

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)

**Request for an open appellate hearing
by the
European Communities**

Geneva, 3 June 2008

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I. INTRODUCTION

1. Through this submission, the European Communities submits to the Appellate Body the request that it allow the public to observe the oral hearing in the consolidated appeals from the Panel Reports in the disputes *US – Continued Suspension of Obligations* and *Canada – Continued Suspension of Obligations*. The present submission explains why such a decision would be fully compatible with both the letter and the spirit of the Dispute Settlement Understanding (DSU) and why the Appellate Body should accede to the request for an open hearing.
2. The European Communities submits this request jointly with the United States and Canada, the other participants in these appeals, who are presenting their own submissions justifying the request.
3. The present request to the Appellate Body follows and builds on nearly three years of panel practice with open hearings. The panels in the present disputes were the first to decide, on 1 August 2005, to open the hearings to public observation, in response to a joint request by the parties.¹ Since 2005, the parties to nine other WTO disputes so far have agreed to request that the panels open their doors. The panels' decision in the present disputes was preceded by an exchange of arguments between the parties and the third parties in response to questions posed by the panel. The panels acceded to the parties' request for open hearings and agreed that open panel hearings are compatible with the DSU.² Subsequent panels have always agreed to open their hearings when the parties jointly made such a request, without entering again into the question of legality under the DSU.
4. The practice of open panel hearings has been greatly beneficial for the WTO and its public perception. Allowing the public at large, e.g. civil society representatives, journalists or individual citizens, to observe dispute settlement

¹ *US and Canada – Continued suspension of obligations*, Communication from the Chairman of the Panels of 1 August 2005, WT/DS320/8, WT/DS321/8, 2 August 2005.

² Panel Report, *US – Continued suspension of obligations*, paras. 7.1-7.54; Panel Report, *Canada – Continued suspension of obligations*, paras. 7.1-7.52.

hearings has been a historic shift from the old practice of the GATT and the WTO. The fact that dispute settlement hearings at the WTO used to take place behind closed doors was one of the reasons why certain people in civil society cultivated misperceptions on WTO dispute settlement as well as doubts about the unbiased, proper and fair manner in which panels conduct these trade disputes. It was therefore highly useful that the public could see with its own eyes (or through the eyes of journalists who reported about what they saw and heard) that WTO panelists are in reality highly professional, engaged, impartial and objective. People could also see from the panels' questions that panels fully explore the case, are mindful of the interests at stake, and that they accord the parties a full opportunity to present their positions. Public dispute settlement hearings therefore strengthen the legitimacy and credibility of the system.³

5. The practice of open panel hearings has been received very favourably not only by members of the general public, i.e. by the citizens of WTO Members, but also by the governments of many WTO Members. Invariably, a significant number of delegates from WTO Members that were not parties (or, in relation to certain portions of the panel hearings, third parties) to the dispute have been using the opportunity to observe the panel hearings in question. They could thereby follow the dispute more closely than they would otherwise have been able to do. It also appeared that delegates from developing country WTO Members accounted for a considerable share of the people attending the public viewings of panel hearings. This opportunity is valuable also in allowing WTO Members who are not yet sufficiently familiar with the actual conduct of WTO disputes to learn about the procedure without even the burden of being a third party (where access to panel hearings would generally be limited to the third party session). Observing a panel hearing can be educational also for private lawyers who want to improve their capability to represent WTO Members in dispute settlement, which again tends to benefit those WTO Members who have fewer internal resources to conduct dispute settlement proceedings. Thus, open hearings benefit not only the public, but also

³ These benefits arise irrespectively of the actual turnout because, like in other judicial systems, the purpose of allowing public observation is to provide for the *possibility* of access, rather than having high numbers of people actually attend all hearings.

