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

(WT/DS212)

Second Submission of the United States of America

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I. Introduction.

1. At this point in the proceeding, it is clear that the issue for this dispute is relatively straight-forward: if a company receives a subsidy – a financial contribution that confers a benefit – is that subsidy automatically removed when that company is transferred at fair market value to another owner? The answer is a clear no: if the company is the same person, and that company has done nothing to eliminate either the contribution or the benefit, the subsidy continues. The EC's responses to the questions of the Panel and the United States make clear that there is no credible argument for claiming that the sale of a company removes the subsidy.

2. Two main facts emerge from the EC's responses to the questions. First, the EC cannot explain how a new owner's payment of fair market value *for* a company automatically extracts previous subsidies *from* that company. Second, because the EC cannot solve this problem, it has attempted to define it away. The EC now asserts that subsidies are received by "economic entities," not (as the Appellate Body has found) legal persons. Although the EC does not define this new concept (or explain its origin), the EC's strategy is clear — if it can persuade the Panel to disregard the normal distinction between owners and companies by combining them into "economic entities," it might talk the Panel into treating money taken out of an owner's pocket as having been taken out of the company, potentially eliminating subsidies previously bestowed upon that company.

3. The United States will discuss each of these issues below. Given the elusiveness of the EC's position, however, the United States believes that it is useful first to re-emphasize the basic provisions of the SCM Agreement that govern the issue before the Panel.

4. The nature of countervailable benefits is made plain by Articles 1 and 14 of the SCM Agreement. A countervailable benefit is that part of a financial contribution that is obtained on terms more generous than what the recipient could have obtained commercially. For example, if a government sells raw materials worth $20 million to a producer for $15 million, the financial contribution to the producer is $20 million and the benefit to that producer is $5 million If a government grants a company $10 million in cash, the financial contribution and the benefit are both $10 million. There is no requirement to analyze the competitive advantage derived by the recipient from the benefit, or the extent to which the recipient succeeds in enjoying the benefit. These concepts are not found in the SCM Agreement. Countervailable benefits are, in essence, simply *fixed sums of money*, which (in the case of non-recurring benefits) are amortized over time.[1]

5. Because countervailable benefits, once identified and valued, are, essentially, amounts of money, the method by which they may be terminated is straightforward — that amount of money is amortized over time, unless the recipient pays back the remaining unamortized amount. The United States agrees that such a repayment could occur in conjunction with a change in ownership and, under its new methodology, investigates any claim that such a repayment has

[1] This is not to say that all countervailable benefits are received in the form of cash. However, value of a countervailable benefit is measured in terms of money, and thereby reduced to money.

occurred (or that the subject merchandise is being produced by a different person than the recipient). But the SCM Agreement provides no basis for concluding that a change in the ownership of a subsidy recipient, for fair market value or otherwise, automatically eliminates the benefit conferred on the company. The EC has offered no credible argument that the Panel should conclude otherwise. If a corporation has received a subsidy — a financial contribution that confers a benefit — the simple transfer of that corporation from one owner to another does not mean that the corporation no longer has the subsidy. Neither the financial contribution nor the benefit has changed, and the corporation is still the same person.

II. The EC's Responses to the Questions of the Panel and the United States.

6. The EC's responses to the questions of the Panel and the United States may be summarized as follows:

> The EC agrees that, generally speaking, subsidies may be allocated over time without inquiring into: (1) whether those subsidies have any effect on the "pricing, output, or profitability"of the recipient;[2] or (2) whether external factors (those not removing the subsidy from the company) may have prevented the recipient from taking full advantage of the subsidy during the allocation period.[3]
>
> Instead of explaining how the fair market value payment by a new owner extracts the subsidy from the company,[4] the EC is now de-emphasizing this argument.[5] The EC now stresses that a change in ownership triggers an obligation to re-examine the existence

[2] *See* EC Response to Panel Question No. 5 and U.S. Questions Nos. 1 (¶ 2) and 21.

[3] *See* EC Reponse to Panel Question No. 5 and U.S. Question Nos. 1 - 3 and 21.

[4] *See* EC Response to U.S. Questions Nos. 8, 22, and 23.

