United States – Measures Relating to Zeroing and Sunset Reviews: Recourse to Arbitration by the United States under Article 22.6 of the DSU

(WT/DS322)

Comments by the United States on the Requests of the EU and Mexico for Third Party Participation in the Arbitration

June 15, 2010

1. Pursuant to the communication from the Arbitrator dated June 8, 2010, and the decision by the Arbitrator at the organizational meeting to extend the time within which the parties should file any comments until June 15, the United States is pleased to provide the following comments on the requests of the European Union (EU) and Mexico to participate in the arbitration as third parties.

2. On April 26, 2010, well over two years after the United States referred this matter to arbitration, the European Union "notified" the Arbitrator that "[p]ursuant to Article 10.2 of the DSU" the EU has "a substantial interest in the matter before the Arbitration Panel" and so "has the right to be heard by the Panel."[1] The EU also requested, either "in addition and/or in the alternative," that the Arbitrator exercise its discretion and permit the EU to participate as a third party.[2] On May 27, 2010, Mexico sent a letter to the Arbitrator requesting that the Arbitrator exercise its discretion and permit Mexico to participate as a third party. Mexico did not assert a right under Article 10 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") to participate as a third party.

3. The United States objects to the EU's assertion of any rights under Article 10.2 of the DSU. The United States also objects to the requests of the EU and Mexico to permit them to participate in these proceedings as third parties. In these comments, the United States explains the bases for its objections:

- In Section I, the United States explains that the EU's assertion of third party status pursuant to Article 10 of the DSU is legally erroneous. The EU bases much of its argument on DSU Article 1.1, but its interpretation of DSU Article 1.1 is incorrect and irrelevant. The EU also seeks to erase the distinction between panel proceedings and arbitrations, but Article 10 by its express terms only applies to panel proceedings while Articles 22.6 and 22.7 only refer to arbitrations.

- In Section II, the United States explains why the requests of the EU and Mexico for third-party participation at the Arbitrator's discretion should also be rejected.

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[1] EU Request for Third Party Procedures, para. 1.

[2] EU Request for Third Party Procedures, para. 2.

Third-party participation would require extraordinary circumstances not present here. The EU's and Mexico's requests focus on the *EC – Hormones* arbitrations, but they ignore the multiple unique elements of the *Hormones* arbitrations that are not present in the current arbitration. The interests of the EU and Mexico in this arbitration, moreover, are insufficient to justify third-party participation.

- Finally, in Section III, the United States explains that, even aside from the fact that their requests should be rejected, the EU and Mexico are asking for a level of participation that is unprecedented and would raise substantial systemic concerns. The proposals ignore the very real burdens that would be imposed on the United States and the diversion of time and resources that would be created in what is supposed to be a focused and time-limited proceeding.

I. The EU's Assertion of Third Party Status Pursuant to Article 10 of the DSU Is Legally Erroneous and Should be Rejected

4. 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."[3] Nevertheless, the EU argues that third party participation in arbitrations should occur as a matter of right. To make this argument, the EU has looked to Article 10 of the DSU. This article, however, by its terms applies only to panel proceedings. In order to argue that this provision also applies in the case of an Article 22.6 arbitration, the EU asserts 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]

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[3] EU Request for Third Party Procedures, para. 9.

[4] If this is a bit jarring, it is because, until the EU's most recent efforts in the *Zeroing (EC)* arbitration, no Member, including the EU, had ever 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] Both Japan and Mexico would seem to agree. In its April 23, 2010 letter to the Arbitrator, Japan made a request for "the Arbitrator to resume the arbitration." Nowhere in these proceedings has Japan referred to the Arbitrator as an "arbitration Panel" or to the arbitration as a "panel proceeding." Similarly, nowhere in its May 27, 2010 letter to the Arbitrator does Mexico refer to the Arbitrator or these proceedings as anything other than "Arbitrator" or "arbitration."

