

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

(WT/DS302)

**Third Party Submission
by the European Communities**

**Geneva
27 April 2004**

I. INTRODUCTION

1. The European Communities thanks the Panel for this opportunity to present its views in these proceedings.
2. The European Communities intervenes in this case because of its systemic interest in the interpretation of fundamental provisions of the *General Agreement on Tariffs and Trade 1994* (the “GATT”), in particular Article III. Therefore, the European Communities does not take a position on the specific facts of this case and the question of whether or not the challenged measures are WTO-consistent.

II. THE TRANSITIONAL SURCHARGE ON IMPORTS

3. In its submission, Honduras argues that the transitional surcharge on imports is inconsistent with Article II:1(b) of the GATT. Moreover, in a footnote, Honduras maintains that, for this reason, the measure is also in breach of Article II:1(a) of the GATT.¹
4. At the outset, the European Communities would note that it cannot agree with the statement made in passing by Honduras that “Article II:1(a) of the GATT prohibits, in principle, duties and charges on bound items other than ordinary customs duties.”² Rather, that Article mandates treatment no less favourable than that provided for in the relevant schedule. The same applies to Article II:1(b) second sentence of the GATT as is further corroborated by the *Understanding on the Interpretation of Article II:1(b)*.³ The text of the schedule will therefore govern the question of the WTO-compatibility of the particular “other duties or charges” a Member imposes. To the extent that the transitional surcharge on imports is inconsistent *with the schedule*, it would be in violation of Article II:1(b) of the GATT and consequently, to this extent, also in breach of Article II:1(a) of the GATT.⁴

¹ Honduras’ First Written Submission, paras. 47 *et seq.*, footnote 34.

² Honduras’ First Written Submission, para. 2.

³ Cf. Panel Report, *Chile – Price Band System*, para. 7.107.

⁴ Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45.

III. THE FOREIGN EXCHANGE FEE

5. The European Communities reserves its right to comment on the legal questions raised by Honduras' challenge of the foreign exchange fee at the third party session of the first substantive meeting with the Panel.

IV. THE REQUIREMENT TO AFFIX TAX STAMPS IN THE TERRITORY OF THE DOMINICAN REPUBLIC

1. *Article III:4 of the GATT*

6. The European Communities wishes to comment upon the legal test to be applied under Article III:4 of the GATT when assessing the question whether imported products are accorded "less favourable treatment" compared to the "like" domestic products. As is well established in the GATT/WTO jurisprudence, less favourable treatment can arise both from formally different and formally identical treatment of imports and like domestic products.⁵ The fact that the requirement to affix the stamp in the Dominican Republic's territory is identical for importers and domestic manufacturers, therefore, does not exclude the possibility of *de facto* less favourable treatment.⁶
7. According to the Appellate Body in *Korea – Various Measures on Beef*, the relevant standard for a determination of "less favourable treatment" is whether the measure at issue accords "conditions of competition" that are less favourable for imports than for the like domestic goods.⁷

⁵ Appellate Body Report, *Korea – Beef*, paras. 136, 137; Panel Report, *US – Section 337*, para. 5.11.

⁶ In this context, it should be pointed out that one should not misunderstand the panel's reference in *US – Section 337, ibid.*, to "cases where the application of formally identical legal provisions would in practice accord less favourable treatment to imported products *and a contracting party might thus have to apply different legal provisions* to imported products to ensure that the treatment accorded them is in fact no less favourable" (emphasis added). The remedy to abolish the *de facto* discrimination which arises from identical treatment need not necessarily and always introduce *different* treatment of imports and domestic products. There may also exist forms of identical treatment other than the discriminatory one that would remove any less favourable treatment.

