

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

RECOURSE TO ARTICLE 22.6 OF THE DSU
BY THE UNITED STATES

(DS322)

Written Submission of the United States

July 8, 2010

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<i>EC – Bananas III (Article 21.5) (US) (Panel)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/RW/USA, adopted 22 December 2008, as modified by the Appellate Body Report, WT/DS27/AB/RW/USA
<i>EC – Bananas III (Article 22.6) (US)</i>	Arbitrator Award, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under DSU Article 22.6</i> , WT/DS27/ARB, circulated 9 April 1999
<i>EC – Hormones (Article 22.6) (Canada)</i>	Arbitrator Award, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities</i> , WT/DS48/ARB, circulated 12 July 1999
<i>EC – Hormones (Article 22.6) (US)</i>	Arbitrator Award, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities</i> , WT/DS26/ARB, circulated 12 July 1999
<i>US – 1916 Act (Article 22.6)</i>	Arbitrator Award, <i>United States – Anti-Dumping Act of 1916 – Recourse to Arbitration by the United States under DSU Article 22.6</i> , WT/DS136/ARB, circulated 24 February 2004
<i>US – CDSOA (Article 22.6) (EEC)</i>	Arbitrator Award, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Recourse to Arbitration by the United States under DSU Article 22.6</i> , WT/DS217/ARB/EEC, circulated 31 August 2004
<i>US – Corrosion-Resistant Steel Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – Gambling (Article 22.6)</i>	Arbitrator Award, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration under DSU Article 22.6</i> , WT/DS285/ARB, circulated 21 December 2007

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<i>US – Upland Cotton (Article 22.6 and SCM Article 4.11)</i>	Arbitrator Award, <i>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</i> , WT/DS267/ARB/1, circulated 31 August 2009
<i>US – Zeroing (Japan) (Panel)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, adopted 23 January 2007, as modified by the Appellate Body Report, WT/DS322/AB/R
<i>US – Zeroing (Japan) (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007
<i>US – Zeroing (Japan) (Article 21.5)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/RW, adopted 31 August 2009, as upheld by the Appellate Body Report, WT/DS322/AB/RW
<i>US – Zeroing (Japan) (Article 21.5) (AB)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009

I. INTRODUCTION

1. In proposing a level of suspension of concessions in this dispute, Japan presents the Arbitrator with a flawed calculation that overestimates the level of nullification or impairment. The United States objects to the excessive level of suspension proposed by Japan, and will explain in detail below the numerous flaws and erroneous assumptions contained in Japan’s calculation.

2. 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 is equivalent to the level of nullification or impairment. 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 nullified or impaired as a result of the infringement or breach found by the DSB. Due to several conceptual flaws and methodological errors, however, Japan’s calculation is not equivalent to the level of nullification or impairment.

3. As an alternative to the erroneous methodology proffered by Japan, the United States as accurately as possible estimates the trade effects of the measures at issue by means of a counterfactual. This counterfactual: (1) examines the actual relevant U.S. imports during the most recent period; and (2) estimates the relevant imports that would exist during the same period if: (a) the United States measures were brought into compliance with the DSB recommendations and rulings; (b) the full economic adjustments resulting from compliance were reflected; and (c) all other factors were held constant. As a result of this calculation, the United States estimates the trade effect to be no greater than \$4.1 million.

4. In the discussion below, the United States first explains the methodology employed to arrive at the level of nullification or impairment and why the approach taken by the United States is preferable. After demonstrating the validity of the level of nullification or impairment calculated using this methodology, the United States explains why Japan’s methodology fails to arrive at a reasonable estimate of the level of nullification or impairment.

5. Japan’s methodology is organized based upon whether the entries were made before or after the expiration of the reasonable period of time (“RPT”) of December 24, 2007. Japan’s methodology calculates nullification or impairment for: (1) entries made before the end of the RPT that were liquidated post-RPT; and (2) entries made post-RPT, which Japan divides into entries made prior to the current year; 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.”

6. Japan’s methodology as a whole suffers from several conceptual flaws that result in inflated estimates of nullification or impairment. Chief among these flaws are: (1) erroneous retroactive, cumulative suspension for past entries; (2) the assumption that the antidumping order on ball bearings would have been terminated after the 1999 sunset review; (3) the assumption that all dumping margins would be eliminated by the elimination of zeroing; and (4) the assumption of inconsistency of pre-existing AD duty rates never challenged by Japan and never subject to any findings of inconsistency or failure to comply.

7. In addition to these conceptual flaws, Japan’s pre-RPT methodology suffers from methodological errors that cause it to overstate the nullification or impairment resulting from the alleged “excess duties.” Japan erroneously (1) calculates nullification or impairment based upon the amount of alleged “excess duties” and an interest factor rather than the trade effect, if any, resulting from such duties; (2) includes an interest calculation based upon U.S. statute rather than any WTO obligation; and (3) calculates interest from the date of entry until the end of 2009 instead of from the end of the RPT until the date of liquidation.

8. Furthermore, in addition to the conceptual flaws, Japan’s post-RPT methodology contains methodological errors that cause it to overstate the amount of “lost exports.” To measure the alleged “lost exports,” Japan erroneously multiplies the amount of excess duties from its calculation by an elasticity factor taken from a study by the Global Trade Analysis Project (GTAP). Japan erroneously (1) uses overbroad GTAP elasticities that are not specific to the United States; (2) bases its calculation upon change in AD margin rather than the resulting price change; and (3) arbitrarily limits the trade value data on which it estimates the current-year level of trade to data after the RPT.

9. Finally, Japan improperly proposes to unilaterally decide whether to adjust the level of suspension in later years, and to suspend concessions on a greater value of trade than the level of nullification or impairment and to apply an unspecified, non-prohibitive tariff to that trade.

10. As a result of the calculation of the level of nullification or impairment presented by the United States, and the conceptual flaws and methodological errors in Japan’s calculation, the Arbitrator should conclude that the United States has met its burden to demonstrate that Japan’s calculation exceeds the level of nullification or impairment. Furthermore, the United States respectfully requests the Arbitrator to conclude that the level of nullification or impairment is no greater than \$4.1 million.

II. PROCEDURAL BACKGROUND

11. This Article 22.6 proceeding arises from a challenge made by Japan against the United States concerning the calculation of the amount of antidumping duty in antidumping duty proceedings.

A. The Original US – Zeroing (Japan) Dispute

12. Japan challenged the use of “zeroing” as applied in one antidumping investigation and eleven administrative reviews, as well as the reliance on margins calculated using “zeroing” in two sunset reviews.¹ Japan also challenged the U.S. use of “zeroing” as being inconsistent “as such” with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”), the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”), and the *Marrakesh Agreement Establishing the World Trade Organization* (“WTO Agreement”) when employed in original investigations, administrative reviews, new shipper reviews, sunset reviews, and changed circumstances reviews.²

13. The original panel circulated its report on September 20, 2006. Both the United States and Japan appealed, and the Appellate Body circulated its report on January 9, 2007.³

14. Japan and the United States agreed that the United States would have a reasonable period of time (“RPT”), ending on December 24, 2007, to implement the recommendations and rulings of the DSB.⁴

B. Compliance Panel Proceedings

15. Pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), Japan requested the establishment of a compliance panel on April 7, 2008.

16. The compliance Panel found that the United States failed to comply with the DSB’s “as such” recommendations and rulings in administrative reviews, new shipper reviews, and in transaction-to-transaction comparisons in investigations.⁵ Additionally, the compliance Panel found that the United States had failed to implement the DSB’s “as applied” recommendations

¹ *US – Zeroing (Japan) (Panel)*, para. 3.2.

² *US – Zeroing (Japan) (Panel)*, para 3.1.

³ *US – Zeroing (Japan) (AB)*, para. 190(f).

⁴ WT/DS322/20.

⁵ *US – Zeroing (Japan) (Article 21.5)(Panel)*, para. 8.1(c).

and rulings with respect to one sunset review⁶ and the originally challenged Reviews 1, 2, 3, 7, and 8.⁷

17. The compliance Panel also found that Reviews 4, 5, 6, and 9 constituted measures taken to comply that were inconsistent with the covered agreements.⁸ Finally, the compliance Panel found that certain liquidation of entries on which antidumping duties were owed were inconsistent with Article II:1(a) and II:1(b) of the GATT 1994.⁹

C. Appellate Body Proceedings

18. On May 20, 2009, the United States appealed the compliance Panel’s findings with respect to Reviews 1-9 and the compliance Panel’s finding under Article II of the GATT 1994.

19. On August 18, 2009, the Appellate Body issued its report upholding the Article 21.5 compliance panel’s findings.¹⁰

D. Recourse to Article 22.6

20. On June 11, 2008, Japan filed its request for authorization from the DSB to suspend the application of concessions or other obligations under the covered agreements pursuant to Article 22.2 of the DSU in this dispute. Japan filed separate requests for authorization to suspend application of concessions with respect to the “as such” finding with respect to periodic reviews,¹¹ and for the “as applied” findings with respect to the 1999 sunset review and periodic reviews at issue.¹² On February 12, 2010, the United States filed its objection to the level of suspension of concessions or other obligations proposed by Japan.¹³ As a result, the matter was referred to arbitration in accordance with Article 22.6 of the DSU.

