UNITED STATES - COUNTERVAILING DUTIES ON CERTAIN CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM GERMANY

WT/DS213

EXECUTIVE SUMMARY OF THE

FIRST WRITTEN SUBMISSION

OF THE

UNITED STATES OF AMERICA

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I. INTRODUCTION

1. The crux of the EC's case that is properly before the Panel consists of allegations that the U.S. countervailing duty law, as well as the sunset review determination in certain corrosion-resistant carbon steel flat products from Germany based upon that law, are inconsistent with the SCM Agreement because: (1) Commerce automatically initiates sunset reviews without first gathering evidence regarding the continuation or recurrence of subsidization; and (2) Commerce does not apply the SCM Agreement's *de minimis* standard for countervailing duty investigations to sunset reviews. The EC argues that the Panel should read into Article 21.3 – the provision of the SCM Agreement that deals with sunset reviews – the requirements of Articles 11.6 and 11.9.

2. The EC's claims, however, run afoul of a basic principle of treaty interpretation. As stated by the Appellate Body in *India Patent Protection*, "the principles of treaty interpretation set out in Article 31 of the *Vienna Convention* . . . neither require nor condone the imputation into a treaty of words that are not there . . . ." This is precisely what the EC is asking the Panel to do here; impute into Article 21.3 of the SCM Agreement "words that are not there."

3. The EC tries to overcome this problem by repeatedly asserting that sunset reviews are "exceptions" to some other principle and, thus, must be interpreted in such a manner as to read into Article 21.3 "words that are not there." As discussed below, sunset reviews are not "exceptions" to something else, but instead are merely one part of an overall balance of rights and obligations negotiated during the Uruguay Round. However, even if one were to treat the provision on sunset reviews as an "exception" to something else, the EC's arguments run afoul of another principle, articulated in *EC Hormones*, which is that "merely characterizing a treaty provision as an 'exception' does not by itself justify a 'stricter' or 'narrower' interpretation of that provision than would be warranted . . . by applying the normal rules of treaty interpretation."

II. FACTUAL BACKGROUND

A. Sunset Reviews Under U.S. Law

4. Commerce and the USITC jointly conduct sunset reviews pursuant to sections 751(c) and 752 of the Act. Pursuant to section 751(d)(2) of the Act, a countervailing duty order must be revoked after five years unless both Commerce and the USITC make respective affirmative determinations that subsidization and injury would be likely to continue or recur. Under the statute, Commerce automatically initiates a sunset review on its own initiative within five years of the date of publication of a countervailing duty order.

5. Commerce has the responsibility of determining whether revocation of a countervailing duty order would be likely to lead to continuation or recurrence of subsidization, whereas the USITC has the responsibility of determining whether revocation of a countervailing duty order would be likely to lead to continuation or recurrence of injury. If Commerce's determination is negative – *i.e.*, if Commerce finds that there is no such likelihood – Commerce must revoke the order. If Commerce's determination is affirmative, Commerce transmits its determination to the USITC, along with a determination regarding the magnitude of the net countervailable subsidy

that is likely to prevail if the order is revoked. Under U.S. law, the applicable *de minimis* standard in sunset reviews is the same as the standard in other types of reviews (*e.g.*, duty assessment reviews) – 0.5 percent.

6. Commerce's 1998 *Sunset Regulations* describe specifically the information to be provided by all interested parties in a sunset review and invite parties to submit, with the required information, "any other relevant information or argument that the party would like [Commerce] to consider." These regulations function as the standard questionnaire. The *Sunset Regulations* also provide that substantive responses to a notice of initiation are due 30 days after the date of publication in the *Federal Register* of the notice of initiation; rebuttals are due five days later. The regulations provide that Commerce normally will not accept or consider any additional information from a party after the time for filing rebuttals has expired.

7. On May 14, 1998, Commerce published the schedule for initiation of sunset reviews of pre-1995 anti-dumping and countervailing duty orders, indicating that the sunset review of the countervailing duty order on corrosion-resistant steel would be initiated in September 1999.

