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

RECOURSE TO ARTICLE 22.6 OF THE DSU BY THE UNITED STATES

(DS294)

COMMENTS ON THE RESPONSES OF THE EUROPEAN UNION TO THE ARBITRATOR'S ADDITIONAL QUESTIONS TO THE PARTIES

June 11, 2010

58. <u>To both parties</u>: A number of past arbitrators have expressed the level of nullification or impairment in terms of "trade effects" (see for example *US – Byrd Amendment*, Decision of the Arbitrator, para. 3.39), or "lost trade" (see for example *EC – Bananas III (US),* Decision of the Arbitrator, paras. 6.11, 6.12, 6.15) or "trade or economic effects" (see for example *US – Anti-Dumping act of 1916*, Decision of the Arbitrator, para. 5.53). Please clarify what you understand these various terms to refer to, and whether one or other of them reflects a correct understanding of what the level of nullification or impairment may consist of for the purposes of establishing a level of suspension "equivalent" to the level of nullification of impairment.

1. In its response to Question 58, the EU argues that the <u>nature</u> of the requesting party's choice of suspension sets the framework or approach for the evaluation for the level of nullification or impairment.[1] This is incorrect.

2. The evaluation of the level of nullification or impairment of benefits relates to the proposed <u>level</u> of suspension of concessions or other obligations, not the <u>nature</u> of the concessions that are proposed to be suspended. As the EU has frequently reminded the Arbitrator, Article 22.7 specifically precludes the examination of the nature of the concessions.[2]

3. The task of the Arbitrator here is to determine whether the level of suspension proposed by the EU – set forth in its original request as taking the form of the suspension of concessions on either $311 million or $477 million in trade – is equivalent to the level of nullification or impairment of benefits, and if not, what level of suspension of concessions or other obligations is equivalent to that level. The measures that the EU might intend to adopt as a result of the suspension of concessions is irrelevant to that inquiry.

4. In its response to Question 58, the EU also notes that it adopted the first step of Methodology 1 because it is "verifiable" and "directly identifiable and quantifiable." Notwithstanding the fact that the trade values employed by the EU may be verified, the United

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[1] EU Response to the Additional Questions of the Arbitrator, paras. 2 ("[T]he conception of the nullification or impairment in terms of lost trade or trade effects flowed from the selection by the United States of the nature of the suspension of concessions or other obligations. . . . As we have explained in our submissions to the Arbitration Panel, a countermeasure blocking a certain trade value equivalent to what has been blocked by the WTO inconsistent measure by definition sets the discussion in the framework of trade effects or lost trade. "), and 3 ("We consider that this is one way to conceive of nullification or impairment (and a correct way) in circumstances where the nature of the countermeasure selected by the complaining Member is a prohibitive duty on an equivalent trade value. On the other hand, the European Union understands the term "economic" effect to refer to a broader concept, encompassing other types of metric for assessing equivalence, as indicated, for example, in the *Section 110(5)*, *1916 Act*, *Byrd* and *Superfund* cases. We consider this to be an equally correct way of approaching the matter, and that the appropriate approach flows from the selection of the nature of the countermeasure by the complaining Member.").

[2] EU Response to the Additional Questions of the Arbitrator, para. 17 ("The European Union considers that the nature of the countermeasure is a matter for the complaining Member and outside the Arbitration Panel's jurisdiction.")

States, in exhibits US-32 through US-40, US-44, and US-48, demonstrated that the EU's selected trade values are inaccurate and, in most cases, grossly overstate the trade value at issue under the relevant antidumping duty orders. Moreover, the EU's statement obscures the fact that step 2 of Methodology 1 (the "reverse charge") is based on the completely unverifiable and unsupported assumptions that all of the affected companies absorbed 5 percent of the antidumping duty and should have earned a hefty 20% profit on such sales.[3] As previously noted, the only justification for the EU's quantification of the duty absorption rate was the unhelpful comment that the rate of absorption "will necessarily have to be somewhere between zero and 100%."[4]

5. With respect to the EU's comment addressing other Members exporting to the United States with the elasticities, please refer to the U.S. Response to Question 86.

6. With respect to Japan's response to Questions 1, 2 and 12 (paragraphs 2 to 5) from the Arbitrator, which the EU incorporates by reference into its response to Question 58, please see the Response of the United States to Questions 59 and 65.[5]

7. Please also refer to the Response of the United States to Question 58.

64. <u>To the European Union</u>: you refer to the nullification or impairment as "the measure found to be inconsistent" (for example, in paragraph 68 of your responses

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[3] In response to our criticisms of this component of the calculation, the EU made the arbitrary decision 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 exporter's absorption of 50% of the duties paid on actual 2007 trade. See 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 %."); EU Written Submission, paragraph 70.

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

[5] With respect to the EU's "incorporation" of Japan's arguments, the United States notes that the EU is now adopting Japan's arguments as its own at the very end stage of the proceedings. Procedurally, puts the United States in a difficult position because our opportunity to respond is limited. It also burdens the United States by requiring us to respond to two sets of arguments, and gives Japan an advantage in its Article 22.6 proceeding in its separate dispute with the United States by requiring us to provide responses to Japan's arguments in advance.

Nevertheless, in our comments, the United States has responded to the substantive points raised by the EU, including the "incorporated" points from Japan's responses. To the extent that the EU "incorporates" Japan's responses, our comments apply to Japan's responses as well. Any instance where the United States does not directly address Japan's response does not signify agreement with Japan's response. Instead, our comments apply to all of the substantive issues poised by the EU's responses, including the "incorporated" responses by Japan.

to the Arbitrator's questions). Do you consider that the nullification or impairment *is* the violation? Please comment on the determinations of the arbitrator in *US – Byrd amendment* that "the benefit nullified or impaired must necessarily mean something else than the violation itself (*US – Byrd Amendment*, Decision of the Arbitrator, para. 3.55). Do you agree with this determination?

8. In responding to Question 64, the EU erroneously argues that the nature of the proposed measure that a Member intends to take once the Member is authorized to suspend concessions dictates the manner in which the level of nullification or impairment is determined.[6] As discussed above with respect to the EU's response to Question 58, this is incorrect.

9. The EU further suggests here that if the requesting Member proposes a measure that is "in the nature of an equivalent ad valorem tariff on an equivalent amount of actual trade . . . , then the relevant nullification or impairment is the application of an equivalent tariff to an equivalent trade value." As the United States explained in response to Question 66, such a "mirror" approach cannot form the basis for the comparison of the proposed level of suspension to the level of nullification or impairment. Even aside from the fact that an arbitrator is not to examine the nature of the concessions to be suspended, the EU's approach is wrong. Because the EU's proposed mirror approach does not take into account the proposal's quantitative effect on trade, the level of nullification or impairment cannot be calculated or evaluated by reference to the proposed mirror measure itself.

66. To both parties: Please comment on the potential relevance of the determinations in *US – 1916 Anti-Dumping Act*, authorizing countermeasures in the form of a "mirror" legislation. In this context, please comment on:

(a) the admissibility, under Article 22.6 of the DSU, of an approach to calculating the level of nullification or impairment based on an "equivalent" measure;

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[6] EU Response to the Additional Questions of the Arbitrator, para. 10 ("It is only once that is known, in the context of Article 22, that the relevant metric will have been identified, and thus only at that stage that it is possible to consider whether the proposed suspension of concessions or other obligations is equivalent to the nullification or impairment. Thus, for example, if the complaining Member selects a countermeasure in the nature of a prohibitive tariff on lost trade, then that lost trade will be the relevant nullification or impairment - and it is that statement or proposition that is more than the violation. If, on the other hand, the complaining Member selects a countermeasure in the nature of an equivalent ad valorem tariff on an equivalent amount of actual trade (second EU alternative, step 1), then the relevant nullification or impairment is the application of an equivalent tariff to an equivalent trade value - and once again it is that statement or proposition that is more than the violation. Finally, if the complaining Member selects a countermeasure in the nature of a reverse charge on excessive anti-dumping duties collected, then those excessive duties will be the relevant nullification or impairment - and it is that statement or proposition that is more than the violation.")

(b) the relationship between the quantum of trade to which the suspending "equivalent" measure might apply and the trade effects of the violating measure.

10. The EU in its response to Question 66 focuses on a hypothetical posed in paragraph 5.530 of the arbitrator's report in *US – 1916 Anti-Dumping Act*. Paragraph 5.530 reads as follows:

> 5.530 We agree with the United States that even when identical measures are applied in similar ways, the effects on trade can be dramatically different. The following hypothetical example illustrates this point:
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> - Member X exports $10 billion dollars worth of goods to Member Y. Member Y decides to impose a 10% *ad valorem* tax on all imported goods from Member X. The total economic or trade impact of such a measure (assuming that exports continued as before, and the tax was paid) would be $1 billion.
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> - Member Y's 10% ad *valorem* tax is found to be WTO-inconsistent. Following the expiration of the reasonable period of time, Member X seeks to adopt a "qualitatively equivalent" measure by imposing a 10% *ad valorem* tax on all imports from Member Y.
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> - Member Y exports $100 billion dollars worth of goods to Member X. The total economic or trade impact of this "qualitatively equivalent" measure, the 10% *ad valorem* tax on all imported goods from Member Y, would be $10 billion.[7]

The arbitrator, in rejecting the EU's mirror approach continues:

> 5.531 Other examples, drawn from other WTO agreements, could illustrate the same conclusion. More to the point, however, is to consider how the proposed EC suspension in the present case could apply to US exports to the European Communities. Whatever the level of nullification or impairment – an issue we return to below – the EC suspension, once applied, must remain capped at or below that level.
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> 5.532 We also do not accept the EC argument that the suspension of obligations is somehow "equivalent" because its proposed measure would replicate, or partially replicate, the 1916 Act. Leaving aside for the moment the issue of whether we can examine the EC measure, we would re-iterate that similar or even identical measures can have dissimilar trade effects. Stated another way, similar or identical measures may not

[7] *US – 1916 Anti-Dumping Act* (22.6), para. 5.30.

result in the required equivalence between the level of suspension and the level of nullification or impairment.[8]

11. The EU argues that, unlike the proposed suspension in the hypothetical, the EU's proposed suspension in the present case is capped at a particular volume of trade and therefore "eliminates the 'lack of cap' concern expressed in the *1916 Act* case."[9] Although the EU has capped the value of trade to which its proposed suspension would apply, this does not equate to an equivalent level of suspension. As the arbitrator in the 1916 Act noted, "similar or even identical measures can have dissimilar trade effects" and "may not result in the required equivalence between the level of suspension and the level of nullification or impairment."

12. As discussed in the U.S. response to Question 66, in its original request for authorization under Article 22.2, the EU proposed, as one of its two approaches, to apply an *ad valorem* tariff of 13.18% on $477 million in trade.[10] However, if the EU suspends its tariff concessions on these goods, then there would be nothing inherent to limit the tariff the EU could apply to 13.18%, nor can the Arbitrator examine the nature of the EU's proposed measure. Furthermore, even aside from the difference between the suspension of concessions and the measure to be applied to take advantage of that suspension, there is no basis for considering that the EU's proposed measure would result in trade effects equivalent to the level of nullification or impairment. The EU has not indicated to what products the EU would apply this rate[11] nor provided any other information or analysis that would permit the Arbitrator to evaluate whether such a measure would have trade effects equivalent to the level of nullification or impairment. The actual trade effects of this measure could vary greatly depending on the elasticities associated with the products to which the EU chooses to apply the additional *ad valorem* tariff. Accordingly, contrary to the EU's assertions, the EU's proposed approach does not eliminate the "lack of cap" problem identified by the arbitrator in *US – 1916 Act.*

13. The EU further claims that "by implication the *1916 Act* case confirms that the mirror now proposed by the European Union meets the requirements of Article 22." However, the arbitrators in *US – 1916 Act* do no such thing. The arbitrator in *US – 1916 Act* did not authorize a mirror approach, and in fact explicitly rejected such an approach.[12] Instead, the arbitrator

[8] *US – 1916 Anti-Dumping Act* (22.6), paras. 5.531-5.532.

