United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products:

Recourse by the United States to Article 22.6 of the DSU

(DS381)

Responses of the United States to the Arbitrator's Questions

Regarding the U.S. Preliminary Ruling Request

September 14, 2016

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EC – Bananas III (US) (Article 22.6 – EC)	Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1999
US – Continued Suspension (AB)	Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008
US – COOL (Article 22.6 – US)	Decisions by the Arbitrator, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 22.6 of the DSU the United States*, WT/DS384/ARB and Add.1 / WT/DS386/ARB and Add.1, 7 December 2015
US – Tuna II (Article 21.5 – Mexico) (Panel)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/RW, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW
US – Upland Cotton (Article 22.6 – US I)	Decision by the Arbitrator, *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the* SCM Agreement, WT/DS267/ARB/1, 31 August 2009

QUESTIONS CONCERNING THE UNITED STATES' REQUEST FOR A PRELIMINARY RULING

To the United States:

1. The Arbitrator notes the United States' statement, in paragraph 42 of its written submission, that the measure addressed in Mexico's MP (2013 Final Rule) is "no longer in existence". The Panel also notes the United States' statement, in paragraph 46 of its written submission, that "the task in an Article 22.6 proceeding is to look at the measure as it currently exists and not the measure in an earlier form." (Emphasis added). Could the United States please clarify what it means by "no longer in existence", on the one hand, and "an earlier form", on the other? In particular, has the 2013 Final Rule been repealed and replaced by a completely new measure, or has it merely been modified, such that it now represents an earlier form of the current 2016 IFR?

1. The U.S. dolphin safe labeling regulations are contained in 50 CFR part 216, subpart H. Those regulations were amended by the 2013 Final Rule.[1] The 2013 Final Rule changed the substance of the U.S. dolphin safe labeling regulations in an effort to bring the measure into conformity with the recommendations and rulings of the Dispute Settlement Body ("DSB"). The interim final rule issued on March 22, 2016 ("2016 IFR") in turn further amended the regulations and changed the substance of those regulations.

2. As a result, the U.S. dolphin safe labeling regulations as amended by the 2013 Final Rule no longer exist in that their substance had changed. Instead, the U.S. dolphin safe labeling regulations are the regulations as further amended by the 2016 IFR. For purposes of determining the level of nullification and impairment within the meaning of Article 22.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the measure to be evaluated is the regulations as amended by the 2016 IFR.

3. The fact that the substance of the regulations has changed is important since it is the substance – that is, the consistency of the regulations with U.S. obligations under the WTO Agreement – that is relevant for purposes of the evaluation required for Article 22.4 of the DSU.

2. The Arbitrator notes the United States' argument, presented in paragraphs 43 and 44 of its written submission, that Articles 22.4 and 22.7 of the DSU do not refer to a "past" level of nullification or impairment. Could the United States please explain why it interprets these Articles as referring to the current or existing level of nullification or impairment, rather than to the level of nullification or impairment that existed when the RPT expired?

4. Article 22.4 of the DSU states: "The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment." The provision is expressed as an imperative command ("shall be") in relation to "the" level of nullification or impairment – indicating a present situation of equivalence at the

[1] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 3.32.

time the suspension is "authorized by the DSB". Nothing in Article 22.4 refers to a past period of time – in particular, Article 22.4 does not refer to the reasonable period of time ("RPT") or to the expiration of the reasonable period of time. If Members, in agreeing to Article 22.4, had intended that the level of nullification or impairment was the level fixed at a specific point in the past – the end of the RPT – then the text would have needed to have specified that specific point in time.

5. Similarly, the reference in Article 22.7 of the DSU to the level of nullification or impairment also does not reference a past point in time, such as the expiration of the RPT. The first sentence of Article 22.7 states: "The arbitrator acting pursuant to paragraph 6 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." Again, if Members intended that the level of nullification or impairment referred to in Article 22.7 be the level fixed at some specific point in the past, then the text of Article 22.7 would have needed to specify that specific point in time, but the text does not.

6. The arbitrator in *EC – Bananas III (US)* found that "any assessment of the level of nullification or impairment presupposes an evaluation of consistency or inconsistency with WTO rules of the implementation measures taken by the European Communities, i.e. the revised banana regime, in relation to the panel and Appellate Body findings concerning the previous regime."[2] And the arbitrator stated:

> [W]e could resort to the option of measuring the level of nullification or impairment on the basis of our findings in the original dispute, as modified by the Appellate Body and adopted by the DSB. To do that 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.[3]

7. Thus, the arbitrator found that under the DSU the level of nullification or impairment relates to the amended measure as it currently existed, not the previous measure.

