**WORLD TRADE ORGANIZATION**

**WT/DS212/R**
31 July 2002

(02-4138)

# UNITED STATES – COUNTERVAILING MEASURES CONCERNING CERTAIN PRODUCTS FROM THE EUROPEAN COMMUNITIES

## *Report of the Panel*

The report of the Panel on United States – Countervailing Measures Concerning Certain Products from the European Communities is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 31 July 2002 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/452). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

**Note by the Secretariat**: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

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# I. INTRODUCTION

1.1 On 10 November 2000, the European Communities requested consultations with the United States under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994") and Article 30 of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"). The European Communities' request was related to the continued application by the US Department of Commerce of countervailing duties based on its "*change in ownership*" methodology which consisted of a presumption that non-recurring subsidies granted to a former producer of goods, prior to a change in ownership, "pass through" to the current producer of the goods following the change in ownership.[1]

1.2 Consultations took place in Geneva on 7-8 December 2000, but the parties failed to reach a mutually satisfactory solution. On 1 February 2001, the European Communities requested further consultations with the United States.[2] Further consultations took place in Geneva on 3 April 2001, but the parties did not reach a mutually satisfactory solution.

1.3 On 8 August 2001, the European Communities requested the Dispute Settlement Body (the "DSB") to establish a panel, pursuant to Articles 4 and 6 of the DSU, Article 30 of the SCM Agreement and Article XXII of the GATT 1994 with respect to the practice by the United States of imposing countervailing duties on certain products exported from the European Communities "without establishing the existence of a financial contribution or a benefit to the producers under investigation and hence the existence of a countervailable subsidy as defined in the SCM Agreement." These duties had been imposed or maintained notwithstanding privatizations or changes of ownership in reliance, *inter alia,* on Section 771(5)(F) of the Tariff Act 1930, as amended, (19 USC Section 1677(5)(F)) and according to the European Communities were not based on an analysis of the existence of a countervailable subsidy benefiting the producer concerned during the period of investigation or review.[3]

1.4 At its meeting on 10 September 2001, the DSB established a panel in accordance with Article 6 of the DSU. At that meeting, the parties agreed that the Panel should have standard terms of reference. The terms of reference of the panel were, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS212/4, the matter referred to the DSB by the European Communities in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[4]

1.5 On 25 October 2001, the European Communities requested the Director-General to determine the composition of the panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council

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[1] WT/DS212/1.

[2] WT/DS212/1/Add.1.

[3] Since the request for consultations, which included 14 countervailing duty determinations, one order was terminated (Cold-Rolled Carbon Steel Flat Products from Sweden C-401-401) and another order was limited to recurring subsidies, pursuant to an agreement between the exporter concerned and the US Department of Commerce (Certain Pasta from Italy C-475-819). Therefore, the European Communities decided not to include these two determinations in its request for the establishment of a Panel. WT/DS212/4, footnote 1.

[4] WT/DS212/5.

> or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.6 On 5 November 2001, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. Gilles Gauthier

Members: Ms. Marie-Gabrielle Ineichen-Fleisch
Mr. Michael Mulgrew

1.7 Brazil, India and Mexico reserved their rights to participate in the panel proceedings as third parties.

1.8 The Panel met with the parties on 19-21 February 2002 and 20-21 March 2002. It met the third parties on 20 February 2002. The Panel sent questions to the parties on 25 February 2002 and provided additional questions to the parties during the second substantive meeting.

1.9 The Panel submitted its Interim Report to the parties on 13 May 2002. The Panel submitted its Final Report to the parties on 19 June 2002.

## II. FACTUAL ASPECTS

### A. UNITED STATES' COUNTERVAILING DUTY DETERMINATIONS COVERED BY THIS DISPUTE

2.1 The European Communities has requested the Panel to rule on the WTO-consistency of 12 countervailing duty determinations against imports of certain steel products originating in the European Communities. The imposition of countervailing duties in these 12 determinations were based on the application by the US Department of Commerce of two different methodologies (the so-called "gamma" and "same person" methodologies) used to assess the impact of a change in ownership, (in all 12 cases before the Panel) via privatization, in the determination of the existence of subsidization in respect of the privatized producer; specifically whether non-recurring subsidies bestowed prior to the change in ownership (privatization) remained countervailable against imports from the privatized producer. From these 12 determinations, six are original investigations Stainless Sheet and Strip in Coils from France (C-427-815) (Case No. 1); Certain Cut-to-Length Carbon Quality Steel from France (C-427-817) (Case No. 2); Certain Stainless Steel Wire Rod from Italy (C-475-821) (Case No. 3); Stainless Steel Plate in Coils from Italy (C-475-823) (Case No. 4); Stainless Steel Sheet and Strip in Coils from Italy (C-475-825) (Case No. 5); Certain Cut-to-Length Carbon-Quality Steel Plate from Italy (C-475-827) (Case No. 6); two are administrative reviews Cut-to-Length Carbon Steel Plate from Sweden (C-401-804) (Case No. 7); Grain-oriented Electrical Steel from Italy (C-475-812) (Case No. 12) and four are sunset reviews Cut-to-Length Carbon Steel Plate from United Kingdom (C-412-815) (Case No. 8); Certain Corrosion-Resistant Carbon Steel Flat Products from France (C-427-810) (Case No. 9); Cut-to-Length Carbon Steel Plate from Germany (C-428-817) (Case No. 10); and Cut-to-Length Carbon Steel Plate from Spain (C-469-804) (Case No. 11).[5] A table describing these determinations is included in Annex A.

[5] The numbering of the cases from 1 to 12 was presented by the European Communities and seconded by the United States.

2.2 In two out of these 12 cases, the Court of International Trade (CIT), in prior court appeals, expressly requested that the US Department of Commerce determine if the privatization at issue was at arm's length and for fair market value. The companies involved were British Steel (Case No. 8, Cut-to-Length Carbon Steel Plate from United Kingdom (C-412-815)) and Dillinger AG (Case No. 10, Cut-to-Length Carbon Steel Plate from Germany (C-428-817)). In 1995, in the context of a court remand, the US Department of Commerce determined that the British Steel privatization was at arm's length, for fair market value and consistent with commercial considerations because British Steel shares were offered to private investors world-wide (a) the offering price was based on valuations by independent consultants; (b) private investors purchased nearly the entire share offering; (c) similar findings were made for Dillinger.[6]

2.3 Both parties agree that the changes in ownership relevant to this dispute only concern the privatization of state-owned companies, i.e. the change in ownership from government to private hands. All the privatizations concerned by this dispute involved a full change in ownership in the sense that in all these 12 cases, governments had sold all, or substantially all, their ownership interests and, clearly, had no longer any controlling interests over the privatized producers.[7]

2.4 The following factual information regarding these 12 countervailing duty determinations and the relevant privatizations is based on evidence submitted by the European Communities commented by the United States, including references from the twelve determinations submitted as exhibits by the European Communities.

## 1. Original investigations

(a) Original investigations covered by this dispute

*(i) United States Countervailing Duties on Imports of Stainless Steel Sheet and Strip in Coils from France (Case No. 1)*

2.5 This case concerns the imposition of countervailing duties on imports of stainless steel sheet and strip in coils from France, produced and exported by Usinor -Sacilor S.A. (Usinor). The US case number is C-427-815; (64 Fed. Reg. 30774 of 29 June 1999). On 8 June 1999, the US Department of Commerce published its final determination imposing a countervailing duty rate of 5.38 per cent *ad valorem* on imports produced by Ugine S.A., a wholly owned subsidiary of Usinor.[8]

2.6 In July 1995 the privatization of Usinor began. Pursuant to the French privatization law, Usinor Sacilor (and shares thereof) was valued for privatization purposes by the French Privatization Commission (the "FPC"), an independent body charged with valuing companies designated for privatization. The FPC's valuation analysis used three methods: (i) comparison to the stock market values of other European steel producers; (ii) evaluation of net liquidity flows; and (iii) estimated value of the company's net re-evaluated assets. Based on the FPC's valuation opinion, the French Minister of Economy and Finance established share prices for the various Usinor share offerings. The Commission's valuation of the company was consistent with the range of values for the company established in a report prepared by Banque S.G. Warburg and Crédit Lyonnais.[9] At the same time, Usinor Sacilor offered additional shares for sale in the form of a capital increase. All shares were sold through a public offering of shares which consisted of a French public offering, an international public offering, and an employee offering. In accordance with the French privatization law, a certain portion of the shares were also sold to a group of so-called "stable shareholders", some of which were

[6] *See* EC's and US' responses to question No. 16 posed by the Panel.
[7] *See* EC's response to question No. 11 posed by the Panel.
[8] *See Stainless Steel Sheet and Strip in Coils from France* 64 Fed. Reg. 30774 (Dep't Commerce 8 June 1999) (final countervailing duty determination), Exhibit EC–10 to the EC's first written submission.
[9] *See* Annex to EC's responses to questions posed by the Panel (4 March 2002).

government-owned banks and other entities.[10] After the July 1995 public offering, the French Government held 9.8 per cent of Usinor's shares while Crédit Lyonnais retained approximately 3 per cent.[11]

2.7 The privatization continued throughout the years 1996 and 1997. At the end of the privatization, the stable shareholders held approximately 14 percent of Usinor's total shares, 10 per cent of which were held by government- owned or controlled entities.[12] During 1997 and 1998 the French Government divested itself of the remaining shares which it held.[13]

2.8 The margins found by the US Department of Commerce in its final determination were attributable to non-recurring subsidies found to have been received by the state-owned Usinor Sacilor (as Usinor was then known) in the 1980s. The US Department of Commerce found, on the basis of its gamma methodology[14], that these subsidies continued to benefit the company during the 1997 period of investigation. Usinor claimed that it had been privatized in 1995 by means of an arm's length, fair market value sale of shares.[15] Usinor further claimed that pre-privatization subsidies accounted for all but 0.10 per cent of the subsidy margin.

2.9 On 1 October 2000 Usinor challenged aspects of the US Department of Commerce's final determination, including its treatment of Usinor's privatization, in the CIT. During the litigation, the US Department of Commerce requested, and was granted, a remand to reconsider the effect of the US Court of Appeals for the Federal Circuit's decision in *Delverde Srl v. United States* (*Delverde III*)[16] on the US Department of Commerce's treatment of the effect of Usinor's privatization on prior non-recurring subsidies. On 20 December 2000, the US Department of Commerce reported its final remand redetermination to the CIT, which Usinor challenged. In its remand determination in the ongoing appeal before the CIT, the US Department of Commerce applied the same person methodology and focused on whether the change in ownership of Usinor resulted in a new legal person.[17] The US Department of Commerce found that Usinor had received a financial contribution and a benefit notwithstanding the change in ownership because Usinor was the same person before and after the privatization. On 4 January 2002, the CIT issued a remand order in which it found the same person methodology inconsistent with the US statute.[18]

*(ii) United States Countervailing Duties on Imports of Certain Cut-to-Length Carbon Quality Steel Plate from France (Case No. 2)*

2.10 This case concerns the imposition of countervailing duties on imports of certain cut-to-length carbon quality steel plate from France, produced and exported by Usinor Sollac S.A. (Usinor) and GTS Industries S.A. (GTS). The US case number is C-427-817; (64 Fed. Reg. 73277 of 29 December 1999). On 29 December 1999, the US Department of Commerce published its final determination

[10] *Stainless Steel Sheet and Strip in Coils from France, supra*, footnote 8, at 30776.

[11] *See* Annex to the EC's responses to questions posed by the Panel (4 March 2002).

[12] *Stainless Steel Sheet and Strip in Coils from France, supra,* footnote 8, at 30776

[13] *See* Annex to EC's replies to questions posed by the Panel (4 March 2002). For details of the GOF divestiture *see Stainless Steel Sheet and Strip in Coils from France, supra,* footnote 8, at 30776-30777.

[14] *See infra,* Section B.1 for a description of this methodology.

[15] *Stainless Steel Sheet and Strip in Coils from France, supra,* footnote 8, at 30776-30778.

[16] *Delverde Srl. v. United States* ("*Delverde III*") 202 F.3rd 1360 (Fed Cir. Feb 2, 2000) rehg denied (20 June 2000). Exhibit EC-5 to the EC's first written submission.

[17] *See*, *Final Results of Redetermination pursuant to Court Remand*, *Allegheny Ludlum Corp. et al. v United States* Court No. 99-09-00566, (Ct. Int'l Trade 13 December 2000) (unpublished) ("*Allegheny Ludlum I*").

[18] See, *Allegheny Ludlum Corp. et al. v United States* Court No. 99-09-00566 (Ct. Int'l Trade 4 January 2002). Exhibit EC–29 to the EC's second written submission. ("*Allegheny Ludlum II*").

imposing countervailing duties to Usinor and GTS of 5.56 per cent and 6.86 per cent *ad valorem* respectively.[19]

2.11 As regards the margins found by the US Department of Commerce for Usinor in its determination, these were mainly attributable to non-recurring subsidies found to have been received by Usinor during State-ownership in the 1980s. Usinor claimed that it was privatized in 1995 by means of an arm's length, fair market value sale of shares. The US Department of Commerce found, on the basis of its gamma methodology[20], that these subsidies continued to benefit the company during the 1998 period of investigation. Usinor claimed that these pre-privatization subsidies accounted for all but 0.10 per cent of the subsidy margin.

2.12 In the same determination the US Department of Commerce imposed a countervailing duty rate of 6.86 per cent on products exported by GTS Industries (GTS). The US Department of Commerce assigned a countervailing duty rate of 6.86 per cent allocated *pro rata* to GTS based on financial contributions that were given to the Usinor group of which GTS was a member. The US Department of Commerce concluded that the conversion of the group's consolidated debts owed to the French Government, denominated as "Loans with Special Characteristics" and of "Steel Intervention Fund" bonds into shares of common stock constituted countervailable equity infusions, which were treated as non-recurring grants.[21] The US Department of Commerce applied its gamma change in ownership methodology.[22] GTS, Usinor, the Government of France, and the European Communities provided evidence that Usinor had been privatized in 1995 at arm's length and for fair market value, but the US Department of Commerce never made any finding on whether the privatization was for fair market value.

2.13 At the time of Usinor's privatization, GTS was owned 100 per cent by AG der Dillinger Hüttenwerke (Dillinger), and Usinor held 70 per cent of Dillinger's parent company DHS – Dillinger Hutte Saarstahl (DHS). In July 1995, the French Government sold 90.2 per cent of Usinor's shares in a public offering on the French and International Stock Exchanges (described in Case No. 1 above). In April 1996, Usinor reduced its interest in DHS to 48.75 per cent. As a result of this reduction, the US Department of Commerce found in its final determination that GTS was no longer under the control of Usinor but it continued to benefit from the subsidies previously granted to Usinorand thus GTS' products were subject to countervailing duties.

2.14 On 7 April 2000, GTS filed a complaint with the US CIT On 24 August 2000, the CIT remanded the case to the US Department of Commerce to determine whether the *Delverde III* decision had any applicability on the GTS proceeding. In its remand determination in the ongoing appeal before the CIT, the US Department of Commerce did not investigate further whether any of the privatization transactions were at arm's length and for fair market value but focused exclusively on whether the change in ownership of Usinor resulted in a new legal person. In this respect the US Department of Commerce concluded that whether the owners of the newly privatized Usinor paid fair market value for the company in an arm's-length transaction based upon commercial considerations was not relevant to its analysis of previously-bestowed subsidies.[23] The US Department of Commerce found that Usinor had received a financial contribution and a benefit notwithstanding the change in ownership because Usinor was the same person before and after the privatization. On 4 January 2002,

[19] *See Certain Cut-to-Length Carbon-Quality Steel Plate from France* 64 Fed. Reg. 73277 (Dep't Commerce 29 December 1999) (final countervailing duty determination). Exhibit EC–11 to the EC's first written submission.

[20] *Ibid.*, at 73279-73280.

[21] *Certain Cut-to-Length Carbon-Quality Steel Plate from France, supra*, footnote 19, at 73281-73282

[22] *Ibid.*

[23] *Allegheny Ludlum I*, Court No. 99-09-00566, at 17.

the CIT issued its judgment on the remand redetermination in which it found the same person methodology inconsistent with US statute[24].

*(iii) United States Countervailing Duties on Imports of Certain Stainless Steel Wire Rod from Italy (Case No. 3)*

2.15 This case concerns the imposition of countervailing duties on imports of Certain Stainless Steel Wire Rod from Italy, produced and exported by Cogne Acciai Speciali S.r.l. (CAS) The US case number is C-475-821; (63 Fed. Reg. 40474 of 29 July 1998). On 7 January 1998, the US Department of Commerce published its final determination imposing a countervailing duty of 22.22 per cent *ad valorem* on imports of the product concerned from CAS.[25]

2.16 Until the early 1990s, the company was owned by the Italian State, at first directly by a Government-owned holding company, Istituto per la Ricostruzione Industriale (IRI) and thereafter by IRI subholding companies, Finsider S.p.A., Deltasider S.p.A. or ILVA S.p.A. On 31 December 1992 (CAS) came into being. All shares in CAS were owned by Cogne S.p.A., also a state-owned company. From this date, CAS assumed the ongoing operations of the Cogne facility. As a part of the privatization, a public offer for the sale of CAS was prepared. Notices were published in Italian and foreign newspapers soliciting purchase offers. The result of this process was that expressions of interest were received from ten private industrial or financial bidders. On 27 December 1993, an agreement was signed between Cogne S.p.A. and GE.VAL. S.p.A. for the purchase of all shares of CAS. The total price paid by GE.VAL. for CAS was higher than the amount that had been independently determined as Cogne's value by an independent expert in 1992. Since the public sale of the company, the Italian State has held no ownership interest of any kind in CAS.

2.17 The US Department of Commerce assigned a rate of 22.22 per cent *ad valorem* to CAS based almost exclusively on pre-privatization financial contributions to the ILVA group that were conferred before the creation of CAS. The US Department of Commerce applied its gamma change in ownership methodology.[26] According to the US Department of Commerce's calculations provided to CAS, at least 21.74 per cent of the total 22.22 per cent margin was composed of CAS' pro-rata share of subsidies granted to the state-owned ILVA group.

*(iv) United States Countervailing Duties on Imports of Stainless Steel Plate in Coils from Italy (Case No. 4)*

2.18 This case concerns the imposition of countervailing duties on imports of Stainless Steel Plate in Coils from Italy, produced and exported by Acciai Speciali Terni S.p.A. (AST).[27] The US case number is C-475-823; (64 Fed. Reg. 15508 of 31 March 1999). On 31 March 1999, the US Department of Commerce published its final determination imposing a countervailing duty rate of 15.16 per cent *ad valorem* on products exported by AST.[28]

2.19 In September 1993, Istituto per la Ricostruzione Industriale (IRI) endorsed a plan for the market privatization of ILVA's core businesses, and the ILVA's specialty steels division was

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[24] See *GTS Industries v. United States* Court No. 00-03-00118 (Ct. Int'l Trade 4 January 2002). Exhibit EC–30 to the EC's second written submission.

[25] *See: Certain Stainless Steel Wire Rod from Italy* 63 Fed. Reg. 809 (Dep't Commerce 7 January 1998) (prelim. determination and alignment of countervailing duty and anti-dumping duty final determinations). Exhibit EC–12 to the EC's first written submission.

[26] *Ibid.*, at 811-12.

[27] ILVA S.p.A. (old, state-owned) was dissolved on 31 October 1993. Two new companies were created: ILVA Laminati Piani S.r.l. (ILP) and Acciai Speciali Terni S.r.l. (AST). In December 1994, AST was sold to KAI Italia S.r.l. A more detailed corporate history can be found in Annex A *infra*.

