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United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany

(AB-2002-4)

ORAL STATEMENT OF THE UNITED STATES

October 11, 2002

1. Good morning Mr. Chairman, members of the division. The United States appreciates this opportunity to present the views of the United States.

2. Our oral statement today is divided into two parts. In the first part of our statement, we address certain specific substantive and procedural issues raised in this case. In the second part, we address generally four major theories or themes that run through the EC's submissions, as well as the submissions of the third parties. These themes involve, first, attempting to create a presumption that all countervailing duty orders must terminate after five years; second, ignoring that countervailing duties are to remedy trade-distorting subsidies; third, extolling a teleological approach to treaty interpretation; and fourth, seeking to rewrite the "deal" reflected in the SCM Agreement.

There is No De Minimis Standard in Article 21.3

3. Let me turn now to some of the specific substantive and procedural issues raised in this case. I intend to confine most of my comments to arguments raised by the EC in its Appellee Submission concerning *de minimis*, since we address the EC's arguments concerning self-initiation and the "obligation to determine" in our Appellee Submission.

4. With respect to the issue of the application of a *de minimis* standard in sunset reviews, the Panel erroneously concluded that the *de minimis* standard applicable to countervailing duty investigations in Article 11.9 of the SCM Agreement is "implied" in Article 21.3 of that same Agreement and, thus, is applicable to sunset reviews. In essence, the Panel relied on a broad

rationale for a *de minimis* standard of its own devising, which it then used to form the basis for its conclusion that the *de minimis* standard of Article 11.9 is implied in Article 21.3. As demonstrated in the United States' Appellant Submission, this purely policy-based approach does not comport with customary rules of treaty interpretation, is inconsistent with prior panel reports, and resulted in the Panel impermissibly reading into Article 21.3 "words that are not there."[1]

5. The EC purportedly finds support for the Panel's flawed approach to treaty interpretation in the International Law Commission's commentary on draft Articles 31 and 32 of the *Vienna Convention*. According to the EC, the ILC commentary supports the proposition that "object and purpose" can trump the text and context.[2] The EC is wrong.

6. What the ILC commentary says is that there is a single, unitary rule, as opposed to a hierarchical rule, when it comes to treaty interpretation. Significantly, however, the ILC commentary describes the approach taken in what became Article 31(1) of the Vienna Convention as the "textual approach", and, referring to the jurisprudence of the International Court of Justice, stated that "the Court has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain."[3] Moreover, the Appellate Body has indicated – in a number of cases cited by the United States, but which the EC ignores – that treaty interpretation begins with the text.[4]

7. Ignoring the obvious ramifications of a textual approach – that is, that no *de minimis* standard is applicable in sunset reviews under Article 21.3 – the EC advocates a "rationale-based" approach. In this regard, the EC makes the same mistake as the Panel.

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[1]US Appellant Submission, paras. 6-47.

[2]EC Appellee Submission, para. 7.

[3]YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1966), Vol. II, pages 220-21.

[4]*See, e.g.,* US Appellant Submission, para. 2 (citing *India Patent Protection*); paras. 7, 37 (citing *US Shrimp*); para. 10 (citing *Canada Autos*); para. 20 (citing *Korea Dairy*).

8. According to the EC, the rationale for the *de minimis* standard is that it establishes the standard for "noninjurious subsidization".[5] However, this purported reasoning is solely of the EC's own devising, and leads to *a priori* reasoning. The EC's reasoning is as follows – because the drafters deemed a *de minimis* subsidy to be non-injurious, it should be deemed non-injurious for all purposes, and any interpretation of the SCM Agreement which does not arrive at this result is absurd. The fatal flaw in the EC's reasoning is the fact that there is no evidence that the drafters relied on an "injurious subsidization" rationale. Moreover, the SCM Agreement contains no such concept as "injurious subsidization".

