World Trade Organisation

Article 22.6 DSU Panel Proceedings

As delivered

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

Oral Statement
by the European Union

Geneva, 20 May 2010
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1. Mr. Chairman, distinguished Members of the Panel.

2. Before turning to the document before you, we would like to make some preliminary remarks. We hope the US modus operandi is clear to you. The United States has all the data. It is up to us to design the nature of the countermeasure. The United States starts selectively attacking what we have done, adducing the evidence that suits the United States, and withholding other evidence. We think this is completely unacceptable.

3. In this Oral Statement the European Union will first respond to some of the US answers to the Arbitration Panel's questions. We will then briefly summarise the current position as we see it in relation to the first and second EU alternatives, and the request to suspend concessions or other obligations under the DSU, also taking into account the applicable procedural rules, before offering some concluding remarks designed to place the case as a whole into some sort of appropriate overall perspective.

I. REACTIONS TO CERTAIN OF THE UNITED STATES' RESPONSES TO THE QUESTIONS FROM THE ARBITRATION PANEL

A. Assessing the countermeasure against the equivalence obligation and completing the analysis whilst respecting the applicable procedural rules

4. We would like to begin by addressing the question of the task of the Arbitration Panel in this dispute, particularly in the light of the US responses to the first and second questions posed by the Arbitration Panel.

5. The Parties agree that the Arbitration Panel can and should aim to reach a final award – although unlike the United States the European Union does see room for a partial approval of the countermeasure, leaving the complaining Member with the responsibility of ensuring that the Article 22.7 request is consistent with the award,
and the defending Member with the responsibility of bringing original panel proceedings if it considers the countermeasure excessive (albeit that this situation does not arise in the present case). In other words, the European Union agrees with the United States that the correct interpretation of the phrase "[t]he parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration" is that it precludes the defending Member from again referring the matter to further arbitration when an Article 22.7 request is made. However, we do not think that it precludes original or compliance panel proceedings with respect to aspects of a countermeasure not previously authorised or nor longer justified, as the Continued Suspension cases demonstrate.

6. Where the Parties differ is that the United States appears to see the Article 22.6 process as a procedural free-for-all. Thus, according to the United States, it doesn't really matter who submits what claim, argument, fact or evidence, or when they submit them, or indeed whether they even submit them at all – ultimately the Arbitration Panel can just do what it likes. The European Union, on the other hand, considers that the same basic procedural rules that apply in other types of DSU proceeding also apply in Article 22.6 proceedings, but in reverse. Thus, we consider that the Arbitration Panel must start with the proposed countermeasure, limit itself to the claims made by the United States, and consider whether the United States has made a prima facie case with respect to fact, evidence and argument, failing which, the arbitration panel must reject the relevant US claim and confirm the relevant aspect of the countermeasure.

7. The European Union is quite certain that the proposition advanced by the United States constitutes an error on an issue of law or legal interpretation. Just as it would be a legal error to reason in original panel proceedings that the requirement in Article 11 of the DSU (that panels must assess the matter before them) precludes the basic principles regarding burden of proof; so it would be a legal error to reason that the requirement in Article 22.6 that arbitration panels determine equivalence precludes those same basic principles. The question of what

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1 US Response to the Arbitration Panel's Questions, question 1, second paragraph.
2 US Response to the Arbitration Panel's Questions, question 1, third paragraph.
is an adjudicator's jurisdiction or terms of reference or mandate is distinct from the question of what procedural rules apply.

8. When the Appellate Body addressed this fundamental issue in what was one of its earliest reports it based its analysis on "[t]he foundation of dispute settlement under Article XXIII of the GATT 1994" (which of course includes arbitration panels); found it "difficult … to see how any system of judicial settlement could work" without such rules; and drew on the practice of "various international tribunals, including the International Court of Justice" and "a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions".3

9. Viewed from a certain perspective, the idea of sweeping aside the relevant procedural rules and engaging in a de novo review might seem superficially attractive because of the freedom and discretion that would thereby accrue to arbitration panels. It is, however, a poisoned chalice. Faced with the prospect of de novo review and lacking the necessary investigative powers to obtain data that is not in the possession of the parties, arbitration panels are quite likely to find themselves facing an impossible task – as a number have famously had cause to lament in the past. Applying the relevant procedural rules provides an alternative, effective, simple and fair way of solving the problem.

10. Ignoring the applicable procedural rules might also seem to chime with the idea that an arbitration panel's task is to relentlessly search for the one "correct" countermeasure that alone ensures equivalence, and this in turn might reflect the idea that an arbitration panel is awarding "damages" for breach of a "bilateral" "contract", consistent with the objective of "compensation" or the idea of "efficient breach". But the WTO is not a contract: it is an international treaty. And it is not a bilateral instrument: it is a multilateral instrument, where nullification or impairment is presumed for all Members4 and in many instances is very likely to be difficult or impossible to unscramble for individual Members, as some past arbitration panels have illustrated only too well. Further, the European Union is not seeking compensation. We are seeking to induce compliance – or in

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4 DSU, Article 3.8.
contractual terms, we are seeking specific performance. And we believe that there is (and indeed by definition must be) more than one way to design an equivalent countermeasure – the selection of the nature of the countermeasure being a matter for the complaining Member.

