

In the World Trade Organization

Before the Appellate Body

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

Canada – Continued Suspension of Obligations in the EC – Hormones Dispute

(DS320, DS321)

**OPENING STATEMENT
OF THE EUROPEAN COMMUNITIES
ON THE QUESTION OF WHETHER TO ALLOW
OBSERVATION BY THE PUBLIC OF THE ORAL HEARING**

Geneva, 7 July 2008

Mr. Presiding Member, Members of the Division,

1. The European Communities would like to thank you for holding this hearing today. It demonstrates the Appellate Body's desire to fully explore the issues surrounding the parties' joint request for an open hearing. We are grateful for the care and diligence that you apply to our request and are looking forward to your questions.
2. This request may be the only element in these appeals on which the parties are in full agreement. As you know this case raises questions of fundamental importance, at the level of DSU procedures as well as public health protection. The parties are deeply divided on these issues. But on this one point they all agree: that all WTO Members and the public at large should be given the opportunity to follow this dispute, to hear the arguments of either side, and to see how impartially and professionally the Appellate Body deals with its cases, including this important one.
3. It is for the Appellate Body to decide on this joint request and as we have explained in our written submissions there is nothing in the DSU or the Working Procedures that prevents you from acceding to it. One may argue that Article 17.10 is not a "model of clarity" (as the Appellate Body once put it in a different context), but the suggestion that it would prohibit open hearings is, as Canada, the United States and the European Communities have demonstrated, untenable.
4. We also do not see any other reason for the Appellate Body to decline the request. All parties agree on it and what could be more conducive to a positive solution of this dispute than parties agreeing on something? In the presence of such agreement, only "cogent reasons" (to borrow again from another context) should lead you to deny the request. We do not see any such reasons.
5. It can certainly not be the fact that some third parties would prefer this hearing not to be open. Their wish not to speak in public can be accommodated. Beyond that, it is not for them to overrule the common will of the parties in this dispute (nor to trump the desire of the other third parties who do wish to speak in public).

6. And it is most certainly not the fact that there are ongoing negotiations under the DSU. It seems like a powerful argument to suggest, as some third parties do, that we parties are supposedly seeking to obtain from the Appellate Body what we might not obtain in the negotiations. However, apart from being factually wrong this argument sees the Appellate Body in a role, which, with all due respect, it does not have. You cannot make law, you can only interpret and apply the existing law and this is what we ask you to do.

7. Mr. Presiding Member, Members of the Division, it is a general principle of law, indeed a principle of natural justice, that justice must not only be done, it must also be seen to be done. As such, this principle applies to the Appellate Body as it does to any other institution tasked with ruling on the basis of law. Certainly, there are many ways for justice to be seen to be done. No doubt, the Appellate Body's reports with their careful summaries of the arguments and meticulous reasoning are an important contribution to this visibility. But what could be more convincing, what could be more transparent than to let the world watch the parties present and argue their case before your bench? And this is especially so in a case where trade rules are said to conflict with public health protection. We therefore invite you to engage in this exercise of transparency for the purposes of solving our dispute. We do so because we fundamentally believe that this will greatly benefit this Organization and all its Members, many of which have so far never had the opportunity to see the Appellate Body in action.

Thank you