9. As the Appellate Body has recognized, subsidization and injury are separate concepts defined by the Agreement.[6] Whether in fact subsidization is causing injury must be ascertained in light of the applicable provisions on determination of injury set forth in Article 15 of the SCM Agreement. The EC has not challenged the United States' likelihood of injury determination in this case.[7]

10. Furthermore, it is difficult to reconcile the EC's claim that the *de minimis* standard relates to the question of whether there is injury with the fact that the SCM Agreement has not one, but three different, *de minimis* standards.[8] Not only are there three standards, but the choice of which *de minimis* standard to apply depends on the level of economic development *of the exporting country*. It is difficult to see how a determination of injury to an industry in the importing Member from subsidized imports would or should depend upon the level of economic development in the exporting Member.

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[5]EC Appellee Submission, paras. 14-16.

[6]*See UK Lead Bar* (AB Report), paras. 53-54, 61; *see also* Panel Report, para. 6.10 (dissent).

[7]EC First Panel Submission (13 December 2001), para. 30, n.28.

[8]*See* SCM Agreement, Articles 11.9, 27.10(a), and 27.11.

11. Aside from the fundamental flaws in the EC's reasoning, the EC has failed to address or rebut numerous U.S. arguments.

12. For example, the United States demonstrated that where the drafters sought to have obligations set forth in one provision apply in another context, they did so expressly.[9] Specifically, Article 21.3 and the SCM Agreement contain multiple instances where obligations set forth in one provision are made applicable in another context by means of express cross-reference. The SCM Agreement is also replete with explicit statements on the scope of application of particular provisions. If the drafters had intended to make the Article 11.9 *de minimis* standard applicable in Article 21.3 sunset reviews, they could easily have done so. They did not.

13. The EC would have the Appellate Body believe that the absence of a specific cross-reference can be explained by the drafters' belief that it is "obvious" the Article 11.9 *de minimis* requirement applies in Article 21.3 sunset reviews.[10] The EC is wrong. The only thing that should be considered "obvious" in the context of treaty interpretation is what is stated in the text of the treaty itself, which, in this case, is that Article 11.9 does not apply to Article 21.3 sunset reviews.

14. The EC also suggests that the United States reliance on the phrase "For the purpose of this paragraph" in Article 11.9 is misplaced because the purpose of the phrase is to differentiate the one percent *de minimis* standard for developed countries from the higher thresholds for developing countries. According to the EC, this interpretation is confirmed by comparing Article 11.9 of the SCM Agreement with the parallel provision in the AD Agreement, Article 5.8.[11] The EC is wrong again. With respect to Article 5.8 of the AD Agreement, even in the absence of the

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[9]US Appellant Submission, paras. 14-20.

[10]EC Appellee Submission, para. 29.

[11]EC Appellee Submission, paras. 30-31.

phrase in question the *Korea DRAMs* panel stated that the Article 5.8 *de minimis* standard does not apply beyond the investigative stage.[12] Furthermore, the EC makes no attempt to distinguish the *Indonesian Autos* panel's interpretation of an analogous phrase.[13] Finally, even if, as the EC posits, the phrase in Article 11.9 is referring to the additional *de minimis* standards set forth in Article 27.10, Article 27.10 appropriately provides context for interpreting Article 11.9 by expressly refering to investigations. The United States made this very point in its Appellant Submission, noting that the dissent reached a similar conclusion.[14] The EC has failed to rebut this argument.

15. Finally, the EC's discussion of the Panel's consideration of negotiating history is grossly distorted, as well as being incomplete. The EC's discussion is distorted because the Panel did not use the negotiating history to *confirm* the meaning of Article 21.3 under Article 31; rather the Panel used the negotiating history to *change* the meaning of Article 21.3.[15] Furthermore, the EC's discussion of the Panel's consideration of negotiating history is incomplete because it fails to address the United States' arguments concerning the inadequacies of the analysis of the 1987 Secretariat Note – such as that the Note provides little evidence of the thinking of negotiators because it was prepared at a very early stage of the negotiations, and that the Note reveals not one, but two theoretical justifications for the *de minimis* concept. Simply asserting that the Panel's analysis of the negotiating history was correct does not make it so.[16]

U.S. Law, As Such, Is Consistent With the Obligation to Determine Likelihood

16. Let me turn briefly to the issue of the "obligation to determine" likelihood of continuation or recurrence of subsidization under Article 21.3. The Panel correctly found that U.S. law, as

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[12]US Appellant Submission, paras. 27-29, discussing *Korea DRAMs*, para. 6.87.

