

**UNITED STATES – MEASURES RELATING TO ZEROING
AND SUNSET REVIEWS**

RECOURSE TO ARTICLE 22.6 OF THE DSU
BY THE UNITED STATES

(DS322)

Response of the United States to Questions from the Arbitrator

September 8, 2010

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To the United States:

1. Japan submits that, "[a]s a matter of law, the relevant date for determining the level of N/I, and accordingly the level of suspension of concessions, is the end of the RPT" (Japan's written submission, para. 20). Does the United States agree with this statement? If not, what is in the United States' view, the precise relevant date for determining the level of nullification or impairment in the present case?

1. The United States disagrees with the statement that the “relevant date for determining the level of N/I, and accordingly the level of suspension of concessions, is the end of the RPT.” Nowhere in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) is there a requirement that the determination of the correct level of suspension is to be made as of the end of the reasonable period of time (“RPT”), let alone that the determination is to be made only at that point in time. Indeed, prior arbitrators have rejected the notion that it is the situation at the end of the RPT that controls, but rather have found that changes after the RPT should be taken into account.¹

2. It is not difficult to see how Japan’s approach is in fact inconsistent with the DSU. There will often have been Dispute Settlement Body (“DSB”) recommendations and rulings subsequent to the end of the RPT, for example resulting from a compliance panel under Article 21.5 of the DSU. Under Japan’s approach, where the relevant date for determining the level of nullification or impairment is the end of the RPT, an arbitrator would not be permitted to base a determination of the level of nullification or impairment on those most recent DSB recommendations and rulings. Japan’s approach would treat those DSB recommendations and rulings as though they had no legal effect.

3. It is also important to consider what would result if Arbitrators were limited to examining the situation as it existed at the end of the implementation period or could not take into account any more recent evidence. An arbitrator could authorize suspension of concessions even where a

¹ See, *EC – Bananas III (Article 22.6)*, para. 4.7, in which the arbitrator stated that to examine the original banana import regime “would mean to ignore altogether the undisputed fact that the European Communities has taken measures to revise its banana import regime. That is certainly not the mandate that the DSB has entrusted to us”; see also *Brazil – Aircraft (Article 22.6)*, paras. 3.37-3.40, in which the arbitrator indicated that it was examining the *revised* PROEX regime.

Member has come into compliance; this would plainly not be equivalent under Article 22 of the DSU.

4. The WTO Agreement represents the result of a number of negotiations under which Members agreed to make certain trade concessions in return for trade concessions from other Members. One of the underlying principles in authorizing the suspension of concessions under Article 22 of the DSU then is that where a Member's measure is nullifying or impairing the benefits promised to another Member under the covered agreements, the Member whose benefits are nullified or impaired is not required to continue providing the full level of benefits of its trade concessions to the Member in breach. In other words, the suspension of concessions under Article 22 permits the complaining Member to suspend concessions in order to balance the benefits that are being denied it by the measure of the Member concerned. Article 22.4 ensures that the complaining Member does not suspend concessions greater than the level of nullification or impairment the complaining Member is suffering. In other words, there is no punitive element to the suspension of concessions.

5. The determination of the correct level of suspension is thus, by necessity, forward-looking. Past periods are relevant only to the extent that they serve as a proxy for the level of nullification or impairment going forward. The more remote in time the request for suspension is from the end of the reasonable period of time, the less relevant the period at the end of the RPT may be to the inquiry into the appropriate level of suspension.

6. Past arbitrations awarding variable levels of suspension recognize that the calculation of a level of nullification or impairment is a forward looking exercise. In *United States – Continued Dumping And Subsidy Offset Act Of 2000 (EC)*, the arbitrator authorized a variable level of suspension to reflect the fact that “the value and industry distribution of the trade impact of the CDSOA could vary widely from one year to the next, because of the numerous factors affecting the amounts that may be disbursed, the nature of the recipients and how each category of recipient is likely to use the monetary amounts awarded to them under the CDSOA.”² If assessing the proposed level of suspension was a static exercise of comparing that level to the level of nullification or impairment at the end of the reasonable period of time, such a variable level of suspension would be unnecessary.

