1 ARTICLE 22

1.1 Text of Article 22

Article 22

Compensation and the Suspension of Concessions

1. 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. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. 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.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

(d) in applying the above principles, that party shall take into account:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

(e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;

(f) for purposes of this paragraph, "sector" means:

(i) with respect to goods, all goods;

(ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;[14]

(footnote original)[14] The list in document MTN.GNS/W/120 identifies eleven sectors.

(iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;

(g) for purposes of this paragraph, "agreement" means:

(i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade

Agreements in so far as the relevant parties to the dispute are parties to these agreements;

(ii) with respect to services, the GATS;

(iii) with respect to intellectual property rights, the Agreement on TRIPS.

4. 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.

5. The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.

6. 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, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), 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[15] 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 original)[15] The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

7. The arbitrator[16] 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. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. 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 original)[16] The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

8. The 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, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

9. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions

> or other obligations apply in cases where it has not been possible to secure such observance.[17]
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> *(footnote original)*[17] Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.

1.2 Nature and purpose of countermeasures

1. In *EC – Bananas III (US) (Article 22.6 – EC),* the Arbitrator confirmed that the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned. They further agreed with the United States "that this *temporary* nature indicates that it is the purpose of countermeasures to *induce compliance*". However, the Arbitrator considered that "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 countermeasures of a *punitive* nature".[1]

2. Similarly, the Arbitrator in *EC – Bananas III (Ecuador) (Article 22.6 – EC)* observed that "the object and purpose of Article 22 … is to induce compliance".[2]

3. In *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)* the Arbitrator considered that "Article 22.1 of the DSU is particularly clear as to the temporary nature of suspensions of concessions or other obligations, pending compliance." The Arbitrator further 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, the Arbitrator 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."[3]

4. In *US – 1916 Act (EC) (Article 22.6 – US),* the Arbitrator clarified that they were "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'".[4] Further to quoting the above awards, the Arbitrator agreed that "a fundamental objective of the suspension of obligations is to induce compliance". It emphasized that "[t]he fact that such suspension is meant to be temporary – as indicated in Article 22.1 – is further evidence of this purpose."[5] The Arbitrator further indicated that:

> "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."[6]

5. In *US – Offset Act (Byrd Amendment) (Article 22.6)*, the Arbitrator questioned the nature of the countermeasures, in particular whether "inducing compliance", as set out in *EC – Bananas III (US) (Article 22.6 – EC)*, was the only objective pursued by the DSU when allowing a WTO Member to suspend concessions or other obligations. In that regard, the Arbitrator noted that:

> "The concept of 'inducing compliance' was first raised in the *EC – Bananas III (US) (Article 22.6 – EC)* arbitration and has been referred to since in other arbitrations. However, it is not expressly referred to in any part of the DSU and we are not

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[1] Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3. See also Decision by the Arbitrator, *EC – Hormones (Article 22.6 – Canada)*, para. 39.
[2] Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 76.
[3] Decision by the Arbitrator, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 3.105.
[4] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.4.
[5] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.7.
[6] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.8.

> persuaded that the object and purpose of the DSU – or of the WTO Agreement – would support an approach where the purpose of suspension of concessions or other obligations pursuant to Article 22 would be exclusively to induce compliance. Having regard to Articles 3.7 and 22.1 and 22.2 of the DSU as part of the context of Articles 22.4 and 22.7, we cannot exclude that inducing compliance is part of the objectives behind suspension of concessions or other obligations, but at most it can be only one of a number of purposes in authorizing the suspension of concessions or other obligations. By relying on 'inducing compliance' as the benchmark for the selection of the most appropriate approach we also run the risk of losing sight of the requirement of Article 22.4 that the level of suspension be *equivalent* to the level of nullification or impairment."[7]

6. In *US – Offset Act (Byrd Amendment) (Article 22.6)*, the Arbitrator further remarked that the reason for suspending concessions is not explicit in the DSU, and that the means for "inducing compliance" are likely to vary in each case:

> "[T]he DSU does not expressly explain the purpose behind the authorization of the suspension of concessions or other obligations. On the one hand, the general obligation to comply with DSB recommendations and rulings seems to imply that suspension of concessions or other obligations is intended to induce compliance, as has been acknowledged by previous arbitrators. However, exactly what may induce compliance is likely to vary in each case, in the light of a number of factors including, but not limited to, the level of suspension of obligations authorized.[8]"[9]

1.3 Article 22.2: request for authorization to suspend concessions or other obligations

1.3.1 Specificity in the request for suspension of concessions or other obligations

1.3.1.1 General

7. In *EC –Hormones (US) (Article 22.6 – EC)*, the Arbitrator considered that it was better to be as precise as possible in the request for suspension of concessions:

> "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'."[10]

8. In *US – 1916 Act (EC) (Article 22.6 – US)*, the European Communities requested to suspend obligations instead of tariff concessions. The Arbitrator considered 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".[11]

1.3.1.2 Relevance of Article 6.2 specificity requirement

9. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the Arbitrator held that the requests for suspension of concessions under Article 22.2, as well as the requests for a referral to arbitration

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[7] Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil)*, para. 3.74.

[8] *(footnote original)* While the value of the suspension or concessions or other obligations easily comes to mind as a relevant factor in inducing compliance, it must also be acknowledged that the actual role of the value of such suspension in securing compliance or not may vary from one case to the next. In some cases, even a very high amount of countermeasures may not achieve compliance, whereas in some others a limited amount may.

[9] Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil),* para. 6.2.

[10] Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC)*, fn 16. See Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, fn 12.

[11] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 3.7.

under Article 22.6, serve similar due process objectives as requests under Article 6.2 and thus concluded that the specificity standards are relevant for Article 22 requests:

> "The DSU does not explicitly provide that the specificity requirements, which are stipulated in Article 6.2 for panel requests, apply *mutatis mutandis* to arbitration proceedings under Article 22. However, we believe that requests for suspension under Article 22.2, as well as requests for a referral to arbitration under Article 22.6, serve similar due process objectives as requests under Article 6.2. First, they give notice to the other party and enable it to respond to the request for suspension or the request for arbitration, respectively. Second, a request under Article 22.2 by a complaining party defines the jurisdiction of the DSB in authorizing suspension by the complaining party. Likewise, a request for arbitration under Article 22.6 defines the terms of reference of the Arbitrators. Accordingly, we consider that the specificity standards, which are well-established in WTO jurisprudence under Article 6.2, are relevant for requests for authorization of suspension under Article 22.2, and for requests for referral of such matter to arbitration under Article 22.6, as the case may be. They do, however, not apply to the document submitted during an arbitration proceeding, setting out the methodology used for the calculation of the level of nullification or impairment."[12]

1.3.1.3 Minimum specificity requirements

10. In *EC – Hormones (US) (Article 22.6 – EC)*, the Arbitrator stated that the minimum requirements attached to a request to suspend concessions or other obligations are:

> "(1) the request must set out a specific level of suspension, i.e. a level equivalent to the nullification and impairment caused by the WTO inconsistent measure, pursuant to Article 22.4; and (2) the request must specify the agreement and sector(s) under which concessions or other obligations would be suspended, pursuant to Article 22.3. "[13]

11. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, in connection with the first minimum requirement for making a request for the suspension of concessions or other obligations, Ecuador requested suspension under Article 22.2 of the DSU in the amount of US$ 450 million. Ecuador's methodology paper and submissions indicated that the direct and indirect harm and macro-economic repercussions to its entire economy amounted to US$ 1 billion. Ecuador argued that, pursuant to Article 21.8 of the DSU, the total economic impact of the European Communities banana regime should be considered by the Arbitrator by applying a multiplier when calculating the level of nullification and impairment suffered by Ecuador. The Arbitrator stated:

> "[T]he level of suspension specified in Ecuador's request under Article 22.2 is the relevant one and defines the amount of requested suspension for purposes of this arbitration proceeding. Additional estimates advanced by Ecuador in its methodology document and submissions were not addressed to the DSB and thus cannot form part of the DSB's referral of the matter to arbitration. Belated supplementary requests and arguments concerning additional amounts of alleged nullification or impairment are, in our view, not compatible with the minimum specificity requirements for such a request because they were not included in Ecuador's request for suspension under Article 22.2 of the DSB."[14]

12. With respect to the second minimum requirement for making a request for the suspension of concessions or other obligations, the Arbitrator in *EC – Bananas III (Ecuador) (Article 22.6 – EC)* noted that Ecuador listed the service subsector of "wholesale trade services (CPC 622)" under the GATS; "Protection of performers, producers of phonograms (sound recordings) and broadcasting organizations" in Section 1 (Copyright and related rights), Section 3 (Geographical indications) and Section 4 (Industrial designs) under the TRIPS Agreement. The Arbitrator determined that these requests by Ecuador under the GATS and TRIPS Agreement fulfilled the minimum requirement to specify the agreements and sectors with respect to which it requests

[12] Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 20.
[13] Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC)*, para. 16.
[14] Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 24.

authorization to suspend concessions or other obligations. However, the Arbitrator held with respect to Ecuador's statement that it "reserve[d] the right" to suspend concessions under the GATT:

> "[T]he terms of reference of arbitrators, acting pursuant to Article 22.6, are limited to those sector(s) and/or agreement(s) with respect to which suspension is specifically being requested from the DSB. We thus consider Ecuador's statement that it 'reserves the right' to suspend concessions under the GATT as not compatible with the minimum requirements for requests under Article 22.2. Therefore, we conclude that our terms of reference in this arbitration proceeding include only Ecuador's requests for authorization of suspension of concessions or other obligations with respect to those specific sectors under the GATS and the *TRIPS Agreement* that were unconditionally listed in its request under Article 22.2."[15]

1.3.1.4 No requirement to specify particular "concessions or other obligations"

13. In *EC – Hormones (US) (Article 22.6 – EC)* and in *EC – Hormones (Canada) (Article 22.6 – EC),* the Arbitrator declined the European Communities' request that the Arbitrator first decide on the amount of nullification and impairment, and to then request a specific product list from the United States and Canada and to finally determine whether both were "equivalent". See paragraph 38 below.

14. In *US – 1916 Act (EC) (Article 22.6 – US),* the European Communities had requested to suspend "obligations" under the GATT 1994 and the Anti-Dumping Agreement in order to adopt an equivalent regulation to the 1916 Act against imports from the United States, instead of tariff concessions. The Arbitrator confirmed that the decision by the European Communities to seek the suspension of "obligations" rather than tariff "concessions" was not subject to their review.[16] The Arbitrator however examined the question whether the European Communities was nevertheless obligated under Article 22 of the DSU to specify precisely which "obligations" in those two Agreements it sought to suspend. In doing so, the Arbitrator reviewed previous arbitrations and concluded that 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:

> "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 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.
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> 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. 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.' 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.
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> 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.

[15] Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 29.
[16] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 3.7.

> 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.
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> 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."[17]

15. In *US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, Mexico requested authorization to suspend the application to the United States "of obligations in the goods sector."[18] The Arbitrator granted Mexico the possibility to suspend "concessions or other obligation on products originating in the United States."[19]

16. In *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, the Arbitrator found that Canada's request for suspension of obligations under a number of articles of the GATT 1994, the Anti-Dumping Agreement, and the SCM Agreement, "to determine that the effect of dumping or subsidization of products from the United states is to cause or threaten material injury to an established domestic industry or is to retard the establishment of a domestic industry"[20], "while it could have certainly been more informative, is acceptable in terms of the minimum specificity requirement applicable to Article 22.2 requests." In that respect, the Arbitrator "consider[ed] that the United States did not demonstrate that either its ability to reach an informed decision to request arbitration, or its ability to defend itself in these proceedings had been prejudiced as a result of the way Canada's request was formulated."[21]

17. Also in *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, the Arbitrator found that it did not "have authority under our mandate to *require* Canada to be more specific as to the *measures* it intends to apply to suspend its obligations" under those provisions.[22] In that regard, the Arbitrator expressed that:

> "[I]t is necessary to differentiate between the *WTO obligation* to be suspended and the specific *measures* taken to implement such suspensions. We note that our mandate is to determine whether the level of suspension of WTO *obligations* is equivalent with the level of nullification or impairment. Article 22.7 of the DSU does not imply a review of the actual *measures*, which will implement a suspension, to determine if they will exceed the level of nullification or impairment, and in our view, the Arbitrator's mandate does not extend to addressing or approving the proposed implementation of the suspension of the obligations."[23]

1.3.2 Adopted DSB recommendations as prerequisite for request to suspend concessions

18. In *US – Supercalendered Paper (Article 22.6 – US)*, the Arbitrator recalled that the United States expressed the view that the document WT/DS505/AB/R was not a valid Appellate Body report and objected to its adoption; that Canada's request for authorization to suspend concessions was considered at the DSB meeting held on 29 June 2020; that the United States argued Canada's request to suspend concessions was based on an incorrect premise, namely, that there were valid DSB recommendations adopted; and that Canada responded that

[17] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 3. 10-3.14.
[18] Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, para. 1.4.
[19] Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, para. 5.2.
[20] Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, para. 1.7.
[21] Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, para. 5.2. See also para. 107 below.
[22] Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, para. 2.32.
[23] Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, para. 2.29.

the DSB had adopted the Panel Report and the Appellate Body Report in this dispute at its meeting on 5 March 2020, as reflected in the minutes of the DSB meeting and consistent with Article 17.14 of the DSU, which sets forth the negative consensus rule for adoption of reports of the Appellate Body. The Arbitrator did not rule on this issue, but in the introduction to its Decision it noted that, notwithstanding the United States' objection, "the Panel Report and the Appellate Body Report were adopted by the DSB by negative consensus".[24]

1.4 Article 22.3: principles and procedures complaining party to apply

1.4.1 Review by the arbitrator under Article 22.3

19. In *EC – Bananas III (US) (Article 22.6 – EC)*, the United States argued that the Arbitrator could not examine the principles and procedures set forth in Article 22.3 in that particular arbitration proceeding because the United States had requested authorization to suspend concessions only pursuant to paragraph (a) of Article 22.3 of the DSU. In the view of the United States, the Arbitrator could only do so if the United States had requested authorization to suspend concessions pursuant to paragraphs (b) or (c) of Article 22.3 of the DSU. The Arbitrator disagreed:

> "We believe that the basic rationale of these disciplines is to ensure that the suspension of concessions or other obligations across sectors or across agreements (beyond those sectors or agreements under which a panel or the Appellate Body has found violations) remains the exception and does not become the rule. In our view, if Article 22.3 of the DSU is to be given full effect, the authority of Arbitrators to review upon request whether the principles and procedures of subparagraphs (b) or (c) of that Article have been followed must imply the Arbitrators' competence to examine whether a request made under subparagraph (a) should have been made – in full or in part – under subparagraphs (b) or (c). If the Arbitrators were deprived of such an implied authority, the principles and procedures of Article 22.3 of the DSU could easily be circumvented. If there were no review whatsoever with respect to requests for authorization to suspend concessions made under subparagraph (a), Members might be tempted to always invoke that subparagraph in order to escape multilateral surveillance of cross-sectoral suspension of concessions or other obligations, and the disciplines of the other subparagraphs of Article 22.3 of the DSU might fall into disuse altogether."[25]

20. The Arbitrator in *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)* applied the burden of proof rules that generally apply in WTO dispute settlement to arbitration proceedings under Article 22.6 of the DSU and stated that "a complaining party's request under Article 22.3(c) must be treated as DSU-consistent until proven otherwise."[26] Noting that the European Union had not pursued its claim under Article 22.3(c) in those proceedings, the Arbitrator presumed that "the United States' request for cross-retaliation is not inconsistent with Article 22.3(c) of the DSU."[27]

21. In *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, the complainant requested authorization to take countermeasures under the GATT 1994 and the SCM Agreement, as well as the GATS.[28] The respondent claimed that the complainant had not followed the principles and procedures set forth in Article 22.3 in considering what countermeasures to take. The respondent reserved the right to raise a claim before the Arbitrator that the complainant had not followed the principles and procedures set forth in Article 22.3. The Arbitrator recalled that it was for the respondent to make out a *prima facie* case that the complainant had not followed the principles and procedures in Article 22.3.[29] The Arbitrator noted, however, that as the respondent did not pursue its claim in the arbitral proceedings, it could not examine this issue. The Arbitrator stated that it must treat the complainant's request under Article 22.3(c) to be DSU-consistent until proven otherwise:

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[24] See Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, paras. 1.7-1.9.
[25] Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 3.7.
[26] Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 7.5.
[27] Ibid.
[28] Decision by the Arbitrator, *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 7.1.
[29] Decision by the Arbitrator, *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 7.2.