[13]US Appellant Submission, para. 25, discussing *Indonesian Autos*, para. 14.210.

[14]US Appellant Submission, para. 24.

[15]US Appellant Submission, paras. 34-44.

[16]EC Appellee Submission, para. 32 ("[T]he recourse by the Panel to the negotiating history of the SCM Agreement appears as a pertinent interpretative mean [sic].").

such, is consistent with the SCM Agreement in respect of this "obligation to determine". I would like to make just one point, which is related to U.S. domestic jurisprudence, that supports the Panel's findings on this issue. U.S. judicial opinions obviously are of considerable importance in deciding what U.S. law does or does not require given that, under the U.S. Constitution, the judiciary has the final say on what the law is.

17. In a recent ruling by the U.S. Court of International Trade involving the sunset review of the very case that is now before the Appellate Body, the court found that the administering authority – Commerce – has an obligation to support its ultimate determination with substantial evidence on the administrative record. Since a U.S. court has said that Commerce has an obligation to determine likelihood of continuation or recurrence of subsidization – and in this case found Commerce to have acted inconsistently with that obligation – how can the EC credibly contend that U.S. law mandates action inconsistent with that obligation?

Procedural Issues

18. Turning now to the procedural issues arising out of claims allegedly contained in the EC's panel request, I don't intend to repeat the arguments we have made in our Appellant and Appellee Submissions. I would, however, draw the Appellate Body's attention to the portion of the Panel Report where the Panel characterizes the individual paragraphs of the EC's panel request. Specifically, paragraph 8.8 of the Panel Report states as follows:

> Paragraphs 1-2 of the request for establishment set out the procedural background to the request for establishment, paragraph 3 explains that the request relates particularly to the sunset review in carbon steel, paragraphs 4-7 set out the European Communities' claim in respect of the de minimis standard applied in that review, paragraphs 8-10 set out the European Communities' claim in respect of the evidentiary standards applied in relation to the initiation of that review, and paragraph 11 summarizes the European Communities' challenge to the US decision in that review, as well as to "certain aspects of the sunset review procedures which led to it"....[17]

[17]Panel Report, para. 8.8.

This is an accurate characterization of the EC's request and is the way that the United States interpreted the request. No reasonable, objective person could interpret the EC's panel request as raising claims about the obligation to determine or the obligation to provide ample opportunity to submit evidence.

Attempting to Overcome an Absence of Textual Support Through Creation of a Presumption Not Found in the Agreement

19. Unable to respond to the absence of textual support for its positions, the EC instead offers a number of theories intended to rewrite the SCM Agreement. Let me turn now to the first of the EC's theories – that Article 21.3 of the SCM Agreement creates a presumption of termination of countervailing duties after five years. This theory finds no support in the applicable provisions of the SCM Agreement properly interpreted in accordance with customary rules of treaty interpretation.

20. Article 21.3 states as follows: "[A]ny definitive countervailing duty shall be terminated on a date not later than five years from its imposition ... unless the authorities determine ... that expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury." The EC argues that the extension of a countervailing duty order beyond five years is an "exception" that must be stringently construed.[18] Alternatively, the EC suggests that Article 21.3 of the SCM Agreement creates a "presumption" that all countervailing duty orders must terminate after five years.[19] The EC is wrong on both counts.

21. There is no *temporal* limitation on the remedial relief from unfairly trade imports afforded by the countervailing duty provisions of the SCM Agreement – that is, the Agreement does not prescribe a maximum number of years for application of countervailing measures. Rather, under Article 21.3, there is a *conditional* limitation on the application of countervailing

[18]*See, e.g.,* EC Other Appellant Submission, para. 38; EC Appellee Submission, para. 23.

