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

Methodology Paper
Submitted by the European Union

Geneva, 11 March 2010
Table of Contents

I. INTRODUCTION .............................................................................................................................................. 1

II. HISTORY OF THE DISPUTE .................................................................................................................................. 4
   A. THE ORIGINAL PANEL AND APPELLATE BODY REPORTS ........................................................................ 4
   B. THE AGREED REASONABLE PERIOD OF TIME FOR COMPLIANCE ......................................................... 4
   C. THE COMPLIANCE PANEL AND APPELLATE BODY REPORTS .................................................................. 4
      1. Cash deposit rates after the end of the RPT .................................................................................................. 5
      2. Final liquidations after the end of the RPT ............................................................................................... 6
      3. Case 1 (Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands) ...................................... 7
      4. Case 6 (Stainless Steel Wire Rod from Sweden) ....................................................................................... 7
      5. Case 31 (Ball Bearings and Parts Thereof from the United Kingdom) ................................................... 8
      6. "Section 129" re-determinations in Cases 2, 3, 4 and 5 (Stainless Steel Bar from France, Germany, Italy and the United Kingdom) .................................................................................................................. 8
      7. Sunset review in Case 19 (Certain Pasta from Italy) ................................................................................... 9
      8. Sunset reviews in Cases 28 (Stainless Steel Sheet and Strip in Coils from Germany), 29 (Ball Bearings and Parts thereof from France), 30 (Ball Bearings and Parts thereof from Italy) and 31 (Ball Bearings and Parts thereof from the United Kingdom) .......................................................................................................................... 9
   D. THE ARTICLE 22.2 DSU REQUEST BY THE EUROPEAN UNION FOR AUTHORISATION TO SUSPEND
      CONCESSIONS OR OTHER OBLIGATIONS AND THE REFERRAL OF THE MATTER TO THE PANEL PURSUANT TO
      ARTICLE 22.6 OF THE DSU .................................................................................................................................. 9

III. FIRST ALTERNATIVE: PROHIBITIVE TARIFF ON EQUIVALENT OBSERVED LOST TRADE ................................. 10
   A. THE EUROPEAN UNION SEEKS TO SUSPEND CONCESSIONS OR OTHER OBLIGATIONS UNDER THE GATT
      1994 AND THE OTHER AGREEMENTS LISTED IN ANNEX 1A OF THE WTO AGREEMENT (TAKEN AS A
      WHOLE) ....................................................................................................................................................... 10
   B. THE EUROPEAN UNION SEEKS TO SUSPEND CONCESSIONS OR OTHER OBLIGATIONS WITH RESPECT TO
      THE SAME SECTOR AS THAT IN WHICH THE PANEL OR APPELLATE BODY HAS FOUND A VIOLATION OR OTHER
      NULLIFICATION OR IMPAIRMENT: GOODS ............................................................................................... 11
   C. THE EUROPEAN UNION SEEKS TO SUSPEND CONCESSIONS OR OTHER OBLIGATIONS IN APPLICATION OF
      ARTICLE 22.3 AS A WHOLE AND IN PARTICULAR 22.3(A) OF THE DSU ...................................................... 11
   D. THE NATURE OF THE CONCESSIONS OR OTHER OBLIGATIONS TO BE SUSPENDED (THE "SUSPENDING
      MEASURE") .................................................................................................................................................. 11
      1. Trade effects: observed trade lost by the European Union as a consequence of that part of the amount
         imposed by the WTO inconsistent measure that results in increased prices and reduced trade volumes
         ..................................................................................................................................................................... 13
      2. Reverse charge: as regards that part of the amount imposed by the WTO inconsistent measure that is
         borne directly by the firm ............................................................................................................................ 14
   E. THE LEVEL OF SUSPENSION OF CONCESSIONS OR OTHER OBLIGATIONS IS LESS THAN OR EQUIVALENT TO
      THE LEVEL OF THE NULLIFICATION OR IMPAIRMENT ........................................................................ 14
   F. THE PROPOSED SUSPENSION OF CONCESSIONS OR OTHER OBLIGATIONS IS ALLOWED UNDER THE
      COVERED AGREEMENTS ................................................................................................................................. 14

IV. SECOND ALTERNATIVE: EQUIVALENT AD VALOREM TARIFF ON EQUIVALENT TRADE 15
   A. MUTATIS MUTANDIS ............................................................................................................................................. 15
   B. THE NATURE OF THE CONCESSIONS OR OTHER OBLIGATIONS TO BE SUSPENDED (THE "SUSPENDING
      MEASURE") .................................................................................................................................................. 15
   C. THE LEVEL OF SUSPENSION OF CONCESSIONS OR OTHER OBLIGATIONS IS LESS THAN OR EQUIVALENT TO
      THE LEVEL OF THE NULLIFICATION OR IMPAIRMENT ........................................................................ 16