> "The United States advanced no such claim under Article 22.3 in its written submission or oral statement. Since the United States did not pursue its claim before the Arbitrator, we cannot examine this issue further in the present Decision. We note that in WTO dispute settlement practice, a Member's measure is treated as WTO-consistent until it has been proven otherwise. Accordingly, we consider that a complaining party's request under Article 22.3(c) must be treated as DSU-consistent until proven otherwise. Consequently, it has not been demonstrated that the European Union's request for cross-retaliation is inconsistent with Article 22.3(c) of the DSU."[30]

1.4.2 "same sector(s)"

22. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the Arbitrator examined Ecuador's request for suspension of concessions or other obligations in the area of the GATS and the TRIPS Agreement. The Arbitrator stated:

> "[W]e further recall the general principle set forth in Article 22.3(a) that suspension of concessions or other obligations should be sought first with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment. Given this principle, it remains the preferred option under Article 22.3 for Ecuador to request suspension of concessions under the GATT as one of the same agreements where a violation was found, if it considers that such suspension could be applied in a practicable and effective manner."[31]

23. In *EC – Bananas III (US) (Article 22.6 – EC)*, the European Communities alleged that in cases where findings of violation or nullification have been made in more than one sector, or under more than one Agreement, requests for the suspension of concessions had to be made commensurate with the number or the degree of violation. The Arbitrator disagreed:

> "We recall that subparagraph (a) of Article 22.3 of the DSU refers to the suspension of 'concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment.' We note that the words 'same sector(s)' include both the singular and the plural. The concept of 'sector(s)' is defined in subparagraph (f)(i) with respect to goods as *all goods*, and in subparagraph (f)(ii) with respect to services as a *principal sector* identified in the 'Services Sectoral Classification List'. We, therefore, conclude that the United States has the right to request the suspension of concessions in either of these two sectors, or in both, up to the overall level of nullification or impairment suffered, if the inconsistencies with the EC's obligations under the GATT and the GATS found in the original dispute have not been removed fully in the EC's revision of its regime. In this case the 'same sector(s)' would be 'all goods' and the sector of 'distribution services', respectively. Our conclusion, based on the ordinary meaning of Article 22.3(a), is also consistent with the fact that the findings of violations under the GATT and the GATS in the original dispute were closely related and all concerned a single import regime in respect of one product, i.e. bananas."[32]

1.4.3 "if that party considers that it is not practical or effective"

24. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the European Communities argued that Ecuador had not demonstrated why it was not practicable or effective for it to suspend concessions under the GATT or commitments under the GATS in service sectors other than distribution services. Ecuador claimed that "it did not request suspension entirely under the GATT and/or in service sectors under the GATS other than distribution services because it considered that it would not be practicable or effective in the meaning of Article 22.3(b) and (c) of the DSU, that circumstances in Ecuador's bananas trade sector and the economy on the whole are serious enough to justify suspension under another agreement, and that the parameters in Article 22.3(d)(i)-(ii) corroborate this conclusion."[33] The Arbitrator held that the term "practicable" connoted "availability" and "suitability"; with respect to the term "effective", the Arbitrator held

[30] Decision by the Arbitrator, *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 7.3.
[31] Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 33.
[32] Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 3.10.
[33] Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 68.

that "the thrust of this criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB rulings within a reasonable period of time." According to the Arbitrator:

> "[A]n examination of the 'practicability' of an alternative suspension concerns the question whether such an alternative is available for application in practice as well as suited for being used in a particular case.
>
> To give an obvious example, suspension of commitments in service sub-sectors or in respect of modes of service supply which a particular complaining party has not bound in its GATS Schedule is not available for application in practice and thus cannot be considered as practicable. But also other case-specific and country-specific situations may exist where suspension of concessions or other obligations in a particular trade sector or area of WTO law may not be 'practicable'.
>
> In contrast, the term 'effective' connotes 'powerful in effect', 'making a strong impression', 'having an effect or result'. Therefore, the thrust of this criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB rulings within a reasonable period of time.
>
> One may ask whether this objective may ever be achieved in a situation where a great imbalance in terms of trade volume and economic power exists between the complaining party seeking suspension and the other party which has failed to bring WTO-inconsistent measures into compliance with WTO law. In such a case, and in situations where the complaining party is highly dependent on imports from the other party, it may happen that the suspension of certain concessions or certain other obligations entails more harmful effects for the party seeking suspension than for the other party. In these circumstances, a consideration by the complaining party in which sector or under which agreement suspension may be expected to be least harmful to itself would seem sufficient for us to find a consideration by the complaining party of the effectiveness criterion to be consistent with the requirement to follow the principles and procedures set forth in Article 22.3.
>
> …
>
> Our interpretation of the 'practicability' and 'effectiveness' criteria is consistent with the object and purpose of Article 22 which is to induce compliance. If a complaining party seeking the DSB's authorization to suspend certain concessions or certain other obligations were required to select the concessions or other obligations to be suspended in sectors or under agreements where such suspension would be either not available in practice or would not be powerful in effect, the objective of inducing compliance could not be accomplished and the enforcement mechanism of the WTO dispute settlement system could not function properly."[34]

25. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, Ecuador argued that it was the prerogative of the Member suffering nullification or impairment to decide whether it is "practicable or effective" to choose the same sector, another sector or another agreement for the purposes of suspending concessions or other obligations. The Arbitrator held that the term "consider" in subparagraphs (b) and (c) granted a certain margin of appreciation, but that a decision by a Member was nevertheless subject to review by the Arbitrator regarding whether the Member had considered "the necessary facts objectively":

> "It follows from the choice of the words 'if that party *considers*' in subparagraphs (b) and (c) that these subparagraphs leave a certain margin of appreciation to the complaining party concerned in arriving at its conclusions in respect of an evaluation of certain factual elements, i.e. of the practicability and effectiveness of suspension

[34] Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 70-73 and 76.

> within the same sector or under the same agreement and of the seriousness of circumstances. However, it equally follows from the choice of the words 'in considering what concessions or other obligations to suspend, the complaining party *shall* apply the following principles and procedures' in the chapeau of Article 22.3 that such margin of appreciation by the complaining party concerned is subject to review by the Arbitrators. In our view, the margin of review by the Arbitrators implies the authority to broadly judge whether the complaining party in question has considered the necessary facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same agreements, or only under another agreement provided that the circumstances were serious enough."[35]

1.4.4 Relationship between Article 22.3(a) and 22.3(c)

26. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the Arbitrator noted that Ecuador argued that, in addition to suspending concessions or other obligations under the GATS and TRIPS Agreement, it "reserves the right to suspend tariff concessions or other tariff obligations granted in the framework of the GATT 1994 in the event that these may be applied in a practicable and effective manner."[36] The Arbitrator noted an "inconsistency" between making simultaneously a request under Articles 22.3(a) and Article 22.3(c):

> "Even if Ecuador's 'reservation' of a request for suspension under the GATT were permissible, there would be a certain degree of inconsistency between making a request under Article 22.3(c) – implying that suspension is not practicable or effective within the same sector under the same agreement or under another agreement – and simultaneously making a request under Article 22.3(a) – which implies that suspension is practicable and effective under the same sector. In this respect, we note that, although Ecuador did not in fact make both requests at the very same point in time, if it were likely that the suspension of concessions under the GATT could be applied in a practicable and effective manner, doubt would be cast on Ecuador's assertion that at present only suspension of obligations under other sectors and/or other agreements within the meaning of Article 22.3(b-c) is practicable or effective in the case before us.
>
> … we fail to see how it could be possible to suspend concessions or other obligations for a particular amount of nullification or impairment under the same sector as that where a violation was found (which implies that this *is* practicable and effective) and simultaneously for the same amount in another sector or under a different agreement (which implies that suspension under the same sector – or under a different sector under the same agreement – is *not* practicable or effective). But we do not exclude the possibility that, once a certain amount of nullification or impairment has been determined by the Arbitrators, suspension may be practicable and effective under the same sector(s) where a violation has been found only for part of that amount and that for the rest of this amount of suspension is practicable or effective only in (an)other sector(s) under the same agreement or even only under another agreement."[37]

1.5 Article 22.6

1.5.1 "shall be referred to arbitration"

27. In *US – COOL (Article 22.6 – United States),* the Arbitrator had to determine whether referral to arbitration under Article 22.6 is exclusively carried out by the DSB or whether mere objection by the responding party to the proposed level of suspension of concessions is enough for the establishment of arbitration. The Arbitrator did not agree with the European Union's contention that the phrase "shall be referred" in Article 22.6 means that referral to arbitration has to be done by the DSB. The Arbitrator noted that, contrary to Article 6 of the DSU, where the establishment of a panel is done exclusively at a DSB meeting, no such language is found in Article 22.6 of the

[35] Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 52.
[36] Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 27.
[37] Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 30-31.

DSU.[38] The Arbitrator also noted that arbitration proceedings under Articles 21.3(c) and 25 of the DSU do not refer to the DSB, and that Article 2 of the DSU, which specifies the functions of the DSB, does not mention arbitration:

> "Although the terms of Article 22.6 do not prescribe the manner of referral, there are contextual indications within the DSU suggesting that referral to arbitration need not be performed by the DSB. For example, a number of provisions of the DSU explicitly provide for arbitration proceedings in contrast to panel proceedings. 'Arbitration' is contemplated under Article 21.3(c), Article 25, and Article 22.6. In arbitrations under Article 21.3(c) and Article 25, there is no explicit requirement of any action by the DSB to initiate the arbitration. Rather, Article 21.3(c) provides that the reasonable period of time for compliance 'shall be … a period of time determined through binding arbitration', without further specification of the procedure or forum through which such arbitration is initiated. With respect to arbitration under Article 25, the DSU provides that 'resort to arbitration shall be subject to mutual agreement of the parties' and that '[a]greements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process', without explicit requirement of any action on the part of the DSB. Thus, these arbitration procedures under the DSU can be contrasted with the explicit requirements for the establishment of a panel described in Article 6, namely the initial request(s) by a Member and the subsequent establishment of a panel at a DSB meeting.
>
> The difference in explicit procedural requirements, as well as the difference in designation between 'arbitration' and 'panel', is consistent with Article 2 of the DSU, which sets out the functions and authority of the DSB. In particular, although the DSB has 'the authority to establish panels', Article 2 makes no specific reference to the role of the DSB in relation to arbitrations. Further, it does not necessarily follow from its authority 'to administer these rules and procedures' or other general functions that the DSB must carry out the specific act of referral to arbitration under Article 22.6, or under Articles 21.3(c) and 25."[39]

28. The Arbitrator further explained that the initiation of dispute settlement proceedings without the action of the DSB is also possible in other contexts, such as the appeal of a panel report.[40] Similarly, the Panel expressed the view that the absence of the negative consensus rule in Article 22.6 of the DSU implicates that the referral to arbitration does not have to be done by the DSB:

> "Further, we find it difficult to equate the arbitration referral procedure under Article 22.6 with that of panel establishment under Article 6 in light of the decision-making rule in Article 2.4, which states that '[w]here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.' The establishment of panels authorized under Article 2.1 is based on negative consensus, as stipulated in Article 6.1. Similarly, adoption of panel and Appellate Body reports under Articles 16.4 and 17.14, respectively, is achieved through negative consensus decisions by the DSB, as is the authorization of suspension of concessions under Articles 22.6 and 22.7. Interpreting Article 22.6 to include a requirement of referral by the DSB implicates the decision-making rule that would apply to such action, yet there is no explicit reference to such a decision in the text of Article 22.6."[41]

1.5.2 "by the original panel, if members are available, or by an arbitrator appointed by the Director-General"

29. As of 31 December 2021, all arbitrations under Article 22.6 of the DSU have been referred to the original panel, except *US – 1916 Act (EC) (Article 22.6 – US)* and *US – Tuna II (Mexico)*

[38] Decisions by the Arbitrator, *US – COOL (Article 22.6 – United States)*, para. 2.11.
[39] Decisions by the Arbitrator, *US – COOL (Article 22.6 – United States)*, paras. 2.12-2.13.
[40] Decisions by the Arbitrator, *US – COOL (Article 22.6 – United States)*, para. 2.15.
[41] Decisions by the Arbitrator, *US – COOL (Article 22.6 – United States)*, para. 2.14.

(Article 22.6 – US). In these cases, the Chairman of the original panel was no longer available. However, the other two arbitrators were members of the original Panel.[42]

1.5.3 Working procedures for Article 22.6 arbitrations

30. Most arbitrators have attached their working procedures to their Decisions.

1.5.4 Table of arbitration decisions and level of suspension authorized

31. For a table providing information on the level of suspension of concessions or other obligations authorized in Article 22.6 arbitrations to date, see the chapter of the Analytical Index on "DS information tables".

1.5.5 Table showing the length of time in Article 22.6 proceedings to date

32. For a table providing information on the length of time taken in Article 22.6 proceedings, calculated from the date of the expiry of the reasonable period of time to the date of circulation of the Article 22.6 decision, see the chapter of the Analytical Index on "DS information tables".

1.5.6 Table showing separate opinions in Article 22.6 decisions to date

33. For a table providing information on separate opinions in Article 22.6 proceedings, see the chapter of the Analytical Index on "DS information tables".

1.5.7 Third party rights in Article 22.6 arbitration proceedings

34. In *EC – Bananas III (US) (Article 22.6 – EC)*, the Arbitrator rejected Ecuador's request to be granted third party status:

> "On 4 February 1999, Ecuador requested the Arbitrators to accord it third-party status in light of its special interest in the proceedings. However, in light of the absence of provisions for third-party status under Article 22 of the DSU and given that we do not believe that Ecuador's rights will be affected by this proceeding, we declined Ecuador's request. In this regard, we note that our Initial and Final Decisions in this arbitration fully respect Ecuador's rights under the DSU, and, in particular, Article 22 thereof."[43]

35. In *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, involving two parallel proceedings, one initiated by Canada and one by the United States against the European Communities, the Arbitrator granted third party rights to the United States and Canada in Article 22.6 proceedings initiated against them by the European Communities:

> "Following a request by the United States ('US') for third-party rights and after careful consideration of the parties' arguments made at the organisational meeting of 4 June 1999 and in their written submissions, the arbitrators ruled as follows:
>
> The US and Canada are allowed to attend both arbitration hearings, to make a statement at the end of each hearing and to receive a copy of the written submissions made in both proceedings.
>
> The above ruling was made on the following grounds.
>
> - DSU provisions on panel proceedings, referred to by analogy in the arbitrators' working procedures, give the arbitrators discretion to decide on procedural matters not regulated in the DSU (Article 12.1 of the DSU) in accordance with due process. The DSU does not address the issue of third-party participation in Article 22 arbitration proceedings.

[42] See WT/DS136/17 and Decision by the Arbitrator, *US – Tuna II (Mexico) (Article 22.6 – US),* para. 1.6.

[43] Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 2.8.

