**United States – Continued Suspension of Obligations in the *EC – Hormones* Dispute**

**Responses of the United States to Questions from the European Communities**

**October 3, 2005**

Q1. *According to the United States and Canada the continued suspension of concessions and related obligations is based on the original DSB authorization and not on the (alleged) WTO-inconsistency of the EC's compliance measure. Does this mean that the United States and Canada claim a right to continue the application of sanctions even if the EC measure is WTO-consistent as long as the DSB authorization has not been formally withdrawn?*

1. First, the United States notes that the EC's dispute with Canada is a separate dispute and the United States is not in a position to provide Canada's position. Accordingly, the United States is not able to respond to that portion of the question asking for what Canada claims.[1] Second, the EC is the complaining party in this proceeding. Accordingly, it is the EC that is bringing claims, not the United States. Third, as the United States has explained, the EC may not unilaterally declare that it has complied with the DSB's recommendations and rulings in the underlying dispute and thereby overturn the DSB's authorization for the United States to suspend concessions and related obligations. The United States is however encouraged that the EC's question appears to acknowledge that the question of the consistency of the EC's measure is an issue that is relevant to the current proceedings.

Q2. *You argue that the DSB authorization to suspend concessions can only be revoked following a multilateral determination of compliance of the EC' implementing measure. You suggest that this could be achieved, inter alia, through an Article 21.5 procedure initiated by the European Communities. In such a case would the European Communities be the "complaining party" within the meaning of Article 6? Who would be the "defending party"? What would be "the specific measures at issue"? What would be the legal basis for the "complaint"? What would the European Communities be complaining against?*

2. It is not clear what the EC means by "revoking" the DSB's authorization to suspend concessions. In any event, in this proceeding the EC has the burden to show that the U.S. measures at issue are not authorized by the DSB. Furthermore, this proceeding does not present these questions concerning a hypothetical Article 21.5 proceeding, and the Panel's terms of reference do not include making findings on these matters.

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[1] Questions 3, 4, 5, 8, 10, 11, 12, 13, 14, 15, 16, 18, and 19 also relate to arguments raised by Canada in its dispute with the EC. Again, because the EC's disputes with the United States and Canada are two separate disputes, we will refrain from opining on arguments raised by Canada and the EC in the context of their dispute or attempting to provide Canada's position on the questions posed.

Q3. *Would the United States and Canada participate in a self-initiated Article 21.5 proceeding, such a proceeding? [sic] If yes, would they do so because of a legal obligation?*

3. This proceeding does not present these questions concerning a hypothetical Article 21.5 proceeding, and the Panel's terms of reference do not include making findings on these matters. In any event, the United States finds it difficult to understand how it could self-initiate an Article 21.5 proceeding and not be considered to be participating in it.

Q4. *What would be the terms of reference of a self-initiated Article 21.5 proceeding? Would the European Communities be required to anticipate any possible claims by the United States and Canada? Could the United States and Canada raise new claims outside the legal basis for the "EC complaints"? If yes, how could this be squared with the terms of reference?*

4. This proceeding does not present these questions concerning a hypothetical Article 21.5 proceeding, and the Panel's terms of reference do not include making findings on these matters. However, the United States would note that Article 21.5 of the DSU prescribes a limited jurisdiction for any panel established under that provision. In addition, Article 7 of the DSU provides the options for determining a panel's terms of reference.

Q6. *In the oral hearing, the United States argued that there is no "disagreement" between the United States and the European Communities as to the WTO-consistency of the new compliance measure. If this is correct, how could the European Communities self-initiate an Article 21.5 proceeding as suggested by the United States?*

5. In this proceeding, the EC has made a claim that the United States has breached Article 21.5 of the DSU. If the EC chooses to pursue that claim (which is not clear at this point), then the EC has the burden to prove its claim, including the burden to prove that there was a "disagreement" at the time the EC requested consultations. If the EC now acknowledges that there may not be a "disagreement," then the United States can understand why the EC may have chosen not to pursue an Article 21.5 claim.

Q7. *Assuming that a proceeding under Article 21.5 comes to the conclusion that the EC' compliance measure is WTO-consistent. How would this lead to a withdrawal of the DSB authorization? What would be the legal basis for the DSB to "withdraw" the authorization, and what decision-making mechanism would apply for that DSB action.*

6. This proceeding does not present these questions concerning a hypothetical Article 21.5 proceeding, and the Panel's terms of reference do not include making findings on these matters.

However, the United States is somewhat surprised that the EC, which brought a claim that the United States was in breach of Article 21.5, does not have the answers to the questions it poses.

Q9. *How is the theory of the "withdrawal of the DSB authorization" in line with the text of Article 22.8, first sentence, of the DSU, and what is the need for it in the light of that provision?*

7. The United States is unclear to which "theory" the EC refers. However, the text of the first sentence of Article 22.8 specifies the end point for applying the suspension of concessions or other obligations authorized by the DSB. If the EC is relying in this proceeding on some other provision of the DSU as requiring the United States to stop applying the suspension of concessions or other obligations authorized by the DSB, it is incumbent on the EC to specify that provision and explain how it would operate to that effect.

