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

RECOURSE TO ARTICLE 22.6 OF THE DSU BY THE UNITED STATES

(DS294)

RESPONSE OF THE UNITED STATES TO THE ARBITRATOR'S ADDITIONAL QUESTIONS TO THE PARTIES

June 2, 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. The term "lost trade" as used in *EC – Bananas III (US)*[1] appears to be equivalent in scope to the term "trade effect" as used in *US – Byrd Amendment*.[2] As formulated by the arbitrator in *EC – Bananas III (US)*, "the benchmark for the calculation of nullification or impairment of US trade flows should be the losses in US exports of goods to the European Communities . . . ."[3] As the question notes, the Arbitrator in the *1916 Act* proceeding used a "trade or economic effects" concept, though it is not clear how it applied that concept.[4]

2. In the present case, the nullification or impairment of benefits arises from the use of zeroing in particular antidumping duty administrative reviews to calculate the applicable antidumping duties to be collected. This may result in the collection of excess duties on goods. In such cases, the Arbitrator need not look beyond the effect of the excess duties on the trade in goods to determine the level of nullification or impairment.

59. <u>To the United States</u>: In your Written Submission, you argue that a calculation of "trade loss", by its very nature, represents the level of nullification or impairment" (para. 132). Please clarify whether you consider that "trade loss" is the *only possible way* of measuring the level of nullification or impairment or do you agree with the European Union's argument, in its response to question 8 of the Arbitrator, that an

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[1] *EC – Bananas III (US) (Article 22.6)*, paras. 6.11, 6.12, 6.15.

[2] *US – Byrd Amendment (Article 22.6)*, para. 3.39.

[3] *EC – Bananas III (US) (Article 22.6)*, para. 6.12

[4] It should be noted that the arbitrator in the *1916* proceeding did not permit claims that were "too remote," "too speculative," or "not meaningfully quantified." *US – Anti-Dumping Act of 1916 (Article 22.6)*, para. 5.57. Specifically, the arbitrator determined that it would not be appropriate to include any claims related to (i) the alleged chilling effect of the measure, (ii) litigation costs, or (iii) undisclosed settlement amounts between private parties. *US – Anti-Dumping Act of 1916 (Article 22.6)*, paras. 5.79, 7.7.

assessment of nullification or impairment in terms of trade effects is not always possible, and that if a countermeasure can be designed that is equivalent in terms of a metric other than trade effects, there is no need to think of it in terms of "trade effects".

3. The EU's argument is hypothetical. The matter before this Arbitrator here is not an unusual case. It presents a straightforward situation – the imposition of excessive duties – for which arbitrators have commonly looked to trade loss for determining the level of nullification or impairment. There is no need in this proceeding to look at anything other than trade loss. It is in this sense that the "trade loss," by its very nature represents the level of nullification or impairment in this dispute, as mentioned in paragraph 132 to the U.S. Written Submission.[5]

4. In a different situation, it may be possible that a level of nullification or impairment may be calculated by reference to something other than trade loss, or through other metrics, although this proceeding does not present that question. For example, the United States is mindful that in *US – Section 110(5)*, the arbitrator determined the level of nullification or impairment by reference to forgone royalty income; that dispute, however, involved breaches of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*.[6]

5. However, determining the level of nullification or impairment is a highly case-specific exercise. And the present dispute is not one in which it is necessary or appropriate to adopt an approach different from the trade effects approach typically used by past arbitrators.

6. The case before the Arbitrator here is not an unusual case. It presents a very common situation – the imposition of excessive duties – for which arbitrators have commonly looked to trade loss for determining the level of nullification or impairment. There is no justification based on the facts of this case to look at anything other than trade loss.

7. Finally, the United States reiterates that the EU now appears to agree that the use of the term "countermeasure" in response to question 8 of the Arbitrator and elsewhere in its submissions is incorrect. "Countermeasure" is a term of art with a particular meaning in the context of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement). Moreover, Article 7.9 of the SCM Agreement applies a different standard to a Member's

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[5] In that paragraph, the United States was referring to the EU's estimate of a trade loss totaling $193.664 million as a component of its Methodology 2. In its Methodology 2, the EU calculates an amount that is equivalent to the EU's estimate of the actual trade in subject merchandise for 2007 ($281.352 million) plus the estimate of the amount of lost trade ($193.664 million). The EU proposes applying an *ad valorem* tariff to the combined amount ($475.016 million). The United States argued that the calculation leading to the EU's proposal to apply an *ad valorem* tariff to $475.016 million exceeds the level of nullification or impairment by its own terms.

[6] *U.S. – Section 110(5) (Article 22.6)*, para. 3.19.

proposed countermeasures than Article 22 of the DSU applies to proposed levels of suspension of concessions or other obligations. At issue in this dispute is the proposed level of suspension of concessions or other obligations under Article 22 of the DSU. In any event, the suspension of concessions is not a "measure"[7] as that term is used elsewhere to describe action or inaction attributable to a Member. A Member that has been authorized to suspend concessions may or may not actually adopt a "measure" that would only be permitted as a result of that authorization. For example, a Member could suspend a tariff concession but nonetheless not increase its tariff above the maximum rate permitted under that (suspended) tariff binding.

60. <u>To the United States</u>: You indicate in paragraph 9 of your Oral Statement, that the difference in the level of trade under the "counterfactual" and the level of trade for the complaining party under the WTO-inconsistent measure "typically" represents the level of nullification or impairment. Please clarify whether you consider that a counterfactual is always required for the purposes of determining the permissible level of suspension of concessions or other obligations under Article 22.4 of the DSU.

8. In at least one instance an arbitrator has determined that a counterfactual was not required.[8] However, as noted above, the present case is a "typical" case of the collection of excess duties on goods. As such, the typical approach to determining the permissible level of nullification or impairment is called for.[9] The typical approach for this type of case is a counterfactual.

9. A counterfactual estimates the level of trade the complaining party would have were the measures brought into conformity with the DSB recommendations and rulings, in this case by not using "zeroing"in the calculation underlying the measures at issue. By calculating what level of

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[7] Although the EU cites to Article 22.1 of the DSU to support its argument that the suspension of concessions is a "measure," it is clear that Article 22.1 is not referring to a "countermeasure" nor to a "measure" as that term is used in other provisions of the DSU to refer to a measure of a Member. For example, the EU's argument would mean that because Article 22.1 also refers to "measure" in relation to "compensation," then compensation is also a "countermeasure."

