

European Communities – Export Subsidies on Sugar

(WT/DS265, 266, and 283)

Third-Party Executive Summary of the United States

April 8, 2004

1. The United States is providing its views on a limited number of issues. The United States recognizes that many of the issues raised in this dispute are solely or primarily factual. The United States takes no view as to whether, under the facts of this dispute, the measures at issue are consistent with the Agriculture Agreement and/or the Subsidies and Countervailing Measures Agreement (“SCM Agreement”).

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.

I. The Provisions Of The Agriculture Agreement And The Provisions Of The SCM Agreement, Both Covered Agreements, Govern The Panel’s Examination Of The Measures At Issue In This Dispute

3. The European Communities (“EC”) argues that it was known at the time it negotiated its Schedule that C Sugar did not receive export subsidies, and for that reason C Sugar was not included in the base quantity used to calculate the EC’s reduction commitments for sugar export subsidies. The EC also argues that the modalities guidelines developed during the negotiations support its position that, if the Panel concludes that the EC is exceeding its commitments, the EC’s commitment levels for sugar export subsidies should be recalculated. However, neither of these arguments can be used to contradict the text of the WTO Agreement.

4. The question presented is whether the EC is providing export subsidies for C Sugar. That is a question that needs to be resolved by reference to the text of the Agriculture Agreement and the SCM Agreement. If the answer is that the EC is providing export subsidies for C sugar, then the question becomes whether the EC is exceeding its export subsidy commitments for sugar. And that is a question that needs to be resolved with reference to the Agriculture Agreement and the EC’s Schedule.

5. What was “known” at the time the EC negotiated its Schedule is not the issue – Members’ alleged “knowledge” does not govern the legal inquiry, but rather it is the Members’ agreement, which is reflected in the text of the WTO Agreement, that governs. Similarly, the modalities guidelines are not a covered agreement, indeed are not an “agreement” at all, and do not provide “context” for interpreting the text of the WTO Agreement. As a matter of fact, the “Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme” document itself establishes that it is not a covered agreement, stating:

The revised text is being re-issued on the understanding of participants in the Uruguay Round that these negotiating modalities shall not be used as a basis for dispute settlement proceedings under the MTO Agreement.¹

¹ Modalities for the Establishment of Specific Binding Commitments, MTN.GNG/MA/W/24 (Dec. 20, 1993) (Exhibit EC-3).

The Appellate Body in *EC - Bananas III* has further observed that this modalities document is not referenced in the Agriculture Agreement.² 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.

6. 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.”³ 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.”⁴ 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.

7. 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 result which is manifestly absurd or unreasonable.”⁵ Such recourse to supplementary means of interpretation is not necessary here.

8. Accordingly, to determine whether the measures at issue constitute export subsidies for purposes of the Agriculture Agreement, it is necessary to refer to the definition of export subsidy in the Agriculture Agreement and the related provisions. Similarly, it would be necessary to refer to the definition and related provisions in the SCM Agreement to determine if the measures are export subsidies for purposes of that Agreement.

9. If the measures are export subsidies and are in excess of the EC’s export subsidy commitments, then the EC would need to bring its measures into compliance. Additionally, as explained below, the measures would be subject to the SCM Agreement disciplines. The United States is struck by the EC’s argument that if the Panel concludes that the EC is subsidizing C

² See Appellate Body, *European Communities – Regime for Importation, Sale and Distribution of Bananas* (“*EC – Bananas III*”), WT/DS27/AB/R (Sept. 25, 1997), para. 157.

³ *Vienna Convention*, Art. 31(2).

⁴ 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).

⁵ *Vienna Convention*, Art. 32.

Sugar, it follows that the base quantity in its Schedule is the result of a “shared and excusable scheduling error,”⁶ and that therefore:

“It would be manifestly disproportionate, discriminatory and unfair to penalise the EC in that manner for a scheduling error which it could not have anticipated at the time where the commitments were made and which, in fact, was shared by the Complainants themselves until very recently.”⁷

The EC’s approach in this dispute appears to completely contradict its approach in the *United States - FSC* dispute.⁸

II. Subsidies May Be Challenged Under Both The Agriculture Agreement And The SCM Agreement

10. The EC argues that “[w]ere it to be proven that the EC provided subsidies inconsistently with the Agreement on Agriculture it does not follow that such subsidies could be analysed for conformity with the SCM Agreement.”⁹ The EC also argues that “the SCM Agreement *does not apply* to export subsidies maintained in respect of products which fall under the scope of the Agreement on Agriculture.”¹⁰ However, there is no *per se* rule that an export subsidy on an agricultural product cannot be reviewed under the SCM Agreement. The EC again directly contradicts the DSB recommendations and rulings in the *FSC* dispute. Neither the panel nor the Appellate Body in that dispute found that the SCM Agreement did not apply to products that fall under the scope of the Agriculture Agreement. To the contrary, the *FSC* dispute shows that subsidies may be analyzed under both the SCM Agreement and the Agriculture Agreement.

11. 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.¹¹ 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.

12. Such an interpretation is supported by the language of Article 3 of the SCM Agreement, which states that certain subsidies are prohibited “except as provided in the Agreement on

⁶ EC Submission, para. 33.

⁷ *Id.*, para. 113.

⁸ *United States - Tax Treatment For “Foreign Sales Corporations,”* WT/DS108.

⁹ EC Submission, para. 152.

¹⁰ *Id.*, para. 154 (italics added); *see also* paras. 204(6), 205(5).

¹¹ *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.

Agriculture.”¹² If export subsidies do not fully conform to the commitments established under Part V of the Agriculture Agreement, those subsidies are subject to the SCM Agreement disciplines.

13. Further, contrary to the EC’s assertion, the *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products* dispute does not stand for the proposition that a measure cannot be analyzed under both agreements.¹³ Rather, in that dispute the panel decided as a matter of judicial economy not to make findings under the SCM Agreement. In fact, the panel noted that claims made under the Agriculture Agreement and claims made under the SCM Agreement “can be said to be ‘closely related’ and ‘part of a logical continuum.’”¹⁴ It thus logically follows that certain subsidies may be challenged under both the Agriculture Agreement and the SCM Agreement.

III. Whether Subsidies Are Contingent on Export Performance Is A Necessary Part Of Any Analysis Under Article 9.1(c) Of The Agriculture Agreement

14. 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.¹⁵ 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 established under the two

¹² *SCM Agreement*, Art. 3.1.

¹³ EC Submission, para. 154.

¹⁴ Recourse to Article 21.5 of the DSU by New Zealand and the United States, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/RW, WT/DS113/RW (Dec. 18, 2001), para. 6.92.

¹⁵ 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).

Agreements, those differences do not, in our view, affect the common substantive requirement relating to export contingency.¹⁶

IV. The Role of International Law In WTO Dispute Settlement Proceedings Is Limited To Customary Rules Of Interpretation

15. 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.

16. 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."¹⁷ 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 consequences resulting from a change in the other party's position.¹⁸ 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.

¹⁶ Appellate Body, *United States – Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/R (Feb. 24, 2000), para. 141.

¹⁷ 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)).

¹⁸ 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.