

**UNITED STATES – MEASURES AFFECTING TRADE
IN LARGE CIVIL AIRCRAFT
(SECOND COMPLAINT)**

Recourse to Article 22.6 of the DSU by the United States

Constitution of the Arbitrator

Note by the Secretariat

1. At the meeting of the Dispute Settlement Body (DSB) on 23 October 2012, the European Union stated that the United States had not brought measures found to result in adverse effects into compliance with their obligations under the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and that it had requested authorization to take countermeasures.¹

2. The United States objected to the level of suspension of concessions or other obligations contained in the European Union's request and claimed that the principles and procedures set forth in Article 22.3 of the DSU had not been followed. The United States also stated that the European Union was not entitled to request authorization under Article 4 of the SCM Agreement because the DSB's recommendations and rulings do not include any recommendation with respect to Article 4. The United States requested the matter be referred to arbitration under Article 22.6 of the DSU. The DSB agreed that the matter raised by the United States² is referred to arbitration as required by Article 22.6 of the DSU.

3. Article 22.6 of the DSU provides as follows:

"When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator¹⁵ appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration."

(original footnote) ¹⁵ The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

¹ See WT/DS353/17.

² See WT/DS353/19.

4. Article 4.10 of the SCM Agreement provides as follows:

"In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate⁹ countermeasures, unless the DSB decides by consensus to reject the request."

(original footnote) ⁹ This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

5. Article 4.11 of the SCM Agreement provides as follows:

In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ("DSU"), the arbitrator shall determine whether the countermeasures are appropriate.¹⁰

(original footnote) ¹⁰ This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

6. Article 7.9 of the SCM Agreement provides as follows:

"In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request."

7. Article 7.10 of the SCM Agreement provides as follows:

"In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist."

8. The Arbitration will be carried out by the original panel, namely:

Chairperson: Mr Crawford Falconer

Members: Mr Francisco Orrego Vicuña
Mr Virachai Plasai
