

Retaliation under the WTO system: When does Nullification or Impairment Begin?

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To

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List of Abbreviations

AB	Appellate Body
EC	European Communities
EU	European Union
DSB	Dispute Settlement Body
DSU	Understanding on rules and procedures governing the settlement of disputes
GATT	The General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ILC	International Law Commission
ILC Draft	Draft articles on Responsibility of States for Internationally Wrongful Acts
N/I	Nullification or Impairment
O.E.D.	Oxford English Dictionary
RPT	Reasonable Period of Time
SCM	Agreement on subsidises and countervailing measures
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
US	United States of America
VCLT	The Vienna Convention on the Law of Treaties 1968
WTO	World Trade Organization

Executive Summary

This memorandum deals with the question of how to calculate nullification or impairment (N/I) in retaliation as contained in the understanding on rules and procedures governing the settlement of disputes (DSU). To solve this issue, we look at the question of the period that extends from the end of the reasonable period of time (RPT) to the Dispute Settlement Body's (DSB) authorization on retaliation, what we call the 'disputed period'. The disputed period and the calculation of N/I are inter-related issues. If the disputed period does not exist, then N/I starts at the end of the RPT. If we solve the status of the disputed period, by stating that it is a second RPT then N/I (that can be retaliated) starts at the authorization of the DSB. We first look at past practices of 22.6 arbitrators and determine that they were not directly relevant to the issue at hand. We then assess the text of the DSU, namely Article 22.4 which is the only provision that deals with the level of retaliation. We proceed to a Vienna Convention interpretation. Out of Article 22.4 we single out the key terms 'level' and 'equivalent' which in their ordinary meaning do not contain any obvious means of resolving the issue. The context of this Article proves to be inconclusive. We also evaluate the objective and architecture of retaliation in comparison with similar mechanisms in public international law, namely suspension of treaties, compensation and countermeasures and find that retaliation is not comparable to anything; it is *sui generis*. The next step is to look at State Practice, which could prove to be a supporting argument to the exclusion of the disputed period, however this practice is not directly relevant and too small to really be qualified as a solid practice. Ultimately the last step is to look at relevant rules of International Law, and we focus on 'appropriate countermeasures' [WTO SCM Agreement] and 'proportional countermeasures' [ILC Draft Articles on State Responsibility]. However, both terms do not contain any time indications which could aid us. Overall from the interpretation of Article 22.4, there are no elements that allow us to firmly take a stand on the issue, so we conclude by giving elements that are relevant to the issue and that should be taken into account in future negotiations.

Introduction

This memorandum sets out to answer the question “when does the nullification and impairment (N/I) under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) actually begin? Is it at the end of the reasonable period of time (RPT) when the responding Member is required to bring itself into compliance, but fails to do so? Or can the calculation of the level of nullification and impairment only begin once the Dispute Settlement Body (DSB) has authorised the suspension of concessions? It is important to define the type of N/I under discussion in this memorandum. Factually, N/I occurs as soon as a violating measure is enacted. For the purpose of this study we consider continuing violation or measures enacted during the RPT. Regardless of when factual N/I starts, the adverse measure (continuing or newly enacted) will create N/I during the period that extends from the end of the RPT to the DSB authorization, this N/I is the one we address in this memorandum. The status of this period (hereafter the disputed period) is uncertain. By resolving the status of the disputed period, we resolve the status of the beginning of N/I for the purpose of retaliation. If the disputed period does not exist and is to be included in the retaliation then logically N/I starts at the end of the RPT. Conversely if the disputed period is in fact a second RPT then N/I only starts at DSB authorization. The DSU contains no provision on the exact method of calculation of the N/I. Through a close examination and interpretation of the DSU we attempt to provide a solution to the questions that calculation of N/I in retaliation poses.

The structure we follow in this memorandum is as follows. After a general introduction to WTO remedies, we provide reasons why the disputed period has become important recently. We then take a look at past practice to see if there is a trend or if the question has been addressed in any way. In the next step we jump to a VCLT analysis of the only DSU provision that has relevant information on the amount of retaliation—Article 22.4 DSU. In this part, we first analyze the ordinary meaning of the text, and then different articles of the DSU are used as contextual elements of Article 22.4. In the following section we observe the objective of retaliation and see if given that objective we can infer a similarity between retaliation and mechanisms of public international law (namely suspension of concession, compensation and countermeasure). The objective and architecture of retaliation in light of public international law remedies could give us indication of how to look at

the disputed period. State practice is then taken into account. The final step in the VCLT analysis is to look at relevant rules of international law. Here we consider ‘appropriate’ (countermeasure SCM) and ‘proportional’ (countermeasure ILC) to see if we can find a time element in these standards. After concluding our legal analysis of the issue, we list the arguments that are relevant to the disputed period. Those arguments are either in favour, against or neutral. They are not limited to legal elements *per se*, but are linked to retaliation as a whole and should be considered when addressing the issue in future negotiations.

Introduction to WTO Remedies

Ideally there would be no violation of the World Trade Organisation (hereafter WTO) agreements, but when there is, WTO law provides for a full procedure of dispute settlement. A Member that decides to challenge a measure under the WTO first has to call for consultations (Article 4 DSU). If the consultations fail, the Complainant can then request the establishment of a Panel (Article 6 DSU). Once the Panel has issued its decision, either party can appeal it. The decision of the Appellate Body (AB) is final. The process of finding a violation by the Panel/AB is separate from the process of verifying compliance. The Panel/AB settles on an alleged violation, while the 21.5 Panel decides if the criteria for compliance have been met. The Respondent then has an obligation of coming into compliance with the Panel/AB recommendation. The Respondent has the choice to and usually does request a RPT to bring its measure into compliance (Article 21.3 DSU).

Towards the end of the RPT the parties in dispute may conclude a compensation agreement (Article 22.2 DSU). Compensation agreements under the WTO (Article 22.2 DSU) are not to be confused with the form of reparation that is Compensation under Public International Law. A Compensation agreement in the WTO is a voluntary mechanism provided when one Member sees that it will not be able to comply before the end of the RPT. So far it has only been done in a few cases.¹ It should be noted that those agreements can be confidential; therefore the modalities of the settlement are often unclear. If the parties cannot negotiate on a compensation agreement, the next step is for the Complainant to request authorization to suspend

¹ See for example US — Section 110(5) Copyright Act. On June 23 2003 the US made a lump-sum payment of \$3.3 million to the EU, this temporary agreement was planned for a period of three years

concessions or other obligations (Article 22.2 DSU). If the parties disagree on compliance with the Panel/AB recommendation, a compliance Panel (pursuant to Article 21.5 DSU) will be established to decide whether the alleged measure is still in violation of the WTO agreements.