⁶ *US – Zeroing (Japan) (Article 21.5)(Panel)*, para. 8.1(e).

⁷ *US – Zeroing (Japan) (Article 21.5)(Panel)*, para. 8.1(a).

⁸ *US – Zeroing (Japan) (Article 21.5)(Panel)*, paras. 8.1(b), 7.82, 7.114.

⁹ *US – Zeroing (Japan) (Article 21.5)(Panel)*, para. 8.1(d).

¹⁰ *US – Zeroing (Japan) (Article 21.5)(AB)*.

¹¹ WT/DS322/23.

¹² WT/DS322/24.

¹³ WT/DS322/25.

21. On June 6, 2008, in accordance with certain procedures under the *Understanding between the United States and Japan Regarding Procedures under Article 21 and 22 of the DSU*¹⁴ (“Confirmed Procedures”), Japan and the United States requested the Arbitrator to suspend its work. On June 9, 2008, in accordance with this joint request, the Arbitrator decided to suspend the arbitration proceeding effective as from that date until either party requests the resumption of the proceedings under the circumstances described in paragraph 3 of the Confirmed Procedures.

22. On August 18, 2009, the Appellate Body issued its report upholding the Article 21.5 compliance panel’s findings.¹⁵ On April 23, 2010, Japan filed its request to resume the arbitration.¹⁶

III. CALCULATION OF THE LEVEL OF NULLIFICATION OR IMPAIRMENT

23. Pursuant to Article 22.6 of the DSU, the United States objects to Japan’s proposed level of suspension of concessions or other obligations because it is not equivalent to the level of nullification or impairment from the measures at issue. Japan’s calculation suffers from several conceptual flaws and methodological errors that result in a vastly greater estimate of nullification or impairment than Japan can legitimately claim. We discuss the conceptual flaws and methodological errors in Japan’s calculation in Section IV of this submission.

24. To help show that Japan’s proposed level is excessive, in this submission the United States provides a calculation of the level of nullification or impairment. In order to do this, the United States first discusses the requirement of Article 22 of the DSU that the proposed level of suspension be equivalent to the level of nullification or impairment. Next, the United States discusses the proper methodological approach to calculating the level of nullification or impairment in this dispute, which is a counterfactual.

25. A counterfactual estimates the level of trade the complaining party would have were the measures brought into conformity with the DSB 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 “as applied” inconsistent, (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 “as applied” inconsistent, 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 “as such” inconsistent. By calculating what level of trade the complaining party would

¹⁴ WT/DS322/26

¹⁵ *US – Zeroing (Japan) (Article 21.5)(AB)*.

¹⁶ WT/DS322/37.

have had, a counterfactual approach provides the most reasonable estimate of the level of nullification or impairment.

26. The calculation provided in this submission determines the factors that may be subject to change in the absence of zeroing. The starting point for the calculation is the measures at issue. 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.

27. The calculation applies these factors to estimate the level of trade that would occur in the absence of zeroing. The additional amount of trade in the counterfactual is the level of nullification or impairment. Because it is methodologically sound and uses reasonable assumptions, the calculation provided in this submission reasonably estimates the level of nullification or impairment.

A. Article 22 of the DSU Requires that the Proposed Level of Suspension Be Equivalent to the Level of Nullification or Impairment

28. 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 is “equivalent” to the level of nullification or impairment. Arbitrators in the past have recognized that “equivalence” is an exacting standard:

[T]he ordinary meaning of the word “*equivalence*” is “equal in value, significance or meaning”, “having the same effect”, “having the same relative position or function”, “corresponding to”, “something equal in value or worth”, also “something tantamount or virtually identical.”¹⁷

29. The starting point in the analysis of a suspension proposal is to determine the extent to which any WTO-inconsistent measure that is the subject of DSB recommendations and rulings nullifies or impairs benefits accruing to the complaining party.

¹⁷ *EC – Bananas III (Article 21.5) (US)*, para. 4.1.

30. Thus, an analysis of the level of nullification or impairment must focus on the “benefit” allegedly nullified or impaired as a result of the infringement or breach found by the DSB.¹⁸ 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.’”¹⁹ As the arbitrator found in *EC - Hormones*, “[W]e need to guard against claims of lost opportunities where the causal link with the inconsistent [measure] is less than apparent, *i.e.*, where exports are allegedly foregone not because of the [inconsistent measure] but due to other circumstances.”²⁰

31. In previous proceedings, the arbitrator has compared the level of trade for the complaining party under the WTO-inconsistent measure to the complaining party’s level of trade where the Member has brought the WTO-inconsistent measure into conformity. The situation in which the Member concerned has removed the WTO inconsistency is referred to as the “counterfactual.” The difference in the level of trade under these two situations typically represents the level of nullification or impairment.

32. Other Article 22.6 arbitrators – as Japan does here – have recognized that a counterfactual is the appropriate method in those proceedings to calculate a level of nullification or impairment.²¹ An analysis of the actual effect of the measures at issue is thus necessary.

¹⁸ The concept of nullification or impairment derives from Article XXIII of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”). Article XXIII provides: “If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired ... as a result of ... the failure of another contracting party to carry out its obligations under this Agreement ... the matter may be referred to the CONTRACTING PARTIES.” For example in *US – Section 110(5)*, the arbitrators agreed with the U.S. position 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.” See *US – Section 110(5) (Article 25)*, U.S. Oral Statement to the Arbitrators (Sept. 5, 2001), para. 22; *US – Section 110(5) (Article 25)*, paras. 3.20-3.35.

¹⁹ *US – 1916 Act (Article 22.6)*, para. 6.10; see also paras. 5.54 and 5.69 (“In determining the level of nullification or impairment ... we need to rely, as much as possible, on credible, factual, and verifiable information. We cannot base any such estimates on speculation. ... We are of the view that any claim for a deterrent or ‘chilling effect’ by the European Communities in the present case would be too speculative, and too remote.”).

²⁰ *EC – Hormones (Article 22.6) (US)*, para. 41; see also para. 77 (Refusing to consider, as “too speculative”, lost exports that would have resulted from foregone marketing campaigns.).

²¹ See, e.g., *US – Gambling (Article 22.6)*, para. 3.14 (“the use of a counterfactual to assess the level of exports that would have accrued to Antigua had the United States complied with the rulings, constitutes an appropriate basis for assessing the level of nullification or impairment of benefits accruing”); *US – CDSOA (Article 22.6) (EC)*, para. 4.22; *EC – Hormones (Article 22.6) (Canada)*, para. 37, and *EC – Bananas III (Article 22.6) (US)*, para. 7.1.

33. Accordingly, the United States agrees with the basic concept – as expressed in Japan’s Methodology Paper – that, in this case, the level of nullification or impairment should be calculated based on a “counterfactual,” under which the Member concerned is assumed to have adopted measures in compliance with the DSB recommendations and rulings.²² Japan’s counterfactual, however, suffers from several conceptual flaws and methodological errors that result in a vastly inflated calculation of nullification or impairment.

34. In order to remedy the incorrect assumptions in Japan’s approach, the United States has provided a calculation of the level of nullification or impairment. This calculation corrects erroneous assumptions in Japan’s calculation and reasonably estimates the level of nullification or impairment. An explanation of this calculation follows.

B. The Calculation Necessary To Accurately State the Level of Nullification or Impairment

1. Overview of Calculation

35. The calculation estimates the trade effects of the measures at issue by means of a counterfactual. The proper analysis to be applied is a “comparative static analysis.” To apply the analysis to calculate the amount of nullification or impairment, one must: (1) examine the actual relevant U.S. imports during the most recent period; and (2) estimate the relevant imports that would exist during the same period if (a) the U.S. measures were brought into compliance with DSB recommendations and rulings; (b) the long-term economic adjustments resulting from compliance were reflected; and (c) all other factors were held constant.

36. The estimate in (2) is the counterfactual, which is the estimated volume of relevant imports that would exist absent zeroing following the assumptions described above. The level of nullification or impairment is the difference between the actual value of Japan’s exports to the United States and the estimated value in the counterfactual.

37. The starting point for the counterfactual is the measures subject to the DSB recommendations and rulings that currently cause nullification or impairment. As discussed below, some of the measures the DSB found not to be in compliance have been revoked, and consequently no longer cause nullification or impairment. The United States discusses below which measures have been revoked, and thus no longer result in nullification or impairment.

38. Measurement of trade effects requires empirical application of the conceptual methodology. To perform such an empirical application, the United States generally considers the availability of the relevant data, knowledge of relevant behavioral parameters, and the types

²² See Japan Methodology Paper, para. 24.

of trade measures and obligations involved. When possible, this analysis is performed through formal economic modeling practices (*i.e.*, development and use of a mathematical model based on the principles of standard economic theory). When formal modeling is not possible, a more descriptive analysis is pursued, reflecting as much as possible the underlying economic analytical structure that would have been reflected in a more formal model.

