

*United States – Countervailing Duties Concerning
Certain Products from the European Communities:
Recourse by the European Communities to Article 21.5 of the DSU*

WT/DS212

Oral Statement of the United States

March 1, 2005

I. Introduction

1. Thank you, Mr. Chairman and members of the Panel. The United States appreciates this opportunity to present its views regarding the issues in this dispute. We apologize in advance for the length of our statement. However, this statement provides us our only real opportunity to rebut the EC's second submission.

2. Before embarking on a more detailed discussion of the issues raised by the EC's second submission, we think it is useful to bear in mind what an Article 21.5 proceeding is – and what it is not. After the DSB has made findings and recommendations regarding a measure, a Member may invoke the expedited procedures of Article 21.5 to have a panel evaluate whether the “measure taken to comply” with the DSB's recommendations and rulings in fact so complies. The EC seeks to muddy the waters with respect to whether the injury determination and aspects of Commerce's revised determinations are part of the “measure taken to comply.” We will explain in detail why the EC's arguments are unavailing. However, as this debate moves forward, we must be clear as to what is a “measure taken to comply.”

3. A “measure taken to comply” consists of those aspects of a determination that implement the findings and recommendations of the DSB. In *EC – Bed Linen*, where compliance with the recommendations and rulings required modification of some aspects of the determination but not

others, only those aspects modified to comply with the recommendations and rulings were “the measure taken to comply” and therefore subject to the 21.5 proceedings. In *Canada – Aircraft*, where Canada terminated an existing WTO-inconsistent measure¹ and replaced it with a new measure,² the new measure was considered a “measure taken to comply” – and Canada submitted it as such.³

4. The EC attempts to distinguish *EC – Bed Linen* “factually” by arguing that it was limited to disputes in which the same claim was advanced in the underlying proceeding and raised again in the Article 21.5 proceeding.⁴ But the Appellate Body’s conclusions, and the reasoning underpinning those conclusions, are not limited to the question of whether the same claim can be advanced. Instead, they are broader: the Appellate Body rejected India’s claim in that dispute because India sought to “challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings”⁵ That is the precise situation in this dispute.

5. Furthermore, the EC’s reliance on *Canada – Aircraft* is misplaced. *Canada – Aircraft* stands for the proposition that a 21.5 panel may evaluate *new* aspects of a revised measure for compliance with a covered Agreement. It does not stand for the proposition that an Article 21.5 panel should entertain claims that relate to *unchanged* aspects of the original measure.

¹ Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000 (“*Canada – Aircraft*”), para. 26.

² *Canada – Aircraft*, para. 34.

³ *Canada – Aircraft*, para. 36.

⁴ Second Written Submission of the European Communities, para. 25.

⁵ Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted April 24, 2003 (“*EC – Bed Linen*”), para. 87.

6. The approaches in *EC – Bed Linen* and *Canada - Aircraft* make sense. If a responding Member could escape the expedited proceedings of Article 21.5 by simply replacing one faulty measure with another, then Article 21.5 would be rendered meaningless. But there are also restrictions on the complaining Member and its ability to challenge more than the measure taken to comply; without these restrictions, Article 21.5 would simply become an expedited procedure for any claim even if unrelated to the DSB’s recommendations and rulings.

7. The EC exposes its quest to reopen the original dispute by asking the Panel to decide whether Commerce can provide a “justification for maintaining” the measures in question.⁶ But Commerce is under no burden here to “justify” maintaining the measures. Rather, the EC bears the burden of demonstrating that the United States failed to comply with the recommendations and rulings of the DSB. With that in mind, we turn to the specifics of this dispute.

II. The Injury Determination

8. The EC argues that the issue of likelihood of continuation or recurrence of injury is within the terms of reference of this Panel. The United States has already explained that injury was not part of the DSB recommendations and rulings and therefore is not properly part of this Article 21.5 proceeding.⁷ The EC has responded by stating that the issue “obviously” could not have been raised during the original proceedings; the EC later explains that “because changes to the subsidy rates resulted from the . . . revised subsidization findings, the European Communities

⁶ Second Written Submission of the European Communities, para. 2.

⁷ First Written Submission of the United States, paras. 14-17.

logically could not have argued at an earlier stage of WTO proceedings that the USDOC's redetermination of the subsidy rate required a reconsideration of the injury determination."⁸

9. The truth is, however, the EC simply neglected to include any claims, or even arguments, regarding injury in the underlying proceeding. As such, the EC cannot now use the expedited procedures of Article 21.5 to address injury. The DSB made no recommendations or rulings with regard to injury, and as a result, the injury determination remains an unchanged aspect of the original measure and is not a part of the measure taken to comply.

