

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***

DECISION BY THE ARBITRATORS

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<i>Brazil – Aircraft</i> (Article 22.6 – Brazil)	Decision by the Arbitrators, <i>Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 411 of the SCM Agreement</i> , WT/DS46/ARB, 28 August 2000
<i>Canada – Aircraft Credits and Guarantees</i> (Article 22.6 – Canada)	Decision by the Arbitrator, <i>Canada – Export Credits and Loan Guarantees for Regional Aircraft – Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 411 of the SCM Agreement</i> , WT/DS222/ARB, 17 February 2003
<i>EC – Bananas III (Ecuador)</i> (Article 22.6 – EC)	Decision by the Arbitrators, <i>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</i> , WT/DS27/ARB/ECU, 24 March 2000, DSR 2000:V, 2243
<i>EC – Bananas III (US)</i> (Article 22.6 – EC)	Decision by the Arbitrators, <i>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</i> , WT/DS27/ARB, 9 April 1999, DSR 1999:II, 725
<i>EC – Hormones (US)</i> (Article 22.6 – EC)	Decision by the Arbitrators, <i>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</i> , WT/DS26/ARB, 12 July 1999, DSR 1999:III, 1105
<i>EC – Hormones (Canada)</i> (Article 22.6 – EC)	Decision by the Arbitrators, <i>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</i> , WT/DS48/ARB, 12 July 1999, DSR 1999:III, 1135
<i>US – 1916 Act</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
<i>US – 1916 Act (EC)</i>	Panel Report, <i>United States – Anti-Dumping Act of 1916 – Complaint by the European Communities</i> , WT/DS136/R and Corr.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593
<i>US – 1916 Act (Japan)</i>	Panel Report, <i>United States – Anti-Dumping Act of 1916 – Complaint by Japan</i> , WT/DS162/R and Add.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4831
<i>US – FSC</i> (Article 22.6 – US)	Decision by the Arbitrator, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 411 of the SCM Agreement</i> , WT/DS108/ARB, 30 August 2002
<i>US – Section 110(5) Copyright Act</i> (Article 25.3)	Award of the Arbitrators, <i>United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under Article 25 of the DSU</i> , WT/DS160/ARB25/1, 9 November 2001, DSR 2001:II, 667
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815

I. INTRODUCTION

A. REQUEST FOR ARBITRATION AND SELECTION OF THE ARBITRATORS

1.1 On 26 September 2000, the Dispute Settlement Body (DSB) adopted the report of the Appellate Body and the report of the Panel as upheld by the Appellate Body in this dispute.¹ The reasonable period of time for the United States to bring the Anti-Dumping Act of 1916 into conformity with the DSB recommendations and rulings was originally decided through arbitration pursuant to Article 21.3(c) of the Dispute Settlement Understanding (DSU), and was due to expire on 26 July 2001. It was subsequently extended so as to expire on 31 December 2001, or the date on which the then session of the US Congress adjourned, whichever would be earlier.²

1.2 On 7 January 2002, the European Communities requested that the DSB authorize it to suspend the application of obligations under GATT 1994 and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement").³

1.3 On 17 January 2002, the United States objected to the level of suspension proposed by the European Communities, pursuant to Article 22.6 of the DSU.⁴ The matter was referred to arbitration. On 19 February 2002, Members were informed of the constitution of the Arbitrator. Its composition was as follows:

Chairman: Mr Dimitrij Grcar

Members: Mr Brendan McGivern
Mr Eugeniusz Piontek

1.4 On 27 February 2002, however, the European Communities and the United States jointly informed the Arbitrators that a proposal to repeal the 1916 Anti-Dumping Act and to terminate cases pending under the Act was being examined by the US Congress. In the light of this, the European Communities and the United States requested the Arbitrators to suspend the arbitration proceeding. The communication to the Arbitrators also stated that the European Communities and the United States agreed that the arbitration could be reactivated at the request of either party after 30 June 2002.⁵

1.5 On 19 September 2003, the European Communities requested the reactivation of the arbitration proceedings.⁶

B. PRESENTATION OF THIS REPORT

1.6 This report is structured as follows:

- In Part II, we set out the relevant factual background to these proceedings. We describe briefly both the Anti-Dumping Act of 1916, and the request by the European Communities to suspend obligations.

¹ *US – 1916 Act*, hereafter the "Appellate Body Report" and *US – 1916 Act (EC)*, hereafter the "Panel Report", the panel in this dispute being referred to as the "original Panel". The Appellate Body Report also upheld the report of the panel in the complaint brought by Japan, *US – 1916 Act (Japan)*.

² Minutes of the DSB meeting of 11 September 2001, WT/DSB/M/107, paragraph 66.

³ WT/DS136/15, 11 January 2002.

⁴ WT/DS136/16, 18 January 2002.

⁵ WT/DS136/18, 4 March 2002.

⁶ We note the parties thus agreed both to postpone the beginning of the proceeding, and to extend the time-frame foreseen in Article 22.6 of the DSU. The Arbitrators agreed to these arrangements.

- In Part III, we examine three preliminary issues: (i) the burden of proof; (ii) whether the European Communities was required to specify which obligations it seeks authorization to suspend; and (iii) the "blocking regulation" recently adopted by the Council of the European Union.⁷
- In Part IV, we describe the role and jurisdiction of the Arbitrators under Article 22 of the DSU.
- In Part V, we set out the parameters for the determination of the level of nullification or impairment.
- In Part VI, we apply these parameters to the specific facts of this case.
- In Part VII, we summarize our principal findings and conclusions.
- In Part VIII, we provide the award and decision of the Arbitrators.
- In Part IX, we offer some concluding observations.

II. FACTUAL BACKGROUND – THE US ANTI-DUMPING ACT OF 1916 AND THE EC REQUEST TO SUSPEND OBLIGATIONS

A. INTRODUCTION

2.1 The European Communities seeks authorization to adopt a so-called "mirror" regulation.⁸ It requests authorization to suspend the application of obligations owing to the United States under GATT 1994 and the Agreement on Anti-Dumping in order to adopt an "an equivalent regulation to the 1916 Act against imports from the United States."

2.2 At this point, it would be useful to describe briefly the Anti-Dumping Act of 1916 ("1916 Act"), the findings of the original Panel with respect to the Act, and the European Communities request to suspend obligations.

B. THE US ANTI-DUMPING ACT OF 1916

2.3 The 1916 Act was enacted by the US Congress under the heading of "Unfair Competition" in Title VIII of the Revenue Act of 1916.⁹ It provides in part as follows:

"It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an

⁷ Council Regulation (EC) No. 2238/2003, described below.

⁸ The submissions of the European Communities referred to its proposed measure alternately as a "mirror regulation" or "mirror legislation."

⁹ Panel Report, paragraph 2.1.

industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanour, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee."¹⁰

C. FINDINGS OF THE ORIGINAL PANEL

2.4 The original Panel found in part that:

"(d) by not providing exclusively for the injury test provided for in Article VI, the 1916 Act violates Article VI:1 of the GATT 1994;

(e) by providing for the imposition of treble damages, fines or imprisonment, instead of anti-dumping duties, the 1916 Act violates Article VI:2 of the GATT 1994;

(f) by not providing for a number of procedural requirements found in the Anti-Dumping Agreement, the 1916 Act violates Articles 1, 4, and 5.5 of the Anti-Dumping Agreement;

(g) by violating Articles VI:1 and VI:2 of the GATT 1994, the 1916 Act violates Article XVI:4 of the Agreement Establishing the WTO;

(h) since violations have been established that have not been rebutted by the United States, the United States nullifies or impairs benefits accruing to the European Communities under the WTO Agreement."¹¹

2.5 The Appellate Body upheld the findings of the Panel, including "the Panel's findings in the EC Panel Report that the 1916 Act is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 1, 4 and 5.5 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*."¹²

D. THE EC REQUEST TO SUSPEND OBLIGATIONS

2.6 The request made on 7 January 2002 to the DSB by the European Communities stated in part that:

"As a result of the United States' failure to bring its 1916 Act into conformity with the WTO Agreements, or otherwise to comply with the recommendations and rulings of the Dispute Settlement Body in this matter, a number of companies are currently facing judicial proceedings brought in the United States on the basis of the 1916 Act.

¹⁰ Ibid.

¹¹ Panel Report, paragraph 6.228.

¹² Appellate Body Report, paragraph 155.

Moreover, all companies which export to the United States are facing the threat of legal action on the basis of this WTO-incompatible legislation."¹³

2.7 The European Communities request also indicated that:

"[T]he European Communities will request authorization from the Dispute Settlement Body to suspend the application of the obligations under GATT 1994 and the Anti-Dumping Agreement in order to adopt an equivalent regulation to the 1916 Act against imports from the United States. This regulation would allow the European Communities to impose on United States companies found to dump their products in the European Communities additional duties corresponding, over the five year projected life of the measures, to three times the amount of the damage suffered by companies in the European Communities when certain specific intents analogous to those required under the 1916 Act are established. This regulation would also mirror other procedural aspects of the United States' measure which have been found to be inconsistent with the WTO obligations of the United States in cases where sufficient evidence of specific intent is present. The investigation would be conducted by the authorities of the European Communities responsible for the application of its anti-dumping legislation as part of the anti-dumping investigation rather than by the courts and the additional duties would not be paid to the complainants."¹⁴

2.8 The United States informed the DSB that it "object[ed] to the level of suspension of obligations proposed by the European Communities."¹⁵ Therefore, as noted above, the matter was referred to arbitration.

2.9 The Arbitrators requested the European Communities to provide a communication "describing the measure subject to arbitration" and "the methodology for calculating the proposed level of suspension of concessions or other obligations." In its 6 October 2003 Methodology Paper, the European Communities provided additional detail about its proposed measure:

"The EC legislation would be based on the equivalent requirements as under the 1916 Act. In particular, the application of special duties would be contingent upon

- the finding of dumping by a US company;
- damage to the complaining EC company or companies;
- the intention to destroy or injure an industry in the European Communities, or to prevent the establishment of an industry in the European Communities, or to restrain or monopolise any part of trade and commerce in such products in the European Communities;

However, the EC legislation would differ from the 1916 Act in various regards, in particular, it would

- not provide for the imposition of fines or for imprisonment;
- not provide that the special duties are imposed by the courts but by the EC authorities responsible for the application of the anti-dumping legislation;

¹³ WT/DS136/15, 11 January 2002.

¹⁴ Ibid. The request also stated that "[i]n considering what obligations to suspend, the European Communities has applied the principles and procedures set forth in Articles 22.3 and 22.4 of the DSU."

¹⁵ WT/DS136/16, 18 January 2002.