39. In this proceeding, the United States' empirical application involves: (1) the price change from the effect of zeroing on AD duty rates; (2) U.S. import demand elasticities; and (3) trade value data from 2007-09 showing the actual value of goods imported under the relevant AD orders.

40. To calculate the level of nullification or impairment, the United States uses 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*

2. Measures at Issue on Prospective Basis

41. The analysis begins with the measures at issue. Each measure corresponds to a different AD order. 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*.²³

42. 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. 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*.

3. Price Change as Measured by Section 129 Determinations

43. After determining the relevant measures, the next element of the calculation is the price change, if any, of the product subject to each of those measures in the absence of zeroing. The price change due to zeroing is a necessary component of the calculation because the change in price would trigger the change, if any, in the level of trade.

²³ Japan Methodology Paper, para. 3.

44. 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. This is the beginning point for determining the change in price.

45. After estimating the change in AD duty rates, if any, due to the effect of zeroing, the calculation applies this change to determine the change in price. The calculation uses the percentage-point change in the AD duty rate to estimate the percentage change in price. Below we explain how the calculation estimates (1) the change in AD duty rates; and (2) the change in price given the change in AD duty rates.

(a) Calculation of Change in AD Duty Rates

46. The U.S. calculation estimates the percentage-point change in AD duty margins due to zeroing by drawing on determinations performed by Commerce pursuant to Section 129 of the Uruguay Round Agreements Act (URAA).²⁴ These determinations are relevant to calculating the level of nullification or impairment because they demonstrate the effect of the removal of zeroing in several AD investigations.

47. Pursuant to Section 129, Commerce recalculated the margin of dumping from several investigations without zeroing.²⁵ As a result, each Section 129 determination shows the margin of dumping with zeroing and without zeroing. During each of these re-calculation proceedings, Commerce issued preliminary results, received and responded to comments from interested parties, and published its results in the U.S. Federal Register.²⁶

²⁴ See Uruguay Round Agreements Act of 1994, P.L. 103-465, Section 129, *codified at* 19 U.S.C. § 3538 (Exhibit US-1), and accompanying Statement of Administrative Action, H.R. 103-826(I), at 37.

²⁵ See Section 129 Determinations, attached as Exhibit US-2.

²⁶ Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act Regarding the Antidumping Order on Certain Cut-to-Length Carbon-Quality Steel Plate Products from Japan, 73 Fed. Reg. 29109 (May 20, 2008); Implementation of the Findings of the WTO Panel in United States Antidumping Measure on Shrimp from Ecuador; Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Ecuador, 72 Fed. Reg. 48257 (Aug. 23, 2007); Implementation of the Findings of the WTO Panel in United States -- Antidumping Measure on Shrimp from Thailand; Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand, 74 Fed. Reg. 5638 (Jan. 30, 2009); Implementation of the Findings of the WTO Panel in United States -- Final Antidumping Measures on Stainless Steel from Mexico: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act, 74 Fed. Reg. 19527 (Apr. 29, 2009); Purified Carboxymethylcellulose from the Netherlands (available on Commerce's official website: <http://ia.ita.doc.gov/download/section129/full-129-index.html>); Purified Carboxymethylcellulose from Sweden (available on Commerce's official website: <http://ia.ita.doc.gov/download/section129/full-129-index>).

48. In this case, the U.S. calculation uses a simple average of the differences in the rates as a result of the Section 129 determinations for all products as a proxy for the difference between WTO-inconsistent AD duty rates calculated with zeroing and WTO-consistent AD duty rates calculated without zeroing.

49. The Section 129 determinations represent recalculations of numerous dumping margins with offsets granted to bring those investigations into compliance with the DSB's recommendations and rulings in various disputes. Accordingly, the Section 129 determinations represent a reasonable proxy for the effect of zeroing on antidumping duty rates. The results of these determinations reliably estimate the impact of zeroing, and ensure that any suspension of concessions is equivalent to, and not in excess of, the level of nullification or impairment for the measures found to be inconsistent.

50. The calculation estimates the effect of zeroing by relying on the completed Section 129 determinations. 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. This simple average of determinations was the most appropriate choice of methodology given the lack of availability of Section 129 determinations for the specific products under the *Ball Bearings* order. In determining the average change in dumping margins, the calculation excludes the "all others" rate because that rate is a weighted average of those firms with individually calculated rates, rather than a calculation of a specific importer's margin.

51. Based on the Section 129 results of an average zeroed duty rate of 9.22%, and a non-zeroed duty rate of 6.27%, the percentage-point change in duty rates is:

$$\text{Change in duty rate} = 9.22\% - 6.27\% = 2.95\%.$$

(b) Calculation of Price Change Given Change in AD Duty Rates

52. After determining the effect of zeroing on AD duty rates, it is necessary to determine the effect on prices from the non-zeroed AD duty rates. The calculation does this by removing the effect of the non-zeroed AD duty rates from the original price of the product, which included the AD duty paid by the importer. When the AD duties change, the percentage change in the price paid by a U.S. importer is equal to the change in duties divided by the original price of the good (including the duty). The percentage-point change in duty rate does not equal the percentage change in price.

<http://ia.ita.doc.gov/download/section129/full-129-index.html>); Purified Carboxymethylcellulose from Finland (available on Commerce's official website: <http://ia.ita.doc.gov/download/section129/full-129-index.html>); Chlorinated Isocyanurates from Spain (available on Commerce's official website: <http://ia.ita.doc.gov/download/section129/full-129-index.html>); Polyethylene Retail Carrier Bags from Thailand (available on Commerce's official website: <http://ia.ita.doc.gov/download/section129/full-129-index.htm>). (Exhibit US-2).

53. For example, if the price of a hypothetical product was \$1, with a tariff rate of 100 percent, the price to the U.S. importer would be \$2. If the tariff were then removed, thus causing the price of the good to return to \$1, the percentage change in price would not be 100 percent, which would imply that the product becomes free, but rather 50 percent.

54. After determining the percentage-point change in duty rate by the method described in section III.B.3(a) above, the calculation estimates the percentage change in price by the following formula:

$$\text{Price change} = \frac{(\text{change in margin})}{(1 + \text{original margin})}$$

55. The change in AD margins due to zeroing may result in little or no change to the price of a given product for several reasons. For products with a low existing AD duty rate, the amount of antidumping duties may be a negligible portion of the overall price of the product. In such a case, e.g., a product with a cost of \$1000 and an AD margin of one percent, the portion of the product's price attributable to zeroing would be very small, and any reduction in the AD margin would not significantly impact the product's price. Similarly, for products where the AD margin does not change significantly due to zeroing, there would be little price change because the change in rates was itself minor.

56. 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 the following:

$$\text{Change in duty rate} = 9.22\% - 6.27\% = 2.95\%$$

$$\text{Price change} = \frac{-.0295}{(1+.0922)} = -2.70\%$$

We provide the margin change calculations at Exhibit US-3, and supply the calculation spreadsheet at Exhibit US-4.

4. U.S. Import Demand Elasticities Based on World Bank Data

57. The next element of the calculation of the level of nullification or impairment is the U.S. demand response to the change in the Japan 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. In the calculation, the import demand elasticities estimate the likely increase in import demand for the products in question given the price change.

58. Import demand elasticity figures are normally negative, meaning that an increase in price will result in less imports demanded. If the demand elasticity figure for a given product is

between zero and negative one, an increase in price of one percent would result in a less-than-one-percent decrease in the level of trade.

59. To estimate U.S. demand elasticities for the counterfactual, the calculation uses U.S. import demand elasticities estimated by World Bank researchers.²⁷ This study provided U.S. import demand elasticities at the six-digit Harmonized Tariff Schedule (HTS) line.²⁸

60. Since ball bearings may enter the United States under multiple six-digit HTS lines, the United States took a simple average of the different import demand elasticities for these tariff lines. Because the study did not provide import demand elasticities for all of the possible tariff lines, the calculation averages those that were available.

61. Based on the Section 129 results of an average zeroed duty rate of 9.22%, a non-zeroed duty rate of 6.27% and an elasticity of -1.17 based on the World Bank research, the calculation is as follows:

$$\text{Price change} = \frac{-.0295}{(1 + .0922)} = -2.70\%$$

$$\text{Elasticity} = -1.17$$

$$\text{Percentage change in volume of trade} = 3.2\% (-2.70\% * -1.17)$$

We summarize the U.S. import demand elasticities in Exhibits US-5 and US-6.

5. Import Value Data for 2007-09 for Individual Firms Consistent with Data from U.S. Customs and Border Protection

62. After determining the impact of price change and elasticity, the next step in the calculation is to determine the actual value of trade subject to zeroing under the relevant measures. Any percentage change in the value of trade resulting from the removal of zeroing must be applied to the correct baseline level of trade to result in an accurate estimate of the level of trade in the counterfactual. Because the counterfactual compares the level of trade once zeroing is removed to the existing level of trade, the actual volume of trade for the products at issue is crucial to calculating both figures.