5. Indeed, the United States notes that, in its April 26, 2010, request, the EU failed to mention that this is not the first time it has asserted that there are third party rights in arbitration under DSU Article 10. It submitted the same arguments – nearly word for word – in the *Zeroing (EC)* Article 22.6 arbitration[6] as it does here. The EU's assertion of Article 10 rights was rejected in that arbitration, and for the following reasons, the Arbitrator should also reject that assertion.[7]

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

6. 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 Marrakesh Agreement contains a separate jurisdictional article.[8] 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,[9] then that sentence would have read: "taken in isolation or in combination with any other *provision of any other* covered agreement."

7. 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

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[6] *United States – Laws, Regulations and Methodology for Calculating Dumping Margins, Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS294 ("Zeroing (EC)").

[7] Moreover, Japan is not supporting the EU's position either; at the organizational meeting held on June 11, Japan said it took no position on the EU's assertion of rights under Article 10.2 of the DSU.

[8] 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").

[9] 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?

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.[10] 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.[11]

8. The EU's reading of Article 1.1 is considerably more convoluted. As the United States understands it, the EU is arguing that, in order to "ensure an integrated and coherent system of dispute settlement,"[12] 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."[13] Furthermore, the EU says, Article 1.1 applies to this arbitration because "the present proceedings concern the settlement of disputes between the United States and Japan concerning their respective rights and obligations,"[14] 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.[15]

9. Up to this point, though reading Article 1.1 incorrectly,[16] 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

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[10] 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).

[11] See EU Request for Third Party Procedures, footnote 6.

[12] EU Request for Third Party Procedures, para. 30.

[13] EU Request for Third Party Procedures, para. 9. As noted above, that reading of the last sentence of Article 1.1 is incorrect.

[14] EU Request for Third Party Procedures, para. 9.

[15] EU Request for Third Party Procedures, para. 26.

[16] 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.

proceeding is not in dispute. What remains unexplained is why this means that Article 10.2 specifically would apply to this arbitration proceeding.

10. The closest the EU comes to providing such an explanation is in paragraphs 9 and 10 of its request 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.

11. 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.

12. 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."[17] 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.

13. 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.

14. 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 8 and 9 of its request, Article 10.2 would apply to Article 22.6 so long as there was no "conflict" between the two. But, even

[17] EU Request for Third Party Procedures, para. 23.

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.[18] This perhaps explains why the EU spends the majority of its lengthy request 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. DSU Article 10.2 Does Not Apply to Article 22.6

15. 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 rules and procedures and the provisions of Article 22."[19] It would seem clear, however, that Article 10 only applies to panel proceedings while Articles 22.6 and 22.7 only refer to arbitrations.[20] Accordingly, the EU now seeks to erase the distinction between panel proceedings and arbitrations.[21]

16. As the EU acknowledges, the DSU provisions of immediate relevance to the Arbitrator are Articles 22.6 and 22.7.[22] 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

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[18] 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 request, 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 Request for Third Party Procedures, para. 30.

[19] EU Request for Third Party Procedures, para. 9.

[20] For instance, 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*." 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*s 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). (All emphases added).

[21] Up until the recent *Zeroing (EC)* arbitration, this had not been the position of the EU. 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.

[22] EU Request for Third Party Procedures, paras. 6 and 9.

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.

17. 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.

18. 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, namely "primary" and "alternative descriptor[s]."[23] 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.

19. Perhaps more puzzling, however, is what the EU expects its newly-created distinction between "descriptors" to accomplish. 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."[24] 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.

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[23] EU Request for Third Party Procedures, paras. 13, 14, and 19.

[24] See, for example, EU Request for Third Party Procedures, para. 13.

20. 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.[25] 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;[26] again, that is not the case for arbitrations, and it did not occur here.

21. 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.[27] In contrast, no DSB action is required to refer the matter to arbitration; the matter is referred by the objection of the Member concerned under Article 22.6.[28]

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[25] DSU, Art. 4.3.

[26] DSU, Art. 4.7.

[27] DSU, Art. 6.1.

