I. INTRODUCTION

1. The United States thanks the Arbitrator for this opportunity to submit its comments regarding the communication by the European Communities ("EC") of 4 February 2002 ("EC methodology paper") concerning the methodology for calculating the proposed level of suspension of concessions in the dispute *United States - Tax Treatment for "Foreign Sales Corporations" - Recourse by the United States to Article 22.6 of the DSU and Article 4.11 of the SCM Agreement* (WT/DS108). Because the discussion in the EC methodology paper is very short and general, the U.S. comments thereon can only be of a very general nature.

2. At the outset, the United States should set forth its understanding of the EC's approach. As the United States understands it, based on the EC's methodology paper and the EC's request to the DSB of 17 November 2000,[1] the EC has requested authority to impose an additional duty of 100 percent *ad valorem* above bound customs duties on U.S. exports to the EC amounting to $4.043 billion per year. The figure of $4.043 billion is based on the size of the subsidy conferred by the Foreign Sales Corporation ("FSC") provisions as of 2000, as estimated by the EC.[2] Assuming *arguendo* that the Dispute Settlement Body ("DSB") were to grant the EC's request for authority to impose such duties, the products on which the duties would be levied would be drawn from an indicative list attached to the EC's request to the DSB.[3]

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[1] WT/DS108/13.
[2] EC methodology paper, paras. 4 and 11.
[3] WT/DS108/13.

II. THE EC'S BASIC APPROACH IS IMPROPER

3. The EC's basic approach is improper because it bears no relationship to the level of nullification or impairment suffered by the EC[4] as a result of the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 ("ETI Act").

4. In addition, even assuming *arguendo* that an amount of countermeasures corresponding to the total amount of the subsidy might be "appropriate" with respect to the Panel's finding that the ETI Act is a prohibited export subsidy under the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") (an issue that the United States will address separately in this proceeding), such a standard cannot be used with respect to the DSB's recommendations and rulings concerning the *Agreement on Agriculture* and Article III:4 of the *General Agreement on Tariffs and Trade 1994*. With respect to those latter two recommendations and rulings, Article 22.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") provides that the level of suspension of concessions cannot exceed the level of the nullification or impairment to the EC.

5. In summary, the EC's basic approach is not "reasonable" or "conservative", as the EC would have the Arbitrator believe. Instead, it is unreasonable and aggressive. The United States will demonstrate why this is so as a matter of law and fact in other parts of this proceeding.

[4] The United States also notes that the EC has made no attempt to distinguish between any nullification and impairment to the EC as opposed to other Members.

III. THE EC'S CALCULATIONS ARE INACCURATE

6. In addition to being based on a flawed premise, the EC's calculations themselves are inaccurate.

7. The EC purports to have calculated the size of the subsidy by projecting forward to the year 2000 based on published data for 1996 and on the methodology used by the United States Department of the Treasury ("Treasury") in 1997. However, there is no need to engage in such projections, because Treasury did publish a tax expenditure estimate of the subsidy for the year 2000. This estimate is slightly lower than the EC's projected figure.

8. The EC's figure is also excessive to the extent that it reflects an amount attributable to exports of services, which are not subject to the SCM Agreement. In addition, the EC's figure is excessive to the extent that it reflects an amount attributable to subsidies conferred on exports of agricultural products. As noted above, the level of suspension of concessions due to a violation of provisions of the *Agreement on Agriculture* cannot exceed the level of nullification or impairment to the EC.

IV. THE EC CANNOT REQUEST A HIGHER AMOUNT

9. At paragraph 12 of the EC methodology paper, the EC appears to unilaterally reserve to itself the right to argue for a higher amount. There is no basis in either the DSU or the SCM Agreement for a party to an arbitration proceeding to increase in the course of that proceeding the amount of countermeasures or the level of suspension of concessions requested.