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

RECOURSE TO ARTICLE 22.6 OF THE DSU BY THE UNITED STATES

(DS294)

Oral Statement of the United States

May 20, 2010

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1. Mr. Chairman, members of the Arbitrator, I would first like to express the appreciation of the United States for your willingness to serve as the Arbitrator in this new phase of this dispute. The United States, of course, also would like to thank the staff of the Secretariat for their work in assisting the Arbitrator.

2. The task before us today, if not simple, is at least relatively straightforward. Despite the European Union's inflated rhetoric and attempts to narrowly constrain the Arbitrator in its ability to examine the matter referred to it, the questions before the Arbitrator in this dispute are (1) whether the EU's proposed level of suspension of concessions is equivalent to the level of nullification or impairment, and if not, what level of suspension of concessions or other obligations is equivalent to that level, and (2) whether the EU has followed the principles and procedures set forth in Article 22.3 in making its request to suspend obligations under the DSU.

3. By contrast, the EU believes that the Arbitrator's task is to adopt an approach that will permit the EU "to choose between observing lost trade and calculating lost trade, depending upon which approach produces the most advantageous result for us in this particular case."[1] Needless to say, finding a way for the EU to choose the most advantageous result for it is far from ensuring that the EU's level of suspension is equivalent to the level of nullification or impairment.

[1] EU Written Submission, para. 58.

4. In our statement today, the United States will discuss a methodology for calculating the level of nullification or impairment and explain the reasoned basis for selecting each element of the calculation. The United States will then address the EU's calculations and explain why the EU's overreaching and flawed approach to determining the level of suspension of concessions invariably leads to a level of suspension that exceeds the level of nullification or impairment. Next, the United States will address a few of the arguments raised by the EU in its answers to the Arbitrator's questions. Finally, the United States will explain why the EU's request for authorization to suspend obligations under the DSU does not meet the requirements of Article 22.3 of the DSU.

5. As a starting point, then, it is necessary to examine the issue of nullification or impairment of the EU's benefits. In turn, this requires looking at the particular inconsistencies found by the DSB.

Level of Nullification or Impairment

6. This arbitration involves specific findings that apply in the particular context of the antidumping orders at issue. The United States has come into compliance with the DSB's recommendations and rulings that related to "as such" and "as applied" findings regarding the U.S. calculation of antidumping margins in investigations. However, the EU nonetheless includes in its calculations cases 1, 6, 7, 8, and 14, which have all been brought into compliance through Section 129 determinations. The EU also ignores that, as a result of the U.S. compliance efforts, zeroing has been removed from many of the all others rates that remain in effect today. The remaining recommendations and rulings are "as applied" findings relating to the administrative reviews of certain antidumping orders that remain in effect, in particular, the use of certain

antidumping duty rates that were calculated using a methodology that employed "zeroing." The United States remains committed to bringing its measures into compliance with the DSB's recommendations and rulings and continues to devote significant resources toward reaching a solution.

7. Arbitrators in past proceedings have uniformly based their determinations on hard evidence and have refused to accept claims that are "too remote," "too speculative," or "not meaningfully quantified." Similarly, an arbitrator's determination should not be designed to punish the responding party. While inducing compliance may be one of the underlying principles of authorizing suspension, it is to be achieved by the requirement under Article 22.4 that the level of suspension of concession be equivalent to the level of nullification or impairment.

8. The equivalence requirement reflects another underlying principle for authorizing suspension of concessions: maintaining the balance of trade benefits accruing to the parties. The WTO Agreement represents the result of a number of negotiations under which Members agreed to make certain trade concessions in return for trade concessions from other Members. Where a Member's measure is nullifying or impairing the benefits promised to another Member under the covered agreements, the Member whose benefits are nullified or impaired is not required to continue providing the full level of benefits of its trade concessions to the Member in breach. Article 22 permits the complaining Member to suspend concessions up to the level of nullification or impairment in order to account for the benefits that are being denied it and thus maintain the balance of trade benefits.

9. In determining the level of nullification or impairment in past proceedings, the arbitrator has compared the level of trade for the complaining party under the WTO-inconsistent measure to

the complaining party's level of trade were the Member to have brought the WTO-inconsistent measure into conformity. The situation in which the Member concerned would have removed the WTO inconsistency is referred to as the "counterfactual." The difference in the level of trade under these two situations typically represents the level of nullification or impairment.

10. The counterfactual in this dispute is the following: what is the difference between:

(1) the actual level of U.S. imports at issue, and

(2) a reasonable estimate of the imports at issue that would exist if:

(a) the U.S. measures were brought into compliance with the DSB's recommendations and rulings (that is, if the United States were to collect antidumping duties based on dumping margins calculated using a WTO-consistent methodology that does not include zeroing);

(b) the economic adjustments resulting from compliance were reflected; and

(c) all other factors were held constant.

In order to estimate trade looking forward in time, the calculation uses the most recent representative period.

11. In arriving at a calculation for the level of nullification or impairment, the United States followed the broadly-accepted approach to a counterfactual 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 in this dispute. In pursuit of the greatest level of accuracy in the calculation, the United States has, in some instances, proffered data that contained higher values than the EU's own approach. By this sound approach, the United States demonstrates that the level of nullification or impairment of benefits to the EU in this

dispute can be no greater than, in the aggregate, $2.87 million annually in lost trade.

12. In stark contrast to the U.S. calculations of the level of nullification or impairment, the EU presented two alternative calculations for suspension of concessions that are based on overbroad data sets, flawed, arbitrary, and often self-serving assumptions, and more generic economic factors that are applied outside of their normal context. The EU overreaches in every assumption to obtain the highest level of concessions mathematically possible. The end result is two internally inconsistent calculations that grossly exceed the level of nullification or impairment. Clearly, the EU's two approaches were not aimed at arriving at an equivalent level of suspension of concessions.

