BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2008-5)

ORAL STATEMENT OF THE UNITED STATES OF AMERICA

July 28, 2008

1. Good morning, Mr. Chairman and members of the Division. On behalf of the United States, we would like to thank you for the opportunity to appear before you today. Because this is Mr. Abi-Saab's final hearing as an Appellate Body member, we would also like to acknowledge and express our appreciation for Mr. Abi-Saab's valuable service and insights over the course of the past eight years. We wish him all the best in his pursuits.

2. We would also like to acknowledge the historic nature of today's hearing. This is the first time that the Appellate Body has opened its doors to all WTO Members and the public at an oral hearing. We commend the Appellate Body for the careful thought that it has devoted to the question of opening this hearing, and for its wisdom in making this decision. We strongly believe that opening the Appellate Body's oral hearings to the public promotes transparency and confidence in the WTO dispute settlement system, increases the public's familiarity with the objective, professional manner in which the Appellate Body conducts its hearings, and provides other important benefits to the WTO dispute settlement system. We are therefore particularly honored to participate in today's hearing.

3. Mr. Chairman and members of the Division, this dispute should have been much simpler. The European Communities ("EC"), in light of its adoption of Directive 2003/74/EC (the "2003 Directive") and its view that its hormone ban was no longer inconsistent with its WTO obligations, could have simply challenged the U.S. tariffs resulting from its suspension of concessions as being inconsistent with Article II of the GATT 1994, with reference to Article 22.8 of the DSU. The EC thus would have resorted to "these dispute settlement procedures" within the meaning of DSU Article 21.5 in order to resolve any disagreement regarding the existence or consistency of what it considered to be its measure taken to comply.

4. Under that approach the application of the suspension of concessions would be permitted to continue during the proceedings just as the EC's WTO-inconsistent hormones ban was permitted to continue during the original (and now these) proceedings. The EC instead urges a different approach – one that would have the application of the suspension of concessions stop as soon as the EC unilaterally claims its compliance. This would seem to be similar to saying that the EC was required to suspend its hormones ban as soon as the United States or Canada had requested the original consultations on it.

5. The EC appears to have begun with that relatively straightforward challenge to the U.S. tariffs in its panel request but then abandoned it in its first submission. In its place, the EC has gone to great lengths to make this anything but that simple dispute. Even in this appeal, the EC argues that the Appellate Body should not look to the substance of the 2003 Directive. The EC's insistence that the WTO should not examine the EC's actual compliance may very well be explained by the fact that the EC has not actually complied.

6. Instead, the EC re-characterizes this dispute as one about procedural violations and charges that the ongoing, un-modified U.S. suspension of concessions has somehow transformed in character and become "redress" against a new measure. To do so, the EC has had to argue that its unilateral assertion of compliance modified the legal basis for the DSB's multilateral authorization of the U.S. suspension of concessions and created a duty for the United States to lift its application of the suspension of concessions or take dispute settlement actions within a certain period of time. Unfortunately, the Panel accepted the EC's approach, and recast the U.S. suspension of concessions as impermissibly directed against the 2003 Directive, on the basis of illogical and inconsistent reasoning. The Panel's approach included finding that the statements

of the United States at the DSB meetings in November and December 2003 became Article 23.2(a) determinations. Those statements were not, on their face, determinations, even aside from the question of whether such statements should ever be found to constitute "determinations."

7. Now let me turn to what this dispute is really about – hormones. Mr. Chairman and members of the Division, you and I, and all of us in this room, are constantly producing hormones at levels far in excess of what is present in a serving of meat. Each of us is also constantly consuming hormones in food other than meat at levels far higher than the levels in the meat at issue. For instance, the eggs or butter croissants that you and I might have had this morning for breakfast contain concentrations of hormones that are substantially greater – by several orders of magnitude in the case of eggs – than the concentrations found in meat from hormone-treated cattle. The hormones at issue in this dispute have been intensively studied and safely used for the past 20 to 30 years.

