***United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"); Arbitration under Article 22.6 of the DSU* (WT/DS294)**

Comments by the United States on the EU's Comments regarding Japan's Communication to the Dispute Settlement Body

March 16, 2010

1. On March 11, 2010, at the invitation of the Arbitrator, the United States and the EU provided written comments on Japan's February 26, 2010 communication to the chair of the Dispute Settlement Body ("DSB") stating that it had "a substantial interest in the matter before the arbitration" and that it "wishes to participate in the arbitration as a third party." The United States hereby responds to the EU's March 11 comments.

2. It is, as the EU acknowledges, "not controversial that Articles 22.6 and 22.7 of the DSU are silent with respect to third parties."[1] Nor is it controversial that, on those rare occasions when a Member has sought permission to participate as a third party in an arbitration (such third party rights have been requested in only four of the 20 arbitrations to date under Article 22.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU)), arbitrators have rejected those requests all but once.[2] Furthermore, it remains true that Japan has not addressed any communication to the Arbitrator requesting that the Arbitrator accord Japan the ability to participate in this proceeding as a third party or seeking to have the Arbitrator create any third party procedures. Accordingly, the EU's submission was filed under circumstances where Japan itself had not made a request of the Arbitrator for any kind of finding. There is no

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[1] EU Comments, para. 2.

[2] See, Arbitrator Award, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under DSU Article 22.6*, WT/DS27/ARB, circulated 9 April 1999, at para. 2.8; Arbitrator Award, *Brazil – Exporting Financing Programme for Aircraft – Recourse to Arbitration by Brazil Under DSU Article 22.6 and SCM Agreement Article 4.11*, WT/DS46/ARB, circulated 28 August 2000, para. 2.5; Arbitrator Award, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration under DSU Article 22.6*, WT/DS285/ARB, circulated 21 December 2007, para. 2.31. The only instance in which third party participation was allowed in an arbitration was where the third parties were co-complainants in the underlying dispute, the complaining parties had each exercised their own, independent rights under Article 22 of the DSU, the arbitrator in each proceeding comprised the same individuals, and the assessment of the nullification and impairment to one Member necessarily depended on the assessment for the other Member. In that situation, the arbitrator in each proceeding considered that it made sense to hold what were essentially combined proceedings. *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/ARB, circulated 12 July 1999, para. 7; *European Communities – Measures Concerning Meat and Meat Products (Hormones)* (Canada), WT/DS48/ARB, circulated 12 July 1999, para. 7. In light of subsequent arbitrations where the proceedings of co-complainants were combined without providing any third party participation, it is not clear that in similar circumstances to *Hormones* an arbitrator now would follow the approach of providing third party participation rather than just combining the proceedings.

action requested of the Arbitrator.[3]

3. In order to support its contention that Japan should be allowed to participate in this arbitration as a third party in spite of those facts, the EU argues that third party participation in arbitrations should occur as a matter of right, and consequently that every Member that has previously examined this issue (including the EU), and every arbitrator to have considered the issue, has misread the DSU and misunderstood the form of arbitrations under Article 22.6 of the DSU. To accomplish this, the EU has looked to Article 10 of the DSU, the only DSU provision that creates a right to third party participation. In order to argue that this provision – which by its terms applies only to panels – applies in the case of an Article 22.6 arbitration, the EU argues that the present proceeding is actually a panel proceeding. The EU even goes so far as to continually refer to the Arbitrator as "the Panel," and to these proceedings as "Article 22.6 panel proceedings."[4] In these comments, the United States will demonstrate that the Arbitrator, as no doubt arbitrators have considered all along, is presiding over an arbitration, not a panel proceeding.[5]

A. The EU's Interpretation of Article 1.1 is Incorrect and Irrelevant

4. Before addressing the EU's theory on the last sentence of Article 1.1, it is worth recalling what that sentence says. The last sentence of Article 1.1 is a jurisdictional provision that states that the DSU will govern disputes that arise under the DSU as well as the Marrakesh Agreement. That sentence was needed because, unlike the other covered agreements, neither the DSU nor the

[3] Were Japan to submit such a request to the Arbitrator, it would raise issues different than those discussed in these comments on the EU's comments, and the United States would respectfully request an opportunity to comment on that request.