[8] *See United States – Section 110(5) (Article 25)*, para.4.8 ("This approach also has the advantage of limiting the number of assumptions necessary. In comparison, the European Communities approach would require, in our view, that we base our calculation on what has been described in some Article 22.6 arbitrations as a "counterfactual". We believe that recourse to a counterfactual would only be justified if it was established that the situation predating the 1998 Amendment was itself TRIPS-incompatible.").

[9] The United States notes that, however flawed, the EU itself employs counterfactual analyses as part of both its proposed Methodologies.

trade the complaining party would have had, a counterfactual approach provides the most reasonable estimate of the level of nullification or impairment.

10. In the present case, the counterfactual involves determining (1) the difference between the antidumping duty rates calculated with zeroing actually applied and rates that would exist using a WTO-consistent methodology that does not use zeroing for the products to which the measures at issue apply; (2) the impact of the difference in the antidumping duty rates on the price of those products; and (3) any decrease in the value of trade as a result of the price impact for each of those products. The calculation applies these factors to estimate the level of trade that would occur in the absence of zeroing. The additional amount of trade in the counterfactual is the level of nullification or impairment.

61. <u>To the United States</u>: In your response to question 54 of the Arbitrator (para 96), you argue that "company profit is not a component that should be factored into the calculation of the level of nullification or impairment of benefits". Please further elaborate. Is it your view that the only effects of a WTO-consistent measure that may be recognized as nullification or impairment are those manifested in lost export volumes? Why should the Arbitrator disregard any other demonstrable negative effects upon an exporting Member resulting from such a measure, such as foregone revenue?

11. The only effects of a WTO-inconsistent measure that may be included in the calculation of the level of nullification or impairment are those that nullify or impair a benefit accruing to a Member. Foregone profits are not such a benefit. Rather the foregone profits to which the EU refers in its "reverse charge" calculation represent business decisions made by individual firms to absorb some of the antidumping duties collected on their shipments of merchandise.[10] None of the covered agreements guarantee profits for individual companies. In *EC – Bananas*, the arbitrators specifically rejected proposed levels of suspension and nullification or impairment that were based on profit. The arbitrator in that dispute reasoned that "in our view the relevant effect is not on US suppliers' profits but rather on the value of relevant imports from the United States."[11]

12. Moreover, as discussed in detail in response to Question 54 of the Arbitrator, the EU has not demonstrated the amount of forgone profits in its calculations of the reverse charge component of Methodology 1. Rather, the EU calculated the figure based on two arbitrarily selected factors: a robust profit rate of 20% and a duty absorption rate of 5%. The Arbitrator

[10] EU Written Submission, para. 71.

[11] *EC – Bananas (U.S.) (Article 22.6)*, paragraph 7.6.

should note that when this calculation was challenged, the EU did not seek to justify its rate. Instead, it selected two alternate rates that resulted in a twenty-fold increase in the resulting reverse charge.[12] In justifying this revised figure, the EU offered the unhelpful comment that the rate of absorption "will necessarily have to be somewhere between zero and 100%"[13] and a list of profit rates with no worksheets explaining the calculations.

62. <u>To the United States</u>: In the final paragraph of your Oral statement, you ask the Arbitrator to determine that the level of nullification or impairment is no greater than $2.87 million. Should the Arbitrator understand that you consider that this would be the maximum value of imports to which the suspending measure should apply, whatever that suspending measure might be?

13. Because the figure of $2.87 million would be the level of nullification or impairment, it would also be the maximum value of the concessions that the EU could suspend, pursuant to DSU Article 22.4.

14. In this case, the EU has proposed only two forms of suspension of concessions under Article 22.6 of the DSU: a "mirror" retaliation, and a prohibitive tariff.[14] We have explained elsewhere why the EU's proposed "mirror" retaliation is inappropriate.[15] Prohibitive tariffs on tariff lines that cover $2.87 million in trade would, however, be a suspension of concessions that is equivalent to the level of nullification or impairment calculated. Of course, the EU could also choose not to exercise the full amount of any DSB authorization that it might receive.

65. To both parties: Please comment on Japan's arguments in Section II.B of its Written Submission, that "the treaty term "nullification or impairment" refers to the impact of those WTO-inconsistent actions" (para. 36) and that nullification or impairment need not be measured solely in terms of lost exports, "but rather may also be measured in terms of *excess anti-dumping duties collected*" (emphasis added).

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[12] EU Written Submission, paragraph 70.

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

[14] We also recall that under DSU Article 22.7, the Arbitrator is not to examine the nature of the concessions to be suspended.

[15] See U.S. Oral Statement, para. 62, U.S. Response to Question 66.

15. As an initial matter, Japan's arguments do not relate to any of the methodologies that have been presented to the Arbitrator by the European Union or the United States in this proceeding. The European Union has presented one methodology that seeks to calculate lost trade based upon an alleged disparity between its actual growth rates and the rest-of-the-world growth rates, and a second methodology that seeks to calculate the actual amount of trade subject to zeroing-affected tariffs, and an incremental amount of lost trade that it projects would have occurred absent zeroing. Neither of these methodologies have any connection to Japan's arguments concerning excess anti-dumping duties collected.

16. Japan's description of this methodology in its written submission lacks detail and is incomplete. Nevertheless, Japan appears to equate the amount of excess duties collected with the level of nullification or impairment. This equation would be in error. Such an approach confuses the measure found to be inconsistent with the level of nullification or impairment. The duties are not themselves a level of nullification or impairment, but are the WTO-inconsistent measure. It is necessary to examine the WTO-inconsistent measure to determine in light of the rights and obligations at issue in what manner and to what extent the EU's trade benefits are being nullified or impaired. Japan would end its analysis before reaching this crucial part of the question. As the United States has explained, it is necessary to take the amount of the duties and then determine what the effect is on the price. It would then be necessary to estimate impact of the price effect on imports from the complaining member.

