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**GENERAL AGREEMENT ON
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EUROPEAN COMMUNITY - TARIFF TREATMENT ON IMPORTS OF CITRUS PRODUCTS
FROM CERTAIN COUNTRIES IN THE MEDITERRANEAN REGION

Communication from the United States

The following communication, dated 19 April 1985, has been received from the Office of the United States Trade Representative in Geneva with the request that it be circulated to contracting parties.

Response of the United States to
Declaration of the European Communities
Regarding Tariff Treatment on Imports of Citrus Products

The United States submits the following comments in response to the Summary of the Declaration of the Spokesman for the European Community (C/W/462) which was distributed at the meeting of the Council on March 12, 1985. The U.S. believes that, contrary to assertions contained in the EC Declaration, adoption of the Panel report regarding citrus products (L/5776) will not establish precedents prejudicial to agreements entered into pursuant to the provisions of Article XXIV. A careful review of the panel report demonstrates that the EC assertion that adoption of the report will establish adverse legal precedents is simply unfounded. In fact, the U.S. contends that acceptance of the EC views, as expressed in C/W/462 would prejudice the legitimate rights and interests of other contracting parties, and would compel contracting parties to abandon the pragmatic approach previously taken in the GATT with respect to interim agreements under Article XXIV.

Attached are specific comments which respond to the EC summary of the panel report which was circulated as part of C/W/462. In addition, the U.S. requests that the Council consider the following points:

1. The Panel report should be read in the context of the Panel's approach to this complaint, which was one of balancing competing interests: (a) the interest of the U.S. in redressing the harm caused by the EC tariff preferences to U.S. trade in citrus; and (b) the interest of the EC in maintaining its arrangements with the Mediterranean countries. This approach is entirely in keeping with the traditional GATT approach of seeking practical solutions to trade problems.
2. While the U.S. does not agree with every statement made by the Panel in its report, we believe that the Panel has made a recommendation that redresses the real harm caused to U.S. exports of oranges and lemons yet does not affect the preferential arrangements as a whole. Indeed, it must be recognized that the Panel's recommendation would result in a further reduction in import duties levied on oranges and lemons from the preference recipients.

3. The EC is asking the Contracting Parties to reject this practical solution because they claim that adverse legal precedents would arise from adoption of the Panel report. However, one must remember that this Panel did not base its conclusions on some unusual legal interpretation of the GATT. On the contrary, the Panel expressly avoided basing its findings on general legal principles; instead it made a finding of non-violation nullification or impairment based on the specific facts of this case and in accordance with the provisions of Article XXIII and past GATT practice. As will be discussed in more detail below, the EC has no basis for claiming that the Panel's findings will be generally applicable to tariff preferences given pursuant to other agreements or to unilateral measures such as GSP.
4. The EC position, if accepted, will render meaningless all contracting parties' rights under Article XXIII with respect to any preferential agreement for which no recommendation is made under Article XXIV:7, regardless of the circumstances of the review of the agreement by the CONTRACTING PARTIES. Thus, contracting parties which believed that, explicitly or implicitly, they retained rights under Article XXIII with respect to any existing preferential agreements will find their rights have terminated.

Because the EC position precludes the possibility of reserving GATT rights in cases where the Contracting Parties wish to be accommodating, but doubt the consistency of an agreement with GATT, it will force contracting parties to abandon the tolerant approach, which they have thus far adopted, in reviewing any future preferential agreements.

5. One fact which emerges clearly from the Panel report and which the EC has ignored in its Declaration is that U.S. exports of lemons and oranges have been damaged by the EC's tariff preferences. The U.S. seeks only to redress this problem. Therefore, to satisfy those concerned (unnecessarily, in the U.S. view) about legal precedents, the U.S. could agree to simply take note of the Panel report if the EC would agree to take action as outlined in the Panel's recommendation. Such action will not cause the EC to violate its agreements with the Mediterranean countries, and duties charged to preference recipients will also be reduced since the preferences are calculated as percentages of the MFN rate.