7. Similarly, in *United States – Anti-Dumping Act of 1916*, the United States had never applied the 1916 Act, which had been found to be WTO-inconsistent, as of the end of the RPT. Thus, if the end of the RPT were the only appropriate time to measure the level of nullification or impairment, then the award would have been zero. The arbitrator, however, rejected such an

² *United States – Continued Dumping And Subsidy Offset Act Of 2000 (EC)* (WT/DS217/ARB/EEC), para. 4.21.

approach.³ Instead, the arbitrator concluded that, “[i]n the event that there are future applications of the 1916 Act – such as future US court decisions against EC entities, or future settlement awards involving European Communities entities – then the European Communities would be entitled to adjust the quantified level of suspension to account for this additional level of nullification or impairment.”⁴ This future-oriented approach is inconsistent with Japan’s argument that the arbitrator should focus upon the period at the end of the RPT.

8. Moreover, in *United States – Upland Cotton*, the arbitrator considered a request from the requesting Member for the level of countermeasures to include “one-time countermeasures” in the amount of the user marketing (Step 2) payments made by the United States to domestic users of upland cotton in addition to the level for other countermeasures sought by the complaining Member.⁵ The compliance panel had found these Step 2 payments to be inconsistent with the SCM Agreement.⁶ The expiration of the RPT was 1 July 2005; Brazil was seeking authorization for this one-time amount for the 13 months after the RPT, to 30 July 2006, when the United States repealed the Step 2 program.⁷ Although the United States continued to make Step 2 payments for a period after the expiration of the RPT, the arbitrator nonetheless denied Brazil’s request for a one-time amount.⁸ This decision confirms that the suspension of concessions should be based upon the current level of nullification or impairment, not a retroactive analysis.

9. With respect to the question of the “precise relevant date for determining the level of nullification or impairment in the present case,” the correct level of suspension should be based on the most recent DSB recommendations and rulings in this dispute. Furthermore, the correct level of suspension in this dispute should be forward-looking. In particular, Article 22.4 of the DSU provides that the “level of the suspension of concessions or other obligations authorized by the DSB *shall be* equivalent to the level of nullification or impairment.” (Emphasis added.) Similarly, Article 22.7 of the DSU provides that the Arbitrator “shall determine whether the level of such suspension *is* equivalent to the level of nullification or impairment.” (Emphasis added.) In neither case does the DSU provide for a determination a level of suspension that *would have been* equivalent to the level of nullification or impairment that *had been caused* by the measures.

³ *United States – Anti-Dumping Act of 1916* (WT/DS136/ARB), para. 7.6.

⁴ *Id.* at para. 7.8.

⁵ *United States – Upland Cotton* (WT/DS267/ARB1), para. 2.6

⁶ *Id.* at para 1.13.

⁷ *Id.* at para. 3.2.

⁸ *Id.* at para. 3.50. While the *US – Upland Cotton* arbitration was under the SCM Agreement, the question of the scope of suspension of concessions with respect to past actions does not depend on the differences between the SCM Agreement and AD Agreement.

10. In other words, the question is what is the level of nullification or impairment when the suspension of concessions or other obligations is being applied. In keeping with the forward-looking nature of the level of suspension, the United States has estimated the level of nullification or impairment by taking the average level of nullification or impairment for the last three years as a proxy for the level of nullification or impairment in the current year.

2. In its written submission (Japan's written submission, para. 37), Japan quotes from paragraph 167 of the Appellate Body's report in *US – Zeroing (Japan) (Article 21.5 – Japan)*, to the effect that "[t]here is no 'retroactive relief' involved when a WTO Member's conduct is examined as of the end of the reasonable period of time, which is the proper reference point." In the United States' view, is this statement by the Appellate Body relevant for the discussion on whether imports liquidated after the end of the RPT should be taken into account when determining the level of nullification or impairment suffered by Japan?