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;

17. The arbitrator in *United States – 1916 Act* did not authorize "mirror" legislation, and in fact explicitly rejected "mirror" legislation.[16] Rather the arbitrator quantified the level of

[16] *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 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.").

nullification and impairment using the amount of any court judgments and settlements, and called on the EU to quantify any suspension of concessions accordingly.[17] 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.[18]

18. Articles 22.6 and 22.7 of the DSU do not task the Arbitrator with determining the equivalence between a measure proposed to implement the suspension of concessions and the measures that caused the nullification or impairment of benefits. Rather the task of Arbitrator is to determine whether the proposed level of suspension of concessions is equivalent to the level of nullification or impairment of benefits. Whether a proposed level of suspension is equivalent to the level of nullification or impairment is necessarily a quantitative assessment.[19]

19. As *United States – 1916 Act* makes clear, a proposal to adopt "mirror" legislation or an "equivalent" measure relates to the nature of the obligations to be suspended, not to the level of suspension of concessions or obligations.[20] Article 22.7 specifically precludes the examination of the nature of the concessions. Even assuming that an arbitrator could examine the nature of the mirror legislation or an equivalent measure, the qualitative nature of such measures does not permit an analysis that would lead to a determination of the quantitative level of nullification or impairment or to a determination of whether the level of suspension achieved by the mirror measure was quantitatively equivalent to that level. In *United States – 1916 Act*, the arbitrator reasoned:

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[17] *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.").

[18] 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.").

[19] See *US – 1916 Act (Article 22.6)*, paras. 5.18 -5.29.

[20] *US – 1916 Act (Article 22.6)*, para. 5.42.

> in order to determine whether the qualitative suspension could be applied in such a manner that the level of suspension could exceed the level of nullification or impairment, it is necessary to determine the trade or economic effects on the European Communities of the 1916 Act. Once this has been determined, the European Communities could implement its suspension up to, but not beyond, this amount. This necessitates a determination of the trade or economic effects of the 1916 Act on the European Communities in numerical or monetary terms, which is the only way in which the arbitrators can determine "equivalence" in the present context.[21]

Because the mirror legislation does not take into account its quantitative affect on trade, the level of nullification or impairment cannot be calculated or evaluated by reference to the proposed mirror measure itself.

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

20. As was noted in *United States – 1916 Act*, even when identical measures are applied in similar ways, the effects on trade can be dramatically different. In rejecting the 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:

> 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.
>
> 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.[22]

21. At the hearing, the EU asserted that the mirror approach it proposes here is unlike the mirror legislation proposed in *United States – 1916 Act* and unlike the hypothetical examples discussed in the report of the arbitrator. This is because, the EU argued, the mirror approach

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[21] *US – 1916 Act (Article 22.6)*, para. 5.23.

[22] *US – 1916 Act (Article 22.6)*, paras. 5.31 and 5.32.

proposed here sets a limit on the total value of trade to which it would apply. The EU misses the point. A limit on the total value to which a mirror measure would apply does not limit the total effect of the mirror measure, which could exceed the level of nullification or impairment.

22. The arbitrator in *United States – 1916 Act* rejected the EU's proposed mirror in part because the proposal "did not ensure that the suspension [would] be limited to the level of nullification or impairment it has sustained, as expressed in quantifiable economic or trade terms." The EU's limit on the amount of trade to which the suspension would apply in the present case simply does not cure the defect identified in *United States – 1916 Act* .

23. In its original request for authorization under Article 22.2, the EU requested, as one of its two proposed levels of suspension, *ad valorem* tariff of 13.18% on $477 million in trade.[23] The EU has not indicated to what products the EU would apply this rate[24] nor provided any other information or analysis that would permit the Arbitrator to evaluate whether such a measure is equivalent to the level of nullification or impairment. The actual impact of this measure could vary greatly depending on the elasticities associated with the products that the EU chooses to apply the *ad valorem* tariff.

24. The EU is effectively 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. The arbitrator in *United States – 1916 Act*, correctly interpreting Article 22.6 and 22.7, make clear that the arbitrator cannot do so.

75. <u>To the United States</u>: In its response to question 20, the European Union cites a study which it asserts indicates that "any secular shifts in global trading patterns ... appear[s] to be very limited in the case of the European Union." Please respond.

25. The CEPII study provided by the EU to support its approach in Methodology 1 of applying the rest of world growth to the member State's trade falls short in providing that support. The study reports that the EU has maintained its relative global market share based on goods as a whole excluding mineral and energy products, without any specific findings about the products in this proceeding.

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

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

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?

26. The EU relies on the USITC Interactive Tariff and Trade Data Web by reference to the U.S. Harmonized Tariff Schedule (HTSUS) as the source for its trade data. For reasons more fully explained in our written submission, paragraphs 97 through 102, reliance on these data would in most cases result in an overestimate of trade values. However, an underestimate might also be possible because, after the USITC Interactive Tariff and Trade Data Web is posted to the USITC website, it is not updated. The case-specific entry data provided by the United States is continuously updated as changes occur to individual entries.

27. One further reason that could explain the discrepancy is that it is possible that not all of the merchandise subject to an antidumping order might be classifiable under the HTSUS categories contained in the scope descriptions. Although Commerce describes the subject merchandise as being "classifiable" under certain HTSUS headings, it is possible certain of the subject merchandise could enter under a different HTSUS category, and not be captured by the data provided by the EU. The fact that the HTSUS subheadings do not precisely define the subject merchandise is one of the reasons that Commerce explains in every scope description that it is the written description of the scope that is dispositive, not the HTSUS heading.

77. To the United States: In exhibit 16, the United States provides calculations of "Trade under Antidumping Orders at Issue in Dispute" and in exhibits 32-39, the United States provides the data which it contends supports these calculations.

(a) Please provide 2007-2009 trade data for those cases alleged by the EU to give rise to nullification or impairment and for which such CBP data has not yet been provided by the United States;

(b) Please clarify to which cases/orders US exhibit 38 applies.

28. With respect to the cases that the EU includes for its calculations in Methodology 1 and Methodology 2, the United States has previously provided available CBP data for all products for which there were entries of subject merchandise at Exhibits 31-40.

29. The EU did not include a trade loss calculation for the products in case 1 (hot rolled carbon steel from the Netherlands) and case 6 (stainless steel wire rod from Sweden), as the orders have been revoked. The United States provided the CBP trade data through 2007 for these

products in Exhibit US-40. The CBP database does not contain entries of subject merchandise in 2008 and 2009 for these products because the orders were revoked in 2007.

30. The United States notes that the CBP database indicated that there were no entries subject to the antidumping order for Stainless Steel Wire Rod from Spain, a product included in the EU's Methodology 1 reverse charge calculation, and listed as a product in Methodology 2, but with a figure of zero because there was no trade.

