

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

Request for the Establishment of a Panel by the European Communities

The following communication, dated 8 August 2001, from the Permanent Delegation of the European Commission to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

The European Communities hereby requests the establishment of a panel pursuant to Articles 4 and 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 30 of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) and Article XXII of the General Agreement on Tariffs and Trade 1994 with respect to the practice of the United States of America of imposing countervailing duties on certain products exported from the European Communities without establishing the existence of a financial contribution or a benefit to the producers under investigation and hence the existence of a countervailable subsidy as defined in the SCM Agreement. These duties have been imposed after privatisations or changes of ownership in reliance, *inter alia*, on § 771(5)(F) of the Tariff Act 1930 (19 USC § 1167(5)) and are based on an incorrect analysis of the existence of a countervailable subsidy benefiting the producer concerned during the period of investigation or review.

On 10 November 2000 and on 1 February 2001, the European Communities requested consultations with the United States on the above matter with a view to reaching a mutually satisfactory solution¹. Consultations were held on 7 December 2000 and 3 April 2001 in Geneva but have not led to a satisfactory resolution of the matter.

The full factual background is set out in the requests for consultations. Despite the interpretation of the SCM Agreement developed by the Appellate Body and Panel in *United-States – Imposition of countervailing duties on certain hot-rolled lead and bismuth carbon steel products originating in the United Kingdom*², the United States, when imposing countervailing duties on a producer, fails to examine whether there is a subsidy to the producer concerned in circumstances where a financial contribution was granted to a previous owner of a company or its productive assets and there has been a change of ownership or privatisation thereof at arm's-length for fair market value.

¹ Docs WT/DS212/1, G/L/415, G/SCM/D37/1 of 27 November 2000 and WT/DS212/1/Add.1, G/L/415/Add.1, G/SCM/D37/1/Add.1 of 6 February 2001

² Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("United States – Leaded Bars"), WT/DS138/R, adopted 7 June 2000, as upheld by the Appellate Body Report, WT/DS138/AB/R.

The United States continues to levy countervailing duties based on what the United States has called its "change-in-ownership methodology", which was found inconsistent with the United States' WTO obligations in *United States – Leaded Bars* (the "old change-in-ownership methodology").

The United States authorities have also applied what they claim is a "new change-in-ownership methodology" to certain European Communities producers. This new change-in-ownership methodology has been applied, *inter alia*, in the final results of an administrative review concerning *Grain Oriented Electrical Steel from Italy*, one of the measures on which consultations have taken place³. This new change-in-ownership methodology replicates the essential features of its predecessor which were found inconsistent with the United States' WTO obligations in *United States – Leaded Bars*. It ignores the consideration paid by the current producer in the privatisation or change of ownership, instead purporting to undertake an analysis of whether the buyer is "for all intents and purposes" the "same person" as the company which had received a financial contribution before privatisation. The United States has intimated that it will use this new change-in-ownership methodology in future countervailing duty investigations.

The European Communities considers, therefore, that the old change-in-ownership methodology still applied in 12 countervailing duty orders listed in Annex 1⁴, and the new change-in-ownership methodology applied, *inter alia*, in the administrative review in *Grain Oriented Electrical Steel from Italy*, and more generally the refusal of the United States to correctly apply the SCM Agreement, as interpreted by the Panel and Appellate Body in *United States – Leaded Bars*, are inconsistent with the United States' obligations under the WTO Agreement. In particular, but not necessarily exclusively, the European Communities requests a panel to examine the consistency of these measures with the following provisions:

- Articles 1.1, 10, 14(d) of the SCM Agreement insofar as these articles require an authority to establish the existence of a financial contribution and benefit (and hence a countervailable subsidy);
- Footnote 36 to Article 10 of the SCM Agreement which provides that countervailing duties may only be imposed in order to offset a subsidy bestowed upon the manufacture, production or export of any merchandise, as provided for in Article VI:3 of GATT 1994;
- Article 19.1 of the SCM Agreement which in particular provides that a countervailing duty may only be imposed if the existence of a subsidy has first been determined ;
- Article 19.3 of the SCM Agreement which in particular requires investigating authorities promptly to establish an individual countervailing duty rate for new exporters who were not subject to the original investigation;
- Article 19.4 of the SCM Agreement, which provides that no countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist calculated in terms of subsidisation per unit of the subsidised and exported product;
- Article 21.1 of the SCM Agreement, which provides that a countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidisation;

³ In other instances, the U.S. authorities have applied the new change-in-ownership methodology in the context of court-ordered remand determinations.