V. SUSPENSION OF OBLIGATIONS UNDER THE DSU ......................................................................................................... 17
I. INTRODUCTION

1. There have now been 24 DSB reports confirming that, leaving aside the targeted dumping provisions, the zeroing methodology is WTO inconsistent, in all its forms, in all types of anti-dumping proceedings, as applied and as such. The following 20 WTO Members, including a number of developing or least-developed countries, have participated or are currently involved in proceedings relating to US zeroing as parties or third parties: Argentina; Brazil; Canada; Chile; China; Ecuador; Egypt; European Union; Hong Kong, China; India; Japan; Korea; Mexico; New Zealand; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; Turkey; Venezuela; and Viet Nam. Consistent with its obligation under Article 21.3 of the DSU the United States has repeatedly informed the DSB of its intention to implement the DSB's recommendations and rulings. Because of that repeatedly stated intention, the United States has repeatedly obtained a reasonable period of time in which to implement.  

---


2 See, for example: WT/DSB/M/213, 21 June 2006, Minute of DSB meeting of 30 May 2006 (with respect to US-Zeroing (EC)), paras 2 and 14: "The representative of the United States said that his delegation was able at the present meeting to inform Members that the United States intended to implement the DSB's recommendations and rulings. The United States would need a reasonable period of time in which to do so … The DSB took note of the statements, and of the information provided by the United States regarding its intentions in respect of implementation of the DSB's recommendations"; WT/DSB/M/226, 26 March 2007, Minute of DSB meeting of 20 February 2007 (with respect to US-Zeroing (Japan)), paras 34 and 42: "… the United States wished to state that it intended to comply in this dispute with its WTO obligations and would be considering carefully how to do so. The United States would need a reasonable period of time … The DSB took note of the statements, and of the information provided by the United States regarding its intentions in respect of implementation of the DSB's recommendations"; WT/DSB/M/251, 4 July 2008, Minute of DSB meeting of 2 June 2008 (with respect to US-Stainless Steel), paras 9 and 11: "… the United States simply wished to state that it intended to comply in this dispute with its WTO obligations and would be considering carefully how to do so. The United States would need a reasonable period of time for
2. By a notice published in its Federal Register the United States has announced that, with the exception of model zeroing in original investigations, the United States zeroing methodology will remain unchanged.4

3. The United States has previously made the following statement,5 with which the European Union agrees:

The United States delegation believes that an effective dispute settlement mechanism, which is seen to be both reliable and expeditious, is an essential element of a healthy, expanding international trading system. The present dispute settlement system of the GATT has performed reasonably well in a number of disputes; however, it has displayed conspicuous shortcomings in some cases, which have diminished its credibility and, with it, confidence in the larger institution -- the GATT.

The most obvious problem is that some disputes have not been resolved, perhaps partly because of inadequate panel reports or difficult rules in a few cases, but more often because one or more parties have been unwilling to allow a resolution. In addition, the process takes too much time. Partly this is again a problem of the attitude of parties; for example, a party whose measures are challenged will all too often claim the need for further consultations as a means of stalling. This occurs even when an issue has already been stalemated through lengthy informal and formal consultations, sometimes over a period of years. Delays also arise from the difficulty of finding willing, qualified panellists, haggling over terms of reference, and delaying tactics during a panel's work. The failure to resolve disputes expeditiously (or in some cases to act at all) leads to frustration, and diminishes respect not only for dispute settlement but for rights and obligations under the GATT.

Improvement of the GATT dispute mechanism, therefore, deserves high priority. But any attempt to improve the mechanism needs to be supported by a change in implementation … The DSB took note of the statements."; WT/DSB/M/266, 19 May 2009, Minute of DSB meeting of 20 March 2009 (with respect to US-Continued Zeroing), paras 56 and 59: "As provided in the first sentence of Article 21.3 of the DSU, the United States wished to state that it intended to comply in this dispute with its WTO obligations, and would be considering carefully how to do so. The United States would need a reasonable period of time … The DSB took note of the statements, and of the information provided by the United States regarding its intentions in respect of implementation of the DSB's recommendations.".

4 United States Federal Register, Vol. 71, No. 248, Wednesday December 27, 2006, page 77722, at page 77724: "Department's Position: In its March 6, 2006 Federal Register Notice, the Department proposed only that it would no longer make average-to-average in investigations without providing off-sets for non-dumped comparisons. The Department made no proposals with respect to any other comparison methodology or any other segment of an antidumping proceeding, and thus declines to adopt any such modifications concerning those other methodologies in this proceeding." (http://www.gpoaccess.gov/fr/) (last accessed 1 February 2010).