[28] The United States notes that Japan agrees with this position and specifically stated that no DSB action was required to establish the Arbitrator under Article 22.6. 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, 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 EU 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 *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration under DSU Article 22.6 and SCM*

22. 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 "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]

23. Article 10 is, of course, also relevant. Article 10 provides third party rights at the panel stage. But, here again, third party access is provided for at the panel stage, but not at the arbitral stage.

24. 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 request, 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."[34] There are numerous problems with such a haphazard approach to interpreting the DSU.

25. Most importantly for the present arbitration, 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. This arbitration was suspended on June 6, 2008, more than 12 months before Japan requested its resumption on April 23, 2010. Accordingly, under the EU's theory, the Arbitrator's authority shall be deemed to have lapsed. Indeed, the EU believes that Article

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Agreement Article 4.11, para. 6.

[29] DSU, Art. 15.

[30] DSU, Art. 16.

[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] EU Request for Third Party Procedures, para. 21.

12.12 already does apply to Article 22.6 arbitrations.[35] The result of accepting that Article 10 applies to this so-called "arbitration Panel" would be that this "arbitration Panel" would cease to exist.

26. 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.

27. Near the end of its request, 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.[36] 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.

28. 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).[37] 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.

29. 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

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[35] EU Request for Third Party Procedures, para. 20.

[36] EU Request for Third Party Procedures, paras. 27, 28.

[37] 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 Request for Third Party Procedures, para. 23.

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.

30. 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.

31. 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.[38]

32. 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

33. 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. Accordingly, the United States requests the Arbitrator to reject the EU's assertion of third-party rights under DSU Article 10.2 in this arbitration.

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[38] Similarly, the DSU does not provide for third party rights in arbitrations under Article 21.3(c) of the DSU or Article 25 of the DSU. With respect to the latter type of arbitration, the DSU provides that the parties to the arbitration may agree to permit the participation of other Members, but absent such agreement, other Members may not participate in the arbitration (DSU Article 25.3). In the present proceeding, of course, there is no agreement on the participation of the EU or Mexico.

II. The Requests of the EU and Mexico for Third Party Participation at the Arbitrator's Discretion Should Also Be Rejected

34. The EU and Mexico also request the Arbitrator to exercise discretion to allow them to participate as third parties, asserting that (1) granting such participation would be consistent with the arbitral awards in the *EC – Hormones* disputes, (2) their interests (though different) may be affected by the outcome of this arbitration, and (3) granting their requests would not prejudice the United States or delay the arbitration. These arguments are incorrect and do not justify third party participation by the EU and Mexico in this arbitration.

35. As both the EU and Mexico acknowledge, "[t]he DSU does not set forth rules that explicitly address ... the right of an arbitrator to allow third party participation in an Article 22.6 arbitration."[39] The DSU is not silent, however, with respect to the range of third party rights provided at other stages of dispute settlement.

- Article 10 authorizes third party participation in panel proceedings.
- Article 17.4 limits third party participation in appellate proceedings to those Members who had reserved third party rights at the panel stage.
- Article 4.11 creates the possibility of Members with a substantial trade interest in a matter subject to consultations to participate in those consultations if requested under Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") (but not consultations requested under GATT 1994 Article XXIII), though only if the responding Member agrees that the claim of substantial interest is well-founded.
- Article 25.3 provides for an opportunity for other Members to participate in an arbitration, but only by agreement of the parties.

In short, where the drafters of the DSU intended to provide for third party participation, they did so explicitly and with precision.

36. Furthermore, in so doing, the drafters provided notice to all Members of the opportunities for such participation and the conditions under which that participation would be possible. Had the drafters intended for third party participation to be available under other circumstances (such as arbitrations under DSU Article 22.6), they would have presumably negotiated a means to notify Members of that possibility as well as a basis for determining which Members would be able to participate. By contrast, the *ad hoc* approach advocated by the EU and Mexico presents

[39] EU Request for Third Party Procedures, para. 42; Mexico Request for Third Party Procedures, para. 3.

serious concerns, including the lack of notice to, and potential for discrimination among, WTO Members.