Comments on EC Summary of Panel Report¹

Terms of Reference (Item A of the EC Summary)

The Panel's conclusions with respect to terms of reference are illustrative of the Panel's entire approach to this complaint. That approach was to reconcile the need to redress the harm caused by the EC tariff preferences to the specific citrus trade interests of the U.S., with the desire to upset as little as possible the broad political and economic interests of the Mediterranean countries. It is important to bear this approach in mind because it explains why the Panel has given priority to the goal of balancing these competing interests even at the expense of consistently applying legal principles.

The U.S. believes that once the EC chose to justify its tariff preferences on citrus as part of valid Article XXIV interim agreements, the U.S. had the right to challenge that justification, and the Panel had the right to make a finding on this legal point. The Panel's terms of reference called for an examination "in the light of the relevant GATT provisions" (para. 1.5) and the Panel expressly stated that Article XXIV was a relevant provision (para. 4.3). In addition, the agreement on the terms of reference (para. 1.5) specifically recognized that the citrus preferences were elements of more general agreements and that

"...the Panel will take due account, inter alia, of the reports of the working parties relating to these agreements and of the Minutes of the Council sessions where these reports were discussed and adopted...."

The U.S. further believes that had the Panel made a finding on this legal issue it would be compelled to conclude that the agreements as a whole are not consistent with Article XXIV. The U.S. bases its belief on the fact that if the agreements were consistent with Article XXIV, the EC would have had an absolute defense to the U.S. complaint and the Panel would not need to consider a non-violation case at all. This was recognized by the Panel when it stated:

"Had it been recognized that an agreement was in conformity with the requirements of Art. XXIV, the implementation of the agreement could no longer be considered as nullifying or impairing benefits accruing under the General Agreement." (para. 4.19).

¹Except where specifically noted, references are to the Panel's report.

The Panel could only make a legal finding in favor of the U.S., however, if it were willing to sacrifice entirely the sensitive political arrangements of the EC with the Mediterranean countries. Such an action would have been inconsistent with the Panel's basic approach to this issue. To avoid this, the Panel interpreted its terms of reference, which referred to EC preferences on citrus, narrowly as not permitting a legal finding to be made which would pass judgment on the conformity of the agreements generally with Article XXIV.

The U.S. disagrees with the Panel's reasoning on this interpretation. The Panel places much emphasis on a purported practice of not reviewing Article XXIV agreements, as a whole, pursuant to Article XXIII procedures. In fact, however, no such practice has developed (we note that the Panel made no specific citation here) because the issue has never arisen before.

Nevertheless, because the United States is interested only in redressing the specific harm to its citrus trade resulting from the EC's preferences on citrus, we are willing to support the practical approach of the Panel despite the fact that this has placed a greater burden on the U.S. in terms of specifically demonstrating adverse effects.

With regard to the Panel's determination that it could rule on the consistency of specific measures taken under the preference agreements (see second question of Item A of the EC summary), the U.S. notes that the Panel did not rely solely on conclusions reached by the CONTRACTING PARTIES with regard to the Treaty of Rome and the Stockholm Convention, but relied also on statements of EC representatives in the context of working party reviews of EC agreements with Egypt, Lebanon, and Jordan pursuant to which citrus imports from those countries are granted tariff preferences:

"Furthermore, the Panel noted that in the reports of the working parties relating to the respective EEC agreements with Egypt, Lebanon and Jordan, it was specified that "as regards the possibility of consultations with the contracting parties concerning the incidence of the Agreement on their trade interests, which had been mentioned by some members of the Working Party, the spokesman for the European Communities stated that nothing prevented these countries from invoking the relevant provisions of the General Agreement, such as Article XXII and XXIII" (BISD 255/19 para. 15, 139 para. 16 and 147 para. 15)." (Emphasis added.) (para. 4.18)

Thus, the EC has expressly recognized the rights of contracting parties to invoke Article XXIII to deal with specific measures (e.g. citrus preferences) taken pursuant to three of its Mediterranean agreements. There is no reason Article XXIII would not be available with respect to the remaining agreements.

Questions of Substance (Item B of the EC Summary)

The EC has posed the question of whether the citrus preferences are incompatible with provisions of the GATT. Its response is that there is no evidence of a contravention of the GATT under Article XXIII:1(a) or of a situation which impairs advantages under the GATT such as to constitute a prima facie nullification under Article XXIII:1(b). The U.S. notes that nowhere in its report does the Panel say that there is no evidence of a violation of the GATT. On the contrary, the Panel found

"...that the granting by the EEC of tariff preferences on citrus products . . . would be inconsistent with the obligations under the General Agreement as regards Article I:1 unless otherwise permitted under other provisions of the General Agreement or under a decision of the CONTRACTING PARTIES." (para. 4.2).

