UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

RECOURSE TO ARTICLE 22.6 OF THE DSU BY THE UNITED STATES

(DS322)

Comments of the United States on Japan's Responses to Additional Questions from the Arbitrator

November 12, 2010

TABLE OF REPORTS

Australia – Automotive Leather	Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R, adopted 16 June 1999
EC – Hormones (Article 22.6) (Canada)	Arbitrator Award, *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities*, WT/DS48/ARB, circulated 12 July 1999
EC – Hormones (Article 22.6) (US)	Arbitrator Award, *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities*, WT/DS26/ARB, circulated 12 July 1999
US – 1916 Act (Article 22.6)	Arbitrator Award, *United States – Anti-Dumping Act of 1916 – Recourse to Arbitration by the United States under DSU Article 22.6*, WT/DS136/ARB, circulated 24 February 2004
US – CDSOA (Article 22.6)	Arbitrator Award, *United States – Continued Dumping and Subsidy Offset Act of 2000 – Recourse to Arbitration by the United States under DSU Article 22.6*, WT/DS217/ARB/EEC, circulated 31 August 2004
US – Section 110(5) (Article 25)	Arbitrator Award, *United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under DSU Article 25*, WT/DS160/ARB25/1, circulated 9 November 2001
US – Upland Cotton (Article 22.6 and SCM Article 4.11)	Arbitrator Award, *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS267/ARB/1, circulated 31 August 2009

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24. (United States and Japan) Mexico has argued (paragraph 7 of Mexico's third-party submission) that:

> **"[T]he question of whether the authorization of countermeasures by the DSU provides a 'prospective' or 'retrospective' remedy does not provide an answer to the issues raised in this Article 22.6 arbitration.... The critical question before [this arbitrator] is whether a Member seeking the authorization of countermeasures is entitled to a remedy for *all* actions taken inconsistent with the DSB's recommendations and rulings after the expiry of the RPT. This inquiry does not require an answer to abstract questions of whether the WTO is providing 'prospective' or 'retrospective' relief."**

Can the United States and Japan comment on this statement.

1. Please see response to Question 24 and U.S. comments on Japan's response to Question 25. Additionally, Japan's answer reveals that Japan's methodology lacks a proper analytical foundation. Japan states that determining the level of nullification or impairment requires two steps: first, what is the starting date for assessing the level of nullification or impairment; and second, what types of economic harms should be quantified in determining the level of nullification or impairment?

2. As the United States explained in its response, Japan's reliance on the concept of a "remedy" is unsupported in the DSU, and the wrong framework for analyzing the equivalence between nullification or impairment and the authorized level of suspension of concessions. Similarly, Japan's proposed framework of quantifying "economic harm," apparently cumulating the "harm" from a "starting date," is likewise unsupported in the DSU, and is an improper framework for an arbitration under DSU Article 22.6.

3. The United States notes that the terms "starting date" and "economic harm" do not appear anywhere in the DSU. Under Article 22 of the DSU, the appropriate question is not how to quantify "economic harm" beginning with some "starting date," but rather what is the level of suspension of concessions that would be equivalent to the level of the nullification or

impairment. As the United States has discussed,[1] determining the level of nullification or impairment is a forward-looking exercise. Japan's approach thus incorrectly seeks to quantify all "economic harms" experienced after a starting date rather than determining the level of nullification or impairment.

4. Given this lack of an analytical basis, it is also not surprising that Japan has not been able to cite to another example where an arbitrator has cumulated nullification or impairment based on the end of the reasonable period of time ("RPT"). To the contrary, as previously discussed,[2] no prior Article 22.6 arbitrator has made an award based upon a cumulation of past nullification or impairment for past entries. The United States thus respectfully submits that, as previously discussed,[3] the Arbitrator should not base its determination of the level of nullification or impairment upon Japan's novel legal theory that has no basis in the text of the DSU or in past practice.

5. Japan also states that, for pre-RPT entries, this "economic harm" should be measured by excess duties. That is, Japan's methodology is premised on the assumption that the "economic harm" suffered by Japan for pre-RPT entries is equal to the excess duties imposed. Even assuming, for the sake of argument, that Japan's concept of "economic harm" is analogous to the concept of nullification or impairment found in Article 22 of the DSU, Japan has failed to support its assumption that the amount of "economic harm" caused by these pre-RPT entries corresponds to the amount of excess duties.

6. There is, in fact, no basis for this assumption. These excess duties were imposed on goods which entered the United States, in most cases, several years ago. The duties were paid by U.S. entities well after importation, and Japan presents no basis for believing that such payments currently have any effects on imports from Japan. Indeed, Japan concedes that it has no reliable method for measuring the economic effect of any lost exports due to excess duties on pre-RPT entries.[4] Thus, there is no basis to assume that Japan is currently experiencing any "economic harm" from these pre-RPT entries.

25. (United States and Japan) Please explain how the text of Article 22 of the DSU, read in its context and in the light of the treaty's object and purpose, supports your respective position on whether there may be suspension of concessions for nullification or impairment

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[1] *See* U.S. Written Submission, paras. 77-89; U.S. response to Questions 1, 25; U.S. comments on Japan's responses to Questions 25 and 28.

[2] *See* U.S. response to Question 24, paras. 7-8.

[3] *See, e.g.,* U.S. response to Question 24, para. 32; *US – CDSOA (Article 22.6)*, para. 3.76 (rejecting claims that are "too remote, too speculative or not meaningfully quantified") (citations omitted); *see also US – 1916 Act (Article 22.6)*, paras. 5.76-5.78 (amounts which cannot be meaningfully quantified cannot be included in the calculation of level of nullification or impairment).

[4] *See, e.g.,* Japan's response to Question 11; Japan Oral Statement, para. 44.

arising after the end of the RPT but before the date of the DSB's authorization to suspend concessions.

7. The United States notes that Japan begins its response by misapprehending the question. Japan states that it understands the question to seek clarification of "the relevant start-date for assessing the level of N/I." Japan's reformulation misstates the question.

8. For the reasons discussed in the U.S. response to Question 25, the appropriate question is what is the level of nullification or impairment when the suspension of concessions or other obligations is being applied. First, the term "level" in Article 22.4 supports the U.S. argument because the most natural reading of the term "level" refers to a specific amount being compared at a specific point in time to the level of nullification or impairment at that time. Second, neither the term "level" nor the supporting language in Articles 22.4 and 22.7 makes reference to cumulation of past nullification or impairment.

9. Third, the use of the tense "shall be" and "is" in Article 22 of the DSU supports the U.S. argument that there may be no suspension of concessions for past nullification or impairment because both verbs are in the present tense. Fourth, basing the award upon the present level of benefits being nullified or impaired fulfills the underlying principle for authorizing suspension of concessions of maintaining the balance of trade benefits accruing to the parties. In addition, this interpretation of Article 22 comports with the context of Article 22, specifically the reference in Article XXIII:1 of the GATT 1994 to "any benefit" that "is being nullified or impaired."

10. It is important to separate the concept of the timing used for calculating nullification or impairment and the selection of the correct *counterfactual* to be used in the analysis. The counterfactual – that is, what the responding party's measure would be if it had achieved compliance – should be based on the most recent DSB recommendations and rulings in this dispute. However, the specific date of those DSB recommendations and rulings is not relevant to ensuring an equivalence of the level of nullification or impairment to the corresponding level of suspension of concessions.

11. Japan begins its response by arguing that the text of Article 22 provides that the right to suspend arises at the end of the RPT. Japan's assertion is incorrect. The DSU provides that a Member may *request* authorization to suspend concessions starting 20 days after the expiry of the reasonable period of time. The Member does not obtain the right to suspend concessions until the DSB actually grants the authorization.

12. Moreover, the timing of when a party may first request authorization to suspend concessions does not establish an analytical framework for determining the level of nullification or impairment. Japan's citations on this issue thus have no bearing upon the question posed by the Arbitrator.

13. For example, Japan's citation to the United States' statement from a DSB meeting in *EC-Bananas*[5] makes reference to the right of a Member to proceed to Article 22 proceedings without first going through Article 21.5 proceedings. Whether a complaining Member may proceed directly to Article 22 proceedings if there is a corresponding Article 21.5 proceeding has no bearing upon how the Arbitrator should calculate the level of nullification or impairment in the Article 22.6 proceeding – in either instance, the Arbitrator should determine the level of nullification or impairment currently experienced rather than a cumulation of past nullification or impairment. Japan's position that the pendency of an Article 21.5 or Article 22.6 proceeding should result in a cumulation of past nullification or impairment thus is unsupported.

14. Japan further argues that the pendency of an Article 22.6 proceeding should not disturb the complaining party's ability to cumulate alleged harms arising after the end of the RPT. Specifically, Japan speculates in the hypothetical that, "a responding Member would then have the unilateral ability and incentive to evade compliance with the covered agreements, by not withdrawing its WTO-inconsistent measures but rather enforcing them before the date of the DSB's authorization of suspension."[6] This argument misstates the role of the Article 22.6 arbitration process, which is designed to prevent excessive suspension of concessions by a complaining party. The time limits built into the Article 22.6 process protect the rights of both the complaining party and the Member concerned.

15. In the case of "as applied" measures, Japan argues that, "if the date of the DSB's authorization were the relevant start date for assessing the level of N/I, the complainant would be prejudiced by the delays between the end of the RPT and that date, resulting from the conduct of compliance proceedings under Article 21.5 of the DSU and arbitration under Article 22.6."[7] Contrary to Japan's argument, the operation of Article 21.5 and Article 22.6 proceedings is not prejudicial to the complaining party. Instead, these proceedings reflect the balance struck in the DSU between the complaining parties and Members concerned. Nothing in the DSU makes reference to cumulation of alleged past harms as the basis for this analysis.

16. Japan's argument would cause the use of both Article 21.5 compliance proceedings and Article 22.6 arbitration proceedings to have unexpected harmful consequences. A Member could participate in a compliance proceeding to determine if that Member had achieved compliance, but at the cost of steadily mounting trade damage (in the sense of a cumulating level of suspension of concessions which steadily increases), or of forgoing the opportunity to establish that it had achieved compliance in order to avoid the steadily mounting trade damage.

