United States – Continued Suspension of Obligations in the 
EC – Hormones Dispute

(WT/DS320)

Canada – Continued Suspension of Obligations in the 
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Oral Statement
by the European Communities
in the First Substantive Meeting

Geneva
12 September 2005
Mr. Chairman, Members of the Panel

I. INTRODUCTION

1. It is an honour to be the first party this morning to have the floor in this first ever public hearing of a Panel in the history of the GATT and the WTO. The European Communities is very pleased to be part of this joint endeavour of the parties to increase transparency in the dispute settlement system. And it wishes to thank the Panel, the Secretariat and the defending parties for having made this possible.

2. The European Communities hopes that the public who is present in the viewing room today will find this a valuable experience of receiving a first-hand impression of a WTO panel procedure. This experience may help against the misperceptions that exist in civil society regarding WTO dispute settlement. I am thinking in particular of the doubts that have been voiced about the unbiased, proper and fair manner in which panels conduct these trade disputes. Today, the public can see with its own eyes that WTO panelists are highly professional, impartial and objective, and that they accord the parties a full opportunity to present their positions. This is important in a trade dispute like this one, which is about measures that directly affect the lives of people. You, Mr. Chairman and distinguished members of the panel, will not be among those who have sometimes been called “faceless trade judges in Geneva”. Finally, it will be seen that opening this hearing to the public for observation will change nothing about the intergovernmental nature of the WTO.

3. Allow me to add a remark regarding WTO Members who are not parties to this dispute and whose delegates may be among the observers in the viewing room today. The ability of these WTO Members to observe the present proceedings is also a very positive fact, especially for WTO Members who have not yet had the opportunity to be a party or third party to a dispute, among which there may be many developing and least-developed countries.
4. Let me now turn to our case. Oral statements serve to present the parties’ point of view in light of the written submissions that have been filed. That somehow presupposes that the written submissions all address the same claims, talk about the same case. Yet, what we see in this dispute seems a bit like having two different cases. The European Communities has made a case on fundamental systemic issues under the Dispute Settlement Understanding (DSU), and the United States and Canada reply by making a case against the Hormones Directive under the Sanitary and Phytosanitary Agreement (SPS Agreement). No doubt an interesting case, that latter one, as well. Indeed it is the very case the European Communities would want the defending parties to bring – albeit under a different procedure than the present one. The fact that they are refusing to do so is what the present case here is about.

5. Mr. Chairman, Members of the Panel, it does not need reminding that it is not the defendant, but the complainant who defines the scope of a WTO dispute by selecting the claims it submits to a panel for adjudication. Thus, our task this morning will be to untangle these two cases and set the record straight on a few issues before a proper debate can take place.

6. The background to these proceedings is simple enough: The European Communities, as many as two years ago already, adopted revised legislation in order to implement the recommendations and rulings of the WTO Dispute Settlement Body (DSB) in the Hormones case of 1998. The DSB had found that the old regime – an import ban on beef raised with six kinds of hormonal growth promoters - was not based on sufficient scientific evidence to show that there are health risks of hormones when used for growth promotion purposes in meat. The European Communities, therefore, had launched a series of 17 scientific studies to look more closely into possible health risks. It then had all scientific data thoroughly reviewed and evaluated by an expert committee before adopting the revised regime. On the basis of this new risk assessment, the revised regime maintains a ban on all six hormonal substances in question, albeit only on a provisional basis for five of them.
7. This legislative process was followed through in a fully transparent manner, not least through the notification of the legislative proposal (and later the final measure) to the WTO. The United States and Canada, from early on, disagreed with the conclusions of the EC scientific committee and have maintained that position ever since.\(^1\) Instead of contesting the implementing measure through a compliance procedure, however, which is what the DSU requires, the United States and Canada, have simply continued to apply retaliatory measures (“sanctions”) against the European Communities, as if nothing had happened.

8. The European Communities argues that this is something they cannot do. Either they must stop sanctions because they accept that we have implemented or they must ask a Panel to establish that there is no compliance. But continuing for two years to apply sanctions, as if nothing had happened, is the kind of unilateral behaviour that is prohibited under the DSU.

9. Canada’s and the United States’ reply is to say that they have been authorized by the DSB to apply sanctions back in 1999, when the European Communities had failed to adopt an implementing measure within the reasonable period of time it had been granted. Thus, they say, they may continue to apply the suspension of concessions until the European Communities has proven that it is in compliance. It is for the European Communities, so they argue, to seek multilateral confirmation that it is in compliance and not for them to make a case that there is no compliance. In other words, they apply a “once a sinner always a sinner” logic, that puts the onus of proving that its measures are consistent with WTO obligations on the European Communities.

10. Mr. Chairman, Members of the Panel: which obligations are incumbent upon whom in the post-implementation phase, the nature and extent of a DSB

\(^1\) Canada, for example, commented on the notification of the proposal for a Directive on 3 November 2000 (G/SPS/N/EEC/102) by stating: « Canada, therefore considers that the ban addressed in the WTO notification is based on the same evidence that has already been presented to and rejected by the WTO Panel and Appellate Body. Canada views the EU’s continued ban as being in violation of the rulings and recommendations of the DSB and of the EU’s international obligations pursuant to the SPS Agreement. » The US’ comments on the same notification, similarly, stated « With this proposed modification, however, the EC fails to provide any new scientific evidence and cites no peer reviewed risk assessment that could provide a scientific basis for the proposed legislation. » The US added:
authorization, these issues are important systemic issues to which not only the European Communities but also a great number of other WTO Members attach great importance. Contrary to what the United States claims these are not issues de lege ferenda. This Panel is not asked to invent rights and obligations that do not exist, but it is requested to interpret and clarify the existing provisions of the DSU.

11. The Panel should therefore not shy away from applying the existing procedural rules of the DSU to this case. Whatever Members may be discussing in the special session of the DSB as regards future DSU rules – whether improved or merely clarified – cannot alter the rights and obligations of Members under the existing rules. This said, and in that we agree with the United States, there is indeed in the existing provisions no mechanism through which a WTO body formally removes a previously granted DSB authorization. However, this does not change the clear fact that a once granted authorization may be used only up to a certain point.

12. Admittedly it is not an easy task to identify the existing rules and clearly it is not made any easier by the defending parties’ attempts to obfuscate the issues. This case is also about compliance, they say, and that the European Communities is trying to avoid having to discuss its revised Hormones regime. Mr. Chairman, Members of the Panel, such allegations are paradoxical, if not absurd, in light of the very purpose of the present case, which is to get the defending parties to launch a compliance procedure. Not only have we discussed our revised Hormones regime with them, but we have made numerous attempts over the past two years to agree with them on a procedure to establish compliance. To no avail.

