United States – Countervailing Measures Concerning Certain Products from the European Communities: Recourse to Article 21.5 by the European Communities (WT/DS212)

Comments of the United States of America on the Answers of the European Communities to Questions from the Panel to the Parties in Connection with the Substantive Meeting

March 18, 2005

Q2. In reference to the European Communities' argument on judicial economy, is the European Communities stating that it did not argue the injury claim in the original proceedings because it was already attacking the change-in-ownership methodology and that doing so obviates the need to make any claims on injury? (European Communities)

1. There are numerous problems with the EC's response to this question. First, the EC attempts to analogize judicial economy to restraint by complaining parties, with both supposedly facilitating the prompt settlement of disputes.[1] The EC provides no further explanation. Yet in *Bed Linen* the EC argued just the opposite – that prompt settlement of disputes required complaining parties to advance all claims that could be advanced in the underlying proceeding and not to spring such claims on the responding party for the first time during the Article 21.5 proceeding:

> [R]eferring to the overall purpose and object of the DSU to achieve a 'prompt settlement' of disputes, . . . as well as to the requirement to engage in dispute settlement procedures in good faith . . . the Appellate Body has emphasised in a number of cases that procedural actions under the DSU must be taken in a timely fashion . . . . The EC submits that, in similar fashion, *the right to make a claim must be exercised promptly, with the consequence that Article 21.5 of the DSU must be interpreted as excluding the possibility to raise or argue for the first time a claim before an Article 21.5 Panel when the same claim could have been pursued before the original Panel.*[2]

2. Similarly, the EC is currently advancing the argument that it does not consider complaining parties to be required to "attack all inconsistencies in a proceeding and still less inconsistencies that may only arise once another inconsistency has been established . . . ."[3] Yet in *Bed Linen* the EC argued that:

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[1] EC Answers, para. 2.

[2] Appellee Submission of the European Communities, paras. 143, 147 (emphasis added) (Exhibit US-4) .

[3] EC Answers, para. 1.

> Article 21.5 is not intended to provide a 'second service' to complaining parties which, by negligence or calculation, have omitted to raise (or argue) certain claims during the original proceeding.[4]

3. At the Panel meeting, the EC insisted that it was concerned with "results," *i.e.,* revocation of the order. In this context, it is all the more clear that the EC is seeking "second service" to challenge that which it neglected to challenge in the original proceeding. However, Article 21.5 does not permit complaining parties – who control the terms of reference of the underlying dispute – to achieve "results" at the expense of fairness and the rights of responding parties.

4. It is also notable that in criticizing India for bringing up new claims in *Bed Linen*, the EC argued that India's failure to raise those claims in the original proceeding meant that the EC

> could assume legitimately that such finding was WTO consistent and did not need to be corrected. It would be manifestly unfair to expose the EC to the possibility of an immediate suspension of concessions under Article 22 of the DSU in response to a violation which the EC could not have anticipated when the implementing measures were taken and which it will be given no opportunity to correct.[5]

5. Similarly, the United States was entitled to assume legitimately that the findings in the original sunset review that the EC elected not challenge (such as findings regarding Glynwed and the recurring Spanish subsidies) were WTO-consistent. The question is not whether the EC should be permitted to challenge these newly-alleged WTO inconsistencies; rather, the question is whether the EC should be permitted to use the expedited proceedings of Article 21.5 to do so with respect to claims that are not related to the measure taken to comply. As the EC itself noted in *Bed Linen*, a complaining party can present such claims to an ordinary Panel established in accordance with Article 4.7 of the DSU.[6]

6. Finally, the EC's answer – that attacking the privatization methodology obviated the need to make any claims on injury – is simply a concession that the EC made no claims at all on injury and, consequently, obtained no DSB rulings or recommendations with respect to injury. The aspects of the original measure pertaining to injury are not within the ambit of this Article 21.5 proceeding.

> ***Q17. In its Request for establishment, the European Communities seems to focus on three sunset reviews as the relevant measures taken to comply. In the background information provided earlier in the Request itself, however, the***

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[4] Appellee Submission of the European Communities, paras. 140-141.
[5] Appellee Submission of the European Communities, para. 142.
[6] Appellee Submission of the European Communities, para. 134.

