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

ORAL STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

September 12, 2005

Introduction

1. Before engaging in the issues before us today, we would like to thank each of the members of the Panel for serving in this dispute. The United States recognizes that this – the first panel meeting at the World Trade Organization to be opened to the public and other WTO Members generally – is a historic occasion. We would like to take this opportunity to thank the Panel for accepting the parties' request to open today's session to the public and other WTO Members. The long-standing U.S. views on the benefits of open meetings are well known, and we are particularly mindful of the wide public interest in this particular dispute. We also want to thank the Panel and the Secretariat for all the hard work in making the arrangements for today's meeting and making it possible for so many people to attend from so many different countries and positions. We look forward to seeing how the logistics fare in practice.

2. Mr. Chairman, members of the Panel, there are two central facts in this dispute. The first is that the WTO's Dispute Settlement Body (or "DSB") authorized the United States to suspend concessions against the European Communities (or "EC") in the *Hormones* dispute over 5 years ago because the DSB found that the EC lacked a scientific risk assessment to justify its ban on imports of meat in connection with hormones and that the EC then failed to implement the DSB's recommendations and rulings. The second is that the EC has made no effort to

demonstrate that the conditions in the WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") for ending that DSB-authorized suspension have been met. Those conditions are set forth in DSU Article 22.8. While the EC has alleged that the United States is breaching this provision, the EC apparently considers that it can simply assert that those conditions have been met, that it can unilaterally declare itself to be in compliance and that it can thereby invalidate the multilateral authorization of the DSB.

3. This position is not sustainable. The EC is alleging that the United States is breaching its WTO obligations, and there can be no dispute that the EC bears the burden of demonstrating this – including demonstrating that it has removed the measure or provided a solution to the nullification or impairment suffered by the Member suspending concessions.

4. Despite this burden, the EC has insisted that this proceeding should not reach the question of whether it has actually complied with its WTO obligations in the *Hormones* dispute. We can understand the EC's reluctance to deal with this issue, since we do not see how the EC can credibly claim it is in compliance with those obligations. Nevertheless, the EC's failure to make any effort at all to demonstrate its compliance is by itself grounds for rejecting the EC's claims, since this question goes to the heart of those claims.

5. The EC offers several untenable interpretations of the DSU. In examining the requirements of the DSU, let us acknowledge some basic facts. First, the DSU is largely silent on the procedures to handle disputes over compliance in a "post-suspension" scenario. Thus the DSU leaves open a number of options, including a regular panel proceeding such as this one. A desire for greater specificity in the applicable procedures has led to negotiations on a number of proposals on this issue in the process we know as the "DSU review." The EC appears to want to

short-circuit those negotiations and asks this Panel to re-write the DSU to specify a particular set of procedures convenient to the EC in this particular situation. At this point, however, we all must accept the DSU as currently written and agreed by WTO Members, and we must seek to resolve this dispute based on its terms. We cannot through this dispute settlement process amend or modify the DSU.

The EC's Amended Ban

6. It is notable what the EC has not argued in these proceedings – how and why it has come into compliance with the DSB's recommendations and rulings. The absence of this argument is odd since the majority of its claims are premised on the assertion that its ban is now WTO-consistent. Let us look for a moment at what, exactly, the EC has done. As far as the United States can tell in the absence of any explanation by the EC, the EC's "amended" ban simply preserves the *status quo* of its original ban found by a WTO panel and the WTO Appellate Body to violate the SPS Agreement in 1997 and 1998, respectively. Under the ban, found in Directives 96/22/EC and 2003/74/EC, the same products that were prohibited entry into the EC almost ten years ago when we first challenged the measure still may not enter the EC today.

7. Like before, the EC's ban is a selective one, banning meat from cattle treated with hormones for growth promotion purposes while at the same time permitting at least three of the hormones to be administered to domestic cattle for other purposes convenient to the EC. Certain of these purposes can involve the treatment of an entire herd of cattle that will then be eligible for slaughter for consumption by EC citizens. Meanwhile, the wealth of scientific evidence relating to the six hormones has grown, further confirming the conclusions of the original panel and the relevant international standard-setting body, the *Codex Alimentarius Commission* ("Codex", for

short) that the hormones, when administered for growth promotion purposes according to good veterinary practices, are safe for consumers.