63. To determine the volume of trade currently affected by zeroing, we have examined the actual import values for 2007-09 as provided by U.S. Customs and Border Protection (CBP).

²⁷ See Exhibit US-5, Kee et al., *Import Demand Elasticities and Trade Distortions*.

²⁸ See Exhibit US-6, Excel file of U.S. import demand elasticities from Kee et al.

CBP is the responsible U.S. agency to apply the cash deposit rates/AD duties as imports enter the United States. CBP maintains a database to record all entries of subject products into the United States. Specifically, we examined the statistics provided by CBP listing the value of trade subject to AD duties under the order at issue.

64. In this case, Japan has provided trade value data for individual firms, and has requested authorization for suspension relating to imports by those specific firms. We have compared Japan's trade value data with CBP's data, and, at this time, have found no reason to dispute that Japan's trade value data is sufficiently consistent with CBP's data for the purposes of this proceeding. Therefore, at this time we do not challenge Japan's estimation of trade value data based upon the information it received from the individual firms for the purposes of this proceeding. Nevertheless, given the volume of data provided by Japan and the limited time for preparation of our written submission, we reserve the right to submit additional comments regarding Japan's trade value data should it prove necessary.

65. 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.

66. To estimate the counterfactual, the 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. 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.

6. Counterfactual Level of Nullification or Impairment

67. The calculation multiplies the price change, import demand elasticity, and value of trade to calculate the level of nullification or impairment for each of the relevant measures. We provide this calculation, representing all of the steps detailed above, as Exhibit US-4. This estimate includes all of the data used in the calculation, including: (1) inclusion of trade from those measures still in effect; (2) the effect of zeroing on AD duty rates based upon Section 129 determinations; (3) import demand elasticities estimated by the World Bank study; and (4) trade values based upon the 2007-09 period.

68. The calculation applies this formula for each year. The average for the years 2007-09 represents the estimated level of nullification or impairment likely to continue due to non-compliance. Both the calculation and data sources are based upon best available information. The calculation thus represents a reasonable estimate of the level of nullification or impairment.

69. 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 -1.17 and 2007 ball bearing imports of \$130.2 million, the calculation for 2007 is as follows:

$$\text{Change in duty rate} = 9.22\% - 6.27\% = 2.95\%$$

$$\text{Price change} = \frac{-.0295}{(1 + .0922)} = -2.70\%$$

$$\text{Elasticity} = -1.17$$

$$\text{Trade value} = \$130.2 \text{ million}$$

$$\text{Level of nullification or impairment} = -2.7\% * -1.17 * \$130.2 \text{ million} = \$4.1 \text{ million}$$

70. The following table shows the results by year for *Ball Bearings from Japan*:

2007 NULLIFICATION OR IMPAIRMENT:	\$4.1 million
2008 NULLIFICATION OR IMPAIRMENT:	\$5.1 million
2009 NULLIFICATION OR IMPAIRMENT:	\$3.2 million
AVERAGE NULLIFICATION OR IMPAIRMENT (2007-2009):	\$4.1 million

71. Based upon the calculation, the estimated amount of nullification or impairment for the measure at issue is therefore \$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.

IV. THE LEVEL OF SUSPENSION OF CONCESSIONS OR OTHER OBLIGATIONS PROPOSED BY JAPAN EXCEEDS THE LEVEL OF NULLIFICATION OR IMPAIRMENT

72. 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 of 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 entries prior to the current year 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."

73. 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.

74. 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.

75. Following is a discussion of the specific conceptual flaws and methodological errors that cause Japan’s calculation to result in a vastly inflated estimate of the level of nullification or impairment.

A. Conceptual Flaws in Japan’s Methodology

76. As discussed below, Japan’s calculations contain several conceptual flaws that result in excessive estimates of nullification or impairment. Specifically, Japan: (1) requests retroactive, cumulative suspension for past entries; (2) with respect to the “as applied” sunset review finding, assumes that the AD order would have been terminated after the 1999 sunset review; (3) with respect to the “as such” and “as applied” periodic review findings, assumes that the removal of zeroing would eliminate all dumping margins; and (4) with respect to the “as such” finding as to periodic reviews, assumes the inconsistency of pre-existing AD duty rates never challenged by Japan and never subject to any findings of inconsistency or failure to comply. Correction of these flaws would drastically reduce Japan’s estimate of nullification or impairment.

1. Japan’s Proposed Suspension for Past Entries Is Inappropriate Because It Is Retroactive and Cumulative

77. Japan erroneously calculates nullification or impairment for entries prior to the present year.²⁹ Japan then compounds this error by requesting cumulative suspension for all past nullification or impairment after the end of the RPT, as opposed to the estimated level from the current year. Removing this erroneous request for retroactive, cumulative suspension would eliminate the requests for suspension for both the pre-RPT entries and the post-RPT entries prior to the present year.

²⁹ Japan Methodology Paper, paras. 25, 46.

78. The underlying premise of Japan’s claim – that Japan may properly cumulate suspending measures for the first year 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 of nullification or impairment. As the “level” does not refer to cumulation of past effects, the underlying premise of Japan’s contention is fundamentally flawed.

79. The WTO agreements represent the result of negotiations under which Members agreed to make certain trade concessions in return for trade concessions from other Members. As a result, one of the underlying principles in authorizing the suspension of concessions under Article 22 of the DSU is that where a Member’s measure is nullifying or impairing the benefits promised to another Member under the covered agreements, the Member whose benefits are nullified or impaired is not required to continue providing the full level of benefits of its trade concessions to the Member in breach.

80. In other words, the suspension of concessions under Article 22 permits the complaining Member to suspend concessions in order to balance the benefits that are being denied it by the measure of the Member concerned. Article 22.4 ensures that the complaining Member does not suspend concessions greater than the level of nullification or impairment the complaining Member is suffering. In other words, there is no punitive element to the suspension of concessions. The cumulation 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.

81. 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.

82. In this case, Japan claims nullification or impairment resulting from the *Cylindrical Roller Bearings* and *Spherical Plain Bearings* AD orders (Reviews 7 and 8). The United States revoked these two orders on July 11, 2000, effective January 1, 2000.³⁰ Accordingly, Japan will not experience current or future nullification or impairment as a result of these measures, which are no longer in existence. Nevertheless, Japan continues to claim “excess duties” – with interest – for entries under these orders made prior to the end of the RPT that were liquidated post-RPT.³¹

³⁰ See *Revocation of Antidumping Duty Orders on Certain Bearings From Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom*, 65 Fed. Reg. 42,667 (Dep’t of Commerce July 11, 2000) (Exhibit US-15).

³¹ See Japan Methodology Paper, para. 4.

83. Japan thus seeks suspension for orders that have been revoked. According to Article 22.8 of the DSU the suspension of concessions is a remedy that is prospective in nature and is designed to be in place “until such time as the measure found to be inconsistent with a covered agreement has been removed.” Because these two orders have been revoked, any suspension with respect to these orders would be inconsistent with Article 22.8. Such a suspension bears no relation to the current level of nullification or impairment, and does not serve to induce compliance.

84. Additionally, the combination of all of these trade effects in the first year would compound this distortive impact. A cumulative award of suspensions would permit a complaining Member to prohibit several times as much trade in the first year as had been done in any previous year. Such a distortion is neither contemplated by the requirement in Article 22.4 that the level of suspension be equivalent to the level of nullification or impairment, nor does it make economic sense to allow a complaining Member to magnify a distortive effect merely through the passage of time.

85. To give one example, in a hypothetical case there could be two WTO-inconsistent measures, one of which had a trade effect of \$99 per year, and the other had a trade effect of \$1 per year at the end of the RPT, for a total of \$100 per year. If the measure with the trade effect of \$99 per year were revoked after the RPT and the measure with the trade effect of \$1 per year stayed in effect, under Japan’s reasoning the complaining Member would be entitled to a level of suspension of \$100 per year. If three years had transpired since the end of the RPT, under the Japan’s reasoning the complaining Member would be entitled to suspend concessions of \$300 in the first year, even though the current level of nullification or impairment was only \$1 per year. This result would bear absolutely no relation to the current level of nullification or impairment, nor would it bear any relation to the current balance of trade concessions.

86. 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. Indeed, prior arbitrators have rejected the notion that it is the situation at the end of the RPT that controls, as opposed to the present state.³² The Arbitrator thus should reject Japan’s request for suspension based upon a cumulation of past effects.

³² See, *EC – Bananas III (Article 22.6) (US)*, para. 4.7, in which the arbitrator stated that to examine the original banana import regime “would mean to ignore altogether the undisputed fact that the European Communities has taken measures to revise its banana import regime. That is certainly not the mandate that the DSB has entrusted to us”; see also, *Brazil – Aircraft (Article 22.6)*, paras. 3.37-3.40, in which the arbitrator indicated that it was examining the revised PROEX regime. It is also important to consider what would result if the Arbitrators were limited to examining the situation as it existed at the end of the implementation period or could not take into account any more recent evidence. An arbitrator could authorize suspension of concessions even where a Member has come into compliance; this would plainly be “disproportionate.”

