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

**WT/DS212**

# ANSWERS OF THE UNITED STATES OF AMERICA

# TO QUESTIONS FROM THE PANEL

# AT THE SECOND SUBSTANTIVE MEETING

**March 26, 2002**

## Question 20

*When a sunset review is initiated, does your investigating authority inform the exporting Member(s) and/or firm(s) of such initiation?*

1. Yes. The U.S. Commerce Department ("DOC") informs exporting Members and firms of initiation of a sunset review in at least four ways. Under U.S. law, the DOC automatically initiates a sunset review on its own initiative within five years of the date of publication of a countervailing duty order.[1] In May 1998,[2] the DOC published in the *Federal Register* a sunset review initiation schedule to provide for monthly initiations of so-called "transition orders"[3] beginning in July 1998. The final sunset review initiation schedule indicated that the sunset reviews of the four countervailing duty orders at issue in this case would be initiated in September 1999. In addition, in the month preceding the scheduled initiation date of a sunset review, the DOC notifies representatives of the foreign government, the foreign producers, and the domestic producers, by mail, that the sunset review of a particular countervailing (or antidumping) duty order will be initiated on or about the first of the following month. The DOC subsequently publishes the notice of initiation of the sunset review in the *Federal Register*. Finally, information concerning, *inter alia*, the initiation of a sunset review, including the scheduled initiation date, the parties on the service list, and the merchandise covered by the scope of the order, is available on the DOC's website.

*Does your investigating authority seek and/or obtain information regarding the continued existence of countervailable subsidization and its level?*

2. Yes, the DOC seeks information regarding the continued existence of subsidization and its level. Under U.S. law, the DOC has the responsibility of determining whether revocation of a countervailing duty order would be likely to lead to continuation or recurrence of subsidization.[4] If the DOC's determination is negative – *i.e.*, if the DOC finds that there is no such likelihood – the DOC must revoke the order.[5] However, if the DOC's determination is affirmative, the DOC transmits its determination to the U.S. International Trade Commission ("USITC"), along with a determination regarding the magnitude of the net countervailable subsidy that is likely to prevail

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[1] Sections 751(c)(1) and (2) of the Tariff Act of 1930, as amended ("the Act"); *see also* 19 CFR 351.218(c)(1).

[2] Transition Orders; Final Schedule and Grouping of Five-Year Reviews, 63 FR 26779 (May 14, 1998). The DOC republished the notice two weeks later due to typesetting errors. *See* 63 FR 29372 (May 29, 1998) ("*Sunset Initiation Schedule*").

[3] A "transition order" is a countervailing (or antidumping) duty order in effect as of January 1, 1995, the date of entry into force of the WTO Agreement for the United States.

[4] Section 752(b) of the Act.

[5] Section 751(d)(2) of the Act.

if the order is revoked.[6] Although there is no requirement under Article 21.3 or elsewhere in the SCM Agreement to quantify the amount of subsidization likely to continue or recur, the United States does so under its domestic law. The DOC transmits this information to the USITC, which has the option of considering the magnitude of the net countervailable subsidy when it analyzes the likelihood of continuation or recurrence of injury.

3. In 1998, the DOC issued regulations addressing the procedures for participation in, and conduct of, sunset reviews.[7] Given that over 300 "transition orders"[8] were eligible for revocation by January 1, 2000, the DOC needed to create a framework that would both implement statutory requirements and provide a clear, transparent process. The resulting Sunset Regulations did just that, setting forth, *inter alia*, the information to be provided by parties participating in a sunset review[9] and the deadlines for required submissions.[10]

4. With respect to information requirements, the *Sunset Regulations* describe specifically the information to be provided by all interested parties in a sunset review.[11] This includes information regarding likelihood of continuation or recurrence of subsidization and the magnitude of the net countervailable subsidy likely to prevail if the order is revoked. In addition, the regulations invite parties to submit, with the required information, "any other relevant information or argument that the party would like [the DOC] to consider."[12] These regulations constitute the standard request for information in sunset reviews and function as the standard questionnaire.