A. Third Party Participation Would Require Extraordinary Circumstances of the Kind Present in the *EC – Hormones* Arbitrations and Not Present Here

37. In this light, if third party participation is to be granted in Article 22.6 arbitrations, it should only be in extraordinary circumstances. Third party participation has only been requested in five of the 21 arbitrations to date, and arbitrators have rejected those requests in all but two situations.[40] Furthermore, in those three arbitrations in which the arbitrator rejected the request of a Member for permission to participate as a third party, each of the arbitrators noted the absence of provisions for third party participation in arbitrations in the DSU and indicated that they would not grant the request absent a showing that the Member's rights would be adversely affected by the arbitrator's determination.[41]

38. The EU's and Mexico's requests focus on the *EC – Hormones* arbitrations, but they ignore the multiple unique elements of the *Hormones* arbitrations and the significant differences between those arbitrations and the current one.

39. *Hormones* was a situation where the two complaining parties:

(a) were co-complainants in the underlying disputes regarding the exact same EC measures;

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[40] See, Arbitrator Award, *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, circulated 9 April 1999 ("*EC – Bananas (Article 22.6) (US)*"), para. 2.8; Arbitrator Award, *Brazil – Exporting Financing Programme for Aircraft – Recourse to Arbitration by Brazil Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB, circulated 28 August 2000 ("*Brazil – Aircraft (Article 22.6)*"), para. 2.5; Arbitrator Award, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration under Article 22.6 of the DSU*, WT/DS285/ARB, circulated 21 December 2007 ("*U.S. – Gambling (Article 22.6)*"), para. 2.31; *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration under Article 22.6 of the DSU*, WT/DS26/ARB, circulated 12 July 1999 ("*EC – Hormones (Article 22.6)*"), para. 7; *European Communities – Measures Concerning Meat and Meat Products (Hormones)* (Canada) – *Recourse to Arbitration under Article 22.6 of the DSU*, WT/DS48/ARB, circulated 12 July 1999, para. 7; *Zeroing (EC) (Article 22.6)*.

[41] In *EC – Bananas*, the arbitrator rejected Ecuador's request for third party rights "in light of the absence of provisions for third-party status under Article 22 of the DSU" (para. 2.8). Australia's request for third party rights in *Brazil – Aircraft* was rejected due to "the fact that there is no provision in the DSU as regards third party status under Article 22" (para. 2.5). Similarly, the EC's request to join the *U.S. – Gambling* arbitration was rejected due to "the absence of a specific provision in the DSU on third-party rights in Article 22.6 arbitral proceedings," as well as the fact that there was "no agreement among the parties as to whether the EC request should be accepted" (para. 2.31).

(b) had obtained identical recommendations and rulings in each dispute;[42]
(c) had each exercised their own, independent rights under Article 22 of the DSU; and
(d) had identical timetables in the arbitrations, including meetings with the arbitrators on the same day.[43]

40. In *Hormones*, the arbitrator relied first on the fact that "*[a] determination in one proceeding may thus be decisive for the determination in the other*" (italics added). In particular, the arbitrator's determination in each proceeding would be "based on a tariff quota that allegedly needs to be shared between Canada and the US."[44] This alone distinguishes *Hormones* from the current situation. But in addition, the arbitrator in *Hormones* cited to the fact that:

(a) the product scope and relevant trade barriers are the same in both proceedings; and
(b) both arbitrators were composed of the same three individuals.[45]

41. None of these elements is present in the current arbitration proceeding. In particular, a determination in one proceeding will not be decisive for the determination in the other. There is no tariff quota or similar measure at stake that would need to be shared between Japan, the EU, and Mexico. Nor is there anything in the current arbitration that will be decisive for the outcome of the arbitration dealing with the EU's request, or an arbitration, if one ever takes place, in either Mexico's dispute or the EU's second dispute (*Zeroing II (EC)*).