- US and Canadian rights may be affected in both arbitration proceedings:

…

- In contrast, the EC has not shown how third-party participation would prejudice its rights. No specific arguments were made demonstrating that third party participation would substantially impair the EC's interests or due process rights."[44]

36. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrator declined Australia's request to participate as a third party. In this regard, the Arbitrator recalled that Australia's position in those proceedings was different from that of the United States in the *EC – Hormones* arbitration, and Ecuador in the *EC – Bananas* arbitration:

> "On 5 June 2000, Australia requested the Arbitrators to register its participation as a third party given its participation as a third party in the proceedings under Article 21.5 of the DSU and its substantial and continuing interest in the dispute.
>
> At our request, the parties made their views known on 8 June 2000. On the same day, we informed Australia that we declined its request. Our decision took into account the views expressed by the parties, the fact that there is no provision in the DSU as regards third party status under Article 22, and the fact that we do not believe that Australia's rights would be affected by this proceeding.
>
> We note in this respect that third party rights were granted in the Article 22.6 arbitrations concerning *European Communities – Measures Concerning Meat and Meat Products (Hormones)* and rejected in the *EC – Bananas (1999)* Article 22.6 arbitration. We do not consider that Australia in this case is in the same situation as Canada and the United States in the *EC – Hormones* arbitrations, nor even in the same situation as Ecuador in the *EC – Bananas (1999)* arbitration. Indeed, Australia never initiated dispute settlement proceedings against Brazil with respect to the export financing programme at issue. Moreover, Australia did not draw the attention of the Arbitrators to any benefits accruing to it or any rights under the WTO Agreement which might be affected by their decision."[45]

37. In *US – COOL (Article 22.6 – United States)*, involving two parallel proceedings, one initiated by Mexico and one by Canada, the Arbitrator granted these two Members' requests to participate in each other's proceedings. Specifically, the Arbitrator gave the two parties the right to have access to all written submissions and to be present during the entirety of the joint hearings:

> "As noted in previous arbitrations under Article 22.6 of the DSU, arbitrators, like panels, have 'a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not expressly regulated.' The DSU does not contain a specific provision on third-party rights in Article 22.6 arbitration proceedings, nor does it deny any such rights. Noting the absence of any such provision, previous arbitrators have denied requests for third-party status on the grounds that the party making the request could not show that its rights would be adversely affected through their inability to participate in the proceedings. However, arbitrators have authorized participation by Members not directly involved in the arbitration in certain situations. We note that in the two parallel arbitration proceedings in the *EC – Hormones* dispute, participation rights were granted because it was considered that the rights of the requesting Members 'may be affected in both arbitration proceedings'. In particular, it was noted that the product scope and relevant trade barriers were the same in both proceedings and that both arbitrators (composed of the same three individuals) might adopt the same or very similar methodologies. On these grounds, combined with the absence of any prejudice to the interests or due process rights of the respondent, the Members requesting suspension of concessions in the parallel cases were allowed 'to attend

[44] Decisions by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC)*, para. 7; see Decision by the Arbitrator, *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 7.
[45] Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 2.4-2.7.

> both arbitration hearings, to make a statement at the end of each hearing and to receive a copy of the written submissions made in both proceedings.
>
> …
>
> We have granted the above rights on the basis of our margin of discretion as described above. We note that these rights are not the same as those accorded to third parties in panel proceedings pursuant to Article 10 of the DSU. In particular, third parties in panel proceedings may make submissions in another party's case, including on issues not pertaining to its own case. Further, Canada and Mexico have been granted full access to all submissions and communications in each other's arbitration, including those made after the meeting with the Arbitrator."[46]

1.6 Article 22.7

1.6.1 "The arbitrator … shall not examine the nature of the concessions or other obligations to be suspended"

38. In *EC – Hormones (US) (Article 22.6 – EC)* and in *EC – Hormones (Canada) (Article 22.6 – EC),* the United States and Canada had not attached a list of products to their requests for suspension of concessions (as the United States had done in *EC – Bananas III (US) (Article 22.6 – EC)*). The European Communities requested that the Arbitrator first decide on the amount of nullification and impairment, and to then request a specific product list from the United States and Canada and to finally determine whether both were "equivalent". The Arbitrator in both cases declared themselves "unable to follow the EC request" since "[n]o support for this request can be found in the DSU"[47] and thus they "d[id] not have jurisdiction to set a definite list of products that can be subject to suspension"[48]:

> "The authorization given by the DSB under Article 22.6 of the DSU is an authorization 'to suspend [the application to the Member concerned of] concessions or other obligations [under the covered agreements]'. In our view, the limitations linked to this DSB authorisation are those set out in the proposal made by the requesting Member on the basis of which the authorisation is granted. In the event tariff concessions are to be suspended, only products that appear on the product list attached to the request for suspension can be subject to suspension. This follows from the minimum requirements attached to a request to suspend concessions or other obligations. They are, in our view: (1) the request must set out a specific level of suspension, i.e. a level equivalent to the nullification and impairment caused by the WTO inconsistent measure, pursuant to Article 22.4; and (2) the request must specify the agreement and sector(s) under which concessions or other obligations would be suspended, pursuant to Article 22.3.
>
> Neither can support for the EC request be found in other provisions of Article 22 …
>
> In our view, the determination of other aspects related to the suspension remain the prerogative of the Member requesting the suspension. We note, in particular, that the Member in respect of whom concessions or other obligations would be suspended, can object to '*the level* of suspension proposed' and that an arbitrator has to 'determine whether *the level* of such suspension is equivalent to *the level* of nullification or impairment'. 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

[46] Decisions by the Arbitrator, *US – COOL (Article 22.6 – United States)*, paras. 2.20 and 2.23.
[47] Decisions by the Arbitrator in *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 14.
[48] Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC),* para. 23.

> 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 proposed suspension touching upon the 'nature' of concessions to be withdrawn. They fall outside the arbitrators' jurisdiction."[49]

39. In *US – Offset Act (Byrd Amendment) (Article 22.6)*, the requesting parties (all but Mexico, i.e. Brazil, Canada, Chile, European Communities, India, Japan and Korea) requested authorization to suspend tariff concessions and to be allowed to impose additional import duties on a list of products originating in the United States. Since, in the case of the European Communities' request, the list of products was not "final", the Arbitrator noted that the European Communities "will notify the DSB every year, prior to the entry into force of a new level of suspension of concessions or other obligations … the list of products that will be subject to this measure."[50][51]

1.6.2 Is present nullification or impairment needed for an arbitrator to proceed to carry out its task described in Article 22.6?

40. In *US – Supercalendered Paper (Article 22.6 – US)*, the United States objected to the level of suspension of concessions proposed by Canada, noting that since the CVD order at issue had been revoked by the United States, Canada was not subject to the OFA-AFA measure, and that therefore the level of nullification or impairment suffered by Canada was zero. The United States also made the argument that it would be proper for an Article 22.6 arbitrator to determine whether a Member has rebutted the presumption of nullification or impairment set out in Article 3.8 of the DSU.[52] The Arbitrator disagreed with the United States:

> "The United States' argument in this context, rather, is that that Canada is not presently suffering NI, and that for this reason, the level of NI for the purpose of this arbitration must be set at zero and stay at zero. The validity of this argument depends upon the merits of following propositions: (a) present NI must exist in order for an arbitrator acting under Article 22.6 of the DSU to allow an original complainant to suspend concessions in a non-zero amount in the future that is 'equivalent' to a future level of NI; (b) no present NI exists *vis-à-vis* Canada because there are currently no US CVD measures in place against Canadian firms that are affected by the OFA-AFA Measure; and (c) it is within the Arbitrator's jurisdiction to examine the existence of present NI. All three propositions must hold in order for the United States to prevail in this context. We therefore first address the United States' proposition under item (a), i.e. that present NI must exist in order for an arbitrator to allow for a non-zero level of NI and equivalent suspension in the future. As discussed below, we find that we must ultimately reject the United States' position because it not only lacks support in the text of the DSU and in prior dispute settlement practice, but it could also effectively nullify original complainants' rights to seek redress through Article 22.6 arbitrations for a wide variety of measures that are subject to WTO dispute settlement."[53]

41. In explaining its reasoning in this regard, the Arbitrator underlined the fact that the OFA-AFA measure could be applied in future:

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[49] Decisions by the Arbitrator in *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, paras. 16-19.

[50] Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 22.6 – EC)*, para. 5.3.

[51] The authorization to suspend concessions of Brazil, India, Japan and Korea expressely indicated that the additional import duties were to be applied on a"final list of products". The authorization to the European Communities did not mention the term "final", and hence the remark made by the Arbitrator. The European Communities had committed, however, (as had the four Member mentioned above) not to change the list of products (see para. 1.6 of the decisions concerning these Members). A similar situation concerned Chile's request, who would notify each year the products where the suspension of concessions was to be applied; the decision concerning Chile, did not indicate whether or not the Member had committed not to change the products. Finally, in Canada's request there is no reference to "final" list, nor is there a remark regarding the possibility of altering the products on a yearly basis.

[52] Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, para. 6.2.

[53] Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, para. 6.5.

> "This line of reasoning is directly supported, in our view, by the core principles of WTO dispute settlement. We recall that panels and the Appellate Body have, correctly in our view, explained that certain measures (e.g. taking the form of rules and norms) can be found to violate the covered agreements independently from their application in a particular instance, based on the reasoning that the disciplines of the GATT and WTO are intended to protect not only existing trade but also the predictability and security needed to conduct future trade. We therefore note that in instances where such measures had not been applied at the time of a subsequent arbitration occurring under Article 22.6 of the DSU, the United States' approach in this context would nullify an original complainant's ability to seek redress of the violation via such an arbitration. We discern no basis upon which to conclude that such an extreme result was the intent of the drafters of the DSU, and reiterate that we find no support for such a result in the text of the DSU or in prior dispute settlement practice."[54]

1.6.3 "The arbitrator … shall determine whether the level of such suspension is equivalent to the level of nullification or impairment."

1.6.3.1 Assessment of the level of suspension of concessions

1.6.3.1.1 Burden of proof

42. In *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, the Arbitrator explained the general rule on burden of proof in arbitration proceedings under Article 22.6 as follows:

> "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; in this case, for example, where a party relies on a decrease of beef consumption in the EC or the use of edible beef offal as pet food. 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 explaining how it arrived at its proposal and showing why its proposal *is* equivalent to the trade impairment it has suffered. Some of the evidence - such as data on trade with third countries, export capabilities and affected exporters - may, indeed, be in the sole possession of the US, being the party that suffered the trade impairment. This explains why we requested the US to submit a so-called methodology paper."[55]

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[54] Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, para. 6.20.

[55] Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC)*, paras. 9-11; decision by the Arbitrator, *EC – Hormones (Canada) (Article 22.6 – EC)*, paras. 9-11. See also Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 1.14.

43. The Arbitrator in *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)* noted, however, an important difference between an arbitrator's task under Article 22.6 and the task of a panel:

> "There is, however, a difference between our task here and the task given to a panel. In the event we decide that the Canadian proposal is *not* WTO consistent (i.e. 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.[56] 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[.]"[57]

44. The Arbitrator in *EC – Bananas III (Ecuador) (Article 22.6 – EC)* agreed with the approach outlined by the Arbitrator in *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, and also explained the reason why the party allegedly suffering nullification or impairment was required to submit a methodology paper:

> "We agree with the Arbitrators in the *EC - Hormones* arbitration proceedings that the ultimate burden of proof in an arbitration proceeding is on the party challenging the conformity of the request for retaliation with Article 22. However, we also share the view that some evidence may be in the sole possession of the party suffering nullification or impairment. This explains why we requested Ecuador to submit a methodology document in this case."[58]

45. The Arbitrator in *Brazil – Aircraft (Article 22.6 – Brazil)* reiterated that the initial burden of proof rests on the party challenging the proposed suspension of concessions or other obligations under the covered agreements:

> "In application of the well-established WTO practice on the burden of proof in dispute resolution, it is for the Member claiming that another has acted inconsistently with the WTO rules to prove that inconsistency. In the present case, the action at issue is the Canadian proposal to suspend concessions and other obligations in the amount of C$700 million as 'appropriate countermeasures' within the meaning of Article 4.10 of the SCM Agreement. Brazil challenges the conformity of this proposal with Article 22 of the DSU and Article 4.10 of the SCM Agreement. It is therefore up to Brazil to submit evidence sufficient to establish a *prima facie* case or 'presumption' that the countermeasures that Canada proposes to take are not 'appropriate'. Once Brazil has done so, it is for Canada to submit evidence sufficient to rebut that 'presumption'. Should the evidence remain in equipoise on a particular claim, the Arbitrators would conclude that the claim has not been established. Should all evidence remain in equipoise, Brazil, as the party bearing the original burden of proof, would lose the case."[59]

46. However, the Arbitrator in *Brazil – Aircraft (Article 22.6 – Brazil)* also underlined that, regardless of who bears the burden of proof, both parties are required to produce evidence and collaborate with the Arbitrator:

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[56] *(footnote original)* If this were not done, the Member requesting suspension would need to make new estimates and arguably submit a new proposal. This proposal could again meet objections and might be referred back to arbitration. To avoid this potentially endless loop, the arbitrators - in the event they find that the proposal is *not* equivalent to the trade impairment - have to come up with their own estimate, i.e. their own figure.

[57] Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC)*, para. 12; Decision by the Arbitrator, *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 12.

[58] Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 38.

[59] Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 2.8. See also Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 2.10; Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (India) (Article 22.6 – US)*, para. 2.25.

> "An issue to be distinguished from the question of who bears the burden of proof is that of the duty that rests on both parties to produce evidence and to collaborate in presenting evidence to the Arbitrators. This is why, even though Brazil bears the original burden of proof, we expected Canada to come forward with evidence explaining why its proposal constitutes appropriate countermeasures and we requested it to submit a 'methodology paper' describing how it arrived at the level of countermeasures it proposes."[60]

47. According to the Arbitrator in *US – COOL (Article 22.6 – United States),* an alternative methodology can be presented to disprove a proposed methodology, but that would not necessarily meet the objecting party's burden of proof:

> "It may be possible to present an alternative methodology as a way of engaging with, and contributing to disproving, a proposed methodology. However, merely putting forward, as was done here, a different methodology as 'appropriate' or as one that 'more accurately estimates' the level of nullification or impairment is not sufficient. In the absence of a demonstration that the proposing party's methodology is incorrect, the mere submission of an alternative methodology would not meet the objecting party's burden of proof. This is because the alternative methodology does not, in itself, assist the Arbitrator in determining whether the result from the first methodology is (or is not) equivalent to the level of nullification or impairment. In such a situation, it would follow from the rules on burden of proof that the objecting party has not proved that the act at issue is WTO-inconsistent."[61]

48. According to the Arbitrator in *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, the respondent bore the overall burden of demonstrating that the complainant's methodology had resulted in countermeasures that were not "commensurate" within the meaning of Article 7.10 of the SCM Agreement:

> "For present purposes, it is sufficient to state that we regard the United States, as the party challenging the proposed level of countermeasures, to bear the overall burden of demonstrating that the European Union's methodology results in countermeasures that are not 'commensurate' with the degree and nature of the adverse effects determined to exist. To discharge that burden, it is not sufficient for the United States merely to propose an alternative methodology that it asserts is more appropriate. Rather, the United States must engage with the methodology used by the European Union, in the sense that the United States must demonstrate why that methodology would result in countermeasures that are not 'commensurate' within the meaning of Article 7.10 of the SCM Agreement."[62]

49. The Arbitrator also considered that each party has the duty to produce evidence in support of its assertions of fact and to collaborate with an Article 22.6 arbitrator in presenting evidence:

> "We agree with the DS316 arbitrator that each party has the duty to produce evidence in support of its assertions of fact and to collaborate with an Article 22.6 arbitrator in presenting evidence. Consistent with this duty and prior arbitrations, we requested that, as a first step in the proceeding, the European Union as the party seeking authorization to take countermeasures submit a methodology paper substantiating how it arrived at the proposed countermeasures."[63]

50. In *US – Countervailing Measures (China) (Article 22.6 – US)*, the Arbitrator recalled the applicable principles on burden of proof followed in prior Article 22.6 arbitration proceedings:

> "[I]n Article 22.6 arbitration proceedings, the 'overall burden' of proving that the requirements of the DSU have *not* been met rests in general on the party challenging

[60] Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 2.9. See also Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 2.11; Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (India) (Article 22.6 – US)*, paras. 2.26-2.27.
[61] Decisions by the Arbitrator, *US – COOL (Article 22.6 – United States),* para. 4.12.
[62] Decision by the Arbitrator, *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 4.3.
[63] Decision by the Arbitrator, *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 4.4.