[5] The contrast between the EC's 1st Written Submission and their answers to the questions presented by the Panel and the United States is pronounced. Compare, for example ¶¶ 52, 64, 69, 72, 73, 132, 148, and 157 of the EC's 1st Written Submission, with the EC's response to U.S. Question No. 8. Although the answer is evasive, this plainly would have been the place for the EC to emphasize that the payment of fair market value eliminates prior subsidies, if the EC still wanted to emphasize this argument. *See also* the EC's response to Panel Question No. 3 (¶ 7), where the EC states that "[t]he fact that consideration was paid provides further evidence that the change in ownership was a genuine change in ownership . . . ." Note that "consideration" has been substituted for "fair market value." Although it has de-emphasized this argument, the EC continues to assert that the payment of fair market value eliminates the "competitive advantage to the recipient" from a subsidy, without explaining what this has to do with whether the subsidy itself continues. *See* the EC's responses to Panel Question No. 14 and U.S. Question Nos. 24 (at ¶ 33).

of subsidies[6] (a proposition about which there has never been any dispute before this Panel).

The EC appears to have dropped its argument that privatization terminates prior subsidies because the new private owners will extract the subsidy from the company.[7]

The EC acknowledges that there is a clear legal distinction between a company and its owner or owners.[8] However, the EC believes that it is "appropriate" to disregard this distinction for the purpose of analyzing the existence of subsidies.[9] The EC now apparently believes that the recipient of a subsidy is the "economic entity" responsible for the production of the subject merchandise.[10]

The EC acknowledges that, when a company is sold, it normally retains all of its corporate and regulatory liabilities,[11] and that this includes direct liability for CVDs.[12]

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[6] *See* the EC's responses to Panel Question No. 3: "The obligation to review the [CVD] determination was triggered by the change of ownership" (¶ 6); ". . . the critical factor for the re-examination was the *change in ownership*" (¶ 7); the EC's response to Panel Question 11 (¶ 15) concerning the 12 privatizations at issue, where the EC states that "[t]he European Communities considers that the *key factual element*, that is *a change of ownership from public to private hands*, which triggers the obligation to re-examine the existence of subsidisation, is present in all twelve cases" (emphasis added); and the EC's responses to U.S. Questions Nos. 24 (¶ 33), 25, and 26 (¶¶ 38 and 39).

[7] *Compare* the EC's 1st Written Submission at ¶¶ 70 - 73 with the EC's responses to U.S. Question Nos. 12 - 15.

[8] *See* the EC's response to U.S. Question No. 11.

[9] *See* the EC's response to Panel Question No. 9.

[10] *See* the EC's response to Panel Question No. 2 (¶4).

[11] *See* the EC's responses to U.S. Question Nos. 9 and 11.

[12] *See* the EC's responses to U.S. Question No. 10 (¶ 10). Such importers are often the subsidiaries of foreign steel producers. Thus, the EC acknowledges that, if a subsidized foreign steel producer with a subsidiary distributor in the United States were to be privatized, its U.S. subsidiary (which would remain the same person) would continue to be liable for any unpaid CVDs. As for CVDs on subsequent exports, however, the EC apparently believes that the U.S. subsidiary would no longer be liable for CVDs, because its parent (also still the same person) would no longer have a benefit from those subsidies.

The EC has abandoned its notion that a change in ownership transforms a subsidy recipient into a new legal person (that cannot be found to benefit from subsidies until the requirements of the SCM Agreement have been satisfied anew for that new person).[13]

The EC has admitted that there were two distinct persons in the *UK Lead Bar* case, and that the Appellate Body treated them as such.[14]

III. The EC Has Failed to Explain How the Payment of Fair Market Value *for* a Company Extracts a Subsidy *from* that Company.

7. Generally speaking, the EC's approach to this issue has been to fashion a superficially-appealing mantra -- "fair market value extinguishes subsidies" -- and then keep repeating it, while dodging specific questions about how this works and whether there is any basis for it in the Agreement. The EC had many different variations of this basic refrain, for example:[15]

> . . . an arm's length, fair market value transaction does not pass through any benefits from pre-transaction financial contributions to the post-transaction entity . . .[16]

> . . . pre-transaction benefits will not pass through to an entity as a result of an arm's length, fair market value privatisation . . .[17]

> . . . the purchaser does not obtain any benefit because the assets are acquired at fair market value. . . .[18]

> . . . there is no benefit to a post-transaction entity which has obtained ownership of the production facilities at fair market value. . . .[19]

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[13] *Compare* the EC's 1st Written Sub. at ¶¶ 10 - 12 with the EC's responses to U.S. Question Nos. 4 - 7.