11. In short, there is no one "correct" countermeasure, and it is a mistake to go looking for it without regard to the disciplines of the applicable legal procedures. The Arbitration Panel should rather assess the proposed countermeasure in light of the equivalence obligation and having regard to the claims made and substantiated by the United States (if any), completing the analysis where possible, but always respecting the relevant procedural rules.

12. Finally, the US assertion that Article 13 of the DSU does not apply is in our view both incorrect and in any event sterile. An arbitration panel's right to question parties and draw reasonable inferences from failures to respond in whole or in part also flows from similar basic principles previously articulated by the Appellate Body, and exercised within the framework of the applicable procedural rules. Such powers have frequently been exercised by past arbitration panels.

13. Consistent with these observations – and without splitting hairs about the terms "jurisdiction", "terms of reference" and "mandate" – there is no legal basis for the Arbitration Panel to rule on matters that are not in dispute between the Parties – in such circumstances the Arbitration Panel need only record the absence of dispute. In this respect, the European Union notes particularly that, in its response to question 2 from the Arbitration Panel, the United States again does not dispute:

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5 US Response to the Arbitration Panel's Questions, question 1, footnote 1.
6 Appellate Body Report, Canada – Aircraft, para. 202; ("... that authority seems to us an ordinary aspect of the task of all panels...").
that the principles and procedures of Article 22.3 have been followed with respect to the first and second EU alternatives; that the proposed countermeasures are allowed under the covered agreements; that certain measures are correctly included in the calculations; and that certain aspects of the proposed countermeasures are consistent with the equivalence rule.

B. **Burden of proof**

14. We would like to turn now to the question of burden of proof. The Parties agree that the United States has the burden of proof, and that it is only if the United States discharges that burden of proof, by making a *prima facie* case (that is making a claim, asserting fact, adducing evidence and stating an argument), and the European Union rebuts it, that the Arbitration Panel may be called upon to weigh conflicting evidence.8

15. However, the Parties disagree on certain very important points.

16. First: does the burden of proof operate at the level of the countermeasure as a whole; or does it operate at the level of each "aspect" of the countermeasure (to use the term used by the Arbitration Panel in question 1). The European Union has carefully explained why it considers that the burden of proof operates at the level of each aspect of the countermeasure (as in any original or compliance panel proceeding), and how the Arbitration Panel can and indeed should complete the analysis in the event that proves necessary and if at all possible, but always respecting the applicable procedural rules. The United States, on the other hand, seems to conceive of the burden of proof as operating at the level of the countermeasure as a whole. Having set itself this formidable task, the United States then illogically assumes that if it "faults" one aspect of the countermeasure, the entire countermeasure falls, relieving the United States of its burden of proof with respect to all other aspects of the countermeasure, and leaving the Arbitration Panel with absolute discretion (and the burden of exercising it) to determine the

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8 US Response to the Arbitration Panel's Questions, question 3.
"one true" countermeasure. In other words, according to the United States, all the United States has to do is scratch the surface of the countermeasure, and with one bound the United States will entirely free itself, in all respects, from the procedural rules that the United States agrees are binding on the United States – thus, in effect, emptying those procedural rules of any significant meaning or utility.

17. However, the United States cannot "have its cake and eat it".

18. If the burden of proof issue is to be tackled at the level of the countermeasure as a whole, as the United States would initially seem to suggest, then the United States would effectively be inviting the Arbitration Panel to reject the EU countermeasure as a whole in favour of the US proposal as a whole. That would necessarily imply that the Arbitration Panel would accept the US proposal as a whole. However, the European Union believes that it has irrefutably demonstrated why the Arbitration Panel cannot accept the manifestly biased data advanced by the United States regarding the rates without zeroing, particularly given that the United States is withholding the only data that might actually be relevant to its claim. At this level, therefore, the US case necessarily fails in its entirety, and the Arbitration Panel should move directly to confirm the countermeasures as proposed.

19. If, on the other hand, the burden of proof issue is to be tackled at the level of each aspect of the countermeasure, then even if the United States would prevail with respect to one aspect, that would not provide any justification for rejecting the EU countermeasure as a whole.

20. Second, the United States does not advance its case by making assertions about what the situation may or may not be under Article 21.3 of the DSU. We have carefully explained, with supporting textual references, that Article 22.6 proceedings involve a "measure" (the countermeasure), "claims", "argument", "fact" and "evidence". In particular, unlike an Article 21.3 proceeding, an Article 22.6 proceeding specifically concerns a "measure" (the countermeasure) to be adopted by the complaining Member, and like any measure, it benefits from a

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presumption of conformity unless and until the defending Member proves otherwise. Thus, an arbitration panel does not have the authority to fault one aspect of the countermeasure and then proceed to a *de novo* assessment, without regard to the applicable procedural rules, any more than a compliance panel would have such authority with respect to a measure taken to comply, or an original panel with respect to a measure.

21. Third, contrary to what the United States asserts, it has not discharged its burden of proof in this case with respect to any of its claims, as we enumerate them in the two following sections of this Oral Statement.

C. *The European Union's right to select the nature of the countermeasure as non-variable and calculated by reference to the end of the reasonable period of time*

22. The next issue that we would like to briefly address is the European Union's right to select the nature of the countermeasure as non-variable and calculated by reference to the end of the reasonable period of time.