11. The United States responds that this statement by the Appellate Body is not relevant to the question of the scope of suspension of concessions with respect to past actions. The Appellate Body's statement was in a DSU Article 21.5 proceeding, which dealt with the matter of compliance, not suspension of concessions. In particular, the question presented concerned the scope of the obligation to comply after the end of the RPT with the DSB recommendations and rulings. The passage cited by Japan dealt with post-RPT liquidation of entries made before the end of the RPT. That passage did not concern the question of the level of suspension of concessions or of nullification or impairment. The question of the scope of compliance is a different question from whether such liquidations are relevant to the level of nullification or impairment.

12. Correspondingly, this statement by the Appellate Body is not relevant to the discussion of whether the relevant date for determining the level of nullification or impairment suffered by Japan is the end of the RPT.

3. The United States refers to Japan's recalculation of the dumping margins with the zeroing instruction removed for five exporters as "unofficial" and argues that, even assuming for the sake of argument that Japan's calculations were run properly, this is not the only WTO-consistent methodology the United States may choose to employ (United States' written submission, paras. 102-103).

- (a) **Does the United States contest that Japan "properly ran the margin calculation program with the zeroing instruction removed"? If so, please identify in what respect in your view Japan ran the programme incorrectly, and correct the calculations as required.**

13. The United States cannot confirm the accuracy of any margin calculations where the documentation for the calculation is not the actual documentation generated by Commerce in the course of its administrative proceedings.

14. Here, Japan offers recalculations performed by its consultant involving the application, solely for purposes of dispute settlement, of a dumping margin calculation methodology that the United States has not adopted or applied. As such, the United States questions the reliability of these calculations performed without the benefit of a transparent proceeding, without the opportunity for parties to participate, and without opportunity for judicial review.

15. In contrast, the Section 129 determinations on which the U. S. based its calculation of nullification or impairment were conducted pursuant to an official administrative proceeding and, as a result, these determinations, including the margin program runs, were subjected to numerous procedural protections. The Section 129 determinations were first published as preliminary determinations on which both foreign producers/exporters and the U.S. domestic industry were invited to comment before the issuance of the final determinations. These parties' representatives had full access to all the confidential underlying data and margin programs, and were able to participate fully in the Section 129 proceedings and raise arguments and have them addressed by Commerce.

16. These procedural protections are important to reliably calculate accurate dumping margins. Therefore, the United States is not in a position to reassure the arbitrator as to the reliability and accuracy of Japan's calculations which enjoy none of these procedural protections.⁹

(b) The United States argues that there is no basis to extrapolate Japan's recalculations for five exporters to the remaining nine exporters. Can the United States elaborate on its argument, in the light of Japan's assertion that these recalculations represent 93 per cent of the trade value at issue.

17. The effect of zeroing relates to the extent to which transaction prices for exports are both above and below normal value. The Section 129 results demonstrate that when the margins of dumping for all companies are recalculated without zeroing, the decrease in the margins of dumping can vary considerably from one company to the next. Japan, however, has provided recalculated dumping margins for only certain of the companies that are the basis for its estimation of the level of nullification or impairment. The assertion that these recalculations for five exporters represent 93 percent of the trade value at issue highlights that the remaining nine exporters share a relatively small share of the U.S. market and appear to occupy a different position in the U.S. market. These smaller exporters may sell a very different range of products,

⁹ See U.S. Written Submission, para. 106.

and may have transaction prices that have a different relationship to normal value than the exporters who occupy a much larger share of the U.S. market.

(c) Could the United States itself recalculate the remaining nine margins using the margin calculation programme with the zeroing instruction removed.

18. For the reasons described in response to subsection (a) above, the United States is not in a position to recalculate the remaining nine margins using the margin calculation program with the zeroing instruction removed.

(d) Is the United States prepared to provide the Arbitrator with an alternative WTO-consistent calculation of the margins of dumping? If so, please provide such alternative calculation. If not, please indicate why the United States believes the Arbitrator should accept the United States' view that the countermeasure should not be based on Japan's recalculation.