> the proposed level of suspension. In other words, it is for the United States in this dispute to prove that China's proposed level of suspension of concessions is *not* 'equivalent' to the level of nullification and impairment within the meaning of Article 22.4 of the DSU.
>
> Despite these rules on the general allocation of the burden of proof in Article 22.6 arbitrations, the duty rests on both parties to produce evidence and to collaborate in presenting evidence to the Arbitrator. In particular, 'it is for each party to bring forward the elements to sustain the factual assertions it makes', insofar as '[i]t is for the party alleging the fact to prove its existence'.
>
> We also note that, in the event we conclude that China's proposed level of suspension of concessions or other obligations is not WTO-consistent, we cannot end our examination the way panels do. Instead, we would be called upon to go further, and, in pursuit of the basic DSU objectives of prompt and positive settlement of disputes, we would need to estimate the level of suspension we consider to be equivalent to the impairment suffered."[64]

51. In *US – Supercalendered Paper (Article 22.6 – US)*, the Arbitrator agreed with the approach taken by previous arbitrators regarding the burden of proof:

> "We agree with previous arbitrators that the burden of proving that the requirements of the DSU have not been met rests on the party challenging the proposed level of suspension. Accordingly, in this proceeding, the United States bears the initial burden of establishing a *prima facie* case that the level of suspension proposed by Canada is not equivalent to the level of NI. To discharge this burden, it would be insufficient for the United States to merely propose an alternative methodology that it asserts is more appropriate compared with the methodology advanced by Canada. Rather, the United States must demonstrate why Canada's methodology would result in a level of suspension that is not 'equivalent' to the level of NI within the meaning of Article 22.4 of the DSU. Finally, each party also 'has the duty to produce evidence in support of its assertions of fact and to collaborate with an Article 22.6 arbitrator in presenting evidence'."[65]

1.6.3.1.2 Methodology paper

52. In *EC – Hormones (US) (Article 22.6 – EC)*[66], *EC – Hormones (Canada) (Article 22.6 – EC)*[67] and *Brazil – Aircraft (Article 22.6 – Brazil)*[68], the Arbitrator asked the requesting party to provide them with a methodology paper explaining the methodology they applied in calculating the proposed level of suspension.

53. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the European Communities requested that the Arbitrator disregard certain information contained in Ecuador's methodology document on the basis such information was included in Ecuador's first submission only and not in the methodology document. The Arbitrator held that while a procedural step of submitting a methodology document had been stipulated in another arbitration proceeding for reasons of practicality, such a "methodology document" was not expressly mentioned in the DSU. Furthermore, the Arbitrator rejected "the idea that the specificity requirements of Article 6.2 apply *mutatis mutandis* to the methodology document":

> "[W]e introduced the procedural step of submitting a methodology document in the US/EC *Bananas III* arbitration proceeding because we reckoned that certain information about the methodology used by the party for calculating the level of nullification or impairment would logically only be in the possession of that Member and that it would not be possible for the Member requesting arbitration pursuant to Article 22 of the DSU to challenge this information unless it was disclosed. Obviously,

[64] Decision by the Arbitrator, *US – Countervailing Measures (China) (Article 22.6 – US)*, paras. 3.2-3.4.
[65] Decision by the Arbitrator, *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 4.1.
[66] Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC),* para. 5.
[67] Decision by the Arbitrator, *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 5.
[68] Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 2.9.

> if such information were to be disclosed by the Member suffering impairment only in its first submission, the Member requesting arbitration could only rebut that information in its rebuttal submission, while its first submission would become necessarily less meaningful and due process concerns could arise. It was out of these concerns that the United States was requested to submit a document explaining the methodology used for calculating impairment before the filing of the first submission by both parties. Unlike in panel proceedings, where parties do not file their first submissions simultaneously, it has been the practice in past arbitration proceedings under Article 22 that both rounds of submissions take place before a single oral hearing of the parties by the Arbitrators and that in both these rounds parties file their submissions simultaneously.
>
> However, we agree with Ecuador that such a methodology document is nowhere mentioned in the DSU. Nor do we believe, as explained in detail above, that the specificity requirements of Article 6.2 relate to that methodology document rather than to requests for suspension pursuant to Article 22.2, and to requests for the referral of such matters to arbitration pursuant to Article 22.6. For these reasons, we reject the idea that the specificity requirements of Article 6.2 apply *mutatis mutandis* to the methodology document. In our view, questions concerning the amount, usefulness and relevance of information contained in a methodology document are more closely related to the questions of who is required at what point in time to present evidence and in which form, or in other words, the issue of the burden of proof in an arbitration proceeding under Article 22.6."[69]

54. In *US – Anti – Dumping Methodologies (China) (Article 22.6 - US)*, the Arbitrator declined to use different calculation methodologies for the different anti-dumping orders at issue, finding the distinction between the two methodologies to be arbitrary.[70]

1.6.3.1.3 Use of counterfactuals

55. In *EC – Bananas III (US) (Article 22.6 – EC)*, the Arbitrator considered that "to estimate the level of nullification or impairment, the same basis needs to be used for measuring the level of suspension of concessions. Since the latter is the gross value of US imports from the European Communities, the comparable basis for estimating nullification and impairment in our view is the impact on the value of relevant EC imports from the United States (rather than US firms' costs and profits, as used in the US submission). More specifically, we compare the value of relevant EC imports from the United States under the present banana import regime (the actual situation) with their value under a WTO-consistent regime (a "counterfactual" situation)".[71]

56. In *US – Tuna II (Mexico) (Article 22.6 - US),* the Arbitrator noted that in past arbitrations under Article 22.6, arbitrators had based their calculation of the level of nullification or impairment on so-called "counterfactuals". The Arbitrator also stated that such counterfactuals should reflect a reasonable and plausible compliance scenario:

> "It is well established that it is for the responding party to choose how to implement DSB recommendations and rulings. Consequently, there is no prescribed manner of complying; the responding party may choose to withdraw the measure at issue in its totality or appropriately modify its WTO-inconsistent aspects. The implication of this principle for Article 22.6 arbitration proceedings is that the arbitrator does not always know what form implementation would have taken had the responding party implemented the DSB recommendations and rulings. As a result, in past arbitration proceedings, arbitrators have found it necessary to base their decisions on a so-called 'counterfactual'. In this context, a counterfactual refers to a hypothetical scenario that

[69] Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 35-36.
[70] Decision by the Arbitrator, *US – Anti – Dumping Methodologies (China) (Article 22.6 - US)*, para. 6.53.
[71] Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 7.1.

> describes what would have happened in terms of trade flows had the responding party implemented the DSB recommendations and rulings.[72]
>
> Prior dispute settlement practice establishes that the legal standard that a scenario must meet for it to constitute an appropriate counterfactual for purposes of Article 22.6 proceedings is that of *plausibility* and *reasonability*. In *US – Gambling*, for instance, the arbitrator emphasized that it was important for the counterfactual to reflect accurately the nature and scope of the benefits that were being nullified or impaired by the measure at issue. The arbitrator observed that a counterfactual does not necessarily need to reflect the most likely compliance scenario, as counterfactuals always involve an inherent degree of uncertainty because they represent a hypothetical scenario. The counterfactual should, however, reflect at least a plausible or 'reasonable' compliance scenario."[73]

57. In *US – Anti – Dumping Methodologies (China) (Article 22.6 - US)*, the Arbitrator rejected the counterfactual proposed by the respondent, on the ground that it went beyond the DSB recommendations and rulings. In so finding, the Arbitrator found irrelevant whether the proposed counterfactual is more straightforward and easier to implement than alternative counterfactuals:

> "Accordingly, the counterfactual must reflect what would have happened if, by the expiry of the reasonable period of time, the USDOC ceased using the WTO-inconsistent WA-T methodology with zeroing and the WTO-inconsistent Single Rate Presumption in the relevant anti-dumping proceedings, in this limited context. In our view, it would not be reasonable to assume that, had the USDOC ceased using the WTO-inconsistent WA-T methodology with zeroing and the WTO-inconsistent Single Rate Presumption, it would have withdrawn the entirety of the anti-dumping orders, including the anti-dumping duties imposed on exporters whose dumping margins were not calculated using these WTO-inconsistent methodologies. We agree with the United States that this would go beyond the DSB recommendations and rulings.
>
> While we do not disagree with China's view that suspension of concessions or other obligations is meant to induce compliance, we do not believe that this warrants suspension of concessions or other obligations at a level going beyond the DSB recommendations and rulings. In our view, this would run the risk of suspending concessions or other obligations in a punitive manner. Further, while China's proposed counterfactual is undoubtedly more straightforward and easier to implement for purposes of estimating the level of nullification and impairment, in our view, this does not necessarily render the counterfactual a reasonable or plausible compliance scenario. We cannot let simplicity outweigh our guiding principle that the counterfactual must represent a reasonable or plausible compliance scenario."[74]

58. The Arbitrator in *US – Anti – Dumping Methodologies (China) (Article 22.6 - US)* confronted the issue of whether the counterfactual adopted by the Arbitrator should be WTO-consistent and if so what the scope of such an assessment should be. Specifically, the issue was whether this assessment should be based exclusively on the WTO obligations found to have been

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[72] *(footnote original)* A counterfactual approach was used in several past arbitration proceedings. In *EC – Bananas III*, the arbitrator compared the value of relevant EC imports from the United States under the actual banana import regime with their value under a hypothetical WTO-consistent regime (a "counterfactual" situation). (Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 7.1). In *Canada – Aircraft (Article 22.6 – Canada)*, the arbitrator noted how past arbitrators had used a "counterfactual approach", comparing the existing situation with that which would have occurred "had implementation taken place as of the expiration of the reasonable period of time". (Decision by the Arbitrator, *Canada — Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 3.21). In *EC – Hormones*, the arbitrator based its analysis on what the complaining party's exports of the relevant product to the responding party would have been had the latter withdrawn the measure at the end of the RPT. (Decision by the Arbitrator, *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 38). In the recent *US – COOL* arbitration, the arbitrator also decided to use a counterfactual that assumed that the COOL measure was withdrawn at the end of the RPT. (Decision by the Arbitrator, *US – COOL (Article 22.6 – United States),* para. 6.32).

[73] Decision by the Arbitrator, *US – Tuna II (Mexico) (Article 22.6 - US),* paras. 4.4-4.5. See also Decision by the Arbitrator, *US – Anti – Dumping Methodologies (China) (Article 22.6 - US)*, para. 5.2.

[74] Decision by the Arbitrator, *US – Anti – Dumping Methodologies (China) (Article 22.6 - US)*, paras. 5.7-5.8. See also ibid. para. 5.12.

violated in the underlying proceedings in the same dispute or all WTO obligations. The Arbitrator took the latter view:

> "The parties' arguments raise the issue of whether we, in our role as an arbitrator acting pursuant to Article 22.6 of the DSU, can take into account the proposed counterfactual's consistency with WTO obligations other than those that formed the basis of the original panel's findings of violation. The parties have expressed opposing views on this issue. The United States is of the view that an examination of the 'likely' WTO inconsistency of its proposed counterfactual would go beyond the DSB recommendations and rulings and thus beyond the mandate under Article 22.6 of the DSU. China, on the other hand, argues that the DSU makes it clear that a determination of the level of nullification or impairment under Article 22.6 of the DSU must be measured against a WTO-consistent benchmark. While China agrees that an arbitrator cannot make 'formal' findings of WTO inconsistency, it argues that an arbitrator has the authority to consider the likely WTO consistency of a proposed counterfactual as a part of its determination of whether that counterfactual is reasonable.
>
> We recall that there is a difference between, on the one hand, assessing the WTO consistency of a measure or a measure taken to comply with the DSB recommendations and rulings, and, on the other hand, assessing whether a proposed counterfactual represents a reasonable or plausible compliance scenario. We agree with the view expressed by both parties that it is not for us to make findings of WTO inconsistency with respect to a measure or a measure taken to comply with the DSB recommendations and rulings. This is the mandate of a panel acting pursuant to Article 11 of the DSU or a compliance panel acting pursuant to Article 21.5 of the DSU. Our mandate is to assess a hypothetical counterfactual and determine whether this counterfactual reflects at least a reasonable or plausible compliance scenario. In our view, it would be incongruous to assess whether a counterfactual reflects a reasonable or plausible compliance scenario without considering that counterfactual's WTO consistency. In this regard, we recall that compliance requires full consistency with WTO obligations, not just those forming part of the original proceedings. In considering whether the United States' proposed counterfactual reflects a reasonable or plausible compliance scenario, we will therefore take into account that counterfactual's WTO consistency with the covered agreements. We will not limit this assessment to the provisions that were found to have been violated in the original proceedings. We see no basis for distinguishing, in fulfilling our mandate to determine a reasonable or plausible compliance scenario, between WTO obligations that were found to have been violated in the original proceedings and other WTO obligations. In our view, this distinction is arbitrary as it would compel an arbitrator to accept a proposed counterfactual without any regard to its inconsistency with other relevant WTO obligations. Such an approach would, in our view, fall short of fulfilling an arbitrator's mandate under Article 22.6, and would diminish the effectiveness of the WTO dispute settlement system. With this in mind, we now turn to our assessment of the particular elements of the counterfactual that the United States proposes."[75]

59. The Arbitrator in *US – Anti – Dumping Methodologies (China) (Article 22.6 - US)* found the counterfactual proposed by the United States not plausible because of the WTO-inconsistencies it contained, and made modifications to remove such inconsistencies, before adopting that counterfactual.[76]

60. In *US – Countervailing Measures (China) (Article 22.6 – US)*, the Arbitrator noted the parties' agreement on the need to assess a counterfactual scenario:

> "The parties agree that, in order to determine level of N/I, the Arbitrator should assess a 'counterfactual' scenario, i.e. a 'hypothetical scenario that describes what would have happened in terms of trade flows had the responding party implemented

[75] Decision by the Arbitrator, *US – Anti – Dumping Methodologies (China) (Article 22.6 - US)*, paras. 5.39-5.40.

[76] Decision by the Arbitrator, *US – Anti – Dumping Methodologies (China) (Article 22.6 - US)*, paras. 5.41-5.52.

> the DSB recommendations and rulings' by the end of the RPT, and 'compare[] [this counterfactual] with the actual situation, as of the end of the RPT – where the Member has yet to come into compliance – in order to quantify the trade effect caused by that Member's failure to comply'. As the RPT expired on 1 April 2016, the parties agree that the baseline year or reference period for a counterfactual analysis should be the 2017 calendar year.
>
> In light of the relevant DSB recommendations and rulings in the Article 21.5 compliance proceedings, the parties are also in agreement that, had the United States brought its measures into conformity with its obligations under Articles 2.1(c) and 14(d) of the SCM Agreement, it would not have identified a countervailable subsidy with respect to the alleged provision of inputs for less than adequate remuneration, and any countervailing duties (CVDs) applied to the products at issue would be calculated so as to exclude the portion of the total CVD margin attributed to the alleged input subsidy programmes.
>
> Thus, the parties agree that the appropriate counterfactual analysis would entail modifying the relevant CVD rates by deducting the portion attributable to the alleged input subsidy programs."[77]

61. In *US – Supercalendered Paper (Article 22.6 – US)*, the parties agreed that the appropriate counterfactual was generally one in which the "ongoing conduct" measure was eliminated in CVD investigations *vis-à-vis* Canadian firms, but they disagreed on several other issues pertaining to the appropriate counterfactual. The Arbitrator recalled how prior arbitrators had relied on counterfactuals and the general considerations that ought to inform such an analysis:

> "Counterfactuals are tools commonly used by arbitrators acting under Article 22.6 of the DSU to determine the level of NI caused by the WTO-inconsistent measures. A counterfactual relates to 'a hypothetical scenario that describes what would have happened in terms of trade flows had the responding party implemented the DSB recommendations and rulings'. This hypothetical scenario is then 'compared with the actual situation … where the Member has yet to come into compliance – in order to quantify the trade effect caused by that Member's failure to comply'. It may be necessary to make assumptions to answer the hypothetical question of what would happen if the original respondent, in this case the United States, achieved compliance with the DSB recommendations and rulings. However, rather than prejudging how exactly the United States would have implemented the DSB recommendations and rulings at issue, or speculating on which would be the 'most likely' compliance scenario, an Article 22.6 arbitrator should instead evaluate whether the original complainant, in this case Canada, has offered a plausible or reasonable counterfactual scenario. According to the arbitrator in *US – Gambling (Article 22.6 – US)*, the considerations of plausibility and reasonableness are connected to the nature and scope of benefits that are nullified or impaired by the measure at issue. We consider such previous guidance instructive."[78]

1.6.3.1.4 The appropriate time-frame / reference period for assessing nullification and impairment

62. In *US – Tuna II (Mexico) (Article 22.6 - US),* the Arbitrator had to determine the appropriate time-frame that would form the basis for the calculation of the level of nullification or impairment. The Arbitrator held that a short-term assessment of the withdrawal of the WTO-inconsistent measure would be appropriate:

> "There is no rule in the DSU prescribing the time-frame for the determination of the level of nullification or impairment. Past Article 22.6 arbitration decisions indicate that the period of time for the arbitrator's determination of the level of nullification or impairment is usually the period that follows the end of the RPT. In this regard, we also share the parties' view that a short-term assessment of the withdrawal of the 2013 Tuna Measure would be appropriate in these proceedings. In our view, the

[77] Decision by the Arbitrator, *US – Countervailing Measures (China) (Article 22.6 – US)*, paras. 3.9-3.11.
[78] Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, para. 6.50.

