UNITED STATES – LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING DUMPING MARGINS ("ZEROING")

RECOURSE TO ARTICLE 22.6 OF THE DSU BY THE UNITED STATES

(DS294)

Response of the United States to Questions from the Arbitrator

May 7, 2010

UNITED STATES - LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING DUMPING MARGINS ("ZEROING") (DS294)

Response to Questions from the Arbitrator to the Parties

Questions to both parties:

1. Please clarify your understanding of the mandate of the Arbitrator in these proceedings. In addressing this question, please indicate:

(a) whether you agree with the determinations made by prior arbitrators acting under Article 22.6 of the DSU to the effect that, in the event that they find that the level of suspension of proposed by the requesting Member is not equivalent to the level of nullification or impairment, it is appropriate for the Arbitrator to proceed with a further calculation of what such a level would be.

(b) how the Arbitrator should proceed, in the event that it finds, for instance, that the methodology proposed by the requesting Member is acceptable in principle but that some aspects of the application of that methodology as proposed by the requesting Member are inadequate. Would the Arbitrator then be entitled to adjust the application of the methodology and to seek from the parties the information required for such adjustments, or would it be compelled to reject in their entirety the methodology and associated calculations as proposed by the requesting Member?

1. The United States agrees with the determinations made by prior arbitrators acting under Article 22.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") that, if an arbitrator finds that the level of suspension of concessions or other obligations proposed by the requesting Member is not equivalent to the level of nullification or impairment, it is appropriate for the arbitrator to proceed with a determination of what level of suspension of concessions or other obligations would be equivalent to the level of nullification or impairment.

2. Article 22.7 of the DSU states that 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 . . . ." This appears to presume that the arbitrator will reach a decision with respect to what level of suspension of concessions or other obligations would be equivalent to the level of nullification or impairment. Moreover, the DSU does not contemplate a subsequent proceeding under which a requesting Member would submit a revised proposed level of suspension of concessions or other obligations. Indeed, Article 22.7 of the DSU appears to preclude such a subsequent arbitration on a revised request when it states that the "parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration."

3. As part of the exercise of determining what level of suspension of concessions or other obligations would be equivalent to the level of nullification or impairment, the arbitrator would be free to apply the methodology that it determines to be appropriate, including a methodology proposed by the requesting Member, with adjustments, a methodology proposed by the Member concerned, or some other methodology. Also as part of that exercise, the arbitrator could request information relevant to the determination.[1]

4. In this case, for the reasons set forth below and in the U.S. Written Submission, the United States respectfully requests the Arbitrator to reject the level of suspension proposed by the EU and, using the methodology set forth by the United States, determine that the level of suspension in this dispute should not exceed, in the aggregate, $2,873,396 annually.

2. In paragraph 79 of its Written Submission, the EU states that certain matters are "no longer within the Arbitration Panel's terms of reference". Similarly, in paras 80 and 109 of its Written Submission, the EU notes that certain matters are not in dispute between the parties "and are outside the Arbitration Panel's jurisdiction". Please clarify, in light of these statements, what you understand the Arbitrator's jurisdiction to be in this case, in light in particular of the definition of the Arbitrator's mandate in Article 22.7 of the DSU. Please clarify also in this context whether you consider that the terms of reference of the Arbitrator may evolve or change in the course of the proceedings and, if so, on what basis.

5. The EU argues that the arbitrator's jurisdiction fluctuates and is narrowly circumscribed through a complex series of shifting limitations apparent only to the EU. However, the EU's attempt to confine the Arbitrator's role in this arbitration to one that suits the EU's purposes is incorrect and lacks any legal basis.

6. The United States is not sure what the EU means by "jurisdiction" (a term used in the DSU only to refer to a Member's jurisdiction[2], and not used in relation to an arbitrator). However, the Arbitrator's mandate does not expand or contract, or evolve or change, during the course of the proceeding, because that mandate is set by the text of DSU Articles 22.6 and 22.7.[3]

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[1] The United States notes that Article 13 of the DSU would not apply to arbitration proceedings under Article 22.6 of the DSU, since Article 13 applies only to a "panel," and for the reasons previously articulated in the U.S. Comments on Japan's Request to Participate in the Arbitration, an arbitrator is not a panel within the meaning of the DSU.

[2] Article 13 of the DSU states "before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member".

[3] The United States notes that previous arbitrators have used the term "mandate" in their decisions rather than the term "terms of reference" which is found in part of the Arbitrator's question. *See United States – Subsidies on Upland Cotton* (WT/DS267/ARB1), para. 2.3 ("the following mandate for the arbitrator"); *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/ARB), para. 2.9 ("In light of these

7. The mandate of the Arbitrator is outlined in Article 22.7 of the DSU. Specifically, the Arbitrator is (1) to "determine whether the [proposed] level of . . . suspension is equivalent to the level of nullification or impairment" and, when raised as an issue, (2) to determine whether the principles and procedures set forth in paragraph 3 of Article 22 have been followed. The Arbitrator "may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement."

8. Article 22.7 further directs that the DSB be promptly informed of the arbitrator's decision. The DSB for its part will "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." As discussed in response to Question 1 above, this directive to the DSB presumes that the arbitrator, in determining whether the proposed level of suspension is equivalent to the level of nullification or impairment, will also determine as necessary the level of nullification or impairment that is equivalent.

9. Notwithstanding the EU's sharp delineations of what the Arbitrator can and cannot consider in reaching its determination, there is nothing in the text of the DSU to indicate that the Arbitrator is precluded from considering an issue or seeking information on a particular matter should the Arbitrator deem it necessary in fulfilling its task as set forth under Article 22.7.

3. Please clarify your understanding of the allocation of the burden of proof in these proceedings. In addressing this question, please explain:

(a) whether you agree that the US bears the burden of proving that the level of suspension proposed by the EU is not "equivalent to the level of nullification or impairment";

(b) what the allocation of burden of proof implies in terms of treatment of evidence submitted by the parties; and

(c) what the allocation of burden of proof implies in terms of the Arbitrator's authority to seek factual information or clarifications from the parties.

10. The United States agrees that the party objecting to the level of suspension proposed (and thereby the party referring the matter to arbitration) has the initial burden of showing that the

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elements, we understand our mandate in relation to Antigua's proposed level of suspension to require us to determine whether the annual amount of US$3.443 billion proposed by Antigua is equivalent to the level of nullification or impairment of benefits accruing to Antigua under the GATS as a result of the failure of the United States to bring its GATS-inconsistent measures into conformity with its obligations. If we find that it is not, then we will need to determine what the level of such nullification or impairment is."); *United States – Anti-Dumping Act of 1916* (EC), para. 4.5 ("the mandate of the arbitrators is to determine whether the level of suspension of concessions or other obligations sought by the complaining party is equivalent to the level of nullification or impairment sustained by the complaining party as a result of the failure of the responding party to bring its WTO-inconsistent measures into compliance.").

proposed level of suspension is not equivalent to the level of nullification or impairment.

11. However, burden of proof does not deal with the treatment or weighing of the evidence, rather it deals with which party must initially present sufficient evidence to create a presumption that its claim is correct. As the Appellate Body explained in *Wool Shirts*, if the party with the burden of proof "adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."[4] As a result, the allocation of the burden of proof does not affect the treatment of evidence submitted by either party to the arbitration proceeding. Rather, as the Appellate Body has explained, this is a function not of the burden of proof but of the measure and provision of the covered agreement at issue: "precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case."[5]

12. In other words, this burden does not mean that the allegations and factual assertions of the EU enjoy any presumption of correctness or any special weight simply because the EU has put them forth in this arbitration. The situation is analogous to the situation in an arbitration under Article 21.3(c) of the DSU, where the fact that the responding party bears the burden of proof does not equate to any special weight or significance or presumption in favor of the evidence or assertions made by the responding party.[6]

13. The United States has met its burden of showing that the EU's proposed level of suspension of concessions or other obligations is not equivalent to the level of nullification and impairment.

In fact, the EU's proposed level of suspension grossly exceeds the level of nullification or impairment. For example:

a. Using the most accurate data available, the best proxies available to estimate the actual impact of zeroing on antidumping margins, and the most specific economic

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[4] *Appellate Body Report, United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, page 13.

[5] *Id.*

[6] *See, e.g.,* Award of the Arbitrator, *Colombia – Indicative Prices and Restrictions on Ports of Entry: Arbitration under Article 21.3(c) of the DSU*, WT/DS366/13, circulated 2 October 2009, para. 67 ("I am guided by previous arbitrators' awards that place the burden on the implementing Member to demonstrate that, if immediate compliance is impracticable, the period of time it proposes constitutes a 'reasonable period of time.' However, *this does not absolve the other Member from producing evidence in support of its contention* that the period of time requested by the implementing Member is not 'reasonable', and a shorter period of time for implementation is warranted.") (footnotes omitted and emphasis added).

factors available for the products at issue, the level of nullification or impairment is no greater in the aggregate than $2,873,396 annually.

b. The EU's proposed level of suspension exceeds the level of nullification and impairment due to a number of flaws and erroneous assumptions including the EU's:
   i. inclusion of measures that have been revoked or for which there have been no findings of inconsistency;
   ii. use of trade data that overestimates the trade value of the products at issue;
   iii. erroneous assumption that the elimination of zeroing would result in the elimination of all antidumping duties in the cases at issue;
   iv. erroneous assumptions with respect to the growth rates the EU would have experienced absent zeroing;
   v. inappropriate inclusion of a "reverse charge;"
   vi. unsupported assumptions for the calculation of the "reverse charge;"
   vii. inappropriate combination of actual trade and "trade loss" to overstate the level of nullification or impairment; and
   viii. inappropriate use of GTAP elasticities.

c. The EU's request to suspend DSU concessions or other obligations is inconsistent with Article 22.3 of the DSU.

