UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

RECOURSE TO ARTICLE 22.6 OF THE DSU
BY THE UNITED STATES

(DS322)

Oral Statement of the United States

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1. Mr. Chairman, members of the Arbitrator, I would first like to express the appreciation of the United States for your willingness to serve as the Arbitrator in this new phase of this dispute. The United States, of course, also would like to thank the staff of the Secretariat for their work in assisting the Arbitrator.

2. The task before us today, if not simple, is at least relatively straightforward. The questions before the Arbitrator in this dispute are defined by Article 22 of the DSU, namely whether Japan's proposed level of suspension of concessions is equivalent to the level of nullification or impairment, and if not, what level of suspension of concessions or other obligations is equivalent to that level. This question includes several sub-issues, including, among others, Japan's request for authorization to suspend an additional amount of concessions in an amount allegedly reflecting a retroactive calculation of past nullification and impairment, and Japan's request for discretion to adjust the amount of suspension. The United States also wishes to note that it remains committed to bringing its measures into compliance with the DSB's recommendations and rulings and continues to devote significant resources toward reaching a solution. That commitment was reflected as recently as in WT/DS294/39.

3. In our statement today, the United States will discuss a methodology for calculating the level of nullification or impairment and explain the reasoned basis for selecting each element of the calculation. The United States will then address Japan's calculations and explain why Japan's flawed approach leads to a level of suspension that exceeds the level of nullification or

impairment. In doing so, the United States will also address some of the arguments raised by Japan in its answers to the Arbitrator's questions. Finally, the United States will explain why Japan's request for discretion to adjust the level of suspension is improper.

Level of Nullification or Impairment

4. Pursuant to Article 22.7 of the DSU, the task of the Arbitrator is to determine whether the level of suspension of concessions or other obligations for which Japan seeks DSB authorization is equivalent to the level at which Japan's benefits under the WTO Agreement are being nullified or impaired as a result of U.S. measures that have not been brought into compliance. The starting point in any analysis of a suspension proposal is to determine the extent to which a Member's WTO-inconsistent measure that is the subject of the DSB's recommendations and rulings nullifies or impairs benefits accruing to the complaining party. Thus, an analysis of the level of nullification or impairment must focus on the benefit allegedly being nullified or impaired as a result of the infringement or breach found by the DSB.

5. The recommendations and rulings of the DSB at issue are "as such" and "as applied" findings regarding the U.S. calculation of antidumping margins in administrative reviews using a "zeroing" methodology, and an "as applied" finding regarding the U.S. 1999 sunset review of the antidumping duty order for *Ball Bearings from Japan* that utilized margins calculated using "zeroing." Japan has sought suspension of concessions based upon the DSB's recommendations and rulings.

6. Before turning to the U.S. calculation of nullification and impairment and the flaws in Japan's methodology, we would note certain principles that apply in Article 22.6 arbitrations.

First, Arbitrators in past proceedings have uniformly based their determinations on hard evidence and have refused to accept claims that are too remote, too speculative, or not meaningfully quantified. Second, an arbitrator's determination should not be designed to punish the responding party. While inducing compliance may be one of the underlying principles of authorizing suspension, it is to be achieved subject to the requirement under Article 22.4 that the level of suspension of concessions be equivalent to the level at which benefits are being nullified or impaired.

7. Third, the Article 22.4 equivalence requirement reflects an underlying principle for authorizing the suspension of concessions: maintaining the balance of trade benefits accruing to the parties. The WTO Agreement represents the result of a number of negotiations under which Members agreed to make certain trade concessions in return for trade concessions from other Members. Where a Member's measure is nullifying or impairing the benefits promised to another Member under the covered agreements, the Member whose benefits are nullified or impaired is not required to continue providing the full level of benefits of its trade concessions to the Member in breach. Article 22 permits the complaining Member to suspend concessions up to the level of nullification or impairment in order to account for the benefits that are being denied it and thus maintain the balance of trade benefits.

8. Fourth, in determining the level of nullification or impairment, for the period that will be subject to the equivalent suspension of concessions, the Arbitrator should compare the level of trade for the complaining party under the WTO-inconsistent measure to an estimate of what the complaining party's level of trade would be if the Member had brought the WTO-inconsistent measure into conformity. The situation in which the Member concerned would have removed the

WTO inconsistency is referred to as the "counterfactual." The difference in the level of trade under these two situations represents the level of nullification or impairment.

9. The counterfactual in this dispute is the difference between the actual level of U.S. imports at issue, and a reasonable estimate of the imports at issue that would exist if the U.S. measures were brought into compliance with the DSB's recommendations and rulings – that is, if the United States were to collect antidumping duties based on dumping margins calculated using a WTO-consistent methodology that does not include zeroing. In order to estimate trade for the period that will be subject to the equivalent suspension of concessions, the calculation uses the most recent representative period.

10. In calculating the level of nullification or impairment, the United States followed the broadly-accepted approach of using the most accurate data available, the best proxies available to estimate the actual impact of zeroing on antidumping margins, and the most specific economic factors available for the products at issue in this dispute. By this sound approach, the United States demonstrates that the level of nullification or impairment of benefits to Japan in this dispute can be no greater than, in the aggregate, $4.1 million annually in lost trade. Japan's calculation, on the other hand, suffers from several conceptual flaws and methodological errors that result in a vastly greater estimate of nullification or impairment than Japan can legitimately claim.