23. In its response to question 4 from the Arbitration Panel the United States erroneously asserts that it is the European Union's position that *in all cases* the calculation must only be done by reference to the end of the reasonable period of time. That is incorrect. The European Union's position is that whether the nature of the countermeasure is fixed or variable is a matter for the complaining Member. It may or may not be that in two other cases (*Byrd* and *1916 Act*) the European Union was content that the nature of the countermeasure was variable. In this case, however, the choice made by the European Union is clear: the nature of the countermeasure will be fixed (with the exception of the request under the DSU).

24. Misstating the opponent's argument and then knocking down that misstated argument is a standard litigation technique employed by litigants that are unable or unwilling to respond to the point that has actually been put to them, in this case both in the argument of the European Union and in the question of the Arbitration Panel. It is quite futile.
25. This being the only (erroneous) argument made by the United States with respect to this matter, and the United States making no argument identifying any other relevant point in time (other than the end of the reasonable period of time), the Arbitration Panel must reject this US claim, and confirm this aspect of the countermeasure.

D. *The European Union's right to propose a single countermeasure*

26. The European Union notes that there is no dispute between the Parties regarding the imposition of a single countermeasure (as opposed to one countermeasure for each order). The Parties also agree that it is incumbent on the Arbitration Panel to explain the basic rationale behind any findings that it makes, as required by Article 12.7 of the DSU, which would include, in this case, a level of detail making it possible to identify the relevant parts of the calculation with respect to each order.  

E. *The inclusion of Cases 1 and 6; Cases 7, 8 and 14; and Cases 9, 11 and 15*

27. The next point that we would like to comment on relates to the inclusion of Cases 1 and 6 in basket 2 of the first EU alternative, and an adjustment that needs to be made following the US response to the Arbitration Panel's questions. The Arbitration Panel asked the United States to provide data about the amount of outstanding unliquidated duties. There are three points that the European Union would like to make about the US response.

28. First, the relevant number is not the amount of outstanding unliquidated duties today – the relevant number is the amount of outstanding unliquidated duties at the end of the reasonable period of time (10 April 2007).

29. Second, with respect to Case 1, the United States provides a figure which is substantially more than the estimate provided in the EU Methodology Paper.

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This further demonstrates the conservative and reasonable nature of the estimates made in the proposed countermeasure. It also necessitates adjustment of the estimate to bring it into line with the amount stated by the United States, since there is no longer any dispute between the Parties that the amount in question is at least the amount stated by the United States.

30. Third, the United States protestations that there are no longer any trade effects associated with these duties continue to represent attempts by the United States to re-argue matters that have already been decided. As the European Union has already explained and demonstrated, also by reference to prior case law, there is no requirement to approach the question of nullification or impairment uniquely by reference to trade effects.

31. In this respect, the European Union also refers to the Third Party Written Submission of Japan, which re-iterates and confirms the arguments of the European Union on this point. To summarise. The European Union has confined itself to proposing a countermeasure with respect to nullification or impairment arising from the end of the reasonable period of time. The European Union has selected a countermeasure that takes the end of the reasonable period of time as the decisive date, and there is no reason for the Arbitration Panel to disturb that choice. Article 22 of the DSU extends to nullification or impairment resulting from actions or omissions taken after the end of the reasonable period of time, also with respect to imports occurring before the end of the reasonable period of time. Concessions or other obligations may be suspended also with respect to the period of time between the end of the reasonable period of time and expiry of a measure. And nullification or impairment need not be measured solely in terms of lost exports, but may also be measured in terms of excess anti-dumping duties collected. For the avoidance of doubt, we again also re-iterate these arguments and adopt them as our own and expressly incorporate them in our submissions to the Arbitration Panel (although we note that the Appellate Body did not need to rule, and did not in fact rule, with respect to nullification or impairment arising

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13 EU Methodology Paper, Exhibit EU-2, Methodology 1, Case 1, "Duty paid estimate", US$6,004,000.
14 Third Party Submission of Japan, paras 3 to 38.
between the date on which the WTO inconsistent measure is adopted and the end of the reasonable period of time\textsuperscript{15}).

32. Turning to Cases 7, 8 and 14, the United States is incorrect to assert that the Compliance Panel and Appellate Body made no relevant findings.\textsuperscript{16} The relevant findings are set out \textit{verbatim} at paragraphs 9 to 10 of the EU Methodology Paper.

33. The US contrary position appears to be based, first, on the proposition that the relevant findings are couched in general terms that do not refer expressly to Cases 7, 8 and 14. That does not detract from the fact that the Compliance Panel made findings, anymore than would be the case for an "as such" finding regarding the methodology. Clearly, the Appellate Body considers these to be findings, since it repeatedly characterised them as such, went on to observe that neither Party had appealed them, and repeatedly stated that it agreed with the Compliance Panel. Evidently, the Appellate Body would not have done that if it did not consider them to be findings subject in principle to appeal, that is, having legal effect. What the United States is now trying to do is to deprive these findings of all legal effect.

34. Second, the United States appears to be attempting to characterise a statement in paragraph 232 of the Appellate Body Report in \textit{US-Zeroing (Article 21.5 – EC)} as meaning that the rate resulting from the Section 129 determinations also displaced the current rate resulting from an intervening administrative review. The European Union is somewhat dismayed by this suggestion, since the United States well knows that proposition to be untrue. However, more significantly, the United States is overlooking the fact that the statement in question begins with the words "To the extent that …". It follows that, to the extent that the current rate is the zeroed rate and not the rate resulting from the Section 129 determination (which is the case), the statement in question has no bearing on the issue before you.

