

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

**RECOURSE TO ARTICLE 22.6 OF THE DSU
BY THE UNITED STATES**

(DS322)

Comments of the United States on Responses to Questions for Third Parties

November 2, 2010

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59. (European Union and Mexico) Please explain how the text of Article 22 of the DSU, read in its context and in the light of the treaty's object and purpose, may provide useful guidance in addressing the question of whether there may be suspension of concessions for nullification or impairment arising after the end of the RPT but before the date of the DSB's authorization to suspend concessions.

1. The U.S. response to Question 25 addresses the issues covered in the EU and Mexico's responses to Question 59. The United States has reviewed Japan's response to Question 25 and will provide further comments regarding the issues raised by Question 59 in our comments on Japan's response.

60. (European Union and Mexico) In paragraph 78 of its written submission, the United States argues that:

"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."

In response, Japan contends that:

"The United States offers no explanation as to why the term 'level' has any *temporal* significance whatsoever, much less why it means that suspension of concessions must be limited to amounts accruing from the time of the arbitration forward, rather than include amounts associated with N/I accruing after the end of the RPT. The relevant definition of 'level' is: 'A position (on a real or imaginary scale) in respect of amount, intensity, extent, etc.; a relative height, amount, or value'. Thus, 'level' simply refers to the 'amount' or 'value' of N/I and suspension of concessions, and has no bearing whatsoever on the time period over which N/I and suspension of concessions are to be assessed." (Footnote omitted.)

Please explain whether the use of the word "level" in Article 22.4 of the DSU supports the United States' argument that there may be no suspension of concessions for past nullification or impairment.

2. The U.S. response to Questions 25 and 26 addresses the issues covered in the EU and Mexico's responses to Question 60. The United States has reviewed Japan's response to Question 25 and will provide further comments regarding the issues raised by Question 60 in our comments on Japan's response.

61. (European Union and Mexico) In paragraph 9 of its response to question 1 from the arbitrator, the United States argues that:

"[T]he correct level of suspension in this dispute should be forward-looking. In particular, Article 22.4 of the DSU provides that the 'level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment.' (Emphasis added.) Similarly, Article 22.7 of the DSU provides that the Arbitrator 'shall determine whether the level of such suspension is equivalent to the level of nullification or impairment.' (Emphasis added.) In neither case does the DSU provide for a determination a level of suspension that *would have been* equivalent to the level of nullification or impairment that *had been caused* by the measures." (Original emphasis.)

Please explain whether the use of the tense "shall be" and "is" in Article 22.7 of the DSU supports the United States' argument that there may be no suspension of concessions for past nullification or impairment.

3. The U.S. response to Question 25 addresses the issues covered in the EU and Mexico's responses to Question 61. The United States has reviewed Japan's response to Question 25 and will provide further comments regarding the issues raised by Question 61 in our comments on Japan's response.

62. (European Union and Mexico) Can you point to any supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, which may provide useful guidance in addressing the question of whether there may be suspension of concessions for nullification or impairment arising after the end of the RPT but before the date of the DSB's authorization to suspend concessions.

4. The U.S. response to Question 25 addresses the issues covered in the EU and Mexico's responses to Question 62. The United States has reviewed Japan's response to Questions 25 and 28 and will provide further comments regarding the issues raised by Question 62 in our comments on Japan's response.

63. (Mexico) Mexico has argued (paragraph 7 of Mexico's third-party submission) that:

"The critical question before [this arbitrator] is whether a Member seeking the authorization of countermeasures is entitled to a remedy for *all* actions taken inconsistent with the DSB's recommendations and rulings after the expiry of the RPT."

In the Article 22.6 arbitration on *US – Upland Cotton*, the arbitrator decided that there was no legal basis for Brazil to impose one-time countermeasures with respect to Step 2 payments made by the United States after the expiry of the RPT, because there was no indication of continued non-compliance by the United States. Does this decision suggest that a Member seeking authorization to impose countermeasures is *not necessarily* entitled to a remedy for *all* actions taken inconsistent with the DSB's recommendations and rulings after the expiry of the RPT?

5. The U.S. response to Questions 24 and 25 addresses the issues covered in Mexico's response to Question 63. The United States has reviewed Japan's response to Questions 24 and 25 and will provide further comments regarding the issues raised by Question 63 in our comments on Japan's response.

64. (European Union) In its third party submission, the European Union states that "it is appropriate to measure nullification or impairment arising *at least* since the end of the reasonable period of time". (European Union third party submission, paragraph 7). Does this imply that, in the European Union's view, the relevant date may not be the RPT, but some other point in the dispute settlement process? Please elaborate.

6. The United States notes that in its response, the European Union stated that, "this is not a matter in dispute between the Parties, nor one that needs to be considered by this Arbitration Panel for the purposes of settling the matter in dispute before it," and that the European Union "refrains at this time from adding to what it has already submitted." Accordingly, the United States has no further comment regarding the European Union's response other than to note that, as previously discussed,¹ no prior Arbitrator has interpreted the DSU as providing the Arbitrator with a range of options to choose from in determining the appropriate date for measuring the level of nullification or impairment.

¹ See, e.g., U.S. Oral Statement at para. 41.