11. For the reasons detailed below, the United States respectfully requests that the Arbitrator decline Japan's proposed level of suspension of concessions and, instead, determine that the level of nullification or impairment is no greater than $4.1 million per year.

Outline of U.S. Methodology

12. With the above as introduction, the United States will now outline a methodology for calculating the level of nullification or impairment and explain the basis for selecting each element of the calculation.

13. As mentioned previously, to arrive at the calculation of the level of nullification or impairment of trade benefits that would otherwise accrue to Japan, the United States employs a counterfactual analysis. In this case, that analysis seeks to measure the amount of trade that would exist if the U.S. measures were brought into compliance with the DSB's recommendations and rulings, in this case by: (1) not using "zeroing" in the dumping margin calculations at issue in the periodic reviews found to be inconsistent "as applied"; (2) not relying on margins calculated using "zeroing" as a basis for continuing the antidumping duty order at issue in the sunset review found to be inconsistent "as applied"; and (3) not continuing to maintain "zeroing procedures" in the calculation of dumping margins in periodic reviews as a measure of general and prospective application found to be inconsistent "as such".

14. In this case, the three factors that are necessary to reasonably estimate the counterfactual are: (1) the difference in antidumping duty rates, if the antidumping duty rates at issue were recalculated using a WTO-consistent methodology without zeroing for the products to which those rates apply; (2) the impact of the difference in the antidumping duty rates on the price of those products; and (3) any increase in the value of trade as a result of the price impact for each of those products, using the import demand elasticities for the products. For each of these factors, the calculation uses reasonable assumptions given the available data. The calculation involves the following formula:

*Level of nullification or impairment = price change of product * U.S. import demand elasticity * trade subjected to antidumping (AD) duties with zeroing*

Orders at Issue

15. The U.S. calculation begins with the measures at issue. In this case, the three antidumping orders that were originally at issue, and for which Japan currently claims nullification or impairment, are *Ball Bearings from Japan*, *Cylindrical Roller Bearings from Japan*, and *Spherical Plain Bearings from Japan*.

16. Because the analysis is prospective, measures that have been revoked or have been brought into compliance are not relevant to the calculation of the counterfactual. If a measure has been revoked, then it would not be imposing any AD duties, and the absence or existence of zeroing would have no impact on trade. If a measure has already been brought into compliance with the DSB recommendations and rulings, then it is not currently causing nullification or impairment.

17. In this case, because the antidumping orders for *Cylindrical Roller Bearings* and *Spherical Plain Bearings* have been revoked, the United States has only calculated nullification or impairment for *Ball Bearings*. *Cylindrical Roller Bearings* and *Spherical Plain Bearings* were revoked in 2000, long before the expiration of the reasonable period of time (RPT) on December 24, 2007. Thus, there are no more administrative reviews, sunset reviews, estimates of future antidumping duties, or security for the payment of estimated antidumping duties for these two orders. Although a small number of entries made prior to the end of 2000 remained unliquidated as of the expiration of the RPT, the entries in question have long ago entered the United States. The liquidation of the duties on these entries will not affect trade. Accordingly, the United States

has only calculated the level of nullification or impairment associated with antidumping duties related to the proceedings for *Ball Bearings*.

Percentage Change in Price

18. After determining the relevant measures, the United States next calculated the price change, if any, of the product subject to each of those measures in the absence of zeroing. It is the price change due to zeroing that would trigger the change, if any, in the level of trade.

19. The first step in estimating the price change due to zeroing is to estimate the percentage-point change in existing AD duty rates, if any, that would result if the rates were recalculated using a WTO-consistent methodology without zeroing. The change in AD duty rates in the counterfactual is the difference between what AD duty rates would be without zeroing and the existing AD duty rates for the same product. After estimating the change in AD duty rates, if any, due to the effect of zeroing, the U.S. calculation applies this change to determine the change in price.

20. The U.S. calculation estimates the percentage-point change in AD duty margins due to zeroing by drawing on actual determinations performed by the U.S. Department of Commerce (Commerce) pursuant to Section 129 of the Uruguay Round Agreements Act. These determinations are relevant to calculating the level of nullification or impairment in this case because they reflect the calculation of actual margins with zeroing and without zeroing. To estimate the impact of the removal of zeroing, the calculation takes the simple average of the margin differences between the original margin with zeroing and the recalculated margin without zeroing across orders where a Section 129 determination has been completed. These determinations were calculated in a public, transparent manner and subjected to numerous

procedural protections to ensure that these recalculations accurately reflect the removal of zeroing from the resulting redetermined dumping margin. During its conduct of these proceedings, Commerce issued preliminary results, and invited interested parties (both foreign and domestic) to comment before the issuance of the final recalculations. Accordingly, the results of the Section 129 determinations are the best, most reliable metric available for estimating the impact of zeroing on dumping margins.

21. As shown in Exhibits US-3 and US-20, based on the Section 129 recalculations, in which the average duty rate with zeroing was 9.22% and an average rate of 6.27% without zeroing, the price change is -2.70% [(.0922-.0627)/(1+.0922)].