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[5] *See* Japan's response to Question 25, para. 27 (quoting Minutes of the DSB Meeting of 29 January 1999, WT/DSB/M/54, p. 11).

[6] *See* Japan's response to Question 25, para. 22.

[7] *See* Japan's response to Question 25, para. 24.

17. Japan's argument thus would place Members concerned in an untenable position. Japan's position – that the amount of authorized suspension should cumulate during the pendency of either Article 21.5 compliance or Article 22.6 arbitration proceedings – would enact a huge disincentive for parties to engage in these proceedings. At a minimum, if such a provision were intended, the text of the DSU would specify the process by which such an assessment should be made.

18. Japan then speculates that if the United States' position were upheld, this would have an effect on the willingness of parties to enter into "sequencing agreements" to reconcile the conflicting timeframes in Article 21.5 of the DSU for compliance proceedings and in Article 22 for the suspension of concessions. Simply put, a party's willingness – or lack of willingness – to enter into a "sequencing agreement" has no bearing upon the Arbitrator's determination of nullification or impairment. In any event, as discussed above, Japan's theory for determining the level of nullification or impairment places Members in an untenable position which could also influence Members' willingness to enter into sequencing agreements and could ultimately discourage Members from availing themselves of proceedings pursuant to Article 21.5 and Article 22.6 of the DSU.

19. If the negotiators of the DSU had contemplated that the amount to be authorized would be constantly growing from the end of the RPT until the award was finally issued, they would have needed to have addressed the questions identified in this arbitration – for example, how to allocate such an increased amount (for example, suspend additional concessions all in the first year? Allocate it in decreasing amounts over a period of *x* years?). The lack of such language demonstrates the fallacy of Japan's position that such a cumulation should be inferred.

20. In addition, increasing the amount of concessions to be suspended by multiple times the level of nullification or impairment could have meant that the complaining party could stop *all* trade with a particular responding party, depending on the levels of trade between them. This would have a much greater trade-distorting effect than the measure at issue and could lead to serious disruption in the world trading system.

21. Japan also speculates that, if the U.S. position were upheld, "respondents would have every incentive to drag out compliance and arbitration proceedings for as long as possible, knowing that each additional day's delay will lower the level of suspension it faces."[8] Japan again misstates the structure of the process.

22. The time of an Article 21.5 or Article 22.6 proceeding does not "lower the level of suspension." To the contrary, whether there is an Article 21.5 or 22.6 proceeding or not, the level of suspension should be equivalent to the level of nullification or impairment at the time the

[8] *See* Japan's response to Question 25, para. 31.

measure is being applied. Whether that level is measured as of the date of the request for authorization to suspend concessions, or upon the date of the Arbitrator's award, there should be the same analysis of the level of benefits that "is being nullified or impaired," by the language of GATT XXIII:1.

23. In section (b) of its response, Japan makes reference to other provisions of the DSU regarding compliance, which only go to the same point regarding the time for compliance discussed above. Japan also contends that it is "significant that no alternative date is specified in the treaty text for measuring the extent of the right to suspend concessions."[9] Any significance from this supposed omission, however, works against Japan's position.

24. Japan also seeks support from the provision in Article 22.8 that suspension of concessions is permitted to continue until "full implementation" and "substantive compliance" have been achieved. Japan then proclaims that, "Thus, the level of suspension must be equivalent to the N/I that accrues from the end of the RPT until substantive compliance has been achieved." Japan's argument is a *non sequitur*.

25. Article 22.8, of course, makes no mention at all of nullification or impairment that "accrues," nor does any provision of the DSU. Allowing a complaining Member to suspend concessions with respect to a measure from which it is no longer suffering any trade effects does not serve to restore the balance of trade concessions. Furthermore, that the allowance for suspension of concessions is permitted under Article 22.8 of the DSU only "until such time as the measure found to be inconsistent with a covered agreement has been removed," demonstrates that the level of suspension of a concession is a remedy that is prospective in nature. Otherwise, a complaining party could continue to suspend concessions up to the total nullification or impairment it has suffered even after compliance.

26. In section (c) of its response, Japan contends that the "object and purpose" of the DSU favors its position. For the reasons discussed in these comments, Japan is mistaken. The "object and purpose" of the DSU – as expressed through the language of the negotiators – creates a system of incentives and procedures both for inducing compliance and for protecting the rights of the various parties. Japan's request for suspension based upon a cumulation of past nullification or impairment would significantly alter that balance in ways not contemplated by the language of the DSU or the intent of the negotiators.

27. In section (d) of its response, Japan cites a series of decisions of past arbitrators in support of the proposition that "the start-date for assessing the level of N/I is the end of the RPT."[10] Again, Japan misstates the question. Regardless of the date used as the reference point for determining the level of nullification or impairment, no Article 22.6 decision has awarded

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[9] *See* Japan's response to Question 25, para. 36.
[10] *See* Japan's response to Question 25, para. 41.

suspension based upon a cumulation of nullification or impairment incurred since the end of the RPT. The Article 22.6 decisions cited by Japan using the end of the RPT as the reference point for the calculation of nullification or impairment thus do not bear upon the question posed by the Arbitrator.

28. Japan seeks to rely on past DSB recommendations and rulings in the context of Article 21.5 of the DSU. However, in so doing, Japan confuses two separate issues: the focus of an Article 21.5 proceeding – whether a Member has complied with the DSB's recommendations and rulings in a dispute; and the focus of an Article 22.6 arbitration – the level at which a benefit is being nullified or impaired. The issue here is whether Japan may suspend concessions in an additional amount to account for any past nullification or impairment that has already transpired going back to the end of the RPT. The Article 21.5 proceedings cited by Japan did not address this issue. As such, these DSB recommendations and rulings do not support Japan's position.

29. Japan also relies upon Article 22.6 proceedings such as *United States – Continued Dumping And Subsidy Offset Act Of 2000 (EC)*, where the arbitrator fashioned its award based upon an estimate of the current level of subsides.[11] This decision does not support Japan's proposal of a cumulative award since the end of the RPT. Instead, the arbitrator provided for 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."[12] If assessing the proposed level of suspension was a static exercise of measuring past trade effects, such a variable level of suspension would be unnecessary.

30. Furthermore, with respect to the Article 22.6 proceeding in *United States – Upland Cotton*, the arbitrator considered and rejected 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 after the end of the RPT to domestic users of upland cotton in addition to the level for other countermeasures sought by the complaining Member.[13] Although the arbitrator noted that the United States had come into compliance with respect to this payment program, the arbitrator did not find that it would have awarded these "one-time countermeasures" if the United States had not come into compliance.

31. The *Upland Cotton* decision confirms that the suspension of concessions should be based upon the current level of nullification or impairment, not a retroactive analysis which cumulates nullification or impairment occurring in the past. Indeed, in that decision, despite the issue of cumulation being raised (albeit in the limited context of Step 2), the arbitrator did *not* provide for

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[11] *US – CDSOA (EC) (Article 22.6)*, para. 4.25.
[12] *US – CDSOA (EC) (Article 22.6)*, para. 4.21.
[13] *US – Upland Cotton (Article 22.6 and SCM Article 4.11)*, para. 2.6.

cumulation of any other amounts of nullification or impairment, thus confirming that the arbitrator would not have provided for a cumulative amount for Step 2 even in the absence of compliance.

28. (United States and Japan) In addition to the text of Article 22 of the DSU, can the United States and Japan point to any supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, which would support each party's respective position on whether there may be suspension of concessions for nullification or impairment arising after the end of the RPT but before the date of the DSB's authorization to suspend concessions.

32. Please see response to Question 25. Additionally, the United States notes that none of the selected language cited by Japan supports its position that there may be suspension of concessions for nullification or impairment arising after the end of the RPT but before the date of the DSB's authorization to suspend concessions. The United States first notes that supplementary means of interpretation can only be used to confirm the meaning of text derived using the rules of interpretation reflected in Article 31 of the Vienna Convention on the Law of Treaties, or to address situations where these rules leave the meaning ambiguous or absurd. As a result, negotiating history cannot prevail over the agreed text. Thus, any statement from the negotiating history that contradicts the language of the DSU has no effect.

33. Japan first cites several statements concerning the importance of inducing compliance as an overarching goal of the DSU. Although the United States agrees that compliance is an important facet of the DSU, the United States also notes that the language of the DSU balances many competing factors. This includes, as Japan quotes from the previous U.S. statement, the principle that the suspension of concessions is not the objective of dispute resolution and would be allowed only to provide a concrete incentive for a more prompt remedy to the practice at issue.

34. Another core principle of the suspension of concessions under Article 22 is to maintain the balance of trade concessions. The suspension of concessions permits the complaining Member to suspend concessions in order to balance the trade benefits that are being denied as a result of a WTO-inconsistent measure. Any award in this dispute which exceeds the level of nullification or impairment of benefits currently suffered by Japan would not balance the rights and obligations under the covered agreements. In this regard, permitting excessive suspension of concessions would frustrate the object and purpose of the DSU. Japan ignores this object and purpose when it argues that the DSU should be read in light of the single objective of inducing compliance.

35. In this proceeding, the United States has referred Japan's request for authorization to suspend concessions or obligations to arbitration under Article 22.6. The Article 22.6 process serves to ensure that the Member concerned is not subject to the suspension of concessions in

excess of the level of nullification or impairment. This is an integral feature of the DSU, much as the implementation of DSB recommendations and rulings.

36. Japan also cites numerous statements concerning the effective start date for implementation of DSB recommendations and rulings. None of these statements address the central question in this arbitration – how to calculate the level of nullification or impairment for the suspension of concessions. Instead, these statements address the issue of when a party may first request authorization to suspend concessions.

37. A party may have the right to seek authorization to suspend concessions 20 days after the expiration of the RPT, but its procedure for doing so must follow the DSU. The possible timing of a party's authorization request in no way determines the time periods to be used in ensuring the equivalence of the level of nullification or impairment with the level of suspension of concessions.