13. There can be no doubt, therefore, that the European Communities is ready to discuss compliance, but that discussion must take place under the proper procedure. Indeed, Mr. Chairman, we made it clear to the defending parties

«We again urge the EU to come into compliance with the WTO rulings, ie. – a complete removal of the ban on imports of beef raised with growth promoters. »
during the consultations that we are ready to suspend these proceedings if they launch an Article 21.5 procedure. To no avail.

14. In the present proceedings, therefore, the European Communities is challenging violations of the DSU thereby seeking an answer to the above systemic issues on obligations under the DSU in the post-implementation phase. These issues affect its interests well beyond the present case on the Hormones regime.

15. It is true that the European Communities has made an alternative claim which addresses also the substance of the EC’ implementation measure “if and only if” the Panel were to disagree with the European Communities on its interpretation of the DSU. Mr. Chairman, Members of the Panel, our exporters, for the last two years, have been facing illegal sanctions which severely restrict trade. Traders and consumers on the other side of the Atlantic are suffering as well. These sanctions must end. If not through the proper procedures then through the present ones. If the European Communities’ views on the systemic questions prevail, there is no need in the present proceedings to discuss the substance of the new EC measure; if they do not prevail the question of compliance should be settled rather sooner than later. In that event the European Communities stands ready to answer any questions this Panel might have regarding the scientific basis of its compliance measure and discuss the legal issues the defending parties have raised.

16. Mr Chairman, Members of the Panel, let me therefore come back to the systemic issues of the DSU. If the defending parties were right in that it is for the European Communities to bring a case in order to prove it is compliant, then we are effectively talking about a presumption of bad faith against an implementing WTO Member. It is the “once a sinner, always a sinner” logic. If they are right, we are effectively talking about sanctions applying against a WTO Member who may be in full compliance with its obligations.

17. Where does the DSU give a WTO Member the right to impose or maintain trade sanctions against another WTO Member which behaves in a fully WTO

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2 EC First Written Submission, para. 8; cf. also para. 132.
compatible way? Where else is a WTO Member not allowed to rely on its own good faith which is a basic principle in international law? And where else is a WTO Member called upon to prove the negative, i.e. to demonstrate without any specific allegation that its measure is *not* WTO inconsistent?

18. Mr. Chairman, Members of the Panel, the answer is: nowhere.

19. The European Communities will now deal with the different arguments the defending parties have made.

II. THE CLAIMS

20. The central provision on which the European Communities bases its claims is Article 23 of the DSU. Article 23 is about what a WTO Member is supposed and allowed to do when it wants to react to what it perceives as a violation by another WTO Member of obligations under the covered agreements. Article 23 requires WTO Members to have recourse to the procedures set out in the *DSU* instead of resorting to any kind of “self-help.” Article 23, in other words, prohibits a WTO Member from making itself the judge over other WTO Members. What is and what is not a violation of the covered agreements and what one can do to remedy it, is to be determined multilaterally, not unilaterally.

21. So here we are (and have been for the last two years) in the presence of an implementing measure that the European Communities has adopted in good faith to comply with the rulings and recommendations of the DSB. Let me add that this implementing measure did not come out of the blue for anyone. As already stated, all WTO Members have been able to follow how this measure has been devised as the process of adopting it has been held in total transparency. I will come back to this later in greater detail.

22. And here we have two WTO Members who have reacted to the adoption and notification of that measure by simply stating that they fail to see compliance and that therefore they will continue to apply sanctions.

23. One cannot act more unilaterally than that.
24. Indeed, the European Communities argues that this is precisely the kind of conduct prohibited by Article 23. If Canada and the US are of the opinion that there is no compliance, then it is their obligation to obtain a multilateral determination to this effect. Only a multilateral determination of non compliance would allow them to continue to apply the suspension of concessions.

25. The defending parties have the greatest difficulties to address this claim let alone refute it. They start by ignoring the claim altogether, launching straight into a defence on a (direct) violation of Articles 22.8 and 3.7, which the European Communities has only raised in a strictly subsidiary, conditional claim. When finally addressing Article 23, they limit themselves to pursuing two lines of argument. One, simply denying the obvious (which is that they are continuing to apply sanctions because they consider that there is no compliance). And two, relying on the fact that they have been given a DSB authorization to apply sanctions.

26. The European Communities has argued two specific violations of Article 23 DSU, namely that in continuing to apply sanctions - without seeking a multilateral decision - the defending parties violated, on the one hand, Articles 23.1 and 23.2(a) together with Article 21.5 and, on the other, Article 23.1 together with Articles 22.8 and 3.7. We will briefly set out these claims again. In doing so, we will address the most salient arguments that the defending parties have raised, even if they have raised them outside Article 23. Our objective this morning is to refocus these proceedings on the provision of Article 23, which is at the heart of this case.

A. Article 23.1 – Seeking Redress of a WTO violation

27. Article 23 DSU provides that when “Members seek redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements […] they shall have recourse to, and abide by, the rules and procedures of this Understanding.”
28. All parties seem to agree that when, in 1999, the US and Canada requested, obtained and started using a DSB authorization to suspend concessions, they were seeking to redress a violation established at that time.\(^3\) What violation? The violation identified in the *Hormones* report as it has been adopted by the DSB in 1998, and which the European Communities had not been able to mend within the reasonable period of time that was granted to it then.

29. Where we differ is what the US and Canada are doing right now.

30. One should think that they are still seeking redress. After all, they are still applying their suspension of concessions stating explicitly that they see no reason to stop doing that. This can only mean that they still see a violation, especially given that Article 22.8 would prohibit the continuation of sanctions in the opposite case. But what violation? Given that they cannot really deny that something has happened in the meantime, namely that an implementing measure has been properly adopted and notified to the WTO, the presumed violation can only be that the European Communities’ failure to comply with the DSB rulings and recommendations through its implementing measure.

31. But no. The defending parties instead flatly deny that what they are doing right now is seeking redress of a violation against an alleged WTO-inconsistency of the implementing measure. The US states that it did not “try to obtain or bring about compensation or remedy for some new wrong or alleged WTO violation.”\(^4\) It goes on to state that it “has already sought and obtained redress through the multilateral dispute settlement system for a violation found by the DSB.”\(^5\) “Sought and obtained” – “sought” as in “resorted to, made an attempt to, tried” (the meaning identified by the Panels in *US – Section 301* and *US - Certain EC products*) or rather as in “requested, asked for”?

32. Canada not only uses the same terms – “sought and obtained” - but also takes the trouble of underlining those words in its submission in order for everyone to

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\(^3\) US First Written Submission, para. 175; Canada First Written Submission, para. 68.