8. Notwithstanding these facts, the EC now asserts that its ban on five of the six hormones is "provisional" in nature and that there is insufficient scientific evidence to complete a risk assessment. The EC's argument is self-serving: in dispute settlement nearly ten years ago, the EC specifically insisted that the scientific evidence was sufficient for each of the hormones used for growth promotion purposes to conduct a risk assessment. Why has the EC taken the opposite view now? By re-packaging its ban as a "provisional" ban, the EC claims that it is now in compliance with a DSB ruling that its ban on these hormones was not based on a risk assessment. But this begs the question: how can this possibly constitute compliance with DSB recommendations and rulings? How can evidence that the EC believed was "sufficient" to conduct a risk assessment – evidence which has been extensively supplemented since – become "insufficient" to conduct such an assessment. Was it simply because the WTO found against the EC? Is the EC saying that any time the WTO finds that a Member's SPS measure is not based on a risk assessment, then that Member may come into compliance by simply saying: "We did not actually mean that there was sufficient scientific evidence. Come to think of it, the measure is really just provisional in nature."?

9. For the sixth hormone, estradiol 17β, the EC would simply have the Panel accept at face value its assertion that it has developed a risk assessment, in the form of its 1999 and 2002 Opinions and intervening 2000 Review, that now rationally relates to, or reasonably supports, its import ban.

10. In other words, for each of these hormones, the EC would have this Panel disregard the findings of years of dispute settlement underlying this matter, conclusions of international standard-setting groups such as Codex, as well as the opinions of review bodies within the EC itself by a simple declaration of compliance. Based on that same unsupported declaration, the EC would have this Panel find that the United States, a WTO Member acting pursuant to DSB authorization, has breached a litany of provisions under the DSU and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). This position is not sustainable.

11. Unlike the EC, the United States is not reluctant to debate the WTO-consistency of the EC's ban, the scientific evidence as it relates to these six hormones, or whether the EC's Opinions are indeed risk assessments. To this end, we have illustrated several serious flaws regarding the EC's ban, Opinions, and scientific analysis in our written submission. We have also noted in that submission that this panel proceeding provides an appropriate forum to examine the merits of the EC's claim of compliance. While I will not repeat all the technical arguments made in our submission, I will attempt to clarify for the Panel some of the underlying scientific issues relating to the six hormones and their use for purposes of growth promotion in cattle, recognizing that none of the members of this Panel had the benefit of involvement in the earlier *Hormones* proceedings.

The Six Hormones Used for Growth Promotion Purposes According to Good Veterinary Practices

12. The six hormones at issue are estradiol 17β, testosterone, progesterone, zeranol, trenbolone acetate and melengestrol acetate (or "MGA"). These hormones have been used for growth promotion purposes in cattle for decades in several countries, and meat from treated

animals has been consumed by millions of people, without any evidence of risk or harm to human health. By "use for growth promotion purposes", we simply mean that the hormones are administered to cattle in order to allow producers to cost-effectively improve animal growth rates, optimize feed efficiencies, and increase lean muscle mass. Consumers benefit from greater availability of meat, a leaner cut of meat, as well as lower retail prices.

13. Three of the hormones – estradiol 17β, testosterone, and progesterone – are naturally present in both cattle and humans. These naturally present hormones (as well as their metabolites), when administered to cattle, are chemically identical to hormones produced in the human body. In the case of estradiol 17β, humans can produce, on a daily basis, amounts of the hormone thousands of times greater than the amount contained in an average serving of meat from a treated animal. The hormones are present in several other commonly consumed human foods, such as eggs and milk, often at levels or concentrations greatly exceeding those in meat from animals to which these hormones have been administered for growth promotion purposes according to good veterinary practices. For example, a hen's egg has over ten times the amount of estradiol 17β per gram as a piece of meat from cattle treated with hormones for growth promotion purposes. Butter has over eight times the amount of estradiol 17β per gram.