38. Japan has not cited any supplementary means of interpretation that support its position that an arbitrator may base its award upon a cumulation of past nullification or impairment. To the contrary, the context of Article 22 reaffirms the forward-looking nature of the analysis. Article XXIII:1 of the GATT 1994 refers to "any benefit" that "*is being* nullified or impaired." (Emphasis added.) Again, the language is in the present tense and makes clear that it is not concerned with past nullification or impairment.

39. Article XXIII formed the basis for the DSU and is explicitly "affirmed" in Article 3.1 of the DSU. Furthermore, the arbitrator in *United States – CDSOA* stated that: "[i]n this arbitration, we have interpreted the concept of nullification or impairment, *inter alia*, from the terms of Article XXIII of GATT 1994 and Article 3.8 of the DSU."[14] As with the use of the present tense in Article 22.4 and Article 22.7, the formulation of nullification or impairment in Article XXIII of the GATT 1994 is inconsistent with the concept that suspension should be based upon a cumulation of nullification or impairment.

30. (Japan) In paragraph 3.38 of its decision in the Article 22.6 arbitration on *US – Upland Cotton*, the arbitrator stated that:

> **"The suspension of concessions or other obligations is a remedy of an exceptional character, that allows the Member concerned to temporarily suspend its own obligations toward the responding party under the covered agreements. This exceptional remedy is only available in limited circumstances and for a limited time period."**

[14] *US – CDSOA (Article 22.6) (EC)*, para. 6.6.

In Japan's view, does this statement suggest that the possibility of suspending concessions or other obligations under the DSU should be interpreted restrictively? Does the expression "for a limited time period" exclude the relevance of nullification or impairment arising after the end of the RPT but before the date of the DSB's authorization to suspend concessions, in particular when there is a long lapse of time between the aforementioned two points in the dispute settlement proceedings?

40. Please see the U.S. response to Questions 25 and 26 and the U.S. comments on Japan's responses to Questions 25 and 28. Additionally, Japan's response misinterprets the Arbitrator's question as to whether a Member's right to suspend concessions should be "interpreted restrictively" and misinterprets the temporal limitation in Article 22.8 of the DSU.

41. Japan objects to the use of "restrictive" as potentially prejudicial to Japan, arguing that, "the Arbitrator may have in mind an interpretation *against the interests of the complainant*, for example, by prohibiting suspension of concessions with respect to N/I that arises between the end of the RPT and the DSB's authorization to suspend."[15] The United States disagrees that there is anything prejudicial to Japan suggested by interpreting a right to suspend "restrictively."

42. As the quote from *United States – Upland Cotton* on which this question was based recognizes, suspension of concessions is "a remedy of an exceptional character" and "[t]his exceptional remedy is only available in limited circumstances and for a limited time." Given this exceptional nature, it is important that any concessions are suspended with clearly defined limits and only in the manner provided for in the covered agreements. In this sense, a "restrictive interpretation" is appropriate.

43. Additionally, Japan's response demonstrates that Japan's method for determining the level of nullification or impairment is inconsistent with the duration of suspension prescribed in Article 22.8 of the DSU. Japan describes Article 22.8 as "the sole temporal limitation imposed by Article 22" and states that Article 22.8 provides that "suspension is no longer permitted when substantive compliance has been achieved."[16] Japan also argues that, "the end-point set forth in Article 22.8 for the suspension of concessions has not arrived, and Japan's right to suspend concessions for N/I accruing since the end of the RPT has not lapsed."[17]

44. Contrary to Japan's argument, although Article 22.8 prohibits suspension of concessions once a measure has been brought into conformity, this limitation does not imply that the level of nullification or impairment should include all alleged harms "accruing" prior to that point. The significance of this duration of suspension found in Article 22.8 is that it makes clear that suspension is based on the *current* nullification or impairment of benefits suffered by the

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[15] *See* Japan's response to Question 30, para. 72 (emphasis in original).
[16] *See* Japan's response to Question 30, para. 80.
[17] *See* Japan's response to Question 30, para. 76.

complaining Member. Otherwise, if past nullification or impairment were relevant, Article 22.8 would permit the complaining Member to suspend concessions to account for all past nullification or impairment, even if compliance had been achieved.

45. As the United States has explained,[18] the purpose of the suspension of concessions is to balance the trade benefits that are currently being denied as a result of a WTO-inconsistent measure. Thus, once a Member brings a measure into conformity, there is no longer an imbalance in the current trade benefits and, as a result, there is no longer a basis for a suspension of concessions. Maintaining this balance on a current basis conflicts with Japan's unsupported claim that Article 22.8 supports Japan's theory that the level of nullification or impairment should be calculated as "accruing" after the end of the RPT.

31. In its third party submission, the European Union states that "it is appropriate to measure nullification or impairment arising at least since the end of the reasonable period of time". (paragraph 7 of the European Union's third party submission). This implies that in the European Union's view the relevant date may not be the RPT, but some other point in the dispute settlement process. Please comment.

46. Please see comments on the European Union's response to Question 64. The United States also notes that Japan's response states that "Japan has requested that the Arbitrator assess the level of N/I from the end of the RPT."[19] To the extent that the European Union has a theory for determining the level of nullification or impairment which is distinct from Japan's theory, this statement by the European Union is not applicable to Japan's request. Accordingly, the United States has no further comment regarding Japan's response to the European Union's statement other than to note that, as previously discussed,[20] no prior arbitrator has interpreted the DSU as providing a range of options to choose from in determining the appropriate date for measuring the level of nullification or impairment.

33. (United States and Japan) In their respective statements at the meeting with the arbitrator, both the United States and Japan referred to the possible effects import measures may have on price changes. (See, paragraph 69 of the United States' opening statement at the meeting with the arbitrator; paragraph 11 of Japan's opening statement at the meeting with the arbitrator). In your view, would price changes be an acceptable form of determining the level of nullification or impairment?

47. The United States notes that Japan's response fails to address the central issue posed by the question, namely whether price changes are an acceptable form of determining the level of nullification or impairment. Instead, Japan submits a non-responsive discussion about the

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[18] *See, e.g.,* U.S. response to Question 23, para. 1.
[19] *See* Japan's response to Question 31, para. 84.
[20] *See*, *e.g.*, U.S. Oral Statement, para. 41.

expectations of Japan and its exporters for post-RPT implementation of the findings of the DSB, and then defends its choice of excess duties for pre-RPT entries, and its use of margin change instead of price change for post-RPT entries. Neither calculation accurately reflects the level of nullification or impairment.

48. With respect to pre-RPT entries, Japan's "excess duties" calculation is an estimate of financial impacts on U.S. revenue and U.S. importers, not a measure of lost exports to Japan. Profits of U.S. entities should not be factored into the calculation of the level of nullification or impairment of Japan's trade benefits. Moreover, as previously discussed by the United States in its response to Question 40, trade effects are the most logical and natural method of assessing nullification or impairment in a case such as this one that involves excessive duties. Indeed, Japan's metric of "excess duties" is a function of its improper attempt to claim nullification or impairment for pre-RPT entries far in excess of any nullification or impairment currently experienced by Japan.

49. With respect to current-year entries, as previously discussed, although price changes are not a "form" of nullification or impairment, they can be used in conjunction with a particular elasticity factor to determine the level of nullification or impairment. Instead of calculating price changes, Japan estimates the change to import prices by using its estimate of margin change. Japan acknowledges that its use of margin change is different from price change, but attempts to minimize this difference by claiming that the U.S. calculation of price change would introduce "additional complexity," and that the difference does not represent an "order of magnitude."[21] Both claims are incorrect.

50. With respect to "additional complexity," as shown in paragraphs 52 through 56 of the U.S. Written Submission, the only required change to the equation to convert margin change to price change is to divide the margin change by (*1+original margin*). This straightforward change does not cause "additional complexity."

51. With respect to the "order of magnitude," Japan's attempt to minimize the degree by which its calculation exceeds the level of nullification or impairment only underscores the fact that its calculation is not equivalent. Japan's use of margin change rather than price change systematically overstates the level of nullification or impairment, potentially by millions of dollars given the levels of trade projected by Japan.

52. Moreover, the appropriateness of price change as a component in determining the level of nullification or impairment undermines Japan's use of a source substitution elasticity in its lost exports methodology. As previously explained,[22] Japan's use of a source substitution elasticity requires information regarding both import and domestic price changes that result from

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[21] *See* Japan's response to Question 33, para. 91.

[22] *See* U.S. response to Question 33, para. 26.

compliance. Rather than calculating either price change, Japan estimates the margin change for imports calculated with and without zeroing. Japan has not demonstrated that using an estimated margin change to estimate the change in import price is appropriate, nor has Japan provided any estimate of the change in domestic price from compliance.

53. In the alternative, excluding price change as an acceptable form of determining the level of nullification or impairment would undermine Japan's use of a source substitution elasticity at all. As previously discussed, in order to properly use a source substitution elasticity, Japan would need information regarding changes to import and domestic prices that result from compliance. If price changes were not an acceptable form of determining the level of nullification or impairment, then Japan's entire lost exports methodology would be invalid.

34. The United States has argued (paragraph 121 of the United States' written submission) that:

> **"Although the payment of excess duties may have an effect on trade, the amount of excess duties is not equivalent to the trade effect. Depending upon the elasticity factor for a given product, the same amount of 'excess duties' for two products could result in different trade effects for the same amount of duties."**

Can Japan comment on this statement.

54. Rather than responding to the question posed by the Arbitrator – whether the same amount of "excess duties" for two products could result in different trade effects for the same amount of duties – Japan first responds by repeating its claim that the level of nullification or impairment need not be measured by reference to lost exports. Japan states that the Arbitrator may employ "metrics" other than lost exports where "lost exports as a metric to quantify N/I is impossible or inappropriate in light of the nature of the WTO-inconsistent measures and WTO obligations at issue."[23] Japan's formulation is mistaken from both a theoretical and practical perspective.

55. From a theoretical perspective, Japan is incorrect to state that its failure to quantify the level of nullification or impairment from pre-RPT "excess duties" justifies its resort to an entirely different method of calculation. By Japan's own admission, it is unable to quantify any level of nullification or impairment resulting from "excess duties" on the pre-RPT entries. This admission, standing alone, should be sufficient for the Arbitrator to conclude that no suspension

[23] *See* Japan's response to Question 34, para. 108.

is appropriate for those entries.[24] Japan's inability to calculate nullification or impairment for those entries does not entitle it to use an entirely different method which has no regard for equivalence.

