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

WT/DS213

Oral Statement of the United States at the
First Meeting of the Panel

January 29-30, 2002

Mr. Chairman, Members of the Panel:

1. On behalf of the United States delegation, I would like to thank the Panel for this opportunity to comment on certain issues raised by the EC in its First Written Submission. We do not intend to offer a lengthy statement today; you have our written submission, and we will not repeat all of the comments that we made there. We will be pleased to receive any questions you may have at the conclusion of our statement.

2. Mr. Chairman, this proceeding presents three basic questions. The first is a purely legal question: Does the United States act inconsistently with Article 21.3 by self-initiating sunset reviews without regard to the evidentiary provisions of Article 11.6? The second is also a purely legal question: Does the United States act inconsistently with Article 21.3 by *not* applying the *de minimis* provisions of Article 11.9 in sunset reviews? The answer to both of these questions is no, for a simple, yet fundamental reason – it is impossible to act inconsistently with an obligation that does not exist.

3. I will return to these two issues in a moment, but first let me address the third question, which goes to the specific CVD determination at issue in this proceeding – Commerce's

determination that expiry of the countervailing duty on certain corrosion-resistant carbon steel flat products from Germany would be likely to lead to continuation or recurrence of subsidization. The question here is whether Commerce's determination was based upon an appropriately conducted review of all relevant and properly submitted facts. An "objective assessment" of Commerce's findings and actions supports an answer in the affirmative.

Commerce Properly Determined That Expiry Of The Duty Would Be Likely To Lead To Continuation Or Recurrence Of Subsidization

4. Article 21.3 defines the point in time at which the authorities must take stock of or terminate a duty – that is every five years. Article 21.3 also defines the circumstances under which maintaining a duty may be considered "necessary" – that is when continuation or recurrence of subsidization and injury is likely. An authority's decision to maintain a duty must be supported by evidence of these requisite circumstances.

5. Setting aside the issue of injury, which is not being challenged in this case, what does it mean to determine likelihood of continuation or recurrence of subsidization?

6. First, we consider, individually, the words establishing the circumstances under which maintaining a duty may be considered necessary. The word "likely" carries with it the ordinary meaning of "probable".[1] Where continuation or recurrence of subsidization is probable, this probability would then constitute a proper basis for entitlement to the continued imposition of a countervailing duty.

[1] *See Korea DRAMs*, para. 6.48, n.494.

7. The word "continuation" expresses a temporal relationship between past and future.[2] Something that happened in the past may continue in the future. An example might be where benefits from an untied, non-recurring financial contribution continue to flow.

8. The word "recurrence" also expresses a temporal relationship between past and future. Something that happened in the past may happen again in the future. An example might be where there was not a recent financial contribution under a particular subsidy program, but the program still exists and may be used in the future. In this situation, the existing program is a source for new financial contributions – in other words, its continued existence enables recurrence of subsidization.

9. Considered together then, these words indicate that determining likelihood of continuation or recurrence requires a consideration of future, rather than present, circumstances. What are the prospects of subsidization in the future? Without the discipline of the duty, is subsidization likely to continue or recur? The analysis required in a sunset review, therefore, is necessarily prospective in nature.

10. Support for this proposition is found in the text of Article 21.3 itself. As discussed in our First Written Submission, note 52 provides that a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty. This indicates that the current level of subsidization is not decisive as to whether subsidization is likely to continue or recur.

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[2] *See Korea DRAMs*, para. 6.27 (discussion of the word "continued).

11. In the sunset review involving German corrosion-resistant steel, Commerce found likelihood based on two unrefuted facts. The first fact is the continued existence and availability of countervailable subsidy programs previously found to have been used by German producers. The second fact is the continued existence of benefit streams from a countervailable subsidy program previously found to benefit German producers.