14. The other three hormones are synthetic or "xenobiotic" hormones that mimic the action of their natural counterparts – zeranol mimics estradiol 17β, trenbolone acetate mimics testosterone, and MGA mimics progesterone. Five of the six hormones are administered as implants under the skin in animals' ears. The ears, along with any remaining implant, are later discarded at slaughter. The sixth, MGA, is administered as a feed additive.

15. Concentrations of the natural hormones in cattle treated according to good veterinary practice do not vary significantly from natural concentrations in untreated cattle. In other words, hormone residue levels in meat from treated cattle such as those raised in the United States are well within the range of hormone residues in meat from untreated cattle. Indeed, hormone levels in meat from untreated bulls, commonly slaughtered for human consumption in the EC, can possess significantly higher hormone levels than meat from treated steers (castrated male cattle), which are commonly slaughtered for consumption in the United States. Despite these facts, the EC has apparently concluded that it is only meat from cattle treated with hormones for growth promotion purposes according to good veterinary practices that poses a risk to the EC consumer, even though such meat in many instances contains significantly lower concentrations of hormones than the meat the EC currently allows its consumers to eat every day.

16. In terms of human food safety, the six hormones have been studied extensively, by national authorities and by Codex, the relevant international standard-setting body with scientific expertise in this area. In fact, the study of these hormones dates back over twenty years. The consensus throughout the course of this study is that meat from cattle treated with these six hormones for growth promotion purposes according to good veterinary practices is safe. This point has been emphasized again and again, by the EC's own Lamming Group, the EC's Scientific Conference on Growth Promoting Substances in Meat Production, the World Organization for Animal Health (the "OIE"), the Joint FAO/WHO Expert Committee on Food Additives (the "JECFA"), Codex, and several national risk assessments. All have determined that the six hormones, when used for growth promotion, do not pose a risk to consumers.

17. To this end, Codex, upon review of reams of scientific studies relating to the hormones, has set Maximum Residue Levels ("MRLs") for five of them. An MRL is an acceptable or safe residue threshold in food that is recommended by Codex. In the case of the three natural hormones, Codex has determined that MRLs are "not specified", meaning that there is no need to set a numerical MRL because residues of the hormones in meat do not present a health concern. Codex set MRLs for trenbolone and zeranol, and residue concentrations of these hormones in meat from cattle treated for growth promotion purposes according to good veterinary practices are fractions of these levels. The sixth hormone, MGA, has undergone extensive analysis by JECFA, which has set an Acceptable Daily Intake ("ADI") for the hormone. An ADI is JECFA's estimate of the maximum amount of a veterinary drug, expressed on a body weight basis, that can be ingested daily over a lifetime without appreciable health risk.

18. In stark contrast to the several reviews finding the use of these hormones to be safe, there is one view that the EC portrays as dissenting – that of its Scientific Committee on Veterinary Measures Relating to Public Health ("SCVPH"), contained in the SCVPH's 1999 and 2002 Opinions and 2000 Review, ostensibly supported by several (17) studies commissioned by the EC. It is this view which the EC now asks the Panel to accept wholesale without any explanation or analysis. But it is indisputable that the EC itself rejects the very conclusions of the Opinions on which the EC now claims its ban rests. The Opinions conclude that certain of the hormones may present a genotoxic risk to consumers, but the EC continues to allow the administration of these very same hormones, including estradiol 17β, to cattle in several instances. For example, under its ban, member States are authorized to treat cattle with certain of the hormones in question for "zootechnical" or "therapeutic" purposes, which can involve treatment of an entire

herd of cattle. Were the EC to believe that these hormones do pose a risk to consumers, it would not only ban their administration to cattle for growth promotion purposes, it would also ban them for "zootechnical" and "therapeutic" purposes.

19. It is therefore not surprising that the EC has been unable to convince several of its own agencies of the conclusions set out in its Opinions and studies. For example, in 1999, a sub-group of the United Kingdom's Veterinary Products Committee dismissed the methodology and conclusions of the EC's 1999 Opinion. Recently, in a May 2005 draft report reviewing the EC's 2002 Opinion and 17 studies, the Veterinary Products Committee ("U.K. Group") again concluded that it was "unable to support the conclusion reached by the SCVPH that risks associated with the consumption of meat from hormone-treated cattle may be greater than previously thought." The U.K. Group also stated that, regarding estradiol 17β, "there is ample information to show that zootechnical and therapeutic uses of 17β-oestradiol do not pose any risk to humans unless an active implant site is ingested."[1] For purposes of its review, the U.K. Group treated growth promotion as a "zootechnical use" of hormones. As noted earlier, for growth promotion purposes the active implant site, the animal's ear, is discarded at slaughter.

