

- a. suspension of tariff concessions and other related obligations under the GATT 1994 on a list of US products to be established in due course;
- b. suspension of concessions and other obligations under the SCM Agreement; and
- c. under the GATS, suspension of horizontal or sectoral commitments contained in the consolidated EU Schedule of Specific Commitments, as supplemented to incorporate the individual Schedules of Specific Commitments of its Member States, with regard to all principal sectors identified in the Services Sectoral Classification List.<sup>602</sup>

7.2. In response, the United States claimed that the European Union did not follow the principles and procedures set forth in Article 22.3 in considering what countermeasures to take.<sup>603</sup> The United States thus reserved the right to raise a claim before the Arbitrator that the European Union had not followed the principles and procedures set forth in Article 22.3. It is for the United States to make out a *prima facie* case that the European Union did not follow the principles and procedures in Article 22.3.<sup>604</sup>

7.3. 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.<sup>605</sup> Accordingly, we consider that a complaining party's request under Article 22.3(c) must be treated as DSU-consistent until proven otherwise.<sup>606</sup> 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.

## 8 CONCLUSION

8.1. For the reasons set out above, the Arbitrator concludes as follows:

- a. with reference to Articles 7.10 of the SCM Agreement and 22.6 of the DSU, the level of countermeasures "commensurate with the degree and nature of the adverse effects determined to exist" amounts to USD 3,993,212,564 per annum; and
- b. with reference to Article 22.3 of the DSU, the United States has not demonstrated that the European Union failed to follow the principles and procedures set forth in Article 22.3 of the DSU in determining that it is not practicable or effective to suspend concessions or other obligations in trade in goods and that the circumstances are serious enough.

8.2. The European Union may therefore request authorization from the DSB to take countermeasures with respect to the United States at a level not exceeding, in total, USD 3,993,212,564 annually. These countermeasures may take the forms enumerated in points (1)-(3) in the penultimate paragraph of document WT/DS353/17, which are also referenced in paragraph 7.1 a.-c. above.

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<sup>602</sup> Recourse to Article 22.2 of the DSU, and Articles 4.10 and 7.9 of the SCM Agreement by the European Union, WT/DS353/17.

<sup>603</sup> Recourse to Article 22.6 of the DSU by the United States, WT/DS353/19.

<sup>604</sup> Decisions by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 7.3; *US – Upland Cotton (Article 22.6 – US II)*, para. 5.55; *US – Gambling (Article 22.6 – US)*, para. 2.27; and *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 59.

<sup>605</sup> Appellate Body Report, *US – Carbon Steel*, para. 157.

<sup>606</sup> Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 7.5.