13. Apparently not satisfied with the excessive results set forth in their methodology, the EU proffered two additional amounts: a 20% increase to the annual level of suspension and an approximate quadrupling of the level of suspension for the first year of suspension. The EU's intention clearly is not to arrive at a level of suspension that is equivalent to the level of nullification or impairment.

14. Simply put, the EU overreached at every turn in its request, while the United States developed a reasonable approach to ascertaining the level of nullification or impairment. For the reasons detailed below, the United States respectfully requests that the Arbitrator decline the EU's proposed level of suspension of concessions and, instead, determine that the level of nullification or impairment is no greater than $2.87 million.

15. With the above as introduction, the United States will now outline a methodology for calculating the level of nullification or impairment and explain the basis for selecting each element of the calculation.

16. As mentioned previously, to arrive at the calculation of the level of nullification or impairment of trade benefits that would otherwise accrue to the EU, the United States employs a counterfactual analysis. In this case, that analysis seeks to measure the amount of trade that would exist if the U.S. measures were brought into compliance with the Dispute Settlement Body's recommendations and rulings. That is, the difference between actual relevant U.S. imports during the most recent period; and a reasonable estimate of the relevant imports that would exist during the same period if (a) the U.S. measures were brought into compliance with the DSB's recommendations and rulings (that is, if the United States were to collect antidumping duties based on dumping margins calculated using a WTO-consistent methodology that does not include zeroing); (b) the economic adjustments resulting from compliance were reflected; and (c) all other factors were held constant.

17. The calculation involves following formula:

> *Level of nullification or impairment = price change of product * U.S. import demand elasticity * trade subjected to antidumping (AD) duties with zeroing*

18. The U.S. calculation begins with the measures at issue. In identifying these measures, the United States eliminated several measures used in the EU's calculation that have either been brought into compliance (Cases 7, 8, and 14) or have been removed entirely (Cases 1 and 6).

19. With respect to cases 7, 8, and 14, the only DSB recommendations and rulings involved concern the original investigation. This is because all the administrative reviews that the EU challenged in the compliance proceeding were completed prior to the end of the RPT. During the compliance proceeding, neither the panel nor the Appellate Body made any findings of inconsistency as to reviews completed after the end of the RPT. The United States fully complied

with the only DSB recommendations and rulings related to these cases when it recalculated the investigation margins in Cases 7, 8, and 14 without zeroing. The inclusion of these cases accounts for $27.26 million of the level of suspension in Methodology 1 and $8.69 million of the value of "trade loss" in Methodology 2.

20. With respect to cases 1 and 6, these orders were revoked. For all entries made on or after April 23, 2007 there are no antidumping duties being collected. Although a small number of entries made prior to that remain unliquidated, the entries in question have already long entered the United States. The liquidation of the duties on these entries will not affect future trade. The inclusion of these cases accounts for $1.85 million of the reverse charge calculated in Methodology 1.

21. After determining the relevant measures, the United States next calculated the price change, if any, of the product subject to each of those measures in the absence of zeroing. It is the price change due to zeroing that would trigger the change, if any, in the level of trade. The first step in estimating the price change due to zeroing is to estimate the percentage-point change in existing antidumping duty rates, if any, due to zeroing.

22. The U.S. calculation estimates the percentage-point change in AD duty margins due to zeroing by drawing on actual determinations performed by the U.S. Department of Commerce (Commerce) pursuant to Section 129 of the Uruguay Round Agreements Act. These determinations are relevant to calculating the level of nullification or impairment in this case because they reflect the calculation of actual margins with zeroing and without zeroing - in many cases with respect to the same AD orders at issue in this dispute. Moreover, these determinations were calculated in a public, transparent manner and subjected to numerous procedural protections

to ensure that these recalculations accurately reflect the removal of zeroing from the resulting redetermined dumping margin. During its conduct of these proceedings, Commerce issued preliminary results, and invited interested parties (both foreign and domestic) to comment before the issuance of the final recalculations. Accordingly, the results of the Section 129 determinations are the best, most reliable metric available for estimating the impact of zeroing on dumping margins.

23. For AD orders where Commerce performed a Section 129 determination with respect to the same order, the calculation uses the difference in AD duty rates as a result of the Section 129 determination as a proxy for the difference in the AD duty rate absent zeroing.

24. For AD orders where there was no corresponding Section 129 determination, the calculation uses a simple average of the differences in the rates as a result of the Section 129 determinations for all products as a proxy for the difference in the AD duty rate absent zeroing. The results of these determinations reliably estimate the impact of zeroing, and ensure that any suspension of concessions is equivalent to, and not in excess of, the level of nullification or impairment for the measures found to be inconsistent.

25. The United States notes that in deriving the average change in dumping margins, the calculation excludes the "all others rate" because that rate is a weighted average of those firms with individually calculated rates, rather than a calculation of a specific importer's margin. We note that the EU, by contrast, erroneously incorporated the "all other rates" that were in place prior to the Section 129 determinations into its methodology and disregarded the results of the Section 129 determinations when estimating the impact of zeroing on these rates.

26. The U.S. calculations are set forth in Exhibit US-12. After estimating the change in AD

duty rates, if any, due to the effect of zeroing, the calculation applies this change to determine the change in price. The calculation does this by removing the effect of the reduced AD duty rates from the original price of the product, which included the AD duty paid by the importer. When the AD duties change, the percentage change in the price paid by a U.S. importer is equal to the change in duties divided by the original price of the good (including the duty). The EU has argued that this step is unnecessary; however, the difference between the change in duties and the change in price can be significant where the existing antidumping duty rate is high.