5 MTN.GNG/NG13/W/3, 22 April 1987, Communication from the United States, Comments from the United States Delegation at the first meeting of the Negotiating Group on Dispute Settlement, 6 April 1987.
attitude of contracting parties. Too often, dispute settlement in the GATT is viewed as a zero-sum contest in which for every winner there must be a loser. Disputing parties focus on the narrow issue at stake rather than their broader interests in an effective trading system. In truth, the failure to resolve disputes satisfactorily can be costly, not only to the disputants, but to innocent third parties as well. Successful dispute settlement, on the other hand, can benefit both the complaining party and the party whose actions gave rise to the complaint.

Improvements in the system and the attitude of governments toward the process of dispute settlement are not independent variables. Any process for settling disputes among sovereign States, however well designed, can be frustrated by a determined disputant. An effective process, however, can create an atmosphere of confidence leading to greater reliance by governments on that process in preference to situations in which problems fester or in which governments are led to unilateral actions.

The primary objective of dispute settlement should be to resolve disputes, and to do so expeditiously, fairly and in a manner that is consistent with the trade expansion objectives of the GATT. If we are all prepared genuinely to accept this objective, then we think we can move forward quickly in this area of negotiations. Reform will mean a better trading system for all contracting parties, not a trade-off among interests of different industries or countries. It is evident that many delegations have been giving considerable thought to the problems which have plagued the GATT dispute settlement process in recent years. For our part we will, prior to the next meeting of this Group, submit some proposals to improve the system. We hope other delegations will do so as well.

4. These facts are relevant in these proceedings. It is not that the European Union requests a suspension of concessions or other obligations that is punitive. All of the suspending measures will operate within the equivalence rule provided by Article 22.4 of the DSU.

5. However, in all the circumstances of this case, the Panel should take particular care to ensure that the burden of proof rests with the United States, in accordance with the established case law, particularly with respect to any non-zeroed rates and amounts; and accordingly that where appropriate the European Union can proceed on the basis of the information in its possession. In this respect, when it comes to the level of suspension of concessions or other obligations, and the making of reasonable estimates or assumptions, the Panel should pay particular attention to and be particularly receptive to the reasonable approach proposed by the European Union. Finally, the Panel should also take particular care to remain within its jurisdiction, and not address the nature of any of the suspending measures.
II. HISTORY OF THE DISPUTE

A. The original Panel and Appellate Body Reports

6. On 9 May 2006, by DSB action, the DSB adopted the Appellate Body Report[^6] and the Panel Report[^7] as modified by the Appellate Body Report in United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing").[^8] The Panel found that each of the measures listed in Cases 1 to 15 and the zeroing methodology as such were inconsistent with Article 2.4.2 of the Anti-Dumping Agreement[^9]. The as applied findings were not appealed by the United States and the as such finding was upheld by the Appellate Body.[^10] The Appellate Body further found that each of the administrative reviews in Cases 16 to 31 were inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[^11] The United States was recommended to bring these measures into conformity with the Anti-Dumping Agreement and the GATT 1994.[^12]

B. The agreed reasonable period of time for compliance

7. Pursuant to an agreement concluded between the Parties in accordance with Article 21(3)(b) of the DSU, the reasonable period of time for compliance expired on 9 April 2007.[^13]

C. The compliance Panel and Appellate Body Reports


[^6]: WT/DS294/AB/R.
[^7]: WT/DS294/R.
[^9]: Panel Report, US-Zeroing (EC), paras 8.1(a) and (c).
[^13]: WT/DS294/19, 1 August 2006.
[^15]: WT/DS294/RW.
– Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"): Recourse to Article 21.5 of the DSU by the European Communities.  

1. Cash deposit rates after the end of the RPT

9. With respect to cash deposit rates going forward after the end of the reasonable period of time, the Panel made the following findings:

"… the continued imposition of cash deposit requirements at rates calculated in the administrative reviews at issue in the original dispute or in subsequent administrative review would constitute a failure (omission) on the part of the United States to implement the DSB's recommendations and rulings, because of the use of zeroing in calculating the margin of dumping …

… in order to comply with the recommendations and rulings of the DSB, the United States had to ensure that any cash deposit rate applied after the end of the reasonable period of time in relation to one of the measures at issue in the original dispute was not one that derived from a margin of dumping calculated with zeroing, even where that cash deposit was established as a result of a subsequent review, and not a measure at issue in the original dispute. Concluding otherwise would mean that the United States is allowed to circumvent its obligation to bring its measures and action into conformity with those recommendations and rulings by the mere replacement of the cash deposits established in the measures challenged in the original dispute by subsequent ones established in administrative reviews in which zeroing was again used. …  