8. The "Understanding between the United States and Mexico Regarding Procedures under Articles 21 and 22 of the DSU" (WT/DS381/19) ("Understanding") is also consistent with the interpretation of Articles 22.4 and 22.7 of the DSU that the level of nullification or impairment is the current or existing level. That Understanding contemplates the situation in which an arbitration under Article 22.6 of the DSU would only occur after there has been a compliance proceeding to evaluate a measure taken to comply and DSB rulings subsequent to the original DSB recommendations and rulings. Nothing in that Understanding indicates that the arbitration would ignore the results of the compliance proceeding and only evaluate the measure as it existed prior to the measure taken to comply that was evaluated in the compliance proceeding.

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[2] *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.3.

[3] *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.7.

9. Indeed, it would be rather surprising if Mexico had insisted on using the level of nullification or impairment as of the expiration of the RPT if the compliance proceeding determined that the measure taken to comply had created additional inconsistencies with the covered agreements and thus the level of nullification or impairment may have increased.

10. As the United States has explained, Article 22.8 of the DSU also provides relevant context.[4] The arbitrator in *US – Upland Cotton* also found Article 22.8 to provide useful context. As the arbitrator explained, "the purpose of countermeasures under Article 4.10 of the *SCM Agreement* (and of suspension of concessions or other obligations under the DSU) is to induce compliance."[5] The arbitrator found that Article 22.8 "usefully informs our analysis of the legal basis and purpose of countermeasures. It confirms to us that the suspension of concessions or other obligations, as a remedy, is available where compliance has not been achieved, and in order to induce such compliance."[6]

11. Mexico's approach is thus contrary to the text of the DSU, as confirmed by previous arbitrators.[7]

3. Is it the United States' view that each time the responding Member modifies the disputed measure and claims that it has brought itself into conformity with its WTO obligations prior to the DSB's authorization of a suspension of concessions or other obligations by the complaining Member, such authorization must not be granted by the DSB until after the completion of a new compliance proceeding under Article 21.5 of the DSU and adoption of the panel report and, where appropriate, Appellate Body report?

12. Although some Members have argued in favor of the view that, in the situation described in the question, there must be a new compliance proceeding prior to the DSB granting authorization to suspend concessions or other obligations,[8] that is not the view of the United States. For instance, the United States has explained that the issue of compliance is one that could also be resolved in the course of an Article 22.6 arbitration, although the United States has explained that, as the DSB has already established two separate compliance panels to help resolve the issue of compliance,[9] the Arbitrator and compliance Panels should determine a means

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[4] U.S. Written Submission, para. 45.

[5] *US – Upland Cotton (Article 22.6 – US I)*, para. 3.43.

[6] *US – Upland Cotton (Article 22.6 – US I)*, para. 3.45.

[7] *See also*, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 7.1 (stating: "More specifically, we compare the value of relevant EC imports from the United States under the present banana import regime (the actual situation) with their value under a WTO-consistent regime (a 'counterfactual' situation)" (emphasis added).

[8] *US – Continued Suspension (AB)*, para. 43.

[9] It is therefore clear that the situation in this proceeding is distinct from other possible situations that might arise within the scope of the Arbitrator's question.

to permit a consistent view of the situation of compliance to be taken as that situation is relevant in all three proceedings.[10]

13. In any case, the same principle would apply – if the measure has been modified, then the relevant level of nullification or impairment is the level of nullification or impairment (if any) resulting from the measure as modified. Otherwise, for instance, the DSB could be authorizing a level of suspension far in excess of the level of nullification or impairment resulting from the measure, or, alternatively, the DSB could be authorizing a level of suspension that is too low (perhaps significantly so) if the modified measure creates new inconsistencies. (The situation where the measure taken to comply, including an undeclared measure taken to comply, results in new inconsistencies with the covered agreements is a situation that is explicitly contemplated in Article 21.5 of the DSU, which refers to a "disagreement as to the … consistency with a covered agreement of measures taken to comply.")