27. The next element of the calculation of the level of nullification or impairment is the U.S. demand response to the change in the EU product price from the change in AD duty rates. The calculation estimates the U.S. demand response by use of U.S. import demand elasticities. In the calculation, the import demand elasticities estimate the likely increase in import demand for the products in question given the price change. For this calculation, the United States uses U.S. import demand elasticities estimated by World Bank researchers. These elasticities are preferable to others (such as GTAP substitution elasticities) for reasons of functionality and specificity.

- They are directly applicable to the analysis of how much imports will change when duties (and hence import prices) change.
- They are specific to the United States and specific to the products at issue at the six-digit Harmonized Tariff Schedule (HTS) line.

28. After determining the impact of price change and elasticity, the next step in the calculation is to determine the value of trade subject to zeroing under the relevant measures. Because the trade volumes of subject merchandise cannot be segregated from the non-subject merchandise simply based upon the tariff headings under which it enters, the United States used data provided by the CBP Automated Commercial System database listing the value of trade subject to AD duties under the orders at issue during the period 2007-2009. This database records data for each entry based on the documents filed at the time of entry including whether the merchandise in question is subject to an antidumping duty order. CBP, thus, was able to extract only those shipments that were subject to the antidumping orders at issue in this dispute.

29. The United States utilized data from the period 2007-2009 because (1) these years represent the time since the expiration of the RPT on April 10, 2007; (2) the averaging removes distortions from an exceptionally high or low level of trade for a given year; and (3) inclusion of more recent data more reasonably estimates the value of trade going forward.

30. The United States has provided a summary table of the trade subject to antidumping duties at Exhibit US-16, and further detail of the output from the CBP database at Exhibit US-31 through US-40.

31. In applying the CBP trade data, the calculation excludes any trade that was not charged an AD duty. This includes: (1) importers who were excluded from the AD order after the initial investigation; (2) importers who had the AD order revoked after administrative reviews (*e.g.*, for being assessed a zero-percent duty rate for three consecutive administrative reviews); and (3) importers who are still subject to the AD order, but who were assessed a zero-percent duty rate in the most recent administrative review. The calculation does not include such trade because AD margins incorporating zeroing do not apply in those situations and therefore no level of nullification or impairment is associated with these trade flows.

32. The United States notes that imports from firms that were subject to adverse facts available (AFA) rates, which in most cases are calculated based upon petition rates or other calculations that do not involve zeroing, were not excluded from the calculation. Thus, to the extent that there were imports from firms subject to AFA rates, the calculation overstates the trade value affected by zeroing.

33. In Exhibit US-13, the United States sets forth its calculation of the level of nullification or impairment, representing all of the steps discussed. As shown in the U.S. Written Submission at US-13, the calculation results in a level of nullification or impairment of no greater than $2.87 million.

34. The EU proposed levels of suspension (even prior to the EU's later requested adjustments and additional amounts of suspension) greatly exceed this calculation of nullification or impairment and, accordingly, fail to meet the Article 22.4 requirement that the level of suspension be equivalent to the level of nullification or impairment.

35. The above demonstration, without more, is sufficient basis for the Arbitrator to determine that the United States has satisfied its burden of proof with respect to showing that the EU's proposed level of suspension is not equivalent to the level of nullification or impairment. Next we provide additional reasons why the EU's proposed methodologies yield excessive levels of suspension and should not be used for purposes of determining the appropriate level of suspension.

The EU Methodologies

36. At the outset of this discussion, the United States would like to note that throughout the EU's submissions it 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 are "no longer within" the Arbitrator's "jurisdiction." This is incorrect. The EU proposed levels of suspension (even prior to the EU's later requested adjustments and additional amounts of suspension) greatly exceed this calculation of nullification or impairment and, accordingly, fail to meet the Article 22.4 requirement that the level of suspension be equivalent to the level of nullification or impairment.

37. The above demonstration, without more, is sufficient basis for the Arbitrator to determine that the United States has satisfied its burden of proof with respect to showing that the EU's proposed level of suspension is not equivalent to the level of nullification or impairment. Next we provide additional reasons why the EU's proposed methodologies yield excessive levels of suspension and should not be used for purposes of determining the appropriate level of suspension.

38. The EU used the USITC Interactive Tariff and Trade DataWeb by reference to the U.S. Harmonized Tariff Schedule (HTSUS) as the source for its trade data. The EU obtained the trade values used in its calculations by reference to the HTSUS subheadings that include the subject

merchandise. In so doing, the EU captures a significant amount of merchandise that should not be considered when determining the possible trade effects on merchandise subject to a particular antidumping order. The most that the EU can say in defense of choosing a patently overbroad data set is that it excluded HTSUS subheadings that to the best of its knowledge are not subject to anti-dumping duties even if they are mentioned in the antidumping order, and that the U.S. objections were too general in nature.

39. Although Commerce provides relevant HTSUS subcategories in its scope descriptions for customs purposes, and for convenience, it makes clear that the *written descriptions* – not HTS subcategories – define the scope of an antidumping order. The subheadings are identified for the convenience and notification of affected importers. HTSUS subheadings are not tailored to the merchandise covered by antidumping orders. While subject merchandise is "included" and "categorized" under particular HTSUS subheadings, it does not follow that all products properly categorized under the same HTSUS subheading are subject to the antidumping order. Indeed, there are many instances in which both subject and non-subject merchandise are both covered by the same HTSUS subheadings.

40. In the U.S. Written Submission, the United States offers several concrete examples of products within the relevant HTSUS subheadings that are excluded from the orders at issue. Similarly, the data by HTSUS subheading does not distinguish among individual producers/exporters that are subject to antidumping duty orders and those that are not. This is particularly significant in *Pasta*, where numerous firms have been excluded from the order. A comparison of the data by subheading to the actual CBP entry data presented by the United States shows just how large the disparity is between subject entries and the broad HTS data.

