June 3, 2008

Mr. David Unterhalter
Presiding Member
United States – Continued Suspension of Obligations in the EC – Hormones Dispute (AB-2008-5)
World Trade Organization
Centre William Rappard
154 rue de Lausanne
1211 Geneva 21

Dear Mr. Unterhalter:

1. The United States recalls that this appeal and the appeal in *Canada – Continued Suspension of Obligations in the EC Hormones Dispute* (AB-2008-6) are the first appeals to reach the Appellate Body in which the meetings of the panels were open to all WTO Members and the public.[1] It is natural then that WTO Members and civil society in general will be asking whether the hearing in this appeal will also be open to the public.

2. In light of the experience gained at the panel stage in this dispute and in the increasing number of subsequent disputes in which the panel meetings are open, the United States respectfully requests that the Appellate Body allow all WTO Members and the public to observe the oral hearing in the appeal in *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* (AB-2008-5).[2] Specifically, the United States requests that all WTO Members and the public be allowed to observe the statements and answers to questions of the participants, as well as those third participants who agree to make their statements and answers in public. The United States is not proposing that other WTO Members and the public be permitted to observe either the statement of a third participant or that third participant's replies to questions should any third participant decide it does not want such observation.

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[1] *United States – Continued Suspension of Obligations in the* EC – Hormones *Dispute* (WT/DS320) and *Canada – Continued Suspension of Obligations in the* EC – Hormones *Dispute* (WT/DS321); *Communication from the Chairman of the Panels*, WT/DS320/8, WT/DS321/8 (2 August 2005) (hereinafter referred to collectively as the "*Hormones Suspension* disputes").

[2] The United States understands that the European Communities (EC) is making a similar request in this appeal, and that both the EC and Canada are making a similar request with respect to the appeal in *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* (AB-2008-6).

3. For the reasons set forth below, opening the oral hearing in this appeal would benefit the WTO as an institution, as well as the multilateral trading system in general. Moreover, nothing in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* (*Rules of Conduct*), or the *Working Procedures for Appellate Review* (*Working Procedures*) precludes the Appellate Body from opening an oral hearing where the participants agree.

Experience with Open Meetings at the Panel Stage

4. Since the decisions of the two panels in the Hormones disputes to open their meetings with the parties to the public, six other panels have made similar decisions.[3] Moreover, the United States is aware that in three other disputes, the parties have agreed to ask their respective panels to open their meetings with the parties to the public.[4] To date, eleven panel meetings have taken place that have been open to the public, and the United States expects that the number will only increase in the future, as parties and panels become more familiar and comfortable with the process.

5. In the view of the United States, this development has been of great benefit to the WTO and the multilateral trading system. The public has a legitimate interest in WTO dispute settlement proceedings, particularly in light of the fact that as a result of the Uruguay Round, WTO disciplines extend into numerous areas of government action. The ability of the public at large – e.g., representatives of civil society, such as NGOs, journalists, academics, and individual citizens – to observe dispute settlement hearings has helped foster greater confidence in the WTO dispute settlement system and the manner in which it operates. The public has been able to see firsthand (or read secondhand from accounts of journalists who attended open panel meetings) that WTO panelists are professional, impartial and objective, and that they provide the parties to

[3] *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (DS316) ("*EC – LCA*); *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* (DS353) ("*US – LCA*"); *European Communities – Regime for the Importation, Sale, and Distribution of Bananas: Recourse to Article 21.5 of the DSU by the United States* (DS27) ("*EC – Bananas (Article 21.5) (US)*"; *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"); Recourse to Article 21.5 of the DSU by the European Communities* (DS294) ("*US – Zeroing (Article 21.5) (EC)*"); *United States – Continued Existence and Application of Zeroing Methodology* (DS350) ("*US – Zeroing II (EC)*"; and *Australia – Measures Affecting the Importation of Apples from New Zealand* (DS367).

[4] *United States – Subsidies and Other Domestic Support for Corn and Other Agricultural Products* (DS357); United *States – Domestic Support and Export Credit Guarantees for Agricultural Products* (DS365); and *United States – Measures Relating to Zeroing and Sunset Reviews; Recourse by Japan to Article 21.5 of the DSU.*

a dispute with a full opportunity to make their case. As a result, the practice of having open panel meetings has served to strengthen the legitimacy and credibility of the system. It has allowed the WTO to demonstrate to all that with respect to the WTO dispute settlement system, it has nothing to hide and that it has much of which to be proud. And increased confidence in the dispute settlement process can translate into a greater acceptance of the outcome of the dispute settlement proceeding, such that those asked to help in the implementation of the outcome, including members of civil society who will be affected by any withdrawal of, or modification to, a measure, are more familiar with, as well as more confident in the integrity, objectivity, and professionalism of, the process that produced that outcome.

