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UNITED STATES – COUNTERVAILING MEASURES CONCERNING CERTAIN PRODUCTS FROM THE EUROPEAN COMMUNITIES

Request for Further Consultations by the European Communities

Addendum

The following communication, dated 1 February 2001, from the Permanent Delegation of the European Commission to the Permanent Mission of the United States and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

The European Communities refers to the consultations held on 7-8 December 2000 concerning the change in ownership methodology applied by the United States Department of Commerce ("DOC") in a number of countervailing measures as set out in the European Communities' request for consultations dated 27 November 2000 (WT/DS212/1, G/L/415, G/SCM/D37/1). The European Communities hereby request further consultations with the Government of the United States of America. The European Communities consider that the application by the US of a new[1] "*change in ownership"* methodology ("the DOC's new change in ownership methodology"), and the imposition of countervailing duties based on it, are in breach of Articles 10, 14, 19 and 21 of the SCM Agreement, for the same reasons as the previous methodology, since, *inter alia,* there is no proper determination of a benefit to the producer of the goods under investigation, as required by Article 1.1(b) of the SCM Agreement. This new methodology was set out in several remand determinations that resulted from DOC's request for court remands following the decision of the US Court of Appeals for the Federal Circuit in *Delverde S.r.l. vs. United States, 202 F. 3d 1360 – Fed. Cir. 2000*), *inter alia,* Final Results of Redetermination Pursuant to Court Remand, Acciai Speciali Terni S.p.A. v. United States - Court No. 99-06-00364 (December 19, 2000) ("the AST remand redetermination"). The methodology is, the European Communities understand, based on § 771(5)(F) of the Tariff Act of 1930 (19 USC § 1167(5)(F)).

The European Communities wish to discuss, in particular, the definitive results of an administrative review which led to the continued imposition of countervailing duties on imports of Grain-Oriented Electrical Steel from Italy ("the *GOES* case"), produced and exported by Acciai Speciali Terni S.p.A. (AST) [2], on 12 January 2001. The US case number is C-475-812; (66 FR 2885 of 12 January 2001). The rate of countervailing duty assigned by the US Department of Commerce

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[1] Although the Communities, as a matter of convenience, use the term "new" to describe this methodology, we note that it is remarkably similar to the methodology used by the DOC prior to its adoption of the "gamma" methodology in 1993. See Paragraphs 9-11 of the EC's first submission to the panel in the *UK lead and bismuth* case (WT/DS138/R).

[2] ILVA S.p.A. (old, state-owned) was demerged on 31 October 1993. Two new companies were created: ILVA Laminati Piani S.r.l. (ILP) and Acciai Speciali Terni S.r.l. (AST). In December 1994, AST was sold at arm's length for fair market value to KAI Italia S.r.l.

("DOC") for AST was 14.25 % *ad valorem* [3]. DOC's final determination in this countervailing duty case uses the DOC's new change in ownership methodology.

The above countervailing duty was determined on the basis of alleged subsidies which derived from financial contributions made by the Italian Government to the state-owned Italian steel industry prior to the fair market value privatization of AST in December 1994. The DOC, in conducting this investigation, has never properly examined whether these financial contributions conferred a benefit to the privatized AST, the producer and exporter of the subject goods during the investigation period (1998). Instead, it simply presumed, on the basis of criteria set out in the AST remand redetermination referred to above, that the current producer of the subject merchandise and the state-owned company which received the subsidies are the "same person".

Under the new change in ownership methodology, once this "same person" condition is satisfied, the DOC assumes that 100% of pre-privatization subsidies automatically pass through to the privatized firm. This approach continues to be based on the presumption that pre-privatisation financial contributions somehow live in assets, automatically travelling with them wherever they may be sold, which is inconsistent with the conclusions of the WTO Appellate Body in "*United States – Imposition of Countervailing duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom" (AB-2000-1) ("UK Lead and Bismuth")*, adopted by the DSB on 7 June 2000. This finding lays down the conditions in which the DOC must find that a change of ownership eliminates any benefit to the private producer from past financial contributions to a state-owned entity.

In the *GOES* case, the DOC has never examined whether the privatized AST itself has received a benefit. Under its new methodology, it has simply concluded that the privatized AST and the state-owned firm are the "same person". The *UK Lead and Bismuth* findings preclude this approach, since they direct the DOC, in the case of a change of ownership, to re-examine the existence of a benefit once payment of consideration has been made. Furthermore, the evidence on the record demonstrates that AST was privatized for fair market value. The European Communities therefore consider that DOC's failure to demonstrate that any benefit, and therefore any subsidy, was conferred to the privatized AST from the previous financial contributions made by the Italian Government to its state-owned steel industry, should have led to the immediate revocation of the countervailing duty order imposed on the subject merchandise.

Without prejudice to the above, even if the privatization were not to have occurred for fair market value, the European Communities submit that the DOC has still erroneously calculated the amount of any outstanding subsidy. The DOC, instead of assuming 100% pass through of previous financial contributions and benefits to a state-owned producer, should have made its calculation on the basis of Article 14(d) of the SCM Agreement *i.e.* on the basis of the amount by which the price paid for the producer and exporter of the subject merchandise constituted "less than adequate remuneration".

Given that DOC has stated that the its new change-in-ownership methodology will apply to all the outstanding cases involving a change of ownership, the European Communities request consultations on the above methodology itself, together with the controlling statute, § 771(5)(F) of the Tariff Act of 1930 (19 USC § 1677(5)(F)), as well as its specific applications in the *GOES* case.

[3] These consultations relate to the countervailing by the US of alleged financial contributions made prior to AST's privatization such as (1) Equity infusions to TAS and ILVA; (2) Debt forgiveness: 1988-90 Restructuring Plan; (3) Debt forgiveness: 1993-94 Restructuring Plan; (4) Pre-Privatization Retirement Benefits Under Law 451/94 for ILVA Residua. These amount to at least 13.31 % of the 14.25% countervailing duty.

This request is without prejudice to the issue of the countervailability of certain government measures which have been subjected to countervailing duties by the DOC in the current case.

We look forward to receiving your reply to this request and to fixing a mutually acceptable date for consultations.