[4] If this is a bit jarring, it is because no Member, including the EU, has before referred to arbitrations as "Article 22.6 panel proceedings." See, for instance, the EU's submissions in relation to Article 22.6 proceedings in *EC – Bananas* (WT/DS27)(e.g., WT/DS27/46 and WT/DS27/53), *EC – Hormones* (WT/DS26)(e.g., WT/DS26/20 and WT/DS48/18), and *EC – Biotech* (WT/DS291)(e.g., WT/DS291/40), as well as *U.S. – FSC* (WT/DS108)(e.g., WT/DS108/17), *U.S. – 1916 Act* (WT/DS136)(e.g., WT/DS136/15), and *U.S. – Section 110(5)* (WT/DS160)(e.g., WT/DS160/19). For example, in *U.S. – FSC (Article 22.6)* (DS108), paragraph 14 of the EC's oral statement expressly distinguishes arbitration awards from panel reports, indicating that an arbitration is distinct from a panel: "Panel reports, whether appealed or unappealed, are only guidance – and the same goes for arbitration reports and indeed for Appellate Body reports."

[5] Japan would seem to agree. Its communication to the chair of the DSB states: "Japan, having a substantial interest in the matter before *the arbitration* ... wishes to participate in *the arbitration* as a third party" (emphasis added). This is in contrast to its letter to the chair of the DSB in *U.S. – AD/CVD* (DS379), where it notified its interest "in the matter before *the panel*" and wished to "reserve its right as a third party pursuant to Article 10." See Exhibit US-1.

Marrakesh Agreement contains a separate jurisdictional article.[6] In this way, the phrase "taken in isolation" in the part of the last sentence that reads: "taken in isolation or in combination with any other covered agreement" refers to the *agreement* taken "in isolation," not an individual "provision" taken in isolation. The comparison is between agreements, not between provisions. If that phrase were meant to say that all the rules and procedures of the DSU apply to each dispute under each individual provision of the DSU,[7] then that sentence would have read: "taken in isolation or in combination with any other *provision of any other* covered agreement."

5. Conceptually, then, the last sentence of Article 1.1 is outward looking – it states to which agreements the DSU applies – not inward looking: it is silent with regard to which specific DSU provisions apply to which other DSU provisions. That latter task is accomplished by the language of the specific DSU provisions themselves. Accordingly, when a panel or the Appellate Body has looked to Article 1.1, it has done so to clarify that the DSU applies to a dispute or an issue that has come before it under a covered agreement.[8] The Arbitrator will look in vain – as the EU apparently has, based on the citations it has provided – for a prior adjudicator who has ever relied on Article 1.1 to determine which specific DSU provisions apply to the dispute before it.[9]

6. The EU's reading of Article 1.1 is considerably more convoluted. The EU's theory must be cobbled together from various parts of its submission, but as the United States understands it,

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[6] See, for example, Article 19 of the *Agreement on Agriculture* ("The provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, shall apply to consultations and the settlement of disputes under this Agreement"); Article 14.1 of the *Agreement on Technical Barriers to Trade* ("Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall take place under the auspices of the Dispute Settlement Body and shall follow, *mutatis mutandis*, the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding"); and Article 6 of the *Agreement on Import Licensing Procedures* ("Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall be subject to the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding").

[7] This would be a very strange concept in any event for the negotiators to have meant. If the DSU applies to disputes involving the DSU, then why would it be necessary to also specify that the DSU applies to disputes involving individual provisions of the DSU?

[8] See, for example, Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, adopted 20 March 2009, para. 7.500 (TRIPS); Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1 and Add.1 to Add. 3, adopted 21 March 2005, as modified by the Appellate Body Report, WT/DS267/AB/R, para. 7.5 (SCM Agreement); Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, para. 85 (GATT 1994); Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R, adopted 22 September 1998, fn. 96 (DSU).