4. With reference to paragraph 45 of the United States' written submission, is it the United States' position that a unilateral declaration by a responding Member that it has "removed" the measure "found to be inconsistent" (Article 22.8) triggers the obligation of the complaining Member to cease the suspension of concessions authorized by the DSB?

14. As an initial matter, the United States would note that the situation specified in the question does not exist in this proceeding. The DSB has not authorized the suspension of concessions or other obligations, so the question of what would result in the termination of that authorization is not one that needs to be addressed in these proceedings.

15. However, as the United States explained to the Appellate Body in *US – Continued Suspension*, Article 22.8 of the DSU does not require "the suspension of concessions to be terminated 'in the presence of an implementation [measure]' that has not yet been found to be WTO-inconsistent through Article 21.5 proceedings." Article 22.8 "does not state that the suspension of concessions shall only be applied 'until the measure found to be inconsistent is *claimed* to have been removed.'"[11]

16. It is important to recognize that the situation where the DSB has granted authorization to suspend concessions has significant procedural differences from the situation where the DSB has not yet granted authorization. Among these significant differences is the fact that once the DSB has granted authorization, there is no mechanism in the DSU for a second arbitration or a second

[10] U.S. Written Submission, paras. 42 et seq.

[11] *US – Continued Suspension (AB)*, para. 111.

granting of authorization, and so it must be clear that one of the three conditions under Article 22.8[12] applies before terminating the authorization to the complaining Member.

17. Where the DSB has granted authorization to suspend concessions and the Member concerned subsequently has claimed compliance, the complaining Member could accept that declaration of compliance or could, for instance, decide to temporarily halt the measure implementing the suspension of concessions until the DSB adopts recommendations or rulings regarding the modifications to the measure. Neither of these responses would be required under the DSU, however.

5. In the view of the United States, is the approach reflected in footnote 59 of the US – COOL Arbitration report relevant to the question at issue in the United States' preliminary ruling request in these proceedings?

18. Footnote 59 states:

> Canada and Mexico request authorization to suspend concessions or other obligations based on the nullification or impairment of benefits caused by the original and amended COOL measures, reviewed in the original and compliance stages of these disputes, respectively. In this Decision, we refer to the original and amended COOL measures separately where the distinction is relevant, and more generally to 'the COOL measure' when referring to combined aspects or effects of the original and amended COOL measures.

19. Although the arbitrators in those proceedings provided for a means to distinguish between the COOL measure prior to the 2013 Final Rule and the COOL measure as amended by the 2013 Final Rule, in each case the conclusion and decision of the arbitrator resulted in a single amount and did not distinguish between the original and amended COOL measures.

20. In fact, Canada and Mexico, in each of their requests for authorization to suspend concessions, sought authorization based only on the level of nullification or impairment resulting from the amended COOL measure.[13] The distinction between the original and the amended COOL measure became relevant for Canada and Mexico in calculating the level of nullification and impairment for the amended COOL measure, since the arguments called for distinguishing between, and cumulating the economic impact of, the original and amended COOL measures.[14]

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[12] Article 22.8 specifies three conditions, any one of which suffices to terminate the authorization to suspend concessions or other obligations. The three conditions are: (1) "the measure found to be inconsistent with a covered agreement has been removed," (2) "the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits," or (3) "a mutually satisfactory solution is reached."

[13] *See*, Canada's Request, WT/DS384/35, page 2: "The requested annual value of the suspension of the concessions and related obligations of CDN $ 3.068 billion is, pursuant to DSU Article 22.4, equivalent to the annual level of nullification or impairment of benefits to Canada caused by the amended COOL measure," and Mexico's Request, WT/DS386/35, page 2.

[14] *See, e.g,, US – COOL (Article 22.6 – US)*, para. 5.72.

However, the arbitrators explained that "the overall COOL impact on the price basis is negative and statistically significant for all weight categories. This impact encompasses both the original and amended COOL measures, the cumulative impact of which is the variable of interest."[15]

21. As a result, footnote 59 of the *US – COOL* arbitration decisions is consistent with the approach in the U.S. preliminary ruling request. Those conclusions and decisions were based on the COOL measure, as amended, as it existed at the time of the arbitrations.