- not provide that the monies collected are paid to the complainants;
- not violate procedural requirements of the Anti-Dumping Agreement such as the presentation of evidence by the complainant."¹⁶

2.10 The European Communities concluded its Methodology Paper by stating that its request "does not exceed the level of nullification and impairment suffered by the EC".¹⁷

III. PRELIMINARY ISSUES

A. BURDEN OF PROOF

3.1 Each party to this dispute made arguments on what the other party was required to prove for the purpose of these proceedings. The United States argued that the European Communities failed to provide any evidence on the level of nullification or impairment arising from the 1916 Act, or to propose any specific level of suspension. The European Communities argued that the United States had to prove that the requested level of suspension of obligations was not equivalent to the level of nullification or impairment. Moreover, according to the European Communities, the United States had not provided any evidence that the envisaged European Communities measure would effectively exceed the level of nullification and impairment caused by the 1916 Act.

3.2 The burden of proof in Article 22.6 arbitrations, as in regular WTO dispute settlement, is by now well established. As stated by the arbitrators in *EC – Hormones (US) (Article 22.6 – EC)*:

"WTO Members, as sovereign entities, can be *presumed* to act in conformity with their WTO obligations. A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency. The act at issue here is the US proposal to suspend concessions. The WTO rule in question is Article 22.4 prescribing that the level of suspension be equivalent to the level of nullification and impairment. The EC challenges the conformity of the US proposal with the said WTO rule. It is thus for the EC to prove that the US proposal is inconsistent with Article 22.4. Following well-established WTO jurisprudence, this means that it is for the EC to submit arguments and evidence sufficient to establish a *prima facie* case or presumption that the level of suspension proposed by the US is *not* equivalent to the level of nullification and impairment caused by the EC hormone ban. Once the EC has done so, however, it is for the US to submit arguments and evidence sufficient to rebut that presumption. Should all arguments and evidence remain in equipoise, the EC, as the party bearing the original burden of proof, would lose.

The same rules apply where the existence of a specific *fact* is alleged It is for the party alleging the fact to prove its existence.

The duty that rests on *all* parties to produce evidence and to collaborate in presenting evidence to the arbitrators – an issue to be distinguished from the question of who bears the burden of proof – is crucial in Article 22 arbitration proceedings. The EC is required to submit evidence showing that the proposal is *not* equivalent. However, at the same time and as soon as it can, the US is required to come forward with evidence

¹⁶ *Methodology Paper of the European Communities*, 6 October 2003, paragraphs 8-9.

¹⁷ *Ibid.*, paragraph 10.

explaining how it arrived at its proposal and showing why its proposal *is* equivalent to the trade impairment it has suffered..."¹⁸

3.3 We agree that this is an accurate presentation of the burden of proof applicable in Article 22.6 proceedings.¹⁹ Moreover, the fact that this case relates to the suspension of "obligations", as opposed to the suspension of tariff concessions, in no way alters the applicable burden of proof.

3.4 Applying this standard to the facts of the present case, we note that the burden is on the United States to prove that the European Communities proposal, as set out in the European Communities' request to suspend obligations, is inconsistent with Article 22.4 of the DSU. This means that the United States must submit arguments and evidence sufficient to establish a *prima facie* case or presumption that the level of suspension proposed by the European Communities is not equivalent to the level of nullification or impairment sustained by the European Communities as a result of the 1916 Act. If the United States does so, it will be incumbent on the European Communities to submit arguments and evidence sufficient to rebut that presumption.

3.5 We also agree with the statement of the arbitrators in *EC – Hormones (US) (Article 22.6 – EC)* regarding the burden of proof that applies "where the existence of a specific *fact* is alleged." The burden is on the party alleging a fact – either the United States or the European Communities, as the case may be – to prove its existence.

3.6 We also agree that a duty rests on both parties to produce evidence and to collaborate in presenting evidence to the Arbitrators. The United States is required to submit evidence showing that the European Communities' proposal is not equivalent. The European Communities, as the Member seeking to suspend obligations, is "required to come forward with evidence explaining how it arrived at its proposal and showing why its proposal *is* equivalent to the trade impairment it has suffered."

B. WAS THE EUROPEAN COMMUNITIES REQUIRED TO SPECIFY WHICH OBLIGATIONS IT SEEKS AUTHORIZATION TO SUSPEND?

1. Introduction

3.7 We agree with the view advanced by both parties that the decision by the European Communities to seek the suspension of "obligations" rather than tariff "concessions" is not subject to review by the Arbitrators.²⁰ However, was the European Communities nevertheless obligated under Article 22 of the DSU to specify precisely which "obligations" it seeks to suspend?

¹⁸ Decision by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, paragraphs 9-11. Original emphasis.

¹⁹ Other arbitrators have similarly referred to the burden of proof enunciated by the arbitrators in the *EC – Hormones* decisions. See, for example: Decision by the Arbitrators, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paragraphs 37-38; Decision by the Arbitrators, *Brazil – Aircraft (Article 22.6 – Brazil)*, paragraph 2.8 and footnote 12; Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, paragraph 2.10 and footnote 18.

²⁰ The European Communities argues that:

"Article 22.2 of the DSU (and Article XXIII:2 GATT) offers to the Member which is suffering from nullification and impairment the possibility to request the suspension of concessions *or* other obligations *or* both. This choice falls within the Member's discretion which escapes a review by the arbitrators by virtue of Article 22.7 of the DSU."

Written Submission of the European Communities, 3 November 2003, paragraph 8. Original emphasis.

Although the United States objected to the EC request on other grounds, it did not challenge the EC choice to seek the suspension of "obligations":

2. Arguments of the parties

3.8 The United States argues that the European Communities has not provided any information regarding the "level" on "either side of the equation." On the one side, according to the United States, the European Communities "has failed to provide even a rough estimate of the level of nullification or impairment." On the other side of the equation, according to the United States, the European Communities "has similarly failed to propose suspension covering a certain 'level' of trade." The United States argues that "Articles 22.4 and 22.7 of the DSU do not permit the arbitrator or the DSB to make a determination in the absence of such information". It asserts that:

"The EC has asked the DSB to issue it a blank check. It asks for the authority to suspend concessions or other obligations, but it fails to identify the particular concessions or other obligations it intends to suspend. In previous cases, the complaining party has identified the obligations it wishes to suspend with specificity—and for good reason: it is difficult for the DSB to authorize the suspension of concessions or other obligations without knowing what concessions or other obligations would be suspended. In addition, a description of the particular obligations the complaining party seeks to suspend facilitates the arbitrator's work in determining, in accordance with Article 22.7 of the DSU, whether the level of suspension is equivalent to the level of nullification or impairment."²¹

3.9 The European Communities replies that it:

"... does not consider that, because it requested to suspend 'other obligations' it would be required to provide information on which specific obligations under the GATT 1994 and the *Anti-Dumping Agreement* it proposes to suspend. By specifying in detail the features of its proposed mirror legislation, the European Communities has in fact [provided] a more precise indication of the retaliatory measure than would a detailed listing of paragraph numbers.

Moreover, the European Communities did clearly limit its suspension request to the 'relevant' provisions under GATT and the *Anti-Dumping Agreement* in order to adopt the envisaged mirror legislation. Thus, the European Communities never intended to request authorisation to suspend *any* obligations under the GATT 1994 and the *Anti-Dumping Agreement*.²²

3. Evaluation by the Arbitrators

3.10 In our view, a party seeking to suspend obligations is not required, under Article 22 of the DSU, to indicate precisely which "obligations" it seeks authorization to suspend. Article 22.2 of the DSU states simply that a party may request authorization from the DSB "to suspend the application to

"[T]he choice of whether to suspend "concessions" or "other obligations" would appear to be the choice of the complaining party, and there is nothing in the DSU that would indicate a basis for an arbitrator to find that the choice had been exercised inappropriately, other than the procedures under Article 22.3. At the same time, the distinction would appear to make little difference since the two terms are used interchangeably in Article 22. The United States is not raising a claim in this proceeding that requires distinguishing between a 'concession' and an 'other obligation'."

Answers of the United States to the Arbitrator's Questions to the Parties, 20 November 2003, paragraph 2.

²¹ *Written Submission of the United States*, 20 October 2003, paragraph 35.

²² *Answers of the European Communities to the Questions of the Arbitrator*, 20 November 2003, paragraphs 40-41.

the Member concerned of concessions or other obligations under the covered agreements." There is no requirement that the requesting party identify exactly which obligations it wishes to suspend.

3.11 Moreover, we note that in previous cases, neither the arbitrators nor the DSB have required requesting parties to enumerate which concessions or other obligations such Members were seeking to suspend. For example, in *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, the arbitrator accepted, and the DSB authorized, the suspension by Brazil, *inter alia*, of "the application of obligations under the Agreement on Import Licensing Procedures relative to licensing requirements on imports from Canada." The Brazilian request did not indicate which "obligations" under the Agreement on Import Licensing it wished to suspend, nor did the arbitrators require such specificity.²³ In *Brazil – Aircraft (Article 22.6 – Brazil)*, the arbitrators similarly did not object to the suspension by Canada of obligations under "the Agreement on Textiles and Clothing and the Agreement on Import Licensing Procedures."²⁴ In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the arbitrators indicated that the complainant could obtain authorization from the DSB to suspend unspecified obligations "under the TRIPS Agreement" with respect to certain sectors.²⁵

3.12 Moreover, even for requests seeking the suspension of tariff concessions "and related obligations under the GATT 1994" the arbitrators did not require specificity as to what these "related obligations" were.²⁶

3.13 Thus, past practice indicates that arbitrators have accepted requests to suspend unspecified "obligations". The DSB has granted authorization to suspend obligations, while allowing the requesting Member to decide which particular obligations it would select to implement the authorization. We would emphasize, however, that whatever discretion is granted to such a Member is subject to the requirement that the level of suspension of obligations cannot exceed the level of nullification or impairment. We return to this point below.

3.14 Therefore, we do not consider that the European Communities' request to "suspend the application of the obligations under GATT 1994 and the Anti-Dumping Agreement in order to adopt an equivalent regulation to the 1916 Act against imports from the United States" can be considered as deficient under Article 22 of the DSU for failing to specify which "obligations" it seeks to suspend.

3.15 As a general concluding observation on this issue, we agree with the arbitrators in *EC – Hormones (US) (Article 22.6 – EC)* that:

"The more precise a request for suspension is in terms of product coverage, type and degree of suspension, etc. ..., the better. Such precision can only be encouraged in pursuit of the DSU objectives of 'providing security and predictability to the multilateral trading system' (Article 3.2) and seeking prompt and positive solutions to disputes (Articles 3.3 and 3.7). It would also be welcome in light of the statement in Article 3.10 that 'all Members will engage in [DSU] procedures in good faith in an effort to resolve the dispute'.²⁷

²³ *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paragraph 4.1.

²⁴ *Brazil – Aircraft (Article 22.6 – Brazil)*, paragraph 4.1. Although both *Canada – Aircraft Credits and Guarantees* and *Brazil – Aircraft* primarily involved requests for "appropriate countermeasures" under the SCM Agreement, in both disputes the requests for countermeasures also cited DSU Article 22.2.