14. There is an additional important aspect of the burden of proof in Article 22.6 arbitrations. The burden of proof on the United States is with respect to whether the EU's proposed level of suspension is equivalent to the level of nullification or impairment. Once the United States has discharged that burden, and the Arbitrator has decided to determine the correct level of suspension, there is no longer a burden of proof for the United States to meet. In particular, in the part of the proceeding in which the Arbitrator is seeking to determine the correct level of suspension, there is no burden of proof allocated to one party compared to the other with respect to that correct level. This is because the burden of proof in an Article 22.6 arbitration flows from the task of the arbitrator – in this case, the U.S. objection to the EU's proposed level of suspension is equivalent to a claim that the EU's request is not consistent with the covered agreements.[7] Once the United States meets that burden and the Arbitrator moves on to determining the correct level, this is analogous to the situation commonly faced by arbitrators acting under Article 21.3(c) of the DSU. As the arbitrator put it in *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico: Arbitration under Article 21.3(c) of the DSU*, "[f]inally, it is incumbent upon the implementing Member seeking a reasonable period of

[7] *EC – Hormones* (WT/DS26/ARB), para. 9 ("[I]t 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.")

time to establish that the proposed period is the 'shortest period possible' within its domestic legal system to implement the recommendations and rulings of the DSB. Failing that, *it is ultimately for the arbitrator to determine* the 'shortest period possible' for implementation, *on the basis of the evidence presented by all parties*."[8] In that inquiry, there is no burden of proof assigned to either party.

15. With respect to whether the allocation of the burden of proof implies anything in terms of the Arbitrator's authority to seek factual information or clarifications from the Members, we note that the task assigned to the Arbitrator under Article 22.7 would necessarily encompass asking for whatever information the Arbitrator deems relevant in fulfilling its mandate.

4. The EU indicates, in paragraph 63 of its Written Submission, that the level of suspension should be equivalent to the nullification and impairment of benefits existing as of the end of the reasonable period of time. By contrast, the United States indicates, in para. 103 of its Written Submission, that the level of suspension should reflect the level of nullification and impairment looking forward.

(a) Please further address whether the level of suspension should be equivalent to the nullification and impairment as of the end of the reasonable period of time, as of the Arbitral proceeding, or as of some other time.

(b) What relevance, if any, do past arbitrations upholding variable levels of suspension have in this context?

16. The United States finds the EU's claim in this arbitration quite surprising. The EU has received awards in at least two arbitrations that directly contradict the EU's claim. The EU not only has requested authorization based on the contrary interpretation of the DSU, the EU is currently applying a suspension of concessions or other obligations with respect to one of these awards. Furthermore, the EU has just notified the DSB of a change in the EU measures based on that award. That change is directly contrary to what the EU in this proceeding says is the correct interpretation of the DSU.[9] Accordingly it is not clear what the EU is intending to say as a result

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[8] WT/DS344/15, circulated 31 October 2008, para. 43 (footnotes omitted and emphasis added).

[9] Commission Regulation (EU) No. 305/2010 of 14 April 2010 (attached at Exhibit US-30); *United States – Anti-Dumping Act of 1916* (WT/DS136/ARB), para. 7.8 ("The European Communities may apply these parameters in determining the level of nullification or impairment that it has sustained as a result of the 1916 Act. In the event that there are future applications of the 1916 Act – such as future US court decisions against EC entities, or future settlement awards involving European Communities entities – then the European Communities would be entitled to adjust the quantified level of suspension to account for this additional level of nullification or impairment. The 1916 Act is WTO-inconsistent "as such", and each application of the Act further nullifies or impairs benefits accruing to the European Communities."), para 8.1 ("For the reasons set out above, we conclude that the European Communities may suspend obligations under GATT 1994 and the Anti-Dumping Agreement against imports from the United States. The European Communities must ensure that the application of this suspension is quantified, and does not exceed the quantified level of nullification or impairment it has sustained as a result of the 1916 Act."); *United States – Continued Dumping and Subsidy Offset Act* (WT/DS217/ARB/EEC), para. 5.1 ("For the reasons set out above, we

of its position in this dispute about the validity of the past arbitration awards or the EU's own suspension of concessions in other disputes.

17. Nowhere in the DSU is there a requirement that the determination of the correct level of suspension is to be made as of the end of the reasonable period of time ("RPT"), let alone that the determination is to be made only at that point in time. Indeed, prior arbitrators have rejected the notion that it is the situation at the end of the RPT that controls.[10]

18. The WTO Agreement represents the result of a number of negotiations under which Members agreed to make certain trade concessions in return for trade concessions from other Members. One of the underlying principles in authorizing the suspension of concessions under Article 22 of the DSU then is that where a Member's measure is nullifying or impairing the benefits promised to another Member under the covered agreements, the Member whose benefits are nullified or impaired is not required to continue providing the full level of benefits of its trade concessions to the Member in breach. In other words, the suspension of concessions under Article 22 permits the complaining Member to suspend concessions in order to balance the benefits that are being denied it by the measure of the Member concerned. Article 22.4 ensures that the complaining Member does not suspend concessions greater than the level of nullification or impairment the complaining Member is suffering. In other words, there is no punitive element to the suspension of concessions.

19. The determination of the correct level of suspension is thus, by necessity, forward-looking. Past periods are relevant only to the extent that they serve as a proxy for the level of nullification or impairment going forward. The more remote in time the request for suspension is from the end of the reasonable period of time, the less relevant the period at the end of the RPT may be to the inquiry into the appropriate level of suspension.

20. Past arbitrations awarding variable levels of suspension recognize that the calculation of a level of nullification or impairment is a forward looking exercise. In *United States – Continued*

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determine that, in the matter *United States – Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by the European Communities)*, the level of nullification or impairment suffered by the European Communities in a particular year can be deemed to be equal to the total of disbursements made under the CDSOA for the preceding year relating to anti-dumping or countervailing duties paid on imports from the European Communities, multiplied by the coefficient identified in Section III.D above.")

[10] *See*, *EC – Bananas III (Article 22.6)*, para. 4.7, in which the arbitrator stated that to examine the original banana import regime "would mean to ignore altogether the undisputed fact that the European Communities has taken measures to revise its banana import regime. That is certainly not the mandate that the DSB has entrusted to us"; *see also Brazil – Aircraft (Article 22.6)*, paras. 3.37-3.40, in which the arbitrator indicated that it was examining the *revised* PROEX regime. It is also important to consider what would result if the Arbitrators were limited to examining the situation as it existed at the end of the implementation period or could not take into account any more recent evidence. An arbitrator could authorize suspension of concessions even where a Member has come into compliance; this would plainly be "disproportionate."

Dumping And Subsidy Offset Act Of 2000 (EC), the arbitrator authorized a variable level of suspension to reflect the fact that "the value and industry distribution of the trade impact of the CDSOA could vary widely from one year to the next, because of the numerous factors affecting the amounts that may be disbursed, the nature of the recipients and how each category of recipient is likely to use the monetary amounts awarded to them under the CDSOA."[11]

21. If assessing the proposed level of suspension was a static exercise of comparing that level to the level of nullification or impairment at the end of the reasonable period of time, such a variable level of suspension would be unnecessary.

22. Similarly, in *United States – Anti-Dumping Act of 1916*, the United States had never applied the1916 Act, which had been found to be WTO-inconsistent, as of the end of the RPT. Thus, if the end of the RPT were the only appropriate time to measure the level of nullification or impairment, then the award would have been zero. The arbitrator, however, rejected such an approach.[12] Instead, the arbitrator concluded that, "[i]n the event that there are future applications of the 1916 Act – such as future US court decisions against EC entities, or future settlement awards involving European Communities entities – then the European Communities would be entitled to adjust the quantified level of suspension to account for this additional level of nullification or impairment."[13] This future-oriented approach is inconsistent with the EU's argument that the arbitrator should only focus upon the period at the end of the RPT.

5. Please comment on the rulings concerning the choice of counterfactual in the decision of the arbitrator in *US - Gambling* (WT/DS285/ARB, paras. 3.16 to 3.73) and the nature of the benefits nullified or impaired in the arbitral decision under Article 25 of the DSU in *US - Section 110(5) of the US Copyright Act* (paras. 3.2 to 3.35) and whether these provide any guidance in the present case with respect to the choice of counterfactual and/or assumptions to be made as to the level of nullification or impairment of the EU's benefits arising from the underlying DSB recommendations and rulings.

23. The *US – Gambling* and *US – Section 110(5) of the US Copyright Act* decisions are instructive for the propositions that the choice of a counterfactual should reflect a reasonable scenario for compliance and that the level of nullification or impairment should reasonably reflect the actual benefits that the complaining party could expect from compliance with the DSB's recommendations and rulings.

US - Gambling

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[11] *United States - Continued Dumping And Subsidy Offset Act Of 2000* (EC) (WT/DS217/ARB/EEC), para. 4.21.

[12] *United States – Anti-Dumping Act of 1916* (WT/DS136/ARB), para. 7.6.

[13] *Id.* at para. 7.8.

24. In *US – Gambling*, as in the present dispute, the arbitrator was faced with a choice between two counterfactuals that assumed different compliance scenarios. Similar to the EU's approach in this case (i.e., assuming that the United States would eliminate the dumping orders on the products at issue), Antigua employed a counterfactual that assumed the United States would eliminate all restrictions on remote gambling in order to come into compliance with the DSB's recommendations and rulings. In contrast, the United States employed a counterfactual that assumed a more limited opening of the U.S. market to certain types of remote gambling (specifically, remote gambling on horseracing). The U.S. approach represented the assumption that a more narrow means to compliance was likely. In the present case, it is appropriate to use as the counterfactual that compliance with the recommendations and rulings of the DSB would be accomplished by recalculating dumping margins under the relevant orders using a WTO-consistent methodology that does not include zeroing.

25. While acknowledging that both scenarios were possible methods for complying with the DSB's recommendations and rulings, the arbitrator in *US – Gambling* found that the compliance scenario assumed by Antigua was not reasonable or plausible because it did not take into account U.S. policy objectives (related to protecting public order and public morals) and the limited scope of the DSB's recommendations and rulings. The DSB's recommendations and rulings required the United States to bring its measures into compliance with the covered agreements, not to remove its restrictions on remote gambling entirely.

26. In the present case, it is appropriate to use a counterfactual based on the reasonable assumption that the United States would likely come into compliance with the DSB's rulings by recalculating dumping margins under the relevant orders using a WTO-consistent methodology that does not include zeroing, not by eliminating the underlying antidumping orders. This is a reasonable assumption under the circumstances of this case. Among other things, Members have agreed that "dumping" is "to be condemned."[14] Therefore it is not appropriate for the EU to assume that the antidumping duty should be removed in its entirety and there be no response to ongoing dumping of merchandise exported by the EU to the United States.