87. Past arbitrations awarding variable levels of suspension recognize that the calculation of a level of nullification or impairment is a forward looking exercise. In *United States – Continued Dumping And Subsidy Offset Act Of 2000 (EC)*, the arbitrator authorized a variable level of suspension to reflect the fact that “the value and industry distribution of the trade impact of the CDSOA could vary widely from one year to the next, because of the numerous factors affecting the amounts that may be disbursed, the nature of the recipients and how each category of recipient is likely to use the monetary amounts awarded to them under the CDSOA.”³³ 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.

88. 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 past trade effects were the appropriate measure of nullification or impairment, then the award would have been zero. The arbitrator, however, rejected such an approach.³⁴ 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.”³⁵ This future-oriented approach is inconsistent with Japan’s request for suspension based upon past trade effects.

89. Finally, a previous Article 22.6 arbitrator has also rejected a request for authorization based on a retroactive approach. 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.³⁶ The compliance panel had found these Step 2 payments to be inconsistent with the SCM Agreement.³⁷ 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.³⁸ Although the United States continued to make Step 2 payments for a period after the expiration of the RPT, the arbitrator

³³ *US – CDSOA (Article 22.6) (EC)*, para. 4.21.

³⁴ *US – 1916 Act (Article 22.6)*, para. 7.6.

³⁵ *US – 1916 Act (Article 22.6)*, para. 7.8.

³⁶ *US – Upland Cotton (Article 22.6 and SCM Article 4.11)*, para. 2.6

³⁷ *US – Upland Cotton (Article 22.6 and SCM Article 4.11)*, at para 1.13.

³⁸ *US – Upland Cotton (Article 22.6 and SCM Article 4.11)*, at para. 3.2.

nonetheless denied Brazil's request for a one-time amount.³⁹ This decision confirms that the suspension of concessions should be based upon the current level of nullification or impairment, not a retroactive analysis.

2. Japan Erroneously Assumes that Removal of Zeroing Would Have Terminated the Antidumping Order After the 1999 Sunset Review

90. 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.

91. As an initial matter, Japan's counterfactual incorrectly assumes that the sunset review at issue would not be brought into consistency with the DSB's recommendations and rulings in this dispute.⁴⁰ However, as Japan correctly notes in its methodology paper, a counterfactual in an Article 22.6 Arbitration is a hypothetical situation “under which it is assumed that the United States had complied with its WTO obligations with respect to the measure at issue by the end of the RPT.”⁴¹ Thus, a correct counterfactual in this dispute would assume that the United States has brought the WTO-inconsistent sunset review into compliance. Because Japan's counterfactual fails to assume such compliance with respect to the sunset review, the Arbitrator should reject it.

92. Furthermore, Japan falsely assumes that compliance would have resulted in the United States terminating the order. Under the facts of the sunset review and the reasoning articulated by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, compliance with respect to the sunset review would not necessarily have resulted in a termination of the *Ball Bearings* order.

³⁹ *US – Upland Cotton (Article 22.6 and SCM Article 4.11)*, at para. 3.50. While the *US – Upland Cotton* arbitration was under the SCM Agreement, the issue of retroactivity is not one that depends on the different standard under that Agreement.

⁴⁰ See Japan Methodology Paper, para. 34 (explaining that Japan's counterfactual is premised on the United States failing to conduct a WTO-consistent sunset review).

⁴¹ Japan Methodology Paper, para. 24.

93. In a sunset review, an administering authority determines whether expiry of an antidumping duty would be likely to lead to continuation or recurrence of dumping.⁴² One of the criteria that Commerce uses to determine likelihood of dumping is whether dumping continued at an above *de minimis* level after imposition of the order.⁴³ In this regard, Commerce examines dumping margins calculated in prior periodic reviews. If dumping continued at above a *de minimis* level, Commerce normally makes an affirmative likelihood determination that expiry of the antidumping order is likely to lead to the continuation or recurrence of dumping.⁴⁴

94. In the underlying dispute, the sunset review was found WTO-inconsistent because Commerce relied on margins which had been calculated using zeroing.⁴⁵ The Appellate Body found that a sunset review that relied on WTO-inconsistent margins “could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3. [*i.e.*, an affirmative likelihood determination].”⁴⁶ Thus, this reasoning from the Appellate Body makes clear that the WTO-consistent hypothetical on which the sunset counterfactual is based cannot include reliance on zeroed margins.

95. As the United States explained before the compliance panel, however, Commerce did not examine only zeroed margins in the challenged sunset review.⁴⁷ Commerce examined margins from the periodic reviews of the Ball Bearings order covering the periods November 9, 1988 to

⁴² Art. 11.3 of the AD Agreement.

⁴³ See, e.g., *Policies Regarding the Conduct of Five-year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin*, 63 Fed. Reg. 18,871, 18,872 (Dep’t of Commerce Apr. 16, 1998) (“Therefore, [Commerce] normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is likely to lead to continuation or recurrence of dumping where — (a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable . . .”) (Exhibit US-9).

⁴⁴ See, e.g., *id.*; see also *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 175 (“We see no problem, in principle, with the United States instructing its investigating authorities to examine, in every sunset review, dumping margins and import volumes. These two factors will often be pertinent to the likelihood determination, and Japan itself does not dispute the relevance of at least one of them, namely dumping margins.”).

⁴⁵ *US – Zeroing (Japan) (AB)*, para. 185.

⁴⁶ *US – Zeroing (Japan) (AB)*, para. 183.

⁴⁷ See, e.g., *US – Zeroing (Japan) (Article 21.5) (Panel)*, U.S. First Written Submission, para. 75 (July 28, 2008) (Exhibit US-10).

April 30, 1990;⁴⁸ May 1, 1990 to April 30, 1991;⁴⁹ and May 1, 1993 to April 30, 1994.⁵⁰ For these reviews, some of these margins were above *de minimis* and were not determined using zeroing.⁵¹

96. In the 1993-94 administrative review alone, for example, Commerce reviewed twenty-one respondents, and for ten of these respondents Commerce applied a dumping margin of 106.61 percent.⁵² Commerce applied this rate using the best information available, which was based upon pricing data that did not include zeroing.⁵³ Japan never challenged these margins and there are no findings and recommendations with respect to these non-zeroed rates. Because these respondents were not subsequently reviewed during the relevant period of the sunset review, their non-zeroed dumping margins of 106.61 percent represent their most recent dumping experience that is directly relevant to the likelihood of dumping determination made in the sunset review at issue.

97. These non-zeroed margins provide an independent, WTO-consistent basis for an affirmative likelihood determination. 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 with respect to the sunset review would be to conclude that the *Ball Bearings* order could well have continued.

98. Additionally, the reasoning of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* supports a counterfactual which assumes an affirmative likelihood determination

⁴⁸ See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Final Results of Antidumping Duty Administrative Reviews*, 56 Fed. Reg. 31,754, 31,756 (Dep't of Commerce July 11, 1991) (Exhibit US-11).

⁴⁹ See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 28,360, 28,361 (Dep't of Commerce June 24, 1992) (Exhibit US-12).

⁵⁰ See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 Fed. Reg. 66,472, 66,473 (Dep't of Commerce Dec. 17, 1996) (Exhibit US-13).

⁵¹ *US – Zeroing (Japan) (Article 21.5) (Panel)*, U.S. Second Written Submission, para. 85 (September 26, 2008) (Exhibit US-14).

⁵² See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 Fed. Reg. 66,472, 66,472-74 (Dep't of Commerce Dec. 17, 1996) (Exhibit US-13).

⁵³ *US – Zeroing (Japan) (Article 21.5) (Panel)*, U.S. Second Written Submission, para. 85 (September 26, 2008) (Exhibit US-14).

and continuance of the order in the challenged sunset review. In that dispute, the Appellate Body found that “Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review.”⁵⁴ The Appellate Body further explained, “[n]or does Article 11.3 identify any particular factors that authorities must take into account in making such a determination. Thus, Article 11.3 neither explicitly requires authorities in a sunset review to calculate fresh dumping margins, nor prohibits them from relying on dumping margins calculated in the past.”⁵⁵

99. Accordingly, in order to comply with the DSB’s recommendations and rulings in this dispute, the United States would not be required to calculate “fresh dumping margins.” Instead, it would be WTO-consistent for the United States to rely on the above *de minimis* and non-zeroed margins calculated in the past to determine that dumping is likely. In fact, while finding a failure to comply because the United States did not conduct a formal new determination, the compliance panel agreed with the United States that “*US – Corrosion-Resistant Steel Sunset Review* supports the notion that it can rely on previously calculated margins that were not challenged by Japan in the original proceeding.”⁵⁶

100. For these reasons, there is no basis for Japan’s counterfactual assumption that the United States would no longer collect any duties under the *Ball Bearings* order after 1999. Instead, the correct counterfactual assumes that Commerce may well have made an affirmative likelihood determination and continued the *Ball Bearings* order based on the non-zeroed dumping margins calculated in the past. Accordingly, the Arbitrator should reject Japan’s counterfactual based upon elimination of AD duties pursuant to the “as applied” sunset review finding.

