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

WT/DS212

ANSWERS OF THE UNITED STATES OF AMERICA TO QUESTIONS FROM THE EUROPEAN COMMUNITIES AT THE SECOND SUBSTANTIVE MEETING

March 26, 2002

Question 1.

Does the United States agree with the factual description contained in paragraph 2 of the Appellate Body report and paragraphs 6.22 to 6.30 of the Panel report [description by the EC omitted]?

1. The United States did not take issue with the factual statements in the interim Panel report. We would caution, however, that the previous approach of the U.S. Department of Commerce ("Department" or "DOC") to changes in ownership of subsidy recipients did not depend on such a close analysis of the facts as its current methodology, so that all of the facts concerning these transactions that would be relevant to an application of that new methodology may not have been obtained by DOC or submitted to the Panel and Appellate Body. For example, it was not important under DOC's previous methodology whether the sales in question were for fair market value.

2. The United States does not agree, however, with the EC's distorted summary. For example, the producer in the first two years was UES -- not "BSplc with its interest in the UES joint venture." The producer in the third year was BSES, not "BSplc and its wholly owned subsidiary BSES." Moreover, the United States does not agree that any subsidies "traveled" anywhere as a result of any of the changes in ownership involved.

Question 2.

Was BSES a different legal person from BSplc? How would the same person methodology apply?

3. Because DOC's new person methodology was not in existence at that time and, therefore, was never applied to that particular factual situation, it is not possible to say whether DOC would have determined BSES to be a different person from BSplc. If confronted with the question of whether BSES and BSplc were the same person, DOC would apply the methodology explained in paragraph 79 of its First Written Submission to the specific facts of that proceeding.

Question 3.

Ignoring the issue of privatization, would the United States agree that even if BSES and BSplc were different legal persons (in the sense that they have distinct legal personality), the United States could have, and did, attribute benefits it considered to be conferred on BSplc to BSES?

4. As reflected in the Department's regulations, it is possible in certain carefully-limited situations for DOC to attribute subsidies nominally given to one legal person to another legal person. We note that DOC never decided whether BSplc and BSES were distinct legal persons. The United States attributed to UES, and then to its successor BSES, unamortized benefits from subsidies conferred on British Steel Corp.

Question 4.

Would the US agree that in situations where a subsidy received by an owner may be allocated to its subsidiary for the purposes of countervailing exports of the subsidiary, it would also be appropriate to ignore this distinction in considering whether the subsidy has been repaid?

5. "Ignoring" the company-owner distinction is never appropriate, and allocating benefits within a corporate group is not the same thing as ignoring the company-owner distinction. Subsidies to a corporate group (like the Usinor-Sacilor group in France or the ILVA group in Italy) often take the form of cancellation of the group's consolidated debts. The subsidy in such a case is in substance bestowed through the parent or holding company and to the various producers who are subsidiaries within the corporate group (and whose operations generated the debts in question).

6. Whether DOC would treat a repayment from a nominally-distinct owner as coming from a subsidiary depends on the specific facts of the situation. For example, where a subsidy was given to a holding company with no production of its own, and was allocated to a subsidiary of the holding company with production, DOC would treat the subsidy as having been indirectly provided to the subsidiary. Accordingly, if the holding company were to repay the subsidy with funds taken from the producer, DOC would treat that repayment as having come from the subsidy recipient and therefore as having eliminated the countervailable subsidy. These distinctions would be made on a case-by-case basis, depending on the specific facts presented to DOC. The Department would not consider it justified to conclude that the entire distinction between owners and companies, investors and producers, was meaningless, simply because it had not treated that distinction as controlling in one specific instance. *See* the United States' answer to Panel Question No. 23.

Question 5.

The United States refers, in its answer to question 14 from the Panel to the idea of the "fungibility of money"? Can the United States confirm that it bases its attribution of subsidies from a parent company to a subsidiary on this principle (see, for reference, § 351.525(b)(6) of the Final Rule - para. 16 of the European Communities second written submission.)?

