United States - Countervailing Duties Concerning
Certain Products from the European Communities

WT/DS212

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

February 19, 2002

1. Thank you, Mr. Chairman and members of the Panel. The United States appreciates this opportunity to present its views regarding the issues in this dispute.

2. Upon carefully reviewing the submissions of the EC and Brazil, the strongest impression that emerges is that they do not want this Panel to take a close look at the merits of the arguments presented by the United States. Both submissions are short on textual analysis of the SCM Agreement and the *UK Lead Bar* reports, and long on allegations that the United States has changed its position on this issue in the past, has already lost this issue before the panel in *UK Lead Bar*, and, in fact, has refused to implement the DSB's *UK Lead Bar* recommendations and rulings. We further note that for the first time, in their opening statement today, the EC appears to also argue that the United States has acted in bad faith, an allegation with which the United States takes sharp exception. The EC's oral statement does provide some hope, however, that the EC is finally prepared to address the merits of the arguments of the United States.

3. All of these other allegations rest on the premise that the change-in-ownership methodology now being applied by the United States is inconsistent with the SCM Agreement, as interpreted by the DSB in *UK Lead Bar*. Accordingly, the United States will focus on the real

issue - - whether the change-in-ownership methodology now being applied by the United States is inconsistent with the SCM Agreement, as interpreted by the DSB in the *UK Lead Bar* proceeding.

4. There appears to be general agreement that, where a producer has received a government financial contribution and a benefit, and its exports are shown to have injured the domestic industry in an importing country, the producer's exports are subject to countervailing duties in that country. There also appears to be general agreement that this countervailing duty liability may be amortized over a reasonable period of time, regardless of whether the competitive position of the recipient improves or deteriorates over that period. No party has argued that countervailable subsidies cease to be countervailable if they are used to purchase equipment which subsequently becomes obsolete, if the subsidies are invested in research and development that is unproductive, or even if the subsidies are simply wasted.

5. The reason is simple - - the SCM Agreement is not concerned with measuring the *economic distortion* caused by subsidies and offsetting *that distortion*. The SCM Agreement provides a mechanism for valuing *the subsidies themselves* - - the benefit received by the recipient on terms inconsistent with commercial considerations. Where exports from the subsidy recipient injure an industry in another country, that country may impose countervailing duties to offset *the subsidy* received. To the extent that the effects on trade of subsidized merchandise are considered, this is done as part of the injury analysis.

6. Once a benefit has been identified and valued, it may be allocated over time. Demonstrating the effect of the subsidy upon the output or pricing of the recipient company is not relevant or necessary when the subsidy is initially received, and it remains irrelevant over the

allocation period. The SCM Agreement does not require any examination whatsoever of whether the benefit received produces any competitive advantage, and provides no mechanism by which such an examination might be attempted.

7. The EC appears to agree with most of these propositions. To make these matters absolutely clear, however, it would be helpful if the EC would answer the following questions:

> Does the EC agree that, absent a change in ownership, subsidies can be countervailed based on the benefit received, without regard to whether they have a demonstrable effect on the pricing, output, or profitability of the recipient and without regard to the cost to the government?
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> If the EC does not agree, why has not the EC or any EC member state ever presented this argument to the Department of Commerce, a U.S. Court, or the WTO? How does the EC justify countervailing allocated subsidy benefits in its own CVD cases?

8. The EC's argument here is that privatization presents a special case, justifying a departure from the general rule under the SCM Agreement, which is that post-bestowal developments affecting the position of a subsidy recipient do not alter the countervailability of a subsidy. But the EC cites no provision of the SCM Agreement that singles out changes in ownership for such special treatment. Instead, the EC claims that, because the new *owner* of a subsidized company receives no *new* benefit from buying the subsidy recipient, that company itself is no longer accountable for the benefit it received. The EC continues to make this argument in its opening statement, specifically at paragraphs 23, 35, 39 and 41. For instance, in paragraph 23 the EC states that: "Where the initial subsidy determination had been based on the fact that, for instance, assets had been provided at less than market value, the fact that fair market value had now been paid for the assets <u>must bring the original benefit determination into doubt</u>." (Emphasis added.) Again, in paragraph 35, the EC states that, " . . . a privatization is

such a <u>fundamental change</u> that any previous benefit determination must be brought into question." (Emphasis added.) However, assertions aside, nowhere has the EC explained exactly why a privatization should in fact be considered a "fundamental change."

