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)

Comments of the United States
on the Answers of the Requesting Parties
to the Questions of the Arbitrators

May 4, 2004

1. The written answers of Brazil, Canada, Chile, the European Communities ("EC"), India, Japan, Korea, and Mexico (the "Requesting Parties") contain a number of very telling points for these proceedings. In particular, those answers may finally begin to shed light on the reasons behind the Requesting Parties' unprecedented and unfounded requests for authorization to suspend concessions.

2. In their response to Question 6, for example, Brazil, Canada, the EC, India, Japan, Korea, and Mexico (collectively, for the purposes of these comments, the "Seven Requesting Parties") state that: "specific quantification of the trade effects of the CDSOA would be an extremely complex and burdensome exercise. It would involve taking into account every payment to every U.S. producer, in respect of every product, now and in the future."[1] Similarly, Chile complains that an economic model "would involve a considerable amount of tedious work."[2]

3. The fact that an exercise is complex, tedious, or even burdensome does not mean that it can be dispensed with. These Requesting Parties appear simply to be seeking to avoid engaging

[1] Needless to say, the United States disagrees that there is any basis under the DSU to speculate about what payments might be provided for which products, let alone their potential trade effects, in the future in Article 22.6 proceedings.

[2] Answers of Chile, Response to Question 6.

in what to them would be a "burdensome" exercise in actually calculating the level of nullification or impairment that they have experienced.

4. Equally telling is that their response establishes that the Requesting Parties concede that their requests bear no relation to the level of nullification or impairment experienced - their requests are not based on the trade effects of the CDSOA. The Requesting Parties explain what would be required to calculate those trade effects and then admit that they have not done this calculation. Accordingly, the United States has met its burden of proof in these proceedings since it is clear that the requests are not for a level of suspension of concessions or other obligations that is equivalent to the level of nullification or impairment.

5. Also telling is the response of the Seven Requesting Parties to question 1. There (in para. 4), these Requesting Parties admit that under their approach, there would be nothing to stop Members from each suspending concessions equal to the total level of nullification and impairment. In other words, under the Requesting Parties' approach, the DSU would be read as permitting a suspension of concessions several magnitudes higher than the total level of nullification and impairment. The Requesting Parties are clear that they are voluntarily limiting their requests to a level less than they believe they would be entitled to under their reading of the DSU.

6. The written answers raise some additional issues that also deserve comment:

- By arguing in response to Question 4 that CDSOA offset payments *constitute* nullification or impairment, rather than serve as *evidence* of the nullification or impairment caused by the CDSOA, the Requesting Parties ignore the DSB recommendations and rulings in these disputes.

- The responses to Question 5 *support* the U.S. position that offset payments have no effect on the trade of each requesting party.

- In response to Question 6, the Seven Requesting Parties *agree* with the United States that a product-by-product, country-by-country economic model provides a better measure of how the CDSOA affects each country's trade than does an "aggregate" economy-wide model. While these Parties believe a product-by-product, country-by-country model would be "prohibitively complicated," the United States believes the data needed for the model are readily available.

7. We address these issues and other aspects of the Requesting Parties' answers in more detail below.[3]

Question 1

8. The Seven Requesting Parties disregard the terms of the DSU and the WTO Agreements, as well as past GATT and WTO practice, in responding to question one. Instead, they merely quote a paragraph from the award in an arbitration conducted under SCM Agreement Article 4.11, and -- on no other basis than that quotation alone -- assert "the obligation being violated in this case is an *erga omnes* obligation, owed in its entirety to each and every Member."[4]

9. As explained in the U.S. answer to question 10, as well as the U.S. preliminary ruling request, numerous provisions of the DSU, the GATT 1994 and other provisions of the WTO Agreement make clear that 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

[3] The United States also includes with these comments revised exhibits to our Written Answers. Exhibit US-11 corrects and supplements the information provided in Exhibit US-7; Exhibit US-12 corrects and supplements the information provided in Exhibit US-10.