> impact of the withdrawal of the Measure would be best captured in the period immediately following the withdrawal. Developments in the long-run would be less likely to be linked to withdrawal."[79]

63. In *US – Washing Machines (Article 22.6 – US)*, the appropriate time-frame was determined to be calendar year 2017, which included the expiry of the reasonable period of time.[80]

64. In *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, whereas the reasonable period of time for the respondent to implement DSB recommendations and rulings expired on 22 August 2018, both parties used calendar year 2017 as the appropriate reference period to determine the level of nullification or impairment. The Arbitrator also found it appropriate to use this period in its determination.[81]

65. In *US – Countervailing Measures (China) (Article 22.6 – US)*, the Arbitrator stated, in the context of evaluating data inputs for purposes of a two-step Armington model, that it agreed with China that "in order to accurately estimate the level of N/I, the effects of the WTO-inconsistent duties in the reference year must be compared to a year in which trade flows were not distorted by those duties, and that using a year-prior when the preliminary duties were in place could prevent us from satisfying that basic requirement".[82]

66. In *US – Supercalendered Paper (Article 22.6 – US)*, the Arbitrator noted that the core purpose of the parties' proposed models was to estimate the trade impact that the imposition of WTO-inconsistent CVD rates had on Canadian exports of a relevant product into the United States, and that, in order to do that, various data inputs were required, including: (a) an annual baseline of the value of imports from relevant Canadian companies; and (b) those same companies' CVD rates that were in effect during the same time. The Arbitrator noted that both parties' proposed models relied on a calendar year preceding a relevant triggering event from which to take such information, and both referred to this year as the "reference period", but that they disagreed as to what calendar year the reference period should be, at least in certain situations. After considering and rejecting several proposed reference periods, the Arbitrator devised an approach that in its view best balanced several competing considerations.[83]

1.6.3.1.5 Possibility of setting a variable level of suspension of concessions

67. In *US – 1916 Act (EC) (Article 22.6 – US)*, the Arbitrator decided that the European Communities could suspend concessions qualitatively provided always that the level of nullification or impairment was quantified on a monetary basis. To facilitate this, the Arbitrator allowed the European Communities to consider the cumulative monetary value of any amounts payable by EC entities pursuant to final court judgements for claims under the 1916 Act and the settlement of claims under the 1916 Act. In this context, the Arbitrator referred to the possibility that the quantified amount of nullification or impairment suffered by the European Communities could vary over time as a result of new judgements or settlement agreements under the 1916 Act:

> "[T]he 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 3.10 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.
>
> 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

[79] Decision by the Arbitrator, *US – Tuna II (Mexico) (Article 22.6 - US),* para. 4.14.
[80] Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 3.43.
[81] Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, paras. 4.1-4.2.
[82] Decision by the Arbitrator, *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.135.
[83] Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, paras. 6.96-6.124.

> 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."[84]

68. In *US – Offset Act (Byrd Amendment) (Article 22.6)*, the Arbitrator examined the possibility of setting for the "level of suspension", rather than setting a fixed value, an economic formula that, when completed with the values of annual disbursements made by the respondent under the WTO-inconsistent measure, would give the parties the level of suspension authorized for that year. The Arbitrator concluded that nothing in the Article 22 of the DSU prevented the adoption of a variable level of suspension if the circumstances of the case required it. In particular, the Arbitrator considered:

> "While we note that Article 22.4 refers to 'the level' (singular) of nullification or impairment and to 'the level' (singular) of suspension of concessions or other obligations, we are not persuaded that these terms impose an obligation to identify a single and enduring level of nullification or impairment. The requirement of Article 22.4 is simply that the two levels be equivalent. As long as the two levels are equivalent, we do not see any reason why these levels may not be adjusted from time to time, provided such adjustments are justified and unpredictability is not increased as a result. In fact, we see no limitation in the DSU to the possibility of providing for a variable level of suspension if the level of nullification or impairment also varies.
>
> Most previous arbitrators have established one single level of nullification or impairment at the level that existed at the end of the reasonable period of time granted to the responding party to bring its legislation into conformity. We do not disagree that this approach is, in the large majority of cases, the most appropriate. However, we do not read anything in Article 22 of the DSU that would preclude us from following a different path if the circumstances of this case clearly required it."[85]

69. In adopting such a decision, the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6)* gave particular relevance to the circumstances of that case, by considering that, under a variable level of suspension system, the respondent party "would control the levers to make the actual level of suspension of concessions or other obligations go down". The Arbitrator remarked that while:

> "In other arbitrations where the level of nullification or impairment was set once and for all, the responding party could not influence the level of countermeasures applied to its trade, unless the requesting party agreed to modify it, [i]n this case, the level of suspension of concessions will automatically depend on the amount of disbursements made under the [WTO-inconsistent measure] in a given year. If this amount decreases, so will the level of suspension of concessions or other obligations that the Requesting Parties will be entitled to impose. If no disbursements are made, the level of suspension will have to be 'zero'."[86]

70. Similarly, in *US – Upland Cotton (Article 22.6 – US I)*, the Arbitrator authorized the suspension of concessions or other obligations at a variable level, which would be determined through a certain formula:

> "The Arbitrator has taken note of Brazil's request for an amount of countermeasures authorization that would be variable on an annual basis, depending on 'the total of exporter applications received under GSM 102 … for the most recent concluded fiscal

[84] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 9.1-9.2.

[85] Decisions by the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil), US – Offset Act (Byrd Amendment) (Article 22.6 – Canada), US – Offset Act (Byrd Amendment) (Article 22.6 – Chile), US – Offset Act (Byrd Amendment) (Article 22.6 – EC) US – Offset Act (Byrd Amendment) (Article 22.6 – India), US – Offset Act (Byrd Amendment) (Article 22.6 – Japan), US – Offset Act (Byrd Amendment) (Article 22.6 – Korea), US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, paras. 4.20-4.21.

[86] Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil), US – Offset Act (Byrd Amendment) (Article 22.6 – Canada), US – Offset Act (Byrd Amendment) (Article 22.6 – Chile), US – Offset Act (Byrd Amendment) (Article 22.6 – EC) US – Offset Act (Byrd Amendment) (Article 22.6 – India), US – Offset Act (Byrd Amendment) (Article 22.6 – Japan), US – Offset Act (Byrd Amendment) (Article 22.6 – Korea), US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, para. 4.24.

> year'. The Arbitrator has also noted that the United States does not dispute that it would be permissible for the level of appropriate countermeasures to be determined through a formula, provided that this formula was sufficiently well defined so as to make it applicable in a transparent and predictable manner. We have therefore decided to authorize an amount of countermeasures that would be variable on an annual basis and that would depend on, among other things, the total amount of GSM 102 transactions in the most recent concluded fiscal year. The terms of this variable amount of countermeasures are contained in Annex 4."[87]

71. In *US – Washing Machines (Article 22.6 – US)*, instead of determining a set level of nullification or impairment, the Arbitrator devised a formula that the complainant could use in each instance where the respondent calculated dumping margins inconsistently with the Anti-Dumping Agreement, as described in an "as such" finding of violation made in the underlying dispute settlement proceedings.[88]

72. In *US – Supercalendered Paper (Article 22.6 – US)*, the Arbitrator adopted a prospective model to allow Canada to calculate a level of suspension "equivalent" to the level of nullification resulting from the *future use* of the "ongoing conduct" measure against Canadian firms. The Arbitrator stated:

> "We note that multiple prior arbitrators have determined methods of varying complexities (including formulae) through which the level of suspension would be determined in the future based on the future application of the measure at issue. We discern no reason to conclude that such an approach, under the circumstances of this dispute, is incompatible with our mandate as described in section 3, above.
>
> Canada claims that the arbitrator in *US – Washing Machines* 'provided guidance on the methodological criteria applicable to the calculation of nullification or impairment in circumstances where the WTO-inconsistent measure has not yet been applied'. Canada recalls that the arbitrator in that dispute indicated that: (a) the calculation should result in a predictable level of suspension; (b) the method should be practical to implement and limit the risk of potential controversies between the parties; (c) the data relied on should be, as much as possible, verifiable and available to both parties; and (d) given that a future WTO-inconsistent trade remedy measure may be applied against any good, the method used to determine nullification or impairment should be 'sufficiently generic to capture any variation' in the types of product and markets.
>
> The Arbitrator finds such principles to be valid in determining the level of NI, and the United States offers no objection to such use. Indeed, we note that principles (a), (b), and (d) go to the selection of a model that will reliably work in the future under varying circumstances, which, of course, is essential if a model is to yield a reasoned estimate of a level of NI. Principle (c), in our view, helps ensure that quality data is used in the calculation of the level of NI. Viewed as such, we consider that these principles are effectively embedded in our task of selecting a model that will yield a reasoned estimate of the level of NI."[89]

1.6.3.2 General parameters for calculating the level of nullification or impairment

1.6.3.2.1 Trade effects approach

73. In *US – Offset Act (Byrd Amendment) (Article 22.6)* the Arbitrator noted that "trade effect" as a parameter to determine the level of nullification and impairment pursuant to Article 22 of the DSU "is found neither in Article XXIII of GATT 1994, nor in Article 22 of the DSU." However, the Arbitrator decided to follow an approach based on determining the trade effect of the inconsistent measure since "the 'trade effect' approach has been regularly applied in other Article 22.6 arbitrations and seems to be generally accepted by Members as *a* correct application of Article 22

[87] Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, para. 4.279.
[88] Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 4.48.
[89] Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, paras. 6.22-6.24.

of the DSU." The Arbitrator noted in that regard that "[p]revious arbitrators' decisions based on direct trade impact are not binding precedents".[90]

1.6.3.2.2 Using reasoned estimates and avoiding speculation

74. The Arbitrator in *EC – Hormones (US) (Article 22.6 – EC)* stated that they were to use reasoned estimates when assessing the level of nullification or impairment. Applying this approach, the Arbitrator rejected United States claims for certain lost exports as "too remote" and "too speculative".[91] The Arbitrator considered:

> "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."[92]

75. 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 … [.]"[93]

76. In *US – 1916 Act (EC) (Article 22.6 – US)*, the Arbitrator referred to the above statements as support for their view that ["i]n 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".[94] The Arbitrator further considered that "this prudent approach taken by earlier arbitrators is appropriate."[95]

77. In *US – Offset Act (Byrd Amendment) (Article 22.6),* the Arbitrator analysed the economic models suggested by the parties, in order to choose the appropriate model to apply in the calculation of the level of nullification or impairment. The Arbitrator "considered the approach of the Requesting Parties to be too aggregated, hence not specific enough to th[e] case. While the model specification proposed by the United States is disaggregated and well specified, [the Arbitrator] concluded that there is insufficient data to run that model with any degree of accuracy." In light of "the lack of available data to implement the United States' model", the Arbitrator decided "to reject the United States' model in favour of a modified version of the model proposed by the Requesting Parties."[96]

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[90] Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil)*, paras. 3.70-3.71.

[91] Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC)*, para. 77.

[92] Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC)*, para. 41. 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." Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.12.

[93] Decision by the Arbitrator, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 3.22.

[94] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.54.

[95] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.57.

[96] Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil), US – Offset Act (Byrd Amendment) (Article 22.6 – EC) US – Offset Act (Byrd Amendment) (Article 22.6 – India), US – Offset Act (Byrd Amendment) (Article 22.6 – Japan), US – Offset Act (Byrd Amendment) (Article 22.6 – Korea), US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, paras 3.22-3.23, *US – Offset Act (Byrd Amendment)*

78. In *US – Tuna II (Mexico) (Article 22.6 - US)*, the Arbitrator highlighted that the assumptions that are used in the assessment of the level of nullification or impairment should be reasonable:

> "With respect to the legal standard governing our assessment of the assumptions underlying Mexico's model, we note, and agree with, the statement of the arbitrator in *US – Gambling* that if the estimation of the level of nullification or impairment requires certain assumptions to be made, 'such assumptions should be reasonable, taking into account the circumstances of the dispute.' We also find relevant the finding made in several arbitration proceedings that assumptions should be based on 'credible, factual, and verifiable information.' We will therefore be guided by these principles in our assessment of the assumptions on which Mexico's model is based."[97]

79. In *US – Supercalendered Paper (Article 22.6 – US)*, the Arbitrator recalled prior decisions and explained that any determination of nullification and impairment would be based on assumptions and necessarily be a "reasoned estimate":

> "Any determination of NI, because it is based on assumptions, is necessarily a reasoned estimate. Previous arbitrators have endeavoured to rely on the best information or data that is available in pursuit of formulating such a reasoned estimate, and have declined to accept claims that are too remote, too speculative, or not meaningfully quantified. Moreover, assumptions relied on by the parties should be reasonable given the circumstances of the dispute and should be based on credible, factual, and verifiable information.[98]"[99]

80. In *US – Supercalendered Paper (Article 22.6 – US)*, Canada sought authorization to suspend concessions at an annual level commensurate with the trade effects of any *future* countervailing duties on Canadian imports of any given good that are attributable to the US "ongoing conduct" measure at issue in this dispute, and explained that its request reflected the level of nullification and impairment (NI) that Canada *will* suffer *if* the "ongoing conduct" continues to exist and applies to exports from Canada in the future. The United States argued that, in these circumstances, the present level of NI suffered by Canada was zero; consequently, there was no NI; and thus the level of NI must be set at zero and remain at zero. According to the United States, Canada's request for suspension of concessions was solely concerned with a "hypothetical, future nullification or impairment". In addition, the United States argued that there were no benefits to Canada that "are being impaired" in the present, and that to allow suspension of concessions with respect to solely hypothetical, future NI was contrary to Articles 3.3, 22.4 and 22.7 of the DSU and unsupported by prior arbitrations. The Arbitrator found that, where the suspension of concessions concerns an "as such" violation, nothing in the DSU confines the ability of Article 22.6 arbitrators to authorize suspension of concessions in the future only where it also establishes that benefits accruing to the complaining Member are also *presently* being impaired; the Arbitrator further found that four prior arbitration decisions referred to by the United States offered no support for its argument. In the course of its analysis of this issue, the Arbitrator stated that:

> "Aside from its arguments regarding the DSU and prior arbitration decisions, the United States also infers from the absence of any present CVD measure applied to Canada that used the OFA-AFA Measure that any future NI is 'hypothetical' and should therefore be discounted. This argument by the United States appears to misapprehend the significance of the temporal scope of NI that may arise from the OFA-AFA Measure. This is so because it does not appear self-evident that, merely because there are no CVD determinations applying the OFA-AFA Measure that currently affect CVD

(Article 22.6 – Canada), paras 3.20-3.21, *US – Offset Act (Byrd Amendment) (Article 22.6 – Chile)*, paras 3.19-3.20.