[28] *See Stainless Steel Plate in Coils from Italy* 64 Fed. Reg. 15508 (Dep't Commerce 31 March 1999) (final countervailing duty determination). Exhibit EC–13 to the EC's first written submission.

separately incorporated, first as a limited liability company (S.r.l.) and then as a stock company (S.p.A.), with all shares in this stock company – AST S.p.A. – initially owned by IRI. IRI's privatization plans were issued under the legal control of the European Commission, which set important conditions for the sale in a binding decision of April 1994. IRI prepared a public offering for the sale of AST. Notices were published in Italian and foreign newspapers soliciting purchase offers. IRI appointed the international investment firm Barclays de Zoete Wedd (BZW) as its financial adviser in the privatization process. It is reported that two other independent financial advisers were retained to conduct financial appraisals of the likely fair market value of AST. The result of this process was that expressions of interest were received from 19 private industrial or financial bidders.

2.20 A binding offer of purchase was accepted by IRI on 30 June 1994. On 14 July 1994, a purchase agreement was signed between IRI and KAI Italia S.r.l. (a holding company created by a German-Italian consortium for this purpose) for the purchase of all shares of AST S.p.A. The total price paid by KAI for AST was significantly greater than the amounts that had been independently determined as AST's value by each of IRI's independent valuation experts and financial advisers to the privatization.

2.21 The above duty is reported to be the result of the pro-rata allocation to AST of the pre-privatization financial contributions to the state-owned ILVA group, of which AST was a member. The determination was made on the basis of the gamma methodology.[29] The US Department of Commerce found irrelevant the evidence placed on the administrative record by AST, the Government of Italy, and the European Communities that the company had been privatized in 1994 at arm's length for fair market value when sold at public auction by the Government of Italy to the highest bidder, a private consortium led by German steelmaker Krupp AG Hoesch-Krupp. According to the US Department of Commerce's calculations provided to AST, at least 13.42 per cent of the total 15.16 per cent margin was composed of AST's pro-rata share of the subsidies granted to the state-owned ILVA group, of which AST was a member.

2.22 The US Department of Commerce's final determination in this investigation was challenged by AST in the CIT on 10 June 1999.[30] On 14 August 2000, the CIT remanded AST's appeal back to the US Department of Commerce in light of the *Delverde III* ruling. The US Department of Commerce applied its new same person test in the remand proceeding and did not consider any evidence regarding the arm's length and fair market value of the privatization of AST.[31] The application of the new methodology resulted in an increase of the countervailing duty applicable to AST from 15.16 per cent to 17.25 per cent *ad valorem*. AST disputed this remand redetermination before the CIT. On 1 February 2002, the CIT rendered its opinion where it rejected the US Department of Commerce's findings.

*(v) United States Countervailing Duties on Imports of Stainless Steel Sheet and Strip in Coils from Italy (Case No. 5)*

2.23 This case concerns the imposition of countervailing duties on stainless steel sheet and strip in coils from Italy, produced and exported by Acciai Speciali Terni S.p.A. (AST).[32] The US case number is C-475-825; (64 Fed. Reg. 30624 of 8 June 1999). The US Department of Commerce

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[29] *See Stainless Steel Plate in Coils from Italy, supra*, footnote 28, at 15509-15510.

[30] *Final Results of Redetermination pursuant to Court Remand, Acciai Speciali Terni ("AST") v. United States* Court No. 99-06-00364, (Ct. Int'l Trade 19 December 2000) (unpublished) (Stainless Steel Plate in Coils from Italy) Exhibit EC–6 to the EC's first written submission.

[31] *Ibid.*

[32] *Stainless Steel Sheet and Strip in Coils from Italy* 64 Fed. Reg. 30624 (Dep't Commerce 8 June 1999) (final countervailing duty determination), Exhibits EC–14 and EC–15 to the EC's first written submission.

published its final determination imposing a countervailing duty of 12.22 per cent on exports of AST *ad valorem*.[33]

2.24 As in stainless steel plate in coils from Italy the countervailing duty is based in part on pre-privatization financial contributions to the ILVA group, in part on pre-privatization financial contributions to TAS/Terni, and in part on debt relief provided to AST itself during the process of privatization.[34] The pre-privatization subsidies were analysed under the gamma methodology by US Department of Commerce.[35]

2.25 The US Department of Commerce's final determination in this investigation was timely challenged in the US courts by AST and is now before the CIT.[36] This appeal has been temporarily stayed pending resolution of the parallel appeal of the US Department of Commerce determination concerning Stainless Steel Plate in Coils from Italy (see paragraph 2.21 above.)

*(vi) United States Countervailing Duties on Imports of Certain Cut-to-Length Carbon-Quality Steel Plate from Italy (Case No. 6)*

2.26 This case concerns the imposition of countervailing duties on certain cut-to-length carbon-quality steel plate from Italy, produced and exported by ILVA S.p.A.[37] The US case number is C-475-827; (64 Fed. Reg. 73244 of 29 December 1999). On 29 December 1999, the US Department of Commerce published its final determination imposing a countervailing duty of 26.12 per cent on exports of ILVA (ILP).[38] The US Department of Commerce assigned that duty of 26.12 per cent to ILP. This was also based on the gamma methodology.[39] According to the US Department of Commerce calculations provided to ILP, at least 22.68 per cent of the total 26.12 per cent margin was composed of subsidies granted to ILVA during that company's period of State ownership.

2.27 As regards the privatization process, in September 1993, the IRI endorsed a plan for the market privatization of ILVA's core businesses, and ILVA's carbon steel flat products division was separately incorporated as a stock company (S.p.A.), with all shares in this stock company – ILP S.p.A. – initially owned by IRI. IRI's privatization plans were issued under the legal auspices of the European Commission. The IRI prepared a public offering for the sale of ILP. Notices were published in Italian and foreign newspapers soliciting purchase offers. IRI appointed the Italian Bank IMI S.p.A. as its financial adviser in the privatization process. It was reported that two other independent financial advisers (Pasfin Servizi Finanziari S.p.A. and Samuel Montagu Ltd.) were retained to conduct financial appraisals of the likely fair market value of ILP. Expressions of interest

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[33] *See Stainless Steel Sheet and Strip in Coils from the Republic of Korea* 64 Fed. Reg. 42943 (Dep't Commerce 6 August 1999) (final determination)*; and Stainless Steel Sheet and Strip in Coils from France, Italy, and the Republic of Korea* 64 Fed. Reg. 42943 (Dep't Commerce 6 August 1999) (notice of countervailing duty orders); and *Stainless Steel Sheet and Strip in Coils from Italy, supra*, footnote 32.

[34] *Stainless Steel Sheet and Strip in Coils from Italy* (C-475-825) *supra*, footnote 32, at 30626, which refers to the examination of the AST change in ownership by the Department of Commerce in *Stainless Steel Plate in Coils From Italy, supra*, footnote 28 (Case No. 4 *supra*).

[35] *Stainless Steel Plate in Coils from Italy*, *supra,* footnote 28,. at 15509-15510.

[36] *See* EC's first written submission, para. 99.

[37] ILVA S.p.A. (old, state-owned) was dissolved on 31 October 1993. Two new companies were created: ILVA Laminati Piani S.r.l. (ILP) and Acciai Speciali Terni S.r.l. (AST). On 16 March 1995, ILP was sold to a consortium of investors led by Riva Acciaio S.p.A. On 1 January 1997, ILP was renamed ILVA S.p.A. (new). For practical reasons, the only name mentioned in this request for consultations is ILVA S.p.A., even when we make reference to the (old) ILVA or to ILP. A more detailed corporate history can be found in Annex A, *infra*.

[38] See *Certain Cut-to-Length Carbon-Quality Steel Plate from Italy* 64 Fed. Reg. 73324 (Dep't Commerce 29 December 1999) (final countervailing duty determination). Exhibit EC–16 to the EC's first written submission.

[39] *Ibid.*, at 73246.

were received from 11 private industrial or financial bidders. On 16 March 1995, a purchase agreement was signed between IRI and Riva Acciaio S.p.A.

2.28 The US Department of Commerce's final determination in this investigation was challenged in the US courts by ILP and is now before the CIT.[40] The US Department of Commerce has conducted a remand redetermination in which it has applied the same person methodology.[41]

(b) The US Department of Commerce's practice in original investigations

2.29 The United States does not dispute that the original investigations before the Panel are WTO-inconsistent to the extent that they were based on the gamma methodology and that the underlying determinations did not fully examine whether the pre- and post-change in ownership entities involved were the same legal persons.[42]

**2. Administrative reviews**

(a) Administrative reviews covered by this dispute

*(i) United States Countervailing Duties on Imports of Certain Cut-to-length Carbon Steel Plate from Sweden (Case No. 7)*

2.30 This case concerns the definitive results of an administrative review which led to the imposition of countervailing duties on certain carbon steel products from Sweden, produced and exported by SSAB Svenskt Stal AB (SSAB), on 7 April 1997. The US case number is C-401-804; (62 Fed. Reg. 16551 of 7 April 1997). On 7 April 1997, the US Department of Commerce published its final determination which led to the imposition of the countervailing measures of 1.91 per cent *ad valorem*.[43] This duty was imposed on the basis of [alleged] subsidies which derived from financial contributions made by the Government of Sweden to the State-owned Swedish steel industry prior to the privatization of SSAB, which began in 1987 and was completed on 15 February 1994. In making this determination, the US Department of Commerce based its findings on the gamma methodology.[44] The US Department of Commerce admits that the administrative review was WTO-inconsistent to the extent that the review was based on the gamma methodology and that, therefore, the underlying determination did not fully examine whether the pre- and post-change in ownership entity was the same legal person.[45]

2.31 SSAB was privatized in three stages, in 1987, 1989 and 1992. The first stage took place in 1987 when the Government of Sweden which by then was the sole owner of SSAB sold one-third of its shares to a consortium of six institutional investors. The second step took place in 1989, when the Government of Sweden and the international investors sold part of their shares in a public offer. After this offer, the Government of Sweden held 47.8 per cent of the company's shares. Shortly afterwards, SSAB's shares were introduced on the stock exchange. In 1992, in the framework of a general privatization programme, the Government of Sweden floated bonds to which were attached warrants

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[40] *Final Results of Redetermination pursuant to Court Remand, ILVA Lamiere e Tubi S.p.A. v. United States* Court No. 00-03-00127, (Ct. Int'l Trade 28 December 2000) (unpublished) (Certain Cut-to-Length Carbon-Quality Steel Plate from Italy), Remand Order (Ct. Int'l Trade August 30, 2000).

[41] *Ibid.*

[42] US' first written submission, para. 85. For a detailed description of US practice in original investigations *see Countervailing Duties; Final Rule* 19 C.F.R. § 351(1998). (Selected pages contained in Exhibit EC–32 to the EC's second written submission).

[43] *See Certain Cut-to-Length Carbon Steel Plate from Sweden* 62 Fed. Reg. 16551 (Dep't Commerce 7 April 1997) (final admin. review) (hereinafter *Sweden Admin. Review*). Exhibit EC–17 to the EC's first written submission.

[44] *Sweden Admin. Review, supra,* footnote 43, at 16552.

[45] US' first written submission, para. 86

to purchase the remaining shares retained by the Swedish Government. All warrants were exercised by 16 February 1994, thereby completing the SSAB privatization. As a result of the SSAB privatization, the company's shares were distributed to more than 30,000 small shareholders. The sale price of the company was determined in 1987 through negotiations with private institutional investors; share prices were based on estimated average profit levels before tax, at a level considered normal on the Swedish stock market at that time for companies with similar profiles. In 1989, the price of shares was determined by two reportedly independent investment banks appointed by the Government. In 1992, the sale price of the remaining shares was determined with reference to the stock market and resulted in a price slightly higher than the six previous months average price. In the administrative review the United States determined that during the review period, SSAB was completely privatized.[46]

*(ii) Grain-Oriented Electrical Steel from Italy (Case No. 12)*

2.32 This case concerns the preliminary results of an administrative review which led to the continued imposition of countervailing duties on grain-oriented electrical steel from Italy, produced and exported by Acciai Speciali Terni S.p.A. (AST). The US case number is C-475-812; (65 Fed. Reg. 41950 of 7 July 2000). On 12 January 2001, the US Department of Commerce published the final results of the administrative review imposing a countervailing duty rate of 14.25 per cent *ad valorem* on exports of Acciai Speciali Terni S.p.A. (AST)[47]. This duty is reported to have been based in part on pre-privatization financial contributions to the state-owned ILVA group (allocated pro-rata to a group of producers, including AST), in part on pre-privatization contributions to TAS/Terni, and in part on debt relief provided to AST itself during the process of privatization.

2.33 The US Department of Commerce applied its same person change in ownership methodology[48]. In this regard, the US Department of Commerce indeed concluded that AST was the same person because the specialty steel factories in Terni still sold specialty steels, still employed the same workers, still had the same or similar suppliers, and still marketed their products to the same or similar consumers. The US Department of Commerce's final determination in the administrative review of Grain-Oriented Electrical Steel from Italy was challenged in court by AST.[49]

(b) The US Department of Commerce's practice in administrative reviews

2.34 Under United States law[50], the US Department of Commerce may initiate an administrative review on its own initiative or further to the written request of a domestic interested party, a foreign government, an exporter or producer covered by an order or an importer of the merchandise.[51] The US Department of Commerce may rescind an administrative review, in whole or only with respect to

[46] *Sweden Admin. Review, supra,* footnote 43 at 1655116552.

[47] *Grain-Oriented Electrical Steel from Italy* 66 Fed. Reg. 2885 (Dep't Commerce 12 January 2001) (final admin. review) (hereinafter *GOES Admin. Review*) Exhibit EC–7 to the EC's first written submission. The original final countervailing duty determination was published in *Grain Oriented Electrical Steel from Italy* 59 Fed. Reg. 183357 (Dep't Commerce 18 April 1994) (final countervailing duty determination) (hereinafter *GOES* Final Determination).

[48] *GOES Admin. Review, supra,* footnote 47, at 2886, which refers to the *Issues and Decision Memorandum for the Administrative Review of the Countervailing Duty Order in Grain Oriented Electrical Steel from Italy for the period January 1, 1998 to December 31, 1998* (unpublished) attached as Exhibit EC-7 to the EC's first written submission , where the relevant discussion can be found on pages 3, 4, and 16-27.

[49] The original 1994 countervailing duty order on grain-oriented electrical steel from Italy was the subject of US sunset review, which was initiated on 1 December 1999. *Grain-Oriented Electrical Steel from Italy* 65 Fed. Reg. 65295 (Dep't Commerce 1 November 2000) (full sunset review).

[50] Detailed procedures for administrative reviews can be found in *Countervailing Duties; Final Rule*, 19 C.F.R. § 351.213 (1998).

[51] *Countervailing Duties; Final Rule*, 19 C.F.R. § 351.213 (1998), p. 203.

a particular exporter or producer, if it concludes that during the period covered by the review, there were no entries, exports, or sales of the subject merchandise, as the case may be.[52]

2.35 Pursuant to US Department of Commerce's practice, the appropriate venue for introducing evidence of a privatization as a basis for a change in the countervailable duty is in an administrative review.[53]

**3. Sunset reviews**

(a) Sunset reviews covered by this dispute

*(i) United States Countervailing Duties on Imports of Cut-to-Length Carbon Steel Plate from the United Kingdom (Case No. 8)*

2.36 This case concerns the definitive results of a sunset review which led to the continuation of the countervailing measures imposed on cut-to-length carbon steel plate from the United Kingdom, produced and exported by British Steel plc. The US case number is C-412-815; (65 Fed. Reg. 18309 of 7 April 2000). On 7 April 2000, the US Department of Commerce published its final determination which led to the continuation of the countervailing measures at a rate of 12.00 per cent, the applicable rate of duty at the time and the same as that found in the original investigation.[54] This countervailing duty was originally imposed in 1993, on the basis of subsidies which derived from financial contributions made by the Government of the United Kingdom to the State-owned British Steel Corporation.[55] This was prior to the transformation of British Steel Corporation into British Steel plc (BS plc) and its privatization in 1988. In making the above sunset determination, the US Department of Commerce determined on the basis of its gamma methodology that these subsidies continued to benefit British Steel after its privatization.[56] The subsidies originally received by British Steel Corporation in this case are the same as those involved in the *US – Lead and Bismuth II* WTO dispute. However, the *US – Lead and Bismuth II* WTO dispute covered countervailing duties on imports by UES whereas this dispute involves imports from British Steel plc., a different sucessor to British Steel Corporation.

2.37 Prior to 1988, British Steel Corporation (BSC) was a Crown corporation without shares which was wholly-owned by the United Kingdom Government. On 26 July 1988, it was reincorporated as a public limited company named British Steel plc (BS plc). All the shares were owned by the United Kingdom Government.

2.38 The second step in the privatization was the actual public offering of the shares of BS plc. Following a competitive process, the Secretary of State for Trade and Industry appointed a number of independent firms to provide advice on the sale. Two billion ordinary shares of BS plc were offered at a fixed price on 23 November 1988. The final price of £1.25, was determined based upon a

[52] *Countervailing Duties; Final Rule*, 19 C.F.R. § 351.213 (1998), p. 204.

[53] See US first written submission, para. 77.

[54] *See*, *Cut-to-Length Carbon Steel Plate from the United Kingdom* 65 Fed. Reg. 18309 (Dep't Commerce 7 April 2000) (exp. sunset review). *See also Issues and Decision Memorandum for the Expedited Sunset Review of the Countervailing Duty Order on Cut-to-Length Carbon Steel Plate from the United Kingdom; Final Results* 29 March 2000 (unpublished) Exhibit EC–18 to the EC's first written submission.

Note that while the Government of the United Kingdom and the European Communities did provide information to the US Department of Commerce to the effect that the order should be terminated because pre-privatization subsidies to BSC did not continue to benefit the production of BS plc after the fair market value privatization in 1988, Corus itself did not cooperate with the US Department of Commerce's investigation.

[55] *See Cut-to-Length Carbon Steel Plate from the United Kingdom* 58 Fed. Reg. 37393 (Dep't Commerce 9 July 1993) (final countervailing duty determination).

[56] *See Issues and Decision Memorandum for the Expedited Sunset Review of the Countervailing Duty Order on Cut-to-Length Carbon Steel Plate from the United Kingdom; Final Results*, *supra*, footnote 54, at 7.

recommendation by the main financial adviser for the transaction and produced a total sale price to the United Kingdom Government of 2.5 billion pounds sterling. In determining the sale price, the main financial adviser took into account the forecast dividend yield, the company's forecasted profits, the market conditions and the anticipated level of demand in the UK and overseas.

2.39 In this case, the US Department of Commerce was expressly requested by a US domestic court to determine if the privatization of British Steel was at arm's length and for fair market value. In 1995, in the context of this court remand, the US Department of Commerce confirmed that the British Steel privatization was at arm's length, for fair market value and consistent with commercial considerations because British Steel shares were offered to private investors world-wide, the offering price was based on valuations by independent consultants, and private investors purchased nearly the entire share offering[57].

*(ii) United States Countervailing Duties on Imports of Certain Corrosion-Resistant Carbon Steel Flat Products from France (Case No. 9)*

2.40 This case concerns the definitive determination of a sunset review which led to the continuation of the countervailing measures imposed on certain corrosion-resistant carbon steel flat products from France, produced and exported by Usinor SA (Usinor). The US case number is C-427-810; (65 Fed. Reg. 18307 of 7 April 2000). On 7 April 2000, the US Department of Commerce published its final determination which led to the continuation of the countervailing measures imposed on corrosion-resistant carbon steel flat products from France, produced and exported by Usinor S.A.[58] The rate of countervailing duty for Usinor was 15.13 per cent *ad valorem*; the same as that found in the original investigation, because Usinor had never sought an administrative review.