27. In particular, the evidence on the record indicates that the elimination of zeroing does not necessarily result in the revocation of the order. The EU has presented no evidence to demonstrate otherwise. Accordingly, the EU's assumptions with respect to the compliance scenario, like those of Antigua in *US – Gambling*, are implausible and unreasonable.

US - Section 110(5) of the US Copyright Act

28. The arbitrator's decision under Article 25 of the DSU in *US – Section 110(5) of the US Copyright Act* underscores the need for the assumptions made in calculating the level of

[14] Article VI:1 of the GATT 1994.

nullification or impairment to be reasonable and take into account the circumstances of the dispute in order that the proposed level of suspension accurately reflect the level of benefits actually being nullified or impaired. There the EC claimed nullification or impairment to be equal to the full extent of its stakeholders' theoretical rights, rather than what those stakeholders could reasonably expect to receive in a compliance scenario.

6. The United States argues, in para. 162 of its Written Submission, that the Arbitrator should state the level of suspension separately with respect to each anti-dumping order. The EU responds in para. 116 of its Written Submission that "the nature of the countermeasures selected by the European Union in this case relates to all the relevant measures and is therefore outside the [Arbitrator's] jurisdiction."

(a) Please address whether DSU Article 22 speaks to whether the suspension of equivalent concessions should be authorized at the level of a dispute as a whole or on a measure-by-measure basis.

(b) To what extent is this question relevant to the "nature of the concessions or other obligations to be suspended" within the meaning of Article 22.7 DSU?

29. As an initial matter, to be clear, the U.S. request that the Arbitrator state the level of suspension in relation to individual antidumping orders was a request for that level of detail *as part of* the overall level to be determined by the Arbitrator. Providing that level of detail simply seeks recognition of the fact that the suspension in this case relates to "as applied" findings with respect to the use of zeroing in several independent antidumping cases and would be consistent both with determining the level of nullification or impairment for the particular measure at issue and with the concept explained above that the level of nullification or impairment, and hence the level of suspension, is a forward-looking exercise.

30. Under Article 22.8, the suspension of concessions "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." It could help the parties during the implementation phase to understand the impact of compliance with respect to individual measures on the level of nullification or impairment.

31. There is nothing in the DSU that would prohibit the Arbitrator from providing, as part of its determination of the appropriate level of suspension, an explanation of the calculations along the way, including how the level was determined with respect to each individual antidumping order.

32. Such an approach does not involve any examination of the nature of the concessions to be suspended. The EU is confusing two distinct concepts. Aside from the fact that paragraph 116 of the EU's Written Submission is another instance where the EU attempts to proclaim yet another non-existent limitation on the mandate of the Arbitrator (and arrogate to itself yet another "right" that has nowhere been agreed or has any basis in the text of the DSU), the EU is simply

incorrect in its reasoning. For the Arbitrator to provide this level of detail of its determination of the *level* of suspension of concessions does not involve examining the *nature* of the concessions to be suspended. Nor would providing this level of detail affect the overall level of suspension determined by the Arbitrator.

Questions to the United States:

37. Please comment on the EU observation, in paragraph 12 of its Written Submission, that past arbitrators have taken into account the responding party's intentions with respect to compliance. Do you agree that US intentions with respect to compliance, and/or the objective of inducing compliance, should be taken into account by the Arbitrator in its determinations in these proceedings?

33. No, the United States would not agree with the EU with respect to the issue of the intentions of the Member concerned. By definition, every Member concerned finds itself in an Article 22.6 arbitration only because the complaining party claims the Member concerned is to some extent not in compliance with the recommendations and rulings of the DSB. The Member concerned finds itself in this position despite its intention to come into compliance. Accordingly, every arbitrator has been operating in this context and there is nothing different about this arbitration.

34. Furthermore, the EU is simply incorrect as a factual matter in its assertion in paragraph 12 of the EU Written Submission that the United States has made any statement that it will not comply.[15] The United States is somewhat surprised that the EU makes the claim to the Arbitrator in that same paragraph 12 that in "at least one past case such refusal to comply has been a relevant factor in an arbitration panel's assessment," without ever informing the Arbitrator that the dispute cited involved a different standard ("whether the countermeasures are appropriate") under a different agreement (the *Agreement on Subsidies and Countervailing Measures*)[16] and not the standard ("equivalent") at issue in this arbitration under the DSU. In fact, the EU fails to mention that the arbitrator in *Aircraft* relied on this different standard in reaching its determination.[17]

35. With respect to the role in an arbitration proceeding of the objective of inducing

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[15] *See* U.S. Written Submission, paras. 142-143.

[16] *Agreement on Subsidies and Countervailing Measures*, Art. 4.11. Footnote 10 to Article 4.11 of the *Agreement on Subsidies and Countervailing Measures* notes that "This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited."

[17] *Canada – Export Credits And Loan Guarantees for Regional Aircraft* (22.6), para. 3.107.

compliance, arbitrators frequently have noted the fact that one of the rationales for authorizing the suspension of concessions is to induce compliance. Nevertheless, the suspension of concessions is not a punitive remedy. The "intentions" of the responding party have no bearing on the level of nullification or impairment.

36. The United States notes that at the time of the *Aircraft* arbitration, the EU was forceful in pointing out that countermeasures cannot be increased to punitive levels:

> The EC would have preferred the Arbitrator to have explained more carefully how he had arrived at the conclusion that the amount of the subsidy plus 20 per cent was an appropriate or not disproportionate level. It should be clear that the amount of countermeasures could not be increased by an arbitrator so as to be "punitive." While Canada's statements on non-compliance were regrettable, the conditions did not call, in the EC's view, for the authorization of countermeasures which contained a punitive element. . . . Indeed, a DSB authorization to suspend concessions under Article 22.7 of the DSU could not justify a derogation from the obligation to maintain the equivalence between the level of suspension and the level of nullification and impairment under Article 22.4 of the DSU.[18]

37. Article 22.4 of the DSU specifically limits the level of suspension of concessions or other obligations to the level of nullification or impairment. This limit reflects another rationale for authorizing suspension of concessions discussed above – the temporary restoring of the balance of trade concessions between two parties to a dispute.

38. Please comment on the EU position, in paragraph 16 of its Written Submission, that Article 11 of the DSU applies to these proceedings.

38. By its express terms, Article 11 of the DSU does not apply to an arbitration under Article 22. According to the text of the DSU, Article 11 applies only to "panels:"

> The function of *panels* is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a *panel* should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. *Panels* should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution. (*emphasis added*).

[18] Minutes of Meeting, Dispute Settlement Body, 18 March 2003, WT/DSB/M/145, para. 48.

Nowhere does the text of Article 11 refer to an arbitration under Article 22.

39. Article 22.6 proceedings are presided over by an arbitrator, not a panel. The EU's argument here appears to simply repeat its unsuccessful argument earlier in this proceeding that this is really a panel proceeding and all previous arbitrators, and the EU as a party to past arbitrations, have all been incorrect in thinking they were involved in an arbitration rather than a panel proceeding. The United States has responded to the EU's incorrect argument previously. Among the other elements that illustrate the error in the EU's position, the DSB neither establishes Article 22.6 arbitrators,[19] nor does it adopt arbitrators' decisions.[20] It would therefore seem clear that Article 11 does not apply to arbitrations.

40. The United States further notes that only one of the arbitrators' decisions cited by the EU actually mentions Article 11, and even there the arbitrator does not say that Article 11 applies to the arbitrator.[21] The other two references merely make reference to making an "objective assessment of the facts."[22] The United States presumes that, regardless of the applicability of Article 11, all arbitrators strive to make an objective assessment of the facts.

39. The EU argues, in para. 50 of its Written Submission, that Section 129 proceedings are not an appropriate basis to estimate the extent to which the margins would have decreased in the measures at issue in the absence of zeroing because they relate to model zeroing, whereas the measures at issue in this proceeding relate to simple zeroing, which generally inflates margins to a far greater extent than model zeroing. Please respond.

41. As an initial matter, it must be understood that the counterfactual proposed by the United States is not that all dumping margins would be recalculated using the methodology that was applied in the section 129 determinations. Rather, the counterfactual is that the dumping margins at issue would be recalculated using a WTO-consistent methodology that does not include zeroing. The United States estimates that the impact on dumping margins is roughly equal the impact observed in the section 129 recalculations.[23]

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[19] Contrast Article 22.6 ("if the Member concerned objects to the level of suspension proposed . . . the matter *shall* be *referred* to arbitration") with Article 6 on the "Establishment of Panels" (emphasis added).

[20] Contrast Article 22.7 ("The DSB shall be *informed* promptly of the *decision* of the arbitrator") to Article 16 on the "Adoption of Panel Reports" (emphasis added).

[21] Arbitration Panel Report, *EC-Bananas III* (Ecuador) (Article 22.6 - EC), footnote 20.

[22] Arbitration Panel Report, *Brazil - Aircraft* (Article 22.6 - Brazil), para. 2.13; Arbitration Panel Report, *Canada - Aircraft Credits and Guarantees* (Article 22.6 - Canada), para. 2.18.

[23] In this regard, it is important to note that the United States is free to adopt any WTO-consistent methodology that does not include zeroing.

42. The United States disagrees with the EU's argument that the differences between so-called "model zeroing" and so-called "simple zeroing" make the section 129 determinations an inappropriate basis to estimate the impact of zeroing. The EU's assertion relies entirely upon the distinction between average-to-transaction comparisons (where so-called "simple zeroing" refers to the denial of offsets for negative comparison results) and average-to-average comparisons (where so-called "model zeroing" refers to the denial of offsets for negative comparison results).

43. Empirically, dumping margins calculated in administrative reviews generally decline from those calculated in original investigations.[24] As compared to the change in comparison methodology, the most significant change affecting the dumping margins calculated in original investigations as opposed to administrative reviews is the change in pricing behavior. Antidumping duties assessed in administrative reviews are decreased when exporters increase transaction prices from below normal value up to the point that the price is at least equal to normal value. No duties are imposed on the basis of prices that are at or above normal value. Thus, while exporters have an added incentive to increase export prices to equal normal value, they have no added incentive to exceed normal value.

44. These responses in pricing behavior also tend to decrease the impact zeroing is likely to have on dumping margins calculated in administrative reviews as compared to dumping margins calculated in original investigations. Accordingly, the impact of zeroing on dumping margins calculated in original investigations is likely to be at least as great as, if not greater than, the impact of zeroing on dumping margins calculated in administrative reviews. The observation that dumping margins calculated in administrative reviews generally decline from the margins found in the original investigation is, therefore, not surprising.