19. The United States is actively engaged in an internal process to comply with the rulings and recommendations of the DSB in regards to zeroing in administrative reviews. The United States is not in a position to prejudge the outcome of that internal process. Nevertheless, as discussed in Paragraphs 101 through 108 of the U.S. Written Submission, the countermeasure should not be based on Japan's recalculation because: (1) the Section 129 determinations provide a reasonable proxy for the effect of zeroing; (2) as discussed in our response to Question 3(a) above, Japan's recalculation is unofficial and lacks the procedural protections present in the Section 129 determinations; and (3) contrary to Japan's assumption that the elimination of zeroing would eliminate virtually all antidumping duties, actual experience with the Section 129 determinations has shown that the elimination of zeroing would not result in the elimination of all antidumping duties, and in the cases of many orders would result in a slight reduction, if any, in the antidumping duties to be applied.

4. In its written submission and its correction (United States' written submission, para. 60), the United States asserts that since ball bearings may enter under multiple six-digit HTS lines, the United States took a simple average of the different import demand elasticities to aggregate the import demand elasticity at the case level. Please explain the rationale for choosing the simple average to aggregate 6-digit elasticities at the case level.

20. In estimating the level of nullification or impairment, the United States relied on the shipment data of the 14 firms provided by Japan. That data did not include any information relating to the HTS codes under which the shipments entered the United States. Correspondingly, the data provided by Japan did not permit other forms of weighting that would have required the individual HTS codes. Therefore, the United States opted to give equal weight to all of the HTS codes.

5. In its written submission, the United States asserts that given the lack of availability of Section 129 determinations for ball bearings, the most appropriate choice of methodology to estimate the effects of zeroing on antidumping duty rates is to recalculate the change in anti-dumping duty rates using a simple average of the differences between zeroed and non-zeroed margins determined in Section 129 determination for all products. Please clarify the rationale behind this methodological approach. In particular, please explain the United States' choice to use simple average across all products.

21. The U.S. methodology for determining the level of nullification and impairment is based on the assumption that the dumping margins at issue would be recalculated using a WTO-consistent methodology that does not include zeroing. As explained in paragraph 43 through 51 of the U.S. Written Submission, the Section 129 determinations represent recalculations of numerous dumping margins with offsets granted to bring those investigations into compliance with the DSB's recommendations and rulings in various disputes. Accordingly, the Section 129 determinations represent a reasonable proxy for the effect of zeroing on antidumping duty rates. The results of these determinations reliably estimate the impact of zeroing, and ensure that any suspension of concessions is equivalent to, and not in excess of, the level of nullification or impairment for the measures found to be inconsistent.

22. However, it should be understood that the counterfactual proposed by the United States is not that all dumping margins would be reduced using the methodology that was applied in the Section 129 determinations. Instead of predicting a precise methodology for implementation, the U.S. methodology estimates that the impact of zeroing on dumping margins in this dispute is roughly equal to the impact observed in the Section 129 determinations.

23. Japan complains that the U.S. methodology uses an average of the Section 129 determinations across all products.¹⁰ Japan fails to provide any rationale why a simple average across distinct products is distortive. In fact, no such rationale exists. The effect of zeroing relates to the extent to which transaction prices are both above and below normal value. The United States is aware of no reason that the extent to which transaction prices were both above and below normal value in some of the Section 129 determinations should be accorded more or less weight in estimating an overall difference between dumping margins calculated with zeroing and dumping margins calculated with a WTO consistent methodology that does not use zeroing.

24. There is no basis to conclude that the use of a simple average instead of a weighted-average is distortive. A weighted-average based on, for example, trade value, would only be appropriate if the effect of zeroing was related to trade value. However, there is no evidence that the effect of zeroing on dumping margins is related to the overall trade value of the product to which the margin of dumping is applied. In fact, the size of the difference between dumping

¹⁰ See, e.g., Japan Written Submission, para. 138.

margins calculated with or without zeroing in the Section 129 determinations does not appear to depend on the overall trade value of the products in question. Nor is there any reason to conclude that the difference in margins would depend on the specific trade values to which the margins were applied. For all these reasons, it is entirely reasonable for the United States to estimate the effect of zeroing through the use of a simple average based on the impact observed in the Section 129 determinations.