U.S. Import Demand Elasticity

22. The next element of the calculation of the level at which benefits are being nullified or impaired is the U.S. demand response to the change in product price from the change in AD duty rates. The calculation estimates the U.S. demand response by use of U.S. import demand elasticities estimated by World Bank researchers in a study published in 2008, which we have filed as Exhibit US-18. This study provided U.S. import demand elasticities at the six-digit Harmonized Tariff Schedule (HTS) line, which we have attached as Exhibit US-19. In the calculation, the import demand elasticities estimate the likely increase in import demand for the products in question given the price change.

23. Ball bearings may enter the United States under several six-digit HTS lines. Because the data on the record in this arbitration show imports of ball bearings, without specifying the specific six-digit HTS line, the United States averaged the World Bank import demand elasticities for the ball bearing tariff lines.

24. As shown in Exhibit US-19, because the study did not provide import demand elasticities for all of the possible tariff lines, the calculation averages those that were available, and, for those tariff lines where no elasticity was available, following the suggestion of the World Bank researchers, uses the average elasticity for all other countries with an estimate for that 6-digit HTS. The resulting elasticity is -1.16.

Value of Trade Subject to Zeroing

25. As explained, to determine the level of nullification and impairment, the price change and elasticity must be applied to the value of U.S. imports subject to the measures that have not been brought into compliance. In this arbitration, the United States is accepting Japan's data on trade value. In particular, Japan has provided trade value data for individual firms, and has requested authorization for suspension relating to imports by those specific firms.

26. Based upon Japan's trade value data, the annual trade values for the 14 bearing producers for which Japan has calculated nullification or impairment for 2007 through 2009 are $130.2 million, $160.8 million, and $102.2 million, respectively.

Level of Nullification or Impairment

27. The U.S. calculation estimates the level of nullification or impairment for each of the three years (2007-2009), then uses the average of those three figures as the estimate for the level of nullification or impairment to be compared with the level of the suspension of concessions for which Japan seeks authorization. This average is an appropriate estimate because: (1) using data from these recent years reasonably estimates the value of trade, including the time since the expiration of the RPT on December 24, 2007; and (2) the averaging removes distortions from an exceptionally high or low level of trade for a given year.

28. Based on the Section 129 recalculations of a 2.95 percent point change in the duty rate, an associated 2.70 percent price reduction, an elasticity based on the World Bank elasticities of -1.16, and 2007 ball bearing imports of $130.2 million, the level of nullification or impairment for 2007 is $4.1 million. Using the corresponding levels of ball bearing imports for 2008 and 2009, the level of nullification or impairment for those years is $5.1 million and $3.2 million, respectively, resulting in an average for 2007-09 of $4.1 million.

29. The United States also notes that in our estimate of the current level of nullification or impairment, the United States has used an average of three years of data, rather than the roughly two years of post-RPT data used by Japan. The United States also notes that no basis in the WTO Agreement, nor any other rationale, limits the Arbitrator to consideration of post-RPT data. In addition, under the facts of this dispute, the use of two years of data as opposed to three years does not result in a different level of nullification or impairment because the trade value for 2007 is roughly equivalent to the average of the values for 2008 and 2009.

30. Correspondingly, the level of nullification or impairment should be, at most, $4.1 million. Because it accurately reflects the available data and is based on reasonable assumptions as to the effect of zeroing, the calculation provides a reasonable estimate of the level of nullification or impairment.

31. Japan's proposed level of suspension greatly exceeds this calculation of nullification or impairment and, accordingly, fails to meet the Article 22.4 requirement that the level of suspension be equivalent to the level of nullification or impairment.

Japan's Calculation

32. The above demonstration, without more, is sufficient basis for the Arbitrator to determine that the United States has satisfied its burden of proof with respect to showing that Japan's proposed level of suspension is not equivalent to the level of nullification or impairment. Next we provide additional reasons why Japan's proposed methodology yields excessive levels of suspension and should not be used for purposes of determining the appropriate level of suspension.

33. Japan divides its calculation of the level of nullification or impairment based upon whether the entries were made before or after the expiration of the RPT on December 24, 2007. Japan's methodology calculates nullification or impairment for: (1) entries made prior to the end of the RPT that were liquidated after the end of the RPT; and (2) entries made after the end of the RPT, which Japan divides into historical post-RPT entries and an estimate of current-year entries. For pre-RPT entries, Japan's methodology purports to measure "excess duties." For post-RPT entries, Japan's methodology purports to measure "lost exports."

34. For each of these periods, Japan attempts to compare the actual level of duties with a "counterfactual" level based on its assumptions as to the effect of compliance. In turn, Japan constructs three "counterfactuals" based upon its assumptions for the effect of compliance with the "as applied" sunset review finding, "as such" finding with respect to periodic reviews, and "as applied" periodic review findings. After performing this counterfactual for each of the three findings, Japan selects the highest as the level of nullification or impairment.

35. After calculating the level of nullification or impairment for each time period, Japan requests suspension for the first year of suspension for the total of all time periods. These figures are $121.1 million relating to excess duties on pre-RPT entries that were to be collected after the

end of the RPT plus interest, $96.3 million relating to lost exports associated with historical post-RPT entries, and $47.6 million relating to lost exports associated with current-year entries. For years after the first year of suspension, Japan requests suspension in the amount of its estimate of nullification or impairment for the current year, subject to later adjustment at its own discretion.