45. The EU's criticism of the U.S. methodology for estimating the impact of zeroing on dumping margins stands in stark contrast to the EU methodologies, which make no attempt to estimate the impact of zeroing on dumping margins, instead assuming the elimination of all antidumping duties. The EU's argument miscasts the burden of proof. The United States is not required to measure the impact of zeroing with mathematical precision, but rather to provide evidence showing that the EU's proposed level of suspension exceeds the level of nullification or impairment. Despite its criticism of alleged imprecision in the section 129 determinations, the EU has provided no alternative measure of the impact of zeroing on dumping margins.

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[24] *See, Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection*, U.S. Government Accountability Office ("GAO"), March 2008, at 21 (*available at* http://www.gao.gov/new.items/d08391.pdf). The GAO found that over a 6-year period, the final duty rates on entries went down or stayed the same 84% of the time, and increased only 16% of the time. Moreover, the median increase was in rate was less than 4 percentage points, whereas the median decrease in rate was 7 percentage points.

46. The evidence of the results from the section 129 determinations also rebuts the EU's implicit assumption that elimination of zeroing would eliminate all antidumping duties. In the section 129 determinations, Commerce redetermined certain dumping margins using Commerce's modified methodology for calculating dumping margins in which negative comparison results reduce the amount of dumping found. Each of the section 129 determinations upon which the United States relies, shows margin(s) of dumping with zeroing, and then margin(s) of dumping for the same product and same time period recalculated without zeroing. Moreover, the removal of zeroing was the *only* change made in these recalculations.

47. Furthermore, each and every section 129 recalculation proceeding was public, transparent and subjected to numerous procedural protections to ensure that these recalculations accurately reflect the removal of zeroing from the resulting redetermined dumping margin. During its conduct of these proceedings, Commerce issued preliminary results, and invited interested parties (both foreign and domestic) to comment before the issuance of the final recalculations.[25] Therefore, interested parties, who had access to all the confidential underlying data at the time of the recalculation, were able to fully participate in the proceedings, raise arguments and have them addressed by Commerce in the course of the proceedings. Accordingly, the results of the Section 129 determinations are the best, most reliable metric available for estimating the impact of zeroing on dumping margins.

48. Importantly, despite the fact that any impact of zeroing has been fully removed from the recalculated section 129 dumping margins, dumping at above *de minimis* levels continues to be found in most cases. The fact that the recalculated section 129 dumping margins were originally calculated using so-called "model zeroing" rather than so-called "simple zeroing" is irrelevant to this conclusion because the recalculated dumping margins, granting offsets for negative comparison results, would be the same regardless of the comparison method.

49. Because the section 129 determinations result in dumping margins calculated using a WTO-consistent methodology, without zeroing, the EU's assumption that the trade effect must be measured based on the removal of any antidumping measure where margins were calculated with zeroing is refuted by the evidence. Reliance upon the EU's assumption thus would establish an excessive level of suspension in relation to the level of nullification and impairment actually attributable to zeroing.

40. Please comment on the EU assertions, in its Written Submission, that the US has in its possession the information necessary to calculate the actual margin of dumping that would exist without zeroing with respect to the measures at issue and is withholding it from

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[25] *See, e.g.*, Implementation of the Findings of the WTO Panel in US-Zeroing (EC); Notice of Determination Under section 129 of the Uruguay Round Agreements Act: Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils From Italy, 72 Fed. Reg. 54,640 (Sep. 26, 2007) (Exhibit US-6).

the proceedings. In addressing that question, please address whether:

(a) the United States has access to and could supply evidence demonstrating the actual margin of dumping that would exist in the absence of zeroing as of the end of the reasonable period of time;

50. The United States is not in a position to supply evidence demonstrating the actual margins of dumping that would exist in the absence of zeroing as of the end of the reasonable period of time. Such evidence does not presently exist because the Department of Commerce has not recalculated the margins of dumping in effect at the end of the reasonable period of time. The EU's assertion that the United States is withholding such information fails to account for the absence of an essential component necessary for such recalculations: a methodology for recalculating administrative review dumping margins that is not inconsistent with the findings against zeroing in administrative reviews.

51. While the United States has adopted a methodology for calculating original investigation dumping margins in a manner not inconsistent with the findings against zeroing in that context, this new methodology does not apply to administrative reviews. The United States notes that, as explained above, the DSB's recommendations and rulings with respect to zeroing in administrative reviews do not require the United States to come into compliance in a specific manner such that the results of such compliance may be predicted. Nevertheless, the United States has submitted the results of actual recalculations of dumping margins originally calculated using zeroing and recalculated in the context of Section 129 determinations using its WTO-consistent methodology. For the reasons described in response to question 39, the impact of zeroing on dumping margins calculated in original investigations is likely to be at least as great as, if not greater than, the impact of zeroing on dumping margins calculated in administrative reviews, and there is no better demonstration of the impact of zeroing on dumping margins than the Section 129 determinations.

(b) if requested by the Arbitrator, the United States would be able to supply such calculations, along with supporting documentation;

52. If requested by the Arbitrator, the United States would not be able to supply the above-referenced calculations within the compressed time frames contemplated by Article 22.6. As discussed above, the United States has not made such calculations and, in fact, has yet to adopt a methodology necessary to perform such calculations. The selection of a methodology itself would involve lengthy intra- and interagency procedures, consultations with Congress, and a public notice and comment period or legislative action. Moreover, the application of that methodology to the individual companies involved in each of the relevant administrative reviews in each of the antidumping orders still at issue in this case would then involve an additional public notice and comment period in order to respect the procedural rights of the companies involved in those reviews.

(c) it would be appropriate for the Arbitrator to make such a request, taking into account the burden of proof in this proceeding.

53. As discussed above in response to question 3, the task assigned to the Arbitrator under Article 22.7 would necessarily encompass asking for whatever information the Arbitrator deems relevant in fulfilling its task.

54. The United States notes that any such request by the Arbitrator for calculations demonstrating the margin of dumping that would exist in the absence of zeroing would relate to that point in the arbitration where the United States has discharged its burden of proof with respect to whether the EU's proposed level of suspension is equivalent to the level of nullification or impairment. Once the United States has discharged that burden, and the Arbitrator has decided to determine the correct level of suspension, there is no longer a burden of proof for the United States to meet. In the part of the proceeding in which the Arbitrator is seeking to determine the correct level of suspension, there is no burden of proof allocated to one party compared to the other with respect to that correct level.

41. The United States indicates, in paragraph 96 of its Written Submission, that the HTS statistics used to generate trade value data are "much broader" than the scope of the merchandise subject to the anti-dumping duties. The European Union responds (para. 58) that, *inter alia*, the United States has adduced no evidence in support of its "numerical assertions" in US Exhibit 16. Please provide such supporting data as would permit the European Union and the Arbitrator to confirm the accuracy of the figures provided in that Exhibit.

55. The data used to prepare the antidumping summary tables provided in the written submission of the United States was extracted directly from U.S. Customs and Border Protection's (CBP's) official system of record: the Automated Commercial System. The Automated Commercial System captures electronically via the Automated Broker Interface (ABI) the information submitted on CBP Form 7501 (Exhibit US-31) in the normal course of business.

56. CBP Summary Form 7501 is one of the essential forms required for an import transaction, as it identifies the details of an import transaction which enters into the United States. Specifically, Form 7501 identifies the goods, the country of origin, the country of export, the importer, the consignee and the manufacturer/shipper, along with other information concerning an imported item's Harmonized Tariff Classification. Information concerning the amount, quantity, value, and duty (if applicable) are also included. Also included is whether the entry in question is subject to an antidumping duty order. Importers are required to file the CBP Summary Form 7501 within 10 days of when merchandise enters the U.S. customs territory.

57. The Automated Commercial System is the same database that the U.S. Census Bureau

utilizes to derive the HTS data that is published online on the U.S. International Trade Commission Interactive Tariff and Trade Data Web (i.e., the EU's source for trade data).

58. The data attached at Exhibits US-32 - US-39, are the output of CBP's search for all entries of merchandise subject to the antidumping orders at issue in this case for the period 2006 to Jan 2010 (for the ball bearings cases, the United States has attached data for the period 2005 to Jan 2010).[26] Because the antidumping order number is one of the data fields that is collected by the Automated Commercial System, all entries of subject merchandise were readily available for retrieval from the system.

59. The United States notes that the information as presented on Form 7501 constitutes the confidential business information of the importer. For this reason, the United States has marked certain output fields from the Automated Commercial System as confidential to the extent necessary to protect the confidential nature of the information.

42. Please comment on the EU arguments in paragraph 34 of its Written Submission to the effect that cases 7, 8 and 14 are properly included in the calculations. In addressing this question, please clarify what impact, in your view, the findings in the compliance proceedings have on the inclusion or non-inclusion of specific "cases" in the calculations of the level of nullification or impairment.

60. The EU's arguments in paragraph 34 of its submission do not support the inclusion of Cases 7, 8 and 14 when calculating trade effects.

61. As detailed in the U.S. written submission, with respect to Cases 7, 8, and 14, the DSB's recommendations and rulings from the original dispute settlement proceeding concerned only the original antidumping investigations carried out by Commerce. Accordingly, in its Section 129 determinations, Commerce recalculated the dumping margins for the investigations to which those recommendations and rulings applied – using a WTO-consistent methodology that does not include zeroing.[27] The results from Commerce's Section 129 determinations applied from April 23, 2007 onwards,[28] and several continue to be in effect.[29]

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[26] Due to the voluminous nature of the data for the ball bearings cases, the United States has provided the data in summary format, by combining entries with similar entry, liquidation, and duty rates. Should the Arbitrator require additional detail, the United States would be able to provide such detail in short order.

[27] Implementation of the Findings of the WTO Panel in *US – Zeroing (EC)*: Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 Fed. Reg. 25261 (May 4, 2007) (Exhibit US-6).

