

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

(WT/DS213)

**COMMENTS OF THE UNITED STATES OF AMERICA ON
THE EC'S ANSWERS TO THE SECOND SET OF WRITTEN QUESTIONS
FROM THE PANEL**

April 9, 2002

1. The United States does not intend to comment on every response by the European Communities (“EC”) to the Panel’s second set of questions, particularly where the issues raised have been addressed in prior written submissions of the United States. Instead, the United States will comment briefly on those specific responses where additional points or emphasis is warranted.

2. At the outset, however, the United States notes the faulty assumption underlying many of the EC’s arguments. In its answers, the EC discusses the SCM Agreement as if the text issued from a body of drafters that shared a common vision. In fact, the text was drafted by countries that did not agree on a lot of things. It is a *negotiated* text. As such, it simply reflects those areas where countries did manage to agree on something. For example, the negotiators agreed on a 1 percent *de minimis* standard for investigations, but the negotiating history reveals no agreement on the theory underlying this negotiated rule.¹

3. As the United States previously has demonstrated, if one applies customary rules of treaty interpretation, the issues in this case are fairly straightforward. In response, the EC has proposed an approach to treaty interpretation – what it alleges is “a more classic way of drafting and interpreting treaties”² – that is contradicted by numerous Appellate Body reports. The EC’s approach in fact simply attempts to impute into the SCM Agreement words and obligations that are not there.

4. Turning now to the EC’s answers to specific questions, with respect to Question 41, the EC’s answer reflects a reliance on assumptions that: (1) the purpose of a sunset review is the same as that of an initial investigation; and (2) every provision of the SCM Agreement automatically should be considered applicable to every other provision. As the United States previously has demonstrated, these assumptions simply are incorrect.³

5. Furthermore, the EC’s approach ignores the fact that where the drafters wished to have obligations set forth in one provision apply in another context, they did so expressly. *Article 21 itself illustrates this point.* Paragraph 4 of Article 21 makes the provisions of Article 12 applicable to Article 21.3 reviews. If, as the EC argues, the drafters intended that the provisions of other articles apply to Article 21, why did they bother with the first sentence of Article 21.4? Under the EC approach, the first sentence becomes superfluous, an outcome which violates the principle of effectiveness of treaty interpretation.⁴

¹ See *Responses of the United States of America to the Questions from the Panel Following the Second Meeting* (“US Second Responses”), April 2, 2002, paras. 12-13.

² *Replies of the European Communities to the second set of written questions from the Panel at the Second Substantive Meeting with the Parties* (“EC Replies”), 2 April 2002, page 2.

³ With respect to the purpose of a sunset review, see *US First Submission*, paras. 79-81; *US Second Responses*, para. 2; and *Answers of the United States of America to Question from the European Communities*, February 21, 2002, para. 6. With respect to the EC’s approach to treaty interpretation, see *Answers of the United States of America to Questions from the Panel*, February 21, 2002, paras. 19-21; and *Comments of the United States of America on the EC’s Answers to Questions from the Panel*, February 28, 2002, paras. 2-4 and 10-11.

⁴ See, e.g., *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body adopted 20 May 1996, page 23 (“[I]nterpretation must give meaning and effect to all the terms
(continued...)”).

6. With respect to Question 42, the EC's assertion that it has made a "claim" with respect to an alleged shifting of the burden of proof under the U.S. system is incorrect. In its panel request (which established the terms of reference in this proceeding), the EC's "claim" was that, under Article 21.3, the United States cannot automatically self-initiate a sunset review.⁵ In making this claim, the EC panel request included only an *argument* that automatic initiation somehow shifted the burden of proof. Accordingly, the Panel should treat the EC's discussion of burden of proof as an *argument*, not as a separate and independent *claim*.

7. Moreover, as a substantive matter, the EC is wrong when it asserts that the United States imposes a burden of proof on foreign exporters and governments to demonstrate no likelihood of continued or recurring subsidization and injury.⁶ As a matter of U.S. administrative law, there is no burden of proof – in the sense of the ultimate burden of persuasion – imposed on either foreign exporters/governments or the U.S. industry. Instead, the burden is on Commerce to make a determination that can withstand review by a domestic court.

