

June 23, 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 thanks the Division for the opportunity to comment on the third party responses to the requests of Canada, the European Communities, and the United States to allow all WTO Members and members of the public to observe the parties' oral statements and answers to questions, as well as those of any third parties who agree to make their statements and answers public.
2. As an initial matter, the United States welcomes the views of Australia, New Zealand, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu that the Appellate Body may open its hearing in this appeal, and furthermore welcomes the notification of those third parties who are willing to make their statements and answers to questions in an open hearing.
3. As is clear from the responses of these third parties, there is nothing in the current rules that would prevent an open hearing. Australia, New Zealand and Norway in particular have provided useful insight into the interpretation of Articles 17.10 and 18.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), including insights to be gained from the French and Spanish language versions.
4. As they have explained, the "confidentiality" of the "proceedings" referred to in Article 17.10 cannot be read to preclude an open hearing, since not only does Article 17.10 expect that the content of hearings will be disclosed to the public in the report of the Appellate Body for each appeal,<sup>1</sup> but the content of hearings is customarily disclosed to the public.

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<sup>1</sup> Article 17.10 provides that Appellate Body reports "shall be drafted . . . in the light of . . . the statements made."

5. The actions of the Dispute Settlement Body (“DSB”) are also informative on this matter. One of the first decisions taken by the DSB was on February 10, 1995, when it adopted the recommendations of the Preparatory Committee for the WTO concerning the Appellate Body. With respect to the issue of Article 17.10 and the “confidentiality” of the “proceedings,” those recommendations provided as follows:

The DSU further provides that “the proceedings of the Appellate Body shall be confidential.” It would thus be desirable to elaborate rules protecting the confidentiality of the deliberations of the Appellate Body, and ensuring the non-disclosure by Appellate Body members and support staff of confidential information provided by participants in the dispute settlement process.<sup>2</sup>

6. Thus it is clear that the DSB and the Preparatory Committee viewed Article 17.10 as focused on the deliberations of the Appellate Body and any confidential information submitted by the participants to an appeal. Conducting an open hearing would not contravene this focus.

7. Brazil, China, India, and Mexico each take a different approach in opposing an open hearing in this dispute. What is noteworthy, however, is that none of them refutes that Appellate Body reports customarily disclose the content of the hearing to the public. Accordingly, they each concede that there is nothing inherently “confidential” about the hearing itself. On this basis alone, these responses do not support a view that the current rules prevent an open hearing in this appeal.

8. As many of the responses of the third parties focused on Article 17.10 of the DSU, the United States would like to take this opportunity to explore that provision in more detail.

### **Article 17.10**

9. Most of the third parties discussed the potential relevance of the first sentence of Article 17.10 of the *Dispute Settlement Understanding* to an open appellate hearing. For example, China claims as follows: “Thus, the proceedings of the Appellate Body shall be confidential means only the participants and third participants may be present at the oral hearing, and all written submissions to the Appellate Body are treated as confidential . . . .”<sup>3</sup> However, China’s assertion is inaccurate. WTO Members who were neither parties nor third parties have already been allowed to observe oral hearings before the Appellate Body in *US – Customs Bond*

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<sup>2</sup> Dispute Settlement Body – Establishment of the Appellate Body: Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995 (WT/DSB/1), para. 9, (footnote omitted) (19 June 1995).

<sup>3</sup> Comments of China on the requests of Canada, EC and US, 12 June 2008, p. 2.

*Directive* (DS345) and the *US – 1916 Act* (DS162).<sup>4</sup> Furthermore, Appellate Body reports routinely describe the statements and answers to questions given by parties and third parties at the oral hearing, and they also routinely describe and quote the written submissions of parties and third parties and the notices of appeal and other appeal of parties.

10. Brazil’s focus on what is included in Appellate Body “proceedings” simply misses the point.<sup>5</sup> Brazil fails to address the fact that whatever is contemplated by the term “proceedings” in Article 17.10, it does not mean that the hearing is “confidential” in the sense that the statements and responses made at the hearing may not be public. For example, the statements and responses to divisions’ questions are routinely quoted and described in Appellate Body reports,<sup>6</sup> and those reports themselves, which Brazil concedes are part of the “proceedings,” are also made public.<sup>7</sup>

11. Similarly, Brazil’s quotation of the Appellate Body report in *Canada – Aircraft* actually supports that hearings can be open.<sup>8</sup> In that report, the division directly quoted and disclosed the

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<sup>4</sup> See U.S. Letter to Mr. David Unterhalter, June 3, 2008 (“U.S. Letter”), paras. 18-19.