[14] *See* the EC's response to U.S. Question No. 16. The EC tries to confuse the facts of this case, however. The subsidies in question were granted to British Steel. The subject merchandise upon which the United States charged countervailing duties was produced by UES. These were two distinct persons, and were treated as such by the Appellate Body.

[15] In addition to the formulations quoted in the text of this submission, see the EC's 1st Written Submission at ¶¶ 11, 16, 52, 64, 72, 132, 139, 148, 152, 155, 156, 162.

[16] 1st Written Submission of the EC, ¶ 7.

[17] 1st Written Submission of the EC, ¶ 57.

[18] 1st Written Submission of the EC, ¶ 69.

[19] 1st Written Submission of the EC, ¶ 157.

8. All of these formulations are vague about exactly how and why the payment of fair market value by *the new owner* of the subsidy recipient extracts the benefit from *the subsidy recipient itself.* The EC carefully avoided acknowledging that two persons — the purchaser and the company purchased — were involved,[20] because it did not want the Panel to inquire into exactly how the new owner's payment extracted the subsidy from the legal person that received the subsidy.

9. By keeping its argument vague (and later not answering direct questions on the subject), the EC may have hoped to leverage the intuitive appeal of the argument that a purchaser for fair market value itself receives no benefit from that purchase (a point about which there has never been any dispute here) into the conclusion that the purchase of a company for fair market value extracted the subsidies from that company.

10. As to *how* the payment of fair market value *for* the company extracts the subsidy *from* the company, the EC has nothing to say (other than changing the subject). Perhaps this is because the EC cannot explain why, if the payment of fair market value for a subsidized company wipes out 100% of those subsidies, the payment of 50% of fair market value should also wipe out 100% of those subsidies. Perhaps it is because the EC realizes that, if a distinct new person is carrying out the production in question following the privatization, it makes no sense to say that this person has any benefit from subsidies bestowed upon some completely different person, *regardless* of the price paid. Perhaps it is because the EC has realized that it was utterly ridiculous to assert that a change in the ownership of a company automatically transformed that company into a new legal person. Perhaps it is because the EC recognized that the argument that the new owners will always succeed in extracting higher profits from the company than the government was pure speculation. Whatever the reason, the EC plainly has nothing to add on the subject and does not want to discuss it.

11. Instead of addressing these issues, the EC is now emphasizing that a change in ownership triggers an obligation to re-examine the existence of a subsidy. There has never been any dispute about this proposition before this Panel. In *UK Lead Bar*, the Appellate Body found that the presumption that benefits are allocated over time could never be irrebuttable, so that an administering authority must always demonstrate that the current producer had a benefit under the SCM Agreement [21] Accordingly, under its new methodology, following a change in ownership, the United States examines whether the current producer has a financial contribution

[20] In the rare formulations where the EC does mention two entities (*see, e.g.*, ¶ 11 and ¶ 73 of its 1st Written Submission) this is in the context of its now-abandoned argument that a change in ownership automatically transforms the company sold into a new legal person. Note that, in ¶ 73, the EC reveals the internal inconsistency its now-abandoned theory. It says that "the post-privatisation entity has paid fair market value for its acquisition," when, in fact, under the EC's own theory, it was the "post-privatisation entity" that was acquired.

[21] *See United States - Imposition of Countervailing Duties on Certain Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted June 7, 2000, para. ¶ 62.

and a benefit, or whether the change in ownership has resulted in the contribution or benefit being repaid or cut off. The EC has offered nothing to suggest that this approach is inconsistent with the SCM Agreement.

IV. The EC's Attempt to Define Away the Distinction Between Company and Owner, by Substituting the Term "Economic Entity," Must be Rejected.

12. Because the EC cannot explain how the payment of fair market value by the new owner of a subsidized company extracts subsidies from that company, the EC has attempted to define the whole problem away. The EC now asserts that the admitted distinction between owners and companies[22] should be disregarded for the purpose of analyzing the existence of subsidies because subsidies are received by "economic entities."[23] Although the EC has not explained just what it means by "economic entity," the concept presumably is broad enough to encompass both owners and companies — investors and producers. The EC wants the Panel to embrace this new concept so that the Panel will treat money taken out of an owner's pocket as having been taken out of the company, potentially eliminating subsidies that reside in the company. If the subsidy is received by an "economic entity"(company/owner unit) *instead of the company*, it may be repaid by that same "economic entity" (company/owner unit), *instead of the owner.*

13. The EC's new argument must be rejected because the distinction between owners and companies is real and may not be ignored. The United States has demonstrated (and the EC does not dispute) that the distinction between companies and owners is fundamental in most jurisdictions, including the EC.[24] Given this fact, it is not possible to interpret the SCM Agreement as if this distinction did not exist, or as if the WTO Member States disavowed it in drafting the SCM Agreement, without giving the slightest indication that they were doing so.

