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

(WT/DS302)

Oral Statement of the European Communities

Geneva
12 May 2004
Mr Chairman, distinguished members of the Panel,

I. INTRODUCTION

1. The European Communities thanks the Panel for this opportunity to present its views before you today.

2. In its third party submission, the European Communities already addressed several issues raised in this proceeding, namely Honduras’ argument on the relationship between Article III:4 of the GATT and Article III:1 of the GATT and the correct interpretation of the terms “less favourable treatment” under Article III:4 of the GATT.

3. In this third party session, we will not develop these arguments further and we trust that the Panel has taken due note of our views. Instead, we will concentrate on other issues raised in this case which are equally of systemic importance for the interpretation of the GATT and for the solution of this dispute. These issues concern the following:

- The exceptional clause under Article XV:9(a) of the GATT;
- The scope of Article XX(d) of the GATT for justifying an alleged violation by the “tax stamp requirement”;
- The question of mootness of Honduras’ claim against the selective consumption tax;
- The correct legal approach for comparing a less favourable treatment of imported product compared to the like domestic product under Article III:4 of the GATT.

4. The European Communities will discuss each of these issues in relation to the respective claim.

II. THE FOREIGN EXCHANGE FEE

5. The foreign exchange fee, as the European Communities understands it, is imposed on the exchange of local currency into foreign currency which is necessary to pay for imported goods.¹ Honduras argues that this fee is contrary to Article II:1(b) of the GATT.

¹ Honduras First Written Submission, paras. 15 et seq.; Dominican Republic First Written Submission, para. 193.
GATT because it exceeds the levels of “other duties and charges” as inscribed by the Dominican Republic in its schedule. The Dominican Republic defends the foreign exchange fee in the first place by referring to Article XV:9(a) of the GATT.

6. The European Communities does not take a position on Honduras’ allegation that the foreign exchange fee would be contrary to Article II:1(b) of the GATT. However, the European Communities would like to make some systemic comments on the interpretation of Article XV:9(a) of the GATT:

7. First of all, the European Communities notes that this provision, and Article XV of the GATT as a whole, are closely related to the IMF field of activity. Under Article XV:9(a) of the GATT WTO Members may use “exchange controls” or “exchange restrictions” consistent with IMF rules. Therefore, the interpretation of this provision should not be conducted in isolation from the relevant IMF concepts and rules. The GATT cannot be assumed to have restricted the scope for Members to adopt these exchange measures consistent with IMF rules.

8. That said, the European Communities would note that it appears that a “fee” is not necessarily an “exchange restriction” within the terms of Article XV:9(a) of the GATT. The ordinary meaning of the term “restriction” is “a limitation on action, a limiting condition”. Thus, while it is of course true that a fee would make foreign exchanges more expensive, this does not necessarily entail a limitation on the availability of foreign currencies. Thus, the exception under Article XV:9(a) of the GATT may not be pertinent in this case.

9. The European Communities would also note that Article XV:4 of the GATT provides that any “exchange action” shall not “frustrate the intent of the provisions of this Agreement”. Clearly, not all “exchange actions” are exempted by virtue of Article XV:9(a) of the GATT. Care must be taken not to interpret this latter provision in a rather broad way to the detriment of the general principle under Article XV:4 of the GATT.

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2 Honduras First Written Submission, paras. 59 et seq.
3 Dominican Republic First Written Submission, paras. 190 et seq.
4 The New Shorter Oxford English Dictionary, Vol. 2, p. 2569. The European Communities would note that this definition appears to be similar to the term “exchange restriction” as interpreted by IMF, cf. Dominican Republic First Written Submission, para. 194.
GATT. To avoid such a conclusion, it appears, therefore, appropriate to give the notion of an “exchange restriction” under Article XV:9(a) of the GATT a meaning consistent with the actual terms used, with its immediate context and with the relevant IMF provisions.

10. In this context, the European Communities would also emphasise the objective and purpose of the WTO Agreements which aims at “expanding the trade in goods and services”. It would be contrary to this objective if the trade impact of certain foreign exchange actions were to escape the GATT rules by virtue of a too broad interpretation of the term “exchange restriction” under Article XV:9(a) of the GATT.

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

11. In its third party submission, the European Communities already developed certain parameters for the interpretation of Article III:4 of the GATT which the Panel should take into account when assessing this claim. Assuming that the “tax stamp requirement” were to be found in violation of Article III:4 of the GATT the Panel would then be called upon to adjudicate on the Dominican Republic’ argument that the measure is justified under Article XX(d) of the GATT.

12. The European Communities believes that a tax stamp requirement pursues a legitimate objective under the GATT, i.e. the levy of taxes on cigarettes, and that a tax stamp is an appropriate means to secure compliance with such an objective. However, the European Communities would invite the Panel to consider whether the concrete measure applied by the Dominican Republic is “necessary” in terms of Article XX(d) of the GATT.

13. The Appellate Body gave an exhaustive interpretation of the term “necessary” under Article XX(d) of the GATT in the case Korea – Various Measures on Beef. Thus, an examination of this term

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5 WTO Agreement, preamble.
6 See Dominican Republic First Written Submission, paras. 100 et seq.
involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected, and the accompanying impact of the law or regulation on imports or exports.

Further,

In our view, the weighing and balancing process we have outlined is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could “reasonably expect to employ” is available, or whether a less WTO inconsistent measure is “reasonably available”.8

14. In the case at hand, the European Communities would not contest that the tax stamp requirement is apt to achieve the compliance with the taxation of cigarettes in the Dominican Republic. However, Honduras contends that the tax stamp requirement has also a considerable adverse impact on the cost of importation due to the necessity to put the stamp on the cigarettes in the Dominican Republic. The European Community is not in a position to judge whether all the additional steps described by Honduras9 would necessarily occur, but it seems clear that the Dominican Republic’ tax stamp requirement, at least, entails some more manufacturing steps for imports compared to the situation in which the stamps could be affixed in the “home” factory of the producer of imported cigarettes. According to the Appellate Body jurisprudence, such an aspect should be taken into account when assessing the “necessity” of the measure under Article XX(d) of the GATT.