Q12. *According to the United States and Canada the continued imposition of sanctions is justified because of the DSB authorization. Assuming the European Communities would try to seek a revocation of the DSB authorization based on a new case under Article 22.8, how could such a proceeding result in a Panel finding that the sanctions are illegal (implying according to the United States and Canada that the DSB authorization would end) if at the same time the Panel accepts the US' and Canada's theory that due to the DSB authorization the sanctions are per se WTO consistent?*

8. The EC does not correctly describe the U.S. argument. A successful challenge under Article 22.8 would, in light of that provision's text, demonstrate that the Member authorized by the DSB to suspend concessions or other obligations was to stop applying that suspension. Furthermore, the United States is confused by the reference to a "new case" under Article 22.8. The EC in the current proceeding has already brought a claim under Article 22.8. As the United States has already pointed out, the EC's claim under Article 22.8 provides an avenue for the DSB to rule in *this* proceeding whether the EC has complied with the DSB's recommendations and rulings.

Q13. *The United States and Canada accept that the purpose of suspension of concessions is to rebalance the rights and obligations of WTO Members and/or to induce compliance. Therefore, would the United States and Canada agree that the purpose of the current continuation of the suspension of concessions is also to rebalance rights and obligations and/or to induce compliance?*

9. The United States is uncertain as to what "acceptance" the EC is referring in the first sentence. In any event, by "current continuation of the suspension of concessions" the EC appears to insinuate that the United States is suspending concessions against a new EC measure. As we have noted in our response to Panel question 39, the United States is applying measures to

implement the suspension of concessions or other obligations because the DSB authorized it to do so after finding that the EC had not complied with the DSB's recommendations and rulings.

Q14. *In its First Written Submission, Canada states that the European Communities is still today under an ongoing obligation to comply despite its implementing measure (para. 40). Does the United States agree? If the European Communities are still under an obligation to comply is it correct to assume that the United States and Canada consider the EC' compliance measure as WTO-inconsistent?*

10. Please see our response to EC question 13 above. The United States is however encouraged that the EC's question appears to acknowledge that the question of the EC's compliance is an issue that is relevant to the current proceeding.

Q15. *How does such a conclusion affect the US' and Canada's allegation that they have not yet made a "determination" as to the WTO-inconsistency of the EC' compliance measure?*

11. Please see our response to EC question 13 above.

Q16. *Do Canada and the United States consider that it is at all possible to make a "determination" in the present situation given that they are acting under a DSB authorization? If you do, could you give an example of what would constitute a "determination" in your view?*

12. Please see the U.S. response to Panel question 41.

Q17. *What is a reasonable timeframe for developing a view on the WTO-consistency of the EC' compliance measure in the present case in the light of the continued application of sanctions against the European Communities?*

13. To the extent the EC's question is premised on an assumption that there is some textual basis for a "reasonable timeframe," the United States notes that the DSU does not set out a "reasonable timeframe" for developing such a view in the post-suspension context. Rather, it envisions that Members will bring their measures into conformity with their WTO obligations by the expiration of the reasonable period of time. It is, however, reasonable to expect that an implementing Member would have a strong interest in persuading a Member that is suspending concessions or other obligations ("suspending Member") that it has complied with the DSB's recommendations and rulings and work to allow the suspending Member to develop its view as promptly as possible.

Q18. *In its First Written Submission Canada refers to an "[abuse of] its right to implement" in case of a scam measure (para. 45) Is it Canada's view that the EC' compliance act is a "scam measure"? What is the US' view?*

14. The United States has never opined whether the EC's amended ban is a scam measure.

Q20. *During the Oral hearing the United States submitted that the EC' approach in the FSC-case was "appropriate". Why does the United States believe that the same approach is not "appropriate" in the present case where the United States is continuing sanctions despite an EC' compliance measure?*

15. By the "EC' approach in the *FSC*-case", we assume that the EC refers to its temporary suspension of sanctions during the course of Article 21.5 proceedings in that dispute. As we have noted, there are several possible approaches for resolving disputes in the post-suspension scenario in which we find ourselves. However, a distinction must be drawn between what a Member may and must do in the post-suspension setting. For instance, in the case cited by the EC, *FSC*, we would note that there was intensive back-and-forth and consultation between the EC and the United States, including members of the United States Congress, throughout the course of the drafting and implementation of the American Jobs Creation Act to comply with the DSB recommendations and rulings in that dispute. We actively sought, and believed we had implemented, EC input into the final version of the legislation. As a result of that consultation and cooperation, we viewed the EC's temporary lifting of its sanctions as being "appropriate" in those circumstances. By initiating an Article 21.5 proceeding and temporarily lifting its sanctions, the EC took the steps that a WTO Member may take.

16. However, this dispute is quite a different matter. The same cooperation and consultation that was integral in preparing the measure taken to comply in *FSC* did not play a role in the EC's development of its amended measure in the *Hormones* dispute. We therefore are left with what steps a Member is obligated to take in the post-suspension setting. As we have noted several times, good offices, arbitration, *de novo* panels and recourse to Article 21.5 are all potential avenues for resolving such a dispute. However, there is no obligation in Article 21.5 for the original complaining Member to initiate dispute settlement post-suspension of concessions, there is no time limitation for doing so, nor does Article 21.5 restrict proceedings to determine the WTO-consistency of a measure taken to comply to Article 21.5 proceedings *per se*. Similarly, there is no obligation not to apply the suspension of concessions during the course of Article 21.5 proceedings.