[28] *See* Implementation of the Findings of the WTO Panel in *US – Zeroing (EC)*: Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 Fed. Reg. at 25264 (Exhibit US-6) ("With respect to Stainless Steel Wire Rod from

62. With respect to cases 7, 8, and 14, all administrative reviews that the EU challenged in the compliance proceeding were completed prior to the end of the RPT.[30] During the compliance proceeding, neither the panel nor the Appellate Body made any findings of inconsistency as to reviews completed prior to the end of the RPT.[31] The United States fully complied with the DSB recommendations and rulings related to these cases when it recalculated the investigation margins in Cases 7, 8, and 14 without zeroing, and there have been no further findings of noncompliance, despite the EU's compliance challenges to subsequent reviews under these orders.

63. The lack of any findings of non-compliance with respect to these antidumping duty orders, coupled with U.S. compliance efforts is relevant because it supports the United States' position that full compliance has been achieved. Because suspension of concessions is available as a limited, temporary remedy, to the extent compliance has not been achieved, the EU cannot justifiably include these antidumping duty orders in its calculations.[32]

Spain,. . . [t]he section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate."; "With respect to Stainless Steel Wire Rod from Italy,. . .[t]he section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate."; "With respect to Certain Cut-To Length Carbon-Quality Steel Plate Products from Italy,. . .[t]he section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.")

[29] The "all others" rate in cases 7 and 8, as well as the rate recalculated for Cogne Acciai Speciali S.r.l. in Case 8 continue to be in effect.

[30] In the Compliance proceeding, the EC challenged one subsequent administrative review in Case 7: 1998-1999 Review (66 Fed. Reg. 10988 (Feb. 21, 2001), and 3 sunset reviews: Case 7, 69 Fed. Reg. 50167 (Aug. 13, 2004); Case 8, 69 Fed. Reg. 50167 (Aug. 13, 2004); Case 14, 70 Fed. Reg. 72607 (Dec. 6, 2005). *See* EC Annex in *EC-Zeroing (Article 21.5)(Panel)*.

[31] *See EC – Zeroing (Article 21.5) (Panel),* para. 8.174 (Finding any definitive duty determination made after the end of the RPT must be consistent with the DSB's recommendations and rulings.); *EC – Zeroing (Article 21.5) (AB),* para. 232 ("To the extent that the effects of the administrative and sunset reviews excluded from the Panel's terms of reference were replaced with those of a subsequent Section 129 determination in which zeroing was not applied, those subsequent reviews would generally not have the necessary link in terms of effects, . . . with the recommendations and rulings of the DSB, so as to fall within the [compliance] Panel's terms of reference.").

[32] S*ee US – Upland Cotton (Articles 22.6/4.11)*, paras. 3.42-3.45. (The arbitrator specifically declined to award compensation where there was no finding of inconsistency, despite the complaining Member's request for such a finding); *See also EC – Zeroing (Article 21.5) (Panel),* para. 412 ("However, if the compliance panel finds that compliance has been achieved at the time of its establishment, but not at the end of the reasonable period of time, the responding WTO Member will not need to take additional remedial action.").

43. Please comment on the EU arguments in paragraph 37 of its Written Submission that Cases 9, 11 and 15 are properly included in the calculations.

64. As noted in Footnote 40 to the U.S. written submission, Cases 9, 11, and 15 refer to the investigations in Stainless Steel Plate in Coils from Belgium, Stainless Steel Sheet and Strip in Coils from Italy, and Pasta from Italy. As the United States has complied with the DSB's recommendations and rulings relating to these investigations by making adjustments through the Section 129 process, the United States does not consider Cases 9, 11, and 15 to be relevant when calculating adverse trade effects.

65. Regardless, Cases 9, 11 and 15 refer to the same antidumping duty orders at issue in Cases 18 through 22. Specifically, Cases 9 and 18 both refer to the antidumping order on Stainless Steel Plate in Coils from Belgium (A-423-808); Cases 15, 19 and 20 refer to the antidumping duty order on Certain Pasta from Italy (A-475-818); and Cases 11, 21 and 22 refer the antidumping order on Stainless Steel Sheet and Strip in Coils from Italy (A-475-824). Because the United States does not contest the inclusion of Cases 18 through 22 in the calculation, each of these antidumping orders at issue is already included in the EU and U.S. calculations under another label. Thus, there is no numerical impact of excluding Cases 9, 11 and 15 from the calculation.

44. Please comment on the following assertion of the EU in para. 45 of its Written Submission: "[t]he measure is the measure imposing the anti-dumping duty, not the injury analysis, or that part of the injury analysis that relates to the Article 3.4 factors, or that part of the analysis that relates to the incorrectly assessed factor. Similarly, if the measure is not brought into compliance, the equivalence of the requested suspension of concessions is assessed by reference to the measure imposing the anti-dumping duty, not the injury analysis, or that part of the injury analysis that relates to the Article 3.4 factors, or that part of the analysis that relates to the incorrectly assessed factor".

66. In paragraph 45, the EU provides an analogy in an attempt to support its argument that the zeroing methodology is "the reason," the measure was found inconsistent, and is not "the measure" itself.[33] It is on this basis that the EU seems to argue that the impact of zeroing is not relevant, because it is the entire margin that should be included when calculating negative trade effects. The United States does not agree with the premise of the EU's analogy, i.e., that the measure itself (i.e., the dumping order) should never have been imposed because a single component of the analysis was found to be WTO-inconsistent. To the contrary, it is entirely possible that the Member imposing the dumping order would have other WTO-consistent reasons upon which to base its injury finding.

[33] EU Submission, at paras .44.

67. In the instant proceedings, there have been *no* findings or demonstration that certain of the orders complained of would cease to exist, but for the imposition of the zeroing methodology. On the contrary, the multiple 129 determinations demonstrate that it is rare and infrequent that positive dumping margins would be completely eliminated by the removal of the zeroing methodology. Indeed, when a 129 determination resulted in a zero or *de minimis* margin, the Department of Commerce revoked the order for the company receiving that margin. However, when a 129 determination resulted in margins that remained above zero or *de minimis*, the Department of Commerce determined that the order would remain in place. Accordingly, there is no basis for the EU's assumption that it is entitled to base its alleged negative trade effects on entire dumping margins, without making allowance for how those margins would have been impacted by the zeroing methodology.

45. Please comment on the EU's argument, in paragraph 63 of its Written Submission, that it is "taking a photograph" on 10 April 2007, and that it is its "right under the DSU not to look any further into the future than the end of the reasonable period of time". In addressing this question, please clarify whether and why you consider that calculations based on the year 2007 would lead to inaccurate estimation of the level of nullification or impairment.

68. The United States disagrees with the EU's argument that it is "taking a photograph" on April 10, 2007, the expiration of the reasonable period of time (RPT). Among other things, the EU uses full-year 2007 data rather than the period from April 2006 to April 2007. The EU could have used the monthly HTS data it relied upon for trade values to analyze the year prior to the RPT, but it did not do so. Instead, more than two-thirds of the trade value data the EU used came after the RPT. The EU's contention that it was "taking a photograph" as of the end of the RPT thus fails by its own terms.

69. Furthermore, as the United States discussed in its written submission, the EU's Methodology 1 calculation fails to represent the level of nullification or impairment as of the end of the RPT. The EU's calculation erroneously: (1) includes measures that have been revoked and measures for which there were no findings of WTO inconsistency with respect to administrative reviews; (2) overestimates the level of trade in the products subject to the measures as of the end of the RPT; (3) assumes that the elimination of zeroing would result in the elimination of all antidumping duties in all cases; (4) assumes that the level of trade for the EU's should have grown at the same rates as the rest of the world; (5) includes an inappropriate "reverse charge"; and (6) conflicts with the EU's calculation of "trade loss" in its Methodology 2.

70. The United States also disagrees with the EU's argument that it is its "right under the DSU not to look any further into the future than the end of the reasonable period of time." Aside from the fact that the DSU does not grant the EU the numerous "rights" it invents in its Written Submission and arrogates only to itself, Article 22 of the DSU does not limit the Arbitrator to only considering the level of nullification or impairment at the end of the RPT. Among other

things, there may well have been additional proceedings in a dispute, such as compliance panel proceedings under Article 21.5 of the DSU or an appeal, resulting in different DSB findings. The EU's approach would render any such findings inutile.

71. As discussed in detail in response to question 4, nowhere in the DSU is there a requirement that the determination of the correct level of suspension is to be made as of the end of the reasonable period of time ("RPT"), let alone that the determination is to be made only at that point in time. Indeed, prior arbitrators have rejected the notion that it is the situation at the end of the RPT that controls.[34] The determination of the correct level of nullification or impairment is, by necessity, forward-looking. Past periods are relevant only to the extent that they serve as a proxy for the level of nullification or impairment going forward. The more remote in time the request for suspension is from the end of the reasonable period of time, the less relevant the period at the end of the RPT may be to the inquiry into the appropriate level of suspension.

72. Also, contrary to the EU's argument, arbitrators in other Article 22.6 proceedings have employed forward-looking analyses rather than looking at the situation at the end of the RPT. In *United States - Anti-Dumping Act of 1916*, there were no applications of the1916 Anti-Dumping Act, which had been found to be WTO-inconsistent, at the time of the RPT. Thus, if the end of the RPT was the only appropriate time for measurement of nullification or impairment, then the award would have been zero. The arbitrator, however, rejected such an approach.[35] Instead, the arbitrator concluded that, "[i]n the event that there are future applications of the 1916 Act – such as future US court decisions against EC entities, or future settlement awards involving European Communities entities – then the European Communities would be entitled to adjust the quantified level of suspension to account for this additional level of nullification or impairment."[36] This future-oriented approach is inconsistent with the EU's argument that the arbitrator should look to the end of the RPT.

73. Given the time that has passed since the end of the RPT and the changes to the financial, economic, and trade environments since the end of the RPT, a calculation that only looked at

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[34] *See*, *EC – Bananas III (Article 22.6)*, para. 4.7, in which the arbitrator stated that to examine the original banana import regime "would mean to ignore altogether the undisputed fact that the European Communities has taken measures to revise its banana import regime. That is certainly not the mandate that the DSB has entrusted to us"; *see also*, *Brazil – Aircraft (Article 22.6)*, paras. 3.37-3.40, in which the arbitrator indicated that it was examining the *revised* PROEX regime. It is also important to consider what would result if the Arbitrators were limited to examining the situation as it existed at the end of the implementation period or could not take into account any more recent evidence. An arbitrator could authorize suspension of concessions even where a Member has come into compliance; this would plainly be "disproportionate."

[35] *United States – Anti-Dumping Act of 1916 (Article 22.6)*, para. 7.6.