The Panel further recognized that while a decision by the CONTRACTING PARTIES on the agreements would have amounted to a judgment on conformity with Article XXIV and thus resolved the matter one way or another, no decision has been taken (para. 4.19). Therefore a question of a GATT violation rests on whether the preferences are "otherwise permitted" under the provisions of the GATT, i.e. Article XXIV. The panel has merely stated that it will not make a finding on this point; it has not said there is no evidence on the matter.

With respect to the issue of whether the citrus preferences actually prejudice U.S. trade interests or other countries it should be noted that the Panel found that:

"Trade interests could only be considered as affected where the adverse effects on third countries resulting from the implementation of an agreement had in practice turned out to be substantial." (para. 4.24).

Based on a voluminous factual record the Panel found that U.S. exports of oranges and lemons had suffered substantial adverse effects.

Reasoning of the Panel (Item C of the EC Summary)

Part IV (Item C.I of the EC Summary)

While the EC points to what it clearly believes are the disadvantages of the legal implications of the panel's views that Article XXIV and Part IV constitute a distinct set of rights and obligations, it does not dispute the validity of the Panel's view. There is nothing in Part IV which suggests that it supersedes the substantive provisions of Article XXIV. Thus the legal implications referred to by the EC do not arise from the Panel report but from the language of Article XXIV and Part IV respectively. The definition of free trade area as embodied in Article XXIV:8(d) does not vary as a factor of whether one of the constituent territories is a developing country.

The EC position also fails to note that the GATT provides other means by which it can offer one-way preferences to developing countries, e.g. a Generalized System of Preferences (GSP).

Recommendations Under Article XXIV:7 (Item C.III of the EC Summary)

The distinction, if any, between optional versus binding recommendations under Article XXIV:7 was never made by the EC in presenting its case to the Panel and so it is hardly surprising that the Panel did not consider it. However, the issue is irrelevant here.

The EC's objection to the Panel report (as described in Item C.IV of the EC summary) centers on the fact that while the Panel acknowledged that no recommendation had been made by the CONTRACTING PARTIES under Article XXIV:7(b), the Panel also recognized that during the review of these particular agreements "there was no consensus among contracting parties as to the conformity of the agreements with Article XXIV:5" (para. 4.6). The Panel further noted "that the Community itself had recognized this lack of consensus as well-established (ref. para. 3.9)" and that the working party reports and minutes of Council sessions reflected this lack of consensus (para. 4.6). What the EC labels "innovation" by the Panel is nothing more than a recognition of reality.

Contrary to the EC's assertion (see point 2 on page 1 of C/W/462), the Panel has not said that the EC agreements should have been explicitly approved. As noted above, the Panel has merely recognized that explicit approval would have rendered

the U.S. complaint moot. However, it does not follow therefore, that explicit approval is a necessary pre-condition to demonstrating GATT conformity. Had the EC at any time during the Panel proceeding demonstrated the GATT conformity of these agreements, the U.S. would not have been entitled to a finding of nullification and impairment.

It is the EC position which is in fact innovative. The EC has taken the position that the absence of a recommendation is tantamount to explicit approval and results in an irrebuttable presumption of GATT conformity. Thus, if the EC view is accepted, all rights under Article XXIII:1(a) and (b) cease to exist if no recommendation is made under Article XXIV:7. This irrebuttable presumption, and accompanying loss of Article XXIII rights, will apply regardless of whether the absence of a recommendation is the result of a desire on the part of contracting parties to be accommodating rather than a belief in the GATT conformity of the agreement. It should be noted that this new position of the EC conflicts with statements the EC representative made to the Panel. According to the EC representative:

"If specific trade issues arose subsequently in the implementation of an agreement, contracting parties could seek a reassessment under Article XXIV:7 or bring a case under Article XXIII:1(b)..." (para. 3.21) (Emphasis added).