6. The practice of open panel meetings also has been of great benefit to the governments of many WTO Members. Based on our experience, a significant number of delegates from WTO Members that were not parties to the dispute have taken advantage of the opportunity to attend an open panel meeting in order to follow a dispute more closely than they otherwise could.[5] In addition, it appears that delegates from developing country Members have accounted for a considerable share of the individuals that have observed open panel meetings. Our understanding, based on conversations with many such delegates, is that they view open panel meetings as an opportunity to gain familiarity with the actual conduct of WTO disputes without having to incur the burden of participating as a party or a third party.

7. And opening meetings allows the WTO to compare more favorably to other international fora, such as the International Criminal Tribunal for the former Yugoslavia,[6] the International Court of Justice,[7] the International Tribunal for the Law of the Sea,[8] the International Criminal Tribunal for Rwanda,[9] the European Court of Human Rights,[10] and the African Court on Human and Peoples' Rights.[11] Those fora deal with issues that are at least as sensitive as those involved in WTO disputes. For example, these fora have addressed boundary disputes, use of force, nuclear weapons, human rights violations, and genocide.

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[5] This has included instances in which a third party to a dispute has used the ability to attend an open panel meeting in order to observe those portions of the proceeding from which it otherwise would be excluded.

[6] Rule 78, Rules of Procedure and Evidence.

[7] Article 59, Rules of Court.

[8] Article 74, Rules of the Tribunal.

[9] Rule 78, Rules of Procedure and Evidence.

[10] Rule 33, Chapter 1, Title II, Rules of Court.

[11] Article 10, On the Establishment of an African Court of Human and Peoples' Rights, Protocol to the African Charter on Human and Peoples' Rights.

8. Moreover, with respect to the eleven open panel meetings that have already taken place,[12] the experience has been entirely successful. There have not been any incidents of improper behavior by observing members of the public, and the presence of public observers does not appear to have affected the professionalism with which parties, third parties and panelists have traditionally conducted themselves. This has been true even in the two instances in which the public was allowed to sit in the same room in which the panel meeting was taking place.[13] Nor has the passive observation of a panel meeting by members of the public interfered with the intergovernmental nature of the WTO, the government-to-government nature of dispute settlement, or the ability of parties to settle a dispute through the negotiation of a mutually agreed solution.

9. In this regard, attendance at the open panel meetings to date has varied, but one would expect this given that not all disputes will be of equal interest or of interest to the same persons. Moreover, the important point is that the benefits from having open meetings arise regardless of actual attendance. This is because the mere possibility to attend a meeting helps to ensure confidence in the system and that the system has nothing to hide.

10. To conclude, while there once were concerns in some quarters about open panel meetings when the idea was first discussed, those concerns have not come to pass. Instead, open panel meetings have served to promote transparency and confidence in the WTO dispute settlement system, increase familiarity with the objective, professional manner in which hearings are conducted, and consequently provide potential benefits for the implementation of any resulting recommendations and rulings by the Dispute Settlement Body (DSB).

Applicability to the Appeal Stage

11. The considerations set forth above for opening panel meetings apply equally, if not more so, to hearings of the Appellate Body. Appellate Body hearings more than sufficiently demonstrate the care, thoroughness, and dispassion with which the Appellate Body examines the issues presented on appeal.

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[12] *Hormones Suspension* disputes (two meetings of the panel with the parties and one meeting of the panel and the parties with the experts); *EC – LCA* (two meetings of the panel with the parties; *US – LCA* (two meetings of the panel with the parties); *EC – Bananas (Article 21.5 (US)* (meeting of the panel with the parties); *US – Zeroing (Article 21.5 (EC)* (meeting of the panel with the parties); and *US – Zeroing II (EC)* (two meetings of the panel with the parties).

[13] In *EC – Bananas (Article 21.5) (US)*, observers were allowed to watch from the balcony in CR1, in which the panel meeting was taking place. In *US – Zeroing II (EC)*, at the second meeting of the panel, the parties agreed, and the panel decided, to allow observers to watch from the balcony when the audiovisual link was lost.