8. With respect to the EC's answer to Question 44, the EC omits any explanation – let alone a demonstration – as to how its invocation of negotiating history is justified under the customary rules of treaty interpretation reflected in Article 32 of the *Vienna Convention*.⁷ Nevertheless, as the United States has demonstrated, the only thing the negotiating history demonstrates is that there was *no* consensus or single reason why the drafters established a *de minimis* standard.⁸ More importantly, however, an analysis of the text and context of Article 21.3 and the object and purpose of the SCM Agreement leads to the conclusion that the Article 11.9 *de minimis* standard does not apply to reviews under Article 21, including sunset reviews under Article 21.3.

9. With respect to the EC's answer to Question 49, by using the terms "presumption" and "all the more so", the EC seems to suggest that a sunset review is some sort of exceptional procedure that warrants a stricter interpretation of Article 21.3, as opposed to Article 21.2. Articles 21.2 and 21.3, however, are specific implementations of the general rule, found in Article 21.1, that a countervailing duty order shall remain in force only as long as and to the extent necessary to counteract subsidization that is causing injury. Nothing in the general rule found in Article 21.1 suggests any presumption concerning how long countervailing duties may continue to be necessary. Article 21.3 simply defines the point in time (*i.e.*, after five years) at

⁴ (...continued)
of a treaty.").

⁵ WT/DS213/3 (10 August 2001).

⁶ *EC Replies*, page 3.

⁷ As discussed in the *US Second Responses*, para. 8, Article 32 permits recourse to supplementary means of interpretation to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable. *See also US Second Responses*, paras. 9-10.

⁸ *US Second Responses*, paras. 12-13.

which the authorities must do one of two things: automatically terminate the countervailing duty or take stock of the situation by conducting a review to determine whether continuation or recurrence of subsidization and injury is likely. If so, the duty may be maintained; if not, the duty must be terminated. As the Appellate Body has stated, “describing [or] 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.”⁹

10. In its answers to Questions 50-54, the EC asserts new claims that were not included in its panel request. Because these claims were not included in the Panel’s terms of reference, the Panel should dismiss them.

11. With respect to Question 50, the EC’s asserts that it has made a “claim” that there can never be “injurious subsidization” as a result of a subsidy rate below one percent. This is incorrect. There is no mention of “injury” or “injurious subsidization” in the EC’s panel request. Rather, the EC’s claim in its panel request was that the Article 11.9 *de minimis* standard for investigations applies also in sunset reviews. Thus, the EC’s new claim with respect to non-injurious subsidization is not within the Panel’s terms of reference, but instead is at most an argument in support of the EC’s claim.

12. Furthermore, as the United States has demonstrated in prior submissions, nothing in the text of Article 11.9 or 21.3 requires the application of the Article 11.9 one percent *de minimis* standard in Article 21.3 sunset reviews, or any other type of review. Finally, the provision of a *de minimis* standard in Article 11.9 is not reflective of the EC’s theory that subsidization below one percent is non-injurious. Rather, the *de minimis* standard for investigations under Article 11 is a creature of negotiation.¹⁰

13. With respect to Question 51, the EC now asserts that it has made a “claim” that U.S. law as such violates the SCM Agreement in respect of the obligation to “determine” the likelihood of continuation or recurrence of subsidization. The EC now argues that U.S. law is equivalent to a “web of provisions (basic law, regulations and guidelines)” which allegedly violate the obligations of the SCM Agreement.

14. It is impossible to read the EC’s panel request as articulating this type of claim. In its panel request, the EC essentially challenged three things: (1) the U.S. system of automatic self-initiated sunset reviews, as such; (2) the U.S. failure to apply a 1 percent *de minimis* standard in sunset reviews, as such; and (3) Commerce’s application of the principles described in (1) and (2) in the sunset review on corrosion-resistant steel from Germany. The EC’s new claims

⁹ *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body adopted 13 February 1998, para. 104.

¹⁰ *US Second Responses*, paras. 12-13.

concerning the definition of “determine” and the issue of “injurious subsidization” are simply not within the terms of reference of this dispute.

15. With respect to Question 52, the EC now alleges that by not making certain documents part of the record of the sunset review, Commerce violated various provisions of Article 12 of the SCM Agreement. However, Article 12 is nowhere mentioned in the EC’s panel request, nor does the panel request refer to the alleged inadequacy of the record of Commerce’s sunset review. Thus, once again, the EC appears to be advancing claims that are not within the Panel’s terms of reference. Accordingly, the Panel should dismiss these new and improper claims.

