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)

Comments by the European Communities on the Third Parties' Submissions regarding the Parties' joint request for an open appellate hearing

Geneva, 23 June 2008

1. The European Communities would like to thank the Appellate Body for giving the parties the opportunity to comment on the third parties' submissions regarding the parties' joint request for an open hearing.

2. The European Communities notes that out of the eight third parties in this case, four have stated their preference to participate in a public hearing and four have stated their preference to make their views heard in a confidential session only. Furthermore, a number of third parties have followed the Appellate Body's invitation, to a greater or lesser extent, to comment on the parties' legal arguments regarding the permissibility of opening the hearing under the DSU and the *Working Procedures*. Two third parties have also commented on the specific logistical arrangements proposed by the parties.

3. In the European Communities' view, those third parties who have submitted that public hearings would not be allowed under the DSU and the *Working Procedures* have not been able to put forward any convincing arguments in support of this view. By contrast, those third parties who support the opening of the hearing have usefully added to and reinforced some of the arguments made by the parties, which continue to be valid.

4. Firstly, as regards the interpretation of Article 17.10, Brazil, China and Mexico rely on a broad reading of the term "proceedings" without even attempting to reconcile such a reading with the context or the object and purpose of this provision. None of them, for example, has commented on the many inconsistencies that would arise out of such a reading (pointed out not only by the parties but also by Australia), not least the fact that the confidentiality requirement obviously does not apply to certain other aspects of the "proceedings" in a broad sense (such as the notice of appeal, the disclosure of statements in the report etc. …).

5. Brazil's reliance on the Appellate Body's reading of the term "proceedings" in the parallel Appellate Body reports *Canada – Aircraft* and *Brazil – Aircraft*, in that regard, is of little use. The Appellate Body, in that case, was discussing the issue

of confidentiality in circumstances diametrically opposed to the present ones – the parties there were insisting on their right to confidentiality, whereas in the present case they are insisting on being allowed to use their right under the DSU to renounce to confidentiality. The Appellate Body's reference to Article 17.10 in those cases occurred in a totally different procedural context than at present, namely whether the protection of business confidential information required the Appellate Body to adopt *additional* procedures. The Appellate Body declined Brazil's and Canada's request to that effect, and referred *inter alia* to Article 17.10 in an "elaboration of the reasons" of its ruling. The Appellate Body expressly added: "Our ruling applies only to the request for additional procedures to protect 'business confidential information' in these appellate proceedings."[1]

6. Moreover, the Appellate Body, in that case, referred to Article 17.10 without much of a discussion of this provision, also between the parties, in particular without any consideration of its exact meaning in relation to the question of an open appellate hearing requested jointly by the parties. Accordingly, the Appellate Body expressly referred only to the "ordinary meaning" of the term "proceedings", leaving entirely open the analysis of the context and object and purpose.[2] The fact that these elements are required under Article 3.2 of the DSU for a proper interpretation of a DSU provision confirms that the Appellate Body did not, in the *Aircraft* cases, give a complete interpretation of the term "proceedings" in Article 17.10 of the DSU and its relevance for the question of whether the oral hearing may be opened to the public. As has already been demonstrated – very convincingly also by Norway – the term "proceedings" in Article 17.10 can be given proper meaning for the purposes of the question now at issue only through the consideration of the context and object and purpose.

7. Brazil tries to rely on the use of the different words "deliberations" and "proceedings" in the DSU, admitting that the term "deliberations" "is defined on a much stricter basis" and does not cover the oral hearing of a panel.[3] In 2005, however, several third parties defended the exactly opposite proposition that the

1 See Appellate Body Report, *Canada – Aircraft*, paras. 141-147; Appellate Body Report, *Brazil – Aircraft*, paras. 119-125.
2 See also Australia's submission in this regard.
3 Brazil's submission, paras. 8-9.

term "deliberations" was very broad and should include the oral hearings. Brazil specifically argued that "confidentiality should continue to apply to all panels' deliberations, not excluding panels' meetings" and that "opening panels' meetings to the public would represent a reinterpretation of Article 14 of the DSU, signal[l]ing that there are cases to which confidentiality is not applied – such as panel's and Appellate Body's meetings".[4]

8. Norway also very appropriately points out that the other two authentic languages not only employ an unusually unspecific word for what the English text refers to as "proceedings" (namely "actuaciones" and "travaux") in Article 17.10,[5] but also use the much more specific, close translation of "proceedings" (namely "procedimientos" and "procédure") in other parts of Article 17, namely Articles 17.5 and 17.12.[6] As Norway rightly concludes, the only reading capable of reconciling these differences in meaning and differences in use under Article 33(4) of the Vienna Convention has to be a more restrictive reading of "proceedings" in Article 17.10, referring only to the internal work of the Appellate Body.[7] By the same token, the argument that the term "proceedings" must always have exactly the same meaning throughout Article 17 (or the DSU, for that matter) fails to take due account of the French and Spanish authentic versions.