7. The United States does base subsidy allocations, in part, on the principle that money is fungible, within certain groups of related persons. That does not mean that money may be treated as fungible between any two given entities. To take two obvious examples, money is not fungible between Daimler-Chrysler and Sony, or between the shareholders of IBM and IBM itself.

Question 6.

How is the relevance of the principle of fungibility of money taken into account in the distinction which the United States is claiming between the company and its owners for the purposes of the same person methodology?

8. As the United States explained at the meeting, the fact that money is fungible does not mean that there can never be a meaningful distinction between a company and its owners. This is particularly obvious in the case of Usinor-Sacilor, which, following its privatization, became a publicly-traded company with thousands of shareholders. The fact that money may be treated as fungible within certain tightly-interwoven groups of producers does not mean that it is fungible between Usinor-Sacilor and its shareholders.

Question 7.

The United States asserts, in its response to question 10 from the EC, that:

> *An asset sale that preserves intact the enterprise that earlier received subsidies may result in that enterprise continuing to face countervailing duties, even it its name has changed.*

In such an example, if the assets had been owned by A, and sold to B, surely, on the United States' own terms, the legal person exporting the goods would change. On what grounds could the United States continue to countervail products exported by B, unless its "same person methodology" is a proxy for a continuation of productive operations test?

9. A change in ownership structured as an asset sale could -- if it included all of the subsidy recipient's assets, rights, and obligations -- be equivalent in effect to a stock sale, leaving the subsidy recipient operating as a continuation of the same business enterprise but under a different name. In such a case, the post-change-in-ownership producer is for all intents and purposes the same as the pre-change-in-ownership producer (rather than, as in the cases currently before the Panel, literally the same as the pre-change-in-ownership producer). In any event, this hypothetical fact pattern has not yet been addressed under DOC's new methodology. As the EC and the Panel are well aware, continuity of productive operations is relevant, but not decisive, under that methodology.

10. The United States' answer referred to a sale nominally structured as purely an assets sale, but, in substance, a sale of the legal person that had received the subsidy. Such a case would be closer to the example in paragraph 19 than the example in paragraph 18 in the EC's Question 10. In most instances (the most obvious example being the dissolution of a company in bankruptcy) a sale of assets would result in the purchaser of those assets not being held liable for CVDs on

goods produced with those assets.

Question 8.

The European Communities is unclear as to how to read § 1677(5)(F). The United States has written

> *[§ 1677(5)(F)] makes it clear that DOC has the discretion to determine whether an arm's length, fair market value change in ownership does or does not result in a benefit to the post-privatised subsidy (answer to question 17 from the Panel para. 58)*

The United States has also written in its response to question 18 from the Panel

> *If an evaluation of all the facts and circumstances of a particular privatisation or a change in ownership warrants a finding that as a result of an arm's length, fair market value privatisation, the post-sale company does not enjoy a benefit from past subsidies, then such a finding can be made. There is nothing in the language of the change-in-ownership provision, or in the legislative history of that provision which would prevent DOC from making such a finding.*

Would § 1677(5)(F) constitute an obstacle to the United States applying the principle reflected in the second statement systematically?

11. If DOC were to find that a "company does not enjoy a benefit from past subsidies," then section 1677(5)(F) would not allow DOC to impose countervailing duties.

Question 9.

Can the United States explain its answer to the previous question in the light of footnote 3 to the Delverde decision of the Court of Appeals where the Court records:

> *Both parties [i.e. DOC and Delverde] tell us that the Change of Ownership provision was intended to overrule the decision of the Court of International Trade in Saarstahl [...]*

Given that in Saastrahl the CIT found that no benefit accrued after an arm's length, fair market value change of ownership, would the United States' agree that § 1677(5)(F) could not overrule the decision in Saarstahl if it did not give DOC discretion to continue countervailing duties even if no benefit accrued?

12. If DOC were to find that no benefit accrued to a company subject to a countervailing duty proceeding, either following a change in ownership or otherwise, Section 1677(5)(F) would not allow DOC to impose countervailing duties.