European Communities also states that the United States finalized a new "change-in-ownership" methodology and subsequently issued new determinations in which the United States applied this methodology to the twelve determinations challenged by the European Communities before the original Panel. Moreover, in footnotes 1 through 3, the European Communities refers to three unpublished memoranda that the USDOC issued and posted on its website. Then, in its First written submission, the European Communities clarifies that it "is requesting the Panel to review the measures taken by the United States concerning the sunset reviews." Later in the same submission, the European Communities states that it "is treating the USDOC's failure to revoke [the three countervailing duty] orders as the purported 'implementation' of the USDOC's findings" Yet in its Second written submission, the European Communities clearly states that the "Section 129 determinations at issue in this proceeding are measures taken by the United States to comply with the recommendations and rulings of the DSB".[7] In its Oral Statement, however, the European Communities argued that the measures taken to comply by the US are the failure to revoke the CVD orders. Can the European Communities please clarify which are the measures taken to comply in these proceedings and where in the Request for establishment these measures are identified? (European Communities)

7. The EC's answer – that maintenance of the order is the measure taken to comply – is simply incorrect.[8] The DSB's recommendations and rulings in the underlying dispute pertained to privatization. These recommendations and rulings provide that the administrative actions were WTO-inconsistent to the extent they were based on a flawed privatization analysis, and for no other reason. The EC's view is inconsistent with the text of Article 21.5, which states:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings, such dispute shall be decided through recourse to these dispute settlement procedures . . . .

This text premises a Panel's jurisdiction over a measure under Article 21.5 on whether it was taken to comply with DSB recommendations and rulings. The necessary corollary is that a measure *not* 'taken to comply' is *not* subject to review. The title of Article 21 – "Surveillance of Implementation of Recommendations and Rulings" – confirms that it focuses on *implementation* of the recommendations and rulings of the DSB, and not on the original measure.

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[7] EC Second written submission, para 12.

[8] EC Answers, para. 4.

Q24. Does the European Communities suggest that because of the significant impact of the new privatisation methodology, the United States should not make its likelihood determination on an order-wide basis in the sunset reviews at issue? (European Communities)

8. The EC states that the order-wide approach of the United States is not sufficient to ensure compliance in this case.[9] The EC ignores the Appellate Body's conclusion in *Japan Sunset* that Members are permitted to conduct sunset reviews on an order-wide basis, even though the United States made this point at the meeting.

9. Paragraph 13 of the EC's response is somewhat baffling. The EC states – without citation to the DSB's recommendations and rulings (or even to the Panel and Appellate Body reports) – that the "findings of the Panel that were adopted by the DSB and were required to be implemented concerned the failure of the United States to ensure that any countervailing duties which were applied were limited to an amount corresponding to injurious subsidisation . . . ." The EC then goes on to state that "[i]n particular, the Panel focussed on the issue of privatisation . . . ." These statements are misleading and give the impression that something more than privatization was addressed in the original proceeding. The Panel "focussed" on privatization because the only issue *at all* in the original proceeding was privatization, and the DSB's recommendations and rulings were limited to that issue as well. Therefore, the measure that the United States "[took] to comply" was the measure that addressed the issue of privatization.

Q25. The United States alleges that the claim on likelihood of injury as regards the French Section 129 determination is outside this Panel's mandate because it is not included in the Request for establishment. Can the European Communities confirm that this is the case? If not, could the European Communities indicate where in the Request for establishment this claim is included? (European Communities)

10. While it is true that the EC's panel request cited Articles 21.1 and 21.3 of the SCM Agreement,[10] that does not save the EC's position. The EC's panel request states, with respect to the French determination, that "the United States failed to properly examine the existence, continuation or likelihood of recurrence of subsidization." By contrast, for the British and Spanish cases, the EC states that the "United States failed to properly determine whether, in these cases, there was continuation or recurrence of subsidization *and injury* . . . ." (emphasis added). Under DSU Article 6.2, the EC's panel request must "present the problem clearly". It is difficult to see what could be clearer from the EC's panel request than the fact that the EC had chosen *not* to include an injury claim with respect to the French determination. Nor is it the case that any invocation of Article 21.1 or 21.3 necessarily includes a claim concerning injury; as is evident