9. Let me emphasize again what we have said in our submission - - the United States agrees that the purchaser for fair market value of a subsidized company itself receives no benefit as a result of that purchase. In a sale for fair market value, the purchaser exchanges value for equal value with the government, leaving the economic positions of both buyer and seller *exactly* the same as before the sale. Just as this exchange of value for equal value, as such, has no effect upon either the seller or the buyer, it similarly has no effect, as such, upon the company sold. If the company owed back taxes or was responsible for an environmental clean-up before the sale, it retains these same liabilities after the sale. These are simply potential burdens on the earnings which the company would otherwise be able generate for its owners, old and then new. Liability for countervailing duties is just one more liability, which is no more affected by the sale than any other liability of the company. This is basic corporate law applied around the world. To reinforce this point, take as a final example a drug company that develops and markets a new drug worldwide. After successfully marketing this new drug, the company is then sold to new owners. Assume further that at some subsequent point, this new drug is found to have serious harmful side effects. Under basic corporate law, the company, even though now under new ownership, is liable for damages that may arise due to the health hazards associated with the use of the drug. Likewise, it is the U.S. position that a steel company under new ownership remains responsible for any countervailing duties arising from prior subsidization of that company.

10. All of this seems quite clear to the United States. Because the EC plainly

disagrees, but has offered no real explanation for its disagreement, the United States would like the EC to answer the following questions:

> Why does a change in ownership extract a subsidy from the company?
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> What *exactly* is it about a change in ownership for fair market value that transforms the legal person sold into a distinct new legal person? Is it the change in ownership of the legal person, *per se*, or the payment of fair market value for that legal person? Why? If the EC believes that a new legal person is automatically created by a change in ownership, how does the EC reconcile this conclusion with provisions of European company law?

(We note that in its opening statement, the EC seems to have backed off of its statements in its submission that a change in ownership *per se* gives rise to a new legal person.)

> Why is liability for countervailing duties different from other corporate liabilities for this purpose? If a company polluted the water supply in a third world country and a suit was filed to obtain compensation, could the company escape liability if its thousands of shareholders simply sold their shares to new thousands of shareholders?
>
> Where do subsidies that are extracted from the subsidy recipient in this manner go? In other words, if a new legal person arises as a result of the change in ownership, what happens to the original legal person?

11. The EC's emphasis on the position of the owners, as opposed to the company, lacks any basis in the SCM Agreement or sound economics. No party to this dispute has ever suggested that the *owners* of a company are accountable for countervailing duties as a result of subsidies that are bestowed upon that company. It is the producer that is artificially inflated by the subsidies, and it is the producer's goods that face duties. All parties seem to recognize, for most purposes anyway, that there is a clear distinction between a company and its owners, and liability for countervailing duties has always been recognized to be a liability of *the company*, not its owners. Just as the original owners are not relevant when the company receives a subsidy, the new owners are not relevant when the company is sold. As the EC has

acknowledged, the benefit from a subsidy resides with the company that receives the subsidy. It continues to reside with the company when the company is sold.

> Does the EC dispute that there is a clear legal distinction between a company and its owners?
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> Does the EC dispute that, when a company is sold, it normally retains all of its corporate and regulatory liabilities?
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> If the EC does not dispute either of these propositions, why does the EC believe that liability for countervailing duties should be treated any differently from other liabilities?
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> Why does a company automatically become a different company (the so-called "post-privatization entity") after a change in ownership, even when the facts show continuity of management, equipment, production, customer base, etc? Upon what legal authority does the EC rely to support this conclusion?

12. The EC asserts that a change in ownership of a subsidized company somehow extracts the subsidy from the company. However, the EC offers no plausible mechanism by which this occurs. The best that the EC can do in this regard is to assert that the new private owners, being more profit-minded than the government, will extract higher profits from the company. At best, this is *pure* speculation. For example, all twelve measures at issue in this dispute concern steel. Steel is a commodity - - and a troubled commodity at that. *Any* owner's ability to extract profits from a steel company is subject to market forces that are well beyond the control of that owner.

13. Because the EC persists with this patently speculative theory, however, the United States would like the EC to answer the following questions, so that we might better understand how the EC believes that this extraction occurs.

> If, during the five years after the privatization, the new owners fail to extract higher profits from the privatized company, does the EC believe that the countervailability of the subsidies should be restored?

> If the new owners succeed in extracting a higher level of profits from the company, but this increase in profits corresponds exactly to a general increase in the profitability of steel producers around the world, how can the EC be certain that the increase in profits is an extraction of the subsidy?
>
> What if profits from the privatized company increase after the sale, but the total profits are small in relation to the remaining unamortized subsidies. For example, what if there are $1 billion in remaining unamortized subsidies, but the total profit in the 10 years following the sale is only $400 million. Does that mean that only part of the subsidy was extracted? How much? When? Is the remainder of the subsidy countervailable? How is this calculation consistent with the SCM Agreement?