⁷ Appellate Body Report, *Korea – Beef*, para. 135. The Appellate Body's formulation, in para. 137 of that Report, "whether a measure *modifies the conditions of competition* in the relevant market to the detriment of imported products" (compared to domestic goods) expresses the same idea, even though strictly speaking "modifies to the detriment of imports" is a correct standard only where there previously was no (such) discriminatory measure imposing a competitive disadvantage on imports. Where, however, the

8. The European Communities would object to the Dominican Republic's attempt to narrow the obligation of national treatment in Article III:4 of the GATT by importing "so as to afford protection" into the criterion of "less favourable treatment". On the basis of "so as to afford protection to the domestic industry" in Article III:1 of the GATT, the Dominican Republic appears to advocate an additional requirement under Article III:4, which is that the measure has "protective application".⁸
9. Firstly, this attempt goes in the direction of advocating the "aims-and-effects" approach which has been explicitly rejected in the WTO jurisprudence.⁹ A responding party can therefore not defend itself against the allegation of an Article III violation by insisting that its measure pursues entirely legitimate policies and is not inherently and intentionally discriminatory.
10. Secondly, while the Dominican Republic is right that the Appellate Body has acknowledged that Article III:1 of the GATT informs all of Article III, including its paragraph 4,¹⁰ this does not result in the additional requirement(s) for a violation of Article III:4 of the GATT as argued by the Dominican Republic. The Appellate Body has made it clear that the principle of Article III:1 of the GATT is already expressed in the requirement of "no less favourable treatment" in Article III:4 of the GATT. Where there is less favourable treatment of the group of like imports, there is automatically protection of the group of like domestic products:

The term "less favourable treatment" expresses the general principle, in Article III:1, that internal regulations "should not be applied ... so as to afford protection to domestic production". If there is "less favourable treatment" of the group of "like" imported products, there is, conversely, "protection" of the group of "like" domestic products.¹¹

previous regulatory situation was equally or even more discriminatory, there would be no "modification" to the detriment of imports, but nevertheless a national treatment violation because the measure in question still "accords" less advantageous conditions of competition to imports. See also Panel Report, *Canada – Wheat Board*, para. 6.184: "the relevant requirement ... must adversely affect the competitive opportunities of imported grain *vis-à-vis* like domestic grain".

⁸ Dominican Republic's First Written Submission, paras. 46, 51.

⁹ Appellate Body Report, *EC – Bananas III*, para. 241; Appellate Body Report, *Japan – Alcoholic Beverages*, pp. 27-28.

¹⁰ Appellate Body Report, *EC – Asbestos*, para. 98; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 18.

¹¹ Appellate Body Report, *EC – Asbestos*, para. 100.

Thus, there is no need for an additional finding of the existence of what the Dominican Republic calls “protective application”.

11. For this reason, the Dominican Republic also cannot defend itself with the argument that the costs imposed by its tax stamp measure are minimal and therefore result in no discriminatory or protective effect.¹² Indeed, according to established jurisprudence even a minimal difference in taxes may contravene Article III:2, first sentence, of the GATT as this provision contains no *de minimis* exception.¹³ In addition, Article III of the GATT protects expectations of equal competitive opportunities, not of trade volumes.¹⁴ This simultaneously shows the irrelevance of the Dominican Republic’s argument that the volume of imports has actually increased despite the allegedly discriminatory trade practice.
12. Finally, the Dominican Republic’s arguments regarding the need for effective enforcement of tax laws, the danger of forgery and tax evasion and the lack of reasonably available regulatory alternatives do not belong in the analysis of competitive conditions and thus of national treatment. In the event of an inconsistency with Article III of the GATT, such considerations would be relevant in the examination of a justification under Article XX:(d) of the GATT.
13. Regarding the analysis of the “conditions of competitions” one would need to assess whether the measure imposes additional costs on imported products compared to those imposed on like domestic products. In contrast, additional costs which are not truly the result of the governmental measure, but of a free choice by the importer would be irrelevant. In the latter case, the additional costs borne by imports as compared with the like domestic products would not be entailed by the governmental measure and they should, therefore, be ignored in the “less favourable treatment” analysis. The same is valid for those competitive disadvantages which are not the

¹² Dominican Republic’s First Written Submission, paras. 45, 53.

