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

Comments of the United States on Japan's Request to Participate in the Arbitration

April 1, 2010

I. Introduction

1. Japan requests the Arbitrator to grant permission to Japan to participate in these proceedings as a third party, asserting that (1) granting such participation would be consistent with the arbitral awards in the *EC – Hormones* disputes, (2) Japan's interests may be affected by the outcome of this arbitration, and (3) granting Japan's request would not prejudice the United States or delay the arbitration. These arguments are incorrect and do not justify Japan's third party participation in this arbitration.

II. Procedural History

2. By a statement at the February 18, 2010 meeting of the Dispute Settlement Body ("DSB"), and again by a letter submitted to the chair of the DSB on February 26, 2010, Japan stated that it had "a substantial interest in the matter before the arbitration." In that letter, Japan also stated that it "wishes to participate in the arbitration as a third party." The Arbitrator invited the parties to comment on Japan's communication by March 11, 2010, and to comment on one another's comments by March 16, 2010. After receiving the views of the parties, on March 26, 2010, the Arbitrator informed the parties and Japan that Article 10 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) does not apply to this proceeding. It also invited Japan to express its interest in participating in the proceedings as a third party directly to the Arbitrator. By letter on March 30, 2010, Japan did so.

III. Japan Accepts that It Does Not Have a Right to Participate as a Third Party

3. As an initial matter, Japan is clear that it is making a request for the Arbitrator to exercise discretion to allow Japan to participate as a third party. Contrary to what the EU asserted in its earlier submissions on this matter, Japan is not claiming there is any right to third party participation in Article 22.6 arbitrations. Instead, Japan states that "[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."[1]

4. In fact, the DSU lays out a range of third party rights at the various 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

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[1] Japan's Letter, para. 3.

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. Where the drafters of the DSU intended to provide for third party participation, they did so explicitly.

IV. Third Party Participation Would Require Extraordinary Circumstances Not Present Here

5. In this light, if third party participation is to be granted in Article 22.6 arbitrations, it should only be in extraordinary circumstances. This, in fact, has been the practice of arbitrators to date. As Japan states, "a considerable number of arbitrations have now taken place under Article 22.6 of the DSU."[2] Third party participation has only been requested in four of those 20 arbitrations, however, and arbitrators have rejected all those requests but one.[3] 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 in the absence of a showing that the Member's rights would be adversely affected by the arbitrator's determination.

6. It is, of course, the single exception on which Japan's letter is focused. However, Japan ignores the multiple unique elements of the *Hormones* arbitrations and the significant differences between those arbitrations and the current one. Nor does Japan recognize the limited level of participation that was granted in those arbitrations.

7. *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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[2] Japan's Letter, para. 10.

[3] 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, 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, 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.

(b) had obtained identical recommendations and rulings in each dispute;[4]
(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.[5]

8. 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." 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."[6] 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.[7]

9. None of these elements is present in the current arbitration proceeding. In particular:

(a) A determination in one proceeding will not be decisive for the determination in the other.[8] There is no tariff quota or similar measure at stake that would need to be shared between Japan and the EU. There is nothing in the current arbitration that will be decisive for the outcome of the arbitration dealing with Japan's request. The current arbitration will not foreclose Japan from putting forward the methodology it prefers and to make the arguments it chooses as to the level of

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[4] 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.

[5] 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.

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

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

[8] Japan indicated in footnote 7 of its letter that it will be requesting the resumption of the Article 22.6 arbitration with respect to its dispute soon.

nullification and impairment to Japan. Indeed, the United States would be quite surprised if Japan were to say that the outcome of this proceeding would be dispositive of Japan's request or that Japan was constrained by the outcome of this arbitration from proposing a different methodology or approach in the arbitration reviewing Japan's request.

(b) The product scope and relevant trade barriers are not the same in both proceedings. Each proceeding deals with its own product scope and different measures. The antidumping measures at issue in the current arbitration are not the antidumping measures at issue in the arbitration over Japan's request. Indeed, the measures at issue in this proceeding do not apply to products from Japan.

(c) The two arbitrators are not composed of the same three individuals.

(d) Japan and the EU were not co-complainants in the underlying disputes, nor did those disputes regard the same U.S. measures.

(e) Japan and the EU obtained different recommendations and rulings in each dispute.

(f) Japan and the EU do not have identical timetables in the arbitrations, including meetings with the arbitrator on the same day.

10. In short, the only element in common with *Hormones* is that both Japan and the EU have each exercised their own, independent rights under Article 22 of the DSU. This is not enough to support Japan's request.