- WTO Members. And since delegates of WTO Members can attend the public hearings, members of the public do not receive opportunities which WTO Members do not have.
6. Open panel hearings have produced the indicated beneficial effects irrespective of the fact that this practice so far extends only to a limited number of WTO disputes. On the contrary, such a selective practice provides for the opportunity to observe the hearings in certain disputes as examples, and it gives WTO Members in other disputes the flexibility to adhere to their preference, if any, not to request the opening of the hearings. This illustrates the absence of implications for these WTO Members as well as the flexibility and pragmatism that are hallmarks of the multilateral trading system.
 7. The experience with open hearings in seven panel procedures to date has been entirely successful and smooth. There has been no incident, nor any discernible effect on the meeting of the panels with the parties. For instance, there was no “trial by media”, no security incident, no additional pressure on panelists, and no effect on the serenity and professionalism with which the litigators argued their case inside the “courtroom”. The passive observation by members of the public had absolutely no negative effect on the intergovernmental nature of the WTO, the government-to-government nature of dispute settlement, nor on the parties’ ability to settle their dispute “outside the courtroom” through a mutually agreed solution. The practice has proven that previously existing fears in these relations were entirely unfounded.

II. THE DSU AND THE WORKING PROCEDURES FOR APPELLATE REVIEW PERMIT AN OPEN APPELLATE HEARING

- A. *No explicit stipulation in the DSU prohibits open hearings*
8. The panels in the present disputes, *US – and Canada – Continued suspension of obligations*, decided that Article 14.1 of the DSU does not prohibit open hearings by stating that only panel “deliberations” must be confidential. These “deliberations” were rightly found to refer to the panel’s internal discussion of the

- case, including the internal process of decision-making. The DSU stipulation that panels meet in closed session is only part of a non-compulsory standard working procedure (Appendix 3, paragraph 2), which panels can modify after consulting the parties (Article 12.1 of the DSU).
9. Regarding the Appellate Body, the DSU at first sight appears to stipulate something slightly different. Article 17.10 of the DSU states that “[t]he proceedings of the Appellate Body shall be confidential.” However, it is by no means obvious that the term “proceedings” covers the oral hearing of the Appellate Body. In fact, an interpretation of the ordinary meaning of that term in its context and in light of the DSU’s object and purpose will demonstrate that “[t]he proceedings of the Appellate Body” rather refers to the Appellate Body’s internal work, and does not include its oral hearing, and that Article 17.10 in any event does not prohibit an open oral hearing.
10. At the outset, one has to recognise that there is no statement in the DSU that the Appellate Body must meet with the parties “in closed session”. This is the language which the DSU uses when it specifically regulates the question of access to the hearing (in Appendix 3, paragraph 2), and no such language exists in relation to the Appellate Body. Had the drafters of the DSU wanted to exclude open appellate hearings, they could have used in Article 17 the language of Appendix 3, paragraph 2. Also, it is worth highlighting that Article 17.10 of the DSU does not speak of “proceedings *before* the Appellate Body”, but about the “proceedings *of* the Appellate Body” (emphasis added).

B. The text and context suggests that the term “proceedings” does not cover the oral hearing

11. “Proceedings” is a different word than “deliberations”, but this difference alone does not yet prove that “proceedings” must include the oral hearing. The fact alone that terms are different does not even prove that their meaning must be different. For instance, the Appellate Body admitted the possibility, in *EC – Asbestos*, that the scope of the terms “directly competitive or substitutable” in

Article III:2 of the GATT 1994 could be no broader than the scope of the terms “like products” in Article III:4.⁴

12. It could be that the word “deliberation” was chosen for panels because panelists convene *ad hoc* and are not part of a permanent institution. This makes it particularly important to stress that panelists must not divulge elements of their internal deliberation when they meet other persons (e.g. WTO delegates) in their daily work outside the dispute. It is by no means inconceivable that the three sentences in Article 14.1-3 and those in Article 17.10-11 ultimately have a very similar meaning, despite the one difference in terminology, namely “deliberations” versus “proceedings”.
13. There is no indication anywhere in the negotiating history that the drafters of the DSU intended to permit open hearings for panels, but to prohibit them for the Appellate Body. Rather, the choice of the different words “deliberations” and “proceedings” may be explained by the fact that the whole idea of creating an Appellate Body emerged relatively late in the negotiations on the DSU, and the fact that the DSU regulates the appellate review in much more rudimentary terms than the panel procedure. Accordingly, there is no basis for understanding the choice of the different words “deliberations” and “proceedings” as reflecting an intention to draw a difference for the question at issue, and to rule out oral hearings with public attendance for the Appellate Body (but not for panels).
14. One can also draw a parallel to the reasoning of the panels in *US – and Canada – Continued suspension of obligations* regarding why open panel hearings are compatible with the DSU. The panels correctly interpreted Article 14.1 (“[p]anel deliberations shall be confidential”) as referring to the panel’s internal work only, not also the hearings. Article 14.2 which is parallel to the second sentence of Article 17.10, elaborates on particular aspects of the internal work, namely the drafting of the report. The panels considered that the three elements of Article 14 (panel deliberations, drafting of the report, separate opinions) all deal with the “work of panels *stricto sensu*”, not with the conduct of the procedure with the

