World Trade Organisation

Article 22.6 DSU Panel Proceedings

United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") (DS294)

Written Submission
Submitted by the European Union

Geneva, 20 April 2010
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I. INTRODUCTION

1. In its Written Submission the United States first advances what it calls "the proper methodological approach". Only then does the United States comment on the first and second alternatives advanced by the European Union in its Methodology Paper. This approach generates repetition and reduces clarity, and does not facilitate the Arbitration Panel's task.

2. The European Union is the complaining Party in this case, and the European Union has already set out in its Methodology Paper the nature of the countermeasures, that being our prerogative under the express terms of the DSU. Consistent with our comments below regarding the standard of review, and with past practice, we invite the Arbitration Panel to first consider what the European Union has proposed. Accordingly, in this Written Submission the European Union first deals with the first and second EU alternatives set out in its Methodology Paper, addressing the points raised by the United States in relation to each. Only then do we address what the United States asserts to be "the proper methodological approach". Where a given issue is relevant to more than one alternative, we deal with it when it first arises, and subsequently refer back to the previous discussion.

II. HISTORY OF THE DISPUTE ("PROCEDURAL BACKGROUND")

3. Under the heading "History of the dispute" the European Union has provided the Arbitration Panel with a brief summary of the Original Panel and Appellate Body Reports and, verbatim, the relevant findings of the Compliance Panel and Appellate Body Reports, thus limiting itself to what is relevant to the Arbitration Panel's assessment.

4. The United States does not contest anything set out in Section II of the EU Methodology Paper.

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1 US Written Submission, para. 29.
2 EU Methodology Paper, Section II.
5. Under the heading "Procedural background", the United States sets out in its Written Submission its own version of events to-date, including a number of statements that are irrelevant and/or with which the European Union disagrees and/or which have already been rejected by WTO adjudicators.3

6. In these circumstances, the European Union respectfully suggests that the Arbitration Panel can and should take as a point of reference Section II of the EU Methodology Paper and can and should disregard Section II of the US Written Submission.

III. THE OBJECTIVE OF SUSPENSION OF CONCESSIONS OR OTHER OBLIGATIONS IN THIS CASE: INDUCING COMPLIANCE

7. To read the US Written Submission in this case one would think that there is only one "proper" or "accurate" suspension of concessions in this or indeed any other case. In truth, however, the assessment that this Arbitration Panel is called upon to make is, in substantial part, not akin to the process of applying the agreed interpretative cipher of the customary rules of interpretation of public international law, as partially codified in the Vienna Convention, to the covered agreements. Rather, this Arbitration Panel, like any other, may be called upon to choose between alternative assumptions, estimates or proxies presented by each Party as "reasonable".4 In choosing between such alternatives one of the factors that the Arbitration Panel must take into account not only when interpreting but also when applying the relevant provisions of the DSU is: what is the object and purpose5 of these DSU provisions?

8. The Arbitration Panel will be aware that there is some debate on this issue: is it compensation (rebalancing or damages) or sanction (inducing compliance or

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3 US Written Submission, Section II. See, for example, para. 17: ("With respect to the determinations in the sixteen administrative reviews challenged by the EU, the antidumping duty rates established by those reviews, with the exception of one company, were no longer in effect because they had been superceded by determinations made in later administrative reviews.").

4 Arbitration Panel Report, US-Gambling (Article 22.6 – US), para. 3.173: ("… we feel we are on shaky grounds solidly laid by the parties. The data is surrounded by a degree of uncertainty. For most variables, the data consists of proxies for what needs to be measured, and observations are too few to allow for a proper econometric analysis. Certain data that we have requested and that, to some extent, could have remedied this situation has not been provided.")

5 Vienna Convention, Article 31(1).
punishment) or both? The European Union does not intend in this Written Submission to rehearse that debate in detail, or one side of it. Suffice is to say that, like the United States,\(^6\) the European Union generally and in this case is focussing on inducing compliance,\(^7\) which it considers is also the most consistent and recent line that emerges from past Arbitration Panels.\(^8\) And the European Union would like to explain to the Arbitration Panel why it is of the view that, *at least in the particular circumstances of this case*, that objective of inducing compliance should also be, within the limits of the equivalence rule, the dominant if not the only objective of the system, that is, of the Arbitration Panel itself when making its assessment.

9. The particular circumstances of this case are, *inter alia*, the following.

10. First, the European Union is not seeking compensation. We are not seeking a situation in which the United States would indefinitely continue to use zeroing against our exporters; whilst the European Union would indefinitely be entitled to suspend equivalent concessions as a form of compensation. We are not seeking indefinite reciprocal protection, but reciprocal trade and respect for and proper enforcement of our rights under the covered agreements. In other words, in designing the nature of the countermeasure, the European Union is seeking to induce compliance, and this fact is relevant to the Arbitration Panel's assessment.

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\(^6\) Appellate Body Report, *US/Canada – Continued Suspension*, para. 109: ("The United States adds that interpreting Article 22.8 as requiring actual compliance is also supported by the purpose of the suspension of concessions, which is to induce compliance").

\(^7\) DSU, Article 3.7: ("[T]he first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement" (emphasis added)).

\(^8\) Arbitration Panel Report, *EC-Bananas III (US) (Article 22.6 – EC)*, para. 6.3: ("the authorisation to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned. We agree with the United States that this temporary nature indicates that it is the purpose of countermeasures to induce compliance."). See also: Arbitration Panel Report, *EC-Hormones (US) (Article 22.6 – EC)*, para. 39; Arbitration Panel Report, *EC-Bananas III (Ecuador) (Article 22.6 – EC)*, para. 76; Arbitration Panel Report, *US-1916 Act (Article 22.6 – US)*, paras 5.5 and 5.7; Arbitration Panel Report, *US-Gambling (Article 22.6 – US)*, paras 2.7 and 4.84: ("the purpose of suspension of concessions or other obligations under the covered agreements as foreseen in Article 22.1 of the DSU is to "induce compliance" by the Member concerned with its obligations under the covered agreements", "the thrust of the effectiveness criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB recommendations and rulings within a reasonable period of time.")
11. Second, the United States itself has shown no inclination to provide compensation.

12. Third, the United States itself has repeatedly stated its intention to comply and repeatedly received reasonable periods of time in which to do so; and yet at the same time has expressly stated that it will not comply. In at least one past case such refusal to comply has been a relevant factor in an arbitration panel's assessment.

13. Fourth, the United States has previously withheld and continues to withhold from this Arbitration Panel the evidence in the sole possession of the United States that would permit, through the simple removal of one instruction from a computer program, the exact calculation of the rate of duty without zeroing. Thus, not only does the United States refuse to comply, but in addition, rather than discussing the issues on the merits, and notwithstanding the fact that it has the burden of proof, the United States continues to indulge in the litigation technique of seeking to deprive other WTO Members and WTO adjudicators of information potentially relevant to a (partial) consideration of compensation.

14. Fifth, and finally, the United States is as a matter of fact itself a frequent user of the dispute settlement system and an important and influential WTO Member. It is important for the effectiveness and credibility of the system that the rules bind, and are seen to bind, all Members.

15. In light of these particular circumstances, and having regard to the objective of seeking to induce compliance, with which the United States agrees, the European Union respectfully submits that when the Arbitration Panel is confronted with a choice between different alternatives, perhaps neither of which it finds easy to categorise as unreasonable, all other things being equal, the Arbitration Panel should prefer the choice that best contributes to inducing compliance.

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9 EU Methodology Paper, Introduction.
10 Arbitration Panel Report, Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada), paras 3.107 and 3.121: ("… we are of the view that Canada's statement that, for the moment, it does not intend to withdraw the subsidy at issue suggests that in order to induce compliance in this case a higher level of countermeasures than that based on the Canadian methodology would be necessary and appropriate.", "… we have decided to adjust the level of countermeasures calculated on the basis of the total amount of the subsidy by an amount which we deem reasonably meaningful to cause Canada to reconsider its current position to maintain the subsidy at issue in breach of its obligations. We consequently adjust the level of countermeasures by an amount corresponding to 20 per cent of the amount of the subsidy …").
IV. STANDARD OF REVIEW

16. The European Union recalls that Article 11 of the DSU has been referenced in a number of past Arbitration Panels, and we agree that Article 11 applies to these proceedings and sets out in principle the appropriate standard of review.

17. However, the European Union would point out that this Arbitration Panel, like others, has begun with the presentation by the European Union of a Methodology Paper that contains, in substance, a draft countermeasure (or in fact alternative countermeasures) responding to the US lack of compliance with its obligations under the Anti-Dumping Agreement. Furthermore, pursuant to the express terms of Article 22 of the DSU, the European Union is seeking to suspend concessions under the same agreement - that is, including the Anti-Dumping Agreement. The European Union further recalls that, pursuant to the standard of review contained in Article 17 of the Anti-Dumping Agreement, a panel should limit itself to determining whether the establishment of the facts was unbiased and objective, and accept permissible interpretations. It seems to the European Union that there is some merit in the view that the notion of equivalence in Article 22.4 of the DSU might also be reflected in equivalent standards of review. Contextually, this confirms and comforts the view that, all other things being equal, the Arbitration Panel should prefer the reasonable assumptions, estimates or proxies put forward by the European Union, provided that they can reasonably be characterised as unbiased, objective and permissible, which we believe is the case.