[9] EU Response to the Arbitrator's Additional Questions, para. 16.

[10] The EU has modified and adjusted this proposal several times throughout these Article 22.6 proceedings. None of the adjustments affects the analysis of the proposal for purposes of this question.

[11] The EU "has not yet decided upon" the list of products to which its proposed suspension will apply. EU Written Submission, para 90.

[12] *US – 1916 Act (Article 22.6)*, para. 5.34 ("Given the potentially unlimited application of the EC suspension, as described in its request, it is possible that the EC suspension could exceed the level of nullification or impairment when it is applied, and thereby become punitive. The EC request does not ensure that the suspension will be limited

quantified the level of nullification and impairment using the amount of any court judgments and settlements, and called on the EU to quantify any suspension of concessions accordingly.[13] This leaves open exactly what measure the EU would have applied, but the arbitrator explicitly stated it could not examine what measure the EU would apply nor attach conditions to any such measure.[14] This does not constitute a confirmation – implicit or otherwise – of the EU's proposed approach in this case.

14. The EU claims that

> there is no relationship between the quantum of trade to which the countermeasure will apply and the trade effects of the WTO inconsistent measure, because the trade effect is not the metric. Rather, the relevant relationship is between the quantum of trade to which the countermeasure will apply and the quantum of trade to which the WTO inconsistent measure is applying at the end of the RPT: and that relationship is one of equivalence.

This proposition is directly contradicted by in *US – 1916 Act* by the arbitrator's reasoning for rejecting a mirror approach in paragraph 5.32 (quoted above). There the arbitrator specifically notes that the problem with the mirrored approach is the "dissimilar trade effects" not the quantum of trade to which the proposed suspension will apply. Moreover, the EU's own approach does not apply to an equivalent quantum of trade. Rather, the EU has proposed the application of an *ad valorem* rate to an equivalent level of trade plus an amount estimated to be the amount of "trade loss."[15]

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to the level of nullification it has sustained, as expressed in quantifiable economic or trade terms.") and para. 5.40 ("In our view, we are not permitted by Article 22.7 to examine the European Communities' proposed "mirror" regulation, let alone "attach conditions" to it. This would involve the arbitrators in an examination of the "nature" of the obligations to be suspended.").

[13] *US – 1916 Act (Article 22.6)*, paras. 6.3 and 8.2 ("In quantifying the monetary level of its nullification or impairment, the European Communities may include: (a) the cumulative monetary value of any amounts payable by EC entities pursuant to final court judgments for claims under the 1916 Act; and (b) the cumulative monetary value of any amounts payable by EC entities pursuant to the settlement of claims under the 1916 Act.").

[14] See *US – 1916 Act (22.6)*, para. 5.42 ("Thus, we are of the view that the European Communities' proposal to adopt a "mirror" regulation relates to the nature of the obligations to be suspended. We agree with the United States that we do not have the jurisdiction to determine equivalence between the measure proposed to implement the suspension and the measure that resulted in the nullification or impairment. DSU Article 22.6 and 22.7 authorize the suspension of concessions or other obligations. The arbitrators do not have the jurisdiction to approve the adoption of measures by the complaining party.") and para. 5.43 ("At this stage, therefore, we simply take note, as a factual matter, of the European Communities' statements that it intends to implement any authorized suspension of obligations through a proposed "mirror" regulation. However, in accordance with the clear limitations on our mandate under Article 22.7, we decline to examine such a regulation.").

[15] EU Methodology Paper at EU-2.

15. Please also refer to the Response of the United States to Question 66.

67. <u>To the European Union</u>: In your submissions (for example at paragraph 145 of your responses to questions), you refer to the "design" or the "nature" of the countermeasures" as something that the Arbitrator may not consider. Article 22.7 refers to the arbitrator not examining "the nature of *the concessions or other obligations* to be suspended". Do you consider that the nature of the obligations to be suspended is the same as the nature or design *of the countermeasures*?

16. With regard to the EU's persistence in using the term "countermeasure" and its claim that the term may be used interchangeably with "suspension,"[16] the United States disagrees that this is "just a question of labels." The confusion of "the level of suspension of concessions or other obligations" with "countermeasures" goes to the heart of the Arbitrator's task. The DSU negotiators were concerned enough about this difference that they included express language limiting the task of the arbitrator to examining the level of suspension and excluding an examination of the nature of the concessions to be suspended.

17. The EU however constantly shifts back and forth between the concept of suspension (i.e., the suspending of an international concession or obligation) and the concept of the measure that is taken as a result of the suspension (i.e., the action taken pursuant to domestic law). Suspension of a tariff concession (a tariff binding in a Member's schedule) refers to the suspending of the concession as a whole; not the modification of that concession such that, for example, the tariff binding goes from 5% (the bound rate) to 50% or 100% or some other rate not found in a schedule. The measure, on the other hand, is an action that may affect trade and may be subject to dispute settlement.[17] Pursuant to DSU Articles 22.4 and 22.7, it is the level of suspension of concessions or other obligations that must be compared to the level of nullification or impairment – not the measure to be taken as a result of the suspension of concessions.

68. <u>To the European Union</u>: In paragraph 63 of your Written Submission, you indicate that you consider it "your right under the DSU not to look any further into the

[16] EU Response to the Arbitrator's Additional Questions, para. 20 ("We are content that every instance of "countermeasure" in our submissions be replaced with "level of the suspension of concessions or other obligations" if that would make the United States happy (in fact, we use the terms interchangeably). There is absolutely no conceptual issue here – it is just a question of labels. Our justification for the choice of terms is that Article 22.1 of the DSU clearly states that compensation and "the suspension of concessions or other obligations are temporary **<u>measures</u>**" – so the DSU itself uses the term. ").

[17] Of course, if a concession is suspended, there can be no claim that a measure is inconsistent with that particular concession.

future than the end of the reasonable period of time". Do you consider that the end of the reasonable period of time is appropriate as *the only* legitimate basis for the calculation of nullification or impairment, or as a representative basis for the future evolution of the level of nullification or impairment, or something else? Some past arbitral decisions have awarded variable amounts of suspension taking into account future evolutions in the level of nullification or impairment. Please comment on these awards in light of your position that there need be no consideration of a period beyond the end of the reasonable period of time.

18. The EU's response does not support its decision to base its calculations solely upon the end of the reasonable period of time. With respect to the choice of a fixed or variable level of suspension, the EU states that, "the question of whether it is to be fixed or variable is a matter for the complaining Member." Article 22.4 of the DSU, however, does not contain such a provision. Instead, Article 22.4 requires that the level of suspension be equivalent to the level of nullification or impairment.

19. The EU's reference to Japan's response to Question 6 posed to Japan also does not support the EU's argument. Japan argued that "an arbitrator may hold that a constant amount of N/I accrues each year, pending full implementation, on the basis of evidence of the N/I that accrued in (a) particular reference year(s)." As we have discussed above, the end of the RPT is not the relevant "reference year," but rather it should be the current level of nullification or impairment. Furthermore, even if the Arbitrator were to accept Japan's argument that the end of the RPT may be used as a "reference year" in some instances, this would not support the EU's argument that "the question of whether it is to be fixed or variable is a matter for the complaining Member." Instead, such decisions would be made by the Arbitrator based upon the available data.

20. Please also refer to the response of the United States to Question 45.

69. <u>To the European Union</u>: Please clarify why, if the nullification or impairment having accrued in years 2008 and 2009 should be included in the amounts to which the suspending measures would be applied in the first year of suspension, these amounts should be calculated on the basis of the year 2007 rather than on the basis of calculations using the relevant data for these years?

21. The EU's response fails to support its decision to ignore the available data for 2008 and 2009. First, the underlying premise of the EU's claim – that the EU may properly cumulate suspending measures for the first year based upon all the time that has passed from the end of the RPT until the present – is contradicted by Article 22.4's requirement that the level of suspension be equivalent to the level of nullification or impairment. As the "level" does not refer to cumulation of past effects, the underlying premise of the EU's contention is fundamentally

flawed. The EU also did not include such a request in its initial request for suspension of concessions, so its belated request is invalid for that reason as well.

22. Second, even if the Arbitrator were to consider the EU's request to cumulate the 2007-09 trade effects for the first year of suspension, the EU's omission of 2008 and 2009 data renders its calculation wholly inappropriate. The EU's omission of 2008 and 2009 data distorts its calculation of the nullification or impairment by (1) including measures that have already been brought into compliance or revoked after the end of the RPT; and (2) failing to account for the different values of trade in 2008 and 2009 compared to 2007. By simply multiplying the 2007 data rather than using the available 2008 and 2009 data, the EU has failed to account for the different measures in effect and variations in trade value in 2008 and 2009.

23. Third, the EU's contention that, "[t]he selection of the countermeasure as fixed is in part a consequence of the US refusal to adduce the relevant data" is simply false. We have, in fact, "adduced the data" to which the EU refers, but the EU has refused to use it. Specifically, we have supplied the CBP data showing the trade values for 2007-09 for each of the relevant measures, and have explained which orders were revoked and brought into compliance after the end of the RPT. The EU's failure to account for differences in trade value and measures at issue in 2008 and 2009 is a consequence of the EU's self-arrogated "right under the DSU not to look any further into the future than the end of the reasonable period of time," not a failure by the United States to "adduce the data."

24. Fourth, the EU incorrectly contends that the United States is somehow required to convene a "reverse compliance panel" to demonstrate which orders it has brought into compliance after the end of the RPT. As we have explained elsewhere, such a "reverse compliance panel" concept appears nowhere in Article 22 of the DSU. In fact, the EU's approach is directly at odds with the basis for this arbitration proceeding – the DSB findings resulting from the compliance proceedings under Article 21.5 of the DSU. In those proceedings, the panel and the Appellate Body were not examining the situation as it existed at the end of the RPT. Indeed, the DSB's findings concern events after the end of the RPT. For example, with respect to Case 1, the Appellate Body report made a finding of inconsistency with respect to a measure that did not come into existence until June 22, 2007, months after the end of the RPT. If the EU's approach were correct that the only question is the situation as it existed as of the end of the RPT, then there would be no basis for the Arbitrator to include in the level of nullification or impairment any findings with respect to measures that were adopted after the end of the RPT.

25. Moreover, the EU's attempt to invent a "reverse compliance panel" requirement denies the Arbitrator's ability to witness the actual current level of nullification or impairment. Nowhere does the DSU so constrain the Arbitrator's ability to witness actual events. Indeed, in the *US - CDSOA* and *US - 1916 Act* decisions, previous Arbitrators have awarded variable levels of suspension based upon their assessment of current levels of nullification or impairment rather than remaining fixed at the level at the end of the RPT.

26. To give one example, in a hypothetical case there could be two WTO-inconsistent measures, one of which had a trade effect of $99 per year, and the other had a trade effect of $1 per year at the end of the RPT, for a total of $100 per year. If the measure with the trade effect of $99 per year were revoked after the RPT and the measure with the trade effect of $1 per year stayed in effect, under the EU's reasoning the complaining Member would be entitled to a level of suspension of $100 per year. Such a result, however, would bear absolutely no relation to the current level of nullification or impairment, nor would it bear any relation to the current balance of trade concessions. Instead, such a level of suspension would create a current imbalance of trade concessions. Cumulating the trade effects for each year between the end of the RPT and the present would only magnify this disparity. As this hypothetical demonstrates, the EU's approach gives no credence to current levels of nullification or impairment, and results in excessive levels of suspension when such a scenario occurs.

