) an estimate of the market demand elasticity. (Each of these inputs is discussed below.)

21. The output of the model would be as follows: (1) an estimate of the decrease in U.S. domestic shipments; (2) an estimate of the increase in requesting parties' exports to the United States that would result from the removal of CDSOA; and (3) an estimate of the increase in rest-of-world exports to the United States.

Data and Input Assumptions

Ad Valorem Measure of CDSOA Offset Payments

22. Only those CDSOA offset payments that affect U.S. production are relevant in determining the level of nullification or impairment. Therefore, the level of CDSOA payments must be limited to only those that affect production. Since some production is exported and does not affect the U.S. market, the level of CDSOA payments must be further adjusted downward to take into account the share of U.S. production exported.

U.S. Market Shipments

23. The U.S. response to Question 22 provides production for products with antidumping/countervailing duty orders. To calculate domestic shipments, exports need to be deducted from total production. In cases in which only total production is available, the ratio of domestic shipments to total production reported in the latest U.S. International Trade Commission ("USITC") report for that product can be used to estimate the current value of U.S. domestic shipments. When there is no information available in the USITC report on U.S. domestic shipment share of production, the average of all other products can be used as a proxy. U.S. Census data can be used for the value of imports. The base year would be the most recent year for which data are available.

Elasticities

24. The USITC provides elasticity estimates in its investigations. These estimates are country- and product-specific, and parties to the investigations have had the opportunity to review and comment on the elasticities selected by the USITC.

25. In addition, the Panel found that the CDSOA, in conjunction with antidumping duty laws, prevents "dumpers" from adjusting their prices downward to match the change in U.S. prices due to the offset payments. To reflect this situation in the modeling, the dumped import supply elasticity can be set to 100 or nearly perfectly elastic so that the prices for dumped imports cannot adjust downward.

26. In the case of the CDSOA, as we explained in paragraphs 66 through 74 of our written submission, the evidence indicates that offset payments do not affect production beyond a *de*

minimis level. (This relates to the first input in the model.) As a result, the output of the model is that the level of nullification or impairment is zero.

Question 16. Please provide the Arbitrator with the following data at the two-digit US Standard Industrial Classification for all industries, for the years 2000, 2001, 2002 and 2003: Production; Imports; Exports; The number of anti-dumping and CVD orders in effect; and Disbursements from CDSOA.

27. Please refer to Exhibit US-7. Since 2001, the United States no longer maintains data based on the US Standard Industrial Classification ("SIC") system. Instead, a new classification system, the North American Industry Classification ("NAIC") system, has been used. Therefore, the United States has provided data on a three-digit NAIC basis, the equivalent level to the two-digit SIC, for 2000 through 2003.

28. Production data is provided in the form of U.S. shipments, in billions of U.S. dollars, for agriculture, fisheries, minerals and ores, and manufacturing products. Import and export data is provided as requested, in actual U.S. dollars.

29. With respect to antidumping and countervailing duty orders, the United States has provided active antidumping orders in effect at the end of each specified year. The NAIC classification code is provided for 2003 only. The United States is still gathering countervailing duty orders and NAIC classifications and intends to supplement this response as soon as possible.

30. With respect to CDSOA offset payments, the United States has provided these payments by year and product grouped by NAIC code. Please note that, at this point, we have not been able to classify 17 products. Also note that, in the table, we deducted the CDSOA repayments from 2002 disbursements, but we did not deduct payments that went to Ingersoll-Rand or to

Green Tree Chemical Technologies (i.e., recipients that do not produce the product subject to the order).

Question 17. **Given the argument of the United States that the value of nullification or impairment arising from the CDSOA is zero, how is the objective of the CDSOA being fulfilled?**

31. As the United States stated in the underlying disputes, the resolution of these disputes does not depend upon what the CDSOA is intended to do but what it actually does. In addition, the United States does not believe that there is a single objective of the CDSOA, or that the objectives of the CDSOA can be easily determined.

32. In any event, in the underlying disputes, the complaining parties asserted that the purpose of the CDSOA offset payments is to "neutralize effectively" dumping and subsidization by ensuring that prices "return to fair levels".[15] If this is the objective of the CDSOA, it does not appear that the objective is being fulfilled. Foreign producers and exporters continue to dump their products or to sell subsidized products in the U.S. market. Moreover, as we explained in our submission, some recipients of CDSOA offset payments do not even produce products that are covered by an antidumping or countervailing duty order.

Question 18. **Does the United States agree with the statement in the analysis of the economic effects of the CDSOA by the Congressional Budget Office (Exhibit RP-4) that the CDSOA "can be expected to result in more anti-dumping and countervailing-duty petitions and more support for those petitions by import-competing industries"? Please provide a full explanation for your response.**

33. The Congressional Budget Office ("CBO") did not provide any evidence to support its statement. Indeed, it appears the CBO was simply speculating on the possible effects of the

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[15] *See, e.g.,* Panel Reports in *United States – Continued Dumping and Subsidy Offset Act of 2000* ("*US-CDSOA*"), WT/DS217/R – WT/DS234/R, 27 January 2003, para. 7.27.

CDSOA without engaging in an empirical analysis, and such speculation plays no role in Article 22.6 arbitrations.

34. Moreover, a review of the available facts shows that the CDSOA has not resulted in more antidumping and countervailing duty investigations being initiated or more industry support for petitions. Exhibit US-8 includes a time series tracking the number of U.S. antidumping and countervailing duty initiations from January 1991 to December 2003. Those data show that the level of initiations has fluctuated over time with the greatest increase in initiations occurring in 1992. Total annual antidumping and countervailing duty investigations initiated actually *declined* from 58 in 1999 and 52 in 2000,[16] to 39 in 2002 and 42 in 2003.[17] These publicly-available figures confirm that the CDSOA has had and can be expected to have no discernible effect on the number of U.S. investigations initiated since its enactment in 2000.[18]

35. The evidence in Exhibit US-9 further shows that the U.S. Commerce Department initiated investigations on the basis of petitions affirmatively establishing standing (*i.e.,* without polling the industry) in almost every case initiated from 1995 to October 2002. Thus, as the Appellate Body correctly pointed out, the facts confirm that domestic producers generally support antidumping and countervailing duty petitions with or without the CDSOA.[19]

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[16] The CDSOA was enacted on October 28, 2000.

[17] Exhibit US-8, *citing* Semi-Annual Reports Under Article 25:11 of the SCM Agreement for the United States (Cases Initiated 1994-2003); Semi-Annual Reports Under Article 16.4 of the Antidumping Agreement for the United States (Cases Initiated 1994-2003); Semi-Annual Reports Under Article 14.4 of the Antidumping Code for the United States (Cases Initiated 1991-1993); Semi-Annual Reports Under Article 2.16 of the Subsidies Code for the United States (Cases Initiated 1991-1993).

[18] *See* U.S. Oral Statement before the Appellate Body, at para. 34 (Nov. 28, 2002).

[19] *US – CDSOA,* Appellate Body Report, para. 292, *citing* Exhibit US-6 before the Panel.

36. This arbitration concerns only the nullification or impairment of benefits that could reasonably be expected to accrue to the requesting parties under the provisions violated.[20] Having failed to establish that the CDSOA violates Articles 5.4 and 11.4 of the Antidumping and SCM Agreements, respectively, the requesting parties cannot now claim nullification or impairment of benefits based on the same unsubstantiated theories.[21]

Question 19. Does the United States agree with the statement in the analysis of the economic effects of the CDSOA by the Congressional Budget Office (Exhibit RP-4) that "the overall net effect of the distributions mandated by CDSOA is to cause the firms receiving the distributions to produce output at greater cost than it is worth and to cause domestic firms that do not receive the distributions to restrict output that would be worth more than its costs of production"? Please provide a full explanation for your response.

37. As explained in response to Question 18, the CBO does not provide any evidence to support this statement. Moreover, it does not appear that the CBO considered the evidence that the United States has submitted in these disputes which indicates that, as a matter of fact, CDSOA offset payments do not affect production, pricing, or trade.

Question 20. Would efficient and inefficient firms equally utilize the CDSOA offset payments in the manner described by the United States in paragraphs 66-74 of its written submission.

38. In paragraphs 66 though 74 of our Written Submission, we explained that (1) the CDSOA does not restrict a producer's use of CDSOA offset payments; (2) producers are unable to predict the amount of offset payments and, as a result, are unable to change their production and marketing plans; (3) in at least two cases, the recipient of the offset payments is not a producer of

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[20] *See US – Copyright*, Arbitrators Report, para. 3.24.

[21] *US – CDSOA*, Appellate Body Report, para. 294.

the product covered by the antidumping or countervailing duty order; and (4) *de minimis* disbursements are unlikely to have any real impact on production.

39. These facts apply equally to "efficient" and "inefficient" firms (however those terms may be defined). For example, regardless of whether a firm is efficient or inefficient, it will utilize the payments in whatever manner makes sense for its overall operations, whether "to 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."[22]

__Question 21.__ Please provide evidence from the economic literature to substantiate the claim apparently made by the United States that the supply elasticity with respect to CDSOA payments is zero.

40. The United States asserted that the effect of the offset payments is zero not because of a zero supply elasticity but, rather, because of no estimated reduction in production costs beyond a *de minimis* amount. Because of the absence of a significant "price wedge" (the level of payment affecting production, as a share of production, and, as a result, price), the supply elasticity did not factor into our analysis.

__Question 22.__ Please provide the Arbitrator with the evidence to substantiate the claim in paragraph 73 of the U.S. written submission that offset payments represent a small fraction of domestic producers' sales or production of a relevant product.

41. Please refer to Exhibit US-10 for this evidence. Exhibit US-10 includes offset payment and production data in connection with those products that are covered or were covered by an antidumping or countervailing duty order applicable to imports from the requesting parties.

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[22] *See* Written Submission of the United States at para. 67.

Question 23. Is there a need for the Arbitrator to distinguish between "trade effects" and "economic effects"? Is there a legal basis to do so? If so, could it be provided and explained?

42. There is no need to distinguish between "trade effects" and "economic effects" in these proceedings. The United States has explained at length, most recently in paragraphs 28 through 33 of our Oral Statement, that any nullification or impairment is to be measured in terms of the effect that the CDSOA has on the trade of each requesting party. The requesting parties 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 that can result from a breach. Thus, no party to these proceedings has identified, much less quantified, any adverse "economic effect," other than the trade effect, that could result from the CDSOA, as a non-permissible specific action against dumping or subsidization.

43. Further, it is worth recalling the origin of the term "economic effects." The term was first used in the Article 25 arbitration in *United States – Section 110(5) of the US Copyright Act*. In that arbitration, the arbitrator concurred with the parties that the relevant benefits are those which are "economic in nature" and stated that this conclusion was consistent with previous decisions of arbitrators under Article 22.6 of the DSU – all of which measured nullification or impairment in terms of lost exports.[23] Thus, although the arbitrator appeared reluctant to use the term "trade effect" in the context of royalty payments under copyright law, its analysis reflected the "trade

[23] Arbitration Award in *United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under Article 25 of the DSU*, WT/DS160/ARB25/1, para. 3.18.

effects" analysis of previous Article 22.6 arbitrations.[24] Indeed, the basis of the award was, in essence, "trade effects" by another name.

44. Based on the *Section 110(5)* arbitration, the arbitrator in *United States – 1916 Act* noted that it was necessary to determine "the trade or economic effects" of the 1916 Act – suggesting the terms are nearly synonymous – and, by contrast, rejected the EC's argument that DSB authorization under Article 22 could be based on some kind of "qualitative equivalence" between two measures. Indeed, at no point did the arbitrator explain the difference between "trade effects" and "economic effects."

[24] *See, e.g.,* Arbitration Award in *United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under Article 25 of the DSU*, WT/DS160/ARB25/1, paras. 3.45 - 3.48.