<sup>5</sup> See Brazil Letter to Mr. David Unterhalter, 12 June 2008 (“Brazil Letter”).

<sup>6</sup> See, e.g., Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, paras. 73, 80, 101, 110, 130, 135, 156; Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, paras. 15, 84; Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* (“*Canada – Aircraft*”), WT/DS70/AB/R, adopted 20 August 1999, para. 210.

<sup>7</sup> Brazil refers to “from the very beginning of the process, i.e. the drawing up of the working procedures, to its conclusion, with the circulation of the Appellate Body report.” Brazil Letter, para. 14. This clearly includes the Appellate Body report, which, under Brazil’s own reading of Article 17.10, would need to be kept confidential, a result that is absurd.

Interestingly, Brazil also states that the “proceedings” begin with the “drawing up of the working procedures.” Brazil Letter, para. 14. Brazil is simply in error. There is no legal basis – and Brazil certainly points to none – for this to be the starting point. Moreover, this assertion, if accepted, would raise significant questions about the operation of appeals, for example under Article 17.5. Perhaps Brazil was seeking to avoid the obvious inconsistency between its position and the fact that notices of appeal are also made public.

<sup>8</sup> Brazil Letter, para. 10, quoting from *Canada – Aircraft*, para. 143.

content of written submissions,<sup>9</sup> the questions posed by the division in that appeal and written responses to questions,<sup>10</sup> and oral statements,<sup>11</sup> from the appeal, and thereby made those public.

12. These third parties miss the fact that it not only matters what “proceedings” means in Article 17.10, it also matters what “confidential” means. As noted above, past practice and DSU Article 17.10 itself make clear that the “confidentiality” contemplated in Article 17.10 does not prevent an open hearing in this appeal.

13. In short, Article 17.10, does not prevent parties and interested third parties from electing to make their portion of the oral hearing accessible to other WTO Members and the public because the “confidentiality” contemplated by that article has manifestly not included parties’ notices of appeal and other appeal, written submissions, oral statements, or answers to questions, nor (as evidenced by *U.S. – Customs Bond Directive* and *U.S. – 1916 Act*) has it included oral hearings as a whole. This conclusion is furthermore compelled by Article 18.2.

### **Article 18.2**

14. Article 18.2 of the DSU creates a right for a party to a dispute to disclose statements of its position to the public, a right that “[n]othing in this Understanding shall preclude.” China, India, and Mexico largely ignore this. Only Brazil attempts to assert that Article 17.10 somehow prevents the parties from seeking to exercise their rights under Article 18.2.

15. However, the fact remains that the right Brazil concedes is granted to Members by the second sentence of 18.2 begins with the phrase “[n]othing in this Understanding shall preclude.” Thus, Brazil eventually states that Article 18.2 operates as “an exception afforded to Members” to the “confidentiality obligations dictated by Article 17.10.”<sup>12</sup> The result, according to Brazil, is that Article 18.2 allows Members to disclose “Members’ statements (written and oral).” While the United States welcomes Brazil’s recognition that the United States and other Members may

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<sup>9</sup> *Canada – Aircraft*. In particular, the report quoted Canada’s appellant submission (at paras. 14, 154, 179), Canada’s appellee submission (at paras. 78, 85, 94, 151, 209, 211), Canada’s second written submission before the Panel (at paras. 70, 208), Brazil’s other appellant submission (at paras. 46-48, 56), Brazil’s appellee submission (at paras. 32, 37, 42, 45), the EC’s third participant submission (at paras. 98, 103), and the U.S. third participant submission (at paras. 110, 120, 121, 123).

<sup>10</sup> *Canada – Aircraft*. In particular, the report discloses the content of the question posed by the division during the oral hearing in that appeal, Brazil’s written response to the question (at para. 210), and Canada’s written response to a question posed by the Panel (at paras. 148, 215).

<sup>11</sup> *Canada – Aircraft*, para. 218 (disclosing the content of Canada’s statement given at the oral hearing before the Appellate Body).