27. Please also refer to the responses of the United States to Questions 45 and 57.

70. <u>To the European Union</u>: Please clarify whether the choice of the end of the reasonable period of time for implementation as period of reference implies also that only measures or actions existing at that time should be taken into account in the calculations. If not, why not?

28. The EU states that its point with respect to its complaint in this dispute "is that all such post RPT actions have their counterpoint in an omission subsisting at the end of the RPT, and it is to that point of time, and all the relevant omissions, that we are looking for the purposes of the calculation."[18] But this is not in fact correct. As noted above, the DSB findings resulting from the compliance proceedings include measures taken to comply after the end of the RPT. These do not represent an "omission" in existence as of the end of the RPT. Furthermore, it appears that the EU seeks to have the Arbitrator include any nullification or impairment resulting from measures taken after the end of the RPT. For example, the EU seeks authorization to immediately increase the level of suspension without recourse to the DSU in the event that the United States increases the existing rates of duties using a calculation methodology that employs zeroing in a future administrative review, a position that is entirely inconsistent with the EU's statements in this answer (and elsewhere).[19]

29. As we have explained elsewhere, the EU incorrectly assumes that it, as the complaining party, has the right to determine the appropriate period of reference. Contrary to the EU's position that the complaining party may determine the appropriate period of reference by its choice of measure, Article 22.4 directs the Arbitrator to determine whether the level of

[18] EU Response to the Arbitrator's Additional Questions, para. 34.

[19] EU Response to the Arbitrator's Additional Questions, para. 124.

suspension is equivalent to the level of nullification or impairment. To determine the current level of nullification or impairment, the Arbitrator should necessarily look to what measures or actions are in effect at the present time, not the time of the end the RPT.

30. Allowing a complaining Member to suspend concessions with respect to a measure from which it is no longer suffering any trade effects does not serve to restore the balance of trade concessions. Furthermore, that the allowance for suspension of concessions is permitted under Article 22.8 of the DSU only "until such time as the measure found to be inconsistent with a covered agreement has been removed," demonstrates that the level of suspension of a concession is a remedy that is prospective in nature. Moreover, a level of suspension that does not take into account any compliance that is achieved, and bears no relation to the current level of nullification or impairment, does not serve to induce compliance.

31. Please also refer to the responses of the United States to Questions 45, 57, and 82, and the U.S. comments on the EU's responses to Questions 68 and 69.

71. <u>To the European Union</u>: In its Written Submission (para. 94), the United States asserts that "there was no finding of non-compliance" in the Article 21.5 proceeding in respect of cases 7, 8 and 14.

(a) Could the European Union identify in the Article 21.5 Panel and Appellate Body Reports the precise findings of non-compliance made in respect of these cases?

(b) Does the European Union consider that these findings of non-compliance relate to the continued application of zeroed cash deposits to imports occurring after the end of the reasonable period of time? If so, between what dates did those cash deposits continue to apply?

(c) Does the European Union contend that these findings of non-compliance related to the continued liquidation of cash deposits at zeroed rates after the end of the reasonable period of time? If so, between what dates did those liquidations occur?

32. In its response to Question 71, the EU fully acknowledges that there are no findings of noncompliance by the compliance panel or the Appellate Body that refer to cases 7, 8 or 14.[20] There is simply no basis for the EU's contention that where the compliance panel or Appellate Body found that it generally agreed with observations or reasoning in the abstract, that such

[20] *See EU Written Response to Questions,* para. 35, June 2, 2010 ("The European Union accepts that these [findings] are couched in general terms that do not refer expressly to cases 7, 8 and 14 . . .").

statements can be extrapolated into a specific finding of noncompliance as applied to cases 7, 8 and 14. In this regard, the United States here incorporates by reference its answer to Question 82(b), and reiterates its position that there have been no findings of noncompliance with respect to cases 7, 8 and 14.

33. The EU relies upon conditional language of a general nature found in the language of the report of the Appellate Body and the compliance panel in the Article 21.5 dispute. This language cannot conceivably be construed to constitute a finding of failure to comply as to cases 7, 8 and 14. Specifically, with respect to subsequent reviews generally, the Appellate Body found that it

> considers that a subsequent administrative review determination issued *after* the end of the reasonable period of time *in which zeroing is used*, . . .*would* establish a failure to comply . . .[21]

First, the Appellate Body's "general findings" relied upon by the EU are limited to inconsistencies occurring *after* the end of the RPT.[22] During the compliance proceeding, the EU challenged one subsequent administrative review in case 7, and three sunset reviews in case 7, 8 and 14. All of these reviews were completed long before the end of the RPT, with the latest completion date being in 2005.[23] Moreover, with respect to cases 7, 8 and 14, there have been no findings that would enable the Arbitrator to conclude that the dumping margins from the Section 129 proceedings or any subsequent reviews were calculated using zeroing or are otherwise WTO inconsistent. There is therefore no basis upon which the EU may claim to suffer nullification or impairment with respect to these three cases.

34. By its reference to paragraph 32 of its Oral Statement[24] the EU accuses the United States of trying to "deprive" the findings of the original panel, as to cases 7, 8 and 14 of "all legal effect." On the contrary, the Section 129 determinations as to cases 7, 8 and 14 were in direct response to the findings of the original panel. It was the EU that chose not to challenge these recalculations during the compliance proceeding.

35. Furthermore, the EU did not contest the collection of any cash deposits or the issuance of liquidation instructions pursuant to these orders, as it did with respect to cases 1 and 6. Nor is the EU able to respond to the Arbitrator's questions by pointing to <u>any</u> specific instances of

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[21] *See EU – Zeroing (21.5) (AB)*, para. 469(c)(i).

[22] *See EU – Zeroing (21.5) (AB)*, para. 469(c)(i) ("a determination issued *after* the reasonable period of time . . .").

[23] 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)*.

[24] EU Response to Questions, para. 35, June 2, 2010.

noncompliance relating to either the imposition of duties based on zeroing, or continued liquidations based on zeroed margins. Although the Appellate Body made several specific findings as to other cases at issue, it made none with respect to cases 7, 8 and 14. There is simply no basis upon which to conclude that either the panel or the Appellate Body in the Article 21.5 proceeding made either explicit or implicit findings as to cases 7, 8 and 14.

36. Finally, there is no finding in the context of these proceedings, as the EU attempts to assert in paragraph 36 of its response to Question 71, that the United States "failed to immediately ensure that the cash deposit rate going forward was not based on zeroing." On the contrary, both the panel and the Appellate Body in the compliance proceedings specifically declined to make findings with respect to the very short period between the end of the RPT (April 9, 2007) and the date on which Commerce issued its Section 129 determinations (April 23, 2007), wherein it recalculated investigation margins without zeroing.

72. To the European Union: In the context of both methodology 1 and methodology 2, you calculated the amount of trade lost as a result of the inconsistent measures. However, as the United States has pointed out (written submission, para. 119), the two methodologies calculated the amount of lost trade using two different approaches, and generated two very different results. Does the European Union expect the Arbitrator to accept both calculations of lost trade as correct? If the Arbitrator were to find that one approach was inaccurate, would it be entitled under its mandate to use the other approach for both methodologies? If the approach based on elasticities of Methodology 2 were to be used in the EU's alternative 1, would the need for the reverse charge disappear?

37. In its response to Question 72, the EU misrepresents the burden of proof in this case by asserting that,

> for the European Union, the question is whether or not the United States has made a *prima facie* case (claim, argument, fact, evidence) with respect to the relevant aspect of the countermeasure (that it is not consistent with the equivalence rule). If not, that aspect of the countermeasure can only be confirmed by the Arbitration Panel. The European Union considers that, absent a *prima facie* case from the United States, the Arbitration Panel cannot depart from the proposed countermeasure. As the party objecting to the levels of suspension proposed (and thereby the party referring the matter to arbitration), the United States has the initial burden of showing that the proposed level of suspension is not equivalent to the level of nullification or impairment.

38. The United States has no obligations with respect to demonstrating that particular aspects of the EU's methodologies "are not consistent with the equivalence rule." Indeed, it is unclear to the United States how a single aspect of a calculation could be demonstrated to be inconsistent

with Article 22.4 when it is the final result of the calculation that yields the level of suspension. Nevertheless, the United States has pointed out with respect to the various components of the EU's methodologies why flaws and deficiencies relating to certain individual components of the EU's methodologies result in levels of suspension that exceed the level of nullification or impairment.

39. The United States has demonstrated that the EU's two proposed levels of suspension of concessions or other obligations are not equivalent to the level of nullification and impairment. As explained in the US. Written Submission and in subsequent submissions, the EU's proposed levels of suspension grossly exceed 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 factors available for the products at issue, the level of nullification or impairment is no greater in the aggregate than $2.873 million annually.

B. The EU's proposed levels of suspension exceed the level of nullification and impairment due to a number of flaws and erroneous assumptions including the EU's:

1. inclusion of measures that have been revoked or for which there have been no findings of inconsistency;

2. use of trade data that overestimates the trade value of the products at issue;

3. erroneous assumption that the elimination of zeroing would result in the elimination of all antidumping duties in the cases at issue;

4. erroneous assumptions with respect to the growth rates the EU would have experienced absent zeroing;

5. inappropriate inclusion of a "reverse charge;"

6. unsupported assumptions for the calculation of the "reverse charge;"

7. inappropriate combination of actual trade and "trade loss" to overstate the level of nullification or impairment; and

8. inappropriate use of GTAP elasticities.

C. The EU's proposed suspension based on Methodology 2 fails to set a cap on trade effects of the proposed suspension.

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

40. The EU further argues in its response to Question 72 that the Arbitrator cannot "just sweep aside" its proposed measures to apply after it suspends concessions, particularly the "mirror" measure of Methodology 2. These arguments, however, go to the nature of the proposed measures, not to the level of suspension itself. Putting aside the actual operation of the EU's proposals, the proposed levels of suspension exceed the level of nullification or impairment and should be rejected.

74. To the European Union: The United States argues that Customs and Border Protection (CBP) trade data for 2007 is more accurate than the data submitted by the European Union because, *inter alia*, the HTSUS data does not take into account imports from exporters/producers who have been excluded from the application of the anti-dumping order. Does the European Union consider that imports from exporters/producers not subject to an inconsistent anti-dumping order should nevertheless be taken into account when calculating nullification or impairment arising from the inconsistent order? If yes, on what basis? What about exporters/producers that are subject to the application of the anti-dumping order but at a duty rate of 0%?

41. Notwithstanding the EU's claims to the contrary in response to Question 74, the United States has identified (by reference to scope definitions, revocation notices, actual CBP data, and other evidence) several concrete instances under which the HTSUS data will include imports from exporters that are not subject to the antidumping order, products that are not subject to the order, importers that are subject to zero duty rates, and importers subject to non-zeroed adverse facts available rates.[25]

42. As a further demonstration that HTSUS subheadings do not properly reflect the merchandise subject to the antidumping orders at issue, the United States points out that 18 of the HTSUS subheadings included in the scope descriptions for both Stainless Steel Sheet and Strip in Coils antidumping orders overlap with those included in the scope description of the orders on

[25] See U.S. Written Submission at paras. 99-101; Exhibits US-18, US-20, US-21, US-22 (showing scope of antidumping duty order on certain pasta from Italy), US-23, US-24, US-25, US-26, US-27, and US-32 through US-40 (showing entries subject to zero duty rates). As was noted in the U.S. response to Question 77, in Exhibit US-16, on the spreadsheet titled "additional cases," it should read "Cut-to-Length Plate from Italy" instead of "Cut-to-Length Plate from France." The United States provided the complete data for Cut-to-Length Plate from Italy in Exhibit US-38. The United States provided a corrected Exhibit US-16 at Exhibit US-44.