12. All the benefits of open meetings at the panel stage apply to the hearings of the Appellate Body, including the benefits to the dispute settlement system, enhanced support for the outcome of the dispute settlement process together with potential benefits with respect to implementation, as well as benefits to WTO Members in general. The fewer number of Appellate Body hearings compared to the number of panel meetings makes it that much more valuable for WTO Members who are not a party or third party to a dispute to be able to observe an Appellate Body hearing to gain familiarity with the process.

13. And this dispute, involving questions of human health and scientific judgements, provides a particularly strong example of public interest in WTO dispute settlement. Thus, an open Appellate Body hearing in this dispute flows naturally from the developing experience with open meetings of WTO dispute settlement panels and the practice of other international tribunals.

An Open Hearing Is Permitted Under the Applicable Rules

14. In the view of the United States, the fact that oral hearings of the Appellate Body have been held to date as closed hearings is due to two simple facts. First, the practice of panels until recently has been to hold their meetings as closed, and it was generally assumed that since panel meetings were closed then Appellate Body hearings would be as well. Second, no party has ever requested that the hearing be open, so that the issue of an open Appellate Body hearing has never been discussed or considered.

15. Nothing in the DSU, *Working Procedures*, or *Rules of Conduct* address this issue directly. The DSU does not even mention an oral hearing of the Appellate Body, leaving the question of whether the Appellate Body would hold a hearing and, if so, how many and how they would be conducted, up to the working procedures referenced in Article 17.9 of the DSU.

16. Some have considered Article 17.10 of the DSU to be relevant to this question. Article 17.10 states as follows: "The proceedings of the Appellate Body shall be confidential." At first reading, this might suggest that oral hearings of the Appellate Body must be closed to the public and non-participating WTO Members. However, upon closer inspection, this proves not to be the case.

17. First, as noted above, there is no mention of an Appellate Body oral hearing in the DSU, so Article 17.10 cannot be directed at the question of whether such a hearing should be open or closed. Rather, the question is what is the scope of the term "proceedings" and what is meant by "confidential."

18. Recent precedent helps shed light on these issues. In the recent *Shrimp Bonding* appeals, in which the Appellate Body held a single consolidated oral hearing, four of the Members (the "Thai 4") who were third parties in the panel proceeding initiated by Thailand (DS343) were not

third parties in the panel proceeding initiated by India (DS345). At the panel level, the panels[14] held a single session with the parties, but two separate third party sessions. The Thai 4 were present for the third party session in DS343, but were not allowed to be present for the third party session in DS345. On appeal, however, the participants agreed to allow the Thai 4 to observe the entire oral hearing, which they did. Accordingly, the Thai 4 were observing an oral hearing, including oral statements and answers to questions by participants and third participants, to which they were not a participant or third participant insofar as the appeal in DS345 was concerned.

19. Something similar appears to have occurred in the *1916 Act* disputes. Mexico was a third party in the proceeding initiated by the EC, but was not a third party in the proceeding initiated by Japan. Nevertheless, Mexico was allowed to be present for the entirety of the oral hearing, which dealt with both disputes. It is clear therefore that whatever the scope of "proceedings" and "confidential," Article 17.10 does not prevent anyone other than a participant from observing an Appellate Body hearing.

20. In addition, there is nothing in the DSU that authorizes a third party to observe any Appellate Body hearing. At the time the DSU was drafted, the model that was available, and that is reflected in the DSU, for providing a third party the opportunity to be heard by a panel was to have a separate third party session. A third party did not have the right to observe the panel meeting other than the third party session. Yet the Appellate Body has permitted third parties to be present during the entirety of the Appellate Body hearing. If Article 17.10 required that the hearing be confidential, then the Appellate Body could not have permitted third parties to observe the hearing. Again, this demonstrates that Article 17.10 does not require that the hearing be confidential.

21. Moreover, since the beginning of the WTO, Article 17.10 has not been interpreted as literally requiring the confidentiality of Appellate Body hearings. Appellate Body reports routinely describe events at a hearing or even include quotations from the statements or answers to questions of the parties and third parties. If Article 17.10 was construed as requiring the hearing be confidential, then such description or quotations would be a breach of confidentiality. In light of this practice, it would be incongruous to interpret Article 17.10 as precluding the Appellate Body from conducting an open oral hearing where the participants agree on having one.

22. In addition, it is worth noting that Article 17.10 has not been interpreted as requiring that other aspects of an appeal be kept confidential either. An Appellate Body report routinely discloses the arguments of the parties and third parties in their written submissions. Furthermore, notices of appeal and notices of other appeal are routinely circulated as public WT/DS documents in every appeal. They are not kept confidential.