41. By selecting 2007 as its base year for calculating trade loss, the EU is choosing a period that predates the DSB findings in the compliance proceeding, yet it is those findings that form the basis for this proceeding. Furthermore, the matter was only referred to arbitration on February 12, 2010, so it follows that the Arbitrator should be relying on data from the most recent period prior to the arbitration.

42. In addition, the EU approach ignores two years of more recent publicly available data and fails to capture a period representative of the current conditions and the potential effects going forward. Trade values can vary substantially from one year to the next. This is particularly so in the uncertain economic and trade environment that has persisted since 2007. A multi-year time period would better take into account market and trade fluctuations.

43. Nowhere in the DSU is there a requirement that the determination of the correct level of suspension is to be made as of the end of the RPT, let alone that the determination is to be made only at that point in time. Indeed, prior arbitrators have rejected the notion that it is the situation at the end of the RPT that controls.

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

45. Past arbitrations awarding variable levels of suspension recognize that the calculation of a level of nullification or impairment is a forward looking exercise. In *United States – Continued Dumping And Subsidy Offset Act Of 2000*, the arbitrator authorized a variable level of suspension

to reflect the fact that "the value and industry distribution of the trade impact of the CDSOA could vary widely from one year to the next, because of the numerous factors affecting the amounts that may be disbursed, the nature of the recipients and how each category of recipient is likely to use the monetary amounts awarded to them under the CDSOA."

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

47. Similarly, in *United States – Anti-Dumping Act of 1916*, the United States had never applied the1916 Act, which had been found to be WTO-inconsistent, as of the end of the RPT. Thus, if the end of the RPT were the only appropriate time to measure the level of nullification or impairment, then the award would have been zero. The arbitrator, however, rejected such an approach.[2]

48. As mentioned previously, several of the measures included in the EU calculations have either been brought into compliance (Cases 7, 8, and 14) or have been removed entirely (Cases 1 and 6), and for the reasons previously mentioned are not properly included within the level of nullification or impairment. Methodology 1 includes Cases 1, 6, 7, 8, and 14 in its calculation of the reverse charge component of its calculation. Methodology 2 includes the antidumping orders at issue in Cases 7, 8, and 14 in its calculations.

Methodology 1

49. In addition to using overbroad HTS data as a starting point, EU Methodology 1 contains several additional flaws that lead to its exceeding the level of nullification or impairment. First,

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

the EU's calculation is predicated upon the erroneous assumption that either (a) elimination of zeroing would result in the elimination of all antidumping duties in all cases, or (b) that it is appropriate to calculate the level of suspension based on the elimination of the antidumping order without regard to the use of zeroing. Both assumptions are false.

50. The EU's extreme assumption that the antidumping duty rates in effect are wholly attributable to the application of zeroing in the dumping margin calculation demonstrates, yet again, that the request for suspension of concessions is demonstrably excessive. In particular, the results of Section 129 determinations summarized at Exhibit US-12 show that dumping margins do not invariably become zero or *de minimis* if the zeroing step is removed from the calculation. Of 32 individual company dumping margins recalculated in Section 129 determinations, only 12 were recalculated as zero or *de minimis*. The EU objects that these Section 129 determinations relate to margins calculated in original investigations using so-called "simple zeroing" and not in administrative reviews using so-called "model zeroing." It must be emphasized, however, that the 20 recalculated dumping margins that remained above *de minimis* would not be any lower if they had originally been calculated using so-called "simple zeroing." In other words, all the zeroing has been removed from these margins and, contrary to the EU's claim, dumping remains. The EU protests that what is at issue here is dumping margins calculated in administrative reviews, not in original investigations. But the EU's calculations contradict this. The EU's methodologies rely significantly on the "all others rates" in effect, labeled as "AOR" in its charts.[3] These "all others rates" were not calculated in administrative reviews. They were calculated in

[3] See Exhibit EU-2.

original investigations.[4] Accordingly, the EU itself urges the Arbitrator to use rates from the investigations as a proxy for the effect of zeroing in reviews. The inclusion of the AOR is incorrect for other reasons however, which we will explain later.

51. With respect to the EU's argument that the suspension of concessions should be calculated by reference to the inconsistent measures rather than the reasons for the inconsistency, this notion is directly contradicted by the arbitrator's award in *United States – Gambling*. There the arbitrator was presented with two scenarios, one, presented by Antigua assuming that the United States would eliminate all restrictions on remote gambling in order to come into compliance with the DSB's recommendations and rulings and another, presented by the United States, assuming a more limited opening of the U.S. market to certain types of remote gambling (specifically, remote gambling on horseracing). The U.S. approach represented the assumption that a more narrow means to compliance was likely.

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

53. In the present case, it is appropriate to use a counterfactual based on the reasonable assumption that the United States would likely come into compliance with the DSB's rulings by

[4] See attached Exhibit US-42.

recalculating dumping margins under the relevant orders using a WTO-consistent methodology that does not include zeroing, not by eliminating the underlying antidumping orders. Just as in *Gambling* the policy issues involved were significant, here WTO Members, including the EU, have agreed that dumping is to be "condemned."[5]

54. Another flaw in the EU's first methodology is that it erroneously assumes that the EU's trade should have grown at the same rate as of the rest of the world. There are several problems with this assumption: (1) it fails to account for the shifting of supply in the rest of the world away from EU suppliers due to changes in taste or new entrants into the market, (2) it ignores the diversion of EU supply to third countries due to the antidumping orders, (3) it ignores the possible continued application of the antidumping orders even in the absence of zeroing, (4) it results in inconsistent outcomes between actual trade and the counterfactual estimates of trade level, (5) it does not take into account the relative market share of the EU as compared to the rest of the world, and (6) it does not take into account the fact that in many cases there are numerous exporters that either have zero margins or are no longer subject to the antidumping order (particularly in the case of *Pasta)*. As a result, the rest of the world's trade growth to the United States is not an appropriate metric.