Stainless Steel Plate in Coils.[26] Although the scope descriptions for both products include 18 of the same HTSUS subheadings, the written descriptions make clear that the two products are mutually exclusive. Specifically, the antidumping orders on Stainless Steel Strip in Coils exclude plate with a thickness of 4.75 mm or more.[27] Conversely, the antidumping order on Stainless Steel Plate in Coils includes flat-rolled plate products that are 4.75 mm or more in thickness, but excludes stainless steel sheet and strip.[28] That identical HTSUS subheadings are found in the scope descriptions of two antidumping orders covering mutually exclusive products, reinforces the United States' contention that because both subject and non-subject merchandise can fall under the same HTSUS subheadings, sole reliance on HTSUS import data results in an overestimation of the trade value subject to the orders at issue in this case.

43. The EU further claims that this point is not relevant to Methodology 1 because, "if a firm is not subject to an order [or subject to a zero rate of duty] in year n-1 or in the year 2007, then the trade for that firm will simply be contained in both the observed trade for year n-1 and the observed trade for the year 2007. It will consequently not be part of the lost trade." However, this argument fails to take into account the fact that changes can occur to either the scopes of the antidumping order, or the subject firms,[29] subsequent to the onset of an antidumping order.

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[26] See Exhibit EU-2 (including the trade volumes for the following subheadings in the calculations for both Stainless Steel Plate (case 9, 18) and Stainless Steel Sheet and Strip antidumping orders (cases 11, 21, 22 and 27, 28): HTSUS 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.20.10.10, 220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 220.20.60.60, 7220.20.60.80, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80.).

[27] Stainless Steel Sheet and Strip in Coils From Italy: Final Results of Antidumping Duty Administrative Review, 67 Fed. Reg. 1715, 1716 (Jan. 14, 2002) ("case 21") ("Excluded from the scope of this review for the following: . . . (3) plate (*i.e.*, flat-rolled stainless steel products of a thickness of 4.75mm or more), . . .") (Exhibit US-58); Notice of Amended Final Results of Antidumping Duty Administrative Review; Stainless Steel Sheet and Strip in Coils from Germany, 68 Fed. Reg. 14193, 14194 (Mar. 24, 2003) ("case 28") ("Excluded from the scope of this order are the following: . . .(3) plate (*i.e.*, flat-rolled stainless steel products of a thickness of 4.75mm or more)") (Exhibit US-59).

[28] Stainless Steel Plate in Coils from Belgium; Final Results of Antidumping Administrative Review, 67 Fed. Reg. 64352 (Oct. 18, 2002)("case 18") ("Excluded from the scope of this order are the following . . .(3) sheet and strip . . .) (Exhibit US-60).

[29] See, e.g., Stainless Steel Sheet and Strip in Coils from Germany; Final Results of Changed Circumstances Review, 66 Fed. Reg. 50173 (Oct. 2, 2001)(Certain magnet iron-chromium-cobalt stainless steel strip was excluded from the order) (Exhibit US-56); Certain Pasta From Italy: Final Results of Antidumping Duty Changed Circumstance and Revocation, in part, 74 Fed. Reg. 41120 (Aug. 14, 2009) (Gluten-free pasta was excluded from the order.) (Exhibit US-57); Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review, 65 Fed. Reg. 77852, 77854 (Dec. 13, 2000) (Exhibit US-23) (DeCecco was excluded from the order); Notice of Amendment of Final Determination of Sales of Less Than Fair Value Pursuant to Court Decision and Revocation in Part: Certain Pasta from Italy, 66 Fed. Reg. 65889 (Dec. 21, 2001) (Exhibit US-24)(Tamma Industrie Alinmentarie and Delverde are excluded from the order); Notice of Final Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order in Part: Certain Pasta from Italy, 67 Fed. Reg. 300. 301-302 (Jan. 3, 2002) (Exhibit US-25)(Puglisi and Corex are excluded from the order); Notice of Final Results of the Seventh Administrative Review of the Antidumping Duty Order on

44. Finally, with regard to the United States not providing alternative data to year n-1, the United States reiterates that order-specific data for the year n-1 does not exist in the CBP Automated Commercial System (ACS) database. As explained in response to Question 79, because the relevant entries made during the year "n-1" were not subject to an antidumping duty order, there are no fields in the ACS database that would identify the relevant entries (e.g., the antidumping duty case number (i.e., the "A" number), payment of a duty (i.e., an antidumping duty) on an otherwise duty-free product).[30]

76. To both parties: A comparison of the data provided in exhibits US 16 and EU 2 suggests that in three cases, the value of trade subjected to the Orders calculated by the US based on the exact scope of application of the Orders is larger than that estimated by the EU on the basis of the entire USHTS headings. How do you explain this?

45. With respect to the EU's claim that it does not have a complete set of data, the United States refers the arbitrator to the complete data set provided for each of the relevant antidumping duty orders at Exhibits US-32 through US-40, US-44, and US-48.

78. To the European Union: Please provide the relevant value of trade (EU exports to the U.S. for the products under consideration) data for 2008 and 2009.

46. The EU argues that the average for the 2007-2009 USITC Data Web data is 6% less than the amount for 2007, and asserts that the 2007 USITC Data Web data is a reasonable proxy. Both of these assertions are mistaken. The United States notes that the actual CBP data for entries subject to the antidumping orders in question indicates that the average total trade value for the period 2007-2009 is more than 15 percent lower than total trade value for 2007.[31]

Certain Pasta from Italy and Determination to Revoke in Part, 70 Fed. Reg. 6832, 6833 (Feb. 9, 2005)(Exhibit US-26) (Ferrara and Lensi were excluded from the order); Notice of Final Results of the Eighth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part, 70 Fed. Reg. 71464, (Nov. 29, 2005)(Exhibit US-27) (Pallante was excluded from the order).

[30] The United States further notes with regard to the EU's repeated suggestion that the United States is withholding this and other data relevant to its proposed calculation that it is not incumbent upon the United States either to provide whatever data the EU deems relevant to demonstrating the EU's calculation of its proposed suspension or to provide the evidence necessary for the EU to correct its flawed methodologies. Rather, the United States has the burden of demonstrating that the level of suspension of concessions proposed by the EU is not equivalent to the level of nullification or impairment.

[31] *See* Exhibit US-44 (($158,344,108 + $144,476,789 + $99,499,1970) / 3 = $134,106,698; $158,344,108 - $134,106,698) / $158,344,108 = 15.3%).

Moreover, as summarized in Exhibit US-44, the actual CBP data shows annual trade values of $158,344,108, $144,476,789, and $99,499,1970 for the orders at issue, far less than the $281,352,000 the EU estimates for 2007 based on the overbroad USITC Data Web data.

80. To the European Union: In its response to the questions from the arbitrator (para. 107), the European Union argues that in methodology 1, a shift in U.S. imports away from EU to third country suppliers is a concern in products where the European Union holds a high market share and non-EU manufacturers supply close substitutes. In light of the above, please provide data on:

(a) Share of EU exports in the U.S. market in period (n-1) for the goods under consideration.

(b) Some indicator of the level of product differentiation across countries for the orders in question.

47. With regard to the burden of proof, please see the U.S. response to Question 3 and the U.S. comments on the EU response to Question 72.[32]

48. At the outset, the United States notes that the GTAP market share data for 2004 does not address the Arbitrator's question. The GTAP sectors are too broad and the orders were in place prior to 2004. Therefore, the GTAP data provide no relevant information to the Arbitrator about the market share prior to the imposition of the duty orders.

49. With respect to calculations of market share, the United States disagrees with the EU's assertion that the GTAP data base provides any information to determine the reasonableness of the EU calculations. The GTAP sector aggregations are much broader than the HTS data that the EU used in its calculations.

50. With respect to differentiation, in its response, the EU incorrectly implies that the products would not be highly differentiable because the relevant imported products must all meet

[32] Additionally, the United States notes that throughout the EU's submissions, including in response to Question 80, the EU claims that the United States does not "challenge" certain aspects of the EU's methodologies or "contest" certain assertions of fact or law, and accordingly these EU assertions are "no longer within" the Arbitrator's "jurisdiction." This is incorrect. First, the United States recalls that the U.S. burden in this proceeding is to demonstrate that the proposed level of suspension of concession is not equivalent to the level of nullification or impairment. The United States has discharged that burden. By showing that the EU's request is fatally flawed, the United States has contested the elements that make up the EU's request. The United States could of course list each word that the United States has filed with the Arbitrator that the EU has not explicitly "contested" and declare that the EU is now forever barred from contesting it and so it is outside the jurisdiction of the Arbitrator. That would not only be legally incorrect, but we suspect the Arbitrator has better uses for its time and resources than engaging in such empty litigation tactics.

the same scope description of the product under the dumping order. To the contrary, although the scope definition generally provides physical characteristics of the product, this does not equate to whether the products may be differentiated. Highly differentiated products can still meet the same physical properties. It may be non-physical properties such as quality, availability, etc. that determine the substitutability of a given product.

51. Furthermore, the EU fails to support its claim that the GTAP substitution elasticities indicate a "moderate" degree of differentiation. As we have previously discussed, the GTAP elasticities are for much broader categories than the products in question and are not region specific. Therefore, the GTAP elasticities do not provide a sufficient basis to determine the substitutability of specific EU products with other sources.

81. <u>To the European Union:</u> In its oral statement, the United States contends that the "all others rates" in seven of the twelve orders at issue in this arbitration were recalculated in the Section 129 proceedings. The United States further asserts that these recalculated "all others rates" became effective on 4 May 2007 and that, because "all others rates" are calculated in original investigations and are not recalculated in administrative reviews, the "all others rates" applied after that date were calculated without zeroing.

(a) Does the European Union contest the US assertions as a matter of fact? If so, please identify which aspects of the US assertions are incorrect, and in what respect. In this context, please clarify whether the European Union challenged the "all others rates" calculations performed in the Section 129 proceedings in the Article 21.5 panel. Does the European Union dispute that compliance was achieved with respect to these all other rates as of 4 May 2007?

(b) Is it the view of the European Union that because 10 April 2007 is the relevant date for determining the level of suspension, it simply does not matter whether the United States thereafter may have eliminated zeroing from these rates? If so, please comment on whether in the view of the European Union it would be appropriate for a Member to continue with a request to authorize suspensions in respect of behaviour where there was no disagreement that compliance had been achieved.

52. The EU has not challenged, in the Article 21.5 proceeding or elsewhere, that the "all others" rates determined in the Section 129 determinations were recalculated without zeroing. Furthermore, in its answer to Question 81, the EU does not dispute that these rates were not calculated with zeroing.