12. The EC argues that there are a number of factual and procedural flaws with Commerce's sunset determination, such that Commerce's determination is in violation of provisions of the SCM Agreement. In out First Written Submission, we address and rebut the EC's claims in greater detail. Today, I will only briefly touch upon the EC's two main claims. The first concerns the Capital Investment Grants, or CIG, Program; the second concerns whether the German producers and the EC were afforded "ample opportunity" to participate in the underlying sunset review.

13. At the outset, I would note that rather than demonstrating that Commerce's findings or procedural actions were inconsistent with the SCM Agreement, the EC's claims present essentially another view of the facts. However, Article 11 of the DSU directs panels to make an "objective assessment" of the facts of the case and of the applicability and conformity with relevant agreements. This "objective assessment" must necessarily focus on the consistency of the sunset review with the requirements of Article 21.3 and Article 12.

14. With respect to the CIG Program, the EC theorizes that, using Commerce's declining balance methodology, the benefits remaining from the program would be *de minimis*. You will recall that in the original investigation, Commerce found that German producers of corrosion-resistant steel benefitted from non-recurring grants under this program. In the sunset review,

Commerce found that benefit streams from the CIG grants would continue beyond the five-year period. While the EC's declining balance theories are not unreasonable, they only address half of the equation. In particular, it is not possible to calculate a particular rate of subsidization using this methodology without information concerning sales of the subject merchandise. The EC's claim presumes that sales volumes have remained constant, a presumption for which there is no evidence in the record.

15. In addition, the EC's argument in this regard is based partly on a calculation memorandum which Commerce properly declined to consider in the sunset review below. As we demonstrate in our First Written Submission, it is not appropriate for the Panel to now consider this business confidential document. Nevertheless, even if this document were appropriately part of the record before the Panel, it does not prove the EC's argument. This is because the memorandum only provides absolute subsidy amounts; it does not contain the information on sales volumes necessary to calculate the *ad valorem* rate of subsidization.

16. Nothing in the SCM Agreement requires consideration of the magnitude of subsidization in determining the likelihood of continuation or recurrence of subsidization. Furthermore, as the Appellate Body recognized in *UK Lead Bar*, benefits from a non-recurring subsidy continue to flow. As a result, Commerce's "continuation of subsidization" finding with respect to the CIG program is correct.

17. With respect to Commerce's procedural actions in the sunset review, the EC argues that Commerce did not provide an "ample opportunity" to present in writing all evidence which the parties considered relevant to the proceeding. As a factual matter, this assertion is simply incorrect.

18. Commerce's published *Sunset Regulations* contain the standard sunset questionnaire and provide an opportunity for parties to submit any argument and information they consider relevant to Commerce's sunset determination. Commerce's regulations also set a 30-day deadline for the submission of such information and provide for extensions of that 30-day deadline. The German Producers and the EC were on notice of these information requirements and options, as well as the applicable deadlines, at least *15 months* prior to the initiation date for the sunset review.

19. The EC has not demonstrated how Commerce's actions in this regard violate any of the evidentiary and procedural requirements of Article 12. Fifteen months certainly seems to provide "ample opportunity" to gather and present any evidence the German Producers and the EC considered pertinent to Commerce's sunset determination. I would also note that 15 months is longer than the normal deadline in Article 21.4 for the conduct and completion of sunset reviews. That the German Producers and the EC failed to avail themselves of the ample opportunity to present evidence is not a dereliction that can be ascribed to Commerce's procedural actions in this case.

It Is Impossible To Act Inconsistently With An Obligation That Does Not Exist

20. I will turn now to the two purely legal claims raised by the EC. The first claim is that an authority must satisfy the evidentiary requirements of Article 11.6 before self-initiating a sunset review under Article 21.3. The second claim is that application of the Article 11.9 *de minimis* standard in a sunset review is required under the SCM Agreement. As set out more fully in our First Written Submission, there is no support in the SCM Agreement for these claims.

21. Article 31 of the *Vienna Convention* contain some very basic principles of treaty interpretation. As articulated by the Appellate Body, these principles "neither require nor

condone the imputation into a treaty of words that are not there...."[3] The EC's arguments in this case run afoul of this fundamental proposition.