8. Thus, with the applicable information requirements, deadlines, and initiation schedule published in the *Federal Register* by May 1998, the EC and German producers had *over 15 months to prepare* for the sunset review of the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany.

B. Certain Corrosion-resistant Carbon Steel Flat Products from Germany

9. On July 9, 1993, Commerce published its final affirmative countervailing duty determination on certain corrosion-resistant carbon steel flat products from Germany. Commerce calculated a country-wide total *ad valorem* countervailing duty rate of 0.59 percent, based on the German producers receipt of countervailable benefits under the following five programs: 1) Capital Investment Grants (hereinafter "CIG"); 2) Structural Improvement Aids; 3) Special Subsidies for Companies in the Zonal Border Area; 4) Aid for Closure of Steel Operations; and 5) ECSC Redeployment Aid Under Article 56(2)(b). On August 9, 1993, the USITC notified Commerce of its final affirmative injury determination. On August 17, 1993, Commerce amended its final determination to correct a ministerial error, which increased the *ad valorem* rate to 0.60 percent, and issued the countervailing duty order.

10. On August 26, 1999, Commerce notified representatives of the EC, the German Government, and German producers, by mail, that the sunset review of the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany would be initiated on or about September 1, 1999 (consistent with the *Sunset Initiation Schedule*). On September 1, 1999, Commerce published its notice of initiation. In both its letters to German producers and the published initiation notice, Commerce highlighted the 30-day deadline for filing substantive responses, as well as the applicable information requirements.

11. By October 4, 1999, the EC, the German Government, German producers, and domestic interested parties filed their substantive responses. The EC, the German Government, the German producers, and the domestic interested parties filed rebuttal comments on October 15, 1999. On October 20, 1999, Commerce determined to conduct a full sunset review based on its receipt of complete substantive responses from the EC, the German Government, and German producers accounting for a significant portion of German exports to the United States.

12. On March 27, 2000, Commerce published its preliminary sunset determination finding likelihood of continuation or recurrence of subsidization. Based on its finding that benefit streams from non-recurring grants under the CIG program would continue beyond the five-year mark and that the Aid for Closure of Steel Operations and ECSC programs continue to exist, Commerce determined there was likelihood of continuation or recurrence of subsidization.

13. As required under U.S. law, Commerce also determined the net countervailable subsidy likely to prevail if the order were revoked. As a general matter, and starting with the total *ad valorem* rate determined in the original investigation, Commerce considers whether, since the investigation, it has found subsidy programs to be terminated and/or new programs to be countervailable. Based on findings, which normally are made in the context of administrative reviews under section 751(a) of the Act, Commerce may adjust the rate determined in the original investigation to take these subsequent findings into account. Although no administrative reviews of the order on certain corrosion-resistant carbon steel flat products from Germany were ever conducted, Commerce agreed with the EC and the German producers that the Structural Improvement Aids and Special Subsidies for Companies in the Zonal Border Area programs had been terminated with no continuing benefits and adjusted the net countervailable subsidy rate accordingly. Because no administrative reviews had been conducted, Commerce did not consider the domestic interested parties' allegations concerning additional countervailable subsidies. For the same reason, Commerce did not recalculate the subsidy rates determined in the original investigation. Based on this analysis, Commerce determined a net countervailable subsidy rate of 0.54 percent.

14. In its final determination, published August 2, 2000, Commerce did not change the basis for its likelihood determination or its determination concerning the net countervailable subsidy likely to prevail. On December 1, 2000, the USITC published its determination that revocation of the countervailing duty order would be likely to lead to continuation or recurrence of injury. On December 15, 2000, the United States published notice of the continuation of the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany based on the decisions by Commerce and the USITC finding likelihood of continuation or recurrence of subsidization and injury.

III. STANDARD OF REVIEW

15. With respect to disputes involving a determination made by a domestic authority based upon an administrative record, the Appellate Body, in *U.S. Cotton Yarn*, recently summarized the standard of review under DSU Article 11. The United States does not disagree with this standard. The EC erroneously argues, however, that the Panel cannot "disregard or refuse to consider facts and evidence *submitted to it*" by the parties to the dispute. The United States disagrees with the EC's implication that a panel has unfettered discretion to consider any evidence in deciding the issues before it and, as discussed below, the Panel should decline to consider the document submitted by the EC.