55. The rest of the world's trade is influenced by the fact that dumping orders exist against some EU suppliers. Importers are likely to shift sources once antidumping cases commence. Therefore, rest of world trade growth is likely to not only reflect increases in demand due to increased consumption but also increases in demand from importers seeking alternatives to EU suppliers.

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[5] GATT 1994, Art. VI.

56. Finally, Methodology 1 erroneously includes an additional trade loss associated with lost profits. The United States objects both to the principle of including the reverse charge and to the arbitrary manner in which the EU calculated it. Under Article 22.4 of the DSU, the suspension of concessions is permitted to a level equivalent to the level of nullification or impairment of trade benefits. The reverse charge relates to the lost profits of individual firms due to their own pricing decisions in coping with the discipline of an antidumping duty order. Company profit is not a component that should be factored into the calculation of the level of nullification or impairment of trade benefits. Profits are not a concession under any of the covered agreements at issue. There is no guarantee that a company should achieve a profit on its trade. In *EC – Bananas*, the arbitrators specifically rejected proposed levels of suspension and nullification or impairment that were based on profit. Moreover, should the Arbitrator consider the EU's claimed lost profits for EU exporters, it must also take into consideration the lost profits of U.S. exporters impacted by the suspension of concessions in its determination of whether the level of suspension exceeds the level of nullification or impairment.

57. The United States further objects to the arbitrary manner in which the EU calculates this proposed reverse charge. The Arbitrator will recall that the EU in its methodology paper included an additional trade loss associated with lost profits (at a robust 20% profit rate) from the EU's partial absorption of 5 percent of the duties paid on actual 2007 trade. It was only in response to U.S. criticisms of this component of the calculation that 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 EU's absorption of 50% of the

duties paid on actual 2007 trade.[6] The United States also notes that in justifying this change, the EU made no attempt to demonstrate the reasonableness of its assumptions. Instead, the EU makes the unhelpful comment that the rate of absorption "will necessarily have to be somewhere between zero and 100%."

Methodology 2

58. The United States now turns to Methodology 2. The EU's second methodology, like the first, is predicated upon the erroneous assumption that elimination of zeroing would result in the elimination of all antidumping duties in all cases. We have discussed most of the implications of this above. In addition to those deficiencies, the United States also notes an important defect in Methodology 2 relating to the calculation of the average antidumping duty rates in effect that accounts for a significant portion of the total trade loss calculation.

59. Seven of the "all others rates" the EU relies on for its claim of suspension of concessions have already been recalculated without zeroing,[7] and none of these recalculated rates became zero or *de minimis*. For the remaining five "all others rates"[8] included in the EU's methodology 2, these rates have never been challenged by the EU; no evidence has ever been produced that zeroing had any impact on these rates; and, there are no findings of inconsistency or failure to comply with respect to these rates. The EU's assumption that the "all others rates" would be zero

[6] EU Written Submission, paragraph 70.

[7] See Exhibit US-6 (Stainless Steel Wire Rod from Spain: 4.72% recalculated as 2.71%, Stainless Steel Wire Rod from Italy – Cogne and all others rate: 12.72% recalculated as 11.25%, Certain Stainless Steel Plate in Coils from Belgium: 9.86% recalculated as 8.54%, Stainless Steel Sheet and Strip in Coils from Italy: 11.23% recalculated as 2.11%, Certain Cut-to-Length Carbon-Quality Steel Plate from Italy: 7.85% recalculated as 7.64%, Pasta from Italy: 11.26 recalculated as 15.45%).

[8] See Exhibit EU-2 (Granular Polytetrafluorethylene 46.46%, Stainless Steel Sheet and Strip in Coils from Germany: 13.48%, Ball Bearings from France: 65.13%, Ball Bearings from Italy: 69.98% (69.14% in EU's chart), Ball Bearings from United Kingdom: 54.27%).

in the absence of zeroing, standing alone, accounts for $123.9 million of the $193.7 million of the initially claimed lost trade in the EU's Methodology 2.

60. It is also worth recalling, as the United States has explained, dumping margins calculated in reviews generally tend to decline as compared to the dumping margins that were calculated in the original investigations. It should be no surprise then to find that significant exporters of the subject merchandise tend to request reviews to have their own individual rate established that is lower than the dumping margins calculated in the original investigation, including the "all others rate." As a consequence "all others rates" typically account for a relatively small proportion of trade subject to an antidumping duty order. The EU's methodologies, in contrast, place significant weight on these rates. In many cases, the "all others rate" accounts for one half or one third of the effective "duty rate" under the EU's methodology. The CBP data provided by the United States,[9] however, demonstrates that the EU's methodology dramatically over-weights the "all others rates." For example, the "all others rate" accounts for one-third of the "duty rate" calculated by the EU for the cases of Ball Bearings from France, Italy, and Germany under the EU's methodologies. The actual U.S. Customs data, however, show that the "all other rates" in these cases are, in fact, applied to only 7 percent, 5.9 percent, and 14.9 percent, respectively, of the value of trade subject to these antidumping duty orders. This discrepancy for the three bearings cases alone, accounts for 3.02 percentage points of the 12.08 percent proposed countermeasure and $58.4 million of the $193.7 million claim of lost trade.

61. The EU's calculation of a "trade loss" of $193.664 million, while overstated for the reasons discussed above, demonstrates that the EU's Methodology 2 overstates the level of

[9] See Exhibits US-31 - US-40.

nullification or impairment. The calculation of "trade loss," in this case, represents the EU's estimate of the level of nullification or impairment. By combining the actual amount of trade with the amount of "trade loss," the EU's calculation overstates the level of nullification or impairment by its own terms. At most, the level of nullification or impairment should be the amount of "trade loss," not an *ad valorem* tariff applied to both the original amount of trade and amount of "trade loss."