22. With respect to the self-initiation issue, the EC argues that the Panel should read into Article 21.3, the requirements of Article 11.6 – the provision of the SCM Agreement that deals with evidentiary requirements for self-initiation of an *investigation*. With respect to the *de minimis* issue, the EC argues that the Panel should read into Article 21.3, the requirements of Article 11.9 – the provision of the SCM Agreement that deals with the *de minimis* standard for an *investigation*. There is no support in the Agreement for the EC's theories.

23. With no textual foundation, the EC simply asserts that, under the SCM Agreement, sunset reviews are essentially nothing more than new investigations. It then takes that unsupported assertion and makes a further leap of logic to the conclusion that various provisions of Article 11 (addressing "Initiation and Subsequent Investigation") *must* therefore apply in sunset reviews carried out under Article 21 (addressing "Duration and Review of Countervailing Duties").

24. Japan, in its third party submission, makes an even more impressive leap of logic, arguing that Article 11 requirements are made applicable to Article 21.3 sunset reviews by virtue of the fact that Article 22 – which addresses "Public Notice and Explanation of Determinations" – applies to reviews under Article 21 (pursuant to paragraph 7 of Article 22). Apparently, according to Japan, the mere *mention* of Article 11 in Article 22.1 creates an obligation *to apply* Article 11 in Article 21.3 sunset reviews. I would also note that the provisions of Article 22

[3] *India Patent Protection*, para. 45.

apply "*mutatis mutandis*" to reviews. This means that the public notice and explanation provisions are applicable to reviews, but with "necessary changes" or "changes as appropriate."

25. Mr. Chairman, it goes without saying that treaty interpretation does not work that way. One cannot create a new set of international obligations through unsupported theories and unfounded suppositions that ignore the very words of the treaty being interpreted. It is well-accepted that, under the *Vienna Convention*, the ordinary meaning of a treaty is the basis for interpreting that treaty. The fact that the EC and Japan have to try so hard to find a connection between Article 11 and Article 21 is itself evidence of the lack of the very connection that they seek. Put differently, the United States agrees with the EC and Japan that Article 11 provides context for purposes of interpreting Article 21.3; but it is context that disproves their assertions.

26. As discussed in our First Written Submission, the drafters clearly knew how to cross-reference a particular provision to make it applicable in the context of Article 21 reviews. For example, Article 21.4 expressly makes the evidentiary requirements of Article 12 applicable in Article 21 reviews. Even Japan's argument proves the point – Article 22.7 makes the public notice and explanation requirements of Article 22 applicable in Article 21 reviews on a *mutatis mutandis* basis.

27. The uncontested fact is that the drafters did not make the initiation and subsequent investigation requirements of Article 11 applicable in Article 21 reviews. And no amount of lawyering can override the plain text of the SCM Agreement or create an obligation that does not exist. The Article 11.6 evidentiary prerequisite simply does not apply to Article 21.3 sunset reviews; and neither does the Article 11.9 *de minimis* standard.

28. The EC makes claims based on its "reasonable and legitimate expectations" on these issues; yet it is the legitimate expectations of the Members as a whole, as expressed in the agreed text of the treaty, that are at risk of being infringed in this case. As the Appellate Body has stated:

> The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these *principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended*.

(Emphasis added.)[4] If the Members had actually agreed that various provisions of Article 11 should apply in sunset reviews carried out under Article 21, the text would reflect that agreement, just as it does with respect to the application of Article 12 to Article 21 reviews. The EC is improperly trying to have the Panel do what the negotiators did not.

29. The EC is asking the Panel to read into Article 21.3 words, and hence obligations, that are not there. For this reason, the EC's claims concerning self-initiation and *de minimis* must fail.

30. This concludes our presentation today. We would be pleased to entertain questions from the Panel. Thank you.

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[4] *India Patent Protection*, para. 45.