EUROPEAN COMMUNITIES – MEASURES AFFECTING TRADE IN COMMERCIAL VESSELS

WT/DS301

THIRD PARTY SUBMISSION OF THE

UNITED STATES OF AMERICA

July 8, 2004

I. INTRODUCTION

1. The United States makes this third-party submission in order to provide its views on a limited number of issues raised in the first submissions of the parties. The United States recognizes that many of the issues raised in this dispute are solely or primarily factual. Therefore, the United States generally takes no view as to whether, under the facts of this dispute, the measures at issue are consistent with the provisions cited by Korea.

II. ARTICLE 32.1 OF THE SCM AGREEMENT

2. Korea claims that the TDM Regulation and the other measures it cites are inconsistent with Article 32.1 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), because they constitute "specific action against a subsidy of another Member" – Korea – that is not taken "in accordance with the provisions of GATT 1994, as interpreted by [the SCM Agreement]." Because Korea's claim raises many factual issues, the United States offers no view on the ultimate resolution of that claim. Nevertheless, it appears to the United States that in this dispute the EC is advocating a surprisingly narrow interpretation of Article 32.1 that is not supported by the Appellate Body reports to which it cites.[1]

A. The EC's Misquotation of *US – Offset Act*

3. The EC begins its discussion of Article 32.1 by misquoting the Appellate Body. In discussing the Appellate Body report in *US – Offset Act*, the EC makes the following statement:[2]

> According to the Appellate Body in *US – Offset Act (Byrd Amendment)*, Article 32.1 of the *SCM Agreement* covers
>
> > a measure that may be taken *only* when the constituent elements of dumping or a subsidy are present.

This quotation of the *US – Offset Act* report is inaccurate, because in the report there is no period after the word "present." Instead, the sentence continues, the full sentence reading as follows:

> Accordingly, a measure that may be taken only when the constituent elements of dumping or a subsidy are present, is a "specific action" in response to dumping within the meaning of Article 18.1 of the *Anti-Dumping Agreement* or a "specific

---

[1] At the outset, the United States wishes to note that both parties claim to be following the approach to Article 32.1 articulated by the Appellate Body in *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, Report of the Appellate Body adopted 27 January 2003 [hereinafter "*US – Offset Act*"]. Although the United States continues to be troubled by that approach, in view of that common ground between the parties, the United States in this submission has limited itself to addressing the parties' use of that approach.

[2] First Written Submission of the European Communities (1 July 2004), para. 185, *quoting US – Offset Act*, para. 239 (emphasis added by EC) [hereinafter "EC Submission"].

action" in response to subsidization within the meaning of Article 32.1 of the *SCM Agreement*.

4. In the view of the United States, there is a subtle but important difference between the two quotations. The EC version of the quotation suggests that coverage of Article 32.1 is limited to measures that may be taken "only" when the constituent elements of dumping or a subsidy are present. The full quotation, however, indicates that Article 32.1 includes, but is not necessarily limited to, "measures that may be taken only when the constituent elements of dumping or a subsidy are present."

5. This understanding of that quotation is borne out by the report in *US – 1916 Act*, in which the Appellate Body found that: "'Specific action against dumping' of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of 'dumping' are present."[3] By its use of the phrase "at a minimum", the Appellate Body indicated that the universe of measures subject to Article 18.1 included, but was not necessarily limited to, "measures that may be taken only when the constituent elements of dumping are present." Indeed, the Appellate Body stated that it was not making any findings regarding the precise scope of Article 18.1.[4]

B. "Against Subsidization"

6. The EC's discussion of the phrase "against subsidization" suffers from similar difficulties. At paragraph 191 of its first submission, the EC quotes the passage from the *US – Offset Act* report in which the Appellate Body stated that "the CDSOA effects a transfer of financial resources from the producers/exporters of dumped or subsidised goods to their domestic competitors."[5] The sole purpose of this quotation appears to be to create the impression that only measures that involve a similar "transfer of financial resources" are capable of falling within the scope of Article 32.1 as interpreted by the Appellate Body. If this is the EC's aim, then it is misguided, because the Appellate Body did not find that the universe of actions "against subsidization" are limited to those involving a transfer of resources. Instead, it simply found that that universe includes actions involving a transfer of resources.[6]

---

[3] *United States – 1916 Act*, WT/DS136/AB/R, WT/DS162/AB/R, Report of the Appellate Body adopted 26 September 2000, para. 122 (underscoring added; italics in original) [hereinafter "*US – 1916 Act*"]. The Appellate Body was discussing Article 18.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), the provision of the AD Agreement that corresponds to Article 32.1 of the SCM Agreement.