820 We recall that we have indicated above that a Member must, to implement the DSB's recommendations and rulings, ensure that actions it undertakes after the end of the reasonable period of time are consistent with its obligations under the DSB. The continuing requirement to provide cash deposits constitutes, in our view, such an action."17

10. The Appellate Body made the following findings:

"… we observe that the European Communities, in its appeal, and the United States, in its other appeal, have not appealed the findings the Panel made in relation to the application after the end of the reasonable period of time of cash deposits calculated with zeroing.  

374 Panel Report, para. 8.218."18

"… we note our earlier conclusions that subsequent administrative reviews in which zeroing is used after the end of the reasonable period of time establish a failure by the United States to comply with the recommendations and rulings of the DSB. Furthermore, we note the Panel's statement that:

16 WT/DS294/33, 8 June 2009.
... in order to comply with the recommendations and rulings of the DSB, the United States had to ensure that any cash deposit rate applied after the end of the reasonable period of time in relation to one of the measures at issue in the original dispute was not one that derived from a margin of dumping calculated with zeroing, even where that cash deposit was established as a result of a subsequent review, and not a measure at issue in the original dispute. Concluding otherwise would mean that the United States is allowed to circumvent its obligation to bring its measures and action into conformity with those recommendations and rulings by the mere replacement of the cash deposits established in the measures challenged in the original dispute by subsequent ones established in administrative reviews in which zeroing was again used.475

We share the Panel's view that the United States fails to comply with the recommendations and rulings of the DSB if it continues to apply cash deposits established on the basis of zeroing after the end of the reasonable period of time in respect of the Cases at issue here.

475 Panel Report, para. 8.218. Footnote 820 to that paragraph reads: "... a Member must, to implement the DSB's recommendations and rulings, ensure that actions it undertakes after the end of the reasonable period of time are consistent with its obligations under the DSB. The continuing requirement to provide cash deposits constitutes, in our view, such an action."19

"... with respect to the United States' compliance obligations in relation to the Cases at issue in the original proceedings:

considers that a subsequent administrative review determination issued after the end of the reasonable period of time in which zeroing is used, or, if no such review is requested, a determination issued after the end of the reasonable period of time by which anti-dumping liability is assessed on the basis of cash deposit rates calculated with zeroing, would establish a failure to comply with the recommendations and rulings of the DSB,"20

2. **Final liquidations after the end of the RPT**

11. With respect to final liquidations and other measures consequent to administrative reviews, adopted after the end of the reasonable period of time, the Appellate Body, reversing in part the Panel, made the following findings:

"... with respect to the United States' compliance obligations in relation to the Cases at issue in the original proceedings:

considers that a subsequent administrative review determination issued after the end of the reasonable period of time in which zeroing is used, or, if no such review is requested, a determination issued after the end of the reasonable period of time by which anti-dumping liability is assessed on the basis of cash deposit rates calculated with zeroing, would establish a failure to comply with the recommendations and rulings of the DSB;

finds, with respect to measures that are consequent to assessment reviews that, in the ordinary course of the imposition of anti-dumping duties, derive mechanically from the assessment of duties would establish a failure by the United States to comply with the recommendations and rulings of the DSB to the extent that they are based on zeroing and that they are applied after the end of the reasonable period of time; … "21

3. Case 1 (Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands)

12. With respect to Case 1, the Panel made the following findings:

"The United States has failed to comply with the recommendations and rulings of the DSB in the original dispute and has acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by determining, after the end of the reasonable period of time, the amount of anti-dumping duty to be assessed based on zeroing in the 2004-2005 administrative review in case 1 (Hot Rolled Steel from the Netherlands) and issuing assessment instructions pursuant to that determination and by determining, after the end of the reasonable period of time, the amount of anti-dumping duty to be assessed based on zeroing in the 2004-2005 administrative review in case 6 (Stainless Steel Wire Rod from Sweden) and issuing assessment instructions pursuant to that determination."22

13. The Appellate Body upheld those findings,23 and in addition made the following findings:

"reverses the Panel's finding, in paragraphs 8.209 and 9.1(b)(iv) of the Panel Report, that the assessment instructions issued on 16 April 2007 and the liquidation instructions issued on 23 April 2007 do not establish that the United States failed to comply with the recommendations and rulings of the DSB to bring the original investigation in Case 1 into conformity with its obligations under the covered agreements by virtue of those instructions; and finds, instead, that these instructions, derived mechanically from the assessment of final duty liability in the ordinary course of the imposition of anti-dumping duties, are measures that were adopted after the end of the reasonable period of time, and thus establish a failure by the United States to comply with the recommendations and rulings of the DSB;"24