If the 21.5 Panel finds a violation, the parties can proceed to arbitration (pursuant to Article 22.6 DSU) on the level of retaliation. In this proceeding, the arbitrator or arbitrators have to examine the proposed level of suspension of concessions or other obligations, and determine it according to what they believe is 'equivalent' to N/I. Based on the decision of the 22.6 arbitration, the DSB will authorize the Complainant to retaliate. The retaliation can continue until substantial compliance is achieved.

While the DSU is the only legal text which regulates this process, its wording is insufficiently clear and leads to many questions. Does the right to suspend concessions and other obligations accrue at the end of the RPT or after the authorization of the DSB? How do we understand the term 'equivalent' in Article 22.4? How do we address the N/I caused by a violation during the disputed period? These questions rely to a great extent on the nature of WTO retaliation. Precisely what was the intention of the Members when drafting the provision on retaliation? Was it to introduce a remedy that would compensate damages suffered, to allow a form of countermeasure, or create an incentive to induce compliance?

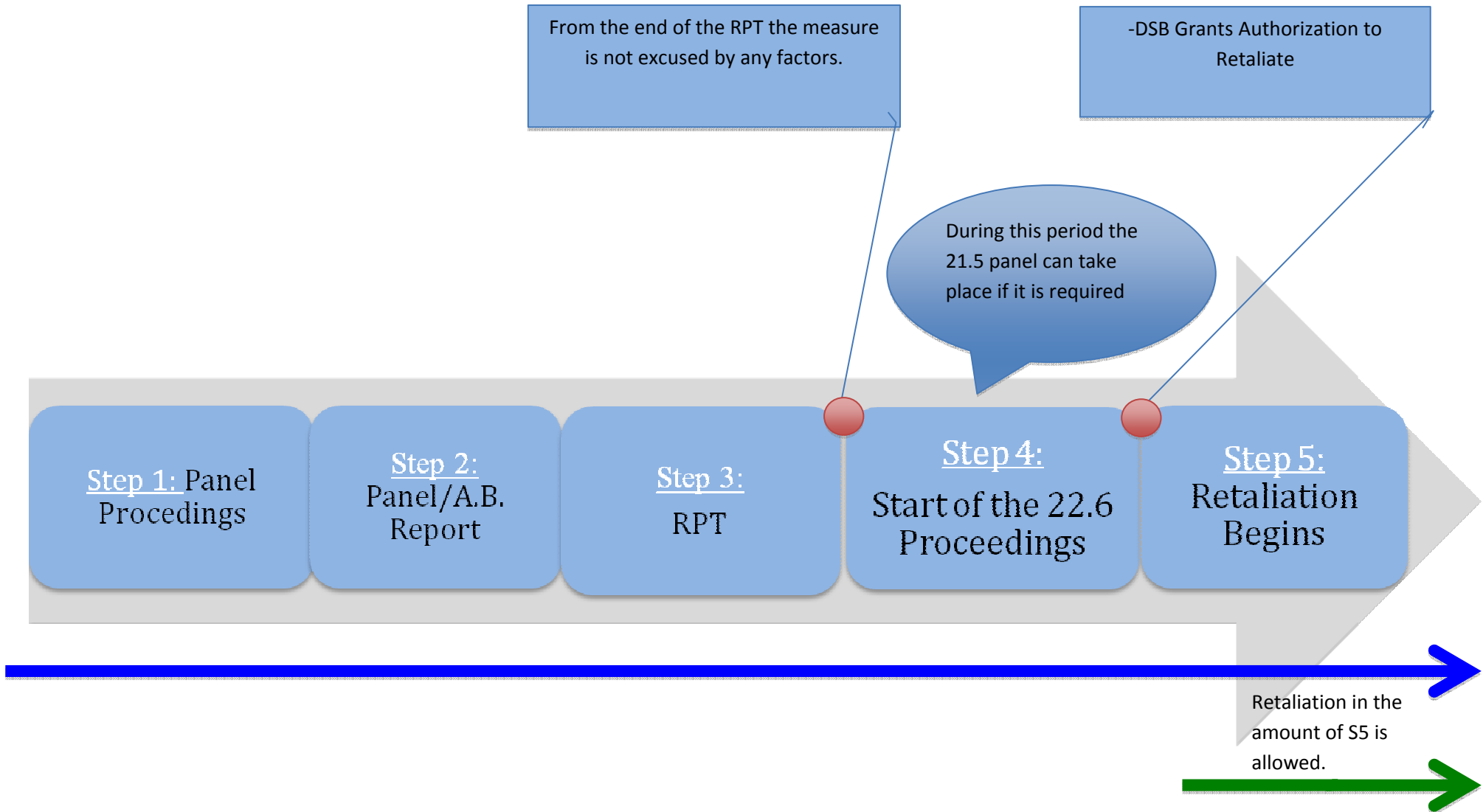
This process of awarding the right to retaliation is done under arbitration of Article 22.6 and in accordance with the other provisions of Article 22 DSU. The provisions of Article 22 DSU give only minor instructions regarding the process of retaliation. It states that the level of suspension of concessions or other obligations shall be equivalent to the N/I (Article 22.4 DSU) and that retaliation is a temporary process that can be applied as long as substantive compliance has not been achieved (Article 22.8 DSU). However, the DSU is silent as to the possible accumulation of N/I during the disputed period or how to calculate the amount of N/I between the end of the RPT and the DSB authorization. There have been seventeen Article 22.6 arbitrations thus

far in the WTO.²³ The only two cases addressing this precise issue are *US-Zeroing (EC)* and *US-Zeroing (Japan)*, but neither case has been settled yet. The former has been suspended as of 9 June 2008, while Japan as of 23 April 2010 has requested the arbitrator to resume the proceedings after having them suspended on 06 June 2008.

The diagrams below are a visual aid to the question we address. The first graph explains what N/I is relevant to our question. The blue arrow represents the factual N/I that occurs as soon as a measure is enacted. Assuming that the respondent does not change its measure, the violation will cause N/I from the point it is enacted until its withdrawal. We know that the N/I symbolized by the green arrow can be retaliated against. The question we deal with is the possibility to take into account the N/I represented by the red arrow, which is uncertain.

The second graph illustrates the different provisions of the DSU in regard to the retaliation process. It is used to further emphasise the fact that at the inception of the DSU, what we have termed the disputed period was intended to be relatively small (80 days maximum), but for the reasons outlined above it has grown substantially.

² Terence P. Steward (ed) *The GATT Uruguay Round: A Negotiating History (1986-1992)* (Volume II Commentary Kluwer Law Netherlands 1993) 2743-2744; GATT Communication from the EEC (MTN.GNG/NG13/W/22) 2 March 1988 4-5



The core question: can a Member in Step 5 retaliate for the amount of N/I suffered in Steps 4 + 5?