[9] See EU Comments, footnote 9.

the EU is arguing that, in order to "ensure an integrated and coherent system of dispute settlement,"[10] the final sentence of Article 1.1 means that "the rules and procedures of the DSU apply to the settlement of disputes between Members concerning their rights and obligations under the provisions of the DSU taken in isolation."[11] Furthermore, the EU says, Article 1.1 applies to this arbitration because "the present proceedings concern the settlement of disputes between the European Union and the United States concerning their respective rights and obligations,"[12] and Article 1.1 must apply to Article 22.6 proceedings in general (and maybe Article 21.3 proceedings) if it is not to be rendered inutile.[13]

7. Up to this point, though reading Article 1.1 incorrectly,[14] the EU's theory does not amount to much. It seems simply to say that the DSU applies to a dispute taking place under the DSU, including matters that concern DSU Article 22.6. That provisions of the DSU apply to this proceeding is not in dispute. What remains unexplained is why this means that Article 10.2 specifically would apply to this arbitration proceeding.

8. The closest the EU comes to providing such an explanation is in paragraphs 7 and 8 of its comments where it states: "the rules and procedures of the DSU apply to these Article 22.6 proceedings. Article 10 of the DSU contains rules and procedures (relating to third parties). It follows that the rules and procedures in Article 10 apply to these Article 22.6 panel proceedings, there being no conflict between those rules and procedures and the provisions of Article 22." This, however, is merely a statement of the result the EU would like; it is not an explanation of how the DSU compels such a result.

9. The missing link is why, once Article 1.1 has established that the DSU applies to a dispute brought under a covered agreement (including the DSU), Article 1.1 would also result in all provisions of the DSU applying to all other DSU provisions, absent a conflict. In other words, where a provision applies by its terms to a panel proceeding, what in the language of Article 1.1 means this would also apply to an arbitration? The EU never provides an answer to this question.

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[10] EU Comments, para. 29.

[11] EU Comments, para. 7. As noted above, that reading of the last sentence of Article 1.1 is incorrect.

[12] EU Comments, para. 8.

[13] EU Comments, para. 25.

[14] As noted above. Also, the last sentence of Article 1.1 is not inutile in any event since it provides a jurisdictional basis for applying the DSU to the Marrakesh Agreement and the DSU. Indeed, if the EU's approach were correct, then Article 25.4 would appear to be inutile since there would be no reason to specify that Articles 21 and 22 applied.

10. The fact is, Article 1.1 contains no language that goes to which DSU provisions apply to which other DSU provisions. The gap left in the EU's theory by the failure of Article 1.1 to provide such a standard manifests itself when the EU attempts to delineate where Article 10.2 would apply and where it would not. For example, it is the EU's opinion that under Article 1.1, third parties would not have access to Article 5 proceedings as these are "voluntary, confidential and without prejudice to other proceedings."[15] None of those qualities would seem to present any "conflict" with the text of Article 10.2, however, and so under the EU's theory of Article 1.1, it would seem that Article 10 would apply to Article 5 proceedings. Nevertheless, in the absence of any guidance on this issue provided by its reading of Article 1.1, the EU has just as easily come to a contrary conclusion. The EU's position is based not on the text, but on its own policy judgments. That is not a correct approach to treaty interpretation.

11. The reason for the difficulty the EU finds itself in with regard to the application of Article 1.1 is that the EU is simply asking Article 1.1 to do too much. Article 1.1 cannot provide the answer to the question of "to which provisions does Article 10.2" apply because it has no language to that effect. The simpler reading of Article 1.1 as a jurisdictional provision remains correct.

12. Ultimately, the EU's interpretation of Article 1.1 is of little importance for the resolution of this issue. Under the EU's theory, as set out in paragraphs 7 and 8 of its comments, Article 10.2 would apply to Article 22.6 so long as there was no "conflict" between the two. But, even assuming *arguendo* that Article 1.1 does create some kind of rule of general application of the DSU absent a conflict, the EU still has to contend with the textual limits of Article 10.2, which applies by its terms to panel proceedings, and the text of Article 22.6, which concerns arbitrations.[16] This perhaps explains why the EU spends the majority of its lengthy written comments arguing directly that Article 10.2 applies by its terms to Article 22.6, and why the EU has begun referring to the Arbitrator as a "Panel."

