

*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 Answer of Brazil to the Question from the Panel
in Connection with the Substantive Meeting**

March 18, 2005

Q. In paragraph 5 of its Oral Statement, Brazil asserts that "[t]he U.S. error [of failing to make a determination on privatisation] was immediately compounded by the fact that, having not made a determination on the effect of the privatisations, it automatically failed to limit the countervailing duties applied under the reviewed orders by taking into account the elimination of benefits resulting from the privatisations. Again, this is an obligation clearly identified by the Appellate Body in its report and formed part of the U.S. obligation to bring its measures into compliance". Please clarify where in that Report the Appellate Body identifies the obligation to "limit the countervailing duties applied under the reviewed orders by taking into account the elimination of benefits resulting from the privatisations"?

1. Brazil's answer is flawed for two reasons. First, Brazil's conclusion that Article 19.4 means that "any new subsidy *finding* that a benefit has decreased should trigger a reassessment of duties levied and an adjustment according to that finding" reveals a fundamental misapprehension of the purpose of a sunset review. The United States conducts its sunset reviews on an order-wide basis, an approach the Appellate Body has found consistent with Article 11.3 of the Antidumping Agreement, the provision analogous to Article 21.3 of the SCM Agreement. The result of an order-wide sunset review is either revocation or continuation of the order. The sunset review does not affect the duties levied. Once an order has been issued, only an assessment review can affect the rate at which the duties are levied – and respondents have the option to seek such a review on an annual basis, *i.e.*, well before the sunset review is initiated.

2. In addition, Brazil misconstrues the findings in the underlying proceeding regarding privatization. The language Brazil quotes must be read in the context in which the proceedings occurred. The EC only challenged Commerce's analysis of pre-privatization, non-recurring subsidies. Therefore, the Appellate Body concluded that continuing an order in a sunset review, *where predicated* on a privatization analysis, required examination of the conditions of such privatization to determine whether the privatized producers received any benefit from the prior subsidization. The Appellate Body did not draw the broader conclusion that in sunset reviews Members are compelled to make company-specific findings.

3. In taking measures to comply, the United States ensured that, where continuation of the order was predicated on a privatization analysis (*e.g.*, the French review), such analysis was conducted to examine whether the privatized producers continued to receive a benefit from prior

subsidization. Continuation of the British and Spanish orders is no longer predicated on a privatization analysis. Therefore, continuing the order does not require a determination as to whether the privatized producers received any benefit from prior subsidization.