

European Communities – Export Subsidies on Sugar

(WT/DS265, 266, and 283)

Third-Party Submission of the United States

March 18, 2004

I. Introduction

1. The United States welcomes the opportunity to present its views in this proceeding. The United States makes this third-party submission in order to provide its views on a limited number of issues raised in the first submissions of the parties. Without prejudice to other issues the United States may wish to raise in the third-party hearing with the Panel, the United States will address the following two issues in this written submission: (1) the legal significance of negotiated commitments; and (2) the relationship between the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”) and the *Agreement on Agriculture* (“Agriculture Agreement”) in the examination of an export subsidy claim. 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 SCM Agreement.

II. 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

2. 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.¹ However, neither of these arguments can be used to contradict the text of the WTO Agreement.

3. 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.

4. 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:

¹ See, e.g., *First Written Submission by the European Communities* (“EC Submission”), para. 9 n. 2 (citing Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (Dec. 20, 1991), Section L, Part B) (Exhibit EC -2); para. 10 n.3 (citing Modalities for the Establishment of Specific Binding Commitments, MTN.GNG/MA/W/24 (Dec. 20, 1993) (Exhibit EC - 3)).

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.²

The Appellate Body in *EC - Bananas III* has further observed that this modalities document is not referenced in the Agriculture Agreement.³

5. 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.

6. 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 Sugar, it follows that the base quantity in its Schedule is the result of a "shared and excusable scheduling error,"⁴ 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."⁵

7. The EC's approach in this dispute appears to completely contradict its approach in the *United States - FSC* dispute.⁶ The United States will need to reflect upon whether the EC is now suggesting that the U.S. Schedule should have been read to permit the FSC subsidies at issue because, under the EC's approach, the fact that the U.S. Schedule did not allow for the FSC subsidies, which were offered during the base period for calculating export subsidies subject to reduction, would have been a "shared and excusable scheduling error." Needless to say, the United States will be following this aspect of this dispute carefully.

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

² Modalities for the Establishment of Specific Binding Commitments, MTN.GNG/MA/W/24 (Dec. 20, 1993) (Exhibit EC-3).

³ 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.

⁴ EC Submission, para. 33.

⁵ EC Submission, para. 113.

⁶ *United States - Tax Treatment For "Foreign Sales Corporations,"* WT/DS108.

8. 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.”⁷ 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.”⁸ However, 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.

9. 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 Agriculture.”⁹ 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.

10. 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.¹⁰ 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.’”¹¹ It thus logically follows that certain subsidies may be challenged under both the Agriculture Agreement and the SCM Agreement.

IV. Conclusion

11. The United States appreciates the opportunity to provide its views in this dispute and hopes its comments will be useful to the Panel in its deliberations.

⁷ EC Submission, para. 152.

⁸ EC Submission, para. 154 (italics added); *see also id.*, paras. 204(6), 205(5).

⁹ *SCM Agreement*, Art. 3.1.

¹⁰ EC Submission, para. 154.

¹¹ 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.