36. As discussed below, Japan's calculations contain two primary flaws that result in excessive estimates of nullification or impairment. Specifically, Japan: (1) requests retroactive suspension for past entries, including an improper calculation of "excess duties" for pre-RPT entries; and (2) exaggerates the amount of lost exports. Japan also commits methodological errors within the framework of its calculation that heighten these flaws. Correction of these flaws would drastically reduce Japan's estimate of nullification or impairment.

Suspension for Retroactive Amounts

37. In addition to seeking to suspend current trade concessions to account for benefits that are currently being nullified or impaired, Japan seeks authorization to suspend current concessions at an additional level – a level allegedly equivalent to the nullification or impairment in the past.

38. As an initial matter, Japan misstates the applicable provisions of the DSU. As just one example, Japan states: "if the nullification or impairment caused by the WTO-inconsistent measures, and implementing measures, does not cease by the end of the RPT, the complainant is entitled to suspend concessions."[1] According to Japan, then, this current arbitration proceeding is just a formality. Japan claims it is already "entitled" to suspend concessions. For Japan, the provisions of the DSU are to be ignored – there is no need to first have a determination by an Arbitrator as to the level of suspension that is equivalent to the level at which benefits are being

1 Japan Written Submission, para. 29.

nullified or impaired. There is no need for Japan to receive DSB authorization to suspend concessions. Japan, at least in its own mind, is presently already "entitled" to suspend concessions.

39. In addition, Japan claims that its position is "a matter of law",[2] and claims support from past arbitration awards. Yet at the same time, Japan can point to no provision of the DSU that provides for a retroactive amount to be added to the level of nullification and impairment that a complaining party is currently suffering. Nor can Japan point to a single past arbitration award in which such an additional amount was added to the level of suspension. In fact, with respect to both the *1916 Act* and *CDSOA* awards, Japan concedes that "these disputes provide no precedent for the existence of N/I with respect to the time between the end of the RPT and the present."[3]

40. One would think from Japan's submission that its position had been the position consistently argued in past arbitration proceedings and adopted by past arbitrators. But of course this is completely misleading and wrong. Nowhere does Japan acknowledge that its position is unprecedented. No Member has ever suggested or endorsed its proposed approach prior to this arbitration and the parallel "zeroing" arbitration by the EU – Brazil did not even advocate this reading of the DSU in *Cotton* where Brazil was seeking an additional amount for Step 2. In that arbitration, Brazil never suggested that there should be – indeed, under Japan's approach, was required to be – an amount added with respect to nullification and impairment occurring between the end of the RPT and the arbitration proceeding for the other elements of Brazil's claim, the GSM-102 export credit guarantees and domestic support.

2 Japan Written Submission, para. 20.
3 Japan Written Submission, para. 46.

41. In other words, Japan is claiming that all past arbitrators failed to carry out their mandates and failed to provide for this additional amount required by the DSU. For example, in Ecuador's arbitration in *Bananas*, the arbitrator did not award an additional amount for the period from the end of the RPT (January 1, 1999) until the arbitrator's award on March 24, 2000. Under Japan's approach, the arbitrator was required to award to Ecuador an amount more than double the amount actually awarded, but the arbitrator did not do so. Japan fails to explain how its position can be reconciled in light of the experience under Article 22 to date.

42. The underlying premise of Japan's claim – that Japan may properly suspend concessions or other obligations for the first year at a level based upon all the time that has passed from the end of the RPT until the present – is contradicted by the Article 22.4 requirement that the level of suspension be equivalent to the level at which benefits are being nullified or impaired. As the level of nullification or impairment does not refer to past cumulative levels, the underlying premise of Japan's contention is fundamentally flawed.

43. The suspension of concessions under Article 22 permits the complaining Member to suspend concessions in order to balance the benefits that are being denied it by the measure of the Member concerned. Article 22.4 ensures that the complaining Member does not suspend concessions greater than the level of nullification or impairment the complaining Member is suffering. The retroactive suspension requested by Japan thus would be inconsistent with Article 22.4 of the DSU, because the suspension of concessions would not be "equivalent" to the level of nullification or impairment – by Japan's own admission, it would be approximately *five* times that level.

44. Allowing a complaining Member to suspend concessions with respect to a measure from which it is no longer suffering any trade effects – as is the case for the pre-RPT entries and historical post-RPT entries for which Japan calculates nullification or impairment – 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.

45. The determination of the correct level of suspension is thus, by necessity, forward-looking. Past periods are relevant only to the extent that they serve as a proxy for the level of nullification or impairment going forward. The Arbitrator thus should reject Japan's request for authorization to suspend concessions based on a retroactive amount.

46. Past arbitrations awarding variable levels of suspension recognize that the calculation of a level of nullification or impairment is a forward-looking exercise. No prior arbitrator has ever awarded a separate amount for the level of nullification or impairment accruing from the end of the RPT to the present.

47. In *United States – Continued Dumping And Subsidy Offset Act Of 2000 (EC)*, the arbitrator authorized a variable level of suspension to reflect the fact that "the value and industry distribution of the trade impact of the CDSOA could vary widely from one year to the next, because of the numerous factors affecting the amounts that may be disbursed, the nature of the recipients and how each category of recipient is likely to use the monetary amounts awarded to them under the

CDSOA."[4] 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.