[14] Technically there were two separate panels.

23. All of these considerations raise a number of questions about what exactly is meant in Article 17.10 by the "proceedings" shall be confidential.

24. It is however not necessary for purposes of the request for an open hearing in this appeal to decide the full scope of "proceedings" and "confidential." This is because, in any event, Article 17.10 must be read and applied in conjunction with Article 18.2 of the DSU, the second sentence of which provides as follows: "*Nothing in this Understanding* shall preclude a party to a dispute from disclosing statements of its own positions to the public." (Emphasis added). The italicized phrase means that not even Article 17.10 could interfere with a party's right to disclose its own positions to the public, including statements made in the course of an Appellate Body hearing. Article 18.2 makes clear that the participants to an appeal may agree to make public their statements and answers to questions during an Appellate Body hearing. And if they can be made public, there is no reason why the parties cannot agree to have such statements and answers made public at the time they are uttered.

25. Finally, the United States would note that it is not aware of anything in the negotiating history of the DSU that would suggest that parties could not agree to open Appellate Body hearings to public observation.

26. Turning to the *Working Procedures*, nothing in them requires that oral hearings be closed to the public.[15] As for the *Rules of Conduct*, Article VII, paragraph 1, first sentence, states as follows: "Each covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential." Where, as here, the parties agree to make their statements in the presence of the public, there is no confidential information to be protected and no confidentiality of the proceedings to be maintained. Accordingly, the *Rules of Conduct* do not preclude the Appellate Body from conducting an open hearing.[16]

27. In summary, the United States strongly believes that there is no legal impediment to the Appellate Body conducting an open hearing. The only provision that is even arguably relevant is Article 17.10, but Article 18.2 makes clear that an open meeting is permissible where, as here, the parties agree.

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[15] As a result, the United States does not perceive that the U.S. request would entail the need for the Division to adopt an "appropriate procedure" pursuant to Rule 16(1) of the Working Procedures. Rather, the fact that the hearing is open could be provided in a notice in the same manner as the time limits, starting time, location, and other aspects of the hearing are communicated.

[16] In this regard, the United States notes that the record of the panel proceedings does not contain any business confidential information.

28. The United States would note here that by granting its request, as well as the request of the EC and Canada, the Appellate Body would not be prejudging the negotiations taking place as part of the DSB Special Session. Instead, the United States is asking for an application of the current DSU rules.

Modalities

29. The United States appreciates that holding an open hearing on appeal presents some unique logistical questions not presented at the panel stage. Accordingly, the United States has given this matter some thought and would like to share those thoughts with the Appellate Body to the extent they might be helpful.

30. The main issue involves the fact that it is customary for third participants to be present and to participate fully in the entire hearing. At the panel stage, several third parties did not wish to make their statements public, and it is possible that some or all of these third parties may not wish to have their statements and answers at the oral hearing observed by other Members and the public.[17] In this respect, the United States reiterates it is not requesting that the other Members and the public be permitted to observe the statements and answers of a third participant that does not want such observation (a "closed hearing third participant"). There are various options available to accommodate these third parties.

31. Separate Third Participant Session. One such option would be to hold a separate third participant session for these closed hearing third participants, similar to what is done at the panel stage. At that separate session, these third participants would make their oral statements and reply to any questions.[18] Such a separate session would make it possible to permit observers in the same room as the participants, as was done in *EC – Bananas (Article 21.5) (US)*. While such a separate session would represent a significant departure from the customary format for an Appellate Body hearing, it bears emphasis that nothing in the DSU or the *Working Procedures* requires that the Appellate Body hold a hearing where third participants present statements and reply to questions throughout the hearing. Holding a separate session for third participants would render moot most of the technical issues discussed below, such as turning transmission on and off. However, the preference of the United States would be to avoid having a separate session for these third participants.

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[17] Although the United States recalls that the statements and answers are not actually "confidential" since they may be disclosed in the report of the Appellate Body.

[18] The fact that the third participant would need to first hear the questions implies that the separate session may need to be divided where the statement would be provided initially, and the remainder of the separate session held at the end of the hearing before closing statements and with the participants and third participants having an opportunity to comment on the replies of any closed hearing third participant.

32. Closed-circuit, simultaneous broadcast, with grouped replies. Another option would be to allow public observation by means of a simultaneous close-circuit audio and video broadcast to a separate room. The camera could capture the whole room and would not have to be moved.