10. The posture of this case provides a good example of why Article 21.5 cannot be used to raise claims that could have been, but were not, raised in the underlying dispute. Here, the EC has waited until the implementation phase to raise, in a cursory fashion, important substantive issues concerning the relationship between the likely subsidy rate and the likely injury determination. The purposes of the DSU would be ill-served by allowing the EC to use this backdoor approach to challenge the validity of the likely injury determination, which the EC chose not to challenge in the underlying dispute.

11. The EC seems to believe (erroneously in the view of the United States), that a revised subsidy rate necessitates a revised injury determination.⁹ Nothing in Article 21.3 of the SCM Agreement (or Article 21.1 of the SCM Agreement, which the EC also cites) requires a calculation of a specific subsidy rate in order to determine whether injury is likely to continue or recur. Indeed, the Appellate Body has already concluded that injury in the SCM Agreement is not defined in relation to any specific level of subsidization, and that the terms "subsidization"

⁸ Second Written Submission of the European Communities, para. 23.

⁹ Second Written Submission of the European Communities, para. 60.

and “injury” each have an independent meaning in that Agreement, which is not derived by reference to the other.¹⁰

12. The Appellate Body has also found the parallel provisions of the Antidumping Agreement do not require the calculation of or reliance on an actual dumping rate in a sunset review in making a likely *dumping* determination,¹¹ let alone in making a likely *injury* determination. By analogy, the calculation of a subsidy rate is not even required to determine whether subsidization is likely to continue or recur, and by logical extension is not required to determine whether injury is likely to continue or recur. Given the absence of any requirements in the SCM Agreement for calculation of or consideration of a likely subsidy rate for a likely injury determination, nothing in the Agreement supports the EC’s view that Commerce’s revision of the likely subsidy rate necessitates reconsideration of the determination of the likelihood of continuation or recurrence of injury.

13. Furthermore, the ITC did not rely on the likely subsidy rates reported by Commerce in determining that revocation of the countervailing duty orders on cut-to-length carbon steel plate would be likely to lead to the continuation or recurrence of injury.¹² In light of this fact alone, there is no basis for the ITC to reconsider the likely injury determination using revised likely subsidy rates.

¹⁰ Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R, adopted 19 December 2002, para. 81.

¹¹ Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, para. 124.

¹² *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, USITC Pub. 3364 (Nov. 2000), at 25-33.

III. The Revised UK and Spanish Sunset Reviews

14. With respect to the sunset reviews on cut-to-length carbon steel plate from the United Kingdom and cut-to-length carbon steel plate from Spain, in implementing the recommendations and rulings of the DSB, Commerce assumed that the privatizations extinguished *entirely* the allocated subsidy benefit from pre-privatization subsidies. By making that assumption, and by revising the sunset reviews accordingly, Commerce fully complied with the DSB's recommendations and rulings. Commerce nevertheless found that countervailable subsidies were likely to continue or recur in the event of revocation, for reasons explained in our first submission.

15. The United States has previously discussed, in detail, why the EC's arguments regarding Glynwed (in the UK case) and recurring subsidy programs benefitting Aceralia (in the Spanish case) are not properly before this Article 21.5 Panel.¹³ Because those arguments have nothing to do with privatization, they are neither encompassed by the EC's request for the establishment of this Panel nor properly within the ambit of an Article 21.5 proceeding that concerns the implementation of recommendations and rulings as to Commerce's privatization methodology.

16. In an attempt to recast this dispute as one more akin to *Canada – Aircraft* than *EC – Bed Linen*, the EC offers the following semantic and unpersuasive argument: that Commerce did not issue *revised* determinations (the unrevised parts of which are not a measure taken to comply) – instead, Commerce, allegedly by its own “admission,” issued “new” determinations.¹⁴ (The EC admits, however, that the United States has also referred to these as “revised determinations.”)

¹³ First Written Submission of the United States, paras. 18-21.

¹⁴ Second Written Submission of the European Communities, para. 14.

But the EC ignores the fact that in *Canada – Aircraft* the Appellate Body itself characterized the “measure at issue [as] a new measure, the *revised . . . program . . .*”;¹⁵ so it remains unclear what the EC gains by distinguishing between “revised” and “new” determinations. In any event, the crucial fact is that the Commerce determinations in this dispute are no different from the “revised” determinations in *EC - Bed Linen*, and the unchanged parts of those determinations were not measures taken to comply.