48. Similarly, in *United States – Anti-Dumping Act of 1916*, the United States had never applied the 1916 Act, which had been found to be WTO-inconsistent, as of the end of the RPT. Thus, if one were to calculate the level of nullification and impairment as of the end of the RPT, then the award would have been zero. The arbitrator, however, did not adopt such an approach. Instead, the arbitrator concluded that, "[i]n the event that there are future applications of the 1916 Act – such as future US court decisions against EC entities, or future settlement awards involving European Communities entities – then the European Communities would be entitled to adjust the quantified level of suspension to account for this additional level of nullification or impairment."[5] This future-oriented approach is inconsistent with Japan's request for suspension based upon past trade effects.

49. Finally, in *United States – Upland Cotton*, the arbitrator considered a request from the requesting Member for the level of countermeasures to include "one-time countermeasures" in the amount of the user marketing (Step 2) payments made by the United States to domestic users of upland cotton in addition to the level for other countermeasures sought by the complaining Member. The compliance panel had found these Step 2 payments to be inconsistent with the SCM Agreement. The expiration of the RPT was July 1, 2005; Brazil was seeking authorization for this one-time amount for the 13 months after the RPT, to July 30, 2006, when the United States repealed the Step 2 program. Although the United States continued to make Step 2 payments for a period after the expiration of the RPT, the arbitrator nonetheless denied Brazil's request for a

4 *US – CDSOA (Article 22.6) (EC)*, para. 4.21.
5 *US – 1916 Act (Article 22.6)*, para. 7.8.

one-time amount. This decision confirms that the suspension of concessions should be based upon the current level of nullification or impairment, not a retroactive analysis.

50. Japan also 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 issue of when a Member is required to have taken measures to comply or otherwise brought itself into compliance, and the issue of the level at which a benefit is being nullified or impaired. In the reports cited by Japan, the issue of "retroactivity" was very different from the question presented by Japan's proposal in this proceeding. In the Article 21.5 proceedings, the issue was whether a finding of inconsistency with respect to the liquidation of entries made before the end of the RPT pursuant to determinations made before the end of the RPT was "retroactive" in the sense of requiring compliance "retroactively" – that is, before the end of the RPT. The issue here is different, it 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.

Japan's Excess Duties Calculation

51. Japan's method for estimating the nullification or impairment for pre-RPT entries suffers from an additional infirmity, namely Japan's calculation of "excess duties" rather than "lost exports" as it did for post-RPT entries. In addition to suffering from the primary defect of measuring nullification or impairment based upon past entries, Japan's "excess duties" calculation also fails because it fails to measure the trade effect for those entries. Although in general the payment of excess duties may have an effect on trade, the amount of excess duties is not equivalent to the trade effect.

52. The amount of "excess duties" does not equate to the level of nullification or impairment experienced by Japan. Any excess duties are paid by the U.S. importer, not Japan. And of course, where the entry occurred long ago, the trade has been completed and there is no effect on current trade with respect to the final collection of duties from that U.S. importer years later. The "excess duties" calculation is an estimate of financial impacts on U.S. revenue and the 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. Profits are not a concession under any of the covered agreements at issue. There is no guarantee that a company should achieve a profit on its trade.

53. 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.

54. The inappropriateness of Japan's analysis is made all the clearer by Japan's own statements. In paragraph 6 of its Methodology Paper, Japan concedes that "the amount of ... lost exports that accrued before the end of the RPT [reasonable period of time] is not available," and that for this reason Japan has chosen to calculate the level of nullification or impairment it has suffered on the basis of excess duties for pre-RPT entries. In Question 12, the Arbitrator asked Japan to explain what it meant by "not available." In its response, Japan conceded that "it has not

attempted to quantify this N/I on the basis of any potential downward effects on future trade from the collection of excess duties at the time of liquidation, because it is unaware of any reliable method for doing so." Similarly, in its response to Question 14 of the Arbitrator, Japan contends that it should be permitted to calculate nullification or impairment based upon excess duties because the amount of lost exports is "not easy to quantify."

55. Japan's statements – that the amount of lost exports is *not available* and that Japan is unaware of *any reliable method* to calculate nullification or impairment for pre-RPT entries – amount to an important concession. The reason that no "reliable method" exists is simply that there is no link between pre-RPT entries and the level of the nullification of Japan's benefits that needs to be examined in an Article 22.6 arbitration. Furthermore, as noted previously, an important principle of arbitration under Article 22.6 is that the calculations must not be based on speculation. But that is just what Japan is requesting here. Japan provides no basis for the Arbitrator to accept its speculative and unfounded claims of nullification and impairment for pre-RPT entries simply because Japan is unaware of "any reliable method" to employ a reasoned calculation methodology – such as that Japan itself accepts for post-RPT entries. Japan's failure to quantify lost exports does not entitle it to use a different method.

56. Japan's "excess duties" calculation further fails because it improperly includes an interest factor in addition to the amount of excess duties. Japan's only legal basis for this request is a provision of U.S. law under which U.S. Customs and Border Protection (CBP) provides interest when a deposit is greater than the duties finally assessed.[6] Even assuming, for the sake of argument, that CBP pays interest at the rate estimated by Japan when it refunds deposits, that does

6 Japan Methodology Paper, para. 23, n.33.

not mean that CBP would be under any WTO obligation to do so here. U.S. domestic legal provisions do not establish WTO obligations. As discussed above, any calculation of interest measures lost profits to a U.S. importer rather than nullification or impairment to Japan.