<sup>12</sup> Brazil Letter, para. 15.

elect to make their oral and written statements public, Brazil's position raises two questions. First, it is not clear why Brazil chose to rely on "statements", when the full phrase in Article 18.2 is "statements of its own positions." Since a party not only states its positions through its written and oral statements, but also through its answers to the Appellate Body's questions, a party's answers would also come under Brazil's "exception."<sup>13</sup> Second, Brazil provides no legal basis for its assertion that there is some limitation on when this disclosure may occur. As the United States has previously noted, there is nothing in the DSU or elsewhere that limits when Members may make this disclosure of their individual positions and, thus, the Appellate Body may allow the parties and interested third parties to disclose their positions immediately.

### **DSU Review**

16. Both Brazil and India point out that "transparency is being discussed in the ongoing negotiations in the Special Session of the Dispute Settlement Body." India urges the Appellate Body to reject the parties' request on that basis,<sup>14</sup> while Brazil's complaint appears to be more general.<sup>15</sup>

17. That ideas on increasing transparency at the WTO are being considered in DSU review is inapposite, because these discussions will continue regardless of what the Division's ultimate interpretation of the current DSU is on the question before it. The Members can overturn that interpretation by amending the DSU, and the Division's finding will not settle any of the ongoing discussions about transparency.

18. More to the point is the disturbing nature of India's request and Brazil's insinuation. India's position is that the Division should deny the parties' request in light of DSU review. However, this position either presumes that the current DSU prevents open appellate hearings – in which case the existence of DSU review is irrelevant – or demands that the Division take a position in spite of the current DSU solely in order to influence the ongoing DSU review. Neither alternative is helpful to the resolution of the question before the Division, and the latter constitutes precisely the sort of attempt to influence the negotiations through the "back door" of which the parties are accused.<sup>16</sup>

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<sup>13</sup> To be clear, the United States does not accept that Article 18.2 operates as an "exception" to Article 17.10. Rather, the opening clause of the second sentence of Article 18.2 means that a Member's right to disclose statements of its position would prevail over any other provision of the DSU, including anything in Article 17.10.

<sup>14</sup> India Letter to Mr. David Unterhalter, 12 June 2008, para. 2.

<sup>15</sup> Brazil Letter, para. 18.

<sup>16</sup> Brazil Letter, para. 18.

19. The legal question of whether the Division may allow open hearings is one that bears directly on the Appellate Body's operation and is clearly within the Division's purview, just as it was for the six panels who have considered the question. The fact that the DSB Special Session is also considering proposals related to transparency of WTO dispute settlement is simply irrelevant. In this regard, the United States cannot help but note that India and Brazil have not taken this position in other contexts. For example, neither has urged the Appellate Body to abstain from making findings on zeroing based on the fact that the Rules negotiations are considering the question of zeroing.

### **Costs/Benefits**

20. Finally, the United States recalls the potential benefits an open appeal hearing and increased transparency would have for the dispute settlement system as noted by Canada, the European Communities, and the United States, as well as Australia and Norway: enhanced legitimacy and credibility of the dispute settlement system; increased civil society confidence in the dispute settlement system; increased acceptance of panel and Appellate Body findings and recommendations, and thus, improved implementation; and expanded education for WTO Members about the dispute settlement system, much of which – and in particular appeals – remains unfamiliar, especially for developing Members. It is telling that *none* of these benefits were disputed by Brazil, China, India, or Mexico. Even more striking is their inability to point to any harm that would result if parties that agree to open their hearing are allowed to do so, while modalities are in place to accommodate third parties who choose to keep their participation closed.

21. Once again, the United States thanks the Appellate Body for its consideration of this matter and looks forward to answering any questions the Appellate Body may have.<sup>17</sup>

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<sup>17</sup> In particular, the United States looks forward to discussing the modalities of an open hearing with the Appellate Body. In this regard, the United States notes that Brazil accuses the parties of having put forward “unrealistic ideas” that will cause “a number of operational difficulties.” Brazil Letter, para. 19. Brazil's assertions, however, are unsupported. In addition, with respect to Brazil's assertion that third participants “are supposed to be present at all times”, *see* Brazil Letter, para. 19, the United States recalls its observation 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.” U.S. Letter, para. 31.

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

Sincerely,

William D. Hunter  
Senior Legal Advisor

**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 Hugueneu 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,  
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