35. Finally, with respect to Cases 9, 11 and 15, the US position appears to be that their inclusion does not affect the calculation.\textsuperscript{17} However, the European Union has an interest in them being properly included in the calculation and in any event on that

\textsuperscript{15} Third Party Submission of Japan, paras 10 to 12.
\textsuperscript{16} US Response to the Arbitration Panel's Questions, question 42.
\textsuperscript{17} US Response to the Arbitration Panel's Questions, question 43.
basis there is no dispute between the Parties on this point, so they must be included.

F. Assessing the countermeasure by reference to the WTO inconsistent measure, US refusal to adduce the relevant data, and the elimination of zeroing equating to the absence of the measures in this case

36. We would now like to turn to an important aspect of this dispute: the disagreement between the Parties as to whether the countermeasure should be assessed by reference to the WTO inconsistent measure, or the reason for its inconsistency; and the related questions of the US refusal to provide the relevant data, and what the duty rate would be absent zeroing.

37. To recall, the European Union has explained that the countermeasure must be assessed by reference to the WTO inconsistent measure, not the reason for its inconsistency, not least because the Arbitration Panel does not have the authority to rule on the WTO consistency of any actual or proposed measures taken to comply.\(^{18}\) We have also explained that, in any event, it makes no difference in this case which approach would be adopted, because the elimination of zeroing would cause the duties to fall to zero or less than zero. We have put it to the Arbitration Panel that it must draw the only reasonable inference that can be drawn from the US refusal to provide the relevant data (namely that such data would precisely demonstrate what we are saying). We have also recalled the data and calculations we provided in the original proceedings, which have never been contested by the United States, and we have demonstrated how that data can be verified as generally accurate to two decimal places on the basis of the calculations subsequently conducted by the United States itself, and that this is not surprising given the mechanistic nature of the required adjustment. We further have explained how that data demonstrates what is in any event perfectly evident from a

\(^{18}\) Panel Report, *US-Certain EC Products*, paras 6.121 and 6.126: ("... We consider that the arbitration process pursuant to Article 22 may constitute a proper WTO dispute settlement procedure to perform the WTO assessment mandated by the first sentence of Article 21.5 of the DSU ... we consider that the WTO compatibility determination mandated by the first sentence of Article 21.5 can be performed by the original panel or other individuals through the Article 22.6-7 arbitration process ..."); Appellate Body Report, *US-Certain EC Products*, para. 90: ("... we conclude that the Panel erred by making the statements in paragraphs 6.121 to 6.126 of the Panel Report ...").
moment's reflection (that simple zeroing is more distorting than model zeroing), and also how it demonstrates what the duty rates would likely be in the administrative reviews and other measures in question were simple zeroing to be eliminated (that is, zero or less than zero).

38. The Arbitration Panel put a number of questions to the United States on this matter, and the US responses are worthy of note and comment.

39. First, the Arbitration Panel asked the United States about supplying the necessary data. The US response is that, first, "such evidence does not presently exist". However, what does exist, of course, is all of the necessary data and evidence, even if the required mechanistic adjustment to the program (the elimination of the zeroing instruction) might not have been carried out by the United States (which is precisely why we are here before you today). Second, the United States complains that it would have no time to produce such evidence in these proceedings – and yet the United States has of course had ample time, including the reasonable period of time, to comply and/or prepare itself for these proceedings. Third, the United States asserts that if the Arbitration Panel would request the data that would mean the United States would be relieved from its burden of proof. That is of course equally incorrect. The burden of proof to which the United States is subject required it to produce this information in the first place.

40. Thus, in plain language, the United States refuses to produce the evidence. The Arbitration Panel can and must draw the only reasonable conclusion: the evidence withheld by the United States would confirm the truth of the EU submissions.

41. Second, the Arbitration Panel asked the United States whether or not its recalculations related to the end of the reasonable period of time. In its response to question 49 the United States confirmed that they do not. In fact, they relate to periods of time (1996) up to 11 years before the end of the reasonable period of time. Further, they relate to completely different data sets, involving different transactions, different products, different exporting countries, different exporters, different importers, a different zeroing methodology, and entirely different

19 Arbitration Panel Question 40.
economic conditions. There is thus no necessary or logical connection between this data and the matter under consideration by this Arbitration Panel. Indeed, it is difficult to conceive of data that could be more irrelevant.

42. Apparently recognising this, the United States now attempts to abandon its previous position, with the statement that "the counterfactual proposed by the United States is not that all dumping margins would be recalculated using the methodology that was applied in the Section 129 determinations".\textsuperscript{20} If this is now the position of the United States, then the only puzzle is why the United States would still suppose that those determinations provide any guidance for this Arbitration Panel, when by the express terms of the US' own submission they are no longer relevant. This chopping and changing by the United States nicely illustrates with vivid clarity the great problem with these types of "counterfactuals", being as they are necessarily hypothetical and untested for WTO consistency through the proper legal procedures – and that is precisely why the countermeasure must be assessed by reference to the WTO inconsistent measure, and not the reason for its inconsistency.