Japan's Lost Exports Calculation

57. For entries made after the end of the RPT, Japan calculates nullification or impairment based upon alleged lost exports. To calculate lost exports, Japan multiplies: (1) a source substitution elasticity taken from the Global Trade Analysis Project (GTAP); times (2) trade entry value data taken from 14 individual exporters of ball bearings; times (3) Japan's estimate of the difference between the zeroed cash deposit rate and non-zeroed cash deposit rate applicable to each entry. Japan calculates lost exports for entries after the end of the RPT but prior to the current year using trade value data for those years. For the current year, Japan utilizes its calculated average annual level of nullification or impairment over the historical post-RPT period.

58. Japan's estimate of nullification or impairment for current-year entries is $47.6 million, compared to $4.1 million under the U.S. calculation. As discussed above, for the purpose of this arbitration, the United States is accepting Japan's trade value data for the 14 firms. Thus, the difference between these two figures is primarily attributable to two variables: (1) Japan's erroneous assumption that the elimination of zeroing would eliminate virtually all antidumping duties; and (2) Japan's erroneous reliance upon the GTAP source substitution elasticities that are inappropriate for this analysis. Japan's calculation also suffers from methodological errors that compound these flaws. We will discuss these errors below.

Assumption That Elimination of Zeroing Would Eliminate Virtually All Antidumping Duties

59. Japan's price change calculation is predicated upon the erroneous assumption that either (1) with respect to the "as applied" sunset review finding, that the AD order would have been terminated after the 1999 sunset review; or (2) with respect to the "as such" and "as applied" periodic review findings, that the removal of zeroing would eliminate virtually all dumping margins. Both assumptions are false.

60. With respect to the "as applied" sunset review finding, Japan erroneously assumes that compliance would have resulted in termination of the AD order for *Ball Bearings from Japan* after the 1999 sunset review. Consequently, in its counterfactual, Japan assumes that the United States would not have collected any AD duties under the *Ball Bearings* order after 1999. Contrary to Japan's assumption, as the United States explained to the compliance panel, compliance with respect to the sunset review would not necessarily have resulted in the United States no longer collecting duties under the order. Thus, Japan's assumption that the United States would not have collected any AD duties under the *Ball Bearings* order after 1999 is incorrect.

61. A correct counterfactual in this dispute would assume that the United States has brought the WTO-inconsistent sunset review into compliance. Compliance with respect to the sunset review would not necessarily have resulted in a termination of the *Ball Bearings* order.

62. Pursuant to Article 11.3 of the AD Agreement, in a sunset review, an administrating authority determines whether expiry of an antidumping duty would be likely to lead to continuation or recurrence of dumping. One of the criteria that Commerce may use to determine likelihood of dumping is whether dumping continued at an above *de minimis* level after imposition of the order. If dumping continued at above a *de minimis* level after imposition of the order,

Commerce may make an affirmative likelihood determination that expiry of the antidumping order is likely to lead to the continuation or recurrence of dumping.

63. In the underlying dispute, the sunset review was found WTO-inconsistent because Commerce relied on margins which had been calculated using zeroing. Nevertheless, as the United States explained before the compliance panel, Commerce did not examine only zeroed margins in the challenged sunset review. Commerce examined margins from the periodic reviews of the *Ball Bearings* order covering several periods. For these reviews, some of these margins were above *de minimis* and were not determined using zeroing. Japan never challenged several of these margins and there are no findings and recommendations with respect to these non-zeroed rates. These non-zeroed margins provide an independent, WTO-consistent basis for an affirmative likelihood determination.

64. Accordingly, even excluding the zeroed margins from the sunset review to comply with the findings in this dispute, these non-zeroed margins support the conclusion that dumping is likely to continue. Thus, the correct counterfactual would be to conclude that the *Ball Bearings* order would have continued. Thus, the Arbitrator should reject Japan's counterfactual based upon elimination of AD duties pursuant to the "as applied" sunset review finding.

65. With respect to the "as such" and "as applied" periodic review findings, based on an unofficial recalculation of the dumping margins for five of the 14 firms performed by its consultant, Japan erroneously assumes that removal of zeroing would eliminate virtually all AD duties. Japan has not supported its assumption that removal of zeroing would result in the removal of virtually all AD duty rates.

66. 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 ran the margin calculation program with the zeroing instruction removed, this is not the only WTO-consistent methodology the United States may choose to employ. Japan's proffered recalculations thus do not support its assumption that removal of zeroing would necessarily eliminate virtually all AD duties.

67. Furthermore, even if the Arbitrator were to accept Japan's recalculations for the five self-selected firms for which it provided recalculations, there is no basis to extrapolate this finding to the nine other importers for whom Japan calculates nullification or impairment. Japan's assertion that these recalculations for five exporters represent 93 percent of the trade value at issue highlights that the remaining nine exporters share a relatively small share of the U.S. market and appear to occupy a different position in the U.S. market. These smaller exporters may sell a very different range of products, and may have transaction prices that have a different relationship to normal value than the exporters who occupy a much larger share of the U.S. market.