6. As a follow-up to the previous question, please clarify what in the United States' view would be the flaws in the methodology proposed by Japan, as described in the Forth Supplementary Statement of Valerie Owenby (Exhibit JPN-140) and in the Updated Chart Summarizing Essential Elements of the Calculation of the Quantitative Impact of the Use of Zeroing, for All Reviews and Companies (Exhibit JPN-140.B), as well as in Japan's written submission.

25. At its most basic level, Japan's methodology assumes one manner of implementation, "the elimination of the zeroing program line."¹¹ For the reasons discussed in our response to Question 3, this methodological assumption is unreasonable.

26. Japan's methodology also unreasonably assumes that the margins for the nine exporters for which it did not perform a margin recalculation would be reduced to zero. Japan's calculations show that the elimination of the zeroing line from the margin program did not reduce the dumping margin to zero or a *de minimis* level in all instances. Nevertheless, Japan's methodology ignores these results and unreasonably assumes no dumping margin for any company for which a rerun was unavailable.¹² Thus, Japan's assumption that the margins for the nine remaining exporters would be zero is belied by its own calculations for the five exporters for which it did perform recalculations.

27. In contrast, the U.S. methodology is an average of *all* of the Section 129 determinations. In this regard, the U.S. methodology reasonably estimates the impact of zeroing on dumping margins in this dispute by considering all the relevant data without ignoring particular results as Japan's methodology does.

7. To calculate the level of nullification or impairment, the United States uses the average of trade value data from 2007-09. Please clarify why this average should be considered more appropriate than the two year average proposed by Japan covering 2008-2009. In particular, please comment on Japan's assertion that "the three-year average trade value for 2007-2009 is virtually identical to the two-year average trade value for 2008-2009" (Japan's written submission, para. 193).

¹¹ Exhibit JPN-140 at 3.

¹² See, e.g., Exhibit JPN-162 "NI Summary Spreadsheet" at n. 4.

28. As discussed in paragraph 66 of the U.S. Written Submission, the United States believes that using three years of data to estimate the level of nullification or impairment is appropriate because (1) using data from these recent years reasonably estimates the value of trade, including the time since the expiration of the RPT on December 24, 2007; and (2) a three-year average would help remove any distortions from an exceptionally high or low level of trade for a given year. As Japan points out in its Written Submission, in this particular case, the two-year average trade value of 2008-2009 is very close to the three-year average trade value of 2007-2009. Based on the U.S. methodological approach, the level of nullification or impairment for both the three-year average and two-year average is \$4.1 million.

8. Does the United States agree with Japan's statement that "[s]imple zeroing tends to inflate margins even further than model zeroing, such that a counterfactual based on model zeroing would understate the impact of zeroing for the periodic reviews at issue in this dispute" (Japan's written submission, para. 139)?

29. As discussed above, 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. Rather, the counterfactual is that the dumping margins at issue would be recalculated using a WTO-consistent methodology that does not include zeroing. The United States estimates that the impact on dumping margins is roughly equal to the impact observed in the Section 129 recalculations. In this regard, it is important to note that the United States is free to adopt any WTO-consistent methodology that does not include zeroing.

30. The United States disagrees with Japan's statement that "[s]imple zeroing tends to inflate margins even further than model zeroing, such that a counterfactual based on model zeroing would understate the impact of zeroing for the periodic reviews at issue in this dispute". Japan's assertion relies entirely upon the distinction between average-to-transaction comparisons (where so-called "simple zeroing" refers to the denial of offsets for negative comparison results) and average-to-average comparisons (where so-called "model zeroing" refers to the denial of offsets for negative comparison results). If Japan's assertion were correct, then one would expect to observe that administrative review dumping margins would tend to be higher than original investigation dumping margins. Empirically, however, dumping margins calculated in administrative reviews generally decline from those calculated in original investigations.¹³ The reason for this decline is that the most significant change affecting the dumping margins

¹³ See, *Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection*, U.S. Government Accountability Office ("GAO"), March 2008, at 21 (available at <http://www.gao.gov/new.items/d08391.pdf>). The GAO found that over a 6-year period, the final duty rates on entries went down or stayed the same 84% of the time, and increased only 16% of the time. Moreover, the median increase in rate was less than 4 percentage points, whereas the median decrease in rate was 7 percentage points.

calculated in administrative reviews, as opposed to original investigations, is the change in pricing behavior, not the change in comparison methodology.

31. The extent to which so-called “simple zeroing” would result in a higher dumping margin than so-called “model zeroing” depends entirely on the extent to which individual transaction prices for merchandise within the same “model” fall both above and below the normal value. Once an antidumping duty order is imposed, however, despite the application of so-called “simple zeroing” in administrative reviews, dumping margins generally decline as pricing behavior changes to minimize antidumping duties.

32. These responses in pricing behavior also tend to decrease the impact compliance would have on administrative review dumping margins (for purposes of the counterfactual) as compared to the impact compliance had with respect to the dumping margins calculated in the original investigations. Accordingly, the impact of compliance on dumping margins recalculated in the Section 129 determinations is likely to be at least as great as, if not greater than, the (counterfactual) impact of compliance on dumping margins calculated in administrative reviews.

9. In its written submission (United States' written submission, para. 145), the United States argues that the elasticity of substitution cannot be used by itself to determine the change in imports resulting from a duty change because the latter will result in changes in both the domestic price and the world import price. Would a change in both the domestic and world import price following the imposition of a duty depend on whether Japanese exporters and US importers are price-makers or price-takers in these markets? If so, is there any evidence to indicate what the case might be for the relevant products in this dispute?

33. The issue of market power does not alter the conclusion that the source substitution elasticity is not the most appropriate elasticity for this analysis. Both parties have submitted equations to estimate lost exports that rely solely on the change to the import price of Japanese ball bearings. The import demand elasticity used in the U.S. Written Submission measures the extent to which consumption will increase when a product's own price falls and thus matches the equations submitted by both parties. The source substitution elasticity proposed by Japan, however, measures changes in relative quantities demanded given changes in relative prices, and therefore requires knowledge of multiple price changes for domestic and imported goods. Here, Japan has provided only an estimate of one price change – the change to the import price of Japanese ball bearings. The price change information submitted by Japan thus supports use of an import demand elasticity, but is insufficient to support use of a source substitution elasticity.

34. Regardless of the degree of market power exhibited by Japanese exporters or U.S. importers, relative quantities and prices will change with changes in the duty level. The United States acknowledges that the magnitude of such changes would be influenced by the degree that either Japanese exporters or U.S. importers exhibit market power. The United States is not

aware of any evidence, and advances no opinion, as to whether market power exists for the Japanese exporters or U.S. importers of the relevant products.

10. Can the United States comment on the statement contained in Japan's written submission (Japan's written submission, para. 46), regarding variable levels of suspension with respect to future years and Japan's proposition that the arbitrators' decisions in *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)* and *US – 1916 Act (EC) (Article 22.6 – US)* "provide no precedent for the existence of N/I [nullification or impairment] with respect to the time between the end of the RPT and the present."

Does the United States agree with Japan's proposition that "[w]here Japan's methodology, including its counterfactuals, provide a 'reliable basis' for estimating the level of N/I [nullification or impairment] and reflect a 'plausible' or 'reasonable' compliance scenario, even if not necessarily the 'most likely' compliance scenario, the Arbitrator must accept Japan's methodology" unless the United States has persuaded the Arbitrator that such methodology does not "reasonably" determine the level of nullification or impairment (see, Japan's written submission, para. 10).

35. With respect to Japan's statement regarding variable levels of suspension, the United States disagrees with Japan's statement that these two decisions "provide no precedent for the existence of N/I with respect to the time between the end of the RPT and the present." Both of these decisions reject the premise – advanced here by Japan – that the level of nullification or impairment should be calculated based upon the "time between the end of the RPT and the present." To the contrary, neither of these decisions measured nullification or impairment based upon the period of time between the end of the RPT and the time of the arbitration, but instead granted awards based upon forward-looking analyses.