B. Article 10.2 Does Not Apply to Article 22.6

13. The crux of the EU's argument seems to be that "Article 10 of the DSU contains rules and procedures (relating to third parties)" and "[i]t follows that the rules and procedures in Article 10 apply to these Article 22.6 panel proceedings, there being no conflict between those

[15] EU Comments, para. 22.

[16] On the other hand, if there is no conflict between the provisions and they apply by their terms to one another, then there would be no need for recourse to Article 1.1. This is the way the DSU is ordinarily discussed. For example, later in its comments, the EU argues that Article 3 is instructive to the resolution of this issue, but it does so without asserting that Article 3 applies to Article 22.6 by way of Article 1.1. EU Comments, para. 29.

rules and procedures and the provisions of Article 22."[17] It would seem clear, however, that Article 10 only applies to panel proceedings while Articles 22.6 and 22.7 only refer to arbitrations.[18] Accordingly, the EU now seeks to erase the distinction between panel proceedings and arbitrations.[19]

14. As the EU acknowledges, the DSU provisions of immediate relevance to the Arbitrator are Articles 22.6 and 22.7.[20] Article 22.6 states that if a Member concerned objects to the level of suspension proposed by a party having invoked the dispute settlement procedures, or claims that the principles and procedures set out in Article 22.3 have not been followed, "the matter shall be referred to arbitration." The remainder of the article sets out the composition of the "arbitrator," the time by which the arbitrator's decision must be made, and that suspension cannot take place "during the course of the arbitration." Article 22.7 sets out the scope of the arbitrator's examination and determination, that the "parties shall accept the arbitrator's decision as final," that the "DSB shall be informed promptly of the decision of the arbitrator," and that the DSB shall, upon request, grant authorization to suspend "where the request is consistent with the decision of the arbitrator." Nowhere in the text of Articles 22.6 or 22.7 is there a reference to a panel proceeding.

15. On this last point, the EU should not be confused by the reference in Article 22.6 to arbitration being carried out "by the original panel, if members are available." Footnote 16 of the DSU makes clear that "[t]he expression 'arbitrator' shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator." Thus, when "members of the original panel" participate in an Article 22.6 arbitration, footnote 16 confirms they are "serving in the capacity of arbitrator," not as a panel.

16. In spite of footnote 16, the EU has seized on the phrase "original panel, if members are available" in an attempt to force an artificial distinction between categories of its own creation,

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[17] EU Comments, para. 8.

[18] Article 10.2 states, for instance, "Any Member having a substantial interest in a matter before *a panel* and having notified its interest to the DSB ... shall have an opportunity to be heard by *the panel* and to make written submissions to *the panel*. These submissions shall also be given to the parties to the dispute and shall be reflected in *the panel report*." (emphasis added). See also, U.S. Comments, para. 4.

[19] This is not the position the EU has held up until this point. For example, in the EU (at that time the European Communities) rebuttal submission to the arbitrator in *Bananas*, the EU said: "Finally, but not less importantly, *since third parties are not permitted to participate in the arbitration procedure, the procedural rights which they would enjoy under Article 10 of the DSU in the course of a panel procedure* on the WTO-consistency of the revised EC banana import regime *would be completely undermined* if this issue could in some way be decided *as a result of the present arbitration procedure*." Para. 15, emphasis added.

[20] EU Comments, paras. 5 and 7.

namely "primary" and "alternative descriptor[s]."[21] As an initial matter, the EU does not explain how "original panel" is to be considered the so-called "primary descriptor" by virtue of one reference to one possible composition of the arbitrator ("original panel, if members are available"). This reference lies in the midst of a paragraph that, in addition to numerous other references to "arbitration" and "arbitrator," makes clear that "the matter shall be referred to arbitration." Arbitration would seem to be the "primary" focus of the paragraph. Nor does the EU explain why "original panel" is of "primary" importance when, as is the case with the present Arbitrator, the arbitrator is frequently not composed of the original panel.[22] Perhaps more puzzling, however, is what the EU expects its newly-created distinction between "descriptors" to accomplish.