42. The current arbitration has not foreclosed the EU from putting forward the methodology it prefers – it did so already on March 11, 2010. The current arbitration has not foreclosed the EU from making the arguments it chooses to as to the level of nullification and impairment to the

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[42] Indeed, by the time the *Hormones* disputes had reached the arbitrators, the Appellate Body had already described the situation in the original proceedings as being that "neither Canada nor the United States were ordinary third parties in each other's complaint." Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 151.

[43] Ultimately, *Hormones* was less a situation of third party participation and more a practical means for the arbitrators to align in a common-sense way two arbitrations which had progressed as a single proceeding. Furthermore, in light of subsequent arbitrations where the proceedings of co-complainants were combined without describing it as third party participation, it is not clear that in similar circumstances to *Hormones* an arbitrator now would provide third party participation rather than simply combining the proceedings. See, for example, Arbitrator Award, *United States – Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by the European Communities); Recourse to Arbitration under Article 22.6 of the DSU*, WT/DS217/ARB/EEC, circulated 31 August 2004, paras. 1.13-1.16.

[44] *EC – Hormones (Article 22.6)*, para. 7.

[45] *EC – Hormones (Article 22.6)*, para. 7.

EU; again, it has already done so. There is no basis for the EU to think this arbitration will have *any* effect on its arbitration in *Zeroing (EC)* as that arbitration is scheduled to be completed well before the Arbitrator has even had its meeting with the parties in this dispute.

43. Similarly, it is not clear what effect Mexico believes this arbitration would have on its zeroing dispute with the United States. At this point, the existence of an arbitration in Mexico's dispute is entirely speculative. While Mexico requested consultations with the United States in August 2009, no compliance panel has been established, and Mexico has yet to make a request for such a panel. Any number of intervening events could disprove Mexico's claim that that dispute "will proceed to Arbitration under 22.6." Nor would it be appropriate for the Arbitrator here to prejudge the issue of compliance in, or to predict the course of, a distinct dispute. The same is true for *Zeroing II (EC)* where no compliance panel or arbitration has yet been requested.

44. Even if at some point in the future there were to be an Article 22.6 arbitration in Mexico's dispute (or the EU's second dispute), the current arbitration would not foreclose Mexico (or the EU) from putting forward the methodology it prefers and to make the arguments it chooses as to the level of nullification and impairment to Mexico (or the EU). Moreover, the United States would be quite surprised if Mexico (or the EU) were to say that the outcome of this proceeding would be dispositive of their respective requests, or if either were to say it was constrained by the outcome of this arbitration from someday proposing a different methodology or approach in a subsequent arbitration.[46]

45. Indeed, the United States has particular difficulty with the EU's suggestion that any one arbitration is "decisive" for a future one. If the EU in fact holds that view, it would seem to follow that the current, almost complete arbitration in *Zeroing (EC)* would be decisive for this one, and not the other way around. The United States is doubtful that Japan holds that view.

46. There are other differences between the present arbitration and the *Hormones* arbitrations the EU and Mexico rely on :

(a) The product scope is not the same in both proceedings; each proceeding deals with its own product scope.
(b) The two arbitrators are not composed of the same three individuals.
(c) Neither the EU nor Mexico were co-complainants with Japan in the underlying disputes.
(d) The EU, Mexico, and Japan obtained different recommendations and rulings in each dispute.
(e) The EU and Japan do not have identical timetables in the arbitrations, including

[46] For example, although Japan argued at the organizational meeting that the same type of counterfactual situation would be applicable to the EU or Mexico in a subsequent arbitration, the EU – in the pending arbitration in *Zeroing (EU)* – has taken the position that the arbitrator does not need to use a counterfactual analysis.

meetings with the arbitrator on the same day. To the contrary, the arbitration in the EU's dispute is well ahead of this arbitration and there is no arbitration in Mexico's dispute or the EU's second dispute.