56. Japan's response also fails from a theoretical perspective because its own methodology calculates the level of nullification or impairment in the current year based on the projected lost exports resulting from the imposition of excess duties. Japan estimates lost imports through application of the GTAP elasticity factor. Thus, by Japan's own calculations, it is not only reasonable to expect but inevitable that Japan's suspension of concessions with respect to pre-RPT entries will include both the amount of purported excess duties and an additional amount of lost exports.

57. Even if Japan were to impose precisely the same amount of "excess duties" in the current year as the importers paid prior to the RPT, then, the level of suspension would be greater than the level of nullification or impairment. Japan's claim that it is simply using the same "metric" thus cannot be correct.

58. Japan's response also fails on a practical level to acknowledge that due to different elasticities and market factors, the same amount of "excess duties" could cause widely varying levels of nullification or impairment if applied to different products. Japan does not address this issue in its answer, even though it was the focus of the Arbitrator's question.

59. Additionally, with respect to Japan's hypothetical concerning collection of WTO-inconsistent duties upon liquidation in a retrospective antidumping system even if no security was collected on entry, Japan's hypothetical is not relevant to this arbitration. A security was collected at the time the Japanese goods at issue entered the United States prior to the expiry of the RPT. Furthermore, the United States is not aware of any Member operating a retrospective antidumping system which does not collect a security at the time of entry. Accordingly, there is no basis to conclude that the purported problem which Japan's hypothetical identifies would ever arise in a WTO dispute. In any case, the hypothetical situation posed by Japan does not arise in the current dispute before the Arbitrator.

60. Japan also fails to distinguish between collection of duties on pre-RPT, as opposed to post-RPT, entries. If a complaining Member could claim nullification or impairment both for lost trade and collection of excess duties, this would result in double-counting of nullification or impairment for the same entries.

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[24] *See, e.g.,* U.S. response to Question 24, para. 32; *US – CDSOA (Article 22.6) (EC)*, para. 3.76 (rejecting claims that are "too remote, too speculative or not meaningfully quantified") (citations omitted); *see also US – 1916 Act (Article 22.6)*, paras. 5.76-5.78 (amounts which cannot be meaningfully quantified cannot be included in the calculation of level of nullification or impairment).

61. The trade benefit to Japan of the trade concessions at issue is not with respect to the revenue that is collected by the United States in the form of duties paid by a U.S. importer. No one has ever suggested that the "benefit" of a tariff concession is that the importing Member will collect less revenue because it will only collect duties at the bound level. Rather, the "benefit" is the trade opportunity that flows from the limit on the amount of duties that will be imposed on imports. By way of further illustration, if a Member applies a duty below the bound rate, there is no additional "benefit" from the tariff concession just because even less revenue is being collected.

62. In section (b) of its response, Japan also illogically attempts to construct a requirement that, "[t]o ensure 'equivalence', Article 22.4 requires that the level of N/I and the level of suspension be quantified in *equivalent terms*, *using an identical metric*."[25] Such a requirement that the Arbitrator match its "metric" to that chosen by the complaining party, of course, appears nowhere in Article 22.4.

63. Japan then claims that because it has chosen the "metric" of "excess duties" for certain entries and "lost exports" for others, that "equivalence must be quantified" by reference to Japan's chosen metric. Japan compounds its error by contending that it "makes no sense to quantify N/I exclusively by considering trade that never occurred (*i.e.*, lost exports), because excessive duties are not collected on such goods."[26]

64. Neither Article 22 of the DSU nor any of the other provisions cited by Japan limits the Arbitrator to the metric chosen by Japan. As previously discussed by the United States in its response to Question 40, trade effects are the most logical and natural method of assessing nullification or impairment in a case such as this one that involves excessive duties. Indeed, Japan's metric of "excess duties" is solely a function of its improper attempt to claim nullification or impairment for pre-RPT entries even though Japan is not currently suffering any nullification or impairment related to these entries.

65. Japan's statement reveals the fundamental inconsistency in its position. If Japan contends that nullification or impairment should be measured with respect to the amount of excess duties at the time of collection, then its entire calculation is improper because it has not measured the amount of duties actually collected at liquidation for either pre-RPT or post-RPT entries. Indeed, in order for Japan's reasoning to be consistent, it should be required to wait until collection of duties to claim nullification or impairment on post-RPT entries. Japan thus fails to justify its calculation of nullification or impairment for pre-RPT entries by reference to "excess duties."

66. Japan's citation of *US – Upland Cotton* also undermines its position that "excess duties" should be considered a form of nullification or impairment. As Japan acknowledges, the *Upland*

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[25] *See* Japan's response to Question 34, para. 109.
[26] *See* Japan's response to Question 34, para. 112.

Cotton decision calculated the "trade effects of the measure," measured through the "drop in price." The amount of subsidy was a factor in determining the "drop in price," not nullification or impairment in its own right. The amount by which a subsidy reduced the price of a good sold does not equate to the amount of nullification caused by excess duties because of the elasticity factor. The *Upland Cotton* decision also denied Brazil's request for a one-time countermeasure in the amount of Step 2 payments after the end of the RPT. The *Upland Cotton* decision thus does not provide precedent for Japan's approach.

67. Moreover, the trade whose drop in price was found to constitute nullification or impairment in *Upland Cotton* occurred after the end of the RPT, not before the RPT as in Japan's "excess duties" calculation. Japan acknowledges that collection of duties upon liquidation "generates no quantifiable lost export at the time of duty collection (or refund decision)."[27] Japan also acknowledges that it has no reliable method to determine the trade effect from these entries – some of which occurred over a decade ago. Japan's requested suspension in the amount of pre-RPT "excess duties," however, would result in both "excess duties" and lost exports to the United States for the current year, even though any lost exports for the pre-RPT entries occurred prior to the end of the RPT.

35. Japan has noted (paragraph 87 of Japan's written submission) that:

> **"[I]n at least two previous disputes, arbitrators have held that the lost benefits or N/I may be measured in terms other than lost exports. First, in U.S. – 1916 Act (EC) (22.6)... Second, in U.S. – Section 110(5) Copyright Act (25)..."**

In both cases cited by Japan the WTO-inconsistent measures adopted by the Member concerned do not seem to have been, at least strictly-speaking, trade measures. In Japan's view, may nullification or impairment be estimated in terms other than trade effects when the WTO-inconsistent measures adopted by the Member concerned are trade measures?

68. Neither the *US - 1916 Act* nor *US - Section 110(5) Copyright Act* decisions cited by Japan involved calculation of excessive duties on exports. As such, Japan's reliance upon these decisions does not support its proposed suspension based upon "excess duties" for pre-RPT entries.

69. Japan's argument that these two arbitrations involved "trade measures" ignores the fact that the Arbitrator described those disputes as *not* involving "trade measures." In fact, neither of these two disputes involved "trade measures" in the sense of excessive duties. In contrast to the two disputes upon which Japan relies, in the current dispute the noncompliance involves excess

[27] *See* Japan's response to Question 34, para. 112.

duties, and the most appropriate method of determining the level of nullification or impairment is to use economic analysis to determine the effect of the excess duties on the trade in goods in terms of lost exports.

70. In contrast to this dispute, in *United States – Anti-Dumping Act of 1916*, any nullification or impairment would only have resulted from the application of the 1916 Act. Because the 1916 Act had not been applied, the arbitrator found 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."[28] As this discussion makes clear, the *1916 Act* proceeding did not involve imposition of excessive duties, but rather court decisions or settlement awards.

71. The arbitrator's decision under Article 25 of the DSU in *US – Section 110(5) of the US Copyright Act* underscores the need for the assumptions made in calculating the level of nullification or impairment to be reasonable and take into account the circumstances of the dispute in order that the proposed level of suspension accurately reflect the level of benefits actually being nullified or impaired. There the EC claimed nullification or impairment to be equal to the full extent of its stakeholders' theoretical rights, rather than what those stakeholders could reasonably expect to receive in a compliance scenario. The arbitrator found that the "nullification-or-impairment analysis must focus on what benefits the EC would receive if the measure at issue – Section 110(5)(B) – were modified in accordance with the DSB recommendation."[29] By contrast, in this proceeding, the form of nullification or impairment takes the form of lost imports due to excessive imposition of antidumping duties.

36. (United States and Japan) The panel on *Australia - Automotive Leather II (Article 21.5 - US)*, after having concluded that the term "withdraw the subsidy" in Article 4.7 of the SCM Agreement also encompassed in certain circumstances the "repayment in full" of prohibited subsidies, rejected the inclusion of "interest" in the repayment of the subsidy at issue in that case. That panel was of the view that the remedy under Article 4.7 of the SCM was not designed to "fully restore the status quo ante" nor was it a remedy intended to provide for "reparation or compensation in any sense." Do you think that the same rationale could apply *mutatis mutandis* to a proper interpretation of the remedy provided for under Article 22 of the DSU? Please, explain.

72. The United States notes that Japan makes no effort to justify its request for interest within the logic of the *Australia – Automotive Leather* decision.

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[28] *See US – 1916 Act (Article 22.6)*, para. 7.8.
[29] *See US – Section 110(5) (Article 25)*, paras. 3.20-3.35.

73. Japan first argues that the term "withdraw the subsidy" under Article 4.7 of the *SCM Agreement* is a different term from "level of nullification or impairment" under Article 22 of the DSU. Although the terms are different, this detracts from Japan's claim rather than bolstering it. As the panel explained in *Australia – Automotive Leather*, the term "withdraw the subsidy" under Article 4.7 of the *SCM Agreement* is a broader requirement than the requirement to "bring the measure into conformity" under Article 19.1 of the DSU. Accordingly, the panel concluded:

> That a "retrospective" remedy might not be permissible under Article 19.1 of the DSU (a question which we do not here decide) does not preclude us from concluding, on the basis of the text of Article 4.7 of the SCM Agreement, that "withdraw the subsidy" is *not* limited to purely prospective action, but may encompass repayment of prohibited subsidies.[30]

Here, on the other hand, the term "level of nullification or impairment" includes neither the retrospective element found by the *Australia – Automotive Leather* panel, nor does it call for the payment of interest.

