WORLD TRADE ORGANIZATION

WT/DS320/16
12 November 2008

(08-5502)

Original: English

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

Communication from the United States
on concerns regarding the Appellate Body's Report

The following communication, dated 7 November 2008, is circulated at the request of the delegation of the United States.

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1. The Appellate Body issued its report in *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* ("*US – Hormones Sanctions*") on 16 October 2008. The Appellate Body's reversal of the panel's findings and conclusions on Article 23 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") is a proper and legally and factually sound correction of the errors with respect to Article 23 of the DSU in the report of the Panel in this proceeding. However, other aspects of the Appellate Body's report, in particular the Appellate Body's apparent perception of the proper relationship between the role of the Appellate Body in helping resolve disputes and the role of Members in establishing the rules and procedures for dispute settlement as well as the Appellate Body's treatment of certain other provisions of the DSU, raise serious systemic and legal concerns which should be an issue for all WTO Members. Those concerns are presented and summarized below.

2. It is first useful to recall the role that Members have provided for the Appellate Body in agreeing to its establishment. Members have explicitly agreed that the Appellate Body plays a limited role. In particular, the "dispute settlement system of the WTO" "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."[1] The "findings and recommendations" of the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements."[2] At the same time, the "Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements."[3] Furthermore, any amendment to the DSU "shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference."[4]

3. Accordingly it is clear that the Appellate Body can clarify, but not interpret or amend, any of the covered agreements, including the DSU.

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[1] Article 3.2 of the DSU.
[2] Article 19.2 of the DSU.
[3] Article IX:2 of the Marrakesh Agreement Establishing the WTO.
[4] Article X:8 of the Marrakesh Agreement Establishing the WTO.

4. Unfortunately, the report of the Appellate Body appears not only to clarify, but also to propose amendments and interpretations, of the DSU, and thus proposes to add to or diminish the rights and obligations of Members.

The Process to Be Followed After the DSB Has Granted Authorization to Suspend Concessions

5. In the appeal, the question was presented as to whether Article 21.5 of the DSU required the United States to initiate a compliance panel proceeding in response to the European Communities' claim of compliance. The Appellate Body correctly concluded that the United States was not so required and therefore rejected the EC's claim that the United States had breached Article 21.5. There was no need for the Appellate Body to go further.

6. Yet the Appellate Body went further. It proceeded to opine, at surprising length and detail, on what process Members should follow in the situation where the DSB has authorized a Member to suspend concessions with respect to the Member concerned, and the Member concerned subsequently claims that it has complied with the DSB recommendations and rulings at issue (the "post-suspension situation").

7. The Appellate Body considered that recourse to Article 21.5 compliance panel proceedings (in which the original panelists are preferred and the time frame is expedited) is the exclusive means for resolving a post-suspension situation.[5] Furthermore, the Appellate Body found that there is a responsibility for either the original respondent or the original complainant to ensure that the suspension of concessions is not applied indefinitely.[6] As a result, either party must initiate compliance panel proceedings as soon as possible.[7] However, recognizing that a proceeding initiated only by the original responding party could pose a number of problems, the Appellate Body considered that where a proceeding is brought first by the original responding party, the original complainant could then bring its own, separate compliance proceeding and the two proceedings could simply be assumed to result in a "review of all the issues."[8] The original complainant should act "as soon as possible" after adoption of an implementing measure or after the filing of the original respondent's Article 21.5 panel request, so that both matters may be referred to the original panel wherever possible.[9] The Appellate Body then set forth the rules it considered would apply regarding the allocation and shifting of the burden of proof.[10]

8. The procedures suggested by the Appellate Body are deeply troubling both in terms of the supposed textual basis on which the Appellate Body relied as well as the severity of the problems with the procedures themselves.

9. According to the Appellate Body, Article 21.5 of the DSU is to be read to limit the procedural options available to Members such that a Member may only have recourse to an expedited compliance panel proceeding. The Appellate Body said that: "Article 21.5 dictates that panel proceedings pursuant to this provision are the procedures that must be followed for adjudicating the cause of action as framed in its opening clause."[11] The Appellate Body bases its reading on the word "shall" together with "these dispute settlement procedures" in Article 21.5. However there are numerous problems with the Appellate Body's reading.