47. In short, there are significant differences between the *Hormones* arbitrations and the current proceeding.

B. The Interests of the EU and Mexico in this Arbitration Are Insufficient to Justify Third Party Participation

48. Both the EU and Mexico state that the standard applied by the *Hormones* arbitrators was simply "whether the applicant third party Member's interest 'may be affected.'"[47] This does not reflect the standard used by the *Hormones* arbitrators. In *Hormones*, the arbitrators described the situation as one where the determination in one proceeding "may thus be *decisive* for the determination in the other."[48]

49. The actual, higher standard used in *Hormones* underlines that third party participation in Article 22.6 arbitrations is to be an extraordinary event. This recognizes that WTO dispute settlement is, above all, to secure a positive solution to a dispute between "the contracting parties concerned."[49] This is particularly pertinent in the Article 22 context which concerns suspension by "the Member invoking the dispute settlement procedures" of "the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member."[50] The standard of "may be ... decisive" achieves that goal better than the vague standard of "may be affected." The EU and Mexico have not attempted to show that the determination in this arbitration "may be ... decisive" in either of their disputes.

50. The EU and Mexico assert that their interests "may be affected" because "[i]n new arbitrations, subsequent arbitration panels have made frequent citations to findings made in

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[47] EU Request for Third Party Procedures, para. 46; Mexico Request for Third Party Procedures, para. 7. At paragraph 10, Mexico also asserts that this was the standard used by the arbitrator in *Zeroing (EC)*. As the arbitrator in that dispute has not issued its award or given any explanation for Japan's participation as a third party, it is not yet possible to know the basis for that arbitrator's actions. The United States opposed the participation of Japan as a third party in that arbitration and continues to believe that Japan's interests did not justify its participation in that proceeding.

[48] *EC – Hormones (Article 22.6)*, para. 7 (emphasis added).

[49] GATT 1994, Art. XXIII.

[50] DSU, Art. 3.7.

earlier arbitration panels."[51] This is an odd assertion coming from the EU since the arbitration proceeding in the *Zeroing (EC)* dispute is not a "new arbitration." In fact, at this point an award in that arbitration is expected in a matter of weeks, well before the Arbitrator in this dispute will issue its award. Thus, while it is true that subsequent arbitrators "have made frequent citations to findings made in earlier" arbitration proceedings, what is not clear is how preceding arbitrators are to make citations to findings that have not yet been made by later arbitrators.[52]

51. Mexico has also asserted that its interest "may be affected" because subsequent arbitrators have frequently cited to previous arbitrators' findings.[53] It is of course true that not just arbitrators, but every WTO dispute settlement adjudicator, looks to previous findings to see if they find them persuasive. And every Member, as a current or potential WTO disputant, may have an interest in how those issues are resolved. Nevertheless, the drafters of the DSU still saw fit to limit third party participation in those proceedings and to make no provision for Members to participate in arbitrations as third parties. Neither the EU nor Mexico has pointed to special circumstances in this arbitration that would be sufficient to warrant its participation as a third party.[54]

52. The EU and Mexico also both seek to argue that their respective situations – though different from one another – are similar to those of the United States and Canada in *Hormones*. They assert that the Arbitrator's decision "could have a significant bearing" on the arbitration in

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[51] EU Request for Third Party Procedures, paras. 49-50; Mexico Request for Third Party Procedures, paras. 9, 11.

[52] Moreover, the EU's and Mexico's argument that arbitrators' findings have taken on "a systemic importance" is overstated since arbitrators frequently take different approaches from one another. For instance, compare the interpretations of the terms "appropriate countermeasures" in Articles 4.10 and 4.11 of the *SCM Agreement* in *U.S. – FSC (Articles 22.6/4.11)* and *U.S. – Upland Cotton (Articles 22.6/4.11)* (Arbitrator Award, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB, circulated 30 August 2002, paras. 5.1-5.62; Arbitrator Award, *United States – Subsidies on Upland Cotton – Recourse to Arbitration under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS267/ARB/1, circulated 31 August 2009, paras. 4.27-4.117).

[53] Mexico Request for Third Party Procedures, para. 11.