⁴ Since the request for consultations, one order has been terminated (Cold-rolled Carbon Steel Flat Products from Sweden C-401-401) and another order has been limited to recurring subsidies, pursuant to an agreement between the exporter concerned and DOC (Certain Pasta from Italy C-475-819)

- Article 21.2 of the SCM Agreement, which in particular requires investigating authorities to determine whether there is a continuing need for the application of countervailing duties in the light of the information before it;
- Article 21.3 of the SCM Agreement, which in particular provides that countervailing duties are to expire after five years unless it is determined that the expiry of the duty would lead to continuation or recurrence of subsidisation and injury;
- Article 32.5 of the SCM Agreement which requires Members to ensure the conformity of their laws, regulations and administrative procedures with the provisions of the SCM Agreement; and,
- Article XVI.4 of the WTO Agreement, which requires Members to ensure the conformity of their laws, regulations and administrative procedures with their obligations as provided in the annexed Agreements.

Moreover, the European Communities considers that § 771(5)(F) of the US Tariff Act of 1930, to the extent that it allows the Department of Commerce to impose countervailing duties without assessing the existence of a countervailable subsidy after a privatisation or change of ownership, is also inconsistent with the United States' obligations under the above provisions of the WTO Agreement.

The European Communities requests that the panel be established with the standard terms of reference.

Annex 1**US Change-in-Ownership methodology**

There are 12 US CVD orders involved, although in one case, *Grain-Oriented Electrical Steel from Italy*, two measures – an administrative and a sunset review – are under dispute. The DOC file number is given in each case.

For each order, the full reference of the measure concerned is set out in the requests for consultations. Documents WT/DS212/1, G/L/415 , G/SCM/D37/1 of 27 November 2000 ("1st request") and WT/DS212/1Add.1, G/L/415/Add.1, G/SCM/D37/1/Add.1 of 6 February 2001 ("2nd request") refer. Unless otherwise stated, all page numbers refer to the 1st request and "SC" refers to "Specific Case", as used in the first request.

Original imposition of countervailing duties (post-WTO measures)

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| 1 | Stainless Sheet and Strip in Coils from France <i>Page 4 SC No 1</i> | C-427-815 |
| 2 | Certain Cut-to-Length Carbon Quality Steel from France <i>Pages 5-6 SC No 2</i> | C-427-817 |
| 3 | Certain Stainless Steel Wire Rod from Italy <i>Page 7 SC No 4</i> | C-475-821 |
| 4 | Stainless Steel Plate in Coils from Italy <i>Page 8 SC No 5</i> | C-475-823 |
| 5 | Stainless Steel Sheet and Strip in Coils from Italy <i>Page 9 SC No 6</i> | C-475-825 |
| 6 | Certain Cut-to-Length Carbon-Quality Steel Plate from Italy <i>Pages 10-11 SC No 7</i> | C-475-827 |

Administrative reviews

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| 7 | Cut-to Length Carbon Steel Plate from Sweden <i>Pages 12-13 SC No 9</i> | C-401-804 |
| 8 | Grain-Oriented Electrical Steel from Italy * | C-475-812 |

Sunset reviews

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|----|---|-----------|
| 9 | Cut-to-Length Carbon Steel Plate from United Kingdom <i>Pages 15-16 SC No 11</i> | C-412-815 |
| 10 | Certain Corrosion-Resistant Carbon Steel Flat Products from France <i>Pages 16-17 SC No 12</i> | C-427-810 |
| 11 | Cut-to-Length Carbon Steel Plate from Germany <i>Pages 17-18 SC No 13</i> | C-428-817 |
| 12 | Cut-to-Length Carbon Steel Plate from Spain <i>Pages 18-19 SC No 14</i> | C-469-804 |

* Definitive determination in administrative review in 2nd request ; final sunset results *Pages 14-15 SC No 10*.