[19]*See, e.g.,* EC Other Appellant Submission, paras. 34-35; EC Appellee Submission, para. 23.

measures. The condition is that *if* the authorities determine that subsidization which causes injury is likely to continue or recur, *then* the authorities may continue to impose countervailing measures. *If* the authorities determine that subsidization which causes injury is not likely to continue or recur, *then* the authorities must terminate the order.

22. Article 21.3 plainly give authorities *the option* of either automatically terminating the definitive countervailing duty, *or* taking stock of the situation by conducting a review to determine whether continuation or recurrence of subsidization and injury is likely. Nothing in Article 21.3 or elsewhere in the SCM Agreement suggests a presumption as to how long countervailing duties may continue to be necessary or as to the final outcome of a sunset review.

23. Moreover, characterizing a sunset review or extension of a countervailing duty order beyond five years as some sort of "exception" does not alter the analysis of the SCM Agreement provision at issue here. As the Appellate Body has previously stated, "describing [or] characterizing a treaty provision as an 'exception' does not by itself justify a 'stricter' or 'narrower' interpretation of that provision than would be warranted by ... applying the normal rules of treaty interpretation."[20] On its face, Article 21.3 does not create a presumption of termination of countervailing duty orders after five years; nor does it set forth an "exception" to a presumption of termination. Rather sunset reviews are merely part of the overall balance of rights and obligations negotiated during the Uruguay Round.

Ignoring that Countervailing Duties Are to Remedy Trade-Distorting Subsidies

24. Let me turn now to the EC's second theme – that the United States' approach to *de minimis* and automatic self-initiation somehow undermines purported guarantees provided to exporters by Article 21.3 with respect to termination of countervailing measures and access to the United States' market. There are no such guarantees under the SCM Agreement.

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[20] *EC Hormones*, para. 104.

25. The SCM Agreement sets out a framework for addressing certain trade distorting practices. If such trade distorting practices are likely to continue or recur, the SCM Agreement, under Article 21.3, recognizes that it is appropriate to continue applying countervailing measures.

26. The EC argues, in essence, the exact opposite – that the role of the SCM Agreement is to ensure that countervailing duties "do not unjustifiably impede international trade".[21] In focusing on supposed trade effects of countervailing duties, the EC conveniently ignores that countervailing duties are a remedy to help address trade-distorting subsidies. Specifically, the EC argues that the United States' approach to initiation and *de minimis* "frustrates" and creates financial "uncertainty" for exporters because exporters expect or presume that an order automatically will terminate after five years.[22] As I will discuss in a moment, such expectation or presumption is a creation flowing directly from the EC's faulty approach to treaty interpretation. The SCM Agreement itself contains no such presumption.

27. The EC's arguments suggest an entitlement to undisciplined access for subsidized exports to other Members' markets. Exporters previously found to have been engaging in, or benefitting from, recognized trade distorting practices need only patiently sit out the market for five years. After five years the slate is wiped clean. Countervailing duty orders are presumed terminated and exporters are free to ship. As previously demonstrated, however, Article 21 of the SCM Agreement does not contain a presumption of termination of countervailing duties after five years. Furthermore, subsidized exporters are not entitled to have an undisciplined run at another Member's market after five years. If exporters continue to benefit from countervailable subsidies or are likely to start benefitting again from countervailable subsidies, the remedy afforded to the injured domestic industry may remain in place. (This assumes that there is also an affirmative finding of likelihood of continuation or recurrence of injury.)

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[21]EC Appellee Submission, para. 18.

[22]*See, e.g.,* EC Other Appellant Submission, paras. 34-35, 39; EC Appellee Submission, para. 35.

Extolling a Teleological Approach to Treaty Interpretation

28. The EC's third theory is that any provision of the SCM Agreement is potentially applicable *mutatis mutandis* to any other provision of the SCM Agreement.[23] According to the EC, the only limitation on this free-for-all application is that a provision must be "relevant" to the issues addressed by another provision and that its application "does not create a situation of conflict or is not specifically excluded."[24]

29. The EC's teleological approach to treaty interpretation suffers from several fatal flaws. First, as set forth in our Appellee Submission, paras. 11-14, it violates the principle of effectiveness by rendering the various cross-references and scope language of the SCM Agreement redundant. Second, and more generally, the EC's approach to treaty interpretation turns a customary rule of treaty interpretation on its head.

