BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities – Export Subsidies on Sugar

(AB-2005-2)

THIRD PARTICIPANT SUBMISSION OF THE UNITED STATES OF AMERICA

February 7, 2005

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities – Export Subsidies on Sugar

(AB-2005-2)

THIRD PARTICIPANT SUBMISSION OF THE UNITED STATES OF AMERICA

Service List

PARTICIPANTS

H.E. Mr. David Spencer, Permanent Mission of Australia
H.E. Mr. Luiz Felipe de Seixas Corrêa, Permanent Mission of Brazil
H.E. Mr. Carlo Trojan, Permanent Delegation of the European Commission
H.E. Mrs. Puangrat Asavapisit, Permanent Mission of Thailand

THIRD PARTICIPANTS

H.E. Mr. C. Trevor Clarke, Permanent Mission of Barbados
H.E. Ms. Yvonne Hyde, Embassy of Belize (Brussels, Belgium)
H.E. Mr. Don Stephenson, Permanent Mission of Canada
H.E. Mr. Sun Zhenyu, Permanent Mission of China
H.E. Ms. Claudia Uribe, Permanent Mission of Colombia
H.E. Mr. Christian Claude Beke Dassys, Permanent Mission of Côte d'Ivoire
H.E. Mr. Jorge I. Mora Godoy, Permanent Mission of Cuba
H.E. Mr. Seremaia Tuinausori Cavuilati, Embassy of Fiji (Brussels, Belgium)
Ms. Marion Herbert, Embassy of Guyana (Brussels, Belgium)
H.E. Mr. Ujal Singh Bhatia, Permanent Mission of India
H.E. Mr. Ransford Smith, Permanent Mission of Jamaica
H.E. Ms. Amina Chawahir Mohamed, Permanent Mission of Kenya
H.E. Mr. Alfred Rambeloson, Permanent Mission of Madagascar
H.E. Mr. Brian G Bowler, Embassy of Malawi (Brussels, Belgium)
H.E. Mr. Shree Baboo Chekitan, Permanent Mission of Mauritius
H.E. Mr. Tim Groser, Permanent Mission of New Zealand
H.E. Mr. Rigoberto Gauto Vielman, Permanent Mission of Paraguay
H.E. Mr. George Bullen, Embassy of Saint Kitts and Nevis (Brussels, Belgium)
H.E. Dr. T.A. Dlamini, Embassy of Swaziland (Brussels, Belgium)
H.E. Mr. Charles K. Mutalemwa, Permanent Mission of Tanzania
H.E. Mr. Bernard Anthony Weston, Permanent Mission of Trinidad and Tobago

I. Introduction and Executive Summary

1. The United States welcomes the opportunity to present its views in this appeal. The United States makes this third-participant submission in order to provide its views on certain issues raised in the Appellant Submission of the European Communities ("EC"): (1) the good faith and estoppel issues; and (2) the asserted conflict between the *Agreement on Agriculture* and Footnote 1 of the Schedule of the EC. Although the United States continues to take no view as to whether, under the facts of this dispute, the measures at issue are consistent with the *Agreement on Agriculture*, it believes that on the two issues addressed in this submission, the Panel reached the right conclusions.

2. On the first issue, the EC's argument concerning good faith and "estoppel" is inconsistent with the text of various provisions of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). For example, the EC's argument would mean that a Member would be *precluded* from engaging in WTO dispute settlement procedures, and would be *unable* to resolve a dispute – both of which would appear directly contrary to Article 3.10's "understanding" that Members *will* engage in dispute settlement procedures in good faith in an effort to resolve the dispute. Moreover, Article 1.1, Appendix 1, and Article 3.2 of the DSU reflect a very conscious choice on the part of WTO Members to limit the use of international law in WTO dispute settlement proceedings to customary rules of interpretation. Members have not consented to provide for the application of a principle of "estoppel" in WTO dispute settlement. Furthermore, the lack of any basis for importing a principle of "estoppel" into WTO dispute settlement is emphasized by (1) the lack of consistent description of the concept when discussed by panels in the past, and (2) the issues that would need to be considered and negotiated by Members before such a notion could be incorporated

3. On the second issue, contrary to the EC's assertions, the Panel properly concluded that, in the event of a conflict between them, the *Agreement on Agriculture* prevailed over Footnote 1 of the EC's Schedule. Textual support for this conclusion is to be found in Article 21 of the *Agreement on Agriculture* as well as paragraph 3 of the *Marrakesh Protocol*. However, it may be that there is no conflict between the *Agreement on Agriculture* and Footnote 1 at all. In addition, the EC's implicit position on the consequences of not making reduction commitments

on ACP and India origin sugar – namely, that in such a case the EC would be free to provide export subsidies on such sugar – is unfounded.