⁴ Appellate Body Report, *EC – Asbestos*, para. 99.

parties, which is regulated in Article 12 of the DSU.⁵ Thus, the fact that the second sentence in Article 17.10 already addresses a part of the internal work of the Appellate Body by no means suggests that “proceedings” must cover more than the internal work. Rather, Article 17.10-11 can be considered to deal with the work which the Appellate Body conducts alone, whereas the conduct of the appellate review involving the parties is regulated in the Working Procedures for Appellate Review, which are not even part of the DSU. Like in the case of Article 14, the immediate context of Article 17.10 of the DSU therefore supports a reading that everything that is addressed in the three sentences of Article 17.10-11 of the DSU relates to the independent work which the Appellate Body conducts internally, in the absence of the parties.

15. If one turns to the French and Spanish versions of the DSU, one notes that Article 17.10 does not contain terms that would be equivalent to the English word “proceedings”, but speaks of “travaux” and “actuaciones”. While these are broad terms as well, the arguments that “proceedings” is better understood to refer to internal work apply equally. “Travaux” would be an odd way to refer to the hearing (in French: “audience”). Literally understood, “travaux” and “actuaciones” are very broad terms that could cover every work which the Appellate Body performs (including the circulation of Appellate Body reports, the publication of the Appellate Body’s annual reports and the adoption or modification of Working Procedures under Article 17.9). This, however, would give rise to absurd results and be at odds with the DSU and dispute settlement practice. The terms “travaux” and “actuaciones” therefore have to be given a more plausible meaning that conforms to their context and object and purpose. They are best understood as capturing the internal work within an appellate review, including the communication between Appellate Body members and with their support staff, whether in oral or written form.
16. Even if one wanted to understand “proceedings” as a term that must have a broader meaning than “deliberations”, this would not yet demonstrate that the oral

⁵ Panel Report, *US – Continued suspension of obligations*, para. 7.49; Panel Report, *Canada – Continued suspension of obligations*, para. 7.47.

hearing is necessarily part of the “proceedings”. The procedures of a panel and of the Appellate Body are not identical, and this would be a way to give broader scope to the term “proceedings” than to the term “deliberations”. For instance, while only three of seven Appellate Body members serve on a case (Article 17.1 of the DSU), these three members exchange views with the other members of the Appellate Body pursuant to paragraph 3 of Rule 4 of the Appellate Body’s Working Procedures. This exchange of views is also kept confidential.

17. The term “proceedings” appears elsewhere in Article 17 of the DSU, which regulates the Appellate Body. Namely, Article 17.5 states that “the proceedings” must not exceed 60/90 days, and this timeframe covers the entirety of the appellate process, from the filing of the appeal until the circulation of the Appellate Body report. Yet, as is known from the concept of “like products” in Article III of the GATT 1994, the same words can have different meanings even within the same Article of a covered agreement.⁶ Also, the fact that Article 17.5 of the DSU expressly defines the starting and end points of the “proceedings” as extending “from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report” suggests that “proceedings” could also mean something else.
18. Notably, Article 17.12 of the DSU admits a different scope of the term “proceeding” where it requires that: “The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.” This does *not* mean that parties may raise issues of law or legal interpretations (Article 17.6) *throughout* the 60 or 90 days of an appellate review. Rather, the Working Procedures for Appellate Review permit the participants to raise these issues only within the first 12 days of the appellate review (Rule 23(1)).

⁶ See Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 21; Appellate Body Report, *EC – Asbestos*, paras. 88-89, 99.