17. In a further attempt to bring these issues within the ambit of an Article 21.5 proceeding, the EC argues that it “would have been impossible for the European Communities to raise the issues regarding the expiry of the UK and Spanish subsidy programmes in the original WTO proceedings inasmuch as those issues did not arise in the USDOC’s original sunset review determinations. . . .”¹⁶ A review of the record reveals this argument to be, quite simply, wrong.

18. The findings that subsidies continued to benefit Glynwed and that there were recurring subsidy programs in the Spanish case were, in fact, made in the original sunset reviews. Allow me to quote from the *Issues and Decision Memorandum* in the original sunset review:

The Department published the countervailing duty order on certain steel products from the UK, finding a net subsidy of 0.73 percent ad valorem for Glynwed Steels Limited . . . , and 12 percent for ‘all other’ British producers/exporters of the subject merchandise. . . . Domestic interested parties assert that most of the subsidy programs found countervailable in 1993 still benefit, or are likely to continue to benefit [British Steel’s], and in some cases, Glynwed’s, production of cut-to-length carbon steel plate. . . . 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

¹⁵ *Canada – Aircraft*, para. 36.

¹⁶ Second Written Submission of the European Communities, para. 4.

programs, it is reasonable to assume that these programs continue to exist and are utilized.”¹⁷

19. The EC, therefore, has a problem. The original sunset review expressly stated that Glynwed continued to be subsidized. The EC did not challenge Commerce’s conclusion to that effect in the underlying proceedings. If the EC is to have this Panel, as part of an Article 21.5 proceeding, *for the first time* examine the Glynwed issue, then the EC must find a way out of the fact that it failed to challenge that issue below. So the EC contrives the following argument: the revised determination uses “different reasoning.”¹⁸ And that allegedly different reasoning is that Commerce’s finding regarding Glynwed in the original sunset review was based on Glynwed’s failure to cooperate; whereas Commerce’s finding in the revised determination was not that Glynwed failed to cooperate but that Commerce had already made findings in the original sunset review regarding the existence of certain programs.¹⁹ But again, this distinction is erroneous: in fact, as the previous quotation indicates, Commerce decided in the original sunset review that Glynwed continued to receive countervailable subsidies, and Commerce relied on that conclusion in its revised determination. The EC did not challenge that conclusion in the underlying proceedings. The allegedly “different reasoning” is fictitious.

20. The EC also argues that the original and revised determinations are different because in the “sunset review determination considered in the original WTO proceedings, the USDOC

¹⁷ *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).

¹⁸ Second Written Submission of the European Communities, para. 17.

¹⁹ Second Written Submission of the European Communities, para. 17.

identified exclusively programmes that benefited *BS plc.*”²⁰ Again, a simple review of the *Issues and Decision Memorandum* reveals this allegation to be false: the domestic interested parties identified a subsidy program that benefitted Glynwed.²¹

21. The EC’s arguments regarding the Spanish case are equally flawed. The *Issues and Decision Memorandum* from the original sunset review lists the subsidy programs and then provides:

Without evidence that the programs have been terminated, that the benefits from programs for which benefits are allocated over time will not continue beyond this sunset review, or participation in this review of a foreign producer/exporter, we determine that revocation of the countervailing duty order is likely to lead to continuation or recurrence of a countervailable subsidy.²²

22. In sum, with regard to all of these reviews, the EC itself admits that it did not challenge these aspects of Commerce’s determinations during the proceedings before the original panel, and neither the original panel nor the Appellate Body considered them.²³ The EC argues that it could not have challenged them during the proceedings below because these are “*new* claims concerning components of the *new* measures which were not part of the original measure.”²⁴ Yet the discussion above reveals this statement to be false, and the EC’s claim that it is entitled to have recourse to Article 21.5 must fail.

²⁰ Second Written Submission of the European Communities, para. 19.

²¹ *Issues and Decision Memorandum in Cut-to-Length Carbon Steel Plate from the United Kingdom: Final Results of Expedited Review of Countervailing Duty Order* (Exhibit EC-6).

²² *Issues and Decision Memorandum in Cut-to-Length Carbon Steel Plate from Spain* (Exhibit EC-7).

²³ Second Written Submission of the European Communities, para. 15.

²⁴ Second Written Submission of the European Communities, para. 15.