30. Article 31(1) of the *Vienna Convention on the Law of Treaties* reflect the customary rule of treaty interpretation that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the *terms* of the treaty in their *context* and in the light of its *object and purpose*" (emphasis added). The EC's approach to interpreting the SCM Agreement is the very antithesis of this customary rule. Rather than reading the words of a provision in its context and *in light of* the object and purpose of the SCM Agreement, the EC effectively calls for the ascertainment of the object and purpose of a particular provision of the SCM Agreement and then applying that object and purpose *in spite of* the ordinary meaning of the words.

31. First, the EC misreads Article 31(1). For the EC, Article 31(1) reads "in light of their object and purpose" as though particular treaty terms have an independent object and purpose. Instead, Article 31(1) is clear that the relevant object and purpose is that of the agreement as a

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[23]EC Appellant Submission, paras. 21-22.

[24]*Id.*, para. 21.

whole (the "its" – which is singular – in "*its* object and purpose" refers to the treaty as a whole, not to "terms" which is plural).

32. Second, the EC's approach runs afoul of the Appellate Body's admonition that "the treaty's 'object and purpose' is to be referred to in determining the meaning of the 'terms of the treaty' and not as an independent basis for interpretation."[25]

33. Moreover, the use of "purposes" to override the text of the SCM Agreement operates to circumvent the requirement in DSU Article 3.2 that Dispute Settlement Body rulings cannot add to or diminish the rights and obligations provided in the covered agreements. Where the Members wished to have obligations set forth in one provision of the SCM Agreement apply in another context, they did so expressly. If accepted, the EC's approach would nullify the Members' expectations as *explicitly* expressed in the SCM Agreement.

Seeking to Rewrite the "Deal" Reflected in the SCM Agreement

34. Let me turn now to the fourth and final thematic point, which is that the EC's flawed approach to treaty interpretation does not just nullify Members' expectations, it confounds those expectations. To put it plainly, the EC is seeking to rewrite the "deal" reflected in the SCM Agreement.

35. In 1995, the United States amended its countervailing duty statute to include – for the first time – provisions for the conduct of sunset reviews of countervailing duty measures and provisions for a range of *de minimis* standards in countervailing duty investigations. The United States agreed to these new provisions subject to the conditions that were clear from the text that the new *de minimis* standards would be limited to investigations and that sunset reviews could be automatically self-initiated by authorities. The EC is trying to undo this deal seven years after the fact.

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[25] *Japan Taxes*, page 11, footnote 20.

36. Under these circumstances, a portion of the Michael Lennard quote in the introduction of our Appellant Submission bears repeating: "The Vienna Convention rules represent the rules most generally agreed as best calculated to give effect to the language of a treaty, as the authentic expression of the negotiators' *collectively expressed* intent (the *consensus ad idem*) and to give confidence that promises between countries expressed in carefully constructed written terms can be relied on in international relations ... ."[26] As the WTO Membership embarks upon the new Doha negotiating round, it is more important than ever that WTO dispute settlement proceedings give effect to the *consensus ad idem* as expressed in the carefully constructed written terms of the WTO Agreements. Members will be less likely to conclude agreements to the extent dispute settlement proceedings are used to rewrite the terms of agreements years after the fact.

Conclusion

37. In summary, Mr. Chairman, for the reasons we have just stated as well as those in our written submissions, the United States respectfully requests that the Appellate Body reverse or affirm specific findings of the Panel as set forth in our Appellant and Appellee Submissions. We look forward to addressing any questions the Appellate Body may have over the course of this hearing. Thank you.

[26]US Appellant Submission, Introduction, quoting Michael Lennard, *Navigating by the Stars: Interpreting the WTO Agreements*, 5(1) J. Int'l Econ. L. (JIEL) 85-86 (2002) (emphasis in original).