

**UNITED STATES – CONTINUED SUSPENSION OF OBLIGATIONS IN THE
EC – HORMONES DISPUTE**

**CANADA – CONTINUED SUSPENSION OF OBLIGATIONS IN THE
EC – HORMONES DISPUTE**

Notification of an Appeal by the European Communities
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 29 May 2008, from the Delegation of the European Commission, is being circulated to Members.

Notification of an Appeal by the European Communities under Article 16.4 and Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), and under Rule 20.1 of the *Working Procedures for Appellate Review*.

1. Pursuant to Article 16.4 and Article 17 of the DSU and to Rule 20.1 of the *Working Procedures for Appellate Review*, the European Communities submits its Notice of Appeal on certain issues of law covered in the Reports of the Panels in DS320, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* and DS321, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* and certain legal interpretations developed by the Panels in those Reports.
2. The European Communities seeks review by the Appellate Body of the following errors of law and legal interpretation contained in the Reports of the Panels:
 - (a) The Panels incorrectly interpreted and applied the words "recourse to dispute settlement in accordance with the rules and procedures of this Understanding" in Article 23.2(a) of the DSU in the presence of an implementation measure in a post-retaliation situation. This is due principally to the Panels' incorrect interpretation of Article 21.5 of the DSU. The Panels' errors are contained in particular in paragraphs 7.246 to 7.249 and 7.346 to 7.359 of the Panel Report in DS320 and paragraphs 7.239 to 7.242 and 7.344 to 7.357 of the Panel Report in DS321.
 - (b) The Panels erred in failing to make a proper finding of violation of Article 23.1 read together with Article 22.8 and 3.7 of the DSU when stating that "to the extent the measure found to be inconsistent with the *SPS Agreement* in the *EC – Hormones* dispute ... has not been removed by the European Communities, [the United States and Canada] have not breached Article 22.8 of the DSU; and to the extent that Article 22.8 has not been breached, the European Communities has not established a violation of Articles 23.1 and 3.7 of the DSU as a result of

a breach of Article 22.8". This error is due to the Panels' incorrect interpretation of Article 22.8 of the DSU and in particular the words "the measure found to be inconsistent with a covered agreement has been removed" therein. The Panels' conclusion and the corresponding reasoning are contained in paragraphs 7.857 and 7.252 to 7.386 of the Panel Report in DS320 and paragraphs 7.842 and 7.245 to 7.383 of the Panel Report in DS321.

- (c) The Panels went beyond their terms of reference and assumed the function of Article 21.5 DSU panels contrary to Articles 7 and 21.5 of the DSU. This appears in particular in paragraph 8.3 of the two Panel Reports and paragraphs 7.150 to 7.182, 7.270 to 7.291 and 7.360 to 7.379 of the Panel Report in DS320 and paragraphs 7.137 to 7.164, 7.286 to 7.307 and 7.358 to 7.376 of the Panel Report in DS321.
- (d) The Panels failed to respect the fundamental principle of due process when selecting and taking the advice of scientific experts under Articles 13.2 of the DSU and 11.2 of the *SPS Agreement* with the result that the Panels failed to make an objective assessment of the matter before them in breach of Article 11 of the DSU. This appears in particular in paragraphs 7.55 to 7.99 and 6.21 to 6.25 and the subsequent analysis of the Panel under the *SPS Agreement* in paragraphs 7.387 to 7.846 of the Panel Report in DS320 and paragraphs 7.53 to 7.96 and the subsequent analysis of the Panel under the *SPS Agreement* in paragraphs 7.384 to 7.831 of the Panel Report in DS321.
- (e) The Panels failed to correctly determine and apply the standard of review under in particular Articles 5.1 and 5.7 of the *SPS Agreement* in breach thereof and in breach of Article 11 of the DSU. The Panels seriously mischaracterised and misinterpreted the evidence on which the European Communities based itself and conducted a *de novo* review of the matter before them and *inter alia* failed to take into account or properly evaluate the scientific basis of the European Communities' measure. They also failed to attach proper legal relevance to genuine uncertainties and scientific controversies on the matter before them and arbitrarily chose between the opinions of their experts and those presented by the other parties to the disputes. The Panels also relied incorrectly on the opinions of Codex Alimentarius and JECFA. This appears *inter alia* in paragraphs 7.412 to 7.427 and paragraphs 7.435 to 7.846 of the Panel Report in DS320 and paragraphs 7.403 to 7.418 and paragraphs 7.426 to 7.831 of the Panel Report in DS321.
- (f) The Panels failed to correctly determine and apply the burden of proof under the *SPS Agreement* and in particular Articles 5.1 and 5.7 thereof. The Panels imposed the burden of proof on the European Communities to prove the consistency of its measure with the *SPS Agreement* and in particular Articles 5.1 and 5.7 thereof. This appears in particular in paragraphs 7.380 to 7.386 and paragraphs 7.435 to 7.846 of the Panel Report in DS320 and paragraphs 7.377 to 7.383 and paragraphs 7.426 to 7.831 of the Panel Report in DS321.
- (g) The Panels incorrectly interpreted and applied Article 5.1 of the *SPS Agreement* and failed to make an objective assessment of the matter before them in breach of Article 11 of the DSU. The Panels erroneously adopted an overly restrictive notion of "an assessment, as appropriate to the circumstances, of the risk" under Article 5.1 of the *SPS Agreement* as informed by Article 5.2 thereof, ignored that the EC risk assessments had focussed on and addressed the particular risk at stake and required that the risk be quantified. The Panels' erroneous assessments arose out of its application of an inappropriate standard of review, as set out in paragraph (e) above. In particular, it arbitrarily chose between the opinions of their scientific experts in their review of the matter before them. This appears in particular in paragraphs 7.435 to 7.579 of the Panel Report in DS320 and paragraphs 7.426 to 7.549 of the Panel Report in DS321.

- (h) The Panels incorrectly interpreted and applied Article 5.7 of the *SPS Agreement* and failed to make an objective assessment of the matter before them in breach of Article 11 of the DSU. The Panels incorrectly interpreted the relationship of Article 5.7 with the other provisions of the *SPS Agreement* and in particular Articles 3.2, 3.3 and 5.1 thereof and adopted and applied an erroneous criterion of critical mass of new scientific evidence and/or information for the purposes of applying Article 5.7. The Panels' erroneous assessments arose out of its application of an inappropriate standard of review, as set out in paragraph (e) above. In particular, it arbitrarily chose between the opinions of its scientific experts in their review of the matter before them. This appears in particular in paragraphs 7.580 to 7.837 of the Panel Report in DS320 and paragraphs 7.550 to 7.823 of the Panel Report in DS321.
 - (i) The Panels erred in making a suggestion that insufficiently clarifies the implications of their findings contrary to Article 3.7 and 19.1 of the DSU. This appears in particular in paragraphs 8.2 and 8.3 of the Panel Reports.
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