31. Exhibit US-38 is the CBP trade data for Stainless Steel Wire Rod from Italy, referred to as case 8.

32. The United States also notes that 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." A corrected Exhibit US-16 is attached as Exhibit US-44.

79. <u>To the United States</u>: Please provide Customs and Border Protection (CBP) data for the relevant value of EU exports to the U.S. in (n-1), rest of the world (ROW) exports to the U.S. in (n-1) and ROW exports to the U.S. in 2007.

33. The United States is unable to extract the relevant value of EU exports and ROW exports from the CBP Automated Commercial System (ACS) database.[25] 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). Moreover, for entries of merchandise from non-subject EU and ROW countries, such information is not available for relevant entries from any period. Because they are not subject to an antidumping duty order, entries from non-subject EU and ROW countries would not have identified the products being entered by reference to an "A" number and would not reflect payment of a duty (i.e., an antidumping duty) on an otherwise duty-free product.

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

[25] As the United States noted in the U.S. Written Submission at paragraphs 85-119, in response to Questions 53 and 54, and in the U.S. Oral Statement, the EU Methodology 1, which relies on the value of trade in year "n-1" and in 2007 for estimating trade loss, contains numerous flaws and erroneous assumptions that result in Methodology 1 calculating a level of suspension that exceeds the level of nullification or impairment.

(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?

34. The United States considers that the determination of the level of suspension may not, and should not, take into account measures that have been remedied.

35. 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. Thus, where a measure imposed by one Member nullifies or impairs benefits promised to another Member, the complaining Member may temporarily suspend certain of its trade concessions afforded to the Member concerned in order to restore the balance of trade concessions. The correct level of suspension of concessions under Article 22 of the DSU will reflect an equivalent level at which a Member is suffering nullification or impairment.

36. 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. The level of suspension of concessions permitted under Article 22 allows the complaining Member to suspend concessions in order to balance the benefits that are being denied to it by the measure of the Member concerned. Article 22.4 of the DSU specifically provides that the level of suspension of concessions "shall be *equivalent,*" not greater than the level of nullification or impairment. The requirement in Article 22.4 that the level of suspension be "equivalent" demonstrates that the correct level of suspension of concessions is not punitive and is not intended to exceed the level of nullification or impairment being suffered by a Member

37. 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. Indeed, in recognizing countermeasures as "an exceptional remedy," the arbitrator in *US – Upland Cotton* recalled that a complaining Member is only entitled to the remedy of a countermeasure so long as the noncompliant measure continues to exist.[26] Incorporating measures that have long since been remedied when calculating the level of suspension of concessions runs counter to the intent of restoring the balance of trade concessions between two parties to a dispute, and instead, creates imbalance.

38. The EU, in its various submissions, has also referred to inducing compliance as an overarching goal of suspension. A suspension level that recognizes that the fact that certain measures have been repealed or remedied serves this purpose. In contrast, a level of suspension that does not recognize or "reward" compliance does not serve to induce compliance.

[26] *US – Upland Cotton (Articles 22.6/4.11)*, para. 3.45.

39. In this dispute, there are two antidumping duty orders that have been revoked – *Certain Hot-Rolled Carbon Steel from the Netherlands* (case 1) and *Stainless Steel Wire Rod from Sweden* (case 6). The section 129 determinations completed as to the original investigations resulted in the complete revocation of the underlying antidumping duty orders, effective for all entries on or after April 23, 2007.[27] Thus, as of April 23, 2007, the antidumping duty orders in cases 1 and 6 were terminated as to all subsequent entries. Additionally, as a result of a subsequent Commerce determination in a sunset review, the revocation of the antidumping duty order in case 1 became effective as of November 29, 2006.[28] Consequently, with respect to case 1, any entry made on imports occurring on or after November 29, 2006 will not be subjected to *any* antidumping duties, let alone a duty that includes zeroing. Because the orders at issue in cases 1 and 6 no longer exist, they do not, and cannot, have any future trade effects. They therefore cannot form the basis of the correct level of suspension.

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

40. The United States considers that the determination of the level of suspension should not take into account measures in relation to which no findings of WTO-inconsistencies were made. The EU has neither argued for, nor established, any such inconsistency with respect to any additional measures. Rather, this arbitration is proceeding on the basis of the DSB rulings as a result of the Article 21.5 proceedings.[29]

41. In this dispute, the EU improperly attempts to include numerous antidumping duty orders in its calculation of the level of suspension where there have been no findings of non compliance. Specifically, the EU's level of suspension includes the antidumping duty orders of *Stainless Steel Wire Rod from Spain* (case 7), *Stainless Steel Wire Rod from Italy (*case 8) and *Cut-to-length Carbon Quality Steel Plate from Italy* (case 14). The original investigations underlying these orders were included in the list of original investigations the EU challenged in the original dispute, however, the EU did not challenge review determinations made pursuant to these three cases in the original dispute. Thus, the DSB's recommendations and rulings from the original

[27] 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. 25261, 25262-63 (May 4, 2007) (Exhibit US-6).

[28] Certain Hot-Rolled Steel Flat Products from the Netherlands: Final Results of the Sunset Review of Antidumping Duty Order and Revocation of the Order, 72 Fed. Reg. 35220, 35221-22 (June 27, 2007). (Exhibit US-17).

[29] In other words, for purposes of this arbitration, the United States can be presumed to have complied with the underlying DSB recommendations and rulings except where the DSB has adopted findings to the contrary.

dispute only concerned original antidumping investigations carried out by Commerce. Pursuant to the DSB's recommendations and rulings in the original dispute, Commerce recalculated the dumping margins for the investigations to which those recommendations and rulings applied – without using the zeroing methodology.[30] The results from Commerce's Section 129 determinations applied from April 23, 2007 onwards,[31] and several of these recalculated margins continue to be in effect today.[32]

42. In the compliance proceeding, the EU did not challenge Commerce's recalculations of these investigation margins, though it did seek to challenge certain enumerated subsequent review determinations under the same antidumping duty orders.[33] Although specific findings were made as to several other of the cases challenged during the compliance proceeding, there were no findings of WTO inconsistency with respect to cases 7, 8 and 14. Additionally there were no findings made as to these cases that would enable the arbitrator to conclude that margins in these subsequent reviews are either WTO inconsistent or calculated with the zeroing methodology.

