

US – LEAD AND BISMUTH II¹

(DS138)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>European Communities</i>	<i>ASCM Arts. 1.1, 10 and 21.</i> <i>DSU Art. 19.1</i>	Establishment of Panel	<i>17 February 1999</i>
			Circulation of Panel Report	<i>23 December 1999</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>10 May 2000</i>
			Adoption	<i>7 June 2000</i>

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** United States Department of Commerce's (USDOC) reliance on "change-in-ownership methodology" in calculating the amount of subsidies to determine a countervailing duty rate in an administrative review.
- **Product at issue:** Certain hot-rolled lead and bismuth carbon steel products from the United Kingdom.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **ASCM Arts. 1.1(b) (definition of a subsidy – benefit), 10 (application of GATT Art. VI) and 21.2 (review of countervailing duties):** The Appellate Body upheld the Panel's finding that the USDOC should not have presumed that the non-recurring subsidy given to a state-owned enterprise (BSC in this case) would have "passed through" to subsequent companies (UES and BSpIc/GKN) when that state-owned enterprise (BSC) had been privatized. Rather, the USDOC was required under Art. 21.2 to examine, in the reviews at issue, whether a "benefit" had been conferred on the new owners of the company (UES and BSpIc/BSES). The USDOC had failed to do so.

The Appellate Body also upheld the Panel's factual finding that no benefit within the meaning of Art. 1.1(b) had been conferred in this case because the new company had paid "fair market value" for all the productive assets, goodwill, etc. when it purchased the formerly state-owned company to which the subsidies at issue had been originally granted. Thus, no subsidy under Art. 1 existed.

Thus, the Appellate Body upheld the Panel's ultimate finding that the countervailing duties at issue in this case were imposed inconsistently with Art. 10.

- **DSU Art. 19.1 (Panel and Appellate Body recommendations – suggestion on implementation):** The Panel suggested, in accordance with the discretion provided under Art. 19.1, that the United States take all appropriate steps, including a revision of its administrative practices, to prevent the violation of ASCM Art. 10 from arising in the future.

3. OTHER ISSUES²

- **Standard of review – countervailing duty measures (DSU Art. 11):** The Appellate Body upheld the Panel's finding that DSU Art. 11 provides the standard of review for cases involving the imposition of countervailing duties, and that the special standard of review for anti-dumping measure set out in the ADA Art. 17.6 does not apply to such cases.
- **Decision vs Declaration:** In the context of addressing the proper standard of review for countervailing duty measures, the Panel noted that a Declaration lacks the "mandatory authority" of a Decision and considered that the Declaration does not impose any obligations on the Panel. The Appellate Body reached a similar conclusion, noting that the Declaration at issue was "couched in hortatory language," as it used the words "Ministers recognize ..." and that it did not specify any action to be taken. The Appellate Body stated that the Decision on Review of ADA Art. 17.6 provides for review of the standard of review in ADA Art. 17.6 to determine if it is "capable of general application" to other covered agreements.

¹ *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*

² Other issues addressed: panel's discretion to examine certain issues that it deems necessary; *amicus curiae* submissions (both panel and the AB); outside observers (panel's preliminary ruling); and a panel's authority to request information (DSU Art. 13).