5. As the United States has argued previously, the focus of a sunset review under Article 21.3 is future behavior, *i.e.*, whether subsidization would be likely to continue or resume absent the order – not whether or to what extent subsidization currently exists. The analysis is perforce predictive. Under these circumstances, mathematical certainty or precision as to the exact amount of likely future subsidization is not necessarily practicable and certainly not required

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[6] Section 752(b) of the Act.

[7] *Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders* ("*Sunset Regulations*"), 63 FR 13516 (March 20, 1998), codified in 19 CFR part 351.

[8] See section 751(c)(6)(C) of the Act. As indicated above, the countervailing duty orders at issue in this case are transition orders.

[9] 19 CFR 351.218(d)(3).

[10] 19 CFR 351.218(d)(3)-(4).

[11] *See* 19 CFR 351.218(d)(1)-(4).

[12] 19 CFR 351.218(d)(3)(iv)(B).

under Article 21.3 of the SCM Agreement.

**Question 21**

*Could the U.S. elaborate on what they mean in para. 3 of its response to Question 1 of the Panel when they wrote that the DOC will investigate whether the benefit has been taken out of the recipient?*

6. By "taken out of the recipient," the United States meant that DOC would investigate whether the benefit to the subsidy recipient had been removed from that recipient after the change in ownership, through a financial contribution from that recipient back to the government of the remaining unamortized amount of the subsidy (or some portion of that amount). The idea is straightforward -- if the essence of a subsidy is that the subsidy recipient (the legal person that received the benefit) has received a financial contribution from the government on terms inconsistent with commercial considerations, then that benefit may be undone if the recipient returns whatever is left of that benefit to the government, also on terms inconsistent with commercial considerations. In order to determine whether this had occurred in any particular administrative proceeding (or whether, as in *UK Lead Bar*, the current producer was simply not the legal person that had received the subsidy and, accordingly, could not be liable for countervailing duties with respect to that subsidy) the United States would reexamine whether a benefit continued to exist after a change in ownership.

*In particular, does the US equate subsidisation under the SCM Agreement with the disbursement/cost by the Government instead of from the point of view of the benefit to the recipient?*

7. No. DOC would examine the existence of a benefit (or its continued existence) purely from the point of view of the recipient. As we explained to the Panel at the second substantive meeting, the difference between the cost to the government and the benefit to the recipient can be difficult to apprehend in the case of a grant or debt forgiveness (the form of many of the key subsidies involved in the individual privatization cases), because the amount of the benefit would be the same under each approach. In the case of a loan, however, the difference may be easier to see, because the amounts can differ. For example, if the commercial rate of interest is 8%, but the government can borrow at 7%, and the government loans money to a company at 5%, the net cost to the government would be 2% (7% - 5%). However, the benefit to the recipient would be 3% (8% - 5%).

**Question 23**

*In reference to the US response to Panel's Question 8, para. 31, please explain what is so*

*special about situations where the owner and the company are the same?*

8. What is so special about such situations is that, where the company and owner become so merged that the law makes no distinction between them (or their assets and liabilities), any payment that nominally comes from the owner may be treated as coming from the company (since they are the same). The United States would regard this as a highly unusual situation that might arise, for example, in the case of a very wealthy person who owned 100% of a company that, was, in effect, his or her hobby. Such situations stand in stark contrast to those involved in the cases of privatization involved in this panel proceeding, where there are many (perhaps several thousand) new private shareholders following privatization, and there has been no suggestion whatsoever that these new owners could possibly be treated as the same person as the companies in which they own shares.

*Isn't it exactly the same situation as with a state-owned company when the government is the only owner?*

9. No. The United States finds it difficult to imagine a situation in which a sovereign state and a state-owned company would be so merged that they would not have separate identities. The fact that governments often grant loan guarantees to government-owned companies underscores the fact that, absent such guarantees, the creditors of such companies would not be able to recover from the governments in the event of a default.