20. The U.K. Group based its conclusion in part on the fact that "it is very unlikely that the presence of 17β-oestradiol and its metabolites in meat from treated animals would significantly increase the risk of adverse effects in consumers. This is due to their low concentrations in comparison to those arising from endogenous [*i.e.*, natural] production and from other dietary sources. Any increase would be likely to be small in the context of the whole food basket."[2] In

[1] "Risks Associated with the Use of Hormonal Substances in Food-Producing Animals", Draft Report of the Veterinary Products Committee, May 2005 ("2005 U.K. Report"), pages 3 and 31. (Exhibit US-20).

[2] 2005 U.K. Report, p. 32.

addition, it noted that "[m]ost of the 'new' information referred to in the [EC's] SCVPH report has been generated using non-standard methodologies that produce information of questionable relevance to effects that may occur in the intact animals," and that "[a] number of the studies discussed in the report are of poor quality."[3]

21. Regarding the other five hormones, the majority of the U.K. Group determined that the "available evidence on genotoxicity, tumorigenicity, hormonal activity and endocrine disrupting effects was supportive of the view that eating meat from animals treated with these five hormones was unlikely to be harmful to human health."[4]

22. Regarding the studies funded by the EC, the U.K. Group, while noting the generally poor quality of the studies, also commented that "the 17 studies were of limited value in the selection of topics that need to be covered. There was a high degree of repetition."[5]

23. In addition, the EC's own Committee for Veterinary Medicinal Products ("CVMP"), which in 1999 evaluated the conclusions of the 1999 Opinion and new EC studies on estradiol and progesterone, determined that the EC had not presented sufficient new evidence to cause the CVMP to conduct a new risk assessment on either hormone or alter its previous conclusions on their safety. Underpinning the CVMP's decision was the conclusion that recent studies provided by the EC proved the opposite conclusion to that reached in its Opinion by instead "support[ing] the notion that [estradiol and progesterone] belong to the group of non-genotoxic carcinogens."[6]

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[3] 2005 U.K. Report, p. 23.
[4] 2005 U.K. Report, p. 31.
[5] 2005 U.K. Report, p. 9.
[6] "Report of the CVMP on the Safety Evaluation of Steroidal Sex Hormones in particular 17β-Oestradiol, Progesterone, Alternogest, Flugestone acetate and Norgestomet in the Light of New Data/Information made available by the European Commission", Committee for Veterinary Medicinal Products (EMEA/CVMP/99), p. 12. (Exhibit US-13).

24. Let me reiterate: these are internal criticisms of the work produced by the EC and of the very documents it now asserts bring its measure into compliance with DSB recommendations and rulings. Despite these criticisms, and despite the extensive history of study of these hormones finding their use to be safe, the EC would have this Panel endorse its assertion that its new measure is WTO-consistent without a demonstration of why this is so. The EC seeks this endorsement through its claim of a U.S. breach of DSU Article 22.8, without so much as a review of why the scientific evidence relating to these hormones now justifies a "provisional" ban or a review of the documents or "risk assessments" and the measure ostensibly based on those documents that supposedly bring it into compliance with its WTO obligations. A determination of an Article 22.8 breach absent a thorough evaluation of these documents would not only ignore the rules of burden of proof in WTO dispute settlement, it would cast aside the substantial history of review of these hormones – a history that has, time and again, demonstrated that their use for growth promotion purposes according to good veterinary practices, is safe for consumers.

The EC's Assertion of its Own Compliance

25. Contrary to the EC's argument, a WTO Member may not, in effect, revoke DSB authorization to suspend concessions, and consequently establish a breach of DSU Article 22.8, by simply asserting that it has brought its measure into compliance. This interpretation ignores the rules of burden of proof in WTO dispute settlement as well as the Article's text and context.