[4] Answers of the Seven Requesting Parties, paras. 2-3.

benefits accruing *to that Member* as a result of a breach of a WTO obligation.[5] Also as explained in our answer to question 10, from the earliest GATT working party to deal with the topic through WTO arbitrations under Article 22.6, it is clear that the GATT Contracting Parties and WTO arbitrators have understood that nullification or impairment is to be measured in terms of the trade effect on the requesting party, even when the trade of other parties may also be affected by the measure.[6] Indeed, the *Bananas* arbitrator declined to find any nullification or impairment to the goods benefits of the United States in specific recognition of the fact that a requesting party may not treat the nullification or impairment of another Member's benefits as nullification or impairment of its own benefits.[7]

10. To date, these Requesting Parties have failed to respond to these arguments – they have failed to respond to the terms of the DSU, GATT Article XXIII:1 and other WTO provisions, and they have failed to respond to the text-based reasoning of past Article 22.6 arbitrators.[8] In their

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[5] *See* Answers of the United States, para. 1; *see also* Preliminary Ruling Request of the United States at paras. 7-17.

[6] *See* Answers of the United States, para. 3 (citing "Netherlands Measures of Suspension of Obligations to the United States" (BISD 1S/33)). It is worth noting that this working party felt constrained to look at trade effects even when it was operating under the standard in Article XXIII:2 of the GATT 1947, which was suspend concessions "as they determine to be appropriate in the circumstances." The standard has now been "elaborated" in the DSU so that the levels must be "equivalent." This standard if anything makes even clearer that one must look at trade effects.

[7] *See* Answers of the United States, para. 2 (citing *Bananas*).

[8] In a rather feeble effort to distinguish the present case from the previous Article 22.6 arbitrations in *Bananas* and *Hormones*, the Requesting Parties have argued that the present case (like the arbitration in *1916 Act* and in *FSC*) involves a measure "on rules," whereas *Bananas* and *Hormones* involved measures "that affect market access." *See, e.g.,* Written Submission of Brazil, the European Communities, India, Japan, Korea, and Mexico at para. 48; Written Submission of Chile at paras. 11-13. There is, of course, no such distinction in the text of the WTO and no listing of "rules" vs. "other" obligations and so there is no legal basis for this position. In any event, it is a false distinction. The obligations at issue in these disputes concern market access just as much as the obligations at issue in *Bananas* and *Hormones*, and *Bananas* and *Hormones* involved the breach of "rules" just as much as these

response to question 1, these Parties now seek to trump the terms of the WTO Agreement through quotation of one previous arbitration award that did *not* ground its analysis in that text. While it is evident that the inability or unwillingness of the Requesting Parties to demonstrate any actual effect on their benefits has led them to disregard the terms of the WTO Agreement in favor of a variety of rationales, this inability or unwillingness is no excuse for doing so.

11. In fact, the very structure of dispute settlement under the DSU in general and under Article 22 in particular demonstrates that the requesting parties' position is incorrect. For example, as explained in paragraphs 5 to 7 of our written answers, a panel and the Appellate Body will only examine those claims made by one WTO member against one other WTO member, and the result will apply only to the parties to the proceeding, not to all WTO Members.[9]

12. Moreover, their approach is at odds with the WTO agreements. For example, under Article XXVIII of the GATT 1994 and Article XXI of the General Agreement on Trade in Services, only other WTO members with particular trade interests have rights in a concession and

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disputes over the CDSOA did.

[9] We also note that the Requesting Parties offer no basis for applicability of the term "*erga omnes*" in the context of the WTO Agreement other than the use of this term in the FSC arbitration. There, the arbitrator merely asserted that the prohibited subsidy obligation at issue in that dispute (not the obligation at issue in this one) was an "*erga omnes per se* obligation" (para. 6.10). The concept received at most cursory treatment by the parties to that arbitration, and the arbitrator's gratuitous reference to "*erga omnes*" in its decision was unsupported and inapplicable. And while the term finds no basis in the WTO Agreement, the United States notes that any proper consideration of the notions for which the term "*erga omnes*" has sometimes been a (partial) shorthand in other areas of international law would require addressing such matters as the relationship between the nature of an obligation and the remedy available for the breach of the obligation, as well as the extent to which these legal issues are settled among States or merely proposals for progressive development. Of course, none of these international law inquiries is within the terms of reference of these DSU Article 22.6 arbitrations.

can withdraw benefits.[10] In addition, Article XXXV of the GATT 1947 provides that the GATT 1947 "shall not apply as between any contracting party and any other contracting party" if the two parties have not entered into tariff negotiations with each other, and either of the parties, at the time either becomes a party, does not consent to such application.