4. Case 6 (Stainless Steel Wire Rod from Sweden)

14. With respect to Case 6, the Panel, upheld by the Appellate Body, made the following findings:

"The United States has failed to comply with the recommendations and rulings of the DSB in the original dispute and has acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by determining, after the end of the reasonable period of time, the amount of anti-dumping duty to be assessed based on zeroing in the 2004-2005 administrative review in case 1 (Hot Rolled Steel from the Netherlands) and issuing assessment instructions pursuant to that determination and by determining, after the end of the reasonable period of time, the amount of anti-dumping duty to be assessed based on zeroing in the 2004-2005 administrative review in case 6 (Stainless Steel Wire Rod from Sweden) and issuing assessment instructions pursuant to that determination."  

5. **Case 31 (Ball Bearings and Parts Thereof from the United Kingdom)**

15. With respect to Case 31, the Panel made the following findings:

"The United States has failed to comply with the recommendations and rulings of the DSB in the original dispute by continuing to apply to imports of NSK cash deposit rates established in the 2000-2001 administrative review in case 31 (Ball Bearings from the United Kingdom), a measure which was found to be inconsistent with Articles 9.3 of the Anti-Dumping Agreement and VI:2 of the GATT 1994 in the original dispute." 

16. The United States did not appeal that finding. The Appellate Body also made the following findings:

"finds that the Panel erred in refraining, in paragraph 8.217 of the Panel Report, to make a specific finding with respect to the assessment after the end of the reasonable period of time of duty liability for imports from NSK Bearings Europe Ltd. in Case 31; and finds further that duties assessed after the end of the reasonable period of time on the basis of cash deposits reflecting zeroing establish a failure by the United States to comply with the recommendations and rulings of the DSB;" 

6. **"Section 129" re-determinations in Cases 2, 3, 4 and 5 (Stainless Steel Bar from France, Germany, Italy and the United Kingdom)**

---

17. With respect to Cases 2, 3, 4 and 5, the Panel made the following findings, which were not appealed by the United States:

"With respect to cases 2, 3, 4 and 5 (Stainless Steel Bar from France, Germany, Italy and the United Kingdom), the United States acted inconsistently with Articles 3.1, 3.2 and 3.5 of the Anti-Dumping Agreement by maintaining the anti-dumping duty orders in those cases without having made a determination of injury based on positive evidence of the volume of dumped imports following the recalculation of dumping margins in the Section 129 determinations in these cases and consequent changes in the volume of dumped imports."\(^{29}\)

7. **Sunset review in Case 19 (Certain Pasta from Italy)**

18. With respect to Case 19, the Appellate Body made the following findings:

"finds that the sunset review in Certain Pasta from Italy (Case 19) is inconsistent with Article 11.3 of the Anti-Dumping Agreement and results in failure by the United States to comply with the recommendations and rulings of the DSB."\(^{30}\)

8. **Sunset reviews in Cases 28 (Stainless Steel Sheet and Strip in Coils from Germany), 29 (Ball Bearings and Parts thereof from France), 30 (Ball Bearings and Parts thereof from Italy) and 31 (Ball Bearings and Parts thereof from the United Kingdom)**

19. With respect to Cases 28, 29, 30 and 31, the Appellate Body made the following findings:

"finds that the sunset reviews in Stainless Steel Sheet and Strip in Coils from Germany (Case 28), Ball Bearings and Parts Thereof from France (Case 29), Ball Bearings and Parts Thereof from Italy (Case 30), and Ball Bearings and Parts Thereof from the United Kingdom (Case 31) are inconsistent with Article 11.3 of the Anti-Dumping Agreement and result in failure by the United States to comply with the recommendations and rulings of the DSB."\(^{31}\)

D. **The Article 22.2 DSU request by the European Union for authorisation to suspend concessions or other obligations and the referral of the matter to the Panel pursuant to Article 22.6 of the DSU**

20. By communication dated 29 January 2010 the European Union requested authorisation from the DSB to suspend the application to the United States of


concessions or other obligations under the covered agreements. By communication dated 12 February 2010 the United States objected to the level of suspension of concessions or other obligations requested and claimed that the EU request did not follow the principles and procedures set forth in paragraph 3 of Article 22 of the DSU. At the DSB meeting on 18 February 2010 the DSB took note of the parties' statements. At that meeting, Japan notified the DSB that it has a substantial interest in the matter before the Panel. By letter dated 26 February 2010 Japan again notified the DSB that it has a substantial interest in the matter before the Panel and wished to participate as a third party. In application of Article 22.6 of the DSU, and consistent with the requests of both Parties, following the DSB meeting, the Secretariat ascertained the availability of the compliance panellists (as opposed to the original panellists).


