European Communities – Measures Affecting Trade in Commercial Vessels
(DS301)

Replies of the United States
to the Questions from the European Communities and Korea

August 23, 2004

Questions from the European Communities

1. Do you consider that Article 23 of the DSU prohibits:

(I) a unilateral determination of WTO inconsistency that bears no consequences in WTO trade relations;

(ii) a measure that is outside the scope of WTO law or compatible with WTO law?

If so, please explain on which basis and what is the rationale for such prohibition?

Reply:

1. It is difficult to discuss such broad concepts in the abstract. In the context of this particular dispute, the United States has taken no position on whether the EC has made a determination that Korea has acted inconsistently with the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement"). However, the United States would observe that Article 23.1 requires Members to have recourse to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") when they "seek redress" of a violation of an obligation under the WTO Agreement. "Redress" is defined as

> 1. Reparation of or compensation for a wrong or consequent loss. 2(a). Remedy for or relief from some trouble; assistance, aid, help. (b) (obsolete) Correction or reformation of something wrong. 3(a) A means of redress; an amendment, an improvement. (b) (obsolete) A person who or thing which affords redress. 4. The act of redressing; correction of amendment of a thing, state, etc.[1]

Various Members have explained that they are not in a position to suspend concessions effectively or have recourse to other modes of redress.[2] Therefore, the main form of redress or "assistance" available to them is a finding that another Member's measure is inconsistent with the WTO Agreement.

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[1] *The New Shorter Oxford English Dictionary*, 4th edition, vol. 2, p. 2515.
[2] For example, this issue has arisen several times during the course of negotiations on the DSU.

2. Article 23.2(a) provides further support that a determination of a breach of the WTO Agreement can be a method of seeking redress. Article 23.2(a) specifically singles out a determination, outside DSU procedures, of a breach of the WTO Agreement as being inconsistent with the DSU. Article 23.2(a) does not require that the determination be accompanied by any other action or trade consequences.[3] As a result, it would appear that a determination of a breach of the WTO Agreement could be sufficient in and of itself to be proscribed by Article 23, irrespective of whether it is accompanied by actions with trade consequences. In this connection, the United States notes that, while the panel in *Certain EC Products* suggested that "determinations" under Article 23.2(a) are ones which bear consequences in WTO trade relations,[4] that panel's Article 23.2(a) finding was reversed because the EC never even raised a claim under that provision – in other words, the parties never presented arguments on whether a determination need have "consequences for trade relations,"[5] and the panel's statement is little more than an unsupported assertion.

3. If there is a determination inconsistent with Article 23.2(a), then that would be sufficient to establish a consequential breach of Article 23.1. There would appear to be little need then for the Panel, in its analysis of Korea's Article 23 claims, to further examine whether any measures of the EC responding to such a determination are consistent with the WTO Agreement. It may, however, be appropriate to examine whether those measures are consistent with other provisions of the WTO Agreement that are the subject of Korea's claims.

> *2. The United States argues in para. 9 of its Oral Statement that Article 23(1) of the DSU is violated in connection with a determination contrary to Article 23(2)(a).*
>
> *Do we understand correctly that where there is no such determination (or otherwise conduct contrary to the second paragraph of Article 23 or to a procedural requirement under the DSU), the first paragraph of Article 23 cannot be interpreted to prohibit Members from taking measures that are perfectly compatible with WTO law?*

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[3] The United States is unclear as to what is meant by "consequences in WTO trade relations." A determination that another Member is failing to abide by its WTO commitments would certainly appear to have potential "consequences in WTO trade relations," if only with respect to the Member's willingness to enter into further commitments with that other Member. However, for purposes of this reply the United States assumes the EC intends this term to refer to trade effects rather than simply the quality of the trade relationship between Members.

[4] Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R, adopted 10 January 2001, para. 6.98.

[5] *See* Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, paras. 107-115.

Reply:

4. Please see reply to Question 1. However, the United States would note that Article 23.2 nowhere refers to measures other than a determination or the suspension of concessions or other obligations. Accordingly it is difficult to see how measures consistent with the WTO Agreement would be covered by Article 23.2. Similarly, Article 23.1 simply commits Members to have recourse to, and abide by, the rules and procedures of the DSU. The DSU is not concerned with rules or procedures for a Member to adopt or maintain measures that are consistent with the WTO Agreement, so it is difficult to see how Article 23.1 would apply to such measures. Of course, in the context of this dispute, if the Panel were to determine that the EC measures at issue are inconsistent with the WTO Agreement, in particular the *Agreement on Subsidies and Countervailing Measures*, then Article 23 of the DSU could also apply to those measures.