2.41 The above countervailing duty was originally imposed in 1993, on the basis of the subsidies which derived from financial contributions made by the French Government to the State owned Usinor SA.[59] This was prior to the privatization of Usinor in 1995.[60] In making this sunset determination, the US Department of Commerce concluded that these subsidies continued to benefit Usinor after privatization.[61]

*(iii) United States Countervailing Duties on Imports of Cut-to-Length Carbon Steel Plate from Germany (Case No. 10)*

2.42 This case concerns the final determination of a sunset review which led to the continuation of the countervailing measures imposed on cut-to-length carbon steel plate from Germany, produced and exported by AG Dillinger Hüttenwerke Saarstahl (Dillinger). The US case number is C-428-817; (65 Fed. Reg. 47407 of 2 August 2000). On 2 August 2000, the US Department of Commerce published its final determination leading to the continuation of the countervailing measures imposed

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[57] *See Final results of redetermination pursuant to Court remand on general issues on privatization* (*British Steel plc v United States*) Consol. Court No. 93-09-00550 (Ct. Int'l Trade 17 July 1995), at 18-20. Exhibit EC–19 to the EC's first written submission.

[58] See *Corrosion-Resistant Carbon Steel Flat Products from France* 65 Fed. Reg. 18063 (Dep't Commerce 7 April 2000) (exp. sunset review) See also *Issues and Decision Memorandum for the Sunset Review of the Countervailing Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from France; Final Results* 29 March 2000 (unpublished). Exhibit EC–20 to the EC's first written submission. Note, that while the Government of France and the European Communities did communicate to the US Department of Commerce that Usinor had been privatized for fair market value, the company itself did not cooperate with US Department of Commerce's investigation.

[59] *Certain Steel Products from France*, 58 Fed. Reg. 37304 (Dep't Commerce 9 July 1993) (final countervailing duty determination, as amended).

[60] For details on Usinor's privatization, see Case No. 1 *supra*.

[61] *See Issues and Decision Memorandum for the Sunset Review of the Countervailing Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from France; Final Results*, *supra,* footnote 58.

on Cut-to-Length Carbon Steel Plate from Germany, produced and exported by Dillinger.[62] The rate of countervailing duty for these products exported by Dillinger is 14.84 per cent *ad valorem*. This countervailing duty was originally imposed in 1993, on the basis of the subsidies which derived from financial contributions made by the German Government and the Regional Government of Saarland to Dillinger Hütte Saarstahl and attributed in part to Dillinger.[63]

2.43 At the beginning of April 1989, Saarstahl Völkingen GmbH was owned 76 per cent by the Government of Saarland (a German land) and 24 per cent by Arbed Luxembourg though its subsidiary, Arbed-Finanz Deutschland GmbH. On 20 April 1989, Saarland and Arbed reached an agreement with Usinor Sacilor to combine Saarstahl Völkingen GmbH with Dillinger, another Saarland steel producer owned by Usinor Sacilor, under a holding company (DHS). The parties engaged two independent accounting firms (Treuarbeit and KPMG) to appraise the relative values each party would contribute to the combined entity, in order to calculate each party's per centage ownership. On 15 June 1989, after the change in ownership transaction, Usinor Sacilor owned 70 per cent of DHS's shares, Saarland owned 27.5 per cent of DHS's shares and the remaining 2.5 per cent was owned by Arbed. The main subsidy came in the form of debt relief provided to DHS in connection with its creation in 1989.

2.44 On 30 June 1989, DHS transferred the assets and liabilities of the former Saarstahl Völkingen GmbH into the newly created subsidiary, Saarstahl. Thus DHS became a holding company with two operating subsidiaries, Saarstahl and Dillinger.

2.45 In the court remand mentioned in Case No. 8, the US Department of Commerce was requested to analyse the change in ownership of certain companies including Dillinger. As a result of this exercise, the US Department of Commerce confirmed that the Dillinger transaction was at arm's length, for fair market value, and consistent with commercial considerations because it occurred between two unrelated parties and each party's percentage shareholding in DHS/Dillinger was based on appraisals performed by two independent accounting firms which took into account the forgiveness of the debt.[64]

2.46 The US Department of Commerce determined that it was "not appropriate" to address the privatization issue in the sunset review, the focus of which is on whether subsidization is likely to continue or recur.[65] The US Department of Commerce cited the "complexity and fact-intensive nature" of this issue in support of its finding that the sunset review schedule did not allow time for it to analyze the privatization and other changes in law. When this determination was challenged before the CIT, it was pointed out that the statute allows the US Department of Commerce to extend the period for issuing final results by up to 90 days. For this and other reasons, the CIT later remanded the sunset review to the US Department of Commerce for redetermination, taking into account all the evidence submitted by the parties, including that on privatization.[66]

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[62] *Certain Corrosion-Resistant Carbon Steel Flat Products; Cold-Rolled Carbon Steel Flat Products; and Cut-to-Length Carbon Steel Plate Products from Germany*. 65 Fed. Reg. 47407 (Dep't Commerce 2 August 2000) (full sunset reviews). See also *Issues and Decision Memorandum for the Sunset Reviews of the Countervailing Duty Orders on Certain Corrosion-Resistant Carbon Steel Flat Products; Cold-Rolled Carbon Steel Flat Products; and Cut-to-Length Carbon Steel Plate Products from Germany; Final Results* 27 July 2000 (unpublished). Exhibit EC–21 to the EC's first written submission.

[63] *Certain Corrosion-Resistant Carbon Steel Flat Products; Cold-Rolled Carbon Steel Flat Products; and Cut to- Length Carbon Steel Plate Products from Germany* 58 Fed. Reg. 37315 (Dep't Commerce 9 July 1993) (final countervailing duty determination).

[64] See *Final results of redetermination pursuant to Court remand on general issues on privatization* (*British Steel plc v United States)* Consol. Court No. 93-09-00550, at 22-34.

[65] *AG Dillinger Huttenwerke et al v United States* ("*Dillinger*"); Court No. 00-09-00437 (Ct. Int'l Trade 28 February 2002), at 62. Exhibit EC-34 to the EC's second written submission.

[66] *Ibid.* at 67.

*(iv) United States Countervailing Duties on Imports of Cut-to-Length Carbon Steel Plate from Spain (Case No. 11)*

2.47 This case concerns the definitive results of a sunset review which led to the continuation of the countervailing measures imposed on cut-to-length carbon steel plate from Spain, produced and exported by Aceralia SA. The US case number is C-469-804; (65 Fed. Reg. 18307 of 7 April 2000). On 7 April 2000, the US Department of Commerce published its final determination continuing the countervailing measures imposed on cut-to-length carbon steel plate from Spain, produced and exported by Aceralia S.A.[67] The rate of countervailing duty was set at 36.86 per cent *ad valorem*, the same rate of duty as found in the original investigation. The above countervailing duty was originally imposed in 1993, on the basis of the alleged subsidies which derived from financial contributions made by the Spanish Government to CSI Corporación Siderúrgica.[68] This was prior to the privatization of CSI in 1997.

2.48 CSI was privatized through a three-step process by its State-controlled owner AIE (Agencia Industrial del Estado). Phase one involved the selection of a "*technological partner*" to purchase a 35 per cent share of the company. Phase two involved the selection of a "*supporting partner*" to purchase between 10 per cent and 25 per cent of the company's shares. In phase three, the remaining shares were sold by an international subscription open to private investors. Prior to its privatization, CSI was valued by experts from the University of Oviedo and Carlos III of Madrid and from the international audit firm of Ernst & Young. Furthermore, a Spanish bank, Banco Central Hispano-Americano, was requested to monitor the privatization in order to ensure that every step was properly carried out. During the process other independent auditors such as Coopers & Lybrand were required to certify the correctness of the privatization. After a fully transparent evaluation process, on 1 August 1997 the Luxembourg company Arbed was finally chosen as the technological partner of CSI. The supporting partner was also selected through an open bid. The only two companies which expressed an interest were Corporacion J.M. Aristrain and Gestamp SL which respectively purchased shares amounting to 11 per cent and 1 per cent of the company's capital (17 October 1997). The privatization was completed by the sale through a public subscription of the remaining shares owned by the Spanish State (March 1998).

2.49 In its sunset review, the US Department of Commerce determined that the above financial contributions continued to benefit Aceralia.[69]

(b) The US Department of Commerce's practice in sunset reviews

2.50 Under United States law, the US Department of Commerce automatically initiates a sunset review on its own initiative within five years of the date of publication of a countervailing duty order.[70] The US Department of Commerce conducts these reviews pursuant to published

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[67] *Cut-to-Length Carbon Steel Plate from Spain* (C-469-804) 65 Fed. Reg. 18307 (Dep't Commerce 7 April 2000) (exp. sunset review). See also *Issues and Decision Memorandum for the Expedited Sunset Review of the Countervailing Duty Order on Cut-to-Length Carbon Steel Plate from Spain; Final Results* 29 March 2000 (unpublished). Exhibit EC–22 to the EC's first written submission.

While the Government of Spain and the European Communities did communicate to US Department of Commerce that CSI had been privatized to create Aceralia, Aceralia itself, did not cooperate with the US Department of Commerce's investigation. According to the US Department of Commerce's practice, Aceralia was not entitled to request any administrative review since it had stopped exporting to the United States when the order became effective in 1993.

[68] *Cut-to-Length Carbon Steel Plate from Spain* 58 Fed. Reg. 37374 (Dep't Commerce 9 July 1993) (final countervailing duty determination). Exhibit EC-22 to the EC's first written submission.

[69] *See also Issues and Decision Memorandum for the Expedited Sunset Review of the Countervailing Duty Order on Cut-to-Length Carbon Steel Plate from Spain; Final Results, supra,* footnote 67.

[70] Sections 751(c)(1) and (2) of the Tariff Act of 1930, as amended, *see also Countervailing Duties; Final Rule,* 19 C.F.R. § 351.218(c)(1) (1998).

regulations.[71] In the sunset review, the US Department of Commerce has the responsibility of determining whether revocation of a countervailing duty order would be likely to lead to continuation or recurrence of subsidization. If the US Department of Commerce's determination is negative, it must revoke the order. However, if the US Department of Commerce's determination is affirmative, it 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 if the order is revoked. The USITC has the option of considering the magnitude of the net countervailable subsidy when it analyses the likelihood of continuation or recurrence of injury.[72]

2.51 The US Department of Commerce informs exporting Members and firms of the initiation of a sunset review in at least four ways. The US Department of Commerce publishes in the *Federal Register* a sunset review initiation schedule to provide for monthly initiations of so-called "transition orders." In addition, in the month preceding the scheduled initiation date of a sunset review, the US Department of Commerce notifies representatives of the foreign government, the foreign producers, and the domestic producers, by mail, that the sunset review of a particular countervailing duty order will be initiated on or about the first of the following month. The US Department of Commerce 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 US Department of Commerce's website.[73]

2.52 When the US Department of Commerce initiates sunset reviews it requests that any interested parties who wish to participate in the review submit such a request and comments on the likelihood of continuation or recurrence of subsidization.[74] The *Sunset Regulations* set forth, *inter alia*, the information to be provided by parties participating in a sunset review and the deadlines for required submissions.[75] When the exporting producers subject to the countervailing duties do not submit comments, the US Department of Commerce conducts an expedited sunset review. The evidence used in sunset reviews is that already on the record at the US Department of Commerce. The US Department of Commerce position is that unless during the five-year period of the countervailing duty the US Department of Commerce has conducted an administrative review, the only evidence in a sunset review on the likelihood of continuation or recurrence of subsidization will be that coming from the original investigation.[76] The United States maintains that the US Department of Commerce is under no obligation, pursuant to Article 21.3 of the SCM Agreement, to convert sunset reviews into full-blown administrative reviews of the respective countervailing duties.

2.53 While the European Communities does not dispute the accuracy of the US Department of Commerce's description of its practices, the European Communities maintains that the practice is incompatible with Article 21.3 of the SCM Agreement. The European Communities argues that the US Department of Commerce's practice of conducting an expedited review and not taking into account comments submitted by interested parties if the exporting producer does not submit comments is inconsistent with Article 21 of the SCM Agreement.

2.54 The European Communities notes a distinction between the United States and the European Communities as to the facts. The US Department of Commerce maintains that "in three of the four sunset reviews, the US Department of Commerce received no comments from the European steel

[71] For a detailed description of procedures, the United States refers to *Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders ("Sunset Regulations")* 19 C.F.R. § 351(1998).
[72] US' response to question No. 20 posed by the Panel, para 2.
[73] *Ibid*, para 1.
[74] *See* US' first written submission, para 89.
[75] The US refers to *Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders ("Sunset Regulations")*, 19 C.F.R. § 351(1998).
[76] See footnote 53.

companies involved. Accordingly, in those cases and pursuant to its procedures, the US Department of Commerce conducted expedited reviews."[77] Both the United States and the European Communities agree that in Countervailing Duties on Imports of Cut-to-Length Carbon Steel Plate from Germany (Case No. 10) the exporting company did participate and a full review was conducted. However, the European Communities asserts that in Countervailing Duties on Imports of Cut-to-Length Carbon Steel Plate from the United Kingdom (Case No. 8), Countervailing Duties on Imports of Certain Corrosion-Resistant Carbon Steel Flat Products from France (Case No. 9) and Countervailing Duties on Imports of Cut-to-Length Carbon Steel Plate from Spain (Case No. 11), the US Department of Commerce deliberately ignored comments submitted by the Governments of the United Kingdom, France and Spain as well as by the European Communities.[78]

## B. UNITED STATES' CHANGE IN OWNERSHIP METHODOLOGIES COVERED BY THIS DISPUTE

2.55 This dispute covers two methodologies used by the US Department of Commerce in order to assess the impact of a change in ownership in the determination of subsidization in respect of privatized companies. These methodologies are the so-called gamma methodology and the same person methodology. In this regard, of the 12 determinations challenged by the European Communities, 11 were initially based on the gamma methodology. In Case No. 12 (*Grain-Oriented Electrical Steel from Italy "GOES"*) the US Department of Commerce used the same person methodology. The same person methodology was first applied in the Final Results of the Administrative Review in this case which was published on 12 January 2001.[79] This methodology had earlier also been applied in various remand determinations ordered by CIT within appeal proceedings in four of the above 11 determinations.[80] The same person methodology has been challenged before the CIT in all of these remand redeterminations[81], and also in the GOES determination.[82]

2.56 The United States has admitted that seven (Case Nos. 1 to 7) of these 12 determinations are inconsistent with its WTO obligations to the extent that the US Department of Commerce did not fully examine whether the pre- and post-change in ownership entities were the same legal persons change in ownership.[83] These were based on the gamma methodology.

### 1. The gamma methodology

2.57 In July 1993, the US Department of Commerce introduced the gamma methodology.[84] According to this methodology, after assessing the existence of pre-privatization subsidies, the US Department of Commerce determines to what extent (if any) the privatization transaction price repaid

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[77] *See* US' first written submission, para. 89.

[78] *See* EC's first written submission, para. 109 and footnote 102 to para. 115; *and Issues and Decision Memorandum for the Sunset Review of the Countervailing Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from France; Final Results, supra,* footnote 58, at 5.

[79] *See* EC's first written submission, para. 124.

[80] Stainless Sheet and Strip in Coils from France (C-427-815) (Case No. 1); Certain Cut-to-Length Carbon Quality Steel from France (C-427-817) (Case No. 2) (with respect to GTS); Stainless Steel Plate in Coils from Italy (C-475-823) (Case No. 4) and Certain Cut-to-Length Carbon-Quality Steel Plate from Italy (C-475-827) (Case No. 6).

[81] The United States claims that since "the EC has not challenged the four remand determinations in this forum ... the Panel's review is limited to the six original determinations in which US Department of Commerce applied its old methodology." US' first written submission, para. 85.

[82] *See* EC's first written submission, para. 124.

[83] *See* US' first written submission, para. 85.

[84] The methodology was set out in a "General Issues Appendix" annexed to *Certain Steel Products from Austria,* 58 Fed. Reg. 37217 (Dep't Commerce 9 July 1993) (final countervailing duty determination) (hereinafter, *General Issues Appendix*). The relevant discussion of privatization is found at 37259-65. Exhibit EC–2 to the EC's first written submission.

unamortized subsidies, and countervails the remainder (if any). Unlike the pass-through methodology where the totality of prior subsidies passed through, the application of the gamma methodology could, depending on the facts, result in a finding that all, some, or none of the unamortized portion of the pre-privatization subsidies remains countervailable after privatization.

2.58 The gamma methodology was the methodology applied in the three administrative reviews of countervailing duty determinations covered by the *United States – Imposition of Countervailing Duties on Certain Hot Rolled Lead an Bismuth Carbon Steel Products Originating in the United Kingdom* ("*US – Lead and Bismuth II*") dispute and which the Panel and Appellate Body found to be inconsistent with the SCM Agreement.[85]

### 2. The same person Methodology

2.59 In *Grain-Oriented Electrical Steel from Italy*, the US Department of Commerce applied for the first time the same person methodology which it had developed on remand after the *Delverde III* judgment. This methodology had first been set out in the draft and then final results of a redetermination pursuant to a court remand in *Acciai Speciali Terni v United States.*[86]

2.60 The same person methodology provides for a two-step test. The first step consists in an analysis of whether the post-privatization entity is the same legal person that received the original subsidies before privatization. For this purpose, the US Department of Commerce examines the following non-exhaustive criteria: (i) continuity of general business operations; (ii) continuity of production facilities; (iii) continuity of assets and liabilities; and (iv) retention of personnel.[87] If, as a consequence of the application of these criteria, the US Department of Commerce concludes that the post-privatization entity is a new legal person, distinct from the entity that received the prior subsidies, the US Department of Commerce would not impose duties on goods produced after privatization on account of the pre-privatization subsidies. The US Department of Commerce would, however, proceed to examine in such an event, whether any subsidy had been bestowed upon the post-privatization entity as a result of the change in ownership (by assessing whether the sale was for fair market value and at arm's-length). If as the result of the application of the above criteria the US Department of Commerce concludes that no new or distinct legal person was created, all the subsidy is found to continue to reside in the post-privatization producer and the US Department of Commerce will not assess whether the privatization was at arm's-length and for fair market value.[88]

## C. SECTION 771(5)(F) OF THE US TARIFF ACT OF 1930, AS AMENDED, (19 U.S.C. SECTION 1677(5)(F))

2.61 Section 771(5)(F) of the US Tariff Act of 1930, as amended, (19 U.S.C. Section 1677(5)(F)), hereinafter "Section 1677(5)(F)", reads as follows:

> "a change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer

[85] *See* Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("*US – Lead and Bismuth II*"), WT/DS138/AB/R, adopted 7 June 2000. As further discussed, the United States in its first written submission stated "the panel and the Appellate Body rejected the gamma methodology as inconsistent with the SCM Agreement." US' first written submission, para. 12.

[86] *Acciai Speciali Terni ("AST")* Court No. 99-06-00364.

[87] *Acciai Speciali Terni ("AST")* Court No. 99-06-00364, at 13.

[88] *Ibid.*, at 7.

continues to be countervailable, even if the change in ownership is accomplished through an arm's-length transaction."[89]

## III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 The **European Communities** claims that the old change in ownership methodology applied by the United States in the 12 countervailing duty orders listed in Section IIabove, and the new change in ownership methodology applied, *inter alia*, in the administrative review in Grain Oriented Electrical Steel from Italy, and more generally the refusal of the United States to correctly apply the SCM Agreement, as interpreted by the Panel and Appellate Body in *US – Lead and Bismuth II*, are inconsistent with the United States' obligations under the WTO Agreement. In particular, but not necessarily exclusively, the European Communities requests the Panel to examine the consistency of these measures with the following provisions:

– Articles 1.1, 10, 14(d) of the SCM Agreement insofar as these Articles require an authority to establish the existence of a financial contribution and benefit (and hence a countervailable subsidy);

– Footnote 36 to Article 10 of the SCM Agreement which provides that countervailing duties may only be imposed in order to offset a subsidy bestowed upon the manufacture, production or export of any merchandise, as provided for in Article VI:3 of GATT 1994;

– Article 19.1 of the SCM Agreement which in particular provides that a countervailing duty may only be imposed if the existence of a subsidy has first been determined ;

– Article 19.3 of the SCM Agreement which in particular requires investigating authorities promptly to establish an individual countervailing duty rate for new exporters who were not subject to the original investigation;[90]

– Article 19.4 of the SCM Agreement, which provides that no countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist calculated in terms of subsidization per unit of the subsidized and exported product;

– Article 21.1 of the SCM Agreement, which provides that a countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization;

– Article 21.2 of the SCM Agreement, which in particular requires investigating authorities to determine whether there is a continuing need for the application of countervailing duties in the light of the information before it;

– Article 21.3 of the SCM Agreement, which in particular provides that countervailing duties are to expire after five years unless it is determined that the expiry of the duty would lead to continuation or recurrence of subsidization and injury;

[89] Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994); 19 U.S.C. § 1677(5)(F). Exhibit EC–4 to the EC's first written submission.