3. Japan Fails To Support Its Assumption that Removal of Zeroing in Periodic Reviews Would Eliminate Virtually All Antidumping Duties

101. With respect to the “as such” and “as applied” findings for periodic reviews, Japan erroneously assumes that removal of zeroing would eliminate virtually all AD duties. The impact of zeroing on dumping margins does not depend on the use of the methodology itself, but rather the extent to which export prices are not less than normal value for some of the comparisons being made as part of the dumping margin calculation. Japan has not supported its assumption that removal of zeroing would result in the removal of virtually all AD duty rates.

102. As purported support for its assumption, Japan presents an unofficial recalculation of the dumping margins with the zeroing instruction removed for five self-selected respondent firms

⁵⁴ *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 123.

⁵⁵ *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 123.

⁵⁶ *US – Zeroing (Japan) (Article 21.5)(Panel)*, para. 7.228.

performed by a consultant it hired for the purpose of this dispute. Japan's calculations are unofficial and do not necessarily reflect the effect of compliance.

103. 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 far from 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.

104. 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 provides no support for its extrapolation other than to describe the extrapolation as a "reasonable inference."⁵⁷ The assumption underlying Japan's methodology is that the other nine bearing producers are engaged in similar pricing behavior to the five producers it selected. Japan provides no factual basis to support this inference. Indeed, Japan's selection of only these five bearing producers tends to suggest that their pricing behavior is not representative of all bearing producers.

105. Also belying this faulty assumption are the actual results of the Section 129 determinations. In the section 129 determinations, Commerce redetermined certain dumping margins using Commerce's modified methodology for calculating dumping margins in which negative comparison results reduce the amount of dumping found. Each of the section 129 determinations upon which the United States relies shows margin(s) of dumping with zeroing, and then margin(s) of dumping for the same product and same time period recalculated without zeroing. Moreover, the removal of zeroing was the *only* change made in these recalculations.

106. Furthermore, each and every section 129 recalculation proceeding was public, transparent, 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. Therefore, interested parties, who had access to all the confidential underlying data at the time of the recalculation, were able to fully participate in the proceedings, raise arguments and have them addressed by Commerce in the course of the proceedings. Japan's proffered recalculation in this dispute, however, has none of these procedural safeguards.

107. Importantly, despite the fact that any impact of zeroing has been fully removed from the recalculated section 129 dumping margins, dumping at above *de minimis* levels continues to be

⁵⁷ Japan Methodology Paper, para. 40.

found in most cases. Of the 50 dumping margins recalculated without zeroing, including recalculated “all others” rates, only 13 became zero or *de minimis* as a result of the recalculation. The remaining dumping margins remained above *de minimis*, despite the removal of the zeroing methodology from the calculation. Indeed, seven margins were unchanged as a result of the recalculation, and eight others were minimally impacted, with 0.3% or less change.

108. As actual experience with the 129 recalculations has shown, the elimination of zeroing would not result in the elimination of all antidumping duties, and in the cases of many orders would result in a slight reduction, if any, in the antidumping duties to be applied. Japan’s calculation thus overstates the level of nullification or impairment.

4. Japan Assumes the Inconsistency of Pre-Existing AD Duty Rates Never Challenged by Japan and Never Subject to Any Findings of Inconsistency or Failure To Comply

109. Japan identifies numerous specific AD duty rates as the bases of its claim of nullification or impairment from continued inconsistency of the “as such” measure with respect to periodic reviews. Several of the AD duty rates Japan relies upon have never been found to be either WTO-inconsistent or to constitute a failure to comply with the “as such” finding, or any other finding for that matter.

110. In particular, as demonstrated in Exhibit JPN-162, Japan relies upon AD duty rates calculated in, *inter alia*, the original antidumping investigation, 1991-92 periodic review, and 1998-99 periodic review. No finding of inconsistency or failure to comply has been made with respect to any AD duty rate determined in those proceedings. The arbitrator should reject Japan’s inclusion of these AD duty rates as a basis for its claim of nullification or impairment in connection with the “as such” finding.

111. The “as such” measure found inconsistent was the maintenance of “simple zeroing procedures in the context of periodic reviews.” The original panel explained that while the “zeroing procedures” were not legislation or regulation, there nevertheless was a measure, described as a “norm” with general and *prospective* effect that could be challenged “as such” just as legislation or regulations could be so challenged:

In order for a measure to have the "normative value" necessary to render it susceptible of being challenged as such, the measure must meet certain requirements. Its content must be clear and it must be understood by those to whom it *will apply* that it *will be applied generally and prospectively*. We also concur with the observation of the panel in *US - Zeroing (EC)* that a finding regarding the WTO-inconsistency of a norm as such must be

based on solid evidence enabling a panel to determine the precise content of the norm and the *future conduct to which it will necessarily give rise*.⁵⁸

112. As with a finding that legislation or a regulation is “as such” inconsistent, full compliance with such a finding would be achieved upon withdrawal of the measure challenged “as such.” In other words, repeal of the legislation or regulation found to be “as such” inconsistent would constitute compliance with the “as such” finding. Likewise, withdrawal of the “zeroing procedures” would be achieved by ceasing to apply the “zeroing procedures” in calculating dumping margins on a general and prospective basis.

113. In this regard, the suspension of concessions is a remedy that is prospective in nature and, according to Article 22.8 of the DSU, is designed to be in place “until such time as the measure found to be inconsistent with a covered agreement has been removed.” Accordingly, the proper counterfactual for measuring the level of nullification or impairment in connection with the “as such” measure with respect to periodic reviews is to assume that the United States would withdraw the “zeroing procedures” and in the future no longer calculate dumping margins using zeroing. It would therefore be inappropriate to seek to ascertain the level of nullification or impairment for the “as such” finding by recalculating AD duty rates that were in existence in the past. In this connection, we also note that these rates existed when Japan first brought the underlying dispute, but Japan elected not to challenge them as applied and, consequently, obtained no findings with respect to them.

B. Methodological Errors in Calculation of “Excess Duties” for Pre-RPT Entries

114. For entries made prior to the end of the RPT that were liquidated after the end of the RPT, Japan calculates nullification or impairment based upon its estimate of the alleged amount of excess duties paid. Japan calculates excess duties by taking the difference between the actual duties paid and the amount of duties Japan assumes it would have paid had the United States complied with each of the three different sets of findings. Next, Japan then adds interest to this excess duties figure, which it purports to derive from the procedure followed by CBP for refunding deposits. Japan claims the sum of these two figures as nullification or impairment.

115. As discussed in section IV.A.1 above, because Japan retroactively and cumulatively calculates interest for pre-RPT entries, its entire interest calculation is inconsistent with the Article 22.6 requirement that the proposed level of suspension be equivalent to the “level” of nullification or impairment. Thus, neither excess duties nor interest for pre-RPT entries is appropriate.

⁵⁸ *US – Zeroing (Japan) (Panel)*, para. 7.48.

116. Also, as discussed above, even assuming that retroactive and cumulative suspension were possible, Japan overestimates the amount of excess duties to which any interest would be applied. Japan erroneously assumes that the *Ball Bearings* AD order would have been terminated after the 1999 sunset review. Furthermore, Japan erroneously estimates the impact of zeroing in periodic reviews by reliance upon unofficial recalculations of duty rates and extrapolation of those recalculations to unrelated firms. Correction of these errors would also substantially reduce Japan’s estimate of nullification or impairment.

117. In addition to the conceptual flaws discussed above, Japan’s calculation contains methodological errors that cause it to overstate the level of nullification or impairment resulting from the alleged “excess duties.” Japan incorrectly: (1) calculates nullification or impairment based upon alleged “excess duties” and interest rather than the trade effect of such duties; (2) adds an interest calculation based upon the interest formula from CBP rather than any WTO obligation; and (3) even assuming interest to be proper, calculates interest from the date of entry until the end of 2009 instead of from the end of the RPT until the date of liquidation. These errors result in an excessive estimate of nullification or impairment.

1. Inappropriate To Calculate Nullification or Impairment Based Upon Alleged “Excess Duties” and Interest Rather Than Trade Effect

118. As we discussed above, Japan’s use of pre-RPT entries in its estimate is a conceptual error because those past entries do not result in any ongoing level of nullification or impairment. In addition to this conceptual error, Japan’s method of calculating the level of nullification or impairment resulting from those entries is also flawed.

119. To estimate the level of nullification or impairment for pre-RPT entries, Japan calculates the alleged amount of “excess duties,” then adds an interest factor to that figure. Even assuming, for the sake of argument, that Japan correctly assumed that these pre-RPT entries could result in a level of nullification or impairment, Japan’s approach fails to measure it. Contrary to Japan’s approach, any measurement of the level of nullification or impairment for these pre-RPT entries should have measured the trade effect, if any, resulting from those duties.