53. The United States wishes to correct paragraph 59 of its opening statement, which erroneously stated that seven of the "all others" rates that the EU relies on for its claim of suspension of concessions were recalculated without zeroing in the Section 129 determinations. In fact, there are seven rates relied upon in the EU's Methodology 2 that have been recalculated, without zeroing, in the Section 129 determinations. Only six of those rates are "all others" rates. The "seventh" rate referred to in paragraph 59 of the United States' opening statement is a company specific margin for Cogne, which was also recalculated during the Section 129 determination of Stainless Steel Wire Rod from Italy (case 7).[33]

54. Contrary to the EU's assertions, the "all others rates" that were recalculated without zeroing during the Section 129 determinations do not represent temporary compliance.[34] As the United States explained in detail in paragraphs 46 and 47 of our response to Question 83, the "all others rate" is calculated during an original investigation, and does not change as a result of subsequent administrative reviews. Thus, the "all others rates" from the original investigations that were revised in the Section 129 determinations are the "all others rates" currently in place under those six orders, and will not be replaced by subsequent reviews.

55. With respect to case 9, *Stainless Steel Plate in Coils from Belgium,* the EU has identified two recent Federal Register notices that state, in error, that the current "all others" rate is the rate established in the original investigation. As the United States has explained, the "all others" rate established in the original investigation is normally not subsequently revised and so this statement is standard boilerplate language in such Federal Register notices. The "all others" rate in case 9, and the other five cases cited, is unusual in that the rate was revised by the Section 129 determination such that the rate currently in effect is a rate calculated without zeroing, notwithstanding the erroneous language that appeared in two Federal Register notices for case 9. To be clear, for case 9, the "all others" rate in effect is not 9.86 percent. The fact that the EU only cites to one of the 6 "all others rates" at issue reflects the fact this was an isolated failure to revise standard language to account for the results of the Section 129 determinations. In that regard, the United States disagrees that this one error represents the "whole picture."[35]

56. Moreover, the misstatement in the Federal Register had no practical effect on the amounts actually collected as cash deposit for entries of merchandise subject to the antidumping duty order at issue in case 9. The language contained in the Federal Register does not represent the amount of duties Commerce actually instructed CBP to collect for the "all others" rate. As shown in Exhibit US-50, following its completion of the Section 129 determination, Commerce instructed CBP that the revised cash deposit for the "all others rate" was 8.54 percent, and further

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[33] For clarification, the United States understands the EU's Methodology 2 to rely on a total of eleven antidumping duty orders, rather than twelve.

[34] EU Answer to Question 81, para. 66 (June 2, 2010).

[35] EU Response to Question 81, para. 69.

instructed that this rate was to apply to shipments that entered on or after April 23, 2007.[36] Any firms to which the "all others" rate was applied do not have an individually determined rate, and Commerce's subsequent instructions direct CBP to assess antidumping duties at the rate in effect at the time of entry, which would have been 8.54 percent as to all entries after April 23, 2007.[37]

57. Putting the erroneous statements with respect to case 9 aside, the language contained in both notices cited by the EU supports our repeated contention that "all others" rates are calculated during the original investigations, and are not revised during the conduct of administrative reviews. The standard language used by Commerce in the final results of administrative reviews make clear that the administrative review results do not alter the "'all others rate' established in the . . . *investigation*."[38] This demonstrates that the "all others" rates are not temporary, but rather remain in place through the life of the order. Therefore, the EU's assertion that the "all others" rates that were recalculated without zeroing in the Section 129 determinations will later be replaced via a subsequent administrative review are refuted by the standard language cited by the EU. The "all others" rates established in the Section 129 determinations without zeroing, and subsequently applied to the entries of all firms that do not have an individually determined rate, represent compliance by the United States with respect to any merchandise to which those rates are applied. Accordingly, there is no basis for the EU to claim, or for the Arbitrator to find, any nullification or impairment stemming from these rates that would justify suspension of concessions.

58. It is unclear what the EU seeks to accomplish in paragraphs 70-71 of its response when it cites to several instances where rates for certain firms increased from one review to the next. There is no basis whatsoever to assume or conclude that any of these increases in rates in the particular instances cited are due to zeroing. Indeed, the calculation of a dumping margin contains a multitude of components that will have an effect on the final number, and the zeroing methodology – to the extent it has any impact on a particular dumping margin calculation – represents just one such component. Importantly, because these examples refer to dumping margins calculated for individual firms, they are wholly irrelevant to the Arbitrator's question, which inquires as to whether the EU contests the United States' assertions that the "all others rates" recalculated during the Section 129 proceedings were calculated without zeroing.[39]

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[36] Exhibit US-50.

[37] *See* CBP Instructions, Automatic Liquidation Instructions for Stainless Steel, Plate in Coils from Belgium (A-423-808), following the 2007-2008 administrative review, para. 2. (Exhibit US-50).

[38] Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review, 74 Fed. Reg. 53468, 53470 (Oct. 19, 2009) (Exhibit US-51); Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review, 73 Fed. Reg. 75398, 75400 (Dec. 11, 2008) (Exhibit US-52).

[39] To the extent that the EU's reference to increasing margins of dumping from one administrative review to another may have been intended as rebuttal to the United States' observation that dumping margins generally decline from original investigations to administrative reviews, the EU's response both fails to rebut and is irrelevant to the

59. The EU takes the position the Arbitrator should not bother to "wade into the morass of factual and legal issues that might arise with respect to the intervening period since the end of the RPT."[40] The United States agrees as to the citations included in paragraph 70 of the EU's response to Question 81, as they are irrelevant to the Arbitrator's question. However, for reasons fully articulated in the United States' response to Question 82(a),[41] it is wholly inappropriate for the Arbitrator not to take account of inconsistencies that have been remedied, such as the six "all others rates" recalculated during the Section 129 proceedings that remain in effect today.

82. To both parties: Please clarify whether you consider that the determination of the level of suspension may or should take into account:

(a) measures in relation to which findings of WTO-inconsistencies were made in compliance proceedings, irrespective of whether such inconsistencies might have been remedied since?

(b) measures in relation to which no such findings were made, irrespective of whether inconsistencies or alleged inconsistencies may have occurred since?

60. The United States takes issue with the EU's repeated claim that the United States must request a separate compliance panel to establish compliance as to measures brought into conformity through the Section 129 determinations. The EU chose not to challenge these measures taken to comply in the Article 21.5 proceeding. Article 21.5 applies only where there is "disagreement" as to the "existence or consistency with a covered agreement of measures taken to comply." Thus, a separate compliance proceeding is not required where the United States complied and the EU has not challenged that compliance. (Similarly, a separate compliance

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question posed by the Arbitrator. The EU references administrative review results in connection with three antidumping duty orders in paragraph 70, but fails to compare these results with the dumping margins found in the original investigations. Such comparison actually supports the United States' point. For instance, the administrative review results for SKF's ball bearings from Italy of 7.65 percent and 15.1 percent are both significantly less than SKF's rate from the original investigation (155 percent). 54 Fed. Reg. 20903 (May 15, 1989) (Exhibit US-53). The cited administrative review results for FAG (2.5 percent) and Pagani (2.76 and 12.40 percent) are also reductions from the rates calculated for these companies in the original investigations. Also overlooked was FAG's margin, which declined from 68.39 percent in the investigation to 2.5 percent in a subsequent review. Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 71 Fed. Reg. 40064, 40066 (Jul. 14, 2006) (68.39 percent for FAG) (Exhibit US-54); Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy, 61 Fed. Reg. 38547, 38548 (Jul. 24, 1996)(18.30 percent for Pagani) (Exhibit US-55).

[40] EU Response to Arbitrator's Questions, para. 71, June 2, 2010.

[41] U.S. Response to Arbitrator's Question 82(a), paras. 34-39 (June 2, 2010).

proceeding is not requirement where the EU was unable to attain a finding of noncompliance in the first place.)

61. The United States further objects to the EU's proposition that the cash deposit rate is a "duty." A cash deposit is a security for later payment of the duty, as explicitly provided for in the Ad Note to Article VI, paragraphs 2 and 3. The actual amount of final duty assessed and collected can and does frequently vary from the amount initially required as cash deposit. Thus, the cash deposit and the duty are not the same thing and the obligations that apply to each are also not the same.

62. Please also refer to the U.S. comments on the EU response to Question 71 above and the U.S. response to Question 82.

84. <u>To the European Union</u>: The United States contends in its oral statement (para. 60) that the European Union's calculation of the average duty rate for each order "dramatically over-weighted" the "all others rates", apparently because they were calculated based on arithmetical rather than weighted averages, and that as a result the 12.08% average duty rate applied by the European Union is too high. Please respond. In particular, do you agree in principle that a weighted rather than an arithmetical average should be the basis for calculating the average duty rate under each order? If not, why not?

63. With respect to the EU's claim that it "does not have the data to make a weighted average calculation within each order because the relevant data is being withheld by the United States," the United States notes that the weighted average duty rates could be derived from the data provided by the United States in response to Question 41 (Exhibits US-32 through US-39). The United States provided the calculation of the average duty rates for each of the duty orders in this dispute in response to Question 85.

87. <u>To the European Union</u>: In its written submission (para. 41), Japan asserts that the European Union utilizes a compound elasticity factor that is a combination of the aggregate U.S. import demand elasticity and the elasticity of substitution between imports from different origins. Does this imply that, conceptually, the first component of this compound elasticity factor used by the European Union is the same as the import demand elasticity used by the United States?

64. The United States disagrees with the EU's assertion that, conceptually, the first component of the compound elasticity factor used by the European Union is the same as the import demand elasticity used by the United States. Contrary to the EU's assertion, as we

explained in our written submission, the import demand elasticity and the substitution elasticity between imports and domestically-produced goods measure different things.

65. The import demand elasticity measures changes in demand for imports given a price change to imports. While substitutability is built into the import demand elasticity, it does not simply measure the substitution between imports and domestically-produced goods. Instead, it may also represent increased demand for the product in general given the lower price.

66. On the other hand, as its name implies, the sourcing substitution elasticity between imports and domestic products measures the relative change in demand for imports to domestically-produced goods given their relative price changes. This is different from the import demand elasticity, which does not incorporate changes to the price of the domestically-produced good. Because of this difference, the two elasticities are conceptually distinct.

88. To the European Union: In its second proposed alternative, the EU uses two sets of GTAP elasticities: once capturing substitution between: one that expresses the propensity of consumers to switch to domestic US products and one that expresses the propensity of US consumers to switch to an alternative source of imports, other than the European Union.

(a) Are the GTAP elasticities specific to the United States? Or is it assumed that these elasticities are identical across all countries?

(b) Are these GTAP elasticities estimated based on Jomini et al. (1991)?

(c) Does the first elasticity reflect an aggregate import demand elasticity, i.e. responsiveness of demand for domestic goods vis-à-vis imported goods across all trading partners? If so, is it conceptually different from the import demand elasticity used by the U.S.?

(d) Is the GTAP elasticity of substitution between various import sources simply derived from elasticity of substitution between imported and domestic goods by multiplying the latter by two, i.e. does it follow the "rule of two" (an empirical regularity which has been tested statistically – Liu et al., 2001)?

If (c) and (d) are true, is it possible to apply the "rule of two" to the import demand elasticity used by the U.S. as well?

67. With respect to subpart (a), the United States concurs with the EU's agreement that GTAP sourcing substitution elasticities are not specific to the United States. Instead, the GTAP elasticities are assumed to be identical for all regions in the GTAP model. Despite this lack of

specificity, the EU contends that the GTAP elasticities are a "reasonable estimate" due to the lack of "precise data from the United States." Contrary to the EU's contention, the United States has provided import demand elasticities estimated by World Bank researchers that are specific to the U.S. market.

68. With respect to subpart (b), although the original sourcing substitution elasticities in GTAP were estimated based on Jomini et al. (1991), the EU's response requires further clarification. Beginning with GTAP 6, and incorporated into the more recent GTAP 7, the sourcing substitution elasticities are based on estimates by Hertel, Hummels, Ivannic and Keeney (2004) (Hertel et al.).[42] Because it is the understanding of the United States that the EU has used the latest version of the GTAP elasticities, the sourcing substitution elasticities relied upon by the EU were based upon Hertel, et al. rather than the Jomini, et al.