9. Secondly, as regards Article 18.2, Brazil rightly admits that that provision applies both to written and oral statements of the parties. Yet, Brazil insists that this would not allow the parties to disclose their oral statements contemporaneously when making them. Brazil argues that the right to disclose statements "does not authorise the conclusion that such right is equally applicable to any other different

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4 Brazil's answers of 1 July 2005 to the Panel's questions to the third parties of 24 June 2005.

5 See also EC submission, at para 15.

6 Note that these are the very provisions on which China relies for support of a broad reading of "proceedings" in Article 17.10.

7 Note that the Appellate Body in several instances has relied on the rules laid down in Article 33 of the Vienna Convention, see for example *EC — Tariff Preferences*, para. 147 and *US — Softwood Lumber IV*, para. 59, where the Appellate Body, Fn. 50 quotes the International Law Commission in stating that the "presumption [that the terms of a treaty are intended to have the same meaning in each authentic text] requires that every effort should be made to find a common meaning for the texts before preferring one to another". [emphasis added]

procedure in the appeal stage" and submits that the oral hearing is different from written and oral submissions.[8]

10. The European Communities fails to see the point of this distinction. First of all, the "statement of positions", whether by written or oral submissions, covers any possible "utterance" a party can make during a proceeding and therefore also includes any position taken by that party in an oral hearing. Second, the European Communities cannot see how, under this logic, oral statements (made exclusively at oral hearings) could ever be disclosed to the public. Indeed, Brazil does not explain how Article 18.2 could cover oral statements and at the same time not have any scope of application. Nor would Brazil be able to explain how such a reading could be reconciled with the practice of many Members, including Brazil,[9] to publish their oral statements on their websites. Third, in Brazil's logic, Article 17.10 would have to trump Article 18.2 for an alleged confidentiality requirement for hearings to overrule the parties' desire to forego confidentiality. The text, however, suggests no such thing, e.g. in the form of a clause in Article 18.2 along the lines of "without prejudice to Article 17.10". Rather, the text suggests the exact opposite, namely that Article 18.2 trumps any confidentiality requirements that may exist elsewhere in the agreement ("Nothing in this Understanding shall preclude a party….").

11. In this regard, Norway puts forward the compelling argument that the very existence of Article 18 supports the view that the "scope of application" of Article 17.10 must be "restricted to only certain stages of the appeal process."[10] Indeed, only that reading allows both provisions to have meaning and existence. That reading also emerges as the correct interpretation for other reasons, as the European Communities explained in its submission of 3 June 2008.

12. The European Communities would add that this proposition is compatible with the practice of the DSB which stated in its very first decision that concerned the establishment of the Appellate Body:

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8 Brazil's submission at para. 16.
9 See, for instance, http://www.mre.gov.br/index.php?option=com_content&task=view&id=1409.
10 Norway's submission, at para. 24.

> 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.[11] (footnote omitted, emphasis added)

13. Mexico, for its part, seems to recognise the parties' right in Article 18.2 to individually decide on the confidential or public nature of their statements. The European Communities appreciates this acknowledgment which implies that Mexico recognises the parties' right to have an open hearing to the extent it does not interfere with Mexico's right under Article 18.2 to designate as confidential information which it submits.

14. Thirdly, as regards references to the ongoing DSU review negotiations, the European Communities strongly disagrees with Brazil's suggestion that the parties through their request would use a "back door" to circumvent the necessity of a consensus decision by the Membership and to create a practice in order to use it as an argument in the negotiations.[12] The European Communities would like to recall once again that the present request is made under the presently existing DSU. It therefore does not prejudge any outcome of the DSU negotiations.[13] It is actually rather difficult to understand how Brazil can take the view that "a decision on whether or not to open panels' and Appellate Body's proceedings to the public should lie with the WTO Membership as a whole". This would mean that Brazil itself was in favour of violating the DSU when it requested/agreed to opening hearings at panel level in several instances.[14] Rather, the European Communities believed that these instances had to mean that Brazil no longer considers such opening to be illegal as a matter of principle.

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11 Dispute Settlement Body, *Establishment of the Appellate Body*, WT/DSB/1, 19 June 1995, para. 9.

12 Brazil's submission, at para. 18.

13 EC submission at para. 41

14 Two such instances occurred in *Brazil – Tyres*, where Brazil agreed to an NGO request for webcasting filed just before the first hearing (whereas the European Communities considered that closed-circuit transmission was at that stage the most appropriate modality for an open hearing and that parties who are in favour of open hearings should address this question at a sufficiently early stage of a panel process to permit practical arrangements for both hearings to be open. A more recent instance known to the European Communities is the dispute DS365 where Brazil agreed to have open hearings, see Minutes of DSB meeting of 17 December 2007 at para. 47.

15. Furthermore, it seems useful to emphasise again the exact nature of this request, which is to open the hearings because all the parties to the dispute have agreed to do so. The Appellate Body is called upon to rule on the admissibility of such a joint request, and not on the broader question of opening hearings in the absence of such a joint request (as India seems to suggest).

16. Finally, as regards the specific logistical arrangements for an open hearing, the European Communities notes that Brazil dismisses the suggestions made by the parties as "unrealistic" and claims that they give rise to a number of "operational difficulties." However, Brazil entirely fails to specify what those operational difficulties would consist in and how they would be insurmountable.