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[30] 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. 25261 (May 4, 2007) (Exhibit US-6). (As a result of the 129 determinations, in Case 7, the margins for both Roldan S.A. and the "all others" decreased from 4.76 percent to 2.71 percent. For Case 8, the margins for Cogne Acciai Speciali S.r.l., and the "all others" decreased from 12.73 percent to 11.25%. In Case 14, the margins for Palini and Bertoli S.p.A. and "all others" decreased from 7.85% to 7.64%, while ILVA S.p.A. was excluded from the order.)

[31] *See EC – Zeroing (Article 21.5) (AB),* para. 232 ("[t]he recalculation without zeroing replaced the effects of the cash deposit rates calculated with zeroing in previous administrative reviews . . ."); *see also* 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 (Exhibit US-6) ("With respect to Stainless Steel Wire Rod from Spain,. . . [t]he section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate."; "With respect to Stainless Steel Wire Rod from Italy,. . .[t]he section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate."; "With respect to Certain Cut-To Length Carbon-Quality Steel Plate Products from Italy,. . .[t]he section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.")

[32] The "all others" rate in cases 7, 8 and 14, as well as the rate recalculated for Cogne Acciai Speciali S.r.l. in Case 8 continue to be in effect.

[33] 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)*.

43. In sum, the evidence before the Arbitrator wholly supports the U.S. position that it fully complied with the DSB recommendations and rulings when it recalculated the investigation margins in Cases 7, 8, and 14 without zeroing, and that there has been no further finding of noncompliance with respect to these cases. Accordingly, there is no basis or finding upon which the arbitrator can conclude that these orders are appropriately included when calculating the level of suspension.[34]

83. To the United States. The United States contends that the "all others rates" in five of the twelve orders at issue in this arbitration were based upon determinations in original determinations in respect to which no multilateral findings of non-compliance were made.

(a) it the contention of the United States that the DSB's recommendations in the Article 21.5 proceeding did not encompass the "all other rates" in the administrative reviews in question? If so, please indicate the basis for this view.

44. With respect to the five orders at issue in the Arbitrator's question, the DSB's recommendations in the Article 21.5 proceeding do not encompass the "all others rates."

45. As an initial matter the United States wishes to clarify that the five orders at issue in this question refer to the following antidumping duty orders: *Granular Poylytetrafluorethylene from Italy* (cases 23 and 24); *Stainless Steel Sheet and Strip in Coils from Germany* (cases 27 and 28)*; Ball Bearings from France* (case 29); *Ball Bearings from Italy* (case 30); and *Ball Bearings from the United Kingdom* (case 31).[35]

46. The "all others rate" is calculated in the original investigation by weight averaging the dumping margins calculated for exporters and producers that were individually investigated.[36] The resulting rate is the estimated rate applied to any exporter or producer that has not been individually examined. Generally, the "all others rate" is calculated during the original investigation, and is not revised or recalculated in the context of subsequent administrative reviews because the administrative reviews determine duty assessment for individual companies

[34] The United States notes that this analysis applies equally to the antidumping duty orders on *Certain Stainless Steel Plate in Coils from Belguim* (cases 9 and 18) and *Stainless Steel Sheet and Strip in Coils from Italy* (cases 11, 21 and 22), because there were no findings of noncompliance in the Article 21.5 proceeding.

[35] The United States further clarifies that there are thirteen antidumping duty orders at issue in the EU's methodology 1, and eleven orders at issue in the EU's methodology 2.

[36] 19 U.S.C. §§ 1673b(d) and 1673d(c)(5) (attached hereto at Exhibit US-43).

for whom a review is requested. The applicable "all others rate" is not changed in an administrative review – it remains the rate originally calculated in the original investigation. Thus, the only rate that will be calculated during an administrative review is that of an individual company, not the "all others rate."[37]

47. The "all others rates" at issue in the five orders in question were not calculated during the specific administrative reviews that the EU challenged in the original dispute. Rather, the "all others rates" that the EU employs in its methodologies were calculated during the original investigations.[38] While the EU did challenge 15 original investigations, it never challenged the original investigations underlying these antidumping duty orders. Because the "all others rates" were calculated during the original investigations, and because all of the findings either from the original dispute or the Article 21.5 proceeding with respect to these five orders only apply to the specific administrative reviews challenged by the EU under these five orders, there are no findings that pertain to the calculation of the "all others rate" in any of these orders. Therefore, there is no finding that any of these "all others rates" is inconsistent with U.S. obligations under the WTO Agreements.

(b) Do you assert that these "all others rates" were not in fact calculated using zeroing? If so, please indicate the basis for this assertion.

48. There is no basis upon which to conclude that these "all others rates" were calculated using zeroing. These five "all others rates"[39] 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. Thus, there is no basis to include these five "all others rates," or any merchandise to which these rates have been or will be applied in the level of nullification or impairment.[40]

49. The EU's inclusion of the "all others rates" into its methodologies grossly overstates the correct level of suspension. The numerical impact of the EU's improper inclusion of the "all others rates" is significant, particularly since the EU applies the incorrect assumption that these "all others rates" would be zero in the absence of zeroing. This assumption alone, accounts for

[37] Under 19 C.F.R. §351.213(b)(2), a producer/exporter subject to the "all others rate" may request an administrative review to establish an individual rate. See Exhibit US-45.

[38] See US Exhibit US-42.

[39] 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%).

[40] The United States additionally maintains that there is no basis for including the remaining six "all others rates" where zeroing was removed less than one month after the end of the RPT.

$123.9 million of the $193.7 million of the initially claimed lost trade in the EU's methodology 2.

50. The EU's methodologies also incorrectly place greater weight than warranted on the "all others rates." Because dumping margins calculated in reviews tend to be lower compared to those calculated in original investigations, most significant exporters of the subject merchandise seek to establish their own individual rate. As a consequence, the "all others rates" typically account for just a small proportion of trade subject to the order. However, in many instances, 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,[41] 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 others 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 suspension and $58.4 million of the $193.7 million claim of lost trade.