IV. SUBSTANTIVE ARGUMENT

A. Automatic Self-Initiation of Sunset Reviews Is Consistent with the SCM Agreement

16. Article 21.3 authorizes authorities to initiate a sunset review "on their own initiative *or* upon a duly substantiated request made by or on behalf of the domestic industry" (emphasis added). This disjunctive language is unambiguous, and, under the customary rules of interpretation, must be read according to its ordinary meaning, which is that a Member may *either* self-initiate a sunset review or initiate a sunset review in response to a duly substantiated request. The right of an investigating authority to initiate a sunset review on its own initiative is unqualified and the Panel may not "diminish" this right. Despite the plain language of Article 21.3, the EC argues that the Article 11.6 requirements for self-initiation of an investigation are applicable to self-initiation of sunset reviews. The obvious flaw in the EC's argument is that there is no reference to the Article 11.6 requirements in the text of Article 21.3 or vice versa. Furthermore, the SCM Agreement itself distinguishes between the investigatory phase and the review phase of a countervailing duty proceeding, *e.g.*, Article 11 deals with investigations, while Article 21 deals with reviews.

17. The EC's arguments, therefore, find no support under customary rules of treaty interpretation. Article 21.3 explicitly provides for initiation of sunset reviews on an authority's own initiative. Furthermore, nothing in the text of Article 21.3, or Article 11.6, imposes any evidentiary requirements on authorities who initiate sunset reviews on their own initiative. It is impossible to violate an obligation that does not exist. Therefore, the United States' automatic initiation of sunset reviews is not inconsistent with the SCM Agreement.

B. There is No *De Minimis* Standard for Sunset Reviews

18. The focus of a sunset review under Article 21.3 is future behavior, *i.e.*, the likelihood of continuation or recurrence of subsidization – not whether or to what extent subsidization currently exists. The analysis is perforce predictive. Under these circumstances, mathematical certainty or precision as to the exact amount of likely future subsidization is not necessarily practicable and certainly not required.

19. Under Article 11.9, Members must apply a one percent *de minimis* standard in countervailing duty *investigations*. The EC erroneously argues that the Article 11. 9 *de minimis* standard is applicable in sunset reviews under Article 21.3. There is no textual or contextual support for the EC's claim.

20. In *Korea DRAMs*, Korea argued that the *de minimis* standard in Article 5.8 of the AD Agreement applied to reviews as well as to investigations. Article 5.8 of the AD Agreement is the parallel provision to Article 11.9 of the SCM Agreement. The panel rejected Korea's arguments, finding that "the term 'investigation' [used in the context of Article 5.8] means the investigative phase leading up to the final determination of the investigating authority." Thus, the *Korea DRAMs* panel found no textual or contextual support for Korea's claim that the *de minimis* standard applied beyond the investigative phase.

21. The EC's argument is not only devoid of support in the text of the SCM Agreement, it also fails to mention, much less reconcile, its position with relevant language in the text. Specifically, note 52 of Article 21.3 provides that "a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty." Thus, the current level of subsidization is not decisive as to whether subsidization is likely to recur. The EC's claim that a *de minimis* standard is required in the context of Article 21.3 sunset reviews would render note 52 meaningless.

22. The EC would also have the panel read into the use of the word "subsidization" in Article 21 an implicit reference to Article 11.9 because authorities must terminate an investigation if the amount of the subsidy is *de minimis*. However, nothing in the word "subsidization", as defined in the SCM Agreement implies anything about a *de minimis* standard. The term "subsidization" simply means the existence of a subsidy as defined in Article 1 of the SCM; Article 1 contains no *de minimis* standard.

23. In sum, giving the text of the Agreement its ordinary meaning, the only conclusion one can reach is that there is no obligation to apply the Article 11.9 *de minimis* standard in an Article 21.3 sunset review. The EC's arguments concerning the object and purpose of Article 21.3 fail to overcome the obvious lack of any textual support for their claim.