43. Third, asked to comment on the point made by the European Union with respect to an injury determination (and further developed in our responses to the Arbitration Panel's questions), the United States simply ducks the question.\textsuperscript{21} The United States even suggests that, notwithstanding a complete absence of implementation, and even a stated intention not to implement, because a "plausible" counterfactual might be reconsideration of the matter and confirmation of the measure, there would be no nullification or impairment. This would reduce the rule in Article 3.8 of the DSU (that nullification or impairment is presumed) to nothing, and does not represent a permissible interpretation of the covered agreements.

44. Fourth, the United States argues that dumping margins generally decline in administrative reviews compared to original investigations because exporters and importers know that duties will have to be paid and so increase prices (and generally reduce volumes).\textsuperscript{22} However, this proposition relates to an entirely

\textsuperscript{20} US Response to the Arbitration Panel's Questions, Question 39, first paragraph.
\textsuperscript{21} US Response to the Arbitration Panel's Questions, question 44.
\textsuperscript{22} US Response to the Arbitration Panel's Questions, Question 39.
different matter: the point that we are making is that simple zeroing is more distorting than model zeroing – and this point is quite distinct from and has nothing to do with possible behavioural changes by firms when they are subjected to an order. Even if margins would generally decline (and the European Union does not consider this to be an accurate assertion at least in this case), that tells one nothing about the degree of distortion introduced by a particular type of zeroing methodology. In fact, if, prior to an order, exporters price downwards freely, there may well be very few export transactions "above the line", so zeroing in any event may have less of an effect. On the other hand, as exporters attempt, following the imposition of an order, to eliminate the obligation to pay anti-dumping duties by raising prices, they may be more likely to price "above the line", with the result that zeroing will have a more distorting effect on the calculation. Finally, the only reliable data provided to the Arbitration Panel (in Exhibit EU-11) demonstrates that, all other things being equal, simple zeroing will tend to inflate dumping margins more than model zeroing.

45. In light of these responses, the European Union respectfully recalls that the bottom line in all of this is that the United States "has the tapes", but refuses to disclose them to the Arbitration Panel, and that the Arbitration Panel should proceed on the basis of the unbiased, objective and reasonable approach set out in the proposed countermeasures.

G. *The absence of a counterfactual in the first step of the second EU alternative*

46. The next point we would like to address concerns the absence of a counterfactual in the first step of the second EU alternative. To recall, in the first step of the second EU alternative the actual trade subsisting in the products concerned is observed at the end of the reasonable period of time (no counterfactual) and a duty is applied equivalent to the anti-dumping duty actually being applied at that time by the United States (no counterfactual). This is the minimum countermeasure proposed by the European Union in the second EU alternative.
47. The Panel put two questions to the United States on this matter, asking the United States to comment on the absence of a counterfactual in the first step of the second EU alternative, and the related EU point that not every countermeasure requires a counterfactual.\(^{23}\)

48. The United States response is that the second step of the second EU alternative involves the application of an elasticity and a counterfactual (a point previously stated by the European Union and not in dispute between the Parties), and that it is therefore, in the view of the United States, not "necessary" to answer the question specifically put to the United States by the Arbitration Panel (a question that evidently the Arbitration Panel would not have put unless it considered elucidation of the point relevant to its assessment).

49. Once again, therefore, the United States demonstrates itself unable or unwilling to answer the questions actually put to it – simply misstating the first question and ignoring the second.

50. The European Union respectfully requests the Arbitration Panel to pay the very closest attention to issues – such as these - with respect to which the United States is refusing to respond to the EU's arguments and the Arbitration Panel's questions. These are not trivial or incidental matters, and it is no accident that the United States is attempting to run as far and as fast as it can away from them. But burying one's head in the sand does not make difficult issues go away. It simply highlights the fact that the matter must be resolved in favour of the other party. Thus, in these circumstances, the European Union respectfully submits that the Arbitration Panel is compelled to reach the following conclusions:

   - not every countermeasure requires a counterfactual (as indeed the case law confirms);\(^{24}\)
   - the first step of the second EU alternative is an example of a countermeasure that does not require a counterfactual;
   - if one does not require a counterfactual, one cannot envelop the question of whether equivalence is assessed by reference to the measure (as the European Union would have it) or the reason for the measure's inconsistency (as the United States would have it) within the question of what the counterfactual should be – since one does not require a counterfactual in the first place. Thus,

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\(^{23}\) Arbitration Panel Questions 46 and 47.

one never gets to the problem with which the arbitration panel in the *Gambling* case, for example, was grappling; and

- if one systematically applies the customary rules of interpretation of public international law: good faith, ordinary meaning, context and object and purpose, it is clear that the equivalence of the countermeasure must be assessed by reference to the measure, not the reason for its inconsistency, and this conclusion also comports with basic common sense, and the particular factual circumstances of this case.

### H. The choice of GTAP elasticities by the European Union is reasonable and there is no reason for the Arbitration Panel to disturb this aspect of the countermeasure

51. The next point that the European Union would like to address is the use of the GTAP elasticities. The United States continues to argue that it has demonstrated that the use of GTAP elasticities would be inconsistent with the equivalence rule.\(^{25}\) The European Union disagrees, for the reasons that it has already set out in its submissions to the Arbitration Panel.\(^{26}\)

52. In particular, as already explained in the EU Written Submission and acknowledged by the United States, the import demand elasticity describes the percentage by which imports change in response to a 1% uniform change of the import price. However, what is at stake in the present proceeding is not a uniform change in the US tariff rate, but a set of targeted measures against individual EU exporters. Furthermore, the parameter of interest is not the change in total US imports of a given product, but the nullification or impairment caused to the EU exporters affected by the illegal measures. The import elasticity data, convenient as it may be for the United States, does not, therefore, address the central question relevant for quantifying the nullification or impairment in the case at hand.

