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UNITED STATES - SECTION 337 OF THE TARIFF ACT OF 1930

Communication from the European Communities

The following communication, dated 7 April 1989, has been received from the Commission of the European Communities, with the request that it be circulated to contracting parties prior to the Council meeting to be held on 12 April 1989.

Comments of the European Communities on the Panel Report* on Section 337 of the United States Tariff Act of 1930

At the 8 February and at the 6 March 1989 GATT Council meetings, the representative of the United States outlined concerns regarding the above Panel report. In reply, the representative of the Community expressed the view that the Panel's findings concerning the interpretation of GATT Articles III:4 and XX(d) were fully in line with established principles and previous practice. The United States observations did not adequately reflect the Panel's findings and mostly contained arguments already made to the Panel and rejected by it after careful consideration. The Community did not consider it appropriate to re-argue the case before the GATT Council. However, in view of the fact that the United States observations misrepresented some of the Panel's findings and their foundation in established GATT practice, the Community had to reserve the possibility to respond in writing in order to assist contracting parties in their appreciation of the Panel's report.

The purpose of this paper therefore is to deal with the comments made by the United States and to put the record straight with respect to the Panel's interpretation of the national treatment standard of Article III:4 and the interpretation of Article XX(d).

Article III:4

1. The United States first observes that the Panel report requires "that a contracting party ensure de facto equality of treatment for imports in all instances". However, this is not what the Panel says, nor is it the basis for the Panel's specific findings. The Panel first sets out its general approach in the following terms:

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> The words 'treatment no less favourable' in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products." (Paragraph 5.11)

This means in the view of the Panel:

> "On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognized that there may be cases where 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."

The basis for the Panel's specific findings is then set out in the following sentence:

> "For these reasons, the mere fact that imported products are subject under Section 337 to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4. In such case, it has to be assessed whether or not such differences in the legal provisions applicable do or do not accord to imported products less favourable treatment."

The Panel thus examined whether the legal provisions under Section 337 establishing de jure a difference in the treatment of imported and domestic products in fact amount to a less favourable treatment of imported goods.

2. The United States secondly observes that the Panel requires that "absolute equality of effect must be ensured not only for all laws, regulations, rules and procedures directly or indirectly affecting imports, but also for each individual element of every law, regulation, requirement and procedure". In this context the United States claims to be concerned:

- that the determination of inconsistency with the national treatment principle is made on the basis of the examination of potential rather than actual results;

- that in the determination of inconsistency, the Panel does not balance elements of more favourable treatment against elements of less favourable treatment.

Both kinds of arguments have been made by the United States in the course of the proceedings and the Panel has dealt with them in some detail, as follows:

> (a) In paragraphs 5.12 and 5.13 the Panel examines the issue of actual versus potential results of less favourable treatment. It noted that Article III has previously been interpreted to protect "expectations in the competitive relationship between imported and domestic products". It goes on to say the following:

"Article III:4 would not serve this purpose if the United States interpretation were adopted, since a law, regulation or requirement could then only be challenged in GATT after the event as a means of rectifying less favourable treatment of imported products rather than as a means of forestalling it. In any event, the Panel doubted the feasibility of an approach that would require it to be demonstrated that differences between procedures under Section 337 and those in federal district courts had actually caused, in a given case or cases, less favourable treatment. The Panel therefore considered that, in order to establish whether the 'no less favourable' treatment standard of Article III:4 is met, it had to assess whether or not Section 337 in itself may lead to the application to imported products of treatment less favourable than that accorded to products of United States origin. It noted that this approach is in accordance with previous practice of the CONTRACTING PARTIES in applying Article III, which has been to base their decisions on the distinctions made by the laws, regulations or requirements themselves and on their potential impact rather than on the actual consequences for specific imported products." (Paragraph 5.13)

The Community furthermore draws the attention to the fact that in the past the United States has consistently opposed a result-orientated approach with respect to the interpretation of Article III. Thus the United States' opposition to the adoption of the report on Spanish measures concerning domestic sale of soya bean oil was based on the belief that:

"with respect to Article III:1 it is not necessary to show adverse or restrictive effects on imports of directly competitive or substitutable products to establish that a measure conceded to protect domestic production is inconsistent with the provisions and principles of Article III:1". (Document L/5161 page 4; see also minutes of the meeting of the Council on 3 November 1981, Document C/M/152 page 8.)

(b) With respect to the arguments advanced by the United States in the proceedings in favour of <u>balancing more favourable against less favourable treatment</u> the Panel found:

"... the "no less favourable" treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products. If this notion were accepted, it would entitle a contracting party to derogate from the no less favourable treatment obligation on one case, or indeed in respect of one contracting party, on the ground that it accords more favourable treatment in some other case, or to another contracting party. Such an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III". (Paragraph 5.14).