74. Instead of referring to the reasoning of the *Australia – Automotive Leather* panel, Japan incorrectly contends that its request for interest is proper because "Japan's request for interest is grounded simply in the proper counterfactual situation that would have existed under the United States' *own law* had it complied with the DSB's recommendations and rulings with respect to pre-RPT entries by the end of the RPT."[31] This formulation reveals the fundamental error in Japan's position. Japan's claim for interest does not properly estimate the level of nullification or impairment to benefits under the covered agreements because it is based upon an estimate of the interest paid by U.S. Customs and Border Protection (CBP) pursuant to U.S. law. No such analogous interest provision exists under the covered agreements.

75. In this Article 22.6 proceeding, the Arbitrator determines the level of nullification or impairment of benefits accruing to a party under the covered agreements. The DSB's recommendations and rulings do not discuss or in any manner require interest for any "excess duties." Accordingly, Japan's claim for interest is without any support under the covered agreements and is not found in the DSB's recommendations and rulings in this dispute.

76. Even assuming, for the sake of argument, that CBP pays interest at the rate estimated by Japan when it refunds deposits, that does not mean that CBP would be under any WTO obligation to do so here. U.S. legal provisions do not establish WTO obligations. More specifically, the interest rate at which CBP refunds deposits has nothing to do with any current measurement of the "level" of nullification or impairment.

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[30] *See Australia – Automotive Leather II (United States)*, para. 5.4 (emphasis in original).

[31] *See* Japan's response to Question 36, para. 126.

77. Japan's reasoning makes payment of interest entirely dependent upon a Member's domestic law. Accordingly, a Member could avoid paying interest in WTO disputes simply by avoiding any interest provision in its statutes. Again, this would have nothing to do with the actual level of nullification or impairment. The Arbitrator should therefore reject Japan's request for interest on pre-RPT entries.

37. With respect to the manner in which it intends to suspend concessions to the United States (paragraph 7 of Japan's methodology paper), Japan has explained that:

> **"[W]here the N/I within a category of entries is based on excess duties, Japan may suspend tariff concessions such that Japan collects the equivalent amount of excess duties on U.S. imports..."**

Does this mean that the suspension of concessions Japan intends to impose to imports from the United States into Japan, with respect to the nullification or impairment allegedly caused by "excess duties" on pre-RPT entries liquidated by the United States following expiration of the RPT, would be implemented through the collection of additional duties until the estimated amount of US$121.1 million is reached?

78. Please see U.S. comments on Japan's response to Question 39.

38. **Japan has argued (paragraph 82 of Japan's written submission) that:**

> **"[B]oth lost exports and excess duties quantify, in different ways, the effect of the United States' WTO-inconsistent measures that was or will be generated on trade in Japanese goods after the end of the RPT..."**

If both lost exports and excess duties should be taken into account by the arbitrator when quantifying the "trade effects" caused by the United States' WTO-inconsistent measures for the purpose of estimating the level of nullification or impairment, should both lost exports and excess duties also be taken into account by the arbitrator when estimating the level of the suspension of concessions and other obligations proposed by Japan?

79. Please see U.S. comments on Japan's responses to Questions 34 and 39.

39. Japan seems to suggest (paragraph 82 of Japan's written submission) that the arbitrator in the present case may take into account both lost exports and excess duties when estimating the level of nullification or impairment suffered by Japan as a result of the United States' WTO-inconsistent measures. Japan has also argued (Japan's response to questions 11 and 12 from the arbitrator) that, with respect to pre-RPT entries, no Japanese exports were lost after the expiry of the RPT or, if some Japanese exports were lost, it is not possible to reliably quantify their amount.

(a) In principle, would it be reasonable to expect that Japan's suspension of concessions, as proposed by Japan, with respect to nullification or impairment caused by pre-RPT entries collected by the United States following expiration of the RPT, would result both in the collection of duties and some lost exports?

(b) If the arbitrator needs to estimate both the duties to be collected by Japan and the United States' lost exports to Japan, when assessing the level of the suspension of concessions proposed by Japan, how can Japan ensure that "[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment", as required by Article 22.4 of the DSU?

80. Please see U.S. comments on Japan's responses to Questions 33 and 34. Additionally, the United States notes that by Japan's own calculations, Japan's imposition of additional duties in the current year will result in lost exports. Japan estimates lost imports for additional duties imposed in the current year through application of the GTAP elasticity factor. By Japan's own calculations, it is not only reasonable to expect but inevitable that Japan's suspension of concessions with respect to pre-RPT entries will result both in the collection of duties on U.S. goods and lost U.S. exports.

40. (United States and Japan) What are the relative roles of excess duties and lost trade in determining and ensuring equivalence under Articles 22.4 and 22.7 of the DSU?

81. Please see response to Question 40 and U.S. comments on Japan's response to Question 39.

41. Japan has argued (paragraph 11 of Japan's response to question 13 from the arbitrator) that:

> **"[It] is not required, as part of these proceedings, to determine or identify the precise duty rate, the particular products to be targeted, and, hence, the impact of potential Japanese suspending measures on U.S. trade."**

Can Japan explain how, in the lack of such information, the arbitrator may perform its task under Article 22.7 of the DSU to "determine whether the level of ... suspension [of the concessions or other obligations proposed by Japan] is equivalent to the level of nullification or impairment"?

82. Please see U.S. comments on Japan's response to Question 39.

42. With respect to the manner in which it intends to suspend concessions to the United States, Japan has suggested (paragraph 76 of Japan's methodology paper) that:

"[E]quivalence [between the suspending measures and the level of nullification and impairment] may be ensured through the imposition of non-prohibitive tariffs that result in the collection of equivalent excess duties on U.S. imports into Japan where the N/I within a category of entries is based on excess duties..." (Emphasis added)

(a) Can Japan explain what exactly does it mean by "non-prohibitive tariffs"?

(b) Why has Japan chosen to restrict itself in its proposed measures to "non-prohibitive tariffs"?

(c) How does Japan intend to ensure equivalence in regard to the three types of entries at issue in these proceedings through non-prohibitive tariffs? Does Japan envisage the possibility of applying prohibitive tariffs to historical post-RPT and current-year entries?

83. Please see U.S. comments on Japan's response to Question 39. Additionally, the United States notes that Japan refuses to state what level of tariff it would deem to be "non-prohibitive," or what the trade effect of such an allegedly "non-prohibitive" tariff would be. To the extent that Japan's proposal might impose an allegedly "non-prohibitive" tariff on a greater value of goods than the level of nullification or impairment, such a scheme contravenes Article 22's equivalence requirement. This refusal on the part of Japan frustrates the Arbitrator's ability to fulfill its task under Article 22.7 of determining whether the proposed level of suspension is equivalent to the level of nullification or impairment.

84. With respect to the request to have discretion to impose non-prohibitive tariffs on a broader amount of trade, contrary to Japan's suggestion, the DSU does not assign such discretion to the complaining party. Japan also has failed to present any basis under the DSU to suspend concessions on a greater trade value of goods than the level of nullification or impairment.

85. Whether a proposed level of suspension is equivalent to the level of nullification or impairment is necessarily a quantitative assessment, but Japan makes no effort to quantify the amount of goods to which it would apply the non-prohibitive tariff. This does not permit the Arbitrator to evaluate whether such a measure is equivalent to the level of nullification or impairment.

86. Japan's proposal also contradicts Article 22.7's requirement that the Arbitrator not examine the "nature" of the suspension. In order to evaluate whether Japan's proposed suspension would be "equivalent" to the level of nullification or impairment, the Arbitrator would need to examine the "nature" of the suspension, *i.e.*, what tariff is being applied on what

products. For all these reasons, Japan's request for discretion to impose a non-prohibitive tariff to a greater volume of goods than the level of nullification or impairment should be rejected.

87. Japan's proposal to impose allegedly "non-prohibitive" tariffs in the amount of "excess duties" found for pre-RPT entries is particularly problematic in this regard. Not only are pre-RPT entries not appropriate for suspension for the reasons the United States has previously discussed, but Japan's proposal to impose "excess duties" through non-prohibitive tariffs in an equivalent amount only increases the potential for the actual level of suspension to vastly exceed the level of nullification or impairment. Under Japan's reasoning, it could impose literally any tariff it wished until it collects an equivalent amount of "excess duties."

88. Using Japan's $121 million "excess duties" request as an example, under Japan's reasoning it could impose a 1% tariff on $12.1 billion of goods, a 10% tariff on $1.21 billion of goods, a 25% tariff on $484 million of goods, and so on. Each of these allegedly "non-prohibitive" tariffs would cause significantly different levels of lost trade, but Japan does not acknowledge these varying effects. Indeed, under Japan's reasoning, it could impose a prohibitive tariff on an infinite amount of trade and never collect the $121 million in excess duties.

89. Japan concedes that it has no reliable method to quantify the lost trade associated with the "excess duties" on pre-RPT entries, yet denies any responsibility to quantify the lost trade associated with its proposal to impose "excess duties" of $121 million. This is particularly unreasonable given Japan's concession that it cannot quantify any lost trade associated with the pre-RPT entries. Japan's own calculations for post-RPT entries also use an elasticity factor, which Japan estimates to be 4.05, but Japan does not concede that any elasticity factor would apply to its proposed "excess duties" retaliation. The Arbitrator should reject such a one-sided formulation.

43. In determining equivalence, how should the arbitrator take into account that "pre-RPT entries" do not lead to lost trade relevant in these proceedings, whereas any retaliation based on excess duties will most probably have trade effects?

90. Please see U.S. comments on Japan's responses to Questions 39 and 42. In addition, the United States notes that Japan's proposed suspension of concessions based on excess duties for pre-RPT entries will have trade effects in the form of lost exports from the United States. However, Japan has conceded that it is not currently suffering any lost exports with respect to these pre-RPT entries. As such, the level of suspension exceeds any nullification or impairment suffered by Japan.