120. The level of nullification or impairment measures the effect of a WTO-inconsistent measure on trade.⁵⁹ Under Article 22.6 of the DSU, Japan’s estimate must be “equivalent” to the “level” of nullification or impairment. As we discussed above in our affirmative calculation, this “level” arises from the trade effect, not the amount of duties alone.

121. 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

⁵⁹ See, e.g., *US – CDSOA (Article 22.6) (Canada)*, para. 3.33 (generally, “nullification or impairment of benefits resulting from a violation should be expressed in terms of trade”).

product, the same amount of “excess duties” for two products could result in different trade effects for the same amount of duties. Japan’s calculation of excess duties ignores this demand elasticity and instead, assumes a one-to-one correlation between excess duties and nullification and impairment. Accordingly, Japan’s calculation results in a grossly inflated level of nullification and impairment.

122. The interest factor Japan applies also has no correlation with the elasticity factor for such entries. Indeed, due to the compounding of interest, entries that occurred earlier in time – as far back as 1999 – would have a greater level of nullification or impairment in Japan’s calculation. Contrary to such an assumption, any ongoing trade effect from these long-past entries would decrease, not increase. Use of the elasticity factor to measure trade effect thus more accurately measures the level of nullification or impairment than an interest factor.

123. For these reasons, neither the amount of “excess duties” nor the interest factor Japan applies measure the trade effect resulting from the AD duties for the measures at issue. Japan’s estimate thus fails to measure the “level” of nullification or impairment for these pre-RPT entries.

2. Inappropriate To Calculate Nullification or Impairment Based Upon Interest Formula from U.S. Statute Rather Than WTO Obligation

124. For its calculation for the level of nullification or impairment for pre-RPT entries, Japan estimates the “excess duties” collected following the expiration of the RPT, plus interest at the interest rate Japan estimates based upon the interest paid by CBP when it refunds deposits.⁶⁰ For each entry at issue, Japan calculates interest from the date of entry until December 2009.⁶¹

125. Japan’s claim for interest does not properly estimate the level of nullification or impairment because it is based upon an estimate of the interest paid by CBP rather than any WTO obligation. In this Article 22.6 proceeding, the Arbitrator determines the level of nullification or impairment to benefits accruing to a party under the covered agreements.

126. Instead of citing to the covered agreements, Japan argues that the obligation to provide interest can be derived from the fact that the DSB’s recommendations and rulings required the United States to cease collecting AD duties in excess of the those duties that would have been owed without zeroing by the end of the RPT.⁶² The DSB’s recommendations and rulings do not discuss or in any manner require interest for any “excess duties.” Accordingly, Japan’s claim for

⁶⁰ Japan Methodology Paper, para. 23. Japan presents its interest calculations for each individual exporter in exhibits JPN-148 through 161, and presents a summary at JPN-162.

⁶¹ Japan Methodology Paper, para. 25.

⁶² Japan Methodology Paper, para. 23.

interest is without any support under the covered agreements and is not found in the DSB’s recommendations and rulings in this dispute.

127. Indeed, requiring interest would be contrary to the requirement that the level of suspension be equivalent to the level of nullification or impairment. By adding interest to its calculation of “excess duties,” Japan explicitly seeks suspension in excess of even the amount of excess duties it allegedly paid.

128. In fact, the only legal provision to which Japan cites is a provision of U.S. law under which CBP provides interest when a deposit is greater than the duties finally assessed.⁶³ 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.

129. 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.

3. Inappropriate To Calculate Interest From the Date of Entry Until the End of 2009 Instead of from the End of the RPT to the Date of Liquidation

130. In its methodology paper, Japan explains that to determine the compound interest in its interest calculation, it “applies the periodic (daily) compounding formula normally utilized by USCBP to each entry, beginning on the date of entry and ending on December 31, 2009.”⁶⁴ Japan calculates interest through 2009 for entries under all three of the orders for which it claims nullification or impairment, *i.e.*, *Ball Bearings*, *Cylindrical Roller Bearings*, and *Spherical Plain Bearings*.

131. Even assuming, for the sake of argument, that Japan may properly calculate nullification or impairment based upon interest for excess duties using the “formula normally utilized by USCBP,” Japan misstates that formula. USCBP normally calculates interest from the date of entry until the date of liquidation. Rather than calculating interest until the date of liquidation, Japan instead calculates interest to December 31, 2009. Contrary to Japan’s claim, this does not correspond to the “formula normally utilized by USCBP.”

⁶³ Japan Methodology Paper, para. 23, n.33.

⁶⁴ Japan Methodology Paper, para. 30.

132. In this case, numerous entries for which Japan claims interest were liquidated between the end of the RPT on December 24, 2007, and December 31, 2009. For Japan’s calculation to correspond to the “formula normally utilized by CBP,” any interest for these entries should have ended on their liquidation dates, rather than December 31, 2009. This discrepancy artificially inflates Japan’s interest estimate.

133. Moreover, as discussed above, Japan’s entire claim for interest is premised on a Member’s obligation to achieve compliance by the end of the RPT. Putting aside that no WTO obligation requires payment of interest, the logical consequence of relying on the expiry of the RPT as the triggering event would be that interest would only be required for any “excess duties” held after the expiry of the RPT, that is, after December 24, 2007.

134. Thus, for all these reasons, there is no basis for Japan to compound interest from the date of entry to December 31, 2009.

C. Methodological Errors in Calculation of “Lost Exports” for Post-RPT Entries

135. 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 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.⁶⁵ 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.⁶⁶ For the current year, Japan utilizes its calculated average annual level of nullification or impairment over the historical post-RPT period.⁶⁷

136. In addition to the conceptual flaws discussed above, Japan’s calculation of “lost exports” for post-RPT entries contains several methodological errors that result in an inflated estimate of nullification or impairment. These errors include: (1) use of GTAP elasticities that are overbroad and not specific to the United States; (2) use of cash deposit rates instead of price change in its “lost exports” calculation; and (3) arbitrarily limiting the estimate of current-year entries to post-RPT data. Correction of these methodological errors would result in a more appropriate estimate.

1. Japan’s Use of GTAP Elasticities Exaggerates “Lost Exports”

⁶⁵ Japan Methodology Paper, paras. 46, 56.

⁶⁶ Japan Methodology Paper, paras. 50-51.

⁶⁷ Japan Methodology Paper, para. 68.

137. 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.

138. First, the GTAP sourcing 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.

139. 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. This degree of aggregation results in an overbroad estimate.

140. By contrast, the World Bank study import demand elasticities were estimated at the six-digit HTSUS level specifically for the United States. 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. This is in contrast 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.

141. 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 necessarily equate to use of GTAP elasticities for analysis of a specific product.

142. 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.

143. 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 measure to use when determining the change in imports resulting from a duty (*i.e.*, price) decrease, 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.

144. The elasticity of substitution, however, is not directly related to the question at hand. The elasticity of substitution expresses the expected percentage change in the ratio of two quantities of goods demanded to the percentage change in the ratio of their prices. For example, if domestic and imported textbooks have an elasticity of substitution of three, then a 1 percent change in the ratio of their prices will result in a 3 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.

145. Despite Japan’s attempt to equate the import demand elasticity and the GTAP sourcing substitution elasticity, the two measures are technically different. The substitution elasticity measures how readily users switch from one source to another, while the import demand elasticity measures the extent to which consumption will increase when a product’s own price falls.⁶⁸ The reduction of a tariff will result in changes in all four components of the substitution elasticity (domestic quantity demanded, imported quantity demanded, domestic prices, and import prices). Here, because none of these remain constant, the elasticity of substitution cannot be used by itself to determine the change in imports resulting from a tariff change.

146. Aside from being the incorrect elasticity, substitution elasticities generally tend to be larger than import demand elasticities.⁶⁹ Inserting a larger elasticity will create a higher estimated level of trade loss, if everything else is held constant.

147. In conclusion, the World Bank import demand elasticities are more appropriate because they better fit the proposed methodology, are specific to the United States, and are at a greater level of disaggregation than the GTAP elasticities.

2. Japan Incorrectly Uses Cash Deposit Rates Instead of Price Change To Calculate “Lost Exports”

148. In addition to using a different price elasticity factor, Japan applies it to a different initial amount. While the United States applies the price elasticity to the percentage change in price, Japan applies the price elasticity to its calculated difference between the zeroed and non-zeroed

⁶⁸ Technically, the elasticity of substitution is the percentage change in relative demand for two goods divided by the percentage change in their relative prices. This elasticity is calculated as the percentage change in the ratio of demand for good one to demand for good two, divided by the percentage change in the ratio of the price of good one to the price of good two. See Mas-Colell, Andreu, Michael Whinston, and Jerry Green, 1995, “Microeconomic Theory,” 97 (Exhibit US-16).

