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 Further Additional Questions from the Arbitrator

July 20, 2010

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Question to both parties:

104. In its written submission, the U.S. argues that in order to arrive at a single elasticity for the formula used to calculate lost trade (EU methodology 2), the EU selected a weighting scheme of 30 percent for the domestic to import substitution elasticity and 70 percent for the import to import substitution elasticity. But it contends that the EU has provided no support for this particular weighting scheme other than to say substitution is more likely to occur between import sources than switching from domestic. In the oral hearing, the EU acknowledged the fact that its selected weighting scheme was not based on any economic model or existing empirical evidence, but simply reflected what the EU thought was reasonable. They added that perhaps the weighting could be 50/50 instead of 30/70.

To reiterate, the EU's formula for calculating lost trade is:

= 0.3 * domestic-import elasticity * duty * trade value + 0.7 * import-import elasticity * duty * trade value

= duty * trade value (0.3 * domestic-import elasticity + 0.7 * import-import elasticity)

Given the above, the Arbitrator would like to refer the parties to a theoretical economic model by Francois and Reinert (1997), referred to in U.S. Exhibit 28, which shows that:

Home country elasticity of demand for imports from country 'i' with respect to the price of the good produced in country 'i' = market share of country 'i' in total imports of home country * aggregate import price elasticity of demand in home country + (1 - market share of country 'i' in total imports of home country) * elasticity of substitution between different import sources.

The above formula is almost identical to the formula used by the EU to arrive at a single elasticity. Given this, do the parties agree that use of market shares would be a less arbitrary way of selecting the weighting scheme used?

1. The European Union's argument, in its response to question 104, that the Arbitrator cannot "lawfully use [the calculation of lost trade] to displace basket 1 of the first EU alternative, absent any *prima facie* case from the United States demonstrating that basket 1 of the first EU

alternative is inconsistent with the equivalence rule" distracts the Arbitrator from its task in this arbitration and misrepresents the burden of proof in this case.

2. 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.[1] Once the United States has met its burden of proving that the proposed levels of suspension of concessions are not equivalent to the level of nullification and impairment – as it has done in this proceeding – the Arbitrator is not required to adopt or reject any individual "aspect" of the calculation methodology that the EU chooses to identify and assert is separate from other portions of its calculation methodology.

3. The United States has pointed out with respect to the various aspects of the EU's methodologies why flaws and deficiencies relating to certain individual aspects of the EU's methodologies result in levels of suspension that exceed the level of nullification or impairment. As detailed in the U.S. Written Submission, the U.S. responses to the Arbitrator's questions, and the U.S. comments on the EU's responses to the Arbitrator's questions, the EU's two proposed levels of suspension of concessions or other obligations are not equivalent to the level of nullification and impairment.

4. With respect to the EU's references to its response to questions 72 and 8 and paragraphs 76 to 78 of its Written Submission, please refer to paragraphs 37 through 40 of the U.S. Comments on the Responses of the European Union to the Arbitrator's Additional Questions to the Parties.

To the European Union:

107. Please clarify how you propose to choose among the two alternative measures that you propose. Specifically, please clarify whether you would make an initial definitive choice to apply one or the other alternative. If so, at what time would you make that choice (for example, at the time of seeking the authorization to suspend concessions or other obligations, or at the time of first application, or some other time)? If not, at what time and at what frequency would you choose to change from one to the other?

[1] *See* U.S. Response to the Arbitrator's Questions, paras. 1-3 and 6-8; U.S. Comments on EU Responses to the Arbitrator's Additional Questions, para. 3.

5. The United States notes that the question regarding the EU's choice among its proposed alternative measures goes to the nature of the EU's suspension of concessions, not to the question of whether the proposed level of suspension is equivalent to the level of nullification or impairment. Discussion of the EU's choice of proposed alternative measures has arisen in this Arbitration only because the EU has erroneously argued that the nature of the requesting party's choice of suspension sets the framework or approach for the evaluation for the level of nullification or impairment.

6. The evaluation of the level of nullification or impairment of benefits relates to the proposed level of suspension of concessions or other obligations, not the nature 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] 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 are irrelevant to that inquiry.

7. Therefore, in accordance with Article 22.7, if the Arbitrator finds that neither of the EU's proposed levels of suspension of concessions or other obligations is equivalent to the level of nullification or impairment, it would be appropriate for the Arbitrator to determine what level of suspension of concessions or other obligations is equivalent to the level of nullification or impairment. It would not be consistent with Article 22.4 or 22.7 to present the EU with a choice of levels of suspension. Rather, once the Arbitrator determines the level of suspension, it is then up to the EU to choose how to go forward with suspending concessions up to the level set by the Arbitrator.

[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.")