V. BURDEN OF PROOF

18. The European Union already recalled in its Methodology Paper the established case law regarding burden of proof in Arbitration Panels. This is not contested by the United States. As we will further explain below, this has important

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11 Arbitration Panel Report, EC-Bananas III (Ecuador) (Article 22.6 – EC), footnote 20; Arbitration Panel Report, Brazil – Aircraft (Article 22.6 – Brazil), para. 2.13; Arbitration Panel Report, Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada), para. 2.18.
12 EU Methodology Paper, para. 23.
13 EU Methodology Paper, para. 5. See also: Arbitration Panel Report, US – Gambling (Article 22.6 DSU - US), para. 3.23 ("[T]he burden rests upon the United States to demonstrate that the level of suspension
consequences when it comes to assessing the fact that the United States has chosen to withhold from the Arbitration Panel the evidence in the sole possession of the United States that would permit the exact calculation of the relevant anti-dumping duties without zeroing. Since this is a necessary element in what the United States asserts to be "the proper methodological approach", but the necessary evidence is withheld by the United States, the European Union respectfully submits that the Arbitration Panel is compelled to reject the US proposal.

VI. RESPECT FOR THE PRINCIPLE OF DUE PROCESS AND THE WORKING PROCEDURES: THE ARBITRATION PANEL MAY NOT MAKE THE CASE FOR THE UNITED STATES

19. The European Union recalls that the Working Procedures required the United States to present in its Written Submission "the facts of the case" and, in addition, its "arguments". No derogation to this rule is permitted.14

20. Consequently, the European Union takes the view that the United States is now precluded by the Working Procedures from presenting any new factual assertions. Furthermore, the United States is also now precluded by the Working Procedures from presenting any new arguments.

21. Furthermore, as a separate matter, the United States was also required to submit in its Written Submission all the "evidence" on which it seeks to rely, except with respect to evidence necessary for the purposes of rebuttal or for answers to questions. Derogations from such procedure may only be granted upon showing of good cause.15

22. Consequently, absent a showing of good cause (and most likely there is none), evidence that could have been submitted with the US Written Submission but was not submitted, should now be excluded. Furthermore, such evidence is by definition excluded from the different category of evidence necessary for the proposed by Antigua is not equivalent to the level of nullification or impairment of benefits it has suffered as a result of the continued application of the inconsistent US measures").

14 Working Procedures, para. 4.
15 Working Procedures, para. 9.
purposes of rebuttal; and the late submission of the former should not be tolerated under the guise of the latter.

23. Further, the European Union recalls the established case law according to which the Arbitration Panel must not make the case for either Party. Accordingly, whilst the Panel may put questions to the United States in order to clarify factual assertions that the United States has already presented, the Panel is not entitled to solicit from the United States, through questioning, new factual assertions not previously presented by the United States. Similarly, whilst the Panel may put questions to the United States in order to clarify arguments that the United States has already presented, the Panel is not entitled to solicit from the United States, through questioning, new arguments not previously presented by the United States. Similarly, whilst the Panel may put questions to the United States in order to obtain evidence, the Panel is not entitled to solicit from the United States, through questioning, evidence that could and should have been presented in the US Written Submission.

24. Accordingly, when framing questions to the United States, the European Union would respectfully invite the Arbitration Panel to begin each question by making it clear what point of fact, argument or evidence the question relates to as presented in the US Written Submission.

25. The European Union attaches particular importance to these rules in this case for a number of reasons.

26. First, we have had a certain experience in the zeroing litigation with the US approach to the late filing of facts, arguments and evidence. We believe that there is no room for such litigation techniques in the context of an Article 22.6 Arbitration Panel. At this stage of the process, it is time for the United States to "make a clean breast" of things and address the issues on their merits. If the United States continues to decline to do that, the appropriate consequences should follow.

27. Second, as we have already indicated above, arbitration panels typically have to deal with issues that may require reasonable proxies or estimates to be used. The assessment is not an exact science. Precisely because of these circumstances
procedural rules – and the respect for and proper application of procedural rules – provide a convenient and objective means for an arbitration panel to prefer one party's assertions, arguments and/or evidence over another's. Thus, instead of struggling to choose, for example, between two apparently "equally reasonable" factual assertions, arguments or pieces of evidence, the first filed in a timely manner and the second filed late, the Arbitration Panel can and should simply reject the late filed item and prefer the timely filed item on the basis of an objective procedural rule of which the Parties have had full prior notice.

28. Third, and linked to the above, the European Union submits that the objective of inducing compliance would be well served by an approach that, instead of interminably searching for a doubtful "economic truth" in a morass of incomplete or conflicting data, also sufficiently validates legal rules, including procedural legal rules, as a robust and simple method of filtering out extraneous information and reaching a conclusion based on a rationale accessible to as many Members as possible.

VII. FIRST EU ALTERNATIVE: PROHIBITIVE TARIFF ON EQUIVALENT OBSERVED LOST TRADE

A. The United States does not claim that the principles and procedures set forth in Article 22.3 of the DSU have not been followed or that the proposed suspension of concessions or other obligations is not allowed under the relevant covered agreements

29. The United States does not claim that the principles and procedures set forth in Article 22.3 of the DSU have not been followed or that the proposed suspension of concessions or other obligations is not allowed under the relevant covered agreements.¹⁶ These matters are not therefore in dispute between the Parties, and are outside the Arbitration Panel's jurisdiction.

B. Measures included in the calculation

¹⁶ US Written Submission, para. 141, final sentence.
1. Cases 1 and 6 must be included in basket 2 (reverse charge)

30. The United States argues that Cases 1 and 6, which are only included in basket 2 (reverse charge) of the first EU alternative, should be excluded from the calculation because allegedly "the remedy is prospective" and allegedly the "measures have been revoked" and "do not have any future trade effects".\(^\text{17}\)

31. The United States is attempting to re-argue matters that have already been decided by the DSB. The US observation relates to one aspect of the measures at issue, that is, the duty rate in the form of cash deposits going forward. However, the United States ignores the fact that those measures also included the final assessment and liquidation of duties after the end of the reasonable period of time. Thus, even if the United States has withdrawn one element of the measures at issue, "full compliance" has not been achieved. The European Union refers in this respect to the findings contained in the Compliance Panel and Appellate Body Reports set out \textit{verbatim} in the EU Methodology Paper.\(^\text{18}\) With respect to both Case 1 and Case 6 the DSB has found that, at the end of the reasonable period of time (10 April 2007), the United States has failed to comply with the recommendations and rulings of the DSB and has acted inconsistently with the covered agreements. Cases 1 and 6 are therefore properly included in the calculation. Because, in these cases, the EU complaint relates not to the duty rate going forward, but to the final assessment of duties, Cases 1 and 6 are included in basket 2 (reverse charge) of the first EU alternative but not basket 1 (observed trade loss).

32. If the United States wishes to assert that, subsequent to the end of the reasonable period of time (10 April 2007), it has complied in whole or in part, and that accordingly it would be appropriate to re-visit the matters that are the subject of the findings in the Compliance Panel and Appellate Body Reports adopted by the DSB, then the United States must request a new compliance panel pursuant to Article 21.5 of the DSU.\(^\text{19}\) These matters do not fall within the jurisdiction of this

\(^{17}\) US Written Submission, paras 89 to 91 (with respect to both the first and second EU alternatives), para. 118 (with respect to the first EU alternative, basket 2) and para. 49 (with respect to the US proposal).

\(^{18}\) EU Methodology Paper, paras 11 to 14.

\(^{19}\) Appellate Body Report, \textit{US/Canada – Continued Suspension}, paras 338, 345 and 368 ("Article 21.5 provides for specific procedures for adjudicating a disagreement as to the consistency with the covered agreements of measures taken by a Member to implement the DSB's recommendations and rulings. (...)"
Arbitration Panel, which is strictly limited by the express terms of Article 22 of the DSU.20

2. Case 7, 8 and 14 must be included in basket 1 (observed trade loss) and basket 2 (reverse charge)

33. Similarly, the United States argues that Cases 7, 8 and 14, which are included in basket 1 (observed trade loss) and basket 2 (reverse charge) of the first EU alternative should be excluded from the calculation because allegedly the United States is in "full compliance", the results of the Section 129 re-determinations relating to the original investigations have replaced the effects of zeroing in the current cash deposit rates, the administrative reviews were "completed prior to the end of the reasonable period of time", and the Compliance Panel and Appellate Body allegedly made no findings in relation to this matter.21

34. Once again, the United States is attempting to re-argue matters that have already been decided by the DSB. The European Union again refers in this respect to the findings contained in the Compliance Panel and Appellate Body Reports set out verbatim in the EU Methodology Paper.22 The Compliance Panel clearly found the continued imposition after the end of the reasonable period of time (10 April 2007) of zeroed cash deposit rates a failure to comply with the recommendations and rulings of the DSB and inconsistent with the covered agreements (basket 1). The Appellate Body specifically referenced these findings as susceptible to appeal, but not appealed by the United States; and, reversing the Compliance Panel in part,

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20 Arbitration Panel Report, US – Upland Cotton (Article 22.6 DSU – US), paras 3.14 and 3.17 (“It is, in our view, appropriate for us, as arbitrators acting under Article 22.6 of the DSU, to take into account this determination made in the context of compliance proceedings under Article 21.5 of the DSU and to assume a priori, on that basis, that the United States has not complied with the relevant recommendations and rulings of the DSB. (...) We note that it is normally not the task of arbitrators acting under Article 22.6 of the DSU to review whether compliance has been achieved or not, as arbitral proceedings under this provision assume that there has been no compliance, and this will normally have been determined through compliance proceedings under Article 21.5 of the DSU, as was the case here”).