53. This nullification or impairment consists of several components, including lost exports and decreased margins on those exports that do still take place. The lost trade component, in turn, includes sales that the targeted exporters lose to unaffected competitors from other countries and to decreased imports by the United States (itself a combination of substitution to domestic suppliers and

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\(^{25}\) US Response to the Arbitration Panel's Questions, Question 52.

\(^{26}\) EU Methodology Paper, paras 45 to 46; EU Written Submission, paras 93 to 98; EU Response to the Arbitration Panel's Questions, Question 29.
demand contraction due to increased prices). Hence, two sets of elasticity estimates are necessary to quantify the trade loss caused to EU exporters, relating to (i) substitution of domestic production for imports and (ii) substitution between different sources of imports.

54. Contrary to the World Bank data preferred by the United States, the GTAP data base draws on a variety of studies and is constantly verified and updated by the network of GTAP researchers. The elasticity estimates constitute inputs to the GTAP (and other) CGE models and are not CGE estimates. The nesting structure or any other assumptions underlying the various existing CGE models do not, therefore, affect the reliability of the elasticity estimates.

55. In addition, the fact that the World Bank elasticities are available for the United States and for disaggregated product groups may seem convenient, but it does not change the fact that they are fundamentally inappropriate for quantifying the nullification or impairment caused to the EU exporters affected by the illegal measures. Indeed, substitution elasticities are generally lower at higher levels of aggregation (because products within disaggregated groupings are necessarily more similar than those in more aggregated groupings). The GTAP elasticities will therefore tend to underestimate the actual trade loss caused to EU exporters.

56. Finally, the European Union also refers to the Third Party Written Submission of Japan, which re-iterates and confirms the arguments of the European Union on this point.27 Also as indicated above, for the avoidance of doubt, we again also re-iterate these arguments and adopt them as our own and expressly incorporate them in our submissions to the Arbitration Panel. The use of the GTAP data is reasonable and appropriate, also in light of the absence of uniform agreement about which dataset might be the most suitable for a particular purpose:

- First, GTAP is the best known, most reliable, most frequently used and constantly updated and refined dataset.28
- Second, the GTAP data are publicly available and free of charge.29
- Third, the United States itself uses GTAP data for its own modelling purposes.30

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27 Third Party Submission of Japan, paras 39 to 44.
28 Third Party Submission of Japan, para. 43, first bullet point.
29 Third Party Submission of Japan, para. 43, second bullet point.
• Fourth, GTAP data has been used in past arbitration panels.  
• Fifth, GTAP elasticities have been subject to empirical testing.  
• Sixth, GTAP elasticities are conservative and apt to understate the actual lost exports.  
• Seventh, GTAP elasticities are based on long-term estimates.

57. For all of these reasons, the European Union respectfully submits that the Arbitration Panel has no reason to disturb the reasonable estimates in the countermeasure based on the GTAP data.

I. The annual countermeasure operates by reference to the end of the reasonable period of time

58. The final point on which the European Union would like to comment in this section relates to the US assertion that the nullification or impairment with respect to which the European Union is entitled to request suspension of concessions or other obligations is not to be measured with effect from the end of the reasonable period of time, and in fact has not even yet started accumulating, and will not do so unless and until the European Union actually implements countermeasures.

59. First, the United States asserts that such suspension of concessions would be "retroactive". That is clearly an incorrect use of the term "retroactive". Insofar as the term "retroactive" would be relevant at all to the adoption of a countermeasure, it would relate to the situation in which a Member would adopt a countermeasure (such as an additional tariff) and attempt to apply it to entries of products that had already occurred. This is precisely what the United States attempted to do in the US-Certain EC Products case, and precisely what it was told was not permissible, because of the unauthorised retroactivity that would be involved.

60. That is not, however, what is at issue in the present case. All we are doing in the present case is measuring nullification or impairment at the end of the reasonable period of time as it relates to the US assertion.
period of time (expressed in annual terms) for the purposes of suspending concessions or other obligations also in annual terms. There is nothing "retroactive" about this. In fact, it is by definition the approach that must be adopted in all Article 22.6 DSU proceedings, so if the US assertion would be correct, suspension of concessions or other obligations would never be possible, which conclusion would obviously constitute a legal error.

61. Second, the United States asserts, without any textual support from or analysis of the DSU, that suspension of concessions is "forward looking", by which it appears to mean with effect from the date on which a countermeasure would be adopted, rather than with effect from the end of the reasonable period of time. The United States adds that past periods are only relevant as "proxies" going forward. Obviously, the United States completely overlooks the fact that the selection of the nature of the countermeasure is a matter entirely in the hands of the complaining Member, and that there is no obligation on the complaining Member to express the countermeasure by reference to any time period, let alone an annual one.