II. Article 3.10 of the DSU, "Estoppel," and the Principle of Good Faith

4. The EC argues that Article 3.10 of the DSU, through its reference to "good faith," makes applicable "estoppel," which the EC characterizes as a "general principle of international law."[1] The EC asserts that it was known at the time it negotiated its Schedule that C Sugar did not receive export subsidies and that the complainants acted in bad faith in bringing this dispute.[2] It alleges that the complainants are therefore estopped from bringing the present dispute.

5. The EC invocation of "estoppel" is without merit. What governed the analysis of the Panel and what should govern the legal review by the Appellate Body is the text of the DSU and the other covered agreements, interpreted in accordance with customary rules of interpretation of public international law.[3] Nowhere in the DSU or the other covered agreements is there a reference to "estoppel."

6. The EC errs in its analysis of Article 3.10 of the DSU. Article 3.10 provides, in relevant part, as follows: "It is understood ... that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute." Article 3.10 is not a general incorporation of "good faith" principles of public international law, whatever the precise

---

[1] EC Appellant Submission, para. 333.

[2] EC Appellant Submission, paras. 301, 327-328.

[3] Although the EC appears to accept that the Modalities guidelines are not a covered agreement, were not binding on Members (*see, e.g.*, para. 330 of the EC Appellant Submission) and are not context for purposes of interpreting the WTO Agreement, as a technical matter, the United States notes that the EC inaccurately refers to the document as the "Modalities Agreement." *See, e.g.,* EC Appellant Submission, paras. 3 and 329-332. The United States notes that the document's actual title is "Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme." It is not an "agreement" among WTO Members; indeed it was never agreed to by them. And it makes explicit that it cannot be used for purposes of dispute settlement. *See Modalities for the Establishment of Specific Binding Commitments*, MTN.GNG/MA/W/24, 20 December 1993, Note by the Chairman of the Market Access Group.

contours of those might be and whether or not they would include a principle along the lines that the EC in this dispute describes as "estoppel." Rather, Article 3.10 sets out the "understanding" of Members that, when engaging in dispute settlement procedures, Members will do so in good faith in an effort to resolve the dispute. The EC's argument concerning "estoppel" is directly contrary to the text of Article 3.10. It would mean that a Member would be *precluded* from engaging in WTO dispute settlement procedures, and would be *unable* to resolve a dispute – both of which would appear directly contrary to Article 3.10's "understanding" that Members will engage in dispute settlement procedures in good faith in an effort to resolve the dispute.

7. Furthermore, the lack of good faith asserted by the EC does not in fact involve the use of dispute settlement procedures. Rather the EC allegations of bad faith relate to a different point in time, long pre-dating any recourse to dispute settlement. The EC alleges the complainants acted in bad faith in not raising their concerns over ten years ago, during the Uruguay Round negotiations and did not "advise" the EC to structure its commitment schedule differently.[4] Again, such EC assertions do not implicate the provisions of Article 3.10, which only applies to what is understood will occur in dispute settlement procedures.

8. A choice by a Member not to challenge or complain about another Member's measure at any given point in time, including during the negotiations of the Uruguay Round, does not preclude a future challenge.[5] Nor does such a failure to object at one point in time render a later objection in bad faith. In fact, "the Appellate Body must presume, whenever a Member submits a request for establishment of a panel, that such Member does so in good faith… Article 3.7 [of

[4] For example, EC Appellant Submission, paras. 325, 327-328.

[5] At least one panel has reached this conclusion already. *See* Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, para. 8.24. This is not to say that circumstances surrounding the conclusion of an agreement are irrelevant to an analysis of the meaning of its terms (*see* Article 32 of the *Vienna Convention on the Law of Treaties*), but that is a very different proposition from an assertion that those circumstances mean that a party is precluded from having recourse to dispute settlement.

the DSU] neither requires nor authorizes a panel to look behind that Member's decision and to question its exercise of judgment."[6]

9. "Estoppel" is not a defense that Members have agreed on, and it therefore should not be considered by the Appellate Body. There is no textual support in any covered agreement for the EC's proposition that "estoppel" is available as a defense for responding Members.[7] Article 1.1, Appendix 1, and Article 3.2 of the DSU reflect a very conscious choice on the part of WTO Members to limit the use of international law in WTO dispute settlement proceedings to customary rules of interpretation. Members have not consented to provide for the application of a principle of estoppel in WTO dispute settlement. No provision of international law as such is a "covered agreement" that may be applied in dispute settlement, nor is there any other basis for importing into the WTO other provisions or obligations of public international law.