V. Japan's Interest in this Arbitration Is Insufficient to Justify Third Party Participation

11. Japan states that the standard applied by the *Hormones* arbitrators was simply "whether the applicant third party Member's interest 'may be affected.'"[9] This does not in fact 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."[10]

12. Japan seeks to argue that its situation is similar to that of the United States and Canada in one another's arbitrations in *Hormones*. It asserts that the Arbitrator's decision "could have a significant bearing" on the arbitration in Japan's case,[11] and that there are "substantial overlaps between the issues."[12] Japan does not mention, however, that the two disputes do not cover any

[9] Japan's Letter, para. 9.

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

[11] Japan's Letter, para. 14.

[12] Japan's Letter, paras. 11-12.

of the same measures and that the scope of the DSB's recommendations and rulings in the two disputes are different. Thus any participation by Japan would likely focus on the recommendations and rulings in its dispute and could well confuse the actual issues in this arbitration.[13]

13. The purpose of each proceeding is different. In one arbitration, the issue is the level of nullification and impairment to the EU, while in the other the issue is the level of nullification and impairment to Japan. Japan is not really in a position to speak to the level of nullification and impairment to the EU.

14. Japan also asserts that its interest "may be affected" because subsequent arbitrators have frequently cited to previous arbitrators' findings.[14] 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,[15] and Japan has not pointed to any special circumstances in this arbitration that would be sufficient to warrant its participation as a third party.[16]

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[13] The EU has already shown itself willing to mingle the two disputes by its extensive discussion of Japan's dispute in its Article 22.2 request (WT/DS294/35, p. 2). In paragraph 12 of its letter, Japan has done the same. This risks both prejudice to the United States and confusion for the Arbitrator.

[14] Japan's Letter, para. 10. Japan'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).

[15] This reflects that WTO dispute settlement is, above all, to secure a positive solution to a dispute between "the contracting parties concerned." (GATT, Art. XXIII). 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." (DSU, Art. 3.7).

[16] Japan also argues for the need for consistency in the DS294 and DS322 arbitrations "[g]iven the numerous WTO zeroing disputes," citing to seven other zeroing disputes (Japan's Letter, para. 14). Japan misrepresents 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

15. What Japan describes 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,[17] and obtained the exact same recommendations and rulings.[18] 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."[19]

16. For the reasons above, the United States requests that the Arbitrator reject Japans' request to participate in this arbitration as a third party.

VI. Third Party Procedures Requested by Japan are Unprecedented in Scope

17. Aside from the fact that Japan does not qualify as a third party in this proceeding, it is notable that Japan is also asking for a level of participation that is unprecedented and would raise substantial systemic concerns. Even in *Hormones* the only third party access granted (and thus the only third party procedures created in any Article 22.6 arbitration) 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."[20]

18. In contrast to these limited third party procedures, what Japan has requested as "third party participation" is greater than that which Japan would receive before a panel.[21] In many ways, Japan is seeking a more advantageous position than provided to the parties themselves. First, Japan has requested the opportunity to "file a written submission addressing ... the EU's and the United States' written submission." The United States recalls that its request to file a written submission addressing the EU's written submission was denied. In addition, Japan is

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request at issue.

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

[18] 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.

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

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

[21] See Japan's Letter, para. 16.

seeking the opportunity to comment in writing on the written responses of the EU and the United States to the Arbitrator's questions, to the extent that such an opportunity is afforded to the EU and the United States.[22] This scenario would allow Japan to provide its comments on issues raised in the Arbitrator's questions to the parties without providing an opportunity for the United States to comment on Japan's comments on those issues.

19. Japan claims that: "Authorizing Japan to 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 by both the EU and Japan within the usual timeframes foreseen for an arbitration."[23] This is not accurate. There is not "ample opportunity" within the current timeframe to respond to arguments made by Japan at the same time as the United States seeks to respond to EU arguments. Nor would the United States have an opportunity to comment on Japan's methodology, since Japan has not submitted a methodology paper in this proceeding.

20. Any written submission by Japan 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 Japan's dispute involves different measures and different recommendations and rulings, the United States would anticipate that Japan's participation may well add new issues not directly pertinent to this arbitration.

21. Returning to the third party procedures in the *Hormones* arbitratons, nearly all of what the United States and Canada were granted in each other's arbitrations is already available to Japan through the transparency arrangements the Arbitrator and the parties have made. Through an open meeting, Japan will be able to observe the arbitration hearing, and since both parties post their submissions on their respective website, Japan will have access to the written submissions as well.[24]

VII. Conclusion

22. The absence in the DSU of any provision for third party participation in arbitrations demonstrates that third party participation is not envisaged. Indeed, with one very unique exception, third party access has never been granted in an Article 22.6 arbitration. The United States objects to Japan's participation in this proceeding, and Japan has provided no reason for the consistent practice to date to change in this arbitration.

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[22] See Japan's Letter, paras. 16-18.

[23] Japan's Letter, para. 19.

[24] The EU has already confirmed this (Rebuttal by the European Union Regarding Third Party Rights, para. 39), and the U.S. does so here.