[90] The Panel notes that although this claim was initially raised by the European Communities, it did not present arguments on this issue during the proceedings.

– Article 32.5 of the SCM Agreement which requires Members to ensure the conformity of their laws, regulations and administrative procedures with the provisions of the SCM Agreement; and

– Article XVI.4 of the WTO Agreement, which requires Members to ensure the conformity of their laws, regulations and administrative procedures with their obligations as provided in the annexed Agreements. [91].

3.2 In addition, the **European Communities** believes that Section 1677(5)(F) is inconsistent with the SCM Agreement and the WTO Agreement to the extent that it prevents the United States from implementing its WTO obligations such that where a privatization takes place for fair market value and at arm's length, no benefit passes through to the post-privatization entity. [92]

3.3 In its first written submission[93], and with reference to the Panel's competence under Article 19.1 of the DSU, the **European Communities** requests the Panel to suggest possible means of implementation on the grounds that the United States has demonstrated a lack of good faith with respect to the previous WTO dispute settlement proceeding. In this regard, the European Communities would like that the Panel suggests the following implementation actions:

– The United States should bring Section 1677(5)(F) into conformity with its WTO obligations;

– The United States should immediately revoke the sunset determinations in Cut-to-Length Carbon Steel Plate from United Kingdom (C-412-815) (Case No. 8) and Cut-to-Length Carbon Steel Plate from Germany (C-428-817) (Case No.10); and,

– The United States should immediately review or amend the remaining determinations brought before the Panel in the present dispute. In doing so, it should apply in good faith the findings of the Panel. If the privatization transactions which are the subject of this dispute have taken place for fair market value and at arm's length, then no more countervailing duties should be levied. In the event that the United States should find that the privatization transactions are not at fair market value and arm's length, the United States should determine that the subsidy amount is the difference between the price actually paid and the fair market value.[94]

3.4 In its first oral statement[95], the **European Communities** indicates that, in order to prevent further dispute over this issue, the Panel should issue a clear and unambiguous explanation of the correct interpretation of the relevant provisions of the SCM Agreement. The European Communities also asks the Panel to consider making a suggestion on implementation to assist in resolving this dispute and suggests that one possibility could be:

> "The Panel suggests that the US abandon its "same-person methodology" and replace it with another that involves (1) an examination of whether an exporter is in fact benefiting from a financial contribution and (2) provides that a sale of a state-owned company for fair market value and at arm's length means that the privatized company cannot be considered to benefit from any prior financial contribution to the State-owned company."

[91] *See* EC's first written submission, para. 160.
[92] *See* EC's first written submission, para. 16.
[93] *See* EC's first written submission, para. 161.
[94] *See* EC's first written submission, para. 57.
[95] *See* EC's statement at the first substantive meeting, para. 64.

3.5 In its second written submission[96], the **European Communities** respectfully requests that the Panel to reach the findings contained in the European Communities first written submission, and to adopt the suggestions on implementation which the European Communities suggested in its first written submission and in its opening statement to the Panel at the first substantive meeting. In its second oral statement[97], the European Communities asks the Panel to make the findings requested in its first written submission, and to issue suggestions for implementation of its Report set out in the conclusion to the oral statement of the European Communities to the first meeting of the Panel.

3.6 The **United States** requests that the Panel make the following findings:

– by not self-initiating reviews to reconsider change in ownership situations in light of the Appellate Body's report in *US – Lead and Bismuth II,* the United States has not acted inconsistently with its obligations under the SCM Agreement;

– the seven US Department of Commerce determinations (six investigations and one administrative review (Case Nos. 1-7) are inconsistent with the United States' obligations under the SCM Agreement only to the extent that US Department of Commerce did not fully examine whether the pre- and post-change in ownership entities involved were the same legal persons;

– the four US Department of Commerce sunset determinations (Case Nos. 8-11) are not inconsistent with the United States' obligations under the SCM Agreement;

– the *GOES from Italy* administrative review (Case No. 12) is not inconsistent with the United States' obligations under the SCM Agreement;

– the US change in ownership provision, Section 1677(5)(F) is not inconsistent with the United States' obligations under the SCM Agreement and the WTO Agreement; and

– the European Communities' claims regarding the expedited sunset review of the countervailing duty order on cut-to-length steel plate from Sweden are not within the Panel's terms of reference.[98]

## IV. ARGUMENTS OF THE PARTIES

4.1 This Section includes a summary of the main arguments of the parties which are of relevance to the findings of the Panel.

### A. WTO-COMPATIBILITY OF THE UNITED STATES' SAME PERSON METHODOLOGY

4.2 The **European Communities** submits that the same person methodology is inconsistent with the requirement under Article 1.1(b) of the SCM Agreement to determine the existence of a benefit to the post-transaction entity before countervailing duties can be imposed. For that reason, any countervailing duties imposed on the basis of this methodology will be inconsistent with Articles 1, 10, 14, 19.4 and either 19.1 or 21.1, 21.2 or 21.3 (depending whether a review or original investigation is at issue).[99]

4.3 The **European Communities** claims that, in applying the methodology, the US Department of Commerce disregards the instructions set down in Article 14 of the SCM Agreement that any

[96] *See* EC's second written submission, para. 83.
[97] *See* EC's statement at the second substantive meeting, para. 20.
[98] *See* US' first written submission, para. 99.
[99] *See* EC's first written submission, para. 126.

benefit must be calculated with respect to the advantage obtained over what was available in the market. It argues that the factors examined by the US Department of Commerce in determining whether the firm under investigation is the same person as the pre-transaction subsidy recipient bear no relation to the benefit analysis required under the SCM Agreement. The "same person methodology", in not taking into account the price paid by the purchaser of the privatized company and thus failing to analyse the existence of a benefit to the post-transaction entity, is inconsistent with Articles 1.1(b), 10, 14, 19.4 and either 19.1 or 21.1 (depending on the circumstances) of the SCM Agreement. Thus, it concludes, Case 12, *Grain-Oriented Electrical Steel from Italy* (C-475-812)[100], based on the same person methodology involves the imposition of countervailing duties inconsistently with Articles 1.1(b), 10, 14, 19.4, 21.1 and 21.2 of the SCM Agreement.[101]

**1. Whether privatization triggers the need for a re-examination of the existence of benefit**

4.4 The **European Communities** submits that privatization is a fundamental change in ownership that *a fortiori* requires a new benefit analysis. It explains that since the government – or a government body – is the owner of any state-owned company, all financial contributions of the State towards a state-owned company must be assessed on the basis of the equity investor standard of Article 14 of the SCM Agreement. This is because in terms of analysis, the European Communities believes there is no meaningful distinction between an equity investment and other forms of financial contribution, such as, for example a cash grant. Whether the government had provided money for the purchase of a factory, or had injected capital, the result is the same; there is an increase in the value of the equity held by the government. Thus, it argues, all subsidies granted by the government to a state-owned company can be analysed on the basis of the private equity investor standard of Article 14(a). The European Communities further argues that this is not the case for subsidies to private companies, because the government may not have the choice as to the form its subsidization might take; i.e. it may not have the option to purchase equity in the company. It explains that when this equity is sold the basis for the original benefit analysis changes, because the government's equity interest will be re-valued on market terms and in fact repaid.[102]

4.5 In its second written submission, the **United States** indicates that there has never been any dispute before this Panel concerning the fact that a change in ownership triggers an obligation to re-examine the existence of a subsidy.[103] In the view of the United States however, their examination (with regard to previously bestowed subsidies) is complete once an authority concludes that the current producer is the same legal entity that received the earlier financial contribution and benefit. The United States, in the second substantive meeting, also disputed the European Communities' belief that all subsidies granted by the government to a state-owned company can be analysed on the basis of the private equity investor standard..

**2. Who is the recipient of the benefit in case of privatization?**

(a) Concept of benefit under the SCM Agreement

4.6 The **European Communities** points out that Article 1.1 of the SCM Agreement provides that a subsidy will only exist if there is a financial contribution which confers a benefit. The European Communities asserts that the findings by the Appellate Body in *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*") clearly state that the focus of the enquiry under Article 1.1(b) is on the recipient, not the government granting the subsidy.[104] The European Communities also refers to the Appellate Body decision in *Canada – Aircraft* to support its contention

[100] *GOES Admin. Review, supra*, footnote 47.
[101] *See* EC's first written submission, para. 132.
[102] *See* EC's second written submission, para.26.
[103] *See* US' second written submission, para. 11.
[104] *See* EC's first written submission, para. 42.

that a benefit can only "be said to arise if a person, natural or legal, or a group of persons, has in fact received something."[105] The European Communities argues that the Appellate Body's interpretation of Article 1.1 of the SCM Agreement in *Canada – Aircraft* makes it clear that the analysis of the existence of a benefit should be on the value to the recipient, not on the cost to the granting authority.

4.7 The **United States** contends that the nature of countervailable benefits is made plain by Articles 1 and 14 of the SCM Agreement. It explains that a countervailable benefit is that part of a financial contribution that is obtained on terms more generous than those the recipient could have obtained commercially. In its view, there is no requirement to analyse the competitive advantage derived by the recipient from the benefit, or the extent to which the recipient succeeds in enjoying the benefit since these concepts are not found in the SCM Agreement. Countervailable benefits are, in essence, simply *fixed sums of money*, which (in the case of non-recurring benefits) are amortized over time.[106]

4.8 The **European Communities** agrees with the United States that the benchmark for making a calculation of the value of the benefit to the recipient is through comparison to the marketplace. The European Communities refers to the text of the various provisions of Article 14 of the SCM Agreement, which refer to "comparable commercial" practices.[107]

4.9 Where the **European Communities** differs with the United States is in the evaluation of the effect of a change in ownership on the existence of a countervailable benefit. The European Communities argues that any benefit, and hence any benefit stream from non-recurring subsidies, must be viewed from the perspective of a natural or legal person. The benefit does not "attach" to the productive assets. Thus, when the exported product is no longer produced by the same natural or legal person as received the financial contribution and benefit, one must ask whether the current producer also enjoys the same benefit stream.[108] This new benefit analysis must be made on the basis of a comparison with a market benchmark in accordance with Article 14 of the SCM Agreement. In *US – Lead and Bismuth II* the Appellate Body concluded that because UES and BS plc/BSES had paid:

> "fair market value for all the productive assets, goodwill, etc., they acquired from BSC and subsequently used in the production of leaded bars imported into the United States in 1994, 1995, and 1996. We, therefore see no error in the panel's conclusion that, in the specific circumstances of this case, the "financial contribution" bestowed on BSC between 1977 and 1986 could not be deemed to confer a "benefit" on UES and BS plc/BSES."[109]

4.10 The **United States** maintains that, because countervailable benefits, once identified and valued, are, essentially, amounts of money, the method by which they may be terminated is

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[105] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*"), WT/DS70/AB/R, adopted 20 August 1999, at para. 154, *cited in* EC's first written submission, para. 42.

[106] *See* US' second written submission, para. 4.

[107] *See* EC's first written submission, para. 44. The European Communities specifically refers to Article 14(d) of the *SCM Agreement* as a useful analogy for the present case. Article 14(d) states:

> "the provision of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of the remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)."

[108] *See* EC's first written submission, para. 49.

[109] Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 68, *cited in* EC's first written submission, para. 52.

straightforward — that amount of money is amortized over time, unless the recipient pays back the remaining unamortized amount. The United States agrees that such a repayment could occur in conjunction with a change in ownership and, under its new methodology, investigates any claim that such a repayment has occurred (or that the subject merchandise is being produced by a different person than the recipient). However, it adds, the SCM Agreement provides no basis for concluding that a change in the ownership of a subsidy recipient, for fair market value or otherwise, automatically eliminates the benefit conferred on the company. The United States argues that if a corporation has received a subsidy — a financial contribution that confers a benefit — the simple transfer of that corporation from one owner to another does not mean that the corporation no longer has the subsidy. Neither the financial contribution nor the benefit has changed, and the corporation is still the same person.[110]

4.11 The **European Communities** argues that since benefits do not reside in the assets themselves a benefit does not continue to flow from untied, non-recurring financial contributions even after changes of ownership. The European Communities believes that the only way to support a finding that the benefit passes through to the new owners would be "if fair market value was not paid for all such productive assets."[111]

4.12 The **United States** submits that the European Communities has not sufficiently explained how "fair market value extinguishes subsidies" nor has it shown where there is any basis for this conclusion in the SCM Agreement.[112] The United States maintains that the European Communities has not sufficiently explained how and why the payment of fair market value by the *new owner* of the subsidy recipient extracts the benefit from *the subsidy recipient itself*.[113]

4.13 The **United States'** reasoning is based on its interpretation of the Appellate Body's finding in *US – Lead and Bismuth II* that subsidies are bestowed on legal persons. The United States believes that this means that subsidies continue to reside in the recipient legal person unless they are taken out of that person, or the person is dissolved.[114]

4.14 The **European Communities** disputes the United States notion that subsidies must be "taken out" or "extracted" from a legal person. To the European Communities, it appears that the United States is talking about the extraction of subsidization from productive operations – whether they be workers with enhanced skills, or steel mills which have been built with the help of subsidies. The United States points out that the workers remain the same after privatization, that the steel mills do not change. The Appellate Body in *United States – Lead and Bismuth II* clearly found that subsidies do not accrue to productive operations, but rather to legal persons. The European Communities relies on the Appellate Body where it rejected the United States' view that benefit should be considered as accruing to productive operations.[115]:

4.15 The **United States** does not dispute that a change in ownership triggers an obligation to re-examine the existence of a subsidy.[116] However, it maintains that its current methodology is consistent with the SCM Agreement. Based on its understanding of the fact that subsidies reside in the recipient legal person, the United States believes that what must be considered after a change in ownership has occurred, is whether prior subsidies have been wholly or partly paid back, and whether

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[110] *See* US second written submission, para. 5.

[111] Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("*US – Lead and Bismuth II*"), WT/DS138/R and Corr. 2, adopted 7 June 2000 as upheld by the Appellate Body Report, at para. 6.81, *cited in* EC's first written submission, para. 53.

[112] *See* US' second written submission, para. 7.

[113] *See* US' second written submission, para. 8.

[114] *See* US' second written submission, para. 16.

[115] Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 58.

[116] *See* US' second written submission, para. 11.

the change in ownership has created a new producer of the subject merchandise to which no portion of any previously bestowed subsidies can be said to accrue.[117] Thus, the US Department of Commerce, following a change in ownership, examines whether the current producer has a financial contribution and a benefit, or whether in conjunction with the change in ownership the contribution or benefit has been repaid or cut off.[118]

(b) United States' "distinct legal person" concept

4.16 The **United States** maintains that the US Department of Commerce's revised change in ownership methodology, i.e. the same person methodology, is consistent with the SCM Agreement, particularly as interpreted by the Appellate Body in *United States – Lead and Bismuth II*. In this regard, the United States explains that, in its report, the Appellate Body agreed with the Panel (based upon the Appellate Body's own findings in *Canada – Aircraft*) that a subsidy must be received by the natural or legal person that produced or exported the subject merchandise. The United States alleges that the Appellate Body also accepted the Panel's finding that the privatized company concerned, UES, was a distinct new legal person entitled to an independent subsidy determination (which it had not received from the US Department of Commerce). In addition, it argues, because UES' new owners had paid fair market value for UES, the Appellate Body found no error in the Panel's conclusion that the financial contributions bestowed upon BSC could not be deemed to confer a benefit upon UES. In its view, although the Appellate Body accepted the Panel's conclusion that BSC and UES were distinct legal persons, it did not adopt the Panel's reason for reaching this conclusion. The United States explains that, whereas the Panel found that BSC and UES were distinct legal persons purely because of the change in ownership, the Appellate Body simply stated that, given the changes in ownership leading to the creation of UES, the US Department of Commerce was required to determine whether UES, had itself received a financial contribution and benefit.[119] The United States further contends that the Appellate Body did not identify the specific factors dictating that UES must be treated as a distinct legal person, and twice stated that its determination was based on "the particular circumstances of this case."[120]

4.17 The **United States** points out that where the Panel emphasized that the changes in ownership leading to the creation of new legal persons had involved the payment of consideration, the Appellate Body simply stated that, given the creation of these new legal persons (who were, in fact the producers of the subject merchandise) the US Department of Commerce was required to determine whether these new legal persons had received a benefit. In its view, the notion that the Appellate Body simply forgot to cite the payment of fair market value as the reason that the prior subsidies did not transfer to the newly-created companies is further contradicted by the fact that the payment of fair market value was no minor issue – it was one of the EC's central arguments in the proceeding. The United States considers that the Appellate Body did not address this issue explicitly because it understood that the issue had not been fully explored or explained. The United States contends the Appellate Body, having a narrower basis upon which to dispose of the appeal, therefore, did the sensible thing – it decided the case on the narrower basis, without touching upon the more difficult and ill-defined issue.[121]

4.18 The **European Communities** contended that the principle whereby it is the change in ownership which reverses the presumption that a benefit stream continues over the average life of the assets, has been explicitly endorsed by the panel and Appellate Body in *US – Lead and Bismuth II*.[122]

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[117] *See* US' second written submission, paras. 15-16.
[118] *See* US' second written submission, para. 11.
[119] *See* US' first written submission, paras. 39-40.
[120] *See* US' first written submission, para. 40 *citing* Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 58.
[121] *See* US' response to question No. 4 posed by the Panel.
[122] *See* EC's second written submission, paras. 23 to 25.

For the European Communities, it is quite clear that the Appellate Body considers the change in ownership the crucial factor bringing about the need to reconsider the continuing existence of the benefit stream. The Appellate Body in the same paragraph also quotes approvingly the Panel's statement that:

> "the changes in ownership leading to the creation of UES and BS plc/BSES should have caused the US Department of Commerce to examine whether the production of leaded bars by UES and BS plc/BSES respectively, and not BSC, was subsidized."[123] (emphasis added)

4.19 The **European Communities** considers, therefore, that it was the change in ownership which triggered the need to examine benefit from the perspective of the post-transaction entity. It considers that this conclusion is reinforced by the fact that the Appellate Body repeated the factual findings of the Panel that British Steel Corporation ceased to exist and British Steel plc was created before the actual privatization transaction.[124] In other words, at that point, before the privatization had taken place, the legal person exporting the product under investigation was different from the legal person which had received a subsidy.[125] It argues that, if the United States were correct in its assertion, this simple change in legal person would have been enough to trigger the need to revisit the subsidy determination. Quite apart from the fact that such an assertion would leave the door wide open for circumvention, this fact was clearly not considered dispositive by either the panel or Appellate Body. The European Communities concludes that what was considered dispositive was the change in ownership, as is evidenced by the clear references to this factual element in the findings of the Panel and the Appellate Body.