16. In any event, the EC’s statement that the USITC is “subject to the same procedures regarding the treatment of business proprietary information as the US DOC” is patently false. Commerce and the USITC each have practices and regulations which govern the collection, protection, and use of business proprietary information. There are significant differences between Commerce and USITC practices and regulations. One of those differences is that the USITC automatically makes certain parts of the record of the original investigation part of the record of the sunset review;¹¹ Commerce, by regulation, can not and does not automatically do the same. The EC is well aware of the fact that Commerce and the USITC have distinct roles in the United States’ conduct of sunset reviews and that the two agencies have distinct sets of practices and regulations on this issue in particular.

17. In its response to Question 53, the EC appears to advance a new claim that U.S. law violates the SCM Agreement because it provides too much discretion to Commerce in making a sunset determination, thereby allegedly eliminating “legal security and predictability” in the review “to the detriment of foreign exporters and international trade.” It is not entirely clear from the EC answer which provisions of the SCM Agreement allegedly have been violated by the existence of “too much discretion”, but the Panel need not concern itself with the lack of precision in the EC’s answer. Here, too, the Panel should dismiss the EC’s claim, because the claim was not included in the EC’s panel request.

18. Nevertheless, the United States notes that it has statutory provisions (sections 751(c) and 752 of the Tariff Act) governing sunset reviews which provide the basic legal and procedural requirements for the conduct of a sunset review. In addition, Commerce has promulgated regulatory provisions (e.g., portions of sections 351.102, 351.104, 351.218, 351.221-222, 351.308-310), primarily procedural in nature, to formalize the sunset review process and provide guidance for effective participation in sunset reviews. Commerce also has issued its *Sunset*

¹¹ See USITC’s *Notice of Proposed Amendments to Rules of Practice and Procedure*, 62 FR 55185, 55190 (October 23, 1997) ; and USITC’s *Rules of Practice and Procedure*, 63 FR 30599, 30606 (June 5, 1998) (final rulemaking) (“[T]he material from the record of the original investigation that the Commission will release to the parties will include the Commission opinion(s) in the original investigation and staff reports and non-privileged memoranda, where available.”).

Policy Bulletin which outlines the methodology Commerce will employ in making its sunset determination. These provisions provide parties with all the information on the procedural and substantive requirements necessary to participate meaningfully in a sunset review.

19. By contrast, the EC provides extremely limited guidance under its own system with respect to the conduct of sunset reviews. As explained in its answer to Panel Question 48, the EC has promulgated a Council Regulation which governs sunset reviews (Exhibit EC-26). This regulation does little more than mirror Article 21. The EC then admits that it has “no other regulatory or administrative texts or guidelines concerning the conduct of countervailing duty expiry reviews” and cites a single sunset review to illustrate the EC’s “practice” in sunset reviews. Thus, while the United States provides expansive guidance on its conduct of sunset reviews, through statutory, regulatory and policy provisions, the EC provides no guidance beyond the limited language of the Council Regulation and the single instance where the EC has made a final countervailing duty sunset determination. Therefore, it would seem that if, *arguendo*, the EC’s assertions regarding the U.S. system were correct (and within the Panel’s terms of reference), it must follow automatically that the EC system also violates the SCM Agreement. Also in violation would be those Members who have chosen to implement their obligations by simply incorporating the SCM Agreement into their domestic law.

20. In its response to Question 53, the EC also asserts that the “flexibility and plasticity” of U.S. law eliminates security and predictability in the interpretation and application of that law, and thereby violates the SCM Agreement. Again, however, the EC is reading words into the text of the SCM Agreement that are not there. The EC apparently is confusing the language in Article 3.2 of the DSU, which is a narrative statement that the WTO *dispute settlement system* is a central element in providing security and predictability to the multilateral trading system, with some obligation on *Members* to provide security and predictability in international trade through their measures. Of course, there is no such vague obligation in the WTO.

21. Finally, with respect to Question 54, the EC states that it is alleging violations of various provisions of Article 12 of the SCM Agreement relating to what it describes as “due process and rights of defense requirements”. Of course, in its panel request, the EC does not reference Article 12 at all (let alone any particular paragraph of Article 12) or the fact pattern which the EC believes gives rise to a violation of Article 12 (allegedly short deadlines for submissions). While the EC’s panel request does mention Article 21, the only reference to particular paragraphs of Article 21 are to paragraphs 1 and 3.

22. This new claim comes nowhere close to satisfying the standards of Article 6.2 of the DSU, which requires that panel requests “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.” No objective person could read the EC’s panel request and discern that the EC had a problem concerning the deadline for submissions in Commerce sunset reviews. Accordingly, the Panel should dismiss this new EC claim.