[54] The EU and Mexico also argue for the need for consistency "[g]iven the numerous WTO zeroing disputes," citing to seven other zeroing disputes (EU Request for Third Party Procedures, para. 53; Mexico Request for Third Party Procedures, para. 15). The EU and Mexico misrepresent the situation. In DS264, the parties notified the DSB of a mutually agreed solution to that dispute on October 12, 2006 (WT/DS264/29). In DS335 and DS343, the United States notified the DSB that it had implemented the recommendations and rulings of the DSB with respect to zeroing, and neither Ecuador nor Thailand, respectively, challenged that assessment (WT/DSB/M/238, p. 10; WT/DSB/M/267, p. 15). There have been no further proceedings in either of those disputes. A panel has yet to be composed in DS382. And with respect to DS383, the parties notified the DSB of a procedural agreement in that dispute that should lead to the full resolution of that dispute (WT/DS383/4). DS294 and DS322 are the only zeroing disputes with an Article 22.2 request at issue.

their respective zeroing disputes,[55] and that there are "substantial overlaps between the issues."[56] The EU does not mention, however, that this dispute covers different measures than those in the *Zeroing (EC)*, *Zeroing (Mexico)* and *Zeroing II (EC)* disputes; nor is the scope of the DSB's recommendations and rulings the same in any of these disputes. Thus, any participation by the EU or Mexico would likely focus on the recommendations and rulings in their disputes and could well confuse the actual issues in this arbitration.

53. The purpose of each proceeding is different. In this arbitration, the issue is the level of nullification or impairment to Japan, while in the pending EU arbitration or the hypothetical Mexican or second EU arbitration, the issue is (or would be) the level of nullification or impairment to the EU or Mexico. Neither the EU nor Mexico is in a position to speak to the level of nullification or impairment to Japan.

54. What the EU and Mexico describe as "substantial overlaps between the issues" – similar measures, some violations found under the same covered agreements – not only fails to rise to the unique situation in *Hormones*, but also has less similarities than the arbitrations in the dispute brought by the United States and Ecuador in *Bananas*. In the *Bananas* dispute, the complainants challenged the exact same measures,[57] and obtained the exact same recommendations and rulings.[58] Even in those proceedings, Ecuador's request to participate as a third party in the U.S. – EC arbitration was rejected since the arbitrator did "not believe that Ecuador's rights would be affected by this proceeding."[59]

55. For the reasons above, the United States requests that the Arbitrator reject the requests of the EU and Mexico to participate in this arbitration as third parties.

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[55] EU Request for Third Party Procedures, para. 53; Mexico Request for Third Party Procedures, para. 15.

[56] EU Request for Third Party Procedures, paras. 50, 51; Mexico Request for Third Party Procedures, paras. 12, 13.

[57] See the Panel Request of Ecuador, Guatemala, Honduras, Mexico and the United States, WT/DS27/6.

[58] See Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, circulated 22 May 1997, paras. 7.399, 9.1; Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU, circulated 22 May 1997, paras. 7.399, 9.1; Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, circulated 9 September 1997, para. 255.

[59] *EC – Bananas (Article 22.6) (US)*, para. 2.8.

III. The Particular Third-Party Procedures Requested by the EU and Mexico Should Be Rejected

56. Even aside from the fact that their requests should be rejected for the reasons stated, the United States notes that the EU and Mexico are asking for a level of participation that is unprecedented and would raise substantial systemic concerns. Even in *Hormones*, on which the EU and Mexico rely so heavily, the only third party access granted was the ability "to attend both arbitration hearings, to make a statement at the end of each hearing and to receive a copy of the written submissions made in both proceedings."[60]

57. In contrast to these limited third party procedures, what the EU and Mexico are seeking as "third party participation" is greater than what they would receive before a panel, and in many ways is a more advantageous position than provided to the parties themselves.[61]

58. First, the EU and Mexico request the opportunity to "file a written submission addressing ... Japan's and the United States' written submission." The draft working procedures do not provide the United States an opportunity to comment on Japan's submission before the meeting with the Arbitrator.