4.20 The **United States** argues that the European Communities portrays the US Department of Commerce as drawing its new privatization methodology on a blank slate following *US – Lead and Bismuth II* (and *Delverde III*). In its view, however, the inquiry into whether the producer in question is the same person that received the subsidy follows directly from the Appellate Body's conclusion that the producer of the subject merchandise in that case (UES) was not the same person that received the subsidy (BSC). The United States notes that the European Communities itself has accepted that, "the Appellate Body agreed that where the change in ownership had lead to *the creation of a different legal person* from the subsidy recipient any benefit must be assessed from the perspective of the post-transaction entity."[126] The United States argues that the US Department of Commerce's new approach simply inquires into the acknowledged premise of the Appellate Body report in *US – Lead and Bismuth II* – whether the change in ownership has led to "the creation of a different legal person." It contends that, where that basic premise is missing – that is, where a change in ownership has *not* led to "the creation of a different legal person" – the Appellate Body's reasoning in *US – Lead and Bismuth II* does not require US Department of Commerce to find that the subsidies were eliminated.[127]

4.21 The **United States** submits that a change in the ownership of a company does not automatically create a distinct new legal person. It argues that the European Communities in GOES

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[123] Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 62.

[124] *Ibid.*, at para. 2.

[125] *See* EC's second written submission, para. 54 where the European Communities notes that during the first substantive meeting with the Panel, the United States stated that BSC and BS plc would probably be regarded as the same person under the "same person methodology". The European Communities refers to US' response to question No. 7 posed by the European Communities during the Panel proceedings, where the United States refuses to explain whether BSC and BS plc could be regarded as the same person under its new methodology. The European Communities believes that applying its new methodology US Department of Commerce would find that BSC and BS plc were the same person and thus that subsidization passed through the privatization.

[126] *See* US' first written submission, para. 41 (quoting EC's first written submission, para. 51 (emphasis added)).

[127] *See* US' first written submission, para. 42.

from Italy claims that the subsidy determination, which originally was conducted for the subsidy recipient itself (AST), must, purely as a result of the change in ownership, now be conducted anew, not for the subsidy recipient (still AST) but for the new owners of that recipient (KAI). It is as if, suddenly, KAI, rather than AST, were the respondent company in the countervailing duty investigation and the producer of the Italian steel products subject to investigation. The United States notes that the European Communities itself has acknowledged that a subsidy "resides with the natural or legal person which originally received the subsidy", not the owner of that person.[128]

4.22 The **United States** also submits that in *US – Lead and Bismuth II*, the Appellate Body found that the presumption that benefits are allocated over time could never be irrebuttable, so that administering authorities were required to demonstrate that the current producer received a benefit under the SCM Agreement.[129] The United States believes that its new same person methodology is entirely consistent with this finding. Under this new methodology, it explains that following a change in ownership, the United States examines whether the current producer benefits from a subsidy, or whether that change in ownership has either terminated the subsidy or created a new legal person entitled to its own subsidy analysis.[130] To make this determination, the United States considers evidence put forward by respondents that the financial contribution has been repaid or withdrawn and/or that the benefit no longer accrues.

4.23 The **European Communities** alleges that the United States intertwines its misinterpretation of the SCM Agreement with a manipulation and distortion of various legal concepts under municipal law. It considers that the assimilation of "ownership changes" to the entirely different concept of the creation of "a new legal entity" is the basis for the United States' misunderstanding of the Appellate Body Report in *US – Lead and Bismuth II*, which the United States claims is based on a finding of "distinct legal persons". The European Communities maintains that the Appellate Body did not equate the natural or legal person which receives a benefit with the exporting producer subject to investigation.[131] Neither the *US – Lead and Bismuth II* nor the *Canada – Aircraft* Appellate Body reports addressed the issue of what is meant by "person". The European Communities explains that in *Canada – Aircraft* the Appellate Body was asked what was the standard for the calculation of benefit – was it cost to the government or benefit to the recipient[132]; in *US – Lead and Bismuth II*, the Panel and Appellate Body were examining the question of whether benefit could accrue to productive assets. Thus, in the European Communities' view, neither report supports the United States' assertion that the only natural or legal person relevant to an examination of subsidization is the exporting producer. Thus, it concludes, the United States equation of "natural or legal person" and the exporting producer under investigation is unwarranted.[133]

(c) Corporate law principles in the interpretation and application of the SCM Agreement

*(i) The relevance of the distinction between a company and its owners for the purposes of assessing the benefit*

4.24 The **United States** invokes corporate law principles to provide logical support for its use of a "distinct legal person" test for its determination of the continuation of a countervailable benefit. The United States contends that the distinction between owners and companies is real and may not be ignored. The United States further submits that it has demonstrated (and the European Communities does not dispute) that the distinction between companies and owners is fundamental in most

[128] The United States refers to EC's first written submission, para. 12.
[129] The United States refers to Appellate Body Report, *US – Lead and Bismuth II,* WT/DS138/AB/R, at para. 62.
[130] *See* US' second written submission, para. 16.
[131] *See* EC's second written submission, paras. 31-35.
[132] Appellate Body Report, *Canada – Aircraft,* WT/DS70/AB/R, at para. 154.
[133] *See* EC's second written submission, paras.36-38.

jurisdictions, including the European Communities. In its view, given this fact, it is not possible to interpret the SCM Agreement as if this distinction did not exist, or as if the WTO Members disavowed it in drafting the SCM Agreement, without giving the slightest indication that they were doing so. The United States contends that not only is the distinction between owners and companies unavoidable, the Appellate Body has confirmed that subsidies are received by legal persons[134], not the owners of those persons or "economic entities." It further submits that the European Communities itself has acknowledged that subsidies "reside" in the legal persons that receive them, not in their owners or some all-encompassing "economic entity".[135]

4.25 The **United States** interprets the Appellate Body findings in *US – Lead and Bismuth II* that subsidies are bestowed on legal persons as meaning that subsidies continue to reside in that person unless they are taken out of that person, or the person is dissolved. The United States asserts that a change in ownership, *per se*, does neither.[136] The United States argues that the only obligation under the SCM Agreement created by a change in ownership is that the investigating authorities should inquire whether, in conjunction with the change in ownership, the subsidies have been paid back or not transferred to the new producer of the subject merchandise (if one has been created). The United States maintains that this position is entirely consistent with the Appellate Body Report in *US – Lead and Bismuth II*.[137]

4.26 The **European Communities** argues that the United States' suggestion to the effect that a distinction be drawn between the company producing the exported goods and its ownership is contrary to the Panel findings in *United States – Lead and Bismuth II*. It recalls that the Panel found that such a distinction "elevate[d] form over substance", and had been rejected itself by the US Department of Commerce.[138] Moreover, the European Communities does not consider, for the purpose of analysing the existence of subsidization, that a distinction between the company and its owners is appropriate.[139] The European Communities goes on to note[140] that the distinction which the United States attempts to make between the company and its owners, for the purposes of the application of countervailing duties, is the cornerstone of the United States' argument. While the European Communities accepts that a distinction can be drawn for general purposes of corporate or commercial law, the distinction between owners and the company is not relevant for the imposition of countervailing duties. It is the economic entity which is the subject of the benefit analysis, not simply the exporting producer subject to investigation. This is the analysis used by the United States in general. This analysis flows from the principle, one of the central principles of countervailing duty law, that money is fungible.

4.27 The **United States** submits that the European Communities' assertion that no distinction can be made between companies and their owners flouts the corporation laws of both the United States and the European Communities, laws which have as their very cornerstone the concept that companies are legal persons distinct from their owners. It further submits that, although the *United States – Lead and Bismuth II* Panel arguably endorsed this position, the Appellate Body did not say that no distinction could be drawn between companies and their owners.[141] The United States affirms that,

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[134] The United States refers to Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 58.

[135] The United States refers to the EC's first written submission, para. 12; *See* US' second written submission, paras. 13-14.

[136] *Ibid*., para. 15.

[137] US' second written submission, para. 16.

[138] *See* EC's first written submission, para. 62.

[139] EC's response to question No. 9 posed by the Panel.

[140] EC's second written submission, paras. 39 to 43.

[141] The United States compares the Panel Report, *US – Lead and Bismuth II*, WT/DS138/R , at para. 6.82 with Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at paras. 62-64. The United States contends that, at the same time, the Appellate Body did, in this context, confirm that: (1) an authority may allocate subsidy benefits to particular post-bestowal years and countervail those benefits without analysing

even if one were to accept, *arguendo,* that a privatized company and its new owner must be considered together, it is easy to see why, as a matter of economics, privatization does not extinguish previously bestowed subsidies. What goes into the company initially (say a $3 billion subsidy) yields an artificial competitive advantage. When the company is later sold (say, for $2 billion) what the new owner/company parts with ($2 billion cash) is precisely balanced by something worth $2 billion coming in (stock – an expected earning stream with a net present value of $2 billion). It is no more defensible to find extinguishment of the $3 billion subsidy here than if the owner/company, after receiving the $3 billion, pays the government $2 billion in exchange for $2 billion worth of coal. The coal purchase, a fair market value transaction, obviously does not "repay" $2 billion of prior government aid. Like the stock transaction, it is an exchange of value for equal value.[142]

4.28 The **European Communities** submits that the United States has attempted to suggest that WTO Members did not decide silently to reject the company/owner distinction in the SCM Agreement given that it is a central concept of corporate law. The European Communities, however, believes that the truth is the opposite. In that regard, it explains that it has been well known for many years, and broadly accepted by WTO Members, that subsidies granted to an owner may be attributed to a subsidiary. It explains that the fact that a parent and wholly owned subsidiary may be considered together was accepted by the Appellate Body when it assimilated BS plc and its subsidiary BSES in the statement in its Report in *US – Lead and Bismuth II.* The European Communities further explains that it has been the practice of the United States to treat parent and wholly-owned subsidiary as one for countervailing duty purposes for a long period of time. In fact, it adds, the United States concluded, when adopting the previous gamma methodology, that the distinction between owners and the company was irrelevant for countervailing duties purposes.[143]

4.29 The **European Communities** contends that, while methodologies might have changed, the basic principles of countervailing duty laws under the SCM Agreement have not. It therefore concludes that the United States has invented the centrality of its company/owner distinction only for the purposes of its same person methodology since it did not apply to its previous change in ownership methodology, nor does the United States currently apply this distinction when it is attributing subsidies.[144]

4.30 The **United States** submits that, because the European Communities cannot explain how the payment of fair market value by the new owner of a subsidized company extracts subsidies from that company, it now asserts that the admitted distinction between owners and companies[145] should be disregarded for the purpose of analysing the existence of subsidies because subsidies are received by "economic entities."[146] It argues that, although the European Communities has not explained just what it means by "economic entity," the concept presumably is broad enough to encompass both owners and companies — investors and producers. The United States submits that the European Communities wants the Panel to embrace this new concept so that the Panel will treat money taken out of an owner's pocket as having been taken out of the company, potentially eliminating subsidies that reside in the company. If the subsidy is received by an "economic entity"(company/owner unit)

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whether the recipient continues to enjoy a demonstrable competitive advantage; and (2) the burden rests upon a respondent in a countervailing duty proceeding to demonstrate in the context of a review, that such a subsidy has been rescinded if it wishes to have its countervailing duties lifted or adjusted. Had any mere change in ownership been adequate to satisfy this requirement, this entire discussion by the Appellate Body would have been surplusage.

[142] *See* US' first written submission, para. 68.

[143] *See* EC's statement at the second substantive meeting, paras. 11-13.

[144] *See* EC's statement at the second substantive meeting, paras. 14-16.

[145] The United States refers to EC's response to question No. 11 posed by the United States during the Panel proceedings.

[146] The United States refers to EC's response to question No. 9 posed by the Panel, para. 13.

instead of the company, it may be repaid by that same "economic entity" (company/owner unit), instead of the owner.[147]

4.31 The **European Communities** considers that countervailing duties are applied without reference to the corporate law distinction between owners and the company; this follows both from the SCM Agreement and US practice. In support of this view, the European Communities quotes the US Department of Commerce's statement in proceedings before the US Court of Appeals for the Federal Circuit; in the case *British Steel plc v United States* as follows:

> "The flaw in the lower court's analysis, plainly stated, is that the CVD law is not based upon principles of corporate law or property law. [T]he CVD law imposes two requirements before Commerce may countervail subsidies: (1) provision of a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise; and (2) injury to the relevant US industry by imports of that class or kind of merchandise".[148]

*(ii) Whether countervailing duties are comparable to liabilities for regulatory or tortious (delictual) acts*

4.32 The **United States** claims that its "same person methodology" is based on the principles of corporate successorship.[149] It argues that its same person methodology is the only approach consistent with the principles of corporate successorship – principles of such long standing and so widely accepted that the drafters of the SCM Agreement would never have abrogated them without clearly so indicating. According to the United States there is nothing in the SCM Agreement which requires an authority to treat potential countervailing duty liability differently from other potential regulatory liabilities and tort liabilities. It also argues that there is no legal or economic distinction between potential countervailing duty liability and other potential burdens on the earnings of a company whose outstanding stock changes hands.

4.33 The **European Communities** disputes the relevance of the above concepts to countervailing duty determinations. According to the European Communities, whereas regulatory and tortious liability may vest at the time of the act, and liability for environmental damage arises as of the date the action causing the damage was taken, liability for countervailing duties does not arise on the day that the subsidy was granted, but only at the time of importation. Thus, it concludes, a company may choose whether or not to export and thereby incur liability for countervailing duties.[150]

4.34 The **United States** considers that the above argument reveals a thorough misunderstanding of the nature of potential liabilities, i.e. potential burdens on a company's earnings stream. In its view, once a company pollutes, the potential for environmental liability exists and may materialize if someone sues. Alternatively, it explains, the company can take steps to cure the harm by voluntarily undertaking a clean-up. Likewise, once a company receives an amortizable subsidy, the potential for countervailing duties exists. The United States contends that that potential liability may materialize if someone (an injured industry in an importing country) files a countervailing duty petition. Alternatively, it adds, the company can take steps to cure the harm by voluntarily repaying the subsidy or stopping its injurious exports. The United States submits that there is simply no basis for the European Communities' extraordinary suggestion that the normal rules of corporate law and successorship cease to apply when the liability in question involves exposure to countervailing duties.

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[147] *See* US' second written submission, para. 12.

[148] *See*, Brief for Defendant-Appellant, United States Court of Appeals for the Federal Circuit; *British Steel plc v United States*, 23 October 1996, pages 21 and 22.

[149] *See* US' first written submission, paras. 15-17, 72.

[150] *See* EC's statement at the first substantive meeting, paras. 76-77.

It adds that the European Communities' argument is particularly vacuous with regard to Usinor, which was actually subject to countervailing duty orders at the time of its privatization.[151]

4.35 In response to the Panel's question No. 6 on whether there are any international standards or rules regarding the creation of a new legal entity further to a change in ownership, the **United States** stated that corporate laws on successor liability (and on what kinds of ownership changes create a new legal entity) are applied in a generally consistent manner although they have not been harmonized internationally.[152]

4.36 The **European Communities** considered, in its response to question No. 6, that the determination of a change in ownership is largely a question of fact, to be determined in accordance with applicable domestic law. It argues that is not aware of any relevant international rules on change in ownership although it pointed out that Article XXVIII (n) of the General Agreement on Trade in Services defines "ownership" and "control" for the purposes of determining which obligations are owed under GATS.[153]

4.37 The **European Communities** agrees that potential countervailing duties do act as a restriction on an exporting producer. It explains that, if an exporting producer is aware that its products might be subject to countervailing duties, an exporting producer might think twice about exporting to a country imposing countervailing duties (such as the United States). However, it adds, as is beyond dispute, simple subsidization is not enough to bring about the imposition of countervailing duties. Moreover, it argues and as distinct from liability for damages caused by pollution, an exporting producer has a choice whether to subject its products to countervailing duties since it can decide whether or not to export. The European Communities explains that a countervailing duty is equivalent to customs duties and submits that it is patently ridiculous to say that liability for customs duties is akin to liability for environmental pollution, and that a corporate successorship test is applicable.[154]

4.38 The **United States** claims that the European Communities argues that, because countervailing duty liabilities do not operate in exactly the same manner as potential tort liabilities, they are not potential liabilities at all.[155] The United States contends that the truth is that countervailing duty exposure is very much like potential tort liabilities – they are both potential burdens upon the earnings of the company that a prospective purchaser would take into account just as surely as it would take account of potential tort liabilities. In any event, it argues, the European Communities' attempt to distinguish potential countervailing duty liabilities is not persuasive since both liabilities will become actual only if injured parties in the affected country bring some kind of legal action. Moreover, the United States affirms, just as a subsidized steel producer could avoid countervailing duties by disgorging the subsidies or by ceasing to export to countries with countervailing duty orders, a producer that has caused environmental damage in another country could well escape that potential liability by repairing that damage or by ceasing certain operations in that country. Finally, it argues, countervailing duties are very specific to the subsidized producer, i.e. the amount of the duty is calculated by dividing the subsidy to that producer for the year in which the merchandise is produced by that producer's total production during that year.[156]

4.39 The **European Communities** considers the United States' example of environmental pollution to be erroneous.[157] In the example of tortious or delictual liability, liability attaches as of the act causing the damage. The "potentiality" of the liability lies entirely in the hands of the person

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[151] *See* US' response to question No. 6 posed by the Panel.
[152] *Ibid*., para. 21.
[153] *See* EC's response to question No. 6 posed by the Panel.
[154] *See* EC's second written submission, paras. 45-46.
[155] The United States refers to EC's second written submission, paras. 44-46.
[156] *See* US' statement at the second substantive meeting, paras. 31-33.
[157] *See* EC's second written submission, para. 46.

suffering damages – they have the choice whether to sue. For countervailing duties, the potentiality is entirely in the hands of the exporting producer; it has the choice whether to export, pay back the subsidies or to request that an investigating authority properly examine whether it is receiving a benefit.