68. Also belying Japan's faulty assumption are the actual results of the Section 129 determinations. As discussed above, these real-world determinations did not result in the elimination of all antidumping duties, and in the cases of many orders resulted in a slight reduction, if any, in the antidumping duties to be applied.

69. Lastly, the United States notes that, even if the Arbitrator were to accept Japan's estimate of the change in duties, Japan incorrectly uses the change in duties rather than the change in price in its lost exports calculation. Japan multiplies the change in duties by a price elasticity factor. A price elasticity measures the change in demand caused by a change in price, and thus should be

multiplied by the percentage change in price, not the difference in cash deposit rates. Because the percentage change in price has both the original price and change in duty in the denominator, as opposed to only the original price, the percentage change in price will be lower than the percentage-point reduction in the duty rate. Thus, even accepting Japan's assumption regarding the change in duties, applying the change in estimated antidumping duty rates rather than the change in price overstates the amount of lost exports.

Use of GTAP Source Substitution Elasticities

70. Japan further overstates the amount of "lost exports" in its calculation by its use of a source substitution elasticity between imports and domestic production from the GTAP model. GTAP is an inappropriate source for elasticities for this type of analysis for several reasons.

71. First, the GTAP source substitution elasticity is neither country-specific nor region-specific. In the GTAP framework, all countries and regions in the model have the same set of elasticities. This assumption is unrealistic, given the wide disparity between the United States and many other countries in the GTAP model.

72. Second, the use of the GTAP elasticities is also inappropriate because the GTAP elasticities are highly aggregated. GTAP only has 57 sectors to represent the whole economy. Ball bearings are included with "machinery and equipment not otherwise specified," which by its nature includes a vast array of items beyond ball bearings. This degree of aggregation results in an overbroad estimate.

73. By contrast, the World Bank import demand elasticities were estimated at the six-digit HTSUS level specifically for the U.S. market. The United States acknowledges that even at the six-digit level there are still some aggregation issues, but clearly the six-digit HTSUS is much

more disaggregated, thereby providing elasticity estimates much more closely related to the products in this dispute. The World Bank elasticities were estimated for 3,890 U.S. tariff lines at the 6 digit HTS level, compared to only 57 sectors in GTAP. By having a much more disaggregated level of analysis, the World Bank estimates provide elasticities for a product much closer to ball bearings than the GTAP elasticities.

74. Third, the World Bank elasticities are also more appropriate than the GTAP elasticities for this analysis because they are import demand elasticities, as opposed to substitution elasticities. The import demand elasticity is the appropriate tool to use when determining the change in imports resulting from a decrease in duties, not the substitution elasticity. The import demand elasticity measures the change in demand for imports given a price change. This elasticity is directly applicable to the analysis of how much imports will change when duties (and hence import prices) change.

75. Japan's rationale for using the GTAP source substitution elasticity is that GTAP estimates are publicly available and relied on by scholars and practitioners. While scholars and practitioners may draw on the GTAP estimates, this is usually to conduct a general equilibrium analysis, whether using the GTAP computable general equilibrium modeling framework or using its underlying databases for a different general equilibrium model. This does not support the use of GTAP elasticities for analysis of a specific product, as proposed by Japan.

76. Economic practice attempts to match elasticities to the analysis. Thus, to the extent that they are available, economic practice prefers elasticities that are specific to the country or countries involved, and, in a product-specific analysis, the most disaggregated elasticity that gets at the product in question. The GTAP elasticity fails in these regards.

77. The GTAP elasticity of substitution used by Japan expresses the expected percentage change in the ratio of imported and domestic quantities of goods demanded to the percentage change in the ratio of their prices. The quantity of imported goods is equivalent to the import level. In this case, because Japan has not provided the expected change in either import prices or domestic prices resulting from the reduction in tariff, there is no way to calculate this ratio.

78. The GTAP elasticity Japan uses is -4.05, meaning that a 1 percent change in the ratio of the prices of domestic and imported ball bearings would result in a 4.05 percent change in the ratio of their quantities demanded. This elasticity is not directly applicable to the analysis of how much imports change with a price change because Japan has not supplied the changes in import or domestic prices.

79. Japan's 4.05 percent assumption is unrealistic given the magnitude of this change and Japan's lack of evidence that consumer behavior would shift so dramatically in response to the duties. By contrast, the average import demand elasticity of -1.16 provides a much more realistic estimate of the level of nullification or impairment resulting from a given price change.

80. In its response to Question 17 of the Arbitrator, Japan argues that while, conceptually, it may be true that import demand elasticities and elasticities of substitution between imported and domestic varieties are distinct concepts, under the present circumstances involving an assessment of lost exports to Japanese exporters due to the WTO-inconsistent imposition of AD duties, the elasticity of substitution between imported and domestic goods, and the import demand elasticity are *identical*. Japan, however, provides no evidence to support this assertion.

81. The error of this position is apparent from a comparison of the -4.05 source substitution elasticity compared to the -1.16 import demand elasticity. In addition to this practical disparity

between the two figures, Japan's theoretical basis for claiming equivalence fails. Japan postulates – without evidence – that only import prices and import quantities change, while domestic prices and domestic quantities remain constant. Japan provides no evidence to support these assertions.