17. The EU seems to think that the terms "arbitrator" and "arbitration" as used in Article 22 are meaningless or, alternatively, that those terms may be deprived of meaning by categorizing them as "alternative descriptors."[23] This is, of course, incorrect. Article 22 consistently refers to "arbitrator" and "arbitration" rather than "panel" and "panel proceeding" in order to reflect that a different proceeding has been set up under Article 22.6 than that which has been set up under the panel process. Even if the EU could blur the distinction between the terms "arbitration" and "panel proceeding," its theory would require a complete revision to the way Article 22.6 arbitrations are conducted and would not comport with the design of the DSU.

18. Despite the lengthy list of provisions the EU alleges apply to Article 22.6 arbitrations (many of which the EU acknowledges have never actually been cited in an Article 22.6 arbitration), arbitrations and panel proceedings are very different proceedings. The DSU states that, before a panel proceeding can commence, consultations are required.[24] That is not the case for arbitrations, however; certainly, no consultations were requested or held before this arbitration began. Similarly, a panel request cannot be made until 60 days after the date of receipt of the request for consultations;[25] again, that is not the case for arbitrations, and it did not occur here.

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[21] EU Comments, paras. 11, 12, and 18.

[22] Unfortunately, in paragraph 26 of its comments, the EU has misrepresented the position of the United States on this issue. The parties did not, as the EU asserts, agree "that the term 'original panel' in Article 22.6 should be interpreted as referring to the members of the compliance panel in this case." Rather, as is clear from Exhibit EU-1, the United States agreed that "the persons who served on the compliance panel would serve as the arbitrator," which was the question put to the parties by the Secretariat.

[23] See, for example, EU Comments, para. 11.

[24] DSU, Art. 4.3.

[25] DSU, Art. 4.7.

19. Crucial differences exist at the initiation of the respective proceedings, as well. In a panel proceeding, the DSB must establish a panel, but may be required to wait until the second request.[26] In contrast, no DSB action is required to refer the matter to arbitration;[27] the matter is referred by the objection of the Member concerned under Article 22.6.[28]

20. Furthermore, panels must issue draft descriptive sections and interim reports to the parties and allow the parties to comment on those.[29] There are no DSU provisions for draft descriptive sections or interim reports at the arbitral stage, and none have ever been issued. Panel reports must be adopted by the DSB, with sufficient time for Members to consider them;[30] arbitral

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[26] DSU, Art. 6.1.

[27] As the EU appears to recognize in paragraph 1 of its comments. The EU correctly states that the only action taken by the DSB after the U.S. objection under Article 22.6 is that "[a]t the DSB meeting on 18 February 2010 the DSB took note of the Parties' statements."

[28] The United States notes that Japan has agreed with this position and has specifically stated that no DSB action is required to establish an arbitrator under Article 22.6. For instance, at the January 21, 2008 DSB meeting, in light of the U.S. objection to the level of suspension proposed by Japan in its Article 22.2 request in *U.S. – Zeroing (Japan)*, Japan removed the agenda items it had inscribed on the matter since the matter had now been referred to arbitration. Japan also noted that the DSB could not establish an Article 22.6 arbitrator:

> The representative of Japan said that, in light of the [objection to the level of suspension proposed by Japan] by the United States, as reflected in WT/DS322/25, and the consequent referral to arbitration, pursuant to Article 22.6 of the DSU, the DSB was not in a position to grant authorization pursuant to Article 22.6 of the DSU and, therefore, the Agenda could be adopted without sub-items 4(a) and 4(b). Japan understood that the adoption of the Agenda without sub-items 4(a) and 4(b) would not constitute a withdrawal of Japan's request for DSB authorization, as set out in documents WT/DS322/23 and WT/DS322/24.
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> The representative of the United States said that his country agreed with Japan that the DSB was not in a position to grant authorization pursuant to Article 22.6 of the DSU and, therefore, the Agenda could be adopted without sub-items 4(a) and 4(b). The United States confirmed Japan's understanding that the adoption of the Agenda without those sub-items would not constitute a withdrawal of Japan's request for DSB authorization.