[5] Paragraph 345 of the Appellate Body Report.
[6] Paragraph 348 of the Appellate Body Report.
[7] Paragraph 348 of the Appellate Body Report.
[8] Paragraph 355 of the Appellate Body Report.
[9] Paragraph 354 of the Appellate Body Report.
[10] Paragraphs 360-365 of the Appellate Body Report.
[11] Paragraph 336 of the Appellate Body report.

10. First, the Appellate Body ignores the fact that Article 21.5 specifies that "these dispute settlement procedures" include "resort to the original panel." In other words, expedited compliance panel proceedings are only one of the "procedures" available under Article 21.5. The Appellate Body reads the word "including" out of Article 21.5. Instead, the Appellate Body appears to be reading "including" as "except that"; in other words, the Appellate Body would have the DSU apply, except that the only proceeding available is a compliance panel proceeding.[12]

11. But the Appellate Body is not even consistent in its reading. The Appellate Body also finds that "these dispute settlement procedures" include the consensual forms[13] of dispute settlement.[14] The Appellate Body cannot have it both ways – either the reference in Article 21.5 to "these dispute settlement procedures" is a reference only to expedited compliance panel proceedings or it refers to a range of procedures. Nothing in Article 21.5 provides that "these dispute settlement procedures" refers to expedited compliance panel proceedings plus consensual forms of dispute settlement.

12. Second, if "these dispute settlement procedures" in truth did limit the procedures only to the expedited compliance panel proceedings referred to in Article 21.5, then there would be no appeal from such compliance panel proceedings. The language on which the Appellate Body relied nowhere includes an appeal among "these dispute settlement proceedings." Under the Appellate Body's reasoning, therefore, Article 21.5 precludes appeals. Yet there have been numerous appeals from compliance panel proceedings under Article 21.5.

13. Third, the Appellate Body's finding on the exclusivity of Article 21.5 compliance panel proceedings for resolving post-suspension disputes also contradicts the Article 22.6 Arbitrator in *EC – Hormones*. According to the Arbitrator, both "ordinary" panel proceedings and Article 21.5 compliance panel proceedings could be legitimate avenues for the EC to challenge US suspension of concessions. As the Arbitrator explicitly explained to the EC in the Arbitrator's award:

> "In the event of a future dispute on this issue, we note that the EC could start normal – or arguably even expedited – DSU procedures challenging the consistency of the level of US suspension with Article 22.4."[15]

In this proceeding, the EC was following one of the procedures explicitly approved by the Arbitrator. The Arbitrator's decision is "final"[16] and in this sense is institutionally on an equal level as an Appellate Body report. Yet the Appellate Body has now explained that this procedure was not open to the EC. The Appellate Body has thus set up a contradiction within the WTO dispute settlement system.

14. Fourth, the problem goes beyond what has been said so far. The Appellate Body's reading of Article 21.5 also contradicts its own finding that the *Hormones – Sanctions* panel, which was established as an "ordinary" panel, had jurisdiction to consider the substance of the EC's claim of compliance. In fact, it was the Appellate Body's own understanding that, had it considered itself able

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[12] For example, in footnote 772 of its Report, the Appellate Body contemplates that Article 9, which is not a procedure under Article 21.5, would be available.

[13] For example, good offices, conciliation, or mediation under DSU Article 5, or arbitration under Article 25 of the DSU.

[14] See paragraph 340 of the Appellate Body report.

[15] Arbitrator Award, European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities, WT/DS26/ARB, circulated 12 July 1999, para. 82.