8. The Panel engaged in an exhaustive consultation with a number of scientific experts and came to the conclusion, once again, that there is no scientific basis for the EC's ban on these hormones. In fact, it appears that even the EC has stopped pretending that a scientific basis exists for its ban on five of the hormones. If anything has been "re-packaged," it is not the U.S. suspension of concessions but the EC's hormone ban; the 2003 Directive maintains a ban on the same six hormones at issue in *EC – Hormones*, although the ban now consists of a permanent ban on one hormone and a "provisional" ban on the other five. The Panel rejected the EC's claim that new packaging of its hormone ban brought it into compliance, and the Appellate Body should reject that claim as well.

I. The Importance of *Actual* Compliance in This Dispute, the WTO Dispute Settlement System and the Multilateral Trading System

9. This dispute over the EC's hormone ban has had a long history. In its Other Appellee Submission, the EC argues that the adoption of the 2003 Directive and its *claim* of compliance modified the legal basis for the DSB's authorization and triggered a duty on the part of the United States to form a view, by some unstated deadline, on whether the 2003 Directive brought the EC into compliance with the DSB's recommendations and rulings in *EC – Hormones*. According to the EC, if the United States then considered the EC not to be in compliance, the United States was obliged:

- to initiate a compliance panel proceeding under Article 21.5 of the DSU, and
- to cease or suspend the application of the suspension of concessions while the question of compliance was adjudicated.

10. The EC's view gives a tremendous amount of power to a mere *claim* of compliance, as opposed to *actual* compliance. The view finds no support in the DSU. What lies at the heart of this dispute is whether there is *actual* compliance and the concomitant matters of how, when, and by whom it is determined, and the consequences that flow from the determination of its presence or absence.

11. The EC relies on a fundamentally flawed claim that the DSU sets forth a "basic dichotomy" between a "measure found to be inconsistent" within the meaning of DSU Article 22.8, and a "measure taken to comply" within the meaning of Article 21.5.[1] As detailed

[1] EC Appellant Submission, para. 136.

in the U.S. Appellee Submission,[2] this "basic dichotomy" finds no support in – and is in fact contradicted by – the text, context, and object and purpose of the DSU. Under the DSU, the issue is whether compliance has actually been achieved, rather than the mere formality of whether there is a measure taken to comply.

12. The DSU does not address "notifications" of compliance; therefore, the notification of compliance cannot be an event triggering DSU obligations. The EC also maintains, however, that the adoption of a measure preceding the notification of compliance triggers an obligation of the original complaining party to initiate a compliance panel proceeding under Article 21.5.[3] This approach leads to even more troubling consequences; it would seem to permit a quiet, unannounced self-determination of compliance to trigger an obligation of the original complaining party to have recourse to dispute settlement following a deadline that is already unstated and would likely therefore be missed. The result would be that the original complaining party could find itself in breach of its obligations without even knowing it. Such an approach would, if accepted, not only add to the obligations provided in the DSU but present serious questions regarding the due process rights of original complaining parties.

A. Article 21.5

13. The text of DSU Article 21.5 states that "disagreement as to the existence or consistency with a covered agreement of measures taken to comply . . . shall be decided through recourse to these dispute settlement procedures . . . ." The United States first clarifies that, contrary to the

[2] U.S. Appellee Submission, paras. 104-105.

[3] EC Appellee Submission, para. 62.

what the EC says,[4] the United States does not reject that Article 21.5 governs disagreements as to the existence or consistency of measures taken to comply. The United States notes, however, that Article 21.5 does not limit "these dispute settlement procedures" to an Article 21.5 compliance panel proceeding. In fact, the text of Article 21.5 does not specify what "these dispute settlement procedures" are, and therefore includes all other forms of dispute settlement procedures provided for in the DSU under, for example, Articles 5, 6, 21, and 25.

14. Furthermore, nothing in Articles 21, 22 or 23 of the DSU provides that a claim of compliance by a Member concerned triggers an obligation on the part of an original complaining party to form a view, within some unspecified period of time, on compliance or to seek recourse through an Article 21.5 panel proceeding.