Burden of Proof

26. As a threshold matter, the EC fails to meet its burden of proving that the United States has breached DSU Article 22.8. As the complaining party, it shoulders the burden of proving

each element of its claims against the United States. Article 22.8 requires that a Member either remove its WTO-inconsistent measure or provide a solution to the nullification or impairment suffered by the Member suspending concessions in order to demonstrate a breach. In other words, for purposes of its Article 22.8 claim, the EC must demonstrate how it has in fact accomplished either of these two conditions. The EC has failed to do so because this burden cannot be met with a simple assertion of one's own WTO-compliance, as the EC would apparently have this Panel conclude.

27. As demonstrated in our first written submission and as we have reiterated this morning, there is a substantial history and body of scientific evidence relating to the six hormones – history and evidence that continue to point to the general conclusion that, when used for growth promotion purposes according to good veterinary practices, they are safe for consumers. Against this landscape of decades of study, the EC's failure to present any evidence in support of its assertion that it has remedied the ban's WTO-inconsistencies becomes all the more glaring. The EC seeks to make its *prima facie* case simply by stating the equivalent of "we don't need a risk assessment for these five hormones after all, and for the sixth, we have a risk assessment now."

28. The EC's assertion begs the questions, "what, exactly, has changed since 1998? What scientific developments do you now think support your ban? What evidence are you putting forward in support of this assertion?" The EC's answer, apparently, is nothing more than, "trust us, we have a science-based risk assessment now for one of the hormones, and we are justified in imposing a provisional ban on the other five. Don't mind the details." The EC chose a similar tack in the *Bananas (21.5)* proceeding. In support of its claim that its amended banana regime

was WTO-consistent, it simply asserted without evidence that this was so, eliciting the following response from the compliance panel:

> we note that in this proceeding, the European Communities presents in its written submission only one summary paragraph listing aspects of its prior banana import regime that it has changed in order to comply with the DSB's recommendations and rulings. We do not believe that a finding of WTO-consistency could be made on the basis of the submission made by the European Communities in this case, as there is an insufficient discussion of how the previously found WTO-inconsistencies have been eliminated in a WTO-consistent manner.[7]

29. The EC's bald assertion of compliance in the context of this scientific and factual landscape highlights the fact that it has made no effort to demonstrate how its new import ban satisfies the conditions of a "provisional" ban under Article 5.7 of the SPS Agreement or "rationally relates" to or is "reasonably supported" by a risk assessment for purposes of Article 5.1 of the SPS Agreement. Its mere assertion that it can invoke Article 5.7 for the five hormones, and that it has developed a proper risk assessment for the sixth and that its ban is now based on such an assessment is not sufficient to demonstrate that it has removed its WTO-inconsistent measure or provided a solution to the EC's nullification or impairment of benefits, and thereby does not satisfy its burden of proof and make its *prima facie* case.

"Presumption of Good Faith"

30. In lieu of an attempt to satisfy its burden of proof, the EC argues the existence of a presumption or principle of good faith. Or, at least such a presumption applied selectively on the EC's terms. For the EC, the presumption applies to its unilateral declaration of compliance, but apparently does not apply to a Member's suspension of concessions in accordance with a DSB

[7] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by the European Communities*, WT/DS27/RW/EEC, 12 April 1999 (unadopted), at para. 4.14.

authorization. The United States cannot help but wonder if the EC intends to take the same position where the EC is the Member suspending concessions and the responding Member declares that it has come into compliance.

31. In support of its argument, the EC cites dicta from WTO disputes in which panels, arbitrators, and the Appellate Body are simply elaborating on the appropriate burdens of proof in WTO dispute settlement. It is unexceptional and uncontested that, in a dispute, the complaining party bears the initial burden of proof to establish its claims of a WTO violation, and that there is no presumption of bad faith with respect to the responding party. Were it otherwise, complaining Members would not have to mount any case whatsoever to demonstrate a WTO violation. They could simply allege that it was so and prevail. The fact that there is no presumption of bad faith that attaches to U.S. measures in this proceeding only underscores, rather than reduces, the EC's need to make a *prima facie* case of a U.S. breach.