51. Finally, even aside from the other problems with the EU's "all others rates," the "all others rates" were calculated during original investigations – not administrative reviews. As such, the EU's objections to reliance on the Section 129 determinations as a measure of the impact of zeroing are inapplicable as to these five rates because the results of the Section 129 determinations relate to margins calculated during original investigations. Thus, even if the Arbitrator were to conclude (despite the absence of any prior findings or evidence) that "all others rates" were based on margins calculated using zeroing contrary to U.S. WTO obligations, the evidence does not support the EU's extreme assumption that the entire rates are entirely attributable to the application of zeroing. Instead, the results of the Section 129 determinations only support a 3.34 percent impact.

52. We have illustrated the effect of the EU's erroneous use of the "all others rates" as a basis for estimating the impact of compliance in Exhibits US-46 and US-47. In these exhibits, we have separated the EU's claimed duty rate in effect for each antidumping duty order from the EU's original Methodology 2 into a portion attributable to"all others" rates (AORs) (Exhibit US-46), and a portion attributable to company-specific rates (Exhibit US-47), while leaving all other aspects of the EU's original calculation unchanged. The EU's reliance on the "all others rates" as part of the duty rate, combined with their assumption that all duty rates would be zero in the absence of zeroing, artificially inflates the amount of *ad valorem* tariff alleged to have been caused by zeroing, and, by extension, the resulting trade loss.

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

53. Exhibit US-47 shows the duty rate in effect and the calculated trade loss for the portion attributable to the company-specific rates. Of the 12.08 percent duty rate claimed by the EU (column I of EU Methodology 2), only 5.33 percent is attributable to the company-specific rates listed by the EU (column I of Exhibit US-47). As we have previously explained, the EU's estimated "trade without zeroed duty" of $475.016 million (column J of EU Methodology 2) combined the EU's observed 2007 HTS trade value of $281.352 million and an incremental "trade loss" calculation (column K of EU Methodology 2) of $193.664 million. The EU's "trade loss" claim of $193.664 million is comprised of $123.9 million attributable to the "all others rates" (column K of Exhibit US-46) and $69.757 million attributable to company-specific rates (column K of Exhibit US-47).

85. <u>To the United States</u>. Please refer to question 84, *supra*. Would the United States be in a position to provide the Arbitrator with a calculation of the average duty rate, and supporting evidence, for each of the twelve orders at issue in this dispute, based on weighted rather than arithmetical averages? If so, please do so. If you are not in a position to do so, please explain how you would expect the Arbitrator to reject this aspect of the European Union's methodologies on the basis of this argument in the absence of the necessary data.

54. The 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). For the convenience of the Arbitrator, the United States provides the calculation of the average duty rates for each of the duty orders in this dispute in the table below.

55. The first column reports the weighted average duty rate based on all trade with a positive duty rate applied. Additionally, the United States has removed any trade associated with adverse facts available (AFA) rates, as both parties have agreed that zeroing is not incorporated into those rates.

56. As the United States discussed during the hearing, as well as in question 83 above, the United States believes that the "all others" rates should not be included in the analysis of nullification or impairment due to zeroing. The "all others" rates in effect have either already been brought into compliance via the section 129 determinations, or have never been challenged by the EU and are subject to no findings of inconsistency or failure to comply. Accordingly, the United States provides in the second column of the table below the weighted average duty rate for trade with positive duty rates, excluding trade associated with AFA rates and excluding trade associated with the "all others" rates.

57. To estimate the weighted averages, the United States relied on the CBP trade data that was provided in exhibits US-32 through US-39. The United States summed the duties paid and the trade value for all entries that were not associated with either a zero antidumping duty, an

AFA rate, or, in the case of column 2, an AOR rate. The sum of the duties paid for the non-excluded entries was then divided by the sum of the associated trade value. The result is the reported weighted average for each product. The calculations for each product are included as Exhibit US-48 and the results are provided below.[42]

Weighted Average Duty Rates for 2007 Trade with a Positive Duty Rate		
Product	**Weighted Average all Trade (excludes zero AD, AFA)**	**Weighted Average excluding AOR (excludes zero AD, AFA, AOR)**
Stainless Steel Plate from Belgium	2.96	2.96
Certain Pasta from Italy	7.14	4.1
Stainless Steel Sheet & Strip from Italy	5.11	3.73
Stainless Steel Sheet & Strip from Germany	7.98	2.45
Granular Polytetrafluorethylene Resin from Italy	35.84	35.83
Ball Bearings from France	14.75	10.85
Ball Bearings from Italy	10.27	6.54
Ball Bearings from the United Kingdom	20.78	12
Cut-to-Length Plate from Italy	7.64	0
Stainless Steel Wire Rod from Italy	0	0
Stainless Steel Wire Rod from Spain	0	0
Notes: • No entries in the CBP database for stainless steel wire rod from Italy or Spain in 2007 • Cut-to-Length Plate from Italy becomes zero in the second method because all trade was either under an AFA rate or a section 129 recalculated AOR.		

58. By providing these calculations in response to the Arbitrator's question, the United States in no way implies that the weighted-average duty rate would be a more appropriate estimate of

[42] The data and calculations for 2008 and 2009 are also provided in Exhibit US-48.

the impact of the removal of zeroing than the Section 129 determinations. As we have previously explained, the results of the Section 129 determinations reliably estimate the impact of the removal of zeroing, demonstrate that elimination of zeroing does not necessarily eliminate all antidumping duties, 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.

59. Nevertheless, should the Arbitrator elect to adopt an estimate of the impact of the removal of zeroing based upon a weighted-average duty rate, the weighted averages we have calculated yield a more appropriate estimate than the EU's simple average duty rate. Since the weighted averages shown above employ actual duties paid and trade values, they eliminate the distortions caused by the EU's use of simple averaging. Of the two weighted averages shown above, the weighted average excluding "all others" rates would be the more appropriate choice because it excludes rates for which no inconsistency or failure to comply has been found..

60. In the event that the Arbitrator should elect to utilize a weighted-average duty rate approach, we also emphasize that the CBP data summarized in Exhibit US-16 (revised and attached hereto as Exhibit US-44) presents the proper basis for trade values, rather than the HTS data relied upon by the EU. As we have discussed elsewhere, the CBP data captures only that trade subject to AD duties under the relevant measures, as opposed to the broader HTS data. Use of the above-calculated weighted-average duty rates buttresses the use of the CBP trade value data because the same CBP data forms the basis of the weighted-average duty rates. Additionally, for the reasons we have discussed elsewhere, any calculation of trade effects should utilize the World Bank elasticities we employed in our calculations, as opposed to the GTAP elasticities relied upon by the EU.