\(^4\) US First Written Submission, para. 174.

\(^5\) US First Written Submission, para. 175.
understand the difference between the present tense (“seeking”), in Article 23.1 DSU, and the past tense of “sought and obtained”. 6

33. That difference seems obvious enough. What is much less obvious, however, is how, by referring to the past, the defending parties want to explain what they are doing right now. Applying sanctions is a form of seeking redress as the defending parties have admitted themselves. 7 They are currently applying sanctions - present tense, not past tense – so how could they not be seeking redress?

34. They are not seeking redress, so the defending parties say, because they are acting under an authorization. 8 Irrespective of the question of what that authorization can or cannot justify under the present circumstances, (a question to which I will turn in a moment), there is one thing it cannot do and that is: change or deny the facts.

35. The authorization they have obtained is indeed a central issue in this case. The defending parties seem to be saying generally that their conduct cannot be incompatible with any WTO provision whatsoever, given that there exists an authorization by the DSB. 9 Thus, they rely on it in their defence on Article 23, as well as in their defence on Article 22.8.

36. Let me just make two general remarks at this stage: The first is that the European Communities does not deny that this authorization has once been properly granted nor does it claim – as the defending parties pretend – that it has been “terminated” or “withdrawn.” We simply say that the conditions for it to be used no longer exist.

37. Second remark: An authorization allows a WTO Member to derogate from its obligations within the scope of the authorization – and not beyond. It is not because a WTO Member has an authorization to suspend concessions that it can go off and violate all sorts other obligations it has under the covered agreements.

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6 Canada First Written Submission, para. 68.
7 See above footnote 3.
8 E.g. Canada First Written Submission, para. 70, US First Written Submission, para. 175.
9 Canada First Written Submission, para. 41; US First Written Submission, para. 39.
38. Thus, as regards specifically Article 23, it is clear that the mere existence of an authorization cannot simply do away with the obligation to abide by the rules and procedures of the DSU, when a Member is seeking redress of a violation. How that authorization then relates to specific rules and procedures we will discuss in more detail as we address these in the individual claims.

39. Let me now turn to the two principal claims the European Communities has made in these proceedings: First, Article 23.1, in conjunction with Article 23.2(a) and 21.5 DSU; and, second, Article 23.1, in conjunction with Articles 22.8 and 3.7 DSU.

B. Violation of Article 23.1, in conjunction with Article 23.2(a) and Article 21.5 DSU

40. Article 23.2(a) is a specific case of application of Article 23.1. It prohibits determinations to the effect that a violation has occurred except through recourse to dispute settlement in accordance with the rules and procedures of the DSU. In other words, whether or not a violation exists is to be established multilaterally, not unilaterally.

41. The case of the European Communities is quite simple: there is a procedure to establish the specific violation of non-compliance and that is Article 21.5 DSU. In deciding to continue to apply sanctions the defending parties have already unilaterally determined that there is non-compliance, instead of requesting that this be established through an Article 21.5 procedure.

42. The defending parties’ reply to that is essentially based on the following two and a half arguments: First, they simply deny that they have made a determination of the European Communities’ non-compliance. Second, they claim that Article 21.5 does not put an obligation on them to launch a compliance procedure against the implementing measure; and, second and a half – “half”, because only the United States seems to make that argument – they say that at least there is no obligation to launch such a procedure immediately!
43. As regards the first argument, the defending parties put forward a number of reasons as to why there is so far no determination by them. Interestingly enough, they hardly deal with one of the main points the European Communities has raised, namely that their “unilateral determination” can be inferred from the fact that they continue to apply sanctions unilaterally.10 And how could it not be inferred from it? We must assume – a good faith assumption I guess – that when two WTO Members apply trade sanctions against the EC they do that for a good reason. It is inconceivable – and indeed would be even worse than what we are discussing now – if they did so without any good reason. On the other hand, both spend considerable time in their first written submissions explaining - in a rather defensive manner - that their public statements do not constitute determinations, that they never alluded to a violation, that they have not yet concluded on non-compliance, etc. And finally, elsewhere in their submissions, they spend even more time explaining why the European Communities’ implementing measure actually falls short of compliance.

44. A few points must be made: First, whether or not a specific statement reaches – as Canada puts it – the “threshold” of a determination is one thing. Yet, another thing is if that statement is accompanied by conduct that severely affects the EC’s trade. We are not looking at statements made in abstracto here. We are looking at statements made in the specific context of two WTO members applying sanctions vis-à-vis another WTO member. What is affecting the European Communities’ exporters is not whether or not the representative of the US and Canada at the DSB meeting did or did not use the word “violation” and what they meant by “fail to see.” It is the 100% duties which continue to apply to their exports. A “determination”, therefore, need not be pinned down to a specific statement in a specific form, it is the whole conduct a WTO member is displaying that needs to be looked at.

10 All that Canada has to say to that is that this is an inaccurate assertion (First Written Submission, para. 73) and that Canada’s views on the WTO consistency of the EC’s current measure are not the basis of its suspension of concessions (ibid. at para. 75). The US merely states that it “did not need to make any further determinations to continue to apply that suspension of concessions and that it did not [do so]”. (First Written Submission, para. 182).
45. Second, - a recurring theme – facts cannot be denied, statements unsaid, measures undone, just because there is a DSB authorization. If, on the other hand, that authorization were to justify them to continue applying this kind of conduct for ever, as the defending parties claim, then why would they insist so much on not having made any determination?

46. As regards the second line of arguments: The line the defending parties pursue is that they do not have an obligation under Article 21.5 DSU to launch compliance proceedings. There is a short answer to that, Mr. Chairman: This Panel is asked to find whether, under Article 23, in conjunction with Article 21.5, a Member has an obligation to launch a compliance procedure if and because it continues to apply sanctions against another Member, even though there is a new implementing measure. It is not relevant for this dispute what obligations can be found directly in 21.5 in the absence of such unilateral conduct.

47. Finally, the second and a half line of arguments the defending parties, or at least the United States, pursues, is that there is no obligation for the complaining parties to immediately launch a compliance review. Mr. Chairman, Members of the Panel, if we were a month or two – rather than two years – into implementation, then we would understand that a discussion on how immediately is immediate or on what a reasonable delay is should take place. Equally, if we were in the presence of two Members who for the first time see a brand new measure and have not already commented on it throughout the whole process of adoption of that measure (not to mention that we have now two submissions in front of us that set out quite detailed and definitive views as to why our new measure is not compliant) then we would understand that a discussion on how much time they would need to assess it should take place;

48. But in the present context and circumstances, with almost one and a half years that have passed after the adoption of the European Communities’ implementing measure, at the moment when this panel was established and with all the discussions that took place between the parties to this dispute regarding this implementing measure, both before and after it was adopted, the question of how quickly a retaliating complainant must react to an implementing measure does not
pose itself. If anything, one could discuss the defendants’ bad faith and their contradictory behaviour (**venire contra factum proprium**).