¹³ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 23; Panel Report, *1987 Japan – Alcoholic Beverages I*, paras. 5.8, 5.11; Panel Report, *US – Malt Beverages*, para. 5.26.

¹⁴ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16; Panel Report, *US – Superfund*, 5.1.9.

result of the measure, but of economic, geographic or cultural circumstances inherently connected with the sale of products in export markets.

14. In sum, Article III:4 of the GATT requires that one considers only those costs that are *imposed* by the challenged measure itself and to assess whether the result is a disadvantage for imports in their competitive relationship with the like domestic products.
15. In the present case, the European Communities would not exclude that the Dominican Republic's requirement to affix the tax stamps in its territory creates a higher burden for imports and thus a competitive disadvantage *vis-à-vis* like domestic products. The Panel would need to assess the extent to which the alleged additional costs are truly imposed on importers compared to domestic producers and not only an exaggerated description of necessary additional steps or costs that are self-imposed by the importer, for instance by inefficient production processes.

2. *Article XX:(d) of the GATT*

16. At this stage, the European Communities does not intend to discuss whether the requirement to affix the tax stamp in the territory of the Dominican Republic, if inconsistent with Article III:4 of the GATT, could be justified under Article XX:(d) of the GATT because that requirement is "necessary" to achieve the chosen level of enforcement of tax laws. The European Community reserves its rights to present its views in this respect during the third party session of the first substantive meeting with the Panel.

V. THE SELECTIVE CONSUMPTION TAX

17. The European Communities has noted the Dominican Republic's defence that the Panel should dismiss the claim because it is moot given the enactment of the Law No. 3-04 that was published on 14 January 2004. The European Communities

reserves its right to present its views on this claim at the third party session of the first substantive meeting with the Panel.

VI. THE REQUIREMENT TO POST A BOND

18. The European Communities would insist that Article XI:1 of the GATT is not applicable to the bond requirement. This measure applies identically to both domestic manufacturers and importers (“tanto por importadores como por fabricantes locales”).¹⁵ As the Interpretative Note *Ad* Article III makes clear, such a measure falls under Article III of the GATT and not within the scope of Article XI of the GATT.
19. In support of its subsidiary claim under Article III:4 of the GATT, Honduras asserts that the bond, which is a specific one-off guarantee (RD\$ 5 million per importer or domestic producer), burdens an importer with small market share much more than a domestic producer with large market share. Honduras also claims that the bond serves to guarantee the payment of the selective consumption tax, the actual burden of which depends on the quantities sold, such that the bond is not commensurate with the tax payable.
20. The European Communities would submit that the assessment whether the bond requirement *de facto* accords less advantageous competitive conditions to imported products than to the like domestic products should also take into account whether the bond requirement has a deterrent effect on potential domestic operators and importers. Domestic producers and also importers may be reluctant to set up business operations in the market of the Dominican Republic because of the bond requirement, with the result that that they do not actually exist on that market. In this connection of the entry barrier resulting from the bond, it may be worth recalling that domestic producers must post the bond before starting production and importers (only) prior to importation.

¹⁵ Article 14 of Regulation 79-03, Exhibit HOND-4.

21. As far as the Dominican Republic's defence on Article III:4 is concerned, in particular the relevance of "so as to afford protection" and "protective application" within "less favourable treatment", the European Communities would refer to its comments in connection to the tax stamp.¹⁶ As regards the question of a justification under Article XX:(d) of the GATT 1994, if needed, the European Communities again reserve its right to comment on this issue at the third party session of the first substantive meeting.

VII. CONCLUSIONS

22. The European Communities considers that this case raises important questions on the interpretation of Article III of the GATT. While not taking a final position of the merits of the case, the Panel should carefully review the scope of the claims in light of the observations made in this submission. The European Communities reserves its right to make further comments at the third party session of the first substantive meeting.

¹⁶ See *supra*, paragraphs 8 to 10.