III. FIRST ALTERNATIVE: PROHIBITIVE TARIFF ON EQUIVALENT OBSERVED LOST TRADE

A. The European Union seeks to suspend concessions or other obligations under the GATT 1994 and the other agreements listed in Annex 1A of the WTO Agreement (taken as a whole)

22. The European Union recalls that, pursuant to Article 22.3(g) of the DSU, for the purposes of paragraph 3 of Article 22, the term "agreement" means, with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole. The GATT 1994 and the Anti-Dumping Agreement are both agreements listed in Annex 1A. Consequently, they may be considered "as a whole" for the purposes of paragraph 3 of Article 22. The European Union is thus entitled, when requesting authorisation to suspend concessions, to treat the GATT 1994 and the

---

33 WT/DS294/36, 16 February 2010.
34 Japan's letter was attached to the communication from the Panel to the Parties dated 4 March 2010.
other agreements listed in Annex 1A, including the *Anti-Dumping Agreement*, as a whole.

23. Consistent with this, the European Union seeks to suspend concessions or other obligations under the *GATT 1994* and the other agreements listed in Annex 1A, taken as a whole. Specifically, the European Union seeks to impose on the import of certain goods from the United States, a prohibitive *ad valorem* duty or charge within the meaning of Article II of the *GATT 1994* (whether or not this is also construed as a duty within the meaning of Article VI of the *GATT 1994* and/or the *Anti-Dumping Agreement*) notwithstanding Articles I, II, III, VI or any other provision of the *GATT 1994* (and notwithstanding any provision of the *Anti-Dumping Agreement* or any provision of any other agreement listed in Annex 1A of the *WTO Agreement*).

B. *The European Union seeks to suspend concessions or other obligations with respect to the same sector as that in which the panel or Appellate Body has found a violation or other nullification or impairment: goods*

24. The European Union recalls that, pursuant to Article 22.3(f) of the *DSU*, for the purposes of paragraph 3 of Article 22, the term "sector" means, with respect to goods, all goods.

25. The European Union seeks to suspend concessions or other obligations with respect to goods. Consequently, the European Union seeks to suspend concessions or other obligations with respect to the same sector(s) as that in which the Panel or Appellate Body has found a violation or other nullification or impairment.

C. *The European Union seeks to suspend concessions or other obligations in application of Article 22.3 as a whole and in particular 22.3(a) of the DSU*

26. It results from the preceding explanations that the European Union seeks to suspend concessions or other obligations in application of Article 22.3 as a whole and in particular Article 22.3(a) of the *DSU*.

D. *The nature of the concessions or other obligations to be suspended (the "suspending measure")*
27. All of the European Union's calculations, based on the most recently obtained data, are summarised in the attached Exhibit EU-2, which is also provided in electronic format as an EXCEL file.

28. The suspending measure is calculated, where this is deemed appropriate, with respect to each relevant zeroed anti-dumping duty that continues to apply, by way of cash deposit rate or final liquidation, after the end of the reasonable period of time (9 April 2007), that being: Cases 1, 6, 7, 8, 9, 11, 14, 15, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31. In principle, the objective is to observe and measure the effect of the US measures on 10 April 2007 in order to apply an equivalent countermeasure. Having regard to the availability of data on an annual basis and in order to ensure a reasonable and stable calculation, the European Union uses annual data as a reasonable proxy and basis for estimate.

29. The countermeasure will take the form of a prohibitive import tariff (such as, for example, 100 %) on a specified annual value of trade from the United States to the European Union.

30. The amounts imposed by the WTO inconsistent measures are considered to be passed on in part to customers in the form of higher prices, with a consequent reduction in trade volume; and in part to be borne directly by the firm.