44. Referring to the annual figure of US$47.6 million for "current-year entries", Japan has noted (paragraph 16 of Japan's methodology paper) that it:

"[W]ould update the annual amount of suspension with respect to current-year entries... if Japan considers it necessary to do so and the most recent data required to implement the formula are made available to the Government of Japan."

(a) When Japan says that it would envisage the possibility of updating the amount of suspension, is Japan referring to year 2010 or only to certain subsequent calendar years after 2010?

(b) Does Japan intend to update the figure for "current-year entries" in a strictly prospective manner? If not, how would Japan implement any aspect of retrospective updating in practice?

(c) Is Japan ready to update the figure for "current-year entries" both upwards and downwards?

(d) Does Japan suggest automatic updating of the figure for "current-year entries"? What would trigger the automatism?

(e) If Japan wishes to retain a certain degree of discretion in deciding whether to update the figure, can Japan explain what considerations would guide it in using this discretion?

91. Because Japan withdrew its request to update the level of suspension in its response to Question 44, the United States has no further comment at this time.

45. Can Japan point to any economic justification for a variable level of nullification or impairment, and by consequence, a variable level of suspension?

92. Please see U.S. comments on Japan's response to Question 44.

46. Does Japan consider that any updated calculation establishing the highest level of nullification or impairment in a sub-section different from "as applied" sunset review findings might result in determining the updated level of nullification or impairment on the basis of another sub-section, in particular, the "as such" periodic review findings? If Japan does not exclude this way of updating the level of nullification or impairment for current-year entries, might this have any relevance for concluding that the level of nullification or impairment, and hence the level of suspension, should be variable?

93. Please see U.S. comments on Japan's response to Question 44.

48. What is the probability of better data becoming available for "current-year entries"? With regard to what specific type of data does Japan expect to have better information in the future, and why?

94. Please see U.S. comments on Japan's response to Question 44.

49. Japan has stated (paragraph 16 of Japan's methodology paper) that it would update the figure for "current-year entries" on the basis of two conditions: "[(i)] if Japan considers it necessary to do so and [(ii)] the most recent data required are made available to the Government of Japan." (Paragraph 74 of Japan's methodology paper.) Can Japan confirm that, as stated at the meeting with the arbitrator, these two conditions would be cumulative.

95. Please see U.S. comments on Japan's response to Question 44.

51. Japan has stated (paragraph 65 of its response to question 18 from the arbitrator) that "the elasticity estimates in the GTAP dataset are predominantly based on U.S. data." Considering that Hummels's data include six countries other than the United States, can Japan elaborate on its assertion that GTAP elasticities estimates are predominantly based on United States' data?

96. Japan makes incorrect assertions about the product coverage and transportation costs data to support its erroneous statements that the GTAP elasticities are based predominantly on U.S. data.

97. First, Japan's assertion that Hummels used data for 15,300 10-digit Harmonized System level goods from the United States and only 3,000 5-digit Standard International Trade Classification (SITC) level goods for the other countries is grossly misleading.[32] The U.S. raw data included more goods than the other countries because the United States reports its raw data at a greater level of detail. Japan, however, ignores the fact that the 10-digit data was aggregated to match the same 5-digit SITC data from the other countries in the sample. As Hummels stated in the description of the methodology for "Import and Transport Cost Data":

> These data report extremely detailed customs information on U.S. imports from all exporting countries (approximately 160) from 1974 to the present. The data are reported at the 10 digit Harmonized System level (approximately 15,300 goods categories). For comparability to other national data, these are concorded to 5-digit SITC using the concordance found in Feenstra (1996).[33]

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[32] *See* Japan's response to Question 51, para. 172.

[33] *See* Excerpt from Hummels, D., "Toward a Geography of Trade Costs," GTAP Working Paper No. 17 (1999), at Appendix A, p. 31 (attached as Exhibit US-24). The full exhibit is Exhibit JPN-191.

98. Second, Japan seems to imply that there were only 3,000 products combined for the four Latin American countries (Argentina, Brazil, Chile, and Paraguay). This is also not the case. The trade data for these four countries came from the Latin American Integration Association (ALADI) secretariat. ALADI provided data for each country at the 6-digit level and these were also concorded to the 5-digit SITC. Therefore, Hummels used the same number of goods, at the same level of classification, for all countries in the dataset.

99. Third, Japan's statement that the Hummels dataset relied solely on U.S. transport cost data from the U.S. Department of Transportation is also a misstatement. In the description of U.S. Department of Transportation "Transborder Surface Freight Data," the paper specifically states that the U.S. Department of Transportation data "are only used in Table 3 to construct estimates of the shape of the freight weights between the U.S. and Canada." The paper also states that the "detailed port entry data for the US are not used in Tables 4-7 or in the pooled regression so that the data are comparable to New Zealand and Latin American data."[34]

100. Because Hummels's estimated elasticities are in Tables 4-7, these elasticities do not use these transport cost data from the U.S. Department of Transportation. Instead, freight costs for each country are used as described in the description of "Imports and Transport Cost Data."[35] In fact, the paper explains that these countries were chosen specifically because detailed transport cost data are available for each.

52. In January 2008, Japan submitted two requests for authorization from the DSB to suspend concessions and other obligations to the United States with respect to the present case (WT/DS322/23 and WT/DS322/24, respectively). Please explain why Japan submitted two different requests and how the amounts of the nullification or impairment estimated in these two requests relate to the amounts estimated in Japan's methodology paper.

101. Japan's response makes clear that its current request for suspension greatly outstrips its requests for authorization in January 2008. Contrary to Japan's claim that its current position is more "conservative" than its requests for authorization, the $265 million Japan is now seeking exceeds the $248 million request in Japan's request for authorization to suspend concessions.[36]

102. In addition, Japan's response shows that its Methodology Paper went beyond the theoretical bases for suspension outlined in its request for authorization. Although Japan's original request sought suspension for the amount of nullification or impairment "in any given

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[34] *Id.* at Appendix A, p. 32.
[35] *Id.* at Appendix A, p. 31.
[36] *See United States - Measures Relating to Zeroing and Sunset Reviews* - Recourse to Article 22.2 of the DSU by Japan, WT/DS322/23 (January 11, 2008), and *United States - Measures Relating to Zeroing and Sunset Reviews* - Recourse to Article 22.2 of the DSU by Japan, WT/DS322/24 (January 11, 2008).

year," its current request improperly seeks the cumulation of past pre-RPT and post-RPT entries based on an analysis of past nullification or impairment.

103. In Japan's request, contained in WT/DS322/23 together with WT/DS322/24, Japan sought: "In any given year, the level of the nullification or impairment is (a) the total amount of the anti-dumping duties illegally determined , and interest thereon ('excess duties'), plus (b) the annual value of Japan's lost exports to the United States ('trade effects')." Furthermore, Japan stated: "For the purpose of suspension with regard to item (a) in the previous paragraph, the additional duties will be set so as to collect an amount that does not exceed the total excess duties. In addition, for the purpose of suspension with regard to item (b) in the previous paragraph, the additional duties will be set so as to decrease the value of exports from the United States to Japan by the annual value of Japan's lost exports to the United States."

104. In other words, Japan sought authorization for an amount on an annual basis equal to the amount of nullification or impairment in that year. It is only after the arbitration resumed that Japan advanced its new theory and request for an additional amount. Japan therefore concedes that the amount it is now seeking is in excess of the level of nullification or impairment for a given year. That request is contrary to Article 22 of the DSU and is punitive.

105. In addition to demonstrating that its current request outstrips its original request, Japan's response also suggests that the Arbitrator could fashion an additional award based upon the theoretical basis of its request for authorization. For the reasons discussed in the U.S. response to Question 56, procedurally, it would be inappropriate for the Arbitrator to consider basing the level of nullification or impairment on this additional methodology at this late stage in the proceeding.

106. Japan requested authorization to suspend concessions in January 2008.[37] Japan submitted its Methodology Paper in June 2010.[38] After numerous subsequent submissions and an arbitration meeting Japan now, in its October 2010 responses to post-hearing questions, invites the Arbitrator to consider an additional methodology. It is simply too late in these proceedings for the Arbitrator to consider the merits of this additional methodology. The question in arbitration is whether Japan's request exceeds the level of nullification or impairment, not what level Japan may now wish it had requested.

107. Japan's belated suggestion that the Arbitrator could treat Japan's response as a basis to increase Japan's requested level of suspension by combining excess duties and lost imports for each given year is similarly utterly devoid of support in the DSU. Japan also made no such

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[37] *See United States - Measures Relating to Zeroing and Sunset Reviews* - Recourse to Article 22.2 of the DSU by Japan, WT/DS322/23 (January 11, 2008) and *United States - Measures Relating to Zeroing and Sunset Reviews* - Recourse to Article 22.2 of the DSU by Japan, WT/DS322/24 (January 11, 2008).

[38] *See* Japan Methodology Paper.

request in either its methodology paper or its written submission, and the United States had no opportunity to analyze any such claim. Japan's request makes clear that Japan itself did not at that time share the understanding of the DSU that it now seeks to promote. For Japan to suggest that the Arbitrator could nonetheless award suspension based upon such a concept contradicts the structure of the proceeding.

108. Turning to Japan's suggested alternate methodologies, Japan's suggestion that it could include "excess duties" in addition to lost exports for historical post-RPT entries is improper. Japan contends that the Arbitrator may calculate excess duties for what Japan calls "historical post-RPT entries" by multiplying only the value of each entry and the difference between the zeroed and non-zeroed cash deposit rate, and summing across all entries.[39] In the alternative, Japan states that the Arbitrator can calculate an amount for excess duties by "dividing Japan's previously-determined lost exports amount of USD 96.3 million by the constant elasticity factor of 4.05."[40]

109. As previously discussed, any award of "excess duties" is improper because "excess duties" are paid by U.S. entities, and thus do not represent nullification or impairment to Japan. Furthermore, without addressing the specifics of Japan's alternate calculation, the United States finds this alternate calculation notable in two respects.