[97] Decision by the Arbitrator, *US – Tuna II (Mexico) (Article 22.6 - US)*, para. 5.16.

[98] (*footnote original*) See, e.g. Decisions by the Arbitrators, *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.40; *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.173; *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.54). See also Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, paras. 1.16 and 3.127, indicating that "'it is necessary to rely only on credible, verifiable information, and not on speculation' in calculating the level of nullification or impairment" (quoting Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.63).

[99] Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.4.

> rates on Canadian products, it follows that Canada's request to suspend concessions is limited to a *hypothetical* future NI in a manner that is relevant for this arbitration proceeding. Indeed, the Arbitrator considers it more accurate to characterize Canada's request as asking for authorization to suspend concessions when *actual* NI (in the form of effects on direct trade flows) arises from future CVD determinations concerning Canadian products and containing the OFA-AFA Measure, a measure which, as the Panel found, is a measure likely to continue in the future. Moreover, the models proposed by both parties are specifically designed to measure NI when and as it arises in the future. Such NI would not be too remote or too speculative such that it should not be quantified in accordance with the prospective model.[100]"[101]

1.6.3.2.3 Indirect benefits

81. The Arbitrator in *EC – Bananas III (US) (Article 22.6 – EC)* considered the notion of "direct or indirect benefits" accruing under the WTO agreements whose nullification or impairment may give rise to an entitlement to obtain compensation or the authorization to suspend concessions or other obligations. In this case, the United States had argued that its exports to Latin America (e.g. fertilizers) used in the production of bananas that would be exported to the European Communities under a WTO-consistent regime should be counted in setting the level of suspension. The Arbitrator concluded that, "to the extent the US assessment of nullification or impairment includes *lost US exports* defined as *US content incorporated in Latin American bananas* (e.g. US fertilizer, pesticides and machinery shipped to Latin America and US capital or management services used in banana cultivation), we do not consider such lost US exports for calculating nullification or impairment in the present arbitration proceeding between the European Communities and the United States":

> "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. As a result, a Member's potential interests in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreements are each sufficient to establish a right to pursue a WTO dispute settlement proceeding. 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.
>
> Over the last decades of GATT dispute settlement practice, it has become a truism of GATT law that lack of *actual* trade cannot be determinative for a finding that no violation of a provision occurred because it cannot be excluded that the absence of trade is the result of an illegal measure. As discussed by the original panel reports, in past dispute settlement practice the non-discrimination provisions have been interpreted to protect "competitive opportunities" or the "effective equality of opportunities" for foreign products which may be undermined by "any laws or regulations which might adversely modify the conditions of competition between domestic and imported products". All these past panel reports concerned the alleged nullification or impairment of potential trade opportunities under the national treatment clause. Also the *US – Superfund* case, from which the wording of Article 3.8 of the DSU establishing the presumption of nullification or impairment in case of an infringement of GATT is drawn, concerned the alleged violation of Article III of GATT. Therefore, the notion underlying the protection of *potential* trade

[100] *(footnote original)* The United States' argument may also be premised more simply on the notion that the OFA-AFA Measure may or may not be used against Canadian exporters in the future. This is true. The nature of the prospective formula itself, however, accounts for this uncertainty because it only results in Canada suspending concessions if actual NI arises. There appears no reason, therefore, to conclude that this kind of uncertainty, in this context, materially supports the United States' argument.

[101] Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, para. 6.19.

> opportunities is *potential* trade between the complaining and the respondent party. Likewise, in the case of an alleged violation of the MFN treatment clause, a dispute would involve trade between the complaining party or a third country, on the one hand, and the respondent party, on the other.
>
> 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 United States under the GATT or the GATS for which the European Communities could face suspension of concessions. To the extent the US assessment of nullification or impairment includes *lost US exports* defined as *US content incorporated in Latin American bananas* (e.g. US fertilizer, pesticides and machinery shipped to Latin America and US capital or management services used in banana cultivation), we do not consider such lost US exports for calculating nullification or impairment in the present arbitration proceeding between the European Communities and the United States."[102]

82. In *US – COOL (Article 22.6 – United States),* the Arbitrator had to determine whether the price suppression losses incurred by Canadian and Mexican livestock producers in their domestic markets could be included in the level of nullification or impairment. The Arbitrator stated that generally market access, which naturally focuses on trade flows, is the relevant indicator for calculating the level of nullification or impairment,[103] It also noted that, by asking that domestic losses should be included in the calculation, the parties sought to go beyond market access.[104] The Arbitrator disagreed with this request, on the following grounds:

> "The foregoing examination of the ordinary meaning of the relevant terms – albeit under separate provisions regarding non-violation claims – is indicative of the potential breadth of the benefits accruing under the covered agreements. However, this in itself does not answer the specific question of whether the claimed domestic losses are within the scope of benefits that are nullified or impaired by a WTO-inconsistency. Even under this broad definition, a 'benefit' is an 'advantage' that is received (or legitimately expected), and it is this 'advantage' that is being nullified or impaired. The benefit that is nullified or impaired, thus, is conceptually distinct from the right from which it flows. Canada and Mexico, in describing the *benefit* as 'the national treatment for Canadian live cattle and hogs in the United States' and 'the right of not having to face a measure like the COOL measure', effectively equate right with benefit. As we see it, the right in question is for imported products not to receive less favourable treatment than domestic products; the extent to which the advantage flowing from the right has been diminished is a separate question from what that right is. Thus, the right to national treatment under the covered agreements does not itself establish or prejudge the scope of benefits accruing therefrom.
>
> …
>
> Second, in terms of relevant context, we see a number of contextual provisions within the DSU as well as the SCM Agreement that weigh against reading 'nullification or impairment of benefits' in the manner suggested by Canada and Mexico. We consider this context in interpreting the provisions of the WTO covered agreements in a coherent manner, giving meaning to all provisions harmoniously. Articles 21.8 and 22.3(d)(ii) of the DSU, which are immediate context to Article 22.7, suggest that the consideration of domestic economic effects is distinct from measuring the nullification or impairment of benefits. Article 21.8 of the DSU applies to cases brought by developing country Members, and directs the DSB to 'take into account' the 'impact on the economy of developing country Members concerned'. This provision (which has not been raised in these proceedings as a basis for including domestic price suppression losses) does not address the level of nullification or impairment that it is

[102] Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, paras. 6.8 and 6.10-6.12.
[103] Decisions by the Arbitrator, *US – COOL (Article 22.6 – United States),* para. 5.12.
[104] Decisions by the Arbitrator, *US – COOL (Article 22.6 – United States),* para. 5.13.

> our mandate to assess under Article 22 of the DSU. In particular, the text of this provision suggests that it relates to a requirement imposed on the DSB to take into account specific factors 'in considering what appropriate action might be taken'. This does not concern arbitration under Article 22.6, but rather the DSB's discharge of its functions in Article 2.1 of the DSU regarding 'the surveillance of implementation of DSB rulings and recommendations' that is the subject of Article 21 of the DSU.
>
> …
>
> Third, in addition to the contextual arguments above, we consider the preamble to the WTO Agreement, which the parties discussed at the substantive meeting. To the extent that the preamble sets out the 'objectives' of the treaty, an initial point is that the term 'objectives' is not to be conflated with the term 'benefits'. This is readily apparent from Article XXIII:1 of the GATT 1994, which refers separately to situations in which 'any benefit … is being nullified or impaired' and those in which 'the attainment of any objective of the Agreement is being impeded'. We note that Article 22 of the DSU does not contain any reference to the objectives of the covered agreements being impeded, but only to nullification or impairment; by contrast, Article 26 of the DSU concerning non-violation and situation complaints is addressed to nullification or impairment or the attainment of any objective being impeded. Thus, the fact that domestic price suppression caused by a WTO-inconsistency may impede certain objectives of the Agreement does not mean that such price suppression is the nullification or impairment of a benefit under Article 22 of the DSU."[105]

1.6.3.2.4 Deterrent or "chilling" effect

83. In *US – 1916 Act (EC) (Article 22.6 – US),* the European Communities had argued that the most damaging effect of the 1916 Act was its chilling effect on the commercial behaviour of European companies and its potential use as a means of intimidation of European companies that were either already active on the United States' market or which had considered entering the market.[106] The Arbitrator was "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." They warned that they did not need to decide, for the purposes of this arbitration, whether a "chilling effect" could be considered to exist for the purposes of WTO dispute settlement. They only needed to determine whether such a chilling effect could 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.[107] The Arbitrator concluded that, "[o]n 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."[108]

1.6.3.2.5 Double-counting of nullification or impairment

84. In *EC – Bananas III (US) (Article 22.6 – EC)*, the United States had argued that its lost exports, including those of goods and services used in the production of Latin-American bananas for the European market, should be counted in setting the level of suspension. After rejecting the United States' argument on "indirect benefits" (see paragraph 81 above), the Arbitrator warned that if overlapping claims by different WTO Members were permissible under the DSU in respect of nullification or impairment suffered because of lost trade in goods, this would result in double counting of nullification and impairment:

> "[I]f *overlapping* claims by different WTO Members as to nullification or impairment suffered because of the same lost trade in goods (and goods and service inputs used in their production or incorporated therein) or the same lost trade in services were permissible under the DSU, the problem of '*double-counting*' of nullification or impairment would arise. Due to the difference in origin of goods or services used as

[105] Decisions by the Arbitrator, *US – COOL (Article 22.6 – United States)*, paras. 5.16, 5.18 and 5.21.
[106] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.64.
[107] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.69.
[108] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.72.

> *inputs* in the banana production, on the one hand, and the origin of the bananas as *end-products*, on the other, *cumulative* requests for compensation or suspension of concessions could be made for the *same* amount of nullification or impairment caused by a Member.
>
> If we were to allow for such '*double-counting*' of the same nullification or impairment in arbitration proceedings under Article 22.6 of the DSU with different WTO Members, incompatibilities with the standard of '*equivalence*' as embodied in paragraphs 4 and 7 of Article 22 of the DSU could arise. Given that the *same* amount of nullification or impairment inflicted on *one* Member cannot simultaneously be inflicted on *another*, the authorizations to suspend concessions granted by the DSB to different WTO Members could exceed the overall amount of nullification or impairment caused by the Member that has failed to bring a WTO-inconsistent measure into compliance with WTO law. Moreover, such *cumulative* compensation or *cumulative* suspension of concessions by different WTO Members for the *same* amount of nullification or impairment would run counter to the general international law principle of proportionality of countermeasures. "[109]

1.6.3.2.6 Presumption of nullification or impairment not evidence of a level of nullification or impairment

85. The Arbitrator in *EC – Bananas III (US) (Article 22.6 – EC)* established that the presumption of nullification or impairment of Article 3.8 of the DSU cannot be taken as evidence proving a particular level of nullification or impairment allegedly suffered by a Member:

> "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."[110]

86. In *US – 1916 Act (EC) (Article 22.6 – US)*, the European Communities had not quantified the level of nullification or impairment but rather had requested a qualitative suspension of concessions (see paragraphs 96-98 below). The United States had claimed that the level of nullification or impairment in this case should then be "zero". The Arbitrator disagreed and indicated that although the level of nullification or impairment had not been specified in quantitative terms by the European Communities, "it clearly is not, and cannot be, 'zero'":

> "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.
>
> …
>
> 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

[109] Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, paras. 6.15-6.16.
[110] Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.10.

> 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."[111]

87. In *US – Offset Act (Byrd Amendment) (Article 22.6),* the requesting parties (Brazil, Canada, Chile, European Communities, India, Japan, Korea and Mexico) partially based their request to suspend concessions on the premise that a violation is a form of nullification or impairment. The Arbitrator distinguished the concept of violation from that of nullification or impairment by noting that, pursuant to Article 3.8 of the DSU, a violation generates a *presumption* of nullification or impairment, not that a violation *is a form* of nullification or impairment. The Arbitrator stated:

> "If violation was conceptually equated … to nullification or impairment, there would be no reason to provide for a possibility to rebut the presumption. The theoretical possibility to rebut the presumption established by Article 3.8 can only exist because violation and nullification or impairment are two different concepts."[112]

1.6.3.2.7 Relevance of post-RPT measures for quantifying the level of nullification and impairment

88. In *US – Tuna II (Mexico) (Article 22.6 – US),* the Arbitrator had to identify the measure that was subject to the assessment of the level of nullification or impairment. Specifically, the Arbitrator had to decide whether the calculation would be made on the basis of the measure adopted by the respondent following the findings of consistency in the first round of compliance proceedings under Article 21.5 of the DSU or the version of the measure that was further modified following those first compliance proceedings, and which therefore was the measure that existed at the time of the arbitration under Article 22.6, but after the expiry of the reasonable period of time given to the respondent. The United States argued that the relevant measure is the one that existed at the time of the arbitration rather than the one that existed at the time of the expiry of the reasonable period of time. The Arbitrator disagreed, noting the importance of the expiry of the reasonable period of time:

> "Given that Article 22.6 of the DSU explicitly refers to 'the situation' described in Article 22.2, that latter provision clearly provides relevant context for the interpretation of Article 22.6. To recall, the text of Article 22.2 provides in relevant part that in a situation where a Member fails to bring a measure previously found by to be inconsistent with the covered agreements into compliance therewith, and where no satisfactory compensation is agreed within 20 days of the expiry of the applicable RPT, the complaining Member may request authorization from the DSB to suspend concessions or other obligations. The 'situation' referred to in Article 22.6 thus occurs where (a) a Member has failed to bring a measure into compliance with the covered agreements before the expiry of the applicable RPT; and (b) the parties have failed to agree on satisfactory compensation.
>
> Read together, Articles 22.2 and 22.6 of the DSU thus establish that a complaining Member may seek authorization to suspend concessions in situations where the responding Member has failed, within the RPT, to bring into conformity a measure that has previously been found to be inconsistent with the covered agreements. It is therefore the continued WTO-inconsistency of the original or a compliance measure (where a compliance measure was taken within the RPT) at the time the RPT expires that forms the basis for any request for authorization to suspend concessions. In turn, a request for authorization to suspend concessions typically triggers a request for

[111] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 5.48-5.50.