15. After initiating an Article 21.5 proceeding as an original responding party in *Bananas*, the EC cannot now declare that original responding parties are not permitted to initiate Article 21.5 compliance panel proceedings. The EC cannot expect the DSU to provide only what the EC considers expedient at a given time. The text of Article 21.5 does not preclude a particular party in a particular posture from invoking an Article 21.5 compliance panel proceeding. By disregarding the text of Article 21.5, it is the EC's interpretation that effectively reduces significant portions of the DSU's provisions on dispute settlement procedures to inutility.

16. Finally, the EC's insistence that the United States was obliged to bring an Article 21.5 compliance panel proceeding after the EC adopted and notified its 2003 Directive conveniently overlooks the fact that, despite repeated U.S. requests, the EC did not provide the United States

[4] EC Appellee Submission, para. 34.

all of the scientific studies and information underlying the 2003 Directive until after the first substantive meeting with the Panel took place in this proceeding. Without access to the studies on which the EC purported to base the 2003 Directive, the United States would not have been in a position to bring an Article 21.5 compliance proceeding to challenge the 2003 Directive.

B. Article 22.8

17. The EC's argument that obligations for the United States flow from the "removal" of a measure found to be inconsistent by the adoption of a replacement measure is simply not credible. The United States has already detailed in its Appellee Submission the reasons why adoption of a new measure or modification of a measure does not necessarily constitute "removal" of the measure found to be inconsistent under Article 22.8. Furthermore, to the extent the EC states that the Panel endorsed the position that the suspension of concessions should cease or be suspended while the question of compliance is adjudicated, the Panel made no such endorsement in its Report. In fact, the Panel explicitly rejected the EC's position that its claim of compliance created an irrebuttable presumption of consistency that required a cessation of the application of the suspension of concessions.

18. Finally, the EC is imprecise in describing whether, in its view, a claim of compliance necessitates permanent termination or only temporary suspension of the application of the suspension of concessions. If the EC considers that the suspension of concessions must be permanently terminated, what would happen if the Article 21.5 compliance panel proceeding results in a finding that the new measure did not in fact achieve compliance? An original complaining party would be left without access to its original suspension of concessions and without the ability to obtain a renewed suspension of concessions. If, on the other hand, the EC's

view is that the tariffs should only be temporarily suspended, then it is even clearer that the EC's approach would require reading words into the DSU that are not there. In addition, it would appear that the EC concedes that "removal" of the measure found to be inconsistent within the meaning of Article 22.8 does not necessarily occur when a measure taken to comply is adopted and notified.

19. Finally, as a review of the text of the DSU demonstrates, and as explained in more detail in the U.S. Other Appellant Submission, despite the DSU's lack of specificity in the post-suspension situation, the DSU still manages to provide both parties with the means to seek recourse and to obtain a positive solution. The DSU affords both original complaining and responding parties a menu of options for dispute settlement in seeking a determination on a claim of compliance or challenging the application of the suspension of concessions. The EC's invocation of the Articles on Responsibility of States for Internationally Wrongful Acts is therefore inapposite.

III. What the Panel Should Have Concluded

20. The Panel erred by finding that the United States was seeking redress of a violation within the meaning of Article 23.1 after the EC notified the 2003 Directive. As already explained, contrary to the EC's assertion, the claim of compliance did not modify the legal basis for the DSB's authorization to suspend concessions. The United States has repeatedly and consistently maintained that after the EC's notification, it was engaged in a process of studying and trying to learn more about the basis for the EC's claim of compliance. In the meantime, the duties remained unchanged since 1999 – including the amount, the products, and the EC member States affected.

21. The EC also fails to refute the U.S. demonstration that the Panel's reasoning resulted in a logical paradox. While the EC reasons that a measure that is at one point in time "authorized" and consistent with the law can later become *in*consistent with the law when circumstances change, the Panel found that the U.S. duties were in the past, and remain in the present, multilaterally authorized.

22. Had the Panel made the correct findings and conclusions on Article 23.1, it would not have reached the analysis of Article 23.2(a), excluded an examination of the EC's Article 22.8 *per se* claim, or made the suggestion in paragraph 8.3 of its Report. Since the Panel did reach these questions, the Panel's findings on these matters were also erroneous and the EC's support of the Panel's findings is misplaced.