49. In conclusion to this first specific claim that the European Communities has made, let me reiterate that the defending members’ conduct is contrary to Article 23, and specifically to Article 23.2(a) DSU, as they have contested compliance and have decided to continue applying the suspension of concessions without first requesting a multilaterally review of our compliance under Article 21.5 DSU.

C. **The United States and Canada are violating Article 23.1, read together with Article 22.8 and 3.7 of the DSU by continuing to suspend concessions and related obligations**

50. I will now turn to the EC’ claim that the defending parties are in violation of Article 23.1 in conjunction with Article 22.8, 3.7 of the DSU because they continue to apply sanctions despite the adoption and notification of an implementing measure which they have not even challenged under Article 21.5.11

51. The defending parties have invoked in essence two defences: first, that the European Communities has to prove in full substance why it has removed the inconsistency of the old **Hormones** legislation. Second, that the continued sanctions are covered by the old DSB authorization.

52. These two counterarguments fail to rebut the claim made by the European Communities.

1. **What is the scope of examination of EC’ compliance measure under Article 22.8 of the DSU?**

53. The United States and Canada submit that the conditions of Article 22.8 are not fulfilled because the European Communities did not prove that it has “removed” the inconsistency of the measure. In this context, the United States refers to the ongoing DSB surveillance under Article 22.8 of the DSU. This provision requires
a multilateral review of compliance and not a mere unilateral declaration of compliance. In the light of the “negative consensus rule” the DSB authorization cannot be “withdrawn” on the basis of a “mere unilateral declaration of compliance”. This is said to be corroborated by Article 3.2 and 3.3 of the DSU.12

54. Mr. Chairman, Members of the Panel, this argumentation overlooks the most basic fundamentals of the dispute settlement proceedings as a non-compliance review. Indeed, in all dispute settlement proceedings that have ever been adopted by the DSB it was for a complaining Member to prove the WTO inconsistency of a measure by another Member. This is only logical. As demonstrated above, Article 23.1 explicitly prohibits a Member to determine unilaterally that another WTO Member has acted contrary to WTO obligations. This is the very raison d’être for the existence of the dispute settlement system as any such allegations should be subjected to a multilateral review.

55. This is explicitly confirmed by Article 6 of the DSU. Under this provision a Panel may be established upon request of a complaining party setting out the legal basis of its complaint. Clearly, a member who brings a complaint pretends that a measure by another Member is WTO-inconsistent but not that it is WTO-consistent.

56. The defending parties completely ignore this very basis of the WTO Agreement. Quite tellingly, they therefore also ignore that the European Communities makes its systemic claim under Article 22.8, in conjunction with Article 23.1. Thus, the Panel is called upon to decide whether or not the conditions under Article 22.8 are fulfilled in view of the prohibition under Article 23 to make unilateral determinations of non compliance.

57. In this case, the Panel should ask itself the simple question whether the defending parties can contest the removal by the EC of the inconsistency of our old measure (Article 22.8), without making a unilateral determination under Article 23.

11 EC’ First Written Submission, paras. 74 et seq.
12 US’ First Written Submission, paras. 109 et seq.; Canada First Written Submission, paras. 43 et seq.
58. The answer to this question is very simple: This is not possible. In fact, by contesting our removal of the inconsistency, the defending parties necessarily say that the EC’s new measure is still WTO inconsistent.

59. I do not want to repeat myself but this message is crucial for the resolution of this dispute: Article 23 requires that the determination of WTO-incompliance can only be done multilaterally. Conversely, in the absence of such a multilateral finding, every determination – whether explicit or implicit - that the inconsistency has not been removed is necessarily unilateral and, therefore, in violation of Article 23 DSU.

60. This proposition is perfectly harmonious with the basic principle of good faith, whereby a Member is presumed to act in a WTO consistent way. I will come to this in a moment.

61. This fundamental logic of the dispute settlement system is in no way affected by the surveillance by the DSB under Article 22.8, second sentence. This surveillance has to be read contextually with Article 22.8, first sentence, to which it is indeed ancillary. Thus, once the WTO inconsistency has been removed, i.e. the recommendations and rulings are implemented, there is no need for an ongoing surveillance by the DSB. Indeed, what should the DSB still keep under surveillance?

62. In this context, the European Communities would also note the surveillance practice of the DSB in the EC – Hormones case. As a matter of fact, this case has practically not been on the DSB agenda since July 1999. Thus, it is strange enough that the defending parties now try to build an argument on the basis of a DSB surveillance which has been practically non-existent.

63. We would then turn to the relevance of the “negative consensus rule”. The US’ argument is already based on a false premise, i.e. that a Member which notifies its compliance measure could unilaterally “terminate” a DSB authorization adopted by negative consensus. As already mentioned, the European Communities has never argued this. Rather, the European Communities carefully submitted that the DSB authorization can not justify the continued application of
sanctions, when a duly notified compliance measure is not challenged under Article 21.5 within a reasonable timeframe.

64. Notably, even Article 22.8, first sentence, DSU does not speak of a “termination” of the DSB authorization. Instead, it only refers to the “application” of the suspension of concessions or other obligations. And this “application” is limited in time. Thus, even in a case where the defending parties would see Article 22.8 fulfilled, they would probably argue that this does not mean that the DSB authorization is “terminated”, be it in the form of a negative consensus rule or not.

65. The defending parties then also refer to Article 3.2 and 3.3 of the DSU. According to them, these provisions (concerning the security and predictability of the dispute settlement system) would be undermined, if a Member which is in breach of its obligations could avoid the application of sanctions.13

66. However, the defending parties obviously make the second step before the first. The defending parties assume that their rights would be impaired or the effectiveness of the system would be undermined, if they could not continue applying the sanctions where a Member is still breaching its obligations. Yet, how do the defending parties know that the European Communities is still in breach of its obligations?

67. Well, the answer is very simple: because the defending parties have made a unilateral determination that the EC’ compliance measure is inconsistent. Thus, by making the argument under Articles 3.2 and 3.3 of the DSU the defending parties are contradicting their own statements that they have not made a unilateral determination of incompliance. Yet, just as this statement has been proven wrong, so must the argument under Articles 3.2 and 3.3 fail.