[4] *US – 1916 Act*, note 66 ("We do not find it necessary, in the present cases, to decide whether the concept of 'specific action against dumping' may be broader.").

[5] *US – Offset Act*, para. 255.

[6] In this regard, it is important to note that this portion of the *US – Offset Act* report is based upon a factual premise that is demonstrably inaccurate. The Appellate Body stated that the CDSOA effected a transfer of financial resources from producers/exporters to their domestic competitors, because "the CDSOA offset payments are

(continued...)

7. More important, however, is the fact that the EC never explains why a system of counter-subsidies cannot, to use the language of the Appellate Body in *US – Offset Act*, dissuade the practice of subsidization or create an incentive to terminate such practice.[7] It seems obvious to the United States that when, for example, a government provides one of its companies with a subsidy, it does so with the aim of giving that company an advantage in the market. That advantage is offset, in whole or in part, if another government provides subsidies to competitors of that company. When this happens, the subsidy provided by the first government is, to some extent, wasted. Because a rational government presumably will not want to waste finite resources, under the Appellate Body's approach, counter-subsidies would be, in principle, capable of dissuading the practice of subsidization or creating an incentive to terminate subsidies. Thus, while the United States offers no views concerning the facts of this particular dispute, it would seem that under that approach, in principle, counter-subsidies are capable of falling within the scope of Article 32.1.

C. "Specific Action"

8. The EC also appears to suggest that an action is not a "specific action" within the meaning of Article 32.1 if it deals with anything other than subsidization. Thus, the EC argues that because the TDM Regulation refers to "unfair practices" rather than "subsidization," and because the *Agreed Minutes* between the EC and Korea suggest that there also was a problem concerning the dumping of ships, the TDM Regulation cannot constitute "specific action against a subsidy."[8] This is a new position for the EC, directly contrary to that taken in disputes where the EC was a complaining party.[9]

9. It seems an interpretive stretch to read the phrase "specific action against subsidization" as including only actions that deal "exclusively" with subsidization. For one thing, such an interpretation would make it relatively easy to evade the scope of Article 32.1 of the SCM Agreement and Article 18.1 of the AD Agreement as interpreted by the Appellate Body. A measure simply would have to purport to deal with both subsidization and dumping and it would not be subject to either provision, because the measure would not deal exclusively with "subsidization" or exclusively with "dumping."[10]

---

[6] (...continued)
financed from the anti-dumping or countervailing duties paid by the foreign producers/exporters." *US – Offset Act*, para. 255. This statement is manifestly inaccurate, because U.S. anti-dumping and countervailing duties are paid by U.S. importers, not foreign producers/exporters. *See* WT/DSB/M/142 (6 March 2003), para. 56 (remarks of the United States).

[7] *US – Offset Act*, para. 256.

[8] EC Submission, paras. 195-196.

[9] *See, e.g.*, *US – Offset Act*, Report of the Panel, para. 7.24.

[10] In this regard, it is interesting to consider the CDSOA that was at issue in the *US – Offset Act* dispute. Because the CDSOA authorized the distribution of both anti-dumping and countervailing duties, under the EC's
(continued...)

D. The "Operative Part" of the Regulation

10. The EC asserts that: "Specific action against subsidisation has to be established on the basis of the *operative part* of the Regulation."[11] The EC offers no support for this assertion, and the United States is not even certain what it means. In any event, Article 4 of the TDM Regulation appears to create a link between the TDM and WT/DS273, the dispute commenced by the EC under the SCM Agreement. Thus, the TDM Regulation itself suggests that the purpose of the Regulation is to take action against subsidization.

