

**UNITED STATES – COUNTERVAILING MEASURES CONCERNING
CERTAIN PRODUCTS FROM THE EUROPEAN COMMUNITIES**

Recourse to Article 21.5 of the DSU by the European Communities

Request for Consultations

The following communication, dated 17 March 2004, from the delegation of the European Commission to the delegation of the United States and to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

On 8 January 2003, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body, in the case WT/DS212 *"United States – Countervailing Measures concerning Certain Products from the European Communities"*. The resulting DSB rulings included the recommendation that the United States brings its administrative practice (the *"same person"* methodology) and measures found to be inconsistent with the Agreement on Subsidies and Countervailing Measures (the *"SCM Agreement"*) into conformity with its WTO obligations.

On 27 January 2003, the United States informed the DSB that it intended to implement the recommendations and rulings of the DSB in a manner consistent with its WTO obligations. The parties agreed under Article 21.3(b) of the DSU that the United States had until 8 November 2003 to implement the Appellate Body decision.

In June 2003 the United States finalised a new *"change-in-ownership"* methodology, published in the US Federal Register (*"Notice of final modification of Agency practice under Section 123 of the Uruguay Round Agreement"* published on the US Federal Register on 23 June 2003 at 68 FR 120 p. 37125).

The new methodology was then applied to the twelve individual determinations brought by the European Communities before the WTO. The United States issued its final determinations on these determinations on 7 November 2003 (published on the US Federal Register on 17 November 2003 at 68 FR 221 p. 64858). In the DSB meeting of 7 November 2003, the United States stated that it had fully complied with the DSB recommendations and rulings on this issue.

The European Communities disagrees. In particular, the following aspects of the measures taken by the US to comply with its WTO obligations are unsatisfactory:

1. The new "*change in ownership*" methodology still contains certain elements which are in breach of the *SCM Agreement*. In particular, it provides¹ that the unamortized amount of any pre-sale subsidy continues to be countervailable if a privatization is found not to be at arm's length and for fair market value. The EC disputes that this is necessarily the case and that the amount of any subsidy that may exist corresponds to the "unamortized amount" of the original subsidy. The new methodology is therefore inconsistent with, *inter alia*, Articles 10, 14, 19.1, 19.4 and 21 of the *SCM Agreement* and Article VI:3 of GATT 1994.
2. In the sunset review *Certain Corrosion-Resistant Carbon Steel Flat Products from France* (C-427-810) (Case No. 9), the United States failed to properly determine whether subsidization would continue or recur. *Inter alia*, with regard to the privatization concerned, it failed to properly establish that the price for employees' shares constituted a subsidy or that it led to any continuation of a countervailable subsidy². This is inconsistent with Articles 10, 14, 19.4, 21.1, 21.2 and 21.3 of the *SCM Agreement* and Article VI:3 of GATT 1994.
3. In the following sunset reviews:
 - *Cut-to-Length Carbon Steel Plate from United Kingdom* (C-412-815) (Case No. 8)³;
 - *Cut-to-Length Carbon Steel Plate from Germany* (C-428-817) (Case No. 10)⁴;
 - *Cut-to-Length Carbon Steel Plate from Spain* (C-469-804) (Case No. 11).⁵

The United States failed to properly determine whether, in these cases, there was continuation or recurrence of subsidization, because it did not examine the nature of the privatizations in question. This is inconsistent with Articles 10, 14, 19.4, 21.1, 21.2 and 21.3 of the *SCM Agreement* and Article VI:3 of GATT 1994.

For the reasons mentioned above, and without prejudice to its rights under the WTO, the European Communities hereby requests the United States of America to enter into consultations under Articles 4 and 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "*DSU*") and Article 30 of the *SCM Agreement* with respect to United States' new "*change-in-ownership*" methodology, its application to the determinations set out here and the findings in the "sunset reviews" referred to above.

The European Communities reserves its rights in respect of all other aspects of the United States' purported compliance with its obligations in this case. In particular, the European Communities reserves its rights with respect to the eventual outcome of a number of court challenges seeking to overturn the revised methodology.

We look forward to receiving your reply to the present request and to fixing a mutually convenient date for consultations.

¹ At page 37127, third column of the above mentioned "*Notice of final modification of Agency practice under Section 123 of the Uruguay Round Agreement*", the US Department of Commerce states that "*if we determine that the evidence does not demonstrate that the privatization was at arm's length and for fair market value, [...] we will find that unamortized amount of any pre-sale subsidy continues to be countervailable*".

² See unpublished memorandum of 23 October 2003.

Note: this memorandum and the other listed below are available at the US Department of Commerce site at <http://ia.ita.doc.gov/download/section129/section129-index.html>.

³ See unpublished memorandum of 24 October 2003.

⁴ See unpublished memorandum of 24 October 2003.

⁵ See unpublished memorandum of 24 October 2003.