69. With respect to subpart (c), as we discussed in our comments regarding the EU's response to Question 87, the import demand elasticity and substitution elasticity between imported and domestically-produced goods are not conceptually the same. Although the EU claims that the GTAP elasticities are "the most widely used elasticities for trade analysis," the EU has not demonstrated that GTAP elasticities are either widely used or appropriate for estimating lost trade as proposed by the EU in this proceeding. GTAP elasticities are more commonly used in a CGE modeling environment, and are subject to adjustment as part of such simulations. The question is not whether economists use GTAP elasticities in a modeling environment, but whether they are appropriate for use in estimating lost trade as proposed by the EU in this proceeding. As we have previously discussed, because the World Bank elasticities we used in our calculations are specific to the United States and less aggregated than the GTAP elasticities, the World Bank elasticities are more appropriate than the GTAP elasticities for this purpose. Moreover, import demand elasticities are conceptually more appropriate for the equation that the EU used to estimate the "lost trade" since the EU's equation in Methodology 2 only has the change in price of the member state's export to the United States.

70. With respect to subpart (d), as explained above, the EU's response requires further clarification. Beginning with GTAP 6, the elasticity estimates are from Hertel et al. These authors actually estimated the sourcing substitution elasticity between import sources based on an approach that exploits cross-sectional variation in delivered prices. The "rule of two" was used in reverse to derive the sourcing substitution elasticity between imports and domestically-produced goods.[43]

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[42] *See* T. Hertel, R.A. McDougall, B Narayanan, and A.H. Aguiar, "Chapter 14: Behavioral Parameters", *GTAP Handbook,* 2008, p. 14-2, *available at* https://www.gtap.agecon.purdue.edu/resources/download/4184.pdf

[43] *See* T. Hertel, R.A. McDougall, B Narayanan, and A.H. Aguiar, "Chapter 14: Behavioral Parameters", *GTAP Handbook,* 2008, pp. 14-2-14-3, *available at* https://www.gtap.agecon.purdue.edu/resources/download/4184.pdf

71. With respect to subpart (e), the United States does not believe that the "rule of two" can be applied to the Kee et al. import demand elasticities. The "rule of two" was based on substitution elasticities. As the United States has explained, the import demand elasticity and the substitution elasticity between imports and domestically-produced goods are not the same.

72. In paragraph 82 of its response, the EU incorporates by reference Japan's response to Question 8 of the Arbitrator to Japan. We have responded to the specific points regarding the use of GTAP elasticities raised by Japan in our response to subparts (a) through (e) above. We also note that Japan contends that the Arbitrator should choose the complaining party's calculation so long as it has a "reasonable basis," rather than determine the "most appropriate" option. We reiterate our disagreement with the EU's and Japan's effort to so artificially constrain the Arbitrator's role. Because the Arbitrator's mandate is to determine whether the proposed level of suspension is equivalent to the level of nullification or impairment, the Arbitrator should consider all evidence, not only that favored by the EU.

73. In paragraph 84 of its response, the EU contends that the appropriateness of GTAP elasticities has no bearing upon the validity of its Methodology 1, which estimates lost trade based upon a rest-of-the-world growth rate rather than elasticities. Although the EU's Methodology 1 does not involve GTAP elasticities, it is nonetheless invalid for the reasons we have discussed elsewhere. The EU thus fails to support its claim that the Arbitrator "must confirm the first EU alternative" if the Arbitrator rejects the second EU alternative.

74. In paragraph 85 of its response, the EU contends that "the United States has made no claim or argument (and certainly not in a timely manner) to the effect that the rule of two should be applied to the World Bank elasticities, and the Arbitration Panel is precluded from making the case for the United States." Although the United States does not believe that the "rule of two" can be applied to the Kee et al. import demand elasticities, the United States objects to the EU's attempt to artificially constrict the Arbitrator's role. Because the Arbitrator's mandate is to determine whether the proposed level of suspension is equivalent to the level of nullification or impairment, the Arbitrator should consider all evidence, not only that favored by the EU.

75. In paragraph 86 of its response, the EU argues that if the Arbitrator decides not to use the GTAP elasticities, it should recalculate the elasticities on its own using the Broda and Weinstein data cited by Japan. The Arbitrator should reject the EU's belated attempt to rely upon an entirely different data set at this extremely late stage in the proceeding. Indeed, the EU's remarkable suggestion that the Arbitrator should recalculate elasticities using an entirely new data set stands in even sharper relief compared to its insistence that the Arbitrator may not "make the case" using its own analysis in the preceding two paragraphs.

76. In addition to reaffirming the EU's one-sided view of the Arbitrator's mandate, the EU's suggested use of this data to calculate lost trade is unavailing. Although the United States has had an extremely limited opportunity to examine this data in this context, even this limited

examination demonstrates that use of this data would be inappropriate for the purposes suggested by the EU. As we have previously discussed, because the EU's Methodology 2 only uses the change in price of the member state's export to the United States, the EU's Methodology 2 calls for an import demand elasticity rather than a substitution elasticity. The substitution elasticities in the Broda and Weinstein data set are therefore inappropriate for estimating lost trade using the methodology proposed by the EU.

77. Indeed, the EU's proposed Exhibit EU-15 demonstrates the problem of inserting a substitution elasticity. The resulting "trade loss" from using the substitution elasticities in Exhibit EU-15 compared to the actual trade in 2007 is simply not believable. For instance, according to their calculation with the Broda and Weinstein elasticities, the "trade loss" on ball bearings from France was nearly $49 million in 2007. This implies that U.S. imports of ball bearings from France would have been 162 percent higher. This highly inflated trade loss estimate demonstrates the inappropriateness of the EU's proposed recalculation.

91. <u>To both parties:</u> In its written submission (para. 43), Japan refers to a US International Trade Commission (USITC) CGE model that uses the same database as GTAP, but is implemented differently because it is a single country model which includes 497 sectors/commodities [Donnelly et al., 2004][44]. In its written submission, Japan also cites a study by Broda and Weinstein (2006).

(a) Do these elasticities reflect US specificities?

(b) How do these elasticities differ from those proposed by two parties and to what extent would they be more or less appropriate?

(c) Do these elasticities simply capture the substitution between domestic and imported goods?

78. With respect to subpart (a), as discussed in the U.S. response to Question 91, the Donnelly, et al. research note was actually mapping USITC model elasticities into the U.S. component of GTAP.

79. With respect to subpart (b), in its response, the EU contends that "the GTAP elasticities are based on a review of several empirical studies." This is not the case, however. As we discussed in our comments regarding the EU's response to Question 88, the current GTAP elasticities were from a single study, Hertel et al. (2004).

[44] According to the authors, the values of the USITC model substitution elasticities were selected from studies in the literature or those used in prior analysis by the Commission. Following certain adjustments, these elasticities were aggregated to the USITC 128 sector level. Subsequently, Armington substitution elasticities required for a GTAP 41 sector model were derived as a trade-weighted average from the USITC 128 sector model elasticities.

80. The EU also incorrectly makes a generalization "that detailed estimates tend to become less reliable because the quality of the data is generally lower at highly disaggregated levels and because the variation of the data points is lower." In fact, very detailed estimates may be very reliable because they are often more precise and less biased since they are estimated at the right level of disaggregation for the analysis at hand.

81. The EU also incorrectly generalizes that estimates based on wider aggregations than the product in question will tend to represent conservative estimates because they underestimate the substitution elasticities. This determination, however, is product-specific. Indeed, as Broda and Weinstein discuss in the study cited by Japan, it is quite possible for the reverse to be the case. In cases involving a more-detailed level of the HTS schedule and highly-differentiated products, the substitution level may decrease as the level of disaggregation increases.

82. With respect to subpart (c), the EU states that the Broda and Weinstein data "estimate elasticities of substitution between different imports," as opposed to "substitution between domestic and imported goods." The EU thus confirms that the Broda and Weinstein data estimate substitution elasticities rather than import demand elasticities. As we have discussed previously, the use of substitution elasticities is less appropriate than the import demand elasticities we have used in our calculations for the purposes of calculating lost trade in this proceeding.

83. The EU also incorporates by reference Japan's response to Question 8 of the Arbitrator to Japan. We have responded to the specific points regarding the use of GTAP elasticities raised by Japan in our response to Question 88. Also, as discussed above, we disagree with the EU's and Japan's effort to artificially constrain the Arbitrator's role to determining whether the complaining party's calculations have a "reasonable basis." Because the Arbitrator's mandate is to determine whether the proposed level of suspension is equivalent to the level of nullification or impairment, the Arbitrator should consider all evidence, not only that favored by the EU.

92. <u>To the European Union</u>: In the calculation of the "reverse charge", why is the use of the profit margin necessary? Logically, it would seem that the level of the effects suffered by EU exporters cannot exceed the revenue lost as a result of the lower prices assumed by the European Union. If so, shouldn't the amount of any "reverse charge" simply be the average duty rate, multiplied by the 2007 trade flow and the duty absorption rate of 0.05?

84. The Arbitrator is correct in noting that the duty absorption rate upon which the EU based its original request for authorization for suspension of concessions was a rate of 0.05. It was in response to U.S. criticism of this component of the calculation that the EU made the arbitrary

decision[45] to increase the impact of this component by asserting in its written submission a reverse charge based in part on a duty absorption rate 0.50.[46]

85. It should be noted that the EU has not supported its assertion that any amount of the antidumping duty – neither 5 nor 50 percent – has been absorbed by the firms in question. The only support that the EU provided for its speculative assumption is that the rate of absorption "will necessarily have to be somewhere between zero and 100%."[47]

86. Notwithstanding the fact that the reverse charge is calculated based on a hypothetical (and robust) profit rate of 20 percent, the EU claims that it is not claiming hypothetical "lost profits" but rather excess antidumping duties imposed on EU firms. Lost profit – whether actually claimed or used as a stand-in for another unsupported amount (here, purportedly, a second form of lost trade flow) – is not a benefit accruing to a Member. Consequently, lost profits should not be inserted into the calculation of the level of nullification or impairment.

93. To the European Union: Please comment on the arbitrator's ruling in *EC – Bananas,* cited by the United States in its response to Question 54 of the Arbitrator, that "the benchmark for the calculation of nullification or impairments of US trade flows should be losses in US exports of goods" and not "US suppliers' profits".

87. Please also refer to the U.S. responses to Questions 54 and 61 and the U.S. comments on the EU response to Question 92 above.

88. In the EU response to Question 93, the EU repeats that the reverse charge "is something completely different from 'lost profit'" despite the fact that its proposed "reverse charge" is calculated based on a hypothetical (and robust) profit rate of 20 percent. As noted above, profit is not a benefit accruing to a Member and should not be inserted into the calculation of the level of nullification or impairment.

89. To the extent that profit is injected into the equation in calculating the nullification or impairment of benefits accruing to the EU, the lost profits of U.S. exporters that are impacted by the suspension of concessions should also be factored into any determination of whether the level

[45] 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 %.").

[46] EU Written Submission, paragraph 70.

[47] EU Written Submission, paragraphs 73-74. In its Answer to Question 92, the EU states flatly that "we are positing the reasonable assumption that the duty is partly (50 %) passed on to customers."

of suspension exceeds the level of nullification or impairment. If the EU prefers, the United States would propose that the consideration of the lost profits of U.S. exporters could be similarly labeled a "reverse charge." Regardless of the label, the impact must be considered on both sides of the comparison.