Time frame	Event	Comments
Maximum 120 days	Panel/ AB Report is issued Decision on the length of the RPT	This can be decided through either agreement or arbitration under Article 21.3 DSU
Guideline of 15 months, but can be shorter or longer depending on circumstances	Reasonable Period of Time: The Respondent is given this period to come into compliance with the Panel recommendation	No later than the end of the RPT if the Respondent will not be able to come into compliance, the parties can choose to conclude a compensation agreement pursuant to Article 22.2 DSU
The 22.2 request should occur maximum 20 days after the end of the RPT	Disputed Period: If there is no agreement on compensation the Complainant will request the suspension of concessions under Article 22.2 DSU.	
The 21.5 panel has 90 days to settle the issue, but this can be extended	Usually, a compliance panel under 21.5 DSU is established to assess compliance. State practice shows that <i>de facto</i> a 22.6 panel will be established at the same time but suspended under the sequencing agreement	
The decision should be issued maximum 60 days after the expiry of the RPT	Proceeding on the 22.6 arbitration	
	The DSB authorizes the Complainant to retaliate	Retaliation can only start from this moment.

Fig 1: The different procedural steps leading to a decision on the suspension of concessions or other obligations

Why is the disputed period important?

When addressing the question of the calculation of N/I during the disputed period a preliminary question should be answered: Why is the disputed period important? Today the disputed period has become extremely long, and thus has increased financial implications for Members. This increase in length is caused by three main factors: (1) The sequencing problem (2) The possibility for the Members to suspend the proceedings at all times and (3) the increasing complexity of recent cases.

The Sequencing Problem

The sequencing problem has three sources: (1) the need for a 21.5 Panel when the parties do not agree on compliance (2) the inconsistency among the time limits within each steps of the dispute settlement process; and (3) the fact that a Complainant can only request the establishment of the 21.5 panel after expiry of the RPT.

If the Respondent either changes its previously non-conforming measure or enacts a new one, but the Complainant disagrees on the fact that these measure(s) comply with the Panel/AB recommendation, a decision on compliance through a 21.5 panel must be issued. However, according to Article 22.6 the authorization to retaliate should be granted within 30 days of the expiry of the RPT while the 21.5 panel is required to issue its decision within 90 days of the request. If both a decision on compliance and a decision on retaliation have been requested then the Respondent is in an impossible situation. The time limits set by the DSU make it possible for the decision on compliance to be issued 30 days after the limit to request retaliation. Furthermore, Members have until the very last day of the RPT to comply, and even if there are tangible signs that a Member will not comply, the requesting Member has to wait until the end of the RPT to start the 21.5 and 22.6 proceedings. Members have solved the time inconsistency problem by concluding a sequencing agreement.⁴ The 21.5 and 22.6 panels can be requested at the same time, but both parties have to agree to suspend the 22.6 procedure until the circulation of the 21.5 report. By concluding such an arrangement, a Complainant reserves its right to retaliate (under the negative consensus rule) even after the deadline set by Article 22.6. In turn, a Respondent

⁴ As an example, United States – Measures Relating to Zeroing and Sunset Reviews, understanding between the United States and Japan regarding procedures under Article 21 and 22 of the DSU (WT/DS322/26) 12 March 2008

gains the opportunity to let the 21.5 panel verify the compliance of a disputed measure. However, this agreement further extends the disputed period.

Suspension of Proceedings

The Complainant can request the Panel to suspend its work at any time (Article 12.12 DSU). This decision is typically based on political, economic or other considerations. In this respect it is important to underline that the complainant and respondent must agree on the suspension of proceedings. They may for example consider that suspension of the proceeding is a better means of resolving the dispute than litigation. Nonetheless, as both have to agree on this, they both bear responsibility for the extension of time that occurs as a result of suspension.

The Increasing Complexity of WTO Cases

The previous elements were directly dependent on the will of the parties, but when considering the length of the dispute settlement procedure, one should bear in mind the fact that procedures can take much longer than originally estimated by the drafters of the DSU. Furthermore, all procedures can be prolonged according to the following:

“When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report” (Article 21.5 DSU)

For example in *US-Zeroing (Japan)*, the establishment of the 21.5 Panel dates back to 23 May 2008. On 1 August 2008 the panel announced it would not be able to complete its work in 90 days in light of a scheduling conflict. On 24 April 2009 the compliance Panel report was issued, 336 days after the panel had been established. This was 246 days more than was provided for in Article 21.5. When considering the losses suffered by the Complainant, 246 days can mean millions of dollars.

The various factors that have been outlined can be responsible for the increase in the length of the disputed period, and with this comes an increase in the financial implications. However, we cannot determine the scope of the question without first looking at the way arbitrators dealt with this issue, which we do in the next section.

Past Practice

Arbitrators calculate the level of N/I by establishing a counterfactual of the situation without the measure in violation. In general they use the average trade volume from previous years for their calculation, taking into consideration the elasticity of change in price, revenue and other factors in the counterfactual. By doing so, they calculate an amount, which should be achieved by the complainant if the violation had stopped at the end of RPT. This practice suggests that what they calculate is not the damage suffered by the complainant but the impact that the measure will have. But impact and damage are similar. This is the approach taken in most 22.6 arbitrations *including EC – Hormones, US – Gambling, US – Byrd Amendment, US – FSC*.⁵ It is important to underline two key factors of past practice:

1. The way arbitrators calculate the level of retaliation (equivalent to the level of N/I) is based on the submission of the complainant, which is then objected by the respondent.
2. In this respect, if the Complainant does not request the N/I to be calculated overall, or for the inclusion of the disputed period the arbitrators will not act *ultra vires* and award it.

In conclusion past practice only shows that arbitrators decide on the level of suspension of concession or other obligations based on the submissions of the parties. Furthermore the awards thus far only grant an annual level of N/I. This annual level does not relate to our question. It is only relevant to establish the overall level, but there is nothing there that allows or forbids the inclusion of the disputed period.

⁵ see for example European Communities – Measures Concerning Meat And Meat Products (Hormones) Original Complaint By The United States Recourse To Arbitration By The European Communities Under Article 22.6 Of The DSU Decision By The Arbitrator WT/Ds26/ARB At [43], [47 & 59], [70, 73 & 75]

United States – Measures Affecting The Cross-Border Supply Of Gambling And Betting Services Recourse To Arbitration By The United States Under Article 22.6 Of The DSU Decision By The Arbitrator WT/DS285/AR At [3.177], [3.188 & 3.189].