62. Thus, if, for example, a complaining Member selects a countermeasure in the nature of a measure to raise revenue equivalent to the revenue raised by the WTO inconsistent measure, it is entirely up to the complaining Member over what period it might choose to raise such revenue. It might do that in one week (for example by applying an appropriate countermeasure duty across all imports from the defending Member) or over several years (for example by applying a different countermeasure duty on a specific product). In exactly the same way, the complaining Member is not obliged to express its countermeasure by reference to any particular past period. Indeed, if the complaining Member would seek to impose countermeasures immediately after the end of the reasonable period of time, then there would be little if any period available. On the other hand, if the complaining Member would elect to express the countermeasure in bi-annual terms, then evidently it might use a bi-annual data period as a reasonable proxy.

63. Third, the United States seems to suggest that the European Union is not incurring nullification or impairment with effect from the end of the reasonable period of time, but only with effect from the date on which countermeasures would be
imposed, with the consequence that the proposed accumulated countermeasure would not be equivalent to the nullification or impairment. This argument is obviously incorrect. The finding of WTO inconsistency relates to these measures with effect from the date of their adoption (in essence, neither the law nor the facts have changed since that date) and the nullification or impairment is presumed, pursuant to Article 3.8 of the DSU. As it happens, in this case, the European Union has requested suspension of concessions or other obligations with respect to the nullification or impairment occurring at the end of the reasonable period of time. Thus, to deny this aspect of the European Union's request would obviously be to reduce the suspension of concessions to a level well below the nullification or impairment actually accruing at and since the end of the reasonable period of time, which would clearly constitute a legal error.

64. Fourth, the United States asserts that this matter is not covered by the Article 22.2 request – but the Article 22.2 request clearly states that it relates to the end of the reasonable period of time and that the amounts indicated are annual amounts, and there is therefore no merit in that assertion.

65. Finally, the United States refers to the arbitration panel report in *US-Upland Cotton*, but in that case there was a multilateral DSB finding that compliance had occurred, albeit late – whereas in the present case there is no such finding – and the *US-Upland Cotton* case is therefore of no assistance to the United States.

66. In this respect, the European Union also refers to the Third Party Written Submission of Japan, which re-iterates and confirms the arguments of the European Union on this point. We have already summarised those arguments and will not do so again. Also as indicated above, for the avoidance of doubt, we again also re-iterate these arguments and adopt them as our own and expressly incorporate them in our submissions to the Arbitration Panel.

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37 Third Party Submission of Japan, paras 3 to 38.
38 Para. 31 of this Oral Statement.
II. **THE FIRST EU ALTERNATIVE**

67. In light of the preceding observations, and our other submissions, the European Union would now like to briefly review how it sees the position with respect to the first EU alternative, also taking into account the applicable procedural rules.

68. To recall, basket 1 of the first EU alternative follows that part of the duty (50%) passed on to customers. It observes lost trade at the end of the reasonable period of time (10 April 2007) by comparing observed trade in the year prior to the imposition of the measure with observed annual trade at the end of the reasonable period of time (adjusted by growth in trade observed for the rest of the world), and applies a prohibitive (for example 100%) tariff to that amount. Basket 2 of the first EU alternative follows that part of the duty (the other 50%) borne by the firm, which is estimated by applying the 2008 rates to the 2007 trade values. That amount of lost profit is then re-expressed as lost trade using a profit margin of 10%.

69. In support of its assertion that this countermeasure is inconsistent with the equivalence rule in Article 22.4 of the DSU, the United States does not call into question as a matter of principle the approach of observing lost trade – a perfectly respectable approach that has also been used in past cases, which reflects the nature of the countermeasure selected by the European Union, and that the Arbitration Panel has no reason to disturb. The United States has limited itself to making the following nine specific claims, in respect of each of which the European Union has explained that the United States has made no *prima facie* case, and that in any event the Arbitration Panel has no reason to disturb the reasonable and unbiased estimates in the countermeasure:

- First, according to the United States, certain measures should be excluded from the calculation (we have explained why all the measures are correctly included, including those with respect to which there is no dispute between the Parties);
- Second, according to the United States, the calculation should be based on the reason for the WTO inconsistency rather than the WTO inconsistent measure, and removal of zeroing would only have a small impact on the rate of duty calculated (we have explained why equivalence must be assessed by reference to the measure; that the United States is refusing to provide the Arbitration Panel with relevant data; and that in any event all the indications are that the removal of zeroing would equate to absence of the measure in this case);
• Third, according to the United States, the calculation should be based on CBP rather than HTSUS data (we have explained that the documents submitted by the United States are untimely, and in any event still do not contain data relating to the period before the measure was imposed);
• Fourth, according to the United States, the calculation may not be based on the end of the reasonable period of time (10 April 2007) but must be "forward looking" (we have explained that the nature of the countermeasure selected by the European Union is fixed; that this is done by reference to the end of the reasonable period of time; and that the United States is unable or unwilling to respond to the Arbitration Panel's questions on this point);
• Fifth, according to the United States, observed trade with the rest of the world must be adjusted to take account of other unspecified factors (we have explained that the United States has made no prima facie case with respect to this matter and that in any event the approach adopted by the European Union is reasonable);
• Sixth, according to the United States, the reverse charge (basket 2) must be excluded in principle (we have explained that the United States is attempting to re-argue matters that are already decided);
• Seventh, according to the United States, the 50% pass through rate is "arbitrary" (we have explained that the United States has made no prima facie case with respect to this matter and that in any event the estimate is reasonable);
• Eighth, according to the United States, the 10% profit margin is "arbitrary" (we have explained that the United States has made no prima facie case with respect to this matter and that in any event the estimate is reasonable); and
• Ninth, according to the United States, the first EU alternative does not generate the same result as the second EU alternative (we have explained that there is no requirement that the two alternatives produce the same result).

