Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes

(WT/DS302)

Oral Statement of the United States at the First Substantive Meeting of the Panel with the Parties

May 12, 2004

Mr. Chairman, members of the Panel:

1. The United States appreciates the opportunity to present this oral statement as a third party in these proceedings. The United States takes no position on the measures at issue. However, the United States does have a systemic interest in the analysis of two GATT 1994 provisions: Article III:4 and Article X:3. We offer the following thoughts.

2. As the Panel knows, Article III:4 provides that products of the territory of a Member imported into the territory of another Member must be afforded treatment no less favorable than that accorded to like products of national origin in respect of laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use. *Note Ad* Article III of GATT 1994 provides that such measures may be applied at the point of importation; application at the border does not alter the fact that the measure is an internal one.

3. The necessary consequence of *Note Ad* Article III is that under Article III:4, the border may be a locus of application for a Member administering laws, regulations, and requirements affecting the internal sale of imported and domestic goods. In this dispute, however, a question

has arisen as to whether a measure results in the imported good being provided with treatment less favorable than that accorded to the like domestic product, simply because the measure is being applied in the territory of a Party – at the border. To put it another way: does Article III:4 in the context of this dispute require that a Member apply its measure in the territory of the exporting Member, rather than at the border?

4. Honduras appears to be arguing that because the Dominican Republic permits the tax stamp to be affixed on domestic cigarettes at the domestic production facility, the Dominican Republic must also allow the stamp to be affixed on *foreign* cigarettes at the foreign production facility – in other words, the Dominican Republic may not require the tax stamp to be affixed in the territory of the Dominican Republic.[1] Honduras thus alleges that the mere requirement that the tax stamp be affixed in the territory of the Dominican Republic results in discriminatory effects in the form of, *inter alia,* additional packaging steps and additional costs.

5. The gist of Honduras' argument therefore appears to be that Article III:4 may require that a Member apply a measure in the territory of the exporting Member, rather than at the border – and that the mere application of a measure at the border may result in a violation of Article III:4. The United States does not believe that Article III:4 can be so interpreted. Such an interpretation ignores Article III's recognition of the border as a permissible site of application. Indeed, a finding of a breach of Article III:4 cannot rest simply on where the measure is being applied to

[1] *See* paras. 2 and 76 through 85 of Honduras' first submission.

imported products.

6. Moreover, the fundamental purpose of Article III is not to eliminate every perceived differential between domestic and imported goods, even those incidental to the inherent differences between imported and domestic goods. Instead, as the Appellate Body counseled in *Japan - Alcoholic Beverages II*, the "fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures" and to ensure that such measures are not applied so as to afford protection to domestic production.[2] Rather, Article III:4 does not require *identical* treatment so long as the treatment afforded to imported products is no less favorable than the treatment afforded to domestic products. In other words, like imported and domestic products may be treated differently so long as the different treatment does not result in less favorable treatment for imported products.

7. The United States is aware that in considering the language of Article III:2, first sentence, the Appellate Body concluded that the analysis was simple – either taxes on the imported product are in excess of those on the domestic like product, or they are not. If the taxes are in excess, then the measure providing for those taxes is inconsistent with Article III:2, first sentence. In *Japan - Alcoholic Beverages II,* the Appellate Body stated that "even the 'smallest' amount of excess is too much," and no trade effects or *de minimis* test is necessary.[3]

---

[2] *Japan - Alcoholic Beverages II*, WT/DS75/AB/R, WT/DS/84/AB/R, adopted 1 November 1996, p. 16.
[3] *Id.*, p. 23.

8. The Appellate Body's analysis of Article III:2, first sentence, however, is not automatically applicable to every provision of Article III. Indeed, the Appellate Body did not apply it to the second sentence of Article III:2 in that very same dispute.[4] The Appellate Body considered that:

> [T]here may be an amount of excess taxation that may well be more of a burden on imported products than on domestic "directly competitive or substitutable products" but may nevertheless not be enough to justify a conclusion that such products are 'not similarly taxed' for the purposes of Article III:2, second sentence. We agree with the Panel that this amount of differential taxation must be more than *de minimis* to be deemed "not similarly taxed" in any given case.[5]

9. Likewise, it cannot be assumed that the Appellate Body's Article III:2, first sentence, analysis is applicable to Article III:4. To the contrary, the Appellate Body in the *Korea - Beef* dispute noted that a measure might produce "incidental effects" but that such effects might not have "decisive implications" for an examination of whether the measure is inconsistent with Article III:4. In that dispute, the Appellate Body examined the existence of a "dual retail system" in Korea: one for imported beef, and a second for domestic beef. The Appellate Body stated:

> [e]ven if we were to accept that the dual retail system "encourages" the perception of consumers that imported and domestic beef are "different," we do not think it has been demonstrated that such encouragement necessarily implies a competitive advantage for domestic beef. Circumstances like limitation of "side-by-side" comparison and "encouragement" of consumer perceptions of "differences" may be simply incidental effects of the dual retail system without decisive implication of the issue of consistency with Article III:4.[6]

In short, the Appellate Body was reiterating that under Article III:4 like imported and domestic

---

[4] *Id.*, pp. 26-27.
[5] *Id.*, p. 27.
[6] *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 141.

products may be treated differently so long as the different treatment does not result in less favorable treatment for imported products. Therefore, to the extent that the application of a measure at the border results in differential, "incidental effects," those incidental effects do not necessarily mean that an Article III:4 violation has occurred.

10. Finally, the United States would like to briefly comment on Honduras' argument regarding Article X:3. According to Honduras, the Dominican Republic's administration of its Selective Consumption Tax is inconsistent with Article X:3(a) because the Dominican Republic allegedly disregarded the actual retail selling price when determining the tax base. However, to the extent that Honduras relies on Article X:3(a) to challenge the substance of the Selective Consumption Tax, the United States wishes simply to note that Article X:3(a) concerns the administration of a measure, not the substance of the measure itself.

11. This concludes the oral statement of the United States. We will be pleased to answer any questions the Panel may have.