94. <u>To the European Union</u>: The calculation of lost trade in EU Methodology 1 is expressed in terms of value (export price multiplied by the volume of exports). It therefore should reflect both volume effects (i.e., lost sales) and price effects (i.e., sales at lower export prices), i.e. value of trade in 2007 would include any reduction in the export price of EU firms, which captures the part of the duty absorbed by these firms. If this is the case, please explain why the reverse charge does not involve double counting in that it effectively seeks to account for the price effects of the inconsistent measures.

90. The United States considers that the reverse charge double counts in regard to actual trade in 2007. To the extent that EU firms opted to absorb part of the duty, this was to offset any effect of the dumping duty on their exports and thereby increased the trade that actually occurred in 2007.

95. <u>To both parties</u>: Please comment on the manner in which the arbitrator in *US – Cotton* estimated the "trade-distorting impact" of the measure at issue, based on "volume effects" and "revenue effects". Is such an understanding of "trade-distorting impact" of any relevance in these proceedings?

91. Please refer to the U.S. response to Question 95.

96. <u>To the European Union:</u> In combining the two sets of GTAP elasticities in its second proposed alternative, the EU assigns a 30 per cent weight to the one that expresses the propensity of consumers to switch to domestic US products and a 70 per cent weight to the one that expresses the propensity of US consumers to switch to an alternative source of imports, other than the European Union Is there any supporting evidence to suggest that exports from the EU to the U.S. are more likely to be substituted for by exports from elsewhere, rather than domestic U.S. goods?

92. Please refer to the U.S. comments on the EU response to Question 80 and the U.S. response to Question 86.

97. <u>To the European Union:</u> The US has argued, in para. 133 of its Written Submission, that "absent knowledge of the nature of the concessions, even if the EU applied the same tariff to the same value of goods, the actual level of nullification or impairment could be quite different depending on import demand elasticities or other variables". Do you agree? In particular, do you agree that the "trade effects" of an equivalent measure might be quite different from those of the initial violating measure?

93. The United States notes that the EU did not answer the second part of this question: "do you agree that the 'trade effects' of an equivalent measure might be quite different from those of the initial violating measure?" The EU instead avoids the question by arguing that the trade effects of a proposed suspension lie in the future and that there is no provision in the DSU for monitoring such effects.

94. Notwithstanding the above, the Arbitrator here must determine whether the proposed levels of suspension are equivalent to the level of nullification or impairment. With respect to the mirror measure proposed in Methodology 2, as detailed in our response to Question 66, the U.S. comments on the EU's responses to Question 64 and 66 above, and elsewhere, the level of suspension cannot be ascertained without reference to the nature of the proposed concessions (namely, the products against which the *ad valorem* tariff will apply). As the arbitrator in *US – 1916 Act* made clear:

> We also do not accept the EC argument that the suspension of obligations is somehow "equivalent" because its proposed measure would replicate, or partially replicate, the 1916 Act. Leaving aside for the moment the issue of whether we can examine the EC measure, we would re-iterate that similar or even identical measures can have dissimilar trade effects. Stated another way, similar or identical measures may not result in the required equivalence between the level of suspension and the level of nullification or impairment.[48]

98. To the European Union: Please comment on the following observation of the arbitrator in *EC – Bananas*:

> **"...the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned. We agree with the United States that this *temporary* nature indicates that it is the purpose of countermeasures to induce compliance. But this purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is *equivalent* to the level of nullification or impairment. In our**

[48] *US – 1916 Act* (22.6), para 5.32.

view, there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for countermeasures of a *punitive* nature."

95. Despite the EU's claims to the contrary[49] there are several components of the EU's proposed suspension that appear to be punitive. First, the EU proposed a 20 percent increase in the proposed level of suspension "to reflect the circumstances of the U.S. non-compliance."[50] Second, the EU proposed to roughly quadruple the level of suspension in the first year.[51] Third, the EU includes in its calculation of the level of suspension measures that have either been revoked or brought into compliance after the end of the RPT.[52] Finally, the EU has sought to circumvent the entire dispute settlement process in future cases and effectively turn the very specific "as applied" findings in a limited number of cases into an "as such" finding by unjustifiably seeking to suspend its obligations with respect to the DSU.[53]

99. To the European Union: you suggest that "on any reasonable view the EU countermeasures as they stand are an underestimate". Please explain why that would be the case.

96. Although implicitly acknowledging that the inclusion of lost profits would inappropriately overstate the level of nullification or impairment, the EU erroneously claims that it does not account for nullification or impairment arising from such "lost profits."[54] As noted in the U.S. comments on the EU response to Questions 58, 92, and 93, the reverse charge is calculated based on a hypothetical profit rate and an unsupported duty absorption rate. Regardless of what the EU chooses to label the output of its calculation, the reverse charge injects lost profits into the calculation of the level of suspension.

100. <u>To the European Union</u>: You have suggested that in the first year of application, the suspension measures would "naturally" also include the amount accumulated

[49] EU Response to Question 98 ("We also agree that countermeasures should not be punitive - and we are not seeking any punitive measures in this case.")

[50] EU Written Submission, para. 102.

[51] EU Written Submission, para. 117.

[52] See U.S. Written Submission, paras. 85–95; U.S. Answers to Questions 42, 44, and 82.

[53] EU Methodology Paper, paras. 49-52.

[54] EU Response to Question 99.

between the end of the reasonable period of time and the implementation of the countermeasures (para. 64 of your Written Submission). Please explain how equivalence will be ensured on an annual basis in that situation, or whether the equivalence in question should be calculated on any different basis.

97. The EU's position that "[t]he value of a retaliation rate is necessarily expressed in temporal terms" contradicts Article 22.4's requirement that the level of suspension be equivalent to the level of nullification or impairment. The EU's position is that, "in the first year, the European Union would have the right to suspend at the annual rate, multiplied by the number of years between the end of the RPT and the commencement of retaliation." This position proceeds from the erroneous premise that the cumulative amount of trade effects is equivalent to the level of nullification or impairment for the first year. To the contrary, as we have explained elsewhere, cumulation of past trade effects 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.

98. Additionally, as we have explained above, allowing a complaining Member to suspend concessions with respect to a measure from which it is no longer suffering any trade effects does not serve to restore the balance of trade concessions. Furthermore, that the allowance for suspension of concessions is permitted under Article 22.8 of the DSU only "until such time as the measure found to be inconsistent with a covered agreement has been removed," demonstrates that the level of suspension of a concession is a remedy that is prospective in nature. Moreover, a level of suspension that bears no relation to the current level of nullification or impairment does not serve to induce compliance.

99. To give one example, in a hypothetical case there could be two WTO-inconsistent measures, one of which had a trade effect of $99 per year, and the other had a trade effect of $1 per year at the end of the RPT, for a total of $100 per year. If the measure with the trade effect of $99 per year were revoked after the RPT and the measure with the trade effect of $1 per year stayed in effect, under the EU's reasoning the complaining Member would be entitled to a level of suspension of $100 per year. If three years had transpired since the end of the RPT, under the EU's reasoning the complaining Member would be entitled to suspend concessions of $300 in the first year, even though the current level of nullification or impairment was only $1 per year. This result would bear absolutely no relation to the current level of nullification or impairment, nor would it bear any relation to the current balance of trade concessions.

100. Additionally, the combination of all of these trade effects in the first year would compound this distortive impact. A cumulative award of suspensions would permit a complaining Member to prohibit several times as much trade in the first year as had been done in any previous year. Such a distortion is neither contemplated by the requirement in Article 22.4 that the level of suspension be equivalent to the level of nullification or impairment, nor does it make economic sense to allow a complaining Member to magnify a distortive effect merely through the passage of time.

101. Furthermore, the EU's position proceeds from the erroneous premise that multiplying the level of nullification as of the end of the RPT by the number of years between the end of the RPT and the commencement of retaliation would equate to the cumulative nullification or impairment during that time period. As we have discussed in our comments regarding the EU's response to Question 69 and elsewhere, however, simply multiplying the calculated level of nullification or impairment for 2007, the end of the RPT, fails to take into account any of the real-world data for 2008 or 2009. As we discussed above, the EU's omission of 2008 and 2009 data distorts its calculation of the nullification or impairment by (1) including measures that have already been brought into compliance or revoked after the end of the RPT; and (2) distorting the value of trade affected by the measures at issue. The United States has supplied the CBP trade value data and explained the measures that have been revoked or brought into compliance after the end of the RPT, but the EU has ignored this data in its calculations. Thus, even if the EU's premise that cumulation of nullification or impairment for the first year of suspension would be appropriate, the EU has failed to do so.

101. To both parties: Please elaborate with reference to the applicable rules of interpretation why the DSU allows, or does not allow, the application of suspension measures in relation to the period between the end of the reasonable period of time for implementation and the time at which suspension is authorized by the DSB.

102. Please refer to the response of the United States to Question 101. Please also refer to our responses to Questions 45, 57, and 82, and our comments regarding the EU's responses to Questions 69, 70, and 100.

102. To the European Union: In question 33, the Arbitrator asked the European Union whether the request for suspension under the DSU related to the same cases and orders as the proposed suspensions under the GATT 1994 and other Annex 1A Agreements. In other words, the Arbitrator sought to understand whether you are seeking authorization to retaliate under the DSU in respect of measures already found to be non-compliant in DS294, or whether you are seeking authorization to retaliate with respect to other measures with respect to which no finding has yet been made. Your response did not answer this question. Please clarify. If your answer is the latter, please identify what provision of the DSU would allow the Arbitrator to authorize countermeasures in respect of measures with respect to which no finding has been made?

103. It is notable that, at the very end of this proceeding, the Arbitrator is still having to ask the EU what the measure is with respect to which the EU seeks to suspend DSU obligations. The fact is, the EU has altered its position several times as to the identity of the "measure" on which

its request to suspend DSU concessions is contingent.[55] The EU is not free to amend its request for authorization during the course of the arbitration proceedings so as to add "measures," or change the "measure," for which the EU seeks the arbitrator to review the level of nullification and impairment. Furthermore, the EU's latest response now makes clear why the EU has lacked the confidence to rest its claims on any of the particular "measures" that it has variously cited. The EU is unable to answer the Arbitrator's last question and identify any provision of the DSU that would allow the EU to suspend obligations in respect of measures with respect to which no findings have been made. The EU has also failed to disclose until now that the "measure" it has in mind not only has no findings against it, but does not even "currently exist."[56]

104. Now, however, the EU has said that the measure it has in mind is "administrative reviews (for example) that *might come into existence in the future*."[57] The EU goes on to state, correctly, that "[t]here is no finding that such administrative review is WTO inconsistent."[58] To be clear then, the Arbitrator asked the EU, "*whether you are seeking authorization to retaliate under the DSU in respect of measures already found to be non-compliant in DS294*," and the EU has answered "no." The Arbitrator also asked, "*whether you are seeking authorization to retaliate with respect to other measures with respect to which no finding has yet been made*." The EU has answered "yes."

105. This is where the Arbitrator's inquiry into the EU's request to suspend DSU obligations can end. The DSU is clear that suspension of concessions is only allowed with respect to measures against which there are "recommendations and rulings [that] are not implemented within a reasonable period of time."[59] Though asked directly by the Arbitrator, the EU has been unable to point to any DSU provision to the contrary.