86. <u>To the United States</u>: The United States argues that lost trade should be calculated using import demand elasticities. However, those elasticities would appear not to take into account a possible shift from EU-sourced imports to imports from other sources. Logically, this would suggest that the import demand elasticities advanced by the United States would underestimate the trade impact upon the European Union of the inconsistent measures at issue in this dispute. Do you agree? If not, why not? If so, why would import demand elasticities be an appropriate basis to calculate lost trade in this arbitration?

61. The Arbitrator is correct that the U.S. import demand elasticity that the United States used in its estimate of nullification or impairment does not directly address the switching that the EU alleges would occur with a change to the dumping margins. In an ideal world, the United States would have been able to find a U.S. import demand elasticity for EU products. In that case, the import demand elasticity would account for country source switching. Unfortunately, that does not exist and the United States was left to its second best, which is the U.S. import

demand for global imports. The United States, in contrast to the EU, does not believe that the use of import demand elasticities will greatly underestimate the trade loss due to the inconsistent measures at issue in this dispute.

62. The EU has alleged that most of its trade loss comes from switching to other import sources rather than from a switch to U.S. producers and thus it is necessary to use substitution elasticities. The EU has provided no support for this allegation, nor has the EU provided any support for its weighting scheme of 70/30 for import to import substitution and import to domestic substitution. As the Arbitrator will recall, during the hearing, the EU admitted it does not know what the weighting scheme should be and stated perhaps it is only 50/50 instead of 70/30.

63. While there is likely to be some source switching, it will be relatively limited. It is important to remember that the antidumping orders are not placed on all EU production, but just on production in specific member States, and in some cases, just on a portion of that production. As the United States has shown with the Section 129 determination results, not only have the dumping margins not gone to zero for many of these specific products, the effect on the products' prices has been relatively minor. Therefore, EU products as a whole are not likely to see large price competitiveness changes, thereby limiting the degree of source switching to the EU from other import sources.

64. The likely import switching would mostly occur between firms within the EU. In Exhibit US-49, the United States has pulled the top 15 suppliers for each product in these cases for the years 2007-2009. In general, EU member States accounted for between 6 to 7 of the top 15 producers for each of the products, the one exception being pasta. In this case, Italy alone accounted for roughly half of U.S. imports. Thus, competition is very strong among EU firms.

65. Furthermore, the CEPII study submitted by the EU also supports the view that source switching would be relatively limited. In the executive summary, the study states that

> [t]he EU's good performance compared to the United States or Japan is due to an upgrading of the quality of its products, combined with the ability of EU companies to sell products at premium price because of quality, branding and related services. These "upmarket" products now account for a third of world demand and represent half of EU exports, not only in luxury consumer goods, but across the whole range of products, including intermediary goods, machinery and transport equipment. Building on this ability to sell products at premium price is the only way to uphold EU levels of social protection, employment and wages.[43]

66. The fact that EU products tend to be at the upper end in terms of price and quality is likely to limit the switch from EU products to non-EU products.

[43] CEPII, *EU Performance in the Global Economy*, p.2.

67. Finally, the Broda and Weinstein study submitted by Japan also suggests that this substitution is likely to be limited. Analyzing elasticities of substitution at the seven- or ten-digit level, Broda and Weinstein found that it is "... reasonable to think of goods from different countries as far from perfect substitutes."[44] This implies that substitution between sources will be limited. And even more directly to the point, the author stated "[a]nalyzing the most disaggregated U.S. import data available for the period 1972 and 2001, we find that consumers have low elasticities of substitution across similar goods produced in different countries."[45]

68. Having demonstrated that the likely substitution across sources is limited, the use of the import demand elasticity is more appropriate than the EU approach using the GTAP elasticities.

69. As the United States discussed in its first written submission, to estimate the level of lost trade, the United States multiplied the U.S. import demand elasticity, the price change, and the current level of trade. Generally, when using an import demand elasticity for all imports, one uses the aggregate price change for all imports, not for a subset after a policy change. In this instance, the United States, using the global import demand elasticity as proxy for U.S. import demand for EU products, assumed the full price change associated with the effect of zeroing on the specific member State's trade and also assumed any increase in demand for imports would be attributed to that member State. Since the United States assumes any increase in import demand is attributed to the specific member State instead of parsing it among all U.S. import sources, the United States believes its approach minimizes any underestimation from switching from other import sources.

70. The EU, on the other hand, has proposed using substitution elasticities from the GTAP model. As the United States has previously noted, these elasticities are not region specific. In other words, the same set of elasticities apply to the United States as to the "rest of Eastern Africa" region in the GTAP model. The equation used by the EU is similar to that employed by the United States, but with a few distinctions that will tend to overstate the effect of zeroing. First is that for price, the EU is using an assumed change in margins, which is the complete removal of the dumping duty. As the United States has demonstrated with the Section 129 results, this is not generally the case. In addition, the change in duty margin is not equivalent to the price change in the good. As the United States discussed in paragraphs 61 to 65, it is necessary to convert the margin change to a price change.[46] The EU then applies the margin change against a weighted average of two substitution elasticities. As we already mentioned, they have no justification for the specific weighting chosen.

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[44] Christian Broda and David E. Weinstein, "Globalization and the Gains from Variety"*, Quarterly Journal of Economics,* p. 548.

[45] Christian Broda and David E. Weinstein, "Globalization and the Gains from Variety"*, Quarterly Journal of Economics,* pp. 541-2.

[46] This error by the EU roughly accounts for $50 million in its lost trade calculation.

71. There is however, a more fundamental problem here. As the United States described in its first written submission, a substitution elasticity tells you the relative change in quantities demanded between two goods, given their relative changes in price. The equation provided by the EU, however, does not incorporate relative prices, but just a price change in the EU member State's price. For their approach to work, then, it is necessary to assume that the margin change is the relative price change between the member State's good and other sources as well as the relative price change between the EU good and the U.S. good. This is a very strong assumption that competitors would not adjust their prices, especially if one were to accept the approach that the full antidumping duty would be eliminated. For example, it would be highly unlikely that other ball bearing exporters or U.S. producers would not adjust their prices if suddenly producers in France had price reductions around 30 percent for sales in the U.S. market. And this is the very reason why the U.S. import demand elasticity is the better alternative. The import demand elasticity looks at the change in demand given the change in the price of imports.