- C. *The first sentence of Article 17.10 of the DSU does not cover every aspect of an appellate procedure*
19. If “confidential” in Article 17.10 is understood strictly, similarly as in Article 14.1 of the DSU, and the term “proceedings” were to cover not only the internal work of the Appellate Body, but also the oral hearing, then the absurd result would be that the parties themselves could not attend the hearing in their own dispute.
20. If, instead, “proceedings” were understood broadly as covering the oral hearing and “confidential” as permitting the parties’ presence during the hearing (which would be a necessity), then the same would arguably apply to the rest of the appellate review. In other words, the parties could not only attend the hearing, but also the Appellate Body’s internal deliberation (until it starts with the drafting of the report, which is addressed in Article 17.10, second sentence). This, too, would be wrong and an unworkable interpretation.
21. Furthermore, a lot of information regarding the appellate review is reflected in the Appellate Body’s subsequent report, including what the participants or the Appellate Body said at the oral hearing. The internal process of decision-making, however, is never divulged. This further corroborates that Article 17.10 of the DSU, which stipulates that “[t]he proceedings of the Appellate Body shall be confidential”, may well refer exclusively to the Appellate Body’s internal work.
22. There are further reasons why the term “proceedings” in Article 17.10 of the DSU cannot cover all parts of an appellate review. If it were so, it would be a breach of the DSU that the notice of appeal and (under the new version of Rule 23 of the Working Procedures) also the notice of other appeal is circulated as public WT/DS document in every appeal. The same goes for the letter which the Appellate Body writes to the Dispute Settlement Body pursuant to Article 17.5 of the DSU in virtually every appeal. The panel report that is the object of an appeal obviously is a central element of the appellate “proceedings”, but is public as well.

D. The Appellate Body is empowered to open its oral hearing to public observation

23. In light of the fact that the Working Procedures for Appellate Review can regulate the moment until which the participants may raise issues (Rule 23(1)), the argument can also be made that the Working Procedures can create and shape the Appellate Body's *oral hearing*, which is in fact a term not appearing in the DSU.
24. Rule 27 of the Working Procedures partly regulates the oral hearing and stipulates that "the Secretariat shall notify all parties to the dispute, participants, third parties and third participants of the date for the oral hearing." Although this may suggest that these are the only actors invited and entitled to attend the oral hearing, nothing to this effect is stipulated expressly.
25. In any event, the Appellate Body division hearing an appeal would be entitled, by Rule 16(1), to adopt a special procedure for the purposes of a given appeal. The conditions are that this be "in the interests of fairness and orderly procedure in the conduct of an appeal", that "a procedural question arises that is not covered by these Rules" and that the special rule "is not inconsistent with the DSU". If the Appellate Body was empowered, by Article 17.9 of the DSU to draw up its Working Procedures and thereby to create the "oral hearing", it is submitted that the Appellate Body is also entitled to hold an oral hearing that is open for public observation. This would not be contrary to the DSU, as Article 17.10 can and has to be read as not prohibiting an open hearing. The situation is thus similar to other instances where the DSU leaves open procedural questions that arise in practice.

E. The possibility of open hearings at the request of the parties is consistent with other provisions of the DSU, as well as its object and purpose

26. Further support can be derived from the reasoning of the panels in the present disputes, which also based their reasoning on Article 18.2 of the DSU, a rule that applies identically to panels and the Appellate Body. Article 18.2 requires that submissions to panels and the Appellate Body be treated as confidential, entitles any party to disclose statements of its positions to the public, and requires Members to treat as confidential any information which another Member has

submitted to the panel or the Appellate Body and which that Member has designated as confidential. As the panels explained, opening the hearing does not mean that the panel or the Appellate Body discloses to the public the content of the parties' written submissions. Rather, the parties make their statement in public and thereby *exercise their right* to disclose their statements and positions (a right that covers not only written submissions). Also, the parties involved are not designating as confidential any of the information they submit, unless they request that specific portions of their statements not be made in public. Thus, an open hearing which has been requested by all the parties precisely *gives effect* to the choice which the DSU offers to the parties in the conduct of their dispute.