59. In addition, the EU and Mexico seek the opportunity to comment in writing on the written responses of Japan and the United States to the Arbitrator's questions, to the extent that such an opportunity is afforded to Japan and the United States.[62] This scenario would allow the EU and Mexico to provide their comments on issues raised in the Arbitrator's questions to the parties without providing an opportunity for the United States to respond to their comments on those issues.

60. The EU and Mexico's requests would also have the ironic result that where the DSU does *not* provide for third party participation (Article 22.6 arbitrations), a Member participating as a third party would have more rights than where the DSU *does* provide for third party participation (in panel proceedings). Such a result would not be appropriate and only serves to further highlight that if the negotiators of the DSU had intended third party participation in Article 22.6 arbitrations, they would have negotiated provisions on the means and extent of such participation.

61. Both the EU and Mexico claim that: "Authorizing [the European Union and Mexico] to

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[60] *EC – Hormones (U.S.) (Article 22.6)*, para. 7.

[61] EU Request for Third Party Procedures, para. 55; Mexico Request for Third Party Procedures, para. 17.

[62] EU Request for Third Party Procedures, paras. 55-57; Mexico Request for Third Party Procedures, paras. 17-19.

participate as a third party in the manner requested would not prejudice the United States, which would have ample opportunity to address the positions taken ... within the usual timeframes foreseen for an arbitration."[63] This is not accurate. There is not "ample opportunity" within the proposed timeframes to respond to arguments made by the EU and Mexico at the same time as the United States seeks to respond to Japan's submissions in what is already a very compressed proceeding. Nor would the United States have an opportunity to comment on the EU's and Mexico's methodologies, since neither will submit a methodology paper in this proceeding.

62. Any written submissions by the EU and/or Mexico would require that the parties be given an opportunity to comment in writing on those submissions, which would undoubtedly increase the burden on the parties and extend the time period of the arbitration. In addition, given that both the disputes of the EU and Mexico involve different measures and different recommendations and rulings, the United States would anticipate that participation by either the EU or Mexico may well add new issues not directly pertinent to this arbitration.

63. In fact, the experience of the United States in the *Zeroing (EC)* arbitration confirms this concern.

- There, in its oral statement at the meeting of the arbitrator, the EU requested that every paragraph of Japan's written submission (with the exception of the two paragraph introductory section and the one paragraph conclusion) be incorporated by reference into the EU's submissions – well after the EU had filed its written submission.

- Moreover, in its responses to the arbitrator's post-meeting questions, the EU incorporated several arguments that Japan made in its responses to the arbitrator's post-meeting questions. The United States did not have the ability to develop its responses to these arguments in the normal fashion.

- Moreover, this tactic meant that the United States effectively had to litigate against two Members, not just the one that had requested authorization to suspend concessions. The timing of the EU's incorporation of those arguments also imposed an additional burden on the United States.

- Furthermore, the EU's approach created unhelpful confusion about the relationship between the arguments that the EU elaborated in accordance with the timetable set out by the arbitrator, and those arguments that it later chose to incorporate by reference.

[63] EU Request for Third Party Procedures, para. 58; Mexico Request for Third Party Procedures, para. 18.

The requests of the EU and Mexico invite the Arbitrator to re-create those imbalances and disadvantages for the United States in this proceeding. The United States respectfully requests the Arbitrator to decline the invitation.

IV. Conclusion

64. As demonstrated above, there is no Article 10 right to third party participation in Article 22.6 arbitrations. Nor is there any provision for third party participation in Article 22. The absence in the DSU of any provision for third party participation in arbitrations demonstrates that third party participation is not envisaged in these proceedings, and the EU and Mexico have provided no reason to depart from the text. This arbitration concerns "the Member invoking the dispute settlement procedures" – Japan – and "the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member" – the United States.[64] The United States requests that the Arbitrator's working procedures reflect this and not provide for third party participation.

[64] DSU, Art. 3.7.