62. At best, the EU's effort to apply the *ad valorem* tariff to the amount of "trade loss" relies upon the assumption that the level of incremental "trade loss" from the suspension of concessions by the EU would be equivalent to the level of "trade loss" from the relevant measures applied by the U.S. Article 22.7, however, provides that the arbitrator "shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment." Absent knowledge of the nature of concessions or other obligations to be suspended, 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. Thus, there is no way to determine whether the level of suspensions proposed by the EU would be equivalent to the level of nullification or impairment. As was noted in the *1916 Act* arbitration, even when identical measures are applied in similar ways, the effects on trade can be dramatically different. That arbitrator rejected an EU request to suspend concessions by adopting a measure that would replicate the measure that had been found to be WTO-inconsistent. The arbitrator noted that there was nothing in the EU's request that would cap application of that measure to the level of nullification or impairment. As that arbitrator put it, "Leaving aside for the moment the issue of

whether we can examine the EC measure, . . . similar or identical measures may not result in the required equivalence between the level of suspension and the level of nullification or impairment."[10] Here the EU attempts to quantify the amount of trade that it would apply the ad valorem tax to, but due to the variables noted above, this does not quantify a limit to the level of suspension or permit the Arbitrator to evaluate whether such a measure is equivalent to the level of nullification or impairment. The EU response to the U.S. point is telling: "The logic [of this EU proposal] flows *from the nature of the countermeasure*."[11] Moreover, the EU acknowledges that it "has not yet decided upon" the list of products to which its proposed suspension will apply.[12] In other words, the EU is asking the Arbitrator to endorse the EU's second methodology *not* because of its (supposed) equivalence to the level of nullification and impairment, but purely because of its nature. DSU Article 22.7, however, makes clear that the arbitrator cannot do so. Regardless, the proposed amount of duties that would be collected by the EU's second alternative alone, without reference to the trade effects of the duty, exceed the level of nullification and impairment.

63. The EU further overstates the trade effect in Methodology 2 by its use of elasticities from the GTAP model. GTAP is an inappropriate source for elasticities for this type of analysis given the specific nature of the products in this dispute. GTAP only has 57 sectors to represent the whole economy. For example, iron and steel products are grouped together. This prevents distinctions between say pipe/tube products, ball bearings, and plate.

64. The elasticities used by the EU were Armington substitution elasticities. The substitution elasticity measures how readily users switch from one source to another, while the import demand

[10] *United States – 1916 Act (22.6)*, WT/DS136/ARB, para. 5.32.
[11] EU Written Submission, para 87.
[12] EU Written Submission, para 90.

elasticity measures the extent to which consumption will increase when a product's own price falls. The import demand elasticity is the appropriate measure to use when determining the change in imports resulting from a duty (i.e., price) decrease, not the substitution elasticity. Aside from being the incorrect elasticity, substitution elasticties generally tend to be larger than import demand elasticities. Inserting a larger elasticity will create a higher estimated level of trade loss, if everything else is held constant.

65. Additionally, relying on GTAP for elasticities presents an additional problem. In the GTAP structure, there first is a decision about domestic versus import and then import versus import. Thus, for each sector there are two substitution elasticities. The substitution elasticity between domestic and import is half the substitution elasticity between import sources. The EU, to arrive at a single elasticity for the formula, arbitrarily selected a weighting scheme of 30 percent for the domestic to import and 70 percent for the import to import. As with other factors in the EU calculations, 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. The EU statement appears to reflect a preference based on the fact that the import-import substitution elasticity is higher than the import-domestic substitution elasticity, and provides no rationale for their 70-30 weighting scheme.

66. By contrast, the World Bank study import demand elasticities were estimated at the six-digit HTSUS level specifically for the United States. Even at the six-digit level there are still some aggregation issues, but clearly the six-digit HTSUS is much more disaggregated, thereby providing elasticity estimates much more closely related to the products in this dispute.

67. The EU has used a formula similar to the United States to calculate the trade loss component of Methodology 2. The difference between the two has to do with the actual inputs into the formula. As the United States provided in its calculation of the level of nullification or impairment, the product price change from the elimination of zeroing is needed.

68. The EU, on the other hand, has used a simple average of the current duty rates in the formula. Even for the moment, if one ignores the issue that the removal of zeroing would not eliminate the duty in its entirety, the level of duty reduction does not equate to the price change. The percent change in price will be lower than the percentage point reduction in the duty rate. Making this change to the EU calculation, by itself, lowers the EU's counterfactual level of trade from $475 million to $428 million.

69. In the EU Written Submission, the EU requests two additional components to the level of suspension: a 20% increase to the level of suspension and a quadrupling of the level of suspension for the first one year period in which the suspension is in effect allegedly to account for the trade effects that have occurred since the end of the RPT. Neither its request to the DSB nor its methodology paper requested either of these components. As these requests are untimely, they should be rejected out of hand.

70. Regardless, there is no basis for the EU to request either increase as such increases would clearly exceed the level of nullification or impairment.

71. With respect to the 20%, the only precedent that the EU cites as justification for inclusion of this 20% penalty is an arbitration under a different legal standard under a different covered agreement (the SCM Agreement). The reasoning of that arbitrator would not apply here, to an arbitration under the DSU where a different standard applies. Moreover, at the time of that

arbitration the EU was forceful in pointing out that countermeasures cannot be increased to punitive levels:

> The EC would have preferred the Arbitrator to have explained more carefully how he had arrived at the conclusion that the amount of the subsidy plus 20 per cent was an appropriate or not disproportionate level. It should be clear that the amount of countermeasures could not be increased by an arbitrator so as to be "punitive." While Canada's statements on non-compliance were regrettable, the conditions did not call, in the EC's view, for the authorization of countermeasures which contained a punitive element. . . . Indeed, a DSB authorization to suspend concessions under Article 22.7 of the DSU could not justify a derogation from the obligation to maintain the equivalence between the level of suspension and the level of nullification and impairment under Article 22.4 of the DSU.[13]

Notwithstanding this previous concern, the EU provides no information for the Arbitrator justify a 20% increase in the level of suspension as equivalent.