27. The freedom of choice which Article 18.2 of the DSU accords to the parties in WTO disputes is not only important, but also enjoys strong legal force. The parties' right is expressed in the terms that “[n]othing in this Understanding shall preclude a party to a dispute from disclosing statements of its position”.
28. Another place where the DSU expresses this party autonomy is Article 25, which allows the parties to exercise full control over the procedure when they resort to arbitration under that Article (see the 2nd and 3rd paragraphs). There is no doubt that parties could incorporate in their agreed procedures a provision that the hearing before the arbitrator be public. This shows that the DSU, as a matter of principle, does not bar open hearings.
29. Also more broadly, open dispute settlement hearings based on a joint request by all parties fully conform to the object and purpose of the WTO's dispute settlement mechanism, which is “to secure a positive solution to a dispute” (Article 3.7). If the parties to a dispute jointly consider that an open hearing is an important part of their desired way to find a positive solution of their dispute, then it is in line with the object and purpose of the DSU to accommodate that request. It is worth highlighting the importance of this point and that an open hearing can indeed play an important role for the achievement of the ultimate objective of the dispute settlement system. Open dispute settlement hearings can have significant effects on the credibility and authority of the decision rendered by the WTO. If the acceptability of that decision is strengthened not only at the level of the

- governments of the parties involved, but also in their parliaments and among private stakeholders, this can have beneficial effects on finding a “positive” solution to a dispute.
30. In relation to the Rules of Conduct, nothing needs to be added to the reasoning of the panels in *US – and Canada – Continued suspension of obligations*.⁷ These rules require panelists and Appellate Body members to maintain confidentiality at all times. However, as the panels stated, these Rules of Conduct are subsidiary to the DSU and must not be construed to restrict the rights of WTO Members under the DSU where they waive their right to confidentiality. The last sentence of Paragraph II:1 of the Rules of Conduct expressly states: “These Rules shall in no way modify the rights and obligations of Members under the DSU nor the rules and procedures therein.”
31. Indeed, confidentiality under the DSU is correctly understood as protecting the interests of WTO Members where they consider that they need that protection, and not as an obligation imposed even where WTO Members do not desire confidentiality. The other function of confidentiality is to protect the integrity of the (quasi-)judicial process, but in contrast to secret deliberations, this function does not require closed hearings. On the contrary, open hearings are even better and more natural for the judicial process, as the tradition of open oral hearings in national and international judiciaries around the world demonstrates.
32. For the above reasons, the object and purpose of the DSU in general and of Articles 17.10 and 18 in particular supports the interpretation that the DSU permits open appellate hearings. It would be impossible to reconcile with this object and purpose a situation where panels are entitled to open their hearings, but the Appellate Body is not, although the dispute and the conditions, namely a joint request by the parties, are the same.

⁷ Panel Report, *US – Continued suspension of obligations*, para. 7.51; Panel Report, *Canada – Continued suspension of obligations*, para. 7.49.

F. Conclusion

33. In conclusion, the correct interpretation of the DSU is that open appellate hearings are as legal as they are at the panel level. The Appellate Body is therefore respectfully requested to accede to the parties' joint request.

III. THE APPELLATE BODY SHOULD FOLLOW THE EXAMPLE OF PANELS

34. All the considerations set out above in relation to the beneficial effects of open panel hearings apply equally to the Appellate Body, which is now requested for the first time to open its oral hearing as it is called to examine the reports of panels whose hearings have been open. The Appellate Body itself has revealed in its last Annual Report that a strong majority of WTO Members has never seen an Appellate Body hearing to this date.⁸
35. It is strongly desirable that the Appellate Body continue and finalise the present WTO disputes with an open hearing. This would flow coherently from the panels' preceding decision to have open hearings in the same disputes, and it would enhance the credibility and legitimacy of the Appellate Body and of the dispute settlement system generally. The public would simply not understand a decision by the Appellate Body to hold its hearing *in camera* and to reject a joint request for an open hearing by all the participants. This applies *a fortiori* in the absence of a rule prohibiting open appellate hearings, as the preceding section has explained.
36. Indeed, it would be odd if the Appellate Body were unwilling to do, or barred from doing, what panels can do and have been willing to do. In contrast to panels that are composed *ad hoc* for each individual WTO dispute, the Appellate Body is a standing institution with permanent members. It is the arbiter of last resort on questions of WTO law, and highest (quasi-)judicial instance of the WTO. Whereas the *ad hoc* panels are somewhat akin to arbitration tribunals, the Appellate Body has a more judicial character: the panelists' rule of nationality