WT/DSB/M/245, p. 2. The United States also notes that the EC appears to have agreed that the "objection" of the Member concerned begins an arbitration: "This arbitration proceeding was started by the United States through its objection, under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, to the appropriateness of countermeasures and to the level of suspension of concessions for which the European Communities had requested authorization on 17 November 2000." EC Submission in *U.S. – FSC (Article 22.6)*, para. 6.

[29] DSU, Art. 15.

[30] DSU, Art. 16.

"decisions" are only notified to the DSB.[31] Finally, a panel report may be appealed: the Appellate Body hears appeals from "panel cases."[32] In contrast, the Appellate Body cannot hear, and indeed never has heard, an appeal from an arbitral decision.[33] Under the EU's theory of Article 1.1, however, it would seem possible that, were the EU unhappy with the decision rendered by the Arbitrator, the EU could try to seek appellate review of that decision by arguing that Articles 17 and 22 are not "in conflict."[34]

21. This is not a complete list of the different procedures the DSU sets out for panel and Article 22.6 arbitral proceedings. Article 10 is, of course, also relevant. Article 10 provides third party rights at the panel stage. But, just like consultations, the 60 day period before the establishment of a panel may be requested, panel establishment by the DSB, review and comment on the draft descriptive sections and the interim report, adoption of panel reports by the DSB, and appeals from panel cases, third party access is provided for at the panel stage, but not at the arbitral stage.

22. Presumably, the EU would have to agree that several of the DSU provisions applying to panels, such as those discussed above, do not apply to arbitrations. Otherwise, this arbitration would not be able to proceed. But, in its comments, the EU nevertheless asserts that "it is inconceivable that other relevant provisions of the DSU, as yet not cited in the jurisprudence, would be considered not to apply in Article 22.6 panel proceedings."[35] There are numerous problems with such a haphazard approach to interpreting the DSU.

23. For example, were the Arbitrator to decide that rights and obligations that apply by their express terms to panels also extend to Article 22.6 arbitrations, a question would arise about the effect Article 12.12 would have. Article 12.12 states that if the work of a panel has been suspended for more than 12 months, the authority for the establishment of the panel shall lapse. In *U.S. – Zeroing (Japan)* (DS322), the arbitration has been suspended for more than 12 months. Accordingly, under the EU's theory, the authority for the arbitration in Japan's dispute may be

[31] DSU, Art. 22.7.

[32] DSU, Art. 17.1.

[33] Again, the U.S. notes that Japan would agree with this position. In DSU review, Japan has introduced a proposal that would allow the appeal of arbitral awards – an odd proposal if Japan, or the Membership in general, understood that this right already existed. See TN/DS/22, p. 16.

[34] "[I]t is inconceivable that other relevant provisions of the DSU, as yet not cited in the jurisprudence, would be considered not to apply in Article 22.6 panel proceedings." EU Comments, para. 20.

[35] EU Comments, para. 20.

deemed to have lapsed.[36] The United States doubts that, whatever it intended by its communication to the chair of the DSB, Japan is seeking a result that would call into question the existence of the suspended arbitration in DS322. Under the EU's theory, however, it is not clear how that result could be avoided.[37]

24. It is clear that the use of "arbitrator" and "arbitration" in Articles 22.6 and 22.7, and of "panel," "panel proceeding," and "panel cases" in the provisions just discussed is deliberate and reflects that the DSU has established different dispute settlement proceedings at the panel stage and at the arbitration stage.

25. Near the end of its comments, the EU puts forth one more argument for its theory that panel proceedings and arbitral proceedings are the same. Specifically, the EU argues that since "the DSU establishes an integrated and coherent dispute settlement system," and "because Article 22.6 proceedings themselves are necessarily integrated in and form part of that continuous process," third party rights must apply to arbitrations.[38] The United States does not understand what conclusion the EU expects the Arbitrator to draw from the notion that Article 22.6 is merely the continuation of the panel and compliance panel process. It is not clear how, even if true, this would result in third party access to Article 22.6 arbitrations as a matter of right.