[36] *Id.* at para. 7.8.

2007 would lead to an inaccurate estimate of the level of nullification or impairment, particularly in the near term. As discussed in more detail in response to question 53, present economic conditions differ from those present in 2007. The average of the period 2007-09 remains more representative of the level of trade on a forward-looking basis than the use of only 2007 trade.

46. Please comment on the EU's argument, at paragraph 82 of its Written Submission, that, in the first step of its second alternative, there is no counterfactual, and that this "illustrates the erroneous nature of the US argument that there must be a counterfactual, and that such counterfactual must assume a certain limited means of compliance (what the duty would be without zeroing)".

74. The United States disagrees with the EU's argument that, in the first step of its second alternative, there is no counterfactual. Indeed, such an argument fails by its own terms. The first step of the EU's Methodology 2 is to calculate "trade loss" by multiplying the duty rate times the assumed elasticity and observed 2007 trade value based upon HTS data. Contrary to the EU's argument, however, the "trade loss" calculation is a counterfactual because it estimates the level of EU trade absent the use of antidumping duty margins calculated using zeroing. As we discussed in our written submission, this is the same counterfactual l as the "trade loss estimate" in Methodology 1, although it reaches a radically different result.[37]

75. The mechanics of the "trade loss" calculation in Methodology 2 rely upon counterfactual assumptions as to what the duty rates, elasticities, and trade values would have been absent the measures at issue. The EU bases its "trade loss" calculation upon removal of 100 percent of the duties related to the measures at issue. Such a calculation implicitly assumes that, absent the measures, there would be no duties at all. Although, for the reasons discussed in the U.S. Written Submission, the EU's assumption that elimination of zeroing would result in the elimination of all duties is incorrect, it is nevertheless a counterfactual.[38] Similarly, the EU's selections of GTAP elasticities and the 2007 trade value baseline rely upon counterfactual assumptions. The EU's "trade loss" calculation in its Methodology 2 thus necessarily involves a counterfactual.

47. Do you agree with the EU's observation, at paragraph 47 of its Written Submission, that "not every countermeasure requires a counterfactual"? Specifically, do you agree that the second alternative presented by the EU in these proceedings does not involve or require the use of a counterfactual?

76. As discussed in our response to question 46, the United States disagrees with the EU's argument that the second alternative presented by the EU does not involve or require the use of a

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[37] U.S. Written Submission, paras. 119-20,

[38] U.S. Written Submission, paras. 127-31.

counterfactual. As discussed above, the "trade loss" calculation in the EU's Methodology 2 relies upon a counterfactual for antidumping duty rates, elasticities, and baseline trade value data. The "trade loss" calculation in the EU's Methodology 2 thus necessarily involves a counterfactual. For the reasons discussed in our written submission and in our response to paragraph 46 above, the EU's counterfactual for "trade loss" is also invalid.

77. The United States also disagrees with the argument that the second step of the EU's calculation does not involve a counterfactual. The second step of the EU's Methodology 2 is to apply an *ad valorem* tariff of 12.08 percent, designed to be equivalent to the level of antidumping duties from the measures at issue, to the total of the observed 2007 trade value from HTS data and the calculated level of "trade loss." The assumption that the *ad valorem* tariff would yield an equivalent amount of "trade loss" necessarily involves a counterfactual. As we discussed in our written submission, by combining the actual amount of trade with the amount of "trade loss," the EU's calculation overstates the level of nullification or impairment by its own terms.[39] Moreover, previous 22.6 arbitrators have rejected the argument that imposition of an equivalent measure would yield an "equivalent" level of nullification or impairment. Both steps of the EU's Methodology 2 thus involve invalid counterfactuals.

78. Because a counterfactual is called for in this proceeding, it is not necessary in this proceeding to resolve whether a counterfactual would always be necessary.[40]

48. The United States argues, in paras. 89-91 of its Written Submission, that the EU should not include cases 1 and 6 in its countermeasures because those measures have been revoked. The EU responds, in para. 31 of its Written Submission, inter alia, that full compliance had not been achieved because those measures included final assessment and liquidation of duties after the end of the reasonable period of time. Has final assessment and liquidation of duties now occurred with respect to all entries pursuant to cases 1 and 6? If your answer is yes, please provide appropriate supporting evidence.

79. As noted in the U.S. written submission, the Section 129 determinations completed as to the original investigations in Cases 1 and 6 resulted in the revocation of the underlying

[39] U.S. Written Submission, paras. 132-33.

[40] The United States notes that at least in one instance an arbitrator has determined that a counterfactual was not necessary. *See United States – Section 110(5) of the US Copyright Act (Art. 25)*, para.4.8 ("This approach also has the advantage of limiting the number of assumptions necessary. In comparison, the European Communities approach would require, in our view, that we base our calculation on what has been described in some Article 22.6 arbitrations as a "counterfactual". We believe that recourse to a counterfactual would only be justified if it was established that the situation predating the 1998 Amendment was itself TRIPS-incompatible.").

antidumping duty orders, effective for all entries on or after April 23, 2007.[41] Thus, as of April 23, 2007, the original antidumping investigations subject to the DSB's recommendations and rulings in cases 1 and 6 were terminated. Additionally, as a result of a subsequent Commerce determination in a sunset review, the revocation of the antidumping duty order in Case 1 became effective as of November 29, 2006.[42] Consequently, with respect to Case 1, any cash deposits made on imports occurring on or after November 29, 2006 have been refunded with interest and no such cash deposits have been required of entries made since revocation of the measure.

80. Attached as Exhibit US-40 is a printout showing all subject entries made under cases 1 and 6 since 2004. The data show that entries valued at $180,028,611.00 with duties estimated at $8,219,664.99 remain unliquidated under Case 1 and entries valued at $95,416.00 with duties estimated at $5,448.25 remain unliquidated under case 6.

81. While there remain a small number of unliquidated entries under these two orders, the two measures do not, and cannot, have any future trade effects. Moreover, the EU has not made any claim, much less any demonstration that the final assessment and collection of duties on past entries would have any ongoing or future trade effects on EU exports to the United States. The unliquidated entries in question have already entered the United States. As a result, the 'trade" at issue with respect to these entries has already occurred – the importation has already happened and the product has been sold – and the order is no longer in existence. So the liquidation of these entries cannot affect future trade. The conditions of competition for any future entries and sales are unaffected by any antidumping duties. Therefore, cases 1 and 6 are not properly included in the calculation of the level of nullification or impairment.

49. Please clarify what year the recalculations of dumping margins referred to in Paragraph 54 of your Written Submission are done for. Is it the end of the reasonable period of time?

82. The United States performed the recalculations referred to in paragraph 54 of the U.S. Written Submission based on the information provided by the individually examined companies in the original investigations. The calculations are for the period of investigation examined in the original antidumping investigation for each of the antidumping duty orders at issue. The relevant time periods are set forth below:

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[41] Implementation of the Findings of the WTO Panel in *US – Zeroing (EC)*: Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 Fed. Reg. 25261, 25262-63 (May 4, 2007) (Exhibit US-6).

[42] Certain Hot-Rolled Steel Flat Products from the Netherlands: Final Results of the Sunset Review of Antidumping Duty Order and Revocation of the Order, 72 Fed. Reg. 35220, 35221-22 (June 27, 2007). (Exhibit US-17).

Order	Country	Period of Investigation
Certain hot-rolled carbon steel, A-421-807	NL	10/01/1999 – 09/30/2000
Stainless Steel Bar, A-475-829	F	10/01/1999 – 09/30/2000
Stainless Steel Bar, A-428-830	G	10/01/1999 – 09/30/2000
Stainless Steel Bar, A-475-829	I	10/01/1999 – 09/30/2000
Stainless Steel Bar, A-412-822	UK	10/01/1999 – 09/30/2000
Stainless Steel Wire Rod, A-401-806	SW	07/01/1996 – 06/30/1997
Stainless Steel Wire Rod, A-469-807	Spain	08/01/1996 – 07/31/1997
Stainless Steel Wire Rod, A-475-820	I	07/01/1996 – 06/30/1997
Stainless Steel Plate in Coils, A-423-808	B	01/01/1997 – 12/31/1997
Stainless Steel Sheet and Strip In Coils, A-475-824	I	04/01/1997 – 03/31/1998
Certain Cut-to-Length Carbon-Quality Steel Plate, A-475-826	I	01/01/1998 – 12/31/1998
Certain Pasta, A-475-818	I	05/01/1994 – 04/30/1995
Certain Cut-to-Length Carbon-Quality Steel Plate, A-588-847	Japan	01/01/1998 – 12/31/1998
Frozen and Canned Warmwater Shrimp, A-331-802	Ecuador	10/01/2002 – 09/30/2003
Frozen and Canned Warmwater Shrimp, A-549-822	Thailand	10/01/2002 – 09/30/2003
Stainless Steel Sheet and Strip in Coils, A-201-822	Mexico	04/01/1997 – 03/31/1998
Purified Carboxymethylcellulose, A-421-811	NL	04/01/2003 – 03/31/2004

50. Please comment on the EU arguments in paragraph 50 of its Written Submission that the section 129 re-determinations used by the US (in its calculations of the duty rate without zeroing) are manifestly unrepresentative of the measures in this proceeding because they use "model zeroing". In addressing this question, please clarify what impact, in your view, the use of model zeroing, as opposed to simple zeroing, has in the recalculation of the dumping margin.

83. Please see the response to Question 39, above.

51. Please clarify what is precisely meant by U.S. "import demand elasticities", as referred to in paragraph 67 of the U.S. written submission.

84. An import demand elasticity measures the relative change in demand for imports for a given change in price for the import. The import demand elasticity is usually expressed as the percentage change in demand for imports for a one percent change in price. As the United States

discussed in paragraph 67 of the U.S. Written Submission, generally, there is an inverse relationship between the change in demand for imports and a price change in the import. For example, if the price of the import increases, the demand for the import falls.

85. In its analysis, the United States used import demand elasticities estimated by World Bank researchers. They estimated import demand elasticities for 4,625 products at the 6 digit HS code level for 117 countries. The United States relied on those estimates done specifically for the United States. Some 3,890 products were estimated.

52. In its written submission, the US argues that import demand elasticities are more appropriate than Armington substitution elasticities when determining the change in imports resulting from a change in duty. Please explain more explicitly why this may be the case.