It is also inconsistent with the EC position taken during the review of the agreements with Jordan, Lebanon and Egypt which are referred to above.

Panel Conclusions on Nullification and Impairment (Item C.VI - VIII of the EC Summary)

The U.S. has already expressed its views on the propriety of the Panel reaching a conclusion on conformity of the agreements as a whole with Article XXIV.

With respect to the question of a prima facie nullification or impairment case under Article XXIII:1(b) (see item C.VIII, page 5 of the EC Summary), the U.S. believes that the EC is again inferring a legal implication which simply does not arise from the Panel's conclusions. The EC argues that all agreements involving a free-trade area or a customs union which have not been explicitly approved will be subject to a prima facie finding under XXIII:1(b) if:

- 1) parties to the agreement have granted tariff concessions prior to the agreement; and
- 2) third parties could not reasonably have anticipated at the time the concession was given that the agreement would be established.

As noted above, explicit approval is not the only means by which conformity with Article XXIV can be demonstrated. No agreement which, in fact, conforms to the requirements of Article XXIV, whether or not explicitly approved, would be subject to a prima facie finding under XXIII:l(b) according to the reasoning of this Panel. The EC claim that similar prima facie findings could be made with respect to agreements permitted pursuant to Article XXV or to GSP is completely unfounded. GSP preferences are specifically authorized under the Enabling Clause. As to Article XXV, there would be little point in seeking a waiver under this provision if it did not preclude prima facie nullification and impairment findings.

The EC implies (see item C.VIII, page 6 of the EC summary)) that the only permissible form of a non-violation nullification finding is a prima facie one. There is no rational basis for such a view. The phrase "prima facie" means only that nullification is presumed. Surely, a demonstration of actual nullification and impairment should be equally, if not more, compelling than a prima facie showing. Paragraph 5 of the Annex to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance implicitly recognizes a non-prima facie, non-violation case since it permits non-violation findings to be made where "a detailed justification" is given. Since the Panel found such a justification in this case, a non-violation finding is in keeping with GATT rules and practice.

With respect to the Panel's conclusion on non-violation nullification and impairment (see item C.VIII:(a)(1) of the EC Summary), the EC fails to note that the Panel considered that

"the CONTRACTING PARTIES had refrained from making a recommendation under Article XXIV:7 . . . on the understanding that the rights of third countries would thereby not be affected." (para. 4.37) (emphasis added).

As noted above, the EC explicitly recognized the existence of those rights and should not now argue that they cease to exist.

The EC implies in para. (a)(2) of Item C.VIII that the Panel pre-empts a function of the CONTRACTING PARTIES when it notes that the formation of free-trade areas or customs unions between the EC and the Mediterranean countries have not yet been realized. The implication is without justification. The Panel has not opined on the conformity of the agreements with Article XXIV; it has only noted a fact: that the EC has not notified any of these agreements as having been realized as a "free trade area" or a "customs union". It should be noted that the EC itself has never characterized any of these agreements as a free-trade area or customs union.

The Panel's comment merely reflects its previously stated view that had a free-trade area or customs union existed it would have constituted an absolute defense to the U.S. complaint.

With reference to the legal implications of the Panel's conclusions, the EC also tries to cast doubt on the notion that a non-violation case can apply with respect to products not subject to a tariff binding. As the Panel recognized (para. 4.36), Article XXIII speaks of any benefit arising under the GATT, not only benefits arising under tariff concessions. The principle of non-discriminatory tariff treatment applies on all products except where special circumstances apply, such as GSP, derogations under Article XXV, and agreements consistent with Article XXIV.

The U.S. believes that the EC reads far too much into the Panel report when it assumes that the Panel's findings in this case can be generalized to apply to other preferential arrangements and when it suggests that this means a non-violation finding can be made against the GSP. The Panel has taken great pains to emphasize that its conclusions are limited to this particular case (para. 4.37). As noted above, the fact that the CONTRACTING PARTIES have expressly allowed for GSP in the Enabling Clause means that a non-violation case cannot be made with respect to preferences given to GSP. As to the situation in which derogations are permitted pursuant to Article XXV, we would simply note that under the specific terms of the waiver for the Caribbean Basin Economic Recovery Act, contracting parties retain their Article XXIII rights.