31. The suspending measure consists of two elements. The first element is a prohibitive tariff (for example, 100%) applied to an annual trade flow from the United States to the European Union with a value equivalent to the observed annual value of trade lost as a consequence of that part of the amount imposed by the WTO inconsistent measure that is passed on to customers. The second element is initially conceived of as a reverse charge, that is, the collection of an amount equivalent to that part of the amount imposed by the WTO inconsistent measures that is borne directly by the firm. However, in order to impose a single suspending measure, the second element is ultimately re-expressed also as an equivalent lost trade flow, based on a profit margin, and integrated with the first element.\footnote{The attached calculation sheet in Exhibit EU-2, referencing a pass-through rate of 95 % and a profit margin of 20 %, is conditioned on the assumption that the United States will not contest the estimate of the observed trade loss. If the United States does contest that estimate and/or it is otherwise modified by the}
1. Trade effects: observed trade lost by the European Union as a consequence of that part of the amount imposed by the WTO inconsistent measure that results in increased prices and reduced trade volumes

32. Actual annual trade flows during 2007 from the relevant EU Member States to the United States are obtained from publicly available US import data. In principle, reference is made to the narrowest available classification heading that includes the product subject to the WTO inconsistent measure.

33. The counterfactual is the annual value of trade that would exist after the end of the reasonable period of time (9 April 2007) absent the relevant WTO inconsistent measures (i.e., Cases 7, 8, 9, 11, 14, 15, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31). This is estimated in the following manner. First, the European Union identifies the value of trade from the relevant EU Member State to the United States in the year immediately preceding the imposition of the relevant anti-dumping duty (n-1). Next, the European Union identifies the value of trade in the same product from the rest of the World (ROW) to the United States (1) in the year n-1 (or the nearest available year for which data is available) and (2) in 2007. The European Union uses this ROW data to express a compound annual growth rate (CAGR) between n-1 and 2007. The ROW CAGR is then applied to the value of trade in the relevant product from the relevant EU Member State to the United States in the year n-1, in order to derive the counterfactual. All of this historical data is derived from the same publicly available US import data, and reference is made to the same classification headings.

34. The actual value of current trade at the end of the reasonable period of time is deducted from the value of trade under the counterfactual to derive the observed lost trade, that being US$ 298,650,000. A prohibitive import tariff (for example 100 %) will be applied to an equivalent annual value of trade from the United States to the European Union.

Panel, then the European Union claims in the alternative that the calculation should be done with a pass-through rate of 50 % and a profit margin of 10 %.

2. **Reverse charge:** as regards that part of the amount imposed by the WTO inconsistent measure that is borne directly by the firm

35. The total annual amounts imposed by the relevant WTO inconsistent measures (i.e., Cases 1, 6, 7, 8, 9, 11, 14, 15, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31) are estimated by applying an arithmetical average of relevant publicly available zeroed exporter specific rates and the all others rates where zeroed duties have been used from the following year (2008) to observed trade value at the end of the reasonable period of time (annual 2007).

36. The pass-through rate and profit margin referred to above are then applied so that the collection of zeroed duties is ultimately re-expressed as an equivalent lost trade.

37. The resulting trade value of US$ 10,111,000 is added to the trade value resulting from the trade effects calculation, to derive the total annual value of trade with respect to which the prohibitive duty is applied.

E. *The level of suspension of concessions or other obligations is less than or equivalent to the level of the nullification or impairment*

38. The level of suspension of concessions or other obligations will be a prohibitive tariff (such as 100 %) on an annual trade flow of US$ 308,761,000 and is less than equivalent to the level of nullification or impairment.

39. The Panel's task is jurisdictionally limited to considering the following matters: the accuracy of the US import data; the accuracy of the rate of anti-dumping duty used in the reverse charge calculation; the pass-through rate; and the profit margin.

F. *The proposed suspension of concessions or other obligations is allowed under the covered agreements*

40. The European Union considers that no provision of the covered agreements has as a consequence that the suspending measure is not allowed.
IV. **SECOND ALTERNATIVE: EQUIVALENT AD VALOREM TARIFF ON EQUIVALENT TRADE**

A. Mutatis Mutandis

41. The observations in paragraphs 22 to 26 and 40 apply, modified as appropriate. The European Union seeks to suspend concessions or other obligations under the *GATT 1994* and the other agreements listed in Annex IA of the *WTO Agreement*, taken as a whole, and in the same sector (goods), in application of Article 22.3(a) of the *DSU*. The proposed suspension is allowed under the covered agreements.

B. The nature of the concessions or other obligations to be suspended (the "suspending measure")

42. The suspending measure will consist of an equivalent *ad valorem* tariff on, as a minimum, an equivalent amount of 2007 trade, adjusted upwards to a counterfactual that takes into account the effects of the WTO inconsistent measures.