82. Japan also contends that use of the GTAP source substitution elasticities is appropriate here because the United States International Trade Commission uses GTAP elasticities for some forms of analysis. In certain circumstances, the United States uses the GTAP model, its databases, and variants of the standard "static" GTAP model. The issue, however, is not whether the United States uses GTAP in any circumstances, but rather whether it is appropriate to use the GTAP default elasticities as proposed by Japan, especially when a better choice is available -- namely, the World Bank import demand elasticities. Additionally, the United States has a separate Computable General Equilibrium model for the U.S. economy. The U.S.-specific model does not use GTAP elasticities.

83. In its response to Question 18 of the Arbitrator, Japan also incorrectly criticizes the import demand elasticities provided by World Bank researchers. Japan contends that 7 of the 20 elasticities provided by the World Bank were not statistically significant at the 95 percent confidence level, and that values for three of the 20 tariff lines were not specific to the United States. Neither of Japan's criticisms undermines the rationale for using the World Bank elasticity figures.

84. With respect to statistical significance, in Exhibit JPN-188, Japan asserts that seven of the 20 variables were not statistically significant at the 95 percent confidence level. Japan does not mention, however, that of these seven variables, even under Japan's reasoning, several were significant at the 90 percent confidence level, which is a frequently-used confidence level. Japan

also does not mention that these seven variables actually have a higher average value than the remaining 13, so exclusion of those seven variables would actually serve to decrease the import demand elasticity.

85. With respect to the use of averaging for the three tariff lines where no value was available for the United States, the World Bank researchers suggested this approach. Although this value was not specific to the United States, this approach provides a reasonable approach given the available data. The GTAP figure, on the other hand, is not specific either to the United States or the particular product. Thus, neither of Japan's criticisms is valid.

Japan's Request for Discretion to Adjust the Level of Suspension

86. Japan requests authorization to suspend $47.6 million of concessions for the current year and to update the amount of suspension in future years if Japan in its sole discretion considers it necessary to update this amount. Japan also requests discretion to impose unspecified, non-prohibitive tariffs on a trade value of goods exceeding the level of nullification or impairment, with Japan's assurance that the trade effect of such tariffs would be equivalent to the level of nullification or impairment. The Arbitrator should reject both requests.

87. With respect to the request to update the amount, Article 22.4 provides for the level of suspension of concessions or other obligations to be equivalent to the level of nullification or impairment. There is no basis to conclude that any different amount would be "equivalent" under Article 22.4. Under Article 22.7 of the DSU, the Arbitrator's responsibility is to "determine whether the level of suspension is equivalent to the level of nullification and impairment." Japan's proposal to update the amount of its measure implementing its authorization if Japan

considers it necessary to do so usurps that authority and makes a determination of equivalence impossible with respect to any changes that Japan might make in the future.

88. Furthermore, Japan does not explain how it would update its measures, nor what the basis would be for its unilateral determination that it is necessary to do so. Nor, for that matter, does Japan suggest whether its updates would include both increases and decreases to its suspension of concessions. No previous awards in an Article 22.6 arbitration granted discretion to the complaining party to determine and apply variable levels after the conclusion of the arbitration.

89. With respect to the request to have discretion to impose non-prohibitive tariffs, 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. As a fundamental matter, Japan appears to misapprehend the concept of suspension of concessions. A hypothetical may help illustrate Japan's misunderstanding. Assume Japan imports product *x* from the United States, and trade in product *x* is $10 million per year. Once Japan has suspended a tariff concession on product *x*, Japan has suspended concessions at a level of $10 million. Japan is free to impose tariffs on that product at whatever level it deems desirable. The fact that Japan chooses to impose, for example, a 25% tariff does not make the concession any less suspended, or reduce the amount of trade on which the concession is suspended, such that Japan can then suspend concessions on yet another product. Were Japan to then suspend concessions on product *y* that is traded at $5 million per year, and impose 40% tariffs, Japan will have suspended concessions on $15 million in trade. That $15 million level holds true regardless of the level of tariffs that Japan actually applies – for

example it does not matter whether either the 25% or the 40% tariff is prohibitive or only slightly restrictive.

90. 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 non-prohibitive tariff or the amount of goods to which it would apply it. This does not permit the Arbitrator to evaluate whether such a measure is equivalent to the level of nullification or impairment.

91. 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.

Conclusion

92. In summary, the United States has demonstrated that Japan's request for authorization of suspension of concession or other obligations exceeds the level of nullification or impairment. The United States has set forth a methodology for calculating the level of nullification or impairment based on the most accurate data available, the best proxies available to estimate the actual impact of zeroing on antidumping margins, and the most specific economic factors available for the products at issue in this dispute. Further, the United States has shown that Japan's calculation exceeds the level of nullification or impairment due to flawed assumptions as to price change, the elasticity to be applied, and an unwarranted retroactive suspension based upon

past effects. Japan has also sought to circumvent the entire dispute settlement process by requesting discretion to adjust the rate and amount of goods to which a tariff would be applied, and for unilateral authority to adjust that amount in future years. For the forgoing reasons, the United States respectfully requests that the Arbitrator reject Japan's request for authorization, and determine that the level of nullification or impairment is no greater than $4.1 million per year.