

**BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY**

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

(AB-2008-5)

**OPENING STATEMENT OF THE UNITED STATES OF AMERICA
ON THE QUESTION OF WHETHER TO ALLOW OBSERVATION
BY THE PUBLIC OF THE ORAL HEARING**

July 7, 2008

Mr. Presiding Member, members of the Division:

1. On behalf of the United States, I would like to thank you for the opportunity to present our views on the issue of whether the public should be allowed to observe the oral hearing of the Appellate Body in this appeal. Because the third parties did not submit any new arguments in their comments of June 23, today, I would just like to offer few thoughts that may help put the issue of public observation in perspective.

2. To begin, in approaching the issue of public observation, it is useful to consider the issue of private counsel that the Appellate Body dealt with in the *EC – Bananas III* appeal. In that appeal, Saint Lucia’s request that its legal advisors be allowed to participate in the Appellate Body’s oral hearing called for what, at the time, was a dramatic departure from the way things had been done in the past. Opponents of Saint Lucia’s request, acting in good faith, made dark predictions of what would befall the WTO dispute settlement system if private lawyers were let inside the hearing room, alleging that “such a change would entail a fundamental change in the premises underlying the WTO dispute settlement system.”¹

3. The Appellate Body, looking as it must at the law, found that Saint Lucia was entitled to have its private counsel participate at the hearing. The Appellate Body said that it could find nothing in the *WTO Agreement*, the *DSU* or the *Working Procedures* that prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings.²

4. Over ten years have passed since the Appellate Body’s finding on the issue of private counsel, and private counsel are now a common feature of the WTO dispute settlement

¹ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 8.

² *Id.*, para. 10.

landscape. The departure from the GATT 1947 tradition of relying on representation by government employees – and it must be emphasized that it was nothing more than a tradition – has not caused the sky to fall.

5. The United States submits that the issue before the Division is even simpler than the issue of private counsel in *EC – Bananas III*. First, unlike *Bananas III*, the parties in this appeal agree on the lawfulness and desirability of public observation. Second, neither the parties nor the third parties in this appeal – including the closed hearing third participants – have alleged that any adverse consequences will flow from public observation. To the contrary, with one exception, those who have addressed the consequences agree that public observation will have a positive effect. The one exception is Brazil, and even Brazil made only a vague and unsupported assertion that the proposals to accommodate closed hearing third participants are “unrealistic.” And finally, like the private counsel issue, when one looks at the actual texts, one finds that nothing in the *WTO Agreement*, the *DSU* or the *Working Procedures* precludes the Appellate Body from allowing public observation of its hearing where the parties request it to do so. Finally, we would note that just as the prevailing practice of international tribunals is to allow governments to be represented by private counsel, the practice of such tribunals also is to allow public observation.

6. One other point of perspective is what the issue of public observation does not involve. The issue of public observation involves the question of who can watch a hearing. It does not involve the question of who can participate in a hearing or in WTO dispute settlement in general.

7. Finally, I would recall the benefits of an open hearing that we and the other parties and third parties have described in our written submissions. In addition to those benefits, I would

note that because the parties obviously believe that an open hearing in these appeals will help them resolve their dispute, the dispute settlement system should operate in such a manner as to facilitate, rather than hinder, the achievement of that goal.

8. In conclusion, the United States urges the Division to grant the unanimous request of the parties to allow public observation of the hearing in this appeal. In addition, should the Division grant our request, we respectfully request that you announce your decision promptly in order to provide interested members of the public with sufficient advance notice of the opportunity to observe the hearing.

9. Thank you for your attention. The United States looks forward to answering any questions you may have.