24. The EC argues that a sunset review is equivalent to an investigation because it could result in re-"*imposition*" of an order and, as such, the same *de minimis* standard is applicable in a sunset review. This argument completely ignores the fundamental difference between investigations, in which a *de minimis* standard is required under Article 11.9, and sunset reviews. In the context of Article 11.9, the function of the *de minimis* test is to determine whether foreign government subsidies warrant the imposition of a countervailing duty order in the first instance. For example, in an investigation, if the investigating authority found that a government program

had provided recurring subsidies at a rate of more than one percent, imposition of a countervailing duty would be warranted if the subsidized imports were found to cause injury.

25. In contrast, the focus of the sunset review is the future. The mere continued existence of this same program could warrant maintaining the duty beyond the five-year point, *even if* the amount of the subsidy was currently *zero*, as stated in footnote 52, because subsidization may be likely to recur absent the discipline of the duty. This distinction between the object and purpose of an investigation and the object and purpose of a sunset review supports the conclusion that, absent an express reference to the contrary, there is no basis to assume or infer an intent that the *de minimis* standard for investigations applies in sunset reviews.

26. In an attempt to bolster its non-existent textual argument, the EC cites the fact that the United States applies a *de minimis* standard in sunset reviews as "confirmation" of the requirement to apply a *de minimis* rule in the context of Article 21.3 sunset reviews. In addition, the EC argues that, given the provisions of Article 32.4, it had a "reasonable and legitimate expectation" that the United States would terminate the duty. The EC is wrong on both accounts.

27. The United States' *de minimis* "practice" is legally irrelevant. As demonstrated above, there is no *de minimis* standard in sunset reviews. Thus, Members are free to determine what, if any, *de minimis* standard they will apply. Furthermore, while Article 31.3(b) of the *Vienna Convention* permits consideration of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation," policy decisions made by one Member for purposes of its domestic legislation do not constitute "subsequent practice" within the meaning of Article 31.3(b).

28. In addition, the EC's only legitimate expectations with respect to Articles 32.4 and 21.3 are those reflected in the Agreement itself. As the Appellate Body, in *India Patent Protection*, stated: "[P]rinciples of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."

29. In sum, applying customary rules of treaty interpretation, the Panel should find that there is no *de minimis* standard for sunset reviews in the SCM Agreement and, therefore, the United States' application of a 0.5 percent *de minimis* standard in sunset reviews does not constitute a violation of its obligations under the SCM Agreement.

C. Commerce Properly Determined That the Expiry of the Countervailing Duty Order Would Be Likely to Lead to Continuation or Recurrence of Subsidization Based Upon An Appropriately Conducted Review of All Relevant and Properly Submitted Facts

30. As demonstrated above, the United States' automatic self-initiation of sunset reviews and its application of a particular *de minimis* standard do not breach any provision of the SCM

Agreement. The remaining claims raised by the EC concern Commerce's findings and procedural actions in this case. An "objective assessment" of Commerce's findings and actions, pursuant to Article 11 of the DSU, would focus on the consistency of the sunset review with the requirements of Articles 21.3 and 12.

31. As a starting point for making its likelihood determination in the sunset review, Commerce considered the countervailable subsidies and programs used, and the amount of the subsidy determined, in the original investigation. As explained in Commerce's preliminary sunset determination, the rationale for this approach is that the findings in the original investigation provide the only evidence reflecting the behavior of the respondents without the discipline of countervailing measures in place. This approach makes sense given that, in a sunset review under the Article 21.3, an authority is considering whether, without the discipline of the duty, subsidization would likely continue or recur, *i.e.*, what would happen without the discipline of the order.