6. At paragraph 48 of its written submission, the United States points to the fact that the 2016 amendment to the Tuna Measure was adopted on 22 March 2016, "before the United States objected to Mexico's request for authorization to suspend concessions." (Emphasis original) Does the date of adoption of the 2016 IFR have any bearing on whether the Arbitrator should take that measure, and not the 2013 Final Rule, into account in determining the level of suspension of concessions or other obligations in these proceedings? If the 2016 IFR had been adopted after the United States' objection to Mexico's request for authorization to suspend concessions or other obligations, would the United States not have made this preliminary request? Why (not)? Please elaborate on the basis of the relevant provisions of the DSU.

22. The measure was amended at the time the matter was referred to arbitration. This is a simple matter of fact. As a result, the measure to be evaluated in terms of the level of nullification or impairment is the measure as amended by the 2016 IFR. In this regard, the United States would refer to the discussion of Articles 22.4 and 22.7 of the DSU in response to question 2, above.

23. It is not necessary for purposes of this proceeding to speculate on what approach might be appropriate in the event that the 2016 IFR had been adopted after the U.S. objection to Mexico's request for authorization referred the matter to arbitration.

To both parties:

13. What, in the parties' views, would be the procedural consequences for these Article 22.6 proceedings if the Arbitrator were to grant the preliminary ruling requested by the United States?

24. If the Arbitrator were to grant the preliminary ruling requested by the United States, then this proceeding would be able to concentrate on evaluating the level of nullification, if any, from the dolphin safe labeling measure, as amended by the 2016 IFR. As the United States has

[15] *US – COOL (Article 22.6 – US)*, para. 6.53 (emphasis added).

explained,[16] the determination of the level of nullification and impairment needs to take into account the results of the compliance proceedings under Article 21.5 of the DSU.

14. Could the parties please provide their views regarding when (on what date) the matter before this Arbitrator was referred to arbitration under Article 22.6?

25. As reflected in the Understanding between the United States and Mexico,[17] the matter before the Arbitrator was referred to arbitration on March 22, 2016, the date of the U.S. objection to Mexico's request for authorization to suspend concessions or related obligations (WT/DS381/30).

15. With reference to paragraphs 26, 31 and footnote 41 of Mexico's written submission and paragraph 46 and footnote 106 of the United States' written submission, could the parties please indicate:

a. whether the 2013 Tuna Measure was in force when (on the date) the matter was referred to arbitration under Article 22.6 or whether it had ceased to exist before that date (in the latter case, please also address whether the Arbitrator could then properly assess the nullification or impairment caused by that measure); and

26. The 2016 IFR, which amended the dolphin safe labeling measure, was adopted on March 22, 2016, and constituted a final measure in force as of that date.[18] As noted in the 2016 IFR, different requirements took effect at different times. Requirements that, on their face, did not impact tuna and tuna product in the supply chain as of March 22, 2016, took effect on March 22, 2016. Requirements that could affect tuna and tuna product already in (or soon to be in) the supply chain took effect on May 21, 2016. In both cases, no additional legal action was required for the requirements to become effective.[19] Thus, the 2013 Tuna Measure had ceased to exist by March 22, 2016, in that its substance had changed. Consequently, in this proceeding, the matter referred to arbitration calls for an evaluation of the regulations as amended by the 2016 IFR in order to properly assess the level of nullification and impairment.

b. what was the date of entry into force of the 2016 IFR?

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[16] U.S. Written Submission, paras. 42 et seq.

[17] Paragraph 7 of the Understanding states: "If Mexico requests authorization to suspend the application of concessions or other obligations under the covered agreements to the United States pursuant to DSU Article 22, the United States may object under DSU Article 22.6 to the level of suspension of concessions or other obligations and/or claim that the principles and procedures set forth in DSU Article 22.3 have not been followed, thereby referring the matter to arbitration pursuant to DSU Article 22.6."

[18] *See Enhanced Document Requirements and Captain Training Requirements To Support Use of the Dolphin Safe Label on Tuna Products*, 81 Fed. Reg. 15,444, 15,445 (Mar. 23, 2016) ("2016 IFR") (Exh. US-4).

[19] 2016 IFR, at 15,445 (stating: "This interim final rule is effective March 22, 2016, except for amendatory instruction 2, which is effective May 21, 2016.").

27. As explained above, the United States adopted the 2016 IFR on March 22, 2016, and it had final legal effect as of that date. Mexico errs in ascribing significance to the date of publication of the 2016 IFR.[20] As is apparent on the face of the 2016 IFR, the date of publication does not control the date of entry into force.

[20] Mexico Written Submission, para. 26.