3. Please explain how you define the notion of "counter subsidy" as used in your Third Party Submissions.[1]

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[1] *Oral Statement by China, para. 9; Third Party Submission by the United States, para. 7.*

Reply:

5. The United States used the term to refer to a subsidy provided by one Member in response, either in whole or in part, to a subsidy provided by another Member.

4. Please explain the customs treatment of container ships, product and chemical tankers as well as liquefied natural gas carriers in your legal system. Does your customs system provide for the importation of such ships?

Reply:

6. Although the United States is unclear as to the relevance of this question to the matter at issue in this dispute, since no U.S. measure is within the Panel's terms of reference, the United States would note that container ships and tanker ships (including those used to transport oil, chemicals and LNG) are classified in the following subheadings of the U.S. Harmonized Tariff Schedule:

1. 8901.20 (Tankers);

2. 8901.30 (Refrigerated vessels, other than those classified in subheading 8901.20); and

3. 8901.90 (Other vessels for the transport of goods and other vessels for the transport of both persons and goods).

Tankers that transport chemicals, oil and natural gas (non-refrigerated) are classified in subheading 8901.20. Tankers that transport LNG are specially designed to keep the LNG super-cooled during transportation, therefore, LNG tankers would be classified in subheading 8901.30. Container ships would be classified in subheading 8901.90.

Questions from Korea

1. Is the term "seeks redress" in Article 23 of the DSU limited to suspension of concessions or other obligations under the WTO Agreement?

Reply:

7. No, as noted in response to EC Question 1, the definition of "redress" is broader than the suspension of concessions or obligations. In fact, many Members would be surprised to discover that they are not seeking redress unless they are seeking the suspension of concessions or other obligations since many Members have indicated that they do not see themselves as ever being in a position to seek the suspension of concessions or other obligations. It is difficult to reconcile the decision of the DSU drafters to include subparagraphs (a) and (b) of Article 23.2 with a definition of "redress" that only encompasses the suspension of concessions.

2. Please refer to paragraph 46 of the Oral Statement by the EC. Does the US agree that the WTO case-law and negotiating history "was confined to 'wild' retaliation through suspension of concessions or other obligations leading to spirals of retaliations and destabilizing the GATT system"?

Reply:

8. No. The United States would first note that while paragraph 46 refers to the "above case law and negotiating history" it is unclear as to what that reference is referring, as the only citations "above" are to Korea's arguments based on *US – Special Measures* and *US – Section 301* and there are no obvious references to negotiating history. Neither of those disputes were about anything referred to as "wild" retaliation, nor does the United States recall references in those disputes to any history of "spirals of retaliations and destabilizing the GATT system." This appears to be a new characterization constructed by the EC for purposes of its defense of its measures in the current dispute.

3(a) Please refer to paragraph 52 of the Oral Statement by the EC. Does the US agree with the EC's contention that " [i]n essence, Article 23(2) of the DSU records a deal between GATT members concerning the use of Section 301, a US law calling for the imposition of unilateral trade sanctions against other GATT Members whenever the United States determined they were in violation of their GATT obligations"?

Reply:

9. First, the United States would disagree with this characterization of Section 301. From its inception in 1974, Section 301 has provided a means by which private interests petition the U.S. government to address trade complaints. With regard to the means for doing so, Section 301 requires the U.S. government to resort to trade agreement dispute settlement procedures when the complaint involves a trade agreement right. This requirement was in place several years prior to completion of the Uruguay Round. Second, Article 23 of the DSU records an agreement reached among all the Uruguay Round participants as to how WTO Members would conduct themselves in light of the new DSU being agreed. In this respect, it protected all Members, including the United States, against the actions described.

3(b) Does the US consider that the intent of the negotiators of DSU Article 23.2 was broader than Section 301? In answering this, please comment on whether at the time, there were EC counter-retaliations in place that were not sanctioned by the GATT?

Reply:

10. Yes. Most fundamentally, the intent of a treaty provision is to be found in the language of the provision itself. DSU Article 23.2 by its terms is not limited to Section 301 or to the determinations or suspensions of concessions by any particular Member; it applies equally to all Members. Had the Members intended a narrower application of the disciplines of Article 23.2, they would have drafted the provision accordingly.