The Panel went on to say:

"... an element of more favourable treatment would only be relevant if it would always accompany and offset an element of differential treatment causing less favourable treatment" (Paragraph 5.16)

Moreover, the Panel noted that:

> "... some of the procedural advantages that, according to the United States..., are given to respondents could operate in all cases. The Panel also recognized that the substantive economic requirements put procedural burdens not only on the respondent but also on the complainant, which has the burden of proof on these matters, and that these procedural burdens could operate in all cases. The Panel took these factors into account to the extent that they might be capable of exerting an offsetting influence in each individual case of less favourable treatment resulting from an element cited by the Community". (Paragraph 5.17)

In the view of the Community, this interpretation is reasonable, indeed on reflection is the only one possible. Otherwise, the fundamental national treatment principle could be circumvented in many ways escaping any multilateral discipline.

3. The United States thirdly contends that the Panel report applies Article III to persons, rather than goods. This is clearly a misrepresentation of the Panel's findings. The Panel report is based throughout on the distinction between imported and domestic products as contained in Article III. The report refers to "persons" only in the context of the examination of the question of whether the notion of "laws, regulations and requirements" in Article III:4 includes procedural laws, regulations and requirements. In this context, the Panel says the following in response to an argument advanced by the United States:

> "Nor could the applicability of Article III:4 be denied on the ground that most of the procedures in the case before the Panel are applied to persons rather than products, since the factor determining whether persons might be susceptible to Section 337 proceedings or federal district court procedures is the source of the challenged products, that is whether they are of United States origin or imported. for these reasons, the Panel found that the procedures under Section 337 come within the concept of "laws, regulations and requirements affecting the internal sale of imported products, as set out in Article III of the General Agreement." (Paragraph 5.10)

It is evident from the above that the standard applied by the Panel is the difference in treatment of imported goods and goods of United States origin, and not the difference in treatment of persons.

Article XX(d)

1. The United States expresses concern with the following statement in paragraph 5.26 of the report:

> "It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the

> same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."

The Community draws the attention to the fact that the report goes on as follows:

> "The Panel wished to make it clear that this does not mean that a contracting party could be asked to change its substantive patent law or its desired level of enforcement of that law, provided that such law and such level of enforcement are the same for imported and domestically-produced products. However, it does mean that, if a contracting party could reasonably secure that level of enforcement in a manner that is not inconsistent with other GATT provisions, it would be required to do so."

The Community considers that the standard laid down by the Panel is reasonable, if not the only one possible.

The United States does not indicate what in its view the criteria for examining the "necessity" of a GATT inconsistent measure should be. In the proceedings the United States essentially argued that:

> "The only coherent analysis of consistency with Article XX(d) that was possible was based on consideration of Section 337 as a whole", but "not whether individual facets of Section 337 procedures where necessary for the enforcement of United States patent laws". (Paragraph 3.57)

This obviously would have implied that a contracting party is essentially free to define the modalities of enforcement measures, no matter how discriminatory of protectionist, provided only that it would show that some special mechanism was at all necessary for the purpose of the enforcement of a domestic law with respect to imported products. In this manner, enforcement measures would obviously almost entirely escape from any GATT discipline.

2. The Panel applied its standard to the specific inconsistencies with Article III:4. It recognized as "necessary" in terms of Article XX(d) namely:

- in rem exclusion orders in certain circumstances;
- automatic enforcement of exclusion orders by customs service.

A reading of the report, and in particular paragraphs 5.28, 5.30 and 5.34, clearly shows that the Panel did not, as the United States seems to maintain, "ignore the inter-relationship of the various elements of the enforcement mechanism". However, even in taking into account such inter-relationship, the Panel could not but examine the necessity of each inconsistency on its own merits.

3. Finally, the United States expresses concern about "the Panel's conclusion that simply because other governments have adopted a certain law or procedure that measure is reasonably available to another GATT contracting party".

This, again, is a misrepresentation of what the report says. The "conclusion" referred to was made in response to an argument advanced by the United States to the effect that Section 337 was necessary because it "provided the only means of enforcement of United States patent rights against imports of products manufactured abroad by means of a process patented in the United States". (Paragraph 3.62) The Unites States thus attempted to justify the discriminatory procedures under Section 337 on grounds of necessity under existing internal legislation, namely that the United States patent law did not provide for the enforcement of United States process patents with respect to products manufactured abroad.

In response to this argumentation the report says:

> "The Panel considered that, even if it were accepted that a different scheme for imports alleged to infringe process patents is necessary, this could not in itself justify as 'necessary' in terms of Article XX(d) any of the specific inconsistencies with Article III:4 summarized in paragraph 5.20 above. In any event, the Panel did not consider that a different scheme for imports alleged to infringe process patents is necessary, since many countries grant to their civil courts jurisdiction over imports of products manufactured abroad under processes protected by patents of the importing country. The Panel noted that, in the 1988 Omnibus Trade and Competitiveness Act, the United States has in fact amended its law to this effect (see Annex II)." (Paragraph 5.28)

In short, the Panel concluded that the mere fact that the internal law does not provide for a GATT consistent enforcement mechanism is not enough to justify as necessary within the meaning or Article XX(d) a mechanism which is inconsistent with Article III:4. The Panel did not conclude as the United States maintains "that simply because other governments have adopted a certain law or procedure that measure is reasonably available to another GATT contracting party", but merely drew attention to the fact that many countries, and even the United States following recent amendments of the law, provide for the protection of domestic process patents with respect to products manufactured abroad.