

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 Japan’s Communication to the Dispute Settlement Body

March 11, 2010

1. On February 26, 2010, Japan sent a letter to the chairman 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.” Japan has not made any request of the Arbitrator with respect to participation in the arbitration as a third party. Therefore, there is no action currently being requested of the Arbitrator, nor is there any basis for the Arbitrator to respond to Japan’s document.
2. The United States notes that in past arbitrations, when a Member has sought to participate as a third party in arbitral proceedings, it has made a request directly to the arbitrator. This was the approach taken by Ecuador in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (DS27) and by the EC in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (DS285), for instance.¹ Japan was surely aware of these past events and chose not to follow that approach. Instead, Japan directed its communication to the chair of the DSB.
3. At the organizational meeting, the EU sought to explain Japan’s decision to address the DSB chair rather than the Arbitrator by reference to Article 10 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). The EU is proposing a legal rationale that is not the basis for Japan’s communication, and the United States does not see how the EU has any basis to ascribe this reasoning to Japan. The United States notes that there is no indication from Japan’s letter of February 26 that Japan is asserting that Article 10 applies to this arbitration. This is in contrast to Japan’s request to participate as a third party in the panel proceedings in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379). Japan’s letter to the chair of the DSB in that dispute specifically states that Japan “wishes to *reserve its right as a third party pursuant to Article 10*” of the DSU.² There is no such language in Japan’s letter to the DSB chair in this arbitration. In fact, Japan’s letter is entirely silent on what provision of the DSU, if any, Japan relies.
4. Moreover, the EU’s reliance on Article 10 is incorrect. In the first place, it is contradicted

¹ 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, *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. 2.30.

² See Exhibit US-1 (emphasis added).

by the text of the DSU. Article 10 does not apply to an arbitration under Article 22. Article 10.1 makes clear that this article serves to ensure that the “interests of . . . other Members under a covered agreement at issue in the dispute shall be fully taken into account *during the panel process*” (emphasis added). Article 10 also refers to “a substantial interest in a matter *before a panel*” (Article 10.2, first sentence), “an opportunity to be heard *by the panel*” (Article 10.2, first sentence), “an opportunity . . . to make written submission *to the panel*” (Article 10.2, first sentence), “*the panel report*” (Article 10.2, second sentence), third parties receiving “submissions of the parties to the dispute to the first meeting *of the panel*” (Article 10.3), and “*a panel proceeding*” (Article 10.4). Nowhere, however, does the text of Article 10 refer to an arbitration under Article 22, much less confer any right in such an arbitration.³

5. It would seem obvious that an Article 22.6 arbitration is not a panel proceeding. It is apparent, for instance, that the DSB neither establishes Article 22.6 arbitrators,⁴ nor does it adopt arbitrators’ decisions.⁵ It would therefore seem obvious that Article 10 does not apply to arbitrations.

6. Indeed, from the beginning of WTO dispute settlement until this week’s organizational meeting, the United States is not aware of any Member – including the EU – having ever asserted that there is a DSU right to participate as a third party in an Article 22.6 arbitration. The EU’s previous position was that an arbitrator had the discretion to allow third party participation, not that the DSU granted such rights. In its request to join the *Gambling* arbitration, for example, the EC, after acknowledging the absence of provisions for third party status in Article 22, asked that the EC “be accorded the status of a third party” at the arbitrator’s “discretion.”⁶ This unbroken history of Members not assuming an automatic right to claim third party status in Article 22.6 arbitrations pursuant to Article 10 of the DSU (but, instead, having to seek such or analogous status from the Arbitrator) confirms the textual analysis set out above.⁷

7. Where the DSU allows for a WTO Member to participate as a third party as of right, the

³ Nor does the text of Article 22 make any reference to third party rights under Article 10. Where the reservation of third party rights under Article 10 is relevant for another proceeding, the DSU is explicit, specifically in Article 17.4.

⁴ Contrast Article 22.6 (“if the Member concerned objects to the level of suspension proposed . . . the matter *shall be referred* to arbitration”) with Article 6 on the “Establishment of Panels” (emphasis added).

⁵ Contrast Article 22.7 (“The DSB shall be *informed* promptly of the *decision* of the arbitrator”) to Article 16 on the “Adoption of Panel Reports” (emphasis added).

⁶ See Exhibit US-2.

⁷ Furthermore, this understanding is reflected in the fact that, unlike the situation for panels, the DSB chair does not at a DSB meeting invite Members to register their interest in an Article 22.6 arbitration. Nor did the DSB chair do so at the February 18, 2010, DSB meeting.

DSU contains explicit provisions to that effect. Those provisions are Articles 10.2 and 17.4 of the DSU which apply to panels and Appellate Body proceedings respectively. In contrast, Article 22.6 of the DSU contains no provisions for third party participation.⁸ Consequently, the DSU does not provide for a Member in Japan’s position to participate in this arbitration by notifying the DSB of its supposed interest in the arbitration.

8. We recall that at the organizational meeting the EU made reference to Article 1.1 of the DSU, seeming to imply that Article 1.1 erased any differences between the particular types of proceedings under the DSU and any differences between the particular terms used in the DSU to describe those proceedings. This seemed to be an entirely novel reading of this provision, and one that was less than clear to the United States. Accordingly, the United States will address this argument once it receives the EU’s written comments, assuming the EU continues to advance this reading.

9. In conclusion, Japan’s communication to the DSB chair has not placed the issue of third party participation in this arbitration before the Arbitrator. Nor does Article 10 of the DSU, which the EU speculates is a possible basis for Japan’s communication to the DSB, provide for any right to participate in an arbitration under DSU Article 22.6. The United States therefore does not understand there to be any basis for the Arbitrator to amend the Working Procedures to provide for Japan to participate in this arbitration as a third party.

⁸ On this basis, several Article 22.6 arbitrators have refused third party participation. See, *EC Bananas (Article 22.6)*, 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; *U.S. Gambling (Article 22.6)*, para. 2.31.