10. The lack of any textual basis for importing a principle of "estoppel" is further emphasized by the lack of consistent description of the concept when panels have had occasion to discuss estoppel in the past. The *Bananas I* the panel stated that estoppel can only "result from the express, or in exceptional cases implied, consent of the complaining parties,"[8] while the panels in

---

[6] Appellate Body Report, *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States: Recourse to Article 21.5 by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, para. 74.

[7] If anything, the context of the WTO agreements makes clear that they do not provide for "estoppel." *First*, the carefully negotiated "general exceptions" in both the GATT 1994 and the GATS are just two examples indicating that where Members intended to create exceptions, they did so explicitly. *Second*, neither Article 19 of the *Agreement on Agriculture* nor Articles XXII and XXIII of the GATT 1994 (which Article 19 incorporates) contain any provision suggesting a bar to dispute settlement of the sort that the EC argues for in this dispute. *Third*, perhaps the closest element in the covered agreements to a concept of "estoppel" is the element of Members' "legitimate expectations" in non-violation nullification and impairment claims (which are of course not the sorts of claims involved in this dispute). Even in that context, however, there is no indication that expectations based on other Members' statements or silence were intended to work in the opposite direction as a *defense*.

[8] Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, para. 7.38 (quoting *EEC – Member States' Import Regimes for Bananas* ("*Bananas I*"), unadopted, DS32/R (June 3, 1993)).

Asbestos and *Guatemala Cement* stated that estoppel would be relevant when a party "reasonably relies" on the assurances of another party, and then suffers negative consequences resulting from a change in the other party's position.[9] These inconsistencies illustrate the dangers of seeking to identify purportedly agreed-upon legal concepts beyond the only source all Members *have* agreed to – the text of the covered agreement themselves.

11. Nor is "estoppel" as simple a concept to import into the WTO agreements as the EC would appear to suggest. Rather, creating an "estoppel" defense would require extensive discussion and negotiation among Members. As just one example, in the situation presented here involving a Member's Schedule, one question that might arise in any discussion of the concept of "estoppel" is whether Members would want to limit the application of "estoppel" so that it may only arise as a result of actions of parties with a particular trade interest in a particular concession, along the lines of the limitations on which Members have rights to compensation in a modification of a particular concession under Article XXVIII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").[10]

12. The EC's enthusiasm for the concept of "estoppel" appears to be a new-found one generated for purposes of this dispute. The EC's position in other disputes is contrary to its position here, and thus undermines the EC's arguments. For example, the EC's approach in this dispute appears to completely contradict its approach in the *United States - FSC* dispute[11] – unless the EC would now like to take the position that it is "estopped" from challenging the U.S. FSC for the same reasons that the EC says the complaining parties should be "estopped" in this dispute. The United States will continue to follow this aspect of this dispute carefully.

---

[9] *See* Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, adopted 5 April 2001, para. 8.60 (citations omitted); *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, paras. 8.23-8.24.

[10] The United States notes that in this dispute, the EC has explained that not all the complaining parties were involved in the negotiation of footnote 1. See EC Appellant Submission, para. 122.

[11] *United States – Tax Treatment For* "*Foreign Sales Corporations*", WT/DS108.

III. Legal Status of Footnote 1

13. The EC argues that even if Footnote 1 of its Schedule cannot be interpreted consistently with the Agreement on Agriculture, this fact does not render the footnote without legal effect.[12] The EC notes that finding a conflict between two parts of an international agreement and "consequently disapplying one part … is a conclusion which should only be made in the last resort" and argues that "the Panel should have been more careful in interpretation of Footnote 1."[13] In addition, the EC argues that even if the two provisions were found to be in conflict, the *Agreement on Agriculture* should not have prevailed.

14. In fact, the Panel did act with caution in addressing the relationship between the *Agreement on Agriculture* and the footnote in question. It noted specifically that "there is a presumption against conflicts when treaties have the same membership" and that its "duty" was to "read all applicable provisions of the treaty in a way that gives meaning to all of them, harmoniously."[14] It recalled that a conflict generally occurs only when two provisions in question are mutually exclusive.[15]

15. The Panel not surprisingly concluded that in the event of any conflict between the *Agreement on Agriculture* and the footnote, the *Agreement on Agriculture* prevailed. It cited in support the findings of the Appellate Body in *EC – Bananas III* and of the GATT panel in *United*

---

[12] EC Appellant Submission, paras. 155-169.
[13] EC Appellant Submission, para. 155.
[14] Panel Report, paras. 7.155, 7.165 (footnotes and internal quotation marks omitted).
[15] Panel Report, para. 7.155.