32. In the original investigation, Commerce determined that German producers of corrosion-resistant steel benefitted from five different subsidy programs. In the sunset review, Commerce found that the benefit streams from non-recurring grants under the CIG program will continue beyond the five-year mark; the Structural Improvement Aids and Special Subsidies for Companies in the Zonal Border Area programs had been terminated; and the Aid for Closure of Steel Operations and ECSC Redeployment Aid Under Article 56(2)(b) programs continue to exist. Significantly, the EC has not disputed or disproved these findings. As an initial matter, therefore, it was reasonable for Commerce to find likelihood given the continued existence and availability of countervailable subsidy programs previously found to have been used by German producers of corrosion-resistant steel and the continuation of benefit streams from grants under the CIG program.

33. Although the EC essentially concedes the continued existence of some benefits from the CIG program, it claims that, based on routine amortization, Commerce should have considered the program terminated without residual benefits to the German producers. With respect to non-recurring benefits (such as the benefits from the CIG program), Commerce uses a "declining balance" formula to determine the amount of subsidization to be allocated in each period. An *ad valorem* subsidy rate, for a particular period, is derived by dividing a numerator – the subsidy benefit properly attributable to the subject merchandise – by a denominator – the value of the sales of the merchandise at issue (in the case of a domestic subsidy). Without knowing the sales volume, the *ad valorem* subsidy rate for any period cannot be determined despite the use of a "declining balance" methodology generally . The EC's claim, therefore, fails as a factual matter because there is no basis for its assumption that the sales volumes will remain constant.

34. The EC's amortization arguments, furthermore, are based in part on a calculation memorandum from the original countervailing duty investigation that is not part of the record considered in the sunset review (Exhibit EC-20). The request to submit this business

confidential document was untimely submitted and Commerce properly declined to consider it. The German producers' request to submit this document also implicated Commerce's rules concerning treatment of confidential information ("business proprietary information" or "BPI" in U.S. parlance). Pursuant to U.S. law, release of that information is not permitted without the consent of the person that submitted it. Commerce could not ignore previous requests for confidential treatment and automatically place this information from the original 1993 investigation on the record of the sunset review. Further, other parties without prior access to the document would have been prejudiced by its untimely inclusion on the record.

35. Under these circumstances, Commerce did not consider it practicable or appropriate to consider the document. Commerce's decision to enforce procedural rules governing deadlines for submission of evidence and the release of confidential business information was proper and consistent with Article 12. (The evidentiary and procedural requirements of Article 12 are applicable to sunset reviews by virtue of Article 12.4.) As such, the Panel should find that Commerce appropriately declined to consider the information and that it is not this Panel's role to consider evidence which could have been timely presented to the decision maker but was not. Furthermore, even if the Panel should consider the document, it does not prove the EC's arguments. The calculation memorandum only provides the absolute subsidy amounts (*i.e.*, the numerator) – it does not shed any light on the value of the sales of the merchandise at issue (*i.e.*, the denominator). As demonstrated above, without a denominator, there is no way to calculate the *ad valorem* subsidy rate.

36. Consistent with the Appellate Body's ruling in *UK Lead Bar* and Article 21.3, Commerce properly considered that the existing benefit streams from the CIG programs constituted evidence of the "continuation" of subsidization. Furthermore, the continued existence of other programs previously found to be countervailable is not in dispute. As a result, Commerce's finding of likelihood of continuation or recurrence of subsidization is consistent with its obligations under Articles 21.3 and 12 of the SCM Agreement. In addition, as demonstrated below, Commerce's evidentiary and procedural actions also were consistent with its obligations under Article 12.

37. Article 12.1 requires domestic authorities to give interested Members and parties an ample opportunity to present in writing all evidence which they consider relevant to the proceeding. The facts do not support the EC's claims that Commerce failed to do so.

38. The *Sunset Regulations* describe specifically the information required to be provided by all interested parties in a sunset review, *i.e.*, they constitute the standard questionnaire. In addition, the *Sunset Regulations* specifically invite parties to submit, with the required information, "any other relevant information or arguments that the party would like [Commerce] to consider." Consistent with Article 12.1.1, Commerce's regulations also provide 30 days for parties to submit the required information and provide for extensions of time to meet this deadline. The EC and the German producers were on notice of the information requirements and

options, as well as the applicable deadlines and extension options, over 15 months ahead of the scheduled date for initiation of the sunset review.