Interpretation of Article 22.4 of the DSU

This section interprets Article 22.4 of the DSU. It is generally accepted that treaty interpretation should follow Article 31 and 32 of the VCLT.⁶ The interpretation takes into consideration the ordinary meaning of key terms from the dictionary and past arbitrations' decisions, object and purpose of the DSU, context for the interpretation including state practice and legal remedies under public international law.

Article 22.4 of the DSU

“The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.”

From this text it is clear that what is to be determined is the *level* of suspension of concessions; and this *level* should be *equivalent* to the *level* of N/I. Therefore interpretation of Article 22.4 focuses on the key terms ‘level’ and ‘equivalent’.

The term ‘Level’

According to the Oxford English Dictionary (hereafter O.E.D), the term ‘level’ means a position (on a real or imaginary scale) in respect to an amount.⁷ The term ‘amount’ means ‘quantity or a sum viewed as a total’. Combining them together, the term ‘level’ indicates a position or a scale in respect to an overall quantity or sum. This ordinary meaning supports the US’s understanding of the term in the *US – Zeroing* case, which took the term to mean a specific amount being compared at a specific point in time to the level of N/I at that time.⁸ A different understanding by Japan in the same case viewed ‘level’ as the total N/I suffered from the end of RPT.⁹

⁶ Vienna Convention on the Law of Treaties, Article 31 General rule of interpretation

⁷ Oxford English dictionary Second edition, 1989; online version March 2011. <<http://www.oed.com:80/Entry/107653>>; accessed 25 March 2011. Earlier version first published in *New English Dictionary*, 1902.

⁸ *United States – Measures Relating to Zeroing And Sunset Reviews(DS322)*, Recourse to Article 22.6 of the DSU by the United States – Comments of the United States on Japan’s Responses to Additional Questions from the Arbitrator 12-11-2010 [8]

⁹ Because the Japanese submissions on recourse to Art.22.6 of the DSU are not available to public all the information regarding the Japanese position and its underlying reasoning mentioned in this memorandum are basing on the information from the US’s submissions and are therefore do NOT representing the official position of Japan. Comments of the United States (n.3) [1]

Arbitrators in past cases did not provide a detailed explanation on how the term should be understood. However, in light of the method they used to calculate the level of N/I, it appears that they understand the term as only indicating an annual amount of N/I, rather than all of N/I from the end of the RPT to authorization of retaliation.¹⁰

The term ‘Equivalent’

According to the O.E.D., the term ‘equivalent’ means “*equal in value of things regarded to be as mutually compensating each other, to be tantamount or virtually identical*”. This understanding is similar to that of the Arbitrators’ in *EC – Bananas*, in who stated that the term ‘*connotes a correspondence, identity or balance between two related levels...*’¹¹ In many cases, after arbitrators calculate a level of N/I, they simply conclude that the level of retaliation should be ‘equivalent’ to the level of N/I. This practice seems to suggest that the level of N/I should be equal to the level of retaliation.

Context for the purpose of the interpretation of the DSU in regards to the interpretation of Article 22.4

Pursuant to Article 32.2 of the VCLT other relevant provision of the treaty can be comprised when interpreting a specific provision. In this context there are three key provisions that provide information about retaliation as a whole Article 22.2 which deals with compensation under the DSU, Article 22.7 which deals with the mandate of the arbitrator(s) and Article 22.8 which deals with the end of retaliation.

Article 22.2: Compensation under the WTO

“If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter

¹⁰ For precise decisions see supra Past Practices on page 13

¹¹ 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 – Decision by the Arbitrators, (WT/DS27/ABR) [4.1]

into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation...”

Here the DSU allows for Members to agree on a financial solution without the need to resort to retaliation. This provision allows Members to find a solution for damage that would occur after the end of the RPT. We may think of the compensation mechanism in the context of WTO in the following way. Through this provision the DSU recognizes that there is N/I during the disputed period. If there is N/I during the disputed period in compensation, it is illogical not to recognize N/I during the disputed period in retaliation. In terms of timing both disputed periods are identical. This context supports the idea that there is N/I during the disputed period, and that once the DSB authorization is granted the Member should be allowed to retaliate for the N/I that occurred during the disputed period.

Article 22.7: The Mandate of the Arbitrator(s)

“The arbitrator acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement.”

Taking Article 22.7 into account allows us to see the mandate of the Arbitrators, that mandate is indeed limited the arbitrator ‘*shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent.*’ In US – Zeroing, the E.U. argued that the arbitrators should only decided on the issue of the equivalence of the level to the N/I.¹² Therefore if we consider the level to be not an overall level, but an annual one (which is the current practice of the 22.6 arbitrators) there are no element in the mandate of the arbitrators to allow them to decide on an accumulated sum. As such if it is not expressly forbidden, it must be allowed.

¹² United States – Laws, Regulations And Methodology For Calculating Dumping Margins (“Zeroing”) (Ds294) Recourse To Article 22.6 Of The Dsu By The United States Additional Questions To The Parties Responses Of The European Union Q. 67

Article 22.8: The End of Retaliation

“The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached.”

Article 22.8 provides three conditions under which retaliation should be ended by the complainant: (1) when the inconsistent measure has been removed (2) the respondent provides a solution to the N/I or (3) a mutually satisfactory solution is reached.

In *US – Continued Suspension* case, the AB stated that while “*the three conditions in Article 22.8 are alternatives to each other...they are alternatives leading to the same result, that is, the termination of the suspension of concessions and final resolution of a dispute.*”¹³ The result, as indicated by the same AB, is the removal of the illegality of the measure, i.e. the removal of the violation.¹⁴

In terms of the possibility of claiming for an accumulated sum, once a violation has stopped, retaliation must cease at the same time. The legal text clearly provides a point of time at which retaliation must stop—i.e. when there is full compliance. The legal text provides emphasis on simultaneity between violation and retaliation.

Thus when the violation ends, the right to retaliate ends and with it all past accumulated entitlements to retaliate disappear. This may be an indication that the right to retaliate and entitlement to retaliate are contemporaneous; i.e. accumulation of the sum only exists so long as the right exists, not before or after. If we accept this argument, then there is no possibility for an accumulate sum.

¹³ United States – Continued Suspension Of Obligations In The EC – Hormones Dispute Ab-2008-5 *Report Of The Appellate Body* WT/DS320/AB/R AT [309].