14. Not only is the distinction between owners and companies unavoidable, the Appellate Body has confirmed that subsidies are received by legal persons,[25] not the owners of those persons or "economic entities." The EC itself has acknowledged that subsidies "reside" in the

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[22] *See* the EC's response to U.S. Question No. 11.

[23] *See* the EC Response to Panel Question No. 9 (¶ 13).

[24] In addition to the authorities cited in the United States' 1st Written Submission and answers to the Panel's questions, see Articles 620 and 643 of the Swiss Code of Obligations, with sets out basic provisions of corporate law. Article 620 provides that "shareholders are not obligated to performance other than as stated in the articles of incorporation and are not personally liable for the debts of the Company." Article 643 provides that "the Company acquires the right of a legal entity" once listed in the Commercial Register. See Exhibit USA-12.

[25] *See* Report of the Appellate Body in *UK Lead Bar* at ¶ 58.

legal persons that receive them, not in their owners or some all-encompassing "economic entity."[26]

15. In sum, as the Appellate Body found in *UK Lead Bar*, subsidies are bestowed on legal persons (i.e., the company producing subject merchandise). They continue to reside in that person unless they are taken out of that person, or the person is dissolved. A change in ownership, *per se*, does neither. Accordingly, this Panel should find that changes in ownership of subsidized companies do not automatically extract the subsidies from those companies, but that investigating authorities should simply inquire whether, in conjunction with the change in ownership, the subsidies have been paid back or not transferred to the new producer of the subject merchandise.

16. As we explained in our first written submission, this is perfectly consistent with the Appellate Body's report in *UK Lead Bar*. In that report, the Appellate Body found that the presumption that benefits are allocated over time could never be irrebuttable, so that administering authorities were required to demonstrate that the current producer had a benefit under the SCM Agreement.[27] The United States' new methodology is entirely consistent with this finding. Under that new methodology, following a change in ownership, the United States examines whether the current producer has a subsidy, or whether that change in ownership has either terminated the subsidy or resulted in its failing to be transferred to the current producer.

V. The U.S. Sunset Determinations Were Consistent With the Statute.

17. In its first written submission, the United States explained that the four sunset reviews in question were conducted in accordance with the United States' obligations under Article 21.3 of the Agreement. The EC, meanwhile, has failed to explain why a sunset review conducted pursuant to Article 21.3, which focuses on future behavior with regard to subsidization, must be conducted in the same manner as an administrative review pursuant to Article 21.2, which, under the United States' system, focuses on past actions with regard to subsidization. In addition, the EC has dropped its contention that the U.S. Department of Commerce ("DOC") was required, under Article 21.1, to self-initiate administrative reviews of all outstanding CVD orders based upon DOC's old change-in-ownership methodology. Accordingly, we respectfully request the Panel to make the findings requested in our first written submission with respect to the twelve measures which the EC has called into question.

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[26] *See* ¶ 12 of the EC's 1st Written Submission.

[27] *See* the Report of the Appellate Body in *UK Lead Bar*, at ¶ 62.

VI. The U.S. Statute Does not Mandate Administrative Determinations Inconsistent With the SCM Agreement.

18. Finally, for the reasons set out in our first written submission, Section 1677(5)(F) of the U.S. statute is not inconsistent with the United States's obligations under the SCM Agreement. As we have explained, the plain language of this provision (as corroborated by its legislative history) is discretionary in nature. Accordingly, Section 1677(5)(F) leaves DOC the discretion to make findings on a case-by-case basis whether, as a result of a change in ownership (or privatization), the post-sale company benefits from the subsidies in question or not. No outcome is precluded. Therefore, we respectfully request the Panel to find that the U.S. change-in-ownership provision, 19 U.S.C. 1677(5)(F), is not inconsistent with the SCM Agreement.

VII. Conclusion.

19. For the above reasons, the United States requests that the Panel find the measures identified by the EC in this proceeding not inconsistent with the SCM Agreement.