(d) "Same person" versus "same activity"

4.40 The **European Communities** maintains that the designation given to the United States' new change in ownership methodology, i.e. same person methodology is misleading. It states this because it considers that the term "same person" is a disguise for "same activity". Thus, it argues, this methodology, like the gamma methodology, treats as irrelevant the terms of the sale. In its view, this methodology perpetuates the United States incorrect conception that benefit somehow resides in the assets by examining, not whether the current producer has received any benefit, and hence a countervailable subsidy, but rather whether the assets and business operations of the company can be regarded as the same both before, and after, the transaction. The European Communities considers that this presumption, which could only be rebutted if the post-transaction entity disposed of all of its assets, and started production on another site, with another workforce, and under another brand name, does not involve any examination of the existence of a countervailable benefit. It therefore concludes that the same person methodology is, consequently, as WTO-inconsistent a presumption, as the presumption the United States adopted in the gamma methodology. The European Communities points out that, in determining the existence of a benefit, the US Department of Commerce treats as irrelevant the nature of the transaction. US Department of Commerce is, in order to avoid such a benefit examination, equating the word "person" with the notion of "productive assets". The European Communities considers that the panel and Appellate Body[158] have already rejected the notion that two entities might be the same person simply by virtue of their operations remaining the same.[159]

4.41 In reference to the statement by the European Communities to the effect that the US Department of Commerce's same person test is a "same activity" test, which can only be satisfied if "the post-transaction entity disposed of all of its assets, and started production on another site, with another workforce, and under another brand name,"[160] the **United States** considers that this is a distortion of the US Department of Commerce's actual methodology, which is firmly grounded in sound economics and in the principles of corporate successorship that apply in both the United States and the European Communities. Under that test, it explains, one corporate entity may be considered to be the successor of another if, in substance, it is the same person. As the US Department of Commerce explained, the various factors that go into the determination of whether a nominally different company should be treated, in substance, as the same person are just that – factors. The United States claims that there is no basis for asserting that all of the factors must weigh in favour of finding that a new corporate entity was created before such a finding may be made. The United States contends that in *US – Lead and Bismuth II*, neither the Panel nor the Appellate Body said that two different companies cannot be treated as the same person "simply by virtue of their operations remaining the same"[161], as claimed by the European Communities. The United States submits that, faced with the very particular and complex facts of that case, the Panel simply stated (without explanation) that it "had no doubt" that BSC and UES were different companies and the Appellate Body merely stated that "given the changes of ownership leading to the creation of UES, the [US Department of Commerce] was required …. to examine, on the basis of the information before it relating to these changes, whether a "benefit" accrued to UES ... ." It concludes that there is no indication that the Appellate Body would have required a new subsidy determination had it been

[158] The European Communities refers to, Panel Report, *US – Lead and Bismuth II*, WT/DS138/R, at para. 6.70 and Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 62.
[159] *See* EC's first written submission, para. 125.
[160] *See* US' first written submission, para. 74 (*quoting* EC's first written submission, para. 130).
[161] The United States refers to EC's first written submission, para. 125.

confronted with a determination involving the very same corporate entity accompanied by a fully-developed record demonstrating the continuity of that legal person.[162]

4.42 The **European Communities** submits that there can be no doubt that it was the change in ownership which the Appellate Body considered in *US – Lead and Bismuth II*, triggered the need to examine anew the benefit analysis and that, by ignoring the change in ownership transaction, and focusing on the existence of "same persons", the United States fails to make the benefit determination which is required by Article 1 of the SCM Agreement. It simply assumes that the benefit passes through the transaction, despite the fact that there has been a change in ownership recasting the economic entity, and consideration has been paid for advantages previously received for free. The European Communities considers that the factors examined, which focus on continuity of business activities, do not involve an examination, in any form, of the existence of benefit to the post-privatization entity, they ignore the change in ownership, and the payment of consideration. The European Communities points out that the United States admits that it has never found a pre-privatization and post-privatization entity to be different persons.[163] The European Communities believes that the same person methodology focuses on continuity of business activities, including maintenance of assets and liabilities, workforce etc, and is therefore no more than an extended and enlarged focus on continuity of assets, which formed the core of the gamma methodology discredited by the Appellate Body in *US – Lead and Bismuth II* and by the US Court of Appeals for the Federal Circuit in *Delverde III*.[164]

4.43 The **United States** asserts that it has not said that subsidies reside in assets. In fact, it argues, it has repeatedly stressed quite the opposite, i.e. that subsidies reside in legal persons. The United States explains that if a subsidy recipient simply transfers its productive assets to a different legal person, the subsidies do not transfer to the person that buys the assets. The United States considers that the European Communities' assertion is astonishing in light of the United States' answer to the European Communities' question 10 that "a sale of bare assets is treated differently from a stock sale. Assuming that the assets are sold to a different person than the person that originally received subsidies, the DOC will not find that the producer that operates the purchased assets is subject to countervailing duties".[165]

4.44 The **European Communities** argues that the use of the same person methodology shows that the United States remains convinced that subsidies reside in productive assets. It considers that the United States finds the methodology economically rational only because of its belief that a company "pumped up" with subsidies cannot be "deflated". The European Communities submits that, even accepting, for the sake of argument, the United States' contention that the Appellate Body based its finding on the fact that the subsidy recipient and the exporting producer were distinct legal persons, the same person methodology is still WTO-inconsistent. In this regard, it argues that there can be little doubt that an application of the "same person methodology" to the British Steel privatization would indeed find that the companies involved are the same person since all the factors which the United States examines in its same person methodology are present. Thus, it concludes, even on the United States' interpretation of the Panel and Appellate Body's reports, the same person methodology would not be consistent with the WTO because it is not a methodology which can properly distinguish between distinct legal persons.[166]

[162] *See* US' first written submission , para. 74.
[163] The European Communities refers to the US' response to question No. 13 posed by the Panel.
[164] The European Communities refers to the US' response to question No. 11 posed by the European Communities during the Panel proceedings, para. 21.
[165] *See* US' statement at the second substantive meeting, para. 22.
[166] *See* EC's second written submission, paras. 54-55.

(e) European Communities' "economic entity" concept

4.45 In its second written submission, the **European Communities** refined its arguments by developing the concept of an "economic entity" as the recipient of the benefit. In this regard, the European Communities argues that the essential issue in this dispute is whether a change in ownership at arm's length and for fair market value, such as a privatization, can bring into question the continued relevance of a "benefit stream" presumed to exist as a result of a non-recurring subsidy. In the European Communities' view, the concept of "benefit stream" is simply an expression of the presumption that a non-recurring financial contribution provides a benefit over an extended period of time. The European Communities considers that a total change in ownership (i.e. where control passes from one entity to another)[167] must bring any benefit analysis based on the old group into question for two reasons: first, the benefit must be examined from the perspective of the new economic entity, and, second, what had been received for free has now been paid for.[168]

4.46 The **European Communities** maintains that the appropriate object of a benefit analysis is the economic entity of which the producer of the goods in question forms a part. It explains that this may be a large corporation with a very complex structure or be simply a single company and its controlling owner. According to the European Communities, the economic entity is the object of analysis because subsidies from throughout the economic entity may be attributed to the producer under investigation, and because a subsidy provided to one part of the entity permits resources to be used for other purposes in the economic entity; i.e. money is fungible.[169] The European Communities alleges that this is explicitly permitted by the SCM Agreement and is the practice of investigating authorities, specifically the United States, but also the European Communities and others. The European Communities explains that, in the event of a change in ownership, this economic entity changes and thus the "benefit stream" may no longer be presumed to continue.[170]

4.47 According to the **European Communities**, the benefit must "accrue" to the exporting producer. The European Communities explains that this follows from the principle that money is fungible, i.e. that money granted to one part of an economic entity will free up resources for another part of the economic entity. The European Communities further explains that no investigating authority is required to impose countervailing duties on subsidies bestowed on parts of an economic entity which are not responsible for the production of the products under investigation. However, the European Communities adds, GATT Article VI.3 clearly envisages that it would be possible to countervail such subsidies. It contends that this is also clear from the references in Article VI.3 to subsidies which may be bestowed in both the country of origin or of exportation, and also the possibility that a countervailable subsidy could be granted for the "transportation of a particular product". The European Communities claims that this has also been recognized by the Appellate Body in *Canada – Aircraft* where it stated: "*Logically, a 'benefit' can only be said to arise if a person, natural or legal, or a group of persons, has in fact received something*."[171]

4.48 The **United States**, in response to the above argument of the European Communities to the effect that the distinction between owners and companies should be disregarded because money is fungible within "economic entities,"[172] concedes that, generally speaking, money is fungible. However, it argues, fungibility operates only within groups of entities that may be collapsed and treated as one. It submits that this does not include investors and producers. In its view, to treat money as being fungible between investors and producers, for example, would imply that, if one of

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[167] *Ibid*., para. 3.
[168] *Ibid*., para. 12.
[169] *See* EC's second written submission, para. 29.
[170] *See* EC's second written submission para. 12.
[171] *See* Appellate Body Report, *Canada – Aircraft,* WT/DS70/AB/R, *cited in* EC's second written submission, para. 15.
[172] The United States refers to EC's second written submission, para. 13.

the Panel members were to buy shares of IBM, IBM's creditors could attach that Panel member's assets to satisfy a debt of IBM. The fungibility of money does not extend this far.[173]

4.49 The **United States** maintains that the European Communities' new "economic entity" approach suffers from two fundamental defects. First, as the Appellate Body has stated, the recipient of a subsidy "must be a natural or legal person".[174] The United States argues that, while the European Communities has not explained what an "economic entity" is, it is clearly intended to be broader than the legal person that received the subsidy. Second, the "economic entity" approach leads to one logical absurdity after another. According to the United States, the European Communities' new economic entity approach results in a situation where: (i) a government gives a subsidy to an "economic entity," consisting of both itself and the legal person to whom the subsidy was given; (ii) the government then sells a portion of the "economic entity" (formerly known as the company) to a new owner. This creates a new "economic entity" consisting of a portion of the pre-privatization entity and the new owner[175]; and (iii) when the new owner writes the check, it is distinct from the legal person that received the subsidy (otherwise, the subsidy recipient would be buying itself from itself). The instant the transaction is complete, however, the subsidy recipient is merged with the new owner into a new post-transaction "economic entity," which has never received a subsidy.[176]

4.50 The **European Communities** argues that the existence of a subsidy is not, as the United States claims, something that can be irrebutably presumed until it is demonstrably "extracted" from the assets of the "legal person" in which the US Department of Commerce has deemed it to "reside". It is something that has to be *determined* to exist in the light of all the circumstances. Since the actual ownership of a company and the fact that it is government-owned are circumstances that influence the existence of a subsidy, the European Communities argues, this needs to be re-assessed when these circumstances change.

4.51 The **United States** considers that the European Communities has coined the new term "economic entity" to obscure the simple fact that a privatization consists of a sale by a government of a subsidy recipient to a new owner. It argues that the fact that the sale is not a sale of some other entity is demonstrated by the price paid – the fair market value of the legal person that received the subsidy; it is not the fair market value of some other, larger "economic entity." The United States submits that calling the subsidy recipient different "economic entities" before and after the sale, cannot change this simple fact: the legal person that received the subsidy does not necessarily change simply as the result of the sale.[177]

4.52 The **European Communities** submits that the United States itself explicitly uses the economic entity approach. In this regard, they refer to § 351.525(b)(6) of the US Department of Commerce's *Countervailing Duties; Final Rule* which sets out a number of methods for allocating subsidies granted to one part of a group to other parts of the group.[178] The European Communities contends that this allocation of subsidies depends on relationships of control; i.e. can one company control the use of assets of the other. The European Communities argues that these principles become entirely irrelevant where the United States insists on the need to analyse whether the "legal person" before the privatization is the same as the "legal person" after the privatization. The European Communities considers that, when ownership changes, the economic entity of which the exporting producer formed a part cannot continue to be subject to countervailing measures on the same basis

[173] *See* US statement at the second substantive meeting, para. 30.

[174] *See* US statement at the second substantive meeting, para. 13 (*quoting* the Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 58).

[175] *See* US' statement at the second substantive meeting, para. 15 citing Exhibit US – 13 to the US' statement at the second substantive meeting.

[176] *See* US' statement at the second substantive meeting, paras. 13-15.

[177] *Ibid.*, para. 16.

[178] The European Communities refers to *Countervailing Duties; Final rule*, 19 C.F.R. § 351 (1998). Selected pages contained in Exhibit EC–32 to the EC's second written submission.

and that it must be determined, in an investigation, whether benefits which accrued to or were attributed to the exporting producer under investigation, can still be attributed in the same manner. The European Communities further notes that in its response to part (e) of its question 12, the United States explains that if the parent company then acquired a new company, the United States could impose countervailing duties on imports from that company as well, on the same basis as it had attributed them, to pre-existing subsidiaries. Thus, the European Communities concludes that, for the United States, the existence of ownership is relevant when it may wish to increase the possibilities of imposing countervailing duties, but is not relevant when it might require a renewed examination of the existence of subsidization.[179] In its view, the US Department of Commerce ignores the distinction between companies and owners, so that, in effect, it applies an "economic entity" approach itself.[180]

4.53 The **United States** contends that the above statement by the European Communities is a gross misstatement.[181] It submits that an accurate description of the US Department of Commerce's practice is that, as a general rule, the US Department of Commerce treats companies and owners as completely distinct, but that it sometimes allocates subsidies to different producers within the same corporate group. As regards the general rule, the US Department of Commerce does not allocate to producers, subsidies that are given to investors; nor does it allocate to investors, subsidies that are given to producers. It adds that the US Department of Commerce also necessarily distinguishes between owners and companies each time it finds that a government has provided a subsidy to a government-owned company – not to do so would be to imply that the government subsidized itself. As regards the exceptions, the United States points out that the very existence of carefully crafted exceptions to the rule that legal persons are treated as distinct entities itself demonstrates the existence of the general rule. It explains that the most obvious exception is where subsidies are nominally granted to a holding company that simply acts as a conduit for subsidies to one or more of its producing subsidiaries.[182] If the subsidies were allocated strictly within the holding company, they would never apply to the production in question, negating the remedy that countervailing duty regimes are intended to provide. In spite of this, the United States indicates, the allocation of subsidies to the members of the group does not imply that there is no distinction between the various legal persons – it implies that, in giving the subsidy to the holding company, the government was making an indirect grant to the various operating units.[183] The United States explains that where the US Department of Commerce does allocate subsidies across the combined production of a closely related corporate group, it is because the various members of that group are all engaged in production of similar merchandise and essentially, function as one entity[184], or, if the firm that received an untied financial contribution is a holding company, including a parent corporation with its own production, then the US Department of Commerce would attribute the subsidy to the consolidated sales of the holding company and its subsidiaries.[185] The United States clarifies that when there is an insufficient identity of interests between the parent and the subsidiary to warrant treating the entities as one, the US Department of Commerce follows its general rule and does not allocate subsidies to the entire group.[186]

### 3. Whether the benefit passes through when the privatization transaction takes place for fair market value and at arm's length

4.54 The **European Communities** maintains that where the change in ownership has taken place for fair market value and at arm's length, the entity will not have any benefit and hence any subsidy.

[179] *See* EC's second written submission, paras. 16-20.
[180] *Ibid*.
[181] The United States refers to the EC's second written submission, paras. 16-20.
[182] *Countervailing Duties; Final rule,* 19 C.F.R. § 351.525(b)(6)(iii)
[183] *Countervailing Duties; Final rule,* 19 C.F.R. § 351.525(b)(4).
[184] *Countervailing Duties; Final rule,* 19 C.F.R. § 351.525(b)(6)(ii).
[185] *Countervailing Duties; Final rule,* 19 C.F.R. § 351.525(b)(6)(iii).
[186] *See* US' statement at the second substantive meeting, para. 29 *citing Ferrosilicon From Venezuela*, 58 Fed. Reg. 27539, 27542 (Dep't Commerce 10 May 1993) (final countervailing duty determination).

Consequently, it argues, it is only if the company has received subsidies after the transaction (by virtue of attribution), either through membership of a different economic entity or through a privatization taking place at an undervalue that the exports of the post-transaction entity can be subject to countervailing duties.[187]

4.55 The **European Communities** considers that these two concepts are also facets of the economic entity analysis. In its view, a change in ownership transaction will not involve two different economic entities, if the parties to the change in ownership transaction are not at arm's length. In a similar sense, it adds, one would intuitively expect two different economic entities to negotiate, in order to arrive at the fair market value of the object of sale. If a transaction did not take place at fair market value then there must be a supposition that the two parties are related or are not at arm's length.[188]

4.56 The **European Communities** argues that the concept of the economic entity is also relevant for establishing whether value has been paid for that which had previously been received for free. The European Communities argues that a subsidy offered to a company also has an effect on the owner of the company. In its view, rather than invest in the company, the owners' financial resources are free for other investments. This is because money is fungible. The European Communities explains that when a company is sold, the value which the subsidies have brought is incorporated in the value of the company. A new owner buying at fair market value will not have received a benefit, because it has received nothing for free. That is, the economic entity which produces the goods after the change in ownership has not received anything for free; rather all assets which it is in a position to control have been fully paid for.[189] The European Communities claims that its understanding that it is the change in ownership which reverses the presumption that a benefit stream continues over the average life of the assets, has been explicitly endorsed by the panel and Appellate Body in *US – Lead and Bismuth II*.[190] The European Communities claims that this conclusion is reinforced by the fact that the Appellate Body repeated the factual findings of the panel that British Steel Corporation ceased to exist and British Steel plc. was created before the actual privatization transaction.[191] In other words, the European Communities argues, at that point, before the privatization had taken place, the legal person exporting the product under investigation was different from the legal person which had received a subsidy.[192] Were the United States correct in its assertion, this simple change in legal person would have been enough to trigger the need to revisit the subsidy determination. The European Communities contends that this fact was clearly not considered dispositive by either the Panel or Appellate Body. It submits that what was considered dispositive was the change in ownership, as is evidenced by the clear references to this factual element in the findings of the Panel and the Appellate Body.[193]

4.57 The **European Communities** explains that it has referred to the "pass through" of a benefit rather than whether that benefit is "extinguished" or "survives" the privatization. It clarifies that this is because a benefit does not necessarily simply "disappear"; it resides with the natural or legal person which originally received the subsidy. In its view, a privatization transaction will only lead to the

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[187] *See* EC's second written submission, para. 27.
[188] *Ibid*., para. 28.
[189] *See* EC's second written submission, paras. 21-22.
[190] The European Communities refers to Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 62.
[191] *Ibid*., at para. 2.
[192] *See* EC's second written submission, para. 54 where the European Communities notes that during the first substantive meeting with the Panel the United States stated that BSC and BS plc would probably be regarded as the same person under the "same person methodology".
[193] *See* EC's second written submission, paras.23-25.

"extinction" of a countervailable subsidy where the pre-transaction subsidy beneficiary no longer exists.[194]

4.58 The **United States** maintains that the European Communities fails to explain how the payment of fair market value *for* a company extracts a subsidy *from* that company. It submits that the European Communities should admit that it has not made out even a prima facie case that a payment for fair market value extracts subsidies from a company, and it should admit that the only consequence of such a payment is that the purchasers themselves have not obtained a separate, new benefit.[195] In reference to the European Communities' argument that the purchaser for fair market value and at arm's length of previously subsidized production does not personally obtain any benefit, the United States submits that there is no dispute about this proposition since all parties agree that new owners who pay fair market value (for anything, including a subsidized company) personally obtain no benefit. The new owners give equal value for what they obtain, and so do not personally receive any benefit – their financial circumstances are unchanged. It further submits that there is no new subsidy in such a case, since the purchasers simply become the owners of the entity or "person" in which the subsidy has always resided, and continues to reside. The United States considers that what the European Communities is really suggesting with this argument is that, somehow, when the new owners pay fair market value for a company, not only they do not personally obtain a benefit, but the benefit from any previous subsidies is somehow extracted from the company. The United States considers that there are two problems with this approach: First, it is inconsistent with the European Communities' main explanation that the "post privatization entity" is a new and distinct person from the recipient of the subsidy. If that is so, then the original subsidy is not there to be extracted from the "post-transaction" entity by its owners. Second, it argues, the European Communities' theory is based on pure speculation since there is no basis whatsoever on either the record before the US Department of Commerce or before this Panel, for assuming that AST's new owners will extract some extra margin of profit from the company. The United States argues that prices are set by supply and demand and, therefore, the new owners cannot simply increase the price of the goods; nor can they simply increase production without further pushing prices downward. Put simply, no matter how profit-minded they are, they can extract no more from the company than could the prior owners. It mentions that this is particularly true in the steel industry, which is plagued with chronic overcapacity that frustrates the efforts of even the most ravenous investor to realize a reasonable profit.[196]

4.59 The **United States** claims that, since the Appellate Body found in *US – Lead and Bismuth II* that subsidies are bestowed on legal persons (i.e., the company producing subject merchandise), these continue to reside in that person unless they are taken out of that person, or the person is dissolved. It submits that a change in ownership, *per se*, does neither. Accordingly, the United States requests that the Panel find that changes in ownership of subsidized companies do not automatically extract the subsidies from those companies, but that investigating authorities should simply inquire whether, in conjunction with the change in ownership, the subsidies have been paid back or not transferred to the new producer of the subject merchandise.[197]

4.60 The **European Communities** argues that when the United States uses the word "extract", it appears to be talking about the extraction of subsidization from productive operations – whether they be workers with enhanced skills, or steel mills which have been built with the help of subsidies. In the European Communities' view, the Appellate Body in *US – Lead and Bismuth II* clearly found that subsidies do not accrue to productive operations, but rather to legal persons.[198] The European Communities submits that the United States misrepresents and manipulates the Appellate Body

[194] *See* EC's first written submission, para. 12.
[195] *See* US' statement at the second substantive meeting, paras. 18-19.
[196] *See* US' first written submission, paras. 53-56.
[197] *See* US' second written submission para. 15.
[198] Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 58 (footnotes omitted).

findings with its new same person methodology since an analysis of the factors used in this same person methodology, shows that it is in reality an examination of continuation of productive operations.[199] The European Communities therefore considers that the focus on continuity of business activities, including maintenance of assets and liabilities, workforce etc, is no more than an extended and enlarged focus on continuity of assets, in which, it seems, the United States is convinced subsidization resides[200]. It argues that this is clearly contrary to the Appellate Body's findings firstly, that a benefit is calculated with respect to a natural or legal person, and secondly, that a change in ownership accomplished at fair market value and arm's length means no subsidization passes through.[201]

B. US DEPARTMENT OF COMMERCE'S PRACTICE IN ADMINISTRATIVE REVIEWS

4.61 The **European Communities** does not challenge the procedures in administrative reviews in Countervailing Duties on Imports of Certain Carbon Steel Products from Sweden (Case No. 7) or Grain-Oriented Electrical Steel from Italy (Case No. 12), but rather the methodology applied. However, the European Communities points out a problem of circular logic in the US Department of Commerce's practice whereby the appropriate venue for introducing evidence of a privatization as a basis for a change in the countervailing duty is in an administrative review. The European Communities contends that exporting companies often do not participate in the US Department of Commerce's investigations because of the "prohibitive costs of co-operating and [the] awareness that US Department of Commerce's applicable change in ownership methodology would mean that the privatization would not be taken into account."[202] It also submits that in both Cut-to-Length Carbon Steel Plate from Germany (Case No. 10) and Cut-to-Length Carbon Steel Plate from Spain (Case No. 11) the exporting producers were "precluded from asking it because the US Department of Commerce prohibits the review of an order if a foreign manufacturer has made no shipments to the United States during the relevant period of review."[203]

4.62 The **United States** maintains that, with respect to each of the 12 measures the European Communities has challenged, it 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, where the jurisdictional grounds to do so exist as a matter of domestic law.[204] The United States disputes the assertion by the European Communities that companies do not participate because the process is lengthy and expensive. The United States points out that three European steel companies have requested reviews, one of which is completed and two of which are ongoing. The United States feels that the European Communities' assertion is "pure speculation, unsupported by evidence on any administrative record."[205]

C. OBLIGATIONS OF THE MEMBERS IN SUNSET REVIEW INVESTIGATIONS

4.63 The **European Communities** claims that the US Department of Commerce's practice as regards sunset reviews is inconsistent with the SCM Agreement to the extent that the US Department of Commerce fails to examine the existence of a benefit after a change in ownership on the basis that

[199] *See* EC's statement at the second substantive meeting, paras. 8-9.