The EC's Interpretation of the DSU

32. The EC also ignores the fact that the United States continues to suspend concessions pursuant to DSB authorization. It alleges several DSU violations as though the U.S. suspension of concessions were being imposed for the first time in response to the EC's reformulated import ban.

33. Specifically, the EC claims that the United States has breached Articles 21.5 and 23 of the DSU by continuing to suspend concessions to the EC despite its claim of compliance. However, the EC's analysis of these provisions is not consistent with their terms, nor does it reflect the fact that the United States' DSB authorization remains valid.

Article 21.5

34. For instance, the EC reads into Article 21.5 of the DSU an obligation that a Member duly authorized to suspend concessions must request an Article 21.5 panel the moment that another Member declares its own compliance with DSB recommendations and rulings. However, nothing in Article 21.5's text hints at such an obligation. Indeed, the DSU simply does not prescribe the particular procedures to follow in a situation where the DSB has granted authorization to suspend concessions to a Member, and the implementing Member later claims to have complied. Rather, it leaves open to the parties to choose one of various means to proceed, including bilateral consultations, use of good offices, conciliation and mediation under Article 5 of the DSU, recourse to DSU Article 21.5, arbitration under Article 25 of the DSU, and recourse to normal panel proceedings such as we are party to here.

35. Despite this fact, the EC would instead remove all alternatives except an Article 21.5 compliance proceeding and would read into that Article a deadline that is not there. The EC would also read into Article 21.5 an obligation for the complaining Member, and only that Member, to invoke Article 21.5. The EC does not base its proposed approach on the actual text of the Article, but rather constructs a series of policy arguments as to why the DSU should be re-written in the manner it desires. Its interpretation would lead to absurd results as it would take a provision intended to provide an expedited means of review for a measure taken to comply upon expiration of the RPT and turn it into a vehicle for creating an endless loop of litigation in the post-suspension-of-concessions setting.

36. There are three basic shortcomings in the EC's Article 21.5 analysis. First, Article 21.5 only applies in situations where there is a disagreement regarding the WTO-consistency of a

measure taken to comply. Prior to the EC's request for the establishment of this Panel (and so by definition prior to the EC's request for consultations), the United States had not formulated an opinion as to the WTO-consistency of the EC's ban. The ongoing U.S. evaluation depended to a large extent on the EC's response to questions regarding the scientific studies it has developed and the Opinions and measure it ostensibly based on those studies. To date, the EC has been less than thorough in its responses, providing only cursory answers months after it requested the establishment of this Panel to a U.S. request pursuant to Article 5.8 of the SPS Agreement seeking more information on the ban. Apparently we were not alone in this regard, as the recent U.K. Group report indicated a similar difficulty in obtaining several of the new EC studies, some of which the United States still has not had the opportunity to review.

37. Second, Article 21.5 does not contain any time limitation or deadline by which a Member must initiate dispute settlement proceedings – a point emphasized by the fact that there is often substantial delay between claims of compliance and the initiation of Article 21.5 proceedings (presumably responding Members normally welcome such delays since they would not be in a hurry to have their claims of compliance questioned before a panel). Despite this fact, the EC would find in Article 21.5 some implicit deadline hidden in the text, arguing that upon its declaration of compliance, the onus of initiating such proceedings immediately fell on the United States. This interpretation would prevent Members such as the United States from exercising any judgment as to the fruitfulness of dispute settlement prior to finding themselves obligated to do so and would similarly preclude Members from seeking mutually agreeable solutions through negotiations. It would ignore a fundamental aim of the dispute settlement system, as described in

DSU Article 3.7, which is to secure a positive solution to a dispute by whatever means possible – not simply through litigation.