¹⁴ US – continued suspension (n.6) [304],[311]

Object and Purpose of Retaliation

As part of the analysis the objective of retaliation may shed light on the way it should be interpreted. In this respect retaliation has three major possible purposes: (1) to induce compliance (2); to balance the obligations and rights between Members; and (3) to rebalancing the benefits impaired.¹⁵

With this information in mind, we attempt to discern if retaliation can be classified as a form of suspension of treaties, a countermeasure or reparation. This distinction is important because if retaliation is form of suspension of a treaty it will only aim at suspending obligation until the original equilibrium is attained and therefore does not address past damages. If retaliation is a form of compensation, then all the harm that has been caused should be compensated. Countermeasures look only at the future as they aim to give an incentive to stop the violation and not to repair it. Thus if retaliation is a countermeasure past damages should not be awarded.

Retaliation v. Suspension of Treaties as a Result of a Breach

Generally speaking, suspension of treaties is an act of “self-help”, which is of a purely corrective nature.¹⁶ When a breach of a treaty affects the whole complex of interests of the parties, the balance between their obligations and rights need to be reestablished. As a reaction to a breach of a treaty, it is not aimed at changing the behavior of the offending State, nor covering past damages caused by the wrongful act, but reestablishing equilibrium between the parties in a dispute. By allowing the injured State temporary relief from its duties under the treaty, a new equilibrium between its rights and obligations in respect to the offending State is reached.

WTO retaliation bears some features of suspension of treaties under public international law. Firstly, retaliation takes the form and wording of suspension of concessions, the effect of which is to stop providing preferable tariffs or other benefits to the party in breach. Secondly, the level of retaliation is determined to be equivalent to the level of N/I, which suggests that at least one of the purposes of the retaliation is

¹⁵ 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 - Decision By The Arbitrator WT/DS27/ARB [6.3]

¹⁶ Linos-Alexander Sicilianos, The Relationship between Reprisals and Denunciation or Suspension of a Treaty 4 EJIL (1993) 344-345

to neutralize the harm caused by the breach. Thirdly, according to Article 22.8 DSU the retaliation is accompanying a breach. This follows the philosophy of suspension of treaties under general international law. The existence of the corrective measure is dependent on the existence of the breach. However, it seems that retaliation has moved away from suspension of treaties. It now includes an element of inducing compliance that is recognized by most people involved in WTO law. Although there are similarities in the way these two mechanisms work, they are not the same.

Retaliation v. Reparation

According to Article 36 of the ILC draft, compensation occurs when the *restitutio in integrum* of Article 35 ILC draft is not possible. Compensation should cover ‘*any financially assessable damage including loss of profits insofar as it is established*’. The fact that an injured state is entitled to compensation from the violating state for the damages is a recognized principle of international law.¹⁷ One may see retaliation as having a form of compensation, with the arbitrators in US-Offset Act stating:

“*[T]he requirement that the level of such suspensions remain equivalent to the level of nullification or impairment suffered by the complaining party seems to imply that suspension of concessions or other obligations is only a means of obtaining some form of temporary compensation, even when the negotiation of compensations has failed.*”¹⁸

Four factors that go against the hypothesis that retaliation could be a form of reparation. First, retaliation also affects the economy of the retaliating Member. Second retaliation is only meaningful if there is substantial trade and/or the Complainant can afford to cut its trade with the. When trade is only in essential goods, retaliation could be ineffective if it ends up hurting the Complainant. Third, compensation is only partial as the position of the retaliating member is not as good as it would have been if the Respondent had brought its measure into conformity.¹⁹ This is even worse for smaller countries with fixed terms of trade; retaliation can provide

¹⁷ *Gabcukivi-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 7, at 81, para. 152.

¹⁸ WTO arbitration Decision, *US-Offset Act (Byrd Amendment) (Brazil) (Article 22.6-US)*, *supra* n. 124, [6.3.]

¹⁹ S. Shadikhodjaev, *Retaliation in the WTO dispute settlement system* (2009), at 33.

them with little or no compensation at all.²⁰ Finally, the DSU itself does not support retaliation as a form of compensation. As soon as the measure comes into compliance retaliation must stop according to Article 22.8.

Therefore it is difficult to strictly determine whether or not retaliation is a form of compensation as expressed in the ILC draft. Nonetheless it has some specific compensation elements as the arbitrators in *US-Offset Act* have acknowledged.

Retaliation v. Countermeasures

WTO-sanctioned retaliation and countermeasures in public international law share many features. First, they would qualify as a violation (of WTO law or public international law) if they were not taken by an injured State vis-a-vis the State responsible for the injury. Second they are justified as long as the targeted wrongful act exists.²¹ Finally, both are considered *ultima ratio*. One common purpose is to induce compliance as can be inferred from Article 49(1) ILC and past WTO arbitration reports²². However, they are also different as the WTO inserts a component of institutionalisation that is not present in the ILC draft; and the requirement of proportionality contained in the ILC draft, is not found in the DSU, which instead refers to ‘suspension of concessions or other obligations equivalent to nullification and impairment’. It is therefore not appropriate to deem retaliation in the WTO as the same as countermeasures in public international law.

Conclusion on the Objective and Nature of Retaliation

Retaliation has more than one purpose, and although it seems that its main purpose and architecture make it more similar to countermeasures than compensation it is not the same thing as a countermeasure in public international law. Given this analysis, the best solution is to conclude that retaliation is a *sui generis* mechanism that overlaps with many categories of public international law.

²⁰ R. Lawrence, *Crimes and Punishment? An analysis of retaliation under the WTO* (2003) at 36

²¹ Shadikhodjaev, *supra* note 36 at 27.

²² See for example *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 – Decision by the Arbitrators*, (WT/DS27/ABR) [6.3]

State Practice

In this section we propose that three cases of state practice are relevant to our understanding of the retaliation process. In *EC – Hormones (US)*, the US was allowed to retaliate on 26 July 1999 for an amount of \$116.8 million and, In July 1999 the US retaliated for that amount. In *US – FSC* After a procedure that started with consultation in November 1997, on 7 May 2003 the DSB granted the EU authorization to retaliate in the amount that had previously been awarded by the 22.6 arbitration (\$4.403 million/year). On 8 December 2003 the E.U. adopted a resolution that retaliation in the form of an imposed tariff would start on 1 March 2004 at 5% culminating at 17% on 1 March 2005.²³ However the final amount of the retaliation was well below the level granted by the DSB.²⁴ Ultimately the last example of state practices is that of Mexico in *US – Offset Act*. In this case Mexico was not given a single level of retaliation. Given the circumstances of the case the complainants (Mexico and other Members) were given a coefficient calculated by the arbitrators (0.72) that they had to multiply against the published amount of disbursements under the CDSOA for a given year.²⁵ In this respect the disputed period weighted US \$1 million and the first year of retaliation US \$22 million, Mexico only retaliated for US \$22 million. This is consistent with the practice of the US, and EU in the two previous cases. Judging from these cases it seems that when Members retaliate, the level they adhere to is the one provided by the arbitrator. This lends credence to the idea that states believe there is no possibility of claiming an accumulated sum under the DSU.