[9] EC Answers, para. 12.
[10] EC Answers, para. 14.

from the original panel proceedings in this dispute, a violation of those Articles can be established without any discussion of injury at all. For all these reasons, the EC's panel request – by expressly omitting any mention of injury from its claims concerning the French determination – could not bring any injury claim concerning the French determination within the terms of reference of this Panel.[11]

11. The United States recalls the EC's concern in *Bed Linen* that raising claims for the first time in Article 21.5 proceeding is "manifestly unfair" because of, *inter alia*, the limited time for preparing a defense;[12] this unfairness is all the more manifest when (1) the panel request fails to make clear that such a claim will be advanced for the first time in the entire proceeding, (2) the first submission contains one paragraph on the subject, and (3) the complaining party waits until its second submission – where, with simultaneous rebuttals, the defending party has an even more limited opportunity to address issues raised in that submission – to advance its substantive argument as to why the claim is even properly before the Panel.

> ***Q32. At page 6 of the French Section 129 Determination, the USDOC states: "The decision to privatize Usinor and the terms of privatization were executed through an order of the Ministry of Economic Affairs and Finance, based on an opinion by the Privatization Commission, both issued in June 1995. Share prices were set by the Ministry, based on the opinion of the Privatization Commission, in consultation with Banque S.G. Warburg ("Warburg") and the other Global Coordinators of the share offerings, and in accordance with the privatization law. The Privatization Commission stated that it relied upon various valuation methodologies for Usinor including, inter alia, stock-exchange-based comparisons and net liquidity flows. Based on its analysis, the Commission recommended a minimum value for Usinor of FF 15,750 billion."***
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> ***Do the parties consider that this price of FF 15,750 billion is the fair market value (FMV) for Usinor? For what price did the Government of France actually sell Usinor? (European Communities/United States)***

12. The United States cannot agree with the EC's approach to analyzing fair market value. It improperly reduces the analysis to a purely quantitative one and also makes pointless the arm's length segment of the analysis.

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[11] As discussed above, however, the EC's identification of an alleged failure to properly determine the likelihood of injury in the British and Spanish review did not bring the ITC injury determination within the jurisdiction of the Panel because injury was not part of the measure taken to comply.

[12] Appellee Submission of the European Communities, para. 141.

Q43. When did Glynwed stop production of the product at issue? When did respondents first submit this evidence? Why didn't the respondents provide this evidence during the sunset review investigation? (European Communities)

13. The EC has offered the Panel an erroneous answer to this question. The EC is simply wrong when it states that the "entire focus by both the USDOC and the parties had been on the privatization of BS plc and its impact on the subsidies . . . . "[13] In the original UK sunset review, domestic interested parties provided information that Glynwed continued to benefit from, or was likely to continue to benefit from, certain subsidization programs. Based on that information, Commerce drew the following conclusion: "The Department notes that because there have been no administrative reviews of this order and no evidence has been submitted to the Department demonstrating the termination of the countervailable programs, it is reasonable to assume that these programs continue to exist and are utilized."[14] To the extent that anyone "limited their focus" to privatization, it is the EC and the British Government, not only during the original sunset review but, more importantly, in the original WTO proceeding. The EC now seeks to use these expedited procedures to introduce claims regarding aspects of the original measure that are not related to the DSB's recommendations and rulings. The EC appears to be insinuating that Commerce somehow shares the responsibility for a choice, or failure, on the part of the EC to "focus" on non-privatization issues in a review where such issues were clearly in play. That responsibility, however, belongs to the EC alone.

14. In the end, the question is whether the claims concerning Glynwed are properly part of an Article 21.5 proceeding. Aside from the EC's (or any responding party's) failure to provide any evidence or argument concerning Glynwed in the original sunset review, the EC's failure to advance claims regarding Glynwed in the underlying WTO proceeding means that such claims were not part of the DSB's rulings and recommendations, and those claims do not relate to the measure taken to comply.

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[13] EC Answers at para. 29.

[14] *Issues and Decision Memorandum in Cut-to-Length Carbon Steel Plate from the United Kingdom: Final Results of Expedited Review of Countervailing Duty Order*, 65 Fed. Reg. 18309 (April 7, 2000) (Exhibit EC-6).