

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

### Communication from the European Communities on expression of views regarding Appellate Body reports and circulation of documents

The following communication, dated 18 November 2008, is circulated at the request of the delegation of the European Communities.

In the DSB meeting of 14 November 2008, the Dispute Settlement Body adopted the Appellate Body report in the dispute DS320, *US – Continued Suspension of Obligations*. Prior to that meeting, the United States again requested the circulation of a communication criticising the Appellate Body's decision.<sup>1</sup>

The purpose of this communication is not to rebut the arguments made by the United States on the substance of the Appellate Body report in this dispute. The European Communities considers that the DSB is the right forum for such an exchange. Accordingly, the European Communities has responded to the arguments of the United States it disagrees with most in the DSB meeting of 14 November 2008. The European Communities refers interested parties to the minutes of that meeting. Rather, the purpose of this statement is to raise the general question of expressions of views in the DSB and the subsequent circulation of documents containing such comments.

The European Communities recalls that this circulation of documents issue specifically arose for the first time at a meeting of the DSB when the DSB adopted the panel report in DS245 *Japan – Apples (Article 21.5)*. Japan made a short statement but also had a longer version of that statement, which was circulated "as a relevant DS document", with the agreement of the other WTO Members *in that particular case*.<sup>2</sup> The same approach was adopted at the same meeting for Korea's statement on the Appellate Body report in DS296 *US – DRAMS*.<sup>3</sup> The circulation subsequently occurred in the WT/DS series of the disputes in question. Prior to 2005, the circulation of such documents in a WT/DS series had been exceptional.<sup>4</sup>

Since the DSB meeting of 20 July 2005, and prior to the most recent circulation of a document in *US – Continued Suspension of Obligations*, the United States has in four cases requested and obtained the subsequent circulation of such statements.<sup>5</sup>

<sup>1</sup> WT/DS320/16.

<sup>2</sup> 20 July 2005 DSB, WT/DSB/M/194, paras. 70 to 76; WT/DS245/19 (2 pages).

<sup>3</sup> 20 July 2005 DSB, WT/DSB/M/194, paras. 84 to 85; WT/DS296/9 (11 pages).

<sup>4</sup> E.g. Mexico's communication in *US – 1916 Act*, WT/DS162/8, of 26 July 2000.

<sup>5</sup> AB report in DS294 *US - Zeroing (EC)*, 9 May 2006 DSB, WT/DSB/M/211, para 37; WT/DS294/16 (9 pages) and WT/DS294/18 (13 pages) (the DSB minutes merely record the statement by the United States that it intended to request the subsequent circulation as a WT/DS document); AB report in DS322 *US - Zeroing*

The European Communities is concerned about these cases and feels compelled to make the following observations:

- Any Member has the *right* at any time to express its views on any panel and Appellate Body report.
- However, Articles 16.4 and 17.14 of the DSU<sup>6</sup> do not *create* such right, but merely provide that the adoption procedure for panel and Appellate Body reports is "*without prejudice*" to such right.
- Members should ideally moderate the *length* of such statements. *Repetition* (and subsequent re-translation) of legal arguments *already set out* and disposed of in the report before the DSB for adoption is not an efficient use of the Members' time and resources. A succinct oral statement should be sufficient.
- Regarding the *content* of such statements, the European Communities understands, also from its own experience, that when a Member loses dispute proceedings or is otherwise not entirely satisfied with the results, it might continue to have strongly held views, or have new views about the Appellate Body report that it might wish to express. However, nothing in the expression of such views should call into question the party's mandatory and unconditional acceptance of the report. The WTO Agreement is a single undertaking, and the Appellate Body consists of persons of recognized authority and expertise, whom the Dispute Settlement Body has appointed, and whose judgment all WTO Members have agreed to accept. The adoption of the Appellate Body report marks the resolution of a dispute, thus, Members have to accept that report as final. The DSU does not foresee potentially interminable further exchanges, with one or other Member intent upon having the "last word".
- In WTO dispute settlement practice such statements are recorded in the DSB minutes, which is logical given that WTO Members make these statements in DSB meetings. In contrast, the European Communities does not consider it appropriate to circulate such documents as a WT/DS document. WT/DS documents relate to specific procedural steps occurring on the basis of the DSU, of which the Members need to be informed in order to know what the law is, or in order to know what is the state of the dispute, or in order to be in a position to exercise their rights under the DSU should they wish to do so. Documents containing a statement of views by one party to the dispute or one Member do not fall into this category, and should not be circulated with the designation WT/DS and the number of the dispute in question, any more than any other Member's expression of views, recorded in the DSB minutes, should be so designated and/or subsequently circulated.

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(Japan), 23 January 2007 DSB, WT/DSB/M/241, paras. 74 and 76; WT/DS322/16 (7 pages) (the DSB minutes merely record the statement by the United States that it intended to request subsequent circulation, but not as a WT/DS document); panel report in DS241 *Turkey-Rice*, 22 October 2007 DSB, WT/DSB/M/241, paras. 42 to 45; WT/DS334/9 (2 pages) (the DSB minutes do not record the intended subsequent circulation); AB report in DS344 *US - Stainless Steel*, 20 May 2008 DSB, WT/DSB/M/250, para. 49; WT/DS344/11 (13 pages) (the DSB minutes merely record the statement by the United States that it intended to request subsequent circulation, but not as a WT/DS document).

<sup>6</sup> "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report."

- While the European Communities considers the separate circulation of each and every statement by WTO Members in the DSB, without limitation, undesirable, and at odds with the practice, it is of course Member's right to request the circulation of a document if they consider this necessary. However, such circulation should then occur in a document series of the DSB, and not in the series of formal documents belonging to a particular dispute.

The European Communities voiced its objection to the designation of such documents in the WT/DS series relating to a particular dispute in the DSB meeting of 1 August 2008.<sup>7</sup> During that meeting, the United States referred to Rule 23 of the Rules of Procedure for DSB meetings, according to which Members "may circulate a written statement for distribution to Members, the summary of which, at the representative's request, may be reflected in the records of the [DSB]."<sup>8</sup> Rule 23 confirms the position of the European Communities because DSB minutes are part of the DSB record, but a WT/DS number symbol relates to a particular dispute and precisely not to the work of the Dispute Settlement Body itself. Rule 23 says nothing to suggest that circulated written statements should become part of the WT/DS series of a particular dispute. Further, contrary to the impression which the United States attempted to give on 1 August 2008,<sup>9</sup> written statements of the type had only seldom been recorded as WT/DS documents before this recently became a rather frequent habit of the United States. Only exceptionally had such a document been circulated with a WT/DS symbol during the first ten years of DSB practice. In contrast, quite a number of such statements were recorded under the designation WT/DSB/COM. The latter designation is more appropriate and should become the harmonised norm again.

In the light of the fact that, contrary to the principles set out above, a longer statement was recently again circulated with the WT/DS designation of the dispute *US – Continued Suspension of Obligations in EC – Hormones*, the European Communities feels compelled to request the circulation of the present communication in the same series, so as to ensure that the WT/DS record of this dispute does not contain the document circulated at the United States' request, without response.

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<sup>7</sup> WT/DSB/M/254 Minutes of the Dispute Settlement Body on 1 August 2008, item 5, paras. 71 to 88 and particularly 72 to 74 and 86.

<sup>8</sup> WT/DSB/M/254 Minutes of the Dispute Settlement Body on 1 August 2008, item 5, para. 75.

<sup>9</sup> *Ibidem*.