⁶⁹ Substitution elasticities are larger than import demand elasticities if the substitution elasticity is higher than the aggregate demand elasticity, which is equivalent to assuming that imports are substitutes for domestic goods rather than complements. (No party in this dispute has argued that the imports in question are complementary to domestic products.) See Francois, Joseph, and Kenneth Reinert, 1997, “Applied Methods for Trade Policy Analysis,” 138–139 (Exhibit US-17).

cash deposit rates. Japan’s approach is manifestly in error. A price elasticity is, by definition, a measure used to determine the change in demand caused by a change in price. Accordingly, the correct manner to calculate lost trade using a price elasticity is to multiply the price elasticity by the percentage change in price, not the difference in cash deposit rates.

149. The level of duty reduction does not equate to the price change. As we discussed in section III.B above, the percentage change in price will be lower than the percentage-point reduction in the duty rate. Even accepting, for the purpose of this exercise, that all of the AD duties would disappear absent zeroing, applying the change in cash deposit rates rather than the change in the price of the product itself overstates the amount of “lost exports.”

150. Furthermore, as explained in section III.A above, the Arbitrator’s task is to determine that the level of suspension of concessions is equivalent to the level of nullification or impairment, and that task in turn involves determining the amount of trade that is being lost. Japan’s cash deposit rate baseline approach does not properly carry out that requirement, and should be rejected on that basis as well.

3. Japan Arbitrarily Limits Its Estimate of Current-Year Nullification or Impairment to Post-RPT Data

151. To estimate the level of nullification or impairment for the current year, Japan utilizes the annual average level of nullification or impairment over the historical post-RPT period.⁷⁰ Because the end of the RPT was December 24, 2007, and Japan has collected no data from after 2009, this means that Japan’s estimate of current-year nullification or impairment is only based upon two years of data. This limitation to post-RPT data is not required by the covered agreements and establishes an arbitrary time period for the collection of data to determine nullification or impairment.

152. The time period between the expiry of the RPT and an Article 22.6 proceeding can vary greatly in a WTO dispute. For example, a Member could seek to suspend concessions concurrently with a compliance proceeding. In such a circumstance, the Article 22.6 proceeding could occur very close in time to the expiry of the RPT. Under these circumstances, Japan’s methodology would limit the data period to a few weeks or months. Conversely, a Member could wait several years after the expiry of the RPT before seeking to suspend concessions. Under these circumstances, Japan’s methodology would require analyzing data from the large number of intervening years since the expiry of the RPT.

153. Nothing in the covered agreements prohibits the use of pre-RPT trade value data as part of the averaging process to generate a proxy for current trade effects. Although the calculation of the level of nullification or impairment is a prospective analysis involving current trade effects,

⁷⁰ Japan Methodology Paper, para. 68.

this is not necessarily inconsistent with the use of pre-RPT trade value data in generating a proxy for current trade effects.

154. In this case, the United States has used an average of three years of data, rather than the two used by Japan, in our estimate of the current level of nullification or impairment. Inclusion of three years of data captures a wider range of trade values and serves to smooth out any abnormal trade patterns. Thus, inclusion of three years of data provides a more complete basis for the current-year estimate of nullification or impairment.

D. Japan Improperly Requests Discretion To Adjust the Level of Suspension

155. In its methodology paper, Japan requests authorization to “suspend concessions or other related obligations under the covered agreements in the amount of USD 47.6 million each year, relating to lost exports associated with current-year entries in that calendar year, unless Japan considers it necessary to update this amount.”⁷¹ Japan also requests discretion to impose unspecified, non-prohibitive tariffs to 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.⁷² The Arbitrator should reject both requests.

156. 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.

157. Nor is there any provision of the DSU that authorizes the approach that Japan seeks to have the Arbitrator endorse. 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”⁷³ usurps that authority and makes a determination of equivalence impossible with respect to any changes that Japan might make in the future.

158. 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

⁷¹ Japan Methodology Paper, para. 21.

⁷² Japan Methodology Paper, para. 76.

⁷³ Japan Methodology Paper, paras. 74, 77.

arbitration. Japan’s request to be permitted to “update” the award when it “considers it necessary” thus also gathers no support from previous Article 22.6 arbitrations. For all these reasons, Japan’s request for discretion to “update” the level of nullification or impairment should be rejected.

159. With respect to the request to have “discretion” to impose non-prohibitive tariffs, Japan states that it, as the Member implementing the suspension of concessions, “enjoys a degree of discretion” in how to apply any level of suspension awarded by the Arbitrator.⁷⁴ Specifically, Japan contends that equivalence may be ensured through the imposition of non-prohibitive tariffs that result in “equivalent” excess duties or lost exports. 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. Such a suspension of concessions would be necessary in order to apply tariffs in excess of Japan’s tariff bindings on those products, but nowhere does Japan acknowledge that it would need to suspend those additional concessions.

160. Japan’s request for discretion is invalid under the DSU because it would make it impossible to determine whether the proposed level of suspension was “equivalent” to the level of nullification or impairment. Article 22.7 provides that the arbitrator “shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment.” Whether a proposed level of suspension is equivalent to the level of nullification or impairment is necessarily a quantitative assessment.⁷⁵

161. 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.

⁷⁴ Japan Methodology Paper, para. 76.

⁷⁵ See *US – 1916 Act (Article 22.6)*, paras. 5.18 – 5.29.

TABLE OF EXHIBITS

Exhibit No.	Description
US-1	Uruguay Round Agreements Act of 1994, P.L. 103-465, Section 129, <i>codified at</i> 19 U.S.C. § 3538
US-2	Section 129 Determinations: <ul style="list-style-type: none">• <u>Implementation of the Findings of the WTO Panel in <i>US – Zeroing (EC)</i>: Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders</u>, 72 Fed. Reg. 25261 (May 4, 2007).• <u>Implementation of the Findings of the WTO Panel in United States Antidumping Measure on Shrimp from Ecuador; Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Ecuador</u>, 72 Fed. Reg. 48257 (Aug. 23, 2007)• <u>Implementation of the Findings of the WTO Panel in US-Zeroing (EC); Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils From Italy</u>, 72 Fed. Reg. 54640 (Sept. 26, 2007).• <u>Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act Regarding the Antidumping Order on Certain Cut-to-Length Carbon-Quality Steel Plate Products from Japan</u>, 73 Fed. Reg. 29109 (May 20, 2008).• <u>Implementation of the Findings of the WTO Panel in United States -- Antidumping Measure on Shrimp from Thailand; Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand</u>, 74 Fed. Reg. 5638 (Jan. 30, 2009).• <u>Implementation of the Findings of the WTO Panel in United States -- Final Antidumping Measures on Stainless Steel from Mexico: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act</u>, 74 Fed. Reg. 19527 (Apr. 29, 2009).

- Purified Carboxymethylcellulose from the Netherlands (available at <http://ia.ita.doc.gov/download/section129/full-129-index.html>).
- Purified Carboxymethylcellulose from Sweden (available at <http://ia.ita.doc.gov/download/section129/full-129-index.html>).
- Purified Carboxymethylcellulose from Finland (available at <http://ia.ita.doc.gov/download/section129/full-129-index.html>).
- Chlorinated Isocyanurates from Spain (available at <http://ia.ita.doc.gov/download/section129/full-129-index.html>).
- Polyethylene Retail Carrier Bags from Thailand (available at <http://ia.ita.doc.gov/download/section129/full-129-index.htm>).

US-3	Margin Change Calculations
US-4	Calculation Spreadsheet
US-5	Kee, <i>et al.</i> Import Demand Elasticities and Trade Distortions
US-6	Excel file of U.S. import demand elasticities from Kee, <i>et al.</i>
US-7	Intentionally Omitted
US-8	Intentionally Omitted
US-9	<i>Policies Regarding the Conduct of Five-year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin</i> , 63 Fed. Reg. 18,871 (Dep’t of Commerce Apr. 16, 1998)
US-10	U.S. First Written Submission, <i>United States – Measures Relating to Zeroing and Sunset Reviews; Recourse to Article 21.5 of the DSU by Japan</i> (WT/DS322) (July 28, 2008)
US-11	<i>Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Final Results of Antidumping Duty Administrative Reviews</i> , 56 Fed. Reg. 31,754, 31,756 (Dep’t of Commerce July 11, 1991)
US-12	<i>Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews</i> , 57 Fed. Reg. 28,360, 28,361 (Dep’t of Commerce June 24, 1992)

- US-13 *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 Fed. Reg. 66,472 (Dep’t of Commerce Dec. 17, 1996)
- US-14 U.S. Second Written Submission, *United States – Measures Relating to Zeroing and Sunset Reviews; Recourse to Article 21.5 of the DSU by Japan (WT/DS322)* (Sept. 26, 2008)
- US-15 *Revocation of Antidumping Duty Orders on Certain Bearings From Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom*, 65 Fed. Reg. 42,667 (Dep’t of Commerce July 11, 2000)
- US-16 Mas-Colell et al., *Microeconomic Theory*
- US-17 Francois and Reinert, *Applied Methods For Trade Policy Analysis*