[16] Article 22.7 of the DSU.

to complete the analysis on compliance, final resolution of the question could have been achieved through this proceeding. Again, there is an inherent contradiction in the Appellate Body's reasoning.[17]

15. These are some of the legal flaws in the Appellate Body's reasoning. Beyond that, however, there are numerous problems with the actual procedure recommended by the Appellate Body. For example, the Appellate Body's approach would preclude a Member from initiating an "ordinary" panel proceeding pursuant to DSU Article 6 to address matters of concern with another Member. There has been much litigation over the scope of the jurisdictional limitation of an Article 21.5 compliance panel proceeding. A complaining party has, up until now, always retained the option of avoiding those jurisdictional complexities (for example, in a situation where it is not clear whether a measure is a "measure taken to comply") and initiating an ordinary panel proceeding instead (in exchange, of course, for foregoing the accelerated time frames mentioned in Article 21.5). Under the Appellate Body's approach, a Member would be forced to choose whether to:

(1) argue that a measure is a "measure taken to comply" (and therefore a challenge against that measure could only be pursued through an Article 21.5 proceeding), and risk a finding at the end of the process that in fact the measure is not a "measure taken to comply" and then need to begin an entire new "ordinary" panel proceeding, or

(2) conversely challenge the measure in an ordinary panel proceeding only to risk discovering in the end that it was a "measure taken to comply" and therefore the Member would need to start all over and bring an Article 21.5 compliance panel proceeding with respect to that measure.

Either outcome would entail all the expense and delay associated with having to bring two proceedings. Furthermore, even where it might make sense to challenge a measure together with other, related measures that are clearly not "measures taken to comply," the Appellate Body's approach would prevent a panel from considering the various related measures together.

16. In its report, the Appellate Body correctly identified some of the potential problems with respect to the terms of reference of an Article 21.5 proceeding.[18] However, the Appellate Body's suggestion that two separate Article 21.5 proceedings could be brought to avoid the problems, one brought by the Member concerned and one by the complaining party, would not necessarily solve these problems but only create additional ones. For example, there is nothing in Article 21.5 that provides for consolidating or harmonizing compliance panel proceedings[19] and the DSB could end up adopting mutually exclusive or inconsistent compliance panel reports. Members have already experienced some of the difficulties involved in more than one panel seeking to address the same or similar issues.

17. There are other practical difficulties and issues that Members have been identifying and discussing in negotiations on the procedures in a post-suspension situation. The Appellate Body's proposed approach does not take these into account and would appear to be too simplistic.

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[17] The contradiction could be resolved by interpreting the Appellate Body's opining as intended to pronounce a new rule, i.e., while other avenues had been viable until now – including in this dispute – henceforward, the only avenue available to parties in a post-suspension situation is an Article 21.5 proceeding brought by one or both parties that follows the detailed procedure on claims and counterclaims and the specific burden of proof scheme envisioned by the Appellate Body in this report. Such an interpretation, however, would only highlight the extent to which the Appellate Body would be operating outside its authority and "making law" rather than clarifying the application of the existing rules.

[18] See paragraphs 353 and 354 of the Appellate Body report.

[19] This is particularly true when the timing of different panels, or the Members who are third parties to the panels differed, could result in different panelists serving on each panel.

18. Members have spent several years trying to reach agreement on what process Members should follow in a post-suspension situation, but have not yet achieved consensus on the procedures that would apply.[20] The Appellate Body presumably is aware that Members are engaged in these negotiations, yet proceeded to opine on the matter. The Appellate Body does not explain in its report why it chose to do so. It is possible the Appellate Body considered that its suggestions for how to proceed might be helpful to Members. Unfortunately, however well-intentioned the advice might have been, the Appellate Body's opinion on the appropriate procedural avenue for resolving disputes in a post-suspension situation is an advisory opinion made outside of the Appellate Body's proper mandate in this dispute and outside its authority under the WTO dispute settlement system.

19. It is no secret that the DSU lacks specificity on the procedures applicable in a post-suspension situation. Indeed, this lack of specificity has been long observed by Members and is a key reason for the negotiations referred to above. Members' negotiations on this matter have demonstrated the complexity of the questions presented and the need for Members to decide on a complex series of issues on how the system would best function. Despite the solidity of the Appellate Body's analysis on Article 23 and whatever good intentions the Appellate Body may have had with respect to its additional DSU analysis, the Appellate Body went too far; the rules it has articulated as being applicable in a post-suspension situation are not what any Member has suggested or to which any Member has agreed. This incurs negative consequences for the dispute settlement system and for Members.

