European Communities – Export Subsidies on Sugar

(WT/DS265, 266, and 283)

THIRD-PARTY ORAL STATEMENT OF THE UNITED STATES

April 1, 2004

Introduction

1. As a third party, the United States will limit its comments to highlighting a few key points. First, nothing in the Agriculture Agreement *per se* prevents a panel from examining export subsidies under the provisions of the SCM Agreement. Second, the modalities guidelines are not relevant "context" under customary rules of interpretation of public international law as reflected in the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"). Third, the analytical framework suggested by the panel and the Appellate Body in *Canada – Dairy* focused not only on whether a subsidy is being provided by the government, but also on whether an export contingency exists. Finally, we would also like to make some comments on the arguments concerning estoppel that some parties have raised.

2. The United States recognizes the importance of this dispute and agricultural trade generally for the economies of many WTO Members, including the co-complainants, the ACP countries, and other third parties. Among other things, we recognize that agriculture is often an important employer in low-income countries. We also note that agricultural reforms are an important element in fulfilling the development objectives of the Doha Round.

Discussion

The SCM Agreement and the Agriculture Agreement

3. There is no *per se* rule that an export subsidy on an agricultural product cannot be reviewed under the SCM Agreement. For example, in the *FSC* dispute, the panel analyzed the entirety of the FSC measure under the SCM Agreement – it did not confine its SCM Agreement analysis or recommendations to the FSC measure as it applied to non-agricultural products. The Appellate Body upheld this analysis.[1] The DSB recommendations and rulings concerning the SCM Agreement applied to the FSC measure as a whole, not just to the FSC measure for non-agricultural products. This is not to say, however, that the SCM Agreement applies to all agricultural support or subsidies. Rather, the question needs to be approached on a provision-by-provision, case-by-case basis.

Interpretation of Scheduled Commitments and the Modalities Guidelines

4. Next I will turn to the question of whether the modalities guidelines should be used to interpret a Party's scheduled commitments. As explained in the U.S. written submission, the modalities guidelines are not a covered agreement, nor is it a document that provides relevant context for the Panel's interpretation of scheduled commitments. Under Article 31(1) of the *Vienna Convention*, the terms of a treaty are interpreted "in their context." Yet the Members explicitly rejected the modalities guidelines as "context" for interpreting Member Schedules.

[1] *See generally* Appellate Body, *United States - Tax Treatment for "Foreign Sales Corporations," Recourse to Article 21.5 of the DSU*, WT/DS108/AB/RW (Jan. 14, 2002), paras. 119-120.

5. Apart from the text of the treaty itself, "context" comprises "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" and "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."[2] As noted by the Appellate Body in *EC - Computer Equipment*, "[t]he purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties."[3] Here, the common intentions of the parties is clear from the face of the modalities guidelines. The parties affirmatively rejected the modalities guidelines as relating to the scheduled commitments for purposes of interpretation of those commitments by expressly stating that the guidelines are not a basis for dispute settlement proceedings. It is evident that the parties did not believe the modalities guidelines should be used to interpret scheduled commitments challenged under the Dispute Settlement Understanding.

6. To the extent that the modalities guidelines are characterized as "preparatory work," the *Vienna Convention* provides that "preparatory work" is only looked to as a "supplementary means of interpretation" to confirm the meaning resulting from the application of general rules of treaty interpretation under Article 31, or when the meaning of treaty language under general principles of treaty interpretation "leaves the meaning ambiguous or obscure" or "leads to a

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[2] *Vienna Convention*, Art. 31(2).

[3] Appellate Body, *European Communities – Customs Classification of Certain Computer Equipment*, WP/DS62/AB/R, WP/DS67/AB/R, WP/DS68/AB/R (June 5, 1998), para. 84 (emphasis in original).

result which is manifestly absurd or unreasonable."[4] Such recourse to supplementary means of interpretation is not necessary here.

Subsidies Contingent on Export Performance

7. Some of the parties have focused on only one part of the *Canada – Dairy* analysis. In that dispute, the Appellate Body did not conclude that all export sales below the average total cost of production are necessarily inconsistent with Article 9.1(c) of the Agriculture Agreement. Rather, the Appellate Body accepted the unchallenged finding of the panel that Canada's payments were made contingent on the export of the agricultural product at issue.[5] This critical aspect of government intervention – export contingency – was found because Canada's governmental scheme mandated that products for which payments were received had to be exported. Thus, governmental intervention requiring export performance is a necessary part of any analysis of the obligations under Article 9.1(c) of the Agriculture Agreement. This export contingency requirement applies to both the Agriculture Agreement and the SCM Agreement. As the Appellate Body concluded in *FSC*,

> We see no reason, and none has been pointed out to us, to read the requirement of "contingent upon export performance" in the *Agreement on Agriculture* differently from the same requirement imposed by the *SCM Agreement*. . . . Although there are differences between the export subsidy disciplines

[4] *Vienna Convention*, Art. 32.

[5] *See* Appellate Body, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, *Second Recourse to Article 21.5 of the DSU*, WT/DS103/AB/RW2, WT/DS113/AB/RW2 (Dec. 20, 2002), para. 79 (observing that Canada does not dispute the panel's finding that CEM payments are made "on the export" of agricultural products, as required by Article 9.1(c) of the Agriculture Agreement).

established under the two Agreements, those differences do not, in our view, affect the common substantive requirement relating to export contingency.[6]

Role of International Law

8. In reaction to the parties' discussion of the role of international law, particularly concerning the concept of estoppel (which they characterize as one specific application of public international law), we would simply reiterate that Article 1.1, Appendix 1, and Article 3.2 of the DSU reflect a very conscious choice on the part of WTO Members to limit the use of international law in WTO dispute settlement proceedings to customary rules of interpretation. Members have not consented to provide for the application of the principle of estoppel in WTO dispute settlement. No provision of international law as such is a "covered agreement" that may be applied in dispute settlement, nor is there any other basis for importing into the WTO other provisions or obligations of public international law.

9. The lack of any textual basis for importing the principle of estoppel is further emphasized by the lack of consistent description of the concept when panels have had occasion to discuss estoppel in the past. In *Bananas I*, for example, the panel stated that estoppel can only "result from the express, or in exceptional cases implied, consent of the complaining parties."[7] In *Asbestos* and *Guatemala Cement*, by contrast, the panels stated that estoppel is relevant when a party "reasonably relies" on the assurances of another party, and then suffers negative

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[6] Appellate Body, *United States – Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/R (Feb. 24, 2000), para. 141.

[7] *See Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R (Apr. 22, 2003), para. 7.38 (quoting *EEC – Member States' Import Regimes for Bananas* ("*Bananas I*"), unadopted, DS32/R (June 3, 1993)).

consequences resulting from a change in the other party's position.[8] These inconsistencies illustrate the dangers of seeking to identify purportedly agreed-upon legal concepts beyond the only source all Members *have* agreed to – the text of the DSU itself.

Conclusion

10. This concludes my presentation. On behalf of the United States, I thank you again for this opportunity to express our views.

[8] *See European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R (Apr. 5, 2001), para. 8.60 (citations omitted); *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R (Nov. 17, 2000), paras. 8.23-8.24.