⁸ As of the beginning of 2008, only 66 WTO Members have so far been a participant or third participant in an appellate review, nearly half of these (28) only once, see Appellate Body, *Annual Report for 2007*, WT/AB/9, 30 January 2008, p. 33. It can further be assumed that not all of these 66 WTO Members have attended an appellate hearing.

exclusion (Article 8.3 of the DSU) does not apply to Appellate Body members; parties can agree on the panelists, but they do not select the Appellate Body members serving on a particular division; unlike panels, the Appellate Body does not first issue an interim report to the parties, to name but a few of the differences. If there can be any concerns with regard to confidentiality at the panel level, these concerns are much smaller at the appellate level, where facts are no longer established, but only legal questions are at stake.

37. The Appellate Body is empowered to render the final decision on legal questions in WTO disputes; its rulings enjoy a higher level of authority than those of panels whose findings are subject to modification or reversal by the Appellate Body. By making rulings in individual cases and by developing a consistent jurisprudence over time, the Appellate Body plays a central role in providing the security and predictability to the multilateral trading system which the dispute settlement system is tasked to guarantee. Any appeal is therefore important for the entire Membership of the WTO and also for members of the public which will ultimately be affected by those decisions. The Appellate Body therefore receives more attention than panels from observers in the media, business, civil society and academia. The Appellate Body is the official face of justice in the multilateral trading system. It would be odd if panels were allowed and willing to admit the public to observe a hearing, but the Appellate Body were not. This would wrongly put things upside down and could appear like a step in the opposite direction of transparency.
38. There can be no doubt that the nature of the issues discussed before the Appellate Body in no way justifies secret hearings. What takes place during a panel or Appellate Body hearing is not “diplomacy” or settlement negotiations. These happen outside the courtroom, and the WTO dispute settlement system specifically provides for such diplomatic elements. The DSU and the practice make clear that in every dispute there is a time and place for diplomacy, and there is a time and place for legal argument. An open hearing in no way prevents the parties from going back to negotiations outside the courtroom. When they engage in legal argument before the Appellate Body, however, there is nothing to hide, also because these arguments do not relate to individual commercial transactions and

- private contracts, but to an important international treaty and questions of public concern, such as the legitimacy of a law protecting the health of citizens.
39. Other international courts and tribunals like the International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Court, the war crimes tribunals, the regional Human Rights courts and the courts of regional organisations such as the Court of Justice of the African Union or the Court of Justice of the European Communities, to name but a few, all conduct their oral hearings with public observation, subject of course to the possibility to exclude the public in justified cases.⁹ Even the frequently used standard rules of procedures of international arbitration tribunals established by party agreement, whether between States or between an investor and a State, foresee or allow public hearings at the parties' request.¹⁰ These fora deal with matters that are equally sensitive, and sometimes more sensitive, than those at issue in WTO disputes.
40. On the basis of the practice of open hearings in national and international judiciaries throughout the world, one can go as far as to speak of a general principle of law that hearings are open at least where all parties request this. The Vienna Convention preamble affirms that "disputes concerning treaties ... should be settled ... in conformity with the principles of justice and international law".

⁹ See Article 46 of the *Statute of the International Court of Justice* and Article 59 of the *Rules of Court*; Article 26 of the *Statute of the International Tribunal for The Law of the Sea* and Article 74 of the *Rules of the Tribunal*; Article 64 of the *Rome Statute of the International Criminal Court* and Regulation 20 of the *Regulations of the Court*; Article 20 of the *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* and Rules 78-79 of the *Rules of procedure and evidence*; Article 19 of the *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994* and Rules 78-79 of the *Rules of procedure and evidence*; Article 40 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and Rule 63 of the *Rules of the Court*; Article 24 of the *Statute of the Inter-American Court of Human Rights* and Article 14 of the *Rules of Procedure*; Article 26 of the *Protocol of the Court of Justice of the African Union*; Article 82 of the *Statute of the Court of Justice of the Andean Community*; Article 31 of the *Statute of the Court of Justice of the European Communities*.