11. Moreover, the reasons cited by the EC as to why Article 2.1 of the TDM Regulation does not contain an inextricable link with the elements of subsidization is not convincing.[12] The fact that subsidies can be granted against any Korean competition or offers from any Korean yard, regardless of the extent to which the Korean merchandise is subsidized, simply suggests that the counter-subsidies may be greater than necessary. Likewise, the limitation on contract-related subsidies to 6 percent may render the counter-subsidies too small to dissuade or terminate subsidization. However, these facts do not mean that the counter-subsidies are not "specific action against subsidization." Would the offset payments at issue in *US – Offset Act* have been permissible if they had been automatically halved? Or doubled?

E. Summary

12. The EC's analysis of Article 32.1 and the Appellate Body reports discussing it is overly narrow. In *US – Offset Act*, the Appellate Body concluded that the SCM Agreement prohibits the provision of subsidies in response to another Member's subsidies.[13] Thus, the question for the Panel is whether the EC measures cited by Korea are in response to Korean subsidies.

III. KOREA'S CLAIMS UNDER THE DSU

13. Korea claims that the EC measures are inconsistent with its obligations under Article 23.1 and subparagraphs (a)-(c) of Article 23.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). In responding to these claims, the EC relies

---

[10] (...continued)
logic in the instant dispute, the panel and the Appellate Body should not have found the CDSOA to be inconsistent with Article 18.1 or Article 32.1.

[11] EC Submission, para. 201.

[12] EC Submission, para. 205.

[13] *US – Offset Act*, para. 273 ("To be in accordance with the GATT 1994, as interpreted by the *SCM Agreement*, a response to subsidization must be either in the form of definitive countervailing duties, provisional measures or price undertakings, or in the form of multilaterally-sanctioned countermeasures resulting from resort to the dispute settlement system.").

heavily on the argument that its counter-subsidies cannot be regarded as "countermeasures".[14] According to the EC: "A fundamental tenet of the subsidy disciplines enshrined in the *SCM Agreement* is that Members are permitted to grant or maintain specific subsidies to the extent that they do not constitute a prohibited subsidy within the meaning of Article 3 of the *SCM Agreement* and do not cause adverse effects within the meaning of Articles 5 and 6 of the *SCM Agreement*."[15]

14. This statement is only half right. The EC is correct that, under those articles of the SCM Agreement, Members are permitted to grant or maintain subsidies other than prohibited subsidies or actionable subsidies that cause adverse effects. The EC is incorrect, however, in asserting that the entirety of WTO subsidies disciplines are set forth in Articles 3, 5 and 6 of the *SCM Agreement*. One obvious example that this is not the case is Article III:4 of GATT 1994, which has been interpreted so as to prohibit certain types of subsidies.[16] And, as discussed in the preceding section, Article 32.1 has been interpreted by the Appellate Body so as to prohibit counter-subsidies.

15. Thus, in order to evaluate the "countermeasure" element of the EC's arguments, it appears that the Panel may have to make a finding as to whether the measures challenged by Korea are prohibited by Article 32.1 of the SCM Agreement or another provision of the WTO Agreement under one of Korea's claims. If so, then the Panel may also need to address the other elements of what is essentially a claim by Korea that the EC has engaged in impermissible unilateral action. In so doing, the Panel may want to bear in mind the following observation of the EC:

> [I]f Members take the law into their own hands and unilaterally impose their own views on their rights under the WTO by threatening or taking measures violating their obligations, they risk provoking spirals of retaliatory actions that would jeopardise the results of half a century of trade negotiations.[17]

---

[14] *See* EC Submission, paras. 168, 177, 178. The EC appears to use the term "countermeasures" as a shorthand expression for the "suspension of concessions or other obligations", as used in Article 23 of the DSU.

[15] EC Submission, para. 168.

[16] *See, e.g., United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, Report of the Appellate Body adopted 29 January 2002, para. 256(e).

[17] *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, Report of the Panel adopted 27 January 2000, para. 4.81.