14. The United States hopes that, in answering these questions, the EC will abandon its speculations and explain *exactly* how a change in the ownership of a subsidized company extracts the subsidies from that company.

15. I now turn to the *UK Lead Bar* report of the Appellate Body. Again, there appears to be substantial agreement about much of that report. All parties appear to agree that a subsidy must be received by a legal person. Where we disagree is that the United States says that the Appellate Body found that the exporter of the subject merchandise - - UES - - was a distinct legal person from the original subsidy recipient. The United States accepts that, where there is a distinct new person after the privatization, such as where a company has been liquidated in bankruptcy, or bare assets have been sold, countervailing duties may not be imposed unless it is demonstrated that the new entity has itself received a financial contribution and a benefit.

16. In the main case before this Panel, the simple fact is that the legal person producing the subject merchandise - - AST - - is exactly the same legal person that received the subsidy. Accordingly, the report of the Appellate Body in *UK Lead Bar*, which is based on the

premise that the producer of the subject merchandise was a distinctly different person from the legal person that received the subsidy, does not apply. The Appellate Body conspicuously failed to adopt the Panel's rationale that the change in ownership, *per se*, created a different person not accountable for the prior subsidies. Rather, the Appellate Body, in a report conspicuously limited to its facts, said that an investigating authority must find that the current producer "received" a subsidy.

17. Again, the United States regards these matters as clear. The EC, however, tends to explain the Appellate Body's report by stating that, because the new owners paid fair market value, the company no longer has a benefit, without being very specific about how the financial position of the owners affects that of the company producing the subject merchandise. In fact, throughout its oral and written arguments, and in interpreting the Panel and Appellate Body reports in *U.K. Lead Bar*, the EC blurs the distinction between the company and its owner. This is evidenced, for example, in paragraph 41 of the EC's opening statement where it attempts to interpret the *U.K. Lead Bar* panel report. It is the United States position, however, that a company is distinct from its owners, and that this distinction is crucial to a correct understanding of this issue before this Panel. Accordingly, the United States believes that it would be helpful for the EC to answer the following questions:

> Does the EC agree that the Appellate Body considered the subsidy recipient (British Steel) and the producer of the subject merchandise (UES) to be distinct legal persons?
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> Does the EC dispute that the producer of the GOES from Italy (AST) is the same legal person that received at least some of the subsidies in question?
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> If the EC agrees with both of these propositions, why does the EC believe that the Appellate Body has already decided the question before this Panel?

> Does the EC agree that the Appellate Body confirmed that continued countervailability of a subsidy throughout the allocation period can be presumed, and that respondents bear the burden of demonstrating that the subsidy has been removed if they wish to challenge an allocated benefit stream?
>
> What in the EC's view does Article 27.13 of the SCM Agreement mean, and why did the EC seek an agreement by China not to invoke that article after joining the WTO, if under the *definitional* provisions in SCM Article 1 privatization *automatically* erases all prior subsidies anyway?

18. In its opening statement, the EC referred to recent U.S. court decisions which involved the U.S. privatization methodology. We would like to make the following comments in response. First, U.S. court decisions are not directly relevant to the Panel's consideration of this issue. Second, the *Delverde* decision to which the EC refers involves an interpretation of a provision in U.S. law for which there is no equivalent language in the SCM Agreement. In other words, the *Delverde* decision speaks primarily to an issue that is not covered by the SCM Agreement. Third, the recent CIT decisions are based on a misapplication of the earlier *Delverde* decision and, accordingly, we expect we would prevail in defending our methodology in any future appeal of those decisions before a U.S. appellate court. Finally, the *Delverde* decision involved the pure sale of the assets of a small pasta company, not the privatization of large, heavily subsidized state-owned steel companies that likely should have gone out of business long ago.

19. With respect to each of the twelve measures which the EC has challenged, the United States has complied fully and in good faith with its obligations under the SCM Agreement. The Department of Commerce has given each responding steel company, for each of the countries and products involved, every opportunity to request an administrative review of the pertinent countervailing duty order. In several cases, companies have requested reviews; in other cases

they have not.

20. Why some companies chose to request a review of their order and others did not can depend upon a host of case-specific reasons. If an exporter disagreed with the Department's application of its privatization methodology to its particular case, the proper administrative remedy was, as we explained to the EC in consultations regarding this case, to request an administrative review, so that the investigating authority could apply its new, WTO-consistent methodology. Indeed, this has already occurred in several cases. There is good reason for this: respondents may, for their own business reasons, prefer to leave well enough alone with regard to a particular CVD rate. For example, some may be mindful that they have received new (post-privatization) subsidies which would be included in an administrative review, and which might have the effect of increasing the cash deposit rate regardless of the disposition of older subsidies. Investigating authorities cannot and should not second guess respondents' motives in requesting, or declining to request, reviews.