33. Several panels have used this method successfully. While the audio and visual quality is not quite the same as being in the room where the hearing is taking place, it provides a higher level of security against disruption or interference, and thus may be the safest method for conducting the first open Appellate Body hearing. This method also would make it easier to interrupt the public observation, if necessary – for example, when a statement or answer is being made by a closed hearing third participant.

34. More specifically, the interests of closed hearing third participants could be accommodated by having the presiding member of the division direct the interruption of the broadcast when these third participants make their opening and closing statements.[19] As for the "question and answer" part of the hearing, the Appellate Body could follow its current practice of issuing its questions in groups, and could allow closed hearing third participants to respond to a group of questions without transmission to the public room after the participants and other third participants have had their say. Given the limited number of interventions that can be expected from the third participants and the fact that only some of them would decline to make their answers public, this approach would seem very feasible. Accordingly, the United States would propose this as the modality to use in this appeal.

35. Closed-circuit, simultaneous broadcast, with non-grouped replies. Another option would be to temporarily switch off the transmission each time one of the third participants in question took the floor. This could be done by technical staff on the basis of an advance choice of the third participant in question, so as not to require much intervention from the division hearing the appeal.[20]

36. Recorded, postponed broadcast. One final option – and the least preferred option as far as the United States is concerned – would be to conduct the hearing as per standard practice and videotape it. The tape could be edited before playback to eliminate statements and answers of the third participants in question, and then could be shown to the public in edited form at a date after the hearing. This procedure was used in the *EC – LCA* and *US – LCA* panel proceedings, where inadvertent disclosure of business confidential information was a concern of the panels, as

[19] The Division could depart from its practice of having third participants read in alphabetical order, and instead group the third participants on the basis of whether they do or do not wish to have the statements read in public. This would mean the broadcast would be interrupted just once for opening statements.

[20] This procedure has been used successfully in the context of investment disputes under the North American Free Trade Agreement to protect business confidential information.

well as the parties. While this option is less desirable than real-time observation, it is better than the option of no public observation at all.

37. One final logistical matter concerns the registration of members of the public in the event that the Appellate Body grants the U.S. request to open the oral hearing in this appeal. The practice on this with respect to panels has varied and has been evolving. In the view of the United States, the best practice to date is for the WTO to place an announcement on the WTO website – well in advance of the meeting in question – and to allow members of the public to register directly with the WTO. This allows for the management of available seating capacity and any security screening in the event that such screening is necessary. It also avoids the perception problem of having the participants serve as a filter or gatekeeper for who may attend the hearing. This can be particularly problematic when it is nationals of other Members who are applying. Where panels have asked the parties to be the ones to filter applications, the practice has been for parties to pass on every name received. However, this can still lead to the appearance of a problem. There should be no perception that the participants could deny access to nationals of other Members.

Conclusion

38. For the reasons described above, the United States wishes to make its statements of position public in the course of the Appellate Body hearing in this dispute. The United States understands that the EC has a similar desire, and that the EC and Canada have the same desire in the appeal in their dispute.

39. The United States respectfully requests the Division to hold an open hearing in this appeal, and to do so by means of a closed-circuit, simultaneous broadcast of the hearing, with grouped replies by any closed hearing third participant.

40. In addition, the United States respectfully requests that the Appellate Body provide notice of the open hearing and receive any applications to attend from Members and the public.

41. The United States would be pleased to respond to any questions by the Appellate Body or to provide any further information.

42. A copy of this letter has been served on the European Communities and the third parties identified in the attached Service List.

Sincerely,

Peter F. Allgeier
Ambassador

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

UNITED STATES – CONTINUED SUSPENSION OF OBLIGATIONS IN THE EC – HORMONES DISPUTE

(AB-2008-5)

SERVICE LIST

PARTICIPANT

H.E. Mr. Eckart Guth, Permanent Delegation of the European Commission

THIRD PARTIES

H.E. Mr. Bruce Gosper, Permanent Mission of Australia
H.E. Mr. Clodoaldo Hugueney Filho, Permanent Mission of Brazil
H.E. Mr. Don Stephenson, Permanent Mission of Canada
H.E. Mr. Zhenyu Sun, Permanent Mission of China
H.E. Mr. Ujal Singh Bhatia, Permanent Mission of India
H.E. Mr. Fernando de Mateo y Venturini, Permanent Mission of Mexico
H.E. Mr. Crawford Falconer, Permanent Mission of New Zealand
H.E. Mr. Eirik Glenne, Permanent Mission of Norway
Mr. Yi-fu Lin, Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu