# 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 Response of the European Union to Follow-up Questions from the Arbitrator

**July 28, 2010**

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

Comments on the EU Response to Follow-up Questions from the Arbitrator to the Parties

**To both parties**

**111. US import demand elasticities, estimated by Kee et al. (2004) , are provided by the United States in Exhibit US-15. The Arbitrator notes that these do not generally match the estimates of Kee et al. (2008) - the published version of Kee et al. (2004) - which are publicly available on the website of the World Bank. The following is a link of the relevant page online:**

**http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574446~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html**

**In light of the above, please provide an explanation for this inconsistency. Please also explain which set of elasticities - Kee et al. (2004) or Kee et al. (2008) - is more appropriate for the current dispute and why?**

1. The Kee et al. (2008) paper was published in a highly respected journal, the *Review of Economics and Statistics*. The reason why the estimates in the published paper are different from the 2004 paper is in fact due to academic peer review. Through the peer review process for acceptance into the journal, Kee et al. employed more sophisticated econometric techniques to correct for endogeneity and measurement issues. In contrast, the Hertel et al. paper that is the basis for the GTAP elasticities, did not correct for any endogeneity and measurement errors because the authors used ordinary least squares to estimate the elasticities.

2. The more appropriate elasticities to use for this proceeding are the Kee et al. (2008) elasticities. The Kee et al. elasticities estimates have been peer reviewed and are more econometrically rigorous than the GTAP estimates, in that the Kee et al. (2008) paper corrects for endogeneity and measurement errors.

**To the European Union**

**113. The excel file, attached as EU-Exhibit 17, provides data on the value of US - relevant EU member state imports, the value of US - EU (as a whole) imports, and total US imports for each 10-digit HTS line within each case, individually (for 2007, 2008, 2009). The Arbitrator notes that these data do not include certain HTS 10-digit lines that are included in the CBP data, provided in US Exhibit-61.**

**Given the above, please provide data on the value of US - relevant EU member state imports, the value of US - EU (as a whole) imports, and total US imports for each 10-digit HTS line included by the US in US Exhibit-61. Please provide this data for 2007. In doing so, please insert the relevant data into the Excel file, which is attached as a template. The Arbitrator notes that some of the values would be replicates of data provided earlier, but would be grateful if these could be provided again for coherence. Please also specify the source of the data and the unit of measurement you use. If there are any gaps in the data, please explain how these should be filled.**

3. In its response to Question 113, the EU asserts, without setting forth any basis under the DSU for its assertions, that the Arbitrator "must prefer the data submitted by the European Union . . . unless the US data indicates a higher or additional amount" and that "the benefit of any doubt must accrue to the European Union." As discussed in the U.S. response to Question 3, the fact that the party objecting to the proposed level of suspension may have an initial burden of showing that the proposed level of suspension is not equivalent to the level of nullification or impairment does not in any way imply that either party's submitted evidence should be "preferred" or otherwise given a "benefit of doubt" at any time during the Article 22.6 proceedings. Thus, the EU's data does not enjoy any presumption of correctness or any special weight simply because the EU has put them forth in this arbitration.

4. With respect to the EU's assertion that "{n}either the European Union nor the Arbitration Panel is in a position to verify the accuracy" of the trade value data submitted by the United States, the United States notes that the data submitted by the parties in this dispute are derived from the same source: U.S. Customs and Border Protection's (CBP's) official system of record, the Automated Commercial System.[1]

5. The EU's statement that the United States "has the burden of proof and its opportunity to make a prima facie case was exhausted a long time ago" represents another attempt to distract the Arbitrator from its task in this arbitration and misrepresent the burden of proof in this case. The burden of proof on the United States is with respect to whether the EU's proposed level of suspension is equivalent to the level of nullification or impairment. The United States has pointed out with respect to the various aspects of the EU's methodologies why flaws and

[1] As explained in response to Question 41, because the United States extracted the data directly from the Automated Commercial System, the United States was able to isolate all relevant entries of merchandise subject to the antidumping orders at issue in this dispute by reference to the information supplied by the importer on the CBP Form 7501 for each relevant entry. Although the U.S. Census Bureau utilizes the Automated Commercial System to derive the HTS data that is published online on the U.S. International Trade Commission Interactive Tariff and Trade Data Web (i.e., the EU's source for trade data), this database does not distinguish between entries of merchandise subject to antidumping orders and non-subject merchandise.

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. Once the United States has discharged that burden, and the Arbitrator has decided to determine the correct level of suspension, there is no longer a burden of proof for either party to meet. As part of the exercise of determining what level of suspension of concessions or other obligations would be equivalent to the level of nullification or impairment, the Arbitrator would be free to apply the methodology and data set that it determines to be appropriate, including the methodology and data set proposed by the requesting Member, with adjustments, a methodology and data set proposed by the Member concerned, or some other methodology and data set.

6. Finally, the United States is puzzled by the EU's assertion that "{t}he Arbitration Panel is not entitled to base itself on untimely submissions from the United States and must respect the due process rights of the European Union" in the context of the Arbitrator's request for information relevant to the Arbitrator's determination of the level of nullification or impairment. It is the Arbitrator, not the United States, that is seeking the information requested in Question 113. As explained in the U.S. response to Question 1, there is nothing in the DSU that would prevent the Arbitrator from seeking any information its deems relevant from the parties to aid it in making a determination in discharging its task. Moreover, it is unclear precisely to what allegedly "untimely submission from the United States" the EU is referring. Question 113 referenced one piece of information submitted by the United States: Exhibit US-61. Exhibit US-61 was a timely filed spreadsheet submitted by the United States pursuant to the Arbitrator's specific request in question 108.