[200] Although the United States does not explain why the same logic does not apply in the case of bankruptcy, where the assets, workforce etc also remain essentially the same. *See* the US' response to question No. 11 posed by the European Communities during the Panel proceedings, para. 21.

[201] *See* EC's second written submission, para. 51.

[202] *See* EC's first written submission, footnote 102 to para. 116.

[203] *See* EC's first written submission, footnote 101 to para. 115.

[204] *See* US' first written submission, para. 77.

[205] *See* US' first written submission, footnote 84 to para. 77.

it is not required to take into account evidence before it, other than from the original investigation, where there have been no administrative reviews since the original investigation.[206]

### 1. Scope of the obligations of Members under Article 21.3 of the SCM Agreement

4.64 The **European Communities** argues that Articles 21.1 and 21.3 of the SCM Agreement read together clearly create a presumption that countervailing duties should be terminated five years after the imposition of the original duty unless the investigating authority first initiates a review and second, determines, in that review, that there is a likelihood of continuation or recurrence of subsidization and injury. In its view, the general rule embodied in Article 21.1 is given concrete expression in Article 21.3.[207] The European Communities contends that, because Article 21.1 of the SCM Agreement requires a countervailing duty to be levied only for as long as, and to the extent which injurious subsidization exists, Article 21.3 of the SCM Agreement must be interpreted as requiring an investigating authority to examine the existence of subsidization, as part of its determination of the likelihood of continuation or recurrence of subsidization.

4.65 The **European Communities** submits that an investigating authority cannot determine whether there is a likelihood of continuation or recurrence of subsidization without considering whether, and the extent to which, a benefit continues to accrue and that this requires it to carry out a new, detailed investigation, in which it determines, on the basis of positive evidence, the likelihood of continuation or recurrence.[208] The European Communities explains that in all four of the sunset reviews included in this dispute, the US Department of Commerce based its decision to continue the countervailing duty orders just on information from the original investigation.[209] In its view, the investigating authority cannot simply presume such a likelihood just because certain interested parties have not responded to a notice of initiation.[210]

4.66 The **United States** considers that an investigating authority need not revisit *ex officio* its subsidy determination, in a sunset review under Article 21.3 of the SCM Agreement. In its view, the determination in a sunset review under Article 21.3 concerns future behaviour, i.e. the likelihood of continuation or recurrence of subsidization _ not whether, or to what extent subsidization currently exists. In its final results of the sunset review in Case No. 10, the US Department of Commerce stated that:

> "a sunset review is not the appropriate proceeding in which to examine a complicated privatization transaction and to consider new privatization methodology. In light of the complexity and fact-intensive nature of this issue, it is imperative that the issues be fully developed on the record."[211]

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[206] While the European Communities considers that the automatic self-initiation of sunset reviews by the US Department of Commerce is inconsistent with the SCM Agreement, its arguments in the present dispute are founded on the basis that the United States is levying countervailing duties without having determined the existence of subsidization (and in particular benefit). This is so because the scope of the investigating authority's duties under a sunset review procedure is the subject of parallel panel proceedings also initiated at the request of the European Communities (WT/DS213 – *United States – Corrosion-Resistant Carbon Steel Flat Products from Germany*). *See* EC's second written submission, paras. 62 and 66.

[207] *See* EC's second written submission, paras. 63-65.

[208] *See* EC's second written submission, paras. 71-72.

[209] *Ibid*., para. 76.

[210] *Ibid*., paras. 71-72.

[211] See, *Issues and Decision Memorandum for the Sunset Reviews of the Countervailing Duty Orders on Certain Corrosion-Resistant Carbon Steel Flat Products; Cold-Rolled Carbon Steel Flat Products; and Cut-to-Length Carbon Steel Plate Products from Germany; Final Results, supra*, footnote 62.

4.67 The **United States** points out that nothing in the SCM Agreement requires consideration of the magnitude of subsidization in determining the likelihood of continuation or recurrence.[212] Furthermore, the United States considers that where there have been no administrative reviews of a countervailing duty order, the only evidence which an investigating authority can take into account is evidence from the original investigation. The United States submits that in the four sunset reviews covered by this dispute, the US Department of Commerce was under no obligation, pursuant to Article 21.3, to convert its sunset reviews into full-blown administrative reviews of the respective countervailing duty orders.[213]

4.68 The **European Communities** disagrees with the United States' position. It contends that administrative reviews, under Article 21.2 of the SCM Agreement are facultative; interested parties may, or may not, choose to request reviews, and investigating authorities may, or may not, consider it justified to initiate an investigation. Under Article 21.2, it is for the interested party to provide substantiated information, which the investigating authority is, according to the Appellate Body, obliged to fully examine. The European Communities argues that, under Article 21.3, it is for the investigating authority to make a determination of continuing injurious subsidization. In this regard, it indicates that to premise examination of evidence in a determination under Article 21.3 on the evidence having been examined in a review under Article 21.2 is a pure invention, not founded on any provision of the SCM Agreement. The European Communities points out that the CIT reached the same conclusion in the *Dillinger* case when it found that the US Department of Commerce is not entitled to base its findings in sunset reviews only on evidence gathered in the initial investigation.[214] The CIT also pointed out to the US Department of Commerce that in the case of "extraordinarily complicated" sunset reviews the Secretary of Commerce may extend the period for issuing final results by up to 90 days.[215]

### 2. Obligation of examination

4.69 For the **European Communities**, it is for the importing Member to re-examine whether countervailing duties are still justified and considers this requires it to carry out a new, detailed investigation, in which it determines, on the basis of positive evidence, the likelihood of continuation or recurrence.[216] The European Communities contends that, if no existing subsidization can be identified, an investigating authority must be under an obligation to adduce positive evidence supporting its determination of the likelihood of recurring subsidization. It further indicates that, in a

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[212] *See* US' response to question No. 19 posed by the Panel.

[213] *See* US' first written submission, para. 89.

[214] *Dillinger* Court No. 00-09-00437, at.12–14, 18, 19. The CIT in *Dillinger* held that:

> "even in an "expedited review based on the facts available," Commerce is to rely on information from prior determinations as well as from submissions by the parties in the sunset proceedings. . . It stands to reason, that, than in a "full review," Commerce must engage in analysis that is at least somewhat more searching than simply continuing to apply the countervailing duty rate determined in the original investigation for particular subsidies without considering evidence proffered by the parties that would support making adjustments thereto."

*Dillinger*, Court No. 00-09-00437, at 20-22. (Note that in the version attached as Exhibit EC–34 the quoted material appears on page 14). *See also* EC's second written submission, para. 72.

[215] The CIT also stated:

> "If Commerce deemed the issues raised by the Plaintiffs to warrant a more thorough analysis or more extensive fact gathering, it could have sought additional time, but did not do so. Commerce cannot justify its decision not to address the issues raised by the parties simply on the basis that the issues arise in the context of a sunset review and the stringent time limits involved, especially when Commerce does not avail itself of the mechanisms provided for by its own regulations."

*Dillinger*, Court No. 00-09-00437, at 63 (Note that in the version attached as Exhibit EC–34 the quoted material appears on page 38).

[216] *See* EC's second written submission, para. 76.

sunset review under Article 21.3, it is for the authorities to determine, and not for the respondent to disprove, that there is a likelihood of continuation or recurrence.[217] The European Communities submits that the fact that in three of the reviews the exporting producers did not respond to the notice of initiation, cannot be used by the United States as an excuse for reversing the burden of proof in a sunset review. The investigating authority cannot just simply presume that there is a likelihood of continuation or recurrence of injurious subsidization because certain interested parties have not responded to a notice of initiation. According to the European Communities, this reversal of the burden of proof is inconsistent with Article 21.3 of the SCM Agreement.[218]

4.70 The **United States** contests the nature of the sunset review obligation. The United States feels, that absent an administrative review, the only evidence it is required to evaluate in order to determine the likelihood of continuation or recurrence of the countervailable subsidies is that contained in the original investigation. The United States maintains, insofar as benefits streams from amortizable subsidies addressed in the original investigation are concerned, that sunset reviews are not the appropriate place to evaluate new evidence.

4.71 The **European Communities** points to the CIT ruling in *Dillinger* where the Court held that:

> "The statute, however, does not charge any interested party with the ultimate burden of persuasion, or otherwise create a presumption that a countervailable subsidy is or is not likely to continue or recur if the order is revoked. …. Because there is no presumption as to the likelihood of continuation or recurrence it follows that there is no presumption that the countervailable subsidies will continue at the specific rate determined in the original investigation."[219]

4.72 The **European Communities** submits that the United States, through its practice of limiting evidence in sunset reviews, absent an administrative review, to the evidence in the original investigation, has created an irrebuttable presumption of continuation or recurrence at the specific rate determined in the original investigation.

## D. ARGUMENTS RELATING TO THE WTO COMPATIBILITY OF SECTION 771(5)(F) OF THE US TARIFF ACT OF 1930, AS AMENDED, (19 U.S.C. 1677(5)(F))

4.73 The **European Communities** maintains that Section 1677(5)(F) prevents the US Department of Commerce from adopting the principle laid down in the SCM Agreement, and confirmed by the Panel and Appellate Body in *US – Lead and Bismuth II*, that a benefit must be assessed with respect to the market benchmark and that consequently a fair market value, arm's-length transaction means that any pre-transaction benefit stream is not enjoyed by the post-transaction entity. The European Communities considers that Section 1677(5)(F) is thus inconsistent with Articles 1.1(b), 10, 14 and 32.5 of the SCM Agreement in addition to Article XVI.4 of the WTO Agreement.[220]

4.74 For the **European Communities**, Section 771(5)(F) of the Tariff Act 1930, as amended, (19 U.S.C. Section 1677(5)(F)) (hereinafter Section 1677(5)(F)), as interpreted by the US Court of Appeals for the Federal Circuit, prevents the United States recognizzing the principle that an arm's length, fair market value transaction does not pass through any benefits from pre-transaction financial contributions to the post-transaction entity. The European Communities is of the view that, Section 1677(5)(F) was specifically designed to prevent the US Department of Commerce applying a "rule" that a benefit stream does not survive a fair market value, arm's-length transaction. The European

[217] *See* EC's second written submission, paras. 70 and 72.

[218] *See* EC's second written submission, para. 76.

[219] *Dillinger,* Court No. 00-09-00437, at 16 (Note that in the version attached as Exhibit EC–34 the quoted material appears on pages 11 and 12).

[220] *See* EC's first written submission, para. 139.

Communities argues that the wording and legislative history of Section 1677(5)(F) and the intent to overrule the identical principle as developed by the CIT in the *Saarstahl I* decision, prove that it was designed so as to ensure that in situations of fair market value change in ownership, benefits of the subsidies are never considered not to have been passed to the new owner.[221] It quotes the US Department of Commerce in its findings in the Court remand redetermination in the *Delverde* case:

> "Section 771(5)(F) only acts to preserve the ability of the Department to exercise its discretion, and it accomplishes this goal by overturning the approach ordered in Saarstahl I, which had mandated that the Department find that an arm's-length transaction, in and of itself, precludes any pass-through to the purchaser."[222]

4.75 The **United States** contends that Section 1677(5)(F) does not mandate an either/or approach to the question of whether pre-privatization subsidies benefit a post-privatization entity.[223] On the contrary, it argues, the plain language of Section 1677(5)(F) demonstrates its discretionary nature. In this regard, the United States contends that the text of Section 1677(5)(F) clearly provides that a change in ownership does not by itself means that a past countervailable subsidy is no longer countervailable, nor does it mean that it is countervailable. The United States argues that the statute leaves the investigating authority discretion to make its decision. It further argues that the Statement of Administrative Action ("SAA") also supports the view that Section 1677(5)(F) is discretionary and not mandatory. In this regard, the SAA states that the purpose of Section 1677(5)(F) is to clarify that "the sale of a firm at arm's length does not automatically, and in all cases, extinguish any prior subsidies conferred", and that it is the Administration's intent that "Commerce retains the discretion to determine whether, and to what extent ... previously conferred countervailable subsidies" are eliminated,[224]

4.76 The **European Communities** alleges that it is unable to determine whether the US Department of Commerce requires this discretion as a finder of fact – to determine whether a transaction has taken place at fair market value and arm's length, or whether the US Department of Commerce requires this discretion to allow it to determine that, even after a fair market value, arm's-length transaction, the "benefit stream" from pre-transaction non-recurring subsidization might continue to flow. The European Communities indicate that it can accept that a privatization transaction is often very complex and might require detailed examination. However, the European Communities cannot accept that an investigating authority might require discretion to determine that benefit from pre-transaction subsidization passes through an arm's length, fair market value transaction. In the view of the European Communities, such discretion would clearly be inconsistent with Article 1.1 of the SCM Agreement which requires the existence of benefit for subsidization to be found and countervailing duties imposed, and permits no exception.[225]

4.77 In its response to question No. 18 from the European Communities, the **United States** indicates that if an evaluation of all the facts and circumstances of a particular privatization or a change in ownership warrants a finding that as a result of an arm's length, fair market value privatization, the post-sale company does not enjoy a benefit from past subsidies, then such a finding can be made. In the United States' view, there is nothing in the language of the change in ownership provision, or in the legislative history of that provision which would prevent the US Department of Commerce from making such a finding.

[221] *See* EC's first written submission, para. 157.

[222] Final Results of Redetermination pursuant to Court Remand, *Delverde Srl. v United States* Consol. Ct. No. 96-08-01997 (Ct. Int'l Trade 2 December 1997), at 33. Exhibit EC–28 to the EC's first written submission (Note that in the version of this Remand Redetermination supplied to the Panel, the quoted text can be found on page 16.)

[223] *See* US' first written submission, para. 91.

[224] *See* US' first written submission, paras. 94-96.

[225] *See* EC's second written submission, para. 79.

4.78 The **European Communities** interprets the above statement as meaning that the United States is saying that, even if the "legal person" after the transaction is not a different "legal person" from the subsidy recipient under its "same person methodology", Section 1677(5)(F) would allow the US Department of Commerce to find that where it had determined, as a matter of fact, that the change in ownership had taken place at arm's length and for fair market value, it could conclude that no benefit passes through. The European Communities however claims that the United States has not explained whether the US Department of Commerce could apply the logic of this statement to every change in ownership transaction with which it is faced, issue methodology setting out this intention, and still act consistently with Section 1677(5)(F).[226]

## V. ARGUMENTS OF THE THIRD PARTIES

5.1 From the three third-parties to this proceeding, i.e. Brazil, India and Mexico, only Brazil filed its comments within the 28 January 2002 deadline. Brazil and Mexico presented oral statements during the third-party session. India reserved its rights to participate as a third-party in eventual appeal proceedings.

### A. BRAZIL

#### 1. Arguments relating to the United States change in ownership methodology

(a) The existence of a benefit in the post-privatization entity

5.2 **Brazil** argues that the existence and value of countervailable benefits can change as a result of events that occur after the initial financial contribution. Brazil also notes that in *US – Lead and Bismuth II* the Appellate Body determined that a change in ownership necessarily triggers an examination of whether a benefit received prior to the change in ownership continues to benefit the new owners. The Appellate Body also concluded in *US – Lead and Bismuth II* that whether a financial contribution confers a benefit depends on "whether the recipient has received a financial contribution on terms more favourable than those available to the recipient in the market."[227] Brazil contends that under the United States' same person methodology, the price paid by the new post-privatization owners is irrelevant to the determination of whether the post-privatization entity continues to enjoy the benefits of the pre-privatization subsidies. Brazil contends that this is contrary to the finding in *US – Lead and Bismuth II,* which made clear that the essential determination of whether a post-privatization entity continues to enjoy the benefits of the pre-privatization entity is whether or not the new owners paid fair market value in the transaction transferring ownership. Brazil maintains that theUnited States' same person methodology does not address the issue of whether the transaction transferring ownership was at fair market value, but rather only inquires whether the pre-privatization and post-privatization entities are the same. While Brazil concedes that the Panel and the Appellate Body in *US – Lead and Bismuth II* found there must be a "recipient" of a subsidy benefit and, therefore, that subsidy benefits can only reside in natural or legal persons, it argues that this finding "does not mean either that subsidy benefits cannot be transferred from one legal entity to another or that the entity originally receiving the subsidy retains the benefit for as long as it remains the same legal entity."[228] Rather, Brazil interprets *US – Lead and Bismuth II* to mean that the relevant question is not whether the entity originally receiving the subsidy is the same legal person as the post-privatization entity, but whether the "benefit" has been transferred in the sale to new owners. Thus, Brazil argues that the central issue to be examined according to *US – Lead and Bismuth II* is the nature of the transaction transferring ownership.

[226] *See* EC's second written submission, para. 81.

[227] Appellate Body Report, *US – Lead and Bismuth II,* WT/DS138/AB/R, at para. 67, *citing* Appellate Body Report, *Canada – Aircraft,* WT/DS70/AB/R.

[228] Brazil's statement at the first substantive meeting, para. 11.

(b) Determination of countervailability under Article 14 of the SCM Agreement

5.3 **Brazil** argues that a financial contribution can only confer a countervailable "benefit" if the financial contribution received is "on terms that are more favorable to the recipient than the terms available in the market."[229] Brazil also contends that such contributions only remain countervailable so long as they are provided on terms more favorable than those available in the market. Brazil maintains that Article 14 of the SCM Agreement makes clear that the "existence and magnitude of countervailable subsidies are always determined by reference to "commercial" or "market" criteria"[230] and that the same criteria apply in determining the existence of "benefits" from the provision of capital.

5.4 **Brazil** argues that "countervailable subsidies can change over time, both in terms of their existence and their magnitude."[231] Brazil holds that market factors are the criteria for determining whether provisions of capital, such as loans and equity are financial contributions that confer a subsidy benefit. For a loan, Brazil contends that the measure is whether the interest charged for the loan capital is consistent with the interest charged in the market; for equity, the measure is whether the equity is valued properly based on the expectations that the recipient entity will generate adequate returns. Brazil argues that the existence of a benefit is based on the terms on which the capital is provided and will change if those terms change.