13. The Seven Requesting Parties invite the Arbitrators to disavow the approach taken by all prior arbitrators under Article 22.6 and 25. The Arbitrators should decline the invitation. Tellingly, Canada and the EC have previously taken directly opposite positions when they were the subject of requests to suspend concessions.[11] They have offered no explanation for their reversing their position other than it is expedient for them to do so in these proceedings.

Question 2.

14. Seven of the Requesting Parties argue that a different approach is warranted in these proceedings than in prior arbitrations, contrasting the benefit of "market access" with the benefit of "reasonable expectation."[12] It seems odd indeed that denying market access should as a rule yield a lower level of nullification or impairment than frustrating a "reasonable expectation." These Requesting Parties also mischaracterize the 1916 Act dispute, where it was not a dispute

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[10] *See also* Article XXVII of the GATT 1994.

[11] See, e.g., Decision by the Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas: Recourse to Arbitration by the European Communities*, WT/DS27/ARB, 9 April 1999, para. 6.8 ("The European Communities contends that especially with respect to trade in goods the nullification or impairment suffered by the United States can only be negligible or *nil* since there is no *actual* trade and little prospect for *potential* trade in bananas between the United States and the European Communities") (emphasis in original); Decision by the Arbitrator, *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/DS48/ARB, 12 July 1999, para. 36 ("Canada states that it is expected to estimate the amount of trade that would be occurring in the absence of the EC ban").

[12] *See* Answers of the Seven Requesting Parties at para. 8.

over "reasonable expectations." These Requesting Parties appear to be engaging in the same fallacy as the panels in the *India Mailbox* and *EC – Computer Equipment* disputes, both of which confused "reasonable expectations" with actual obligations.[13]

15. One other point of note is that the Requesting Parties appear to acknowledge that the CDSOA does not nullify or impair benefits absent payments being made under the CDSOA.[14] In other words, the level of nullification or impairment from the law as such can be zero.[15] This is at odds with their insistence that there is a level of nullification or impairment due to the law in principle, regardless of whether it is ever applied.

Question 4.

16. The Requesting Parties assert that CDSOA offset payments do not simply serve as *evidence* of the nullification or impairment caused by the CDSOA, but instead that these payments "constitute the very essence of the CDSOA" and "*constitute*, at a minimum, the nullification or impairment caused by this legislation."[16]

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[13] *See* Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical ("India Mailbox")*, WT/DS50/AB/R, adopted 16 January 1998, at paras. 36, 41-42; and Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment ("EC – Computer Equipment)*, WT/DS62/AB/R; WT/DS67/AB/R; WT/DS68/AB/R, adopted 22 June 1998, at para. 80.

[14] *See, e.g.,* Answers of the Seven Requesting Parties at paras. 9 and 14, where the nullification or impairment is to be quantified based on payments made. Implicitly then, if there are no payments made in a particular year, the level of nullification or impairment would be zero.

[15] This conclusion is hardly surprising. After all, as we explained in paragraphs 62 to 65 of our written submission, the DSB found that Mexico failed to establish that the CDSOA causes adverse effects. As a result, an assumption that the CDSOA causes adverse effects has no place in these arbitration proceedings.

[16] Answers of the Seven Requesting Parties at para. 12.

17. As explained in our submissions and answers to questions,[17] the DSB's recommendations and rulings in these disputes related only to the CDSOA as such. 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 agreement." Moreover, it is not correct, as the Requesting Parties assume, that the breach of an obligation can be equated with the nullification or impairment that results from that breach.[18]

18. The Seven Requesting Parties cite with approval the decision of the arbitrator in the *United States – 1916 Act* arbitration, in which the arbitrator found that final judgments and settlements under the 1916 Act would "constitute" nullification or impairment of benefits accruing to the EC.[19] However, as the United States explained in its written submission,[20] the 1916 arbitrator relied on a false and ultimately illogical distinction between "as such" and "as applied" challenges in justifying its conclusion that the level of suspension could change from year to year. Moreover, in asserting that final judgments and settlements could "constitute" nullification or impairment, the 1916 Act arbitrator explicitly considered that it was, in fact, identifying the trade or economic effect of the measure at issue.[21] Although it applied faulty logic, the 1916 Arbitrator considered this to be the case because final judgments and settlements

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[17] *See, e.g.*, Written Submission of the United States at paras. 15-19; Answers of the United States to the Arbitrators' Questions to the Parties at paras. 10 - 13; Oral Statement of the United States at paras. 39-40.