[112] Decisions by the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil),* para. 3.23, *US – Offset Act (Byrd Amendment) (Article 22.6 – EC) US – Offset Act (Byrd Amendment) (Article 22.6 – India),* para. 3.23, *US – Offset Act (Byrd Amendment) (Article 22.6 – Japan),* para. 3.23, *US – Offset Act (Byrd Amendment) (Article 22.6 – Korea),* para. 3.23, *US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, paras. 3.70-3.71, *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada),* paras. 3.68-3.69, *US – Offset Act (Byrd Amendment) (Article 22.6 – Chile),* paras. 3.65-3.66,

> arbitration under Article 22.6. There is thus a close connection between an Article 22.6 arbitration and the WTO-inconsistent original measure, or a WTO-inconsistent compliance measure, which existed at the time of expiry of the RPT. Or to put it another way, the origin of, and impetus for, arbitration proceedings under Article 22.6 can be traced back to a WTO-inconsistent measure that existed when the RPT expired, which is either the same original measure that has previously been found to be WTO-inconsistent or a WTO-inconsistent compliance measure taken subsequently (but prior to the expiry of the RPT)."[113]

89. In *US – Tuna II (Mexico) (Article 22.6 - US),* the Arbitrator confronted the issue of whether it could also assess the compliance of the Tuna Measure that the United States had adopted subsequent to the Measure on which the Article 22.6 arbitration proceedings were based. The United States argued that the Arbitrator could do this, while Mexico asserted that nothing in the DSU would allow such an approach.[114] While recognizing that this had been done by one arbitrator acting under Article 22.6, the Arbitrator did not consider it appropriate to take the same approach in these proceedings. In so deciding, the Arbitrator agreed with a systemic concern expressed by Mexico:

> "With respect to the systemic concern expressed by Mexico, we think it is valid. As Mexico notes, the interpretation of Article 22.6 of the DSU advocated by the United States seems to imply that whenever a compliance measure subject to adverse DSB recommendations and rulings is further modified and the responding party claims to have come into compliance, and an Article 22.6 arbitration is subsequently conducted, a new assessment of compliance becomes necessary before the DSB can authorize any suspension of concessions. If, in a situation such as ours where an Article 22.6 arbitration is conducted, new compliance panel proceedings under Article 21.5 needed to be undertaken every time a measure already found to be inconsistent at the expiry of the RPT were modified and compliance was claimed, this could very substantially delay, and in theory effectively thwart, a complaining party's efforts towards obtaining DSB authorization to suspend concessions. This is because it would then presumably be necessary to delay or suspend an Article 22.6 arbitration until after completion of compliance proceedings. If, following such proceedings, there were new adverse panel and/or Appellate Body findings that were adopted by the DSB, the arbitration would resume, subject to possible further delay if yet another modification of the measure occurred in the meantime and compliance were claimed. Such an outcome would not, in our view, be consistent with the DSU's objectives of preserving the rights of Members, including complaining Members, and promoting the prompt settlement of disputes."[115]

90. The Arbitrator in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)* likewise declined to take into account modifications made to one of the measures at issue after the expiry of the reasonable period of time:

> "For *OTR Tires*, however, it is undisputed that this anti-dumping order was in full effect by the expiry of the reasonable period of time. Consequently, if we were to exclude *OTR Tires* from the scope of our determination, we would be ignoring the nullification or impairment caused by the failure of the United States to implement the DSB recommendations and rulings on *OTR Tires* by the expiry of the reasonable period of time. Such an approach would not be consistent with our mandate."[116]

91. As regards the counterfactual compliance scenario, the Arbitrator in *US – Countervailing Measures (China) (Article 22.6 – US)* relied on the final CVD rates determined by the United States Department of Commerce (USDOC) in the relevant Section 129 proceedings as a starting point for the calculation of the duties that would have been WTO-consistent, as suggested by the United States. Although these rates took effect a few weeks after the end of the reasonable period of time (RPT), the Arbitrator noted that their calculation had been multilaterally determined to be WTO-inconsistent in the compliance stage of the same dispute, and China's request for suspension

[113] Decision by the Arbitrator, *US-Tuna II (Mexico) (Article 22.6 - US),* paras. 3.19-3.20.
[114] Decision by the Arbitrator, *US – Tuna II (Mexico) (Article 22.6 - US)*, paras. 3.50-3.51.
[115] Decision by the Arbitrator, *US – Tuna II (Mexico) (Article 22.6 - US)*, para. 3.53.
[116] Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 3.10.

of concessions was based on the WTO-inconsistency of these determinations. In the interest of prompt dispute settlement, the Arbitrator decided to rely on these Section 129 rates instead of those in force at the end of the RPT as suggested by China. In reaching this conclusion, the Arbitrator in *US – Countervailing Measures (China) (Article 22.6 – US)* noted that "as a matter of fact, previous Article 22.6 arbitrators have not followed a uniform approach to this issue", as "[t]here have been prior Article 22.6 arbitrations … in which compliance measures adopted after the expiry of the RPT have been considered for the determination of a counterfactual in an N/I assessment."[117] Accordingly, the Arbitrator held that "the determination of the relevant measure for an N/I assessment must be resolved on a case-by-case basis, depending on the facts and circumstances of the specific dispute."[118] The Arbitrator added that:

> "As argued by China, the existence of an RPT is crucial in the assessment under Article 22.7. According to DSU Article 22.1, the suspension of concessions or other obligations is available in the event that the recommendations and rulings are not implemented within the RPT. That said, as the United States argues, Article 22 directs an arbitrator to base its decision on the 'recommendations and rulings' of the DSB to bring a WTO-inconsistent measure into conformity. Further, under Article 22.4, '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 [caused by the measures]'. As a prior Article 22.6 arbitrator noted, 'it would be the WTO-inconsistency of [the measure at issue] that would be the root cause of any nullification or impairment suffered by [the complainant]'. Thus, in order to be able to determine the level of N/I, it is essential to identify the measures causing such N/I. Whether the Section 129 CVD rates were implemented before or after the expiration of the RPT, does not immediately determine the relevant measure, or version of the measure, for our counterfactual analysis."[119]

1.6.3.3 Standard of equivalence

1.6.3.3.1 Quantitative equivalence

92. In *EC – Bananas III (US) (Article 22.6 – EC)*, the Arbitrator considered the meaning of "equivalence" and noted "that the ordinary meaning of the word '*equivalence*' is 'equal in value, significance or meaning', 'having the same effect", "having the same relative position or function', 'corresponding to', 'something equal in value or worth', also 'something tantamount or virtually identical'. The Arbitrator considered that "this meaning connotes a correspondence, identity or balance between two related levels, i.e. between the level of the concessions to be suspended, on the one hand, and the level of the nullification or impairment, on the other."[120]

93. The Arbitrator in *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)* specifically found that "equivalent" had to be determined in "quantitative" terms:

> "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."[121]

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[117] Decision by the Arbitrator, *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.15.
[118] Decision by the Arbitrator, *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.15.
[119] Decision by the Arbitrator, *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.17.
[120] Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.2.
[121] Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 20.

94. Also in the Arbitrator in *EC – Hormones (Canada) (Article 22.6 – EC)* stated that the "total trade value" could not "exceed the amount of trade impairment we find."[122]

95. Similarly, the Arbitrator in *US – FSC (Article 22.6 – US)* noted that drafters of Article 22.4 had explicitly set a "quantitative" benchmark to the level of suspension of concessions or other obligations that can be authorized:

> "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."[123]

1.6.3.3.2 Qualitative equivalence

96. In *US – 1916 Act (EC) (Article 22.6 – US),* the Arbitrator acknowledged that this was the first time that a complainant had requested authorization to suspend "qualitatively" equivalent (rather than "quantitatively" equivalent) obligations. The Arbitrator compared the case before them with previous cases and concluded that the fact that the requested suspension had not been stated in quantitative terms "[did] not in and of itself render the EC request inconsistent with Article 22":

> "[T]his 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.
>
> …
>
> 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.
>
> 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."[124]

97. The Arbitrator in *US – 1916 Act (EC) (Article 22.6 – US)* further indicated that the question of whether it is possible to determine the WTO-consistency of a "qualitatively equivalent" Article 22.2 request cannot be considered in the abstract but has to be looked at from the point of view of its application:

> "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

[122] Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 21.
[123] Decision by the Arbitrator, *US – FSC (Article 22.6 – US),* paras. 5.46-5.47.
[124] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 5.17 and 5.20-5.21.

> European Communities, then the suspension would, in principle, be consistent with DSU Article 22.4.[125]
>
> - 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.
>
> …
>
> 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."[126]

98. In *US – 1916 Act (EC) (Article 22.6 – US),* the European Communities had requested the right to suspend obligations by enacting a regulation replicating the US 1916 Act which had been found inconsistent with WTO law. The Arbitrator noted that the European Communities request had placed no quantifiable or monetary limits on how the suspension could be applied in practice. The Arbitrator were concerned that the suspension could thus apply to an unlimited amount of US exports to the European Communities. The Arbitrator then rejected the EC argument that the suspension of obligations is somehow "equivalent" because its proposed measure would replicate, or partially replicate, the 1916 Act. The Arbitrator concluded that:

> "Leaving aside for the moment the issue of whether we can examine the EC measure, we would reiterate 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.
>
> …
>
> 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."[127]

1.6.3.3.3 Equivalence and "carousel" type suspension

99. In *EC – Hormones (US) (Article 22.6 – EC)*, the European Communities referred to statements made by the United States Trade Representative and submitted that the United States claimed to be free to resort to a "carousel" type of suspension whereby the concessions and other obligations subject to suspension would change every now and then, in particular in terms of product coverage. The European Communities claimed that in so doing the United States would decide not only which concessions or other obligations would be suspended, but also unilaterally would decide whether the level of such suspension of concessions or other obligations was

[125] (*footnote original*) 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. Emphasis original.

[126] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US),* paras. 5.21 and 5.23.

[127] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US),* paras. 5.32 and 5.34.

equivalent to the level of nullification and impairment determined by arbitration. Replying to the questions by the Arbitrator, the United States submitted that although nothing in the DSU prevented future changes to the list of products subject to suspension, the United States had no intention of making such changes. The Arbitrator decided to "assume that the US – in good faith and based upon this unilateral promise – will not implement the suspension of concessions in a 'carousel' manner" and that "therefore [they] d[id] not need to consider whether such an approach would require an adjustment in the way in which the effect of an authorized suspension is calculated".[128] The Arbitrator further considered:

> "As explained above, we do not have jurisdiction to set a definite list of products that can be subject to suspension. It is for the US to draw up that list. In our view, it has to do so within the bounds of the product list put before the DSB. We also agree with the EC that once this list is made or once the US has defined a method of suspension, that list or method necessarily needs to cover trade in an amount not exceeding (i.e. equivalent to or less than) the nullification and impairment we find. This matter of equivalence is not one to be determined exclusively by the US. The US has an obligation to ensure equivalence pursuant to Article 22.4 of the DSU. In its reply to our questions, the US submitted that it 'will scrupulously comply with the requirement that the level of suspension of concessions not exceed the level of nullification or impairment to be found by the Arbitrator'. "[129]

1.6.3.3.4 Exception to "equivalence" standard: arbitrations pursuant to Article 4.10 of the SCM Agreement

100. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrator considered the provisions of Article 4.11 of the SCM Agreement as special or additional rules and recalled that the concept of nullification or impairment is absent from Articles 3 and 4 of the SCM Agreement. In the Arbitrator's view, there is no legal obligation in that context that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment. The Arbitrator thus concluded that, when dealing with a prohibited export subsidy, an amount of countermeasures that corresponds to the total amount of the subsidy is "appropriate". See paragraph 114 below.

101. In *US – FSC (Article 22.6 – US)*, the Arbitrator recalled that "Articles 4.10 and 4.11 of the SCM Agreement are 'special or additional rules' under Appendix 2 of the DSU, and that in accordance with Article 1.2 of the DSU, it is possible for such rules or procedures to prevail over those of the DSU. There can be no presumption, therefore, that the drafters intended the standard under Article 4.10 to be necessarily coextensive with that under Article 22.4 so that the notion of 'appropriate countermeasures' under Article 4.10 would limit such countermeasures to an amount 'equivalent to the level of nullification or impairment' suffered by the complaining Member. Rather, Articles 4.10 and 4.11 of the SCM Agreement use distinct language and that difference must be given meaning."[130]

1.6.3.3.5 Exception: standard of appropriateness in subsidy arbitrations

102. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrator, although indicating that they were following the approach adopted by previous arbitrators, used the standard of appropriateness, that had been rejected in *EC – Bananas III (US) (Article 22.6 – EC)*. This was because Article 4.11 of the *SCM Agreement* calls for the Arbitrators to determine the "*appropriate countermeasures*". The Arbitrator indicated that "[a]s to our task, we follow the approach adopted by previous arbitrators under Article 22.6 of the DSU. We will have not only to determine whether Canada's proposal constitutes '*appropriate countermeasures*', but also to determine the level of countermeasures we consider to be *appropriate* in case we find that Canada's level of countermeasures is not appropriate, if necessary by applying our own methodology."[131]

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[128] Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC),* para. 22.
[129] Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC),* para. 23.
[130] Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.47.
[131] Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.18.

1.7 Article 22.8

1.7.1 "until such time as the measure found to be inconsistent with a covered agreement has been removed"

1.7.1.1 Allocation of burden of proof in a post-suspension situation

1.7.1.1.1 General

103. The issue of allocation of burden of proof under Article 5.7 of the SPS Agreement was decided by the Appellate Body in *US/Canada – Continued Suspension*. The Appellate Body began by setting the basic guidelines in case of an inquiry on substantive compliance under the DSU and subsequently determined the exact onus borne by each party:

> "The allocation of the burden of proof in the context of claims arising under Article 22.8 is a function of the following considerations. First, what is the nature of the cause of action that is framed under Article 22.8. Second, the practical question as to which party may be expected to be in a position to prove a particular issue. Third, consideration must be given to the requirements of procedural fairness.
>
> Since the suspension of concessions is a remedy of last resort imposed after an elaborate multilateral dispute settlement process, in our view, it is appropriate that the Member whose measure has brought about the suspension of concessions should make some showing that it has removed the measure found to be inconsistent by the DSB in the original proceedings, so that normality can be lawfully restored. This requires that the original respondent will have an onus to show that its implementing measure has cured the defects identified in the DSB's recommendations and rulings. The quantum of proof entailed by this is a clear description of its implementing measure, and an adequate explanation regarding how this measure rectifies the inconsistencies found in the original proceedings, so as to place the Article 21.5 Panel in a position to make an objective assessment of the matter and, in the absence of rebuttal, to rule in favour of the original respondent."[132]

104. Following the reasoning discussed in paragraph 103 above, the Appellate Body in *US/Canada – Continued Suspension* held that a Member which, in an effort to rectify inconsistencies found in the original proceedings, replaces a ban under Article 5.1 with a provisional ban under Article 5.7, bears the burden of providing an adequate explanation of how the provisional ban under Article 5.7 rectifies the inconsistencies found in the original proceedings:

> "[W]e explained how we see the allocation of the burden of proof in a post suspension situation in which the parties disagree as to whether an implementing measure brings about substantive compliance. The European Communities had to provide a clear description of its implementing measure, and an adequate explanation regarding how this measure rectifies the inconsistencies found in the original proceedings. … The European Communities replaced the original definitive ban with a provisional ban and invoked Article 5.7 as an alternative justification to Article 5.1. Thus, the European Communities had to provide an adequate explanation of how the provisional ban taken under Article 5.7 rectifies the inconsistencies found in *EC – Hormones*. Such explanation had to include, *inter alia*, an identification of the insufficiencies in the relevant scientific evidence that precluded the European Communities from performing a sufficiently objective risk assessment."[133]

105. The Appellate Body, in *US/Canada – Continued Suspension*, further held that the panel wrongfully allocated the burden of proof by basing its findings on a presumption of good faith compliance by one party resulting in the making of ambiguous and premature statements on the onus born by each party:

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[132] Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 361 and 362.
[133] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 716.

> "We have ... several ... concerns with the Panel's analysis. First, ... we do not believe that it was sufficient for the European Communities to have based its case under Article 22.8 on a presumption of good faith. The European Communities may be presumed to have acted in good faith in adopting Directive 2003/74/EC, but this does not respond to the question as to whether Directive 2003/74/EC achieved substantive compliance. Thus, it was incorrect for the Panel to have relied on a presumption of good faith compliance for purposes of determining the allocation of the burden of proof and finding that the European Communities established a *prima facie* case.
>
> Secondly, we have difficulty following the reasoning behind the Panel's conclusion that the presumptions of good faith enjoyed by each party 'eventually 'neutralized' each other' and that '[u]ltimately, each party had to prove its specific allegations in response to the evidence submitted by the other party.' The statement is ambiguous about which party made which allegation and how the burden of proof was allocated. In the section in which the Panel describes the scope of its review and circumscribes its terms of reference, the Panel states that, in submissions subsequent to the first written submission, 'the European Communities has argued the compatibility of its implementing measure with the provisions referred to in the quotation above (i.e. Article[s] 5.1 and 5.7 of the *SPS Agreement*)'. However, a few paragraphs later, the Panel refers to the allegation of incompatibility with Article 5.1 of the *SPS Agreement* as an allegation made by the United States and Canada. Thus, it is difficult to understand which party had the burden of proving which allegation."[134](footnote omitted)

1.7.1.1.2 Standard of review

106. The Appellate Body in *US/Canada – Continued Suspension*, set the extent and limit of a panel's standard of review in a post-suspension situation, where parties did not initiate 21.5 proceedings but where the panel performs "functions similar to those of an Article 21.5 Panel"[135]:

> "Like any other Panel, an Article 21.5 Panel established in the post-suspension stage, at the request of the original respondent, would be bound to make an objective assessment of the matter. The ultimate issue before such a Panel is whether the measure found to be inconsistent with a covered agreement has been removed. We have interpreted 'removed' to mean substantive compliance. The question is which party bears the burden of proof in respect of the issues of substantive compliance. …
>
> … this case involves a disagreement as to the consistency of a measure taken to comply and, therefore, should have properly been brought under Article 21.5 of the DSU. We also explained how the burden of proof should have been allocated had the dispute been brought under Article 21.5. Although these proceedings were not brought under Article 21.5, the Panel said that it 'perform[ed] functions similar to those of an Article 21.5 Panel'. The European Communities had to provide a clear description of its implementing measure, and an adequate explanation regarding how this measure rectifies the inconsistencies found in the original proceedings, so as to have placed the Panel in a position to make an objective assessment of the matter and, in the absence of rebuttal, to rule in favour of the original respondent."[136]

107. The Appellate Body *US/Canada – Continued Suspension*, in assessing the validity of provisional implementing measures needed to address the insufficiency of the scientific evidence under Article 5.7 of the SPS Agreement, also discussed the issue of a panel's standard of review. The Appellate Body agreed that the panel is bound to limit its review to the insufficiencies expressly identified by the Member who adopted the measure[137], stating that it did "not consider

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[134] Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 581-583.