68. It is also quite striking that the defending parties reserve the notion of effectiveness and preservation of rights only for themselves, but not for a Member suffering from retaliation. Yet, a Member against whom sanctions are

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13 US First Written Submission, para. 112, Canada First Written Submission, para. 62.
applied has just the same right to see the application of these measures ended once it has complied with its obligations. This is very clearly stipulated in Article 22.8 of the DSU. The implementing Member has very much the same interest in defending the effectiveness of the dispute settlement system by asking the retaliation to be ended, because this retaliation does no longer serve any purpose as compliance has been achieved.

2. The presumption of good faith

69. I will then turn to the presumption of good faith, i.e. the presumption of compliance, which the European Communities has invoked in its systemic case under Article 22.8, read together with Article 23 DSU.

70. Both defending parties submit that the European Communities cannot base itself on such a presumption. The United States refers to a quote from a *Bananas* compliance Panel under Article 21.5, while Canada more specifically argues that the general good faith presumption does not apply to a compliance measure which is not part of a day-to-day business, but which has been taken after the reasonable period of time and after a DSB authorization to apply sanctions.

71. The European Communities understands that the defending parties are denying the good faith principle in this case because they consider that the European Communities has not correctly implemented its obligations. By doing so, however, the defending parties are confusing the notion of good faith and a possible violation under a covered agreement.

72. Let me remind that in similar circumstances the United States did not hesitate a moment to uphold the principle of good faith. Of course, it may not come to your surprise that in that particular case the United States was on the other side of the table.

73. In *US – Continued Dumping and Subsidization Offset Act (Byrd Amendment)*, the Panel found that the United States was in violation of certain provisions. On top

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14 US’ First Written Submission, paras. 116 *et seq.*
of that, the Panel held that the United States had done so in bad faith. In its appeal submission the United States vigorously rejected this finding of the Panel arguing that:

There is also utterly no basis or justification in the WTO Agreement for a WTO dispute settlement panel to conclude that a Member has not acted in good faith (...) 16

74. Interestingly, the Appellate Body actually agreed with the United States. It stated:

Nothing, however, in the covered agreements support the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion.17

75. In the present case, the European Communities bases itself on the same rationale as the Appellate Body in the Byrd Amendment case. Thus, even though the defending parties allege that the European Communities is still in violation of the SPS agreement, this does not in any event affect the presumption of good faith. As the Appellate Body has made clear, these are two completely different pairs of shoes.

76. With this in mind, let me address the more specific arguments made by the defending parties. First of all, it is quite remarkable that the United States relies at all on the EC – Bananas (Article 21.5 – EC) decision18. This Panel report is the only one under the WTO dispute settlement system that has never been adopted by the DSB. It has, therefore no legal status.

77. Moreover, the United States at the time even refused to participate in the proceedings. That does obviously not prevent the United States to try to make an argument out of it. Be that as it may, it is in any event quite tellingly that this decision does not even corroborate the US’ own theory. The Panel merely said that a Member should not be presumed to agree that another Member is in compliance. Thus, the decision dealt with what a complaining Member is

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15  Canada First Written Submission, paras. 56 et seq.
18  US’ First Written submission, paras. 109 et seq.
presumed to believe or not to believe. Yet, the general principle of good faith is an objective criterion that applies to compliance measures properly adopted and notified to the WTO. This is even more obvious if the other Members do not challenge the legality of the new implementing measures under Article 21.5 within a reasonable timeframe.

78. I would now like to turn to the defending parties’ theory of a reversed burden of proof in a compliance case. The European Communities has some trouble to understand the basis in the DSU for such a reversal. For instance, let us take a look at the criteria which Canada establishes in its First Written Submission. Where does the DSU provide that a measure, which is not taken as part of its day-to-day business or which has not been taken within the reasonable period of time does not benefit from the presumption of good faith?

79. Mr Chairman, Member if the Panel, the answer is simple: nowhere.

80. Contrary to what Canada believes, a reversal of presumption can also not be deduced from the DSB authorization granted in 1999. We will discuss the DSB authorization in greater detail in a moment. Yet, at this stage it should only be noted that the DSB authorization is limited to giving a Member the right to apply sanctions. However, it does not go further than that. The DSB authorization cannot reverse the normal rules which apply for subsequent implementing measures. This is so, in particular as these measures were not even in existence when the authorization was granted. No, what we see here once again, is the attempt by these two WTO Members to declare their rights sacrosanct to the detriment of a Member that has implemented its obligations in good faith. But there is no “once a sinner, always a sinner” principle in the WTO and the DSU.

81. The general presumption of good faith is not only contained in the DSU (Article 3.10), but it is also a cornerstone under public international treaty law, namely Article 26 of the Vienna Convention on the Law of the Treaties. Accordingly, it has been recurrently confirmed by the International Court of Justice and by the WTO jurisprudence in various decisions.

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19 Canada, First Written Submission, para. 56.
82. Thus, the Appellate Body in *Chile – Alcoholic Beverages* found:

> Members of the WTO should not be assumed, in any way, to have *continued* previous protection or discrimination through the adoption of a new measure. This would come close to a presumption of bad faith.\(^{20}\)

83. Thus, as the Appellate Body made clear, the principle of good faith is not subject to particular situations but it applies indeed in “any” circumstances. Moreover, the Appellate Body said that any other presumption of good faith would be almost equal to a presumption of “bad faith”, which would be clearly against the basic foundations of international relations among sovereign entities.

84. In the same vein, the arbitrators in the case *EC – Hormones (Article 22.6 – EC)* found that:

> WTO Members, as sovereign entities, can be *presumed* to act in conformity with their WTO obligations. A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency.\(^{21}\) (Emphasis in the original)

85. We would also recall Canada’s position in the *Aircraft* case, where it was itself an implementing Member and, thus, was required to defend its compliance measure. Canada stated:

> (…) where there has been a finding of non-compliance with WTO rules and a Member adopted a replacement measure, that Member cannot be assumed to have continued the previous prohibited practice.\(^{22}\)

86. The European Communities, of course, understands why in this particular case Canada would not like to be reminded about its own position in the *Aircraft* dispute. However, as mentioned above, there is no textual basis for Canada’s theory. And as the arbitrator put it in the case *US – FSC (Article 22.6 – US)*:

> It is not our task to read into the treaty text words that are not there.\(^{23}\)

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\(^{20}\) Appellate Body Report, *Chile – Alcoholic Beverages*, para. 74 (underlining added).

\(^{21}\) *EC – Hormones (Article 22.6 – EC)*, Decision by the arbitrators, para. 9.

\(^{22}\) *Canada – Aircraft (Article 21.5 – Brazil)*, Canada’s First Written Submission, Annex 2.-1, para. 44.

