

US – COUNTERVAILING MEASURES ON CERTAIN EC PRODUCTS¹

(DS212)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>European Communities</i>	<i>ASCM Arts. 1, 14 and 21</i>	Establishment of Panel	<i>10 September 2001</i>
			Circulation of Panel Report	<i>31 July 2002</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>9 December 2002</i>
			Adoption	<i>8 January 2003</i>

1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US countervailing duty law governing the treatment of subsidies provided to state-owned companies later privatized, including certain subsidy calculation methodologies developed by the US Department of Commerce ("USDOC").
- Product at issue: Products exported to the United States from the European Communities by privatized companies that were previously state-owned and that received government subsidies before their privatization, in particular products by GOES from Italy.

2. SUMMARY OF KEY PANEL/AB FINDINGS²

- ASCM Arts. 1 and 14: The Appellate Body reversed the Panel in its findings and stated instead that privatizations at arm's length and at fair market value gave rise to a rebuttable presumption that a benefit ceased to exist after such privatization. It shifts the burden on the investigation authority to establish that the benefits from the previous financial contribution does indeed continue beyond such privatization.
- ASCM Art. 19.1 (original investigation), Art. 21.2 (administrative review) and Art. 21.3 (sunset review): Based on its analysis above on ASCM Arts. 1 and 14, the Appellate Body upheld the Panel's finding that the "same person" methodology was *as such* inconsistent with Arts. 19.1, 21.2 and 21.3 when the USDOC, based on this methodology and without further analysis, concluded that a privatized enterprise continued to receive the benefits of a previous financial contribution, irrespective of the price paid for the purchase by the new owners of the privatized enterprise. The Appellate Body also stated that since the methodology was *as such* inconsistent with the ASCM, it followed that the application of the method in individual cases would also be inconsistent with the ASCM.
- Mandatory vs discretionary legislation: The Appellate Body reversed the Panel's findings that the US law itself mandated a particular method of determining the existence of a "benefit" that was contrary to the ASCM. The Appellate Body concluded that the law did not prevent the USDOC from complying with the ASCM, although it noted that the finding did not preclude the possibility that a Member violates its WTO obligations, where it enacts legislation that grants discretion to its authorities to act in violation of its WTO obligations.

¹ *United States – Countervailing Measures Concerning Certain Products from the European Communities*

² Other issues addressed: Working Procedures for Appellate Review, Rules 16(1) and 20(2)(d); *amicus curiae* submission.

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(ARTICLE 21.5 – EC)¹

(DS212)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	European Communities	ASCM Arts. 10, 14, 19 and 21	Referred to the Original Panel	27 September 2004
			Circulation of Panel Report	17 August 2005
Respondent	United States		Circulation of AB Report	NA
			Adoption	27 September 2005

1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- United States Department of Commerce's ("USDOC") revised sunset determinations (under Section 129 of the Uruguay Round Agreements Act)² regarding the likelihood-of-subsidization on products from France, the United Kingdom and Spain.

2. SUMMARY OF KEY PANEL FINDINGS

ASCM Arts. 10, 14, 19.4, 21.1 and 21.3 and GATT Art. VI:3

- Re-determination on France: Having noted that the ASCM does not provide a particular methodology for analysing whether a privatization is conducted at arm's length and for FMV, the Panel found that given the complexity of the privatization process involved, the USDOC's *individual* analysis of the conditions of the privatization for each category of share offering was reasonable. The Panel also concluded that the USDOC's analysis and conclusion that the employee share offering was not for FMV was not unreasonable. The Panel ultimately found that the United States had not failed to implement the DSB's recommendations by maintaining the existing countervailing duties given that (i) there is no obligation to recalculate a rate of subsidization in a sunset review; and (ii) the finding that a small part of the benefit passes through to the privatized producer can serve as the basis of the affirmative likelihood-of-subsidization conclusion and the maintenance of the duties.
- Re-determination on the UK: The Panel found that the United States failed to implement the DSB's recommendations with respect to its likelihood-of-subsidization determination on the United Kingdom, as it had failed to determine (as opposed to merely assuming) whether the privatization was at arm's length and for FMV. Having also found that ASCM Art. 21.3 requires the investigating authority during a (revised) sunset review to take into account *all* the evidence placed on its record in making its determination of likelihood-of-subsidization, the Panel concluded that the USDOC's refusal to consider new evidence presented during the Section 129 proceedings was inconsistent with ASCM Art. 21.3.
- Re-determination on Spain: For the same reason as above in respect of the USDOC's re-determination on the United Kingdom (i.e. failure to determine whether the privatization occurred at arm's length and for FMV), the Panel found that the United States had failed to implement the DSB's recommendations regarding Spain. However, the Panel rejected the European Communities' claim that the USDOC's treatment of evidence on the record was inconsistent with ASCM Art. 21.3, as the Panel was not aware of any new evidence that had been presented by the European Communities during the Spain Section 129 proceedings concerning the products from Spain.

3. OTHER ISSUES³

- Terms of reference (DSU Art. 21.5): The Panel concluded that the European Communities' new claim on the likelihood-of-injury was not properly before it. The Appellate Body clarified that this claim related to an aspect of the original measure, rather than the "measure taken to comply". Allowing such a claim might jeopardize the principles of fundamental fairness and due process by exposing the United States to the possibility of a finding of violation on an aspect of the original measure that the United States was entitled to assume was consistent with its obligations under the relevant agreement given the absence of a finding of violation in the original report.

¹ *United States – Countervailing Measures Concerning Certain Products from the European Communities, Recourse to Article 21.5 of the DSU by the European Communities*

² This determination was based on a new privatization methodology, which included a baseline presumption that non-recurring subsidies benefit the recipient over a period of time and are therefore allocable over that period. This presumption can be rebutted by proving, *inter alia*, the sale was at arm's length and for fair market value ("FMV").

³ Other issues addressed: measures taken to comply; terms of reference (DSU Art. 6.2, European Communities' claim on the USDOC's likelihood-of-injury determination); issues of a "fundamental nature".