[135] Panel Reports, *US – Continued Suspension*, para. 7.376; and *Canada – Continued Suspension*, para. 7.373.

[136] Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 359 and 580.

[137] In its reports, the panel stated:

> "Whereas, in the application of the burden of proof in relation to Article 5.7 of the *SPS Agreement*, it should be for the party challenging the applicability of Article 5.7 to make a prima facie case that the relevant scientific evidence regarding the five hormones is sufficient, it is also for the European Communities, in application of the principle that it is for each party to prove its allegations, to support

that the Panel erred by limiting its review to the insufficiencies identified by the European Communities".[138]

1.7.1.1.3 "application" of the suspension of concessions

108. The Arbitrator in *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)* found that Article 22.8 is concerned with the "application of the suspension of concessions or other obligations, in contrast to Article 22.7 which is concerned with the granting of "authorization" by the DSB to suspend concessions. The Arbitrator found it clear that "Article 22.8 addresses a post-authorization situation – a situation in which the suspension of concessions or other obligations has already been authorized by the DSB – and not a pre-authorization situation".[139]

109. The Arbitrator further went on to find that Article 22.8 does not preclude the DSB from "authorizing" countermeasures in a pre-authorization scenario "where the DSB has ruled after compliance proceedings that the responding party has not brought itself into conformity by the end of the implementation period and the complaining party requests that the DSB grant it authorization to take countermeasures on the basis of the DSB's prior compliance ruling".[140]

1.7.1.1.4 Compliance status

110. The Arbitrator in *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)* found that the compliance status of the responding party is the deciding factor in determining the maximum permissible duration of countermeasures, rather than the ongoing effects of the measure that was found to be WTO-inconsistent.[141]

1.8 Relationship with other WTO Agreements

1.8.1 Arbitrations pursuant to Article 4.10 and 4.11 of the SCM Agreement

1.8.1.1 Special or additional rules

111. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrator indicated that they read the provisions of Article 4.11 of the SCM Agreement as special or additional rules:

> "We read the provisions of Article 4.11 of the SCM Agreement as special or additional rules. In accordance with the reasoning of the Appellate Body in *Guatemala – Cement*, we must read the provisions of the DSU and the special or additional rules in the SCM Agreement so as to give meaning to all of them, except if there is a conflict or a difference."[142]

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its own allegations with appropriate evidence. This also has to be considered in the light of the fact that, even though in this case the European Communities is the complainant, it also argues as part of its allegations under Article 22.8 of the DSU that its implementing measure complies with Article 5.7 of the *SPS Agreement.* Moreover, we recall the consequence of the presumption of consistency with the *SPS Agreement* and GATT 1994 of measures which conform to international standards, guidelines and recommendations on the risk assessments on which such measures are based. Since, in that context, the European Communities argues that the relevant scientific evidence is insufficient, we consider that it is for the European Communities to identify the issues for which such evidence is insufficient.
Therefore, we do not consider that, as Panel, we have any obligation to go beyond the insufficiencies identified by the European Communities. ... we deem it appropriate to limit our review exclusively to the "insufficiencies" expressly identified by the European Communities in its submissions to the Panel."

Panel Reports, *US – Continued Suspension*, paras. 7.652-7.653; and *Canada – Continued Suspension*, paras. 7.629-7.630.

[138] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 716.

[139] Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 2.22.

[140] Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 2.23.

[141] Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.49.

[142] Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.57.

112. In *US – FSC (Article 22.6 – US)*, the Arbitrator recalled Article 30 of the SCM Agreement and concluded that Article 22.6 of the DSU applies to arbitrations pursuant to Article 4.11 of the SCM Agreement although this latter provision would prevail in case of conflict:

> "We also recall the terms of Article 30 of the *SCM Agreement*, which clarifies that the provisions of the *DSU* are applicable to proceedings concerning measures covered by the *SCM Agreement*. Article 22.6 of the *DSU* therefore remains relevant to arbitral proceedings under Article 4.11 of the *SCM Agreement*, as illustrated by the textual reference made to Article 22.6 of the *DSU* in that provision. However, the special or additional rules and procedures of the *SCM Agreement*, including Articles 4.10 and 4.11, would prevail to the extent of any difference between them."[143]

1.8.1.2 Exception to the requirement of equivalence to the level of nullification or impairment

113. The Arbitrator in *Brazil – Aircraft (Article 22.6 – Brazil)* rejected Brazil's argument that the countermeasures must be equivalent to the level of nullification or impairment pursuant to Article 22.4 of the DSU, noting that the concept of nullification or impairment is not found in Articles 3 and 4 of the SCM Agreement. The Arbitrator explained:

> "A first approach would be to consider that the concept of nullification or impairment does not apply to Article 4 of the SCM Agreement. We note in this respect that, in relation to actionable subsidies, Article 5 refers to nullification or impairment as only one of the three categories of adverse effects. This could mean that another test than nullification or impairment could also apply in the context of Article 4 of the SCM Agreement.
>
> That said, we note that the Original Panel concluded that, since a violation had been found, a *prima facie* case of nullification or impairment had been made within the meaning of Article 3.8 of the DSU, which Brazil had not rebutted. In that context, we are more inclined to consider that no reference was expressly made to nullification or impairment in Article 4 of the SCM Agreement for the following reasons:
>
> (a) a violation of Article 3 of the SCM Agreement entails an irrebuttable presumption of nullification or impairment. It is therefore not necessary to refer to it;
>
> (b) the purpose of Article 4 is to achieve the *withdrawal* of the prohibited subsidy. In this respect, we consider that the requirement to withdraw a prohibited subsidy is of a different nature than removal of the specific nullification or impairment caused to a Member by the measure. The former aims at removing a measure which is presumed under the WTO Agreement to cause negative trade effects, irrespective of who suffers those trade effects and to what extent. The latter aims at eliminating the effects of a measure on the trade of a given Member;
>
> (c) the fact that nullification or impairment is established with respect to a measure does not necessarily mean that, in the presence of an obligation to withdraw that measure, the level of appropriate countermeasures should be based only on the level of nullification or impairment suffered by the Member requesting the authorisation to take countermeasures."[144]

114. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrator further indicated that they read the provisions of Article 4.11 of the SCM Agreement as special or additional rules and recalled that the concept of nullification or impairment is absent from Articles 3 and 4 of the SCM Agreement.

[143] Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 2.6.
[144] Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.47-3.48.

The Arbitrator considered that, accordingly, in that context there was no legal obligation that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment. The Arbitrator thus concluded that, when dealing with a prohibited export subsidy, an amount of countermeasures that corresponds to the total amount of the subsidy is "appropriate":

> "We read the provisions of Article 4.11 of the SCM Agreement as special or additional rules. In accordance with the reasoning of the Appellate Body in *Guatemala – Cement*, we must read the provisions of the DSU and the special or additional rules in the SCM Agreement so as to give meaning to all of them, except if there is a conflict or a difference. While we agree that in practice there may be situations where countermeasures equivalent to the level of nullification of impairment will be appropriate, we recall that the concept of nullification or impairment is absent from Articles 3 and 4 of the SCM Agreement. In that framework, there is no legal obligation that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment.
>
> On the contrary, requiring that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment would be contrary to the principle of effectiveness by significantly limiting the efficacy of countermeasures in the case of prohibited subsidies. Indeed, as shown in the present case, other countermeasures than suspension of concessions or obligations may not always be feasible because of their potential effects on other Members. This would be the case of a counter-subsidy granted in a sector where other Members than the parties compete with the products of the parties. In such a case, the Member taking the countermeasure may not be in a position to induce compliance.
>
> We are mindful that our interpretation may, at a first glance, seem to cause some risk of disproportionality in case of multiple complainants. However, in such a case, the arbitrator could allocate the amount of appropriate countermeasures among the complainants in proportion to their trade in the product concerned. The 'inducing' effect would most probably be very similar.
>
> For the reasons set out above, we conclude that, when dealing with a prohibited export subsidy, an amount of countermeasures which corresponds to the total amount of the subsidy is 'appropriate'. "[145]

115. In *US – FSC (Article 22.6 – US)*, the Arbitrator considered that, since Articles 4.10 and 4.11 of the SCM Agreement may prevail over the provisions of the DSU, there can be no presumption that the drafters intended the standard under Article 4.10 of the SCM Agreement to be "necessarily coextensive" with that under Article 22.4 of the DSU:

> "It should be recalled here that Articles 4.10 and 4.11 of the *SCM Agreement* are 'special or additional rules' under Appendix 2 of the *DSU*, and that in accordance with Article 1.2 of the *DSU*, it is possible for such rules or procedures to prevail over those of the *DSU*. There can be no presumption, therefore, that the drafters intended the standard under Article 4.10 to be necessarily coextensive with that under Article 22.4 so that the notion of 'appropriate countermeasures' under Article 4.10 would limit such countermeasures to an amount 'equivalent to the level of nullification or impairment' suffered by the complaining Member. Rather, Articles 4.10 and 4.11 of the *SCM Agreement* use distinct language and that difference must be given meaning.
>
> Indeed, reading the text of Article 4.10 in its context, one might reasonably observe that if the drafters had intended the provision to be construed in this way, they could certainly have made it clear. Indeed, relevant provisions both elsewhere in the *SCM Agreement* and in the *DSU* use distinct terms to convey precisely such a standard as described by the United States, in so many words. Yet the drafters chose terms for this provision in the *SCM Agreement* different from those found in Article 22.4 of the

[145] Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.57-3.60.

> DSU. It would not be consistent with effective treaty interpretation to simply read away such differences in terminology.
>
> We therefore find no basis in the language itself or in the context of Article 4.10 of the *SCM Agreement* to conclude that it can or should be read as amounting to a 'trade effect-oriented' provision where explicitly alternative language is to be read away in order to conform it to a different wording to be found in Article 22.4 of the *DSU*.
>
> We would simply add that, while we consider that the precise difference in language must be given proper meaning, this goes no further than that. Our interpretation of Article 4.10 of the *SCM Agreement* as embodying a different rule from Article 22.4 of the *DSU* does not make the *DSU* otherwise inapplicable or redundant."[146]

116. As regards the subsidy-specific aspects of the determination of "appropriate countermeasures", see the Section on the SCM Agreement.

1.8.2 Articles 7.9 and 7.10 of the SCM Agreement

117. In *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – United States)*, the Arbitrator noted that its arbitration proceeding was governed by both Article 7.10 of the SCM Agreement and Article 22.6 of the DSU. Highlighting that Article 22.7 of the DSU defines the mandate of the arbitrator somewhat differently than Article 7.10 of the SCM Agreement, and that Article 7.10 constitutes one of the "special or additional rules and procedures" listed in Appendix 2 of the DSU, the Arbitrator stated that it would conduct its arbitration with reference to the mandate set forth in Article 7.10 of the SCM Agreement:

> "This arbitration proceeding is governed by both Article 7.10 of the SCM Agreement and Article 22.6 of the DSU.[147] Article 22.7 of the DSU defines the mandate for an arbitrator acting exclusively under Article 22.6; that is, the arbitrator 'shall determine whether the level of suspension is equivalent to the level of nullification or impairment' Article 7.10 of the SCM Agreement defines the mandate of an arbitrator somewhat differently. It states that in the event that a party to a dispute requests arbitration under Article 22.6 of the DSU, the arbitrator 'shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist'. In accordance with the status of Article 7.10 of the SCM Agreement as one of the special or additional rules and procedures listed in Appendix 2 of the DSU, we conduct this arbitration with reference to the mandate set out in Article 7.10 of the SCM Agreement.
>
> Articles 7.9 and 7.10 constitute 'special or additional rules and procedures' under Appendix 2 of the DSU. According to Article 1.2 of the DSU, '[t]o the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail'."[148]

118. Later in its decision, the Arbitrator noted the textual connections between Articles 22.2 and 22.6 of the DSU, on the one hand, and Articles 7.9 and 7.10, on the other hand. Specifically, the Arbitrator highlighted that Article 22.6 of the DSU is cross-referenced in Article 7.10 of the SCM Agreement, and that Articles 22.2 and 22.6 of the DSU contain conditional language similar to Article 7.9 of the SCM Agreement.[149] The Arbitrator then referred to an interpretation of Articles 22.2 and 22.6 of the DSU providing that the "nullification or impairment" to be valued by an

[146] Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, paras. 5.47-5.50.

[147] *(footnote original)* Article 7.10 refers explicitly to a request for arbitration under Article 22.6 of the DSU, thereby confirming that arbitrations governed by Article 7.10 of the SCM Agreement are, at the same time, governed by Article 22.6 of the DSU. Article 4.11 of the SCM Agreement, which begins with an introductory clause that states: "In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the [DSU]", likewise confirms that arbitrations under Article 4.11 are, at the same time, arbitrations under Article 22.6 of the DSU.

[148] Decision by the Arbitrator, *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, paras. 3.3-3.4 (referring to Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 3.4 and fns 75 and 76 thereto).

[149] Decision by the Arbitrator, *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 6.35.

arbitrator is that caused by a measure: (a) that has been evaluated in terms of whether a respondent has failed to comply with DSB recommendations and rulings, and (b) *that exists at the end of the deadline to comply*. In the light of this interpretation and the textual connections mentioned above, the Arbitrator considered that arbitrators under Article 7 of the SCM Agreement should also value the effects of measures that result from the respondent's failure to comply with the DSB's recommendations and rulings:

> "The arbitrator in *EC – Bananas III (US) (Article 22.6 – EC)* explained that the language of Articles 22.2 and 22.6 of the DSU 'confirm[ed]' that 'any assessment of the level of nullification or impairment [as mandated under Article 22.7 of the DSU] *presupposes an evaluation of consistency or inconsistency with WTO rules of the implementation measures* taken by the [respondent]'. In other words, the 'nullification or impairment' that should be valued by an arbitrator under Article 22.7 is that caused by: (a) a measure with respect to which there has been an evaluation regarding whether the responding Member failed to comply with recommendations and rulings of the DSB; and (b) that exists at the end of deadline to comply. We agree with this interpretation of Articles 22.2 and 22.6. We further recall that suspension of concessions or other obligations authorized under Article 22 of the DSU and countermeasures authorized under Article 7 of the SCM Agreement have the same purpose, i.e. to induce compliance. Thus, we observe that there is no compelling reason to conclude that Article 22 of the DSU and Article 7 of the SCM Agreement should be interpreted differently in this specific context. That is, under both provisions, arbitrators should value the effects of measures that occur as a result of the failure of the respondent to comply with the relevant recommendations and rulings of the DSB."[150]

Current as of: December 2023

[150] Decision by the Arbitrator, *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 6.35.