\(^{23}\) *US –FSC (Article 22.6 – US)*, para. 5.35.
87. The same goes for their concept of the reversal of the presumption of good faith. Given that this is such a serious consequence, and contrary to general public international law, one would have expected at least a specific provision to this effect in the DSU. Yet, the silence under the DSU is telling enough.

88. If Canada’s criterion about the day-to-day business should bear any relevance at all, the European Communities considers that in the present case it even supports the EC’s reliance on good faith. Indeed, the European Communities prepared the implementation of the DSB recommendations and rulings with extraordinary carefulness.

89. Let me recall some of the very basic facts and circumstances under which the new Directive 2003/74/EC had been adopted by the European Communities.

90. In the light of the Appellate Body’s decision that the EC’s hormones ban was not based on a sufficient risk assessment, the European Communities made any conceivable effort to analyze the risks to public health from residues in meat treated with hormones for growth promotion purposes.

91. To this effect the European Communities undertook the following steps:

➢ First, as regards the potential risks to human health from hormone residues in bovine meat and meat products, the Commission asked the scientific advice from the relevant Scientific Committee to evaluate such substances, which is the independent Scientific Committee of Veterinary Measures Relating to Public Health (SCVPH, hereinafter “Scientific Committee”). Let me briefly explain the background of this Committee.²⁴ The Scientific Committee was a permanent scientific advisory Committee which provided the European Commission with advice on matters relating to consumer health and food safety related to the production, processing and supply of food of animal origin. The Scientific Committee comprised 15 prominent scientists of respected universities and institutes from the European Communities. Its members had particular expertise in veterinary and human medicine, public

²⁴ Please note that the SCVPH does not exist any longer and its tasks are now assumed by European Food Safety Authority.
health, microbiology, virology, epidemiology, immunology, toxicology etc. For the particular risk assessment for hormones in beef, the Science Committee was assisted by another working group of nine specialized scientists. Four out of these nine scientists were from well known US universities and research institutes. Most importantly, all of these 24 scientists were completely independent.

- Second, as regards the risks of hormonal growth promoters in cattle with respect to risks arising from the abusive use and difficulties of control, the Commission established a special working group, consisting inter alia of external experts with special knowledge in this field.

- Third, in order to complement the current knowledge of hormones used for growth promotion purposes, the Commission launched in early 1998 seventeen specific research studies in an attempt to fill obvious knowledge gaps in the publicly available scientific data. These studies concerned inter alia toxicological and carcinogenicity aspects, residue analysis, potential abuse and control problems as well as environmental issues. They were designed so as to respond to the kind of risk assessment as defined by the Panel and the Appellate Body in the Hormones case.

- Fourth, in order to dispose of all relevant information for the risk assessment the Commission requested several third countries that allow the use of growth promoting hormones in their beef production to make available the risk assessment documentation and the underlying scientific data, on the basis of which the relevant six growth hormones had been authorized for use on their territory. Regrettably, the United States, Canada and Australia declined the request due to alleged business confidentiality. The requests addressed to New Zealand remained unanswered.

- Fifth, the Commission published in February 1999 in the Official Journal an open call for submission of specific scientific data for use in the risk assessment.
92. On this very broad basis the Scientific Committee carried out an assessment of the risks to human health arising from the use of the six hormones as growth promoters, in particular from residues in meat and meat products from bovine animals to which these hormones are administered for growth promotion purposes. In its Plenary Session in April 1999 it adopted unanimously its opinion.  

93. As far as the risks to public health by the hormones in question are concerned the Scientific Committee concludes that “any excess exposure towards 17-β oestradiol and its metabolites resulting from the consumption of meat and meat products presents a potential risk to public health, in particular to those groups of the population which have been identified as particularly sensitive such as prepubertal children”. As regards the remaining hormones, the Scientific Committee opinion considered that the currently available information is insufficient to complete a risk assessment. Nevertheless, the Scientific Committee confirmed that the evidence available was enough to conclude that these hormones are likely to possess developmental, immunological, neurobiological, immunotoxic, genotoxic and carcinogenic effects. Of the various susceptible risk groups, prepubertal children is the group of greatest concern.

94. Mr. Chairman, Members of the Panel, all the above scientific, procedural and regulatory steps are explained with sufficient detail in the recitals of our new Directive 2003/74/EC. Moreover, we have no problem whatsoever to provide to you all the scientific documentation and any other material you may request, on which our risk assessment and the new Directive are based in the following stages of these proceedings.

95. Given that the Scientific Committee did not and indeed could not resolve all pertinent questions, it reviewed its risk assessment twice in 2000 and 2002, taking into account the most recent data from any available source. In particular, it considered reports from the UK Committee on Veterinary (Medicinal) Products, the Joint FAO/WHO Expert Committee on Food additives (JECFA),

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25 See Exhibit CDA – 2.
26 Exhibit CDA – 4 and Exhibit CDA – 5.
and from another internal EU scientific committee, the Committee on Veterinary Medicinal Products. As a result of this review, the Scientific Committee confirmed twice its original findings of 1999.

96. During this process the European Communities undertook every effort to engage notably the United States and Canada in the scientific debate about the potential risks of the hormones in question when used as growth promoters. Quite extraordinarily, in June 1999, scientists of the European Communities and the United States even met in Washington to discuss the results of the 1999 Scientific Committee opinion.

97. On the basis of the 1999 Scientific Committee opinion, the Commission launched in 2000 the legislative process within the European Communities. The Commission adopted a legislative proposal which would permanently ban the use for one hormone (oestradiol 17β) for growth promotion purposes, while the administration for growth promotion of the five others would be forbidden provisionally. The European Communities subsequently notified this proposal to the WTO SPS Committee.

98. It is quite remarkable that the EC’ draft proposal was never subject to discussions in the SPS Committee, despite its obvious sensitivity for the United States, Canada and some other WTO Members. Canada only rejected in a very superficial way the scientific basis for the proposal, i.e. the conclusions by the Scientific Committee. In similar vein, the United States alleged that the proposal did not provide any new scientific evidence.

99. During the legislative process the Commission proposal was closely reviewed by all relevant EC’ bodies, before being eventually adopted after three years of intense discussions and reviews by the European Parliament and the Council.

100. Why is it important for the Panel to know this background?

101. In the European Communities’ view, the Panel should note that, during the compliance process, the European Communities has made every effort to analyze the relevant scientific evidence in full transparency and with an open mind. All
stakeholders – whether inside or outside the European Communities - had at every moment in time the opportunity to submit relevant information and to intervene in the whole process.