[18] *See*, *e.g.,* Oral Statement o fthe United States at paras. 7-13.

[19] *See* Arbitration Award in *United States – 1916 Act*, paras. 5.58 and 5.60 to 5.61.

[20] Written Submission of the United States at paras. 85-90.

[21] *See* Arbitration Award in *United States – 1916 Act*, paras. 5.23, 7.2.

were paid by EC companies and their subsidiaries.[22] By contrast, CDSOA payments are paid by the U.S. government to U.S. domestic producers,[23] and it cannot simply be assumed that these payments have a "trade or economic" effect on the Requesting Parties.

19. Thus, the Requesting Parties are incorrect that CDSOA payments themselves constitute nullification or impairment. Nevertheless, while CDSOA offset payments cannot themselves constitute nullification or impairment in these disputes, the United States does not disagree that recent payments could serve as the starting point for a calculation; that is, they may serve as *evidence* in the calculation of the level of nullification or impairment. As described in the U.S. answer to Question 12, this is consistent with previous proceedings to determine the level of nullification or impairment that results from a WTO-inconsistent law "as such." For example, in the arbitration in *U.S. - Section 110 of the Copyright Act*, the DSB rulings only dealt with the statutory provisions as such. The rulings did not address 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

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[22] *See* Arbitration Award in *United States – 1916 Act*, paras. 5.58 and 5.60 to 5.61. The United States notes that the 1916 arbitrator did not properly apply its own logic, since such payments might not have had any trafe or economic effect on the EC if, for example, the 1916 Act plaintiff were itself an EC company, or if the plaintiff only manufactured the product at issue in an EC member State.

[23] Moreover, unlike the payments made under the 1916 Act, which would only be made in the event of a 1916 Act judgment or settlement, the antidumping and countervailing duties distributed under the CDSOA would, in any event, have been collected pursuant to AD/CVD investigations, and, as explained in our written submission, these duties are paid by importers *in the United States*, and not by exporters from the Requesting Parties. Written Submission of the United States at para. 44.

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.[24]

20. Likewise, in the *EC - Hormones* dispute, the arbitrator considered recent market conditions and prices in determining the level of nullification or impairment in a dispute involving an "as such" challenge to the EC's ban on imports of beef from cattle treated with growth hormones.[25]

21. These previous arbitrations make clear that the application of a WTO-inconsistent law can provide *evidence* for the calculation of the level of the nullification or impairment that can result from that law as such. However, as already explained, since CDSOA payments have no impact on U.S. production, they would not affect the trade of any of the Requesting Parties.

Question 5.

22. In our written submission, we provided a number of reasons why CDSOA offset payments do not affect the Requesting Parties' dumped or subsidized trade.[26] In their response to

[24] *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.

[25] *See* U.S. Answer to Question 12.

[26] *See* Written Submission of the United States at paras. 66-74.

Question 5, the Seven Requesting Parties lend additional support to this conclusion by identifying "several circumstances that might lead to zero supply elasticity."[27]

23. For example, the Seven Requesting Parties describe situations in which the form of a subsidy leaves marginal costs unchanged:

> Optimal subsidies aim to change incentives – that is to say, to change the marginal revenues or costs. Conversely in the tax literature, the desire to minimize distortions to production has led to consideration of using lump sum taxes to reduce the disincentive effect. Under restrictive simplifying assumptions, a one-time lump sum payment (or tax) expands (reduces) the wealth of the firm but does not change the relationship between the marginal cost of producing the next item and the marginal revenue from selling that unit. Accordingly, its profit maximizing quantity of production is not affected.[28]

24. This describes the situation with CDSOA offset payments. Once a year, some sub-set of affected domestic producers receives a lump sum payment under the CDSOA. Whether an affected domestic producer will receive a payment, and what the amount of that payment will be, depends almost entirely on whether foreign producers continue to sell their dumped or subsidized product in the United States – a situation over which affected domestic producers have no control. In this regard, CDSOA offset payments do not change the "incentives" of affected domestic producers.

25. While affected domestic producers must make a "qualifying expenditure" to receive payment, this requirement does not affect marginal costs (or production) beyond a *de minimis* level for at least two reasons. First, an expenditure "qualifies" if it is made at any time after an

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[27] Answers of Seven Requesting Parties at para. 22. Note that, in the view of the United States, these circumstances do not suggest a zero supply elasticity. Rather, they suggest that payments will not reduce production costs beyond a *de minimis* level.

[28] Answers of Seven Requesting Parties at para. 22.

antidumping or countervailing duty order is imposed – which, in the vast majority of cases, occurred long before the CDSOA became law. Needless to say, the CDSOA could not provide an incentive to make an expenditure that was made long before the CDSOA was enacted. Second, as a matter of fact, the qualifying expenditure requirement has not limited the amount of offset payments that affected domestic producers receive. To the contrary, affected domestic producers typically report qualifying expenditures that vastly exceed the amount of offset payments that the producer could ever receive. For example, Alexander & Baldwin (Hawaiian Commercial and Sugar Company) reported approximately $2.3 billion in qualifying expenditures, but received only $487 in offset payments for fiscal year 2003.[29] This demonstrates that the actual payment is essentially irrelevant to production decisions.

26. Thus, the only real incentive that the CDSOA has on affected domestic producers is to encourage them to produce *one unit* of their product per year in the United States. A producer must remain in operation, "continuing to produce the product covered by the antidumping duty order ... or a countervailing duty order" in order to receive payment.[30] The producers are free to shift 99.9 percent of their production overseas (including to countries that are subject to antidumping or countervailing duty orders), so long as they maintain a modicum of production in the United States. In their reply to Question 6, the Seven Requesting Parties appear to agree that there is no nullification or impairment from production outside the United States.

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[29] *See* Exhibit US-6.

[30] *See* 19 C.F.R. § 159.61(b).

Question 6

27. In response to Question 6, the Seven Requesting Parties seem to admit that a "detailed calculation of the trade effects on an industry-by-industry, country-by-country basis" would be necessary to model the trade effects of the CDSOA, but state that this would be "prohibitively complicated, not least because much of the relevant information ... is business confidential information that is not readily available. Further, specific quantification of the trade effects of the CDSOA would be an extremely complex and burdensome exercise."[31] They therefore propose a less exacting model based on aggregate data. The Seven Requesting Parties' alternative approach to measuring nullification or impairment contains several fundamental flaws.

The Information Necessary to Perform a Product-by-Product Analysis of Offset Payments Is Available

28. As explained in our response to Question 15, a three-country partial equilibrium model can be used in these particular disputes to analyze the impact of the CDSOA for any product for which such payments are not *de minimis* and for which the distribution of CDSOA offset payments would alter the cost of producing U.S. products competing with those under dumping orders.[32] This industry-by-industry, country-by-country model would require data on the current market value for U.S. shipments, requesting party exports to the United States and "rest of

[31] Answers of the Seven Requesting Parties at paras. 29-30.

[32] We note that the Seven Requesting Parties argue that the CDSOA has "direct trade effects worldwide." *See* Answers of Seven Requesting Parties at para. 31. They offer *no* evidence to support this assertion. Moreover, because the CDSOA was found to be a non-permissible "specific action against dumping" or a subsidy, the level of nullification or impairment should be based on the CDSOA's effect on *imports* subject to antidumping or countervailing duty orders. *See* Written Submission of the United States at paras. 39-59.

world" exports to the United States for each of the products. It would also require a product-by-product estimate of the following elasticities: substitution, U.S. supply, import supply for each requesting party, rest-of-world import supply, and market demand.[33]

29. These data are available and, with few exceptions, do not require the use of business confidential information. Product-specific data on the current market value for U.S. shipments can be obtained from the U.S. Department of Commerce, the U.S. Department of Agriculture, the U.S. International Trade Commission ("USITC"), or from company annual reports. Data on requesting party exports and "rest of world" exports to the United States can be obtained from the U.S. Census Bureau, within the Department of Commerce. Elasticities can be obtained for the respective products from USITC public reports and memoranda.

30. Thus, while the Seven Requesting Parties are right to recognize that a product-by-product model would provide a more accurate measure of the trade effects than would an approach based on higher product aggregation, they are wrong to assume that such a model would be "prohibitively complicated."