²⁵ *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paragraph 173.

²⁶ *EC – Bananas III (US) (Article 22.6 – EC)*, paragraph 8.1; *EC – Hormones (US) (Article 22.6 – EC)*, paragraph 84; *EC – Hormones (Canada) (Article 22.6 – EC)*, paragraph 73.

²⁷ *EC – Hormones (US) (Article 22.6 – EC)*, footnote 16. We note that the arbitrators in *EC – Bananas III (Ecuador) (Article 22.6 – EC)* also quoted this statement. *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, footnote 12.

C. THE "BLOCKING" REGULATION

3.16 The United States raised certain arguments with respect to Council Regulation (EC) No. 2238/2003 of 15 December 2003, the so-called "blocking regulation".²⁸ The Regulation provides in part that no judgment of a court in the United States "giving effect, directly or indirectly, to the Anti-Dumping Act of 1916 or to actions based thereon or resulting therefrom, shall be recognised or be enforceable in any manner." It states that natural or legal persons within the Community "shall be entitled to recover any outlays, costs, damages and miscellaneous expenses incurred by him or her as a result of the application of the Anti-Dumping Act of 1916 or by actions based thereon or resulting therefrom." It also allows recovery from "the natural or legal person or any other entity that brought a claim under the Anti-Dumping Act of 1916 or from any person or entity related to that person or entity." Recovery may include "seizure and sale of assets held by the defendant."

3.17 The United States argues that by adopting this Regulation, "the EC appears to concede that litigation costs are not subject to concessions or obligations under the WTO" because "[o]therwise, the EC would have been required to receive authorization from the DSB before adopting the 'blocking legislation' since, under the European Communities' prior theory, the EC 'blocking legislation' would have required suspending EC concessions or other obligations under the WTO." The United States also argues that the Regulation "further confirms that the level of nullification or impairment is zero", since "[i]f the level of nullification or impairment [were to be] greater than zero, then any authorized level of suspension would have...to be reduced by the amount that the blocking legislation would reduce the nullification or impairment."²⁹

3.18 The European Communities argues that the Regulation is "irrelevant" for the purposes of the arbitration. It states that "[t]he subject matter of this arbitration proceeding is the EC request to receive authorization from the DSB to adopt a 'mirror legislation' equivalent to the 1916 Act but not the 'blocking regulation'."³⁰ The European Communities asserts that "this regulation merely aims to 'block' the effects of a WTO incompatible US legislation *within* the European Community but it does not affect any WTO rights of the United States."³¹ Moreover, according to the European Communities, "the 'blocking regulation' does not remove the 1916 Act, which constitutes by its very existence the nullification and impairment and to which the retaliation should be equivalent. The objective of this regulation is merely 'to block' enforcement of the 1916 Act within the European Community but it does not (and cannot) remove the 1916 Act or prevent it from being applied or enforced within the US. Thus, the cause for the 'nullification and impairment' the European Communities is suffering because of the existence of the 1916 Act is still present."³²

3.19 We agree with the European Communities that Council Regulation (EC) No. 2238/2003 is not within our terms of reference. As discussed below, our terms of reference are defined by Article 22.7 of the DSU, which requires us to determine whether the level of suspension of obligations sought by the European Communities, as defined in its request of 7 January 2002, is equivalent to the level of nullification or impairment sustained by the European Communities as a result of the 1916 Act. The Regulation is not referred to in the European Communities' request, and we see no basis in Article 22.7 on which the arbitrators could assume jurisdiction to consider it.

3.20 Similarly, we do not need to make a ruling on the United States' argument that "any authorized level of suspension would have to be reduced by the amount that the blocking legislation would reduce the nullification or impairment." The European Communities must ensure that any

²⁸ Council Regulation (EC) No. 2238/2003 of 15 December 2003 (OJ L 333 of 20.12.2003, p. 1).

²⁹ Letter from the United States to the Arbitrators, 5 January 2004, and *Answers of the United States to the Arbitrator's Questions to the Parties*, 20 November 2003, paragraph 29.

³⁰ Letter from the European Communities to the Arbitrators, 7 January 2004.

³¹ *Ibid.* Original emphasis.

³² *Ibid.* Original emphasis.

suspension of obligations does not exceed the level of nullification. If, in the future, the United States is of the view that the actual application of the blocking regulation results in a situation where the suspension of obligations exceeds the level of nullification or impairment, the United States may have recourse to the appropriate dispute settlement procedures to address this issue.

IV. ROLE AND JURISDICTION OF THE ARBITRATORS UNDER ARTICLE 22 OF THE DSU

4.1 As indicated above, Article 22.2 enables complaining parties to seek the suspension of concessions or other obligations where the responding party has failed to comply with the recommendations or rulings of the DSB by the end of the reasonable period of time. This provision states that:

"If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."

4.2 The responding party, in turn, may assert its right to have the complainant's request referred to arbitration. According to Article 22.6 of the DSU:

"When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed...the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration." [footnote omitted]

4.3 Article 22.7 of the DSU sets out the jurisdiction of arbitrators appointed under DSU Article 22.6:

"The arbitrator acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement....The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request." [footnote omitted]

4.4 This notion of "equivalence" is also provided for in Article 22.4, which states that:

"The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment."

4.5 Thus, the mandate of the arbitrators is to determine whether the level of suspension of concessions or other obligations sought by the complaining party is equivalent to the level of nullification or impairment sustained by the complaining party as a result of the failure of the responding party to bring its WTO-inconsistent measures into compliance. In doing so, the arbitrators are specifically enjoined from examining "the nature of the concessions or other obligations to be suspended."

4.6 If the Arbitrators determine that the level of suspension of concessions or other obligations sought by the complaining party is not equivalent to the level of nullification or impairment, they are obligated to determine what level of suspension would be equivalent. As stated by the arbitrators in *EC – Hormones (US) (Article 22.6 – EC)*:

"There is ... a difference between our task here and the task given to a panel. In the event we decide that the US proposal is *not* WTO consistent, i.e. that the suggested amount is too high, we should not end our examination the way panels do, namely by requesting the DSB to recommend that the measure be brought into conformity with WTO obligations. Following the approach of the arbitrators in the *Bananas* case – where the proposed amount of US\$ 520 million was reduced to US\$ 191.4 million -- we would be called upon to go further. In pursuit of the basic DSU objectives of prompt and positive settlement of disputes, we would have to estimate the level of suspension we consider to be equivalent to the impairment suffered. This is the essential task and responsibility conferred on the arbitrators in order to settle the dispute. In our view, such approach is implicitly called for in Article 22.7... "³³

4.7 Similarly, in *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the arbitrators stated:

"[W]e note that, if we were to find the proposed amount...not to be equivalent, we would have to estimate the level of suspension we consider to be equivalent to the nullification or impairment suffered by Ecuador. This approach is consistent with Article 22.7 of the DSU which emphasizes the finality of the arbitrators' decision....

We recall that this approach was followed in the US/EC arbitration proceeding in *EC – Bananas III* and the arbitration proceedings in *EC – Hormones*, where the arbitrators did not consider the proposed amount of suspension as equivalent to the nullification or impairment suffered and recalculated that amount in order to be able to render a final decision."³⁴

4.8 The law was summarized in a concise manner in *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*:

"[W]e note that prior Arbitrators that have rejected proposed levels of countermeasures (or suspensions of concessions) have always proceeded to set levels consistent with the relevant agreements."³⁵

³³ *EC – Hormones (US) (Article 22.6 – EC)*, paragraph 12. Footnotes omitted.

³⁴ *EC – Bananas (Ecuador) (Article 22.6 – EC)*, paragraphs 12-13.

³⁵ Decision by the Arbitrator, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paragraph 3.51, footnote omitted.

4.9 Accordingly, if we determine that the level of suspension of obligations sought by the European Communities is not equivalent to the level of nullification or impairment sustained by the European Communities as a result of the 1916 Act, we would be required to determine what level of suspension would be equivalent.

V. PARAMETERS FOR THE DETERMINATION OF THE LEVEL OF NULLIFICATION OR IMPAIRMENT

A. GENERAL CONSIDERATIONS

5.1 As indicated above, our mandate under Article 22.7 is to determine whether the level of suspension of obligations sought by the European Communities is equivalent to the level of nullification or impairment sustained by the European Communities as a result of the 1916 Act. In this section, therefore, the Arbitrators will examine:

- certain general considerations applicable to the determination of the level of nullification or impairment;
- the concept of "equivalence" under DSU Article 22;
- the "level" of suspension of obligations requested by the European Communities; and
- the "level" of nullification or impairment sustained by the European Communities as a result of the 1916 Act.

5.2 We begin by noting that Article 22.1 of the DSU provides in part that:

"Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements."

5.3 The European Communities stressed that "the basic purpose of the suspension of concessions or other obligations is to induce compliance of the other Member with its WTO obligations".³⁶ The United States suggested other possible purposes, such as "to restore the balance of benefits under the covered agreements between the parties to the dispute."³⁷ It added that: "[t]he United States does not believe it would be appropriate for it (or the Arbitrator) to attempt to provide a comprehensive list of the purposes behind the suspension of concessions, or to rank these purposes in some sort of order of priority."³⁸

³⁶ *Written Submission of the European Communities*, 3 November 2003, paragraph 6.

³⁷ According to the United States, "[s]uch a purpose would confirm that there should be no suspension authorized if the complaining party is not suffering nullification or impairment. Otherwise the complaining party would enjoy a greater level of benefits than it had negotiated under the covered agreements." The United States is also of the view that "[w]hatever the purposes for the suspension of concessions or other obligations, the standard under Article 22.7 is equivalence." *Answers of the United States to the Arbitrator's Questions to the Parties*, 20 November 2003, paragraph 33 and footnote 15.

³⁸ *Answers of the United States to the Arbitrator's Questions to the Parties*, 20 November 2003, paragraph 68.

5.4 The Arbitrators are not called upon to "provide a comprehensive list of the purposes" of the suspension of concessions or other obligations, or to "rank these purposes in some sort of order of priority". Moreover, we agree that it would not be appropriate for us to do so.

5.5 However, in our view, a key objective of the suspension of concessions or obligations – whatever other purposes may exist – is to seek to induce compliance by the other WTO Member with its WTO obligations. As noted by the arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)*:

"[T]he authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned. We agree with the United States that this *temporary* nature indicates that it is the purpose of countermeasures to *induce compliance*. But this purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is *equivalent* to the level of nullification or impairment. In our view, there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for counter-measures of a *punitive* nature."³⁹

5.6 Similarly, the arbitrators in *EC – Bananas (Ecuador) (Article 22.6 – EC)* observed that "the object and purpose of Article 22 ... is to induce compliance".⁴⁰

5.7 We agree that a fundamental objective of the suspension of obligations is to induce compliance. The fact that such suspension is meant to be temporary – as indicated in Article 22.1 – is further evidence of this purpose. As stated by the arbitrator in *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*: "Article 22.1 of the DSU is particularly clear as to the temporary nature of suspensions of concessions or other obligations, pending compliance."⁴¹

5.8 We also agree with the critically important point that the concept of "equivalence", as embodied in Article 22.4, means that obligations cannot be suspended in a punitive manner. This means that in suspending certain obligations owed to the United States under the GATT and the Anti-Dumping Agreement, the European Communities cannot exceed the level of nullification or impairment sustained by the European Communities as a result of the 1916 Act. We consider this further below.

B. QUALITATIVE OR QUANTITATIVE "EQUIVALENCE"

1. Arguments of the parties

5.9 The United States and the European Communities differ over the interpretation of the concepts of "equivalence" and "level" in Articles 22.4 and 22.7 of the DSU.

5.10 In the view of the European Communities, Article 22.4 of the DSU does not impose any obligation to specify a quantitative level of nullification and impairment. The notion of "level" has not only a quantitative, but also a qualitative, meaning. The European Communities argues that it is not necessary to define a certain quantitative level:

³⁹ *EC – Bananas III (US) (Article 22.6 – EC)*, paragraph 6.3.

⁴⁰ *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paragraph 76.

⁴¹ *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paragraph 3.105. The arbitrator in that case also stated that: "[u]nder Article 22.1 of the DSU and Article 4.10 of the SCM Agreement, non-compliance is the very event justifying the adoption of countermeasures." Moreover, they noted that: "...the *EC – Bananas* Arbitrators, referring to [DSU Article 22.1], expressed the view that suspension of concessions or other obligations was intended to induce compliance because it was temporary." *Ibid.*

"Article 22.4 of the DSU merely prescribes that the level on one side should not exceed the level of the other side. Thus, if both "levels" are defined in the same vein, i.e. in qualitative terms, Article 22.4 of the DSU is, in principle, fully respected."⁴²

5.11 Moreover, according to the European Communities, "[a]lthough it may be possible to add a quantitative limit to the effects of a qualitative measure...in this case, there is no quantitative limit to the application of the 1916 Act and so it is not necessary to apply a quantitative limit to the application of the mirror legislation."⁴³

5.12 According to the European Communities, if Article 22.4 of the DSU had been restricted to a quantitative level, the drafters of the DSU would have used the word 'amount'. The European Communities also stresses that "a qualitative interpretation of the notion of "level" is fully consistent with the objective and purpose of retaliatory measures, namely to induce compliance with the WTO obligations by the other Member."

5.13 According to the United States, the "fundamental flaw" in the European Communities' proposal is that it "assumes that some rough similarity between measures creates a presumption that the level of suspension of concessions or other obligations is equivalent to the level of nullification or impairment of benefits". In the view of the United States, there is no basis for such a presumption, and there is no such equivalence.

5.14 The United States objects that "the EC's proposal sets no limit on the EC's ability to affect US trade" because "[i]f the DSB were to authorize the EC to adopt the measure it describes as resembling the 1916 Act, the EC would be free to apply that measure in any number of cases involving an almost unlimited amount of US exports to the EC. Any number of US companies could be forced to pay treble damages—even though no company has ever been asked to pay a treble damage award under the 1916 Act in its entire 87-year history."⁴⁴

5.15 Thus, in the view of the United States, the European Communities' argument on qualitative equivalence "misses the point." The United States argues that:

"What matters under Articles 22.4 and 22.7 is the overall trade effect of the 1916 Act and the EC's proposed measure. The EC has not identified its suspension in a way that sets a 'level' and in a way that allows the Arbitrator to determine whether the EC's proposal will have an equivalent trade effect to the 1916 Act. This determination necessarily involves a quantitative analysis, as the terms 'level' and 'equivalent' make clear."⁴⁵

5.16 With respect to the level of nullification or impairment, the United States argues that arbitrators in prior Article 22.6 proceedings have estimated the "trade impairment" or economic harm to the complaining party due to the failure to bring a WTO-inconsistent measure into compliance during the "reasonable period of time." It adds that arbitrators in past proceedings "have uniformly recognized that this economic harm is "quantifiable" (as the term "level" makes clear)." Moreover, according to the United States, previous arbitrators have based their determinations on "hard evidence" and have "refused to engage in unfounded speculation about "what might have been," had the inconsistent measure been brought into conformity within a reasonable period of time."

⁴² *Written Submission of the European Communities*, 3 November 2003, paragraphs 3, 17-18.

⁴³ *Ibid.*, paragraph 18.

⁴⁴ On 3 December 2003, subsequent to this US submission, the United States District Court for the Northern District of Iowa issued a damage award against a Japanese company under the 1916 Act. This was the first such award under the 1916 Act. This is discussed below.

⁴⁵ *Oral Statement of the United States*, 13 November 2003, paragraph 6.

2. Evaluation by the Arbitrators

5.17 We recall that this the first case in which a WTO Member has sought to suspend "qualitatively equivalent" obligations. In all previous cases, parties seeking to suspend concessions or other obligations have provided a quantitative, monetary figure indicating the amount of suspension sought. Indeed, the European Communities indicated that it was "aware that its request for suspension of 'qualitatively equivalent' obligations constitutes a novelty in WTO practice."

5.18 We note that prior arbitrations have found that "equivalent" had to be determined in quantitative terms. Thus, for example, the arbitrators in *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)* stated that:

"What we do have to determine...is whether the overall proposed level of suspension is *equivalent* to the level of nullification and impairment. This involves a *quantitative* - not a qualitative - assessment of the proposed suspension. As noted by the arbitrators in the *Bananas* case, '[i]t is impossible to ensure correspondence or identity between two levels if one of the two is not clearly defined'. Therefore, as a prerequisite for ensuring equivalence between the two levels, we have to be able to determine, not only the "level of the nullification and impairment", but also the 'level of the suspension of concessions or other obligations'. To give effect to the obligation of equivalence in Article 22.4, the Member requesting suspension thus has to identify the level of suspension of concessions it proposes in a way that allows us to determine equivalence."⁴⁶

5.19 Similarly, the arbitrators in *US – FSC (Article 22.6 – US)* noted that:

"The drafters [of Article 22.4] have explicitly set a quantitative benchmark to the level of suspension of concessions or other obligations that might be authorized. This is similarly reflected in Article 22.7, which defines the arbitrators' mandate in such proceedings

As we have already noted in our analysis of the text of Article 4.10 of the *SCM Agreement* above, there is, by contrast, no such indication of an explicit quantitative benchmark in that provision"⁴⁷

5.20 In cases such as *EC – Hormones (US) (Article 22.6 – EC)*, *EC – Hormones (Canada) (Article 22.6 – EC)* and *US – FSC (Article 22.6 – US)*, where the requested suspension was expressed in quantitative terms, the arbitrators necessarily had to assess whether there was "quantitative equivalence" between the level of the nullification or impairment and the level of the suspension of concessions or other obligations.

5.21 In the present case, by contrast, the requested suspension has not been stated in quantitative terms. However, this does not in and of itself render the EC request inconsistent with Article 22. Indeed, it is not possible to determine the WTO-consistency of a "qualitatively equivalent" Article 22.2 request in the *abstract*. Instead, it is necessary to determine how the actual suspension resulting from such "qualitative equivalence" would be *applied*. More specifically:

- If the suspension of obligations were applied in such a manner that it were equal to or below the level of nullification or impairment sustained by the European

⁴⁶ *EC – Hormones (US) (Article 22.6 – EC)*, paragraph 20, original emphasis; and *EC – Hormones (Canada) (Article 22.6 – EC)*, paragraph 20, original emphasis.

⁴⁷ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, paragraphs 5.46-5.47.

Communities, then the suspension would, in principle, be consistent with DSU Article 22.4.⁴⁸

- If the suspension of obligations were applied in such a manner that it exceeded the level of nullification or impairment sustained by the European Communities, then the suspension would be punitive, and would not be consistent with DSU Article 22.4.

5.22 As indicated above, any suspension of obligations in excess of the level of nullification or impairment would be punitive. We recall that both parties to this dispute accept the proposition, with which we fully agree, that punitive sanctions are prohibited by Article 22.4.⁴⁹

5.23 In the present case, in order to determine whether the qualitative suspension could be applied in such a manner that the level of suspension could exceed the level of nullification or impairment, it is necessary to determine the trade or economic effects on the European Communities of the 1916 Act. Once this has been determined, the European Communities could implement its suspension up to, but not beyond, this amount. This necessitates a determination of the trade or economic effects of the 1916 Act on the European Communities in numerical or monetary terms, which is the only way in which the arbitrators can determine "equivalence" in the present context.

5.24 This is consistent with the approach of previous arbitrations. For example, in *EC – Hormones (Canada) (Article 22.6 – EC)*, the arbitrators stated that:

"[O]ur task of estimating nullification and impairment is very different from that of a panel examining the WTO conformity of certain measures. Once a panel has found a WTO inconsistency, it can *presume* – pursuant to Article 3.8 of the DSU – that the inconsistency has caused nullification and impairment. On that ground the panel can give redress to the winning party under Article XXIII of GATT 1994 or corresponding provisions in other WTO agreements. What normally counts for a panel is competitive opportunities and breaches of WTO rules, not actual trade flows. A panel does not normally need to further assess the nullification and impairment caused; it can presume its existence. We, in contrast, have to go one step further....What we have to do is to estimate the nullification and impairment caused by it (and presumed to exist pursuant to Article 3.8 of the DSU). To do so in the present case, we have to focus on trade flows. We must estimate trade foregone due to the ban's continuing existence beyond [the expiration of the reasonable period of time on] 13 May 1999."⁵⁰

⁴⁸ We recall that we asked the United States if "reciprocal or 'mirror' retaliation – suspension of the same obligations which have been breached by the Member which is the object of the retaliation – is in principle permissible under the DSU provided that the level of suspension is equivalent to the level of nullification or impairment." The United States indicated in its reply that it "agrees that the suspension of the same obligations is, in principle, permissible under the DSU provided that the level of suspension is equivalent to the level of nullification or impairment." *Answers of the United States to the Arbitrator's Questions to the Parties*, 20 November 2003, paragraph 38. Original emphasis.

⁴⁹ The European Communities agrees that obligations cannot be suspended in a punitive manner:

"[O]ne could very well imagine that the best means to induce compliance would be to provide for punitive sanctions. However, the DSU does not allow for such a possibility. Instead, it explicitly limits the level of suspension of concessions or other obligations to the level of nullification, Article 22.4 of the DSU."

Oral Statement of the European Communities, 13 November 2003, paragraph 14.

⁵⁰ *EC – Hormones (Canada) (Article 22.6 – EC)*, paragraph 41. Footnotes omitted.

5.25 The arbitrators in *EC – Hormones (Canada) (Article 22.6 – EC)* also stated that the "total trade value" could not "exceed the amount of trade impairment we find."⁵¹

5.26 A similar approach was adopted by the arbitrators in *US – Section 110(5) of the US Copyright Act (Article 25.3)*.⁵² This was an arbitration established under Article 25 of the DSU to determine the level of nullification or impairment of benefits to the European Communities as a result of the operation of certain US legislation on copyright. The arbitrators stated they agreed with the parties that:

"[F]or purposes of these arbitration proceedings, the relevant benefits are those which are economic in nature. This is consistent with previous decisions of arbitrators acting under Article 22.6 of the DSU."⁵³

5.27 The *US – Section 110(5) of the US Copyright Act (Article 25.3)* arbitrators also observed that the object of the proceeding was to "quantify the economic harm suffered by the European Communities" as a consequence of the continued application of the US legislation.⁵⁴

5.28 In the *Brazil – Aircraft (Article 22.6 – Brazil)* case, as noted above, the arbitrators authorized both the suspension of tariff concessions and the suspension of "obligations" – including obligations under the Agreement on Textiles and Clothing and the Agreement on Import Licensing Procedures. The arbitrators, after determining an overall quantitative limit for the countermeasures, added that:

"[T]he Arbitrators urge Canada to make sure that, if it decides to proceed with the suspension of certain of its obligations *vis-à-vis* Brazil...other than the 100 per cent surtax, this will be done in such a way that the maximum amount of countermeasures...will be respected."⁵⁵

5.29 In this regard, we note that the EC request places no quantifiable or monetary limits on how its suspension could be applied in practice. It could apply to an unlimited amount of US exports to the European Communities.

⁵¹ Ibid., paragraph 21.

⁵² Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25.3)*.

⁵³ Ibid., paragraph 3.18.

⁵⁴ Ibid., footnote 38. The arbitrators also provided examples of prior decisions in which the determination of benefits was calculated in economic terms:

"See, e.g., the Decisions of the Arbitrators on *EC – Bananas III (22.6) (US)*, *supra*, para. 6.12 (benefits nullified or impaired: losses in US exports of goods and losses by US service suppliers in services supply); *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, 24 March 2000, footnote 52 (benefits nullified or impaired: losses by Ecuador of actual trade and of potential trade opportunities in bananas and the loss of actual and potential distribution service supply); *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* (hereafter "*EC – Hormones (22.6) (US)*"), WT/DS26/ARB, 12 July 1999, para. 41 (benefits nullified or impaired: foregone US exports of hormone-treated beef and beef products); *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* (hereafter "*EC – Hormones (22.6) (Canada)*"), WT/DS48/ARB, 12 July 1999, para. 40 (benefits nullified or impaired: foregone Canadian exports of hormone-treated beef and beef products)."

Ibid., footnote 39.

⁵⁵ *Brazil – Aircraft (Article 22.6 – Brazil)*, paragraph 4.2.

5.30 We agree with the United States that even when identical measures are applied in similar ways, the effects on trade can be dramatically different. The following hypothetical example illustrates this point:

- Member X exports \$10 billion dollars worth of goods to Member Y. Member Y decides to impose a 10% *ad valorem* tax on all imported goods from Member X. The total economic or trade impact of such a measure (assuming that exports continued as before, and the tax was paid) would be \$1 billion.
- Member Y's 10% *ad valorem* tax is found to be WTO-inconsistent. Following the expiration of the reasonable period of time, Member X seeks to adopt a "qualitatively equivalent" measure by imposing a 10% *ad valorem* tax on all imports from Member Y.
- Member Y exports \$100 billion dollars worth of goods to Member X. The total economic or trade impact of this "qualitatively equivalent" measure, the 10% *ad valorem* tax on all imported goods from Member Y, would be \$10 billion.

5.31 Other examples, drawn from other WTO agreements, could illustrate the same conclusion. More to the point, however, is to consider how the proposed EC suspension in the present case could apply to US exports to the European Communities. Whatever the level of nullification or impairment – an issue we return to below – the EC suspension, once applied, must remain capped at or below that level.

5.32 We also do not accept the EC argument that the suspension of obligations is somehow "equivalent" because its proposed measure would replicate, or partially replicate, the 1916 Act. Leaving aside for the moment the issue of whether we can examine the EC measure, we would re-iterate that similar or even identical measures can have dissimilar trade effects. Stated another way, similar or identical measures may not result in the required equivalence between the level of suspension and the level of nullification or impairment.

5.33 The European Communities argues that "the potential impact of the EC legislation would, in any case, be more limited than the 1916 Act", in part because, historically, there have been few cases of anti-dumping measures imposed on US products.⁵⁶ However, the Arbitrators cannot simply *assume*, on the basis of historical patterns of trade or other factors, that the EC suspension will always have "similar, or in fact less burdensome economic effects than the 1916 Act."⁵⁷

5.34 Given the potentially unlimited application of the EC suspension, as described in its request, it is possible that the EC suspension could exceed the level of nullification or impairment when it is applied, and thereby become punitive. The EC request does not ensure that the suspension will be limited to the level of nullification it has sustained, as expressed in quantifiable economic or trade terms.

5.35 We therefore find that the United States has met its initial burden of establishing a *prima facie* case or presumption that the level of suspension proposed by the European Communities is not equivalent to the level of nullification and impairment.

5.36 We now turn to the two other components of Article 22.7 and 22.4, namely the "level of suspension of obligations" proposed by the European Communities, and the "level of nullification or impairment" sustained by the European Communities.

⁵⁶ *Written Submission of the European Communities*, 3 November 2003, paragraph 59.

⁵⁷ *Ibid.*, paragraph 60.

C. THE EUROPEAN COMMUNITIES REQUEST AND THE "NATURE" OF THE OBLIGATIONS TO BE SUSPENDED

1. Arguments of the parties

5.37 As noted above, Article 22.7 of the DSU provides in part that the arbitrators "shall not examine the nature of the concessions or other obligations to be suspended."

5.38 The United States argues that the European Communities is asking the Arbitrators to examine the nature of the obligations to be suspended. In the view of the United States, "Article 22.7 mandates arbitrators to determine equivalence between the level of suspension and the level of nullification or impairment, not equivalence between the measure that will implement the suspension and the measure that resulted in the nullification or impairment. Indeed, the first sentence of Article 22.7 appears to prohibit even the examination of the measure for implementing the proposed suspension of concessions or other obligations."⁵⁸

5.39 The European Communities does not agree that it is asking the Arbitrators to examine the "nature" of the obligations to be suspended. According to the European Communities, the Arbitrators not only can examine the proposed "mirror" regulation, they can even "attach conditions" to it.⁵⁹

2. Evaluation by the Arbitrators

5.40 In our view, we are not permitted by Article 22.7 to examine the European Communities' proposed "mirror" regulation, let alone "attach conditions" to it. This would involve the arbitrators in an examination of the "nature" of the obligations to be suspended. As noted by the arbitrators in *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*:

"Arbitrators are explicitly prohibited from 'examin[ing] *the nature* of the concessions or other obligations to be suspended' (other than under Articles 22.3 and 22.5).

On these grounds, we cannot require that the US further specify the nature of the proposed suspension. As agreed by all parties involved in this dispute, in case a proposal for suspension were to target, for example, only biscuits with a 100 per cent tariff *ad valorem*, it would not be for the arbitrators to decide that, for example, cheese and not biscuits should be targeted; that a 150 per cent tariff should be imposed instead of a 100 per cent tariff; or that tariff increases should be levied on a product weight basis, not *ad valorem*. All of these are *qualitative* aspects of the

⁵⁸ *Answers of the United States to the Arbitrator's Questions to the Parties*, 20 November 2003, paragraph 62.

⁵⁹ In a reply to a question by the Arbitrators, the European Communities stated that:

"[the] arbitrators may attach conditions that they consider necessary in order to ensure the equivalence between the two relevant levels. For instance, if the European Communities had the intention to adopt a mirror legislation whereby treble special duties could be imposed without showing a specific intent of destroying the EC industry etc. the arbitrators could ask the European Communities to insert this condition in order to ensure equivalence. Similarly, if the European Communities would provide for the imposition [of] special duties of ten times the damage suffered by the EC company or companies the arbitrators could decide that the equivalent level permits only the imposition of special duties of three times the damage suffered (analogous to the treble damages award of the 1916 Act)."

Answers of the European Communities to the Questions of the Arbitrator, 20 November 2003, paragraph 25.

proposed suspension touching upon the "nature" of concessions to be withdrawn. They fall outside the arbitrators' jurisdiction."⁶⁰

5.41 Thus, the arbitrators in *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)* determined that tariff concessions that targeted "cheese and not biscuits", the extent of the proposed tariff increase, or the modalities of the suspension all related to the "nature" of the concessions to be withdrawn, and could not be examined. In our view, an examination of the European Communities' proposed "mirror" regulation would require a significantly more activist role than the one refused by the arbitrators in *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*.

5.42 Thus, we are of the view that the European Communities' proposal to adopt a "mirror" regulation relates to the nature of the obligations to be suspended. We agree with the United States that we do not have the jurisdiction to determine equivalence between the *measure* proposed to implement the suspension and the *measure* that resulted in the nullification or impairment. DSU Article 22.6 and 22.7 authorize the suspension of *concessions or other obligations*. The arbitrators do not have the jurisdiction to approve the adoption of *measures* by the complaining party.

5.43 At this stage, 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, in accordance with the clear limitations on our mandate under Article 22.7, we decline to examine such a regulation.

5.44 Although we are not able to examine the measures proposed to implement any authorized suspension of obligations, we must, of course, make a determination as to whether the suspension of obligations proposed by the by the European Communities is equivalent to the level of nullification or impairment. We therefore now turn to the other side of the ledger: the nullification or impairment sustained by the European Communities as a result of the 1916 Act.

D. THE LEVEL OF NULLIFICATION OR IMPAIRMENT SUSTAINED BY THE EUROPEAN COMMUNITIES

1. Arguments of the parties

5.45 The United States argues that the level of nullification or impairment sustained by the European Communities as a result of the 1916 Act is "zero." In the view of the United States:

"The failure to bring the 1916 Act into conformity at the end of the reasonable period of time has *not* nullified or impaired any benefits to the EC under the GATT or AD Agreement. The starting point is the situation as it existed at the end of the reasonable period of time, when this arbitration was initiated and its terms of reference fixed. No order was in place against EC products and no EC trade was being affected. Had the 1916 Act been brought into compliance as of that date, it would not have resulted in any increased trade for the EC. Accordingly, the level of nullification or impairment being suffered by the EC was zero."⁶¹

5.46 The European Communities "reject[s] the unsupported US' claim that the nullification and impairment is zero":

"The European Communities would recall the Panel findings in *US – 1916 Act (EC)* whereby

⁶⁰ *EC – Hormones (US) (Article 22.6 – EC)*, paragraphs 18-19, original emphasis; *EC – Hormones (Canada) (Article 22.6 – EC)*, paragraphs 18-19, original emphasis.

⁶¹ *Written Submission of the United States*, 20 October 2003, paragraph 27.

(...) as the United States has adduced no evidence to the contrary, we conclude that the 1916 Act nullifies and impairs benefits accruing to the European Communities under the WTO Agreement.

The US allegations that the European Communities has suffered no nullification or impairment are thus squarely in contradiction to the Panel's conclusions as confirmed by the Appellate Body. Instead of rearguing the 1916 Act Panel and Appellate Body proceedings, the European Communities would recommend the United States to respect Article 17.14 of the DSU, whereby "an Appellate Body report shall be adopted by the DSB and *unconditionally accepted* by the parties to the dispute (...)" (emphasis added).⁶²

5.47 The European Communities argues that the level of nullification or impairment has to be determined in relation to the direct or indirect benefits of a Member under the relevant Agreement. Consequently, the European Communities submits that the nullification or impairment is to be understood "in a broad sense, and it is by no means limited to lost trade or exports to the United States." In the present case, the European Communities considers that "the existence of 1916 Act itself constitutes the relevant nullification and impairment. As a result of the 1916 Act, European companies have suffered and are suffering financial losses and they have to face its broader implications, i.e. the deterrent effect of the 1916 Act."

2. Evaluation by the Arbitrators

(a) The presumption of nullification

5.48 We do not accept the position of the United States that the level of nullification or impairment in this case is "zero." As noted by the European Communities, the original Panel in this dispute found, and the Appellate Body confirmed, that "the 1916 Act nullifies and impairs benefits accruing to the European Communities." Therefore, while the level of nullification or impairment has not been specified in quantitative terms in the EC request under Article 22.2, it clearly is not, and cannot be, "zero." In our view, this US position cannot be sustained in light of the adopted Panel and Appellate Body findings.

5.49 In support of its argument, the United States quotes the decision of the arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)*:

"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 allegedly suffered by a Member requesting authorization to suspend concessions under Article 22 of the DSU at a much later stage of the WTO dispute settlement system. The review of the level of nullification or impairment by Arbitrators from the objective benchmark foreseen by Article 22 of the DSU is a separate process that is independent from the finding of infringements of WTO rules by a panel or the Appellate Body....However, 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."⁶³

⁶² *Written Submission of the European Communities*, 3 November 2003, paragraphs 14-15.

⁶³ *EC – Bananas III (US) (Article 22.6 – EC)*, paragraph 6.10, quoted in the *Written Submission of the United States*, 20 October 2003, paragraph 27.

5.50 We agree with the arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)* that the *presumption* of nullification or impairment, as provided in Article 3.8 of the DSU, by no means provides evidence of the *level* of nullification or impairment sustained by the Member requesting authorization to suspend obligations. However, the fact that the presumption does not automatically translate to a given level does not mean that the level is "zero." The original Panel determined that the 1916 Act "nullifies and impairs benefits accruing to the European Communities." In light of this conclusion, the level must be something greater than "zero", and it is a contradiction in terms to suggest otherwise.

5.51 We now proceed to examine the parameters for determining the actual level of nullification or impairment sustained by the European Communities in the present case.

(b) EC position on existence of 1916 Act constituting the nullification and impairment

5.52 The European Communities emphasized in its submissions that "the existence of the 1916 Act as such constitutes the relevant nullification and impairment". Therefore, in the European Communities' view, the "concrete financial damage of the affected companies as well as the deterrent effect of the 1916 Act are merely the economic consequences of the 1916 Act".⁶⁴

5.53 Nevertheless, as noted above, any suspension proposed by the European Communities cannot be applied in a manner that would exceed the level of nullification or impairment. In order to ascertain under what circumstances this might occur – or, to put it differently, in order to determine a level of suspension that would not be punitive – the arbitrators consider it necessary to consider what could legitimately be considered to constitute nullification or impairment of benefits to the European Communities in the present case.

(c) Calculating nullification or impairment: using "reasoned estimates" and avoiding speculation

5.54 In determining the level of nullification or impairment sustained by the European Communities as a result of the 1916 Act, we need to rely, as much as possible, on credible, factual, and verifiable information. We cannot base any such estimates on speculation. As noted by the arbitrators in *EC – Hormones (US) (Article 22.6 – EC)*:

"The question we thus have to answer here is: what would annual prospective US exports of hormone-treated beef and beef products to the EC be if the EC had withdrawn the ban on 13 May 1999? An answer to this question, like any question about future events, can only be a reasoned estimate. It is necessarily based on certain assumptions. *In making those estimates and assumptions, we need to guard against claims of lost opportunities where the causal link with the inconsistent hormone ban is less than apparent, i.e. where exports are allegedly foregone not because of the ban but due to other circumstances.*"⁶⁵

⁶⁴ *Answers of the European Communities to the Questions of the Arbitrator*, 20 November 2003, paragraph 16.

⁶⁵ *EC – Hormones (US) (Article 22.6 – EC)*, paragraph 41. Emphasis added. In support of this position, the *EC – Hormones (US) (Article 22.6 – EC)* arbitrators quoted from *EC – Bananas III (US) (Article 22.6 – EC)*:

"We are of the view that the benchmark for the calculation of nullification or impairment of US trade flows should be losses in US exports of goods to the European Communities and losses by US service suppliers in services supply in or to the European Communities. However, we are of the opinion that losses of US exports in goods or services *between the US and third countries* do not constitute nullification or impairment of even *indirect* benefits accruing to the US under the GATT or the GATS for which the European Communities could face suspension of concessions."

5.55 Applying this approach, the *EC – Hormones (US) (Article 22.6 – EC)* arbitrators rejected US claims for certain lost exports as "too remote" and "too speculative".⁶⁶

5.56 A similar approach was taken by the arbitrator in *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*. In that case, Canada argued that a certain airline had a "revealed margin of preference" for a Canadian regional aircraft manufacturer. The arbitrator dismissed this argument in part because "[w]hile such a preference may have existed, Canada has not meaningfully quantified it ...".⁶⁷

5.57 We are of the view that this prudent approach taken by earlier arbitrators is appropriate. We therefore proceed to consider the level of nullification or impairment in the present case, while avoiding claims that are "too remote", "too speculative", or "not meaningfully quantified."

(d) Final judgements under the 1916 Act

5.58 In our view, any final judgments entered against EC companies or their subsidiaries under the 1916 Act would constitute nullification or impairment of benefits accruing to the European Communities, up to the cumulative dollar or monetary value of the final judgements. In our view, it would be appropriate to include only "final" judgements, i.e. the amounts payable either after the appeals have been completed, or the appeal periods have expired. Moreover, all such decisions are made public, and therefore the amounts of the judgments are readily verifiable.

5.59 In a case involving multiple claims – i.e., a judgment award that includes both 1916 Act claims and non-1916 Act claims – the amount included by the European Communities in calculating its level of nullification or impairment would need to be limited to the 1916 Act claims alone.

5.60 Judgments under the 1916 Act are awarded pursuant to WTO-inconsistent legislation, and clearly nullify or impair benefits accruing to the European Communities under the GATT 1994 and the Anti-Dumping Agreement. The cumulative dollar or monetary value of judgments under the Act therefore could, in principle, be included in any cumulative calculation by the European Communities of the overall level of the nullification or impairment that it has sustained.

(e) Settlements under the 1916 Act

5.61 In our view, any settlement awards entered into by EC companies or their subsidiaries under the 1916 Act would equally constitute nullification or impairment of benefits accruing to the European Communities, up to the cumulative dollar or monetary value of the settlements. Once again, such settlements result from WTO-inconsistent legislation, and therefore nullify or impair benefits accruing to the European Communities. In our view, whether the amounts are payable by EC entities pursuant to court orders under the 1916 Act, or settlements under the Act, the legal effect is the same in terms of the nullification or impairment of benefits accruing to the European Communities.

5.62 In a settlement involving multiple claims – i.e., a settlement of a lawsuit that includes both 1916 Act claims and non-1916 Act claims – the amount included by the European Communities in calculating its level of nullification or impairment would need to be limited to the 1916 Act claims alone.

5.63 As noted above, in calculating the level of nullification or impairment, it is necessary to rely only on credible, verifiable information, and not on speculation. In the context of settlements under

EC – Bananas III (US) (Article 22.6 – EC), paragraph 6.12, italics in original.

⁶⁶ *EC – Hormones (US) (Article 22.6 – EC)*, paragraph 77.

⁶⁷ *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paragraph 3.22.

the 1916 Act, this would almost certainly necessitate the disclosure of such settlements, such that the amounts of the settlements – and the portions attributable to the 1916 Act – can be confirmed. This is discussed further below.

(f) Deterrent or "chilling" effect

5.64 The parties took sharply divergent positions over the alleged deterrent or "chilling effect" of the 1916 Act. The European Communities stated that:

"Arguably the most damaging effect of the 1916 Act is its 'chilling effect' on the commercial behaviour of European companies and its potential use as a means of intimidation of European companies that are either already active on the US market or which consider entering the market."⁶⁸

5.65 The European Communities characterized the 1916 Act as "as an instrument of intimidation". It argued that "[e]xporters have always been forced to settle" while "[o]ther[s] have no doubt changed their commercial behaviour as a result of threats without any legal action being started".⁶⁹ In support of its position, the European Communities quoted the decision of the Panel in *US – Section 301 Trade Act*:

"[I]n a treaty the benefits of which depend in part on the activity of individual operators the legislation itself may be construed as a breach, since the mere existence of legislation could have an appreciable "chilling effect" on the economic activities of individuals."⁷⁰

5.66 Thus, in the European Communities' view, "Panels have already recognized that legislation may have a deterrent or 'chilling effect' on the economic activities of operators. It goes without saying that this effect is all the more present in case of criminal or civil punitive legislation."⁷¹

5.67 The European Communities added that:

"Any attempt to quantify the 'chilling effect' must necessarily fail. However, the deterrent effect is an important qualitative element for the determination of the level of the nullification and impairment the EC is suffering by the existence of the 1916 Act. Concerned companies have confirmed that the existence of the 1916 Act has impaired their equal opportunities on the US market."⁷²

5.68 The United States argued that:

"With respect to this particular dispute, the 1916 Act does not have a 'deterrent' or 'chilling effect' on imports from the EC, nor has the EC provided any evidence to establish that it has.

No previous arbitration has included any calculation of a 'deterrent or chilling effect' from WTO-inconsistent measures. The European Communities is asking the Arbitrator in this proceeding to take the unprecedented step of introducing the concept of a chilling effect and making a finding of a level of nullification or

⁶⁸ *Written Submission of the European Communities*, 3 November 2003, paragraph 31.

⁶⁹ *Ibid.*, paragraph 32.

⁷⁰ *US – Section 301 Trade Act*, paragraph 7.81.

⁷¹ *Written Submission of the European Communities*, 3 November 2003, paragraph 33.

⁷² *Ibid.*, paragraph 34.

impairment based on this speculative concept. The European Communities has not pointed to any basis in the text of the DSU for such an approach."⁷³

5.69 We are of the view that any claim for a deterrent or 'chilling effect' by the European Communities in the present case would be too speculative, and too remote. We need not decide, for the purposes of this arbitration, the broader issue of whether a 'chilling effect' can be considered to exist for the purposes of WTO dispute settlement.⁷⁴ We need only determine whether such a chilling effect can be meaningfully quantified for the purposes of determining the level of nullification or impairment sustained by the European Communities as a result of the 1916 Act.

5.70 Both parties agree that the chilling effect cannot be quantified in the present case. The United States, referring to certain econometric studies submitted by the European Communities, argues that "[e]ven if these studies could be considered to establish the existence of a 'chilling effect' with regard to anti-dumping duties, they do not with respect to the 1916 Act."⁷⁵ The European Communities acknowledged that it was "not aware of any econometric model that would measure the 'chilling effect' produced by the mere existence of anti-dumping legislation or, even more specifically, of the 1916 Act."⁷⁶

5.71 The European Communities emphasizes that "the question of the 'chilling effect' and its quantification is not essential for the purpose of these proceedings and it has never based its request on this concept. Indeed, in the European Communities' view, it is not even necessary (and may not even be possible) to enter into the [quantitative] details of this concept."⁷⁷ We acknowledge that the European Communities has never "based" its request on the concept of "chilling effect." At the same time, we need to assess whether quantification of the "chilling effect" is possible as part of the determination of the overall quantified level of nullification or impairment sustained by the European Communities.

5.72 On the basis of the information provided to the arbitrators, we agree with the parties that a quantification of the chilling effect is not possible. Accordingly, the chilling effect allegedly caused by the 1916 Act could not be included in any calculation by the European Communities of its overall level of the nullification or impairment.

(g) Litigation costs

5.73 The European Communities considers "legal expenses related to the pending US court cases" one of the "immediate costs of the 1916 Act".⁷⁸ The United States takes a contrary position, emphasizing that it "fails to see how legal expenses in cases pending under the 1916 Act relate to any 'benefit' accruing to WTO Members under any WTO agreement. The EC has pointed to no obligation

⁷³ *Answers of the United States to the Arbitrator's Additional Questions to the Parties*, 16 December 2003, paragraphs 2-3.

⁷⁴ We note that if the 1916 Act has a "chilling" effect – an issue on which we take no position – the EC's proposed suspension of obligations would presumably have the same effect. Concomitantly, if the 1916 Act has no "chilling" effect, then the EC's proposed suspension of obligations presumably would have no "chilling effect" either.

⁷⁵ *Comments of the United States on the Answers of the European Communities to the Additional Questions of the Arbitrator*, 22 December 2003, paragraph 3.

⁷⁶ *Answers by the European Communities to the Additional Questions of the Arbitrator*, 16 December 2003, paragraph 1.

⁷⁷ *Comments of the European Communities on the US Replies to the Additional Questions of the Arbitrator*, 22 December 2003, paragraph 8.

⁷⁸ *Methodology Paper of the European Communities*, 6 October 2003, paragraph 4. The European Communities also referred to related costs, including "the hidden business costs for those companies that are obliged to defend themselves." *Answers of the European Communities to the Questions of the Arbitrator*, 20 November 2003, paragraph 48.

in the WTO to prevent lawsuits against persons in a Member." It argues that "[n]either the GATT 1994 nor the AD Agreement grants any person of a WTO Member the right to import products into the territory of another WTO Member – much less immunity from suit or the benefit of any sort of 'cap' on legal expenses incurred as a result of importation. As a result, 'legal expenses' incurred by importers as a result of the 1916 Act do not appear to constitute the nullification or impairment of any 'benefit' accruing to any Member under any WTO agreement."⁷⁹

5.74 In response, the European Communities rejects the view that "legal expenses in cases pending under the 1916 Act [do not] relate to any 'benefit' accruing to WTO Members." In the view of the European Communities, "[t]he WTO Agreements, and in this particular case the GATT and the Anti-Dumping Agreement, constitute a predictable and secure legal framework for the commercial behaviour of companies on the US market. Thus, any company that complies with the rules thereunder enjoys the reasonable expectation that it can act in a normal commercial way without undue (legal) interference." As a result of the 1916 Act, according to the European Communities, "one of the main benefits under the WTO Agreements, notably the legal security and predictability, is thus nullified and impaired."⁸⁰

5.75 The European Communities also states that it is not possible to make an exact calculation of the litigation costs, in part because "[f]or companies that are actively engaged in a process under the 1916 Act every day brings new costs in defending their case. Thus, to indicate the precise amount of costs would be a moving target exercise."⁸¹ The information submitted by the European Communities to the arbitrators on some of the litigation costs incurred by EC entities was "only for illustrative purposes."⁸² The United States takes the position that "the EC has exaggerated those fees in several important respects and has failed to provide any evidentiary support for these claims."⁸³ The United States argues that the European Communities provided "unsworn and unsubstantiated assertions by private parties involved in those cases. To the best of our knowledge, no Arbitrator has ever based an award under Article 22.6 on such vague and unsubstantiated claims."⁸⁴

5.76 The Arbitrators recall their position, stated above, that it is appropriate to follow the prudent approach taken by earlier arbitrators in determining the level of nullification or impairment. We are not aware of any basis in the WTO Agreements to support the view advanced by the European Communities that legal fees can be claimed as a loss of a benefit accruing to a WTO Member. Moreover, we are not aware of any prior case in which such a claim has been permitted. It is also not clear which fees, and under what circumstances, could be included in such a claim.

5.77 In the circumstances of this case, it is uncontested that the European Communities has not "meaningfully quantified" the amount of legal fees paid by EC entities as a result of the 1916 Act. Indeed, the European Communities acknowledges that it has provided only examples of such costs, not an overall, verifiable tabulation. In addition, as indicated above, these examples of legal fees have been contested by the United States.

5.78 Accordingly, in our view, the litigation costs incurred by EC entities under the 1916 Act could not be included in any calculation by the European Communities of the overall level of the nullification or impairment.

⁷⁹ *Written Submission of the United States*, 20 October 2003, paragraph 30.

⁸⁰ *Written Submission of the European Communities*, 3 November 2003, paragraph 30.

⁸¹ *Written Submission of the European Communities*, 3 November 2003, paragraph 29.

⁸² *Answers of the European Communities to the Questions of the Arbitrator*, 20 November 2003, paragraph 49.

⁸³ *Comments of the United States on the Answers of the European Communities to the Additional Questions of the Arbitrator*, 22 December 2003, paragraph 8.

⁸⁴ *Comments of the United States on the Answers of the European Communities to the Additional Questions of the Arbitrator*, 22 December 2003, paragraph 14.

(h) Conclusion on parameters for calculating nullification or impairment

5.79 We have thus determined that in assessing whether the application of the proposed suspension of obligations by the European Communities would exceed the level of nullification or impairment, it would be appropriate to include final judgments under the 1916 Act, as well as settlement awards to settle claims under the Act. In the present case, it would not be appropriate to include any claims related to the alleged chilling effect from the Act, or litigation and related costs.

5.80 In the next section, we will apply these parameters to the specific facts of this case.

VI. DETERMINATION OF THE LEVEL OF NULLIFICATION OR IMPAIRMENT IN THE PRESENT CASE

1. Introduction

6.1 We have emphasized throughout this award that in assessing the WTO-consistency of the European Communities' request to suspend obligations, the determinative factor, in our view, is how the suspension would be *applied* in practice. It is therefore appropriate to provide views not just on how the EC suspension could be applied at present, but also how it could be applied on an ongoing basis, in the event that the WTO-inconsistent US measure is not removed.

6.2 We agree that the European Communities may suspend obligations under the GATT 1994 and the Anti-Dumping Agreement, subject to the important proviso that whatever obligations the European Communities suspends, the overall quantified level of suspension cannot exceed the quantified level of nullification or impairment.

6.3 In calculating the level of nullification or impairment, we have indicated that the European Communities could include both final judgements under the 1916 Act, and settlement agreements under the Act. We consider each of these below.

2. Final judgments under the 1916 Act

6.4 As indicated above, the amount of any final judgments entered against EC companies or their subsidiaries under the 1916 Act would constitute nullification or impairment of benefits accruing to the European Communities, up to the cumulative dollar or monetary value of the final judgements.

6.5 To date, there have been no judgments entered against EC entities under the 1916 Act. Therefore, at present, no such amounts could be included in any calculation of the level of nullification or impairment sustained by the European Communities.

6.6 Future judgements against EC entities under the Act could, in our view, be included in a future calculation of the level of nullification or impairment sustained by the European Communities. What would be relevant for the purpose of this calculation would be the total monetary value of such judgments under the 1916 Act (i.e. regardless of the number of "treble damage" awards issued in the United States), which could be matched by the suspension of obligations by the European Communities of an equivalent monetary amount (again, regardless of how many "treble duty" awards the European Communities may implement in response).

3. Settlements under the 1916 Act

6.7 As indicated above, the dollar value of any settlement awards entered into by EC companies or their subsidiaries under the 1916 Act would constitute nullification or impairment of benefits accruing to the European Communities, up to the cumulative dollar or monetary value of the settlements payable by European Communities entities.

6.8 The European Communities stated that European Communities entities have entered into settlement agreements since the expiration of the reasonable period of time. However, the amounts of such settlements have not been disclosed, evidently because of confidentiality provisions in the applicable settlement agreements.

6.9 The Arbitrators are well aware of the constraints applicable to the disclosure of such settlement awards. The European Communities advised us that it was not able to obtain the text of the settlement agreements, in part because the US companies involved in the settlements refused to disclose them.⁸⁵ The United States indicated that it could not gain access to the settlement agreements because of the confidentiality provisions in those agreements.⁸⁶

6.10 At the same time, we do not believe that undisclosed settlement awards can be included in the calculation of the level of nullification or impairment. The Arbitrators recall that they cannot accept claims that are "too remote", "too speculative", or "not meaningfully quantified."

6.11 We also recall that in accordance with the normal rules applicable to the burden of proof, as stated in *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, "where the existence of a specific fact is alleged...[i]t is for the party alleging the fact to prove its existence." In the present case, the European Communities has alleged "specific facts" – the settlement of claims under the 1916 Act involving EC entities. Yet it has not proved such facts.⁸⁷

⁸⁵ The European Communities stated that:

"Despite its efforts, the European Communities has not been able to obtain the text of the settlement agreements. In the case *Goss International vs. MAN Roland, Koenig & Bauer* the European Communities was informed that the US company objected to the disclosure of the agreement. The European Communities has no legal means to enforce the disclosure of the terms of the agreement as provided for under the confidentiality terms of the agreement. Finally, the European Communities is informed that even a direct request by the arbitrators to the companies would not satisfy the conditions in the settlement agreement and that unauthorized release of the document could expose the European companies to further legal action in the United States."