20. Furthermore, despite the fact that the specificity supplied by the Appellate Body on the rules and procedures applicable in a post-suspension situation is nowhere provided for in the DSU, the Appellate Body somehow "found" that both parties must engage exclusively in Article 21.5 compliance panel proceedings that either or both parties initiate, and even went so far as to provide for how harmonization of separate proceedings could occur should both parties initiate them[21] and a detailed scheme for applying and shifting the burden of proof, which would apply to post-suspension disputes generally.

21. This type of engagement by the Appellate Body amounts to nothing less than rule-making, which is outside of the Appellate Body's mandate. This is of serious concern in and of itself, even if all Members considered that the Appellate Body's suggestions for how to approach a post-suspension situation were a well-considered approach both from a legal and practical perspective. Unfortunately, that is not the case.

22. In conclusion, the Appellate Body's proposed approach is outside the authority of the Appellate Body, lacks legal foundation in the text of the DSU, raises a number of practical problems, and ignores the extensive work already undertaken by Members in their negotiations to clarify and improve the DSU.

Untenable Standard for "Independence and Impartiality"

23. The Appellate Body also concluded that the panel's appointment of and consultation with two scientific expert advisers infringed "the EC's" due process rights.[22] Those two experts were directly involved in the risk assessments performed by the Joint FAO/WHO Expert Committee on Food Additives ("JECFA"), the international organization that conducts risk assessments, advises, and

[20] See for example TN/DS/W/32, dated 22 January 2003.

[21] See footnote 772 of the Appellate Body Report. Although in that footnote the Appellate Body relies in part on Article 9 of the DSU, that Article would not appear to apply by its terms to the situation envisioned.

[22] The Appellate Body did not explain why the " due process " rights at issue accrued only to the EC. Presumably all the parties to a dispute have a "due process" interest or "right" in ensuring that the process for a panel to receive expert advice affords due process.

makes recommendations to the Codex Alimentarius Commission ("Codex"), the international standard-setting body that Members have explicitly endorsed in the *Agreement on the Application of Sanitary and Phytosanitary Measures* for the hormones at issue. According to the Appellate Body, this fact compounded with the particular role that JECFA's assessments had in this case, formed an objective basis to conclude that the independence or impartiality of those two experts would likely be affected. According to the Appellate Body, the panel's appointment of those two experts therefore compromised the independence and impartiality of the panel and constituted an infringement of the EC's due process rights.

24. The Appellate Body's standard for independence and impartiality of expert advisers is of great concern. It could result in disqualifying those who have the greatest expertise and familiarity with an issue, subject matter, or controversy. The two experts in question had an intimate understanding and well-developed ability to communicate matters of extreme technical, scientific, and conceptual complexity, by virtue of their familiarity with the risk assessments at issue.

25. Furthermore, the panel was well aware of the experts' prior involvement in the Codex process and was able to take that into account in evaluating the advice of the experts. Again, this is all the more surprising given that the panel was fully in a position to take into account the involvement of the experts in the earlier JECFA processes. Indeed, it is important to recall that it is panels, not experts, that make findings of fact. Panels are expected to weigh the probative value of any source of information in making findings of fact, including of course, any information from an expert, taking into account their involvement in earlier processes relevant to and impacting the matters in question. Panels are entirely capable and are expected to make these determinations, and they do so in every single dispute for which they are established.

26. In other contexts in WTO dispute settlement, familiarity and expertise with the matters in dispute are assets viewed with great favor in selecting adjudicators. In Article 21.5 compliance panel proceedings, for example, original panelists are preferred for the composition of the compliance panel. As the Appellate Body explained in its report, original panelists are "familiar with the background of the dispute and the inconsistencies with the covered agreements they had found" and would be able "to examine whether the inconsistencies . . . have been rectified . . . . [Article 21.5 compliance panel] proceedings would benefit from their knowledge and expertise gained from serving as panelists in [the original panel proceeding], and would be adjudicated within a shorter time frame than regular proceedings."[23] The fact that those panelists may have been reversed on appeal and may be reviewing the same or similar issues in the compliance phase is apparently of no concern to the Appellate Body and raises no problems in terms of their impartiality or independence.