15. In the EC’s view, the requirement of a “tax stamp” could in principle also be achieved in a way that would be less burdensome for imports into the Dominican Republic. Such alternative methodology could consist, for instance, of selling tax stamps to authorized producers who would be entitled to fix the stamps on the cigarettes packages during the manufacturing process. If properly designed, such a procedure could sufficiently guarantee that only original tax stamps would be used, thus securing the objective of the tax stamp, while avoiding an unnecessary doubling in the manufacturing process for importers.

8 Ibid., para. 166.

9 Honduras First Written Submission, para. 78.
16. This being said, the European Communities does not contest the right of the Dominican Republic to choose its level of enforcement for its legitimate tax laws. However, as in the case Korea – Various Measures on Beef, this argument is not a “blank cheque” to the Member invoking Article XX(d) GATT. Instead, it is for the Panel to balance and weight all the arguments put forward by the party relying on this defence.

IV. THE SELECTIVE CONSUMPTION TAX

17. The Dominican Republic argues that the Panel should dismiss the claim because it is moot given the enactment of the Law No. 3-04 which was published on 14 January 2004, that is after the establishment of the Panel, i.e. on 9 January 2004. Against this background, the European Communities considers that the Panel should conclude that the claim has become moot unless Honduras advances a special legal interest on why the Panel should still make a finding on this issue.

18. The European Communities is aware that the Panel’s terms of reference form the jurisdictional basis for a case. For this reason, past Panels have been reluctant to dismiss a claim in case the underlying facts changed. That said, in the EC’s view, it is important to take into account the rationale of the dispute settlement system. For instance, Article 3.2 of the DSU provides that this system “serves to preserve the rights and obligations of Members”. Moreover, Article 3.3 of the DSU refers to “measures taken by another Member” and Article 3.7 of the DSU second sentence stipulates that “the aim of the dispute settlement mechanism is to secure a positive solution to a dispute” (emphasis added).

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10 Dominican Republic, First Written Submission, para. 117.
12 See EEC – Measures on Animal Feed Protein, L/4599, BISD 25S/49 (adopted on 14 March 1978); Panel Report, US – Wool Shirts and Blouses, para. 6.2; Panel Report, Indonesia – Autos, para. 4.61 but see also, Argentina – Textiles and Apparel, para. 6.11 et seq. The European Communities would however not that each case represents its particularities thus, they may not necessarily constitute an appropriate precedent.
19. The European Communities considers that in case a measure is withdrawn the basis for a “dispute” does not exist any more.\(^\text{13}\) In these circumstances, it would be for the complaining party to demonstrate why the dispute settlements proceedings should continue and to what extent its rights and obligations could still be affected. However, if the measure has simply become moot it is neither appropriate nor necessary any more for the Panel to make any findings on such a claim. Indeed, there would be no longer a “measure” which could “affect the rights and obligations” of another Member and, consequently, the case would be deprived of a “dispute”.

V. THE REQUIREMENT TO POST A BOND

20. Honduras asserts that the bond requirement is contrary to Article III:4 of the GATT because an importer with a small market share will be much more affected 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.\(^\text{14}\)

21. The European Communities submits that any assessment of a violation of Article III:4 of the GATT involves a comparison between the treatments of domestic products and like imported products. While the parties have no disagreement about the “likeness” of the products in this case, i.e. cigarettes\(^\text{15}\), it is nevertheless important to note that for the purpose of the determination of a “less favourable treatment” “domestic” and “imported” should be compared as respective “groups”. Thus, the Appellate Body in EC – Asbestos held\(^\text{16}\):

> A complaining Member must still establish that the measure accords to the group of “like” imported products “less favourable treatment” than it accords to the group of “like” domestic products. (Emphasis in the original)

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\(^{13}\) See also Article 3.7 fourth sentence: “the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned”. Obviously, if the measure does not exist any more the dispute settlement procedure has already achieved its primary purpose.

\(^{14}\) Honduras First Written Submission, para. 116.

\(^{15}\) Honduras First Written Submission, para. 73 et seq.; Dominican Republic First Written Submission, para. 32.

\(^{16}\) Appellate Body Report, EC – Asbestos, para. 100.
22. Therefore, in order to determine whether imported products are treated less favourably than domestic products one has to compare the “groups” of the respective like products.17

23. In the present case, it is not clear to the European Communities whether the bond requirement constitutes a “less favourable treatment” of the “group” of imported cigarettes compared to the “group” of cigarettes from the Dominican Republic. Indeed, in its claim Honduras only construes one example where an importer with a small market share is allegedly treated disadvantageously compared to a domestic producer with a big market share. Such an isolated example, however, is not sufficient to demonstrate that, under the terms of the decision EC – Asbestos, the “group” of imported products is treated less favourably than the “group” of domestic products. In other words, a single example, which might be purely anecdotal, tells nothing about the effects of the measure on the overall competitive relationship of imported and like domestic goods.

24. Furthermore, in order to make a prima facie case, it is not sufficient to rely for the determination of a “less favourable treatment” solely on the relative market share of importers as a group and domestic producers as a group. Honduras would also have to show that the imposition of a specific, fixed-amount bond results in a higher burden and a competitive disadvantage for the group of imported goods, as compared to the group of domestic like products.

Thank you for your attention.

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17 See also Appellate Body Report Chile – Alcoholic Beverages, para. 52.