43. In order to calculate the equivalent *ad valorem* tariff, first the European Union identifies for each relevant measure (i.e., Cases 7, 8, 9, 11, 14, 15, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31) the arithmetical average of the zeroed anti-dumping duty rates applicable on 10 April 2007 (i.e., the European Union takes the exporter specific duty rates based on zeroing and the all others rates where zeroed duties have been used, and disregards duty rates calculated on a facts available basis). Next we express that duty rate as a weighted average, by multiplying it by a fraction: 2007 trade value of that product divided by total 2007 trade value for all measures. Finally, we sum the weighted averages to derive an equivalent *ad valorem* tariff applicable across all the measures and products to be subject to the countermeasure. The result of this calculation is 12.08%.

44. Next, the European Union identifies the value of trade during 2007 for all products, which is US$ 281,352,000. This constitutes the minimum amount upon which the European Union is entitled to impose 12.08%. However, this amount must be adjusted upwards in order to take into account the fact that the WTO inconsistent measures have themselves depressed the amount of trade.
45. Thus, the European Union next calculates the equivalent value of trade counterfactual. This is the higher value of trade that it is calculated would be occurring in 2007 (on an annual basis) if the WTO inconsistent measures would not be present. In order to make this calculation the European Union uses elasticities of demand substitution obtained from GTAP. An elasticity of demand substitution expresses the extent to which demand for a given product falls in response to a given price increase of that product, as consumers switch to an alternative source. For example, if the elasticity is 4, a 10% price increase will result in a 40% decrease in demand for that product. Two GTAP elasticities are used for each product: one that expresses the propensity of consumers to switch to domestic US products (depending on the product, this is 2, 3.3 or 4); and one that expresses the propensity of US consumers to switch to an alternative source of imports, other than the European Union (depending on the product, this is 4, 6.6 or 8). These are weighted in the calculation 30/70 in favour of the import elasticity, based on the view that substitution is more likely to occur with respect to other imports than with respect to domestic production.

46. The European Union then multiplies the GTAP elasticity by the duty rate applicable on 10 April 2007, and applies the result to annual 2007 trade. The totals are summed for all measures to obtain the counterfactual: the amount of trade that would be present but for the WTO inconsistent measures. The result of this calculation is US$ 475,016,000. The equivalent ad valorem tariff of 12.08% will be applied to an equivalent annual value of US imports to the European Union.

C. The level of suspension of concessions or other obligations is less than or equivalent to the level of the nullification or impairment

47. The level of suspension of concessions or other obligations will be less than or equivalent to the level of nullification or impairment.

48. The Panel's task is jurisdictionally limited to considering the following matters: the accuracy of the US import data; the accuracy of the rate of anti-dumping duty used in the calculation; and the GTAP elasticities.

---

37 Global Trade Analysis Project (GTAP), Purdue University, West Lafayette, Indiana, United States of America. See: [https://www.gtap.agecon.purdue.edu/default.asp](https://www.gtap.agecon.purdue.edu/default.asp) (last accessed 10 March 2010).
V. SUSPENSION OF OBLIGATIONS UNDER THE DSU

49. The preceding observations apply mutatis mutandis.

50. The European Union notes that: zeroing is a mathematical formula that operates mechanistically; the dispute relates to a pure question of legal interpretation; zeroing has been repeatedly found WTO inconsistent; and that panels are to follow the Appellate Body, and the Appellate itself absent cogent reasons. Consequently, the outcome of any fresh DSU proceedings with respect to the matter is a foregone conclusion. The European Union further notes that, notwithstanding the above, the United States has publicly declined to modify the methodology as it relates to administrative proceedings and repeatedly argued, unsuccessfully, that subsequent administrative reviews displace the original measures, leaving nothing to implement, and no effective recourse to Article 22 of the DSU. In this way, the United States effectively seeks to deprive the European Union of its WTO rights and benefits through the passage of time occasioned by an ultimately futile and non-fruitful re-iterative recourse to the DSU.

51. Thus, the nature of the measure adopted by the European Union will be a measure designed to substantially eliminate the temporal aspect of this US policy, by preserving the right to proceed directly to Article 22 of the DSU whenever the United States mechanistically applies the zeroing methodology to any of the products covered by the above proceedings.

52. This measure is precisely equivalent to the nullification and impairment caused by the US actions. Article 23 of the DSU is premised upon the possibility of a meaningful application of the DSU, consistent with the principles set out in Articles 3.10, 4.2 and 4.3 of the DSU; in Article 3.2 of the DSU and Articles 31(1), 26 and 18 of the Vienna Convention of the Law of the Treaties; in WTO jurisprudence;38 and customary public international law. If that possibility is foreclosed in advance by a defending Member then, by definition and through its own actions, the defending Member has, in effect, elected to move directly to the

---

38 See, for example: Appellate Body Report, US-FSC, para. 166.
question of compensation and suspension of concessions or other obligations. Judicial recognition of that fact should be a formality.