86. There are three main reasons why import demand elasticities are more appropriate than the GTAP Armington substitution elasticities proffered by the EU: functionality of the elasticities, geographic specificity, and product desegregation.

87. As described in the response to question 51, the import demand elasticity measures the change in demand for imports given a price change. This elasticity is relatively easy to understand and directly applicable to the analysis of how much imports will change when duties (and hence import prices) change.

88. The elasticity of substitution, on the other hand, is not as simple and not as directly related to the question at hand. The elasticity of substitution expresses the expected percentage change in the ratio of two quantities of goods demanded to the percentage change in the ratio of their prices. For example, if domestic and imported textbooks have an elasticity of substitution of three, then a 1 percent change in the ratio of their prices will result in a 3 percent change in the ratio of their quantities demanded. This elasticity is not directly applicable to the analysis of how much imports change with a price change. The reduction of a tariff will result in changes in all four components of the substitution elasticity (domestic quantity demanded, imported quantity demanded, domestic prices, and import prices); because none of these remain constant, the elasticity of substitution cannot be used by itself to determine the change in imports resulting from a tariff change.

89. With regard to the GTAP substitution elasticities, it is significant that in the GTAP model, there is a nested system of sourcing demand. First, the model applies a domestic to import substitution elasticity to differentiate sourcing between domestic and imported goods. Second, for the portion of demand to be filled from imports, an import to import substitution elasticity is applied to determine the import sources to meet demand. The substitution elasticities in the GTAP model were specifically estimated for the CGE modeling framework of a nested utility

framework.[43] The EU has taken these elasticities for CGE modeling and applied them to a linear equation that is not based on the structural underpinnings of GTAP. Estimated changes in trade flows resulting from price changes depend on import demand elasticities, which are a function of the elasticity of substitution and other parameters such as supply elasticities and market shares.

90. Furthermore, the World Bank import demand elasticities are more appropriate than the GTAP elasticities because these import demand elasticities are specific to the United States. The GTAP elasticities, however, are neither country- nor region-specific, so every region in the GTAP model has the same set of substitution elasticities.

91. Additionally, the World Bank elasticities are more disaggregated than the GTAP elasticities. The World Bank elasticities were estimated for 3,890 U.S. tariff lines at the 6 digit HTS level. This is in contrast to only 57 sectors in GTAP. By having a much more disaggregated level of analysis, the World Bank estimates provide elasticities for "products" much closer to the imports in question than the GTAP elasticities.

92. In conclusion, the World Bank import demand elasticities are more appropriate because they better fit the proposed methodology, are specific to the United States, and are at a greater level of desegregation than the GTAP elasticities.

53. In its written submission, the US lists a number of advantages associated with using an average of trade over the period from 2007 to 2009 (rather than trade only in 2007) in its calculations (paragraph 76). But given that the 2008 and 2009 were characterised by the financial crisis and hence notably lower trade volumes, can these be considered to be representative years?

93. The average of the period 2007-09 remains more representative of the level of trade on a forward-looking basis than the use of only 2007 trade. Inclusion of the years 2008 and 2009 includes more recent trade than use of 2007 alone. As the proposed suspension of concessions or other obligations would occur no earlier than 2010, estimation of the current level of nullification or impairment necessarily includes a continuation of the same trends already present. Given the magnitude of the financial crisis, any projection of future trade levels necessarily involves a degree of uncertainty. The trade levels from 2008 and 2009 thus may be more representative than 2007 in the near term. Inclusion of the more recent trade data is therefore appropriate.

94. The United States also notes that the use of the trade values from 2007-09 ameliorates any potential skewing effect from the financial crisis. The inclusion of 2007-09 data includes years from prior to the financial crisis as well as the present condition. We also note that the trade value under the relevant measures for 2008 ($144.49 million) is much closer to 2007

[43] Thomas Hertel, David Hummels, Maros Ivanic and Roman Keeney. "How Confident Can We Be in CGE-Based Assessments of Free Trade Agreements?" GTAP Working Paper No. 26, 2003, p. 3. (Exhibit US-41).

($160.67 million) than 2009 ($104.01 million).[44] Any potential skewing from the financial crisis is therefore limited by the use of averaging, and counterbalanced by the need to include recent data to reflect present conditions. The average therefore strikes an appropriate balance between present conditions and longer-term trends.

54. In its written submission, the US highlights the possible arbitrariness of the pass-through rate and profit margin used by the EU in the calculations done in its methodology paper. Please clarify if you object to the principle of a reverse charge or simply to the way it has been calculated.

95. The United States objects to both to the principle of including the reverse charge and to the arbitrary manner in which the EU calculated it.

The United States Objects to the Inclusion of the Reverse Charge in Principle

96. The EU claims that by including the reverse charge, it is accounting for "the part of the duty imposed by the WTO inconsistent measure that is born directly by the firm, rather than being passed on to the customer."[45] Under Article 22.4 of the DSU, the suspension of concessions is permitted to up to a level equivalent to the level of nullification or impairment of trade benefits. The reverse charge relates to the lost profits of individual firms that due to their own pricing decisions in coping with the discipline of an antidumping duty order chose to absorb some of the antidumping duties collected on their shipments of merchandise. Company profit is not a component that should be factored into the calculation of the level of nullification or impairment of trade benefits.

97. In *EC – Bananas*, the arbitrators specifically rejected proposed levels of suspension and nullification or impairment that were based on profit. The arbitrator in that dispute reasoned that "in our view the relevant effect is not on US suppliers' profits but rather on the value of relevant imports from the United States."[46] The United States also notes that the EU only references lost profits for EU exporters, but omits any consideration of the lost profits of U.S. exporters that are impacted by the suspension of concessions in any determination of whether the level of suspension exceeds the level of nullification or impairment.

The United States Objects to the Arbitrary Manner in which the EU Calculated the Reverse Charge

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[44] U.S. Written Submission, Exhibit US-16.

[45] EU Written Submission, paragraph 71.

[46] *EC – Bananas (U.S) (Article 22.6)*, paragraph 7.6.

98. As part of its calculation for the reverse charge, the EU in its methodology paper included an additional trade loss associated with lost profits (at a robust 20% profit rate) from the EU's partial absorption of 5 percent of the duties paid on actual 2007 trade. In response to our criticisms of this component of the calculation, the EU made the arbitrary decision[47] to increase the impact of this component by asserting in its written submission a reverse charge based on a lower (but nevertheless still robust) 10% profit rate and the EU's absorption of 50% of the duties paid on actual 2007 trade.[48]

99. In revising its duty absorption rate from 5% to 50% from its Methodology Paper to its first written submission, the EU still makes no attempt to demonstrate the reasonableness of its assumptions. Instead, the EU makes the unhelpful comment that the rate of absorption "will necessarily have to be somewhere between zero and 100%."[49]

100. The EU now attempts to justify its selection of a 10% profit margin based on a sample of profit rates for public companies that are subject to some of the antidumping orders at issue in this dispute. The EU does not, however, explain how it calculated these profit rates. Rather it refers the Arbitrator to each company's website without further guidance as to how to locate the figures that the EU utilized for purposes of the calculation. It is unclear whether these calculations relate to the company's overall profit, profit on the business lines at issue in this dispute, what type of profit calculations are reflected in the calculation, or why that type of profit calculation is appropriate.

101. In addition to the unsupported and speculative assumptions with respect to profit and absorption, this reverse charge further overstates the "trade loss" by including cases 1, 6, 7, 8, and 14. As explained in the U.S. written submission and further explained elsewhere in these responses, the antidumping orders underlying Cases 1 and 6 have been revoked. Therefore, these cases will no longer provide any on-going loss to the EU. Similarly, with respect to Cases 7, 8, and 14, the challenged investigations were brought into full compliance with the DSB's recommendations and rulings and there were no findings of non-compliance with respect to these cases in the Article 21.5 proceedings.

102. The United States further notes that the EU in asserting this reverse charge has assumed that any absorption of antidumping duties by these firms results in a loss for which suspension of

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[47] EU Methodology Paper, footnote 35 ("The attached calculation sheet in Exhibit EU-2, referencing a pass-through rate of 95 % and a profit margin of 20 %, is conditioned on the assumption that the United States will not contest the estimate of the observed trade loss. If the United States does contest that estimate and/or it is otherwise modified by the Panel, then the European Union claims in the alternative that the calculation should be done with a pass-through rate of 50 % and a profit margin of 10 %.").

[48] EU Written Submission, paragraph 70.

[49] EU Written Submission, paragraphs 73-74.

concessions is appropriate. This assumption ignores that this assumes the fact that only a portion of the antidumping duties applicable to these firm's entries of subject merchandise is theoretically attributable to zeroing. There is no evidence whatsoever that any of the antidumping margins currently at issue in this dispute would be reduced to zero or *de minimis* levels if the antidumping margins were recalculated without the use of zeroing.

55. Please comment on the EU request, in paragraph 102 of its Written Submission, for the Arbitrator to "increase the level of countermeasures authorized by 20%".

103. At the outset, the United States notes that the proposed 20% increase to the level of suspension of concessions was not contained in the EU's request for suspension of concessions. Neither its request to the DSB (which was referred to arbitration by the U.S. objection and is therefore the subject of this arbitrator's task) nor its methodology paper suggested this approach. Regardless, there is no basis for the EU to request such an increase as such an increase would clearly exceed the level of nullification or impairment.

104. The only "case law" that the EU cites as justification for inclusion of this 20% penalty is an arbitration under a different legal standard under a different covered agreement (the SCM Agreement). The reasoning of that arbitrator would not apply here, to an arbitration under the DSU under a different standard.

56. Please comment on the EU's explanation of why its request for suspension of obligations under the DSU meets the requirements of Article 22.3(a).

105. The EU argues that Article 22.3(a) of the DSU "clearly states that the request should relate to the same sector" but that subparagraph (a) "does not require that [the request] should relate to the same agreement."[50] Therefore, it says, that so long as its "proposed countermeasure would apply to goods, which are defined by the DSU as the same sector," the EU request would be consistent with Article 22.3(a).[51] This argument is incorrect.

106. As an initial matter, the EU still has not addressed the fact that the alleged measure that the EU claims should give rise to the suspension of DSU obligations – a "statement that the zeroing methodology used in review investigations will not be brought into conformity with the covered agreements"[52] – was not the subject of any findings by the panel or Appellate Body, and

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[50] EU Written Submission, paras. 113. The United States notes that paragraphs 111-113 of the EU Written Submission incorrectly refers to "Article 23(3)(a) of the DSU."