23. Especially with respect to Article 23.2(a), the U.S. statements at the DSB meetings of November 7 and December 1, 2003 were not "determinations." Contrary to the EC's contention,[5] a careful and objective parsing of the Panel Report reveals that while the Panel referred to two DSB statements, the Panel found that only the U.S. DSB statement of December 1, 2003, met all the requirements of a determination,[6] although the Panel later inexplicably refers to both statements as "determinations."[7] The Panel did in fact list other statements made by the United States in a footnote, but only in the context of stating that the EC

[5] EC Appellee Submission, paras. 119-122.

[6] Panel Report, para. 7.226.

[7] Panel Report, para. 7.230.

made references to other statements by the United States.[8] Furthermore, the text of the Panel Report demonstrates that it considered the continued suspension of concessions by the United States not only corroboration of the fact that the DSB statements constituted "determinations," but also that it considered the continuation of the duties, on an alternative basis, as "evidence" from which it imputed that a determination had been made.[9]

24. The EC's rebuttal arguments on each of the reasons that the United States considers the Panel erred in finding that the U.S. DSB statements constituted "determinations" either simply reiterate the Panel's faulty reasoning or fail to address the U.S. objection. Finally, the fact of the matter is that, regardless of whether the Panel needed to answer the question of when exactly a "determination" can be considered to have been made when an original complaining party has maintained the *status quo*, and despite the fact that the Panel acknowledged that the DSU does not provide for any deadlines in Article 23,[10] its findings and conclusions on Article 23.2(a) imply that maintaining the suspension of concessions, at some unspecified point, causes "potential" determinations to ripen into "real" determinations.

25. The DSU's lack of specificity in the post-suspension situation is not in question. This lack of specificity has given rise to many of the contentious issues in the present proceeding. However, the DSU is not *lacking*. The text of the DSU's provisions – in its current form – provides rules that are nevertheless applicable in the post-suspension situation. Those rules

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[8] Panel Report, para. 7.221 and fn. 438.

[9] Panel Report, para. 7.232.

[10] Panel Report, para. 7.232.

provide both original complaining and responding parties recourse in determining whether actual compliance has been achieved, relief to the original responding party in the event that actual compliance has been achieved, and redress to the original complaining party in the event that it has not.

IV. Actual Compliance with the *SPS Agreement*

26. After resisting the Panel's examination of the consistency of the 2003 Directive with the *SPS Agreement*, the EC now challenges the Panel's findings that the 2003 Directive is not consistent with the requirements of the *SPS Agreement*. Despite the EC's avoidance of the issues, the Panel correctly found that the EC's purported risk assessment has once again failed to demonstrate the "specific risk" at issue for estradiol-17β and that the relevant scientific evidence is now insufficient to conduct a risk assessment for the other five hormones.

27. In its attempts to undermine the Panel's findings on estradiol-17β, the EC argues that the Panel failed to accord the appropriate significance to the EC's evaluation of the risks arising from the abuse or misuse in the administration of estradiol-17β and improperly imposed a quantitative dimension to the notion of risk. The EC recalls the Appellate Body's statement that it is error to exclude, on an *a priori* basis, risks, such as those from the failure to follow good veterinary practices, from the scope of application of Articles 5.1 and 5.2 of the *SPS Agreement*. The EC argues that the Panel therefore erred by not deeming the EC's consideration of these risks as satisfying the demonstration of the specific risk required by the definition of "risk assessment" in the *SPS Agreement*. Not excluding, on an *a priori* basis, the consideration of risk arising from the abuse or misuse of estradiol-17β does not, however, translate into the proposition that consideration of such risk is necessary or sufficient in finding that a "risk assessment" exists.