31. To be sure, a number of "pre-model" considerations can, in fact, be the hardest part of the exercise – more difficult than the modeling itself – since they require determining what is the economic effect that results from the measure. The determination of these economic effects are central legal and economic questions that must be determined, independent of the model used to

[33] Answers of the United States at para. 20.

estimate the impact on trade flows.[34] For example, in these particular disputes, it is necessary to estimate the extent to which the CDSOA affects the cost of production. This estimate then serves as an input in the partial equilibrium model. As the United States has explained in comments related to Question 5, in its response to Question 15, and in its written submission, there are any number of reasons to believe that the CDSOA has no, or no more than a *de minimis*, impact on production. This is, of course, consistent with the Panel's finding that the CDSOA has no adverse effects.[35]

32. In any event, such a "pre-model" estimate is needed not only for a product-by-product, country-by-country partial equilibrium model, but also for the aggregate model proposed by the Seven Requesting Parties. More importantly, such an estimate is needed to determine the level of nullification or impairment in these proceedings: one cannot, for example, simply assume that the amount of offset payment paid *by the U.S. government* is the same as the nullification or impairment suffered *by the Requesting Parties*.

The Seven Requesting Parties' "Aggregate" Model Contains Several Fundamental Flaws

33. Not only does a product-by-product model provide the best approach for measuring the level of nullification or impairment, the Seven Requesting Parties' alternative approach contains several fundamental flaws.

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[34] And, as noted previously by the United States, the DSB made no findings concerning "adverse effects" under the SCM Agreement. Accordingly, there is no basis in these proceedings to presume the CDSOA payments have any particular effect or that there is any particular causal link between these payments and the effects on the Requesting Parties.

[35] *See* Written Submission of the United States at paras. 62-65 (citing CDSOA Panel Report at para. 7.132).

34. First, the Seven Requesting Parties have improperly included the amount of *all* CDSOA offset payments in calculating each party's level of nullification or impairment. As we explained in our written submission, to determine the trade that would flow were the CDSOA to be brought into compliance with the WTO rulings, it is necessary to focus on the provisions with which the CDSOA was found to be inconsistent.[36] Because the CDSOA was found to be a non-permissible "specific action against dumping" or a subsidy, the level of nullification or impairment should be based on the CDSOA's effect on *imports subject to antidumping or countervailing duty orders.* Because the Seven Requesting Parties include in their answer (1) payments that relate to duties collected on dumped and subsidized products from all *other* countries and (2) payments related to revoked orders (including orders that were revoked even before Congress enacted the CDSOA into law), they overstate the amount of relevant offset payments. Thus, for example, Canada should not include in the calculation of its trade effects CDSOA offset payments to U.S. pineapple producers that relate to imports of dumped pineapple from Thailand.

35. Second, it is necessary to know the domestic price reduction that results from the CDSOA payments. Without any justification, the Seven Requesting Parties assume the price reduction is equivalent to the size of the CDSOA payments.[37]

36. Third, the Seven Requesting Parties improperly used aggregate data on U.S. manufacturing, rather than data on those industries subject to antidumping and countervailing

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[36] *See* Written Submission of the United States at para. 39-59.

[37] In fact in paragraph 41, the Seven Requesting Parties admit that the full payment may not be used to lower price. They claim, however, that the degree of price reduction from any payment is unquantifiable. The United States, however, believes that degree of price reduction can be estimated and should be at the heart of any empirical analysis of the effects of CDSOA payments.

duty orders. They have also ignored non-manufactured products such as agricultural products, even though some non-manufactured products are subject to antidumping or countervailing duty orders.

37. Fourth, the Seven Requesting Parties used the high end of the substitution elasticity range found in a general equilibrium model, the Global Trade Analysis Project ("GTAP"). It is interesting to note that during the injury phase of antidumping and countervailing duty investigations, firms from the Requesting Parties typically argue that their products are different from the U.S. domestic like product and therefore are not highly substitutable. Ultimately, the USITC carefully analyzes substitutability in its injury analysis, with the benefit of input from all parties involved in the investigation (including, as applicable, firms from the Requesting Parties). The USITC's substitutability estimates are generally in the moderate range of the spectrum, not in the high end of the range.

38. These four fundamental flaws result in the Seven Requesting Parties overstating the potential impact of the CDSOA payments in the U.S. market.

Conclusion

39. The Requesting Parties have gone to great lengths to avoid the "tedium" and the "burden" of nullification or impairment calculations, and have chosen instead to invite the Arbitrators to detour from Article 22 and from past practice in Article 22.6 proceedings. It is time to return to the text and to well charted territory.