However, there are four main points to make when identifying a State practice about retaliation (1) the arbitrators decide upon the level of retaliation based on the submission of the parties (2) state practice is relatively small (3) until DS 294 and DS 322 the period after DSB authorization was financially more interesting than the disputed period and (4) retaliation is heavily influenced by political considerations; it is one thing to be awarded the right to retaliate and another to actually retaliate. As a consequence the trend surveyed in state practice does not reveal a practice dealing

²³ Council Regulation (Ec) No 2193/2003 Of 8 December 2003.

²⁴ US Foreign Sales Corporations (FSC): EU starts countermeasures on US products - Brussels, 1 March 2004 available at <http://trade.ec.europa.eu/doclib/docs/2004/april/tradoc_116003.pdf>

²⁵ WTO arbitration Decision, *US-Offset Act (Byrd Amendment) (Mexico) (Article 22.6-US)*, *supra* n. 124, [5.2]

with the disputed period, but what Members do with retaliation in general and not their opinion regarding accumulation.

Relevant Rules of International law

In our analysis of ‘level’ and ‘equivalent’, the final step is to apply any relevant rules of international law applicable in the relations between the parties. We thus look at two different mechanisms in WTO and public international law: (1) Countermeasures in the SCM agreement and its standard of ‘appropriate’ and (2) Countermeasures in customary law with its standard of proportional. We attempt see if they contain information about a time element, which could be useful in our analysis. We have chosen these two agreements because SCM countermeasures are the closest mechanism in WTO law to retaliation. As for the link to public international law countermeasures, although retaliation is not written as a countermeasure it is commonly accepted by WTO scholars that retaliation is in fact the WTO version of countermeasures.

Equivalence v. Appropriateness in the SCM Agreement

The *Agreement on Subsidies and Countervailing Measures* (hereafter SCM) which under Article 4.10 allows for “appropriate countermeasures” that are not “disproportionate”.²⁶ Article 4.10 of the SCM Agreement states:

“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.”

Footnote 9 qualifies this by explaining:

“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.”

26 SCM Agreement Article 4.10 and Footnote 9

This footnote gives us an important indication about the nature and limits of the term appropriateness and the purpose of countermeasures. What appears to be excluded here as ‘inappropriate’ is the possibility of using ‘disproportionate countermeasures.’

Two of the earliest relevant cases to make reference and attempt to define the terms ‘appropriate countermeasures’ were *US – FSC (22.6 – US)* and *Canada – Aircraft II (22.6)*. Using the ordinary meaning and textual context of ‘appropriate’ the arbitrators in *US – FSC* stated that they regarded the term as meaning that ‘*the countermeasures must be suitable or fitting by way of response to the case at hand.*’²⁷ After analyzing the SCM Agreement and WTO Agreement, they concluded that the objective of Article 4.10 of the SCM Agreement was to insure compliance with panel and appellate body recommendations to withdraw subsidies.²⁸ While maintaining that ‘appropriate countermeasures’ in Article 4.10 did not have the same explicit quantitative limitations as ‘equivalent’ retaliation in Article 22.4 DSU, they at the same time firmly held that this did not mean that the former could impose punitive countermeasures.²⁹ However, where the *Canada – Aircraft II* case was unique was in an actual application of larger than ‘equivalent’ countermeasure:

*“Recalling Canada's current position to maintain the subsidy at issue and having regard to the role of countermeasures in inducing compliance, we have decided to adjust the level of countermeasures calculated on the basis of the total amount of the subsidy by an amount which we deem reasonably meaningful to cause Canada to reconsider its current position to maintain the subsidy at issue in breach of its obligations. We consequently adjust the level of countermeasures by an amount corresponding to 20 per cent of the amount of the subsidy...”*³⁰

In conclusion, ‘appropriate countermeasures’ have a broader scope than ‘suspension equivalent to N/I’. However, with the exception of *Canada – Aircraft II* (which has not been repeated and appears to deviate from normal practice by arbitrators), there is

²⁷ *US – FSC (22.6 – US)* [5.12]

²⁸ *Ibid.*, [5.52 – 5.55]

²⁹ *Ibid.*, [5.61 – 5.62]

³⁰ *Canada – Export Credits And Loan Guarantees For Regional Aircraft Recourse To Arbitration By Canada Under Article 22.6 Of The DSU And Article 4.11 Of The Scm Agreement Decision By The Arbitrator WT/DS222/ARB* at [3.121]

no indication that a Member would be able to claim for an accumulated sum under the SCM Agreement. We can only conclude at this stage is that the broader scope of ‘appropriate countermeasures’ makes it more likely to include accumulated sums than Article 22.7 of the DSU, but there is no formal indication of this.

Proportional v. Equivalent

ILC draft Article 51 provides that countermeasures should be proportionate to the wrongful act. According to the general comments on the ILC draft, the principle of proportionality in countermeasure is a recognized principle of international law, and a customary one as well.³¹ We know from the general understanding of the ILC that the proportionality principle forbids excessive/punitive countermeasures. However, both notions share the purpose of inducing compliance.³² The scope of proportionality was consequently defined in case law. In the *Air-service arbitration* the majority view on proportionality was as follows:

“It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well-known rule ... It has been observed, generally, that judging the “proportionality” of counter-measures is not an easy task and can at best be accomplished by approximation. In the Tribunal’s view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle taken when the French authorities prohibited changes of gauge in third countries.”³³

Reading from excerpt it is interesting to note that the notion of proportionality requires ‘some degree of equivalence’. One could read that ultimately there is not

³¹ Portuguese Colonies case (Naulilaa incident), UNRIAA, vol. II (Sales No. 1949.V.1), p 1028

³² *Yearbook of the International Law Commission, 2001*, vol. II, Part Two Report of the International Law Commission on the work of its fifty-third session at 130

³³ Case concerning the Air Services Agreement of 27 March 1946 (United States v. France), UNRIAA, vol. XVIII, 1979, at pp. 443 para 83

much difference between the criteria of equivalence and proportional. Indeed they seem to be strangely similar, and if this interpretation prevails, the qualitative criteria explained in *Gabcikovo-Nagymaros* case to assess what a proportional countermeasure could also be used in retaliation.

However, neither the term proportional nor equivalent have a time element attached to them. The only thing we can infer from the interpretation of proportional compared with equivalent is the fact that ‘equivalent’ does not seem to be as narrow as it appears on a first reading and that there is some leeway in ‘equivalent’ retaliation. This seems to suggest that the DSU specific rules (on retaliation) and the public international rule (on countermeasure) are not so different. However as previously stated nothing in the general rules relates to accumulation *per se*.