28. Similarly, the EC also recalls the Appellate Body's statement that it is not necessary for a risk assessment to establish a minimum magnitude of risk. The EC argues that the Panel's use of the phrase "potential occurrence of adverse effects" in its analysis under Article 5.1 of the *SPS Agreement* inappropriately imposes a quantitative requirement on a risk assessment. Just because a risk assessment need not establish a quantified level or degree of risk, however, does not mean that a risk assessment cannot or should not evaluate levels or degrees of risk. To the extent the EC argues that the Panel erred by finding that the EC's approach in its purported risk assessment, which relies on the view that estradiol-17β is genotoxic, could *never* be considered a "risk assessment" under the *SPS Agreement*, the EC's argument is specious. The Panel neither makes nor relies on such a proposition. Rather, its findings are specific to and supported by the evidence presented to it in this proceeding.

29. Finally, even the EC acknowledges the weakness of its semantic argument regarding the Panel's use of the phrase "potential occurrence." The relevant definition of "risk assessment" provided in Annex A(4) of the *SPS Agreement* provides, in relevant part: "the evaluation of the potential for adverse effects on human or animal health . . . ." It is clear from the text that the word "potential" relates to the "occurrence" of adverse effects on human or animal health. The panel's interpretation in *EC – Hormones* is consistent with this reading,[11] as is the Appellate Body's interpretation.[12]

[11] *EC – Hormones (Panel)*, para. 8.98.

[12] *EC – Hormones (AB)*, paras.182-184.

30. The EC's challenge to the Panel's findings on the sufficiency of the evidence to conduct a risk assessment for the other five hormones also relies on a semantically-based argument. The Panel considered that a "critical mass of new evidence" would be required to render previously sufficient evidence "insufficient." The EC seizes upon the Panel's use of the word "mass" to argue that the Panel improperly based its analysis only on the quantity of new evidence, to the exclusion of a consideration of the quality of that evidence. This argument is proven false by the Panel's own explanation that it used the term "critical mass" "in the sense of a situation where evidence becomes quantitatively and qualitatively sufficient to call into question the fundamental precepts of previous knowledge and evidence."[13] The bottom line is that the EC has not cited to new evidence of sufficient quantity or quality to show that the relevant scientific evidence is now insufficient to conduct a risk assessment for the other five hormones.

31. In addition, the EC confuses the question of whether relevant scientific evidence is sufficient to conduct a risk assessment within the meaning of Article 5.7 with the question of the appropriate level of protection that a Member may choose for itself. The former reflects a judgment based on scientific grounds while the latter reflects a societal judgment. The Panel's approach in determining the sufficiency of the relevant scientific evidence for the other five hormones did not confuse the two types of judgments and the Panel's findings were properly supported.

32. The Panel's findings on both Articles 5.1 and 5.7 of the *SPS Agreement* are properly supported by the evidence in the record and consistent with the advice provided by the experts.

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[13] Panel Report, para. 6.141.

A theme in the EC's challenges to the Panel's fact-finding is to either discredit certain experts or to challenge the Panel's reliance on the written and oral responses provided by certain experts. The United States notes, however, that not all of the experts were competent to answer all of the questions posed by the Panel, and the input provided by the different experts differed in quality and responsiveness. The choices and judgments made by the Panel in its appreciation of the scientific advice offered by the experts were consistent with the competencies of the experts and the quality of their responses.

V. Conclusion

33. There has been strong disagreement between the parties regarding the application of the DSU's rules in a post-suspension situation and the consistency of Directive 2003/74/EC with the *SPS Agreement*. It should be noted, however, that despite the disagreements, the parties were able to, and did in fact turn to, the dispute settlement system to resolve those differences. This should be acknowledged as a success on the part of the WTO dispute settlement system. This proceeding and the present hearing, despite being part of a long-standing dispute, nevertheless constitute the recourse to dispute settlement in accordance with the rules and procedures of the DSU that were intended to govern the resolution of trade disputes between WTO Members.

34. The fact remains, however, that it is *actual* compliance, and not simply a *claim* of compliance, that brings resolution to long-standing disputes. Accordingly, it is important that the Appellate Body consider the parties' requests for review on issues related to the interpretation of both the DSU and the *SPS Agreement* in light of this fact.

35. This concludes our statement. We hope that it has helped to clarify the issues before you. We welcome the opportunity to answer any questions that you may have.