36. In *United States – Continued Dumping And Subsidy Offset Act Of 2000 (EC)*, the arbitrator authorized a variable level of suspension to reflect the fact that "the value and industry distribution of the trade impact of the CDSOA could vary widely from one year to the next, because of the numerous factors affecting the amounts that may be disbursed, the nature of the recipients and how each category of recipient is likely to use the monetary amounts awarded to them under the CDSOA."¹⁴ If assessing the proposed level of suspension was a static exercise of comparing that level to the level of nullification or impairment at the end of the reasonable period of time, such a variable level of suspension would be unnecessary.

37. Similarly, in *United States – Anti-Dumping Act of 1916*, the United States had never applied the 1916 Act, which had been found to be WTO-inconsistent, as of the end of the RPT. Thus, if the end of the RPT were the only appropriate time to measure the level of nullification or

¹⁴ *United States – Continued Dumping And Subsidy Offset Act Of 2000 (EC)* (WT/DS217/ARB/EEC), para. 4.21.

impairment, then the award would have been zero. The arbitrator, however, rejected such an approach.¹⁵ Instead, the arbitrator concluded that, “[i]n the event that there are future applications of the 1916 Act – such as future US court decisions against EC entities, or future settlement awards involving European Communities entities – then the European Communities would be entitled to adjust the quantified level of suspension to account for this additional level of nullification or impairment.”¹⁶ This future-oriented approach is inconsistent with Japan’s argument that the arbitrator should only focus upon the period between the end of the RPT and the present.

38. Japan’s failed attempt to distinguish these two decisions appears to rest upon the fact that neither of these two decisions dealt with “the existence of N/I with respect to the time between the end of the RPT and the present.” However, this is inaccurate. In *CDSOA*, because the end of the RPT was in December 2003, and the request for authorization to suspend concessions was made in January 2004, there would have been minimal, if any, nullification or impairment resulting from entries between the end of the RPT and the time of the arbitration.¹⁷ Nevertheless, the arbitrator used the previous three years of data in estimating the current-year effect. The award in *CDSOA* was variable because of the forward-looking nature of the analysis and variability of disbursements. Similarly, the award in *1916 Act* did consider the situation at the end of the RPT and rejected using that as the basis for the award. Rather, the arbitrator’s award was based upon potential future applications of the 1916 Act. In neither case did the Arbitrator determine the authorized level of suspension by cumulating past actions.

39. With respect to Japan’s statement regarding the burden of proof, the United States agrees that the party objecting to the level of suspension proposed (and thereby the party referring the matter to arbitration) has the initial burden of showing that the proposed level of suspension is not equivalent to the level of nullification or impairment. However, burden of proof does not deal with the treatment or weighing of the evidence, rather it deals with which party must initially present sufficient evidence to create a presumption that its claim is correct. Neither Japan’s factual assertions nor its methodology are entitled to deference by the Arbitrator. Instead, once the United States has discharged its burden of demonstrating that the level of suspension proposed by Japan is not equivalent to the level of nullification or impairment, the United States has met its burden of proof and there is no additional burden with respect to each element of Japan’s argument.

¹⁵ *United States – Anti-Dumping Act of 1916 (WT/DS136/ARB)*, para. 7.6.

¹⁶ *Id.* at para. 7.8.

¹⁷ *United States – Continued Dumping And Subsidy Offset Act Of 2000 (EC) (WT/DS217/ARB/EEC)*, paras. 1.3-1.4.

