The following communication, dated 27 October 1993, has been received from the European Community with the request that it be circulated as an addendum to SCM/176.

Preliminary and definitive affirmative injury determinations against Belgium, France, Germany, Italy, Spain and the United Kingdom concerning certain cut-to-length carbon steel plate products, certain hot-rolled carbon steel flat products, certain cold-rolled carbon steel flat products and certain corrosion-resistant carbon steel flat products (published 27 November 1992 and in August 1993)

Further elaboration of certain issues

The purpose of this paper is to elaborate further on certain issues that the Community would like to address during this conciliation.

The Community reserves its right in respect of any other issues raised during bilateral consultations held with the United States under Article 3 of the Agreement.

Issues related to the injury determinations

1. The Community would like to raise a number of issues in respect of the injury and causality findings on the flat-rolled steel products by the US International Trade Commission (ITC), and this with regard to the preliminary and final determinations.

In the view of the Community the standards applied by the US in determining injury appear in several instances to be lower than the requirements of the Subsidies Code.
General observations on injury standards

2. The Code provides in Articles 2 and 6 that provisional measures may only be taken after a preliminary affirmative finding has been made that a subsidy exists and that there is sufficient evidence of material injury.

In the view of the Community the ITC’s preliminary determinations for a number of the flat-rolled products and countries, do not meet this requirement.

3. US law and US practice appear to require that a preliminary finding of material injury is made unless (i) the record as a whole contains clear and convincing evidence that there is no material injury, (ii) no likelihood exists that any contrary evidence will arise in a final investigation. A finding that there is no reasonable indication of material injury requires therefore that the ITC finds that there is no injury whatsoever. The Community submits that this is not in accordance with the requirements of Article 6 of the Code.

Burden of proof

4. Injury findings have to be based on positive evidence (footnote 17 to Article 6 of the Subsidies Code). The Community considers that the administrative authorities in a CVD investigation need therefore demonstrate that there is sufficient evidence of material injury. The ITC appears, as is demonstrated by the two criteria mentioned above, to be actually reversing the burden of proof: it requires respondents to prove that there is no material injury, instead of proving itself that there is material injury. This places incorrectly on the defendants in a CVD investigation the burden of proving that they were not causing injury.

Such standards for a provisional determination are, in the view of the Community, from a procedural as well as a substantive point of view, inconsistent with the letter and the spirit of the Subsidies Code.

Cumulation

5. In both provisional and final determinations the ITC has cumulated imports from a large number of countries for the finding of material injury. The US law requires the ITC to do so, unless the imports are negligible and have no discernible impact on the domestic industry. But the ITC apparently “is only to apply this exception if imports are truly negligible and have no discernible impact at all”.

The Community submits that besides the fact that the burden of proof is unacceptably reversed, this also implies an inadmissible narrowing down of the negligibility condition: any time that any discernible impact, however small, is being found, the ITC has to cumulate, if the other conditions are met.

The Code states under Article 2:12 that any time the administering authority finds that the effect of the alleged subsidy on the industry is not such as to cause material injury, the investigation shall be terminated.

A domestic standard, under which an investigation should be pursued, on the basis of such a low threshold of injury, is therefore in violation with the Code.
Causality

6. Article 5:1 of the Code requires for provisional measures to be taken, an affirmative finding that a subsidy exists and that there is sufficient evidence of injury and (Article 2, paragraph 1(c)) that a causal link between these two elements exists.

There seems to be a total absence of an examination of causality and of the possible effect of "other factors" in the ITC preliminary determinations.

The following issues concern the definitive injury findings by the ITC in these cases.

7. Cut-to-length carbon steel plate

In the cut-to-length carbon steel plate case the ITC found that cumulated imports from eleven countries (Belgium, Brazil, Canada, Finland, Germany, Mexico, Poland, Romania, Spain, Sweden and the United Kingdom) had caused injury. The increase of these cumulated imports is however only due to four countries, which increased their market share from 3.9 per cent in 1990 to 8.3 per cent in 1992, whereas imports from the other countries have fallen from 8.6 per cent in 1990 to 5.7 per cent in 1992.