¹⁰ Article 25 of the *Optional Rules for Arbitrating Disputes between Two States of the Permanent Court of Arbitration*; Article 27 of the *Rules of the Court of Conciliation and Arbitration within the OSCE*; Rule 32 of the *Arbitration Rules* and Article 39 of the *Arbitration (Additional Facility) Rules* of the *International Centre for Settlement of Investment Disputes*; Article 21 of the *Rules of Arbitration of the Court of Arbitration of the International Chamber of Commerce*.

This aspect is relevant to the interpretation of the DSU in accordance with Article 3.2 of the DSU.

41. There are no valid arguments militating against opening the appellate hearing in the present appeal. By acceding to the participants' joint request, the Appellate Body would in no way prejudge the DSU reform negotiations. The parties exclusively request an application of the existing DSU rules. Ongoing negotiations about future DSU rules in line with the Doha mandate, whether in the form of *improved* or merely *clarified* rules, cannot undermine the rules that currently exist. Whatever position Members hold in relation to possible future rules cannot modify the interpretation of the existing DSU rules.
42. The WTO so far has had nearly three years of panels' experience with open hearings. This practice has not only been successful in every respect, but it has also been accepted by the WTO Membership. No single discussion or criticism of this practice took place over that period in the Dispute Settlement Body, nor has any Member requested a special meeting of the General Council. One should also stress that open hearings are not about the *participation* of outside persons or organisations in WTO affairs, but only relate to transparency and entirely *passive* observation.
43. The practice of panels has shown that, after decades of *in camera* hearings, the multilateral trading system was ready to evolve by allowing open hearings based on the existing DSU rules. This has been an important improvement in terms of demonstrating that the dispute settlement process is a (quasi-)judicial process. It is worth recalling that more than ten years ago, the Appellate Body demonstrated that the multilateral trading system was ready to break with the tradition that only government officials could represent a WTO Member before panels and the Appellate Body. Its decision of allowing Members to be represented by counsel of their own choice in the Appellate Body's oral hearing was an improvement in terms of justice (namely the parties' and third parties' equality of arms).¹¹

¹¹ Appellate Body Report, *EC – Bananas III*, paras. 10-12.

44. The fact that oral hearings of the Appellate Body so far have been held without public observation does not present an obstacle. Since no participant in an appeal has previously requested that the oral hearing be open, there was no need (nor opportunity) for the Appellate Body to consider this question. An absence of past examples therefore cannot be allowed to prevent procedural rights from being exercised and cannot determine the future. Other innovations in dispute settlement also inevitably involved departing from past practice where the elements in question previously had not existed.

IV. MODALITIES: FORMAT OF THE PUBLIC OBSERVATION AND THIRD PARTIES

45. The participants in the present appeals jointly propose to allow public observation of the Appellate Body’s oral hearing by way of real-time closed-circuit audio and video broadcast to a separate room. The camera could capture the whole room and need not be moved.
46. This is the modality which panels have used successfully many times and it allows a high quality viewing and listening experience which closely approximates a presence in the room of the actual hearing. This modality offers the benefit of giving a higher level of security in terms of preventing any possible disruption or interference and may therefore be the safest and thus most appropriate form for the Appellate Body to organise its first-ever open hearing. Also, this modality would make it easier to interrupt the public observation, if need be.
47. Notably, such interruptions could occur to accommodate the preference of third participants who do not wish to make their interventions in public. The European Communities hopes that all third participants in the present appeals would be willing to speak in public, but has no objection to asking them whether they desire to speak with or without public observation during the oral hearing. This is in line with the participants’ request to the panels in the present disputes, where the parties also suggested accommodating the preferences of the third parties, and to have the opening affect them only to the extent they themselves agree to. In other words, the Appellate Body should give the third participants the opportunity to request not to speak with public observation.