21. Both the EC and Brazil misunderstand Article 21 of the SCM Agreement. They seem to believe that it can serve as a back-door means of converting the DSB's recommendations and rulings in *UK Lead Bar* into something with much broader legal effect. The DSB's recommendations and rulings were restricted to the particular facts and circumstances of the *UK Lead Bar* dispute. In fact, we count that the Appellate Body restricted its findings in that report to the particular facts of that case ten times in nine separate paragraphs. There is no basis for the EC's contention that Articles 21.1 and 21.2 required DOC to review, "*ex officio,*" all twelve measures. Indeed, the EC does not treat DSB rulings as requiring self-initiation of reviews in unrelated cases, as the EC's response to the *India Bed Linen* dispute

demonstrates. We note, however, that at paragraphs 14 and 26 of their opening statement, the EC appears to have dropped this claim regarding Article 21. We will want to ask the EC to clarify this in the course of the Panel's discussions.

22. Brazil's contention that the *UK Lead Bar* dispute required DOC to initiate "changed circumstances" reviews of all other outstanding CVD orders involving change-in-ownership, including all Brazilian orders, would convert the DSB into a type of super-legislature. Clearly this was not intended by the negotiators of the DSU when they drafted Article 19.1 concerning panel and Appellate Body recommendations. Only WTO Members have authority to adopt binding interpretations of agreements – *i.e.*, to "make law."

23. A brief examination of the twelve measures challenged by the EC sheds additional light on the United States' good faith in implementing its WTO obligations. For example, the first six determinations challenged by the EC are all investigations based on DOC's old privatization methodology. Although not obligated to do so by the *UK Lead Bar* dispute, the United States has, in the context of domestic litigation, revised its determinations in four of the six investigations, applying its new, WTO-consistent change-in-ownership approach. The other two determinations are stayed, at the request of the respondents. In addition, the EC has challenged one, five-year-old, administrative review of the Swedish plate CVD order which also applied DOC's old methodology. No review of this has ever been requested.

24. The EC also challenges four sunset reviews, claiming that the Department of Commerce acted inconsistently with the SCM Agreement, because it did not conduct new calculations and apply a new change-in-ownership methodology in those reviews. All four of these reviews involve countervailing duty orders originally issued in 1993, and in none of these

cases did any of the respondent steel companies request subsequent reviews - - thereby allowing five years to go by without contesting their respective rates. Indeed, three of the four declined to participate in the sunset reviews. In each case, based on the evidence available to it, DOC properly found that expiration of the CVD order would be likely to result in continuation or recurrence of subsidization, as required by SCM Article 21.3. The EC, however, seems to believe that Article 21.3 reviews must be the same as Article 21.2 reviews, as evidenced by paragraph 33 of its opening statement. We would like to know where in the text of the SCM Agreement the EC finds that the obligations are identical. I also note that, in paragraph 60 of its opening statement, the EC appears to be challenging the United States' sunset review "practice." Since this practice is not within this Panel's terms of reference, we would like to know if the EC is confusing its claims before this Panel with those before the sister sunset panel, DS/213, concerning the U.S. sunset review of German corrosion-resistant steel.

25. Finally, the twelfth measure challenged by the EC - - the *GOES from Italy* administrative review - - applies the new change-in-ownership methodology. As we have demonstrated in our written submission, this is fully in accordance with U.S. obligations under the SCM Agreement.

26. The EC's final argument is that the change-in-ownership provision of U.S. law is, itself, inconsistent with U.S. obligations under the SCM Agreement. We disagree. It is well established that only legislation which requires a Member to act inconsistently with its WTO obligations can be successfully challenged as being inconsistent with that Member's WTO obligations. The U.S. change-in-ownership provision, which does not mandate a finding one way or another as to whether pre-privatization subsidies benefit a post-privatized entity, falls

squarely within the discretionary category.

27. The discretionary nature of the change-in-ownership provision can readily be seen in the statutory language, and I quote in relevant part: "change in ownership . . . *does not by itself require* a determination . . . that a past countervailable subsidy . . . no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction." This language means that, depending upon the circumstances of a particular case, DOC could find that a change in ownership terminates past subsidies or it could find that a change in ownership does not terminate past subsidies. The statutory language, by itself, dictates no particular outcome one way or the other.

28. The discretionary nature of this provision is further established by the actual legislative history of the provision. As the Statement of Administrative Action points out, and I quote in relevant part: "Commerce retain[s] the *discretion* to determine whether, and to what extent . . . previously conferred countervailable subsidies" are eliminated (emphasis added).

29. Thank you.