In this respect the Community observes that imports from e.g. Germany decreased from a market share of 1.1 per cent in 1990 to only 0.4 per cent in 1992 and imports from the UK, decreased from a market share of 0.8 per cent in 1990 to 0.4 per cent in 1992, resulting in a drop in market share of 50 per cent. In view of the fact that the market had also shrunk, the decline in imports was even greater in terms of volume.

The Community wonders how the US can with such a small decreasing presence on its market, initiate a case and subsequently discover "a discernible adverse impact on its domestic industry". The Community considers that in the circumstances of this case the extremely low market shares from exporters originating in the UK and in Germany, should have been considered negligible and excluded.

8. Cold-rolled carbon steel

In the cold-rolled carbon steel determination the ITC found that imports of Germany were a threat of material injury for the US domestic industry. Article 6 of the Subsidies Code lays down the requirements for a determination of injury. Footnote 17 to this Article requires that an injury determination shall be based on positive evidence.

The Community submits that the US does not meet these requirements for the following reasons:

- First, it should be noted that the market share of Germany has stagnated: 1.1 per cent in 1990, 1.0 per cent in 1991 and 1.2 per cent in 1992. Given the small quantities involved, the variations were insignificant and do not justify the conclusion of an upward trend, also considering that the US sales increased between 1991 and 1992.

- The ITC argues that the prices of the German cold-rolled steel will have a suppressing or depressing effect on prices in the US, on the grounds that German average prices had declined steadily over the period of investigation.

The Community considers that an attempt to assess possible future price developments has to take account of the prices charged by other importers involved in this case. The German prices
were, according to the ITC findings, the second highest of all importing countries. The decrease of German prices appears also to be considerably smaller than the price decrease of several other importers.

- The ITC uses as a further argument the risk of a shift of the German steel exports towards the US. These arguments are, in the view of the Community, not based on positive evidence and are not based on a proper consideration of all the facts available but appear more to be based on unfounded assumptions.

- Because anti-dumping and countervailing duties have been imposed by the US on German exports of corrosion resistant steel, the ITC concludes that German exporters might have to reduce these exports and compensate the resulting loss by increasing exports of cold-rolled steel products.

The Community questions this conclusion. Apart from other reasons, the low level of the combined anti-dumping duties and countervailing duties on corrosion-resistant steel of only 4.87 per cent, makes such a shift unlikely.

- The ITC also argues that since German home market demand is weak and falling and German exports to third countries other than the US were declining, Germany would shift its exports to the US market. This would also be fuelled by an increase from Eastern European steel imports in Germany.

The Community considers that this reasoning is flawed and also contradicted by evidence on the records of the ITC. The reasoning appears to ignore that demand for steel in all countries has fallen, due to the world-wide recession. For many other countries, which were also investigated by the ITC, no assumption of increased exports to the US was made and it is unclear why German exports should follow a pattern different from those countries. Regarding the effect of steel imports from Eastern European countries, the ITC findings ignore the measures that were taken by the Community to monitor imports. Finally, the ITC's conclusions are contradicted by the fact that when in 1990 German exports to third countries decreased by 126,000 tons, its exports to the US also decreased by 75,000 tons. This clearly demonstrates that German exporters had not diverted their exports to the US market, and were unlikely to do so in the future.

Other factors

9. The issue of whether the imported steel products were the actual cause of the injury claimed by the US domestic integrated industry, has been raised again and again by the defendant companies in these cases. Article 6:4 of the Code stipulates that if there are "other factors", e.g. competition by certain domestic producers, which injure the rest of the domestic industry, the injury caused by such other factors must not be attributed to the subsidized imports. In the Community's view this issue has not been examined in sufficient depth by the ITC.

Specialty products

10. Finally, the ITC seems to have ignored submissions by certain Community producers of specialty steel according to which their products did not compete with steel made in the US and should therefore be excluded from the measures imposed. It is clear that imports which cannot injure the domestic producers must not be the subject of countervailing duties.
Conclusion

In the light of the above the Community submits that the US has on several issues ignored procedural rights laid down in the Subsidies Code and it has reached affirmative injury determinations in situations where they were not warranted by applying standards which allowed identification of injury in circumstances where no material injury nor threat thereof could have been found against the imports concerned in applying the standards under the Code.