102. It may be that the United States and Canada would have liked to see a different result from this process. However, this is not the point. The European Communities would have lifted the ban for these hormones if their use for growth promotion purposes were proven to be safe for the public health and would have met its chosen level of protection. But on the basis of the extensive scientific research and risk assessment, the European Communities concluded that this is not the case.

103. Having said this, the European Communities would strongly reject the unsupportable assumption that it has not conducted the whole scientific and legislative process in good faith and, therefore, its measure must be presumed to be enacted in bad faith. In this context, it should not be forgotten that the European Communities has readily accepted to shoulder over four years the sanctions by the United States and Canada. The European Communities accepted this continuous economic burden because it considered it more important to take every care in ensuring that its compliance measure fulfils all the DSB recommendations. Thus, it did not rush into some sort of activism in order to get rid of the countermeasures.

104. It is therefore also absurd, and indeed puts the reality on its head, to maintain that the European Communities in this case seeks to end the termination on the basis of a “mere declaration of compliance”, and that this could be done also just “a week after” the DSB authorization. This is a very serious and indeed unacceptable reproach. It insinuates that the European Communities abused its rights and it just waives its hand to claim compliance. Nothing could be further away from the truth. In the light of the whole process, as just described, it is instead fully legitimate for the European Communities to rely on the presumption of good faith for its compliance measure.
105. Also, the European Communities has never argued, and would never do so, that it is a “mere declaration of compliance” to the DSB that has any of the legal effects discussed in this case. Obviously, the notification is important for information and transparency purposes. But what matters is that the implementing Member has taken a compliance measure, not that it makes some sort of declaration. Given the timing of the European Communities’ communication to the DSB and the entire, uniquely thorough internal process that has preceded it, the alleged risk of “endless loop litigation” prompted by compliance declarations “a week after” are bereft of any basis and relevance for this dispute.

106. Let me say a final word on this matter of good faith. In its submission Canada quoted from the Panel report US – Certain Products whereby the burden of proof shifts to the implementing Member in case this Member abuses its right by adopting a sort of “scam measure”, and this after the retaliating member has received a DSB authorization. The European Communities would like to make two comments on this argument:

- First, it goes without saying that the present case is far away from the situation which the Panel had in mind in the US – Certain Products case. As explained above, the EC’ compliance measure is everything else but a “scam measure”. It is based on the most conceivable careful examination of all the available scientific evidence and the scientific risks involved. Indeed, the European Communities would assume that it has spend more efforts on analyzing the relevant scientific questions related to hormones as growth promoters than the United States and Canada taken together, both of which apply a level of protection for its citizens which is obviously different from ours.

- Second, on appeal the Appellate Body strongly criticized the Panel statement on the effect of the DSB authorization. In fact, the Appellate Body explicitly concluded that:
the Panel erred by stating ‘[o]nce a Member imposes DSB
authorised suspensions of concessions or obligations that
Member’s measure is WTO compatible (it was explicitly
authorised by the DSB)’. Therefore, this statement by the Panel
has no legal effect.27 (Emphasis added).

107. Finally, in this context the European Communities would like to recall again
what we have said on the “burden of proof” standard. In its First Written
submission, the European Communities already emphasized that no special rule
or principle applies just because we are now in the implementation phase of a
dispute.28 Therefore, the general rule is, as the Appellate Body has stated since
US - Shirts and Blouses, that it is the party who alleges the affirmative of a claim
who bears the burden of proof. It is, therefore, excluded to suggest that an
implementing Member should bear the burden of proof for the negative of a
violation claim.

3. The relevance of the DSB authorization

108. Let me now turn to the relevance of the DSB authorization for the continued
application of sanctions in the context of Article 22.8. As we have stated before,
the United States and Canada essentially argue that their sanctions are “by
definition” WTO-consistent due to this authorization.

109. Obviously, the defending parties and the European Communities have different
views about the scope of the DSB authorization. For the United States and
Canada, the DSB authorization operates like a sort of “absolute justification”
which makes every behaviour per se WTO consistent, irrespective of any
subsequent events and compliance acts. On the other hand, the European
Communities considers that it is necessary to put the DSB authorization in its
proper context under the DSU.

110. In this case, the DSB authorization has been granted under Article 22.7 following
an arbitration procedure under Article 22.6 of the DSU. The subject-matter of this

28  EC First Written Submission (WT/DS320), paras. 92 et seq.; EC First Written Submission
(WT/DS321), paras. 90 et seq.
Article 22.6 arbitration was the level of nullification or impairment caused by the original EC’ Hormones legislation. Thus, it is crucial to note that the very basis of the DSB authorization has been the WTO-inconsistency of the Member before the authorization was granted. On the other hand, the DSB authorization is not based on any (alleged) WTO inconsistency of a compliance measure that has been adopted afterwards.

111. What follows from this important and undisputable fact?

112. First of all, in case of a subsequent compliance that is properly adopted and duly notified to the WTO, the basis on which the DSB has granted its authorization has fundamentally changed. The DSB only granted the authorization to suspend concessions precisely because a WTO Member had been found to be WTO inconsistent in the past and no implementation measure was taken within the reasonable period of time. The DSB’ authorization was to induce compliance by the other Member and to rebalance temporarily the rights and obligations until the other Member has complied.

113. The defending parties completely disregard this close nexus between the multilaterally determined WTO-inconsistency and the very purpose of the DSB authorization. For both of them, all this does not matter. Instead, they claim a right to continue the suspension of concessions whatever purpose these sanctions may still fulfil.

114. Second, the DSB authorization is even more fundamentally changed in case of a subsequent compliance measure which has never been found WTO-inconsistent, because the defending parties do not dare to challenge it under Article 21.5. In its First Written Submission the European Communities has referred to the “sequencing” discussion and practice of WTO Members in case of a compliance act before the DSB authorization is granted. Quite remarkably, in the “Bananas” dispute the DSB Chairman explicitly stated that the sequencing of a
115. As it happened, the logical way forward at the time was to assess first whether or not the compliance measure was sufficient before determining the nullification or impairment caused by the WTO-inconsistent measure. In stark contrast to this sequencing, the defending parties consider now that the logical way forward is to continue to apply sanctions even though the EC’ compliance measure has not been challenged by them and not been found WTO-inconsistent. And what is more, they even refuse to challenge the EC’ compliance measure pretending that this is not necessary since they have a DSB authorization.

116. But how can Canada and the United States know that the European Communities is still not in compliance with its obligations? They do so solely on the basis of a unilateral determination of the EC’ compliance measure which is in obvious contradiction to Article 23 and Article 21.5 of the DSU.