70. In these circumstances, the European Union respectfully submits that the Arbitration Panel is compelled to reject each of the US claims, and accordingly to confirm the countermeasure as proposed.

III. THE SECOND EU ALTERNATIVE

71. Similarly, in light of the preceding observations, and our other submissions, the European Union would now like to briefly review how it sees the position with respect to the second EU alternative, also taking into account the applicable procedural rules.

72. To recall, the second EU alternative, in a first step, seeks to impose, as a minimum, an equivalent duty (no counterfactual) on an equivalent actual trade
flow at the end of the reasonable period of time (no counterfactual). In a second step, it seeks to increase the trade on which such duty would be imposed to reflect lost trade, using GTAP elasticities.

73. In support of its assertion that this countermeasure is inconsistent with the equivalence rule in Article 22.4 of the DSU, the United States has limited itself to making the following three specific claims (in addition to certain of the claims outlined above with respect to the first EU alternative and already dealt with), in respect of each of which the European Union has explained that the United States has made no *prima facie* case, and that in any event the Arbitration Panel has no reason to disturb the reasonable and unbiased estimates in the countermeasure:

- First, according to the United States, every countermeasure requires a counterfactual and the first step of the EU second alternative requires a counterfactual (we have explained why this is not the case);
- Second, according to the United States, the second EU alternative involves double counting (we have explained why this is not the case, since it is perfectly reasonable to proceed on the basis that a non-prohibitive duty will reduce trade volumes); and
- Third, according to the United States, the GTAP elasticities are inappropriate and should be rejected, and World Bank elasticities should be used instead (we have explained why this is not the case).

74. In these circumstances, the European Union respectfully submits that the Arbitration Panel is compelled to reject each of the US claims, and accordingly to confirm the countermeasure as proposed.

IV. SUSPENSION OF CONCESSIONS OR OTHER OBLIGATIONS UNDER THE DSU

75. With respect to the EU request to suspend concessions or other obligations under the DSU, the United States has made one claim: that this request is not consistent with the principles and procedures set forth in Article 22.3 of the DSU. This claim is based on one argument: that the term "agreement" should be read into the text of Article 22.3(a) of the DSU, when plainly it is not there.\textsuperscript{39} We respectfully submit that the Arbitration Panel can and should reject this US claim.

\textsuperscript{39} US Response to the Arbitration Panel's Questions, Question 56.
76. This would indeed mean that in theory such a request might be made in any case. However, the United States simply fails to address the particular features of this case that have resulted in this request by the European Union, and which would likely rarely if ever be present in other cases. First, the point is one of pure legal interpretation: there is no room for distinguishing cases on their facts. Second, the necessary adjustment is purely mechanistic. Third, the zeroing methodology has been repeatedly condemned in numerous cases. Fourth, the United States has publicly stated that it will not comply. And fifth, it is abundantly clear that instead of immediately complying with its WTO obligations, the United States is engaging in the kind of "hit and run" litigation techniques that WTO adjudicators have had good reason to deplore in past cases. In response to this unreasonable behaviour, we have designed an eminently reasonable countermeasure, which we would certainly exercise with responsibility and restraint, in the knowledge that failure to comply with the DSB authorisation would expose us to further litigation. We respectfully re-iterate our request that it be approved.

V. CONCLUDING REMARKS

77. Mr. Chairman, distinguished Members of the Panel, we thank you for your patience and would now like to make some concluding remarks, the purpose of which is to attempt to fix this case in some sort of appropriate perspective.

78. The Parties do not appear before you today as equals.

79. It is the United States, not the European Union, that has been found by the DSB and following appeal proceedings to have adopted no fewer than 32 WTO inconsistent measures.

80. It is the United States, not the European Union, that has been found by the DSB and following appeal proceedings to have failed to comply with the recommendations and rulings of the DSB at the end of the reasonable period of time.

81. It is the United States, not the European Union, that has publicly stated that it will not comply.
82. It is the purpose of these proceedings to induce the United States (not the European Union) to comply with its multilateral WTO international obligations.

83. And crucially, the burden of proof in these proceedings rests on the United States, not the European Union.

84. We are convinced that we have designed a countermeasure based on the verifiable data available to us that is unbiased, objective and fundamentally reasonable, within the limits of the equivalence rule.

85. How does the United States respond?

86. First, it continues to bicker about the measures to be included, attempting to re-argue points already decided, or suggesting that measures the United States acknowledges continue to apply and are based on zeroing should be the subject of yet new original panel proceedings.

87. Second, it again attempts to defer the entire discussion to "the future", even though the European Union has been modest in starting the meter running at the end of the reasonable period of time.

88. Third, it complains that some of the reasonable estimates made in the proposed countermeasure are "arbitrary" but adduces no timely or complete evidence in supports of its assertions.

89. Fourth, it argues that data in its sole possession is a necessary part of the calculation, but refuses to provide it, and suggests instead that the Arbitration Panel should rely on manifestly irrelevant and biased Section 129 re-determinations.

Mr. Chairman, distinguished Members of the Panel, we thank you for your attention and stand ready to answer any questions you might have.