21 US Written Submission, paras 92 to 95 (with respect to both the first and second EU alternatives), para. 118 (with respect to the first EU alternative, basket 2) and para. 49 (with respect to the US proposal).
added its own findings with respect to final liquidations after the end of the reasonable period of time (basket 2). It is precisely on this basis that the United States expressly acknowledges that it does not (and indeed cannot) contest the inclusion of Cases 18, 20, 21, 22, 23, 24 and 27. Cases 7, 8 and 14 are therefore properly included in the calculation.

35. If the United States wishes to assert that, subsequent to the end of the reasonable period of time (10 April 2007), it has complied in whole or in part with respect to Cases 7, 8 and 14, and that accordingly it would be appropriate to re-visit the matters that are the subject of the findings in the Compliance Panel and Appellate Body Reports adopted by the DSB, then the United States must request a new compliance panel pursuant to Article 21.5 of the DSU. These matters do not fall within the jurisdiction of this Arbitration Panel, which is strictly limited by the express terms of Article 22 of the DSU.

3. **Case 9, 11 and 15 must be included in basket 1 (observed trade loss) and basket 2 (reverse charge)**

36. Similarly, the United States argues that Cases 9, 11 and 15, which are included in basket 1 (observed trade loss) and basket 2 (reverse charge) of the first alternative should be excluded from the calculation because allegedly the United States "has complied with the DSB's recommendations and rulings".24

37. Once again, the United States is attempting to re-argue matters that have already been decided by the DSB. The European Union again refers in this respect to the findings contained in the Compliance Panel and Appellate Body Reports set out *verbatim* in the EU Methodology Paper.25 Furthermore, in these particular cases, there are even *additional* panel and Appellate Body findings in DS350 US-

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22 EU Methodology Paper, paras 9 to 10 and para. 11.
23 US Written Submission, para. 49.
24 US Written Submission, footnote 40 (with respect to the US proposal).
25 EU Methodology Paper, paras 9 to 11. Moreover, with respect to Case 15 (Certain Pasta from Italy), the European Union also notes that the Appellate Body made findings with respect to the same anti-dumping order, Case 19 (Certain Pasta from Italy), in the context of a sunset review (see EU Methodology Paper, para. 18).
Continued Zeroing.\textsuperscript{26} Cases 9, 11 and 15 are therefore properly included in the calculation.

4. Measures the inclusion of which the United States does not contest

38. The United States does not contest the inclusion of Cases 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31.\textsuperscript{27} There is thus no dispute between the Parties with respect to that matter, which is outside the Arbitration Panel's terms of reference.

5. Concluding remarks with respect to the measures included in the calculation

39. Reviewing the US submissions on this issue, the European Union wonders just how much longer the United States will attempt to drive the WTO dispute settlement system towards absurdity and ridicule. We are dealing with a matter that has been the subject of litigation for some 12 years (since the consultation request in EC-Bed Linen), by some 20 WTO Members, including many developing or least-developed countries, resulting in 24 DSB reports confirming that the zeroing methodology is WTO inconsistent in all its forms, in all types of anti-dumping proceedings, as applied and as such. The European Union, for example, was a third party in both the Japanese and Mexican cases, and vice versa. We are dealing with a simple mathematical formula that is embedded in all the offending US measures (regardless of how many transactions, if any, are above or below the line) and that the United States has publicly stated it will not change. It is now well-established that the duty is the measure, and indeed this is reflected in the US Written Submission.\textsuperscript{28} Furthermore, the United States accepts that it has the burden of proof in this case, and yet chooses to continue to withhold from other WTO Members and from this Arbitration Panel relevant evidence. Is it not finally time for a little bit more good will and robust common sense? Instead of advancing yet more spurious arguments and indulging in yet more litigation techniques,

\textsuperscript{26} Appellate Body Report, \textit{US – Continued Zeroing}, paras 395(d) and 395(e)(ii).
\textsuperscript{27} US Written Submission, para. 49.
\textsuperscript{28} US Written Submission, paras 47 and 49.
would it not be preferable if the United States would seriously address itself to complying with its WTO obligations? In the meantime, the European Union respectfully requests the Panel to focus on the key objective here, in the interests of both the system as well as, in the longer term, the United States, that is: inducing compliance – and reject the US submissions accordingly.

C. The European Union is entitled to calculate the suspension of concessions or other obligations by reference to the measures, given, inter alia, the US failure to adduce to the Panel the evidence in the sole possession of the United States that would demonstrate the exact duty without zeroing at the end of the reasonable period of time.

40. With respect to the first EU alternative, as well as with respect to the second EU alternative, and also with respect to the US proposal, the United States argues that the EU position is based on the implied but erroneous assumption that elimination of zeroing would result in the elimination of all antidumping duties in all cases. The United States refers to certain other dumping margins re-calculated without zeroing in Section 129 determinations, 13 of which became zero or de minimis, seven of which were unchanged and eight of which were changed by 0.3% or less. The United States concludes that "... the appropriate inquiry in this arbitration ... is the impact of the use of zeroing on the AD duties ..." but complains that "the EU makes no attempt to determine what the change in antidumping duty rates in effect would have been absent zeroing".

41. The European Union disagrees. The European Union's approach is not based on the implied assumption articulated by the United States. Rather, the starting point for the European Union is that the DSB has found that, at the end of the reasonable period of time (10 April 2007), through a number of measures (actions and omissions), the United States fails to comply with the recommendations and rulings of the DSB and continues to act inconsistently with its obligations under the covered agreements.

29 US Written Submission, paras 107 to 109.
30 US Written Submission, paras 121 to 131.
31 US Written Submission, paras 54 to 60.
32 US Written Submission, paras 123 and 122.
42. The Appellate Body has made it clear that disputes relate to "measures", as provided for in Article 3.3 of the DSU, and it is equally clear that when such measure infringes the obligations assumed under a covered agreement nullification or impairment is presumed. The relevant DSB recommendations and rulings relate to the measure, and the recommendation to the defending Member is that "it bring the measure into conformity". Furthermore, an Article 21.5 compliance panel addresses the question of whether or not the defending Member has complied with the recommendations and rulings of the DSB (which relate to the measure found WTO inconsistent), and this by specific reference to the existence or conformity of "measures taken to comply". Article 22.2 of the DSU provides expressly that suspension of concessions or obligations is triggered "if the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time". Article 22.8 of the DSU is equally clear: "the suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed", and the DSB keeps the matter under surveillance until "the recommendations to bring [the] measure into conformity with the covered agreements" have been implemented.

43. Thus, it is abundantly clear from the express terms of the DSU that the entire process, including the Article 22.6 proceedings, is conducted by reference to the measure. As long as the inconsistent measure has not been brought into full conformity, the complaining Member is entitled to suspend concessions or other obligations by reference to that inconsistent measure. There is no basis in the text of the DSU for seeking to narrow the scope of the measure, at the stage of Article 22.6 proceedings, to one part of what has previously been identified as the

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34 DSU, Article 3.8.
35 DSU, Article 19.1.
36 DSU, Article 21.5.
37 Appellate Body Report, US/Canada – Continued Suspension, para. 305 ("[A] dispute could not be brought to its finality unless the implementing measure rectifies the inconsistencies found in the DSB's recommendations and rulings and is not in other ways inconsistent with the covered agreements" (emphasis added).
measure, especially when, as in this case, the question of what is the measure has been keenly litigated between the parties, and the complaining party has prevailed.

44. In essence, what the United States is arguing is that this Arbitration Panel, instead of taking as its staring point the finding that a particular measure is WTO inconsistent, should rather take as its starting point the reason why that measure has been found WTO inconsistent, and attempt to assess the question of equivalence by reference to that reason, instead of the measure itself. Not only would such an approach contradict the express terms of the DSU, but on a moment's reflection it is immediately apparent that such an approach would be completely unworkable. There are essentially an infinite number of reasons why a particular measure might be WTO inconsistent. In most if not all cases it will be impossible to assess equivalence by reference to the reason as opposed to the measure, and indeed this is what generally informs the delimitation of the measure in the first place.

45. For example, a complaining Member might object to a measure imposing an anti-dumping duty on the grounds that the investigating authority has failed to assess or correctly assess one of the injury factors set out in Article 3.4 of the Anti-Dumping Agreement. The measure is the measure imposing the anti-dumping duty, not the injury analysis, or that part of the injury analysis that relates to the Article 3.4 factors, or that part of the analysis that relates to the incorrectly assessed factor. Similarly, if the measure is not brought into compliance, the equivalence of the requested suspension of concessions is assessed by reference to the measure imposing the anti-dumping duty, not the injury analysis, or that part of the injury analysis that relates to the Article 3.4 factors, or that part of the analysis that relates to the incorrectly assessed factor.

46. It is not for the complaining Member and still less an arbitration panel to imagine what the consequence of the correct assessment of the injury factor might be. On the contrary, it has been repeatedly emphasised in the case law that the question of how to bring the measure into conformity (ranging from correcting the injury factor and re-affirming the injury determination to withdrawing the measure) is a matter for the defending Member. Precisely the same would be true for any
inconsistency in the dumping calculation. The relative ease or difficulty of anticipating and eventually quantifying the consequence of one possible and partial implementing action does not detract from the fact that the legal obligation to bring the measure into compliance rests with the defending Member and that until such time as that occurs the complaining Member will have the right to suspend concessions equivalent to the nullification or impairment relating to the measure as opposed to the reason for its WTO inconsistency.

47. The United States attempts to wriggle away from this matter by asserting that all countermeasures require a counterfactual, that the European Union must assert a counterfactual, and that the counterfactual is not "no measure" but no zeroing. This is incorrect because not every countermeasure requires a counterfactual, as the European Union explains further below with respect to the first step of the second EU alternative. It is also incorrect in any event because, as explained above, the suspension of concessions operates by reference to the measure, not the reason for the WTO inconsistency, and the defending Member has the burden of proof, and these two fundamental legal points cannot be evaded by the legally erroneous device of rolling them into a counterfactual. Moreover, the United States cannot unilaterally determine in these proceedings which one among a range of potential measures it may take to comply in the present dispute should form the basis of the Arbitration Panel's assessment; rather, the Arbitration Panel should start by examining the countermeasure proposed by the European Union.

48. In this particular case it might be something at least if the United States would adduce to the Arbitration Panel the evidence that is in the sole possession of the United States and that would make it possible to calculate and verify the exact rate of duty without zeroing at the end of the reasonable period of time (10 April 2007). That would include the program, program log and transaction listing, in

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38 US Written Submission, paras 122.
39 Arbitration Panel Report, US-Gambling (Article 22.6 – US), para. 3.24 ("We do not disagree with the United States that a WTO Member generally has the discretion to determine the means through which it will comply with adverse DSB rulings, provided that such means are consistent with the WTO covered agreements. However, this does not, in our view, imply that the Member concerned has the freedom to decide, for the purposes of a determination under Article 22.7 of the DSU, among a range of potential measures that it might have taken in order to comply with such rulings, which one should form the basis of the arbitrator's assessment. Our mandate under Article 22.7 of the DSU is to determine whether the level of
paper format and in electronic format (including all formula visible and capable of
modification), with and without zeroing. With these documents, it would be a
simple matter to verify the zeroed rates against the published rates; and equally to
verify the outcome of the calculations without zeroing, by simply de-activating the
line of computer code containing the zeroing instruction. If the United States
protests that for some reason this is impracticable, then the European Union would
invite the United States to pass the above documents to the European Union, and
the European Union will make the necessary adjustment, and the United States can
verify it. If the United States protests that this information (which relates to EU
firms) is "confidential" then the European Union would be more than happy to
conclude special confidentiality procedures addressing the US concerns. It is not
the European Union that is withholding these documents from the Arbitration
Panel, but the United States, which is in sole possession of them. And it is the
United States that has the burden of proof in this case.

49. The United States appears to accept that it has the burden of proof in this case, and
indeed it would be very difficult if not impossible for the United States to
overcome the existing case law on that question. However, instead of adducing to
the Arbitration Panel the only evidence that could conceivably be relevant to its
argument, the United States chooses to provide the Arbitration Panel with further
copies of Section 129 re-determinations previously made with respect to certain
original investigations. Evidently, these documents do not relate to the relevant
measures in this arbitration panel proceeding. The European Union does not agree
that the United States, having the burden of proof, and having in its sole
possession all the relevant documents, should be free to unilaterally decide to
refuse to disclose the relevant documents to the Arbitration Panel, replacing them
with irrelevant documents that the United States perceives to be to its advantage.

50. Finally, and in any event, the European Union considers these documents to be not
only manifestly inadequate and irrelevant, but also manifestly unrepresentative.
That is because all of these documents relate to model zeroing, whereas all of the
measures in this arbitration panel proceeding relate to or rely upon simple zeroing.

suspension proposed by Antigua is "equivalent" to the level of nullification or impairment of its benefits.
Our starting point, in this determination, must be Antigua's proposed level of suspension").
As is very well known, as a general rule, simple zeroing artificially inflates the dumping margin to a far greater extent than model zeroing. That is because in model zeroing it is at least the case that, within each model, a weighted average to weighted average comparison is made (that is, within each model, there is no zeroing). The zeroing only occurs when the intermediate results for each model are combined, but this combination does not re-introduce zeroing within each model category. Simple zeroing, on the other hand, always captures the full amount of zeroing conceivably possible based on a given data set. In these circumstances, the European Union is at a loss to understand on what possible basis the United States might suppose that the calculation could fairly be done on the basis of the data submitted by the United States. This is not a "reasonable proxy": it is manifestly deficient, self-serving, biased and unreasonable.

51. The United States assertions are particularly disconcerting because several of the relevant measures in this case involve sunset reviews (in particular Cases 7, 8, 14, 18, 19, 22, 23, 24, 28, 29, 30 and 31). The European Union recalls that a sunset review involves an enquiry into whether dumping or injury is likely to continue or recur if the measure would be terminated, and that in such analysis all of the relevant information including the relevant dumping margins must be taken into account. In fact, all of the relevant measures in this arbitration panel, including revised non-zeroed dumping margins, are potentially relevant in subsequent proceedings. Just as, in an original investigation, re-determination of the non-zeroed dumping margin and volume of dumping imports would necessitate review and if necessary revision of the injury determination. The European Union is therefore somewhat shocked by the apparent US assumption that re-determining a non-zeroed dumping margin is necessarily an end to implementation and hence an appropriate staring point for this Arbitration Panel's assessment. That is manifestly incorrect. Thus, in order to implement correctly the United States must first re-calculate without zeroing, but it must then go on to review and if necessary revise all other determinations dependent upon the corrected WTO inconsistent determination.

40 US Written Submission, para. 57.
52. This was also the explicit conclusion of the Compliance Panel in the present dispute. The Compliance Panel found that the United States acted inconsistently with Articles 3.1, 3.2 and 3.5 of the Anti-Dumping Agreement by maintaining some anti-dumping duty orders following the Section 129 Determinations. In particular, the Compliance Panel considered that, in view of the consequent changes in the volume of dumped imports following the recalculation of dumping margins without zeroing in the Section 129 determinations, the United States failed to make a determination of injury based on positive evidence of the volume of dumped imports. The United States appears to be ignoring these findings.

53. In light of these observations, and returning to the US Written Submission, the European Union recalls that the United States argues that "... the appropriate inquiry in this arbitration ... is the impact of the use of zeroing on the AD duties ...". If that is true, it would appear that the United States, which has the burden of proof, has nevertheless decided to withhold from this Arbitration Panel the information, in the sole possession of the United States, necessary for this Arbitration Panel to carry out such assessment.

54. The United States further complains that "the EU makes no attempt to determine what the change in antidumping duty rates in effect would have been absent zeroing". The European Union could agree that if a party is under an obligation to adduce evidence in its sole possession, but fails to do so, that would be relevant to the Arbitration Panel's assessment. Unfortunately for the United States, in making this statement, the United States appears to have overlooked the fact that it is the United States and not the European Union that has the burden of proof in this case. Furthermore, the United States appears to ignore that the determination of the duty rate without zeroing is only one step towards full compliance.

55. Finally, the United States asserts that its approach is "as accurate as possible", but does not explain why, although it is possible for the United States to adduce some (irrelevant and biased) evidence, it is "impossible" for the United States to adduce the only evidence that might be relevant to the US argument.

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42 US Written Submission, para. 4.
D. The European Union is entitled to use publicly available US HTSUS trade data as a reasonable proxy, as opposed to non-public, non-evidenced and non-verified CBP data

56. The United States argues that the European Union is not entitled to use publicly available US HTSUS trade data. The United States asserts that by doing so the European Union captures "a significant amount" of merchandise included within the HTSUS headings but not the written description of the product. According to the United States, this is the case for "most" of the measures. The United States refers, by way of example, to Pasta and Stainless Steel Sheet and Strip in Coils. The United States also argues that there are "additional instances" in which particular exporters have been excluded from the measure, referring by way of example to the measure relating to Pasta. Finally the United States argues that "most rates" based on adverse facts available do not involve zeroing.\(^{43}\) Instead, the United States argues that the Arbitration Panel must rely on CBP data. However, the United States does not provide any evidence in this respect, but merely a table apparently prepared for the purposes of these proceedings, setting out in tabular form the amounts asserted by the United States.\(^{44}\)

57. The European Union disagrees with the various arguments advanced by the United States and invites the Arbitration Panel to use the publicly available US HTSUS data as a reasonable proxy for the purposes of the calculation.

58. The European Union recalls that the United States has the burden of proof in these proceedings and that it has adduced no evidence in support of its assertions. The table at "Exhibit" US-16 is not evidence, but simply contains numerical assertions in tabular format. Neither the European Union nor the Arbitration Panel is in any position to verify such information. By contrast, the US HTSUS data, which emanates from the United States itself, is publicly available, and has the great merit that it has not been prepared specifically for the purposes of the present proceedings.\(^{45}\)

\(^{43}\) US Written Submission, paras 97 to 102 (with respect to the first and second EU alternatives).
\(^{44}\) US Written Submission, paras 73 to 75 and "Exhibit" US-16 (with respect to the US proposal).
\(^{45}\) Exhibit EU-3 (source: http://dataweb.usitc.gov).
59. The US objections to the use of the US's own HTSUS data are both unsubstantiated and unfounded. In the first place, the United States confines itself to making generalised assertions such as "a significant amount" and "most" and "additional instances" and "most rates", but neither explains precisely what it means by such statements not supports such assertions with specific references to evidence. This approach is simply manifestly inadequate for a Member to discharge its burden of proof. Furthermore, the European Union has made adjustments were necessary by excluding HTSUS subheadings which, to its best knowledge, are not subject to anti-dumping duties, even if they are mentioned in the Anti-Dumping Order. Moreover, contrary to what the United States asserts, the European Union did not assume that imports from all exporters under anti-dumping orders were subject to zeroed anti-dumping duties. In this respect, none of the duty rates listed in Exhibit EU-2 was based on adverse facts available and, thus, the entire volume taken into account must be considered as subject to zeroed anti-dumping rates.

60. The European Union provides the Arbitration Panel with a table demonstrating the reasonable correspondence between the descriptive text associated with the relevant HTSUS headings and the description of the products concerned in the measures at issue. The table shows the HTSUS description both at the 10-digit level (used on most measures at issue) and at the 8-digit level (used with respect to Pasta and Granular Polytetrafluorethylene). In truth, the US HTSUS headings provide the best available and most convenient proxy for the product subject to investigation, which is precisely why they are included in the measures themselves in the first place. The European Union respectfully submits that what the United States itself considered to be a reasonable proxy when it adopted the measures in question may continue to be considered a reasonable proxy for the purposes of these proceedings. Even in its own Written Submission, when it comes to the

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46 See Cases 29, 30 and 31 (Ball Bearings from France, Italy and the United Kingdom), where the European Union took 8 out of the 54 HTSUS subheadings listed in the Anti-Dumping Order (Exhibits EU-2, EU-3 and EU-4). This reflects the USITC Report on Certain Bearings from China, France, Germany, Italy, Japan, Singapore, and the UK of August 2006 (FR 3876), which considered ball bearings and parts thereof to be primarily classified "… under the following HTS subheadings: 8482.10.10, 8482.10.50, 8482.80.00, 8482.91.00, 8482.99.05, 8482.99.35, 8483.20.40, and 8483.20.80."

47 Exhibit EU-4 (source: http://dataweb.usitc.gov and the measures and links provided in Exhibit EU-7).
question of substitution elasticities, the United States expressly argues that HTSUS provides "estimates … closely related to the products in this dispute".  

E. The European Union is entitled to use annual 2007 trade data as a reasonable proxy for determining observed trade at the end of the reasonable period of time

61. The United States argues that the European Union is not entitled to use annual 2007 trade data. According to the United States, this is not representative of the potential effects going forward. The United States has used a three year period (2007 to 2009) in its proposal.

62. The European Union recalls that the complaining Member alone has the sole right to determine the nature of the countermeasure, this being a matter outside the Arbitration Panel's jurisdiction. In the first EU alternative, the European Union has chosen a countermeasure in the nature of a prohibitive tariff (such as 100 %), which is a common approach in past cases. The idea is to apply such prohibitive tariff to a certain value of observed trade from the United States, so as to stop it. That in turn necessitates identifying the observed value of trade from the United States to which the prohibitive tariff will be applied. In light of the equivalence rule, that in turn is what necessitates identification of the trade lost to the European Union as a result of the WTO inconsistent measure. The European Union does not set out to calculate the lost trade, but to observe it, which the European Union believes is its right as an integral part of the design or nature of the countermeasure. We do this by comparing the trade observed immediately before the WTO inconsistent measure was imposed (adjusted to take account of the observed growth in world trade over the relevant period) and the trade observed at the end of the reasonable period of time (10 April 2007).

63. Thus, in principle, we are "taking a photograph" on 10 April 2007. We consider that it is our right under the DSU not to look any further into the future than the end of the reasonable period of time. It is by reference to this moment in time that

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48 US Written Submission, para. 137.
49 US Written Submission, paras 103 to 105 (with respect to the first and second EU alternatives) and paras 71 to 72 (with respect to the US proposal).
a multilateral determination that the United States has failed to comply has been made, in the context of compliance proceedings initiated under Article 21.5 of the DSU. As already stated, if the United States wishes to argue that it has subsequently complied, in whole or in part, then it is for the United States to request a compliance panel.

64. Further, because, when it comes to applying our countermeasure, we will have to select US products with a certain trade value, and because such data is generally only publicly available on an annual basis, it is part of the design and nature of our countermeasure that it will be applied to an equivalent value of US trade expressed on an annual basis (with the first year naturally also including the amount accumulated between the end of the reasonable period of time and the implementation of the countermeasure). It is for this reason, and this reason alone, that in observing the EU trade lost as a result of the WTO inconsistent measure we have used annual data as a reasonable proxy for the moment immediately preceding imposition of the measure; annual data as a reasonably proxy for the end of the reasonable period of time (10 April 2007); and annual data to observe growth in world trade over the relevant period.

65. Thus, these decisions flow, in effect, from the design and nature of our countermeasure, and thus fall outside the jurisdiction of this Arbitration Panel. In any event, we believe that they are objective, unbiased, permissible and reasonable, and thus that there is no reason for this Arbitration Panel to disturb them.

66. The European Union has no idea why the United States might be proposing to the Arbitration Panel to use data from 2009, other than that it appears from "Exhibit" US-16 that the United States might consider this to its advantage in this particular case. However, there is nothing about 2009 data that is in any way "representative" of the position prevailing at the end of the reasonable period of time; and in any event this has nothing to do with observing trade at that time, and does not square with the design and nature of the countermeasure.

67. For these reasons, the European Union invites the Arbitration Panel to reject the US submissions with respect to this matter.
F. The United States adduces no evidence to substantiate its speculative assertions about observed trade from the rest of the world to the United States between the imposition of the measure and the end of the reasonable period of time

68. The United States criticises the EU's presentation of observed growth in world trade over the relevant period.\textsuperscript{50} \textsuperscript{51} However, the United States, having the burden of proof in this case, provides no evidence in support of its assertions, and is now precluded from doing so.\textsuperscript{52} The US assertions can and should therefore be disregarded by the Arbitration Panel.

69. In any event, it should be noted that the rest of the world element of the calculation is based on actual past data, showing a trend on which it is reasonable to extrapolate the volume of trade that would have been there without the WTO inconsistent measure. The United States criticises the EU approach for leading to "spurious results", referring to Certain Stainless Steel Plate in Coil from Belgium. In this respect, the European Union considers the examination of the rest of the world as a reasonable proxy to observe trade lost, even though in one particular case such observation led to a negative result. Such a negative amount (i.e., -4,664), which in turn implies the conclusion that there was no observed trade lost in that case, was fully deducted from the total observed trade loss of all the measures listed in Exhibit EU-2. Once again, by suggesting rest of the world data as a reasonable basis for estimate and deducting any negative amount in full, the European Union has been more than reasonable, and there is no reason for the Arbitration Panel to disturb the EU calculations.

G. The European Union is entitled to include basket 2 (reverse charge), on the basis of a 50 % pass-through rate and 10 % profit margin

\textsuperscript{50} Exhibit EU-3.
\textsuperscript{51} US Written Submission, paras 110 to 114.
\textsuperscript{52} See Section VI of this EU Written Submission.
The United States argues that the inclusion of a reverse charge is "inappropriate" and complains that the European Union has not adduced any evidence in support of the 50% pass-through rate and 10% profit margin.53

With respect to the inclusion of a reverse charge, the United States is again attempting to re-argue matters that have already been decided by the DSB. The European Union refers in this respect to the findings of the Compliance Panel Report and Appellate Body set out in the EU Methodology Paper.54 Evidently, the European Union is not here attempting to "capture additional trade loss",55 but simply to account for that part of the duty imposed by the WTO inconsistent measure that is born directly by the firm, rather than being passed on to consumers, as we explain in our Methodology Paper.56

With respect to the evidence, the European Union is not obliged to supply evidence as part of its Methodology Paper, but does so now in accordance with the Working Procedures.57

With respect to the US repeated assertion that these figures are "arbitrary",58 the European Union finds it interesting to contrast this with the US assertion that the US proposal is the "proper methodological approach".59 It seems that the United States has the pretension to instruct the Arbitration Panel as to what is the one single correct way of doing the calculation and that anything else is "arbitrary".

As we have already outlined above, the truth is rather more subtle than that. We do accept, for example, that it is not easy to estimate a pass-through rate. In the particular circumstances of this proposed countermeasure, however, as a simple matter of logic, it is impossible to avoid doing so, and the estimate will necessarily have to be somewhere between zero and 100%. All other things being equal, we do not see why the median point would not provide a reasonable and permissible approach.

53 US Written Submission, paras 115 to 118.
54 EU Methodology Paper, paras 11, 12 to 13, 14, and 15 to 16.
55 US Written Submission, para. 115.
56 EU Methodology Paper, paras 35 to 37.
57 Exhibit EU-5.
58 US Written Submission, paras 116 and 117.
59 US Written Submission, para. 29.
75. Similar comments apply with respect to the proposed 10 % profit margin. The European Union has compiled a table based on publicly available information relating to the companies subject to the relevant measures and provided that to the Arbitration Panel. In all the circumstances of the case, and based on the evidence, we believe that such an estimate would be reasonable and permissible.

H. \textit{The first and second EU alternatives are based on countermeasures of a different nature and a different conception of nullification or impairment and thus equivalence and are therefore not comparable, the US comments in this respect being irrelevant.}

76. The United States argues that the Arbitration Panel should reject the first EU alternative because it is allegedly not consistent with the second EU alternative.\textsuperscript{60}

77. As will become further apparent from the discussion of the second EU alternative below, the first and second EU alternatives are based on countermeasures of a different nature and a different conception of nullification or impairment and thus equivalence and are therefore not comparable. The US comments in this respect are thus irrelevant.

78. The first EU alternative flows from the selection of a countermeasure the design and nature of which is the imposition of a prohibitive tariff on an equivalent observed trade loss. The second EU alternative, however, in a first step, does not concern itself with trade loss. Rather, the design and nature of the countermeasure is an equivalent \textit{ad valorem} tariff on an equivalent trade flow – at a minimum the trade flow subsisting at the end of the reasonable period of time (10 April 2007). This is then adjusted upwards to take account of the trade that would exist at the end of the reasonable period of time absent the WTO inconsistent measure, and in this specific context the trade loss is calculated using substitution elasticities rather than observed. Once again, as will be further explained below, the calculated single rate of duty is a reasonable estimate and probably conservative, leading to a conservative estimate of lost trade. This results simply from the different methodologies and the nature of the second EU alternative, and has no bearing on the validity of the first EU alternative.
I. The United States does not challenge any other aspect of the first EU alternative or make any other claim with respect to it, and is now precluded from doing so.

79. The United States does not challenge any other aspect of the first EU alternative or make any other claim with respect to it, and is now precluded from doing so. Specifically, the United States does not contest or adduce any evidence with respect to: the accuracy (as opposed the applicability) of the HTSUS data used in the calculation for year n-1, the year 2007 and the rest of the world; and the accuracy of the duty rate applicable in 2008 and the corresponding estimated amount of duty paid. These aspects of these matters are therefore no longer within the Arbitration Panel's terms of reference.

VIII. SECOND EU ALTERNATIVE: EQUIVALENT AD VALOREM TARIFF ON EQUIVALENT TRADE

A. The United States does not claim that the principles and procedures set forth in Article 22.3 of the DSU have not been followed or that the proposed suspension of concessions or other obligations is not allowed under the relevant covered agreements.

80. The United States does not claim that the principles and procedures set forth in Article 22.3 of the DSU have not been followed or that the proposed suspension of concessions or other obligations is not allowed under the relevant covered agreements. These matters are not therefore in dispute between the Parties, and are outside the Arbitration Panel's jurisdiction.

B. Measures to be included in the calculation

81. The European Union refers to the above discussion relating to the first EU alternative. The Arbitration Panel may also note that Cases 1 and 6 are not included in the second EU alternative because the second EU alternative does not...
concern itself with the manner in which the relevant duty would be divided in practice between consumers and firms.

C. The European Union is entitled to calculate the suspension of concessions or other obligations by reference to the measures, given, inter alia, the US failure to adduce to the Panel the evidence in the sole possession of the United States that would demonstrate the exact duty without zeroing at the end of the reasonable period of time.

82. The United States argues that the European Union erroneously used the entire duty rate applicable on 10 April 2007 in order to calculate the equivalent ad valorem tariff. The European Union refers to the above discussion relating to the first EU alternative. The Arbitration Panel may also note that, in the first step of the second EU alternative, there is no counterfactual. Thus, the European Union takes the anti-dumping duty rates applied by the WTO inconsistent measures at the end of the RPT (10 April 2007) and applies an equivalent rate to an equivalent amount of 2007 trade. It is thus simply a matter of applying an equivalent ad valorem rate to (at least) an equivalent trade flow at the end of the reasonable period of time (10 April 2007). This nicely illustrates the erroneous nature of the US argument that there must be a counterfactual, and that such counterfactual must assume a certain limited means of compliance (what the duty would be without zeroing).

83. The need for a counterfactual in previous cases emanated from the nature of the countermeasure chosen, in the form of a prohibitive tariff. In order to examine whether the proposed level of suspension of concession was equivalent to the level of nullification or impairment, it was then necessary to examine the trade lost by reference to a situation where the WTO inconsistent measure would fully comply with the covered agreements. In that context, it appears useful to use a counterfactual to estimate the trade loss caused by the WTO inconsistent measure. However, in a situation where the nature of the countermeasure aims at establishing an equivalent tariff on an equivalent trade flow, the arbitration panel's assessment is limited to examining (1) whether the suggested countermeasure is

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64 US Written Submission, paras 121 – 131.
65 Paragraphs 40 to 54 of this EU Written Submission.
equivalent to the WTO inconsistent measure (i.e., whether 12.08% is equivalent to the duty rates of the WTO inconsistent measures), and whether (2) the trade to which the countermeasure will be applied is equivalent to that to which the WTO inconsistent measures apply at the end of the reasonable period of time.

D. The European Union is entitled to use publicly available US HTSUS trade data as a reasonable proxy, as opposed to non-public, non-evidenced and non-verified CBP data.

84. The European Union refers to the above discussion relating to the first EU alternative.\(^\text{66}\)

E. The European Union is entitled to use annual 2007 trade data as a reasonable proxy for determining observed trade at the end of the reasonable period of time.

85. The European Union refers to the above discussion relating to the first EU alternative.\(^\text{67}\) The European Union finds the US arguments particularly inapposite in the context of the second EU alternative, since in the first step of the second EU alternative the European Union is not attempting to capture lost trade. We are merely using a countermeasure the design and nature of which is the imposition of an equivalent ad valorem tariff on an equivalent trade flow at the end of the reasonable period of time (10 April 2007), expressed in annual terms.

F. The European Union is entitled to apply an equivalent ad valorem tariff to, at least, the equivalent trade at the end of the reasonable period of time, and, in fact, the trade that would subsist at the end of the reasonable period of time, absent the WTO inconsistent measures.

86. The United States argues that the countermeasure in the second EU alternative "by its very nature" overstates the level of nullification and impairment. The United States asserts that "trade loss" is the only metric by reference to which equivalence can be assessed. According to the United States, absent knowledge of the goods to

\(^{66}\) Paragraphs 56 to 59 of this EU Written Submission.

\(^{67}\) Paragraphs 61 to 66 of this EU Written Submission.
which the countermeasure would be applied, an assessment of equivalence is impossible.\(^68\)

87. The European Union disagrees. The first point is that, in a first step, the second EU alternative does not address itself to the question of trade loss. It merely applies an equivalent *ad valorem* tariff to an equivalent trade flow at the end of the reasonable period of time (10 April 2007). Thus, it does not concern itself with the effects of such tariff. It does not concern itself with how the tariff might be borne in part by the firm and passed on in part to consumers. Nor does it concern itself with substitution elasticities. Thus, it is in the design and nature of this countermeasure that the nullification or impairment simply consists of the application by the United States of a WTO inconsistent tariff to a certain EU trade flow; and it is in these terms that equivalence is conceived. The logic flows from the nature of the countermeasure, which dictates how the notion of equivalence is understood, and how in turn the notion of the presumed nullification or impairment is understood.

88. The European Union believes that it has a right under the DSU to conceive of a countermeasure in these terms, and that this choice of the nature of the countermeasure is outside this Arbitration Panel’s jurisdiction. Contrary to what the United States argues, there is nothing in the DSU that requires the notion of nullification or impairment to be understood only in terms of trade loss.\(^69\) It can perfectly well be understood in the terms outlined in the preceding paragraph.

89. One of the great merits of this approach is that it very simple, easy to evidence, and dispenses with the need for any counterfactual. That is, it dispenses with the need for any hypothetical reasoning – a point that past and recent arbitration panels have found particularly problematic. It thus has the great merit of being much less subjective and far more objective. Consequently, it makes it much easier for an arbitration panel to ensure that it complies with its obligation under Article 11 of the DSU to make an objective assessment.

\(^{68}\) US Written Submission, paras 132 to 133.

\(^{69}\) Arbitration Panel Report, *US – Offset Act ("Byrd Amendment") (Article 22.6 DSU – US)*, para. 3.70 ("We do not agree with the United States that nullification or impairment is to be limited in all instances to the..."")
90. With this in mind, the United States complaint that absent further knowledge there is no way to calculate equivalence is most remarkable. Although the United States does not quite expressly say it, if one studies these two sentences and reflects, it is immediately apparent that the only thing the United States can possibly be referring to is the fact that the European Union has not yet decided upon or disclosed the list of products to which the countermeasure will apply. In other words, what the United States appears to be suggesting is that because the elasticities associated with the goods subject to the WTO inconsistent measure might be different from the elasticities associated with the goods subject to the countermeasure, there is no way to assess equivalence. In this respect, the European Union observes that in EC – Hormones the arbitration panel rejected a similar request for a specific product list from the United States in order to determine equivalence, noting that "all of these qualitative aspects of the proposed suspension touching upon the 'nature' of the concessions to be withdrawn (…) fall outside the arbitrators' jurisdiction". The US suggestion is also remarkable because the US's own position on this matter is that the requesting Member under Article 22.2 of the DSU does not, at the time of the request or during the arbitration panel, need to disclose the list of products to which the countermeasure will eventually apply. Furthermore, it is well known that the United States believes that it has the right under the DSU to "carousel" (a matter with respect to which other Members have had cause to complain). And yet, on a moment's reflection, one can see that the argument now advanced by the United State would amount to an admission that the nullification or impairment caused by a carousel would by definition exceed the nullification or impairment associated with the WTO inconsistent measure.

direct trade loss resulting from the violation. We agree with the Requesting Parties that the term "trade effect" is found neither in Article XXIII of GATT 1994, nor in Article 22 of the DSU"").

70 US Written Submission, para. 133, final two sentences.


72 Arbitration Panel Report, EC – Hormones (Article 22.6 DSU – EC), footnote 13 ("The US stated that there was nothing in the DSU to the effect that such a list should be attached to a request for authorization to suspend concessions (Minutes of the DSB meeting of 19 April 1999, WT/DSB/M/59)").
91. Assuming that the United States is not, in fact, modifying its position that there is no need for prior disclosure of the list of products and that carousel is WTO consistent, then there is no basis for the United States to complain about the design and nature of the countermeasure in the second EU alternative. Since we may never know and are not legally required to enquire into the question of what the effects of a countermeasure might be, so we may never know and are not legally required to enquire into what the trade loss caused by a WTO inconsistent measure might be, provided that we design a countermeasure that ensures equivalence, in the terms set out in the EU Methodology Paper.

92. Finally, in a second step, the European Union calculates what trade would be absent the WTO inconsistent measure. There is no double counting here. All other things being equal, the application of the equivalent ad valorem tariff to the higher amount will cause trade volumes to fall to the lower amount (but not be eliminated), and thenceforth the ad valorem countermeasure will mirror the WTO inconsistent duty applied at the end of the reasonable period of time (10 April 2007) until such time as the United States asserts that it has complied and, to the extent necessary, convenes a compliance panel in order to substantiate such assertion. However, we do not concern ourselves, and are not legally required to concern ourselves, with what actually transpires. We simply apply an equivalent countermeasure to induce compliance, and wait for the United States to comply.

G. The European Union is entitled to use GTAP as opposed to World Bank elasticities

93. The United States argues that the calculation must be done with World Bank import demand elasticities as opposed to GTAP substitution elasticities.73 In addition, the United States complains that weighting the GTAP substitution elasticities 70/30 in the calculation is arbitrary.74

94. The European Union disagrees. As the United States itself points out in its submission, the GTAP substitution elasticities are particularly suitable when the

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73 Exhibit EU-6.
imports subject to the WTO inconsistent measure are substitutes for domestic goods or other imported goods, rather than complements. And yet, as the United States is itself driven to accept, neither Party in this dispute argues that the imports in question are complements to domestic or other imported products. It follows that, by its own terms, the US Written Submission confirms that the use of GTAP substitution elasticities is appropriate.

95. Furthermore, GTAP elasticities are the most widely used data for trade analysis purposes. They are compiled and constantly updated by a global network of researchers, whereas the World Bank estimates represent a one-off effort by a single institution. Presumably for this reason, the United States does not contest the reliability and accuracy of the GTAP data.

96. The United States is correct to point out that the GTAP elasticities consist of two sets of elasticities concerning, on the one hand, substitution between domestic and imported goods and, on the other hand, substitution between different imports. By contrast, as the United States is also correct to point out, the World Bank elasticities relate to import elasticities, that is, they describe the change in imports resulting from a change of the applicable duty rate for a given product. However, the disputed antidumping measures do not relate to a general change in duty rates for the affected products, but to a targeted measure against individual importers. The nullification and impairment thus comprises not only the resulting decrease in imports by the US, but also the fact that EU importers are bound to lose export sales to competing suppliers unaffected by the illegal measures. The World Bank import elasticities are thus unsuitable to estimate the level of nullification and impairment when the duties in question are targeted only against individual importers and not against all imports in a given product category. Only the GTAP elasticities can capture closely, from a methodological point of view, the nullification and impairment resulting from the illegal antidumping measures.

97. It is true, in the absence of quantitative evidence, that the exact weighting scheme between the two GTAP elasticities requires an element of qualitative judgement.

74 US Written Submission, paras 134 to 137 (with respect to the second EU alternative) and paras 66 to 70 (with respect to the US proposal).

75 US Written Submission, footnote 82.
The extent to which the EU exporters are likely to lose sales to other importers as opposed to US domestic producers depends on the extent to which the relevant products are close or less close substitutes. The 70:30 ratio applied in the methodology paper is guided, firstly, by the observation that the products under review are only moderately differentiated, that is, exports from different sources are likely to be close substitutes and, secondly, by the fact that the measures are targeted at individual countries only, leaving suppliers of close substitutes unaffected. This leads the EU to conclude that substitution between rival exporters is the dominant factor driving the loss of exports by the targeted exporters.

98. In short, with respect to the 70/30 weighting of the GTAP substitution elasticities, this is one of those areas in which the European Union accepts that finding a precise figure is problematic. However, in all the circumstances of this case, and having regard to the preceding observations, the European Union submits that its proposal, which is based on the reasonable assumption that other imports are slightly more likely to substitute blocked imports, is reasonable and permissible.

H. A product price change is not required in the second EU alternative

99. The United States argues that a product price change must be used in the second EU alternative.\(^{76}\)

100. However, in the second EU alternative a product price change is not necessary. That is because, as the United States acknowledges, expressly and by implication, it has a negligible impact on the calculation. Bearing in mind that the second step of the second EU alternative is based on certain (reasonable) estimates or proxies, it is not necessary to introduce the "price change" element, which would simply needlessly complicate the calculation, without producing any significant result.

I. The United States does not challenge any other aspect of the second EU alternative or make any other claim with respect to it, and is now precluded from doing so

\(^{76}\) US Written Submission, paras 138 to 139.
101. The United States does not challenge any other aspect of the second EU alternative or make any other claim with respect to it, and is now precluded from doing so. Specifically, the United States does not contest or adduce any evidence with respect to: the accuracy (as opposed the applicability) of the HTSUS data used in the calculation for the year 2007; the accuracy of the duty rates applicable on 10 April 2007 or the means by which they are expressed as a single rate; and the accuracy (as opposed to the applicability) of the GTAP elasticities. These aspects of these matters are therefore no longer within the Arbitration Panel's terms of reference.

IX. CONSISTENT WITH THE CASE LAW, THE PANEL IS REQUESTED TO INCREASE THE LEVEL OF THE COUNTERMEASURE AUTHORISED BY 20%

102. Consistent with the case law,\(^{77}\) the Panel is requested to increase the level of the countermeasure authorised by 20\%, also in order to reflect the circumstances of the US non-compliance.\(^{78}\) The European Union is aware that the past approach related to a prohibited subsidies context. However, the European Union would point out that, given the sustained and repeated non-compliance by the United States, it is inevitable that the damage caused to EU firms in fact substantially exceeds the countermeasures proposed by the European Union. In other words, as they stand, the proposed countermeasures are clearly an underestimate. Whilst it is difficult to estimate the extent of such additional damage, the European Union submits that, in all the circumstances, the Arbitration Panel may be guided by the reasonable approach adopted in prior cases. This may go some way to ensuring that the suspension of concessions or other obligations more reasonably approaches the actual loss and thus the equivalence standard.

X. "THE PROPER METHODOLOGICAL APPROACH" ACCORDING TO THE UNITED STATES

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\(^{77}\) Footnote 10 of this EU Written Submission.

\(^{78}\) EU Methodology Paper, paras 1 to 5.
103. Almost all aspects of what the United States terms "the proper methodological approach" are already dealt with in the preceding observations. Rather than repeat what we have already said, we refer back to our prior comments:

- all of the measures are properly included in the calculations;\(^{79}\)

- the European Union is entitled to calculate the suspension of concessions or other obligations by reference to the measures, not least given the US failure to adduce to the Panel the evidence in the sole possession of the United States that would demonstrate the exact duty without zeroing at the end of the reasonable period of time;\(^ {80}\)

- the European Union is entitled to use publicly available US HTSUS trade data as a reasonable proxy, as opposed to non-public, non-evidenced and non-verified CBP data;\(^ {81}\)

- the European Union is entitled to use annual 2007 trade data as a reasonable proxy for calculating observed trade at the end of the reasonable period of time;\(^ {82}\)

- the European Union is entitled to use GTAP as opposed to World Bank elasticities;\(^ {83}\)

- the European Union is entitled to observe trade loss (first EU alternative, basket 1) rather than make a hypothetical calculation of trade loss;\(^ {84}\)

- the European Union is entitled to conceive of a countermeasure in terms of a reverse charge (first EU alternative, basket 2);\(^ {85}\) and

- the European Union is entitled to conceive of a countermeasure in the nature of an equivalent ad valorem duty on an equivalent trade flow (second EU alternative).\(^ {86}\)

104. One element of the "the proper methodological approach" according to the United States that does not appear in the first or second EU alternatives is the "price change"\(^ {87}\) and a further comment on that matter might therefore be of assistance to the Arbitration Panel. As indicated above, that element does not feature in the first

\(^{79}\) See paras 30 to 39 of this EU Written Submission.

\(^{80}\) See paras 40 to 54 of this EU Written Submission.

\(^{81}\) See paras 56 to 59 of this EU Written Submission.

\(^{82}\) See paras 61 to 67 of this EU Written Submission.

\(^{83}\) See paras 93 to 98 of this EU Written Submission.

\(^{84}\) See paras 61 to 67 of this EU Written Submission.

\(^{85}\) See paras 70 to 75 of this EU Written Submission.

\(^{86}\) See paras 86 to 92 of this EU Written Submission.
EU alternative because we are observing rather than calculating trade loss, which we believe is our right. Furthermore, it does not appear in the second step of the second EU alternative because, as the United States acknowledges, expressly and by implication, it has a negligible impact on the calculation. 88

XI. SUSPENSION OF OBLIGATIONS UNDER THE DSU

105. The European Union is relieved to hear from the United States that it is not the intention of the United States that it will "never" implement the DSB recommendations and rulings in this case. 89 Perhaps this is progress of sorts. However, "never" is a long time. The European Union would equally appreciate any further indication from the United States as to a timeframe some time before "never" when the United States thinks it might be in a position to comply.

106. The European Union notes that the United States considers that the statement in the Federal Register is "directly contradicted" by statements made by the United States to the DSB. 90 The European Union, with substantial regret, can only agree.

107. The European Union is pleased to hear from the United States that it considers that recourse to the dispute settlement procedures in this case will be "fruitful", 91 and the European Union hopes and trusts that this shared understanding of the Parties will be reflected in the Arbitration Panel Report.

108. The European Union agrees that its request to suspend concessions or other obligations under the DSU is "unprecedented" 92 but believes that this is appropriate given the – fortunately for the time being - unprecedented nature of the US failure to comply in this case.

109. The European Union notes that the United States does not argue that the requested suspension of obligations is not allowed under the covered agreements, so there is

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87 US Written Submission, paras 61 to 65.
88 See paras 99 to 100 of this EU Written Submission.
89 US Written Submission, para. 142.
90 US Written Submission, para. 143.
91 US Written Submission, footnote 90.
92 US Written Submission, para. 145.
no dispute between the Parties on this issue, and it is outside the Arbitration Panel's terms of reference.

110. The DSB recommendations and rulings that have triggered these Article 22.6 Arbitration Proceedings are set out in the EU Methodology Paper. They do not relate to any of the proposed countermeasures. The European Union disagrees with the United States that the proposed countermeasure must have been the subject of DSB recommendations and rulings.93

111. As the European Union has stated, the proposed countermeasure would apply to goods, which are defined by the DSU as the same sector, and the EU request is therefore in this respect consistent with Article 23(3)(a) of the DSU.94

112. The European Union bases its request in the first place on Article 23(3)(a) of the DSU, and in any event considers that the reasons for its request are readily apparent from its Request to Suspend Concessions or Other Obligations.95

113. In making this request, the European Union is relying in the first place on the text of Article 23(3)(a) of the DSU, which clearly states that the request should relate to the same sector (as in this case, goods), but which does not require that it should relate to the same agreement. This contrasts with the explicit references to "the same agreement" and "another covered agreement" contained in subparagraphs (b) and (c) of that provision. The European Union is unable to find in the US Written Submission any argument capable of supporting the view that the Arbitration Panel should depart from the express textual terms and ordinary meaning of Article 23(3)(a). At no point does the United States refer to context or object and purpose, for example. That is perhaps understandable, given that the object and purpose in this case is to induce compliance and that would mitigate in favour of granting the EU request.

114. The European Union is just trying to save itself, the system, and the United States some time and money. After all, both Japan and Mexico already have "as such" findings against the methodology, the European Union was third party in those

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93 US Written Submission, paras 146 to 149.
94 US Written Submission, paras 152 to 153.
cases and *vice versa*, the nullification or impairment is presumed for all Members,\textsuperscript{96} and prompt compliance is also for the benefit of all Members.\textsuperscript{97} How many more times will it be necessary to convene panels and use their precious time and resources, as well as those of the Secretariat, not to mention the Appellate Body, in order to ascertain, despite US refusal to adduce relevant evidence, that 2 plus -2 equals zero, not 2? If the system is not informed by a bit of robust common sense, it will not well serve the interests of its Members for long.

XII. **THE NATURE OF THE COUNTERMEASURE SELECTED BY THE EUROPEAN UNION RELATES TO ALL THE RELEVANT MEASURES AND IS NOT NECESSARILY VARIABLE AND THIS MATTER IS OUTSIDE THE ARBITRATION PANEL'S JURISDICTION**

115. The United States argues that any countermeasure should relate to each order separately and that it should be varied as compliance occurs.\textsuperscript{98}

116. However, the nature of the countermeasures selected by the European Union in this case relates to all the relevant measures and the countermeasures are not necessarily variable, and this matter is therefore outside the Arbitration Panel's jurisdiction. It is the European Union's right to design the nature of its countermeasures by reference to the end of the reasonable period of time (10 April 2007). If the United States considers that it has since complied, in whole or in part, it is for the United States to bring an Article 21.5 compliance panel.

117. Naturally, the countermeasure calculation has been accumulating at least since the end of the reasonable period of time and will continue to accumulate *pro rata* until such time as the countermeasure would be applied. For example, if three years would have elapsed between the end of the reasonable period of time and the date on which the countermeasure would first be applied, then the first annual period would, for example, entitle to the European Union to a countermeasure of four times the annual amount, which would be reduced to the annual amount in the following year.

\textsuperscript{95} US Written Submission, paras 154 to 160.
\textsuperscript{96} DSU, Article 3.8.
\textsuperscript{97} DSU, Article 21.1.
US Written Submission, paras 161 to 162.
List of Exhibits

Exhibit EU-3 United States International Trade Commission, Interactive Tariff and Trade DataWeb (HTSUS) annual data for year n-1 and 2007 with respect to the relevant products and specifically:

Exhibit EU-3.1 Stainless Steel Wire Rod.
Exhibit EU-3.2 Stainless Steel Plate in Coils.
Exhibit EU-3.3 Stainless Steel Sheet and Strip in Coils.
Exhibit EU-3.4 Certain Cut to Length Carbon Quality Steel Plate.
Exhibit EU-3.5 Pasta.
Exhibit EU-3.6 Granular Polytetrafluorethylene.
Exhibit EU-3.7 Ball Bearings.
Exhibit EU-3.8 Certain Hot-Rolled Carbon Steel.

Exhibit EU-4 Table demonstrating the reasonable correspondence between the descriptive text associated with the relevant HTSUS headings and the description of the products concerned in the measures at issue.

Exhibit EU-5 Table summarising the average profit margin of companies subject to the relevant measures extracted from available public accounts or other documents.

Exhibit EU-6 GTAP 7 Data Base Documentation – Chapter 14: Behavioural Parameters, Thomas W. Hertel, Robert A. McDougall, Badri Narayanan G. and H. Aguiar.

Exhibit EU-7 (Provided only for the convenience of the Arbitration Panel): tables summarising the duties applicable on 10 April 2007 (Exhibit EU-7.1) and in 2008 (Exhibit EU-7.2), with links to all of the relevant Federal Register Notices, Issues and Decision Memoranda and relevant WTO DSB findings.