IV. The Revised French Sunset Review

23. The EC challenges here the application of the Department of Commerce's revised privatization methodology. In only one of the twelve revised determinations occasioned by the DSB's recommendations and rulings in this dispute did the EC obtain a result other than that which would follow from a finding of full extinguishment of allocable, pre-privatization subsidies. That one case was the revised sunset review on corrosion-resistant carbon steel flat products from France.

24. In that case, in accordance with the recommendations and rulings of the DSB, where there was an arm's-length sale for fair market value, Commerce found that the benefit from all allocable, pre-privatization subsidies was extinguished by the privatization transaction. This was true for most of the shares in the French company under consideration (Usinor). Commerce also found, however, that the shares sold to the employees of Usinor were not sold at arm's-length or for fair market value. Commerce, therefore, found that the benefit corresponding to those shares was not affected by the privatization transaction and that a countervailable subsidy was likely to continue or recur if the countervailing duty order were revoked.

25. It is undisputed by the EC that Commerce's revised privatization methodology is fully consistent with the Appellate Body's findings. The Appellate Body found – and Commerce's revised methodology reflects – that, where the authorities examine “a benefit resulting from a prior non-recurring financial contribution bestowed on a state-owned enterprise,”²⁵ the authorities must take into account the impact of a privatization on the remaining subsidy benefit without

²⁵ Appellate Body Report, *United States - Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted January 8, 2003, para. 117 (“Appellate Body Report”).

regard to the ordinary legal distinction between a company and its owners.²⁶ The focus of the revised methodology is on whether the privatization transaction has extinguished the benefit from allocable, pre-privatization subsidies such that the “privatized producer” – meaning the company and its new owners²⁷ – has received no benefit. If the entire privatization is at arm’s length and for fair market value, Commerce presumes that the benefit from allocable, pre-privatization subsidies has been extinguished. If the entire privatization is not arm’s-length/fair market value, then *all* of the benefit from allocable, pre-privatization subsidies remains countervailable (except to the extent that it has already been countervailed).

26. Where only a portion of the company is not sold in an arm’s-length/fair market value transaction, it follows that only a corresponding portion of the benefit remains countervailable. The privatized producer has received something “for free” in that the government did not receive fair market value for all, or part, of the company.²⁸

27. The EC takes issue with this last inference, pointing out that the Appellate Body did not opine as to how to treat individual tranches in a multi-tranche privatization. The EC maintains, therefore, that only the *average price* paid by all purchasers may be considered for purposes of the arm’s-length/fair market value analysis.²⁹ The EC takes a curious position; apparently, only that which is expressly authorized by the Appellate Body is permitted. Needless to say, the United States strongly disagrees with that view. Moreover, none of the specific facts of the

²⁶ Appellate Body Report, paras. 118-119.

²⁷ See Panel Report, *United States - Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, as modified by the Appellate Body, adopted 8 January 2003, paras. 7.54, 7.72.

²⁸ Cf. Panel Report, para. 7.72.

²⁹ Second Written Submission of the European Communities, para. 30.

various privatizations were at issue before the Appellate Body. Rather, the issues before the Appellate Body were limited to the WTO-consistency of Commerce's now-discarded privatization methodologies, especially the "same person" methodology.³⁰ For purposes of determining whether the benefit from allocable, pre-privatization subsidies passes through to the new owner, the same person methodology did not take into account how the privatization transaction was conducted or what was paid by the private purchaser. Consequently, it is understandable that the recommendations and rulings leave open the precise methodology to be used in determining whether fair market value was paid in an arm's-length transaction. In addition, there is no language in the SCM Agreement that might be cited in support of the EC's approach.

28. As the panel below made clear, however, the key issue is whether the purchaser received something "for free" by not having to pay fair market value in an arm's-length transaction. The fact that some of the transactions considered in the revised French sunset review were found to be at arm's-length and for fair market value does not negate Commerce's finding that the sales to company employees were neither at arm's-length nor for fair market value, and thus does not undermine Commerce's conclusion that the employees received something "for free." Furthermore, the EC's proposed averaging approach ignores the arm's-length issue and treats fair market value as a purely quantitative issue. Consistent with the recommendations and rulings, Commerce's fair market value analysis under the revised privatization methodology is not purely

³⁰ Appellate Body Report, para. 49.

quantitative – Commerce considers several “process-oriented” factors in its analysis, including limitations on the purchaser pool and the nature of the bidding process itself.