Conclusion on the Interpretation of 22.4

In the final analysis, the answer to the question of whether we can include a disputed period is inconclusive. While the word ‘equivalent’ is narrow, it does not have a time element. On the other hand ‘level’ is, so far, interpreted as an annual amount of N/I; there is a possibility that ‘level’ could also be understood as a cumulative amount of N/I. If we take the objective of retaliation to be either inducing compliance or balancing obligations and rights among Members, from public international law these two purposes do not aim to cover past damages. Even if retaliation is seen as a form of reparation it is not purely reparation *per se*. In the end retaliation is *sui generis*. On the one hand, Article 22.2 acknowledges the significance of the disputed period by providing the possibility of financial compensation that if used addresses the same time frame as the disputed period. On the other hand, Article 22.7 provides that the arbitrators should only decide on the level of retaliation; there is no provision on past sums and if it is not forbidden it may be allowed. Finally relevant rules of public international law and the different criteria used in countermeasures did not provide answers directly relevant to the time element that is of interest here.

Policy Interpretation

In this section we examine from a systemic point of view what are the reasons to include or exclude the disputed period. We assess this question not from a legal

standpoint but from the viewpoint of a Member that could be on either side of a dispute. Elements that cannot be classified as pros or cons for the disputed period are called neutral elements here and are analysed first.

Neutral Elements

What if a Member that enacted a new measure during the RPT believes that it is compliant, when it is in fact not? A violation has therefore existed since its implementation (during the RPT) and consequently authorization is granted to retaliate. Despite the non-compliance, the Respondent has tried and believes that it has brought its measure into compliance in good faith. The opposite scenario entails the respondent purposefully enacting a measure it knows not to be compliant.

Although the end result is the same, can intent make a difference? It seems rather excessive to make a member pay for a measure it believes to be in compliance. Conversely, where a Member knowingly implements a measure that still violates WTO rules in order to delay implementation substantially, it would seem more acceptable to make that Member “pay” for this delay by awarding the Complainant retaliation rights during the disputed period. Even if good/bad faith are not currently legal criteria, as a matter of policy the distinction should matter and may influence future DSU reviews or AB rulings.

Finally, liberalization of trade is the utmost important goal of the WTO. As such larger retaliation is a direct danger to retaliation as they often mean imposition of tariffs. But in the end if they help achieve the goal of inducing compliance maybe some immediate harm is needed for the greater good?

Arguments in Favour of the Disputed Period

There are two main arguments to include the disputed period. First if the goal is to induce compliance then the larger the amount of retaliation the better. A Member that is confronted with large retaliation will have a bigger incentive to comply than one facing a smaller one.

Second, at the moment Members may feel like they can get away with not complying for a period after the end of the RPT. Members who purposefully drag their feet are

abusing the system. Including the disputed period would mean that even if a Member decides not to play by the rules, it will have to face the consequences of attempting to abuse the system.

Arguments against the Disputed Period

First, a cumulated remedy is not always effective to induce compliance. Whether retaliation is effective to induce compliance depends much on the trading relation between the parties. In the case where there is no extensive trading relation between the parties, the claimant may not retaliate in a full amount even if it got a huge cumulated amount (for example in the case of Canada and Brazil and their aircraft subsidies). Then a cumulated remedy, no matter how large the amount, would have no practical implications.

In conclusion, it is important to underline that Retaliation is at best an imperfect tool. The WTO is heavily influenced by individual Members' political and economic interests. In this context, it is difficult to decide in favour of inclusion or exclusion of the disputed period and the accumulated sum (resulting in a larger or smaller amount of retaliation respectively): While it may be justifiable in one case it may be completely unjustifiable in another. It will be the task of future negotiation rounds to weigh and balance the positive and negative aspects of adopting one policy over another, as we have outlined, in order to arrive at a decision which will be best for the WTO system overall. At this point it may be too soon to tell what the best decision is, and perhaps the resolution of DS294 and DS322 will give us some guidance in this regard.

Annex I: Case Study DS 294

DS 294 United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)

Key dates in DS 294 “Zeroing”			
Establishment of panel	19.03.2004	Expiry of RPT	09.04.2007
Circulation of panel report	31.10.2005	Est. of a compliance panel	30.11.2007
Circulation of AB report	18.04.2006	Adoption of compliance report	11.06.2009
Adoption of the AB report	09.05.2006	EC request for 22.6 proceedings	29.01.2010

The EU Position

The EU’s legal position regarding the disputed period is built upon three submissions:

1. Pursuant to Article 3.8 DSU, N/I is presumed from the moment a measure is in violation of a WTO agreement. Thus N/I starts to accrue from the end of the RPT onward.
2. Under Article 22.4 DSU the cardinal principal on retaliation is equivalence;
3. The RPT is a definite period of time and cannot be extended.

A violation gives rise to presumed N/I under Article 3.8 DSU

Under Article 3.8 DSU, N/I is presumed at the end of the RPT and begins accumulating—before the authorization of retaliation. The EU claims that it should be allowed to retaliate for the disputed period time, ignoring the temporal scope of the measure in violation would be a factual mistake; the overall equivalence of N/I caused by the measure in violation would not be respected. The impact of a measure cannot be disconnected from its temporal scope. For example a measure no matter how draconian it is, ends up harmless if it applies for no time.³⁴

Equivalence in retaliation

The EU requests the disputed period to be accounted for. By ignoring the disputed period, the level of retaliation would not be equivalent to the overall level of N/I, since the N/I that occurred during the disputed period would not be taken into account. For example the EU argues that if there is a level of N/I of a 100/year and the

³⁴ United States – Laws, Regulations And Methodology For Calculating Dumping Margins (“Zeroing”) (Ds294) Recourse To Article 22.6 Of The Dsu By The United States Additional Questions To The Parties Responses Of The European Union P 36 [117]

disputed period is 3 years, the level of N/I will be 300. In the first year (the 4th year in the procedure) if it only retaliates for 100 there will be a N/I of 300 missing. The EU claims it would be a legal error and would not restore the balance.³⁵ Once the disputed period amount has been achieved (300,- in our example), the measure would revert to the normal annual rate. Doing so, the E.U. alleges will respect the principle of equivalence included in Article 22.4 DSU

The RPT is a defined period of time:

The EU also argues that the disputed period should not be considered a second RPT).³⁶ Once the RPT has expired, compliance should be immediate.

The US Position

The US builds its position upon three submissions:

1. Article 22.8 DSU suggests that the suspension of concessions or other obligations is a forward-looking exercise in nature.
2. An accumulated sum would mean that in the first year the level of suspension would be three to four times higher than the level of N/I. The equivalence principle contained in Article 22.4 DSU would therefore not be respected
3. Previous arbitral decision proves that N/I only exists for measures that are still in violation.

