

GENERAL AGREEMENT ON

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UNITED STATES - SECTION 337
OF THE TARIFF ACT OF 1930

Communication from the United States

The following communication, dated 9 May 1989, has been received from the United States Trade Representative with the request that it be circulated to contracting parties in connection with the Council's consideration of the agenda item entitled "United States - Section 337 of the Tariff Act of 1930 - Panel report" at its meeting on 10 May 1989.

1. With respect to Article III:4, the European Community notes in L/6487 that it disagrees with the interpretation of the United States that the Panel report requires that contracting parties ensure de facto equality of treatment for imports in all instances.

The relevant portion of the report states that:

"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".

This language means that a panel should examine whether there is de facto equality of treatment of imports even if there is de jure equality.

In this particular case, the Panel found differences in the procedures and examined whether those differences could possibly result in less-favourable treatment. However, the Panel would have examined de facto treatment under these procedures even if explicit de jure differences did not exist.

(We also would note that before the Panel the European Community argued in favour of requiring de facto equality of treatment (see L/6439 at paragraph 3.18).)

2. With respect to our concerns regarding the Panel's requirement that each individual element of every law, regulation, requirement and procedure

equally affect imports and domestically produced goods, the European Community states in L/6487 its view that:

"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".

Our concerns regarding the Panel's analysis are based in part on its examination of individual elements of the measure at issue. These individual elements are not the basis of expectations regarding the competitive relationship between domestic and imported goods. It is the outcome of the procedure, i.e. the decision on exclusion, that affects the expectations and conditions under which goods compete and which may result in less-favourable treatment. Differences in individual parts of a procedure should not matter if the overall effect of the measure in each action is not less-favourable.

If, as the Panel found, it is not feasible to adopt an approach that would require it to be demonstrated that differences between procedures had actually caused, in a given case, less-favourable treatment, it is even less feasible to require contracting parties to enact and apply laws so that differences in treatment are always predictably preferential to imported products and persons importing those products.

We disagree with the European Community's characterization of our statement in opposition to the adoption of the report on Spanish measures on soybean oil. In that case, the United States expressed its view that a contracting party must demonstrate injury to establish a violation of Article III:1. That is clearly distinguishable from our position on assessing whether a measure accords less-favourable treatment to imported products.

3. We have not previously raised the issue with the Council of balancing elements of more-favourable treatment against elements of less-favourable treatment to determine consistency with Article III:4. However, we continue to believe that it is appropriate to consider the effect of the measure as a whole rather than individual elements of that measure.

Contrary to the Panel's understanding, it is not our position that one should "balance more-favourable treatment of some imported products against less-favourable treatment of other imported products". During the proceedings, the United States suggested that if it is not feasible to examine each individual Section 337 enforcement action and it is necessary to assess the effect of Section 337 in general, the Panel could examine the results of all Section 337 actions to determine whether there is a pattern of discrimination or non-conformity with Article III:4. This suggestion does not advocate balancing the treatment of different imported products.

4. The European Community takes issue with our belief that the Panel report applies Article III to persons as well as (the Panel used the words rather than) goods. The Panel recognized that "most of the procedures in the case before the Panel are applied to persons rather than products", and the Panel's conclusions indicate that rules that affect persons as well as those that affect goods are subject to Article III:4. The Panel found several of those procedures affecting persons rather than products to be inconsistent with Article III.

5. With respect to Article XX(d), our most serious concerns rest with the Panel's interpretation of what alternative measures could be considered reasonably available to the United States and the application of that analysis to individual elements of Section 337. My delegation disagrees with the European Community's arguments in support of examination of individual elements of a measure to determine whether each element is necessary within the meaning of that Article for the same reasons that we believe that this approach is inappropriate under Article III:4.

Article XX(d) covers measures necessary to secure compliance with other laws, including patent laws, not inconsistent with other provisions of the General Agreement. An exemption should be granted if the measure as a whole meets the Article XX(d) standard of necessity.

6. We also disagree with the European Community's contention that paragraphs 5.28, 5.30 and 5.34 show that the Panel took into account the interrelationship of various elements of Section 337. The Panel's conclusions regarding Presidential review in paragraph 5.29 contradict this statement.

7. Finally, we believe that the statement:

"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 imported country"

is more than simply taking note of many other countries' practices. It is, in our view, an interpretation of what measures could be considered reasonably available to other contracting parties.

8. Nothing that the European Community has said in L/6487 demonstrates that our concerns are unwarranted or represent inaccurate interpretations of the Panel report. This report and the European Community's interpretation of the report result in a very broad interpretation of Article III:4 and a very narrow interpretation of Article XX(d)'s exceptions to the General Agreement. Although to our knowledge other contracting parties do not have procedures that precisely correspond to those found inconsistent with Article III:4 and not covered by Article XX(d), we believe that adoption of the report, if that should occur, would have a significant effect on future interpretations of these Articles by other panels. Our concerns and those of our Congress have yet to be resolved.