39. Yet over six months after the deadline for responding to the sunset questionnaire and submitting optional information, the German producers attempted to place new factual information on the record. The EC asserts that Commerce's rejection of these untimely submissions was contrary to their "right" under the SCM Agreement to have an "ample opportunity to present in writing all evidence which they consider relevant in respect of the sunset review." As a factual matter, however, the German producers and the German Government had ample time to submit factual information in the sunset review. Furthermore, as a legal matter, Commerce's filing deadlines and its decision not to accept late-filed information fully comport with its obligations under Article 12.

40. Specifically, the German producers had 30 days to respond to the questionnaire. In addition, Commerce's rejection of the German producers late-filed information was reasonable under the circumstances of this case, *i.e.*, the German producers attempted to file new factual information over six months after Commerce's deadline. Although an authority "should" grant extensions "whenever practicable", nothing required Commerce to find that it was practicable to accept and consider documents filed six months late, particularly given the fact that the EC and the German producers had over 15 months to gather any data they considered appropriate and to prepare their submission of required and optional information. Finally, the EC's argument, that Commerce arbitrarily applied its regulation to submissions from the various parties, ignores relevant factual distinctions between the submissions from the German producers rejected by Commerce and those submissions from the U.S. producers and the German Government that were accepted by Commerce. In particular, the accepted submissions involved public documents containing no new factual information.

41. In sum, the Panel should dismiss the EC's claims with respect to treatment of evidence. Commerce followed reasonable, appropriate procedures that fully comply with the evidentiary and procedural requirements of Articles 21 and 12.

D. The Panel Should Make a Preliminary Ruling that the EC's Claims Regarding the Expedited Sunset Review Procedure Are Not Within the Panel's Terms of Reference

42. The United States requests that the Panel make a preliminary ruling that the EC's claims regarding the U.S. expedited sunset review procedure are not properly before the Panel, because this procedure is not a measure within the Panel's terms of reference. Not until its first written submission to the Panel did the EC ever give any indication that it was complaining about this procedure.

43. In its initial request for consultations, the EC identified Commerce's determination in the *full* sunset review of the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany as the challenged measure, alleging that Commerce's determination is inconsistent with Articles 10, 11.9 and 21 of the SCM Agreement. In its second request for consultations, the EC identified Commerce's *procedures for initiation* of sunset reviews, both as applied by Commerce in the sunset determination in question and in general, as an additional challenged measure, alleging that such initiation procedures are inconsistent with Articles 21.1, 21.3 and 32.5 of the SCM Agreement and Article XIV:4 of the Marrakesh Agreement. The EC did not allege that any other sunset determination or procedure violated U.S. WTO obligations. Furthermore, the parties did not discuss the expedited sunset review procedure at either the December 8, 2000, or March 21, 2001 consultations. Finally, there is no mention of the expedited sunset review procedure in the EC's request for the establishment of a panel.

44. Articles 4.7 and 6.2 of the DSU, therefore, preclude the EC's claims with respect to the expedited sunset review procedure, because the EC never identified this procedure as a measure in its consultation requests, in the consultations themselves, or in its panel request. It is well-established that a complaining party cannot add new measures after a panel's terms of reference have been established.

V. CONCLUSION

45. For the reasons set out in this submission, the United States respectfully requests that the Panel make the following findings:

(1) The U.S. procedure for the automatic self-initiation of sunset reviews by Commerce is not inconsistent with the SCM Agreement;

(2) In not applying the 1 percent *de minimis* standard of Article 11.9 of the SCM Agreement to sunset reviews, the United States has not acted inconsistently with its obligations under the SCM Agreement;

(3) The Commerce sunset review determination in certain corrosion-resistant carbon steel flat products from Germany is not inconsistent with United States obligations under the SCM Agreement.

46. In addition, the United States respectfully requests that the Panel make a preliminary ruling that the EC's claims with respect to the expedited sunset review procedure are not within the Panel's terms of reference.