

**UNITED STATES – LAWS, REGULATIONS AND METHODOLOGY
FOR CALCULATING DUMPING MARGINS (“ZEROING”)**

**RECOURSE TO ARTICLE 22.6 OF THE DSU
BY THE UNITED STATES**

(DS294)

**Comments of the United States Regarding
Japan’s Responses to Questions from the Arbitrator**

June 2, 2010

QJ1. Please comment on the European Union's arguments, in its responses to question 8 of the Arbitrator, that an assessment of "nullification or impairment in terms of trade effects is not always possible, and that if a countermeasure can be designed that is equivalent in terms of a metric other than trade effects, there is no need to think of it in terms of "trade effects".

1. Please refer to the response of the United States to Question 59.

QJ2. Please clarify what you mean, in Section II.B of your Written Submission, in stating that nullification or impairment need not be measured solely in terms of lost exports, "but rather may also be measured in terms of *excess anti-dumping duties collected*". What does the notion of "excess anti-dumping duties collected" encompass?

2. Please refer to the response of the United States to Question 65.

QJ3. The European Union refers to the nullification or impairment as the "the measure found to be inconsistent" (for example, in paragraph 68 of its responses to the Arbitrator's questions). Do you consider that the nullification or impairment *is* the violation? Please comment on the determinations of the arbitrator in *US – Byrd amendment* that "the benefit nullified or impaired must necessarily men something else than the violation itself (*US – Byrd Amendment, Decision of the Arbitrator, para. 3.55*). Do you agree with this determination?

3. Please refer to the response of the United States to Question 65.

QJ4. Please comment on the potential relevance of the determinations in *US – 1916 Anti-Dumping Act*, authorizing countermeasures in the form of a "mirror" legislation. In this context, please comment on:

(a) the admissibility, under Article 22.6 of the DSU, of an approach to calculating the level of nullification or impairment based on an "equivalent" measure;

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

4. Please refer to the response of the United States to Question 66.

QJ5. In various places (for example in paragraph 145 of its responses to questions), the EU refers to the "design" or the "nature" of the countermeasures" as something that the Arbitrator may not consider. Article 22.7 refers to the arbitrator not examining "the nature of the concessions or other obligations to be suspended". Do you consider that the nature of the obligations to be suspended is the same as the nature or design of the countermeasures?

5. The Arbitrator posed a similar question to the European Union. We will provide our comments regarding this issue in our comments on the European Union’s response to Question 67.

QJ6. In its Written Submission, the European Union indicates that it considers it to be its right under the DSU "not to look any further into the future than the end of the reasonable period of time". Do you agree with this statement?

6. Please refer to the response of the United States to Question 45.

QJ7. In its written submission (para. 41), Japan asserts that the European Union utilizes a compound elasticity factor that is a combination of the aggregate U.S. import demand elasticity and the elasticity of substitution between imports from different origins. Does this imply that, conceptually, the first component of this compound elasticity factor used by the EU is the same as the import demand elasticity used by the U.S.?

7. The Arbitrator posed a similar question to the European Union. We will provide our comments regarding this issue in our comments on the European Union’s response to Question 87.

QJ8. In its written submission (para. 43), Japan refers to a US International Trade Commission (USITC) CGE model that uses the same database as GTAP, but is implemented differently because it is a single country model which includes 497 sectors/commodities [Donnelly et al., 2004]¹. In its written submission, Japan also cites a study by Broda and Weinstein (2006).

¹ According to the authors, the values of the USITC model substitution elasticities were selected from studies in the literature or those used in prior analysis by the Commission. Following certain adjustments, these elasticities were aggregated to the USITC 128 sector level. Subsequently, Armington substitution elasticities required for a GTAP 41 sector model were derived as a trade-weighted average from the USITC 128 sector model elasticities.

- (a) Do these elasticities reflect US specificities?
- (b) How do these elasticities differ from those proposed by the parties and to what extent would they be more or less appropriate?
- (c) Do these elasticities simply capture the substitution between domestic and imported goods?

8. Please refer to the response of the United States to Question 91.

QJ9. The US has argued, in para. 133 of its Written Submission, that "absent knowledge of the nature of the concessions, even if the EU applied the same tariff to the same value of goods, the actual level of nullification or impairment could be quite different depending on import demand elasticities or other variables". Do you agree?

9. Please refer to the response of the United States to Question 66.

QJ10. Please comment on the following observation of the arbitrator in *EC – Bananas*:

"...the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned. We agree with the United States that this *temporary* nature indicates that it is the purpose of countermeasures to induce compliance. But this purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is *equivalent* to the level of nullification or impairment. In our view, there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for countermeasures of a *punitive* nature."²

10. The Arbitrator posed a similar question to the European Union. We will provide our comments regarding this issue in our comments on the European Union’s response to Question 98.

QJ11. The European Union has suggested that in the first year of application, the suspension measures would "naturally" also include the amount accumulated

² Decision of the Arbitrator, *EC – Bananas (US)*, para. 6.3.

between the end of the reasonable period of time and the implementation of the countermeasures (para. 64 of the EU Written Submission). Do you agree with that proposition? Please explain, with reference to the applicable rules of interpretation, whether, in your view, the DSU allows the application of suspension measures in relation to the period between the end of the reasonable period of time for implementation and the time at which suspension is authorized by the DSB.

11. Please refer to the response of the United States to Question 101.

QJ12. Do you wish to make any other comment relating to issues addressed by the parties in their oral statements during the meeting of the Arbitrator with the parties?

12. The United States provides the following comments regarding Japan’s response to Question 12 of the Arbitrator to Japan relating to issues addressed by the parties in their oral statements delivered during the meeting of the Arbitrator with the parties held 20 to 21 May 2010.

13. In paragraphs 1-5 of its response, Japan provided comments regarding the issue of whether the “lost exports” of the WTO-inconsistent measures is the “only” measurement of nullification or impairment. The United States has provided comments regarding this issue in our response to Question 59, and refers the Arbitrator to that response.

14. In paragraphs 6-10 of its response, Japan provided comments regarding the issue of whether the level of suspension should reflect the “forward-looking” level of nullification or impairment, or instead should include any nullification or impairment that results from actions taken after the end of the reasonable period of time. The United States has provided comments regarding this issue in our responses to Questions 4, 45, 82 and 101, and refers the Arbitrator to those responses.

15. In paragraphs 11-13 of its response, Japan provided comments regarding the burden of proof in this dispute. The United States has provided comments regarding this issue in our responses to Questions 3 and 40, and refers the Arbitrator to those responses.

16. In paragraphs 14-16 of its response, Japan provided comments regarding the European Union’s choice of 2007 data as a proxy, the use by the United States of the average data from 2007 to 2009, and the European Union’s claim that it was properly “taking a photograph” at the end of the reasonable period of time. The United States has provided comments regarding this issue in our responses to Questions 4, 45, 53, 82, and 101, and refers the Arbitrator to those responses.

17. In paragraph 17 of its response, Japan provided comments regarding the issue of whether there was double-counting in basket 1 and basket 2 of the European Union’s Methodology 1. The United States has provided comments regarding the reverse charge issue in paragraphs 115 to 118 of our Written Submission.

18. In paragraphs 18 and 19 of its response, Japan provided comments regarding the relationship between the accumulation of nullification or impairment and the passage of the time after the end of the reasonable period of time. The United States has provided comments regarding this issue in our responses to Questions 82 and 101, and refers the Arbitrator to those responses.