106. Nevertheless, the EU goes on to assert that, in the event the hypothetical future measure it has in mind comes into existence, "the United States would not be complying with its DSU

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[55] In chronological order, the EU has given as the basis for the suspension of DSU concessions: an alleged U.S. "statement that the zeroing methodology used in review investigations will not be brought into conformity" (EU Article 22.2 Request, WT/DS294/35, p. 3); an alleged "US policy" to "deprive the European Union of its WTO rights and benefits through the passage of time occasioned by an ultimately futile and non-fruitful re-iterative recourse to the DSU" (EU Methodology Paper, paras. 50-51); the vaguely formulated "in the event that United States does it again with respect to the same products" (EU First Set of Answers, para. 139); and now, in its second set of answers, either "administrative reviews (for example) that might come into existence in the future" or "litigation delay" (paras. 124, 127).

[56] EU Second Set of Answers, para. 124.

[57] EU Second Set of Answers, para. 124 (emphasis added).

[58] EU Second Set of Answers, para. 124.

[59] DSU, Art. 22.1; see also, DSU, Art. 23.2.

obligations."[60] It is asking the Arbitrator to arrive at the same conclusion. It is asking the Arbitrator to prejudge whether measures might come into existence affecting products exported from the EU, and whether any such measures might be WTO inconsistent for the same reasons as underlie the DSB recommendations and rulings in this dispute. It does this because, it asserts, "administrative reviews (for example) ... would be a 'cookie cut' of exactly what has already been found WTO inconsistent."[61] The EU's approach would have the Arbitrator dispense now with all of the provisions of the DSU that would apply to resolving a dispute over the consistency of a possible future measure with a Member's WTO obligations – there would be no consultations on the measure, no review by a panel, no appeal, no DSB adoption of any recommendations and rulings. In other words, it appears the EU seeks to suspend the provisions of the DSU now, as part of the Arbitrator's proceedings, separate and apart from its request for authorization to suspend its obligations under the DSU later.

107. Even aside from the fact that there is no legal basis for the EU's approach, in making the claim about future, hypothetical measures, the EU seems to be relying on an assertion that such reviews would be based on "the basic measure about which we have been complaining in all these cases, namely the anti-dumping duty based on zeroing."[62] The EU is ignoring the actual findings of the panels and Appellate Body in this dispute, which do not go to any "basic measure" but to specific antidumping and administrative reviews. In essence, the EU is trying to transform the "as applied" findings it obtained with respect to administrative reviews to an "as such" finding with respect to reviews. Yet that is a finding that the EU specifically sought but the panel and Appellate Body explicitly rejected.[63] In doing so, the EU appears to be ignoring the observation of the compliance panel that "particular attention" must be paid "to the fact that the findings with respect to zeroing in the original dispute concerned the use of zeroing in the specific original investigations and administrative reviews at issue in that case, and not the US zeroing methodology 'as such'."[64]

108. Finally, the United States notes that, elsewhere "in this case, the European Union has requested suspension of concessions or other obligations with respect to the nullification or

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60 EU Second Set of Answers, para. 124.

61 EU Second Set of Answers, para. 124.

62 EU Second Set of Answers, para. 126.

63 *US – Zeroing (EC) (Panel)*, para. 7.291; see also, *US – Zeroing (EC) (AB)*, para. 228.

64 *US – Zeroing (EC) (Article 21.5) (Panel)*, para. 8.100. Aside from the fact that there is no finding that these non-existent administrative reviews violate the WTO agreements, there are also no factual findings against these non-existent reviews. The EU disregards that it would still have to demonstrate that zeroing was used in the review and that the review resulted in a duty. This cannot simply be presumed. There have been instances, for example, in which the amount of duty due as a result of a review is found to be zero, and clearly such a result is not affected by zeroing.

impairment occurring *at the end of the reasonable period of time*."[65] The United States wonders how this position is consistent with the EU's request to suspend the DSU with respect to measures that did not exist at the end of the reasonable period of time and do not even exist at the current time. At a minimum, the EU concedes that there is nothing inherent or mandatory in the DSU that requires an Arbitrator to base its decision on the situation as it existed at the end of the reasonable period of time.

103. To the European Union: Please clarify how the proposed suspension of obligations under the DSU would relate to the suspension of concessions or other obligations under alternatives 1 and 2, including how equivalence would be ensured, where alternative 1 or 2 is applied in conjunction with suspension of obligations under the DSU.

109. Prompted by the Arbitrator to relate DSU suspension specifically to alternative 1 or 2, the EU has arrived at a new theory of equivalence. What the EU now says it wants is a way to "adjust the calculation" for suspension of concessions if the level of nullification or impairment were to change as a result of the existence of new administrative reviews.[66]

110. This means that the EU, which has elsewhere flatly asserted that it is entitled to choose a fixed level of suspension based on a "snapshot" as of the end of the RPT,[67] is now simultaneously arguing for a variable level of suspension of concessions under the GATT 1994 in addition to the suspension of concessions under the DSU. The EU simply cannot have it both ways. Indeed, since the EU says it does not view administrative reviews as independent measures, then the EU's "fixed" suspension of concessions already includes the level of any nullification or impairment from these non-existent, hypothetical, future reviews.

111. The EU has stated, "in this case ... the choice made by the European Union is clear: the nature of the countermeasure will be fixed (with the exception of the request under the DSU)."[68] In pursuing such a tactic, the EU has specifically sought to exclude variable levels of suspension from the Arbitrator's review. In particular, the EU is seeking to evade the equivalence requirement in pursuit of a level of suspension that exceeds the level of nullification and impairment.

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65 EU Oral Statement, para. 63 (emphasis added).

66 EU Second Set of Answers, para. 129.

67 EU Oral Statement, para. 23.

68 EU Oral Statement, para. 23.

112. This is not allowed, however. Under Article 22.7, it is the Arbitrator's responsibility to "determine whether the level of suspension is equivalent to the level of nullification and impairment." To this end, the Arbitrator asked, if DSU obligations were suspended, "*how equivalence would be ensured*."

113. The EU has made a determination of equivalence impossible, however, with regard to its request to suspend DSU obligations. The EU has never explained how the suspension of a dispute settlement procedural obligation can be equivalent to "lost trade."[69] Nor has the EU explained how, if the effect of its DSU suspension will be that the EU will be free to "adjust the calculation" with regard to its suspension of GATT 1994 concessions to "the revised higher level of trade," the suspension of the DSU itself will also be within an equivalent level of suspension.[70] In other words, if the suspension of the GATT 1994 is to equal the level of nullification and impairment, how will the suspension of DSU obligations not exceed the level of nullification and impairment?

114. Ultimately, the difficulties the EU has created for the Arbitrator in determining equivalence arise because what the EU has in mind in suspending its DSU obligations is not equivalence. Notably, in its first set of answers to the Arbitrator's questions, the EU stated that "[i]f the duty rate goes down, we might (or might not) prefer to continue with what we have."[71] Under the EU's standard, equivalence is not the goal.

115. The EU has attempted to answer the concerns about equivalence that arise in the absence of arbitrator review and DSB authorization by noting that there is always the possibility of a new dispute, and by giving assurances of its "responsibility and restraint."[72]

116. In paragraphs 129 and 130, the EU says that it might apply a methodology that is subject to disagreement between the parties and will likely be decided upon by a panel (or an appeal). The EU has said that this suspension of concessions or other obligations "would only ever be used by the European Union in a responsible manner."[73] The United States notes that the Arbitrator is not called upon to make a determination of how trustworthy a Member would be with a blank check. The Arbitrator is to determine equivalence.

117. Moreover, the United States is not confident that the EU's assurances of responsibility and restraint are well founded. Even before taking the EU's request to suspend DSU obligations

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[69] EU Second Set of Answers, para. 129.

[70] EU Second Set of Answers, paras. 128-129.

[71] EU First Set of Answers, para. 139.

[72] EU Second Set of Answers, para. 132.; EU Oral Statement, para. 76.

[73] EU Second Set of Answers, para. 132.

into account, the United States has demonstrated that the level of suspension proposed by the EU far exceeds the level of nullification and impairment. The EU's excessive – and with each submission increasing – request raises concerns about what it considers to be "restraint."

118. Nor is the confidence of the United States increased by the EU's statement that once freed from its DSU obligations, it "might (or might not) prefer to continue with" a higher level of suspension in response to a lower level of nullification and impairment. Instead, like the EU's request for a 20% increase to the level of suspension, a quadrupling of the level of suspension in the first year, and a twenty-fold increase in the "reverse charge" component of Methodology 1, the EU's request to suspend DSU obligations is simply another way it has disregarded the Article 22 equivalence requirement in search of an excessive level of suspension.

119. In light of the foregoing, the United States also takes this opportunity to recall its request that the Arbitrator state the level of suspension in relation to individual antidumping orders. As the United States has noted before, it could help the parties, after the conclusion of this proceeding, to understand the impact of compliance with respect to individual measures on the level of nullification or impairment.[74]

120. Finally, the United States notes that the EU has incorrectly referred to the possibility of an appeal of the Arbitrator's decision.[75] The continued reference by the EU to the Arbitrator as an arbitration panel, including in the cited parenthetical, suggests that this stems from the EU's theory that this arbitration is actually a panel proceeding.[76] The United States has pointed out the numerous flaws with this theory.[77] The United States also recalls that, in response to the EU advancing this theory in the third party context, on March 26, 2010, the Arbitrator informed the parties that "[f]or reasons to be set out at an appropriate time, the Arbitrator concludes that Article 10 of the DSU does not apply to these proceedings."[78] The United States respectfully suggests that it would be helpful for the Arbitrator, when providing those reasons, not to confine itself solely to the issue of the applicability of Article 10 of the DSU, but also make clear that this is not a panel proceeding subject to the provisions of the DSU applicable to panels and panel reports.

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[74] U.S. Response to Question 6, paras. 29-31.

[75] EU Second Set of Answers, para. 129 ("Instead of re-running six proceedings (panel, appeal, compliance panel, appeal, arbitration panel, appeal) ...)"

[76] See Written Submission by the European Union Regarding Third Party Rights, para. 5.

[77] See Comments by the United States on the EU's Comments regarding Japan's Communication to the Dispute Settlement Body, paras. 13-24.

[78] Letter from the Secretariat, 26 March 2010.

TABLE OF EXHIBITS

US-50	CBP Instructions, Automatic Liquidation Instructions for Stainless Steel, Plate in Coils from Belgium (A-423-808), following the 2007-2008 administrative review
US-51	Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review, 74 Fed. Reg. 53468 (Oct. 19, 2009).
US-52	Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review, 73 Fed. Reg. 75398 (Dec. 11, 2008).
US-53	Ball Bearings and Cylindrical Roller bearings, and Parts Thereof from Italy, 54 Fed. Reg. 20903 (May 15, 1989)
US-54	Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 71 Fed. Reg. 40064 (Jul. 14, 2006).
US-55	Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy, 61 Fed. Reg. 38547(Jul. 24, 1996).
US-56	Stainless Steel Sheet and Strip in Coils from Germany; Final Results of Changed Circumstances Review, 66 Fed. Reg. 50173 (Oct. 2, 2001).
US-57	Certain Pasta From Italy: Final Results of Antidumping Duty Changed Circumstance and Revocation, in part, 74 Fed. Reg. 41120 (Aug. 14, 2009)
US-58	Stainless Steel Sheet and Strip in Coils From Italy: Final Results of Antidumping Duty Administrative Review, 67 Fed. Reg. 1715 (Jan. 14, 2002).
US-59	Notice of Amended Final Results of Antidumping Duty Administrative Review; Stainless Steel Sheet and Strip in Coils from Germany, 68 Fed. Reg. 14193 (Mar. 24, 2003).
US-60	Stainless Steel Plate in Coils from Belgium; Final Results of Antidumping Administrative Review, 67 Fed. Reg. 64352 (Oct. 18, 2002).