72. In conclusion, the United States believes that using the import demand elasticity estimated by the World Bank specifically for the United States is the best approach in addressing the level of nullification or impairment. As the United States has discussed, the switching between sources outside of the EU is likely to be limited and therefore the use of the U.S. import elasticity to the extent it may underestimate any trade loss would be minimal whereas the EU approach will greatly overstate the level of trade loss.

89. <u>To the United States</u>: What is the time period used by Lee et al.(2004) to estimate the import demand elasticities?

73. The time period for the import data used to calculate the import demand elasticities was 1988 to 2002.

90. <u>To the United States:</u> In its written submission (para. 43), Japan argues that the United States uses GTAP data and a variant of the GTAP model for its own modelling purposes. This was re-iterated by the European Union in its oral statement (para. 55). Please clarify.

74. In certain circumstances, the United States uses the GTAP model, its databases, and variants of the standard "static" GTAP model. Additionally, the United States has a separate Computable General Equilibrium model for the U.S. economy. The U.S.-specific model does not use GTAP elasticities.

75. The issue, however, is not whether the United States uses GTAP in any circumstances, but rather whether it is appropriate to use the GTAP default elasticities as proposed by the EU.

As the United States explained in its Written Submission and the answers to questions of the Arbitrator, the use of GTAP elasticities as proposed by the EU is inappropriate, especially when a better choice is available (namely, the World Bank import demand elasticities). The GTAP elasticities are not specific to either the United State or to the EU, and are too aggregated. The World Bank elasticities are specific to U.S. import behavior, more disaggregated, and properly match the type of equation being utilized to estimate lost trade.

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][47]. 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?

76. The United States will first answer this question for the USITC model referenced in the Donnelly et al. research note and then address the Broda and Weinstein elasticities.

77. In regards to the USITC CGE model referenced in the Donnelly et al., 2004, research note, Japan seems to have misunderstood some of the information in that research note. When the research note stated that the GTAP and USITC model rely upon the same database, this was not the GTAP elasticity database, but rather the BEA input-output accounts.[48] In fact, the

[47] 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.

[48] The authors wrote "[w]hile these two CGE trade models rely upon the same database, the implementation of the models differs. More specifically, the USITC model incorporates both the sector and commodity dimensions in the I-O account, but the GTAP model only utilizes the commodity dimension that is most relevant for bilateral trade analysis." William A. Donnelly, Kyle Johnson, Marinos Tsigas and David Ingersoll, "Revised Armington Elasticities of Substitution for the USITC Model and the Concordance for Constructing a Consistent Set for the GTAP Model", USITC, Office of Economics Research Note, No. 2004-01-A, pp. 2-3.

research note is about taking the USITC model elasticities and inserting them into GTAP for the United States so that when linking the models to do analysis, there would be consistency in U.S. import behavior, reflecting U.S. specific behavioral parameters.

78. The elasticities in the USITC model only represent the substitution between import and domestic goods. The elasticities in the model generally represent U.S. specificity by qualitative adjustment based on expertise of industry analysts from the USITC. Table 4, of Donnelly et al., shows the USITC model import-domestic substitution elasticity compared to the GTAP model defaults at the time that the research note was written. The United States would also note that the USITC no longer uses this model.

79. The United States does not believe that the elasticities from this model are appropriate for the analysis before the Arbitrator. Those elasticity estimates were the best that the USITC could do at the time that the model was being developed. The World Bank estimates are U.S. specific and recently estimated econometrically.

80. Now, the United States will turn to the Broda and Weinstein elasticities cited by Japan. The authors estimated elasticities of substitution for the United States based on HTSUS at the seven digit level for the period 1972-1988 and then based on the HTSUS at the ten-digit level for the period 1990-2001.

81. As the United States discussed in response to question 86, given the approach to estimate lost trade used by both the United States and the EU, the use of a substitution elasticity is less appropriate than an import demand elasticity when determining the change in trade when only incorporating information about the change in one source's price.

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?

82. The manner in which the arbitrator in *US – Upland Cotton* estimated the "trade distorting impact" is not of particular relevance in this case. In *US – Upland Cotton*, the inquiry related to the impact of certain subsidies found to be inconsistent with the SCM Agreement and whether the level of the proposed countermeasure was "appropriate" – a very different type of WTO-inconsistent measure and a very different standard for the proposed suspension.

101. <u>To both parties</u>: 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.

83. The United States considers that the DSU does not permit the suspension of concessions in relation to the period between the end of the reasonable period of time (RPT) for implementation and the time at which suspension is authorized by the DSB.

84. First, such suspension would be retroactive. As we explained in our responses to Questions 4 and 45 of the Arbitrator, however, suspension of concessions under the DSU is forward-looking. Past periods are relevant solely to the extent that they serve as a proxy for the level of nullification or impairment going forward. Thus, suspension with respect to past periods is inappropriate.

85. Second, such suspension would be inconsistent with the practice of past Arbitrators who have awarded variable levels of suspension based upon forward-looking analyses. As we explained in our response to Question 4, several arbitrators in past proceedings have fashioned such variable awards. 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 RPT, or of measuring the effects between the end of the RPT and the present, such a variable level of suspension would be unnecessary. An award based upon retroactive factors would be inconsistent with the potential for such a variable approach.

86. Third, application of such measures could potentially be cumulative in nature. As we explained in our response to Question 57, however, such cumulation is improper. 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: Such an approach would therefore fail to determine whether the level of suspension is "equivalent" to the level of nullification or impairment.

87. Fourth, application of such measures could potentially result in suspension of concessions for measures whose WTO-inconsistency has already been remedied. As we explained in our response to Question 82 above, however, such suspension would be inappropriate because it would (1) fail in the goal of inducing compliance because there would be nothing left to remedy; (2) be punitive because there would be suspension despite the lack of a current violation; and (3) fail to bring balance to trade concessions because the level of concessions would already have been in balance before the suspension.

TABLE OF EXHIBITS

US-43	19 U.S.C. §§ 1673b(d) and 1673d(c)(5)
US-44	Revised Exhibit US-16
US-45	19 C.F.R. §351.213
US-46	Weighted Average Duty Rate and Trade Loss Attributable to AORs
US-47	Weighted Average Duty Rate and Trade Loss Attributable to Company Rates
US-48	Weighted Average Duty Rate Calculations
US-49	Tables of Top 15 Suppliers of Each Product