38. Third, and finally, the EC argues that the United States was obligated to seek recourse to an Article 21.5 compliance panel, and only such a panel, upon hearing the EC's declaration. However, the text of Article 21.5 simply refers to "these dispute settlement procedures," without specifying any particular subset of procedures. Therefore, the EC's argument that the United States was specifically obligated to initiate a compliance proceeding under Article 21.5 is groundless. It is also troubling, since it appears to suggest that a Member would not be able to select the procedure most suited to the particular situation. For example, a Member may decide that the best way to get a solution to a dispute is to challenge both the "measure taken to comply" and other measures also restricting market access for the same product that arguably are not "measures taken to comply." A Member in that situation would normally be expected to select to proceed in a normal panel proceeding, which could cover all of its claims, rather than having to split its claims up into separate Article 21.5 and regular panel proceedings. Yet the EC approach would dictate that the Member must pursue separate proceedings. Needless to say, the EC's approach is not grounded in the text of the DSU.

Article 23

39. In addition to its claim of a U.S. breach of Article 21.5, the EC also contends that the United States has breached Article 23.1 by seeking redress of a perceived WTO violation without recourse to dispute settlement and made a "determination" of the WTO-consistency of the EC's ban in breach of Article 23.2(a). We have done neither. The EC's analysis of these provisions is

not consistent with their terms, and it ignores the fact that the United States continues to act in accordance with the DSB's multilaterally-granted authorization to suspend concessions.

40. The United States was not obligated to seek recourse to dispute settlement pursuant to the general rule set out in Article 23.1 once the EC declared its own compliance at the DSB. The United States adhered to the letter of Article 23.1 by seeking redress of the nullification or impairment caused by the EC's import ban through recourse to the provisions of the DSU. The multilaterally-authorized suspension of concessions stemming from U.S. recourse to dispute settlement remains valid to this day. It is unaffected by the EC's unilateral declaration of compliance, and the EC has failed to demonstrate to the contrary. We have already sought and obtained redress through the multilateral dispute settlement system for a violation found by the DSB. There is no provision in the WTO Agreement providing that a single Member can unilaterally invalidate that multilateral decision of the DSB, and there neither was nor is, consequently, any need for the United States to seek recourse for any hypothetical new violation.

41. Similarly, the United States has made no Article 23.2(a) determination as to the WTO-consistency of the EC's amended ban. Since receiving authorization to suspend concessions to the EC, we have simply continued to act according to that authorization. Contrary to the EC's claims in this panel proceeding, we have made no determinations regarding the WTO-consistency of its import ban, amended or not. We did not have to make any further determinations in order to continue to suspend concessions. Article 22.8, discussed earlier, sets the parameters for when we would no longer have been authorized to do so. The EC has made no effort to demonstrate that any of the conditions of that Article have been met.

42. The EC refers to a handful of U.S. statements regarding the EC's amended ban, but at no point did the United States claim that the ban was WTO-inconsistent, nor did we take any action directed at it. For example, the U.S. statement at the November 7, 2003, DSB meeting makes no reference to a WTO violation. It and other statements simply refer to information put forward by the EC, at that time, in support of its claim of compliance with the DSB's recommendations and rulings. Rather than demonstrating a determination, they reflect the fact that the United States was engaged in internal deliberations concerning the EC's ban. Such deliberations do not amount to an Article 23.2(a) determination. Were it otherwise, WTO Members could claim a violation of that provision premised simply on the internal deliberations or discussions of another Member.

Conclusion

43. In conclusion, upon evaluation of the EC's claims we are left with that same fundamental question: what has the EC done to bring itself into compliance with DSB recommendations and rulings? The EC believes that, with a simple self-assertion of compliance, it may allege an Article 22.8 violation and unilaterally bring an end to DSB-authorized suspension of concessions. The EC hopes that the Panel will endorse this interpretation and do so in the absence of any evidence of how the EC's amended ban in fact brings it into compliance with the DSB's recommendations and rulings. This theory both runs afoul of the rules of burden of proof in WTO dispute settlement and ignores the text of Article 22.8. The EC also argues that Articles 21.5 and 23 of the DSU can be interpreted in such a fashion that the United States, by simply acting pursuant to DSB authorization to suspend concessions, has violated both Articles. This theory entails untenable interpretations of the text of both Articles, while ignoring a simple fact:

the United States continues to act pursuant to DSB authorization to suspend concessions to the EC. The DSB has never withdrawn this authorization. The EC's own assertion of its compliance did not revoke it.

44. For all the reasons discussed above and in its first written submission, the United States respectfully requests the Panel to reject the EC's claims in their entirety.