27. Based on the Appellate Body's reasoning, however, the same kind of familiarity with the facts, background, and conclusions from a prior deliberative exercise should be considered disqualifying with respect to the scientific experts because this prior exposure would likely prejudice the individuals' ability to view a modified situation with independence and impartiality.

28. Similarly, the Appellate Body's view concerning impartiality and independence would mean that no Appellate Body member or member of the Secretariat could be involved in an appeal from a panel report involving issues similar to those explored in an earlier Appellate Body report in which that Appellate Body member or member of the Secretariat had been involved. Otherwise the Appellate Body would lack the necessary impartiality and independence and would infringe the due

[23] Appellate Body Report, para. 344.

process rights of at least one of the parties to the dispute.[24] Yet this is at odds with the Appellate Body's apparent views in that type of situation.

29. In conclusion, the Appellate Body's reasoning and standard for impartiality and independence of expert advisers to panels appears to be fundamentally confused and at odds with the principles underlying the selection of adjudicators in the WTO dispute settlement system.

Legally Defective "Recommendation"

30. Members have explicitly agreed that: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement."[25] In other words, the only situation in which a panel or the Appellate Body is authorized to issue a recommendation is where a panel or the Appellate Body has concluded that a measure within the terms of reference of the proceeding is inconsistent with a covered agreement.

31. In this appeal, the Appellate Body concluded that there was no measure that was inconsistent with a covered agreement. The Appellate Body has no authority, therefore, to make any "recommendation" in this appeal. As a result, it is apparently an ill-considered word choice[26] on the part of the Appellate Body to use the term "recommend" in its report.[27] Any other reading would be contrary to the DSU.

32. A further difficulty with reading the Appellate Body's "recommendation" as intending to have the legal status of a recommendation under Article 19.1 of the DSU is that it is not addressed only to the United States as the responding party in the dispute, but it is also addressed to the European Communities, which was the complaining party in this proceeding. There is no basis in the DSU for addressing a "recommendation" to a complaining party.

33. Yet another difficulty with such a reading is that the Appellate Body refers to "without delay," although nothing in Article 19 of the DSU provides authority for the Appellate Body to specify a time period for implementing a "recommendation" and indeed, such authority would conflict with other elements of the DSU, such as Article 21.3.

34. In addition to these fundamental legal failings with reading the Appellate Body's "recommendation" as intending to have the legal status of a recommendation under Article 19.1 of the DSU, there would also be a number of practical difficulties as well. For example, would the United States and the EC each have a "reasonable period of time" to comply with such a "recommendation"? Would those times periods be the same? How would Article 22 apply in the absence of a "measure" that was found to be inconsistent with a covered agreement?

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[24] Presumably of even greater concern under the Appellate Body's approach would be a situation in which the panel was disagreeing with an earlier Appellate Body report with which that Appellate Body member had been involved.

[25] Article 19.1 of the DSU.

[26] The question of ill-considered word choices is one of the types of questions that could be addressed were the Appellate Body to afford parties an opportunity to comment on an interim report of the Appellate Body.

[27] Paragraph 737 of the Appellate Body report ("In the light of the obligations arising under Article 22.8 of the DSU, we recommend that the Dispute Settlement Body request the United States and the European Communities to initiate Article 21.5 proceedings without delay in order to resolve their disagreement as to whether the European Communities has removed the measure found to be inconsistent in *EC – Hormones* and whether the application of the suspension of concessions by the United States remains legally valid.").

35. In conclusion, while framed as a "recommendation" along the lines of recommendations by the Appellate Body pursuant to Article 19.1 of the DSU in past disputes, the use of the term "recommend" is best read as an ill-considered word choice by the Appellate Body.