48. At the same time, it should be clear that third participants do not enjoy the same procedural rights as the participants/parties. It is not their dispute which is to be settled, they rather have certain rights of participation only. It would therefore be wrong to allow the third participants to prevent an open hearing. Panels have also rejected such attempts.¹²
49. Panels have followed different approaches in the situation where some third parties wanted to make their intervention in public and others had the opposite preference. While certain panels have in this situation decided to keep the entire third party session closed, other panels have allowed each third party to choose whether to speak in public or not.
50. The European Communities does not consider it ideal nor legitimate to allow one third participant to prevent another third participant to speak in public at an oral hearing. Also, the Appellate Body traditionally does not hold a separate third party session of the oral hearing, which may make it easier to allow each third participant to make its own choice. Yet, this question is not of fundamental nature, and the European Communities is therefore ready to defer to the Appellate Body as well as the third participants in this regard.
51. In order to allow third participants to make their opening statements (and closing statements, if any) without public observation, the closed-circuit broadcast could be interrupted when the presiding member of the Appellate Body division turns the floor to these third participants. In the “questions and answers” part of the oral hearing, the Appellate Body could group its questions and allow the third participants in question to respond to grouped questions without transmission to the public room. Given the number of interventions that can be expected from the third participants and the fact that only some of them would insist on speaking without public observation, this approach would be very feasible.
52. Also manageable would be a solution without grouping the questions, but instead to temporarily switch off the transmission, each time the third participants in

¹² Panel Report, *US – Continued suspension of obligations*, para. 7.44; Panel Report, *Canada – Continued suspension of obligations*, para. 7.42.

- question receive the floor. This switching off and on could be operated by technical staff on the basis of an advance choice of the third participant in question, so as to not require much intervention from the division hearing the appeal.
53. As a matter of principle, the technical option of interrupting the transmission to the public room should exist also for the purpose of protecting (business) confidential information. The European Communities understands that this modality has been used successfully for many years in the context of investment disputes in North America. However, the European Communities does not expect confidential information to play any role in the present disputes. This was already the case before the panels in these disputes, where the transmission was not interrupted a single time during the party session (except at the very end of the first substantive meeting when the chairman of the panel discussed the possible modalities for the second hearing with the parties).
54. An alternative to the switching off and on may be the non-connection of certain microphones to the closed-circuit transmission to the public room, based on an advance choice by certain third participants. This modality would of course be contingent on the WTO's technical infrastructure permitting such a selective connection of microphones to the closed-circuit broadcast, which the European Communities understands may not be the case at present. Also, if the delegations in question object to being visible (in small) on the screen, they could take their seats in a part of the room that is not captured by the camera.
55. Finally, should there be, contrary to the European Communities' firm belief, insurmountable difficulties with the proposed above modalities, one could also think of further alternatives. In general, the European Communities believes that technical difficulties should not be allowed to stand in the way of a desirable initiative. The European Communities is convinced that a satisfactory solution can be found to any technical difficulty that may arise and would be happy to consider any suggestion which the Appellate Body may have, for example a delay between the oral hearing and the public viewing.

56. The European Communities would like to add a last remark regarding the registration of members of the public, should the Appellate Body accede to the participants' joint request to open its oral hearing. The best practice followed by panels so far is an announcement on the WTO website, and the opportunity for members of the public to register directly with the WTO, to allow for the management of the available seating capacity and any security screening, as necessary. This practice also avoids the disadvantages of a modality whereby individual citizens first register with one of the participants. This creates the impression that public attendance is by invitation of the participants and under their control, rather than being based on the principle of equal access within the available capacity, without regard to nationality or personal opinion.

V. REQUEST

57. For the reasons set out in this submission, the European Communities respectfully requests the Appellate Body to allow all WTO Members and the public to observe the Appellate Body's oral hearing in the disputes *US – and Canada – Continued Suspension of Obligations*.

58. The European Communities would appreciate the Appellate Body's early decision on this matter, so that, in the event of a favourable decision, the public receives sufficient notice and the open hearing can be organised in a proper way.

59. The European Communities hopes to have addressed all relevant legal and other questions in this comprehensive submission, but stands ready to answer any other questions which the Appellate Body may have, preferably in writing.