110. First, Japan does not include interest in its calculation of excess duties for historical post-RPT entries. As the United States has previously discussed,[41] the DSU makes no provision for interest. For purposes of determining whether it is appropriate to include an interest factor in the calculation of nullification or impairment, there is no significance to distinguishing between pre-RPT and post-RPT entries. Accordingly, this change illustrates that interest is not appropriate for excess duties on either pre-RPT or post-RPT entries.

111. Second, Japan's alternate methodology for determining excess duties for historical post-RPT entries is notable because it makes no distinction between historical post-RPT entries and pre-RPT entries. Japan has already conceded that it has no reliable method of calculating lost exports resulting from excess duties on pre-RPT entries because any lost exports accrued, by definition, at the time of entry.[42] The historical post-RPT entries, too, occurred in the past, and should be treated similarly.

112. Any suggestion by Japan that the Arbitrator could award lost exports for pre-RPT entries is similarly unfounded. "For pre-RPT entries, Japan has concluded that no quantifiable lost

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[39] *See* Japan's response to Question 52, para. 184.
[40] *See id.*
[41] *See* U.S. Methodology Paper, paras. 124-29.
[42] *See*, *e.g.*, Japan's oral statement, para. 44; Japan's response to Question 52, para. 180.

exports accrue after the end of the RPT."[43] Because Japan concedes that it cannot quantify any lost exports from the pre-RPT entries, any award of lost exports for pre-RPT entries would go well beyond Japan's request, and would conflict with the express terms of Article 22.

53. Japan indicates that it has obtained data on all unliquidated entries directly from 14 exporters. (Paragraph 27 of Japan's methodology paper.) However, Japan has calculated a counterfactual margin of dumping without zeroing for only five of the exporters representing 93 per cent of exports. Please explain why Japan was unable to calculate a counterfactual margin of dumping for the remaining nine exporters.

113. Although Japan's response establishes that it could have sought to collect the applicable data from the nine remaining exporters that it did for the five exporters that it selected, Japan has chosen not to do so. As the arbitrator found in *United States – 1916 Act*,[44] in accordance with normal rules applicable to the burden of proof, where the existence of a specific fact is alleged a party alleging a fact must prove its existence. Japan bases its counterfactual rates for the nine exporters at issue upon an assumption that their rates would be virtually zero, an assumption Japan has never proven. On this basis, alone, the Arbitrator should reject Japan's argument.

114. Japan's primary objection to performing this analysis is that it would require it to run the same analysis, presumably done by the same consultant, as it presented for the five self-selected firms it used as the basis for its rate assumption. Japan provides no basis to conclude that the procedure for generating counterfactual rates for these nine exporters would be any different from the procedure for the first five firms. Even though Japan seeks to have the Arbitrator authorize it to impose retaliatory duties of over $265 million against the United States, Japan states that it should not be required to rerun the margin programs for these nine exporters as it did for the first five.

115. Japan argues that it does not have sufficient information to rerun the margin programs for all of the Japanese exporters.[45] During the Article 21.5 compliance proceeding, the Japanese exporters requested a copy of their margin programs from the U.S. Department of Commerce, which cooperated with these requests and provided the margin programs to the exporters. The exporters, in turn, provided the programs to Japan. Thus, the United States has been fully cooperative and in no manner prevented or otherwise deterred Japan from gathering the information it required.

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[43] *See* Japan's response to Question 52, para. 180.

[44] *See, US – 1916 Act (Article 22.6)*, para. 6.11 ("We also recall that in accordance with the normal rules applicable to the burden of proof, as stated in *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, 'where the existence of a specific fact is alleged….[i]t is for the party alleging the fact to prove its existence.' In the present case, the European Communities has alleged 'specific facts' – the settlement of claims under the 1916 Act involving EC entities. Yet it has not proved such facts."

[45] *See* Japan's response to Question 53, para. 188.

116. Japan's other objection is that the United States could calculate the rates for these nine Japanese exporters. Japan has calculated its estimates of counterfactual rates using its own dataset. The United States is not in a position to provide an independent calculation.

117. Furthermore, as the United States has explained, Japan's method of eliminating zeroing in the challenged administrative proceedings by simply removing the zeroing line has never been adopted by the United States as the manner for implementing the DSB's recommendations and rulings in this dispute.[46] In order to comply, the United States is free to adopt any WTO-consistent methodology that does not include zeroing. Even assuming, for the sake of argument, that Japan's consultant properly reran the margin programs with the zeroing instruction removed, this is not the only WTO-consistent methodology the United States may choose to employ. Thus, Japan's recalculations do not support its assumption that removal of zeroing would necessarily eliminate virtually all antidumping duties.

54. Japan states (paragraph 56 of Japan's response to question 17 from the arbitrator) that the assumption of CES preferences is pertinent to describe the ball bearings industry. Can Japan provide evidence or any other further clarification as to why this may be the case.

118. Japan's response to this question did not provide sufficient evidence that constant elasticity of substitution (CES) preferences are pertinent to describe the ball bearings industry. While Japan did provide some evidence of the degree of substitutability between ball bearings from different sources during the period of the 2006 sunset review, this is not the same as CES preferences.

119. By definition, CES requires that the elasticity of substitution be constant at all relative prices. Any test of this property would require measurements of the elasticity at different prices to determine that they are constant. This would require data and an empirical test at different market conditions. The 2006 sunset review reported an elasticity of substitution between 3 and 5 for the market conditions prevalent at the time. That review did not state whether the elasticity would change at other prices or market conditions, nor did it try to do so.

120. None of the other Japanese material is sufficient to establish constant elasticity either, either singly or together. Finding "a significant degree of substitutability" is not sufficient, because this degree of substitutability could change (*i.e.*, not be constant) at other prices.[47] The fact that imported varieties are imperfect substitutes is also not sufficient, because Japan again does not provide evidence whether the degree of substitution will change in other market conditions.[48] The fact that imported varieties are equal substitutes, even if true, is not sufficient

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[46] *See, e.g.,* U.S. response to Question 3(a), para. 14.
[47] *See* Japan's response to Question 54, para. 196.
[48] *See* Japan's response to Question 54, paras. 197-98.

proof of CES for the same reason. Thus, there is no support for Japan's conclusion that the assumption of CES preferences holds for the ball bearing industry.

121. The United States also notes that even if CES preferences did describe the ball bearing industry, this would not result in the automatic collapsing of a substitution elasticity into an import demand elasticity for the reasons stated in the U.S. response to Question 50 and our comments on Japan's responses.

55. Japan states (paragraph 56 of Japan's response to question 17 from the arbitrator) that the assumption of a fixed price index is particularly appropriate for the case at issue given the small share that affected Japanese exporters represent in terms of the overall consumption of ball bearings in the United States. Can Japan please provide evidence on its assertion.

122. Japan does not provide evidence that a fixed price index is appropriate for this analysis. The question is not whether any individual Japanese firm influences the price, but rather whether Japanese firms collectively influence the price. Even if each individual firm is a price taker and therefore sees itself facing a horizontal demand curve (and hence fixed prices), this does not mean that the collective supply curve for Japan as a whole is horizontal.

123. In 2005, the year that Japan uses as the basis to determine market shares, Japan's market share was 9.2 percent, representing one-quarter of all imports. As the sunset review explained, "By far, subject imports of BBs from Japan accounted for the largest share of total apparent U.S. consumption, representing between 7.7 percent in 2003 and 9.6 percent in 2000 during the period of review, with a 9.2 percent share in 2005."[49] Given Japan's significant overall share of the market, Japanese firms, as a whole, are likely to have an impact on pricing in the U.S. market.

124. Additionally, the fixity of the price index is also a question of U.S. consumer responsiveness to prices in the market, not just a question of producers' pricing decisions. Indeed, if ball bearing consumers have CES preferences and a CES equal to 1 across all producers, domestic and foreign, then consumer expenditures on ball bearings will be constant, although the price index for ball bearings need not be fixed. The assumption of a CES of 1 implies a Cobb-Douglas utility function as referenced in the materials cited by Japan in its response to Question 17. In such a situation, a change of one percent in the price of Japanese ball bearings will only change the quantity demanded by one percent.

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[49] *See* Excerpt from U.S. International Trade Commission: *Certain Bearings From China, France, Germany, Italy, Japan, Singapore, and the United Kingdom*, Investigation Nos. 731-TA-344, 391-A, 392-A and C, 393-A, 394-A, 396, and 399-A (Second Review), Pub. 3876 (August 2006), at 30 (attached as Exhibit US-25). The full document is Exhibit JPN-192.

125. If a firm increases its price, consumer demand for its product will decline such that the expenditure on its product is constant because the quantity purchased declines to balance the rise in price. Nevertheless, overall expenditures on ball bearings will remain stable. Stable expenditures do not imply a fixed price index.

126. Additionally, Japan's erroneous calculation of Japanese market share for ball bearings in the U.S. market results in an inconsistent and unrealistically low estimate. Japan relies upon the U.S. consumption value data from the sunset review, but performs its own calculation of market share using mismatched data. Japan's use of total U.S. consumption of ball bearings in 2005 as a denominator and the average of Japanese shipments in 2008 and 2009 to generate a Japanese market share in 2009 is inappropriate.[50] Japan has provided no evidence to suggest that market conditions in 2005 were sufficiently similar to market conditions in 2008 and 2009 so as to allow the use of data from these two different periods to generate market shares.

127. A more appropriate approach to estimate Japan's market share would be to use not only the U.S. consumption value data from the 2006 sunset review but also the import data. Using consistent data, as mentioned above, Japan's market share in 2005 was 9.2 percent. Accordingly, Japan's significantly lower market share estimate is incorrect.

56. (United States and Japan) In footnote 64 to paragraph 63 of its response to question 18 from the arbitrator, Japan states that the elasticity of substitution it uses has been sourced from the study by Hertel et al. (2004). However, this study seems to estimate the elasticity of substitution between different import sources. The domestic-import elasticity of substitution used by Japan in its calculations seem to be derived from this, using the so-called "rule of two". Can parties comment on the appropriateness of this rule in the context of the present dispute.

