EUROPEAN COMMUNITIES – MEASURES AFFECTING TRADE IN COMMERCIAL VESSELS

WT/DS301

THIRD-PARTY ORAL STATEMENT OF THE UNITED STATES OF AMERICA

August 3, 2004

Mr. Chairman, members of the Panel:

1. It is my privilege to appear before you on behalf of the United States this afternoon.

2. As you will recall, on July 8, 2004, the United States filed its third party submission addressing certain issues that have been raised in this dispute. Today, I would like to briefly discuss Korea's claims under Article 23 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). In summary, the United States believes that the European Communities ("EC") has skipped a step in arguing that Article 23.1 of the DSU does not prohibit measures that are otherwise permitted by the WTO agreements.

3. The first question to be answered under Article 23.1 in this context is whether the EC is seeking redress of a violation of WTO obligations. This question would appear closely linked to Article 23.2(a) in that a Member would only be seeking redress of obligations if the Member has determined that there is a breach of those obligations. In this instance, the first question then would be whether the EC has made such a determination outside the context of WTO dispute settlement. If so, then the EC would be in breach of Article 23.2(a) and by extension Article 23.1

of the DSU. If the measures taken in seeking redress amounted to a suspension of WTO concessions or other obligations, then there might also be a breach of Article 23.2(c).

4. If the EC has not made such a determination outside the context of dispute settlement, then Article 23.1 would appear not to be applicable and there would be no need to address, for purposes of DSU Article 23, the question of whether the measures taken were themselves consistent or inconsistent with the WTO.

5. The United States would also like to take this opportunity to explain that neither Article 60 of the *Vienna Convention on the Law of Treaties* nor Article 49(2) of the *Draft ILC Articles on State Responsibility* is relevant to the question presented.[1] With respect to the Draft Articles, the United States does not believe that a report prepared by the International Law Commission (not a body composed of WTO Members) of which the UN General Assembly simply "took note" in 2001 can inform the meaning of provisions of the WTO agreements that entered into force almost six years earlier. Nor do the Draft Articles set forth "customary rules of interpretation of public international law," the standard by which WTO dispute settlement bodies are to clarify existing provisions of the covered agreements pursuant to Article 3.2 of the DSU.

6. With respect to Article 60 of the *Vienna Convention*, the *Vienna Convention* is not a covered agreement nor is it context for purposes of interpreting the WTO agreements. Furthermore, Article 60 does not reflect a customary rule of interpretation of treaties. Therefore, whatever the rules for suspension of a treaty might be under Article 60, they do not establish the

[1] *See* First Written Submission by the European Communities, 1 July 2004, paras. 132-135.

rights and obligations actually provided by WTO covered agreements, and of course Article XV of the Marrakesh Agreement provides the WTO rule for withdrawal from the WTO agreements.

7. Fortunately, the Panel need not address these subsidiary arguments of the EC. In the view of the United States, the first question to resolve is whether the TDM Regulation and the related measures are inconsistent with any provision of a WTO agreement other than Article 23 of the DSU. In this regard, one such provision cited by Korea is Article 32.1 of the *Agreement on Subsidies and Countervailing Measures*. As indicated in the U.S. written submission, in order to determine whether the EC measures are inconsistent with Article 32.1, the Panel will need to determine whether the EC measures cited by Korea are in response to Korean subsidies.[2]

8. If the Panel determines that the EC measures are inconsistent with a provision other than Article 23 of the DSU, the Panel would seem to have two choices. First, it could invoke principles of judicial economy, and stop there. Finding an inconsistency with Article 23 of the DSU arguably does not provide much in the way of additional assistance to the parties or the Dispute Settlement Body. Alternatively, the Panel could go on to conduct the analysis under Article 23, in which case it would have to address the other issues raised by the parties concerning Article 23.

9. If, however, the Panel determines that the EC measures are not inconsistent with a provision other than Article 23 of the DSU, the Panel may wish to proceed to determine if the EC has made a determination contrary to DSU Article 23.1 and 23.2(a). In looking at the question of what would constitute a determination, the United States notes that this question would appear to

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[2] Third Party Submission of the United States of America, July 8, 2004, para. 12.

be distinct from the question of whether there has been a suspension of concessions in breach of Article 23.2(c). We recall that in the *Section 301* dispute, the EC itself took the position that a determination only had to be formal and legally binding and could include determinations of WTO consistency.[3] The EC position in this dispute that there must also be trade consequences is a new position by the EC, and it is not clear what textual support there is for that new position.

10. The United States hopes that the Panel finds these comments useful. We would be pleased to respond to any questions that the Panel might have. Thank you for your attention.

[3] *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, Report of the Panel adopted 27 January 2000, para. 4.844.