Comments of the European Communities on the US Replies to the Additional Questions of the Arbitrator, 22 December 2003, paragraph 10.

⁸⁶ The United States advised that it had contacted parties to the recent 1916 Act litigation to seek information on the terms of settlement in those cases. However, according to the United States:

"... those settlement agreements between the private litigants in each case are subject to confidentiality provisions that preclude access by non-parties. These confidentiality provisions are court-enforced, separate and apart from any concerns of business confidentiality. Neither party has the authority to reveal the terms of the settlement. Consequently, the United States cannot gain access to the terms of the settlement and is therefore not in a position to judge their impact, if any."

Answers of the United States to the Arbitrator's Additional Questions to the Parties, 16 December 2003, paragraph 7.

⁸⁷ The European Communities put before the Arbitrators a damage award against a Japanese company under the 1916 Act, issued on December 3, 2003 by the United States District Court for the Northern District of Iowa. The European Communities noted that this constituted the first award issued under the 1916 Act. The European Communities argued that:

"... the company Goss International obtained the first ever damages award under the 1916 Act against the Japanese company TKS. The damages were set at US-\$ 31,5 million....The European Communities would note that ... European companies ... were originally sued in the same process that was brought against TKS until they entered into a settlement agreement with Goss in December 2002. However, if the damage award against TKS were to be extrapolated to both companies they could have easily faced damages up to US-\$ 100 million plus even more extended legal fees and hidden stalled business costs."

6.12 Therefore, to the extent that the European Communities can obtain credible information about existing settlement agreements under the 1916 Act – in other words, to the extent that it can obtain disclosure of such settlement agreements – it can include in any calculation of the level of nullification or impairment the amounts payable by EC entities in settlements under the 1916 Act.

6.13 Future settlement awards under the 1916 Act involving EC entities could equally be included in a future calculation of the overall quantified level of nullification or impairment sustained by the European Communities. Once again, verifiable information about such awards would need to be obtained. In other words, the disclosure of such awards would be necessary.

4. Ongoing nullification or impairment

6.14 The 1916 Act was found to be WTO-inconsistent "as such", and the United States has not complied with the DSB recommendations and rulings to bring its measure into conformity with its WTO obligations. The European Communities has a right under the DSU to suspend obligations, subject to the conditions described in this award. At the same time, we do not consider that the European Communities' right to suspend obligations must be frozen in time as of the date it made its request under DSU Article 22.2. The existence and maintenance of the 1916 Act as such violates the rights of the European Communities, and each application of the Act – i.e. if a court in the United States were to issue an award of damages against an EC entity, or if EC entities enter into agreements to settle claims under the 1916 Act – increases the level of nullification or impairment sustained by the European Communities as a result of the Act.

6.15 The present situation needs to be distinguished from a case in which the measure of the responding party had been found by the original panel to be WTO-inconsistent only "as applied." In such a case, the Arbitrators cannot authorize the suspension of concessions or other obligations beyond the level of the nullification or impairment caused by the specific application of the WTO-inconsistent measure. This was the situation before the arbitrator in *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*:

"[T]he findings of the Panel do not extend beyond the particular instance where the application of those programmes was found to be illegal. It is likely that an identical application of those programmes would, in identical circumstances, lead to an identical ruling. However, as long as this is not a matter that was before the Panel and it did not lead to recommendations of the DSB, we are not, as Arbitrator under Article 22.6 of the DSU and Article 4.10 of the SCM Agreement, allowed to address it."⁸⁸

6.16 It is worth emphasizing that the basis for this determination by the *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)* arbitrator was the fact that the Canadian measure was found to be WTO-inconsistent only as applied, and not "as such". As this arbitrator stated:

"In the present case, the measures found to be illegal were the granting of subsidies to a number of transactions. The Panel Report clearly ruled that the...programmes 'as such' did not constitute prohibited export subsidies contrary to Article 3.1(a) of the SCM Agreement. The DSB recommendations and rulings clearly cannot be

Answers of the European Communities to the Additional Questions of the Arbitrator, 16 December 2003, paragraphs 10-11.

We decline to "extrapolate", and reaffirm our view that the calculation of the level of nullification or impairment can be based only on credible, verifiable information.

⁸⁸ *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paragraph 3.111.

interpreted as extending the right to take countermeasures to the maintaining of those programmes 'as such'.⁸⁹

6.17 By contrast, in the present case, of course, the 1916 Act *was* found to be WTO-inconsistent "as such". Therefore, in our view, each application of the Act, as indicated above, would entitle the European Communities to increase concomitantly the level of its suspension of obligations.

VII. SUMMARY OF FINDINGS AND CONCLUSIONS

7.1 We recall our findings that it is not possible to determine in the abstract the WTO-consistency of a request for a "qualitatively equivalent" suspension of obligations. Instead, it is necessary to determine how such a suspension would be applied. If the suspension were applied in such a manner that it was equal to the level of nullification or impairment sustained by the European Communities as a result of the 1916 Act, then the suspension would be "equivalent" under Article 22.4 of the DSU. If the suspension were applied in such a manner that it exceeded the level of nullification or impairment sustained by the European Communities as a result of the 1916 Act, then the suspension would not be "equivalent" under Article 22.4 of the DSU. Instead, the suspension would be punitive, which is not permitted under Article 22.4.

7.2 In order to determine whether the "qualitative suspension" could be applied in such a manner that the suspension could exceed the level of nullification or impairment, it is necessary to determine the trade or economic effects on the European Communities of the 1916 Act. The European Communities could then implement its suspension up to, but not beyond, this amount. This, in turn, necessitates a determination of the trade or economic effects of the 1916 Act on the European Communities in quantitative or monetary terms. This is the only way that the arbitrators can determine "equivalence" in the present context.

7.3 We note that the EC request places no quantified or monetary limits on how the suspension could be applied in practice. Moreover, we do not accept the European Communities' argument that its suspension of obligations is "equivalent" because its proposed measure would replicate, or partially replicate, the 1916 Act.

7.4 First, under Article 22.7 of the DSU, the arbitrators cannot examine the "nature" of the proposed suspension. We do not have the jurisdiction to determine equivalence between the measure proposed to implement the suspension and the measure causing the nullification or impairment. Article 22 of the DSU provides for the suspension of concessions or obligations. The arbitrators cannot approve the adoption of *measures* by the requesting party.

7.5 Second, similar or even identical trade measures can have dissimilar trade or economic effects, such that the suspension may not be "equivalent."

7.6 At the same time, we do not accept the argument of the United States that the level of nullification or impairment in the present case is "zero." This is contrary to the clear findings of the original Panel that the 1916 Act nullifies or impairs benefits accruing to the European Communities.

7.7 We therefore considered parameters for the determination of the actual level of nullification or impairment sustained by the European Communities as a result of the 1916 Act. In doing so, we emphasized the need to use credible, factual, and verifiable information. We determined that the European Communities, in assessing the level of nullification or impairment, could include the total amounts of final judgments against EC entities under the 1916 Act, as well as awards payable by EC entities to settle claims under the Act. In the present case, it would not be appropriate to include any claims related to the alleged 'chilling effect', or litigation or related costs.

⁸⁹ *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paragraph 3.110.

7.8 The European Communities may apply these parameters in determining the level of nullification or impairment that it has sustained as a result of the 1916 Act. In the event that there are future applications of the 1916 Act – such as future US court decisions against EC entities, or future settlement awards involving European Communities entities – then the European Communities would be entitled to adjust the quantified level of suspension to account for this additional level of nullification or impairment. The 1916 Act is WTO-inconsistent "as such", and each application of the Act further nullifies or impairs benefits accruing to the European Communities.

7.9 If the United States is of the view that the actual application of the suspension by the European Communities exceeds the level of nullification or impairment, then it may challenge the European Communities' suspension through the appropriate dispute settlement procedures.

7.10 In our view, the approach set out in this report strikes an appropriate balance between:

- the right of the European Communities to apply its qualitative suspension in response to the WTO-inconsistent US Anti-Dumping Act of 1916; and
- the right of the United States to ensure that the European Communities applies its suspension only up to the level of nullification or impairment the European Communities has sustained as a result of the 1916 Act.

7.11 In other words, this approach provides for "equivalence" between the level of suspension of obligations and the level of nullification or impairment.

VIII. AWARD AND DECISION OF THE ARBITRATORS

8.1 For the reasons set out above, we conclude that the European Communities may suspend obligations under GATT 1994 and the Anti-Dumping Agreement against imports from the United States. The European Communities must ensure that the application of this suspension is quantified, and does not exceed the quantified level of nullification or impairment it has sustained as a result of the 1916 Act.

8.2 In quantifying the monetary level of its nullification or impairment, the European Communities may include:

- (a) the cumulative monetary value of any amounts payable by EC entities pursuant to final court judgments for claims under the 1916 Act; and
- (b) the cumulative monetary value of any amounts payable by EC entities pursuant to the settlement of claims under the 1916 Act.

IX. CONCLUDING OBSERVATIONS

9.1 As noted above, the quantified amount of nullification or impairment sustained by the European Communities as a result of the 1916 Act may vary over time, if there are new judgments or settlement agreements under the 1916 Act involving EC entities. This may necessitate access by the parties to all relevant information, including settlement awards. The Arbitrators are confident that each party will abide fully by its obligation under Article 310 of the DSU to "engage in dispute settlement procedures in good faith in an effort to resolve the dispute." In our view, this obligation applies to all stages of the dispute, including during the implementation of the suspension of obligations.

9.2 We also recall that the United States may have recourse to the appropriate dispute settlement procedures in the event that it considers that the application of the suspension by the European

Communities exceeds the level of nullification or impairment that the European Communities has sustained as a result of the 1916 Act. This was similarly recognized by the arbitrators in *EC – Hormones (US) (Article 22.6 – EC)*:

"We received confirmation from the US that the actual level of suspension once implemented will be equivalent to the level of nullification and impairment we have found. All we can do at this stage is to encourage the US to stand by this confirmation and to abide by Article 22.4 of the DSU. In the event of a future dispute on this issue, we note that the EC could start normal – or arguably even expedited – DSU procedures challenging the consistency of the level of US suspension with Article 22.4."⁹⁰

9.3 Finally, we note that Article 22.8 of the DSU provides that:

"[T]he suspension of concessions or other obligations shall be temporary and shall only be applied until such time as 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"

⁹⁰ *EC – Hormones (US) (Article 22.6)*, paragraph 82.