128. Please see response to Question 56. Additionally, neither Japan's explanation for its use of the "rule of two," nor its brand-new calculation purportedly justifying its use of the GTAP source substitution elasticity, supports its claim. The United States disagrees with Japan's characterization of the "rule of two" and its use in Japan's alternative methodology. Furthermore, Japan's alternate calculations are not properly before the Arbitrator, and are flawed and unreliable.

129. Japan begins its response stating that the "rule of two" is an established parameter convention in international trade and has been confirmed by empirical testing.[51] Japan is incorrect to state that the "rule of two" is an established or generally accepted parameter convention for international trade analyses of this nature. In all of Japan's examples, the use of the "rule of two" was in order to generate either the substitution elasticity between import

[50] *See* Japan's response to Question 55, para. 202.
[51] *See* Japan's response to Question 56, para. 208.

sources from the import-domestic substitution elasticity or *visa versa*. The "rule of two," however, has not been established or generally accepted for determining the change in the level of imports for a specific product due to a price change.

130. To the extent that the "rule of two" has been utilized, it has generally been used in conjunction with trade models that incorporated a nested function of substitution, first between imports and domestically produced products and then between different import sources. The examples provided by Japan – the Salter model (Jomini, *et al.*), GTAP and ITC's former Computable General Equilibrium (CGE) model of the U.S. economy – are all examples of this type of model. Contrary to Japan's implication that the "rule of two" is widely accepted, this is not the case. As the Liu, *et al.* study notes in the introduction in regards to CGE models, "[d]espite (or perhaps because of) the importance of these parameters [substitution elasticities], debate over appropriate values remains contentious."[52] This was one reason these authors were attempting to empirically test the "rule of two."

131. At best, the Liu, *et al.* study provides only weak support for the "rule of two." As discussed in the U.S. response to Question 56, the authors found that the probability of the ratio between the import-import substitution elasticity and the import-domestic substitution elasticity was equal to two was 16 percent. In fact, Liu, *et al.* estimated the ratio to be 2.69, not 2.

132. Despite the fact that the "rule of two" has only been utilized between substitution elasticities, Japan in its alternative methodology has made the analytical leap to apply it to the import demand elasticity to generate a substitution elasticity between import sources. The conclusion that multiplying the import demand elasticity by two will generate a substitution elasticity is erroneous. There is no support in the literature for the use of the "rule of two" in this manner.

133. In purported support of its use of the "rule of two," Japan provides a new alternative method to derive an elasticity for use in the lost export equations. Japan relies on an equation, 5.44, taken from the Francois and Hall study cited as Exhibit US-17. Japan mistakenly applies this equation to import demand elasticities taken from GTAP, the Kee, *et al.* study (previously cited as Exhibit US-18), and an additional dataset from Broda and Weinstein (2006). As a procedural matter, these brand-new calculations presented for the first time at this late stage in the arbitration are not properly before the Arbitrator. Furthermore, Japan's calculations are flawed and unreliable.

134. Japan's brand-new calculations are not properly before the Arbitrator because they go far beyond its previous calculations in this case. The United States provided the Francois and Hall equation and the Kee, *et al.* study prior to Japan's filing of its Written Submission. Despite

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[52] *See* Liu, Jing, Channing Arndt, and Thomas Hertel, "Parameter Estimation and Measures of Fit in a Global General Equilibrium Model," *Journal of Economic Integration*, 19(3):626-649, at 627 (Exhibit US-21).

having the opportunity to furnish any argument it wished with respect to these sources much earlier, Japan did not provide any of these new calculations until its responses to the post-hearing questions from the Arbitrator. Such novel arguments and new factual evidence go far beyond the "evidence necessary for the purposes of answering questions" discussed in paragraph 10 of the working procedures as a limited exception to the requirement that each party "shall submit all factual evidence to the Arbitrator no later than in its written submission[.]"

135. Even assuming, for the sake of argument, that Japan's new calculations are properly before the Arbitrator, however, Japan's new calculations are flawed and unreliable. Japan attempts to use the Francois and Hall framework to convert the GTAP source substitution elasticities into an import demand elasticity. But Japan misinterprets the equation, and fails to acknowledge that the data necessary for this analysis are not available. Accordingly, Japan's new calculations are not useful for the Arbitrator.

136. An analysis of the Francois and Hall equation 5.44 demonstrates why this is the case. The Francois and Hall framework provides a method to generate an import demand elasticity if six pieces of information are available: (1) the U.S. domestic market share, (2) U.S. market share of Japanese producers subject to the antidumping orders in question, (3) rest-of-world share of the U.S. market, (4) the U.S. aggregate elasticity of demand, (5) the domestic-import elasticity of substitution, and (6) the import-import elasticity of substitution.[53]

137. By comparing this explanation of the Francois and Hall equation to Japan's interpretation of it, it is clear that Japan has made several errors that render its analysis useless. First, Japan incorrectly uses the U.S. import demand elasticity for ball bearings instead of the U.S. aggregate demand elasticity for ball bearings. Japan does not provide an estimate of U.S. aggregate demand elasticity, nor does the data support this element of its calculation.

138. Second, Japan erroneously combines domestic and non-Japanese import market shares. As a result, Japan does not properly distinguish between the domestic-import substitution elasticity and the import-import substitution elasticity. As discussed above, the domestic-import

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[53] *See* Exhibit US-17 at 138. The equation is as follows:

$N_{22} = (\theta_2 * NA) - (\theta_1 * \sigma_{12}) - (\theta_3 * \sigma_{13})$

where:
N_{22} is the U.S. elasticity of demand for imports from Japan
θ_1 is the U.S. market share
θ_2 is the Japanese market share
θ_3 is the rest of world market share
NA is the U.S. aggregate demand elasticity
σ_{12} is the domestic-import elasticity of substitution
σ_{13} is the import-import elasticity of substitution.

elasticity of substitution and import-import elasticity of substitution are separate inputs for the Francois and Hall equation. Accordingly, Japan's calculation is unreliable.

139. Third, in attempting to provide the Arbitrator different market share levels, Japan creates potential market shares that do not match the intentions of the equation. Japan attempts to create a weight based on Japan's share of total imports or total imports as a share of consumption in 2005, but the data relied upon by Japan do not support this calculation. As noted above, the Francois and Hall equation requires market shares of U.S. consumption of the various products by U.S. producers, Japanese producers subject to the order, and the rest of the world. These shares are not available for the U.S. ball bearings market for the 2007-2009 period.

140. Japan thus failed to provide either the market share data or the elasticity data necessary to apply the Francois and Hall equation. Because the data necessary are not available to convert the GTAP substitution elasticities into an import demand elasticity by the Francois and Hall framework, the import demand elasticities estimated by the World Bank are the best alternative for the Arbitrator as the elasticity input into the lost trade equation. The World Bank import demand elasticities were specifically estimated for the United States. Moreover, the degree of aggregation provides for a much better estimate for these products than the highly aggregated GTAP substitution elasticities.

57. Can Japan match its firm specific entry level information with the HS 6-digit categories for the historical post-RPT entries and current year entries. In particular, can Japan add a column indicating the 6-digit HS category relevant for each entry in the excel files from Exhibit JPN-148 to Exhibit JPN-161.

141. Once again, Japan has refused the Arbitrator's request to gather these data. Japan's suggestion that the United States could gather these data for Japan again fails because the Arbitrator addressed this question to Japan, and because the United States has accepted the use of Japan's trade value data for this proceeding. The United States is not in a position to provide an independent calculation.

142. Similarly, Japan's suggestion that weighting data are not necessary for Japan's calculation, but are necessary for the U.S. calculation, incredibly attempts to use Japan's own failure to provide data against the United States. Particularly given Japan's failure to furnish weighting data, the United States' use of the simple average was eminently reasonable.

143. Indeed, if anything, the United States' use of the simple average was conservative in that it served to increase the U.S. estimate of nullification or impairment. As the 2006 sunset review found, and as the United States explained in its response to Question 58, ball bearings primarily enter the United States under the following six-digit headings: 8482.10, 8482.80, 8482.91,

8482.99 and 8483.20.[54] The remaining headings were included as a result of scope determinations following the original investigations. The average of the import demand elasticities for these HTS codes is -0.83, significantly lower than the average of -1.16 in the U.S. calculation.[55] By placing greater weight on elasticities that suggest a larger price effect, the United States' use of a simple average increased the U.S. estimate of nullification or impairment.

144. The United States' use of a simple average also increased the U.S. estimate of nullification or impairment because it included a now-discontinued HTS line that had the highest elasticity in the U.S. calculation. Beginning in 2007, line 8708.60 was discontinued and merged with 8708.50 with the new description of 8708.50 as drive axles with differential, whether or not provided with other transmission components, and non-driving axles; parts thereof: for tractors (except road tractors).[56]

145. Even though it was discontinued in 2007, the United States nevertheless kept line 8708.60 as part of its simple average determination. This significantly increased the average elasticity in the U.S. calculation because line 8708.60 has an elasticity of -4.59991, close to four times the overall average and more than double the highest elasticity of any of the other HTS codes in the U.S. calculation.[57] Thus, the U.S. import demand elasticity calculation was, if anything, conservative.

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[54] *See* Exhibit US-25 at BB-I-31.

[55] *See* U.S. Elasticity Calculation (Exhibit US-19). The average is as follows:

HTS Code	Elasticity
8482.10	-0.93775
8482.80	-0.94167
8482.91	-0.7694
8482.99	-0.48638
8483.20	-0.99568
Average:	-0.82618

[56] *See* Excerpts from *Harmonized Tariff Schedule of the United States* (2006) – Supplement 1 (Rev. 2); *Harmonized Tariff Schedule of the United States* (2007) (Rev. 2) (Exhibit US-23).

[57] *See* Exhibit US-19.

TABLE OF EXHIBITS

Exhibit No.	Description
US-24	Excerpt from Hummels, D., "Toward a Geography of Trade Costs," GTAP Working Paper No. 17 (1999)
US-25	Excerpt from U.S. International Trade Commission: *Certain Bearings From China, France, Germany, Italy, Japan, Singapore, and the United Kingdom*, Investigation Nos. 731-TA-344, 391-A, 392-A and C, 393-A, 394-A, 396, and 399-A (Second Review), Pub. 3876 (August 2006)