States – Restrictions on Importation of Sugar (*U.S. – Headnote*),[16] both for the principle that in their schedules Members may yield rights but not diminish their obligations under the GATT.

16. The United States notes that textual support for this proposition is found in Article 21 of the *Agreement on Agriculture*, which states: "The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement." In other words, Members explicitly recognized that there may be conflicts between the *Agreement on Agriculture* and other agreements, including the GATT 1994, and provided a rule for how to handle any such conflicts. The EC footnote is part of the GATT 1994 (and this was explicitly recognized in Article 3.1 of the *Agreement on Agriculture*). Accordingly, Members explicitly agreed that the *Agreement on Agriculture* would prevail over Members' Schedules.

17. This point is further reinforced by paragraph 3 of the *Marrakesh Protocol*, which provides that

> The implementation of the concessions and commitments contained in the schedules annexed to this Protocol shall, upon request, be subject to multilateral examination by the Members. *This would be without prejudice to the rights and obligations of Members under Agreements in Annex 1A of the WTO Agreement.*[17]

Since the *Agreement on Agriculture* is one of the Agreements in Annex 1A of the WTO Agreement, no provision of a Member's Schedule could prejudice another Member's rights under the *Agreement on Agriculture*.

---

[16] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 154; GATT Panel Report, *United States – Restrictions on Importation of Sugar* ("*U.S. – Headnote"*), 36S/331, adopted 22 June 1989, para. 5.2. The Appellate Body also reached this conclusion in its report on *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, para. 98.

[17] (Emphasis added.) Also, the very terms "concessions" and "commitments" suggest a Member yielding additional rights and granting benefits, not diminishing obligations.

18. Implicit in the EC's arguments appears to be an assumption that the natural result of the EC's[18] "not making any reduction commitments" on ACP and India origin sugar is that the EC is free to provide export subsidies on such sugar.[19] However, it is not clear how this result would follow.

19. As the Appellate Body found in *United States – FSC*:[20]

> In our view, the terms 'export subsidy commitments' and 'reduction commitments' have different meanings. '*Reduction* commitments' is a narrower term than 'export subsidy commitments' and refers only to commitments made, under the first clause of Article 3.3, with respect to *scheduled* agricultural products. It is only with respect to *scheduled* products that Members have undertaken, under Article 9.2(b)(iv) of the *Agreement on Agriculture*, to *reduce* the level of export subsidies, as listed in Article 9.1, during the implementation period of the *Agreement on Agriculture*.[159] The term 'export subsidy commitments' has a wider reach that covers commitments and obligations relating to *both* scheduled and unscheduled agricultural products.
>
> ---
>
> [159] Article 9.2(b)(iv) provides that, with respect to *scheduled* products, the budgetary outlay and quantity commitment levels must, by the end of the implementation period, not exceed certain threshold levels, expressed as a percentage of the 1986-1990 base period levels.

20. Accordingly, if the EC made *no* "reduction commitment" on such sugar, as its footnote explicitly states, then such sugar would become an "unscheduled" agricultural product subject to the general commitment in the *Agreement on Agriculture* not to provide *any* export subsidy, and the EC would not be able to provide export subsidies for such sugar. Since the EC explained to the panel that in fact it did not provide any subsidies on exports of sugar of ACP or Indian origin,[21] then the footnote would appear to be in accord with what the EC itself has said was its

---

[18] The footnote states that "the Community" is not making any reduction commitment. Presumably this was meant to be the "European Communities" since it is the "European Communities" that is the WTO Member, not "the Community."

[19] *See, e.g.,* EC Appellant Submission, para. 86.

[20] Appellate Body Report, *United States – Tax Treatment For* "*Foreign Sales Corporations*", WT/DS108/AB/R, adopted 20 March 2000, para. 147.

[21] Panel Report, para. 7.117.

practice, and there would not appear to be any conflict at all between the footnote and the *Agreement on Agriculture*.[22]

IV. Conclusion

21. The United States appreciates the opportunity to provide its views in this appeal and hopes that its comments will be useful to the Appellate Body.

[22] With respect to the second sentence of the footnote, the United States notes that the EC has explained that the footnote was "to the entry in Part IV, Section II of the EC's Schedule in respect of sugar" (EC Appellant Submission, para. 81), and that this section of the EC's Schedule contains a "base quantity level" of 1.6 million tons. The second sentence would appear to confirm how that base quantity was derived (*i.e.*, the average of exports in the period 1986 to 1990).