[51] EU Written Submission, para. 111.

[52] EU Article 22.2 Request, WT/DS294/35, p. 3.

that the DSB did not make a recommendation or ruling on this alleged measure.[53] Nor has the EU sought to contradict the fact that no such statement actually exists.[54]

107. Articles 22 and 23 of the DSU are clear that the suspension of concessions or other obligations is contingent on the failure of a Member to implement the recommendations and rulings of the DSB, and that the suspension of concessions or other obligations may not be requested unless that condition is met.[55] The EU has not met this requirement

108. ith respect to Article 22.3(a), the crux of the EU argument is that Article 22.3(a) "does not require that [the EU's request] should relate to the same agreement."[56] The EU, however, ignores the other provisions of Article 22 and provides no explanation of how its request is consistent with the structure of Article 22 as a whole. The opening sentence of Article 22.3 states that "[i]n considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures;" that is, subparagraphs (a) through (g) must all be applied, not just one of those subparagraphs in isolation.

109. Consistent with this sentence, and reading Article 22.3 as a whole, previous arbitrators have found that "Article 22.3 of the DSU provides a 'hierarchy' of remedies that a complaining party must follow in determining in which sectors or under which agreements suspension of concessions or other obligations can be sought, namely (1) seek to suspend in the same sector in the same agreement, (2) seek to suspend within the same agreement and (3) seek to suspend under another agreement."[57] Every arbitrator that has considered cross-agreement suspension has found that the DSU foresees this occurring under Article 22.3(c).[58]

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[53] *See* U.S. Written Submission, paras. 144-148.

[54] *See* U.S. Written Submission, paras. 140-144.

[55] DSU, Arts. 22.1, 22.2, 23.2(c); see also U.S. Written Submission, paras. 146-149.

[56] EU Written Submission, paras. 113.

[57] *U.S. – Upland Cotton (Articles 22.6/4.11)*, para. 5.62 (quoting *U.S. – Gambling (Article 22.6)*, para. 4.19).

[58] *EC – Bananas (Ecuador) (Article 22.6)*, para. 121 ("Having concluded that suspension is not practicable or effective under the same sectors ... nor in other sectors under the same agreement ... as those where violations were found, we next review Ecuador's consideration that 'circumstances are serious enough' within the meaning of Article 22.3(c) to request suspension of concessions or other obligations under another agreement than those where violations were found."); *U.S. – Gambling (Article 22.6)*, para. 4.69 ("Two cumulative conditions therefore have to be met for a complaining party to be able to seek suspension under another agreement: (a) that complaining party considers that it is not practicable or effective for it to suspend concessions or other obligations with respect to other sectors within the same agreement; and (b) that party considers that the circumstances are 'serious enough'."); *U.S. – Upland Cotton (Articles 22.6/4.11)*, para. 5.65 ("Brazil will have followed the principles and procedures of Article 22.3 if it has determined, in accordance with the terms of subparagraph (c), that: (a) 'it is not practicable or effective' to seek suspension under the same agreement (i.e. under the agreements on trade in goods); and (b) 'the

110. Cross-agreement suspension is what the EU is requesting since it is seeking to suspend obligations with respect to an agreement other than that under which the panel or Appellate Body found violations. It is trying to do so, however, without having attempted to meet the requirements of Article 22.3(c). That a complaining party might seek to avoid the requirements of subparagraph (c) by asserting that its request should be reviewed only under subparagraph (a) was foreseen by the very first Article 22.6 arbitrator:

> 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.[59]

111. The EU's assertion that Article 22.3(a) of the DSU allows it to suspend concessions or other obligations under the DSU is inconsistent with the structure of Article 22. The EU's approach to subparagraph (a) ignores the progression set up by Article 22, and would strip subparagraphs (b) and (c) of effect. When read consistently with the context provided by the rest of Article 22.3, "sector," as used in subparagraph (a), must be understood to apply to one of the subparts of the agreement under which a breach has been found. Accordingly, Article 22.3(a) cannot authorize the suspension of DSU concessions or other obligations because the DSU obligations the EU seeks to suspend are not a subpart of, or obligations under, any of the goods agreements listed in Article 22.3(g)(i).

112. Finally, even if one were to accept the EU's isolated reading of Article 22.3(a), it is still not clear how the EU believes subparagraph (a) applies to the suspension of DSU obligations. The EU's Written Submission simply states, without explanation, that the requested suspension of concessions under the DSU would apply to the same sector, i.e, the goods sector. It is unclear whether the EU believes that (1) the obligations under the DSU are part of the goods sector, and

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circumstances were serious enough'.").

[59] *EC – Bananas (U.S.) (Article 22.6)*, para 3.7.

if so how that would be consistent with Article 22.3(f),[60] or (2) the DSU is not within any "sector." If the EU's theory is the latter, then DSU concessions could be suspended in connection with virtually any DSB recommendation or ruling. It is also unclear whether the EU is maintaining that any suspension of concessions or other obligations that would affect goods would be considered "with respect to the [goods] sector" within the meaning of Article 22.3(a).

57. Please comment on the EU's observation, at paragraph 117 if its Written Submission, that the amount of countermeasures would cumulate and that for example, "if three years would have elapsed between the end of the reasonable period of time and the date on which the countermeasure would first be applied, then the first annual period would, for example, entitle to the European Union to a countermeasure of four times the annual amount".

113. The United States disagrees with the notion that the DSU permits suspension of concessions based upon a cumulation of past effects. In the first place, such a countermeasure would be retroactive. As explained in answer to Question 4, however, suspension of concessions under the DSU is forward-looking, and past periods are relevant solely to the extent that they serve as a proxy for the level of nullification or impairment going forward.

114. In the second place, such cumulation would be inconsistent with Article 22.4 of the DSU, because the suspension of concessions would not be "equivalent" to the level of nullification or impairment: by the EU's own admission, it would be three to four times that level.[61] And as noted in answer to Question 37, the EU itself has emphasized the importance of maintaining that equivalence (and not increasing the amount beyond that):

> Indeed, a DSB authorization to suspend concessions under Article 22.7 of the DSU could not justify a derogation from the obligation to maintain the equivalence between the level of suspension and the level of nullification and impairment under Article 22.4 of the DSU.[62]

115. Third, this request by the EU comes too late. Neither its request to the DSB (which was referred to arbitration by the U.S. objection and is therefore the subject of this arbitrator's task) nor its methodology paper suggested this approach. Neither methodology in the EU's

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[60] The DSU is not defined as a sector in subparagraph (f), nor are dispute settlement procedures a "good" under the ordinary meaning of that term in Article 22.3(f)(i).

[61] EU Written Submission, para. 117 ("if three years would have elapsed between the end of the reasonable period of time and the date on which the countermeasure would first be applied, then the first annual period would, for example, entitle to the European Union to a countermeasure of four times the annual amount").

[62] Minutes of Meeting, Dispute Settlement Body, 18 March 2003, WT/DSB/M/145, para. 48.

methodology paper seeks cumulative, retroactive levels of suspension of concession. Instead, both of the EU's methodologies generate an estimated level of nullification or impairment based upon 2007 data. Nowhere does the methodology paper refer to using a cumulative effect as the basis for suspension of concessions, only the estimated 2007 effect. Moreover, because the EU made no attempt to quantify trade values for 2008 or 2009, there is no basis for its suggestion that quadrupling the 2007 figure would result in the cumulative effect. Any suggestion that the EU should be permitted to quadruple the amount of the countermeasure in the first year thus contradicts the EU's methodology paper and is entirely speculative.

116. Nor is it correct to consider – as the heading of the last section of the EU's submission implies – that this issue relates to the "nature" of the concessions to be suspended; it is a question of the level of suspension, and thus is not exempt from scrutiny by the Arbitrator.

117. Finally, a previous Article 22.6 arbitrator has also rejected a request for authorization based on a retroactive approach. In *United States – Upland Cotton*, the arbitrator considered a request from the requesting Member for the level of countermeasures to include "one-time countermeasures" in the amount of the user marketing (Step 2) payments made by the United States to domestic users of upland cotton in addition to the level for other countermeasures sought by the complaining Member.[63] The compliance panel had found these Step 2 payments to be inconsistent with the SCM Agreement.[64] The expiration of the RPT was 1 July 2005; Brazil was seeking authorization for this one-time amount for the 13 months after the RPT, to 30 July 2006, when the United States repealed the Step 2 program.[65] Although the United States continued to make Step 2 payments for a period after the expiration of the RPT, the arbitrator nonetheless denied Brazil's request for a one-time amount.[66] This decision confirms that the suspension of concessions should be based upon the current level of nullification or impairment, not a retroactive analysis.

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[63] *United States – Upland Cotton* (WT/DS267/ARB1), para. 2.6

[64] *Id.* at para 1.13.

[65] *Id.* at para. 3.2.

[66] *Id.* at para. 3.50. While the *US – Upland Cotton* arbitration was under the SCM Agreement, the issue of retroactivity is not one that depends on the different standard under that Agreement.

TABLE OF EXHIBITS

US-30	Commission Regulation (EU) No. 305/2010 of 14 April 2010
US-31	CBP Form 7501
US-32	Pasta, Data from Automated Commercial System, U.S. Customs and Border Protection
US-33	Stainless Steel Plate, Data from Automated Commercial System, U.S. Customs and Border Protection
US-34	Stainless Steel Sheet from Germany, Data from Automated Commercial System, U.S. Customs and Border Protection
US-35	Stainless Steel Sheet from Italy, Data from Automated Commercial System, U.S. Customs and Border Protection
US-36	Stainless Steel Wire Rod from Italy, Data from Automated Commercial System, U.S. Customs and Border Protection
US-37	Ball Bearings, Data from Automated Commercial System, U.S. Customs and Border Protection
US-38	Cut-to-Length Plate from Italy, Data from Automated Commercial System, U.S. Customs and Border Protection
US-39	Granular Polyresin, Data from Automated Commercial System, U.S. Customs and Border Protection
US-40	Summary data for subject entries under Cases 1 and 6
US-41	Thomas Hertel, David Hummels, Maros Ivanic and Roman Keeney. "How Confident Can We Be in CGE-Based Assessments of Free Trade Agreements? GTAP Working Paper No. 26, 2003