117. One might argue that the DSU is not explicit on this question. However, the DSU contains several elements which indicate that the DSB authorization can not serve as a blank cheque for the continuous application of the sanctions even after a subsequent compliance measure has been adopted and notified properly to the DSB:

118. First, let us consider the wording of Article 22.8 of the DSU and what it does not say. Even in case of a removal of the inconsistency of the measure, Article 22.8 does not say that the “DSB authorization ceases to apply”. Instead, it states that the suspension of concessions or other obligations shall not “be applied” any longer. Thus, Article 22.8 does not formally address the fate of the DSB authorization. In an Article 22.8 situation it is, therefore, perfectly conceivable that although the DSB authorization is not formally terminated or withdrawn, a WTO Member is not entitled to continue the application of suspension of concessions. Furthermore, Article 22.8 does not say that the removal of the inconsistency or the termination of the application of suspension requires

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29 WT/DSB/M/54 of 20 April 1999.
whatever kind of DSB decision. Rather, Article 22.8 is self-executing. The use of the word “shall” supports this interpretation, which does not give any margin of manoeuvre and requires no additional acts.

119. Second, contextually, Article 22.8 describes the next procedural step in the course of a dispute after an authorization has been granted. Article 22.8, therefore, provides for the next logical step. Consequently, once the inconsistency of the measure has been removed, the application of suspension of concessions or other obligations is no longer permitted.

120. In addition, Article 22.8 should be interpreted in the context of Article 23 of the DSU, which prohibits WTO Members from judging unilaterally the properly adopted and notified compliance measures of other WTO members. According to text, object, purpose and context of Articles 22.8 and 23, the defending parties must seek a determination of incompatibility under the normal DSU procedures. This general principle is not altered in whatever way under Article 22.8.

121. Another contextual element which should be taken into account is Articles 3.7 and 22.1 of the DSU, which underline the exceptional and temporal nature of the application of suspension of concessions or other obligations. Their exceptional and temporal nature effectively complements the principle of good faith. In case of a properly adopted and notified compliance measure, the exceptional and temporal justification of countermeasures is put into question. In the presence of a subsequent compliance measure, the “normal” situation revives and sanctions can no longer be applied as if nothing has changed.

122. Canada tries to draw contextual support for its position from Article 3.2, emphasizing the security and predictability given by the DSB authorization. It is obvious that this argument is insufficient to support Canada’s position. The “security and predictability” under Article 3.2, also applies to the WTO Member who properly implements its obligations. Once this Member has removed the inconsistency of the measure it should have the reassurance that sanctions are no longer applied. At a minimum, the implementing Member must have the reassurance that its measure is properly challenged under the DSU by the
retaliating Member, which does not agree with the compliance measure. But even this, Canada and the United States refuse to do despite the repeated requests by the European Communities to do so.

123. The European Communities would also recall the object and purpose of the trade sanctions, which is to induce compliance and to rebalance the rights and obligations under the WTO agreements. However, both objectives require that a Member’s measure has been found first to be WTO-inconsistent in accordance with the DSU rules. And such a determination concerns logically not just any measure, but the measure that is currently in force in the Member concerned. Transposed in the present context, it means that Canada and the United States cannot simply argue that the “old” measure has been found to be WTO-inconsistent in 1998. This measure is not any longer in force, since the European Communities adopted and notified its compliance measure in 2003. It is simply not rational and credible to argue that the object and purpose of the suspension of concessions continues to exist, if its basic reason, i.e. the old WTO-inconsistency, has disappeared.

III. CONCLUSIONS

124. Mr Chairman, Members of the Panel, by bringing this dispute against the United States and Canada the European Communities is seeking an important clarification of the rights and obligations of WTO Members under the DSU. As it happens, this dispute is caused by the original Hormones case. But this case presents new systemic issues of general and horizontal importance. The same systemic questions could have arisen in any other compliance proceeding, be it the Byrd Amendment, the case on Foreign Sales Corporations, etc.

125. For precisely this reason, the European Communities has always argued that this dispute is about the defending parties’ unilateral and unjustified continuation of their suspension of concessions. This case concerns the failure of the defending parties to contest the legality of the implementing measures, which the European
Communities has adopted and properly notified to the DSB in 2003. Their failure persists now for about two years.

126. It should be obvious to all why the defending parties so desperately seek to shift the debate from the systemic issues under the DSU which we have raised to the discussions about hormones in beef. One reason is that the defending parties know quite well that their behaviour is not in compliance with the DSU. And it is easier for them to distract the Panel with misplaced and outdated scientific allegations, even though the defending parties could have had this discussion on the scientific basis of our new Directive in depth for a long time by bringing a compliance dispute in 2003. Instead, the defending parties chose to declare unilaterally the European Communities non-compliant and to hide the continuation of their sanctions behind the DSB authorisation.

127. Mr. Chairman, Members of the Panel. One of the cornerstones of the DSU is the prohibition for Members to determine unilaterally that another Member is violating the WTO Agreement. No Member should make itself judge over the trade behaviour of other Members. This is the very raison d’être of the DSU. Thus, by establishing a fair and equitable dispute settlement system the WTO Agreement does not only uphold the general principal of international law that all sovereign entities are equal. It also refutes the atavistic principle that “might is right”.

128. Against this background, it is clear that the US’ and Canada’s continued suspension of concessions against the European Communities goes to the very heart of the WTO system. Should one really allow that a Member judges another Member by making a mere declaration of non-compliance? Is it really acceptable that simply because a Member has at some time in the past received an authorization to impose sanctions that this shall justify for the eternity the continuation of sanctions despite the undeniable fact that the other Member has adopted compliance measures? Should the WTO really endorse the unilateral behaviour of the defending parties, which has no basis other than the proverb “once a sinner, always a sinner”?
129. In the European Communities’ view this is not how the DSU is conceived nor what its text says. A contested compliance situation such as the present one, does not reverse all the fundamental principles established by the DSU and public international law. If the United States and Canada are not happy about the European Communities’ compliance measure, they should have initiated the necessary proceedings under Article 21.5 within a reasonable timeframe. The European Communities would be very happy to engage in such proceedings. But by continuing to apply sanctions after two years, as if nothing has happened in the meantime, they make a mockery of the dispute settlement system. This situation can no longer continue.

130. Therefore, for the reasons set out in its First Written Submission and in this oral statement, the European Communities would respectfully request you, Mr. Chairman, Members of the Panel, to find that the United States and Canada violated their obligations under Articles 23.1, 23.2(a), 21.5, 22.8 and 3.7 of the DSU, and Articles I and II GATT 1994 by unilaterally determining that the European Communities new compliance measure is WTO-inconsistent and, on that basis, continuing to suspend illegally concessions and related obligations against the European Communities.

Thank you for your attention.