Retaliation is a forward-looking exercise:

The US claims that the determination of the level of N/I is a forward-looking exercise.³⁷ The disputed period is only relevant as a proxy for calculation of N/I.³⁸ Article 22.8 DSU only allows retaliation as long as the measure is in place. It is therefore an exercise based on the future, not the past.³⁹

³⁵ *Ibid* p 35 para [114]

³⁶ *Ibid* p 37 para [120]

³⁷ United States – Laws, Regulations And Methodology For Calculating Dumping Margins (“Zeroing”) Recourse To Article 22.6 Of The Dsu By The United States (Ds294) Oral Statement Of The United States P 14. [44]

³⁸ United States – Laws, Regulations And Methodology For Calculating Dumping Margins (“Zeroing”) Recourse To Article 22.6 Of The Dsu By The United States (Ds294) Response Of The United States To The Arbitrator’s Additional Questions To The Parties P 26 Q 101 [84]

³⁹ *Ibid* P 33 Q 100 [98]

The importance of equivalence

The US's position on accumulated sum is that the level of N/I that is set by the arbitrators is a maximum of what can be inflicted during a year. The EU itself recognizes that the level of N/I would be four times this amount in the first year, therefore effectively going over that limit – equivalence would not be respected. The US claims that the N/I given by the arbitrators is a ceiling, the breach of which would not respect Article 22.4 DSU.⁴⁰ There is no room under the DSU for higher than equivalent [to N/I] retaliation.⁴¹

Previous decision on compliance

If the EU was allowed to account for the disputed period, it could retaliate for measures that became compliant during the disputed period. At the moment of retaliation this would amount to retaliating for a measure that is not in violation anymore. The key objective of retaliation, which is to induce compliance, would not be achieved. This would amount to punitive damages.⁴² In US-Cotton the panel found that even if a measure was not in compliance during the disputed period, if it came into compliance before the establishment of the 21.5 panel, the panel could not take a stand on it as ultimately it was compliant.

Annex II: Case Study DS 322

DS322 United States — Measures Relating to Zeroing and Sunset Reviews

Key dates			
Establishment of panel	28.02.2005	Circulation of panel report	20.09.2006
Circulation of AB report	09.01.2007	Adoption of the AB report	23.01.2007
Expiry of RPT	24.12.2007	Request by JP of Art.21.5 panel	07.04.2008
Arbitration suspended	06.06.2008		

The Japanese position

⁴⁰ (DS294) Oral Statement of the United States p 27 para. 72

⁴¹ United States – Laws, Regulations And Methodology For Calculating Dumping Margins (“Zeroing”) Recourse To Article 22.6 Of The Dsu By The United States (Ds294) Response Of The United States To Questions From The Arbitrators P 7 Q 4 [18.]

⁴² United States – Laws, Regulations And Methodology For Calculating Dumping Margins (“Zeroing”) Recourse To Article 22.6 Of The Dsu By The United States (Ds294) Response Of The United States To The Arbitrator’s Additional Questions To The Parties P 26 Q 101. [87]

On 7th April 2008 Japan requested the establishment of the 21.5 panel, alleging that the US failed to fully comply with the AB's recommendation.⁴³ Based on these failures, Japan calculated the level of its 1st year's retaliation, which covers the N/I it suffered from the end of the RPT to the authorization of retaliation.⁴⁴ Japan justified this claim for an accumulated sum in the 1st year's retaliation by the following arguments:

1. Article 22 provides the right to retaliate accrues from the end of the RPT;⁴⁵
2. When measuring extent of this right, no alternative date is provided in DSU;⁴⁶
3. The claim is supported by Article 22.8 and the purpose of the DSU;⁴⁷
4. The claim is supported by past arbitral decisions, which backed the idea that the start-date for accessing the level of N/I is the end of the RPT.⁴⁸

The US position

1. A complaining party can only obtain the legal right to retaliate after the authorization of retaliation;⁴⁹
2. The term 'level' in Article 22.4 DSU should be understood as a specific amount being compared at a specific point in time to the level of N/I at that time. Thus it is incorrect to understand the term 'level' as an accumulation of past N/I;⁵⁰
3. Article 22.8 DSU demonstrates the level of suspension of concessions or other obligation is temporal and prospective in nature, which does not permit a claim for a retroactive sum. Otherwise, it should allow the complaining party to continue suspension until it covered the total N/I it has suffered even after

⁴³ United States – Zeroing, Recourse to Article 21.5 of the DSU by Japan – Second Written Submission of Japan 27 August 2008 [67],[104], [187],[190]

⁴⁴ Due to the fact that until the completion of this legal memorandum, Japanese submissions on Art.22.6 of the DSU are not available to public, all the information regarding Japanese position on Art.22.6 and its underlying grounds are presumed basing on information from some of the US's submissions, therefore are NOT representing the official position of Japan. The information about the Japanese calculation is from *United States – Zeroing, Recourse to Article 22.6 of the DSU by the United States - Written submission of the United States 8 July 2010* [72],[74],[77]

⁴⁵ US – Zeroing Recourse to Article 22.6 of the DSU by the United States – Comments of the United States on Japan's Responses to Additional Questions from the Arbitrator 12 November 2010 [11],

⁴⁶ US – Zeroing comments (n.66.), [23]

⁴⁷ US – Zeroing comments (n.66)[24],[26],[43]

⁴⁸ DS322 Comments(n.66) [27] As an example of such past arbitration decisions, see EC – Hormones (n.31) [38]

⁴⁹ US – Zeroing comments (n.66) [11]

⁵⁰ US – Zeroing Comments(n.66) [8]

compliance.⁵¹ The purpose of the DSU also includes maintaining the balance of trade concessions and trade benefits accruing from them. Having this in mind, the determination of the level of retaliation is also aimed at ensuring that the defending party is not subjected to an excessive suspension of concessions. Allowing a claim for an accumulated sum will be contrary to this purpose;⁵²

4. Past arbitral decisions on the starting-date for assessing the level of N/I is not relevant to this issue.⁵³ In addition, there are no previous cases permitting a claim for an accumulated sum.⁵⁴

⁵¹ US – Zeroing Comments(n.6) [25], [44]-[45]

⁵² US – Zeroing Comments(n.66) [34]-[35] ; US – zeroing, Recourse to Article 22.6 of the DSU by the United States – Response of the United States to Questions from the Arbitrator 8 September 2010 [4]; US – Zeroing, Written Submission (n.65) [84]

⁵³ US – Zeroing Comments(n.66) [28]

⁵⁴ US – Zeroing Comments(n.66) [4]