

European Communities – Export Subsidies on Sugar

(AB-2005-2)

THIRD PARTICIPANT ORAL STATEMENT OF THE UNITED STATES

March 7, 2005

I. Introduction

1. The United States welcomes the opportunity to present its views at this oral hearing. We will limit our comments in this oral statement to just a few points concerning estoppel, and the legal status of Footnote 1. As in its third participant written submission, the United States takes no position in this statement on other issues raised, including the issue of judicial economy. Since a key question involved for judicial economy is what findings resolve the dispute, the participants are best situated to address that question.

II. Estoppel

2. In our third participant submission, we explained why the EC's arguments concerning good faith and "estoppel" are inconsistent with the text of various provisions of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), and we will not repeat those points now.

3. Instead, today we would simply like to emphasize that the submissions of the participants in this appeal have confirmed a number of our concerns about the EC's arguments. Thailand, in its appellee submission, disagrees with the EC that "estoppel" may be based on silence. Thailand says that "[c]ontrary to the EC's argument, there is in fact support for the assertion that silence can give rise to estoppel only if there is a legal duty to speak."¹ Australia, in its appellee submission, also disagrees with the EC about what "estoppel" means, but on an entirely different point. Australia considers the EC's definition of estoppel to be deficient in that the EC fails to

¹ Thailand Appellee's Submission, para. 191.

identify that the representations at issue must be ones of fact; Australia considers that estoppel cannot apply as to a statement of a legal situation.²

4. These divergences highlight two of the points to which we drew attention in our written submission: first, the fact that Members have not agreed on the application of doctrines such as estoppel in WTO dispute settlement; and second, that creating an “estoppel” defense in WTO dispute settlement would require extensive discussion and negotiation among Members.

5. In this connection, we would note that we, like Brazil, were struck by the EC’s apparent change from its previous position concerning Members’ access to dispute settlement, which Brazil highlights in paragraph 111 of its appellee submission.³ The United States has, of course, previously noted another apparent inconsistency between the EC’s position in the *FSC* dispute and its position in the present one.

6. In addition, we would note that another aspect of the EC’s proposed approach to estoppel further demonstrates why that approach is not founded on the text of the DSU. The EC, in paragraph 357 of its appellant submission, accepts that the complainants retain their full rights under the *Agreement on Agriculture* (the “Agriculture Agreement”), but that they are simply unable to assert those rights due to alleged “estoppel.” In other words, the EC would have Members possess rights with no means for securing those rights through dispute settlement. As Article 19 of the *Agreement on Agriculture* makes clear, the agreements that govern the assertion of complainants’ rights are the DSU and Articles XXII and XXIII of the *General Agreement on Tariffs and Trade 1994*. Nowhere in those provisions is there anything that bars the assertion of rights due to “estoppel.” To the contrary, Article 4.7 explicitly permits a request for the establishment of a panel if “consultations fail to settle a dispute within 60 days.” Article 4.7 does not say “unless the Member is estopped.”

² Appellee’s Submission of Australia, paras. 509-510.

³ “The Panel was made aware that the EC itself had taken the position before the Appellate Body, in a prior dispute, ‘that Members have a fundamental right to resort to dispute resolution *at any time* and that such right can be restricted only by clear and unambiguous language.’” Appellee’s Submission of Brazil, para. 111 (footnote omitted).

III. Footnote 1 to the EC Schedule

7. We would like to emphasize two points that we made about the legal status of Footnote 1 in our written submission.

8. First, pursuant to Article 3.1 of the *Agreement on Agriculture*, the export subsidy commitments in Members' schedules are integral parts of the GATT 1994. Consequently, to the extent that there is a conflict between the Agriculture Agreement and the export subsidy commitments in the EC's schedule, Article 21.1 of the Agriculture Agreement makes clear that the Agriculture Agreement prevails. Separately, with respect to the EC's claims that the examination of its Schedule means that complainants are unable to pursue their Agriculture Agreement rights, paragraph 3 of the *Marrakesh Protocol* makes clear that the examination was "without prejudice" to those rights.

9. Second, it is not clear to the United States that Footnote 1 conflicts with the provisions of the Agriculture Agreement at all. As explained in our written submission,⁴ the first sentence of the footnote appears to reflect the EC's explanation that it provides no subsidies on exports of ACP or Indian-origin sugar; and the second sentence appears to confirm how the "base quantity level" in the EC's schedule was obtained.

IV. Conclusion

10. This concludes our oral statement. Thank you for your attention.

⁴ Third Participant Submission of the United States, para. 20.