40. As the Appellate Body explained in *Wool Shirts*, if the party with the burden of proof "adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."¹⁸ As a result, the allocation of the burden of proof does not affect the treatment of evidence submitted by either party to the arbitration proceeding. Rather, as the Appellate Body has explained, this is a function not of the burden of proof but of the measure and provision of the covered agreement at issue: "precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case."¹⁹

41. In other words, this burden does not mean that Japan's allegations and factual assertions enjoy any presumption of correctness or any special weight simply because Japan has put them forth in this arbitration. The situation is analogous to the situation in an arbitration under Article 21.3(c) of the DSU, where the fact that the responding party bears the burden of proof does not equate to any special weight or significance or presumption in favor of the evidence or assertions made by the responding party.²⁰

42. In particular, in the part of the proceeding in which the Arbitrator is seeking to determine the correct level of suspension, there is no burden of proof allocated to one party compared to the other with respect to that correct level. This is because the burden of proof in an Article 22.6 arbitration flows from the task of the arbitrator – in this case, the U.S. objection to Japan's proposed level of suspension is equivalent to a claim that Japan's request is not consistent with the covered agreements.²¹

43. Once the United States meets that burden and the Arbitrator moves on to determining the correct level, this is analogous to the situation commonly faced by arbitrators acting under Article

¹⁸ *Appellate Body Report, United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, p 13.

¹⁹ *Id.*

²⁰ See, e.g., Award of the Arbitrator, *Colombia – Indicative Prices and Restrictions on Ports of Entry: Arbitration under Article 21.3(c) of the DSU*, WT/DS366/13, circulated 2 October 2009, para. 67 ("I am guided by previous arbitrators' awards that place the burden on the implementing Member to demonstrate that, if immediate compliance is impracticable, the period of time it proposes constitutes a 'reasonable period of time.' However, *this does not absolve the other Member from producing evidence in support of its contention* that the period of time requested by the implementing Member is not 'reasonable', and a shorter period of time for implementation is warranted.") (footnotes omitted and emphasis added).

²¹ *EC – Hormones (WT/DS26/ARB)*, para. 9 ("[I]t is for the EC to submit arguments and evidence sufficient to establish a prima facie case or presumption that the level of suspension proposed by the US is not equivalent to the level of nullification and impairment caused by the EC hormone ban. Once the EC has done so, however, it is for the US to submit arguments and evidence sufficient to rebut that presumption.")

21.3(c) of the DSU. As the arbitrator put it in *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico: Arbitration under Article 21.3(c) of the DSU*, “[f]inally, it is incumbent upon the implementing Member seeking a reasonable period of time to establish that the proposed period is the ‘shortest period possible’ within its domestic legal system to implement the recommendations and rulings of the DSB. Failing that, *it is ultimately for the arbitrator to determine the ‘shortest period possible’ for implementation, on the basis of the evidence presented by all parties.*”²² In that inquiry, there is no burden of proof assigned to either party.

To both parties:

20. With respect to pre-RPT entries, Japan identifies in its calculations all pre-RPT entries for fourteen exporters that remained unliquidated as of the end of the RPT, and the value for each such entry. Do any such pre-RPT entries remain unliquidated at the present time? If so, please identify each such entry and its value.

44. Japan has calculated its estimates of pre-RPT entries and cash deposits using its own data set; the United States is not in a position to provide an independent calculation.

21. As Japan notes (Japan's methodology paper, note 25) the anti-dumping orders on cylindrical ball bearings and on spherical plain bearings were revoked as of 1 January 2000. As of the present time, do there remain any unliquidated cash deposits in respect of entries that took place under those orders? If so, please identify each such entry and its value.

45. Please see response to Question 20.

22. Japan and the United States use the same formula to calculate the level of nullification or impairment with respect to current year entries (entries during the period 1 January – 31 December 2010). However, while the United States applies the formula after aggregating individual terms at the case level, Japan uses the same formula but at the firm level. Please elaborate whether the use of this formula at different levels of aggregation affects the results.

46. Using the U.S. methodology that relies on the Section 129 recalculations to estimate the effect of zeroing, it would not matter whether the analysis was done at the firm or at the aggregate case level to calculate the level of nullification or impairment. Because the formula applies the same price change percentage to all entries, it does not affect the result whether the price change is applied to each individual entry or to the sum of all entries.

²² WT/DS344/15, circulated 31 October 2008, para. 43 (footnotes omitted and emphasis added).