26. The EU appears to confuse the concept that panels and Article 22.6 arbitrations are part of one dispute settlement system with the distinct question of whether each phase of that single dispute settlement system should operate the same way. Article 23.2(c) is clear that it is the procedures in Article 22 that govern determining the level of suspension of concessions or other obligations, not the procedures under other provisions of the DSU (such as Article 10). Thus, while it may be true that Article 22.6 is a continuation of the dispute settlement process, and that there may even be phases subsequent to an Article 22.6 arbitration, that chronological point is irrelevant to the legal question of how each phase operates (just as an appeal follows the panel phase but very different procedures apply to each).[39] As Article 23.2 confirms, and the United States has demonstrated, the DSU sets out distinct procedures for the panel phase and for the Article 22.6 arbitration phase.

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[36] Similarly, the arbitration awards in the *U.S. – Upland Cotton (Brazil)* (DS267) dispute should have been impossible.

[37] Indeed, the EU believes that Article 12.12 already does apply to Article 22.6 arbitrations. EU Comments, para. 19.

[38] EU Comments paras. 26, 27.

[39] The fact that Article 23.2(b) reflects that the procedures for establishing a reasonable period of time also comprise a distinct phase from the rest of the dispute settlement process could explain the EU's difficulty in deciding whether or not third parties would have access to an Article 21.3(c) arbitration. See EU Comments, para. 22.

27. Moreover, it is not clear why, even if Article 22.6 arbitration was merely a continuation of the panel process, this would convey automatically obtainable third party rights. There is, for example, also a close link between the panel stage and the appellate stage, but the DSU specifically confers certain rights on third parties at the appellate stage through Article 17.4. The drafters of the DSU could have done the same with regard to the Article 22.6 arbitration stage had they intended to confer such rights.

28. Furthermore, Article 17.4 limits third party participation in an appeal to those Members reserving rights at the panel stage. If the EU's argument is that Article 10.2 sets out the same process for a Member to reserve third party status at the arbitration stage as at the panel stage, then every Member would be able to exercise third party rights in an arbitration. It is not clear why the DSU would limit participation in an appeal – which concerns issues of law or legal interpretation, and has up to 90 days to be completed – but not in an arbitration, which addresses limited questions and is supposed to be completed within 60 days of the expiration of the reasonable period of time.

29. A consistent reading of the DSU would mean that, regardless of the procedural connections between panel, appellate, and arbitral proceedings, where third party rights exist, they are separately established in the DSU for each proceeding. And the fact remains that the DSU does not provide third party rights in Article 22 arbitrations.

30. This result is confirmed not just by differences in the text as it deals with the panel, appellate, and arbitral stages, but also by the fact that panel, appellate, and arbitral proceedings have different purposes. Article 22.6 arbitrations, in contrast to panels and the Appellate Body, are focused on determining whether the level of suspension proposed is equivalent to the level of nullification or impairment suffered by the complaining party, and/or whether the complaining party has followed the principles and procedures set forth in Article 22.3 of the DSU. Because the various types of DSU proceedings have different purposes, it makes sense that the DSU sets out different procedures for their conduct.

C. Conclusion

31. The United States reiterates that Japan has not requested the Arbitrator to take any action with request to its communication to the chair of the DSB. That the EU has taken positions in its comments on that communication that directly contradict those taken by Japan elsewhere, and that could, if accepted, adversely affect Japan's interests, underscores the prudence of the Arbitrator not amending its Working Procedures on the basis of the EU's assessment of Japan's communication. Additionally, neither by reference to Article 1.1, nor by its attempt to collapse Article 22.6 arbitral proceedings into panel proceedings, has the EU shown any basis under Article 10.2 for the Arbitrator to amend its Working Procedures. Therefore, the United States continues to respectfully request the Arbitrator not to amend the Working Procedures to provide for Japan's participation in this arbitration as a third party.