

*Dominican Republic – Measures Affecting the Importation  
and Internal Sale of Cigarettes*

**(AB-2005-3)**

**Statement of the United States at the Oral Hearing of the Appellate Body**

**March 9, 2005**

Mr. Chairman and members of the Division:

1. The United States appreciates the opportunity to present this oral statement today. As a third participant we have a substantial interest in the interpretation of Articles III:4 and XX(d) of the GATT 1994, and have noted our concerns in our third participant submission. In our statement this morning we would specifically like to highlight our concerns regarding GATT Article XX(d).

2. With respect to the discussion of Article XX(d) found in the Panel report, the United States believes that the Panel departed from the Appellate Body's "weighing and balancing" clarification of that provision and added conditions that are not part of the ordinary meaning of the term "necessary," in context, and in light of the object and purpose of the GATT 1994.

3. Specifically, the Panel erred in suggesting that Article XX(d) requires a Member to select a "less GATT-inconsistent" alternative measure, where no GATT-consistent alternative is reasonably available. Nothing in the text of Article XX(d) (or elsewhere in the GATT 1994 or

other WTO agreements) expresses such a requirement. Moreover, it is simply not clear what it means for a measure to be “more” or “less” GATT-inconsistent. A measure is either consistent or inconsistent with the GATT 1994.

4. The Panel also incorrectly suggests that the term “necessary” means that a Member must use a “less trade-restrictive” alternative. There is no basis in the text of Article XX(d) for a requirement to select a “less trade-restrictive” alternative measure. The concept of “less trade-restrictive” measures arises only in the context of the SPS and TBT Agreements, in which it was specifically negotiated. We disagree with Honduras and the Dominican Republic, who assert that Article XX(d) contains such a requirement.<sup>1</sup>

5. The Panel further distorts Article XX(d) when it states that “[t]he Panel thus finds no evidence to conclude that the tax stamp requirement secures a zero tolerance level of enforcement with regard to tax collection and the prevention of cigarette smuggling.”<sup>2</sup> The Panel implies that because the measure does not secure the full level of protection desired by the Dominican Republic, it is not “necessary”. Yet the fact that a measure does not achieve 100 per cent compliance does not mean it is not “necessary”. It may mean it is *insufficient* to secure a Member’s desired level of protection, but it says nothing about whether it is “necessary”.

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<sup>1</sup> See Appellee’s Submission of Honduras, paras. 10, 16, 52, 59, and 65; see also Appellant’s Submission of the Dominican Republic, para. 49.

<sup>2</sup> Panel Report, para. 7.229.

6. This concludes the oral statement of the United States. We will be pleased to answer any questions the Division may have on these and other issues raised in this proceeding. Thank you.