72. With respect to quadrupling of the level of suspension in the first year, this would clearly be inconsistent with the requirement under Article 22.4 of the DSU that suspension of concessions be "equivalent" to the level of nullification or impairment: by the EU's own admission, it would be three to four times that level.

73. The United States notes that a previous Article 22.6 arbitrator has also rejected a request for authorization based on a retroactive approach. In *United States – Upland Cotton*, the arbitrator considered a request from the requesting Member for the level of countermeasures to include "one-time countermeasures" in the amount of certain user marketing (Step 2) payments made by the United States to domestic users of upland cotton that were found to be inconsistent with the SCM agreement. The expiration of the RPT was 1 July 2005; Brazil was seeking authorization for this one-time amount for the 13 months after the RPT, to 30 July 2006, when the United States repealed the Step 2 program. Although the United States continued to make Step 2

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

payments for a period after the expiration of the RPT, the arbitrator nonetheless denied Brazil's request for a one-time amount. This decision confirms that the suspension of concessions should be based upon the current level of nullification or impairment, not a retroactive analysis.

74. In sum, the EU's alternate proposed levels of suspension of concessions exceed the level of nullification or impairment and should be rejected. Moreover, the EU's methodologies are so deficient and flawed in their assumptions that neither can be used as a basis for the Arbitrator to determine the level of nullification or impairment.

Arguments Raised by the EU in its Answers to the Arbitrator's Questions

75. Before turning to the EU's request to suspend concessions or other obligations under the DSU, The United States would like to address several points raised in the EU's answers to the Arbitrator's questions. The EU argues in its response to the Arbitrator's questions that Section129 determinations relied upon in the United States' proposed counterfactual are an improper proxy for estimating the impact of compliance on dumping margins because it claims that the dumping margins at issue were calculated using so-called "simple zeroing" in administrative reviews rather than so-called "model zeroing" in original investigations. The EU further asserts that its own recalculations of certain administrative review margins that it selected to be challenged in the underlying original dispute confirm its assumption that compliance would result in no positive dumping margins calculated in administrative reviews and thus prove that the Section 129 determinations underestimate the impact of compliance in the United States' proposed counterfactual. We disagree.

76. First, as noted previously, even the EU's methodologies rely heavily on "all others" rates which are calculated in original investigations, not administrative reviews. In fact, seven of the

margins the EU relies upon in its two methodologies[14] have been recalculated in Section 129 determinations.[15] Despite the removal of zeroing from these seven Section 129 recalculations, the margins remained above *de minimis*. In contrast, of the self-selected administrative review margins for which the EU has submitted a recalculation prepared for purposes of dispute settlement, only one is relied upon in the EU's methodologies. Indeed, only one of the originally challenged administrative review margins is still in effect. Aside from this one single margin for ball bearings from the UK produced by NSK, no cash deposit rates currently in effect have been specifically found to be inconsistent in the underlying original dispute or to constitute a failure to comply in the underlying compliance dispute. The United States simply does not accept that a self-selected sample of the self-selected dumping margin calculations the EU identified to be challenged in the underlying dispute are a fair representation of all dumping margins at issue here. In that respect, the United States' reliance on all of the recalculated dumping margins without zeroing from all such Section 129 determinations is a more representative sample, but still conservative in the sense that the impact of zeroing is likely to be higher in cases where zeroing has been challenged.

77. Second, aside from their inapplicability to the margins currently in effect, the United States fundamentally does not agree that recalculated dumping margins prepared for purposes of dispute settlement should be relied upon by the Arbitrator. For the EU to assert that this evidence is uncontested or uncontradicted, is incorrect. The United States cannot confirm the accuracy with

[14] Exhibit EU-2.
[15] *See Exhibit US-6,* Implementation of the Findings of the WTO Panel in *US – Zeroing (EC)*: Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 Fed. Reg. at 25264 (Recalculations of the "all others" margins in Case 7; Stainless Steel Wire Rod from Spain; Case 8, Stainless Steel Wire Rod from Italy; Case 11, Stainless Steel Sheet and Strip in Coils from Italy; Case 14, Cut-to-Length Quality Steel Plate from Italy; Case 15, Pasta from Italy).

respect to any calculations where the documentation for calculation is not the actual documentation generated by Commerce in course of its administrative proceedings. The EU has raised its own concerns about the United States' submission of actual customs data, suggesting that it was prepared for dispute settlement purposes and is therefore inherently unreliable. The EU's argument misses the mark because the customs data is compiled in the ordinary course by CBP, not for dispute settlement purposes. The EU's recalculations, however, involve the EU's application, solely for purposes of dispute settlement, of a dumping margin calculation methodology that the United States has not adopted or applied. As such, the United States questions the reliability of these calculations performed without the benefit of a transparent proceeding, without the opportunity for parties to participate, and without opportunity for judicial review.