29. The EC also maintains that Commerce’s factual determinations in the revised French sunset review are unsupported, especially those that concerned the sale of shares to Usinor employees. The EC cites paragraph 84 of the Appellate Body Report to the effect that the United States admitted in the underlying proceedings that these sales were at arm’s length and for fair market value.³¹ The EC neglects to point out that, in a footnote to paragraph 2 of the Appellate Body Report, the Appellate Body stated as follows: “USDOC has made no admissions as to the conditions of sale surrounding the other privatizations at issue.”³² This statement explicitly encompasses “Case No. 9,” the case that led to the revised French sunset review.

30. In challenging Commerce’s finding that the sale of shares to Usinor employees was not at arm’s length, the EC argues that Commerce should have focused on the relationship between the seller and the buyers *after* the privatization, not the relationship between them during the privatization transaction itself.³³ This position reverses the logic of the recommendations and rulings. The recommendations and rulings focused on whether the privatization *transaction* extinguishes the benefit from allocable, pre-privatization subsidies. As the panel below asserted, “a privatization at arm’s-length and for fair market value extinguishes the benefit to the privatized producer, which benefit the market has valued when assessing the fair market price

³¹ Appellate Body Report, para. 37.

³² Appellate Body Report, para. 2, n.4.

³³ Second Written Submission of the European Communities, para. 39.

which the privatized producer has fully paid for *upon the privatization*.³⁴ Thus, what happens after the privatization is plainly irrelevant to the arm's-length determination, as it is to all other aspects of the privatization methodology.

31. The EC also misconstrues the logic underlying Commerce's finding that the sale of shares to Usinor employees was not at arm's length, arguing that the preferential rates offered to employees were the sole basis of the finding.³⁵ Commerce was clear, however, that the first step in its arm's-length analysis was the relationship between the company and its employees.³⁶ That relationship was unarguably one of affiliation. Commerce's second step was to consider whether the price charged the affiliated party was different from what it would have been absent the affiliation. It is in the latter respect that Commerce relied on the "preferential" nature of the employee sales. And the EC has provided no factual basis for second-guessing Commerce's conclusion that the share price made available to Usinor employees was affected by their relationship with the company.

32. The EC further misses the mark by claiming that Commerce's arm's-length analysis should have focused on the relationship between the French government and the employees, not Usinor and the employees. It is more than a bit ironic that the EC – which *completely collapsed* the distinction between a company and its owners when it challenged Commerce's "same person" methodology – now relies on a clear-cut distinction between the company (Usinor) and

³⁴ Panel Report, para. 7.76 (emphasis added).

³⁵ Second Written Submission of the European Communities, para. 42.

³⁶ See *Issues and Decision Memorandum for the Section 129 Determination: Corrosion-Resistant Carbon Steel Flat Products from France; Final Results of Expedited Sunset Review of Countervailing Duty Order* at 6 (Exhibit EC-4).

its owner (the Government of France) for purposes of questioning Commerce’s analysis of the arm’s-length issue.³⁷

33. As to the EC’s challenge to Commerce’s determination that the employee shares were not sold for fair market value – which is based on the EC’s claim that the lower price of the employee shares simply reflected the resale restrictions on those shares – the United States emphasizes before this Panel that, in both of the EC’s written submissions, the EC (1) avoids explaining how the price charged for the employee shares was determined, thereby declining to put into any context the seller’s basis for having characterized the sales to employees as “preferential” and (2) fails to cite to any evidence on the record to support its assertion that the resale restrictions on the employee shares fully account for their preferential price.³⁸ Thus, the EC has cited no evidence to contradict Commerce’s conclusion that the sales to company employees were, in fact, priced at less than the market-clearing level, which was a key element in Commerce’s determination that the employee shares were privatized for less than fair market value.

V. Conclusion

34. The United States has fully implemented the recommendations and rulings of the DSB in this dispute. With respect to the Usinor privatization – the only substantive matter that is properly before this Panel – Commerce’s conclusion that the employee sales did not satisfy the arm’s-length/fair market value standard comports with the recommendations and rulings of the

³⁷ Second Written Submission of the European Communities, para. 43. Cf. Panel Report, para. 7.54.

³⁸ See Second Written Submission of the European Communities, para. 46.

DSB, as does Commerce's finding that a corresponding amount of the remaining benefit from pre-privatization subsidies was not extinguished by the privatization.

35. We will be happy to answer any questions that the Panel may have. Thank you.