78. Third, the EU provides an illustrative example of why it believes removing so-called "model zeroing" from original investigation dumping margins is a poor proxy for removing so-called "simple zeroing" from administrative review dumping margins. The EU's example demonstrates that the extent to which so-called "simple zeroing" results in a higher dumping margin than so-called "model zeroing" depends entirely on the extent to which individual transaction prices for merchandise within the same "model" fall both above and below the normal value. The EU, however, has provided no explanation for the wide variations in export prices of merchandise within the same "model" in its example. Some variation in price may be normal, and in an original investigation such variation within the model is averaged out in the average-to-average comparison methodology. Once an antidumping duty order is imposed, however, despite the application of so-called "simple zeroing" in reviews, dumping margins

generally decline as pricing behavior changes to minimize antidumping duties. Because determinations about which merchandise should be classified in the same model is generally fixed in the original investigation and not revisited in administrative reviews, it is entirely predictable that such wide variations in prices observed for merchandise of the same model would not continue. The EU's example fails to account for this expected change in behavior and fails to prove that the impact of so-called "simple zeroing" is far greater than the impact of so-called "model zeroing." Moreover, the EU's proposition that dumping margins are invariably reduced to zero makes little sense when it comes to higher dumping margins. For example, a dumping margin of 50 percent could result if all transactions were being priced 33.3 percent below normal value. If instead half the transactions are priced at normal value, the remaining half would have to be priced at 66.6 percent below normal value to result in a 50 percent dumping margin. Zeroing would have no impact on the margin calculated in either of these circumstances. For negative comparison results to reduce such a margin to zero would require the implausible scenario of half the transactions priced at 66.6 percent below normal value and the other half priced at 66.6 percent above normal value such that the variation in prices within the U.S. market for the same model of merchandise is 133 percent of the normal value of the merchandise. Reference to the Section 129 results confirms that dumping margins above 20 percent were minimally reduced by recalculation without zeroing.

79. Fourth, and finally, the EU's critique of the United States' proposed counterfactual for compliance with findings against zeroing in administrative reviews is that it must reflect a greater impact than is observed for compliance with findings against zeroing in original investigations. This critique presupposes that the method of compliance will be identical, but that is not

necessarily the case. The United States proposed counterfactual does not specify a method of compliance, instead it estimates the impact compliance would have by reference to the impact that compliance had in the context of original investigations. This means that the United States' counterfactual entails all dumping margins calculated in administrative reviews that are below 3.84 percent would be zero or *de minimis*, and greater margins would be reduced by 3.34 percentage points. By way of comparison to the EU methodologies, 11 of the 22 individual company duty rates listed in the EU's methodology 1 (and 11 of the 21 such rates listing in the EU's methodology 2) would be reduced to zero or *de minimis*. By contrast, the EU simply proposes that compliance necessarily requires all dumping margins, regardless of the size of the original margin, be reduced to zero.

Suspension of Concessions or Other Obligations under the DSU

80. Finally, we turn to the EU's request to suspend concessions or other obligations under the DSU, the EU's final effort at reaching beyond the terms of the DSU in pursuit of a level of suspension that exceeds the level of nullification or impairment.

81. First, the EU's Article 22.2 request states that the basis for its requested suspension of DSU obligations is an alleged "statement that the zeroing methodology used in review investigations will not be brought into conformity with the covered agreements."[16] As we pointed out in our written submission, there is no such statement.

82. There are also no DSB recommendations and rulings on this alleged statement. The United States noted this in our written submission,[17] and the EU – despite now having had two

[16] EU Article 22.2 Request, p. 3.
[17] U.S. Written Submission, para. 140.

chances to do so – has not disputed this fact.[18] Article 22.2 is clear that only "measure[s] found to be inconsistent with a covered agreement" and that have not been brought "into compliance therewith within the reasonable period of time" may give rise to a request to suspend concessions. As such, the EU's request to suspend DSU obligations is inconsistent with Article 22.2 and there is no basis on which to authorize this request.

83. The EU's request also fails to comply with the principles and procedures of Article 22.3. The EU stated in its answers to the Arbitrator's questions that it sees its request to suspend DSU obligations as coming under Article 22.3(a). This subparagraph, in contrast to subparagraph (c), concerns only the suspension of concessions under the same sector and same agreement as that under which the panel or Appellate Body found a violation or nullification or impairment. Here again, the EU is unable to point to any DSB recommendations and rulings that would support its request: there are no DSB recommendations and rulings going to violations of the DSU.

84. Finally, it is not clear how a non-existent statement upon which there are no DSB recommendations or rulings could lead to any nullification or impairment. Nor is it clear how the EU can simply assume that suspension of DSU obligations would "be consistent with the equivalence rule … because it will allow the European Union to increase the countermeasure" if "the U.S. would adopt a new measure increasing the rate of duty."[19] The suspension of dispute settlement procedural rights would seem to be a wholly different matter than the calculation of the effect on trade in the event of an increased rate of duty.

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[18] See, for instance, EU Written Submission, para. 110; EU Answers to Questions, paras. 139-141.
[19] EU Response to Arbitrator's Questions, para. 141.

85. Ultimately, the EU has provided no basis in its Article 22.2 request for suspending DSU obligations, has not made its request consistent with Article 22.3, and has failed to make a request for suspension of concessions or other obligations that is equivalent to the level of nullification or impairment.

Conclusion

86. In summary, the United States has demonstrated that the EU's two proposals for authorization of suspension of concession or other obligations grossly exceed the level of nullification or impairment in this case. The United States has set forth a methodology for calculating the level of nullification or impairment based on 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 in this dispute. This methodology showed that the level of nullification or impairment should not be greater than $2.87 million. Further, the United States has shown that both EU methodologies exceed the level of nullification or impairment due to the flawed assumptions, numerous deficiencies, and the late addition of two unsubstantiated and unjustified upward adjustments to the level of suspension: a 20% increase and a quadrupling of the level of suspension in the first year. Finally, the EU has sought to circumvent the entire dispute settlement process in future case 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. The EU has clearly overreached in every aspect of its request for authorization for suspension. For the forgoing reasons, the United States respectfully requests that the Arbitrator reject the EU's request for

authorization, and determine that the level of nullification or impairment is no greater than $2.87 million.