5.5 Citing Article 14(a) of the SCM Agreement, **Brazil** states that equity capital can be a financial contribution which confers a benefit only if the provision of that equity capital is on terms "inconsistent with the usual investment practice of private investors." Brazil argues that in a financial contribution to an non equity-worthy recipient on terms inconsistent with usual investment practices of private investors ceases to be a countervailable benefit when the capital is no longer available on terms inconsistent with usual investment practices of private investors. Therefore, Brazil concludes that in the case of equity, the transaction governing the sale of equity is the key event which must be analysed to determine whether or not the equity, continues to be provided on terms inconsistent with market terms. Brazil contends that the United States' methodology ignores the question of whether there are changes to the terms of capital provision resulting from a sale of the equity. Brazil maintains that once the equity has been transferred to a private party in an arm's-length transaction at market value, the expectation (and, therefore, the terms of its provision) is that the equity will maintain or increase in value and earn a return for the investors or the company will no longer be able to raise equity capital.

(c) Resource misallocation and countervailing duties

5.6 **Brazil** believes that the true objective of the United States' same person methodology is to ensure that events which take place after the initial financial contribution are not allowed to affect the ability of the United States to impose countervailing duties on the original financial contribution and the benefits conferred by that original financial contribution. Brazil notes that the United States argues that even if an arm's-length transaction does not confer a benefit to the new owners and the new company, a market distortion remains and must be redressed. Brazil argues that the logic of the United States' argument is that any methodology that does not allow Members to address the supposed macroeconomic effects of a subsidy, is not consistent with the object and purpose of the SCM Agreement. However, Brazil notes that the SCM Agreement does not provide Members with a broad-based authorization to redress all actions that the Member feels distort the market. Brazil contends that the SCM Agreement requires a financial contribution which confers a benefit as a condition for imposing countervailing duties, nothing more, nothing less.

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[229] Brazil refers to the citation of the Panel Report in *Canada – Aircraft* by the Appellate Body in *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 67.

[230] Brazil's statement at the first substantive meeting, para. 12.

[231] *Ibid*., at para. 14.

## 2. Arguments relating to Section 1677(5)(F)

5.7 **Brazil** contends that the United States law prevents the adoption of a methodology to determine the existence of post-privatization benefits which would be consistent with the Panel and Appellate Body reports in *US – Lead and Bismuth II.* Brazil argues that Section 1677(5)(F) renders the consideration of whether the transfer in ownership was an arm's-length transaction at fair market value irrelevant to the determination of whether the new owners continued to enjoy the subsidy benefit. As an illustration, Brazil claims that not a single factor in the "totality of circumstances" test applied in the United States' same person methodology looks at whether the transaction is an arm's-length transaction for fair market value. While Brazil recognizes that under the new methodology, the benefits are no longer determined to adhere only to the physical assets of the privatized entity, one of the rationales for the gamma methodology which led to the Panel and Appellate Body rejection of that methodology in *US – Lead and Bismuth II*, they now adhere, in effect, to a more broadly defined set of assets which include the name, the personnel, the customers, the management, and the business relationships of the entity. Thus, the new same person methodology is only a variation of the rejected gamma methodology and still fails to consider the effects of a change in ownership as required by *US – Lead and Bismuth II*.

5.8 **Brazil** believes that, in light of the United States' failure to implement the *US – Lead and Bismuth II* determinations, the Panel should, in addition to finding that the United States actions inconsistent with its WTO obligations, suggest how the substantive standard addressing privatization should be implemented and that the United States should initiate and conduct reviews of all existing countervailing measures.

B. MEXICO

## 1. Arguments relating to the United States change in ownership methodology

5.9 **Mexico** submits that the revised US Department of Commerce same person methodology is used by the United States in its latest attempt to continue applying countervailing duties on goods produced by privatized firms, while avoiding the determination of whether a previously bestowed subsidy continues to confer a benefit. Mexico claims that the SCM Agreement and the GATT 1994 require two essential prerequisites to be fulfilled for the imposition of countervailing duties, as was made clear in *US – Lead and Bismuth II,* which is a direct precedent for this dispute. First, demonstration of the existence of a subsidy is required. In accordance with Articles 19.1, 19.4 and 21 of the SCM Agreement and Article VI:3 of the GATT 1994, an investigating authority may not impose or maintain countervailing duties on an imported product without determining the existence of a subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise. Second, determination of the existence of a "benefit" by reference to a market benchmark. As shown by the Panels and the Appellate Body in *Canada – Aircraft*[232] and *US – Lead and Bismuth II*[233], a "benefit" is determined by reference to the terms on which a "financial contribution" would have been made available to the recipient *in the marketplace.* In addition, in accordance with Article 1.1 (and Article 21) of the SCM Agreement, "the investigating authority must establish the existence of a 'financial contribution' and 'benefit' during the relevant period of investigation or review".

5.10 **Mexico** submits that the US Department of Commerce same person methodology is inconsistent with the United States' obligations as a WTO Member. Under the new US Department of

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[232] *See* Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*"), WT/DS70/R, adopted 20 August 1999 as upheld by Appellate Body Report, *Canada – Aircraft*, WT/DS70/AB/R, at para. 9.112; *and* Appellate Body Report, *Canada – Aircraft,* WT/DS70/AB/R, at paras. 154, 157.

[233] *See* Panel Report, *US – Lead and Bismuth II,* WT/DS138/R, at para. 6.66 (including footnote 78).

Commerce methodology, if the privatized company has been determined as remaining the same person as the firm on which the subsidy was originally bestowed, it is unduly *assumed* that the benefit conferred by that subsidy has passed through to that company. Mexico contends that such an assumption, without a concrete determination on the continued existence of a benefit, cannot be regarded as valid under the SCM Agreement as interpreted in *US – Lead and Bismuth II.* Moreover, the same person methodology, like US Department of Commerce preceding methodologies, is entirely unrelated to the market benchmarks referred to by the panels and the Appellate Body, since according to the US Department of Commerce criteria, practically any privatized company would be found to be the same person. Mexico argues that under no economic logic would it be reasonable to expect that a private investor who buys a public enterprise (*e.g*. a steel company), to have to change its name, facilities, line of production, customers, etc. and to fire hundreds of qualified workers, just to avoid the imposition of antidumping duties. In this context, Mexico contends that this US Department of Commerce criteria used to assume the transfer of the subsidies granted prior to the privatization, may respond to the United States' corporate law principles, but not to the United States' obligations as a WTO Member to make an adequate determination of the continued existence of a "benefit" by reference to a market benchmark, and hence, due demonstration that a countervailable subsidy has been bestowed, directly or indirectly, on the production of goods by the privatized company.

5.11 **Mexico** contends that, in the case of a change in ownership involving the payment of consideration, a distinction must be drawn between the pre-privatization company that originally received the subsidy and the post-privatization entity, for the purpose of reviewing continuity of the benefit conferred by a subsidy. Mexico claims that this has also been recognized by the Panel in *US – Lead and Bismuth II.*[234] According to Mexico, it is the change in ownership and the ensuing payment of consideration for the productive assets that calls for a new determination of benefit conferred by a subsidy. Thus, Mexico considers that the SCM disciplines do not release the United States from the obligation to determine the continued existence of a benefit to a privatized company, on the sole grounds that it deems the new firm to be "not distinct" from the original firm. Thus, Mexico contends that the same person methodology and the investigations and reviews based on that methodology are not consistent with Article VI:3 of the GATT 1994 and Articles 14, 19.1, 19.4 and 21 of the SCM Agreement.

### 2. Arguments relating to Section 1677(5)(F)

5.12 **Mexico** maintains that a concrete determination of the continued existence of a benefit is necessary in all cases involving a change in ownership accomplished through an arm's-length transaction. A change in ownership through an arm's-length transaction is an event of such relevance as to require, by itself, a concrete finding regarding the continuation of the benefit conferred by the subsidy granted to the privatized firm before the privatization. Mexico claims that Section 1677(5)(F) directly contravenes this requirement, since it clearly fails to stipulate the need for such a benefit determination. Therefore, this Section violates the United States' obligations under Articles 1, 10, 19, 21 and 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

## VI. INTERIM REVIEW[235]

6.1 On 8 April 2002, pursuant to Article 15.1 of the DSU, the Panel issued the draft descriptive part of its Report. As agreed, on 18 April 2002 both parties commented on the draft descriptive part. The Panel issued its Interim Report on 13 May 2002. On 27 May 2002, pursuant to Article 15.2 of the DSU, the United States and the European Communities provided comments and requested the revision and clarification of certain aspects of the Interim Report. None of the parties requested that

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[234] *See* Panel Report *US – Lead and Bismuth II*, WT/DS138/R, at para. 6.70.

[235] Pursuant to Article 15.3 of the DSU, "The findings of the final panel report shall include a discussion of the arguments made at the interim review stage". The following section entitled "interim review" therefore forms part of the findings.

the Panel hold a further meeting with the parties. In the absence of a meeting and further to paragraph 16 of the Panel's Working Procedures[236], the parties were given until 5 June 2002 to submit further written comments on the other party's Interim Review's comments. Both parties filed further comments on that date.

6.2 Following the comments of the parties, the Panel has reviewed the claims, arguments and evidence submitted by the parties during the panel process. Where it considered it appropriate to ensure clarity and avoid misunderstandings, the Panel revised its findings, including the correction of typographical and editorial mistakes. The Panel has addressed the following concerns raised by the parties.

6.3 Generally, the United States' allegations concern the factual description of the Panel Report. The United States makes a point of repeating that the Panel did not include several of its 18 April requests to amend the descriptive part of the Panel Report. The United States' comments seem to want to give the impression that the Panel intentionally, or without due diligence, refused to accept or refer to evidence or arguments that the United States submitted to the Panel during the panel process. Before it addresses any specific allegation, the Panel notes that most of the United States' requests and comments made in its 18 April communication were accepted by the Panel and were reflected in the Interim Report. In its 18 April comments, the United States often did not point to submissions or communications where the concerned factual or legal allegations could be located. The Panel notes, however, that the present dispute is generally not concerned with factual matters but rather with the legal consequences of privatizations, which occurred in all 12 cases before it. This is the factual basis upon which the Panel's findings and conclusions are made. Nonetheless, where factual allegations were made by the European Communities, it was for the United States to refute them.[237] On occasion, the Panel has explicitly invited the United States to comment on the European Communities' description of the twelve determinations[238]; the United States did not respond fully to the Panel's questions. However, because it wants to take into account the United States' concerns to the extent permitted by WTO law, the Panel has reviewed the record for the facts that the United States requests be added to the descriptive part of the Panel Report. To the extent possible, and with a view to favour transparency of the circumstances of those cases, the Panel has revised some of the paragraphs of the Panel Report to include references to data contained in the actual 12 determinations submitted by the European Communities as exhibits. As noted later, these additional factual data, are not necessarily relevant to the limited terms of reference of this Panel, including those relating to allocation and attribution of subsidies. In all cases, the Panel has refused to amend the descriptive part of its Report where it would involve the introduction of new evidence or new arguments not submitted during the panel process.

6.4 The United States makes some general remarks regarding what it considers as "errors of particular significance"; namely: (1) "*that the Panel considers that all sizable subsidies at issue in the challenged cases were pre-privatization subsidies* (*some were not)*; (2) "*that in all cases disregarding the pre-privatization subsidies would have left only a de minimis benefit (for several cases this is not true)*"; (3) "*that all of the privatizations were full privatizations (some were not)*"; (4) "*that all of them at issue occurred at fair market value (some likely did not and others have not been sufficiently*

[236] Paragraph 16 of the Panel's Working Procedures reads as follows: "Following issuance of the interim report, the parties shall have no less than 7 days to submit written requests to review precise aspects of the interim report and to request a further meeting with the Panel. The right to request such a meeting must be exercised no later than at that time. Following receipt of any written requests for review, in cases where no further meeting with the Panel is requested, the parties shall have the opportunity within a time-period to be specified by the Panel to submit written comments on the other parties' written requests for review. Such comments shall be strictly limited to referencing the other parties' written requests for review."

[237] The Panel recalls that the Appellate Body has made clear that a *prima facie* case is one which in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.

[238] See for instance the US replies to question No. 11 posed by the Panel.

*investigated to permit a finding one way or the other)*"; and (5) "*that the EC's factual characterizations reproduced in sections II-IV were "not rebutted" by the United States (many were vigorously rebutted)*".[239]

6.5 As regards the United States' allegations Nos. (1) and (2), the Panel fails to understand why the United States considers that the Panel has ignored that, in some of the determinations affected by this Panel, the US Department of Commerce may have countervailed post-privatization subsidies. We have never, contrary to what the United States has claimed, made such statements or assumptions in our Panel Report. What the Panel has done is to delimit the scope of its ruling according to its mandate; namely to assess the WTO-compatibility of the US change-in-ownership methodologies which allow non-recurring pre-privatization subsidies to be countervailed after privatization has taken place without any prior WTO-compatible determination of benefit *vis-à-vis* the privatized producer, as applied in the 12 countervailing duty determinations before it. In this regard, the Panel recalls its findings in paragraph 7.39 (6.39 of the Interim Report).

6.6 Paragraph 7.39 does not exclude the possibility of post-privatization subsidies or even recurring pre-privatization subsidies. These are not, however, relevant to our analysis. Our analysis only focuses on the treatment of pre-privatization non-recurring subsidies under the SCM Agreement following a change in ownership, more specifically on the effect of such treatment on the privatized producer.

6.7 The Panel understands that its request for the termination of the countervailing duty orders may not have been sufficiently clear and may have led the United States to believe that the Panel had wanted to ignore the possible existence of post-privatization subsidies in some of the 12 determinations which, the Panel believes, is not an issue before it. Accordingly, the Panel has amended paragraphs 7.87, 7.100, 7.116 and 7.117 to improve the clarity of the Panel's recommendations.

6.8 As regards the United States' allegation No. (3) that the 12 determinations did not concern full privatizations, the United States alleges that in the case of Usinor, the subsidy recipient in the three French cases, the Government of France continued to maintain a "substantial level" of government ownership. The Panel notes that the Government of France divested itself of the remaining shares in Usinor in 1997-1998, that is before the countervailing duty order was issued in the three cases.[240] As the US Department of Commerce's own record reflects after privatization, so-called "stable shareholders" held approximately 14 per cent of Usinor's total shares; 10 per cent of these stable shareholders were claimed by the United States to be government-owned or controlled entities.[241] To accommodate the United States, the Panel has added this information from the United States Federal Register into the factual description of the relevant French cases. The Panel uses the term "full privatization" to refer to a change in ownership where the government has divested itself of all, or substantially all, of its ownership interest in the privatized company, and clearly could no longer exert a controlling interest On the basis of the evidence submitted by the parties by the close of the second substantive meeting, the Panel still considers that in the 12 determinations before it, the governments had severed their control over the state-owned producers upon privatization and the privatized producers could no longer rely on government financing for their operations and could no longer receive things for free. For the Panel these are full privatizations. In order to facilitate the understanding, the Panel has expanded its discussion on what it understands as (full) privatization for the purpose of these panel proceedings. To take into account the United States' concern, the Panel has deleted the term "full", as this does not affect the Panel's considerations and reasoning applicable to

[239] *See* US Comments to the Interim Report, paras. 2-3.

[240] These cases are: Case No. 1 (original investigation) where the final determination was published on 8 June 1999; Case No. 2 (original investigation) where the final determination was published on 29 December 1999; and Case No. 9 (sunset review) where the final determination was published on 7 April 2000.

[241] *Stainless Steel Sheet and Strip in Coils from France, supra,* footnote 8, at 30776.

all 12 determinations before it, as in all the twelve determinations, the governments had, upon privatization, severed all, or substantially all, their ownership interests over the state-owned enterprises in favour of the privatized producers and their shareholders.

6.9 As regards the United States allegation No. (4), the Panel is surprised at this comment since it has never stated that all 12 privatizations have taken place for fair market value. On the contrary, the Panel has specified that only as regards two determinations (Case Nos. 8 and 10) had the US Department of Commerce itself found that the privatizations at issue taken place for fair market value. The Panel would like to refer to paragraph 2.2 of the Report which is very clear on this matter. The Panel's findings do not assume that all privatizations were for fair market value. Although the European Communities has made allegations to this effect, the Panel does not prejudge those privatizations where the US Department of Commerce has not actually found that the privatization was done for fair market value,. The Panel does consider, however, that the US Department of Commerce's practice, not to examine whether a privatization took place for fair market value and at arm's length in its change in ownership methodology , unless the privatized producer is a distinct legal person from the state-owned producer, is contrary to the SCM Agreement. Except for Case Nos. 8 and 10, whether the specific privatizations were for fair market value is of no relevant to this Panel as long as the US Department of Commerce fails to undertake the examination itself.

6.10 As regards the United States' allegation (5), the Panel does not agree with the United States' statement to the effect that it has vigorously rebutted the factual characterization by the European Communities reproduced in Sections II to IV of the Panel Report. Up to the interim review stage, the United States has scarcely contested the factual data provided by the European Communities. For example, the United States did not rebut the factual data provided by the European Communities in its Annex to question No. 11 of the Panel where it describes the various privatizations. Only at the review stage of the descriptive part (in its communication of 18 April), has the United States attempted to contest these facts generally, often without pointing to any specific evidence on the record which the Panel may have ignored.

6.11 The United States argues that in paragraph 2.1 of its Report, the Panel had inaccurately described the question before the Panel, by implying that any subsidy existing after a privatization, must arise out of the privatization itself. The Panel recalls that its terms of reference are limited to the issues raised by the European Communities in its request for the establishment of a panel. In particular, the European Communities' claims concern the legal consequences of a change in ownership from wholly-owned state enterprises to privatized producers and whether the imports from the privatized producers in the 12 determinations can continue to be countervailed for subsidies bestowed to state-owned producers prior to the privatizations. In any event, the Panel has clarified the wording of paragraph 2.1 in the hope that it will leave no doubt as to the Panel's mandate and intent.

6.12 The United States considers that paragraph 2.3 inaccurately states that all of the privatizations before the Panel involved a full change in ownership; because, in fact, the French privatization featured in 3 out of the 12 cases involved a 'substantial level of continued government ownership' through GOF-owned "stable shareholders". The European Communities in its 5 June 2002 comments suggests that the Panel change the word "ownership" to "control". The Panel refers to its statement in paragraph 6.8 above. Yet, even if the United States is correct in stating that the French Government maintained a minority indirect ownership interest in Usinor, the Panel is of the view that all the determinations before it, including the three French cases, involved changes in ownership leading to a privatization of the state-owned enterprises, in the sense that the government had divested itself of all, or substantially all its ownership interest and clearly no longer had any controlling interest in the privatized companies. After privatization, the privatized producers could no longer rely on government financing for its operations and could no longer receive things for free. The Panel believes that under its definition, Usinor's privatization qualifies as a full privatization. Nonetheless, the Panel has revised the text of paragraph 2.6 to reflect the findings regarding "stable shareholders" made by the US Department of Commerce in *Final Affirmative Countervailing Duty Determination:*

*Stainless Steel Sheet and Strip in Coils from France*.[242] The Panel believes that this change responds to both the United States' comments of 27 May 2002 and the European Communities' comments of 5 June 2002.

6.13 With regard to paragraph 2.6, in its comments of 18 April, the United States was not able to point to any evidence it had submitted to the Panel during the panel proceedings and which the Panel had ignored, set aside or misinterpreted. Yet the Panel has attempted to clarify further its point.

6.14 In paragraph 2.10, the United States disagrees with the use of the term "judgment" to refer to the remand redetermination from the CIT in the AST case, as no final judgment has been issued. The European Communities, in its 5 June comments, suggests using the word "decision" for judgment. The Panel has replaced substituted the word "judgment" with the word "order".

6.15 The United States claims that paragraph 2.13 still fails to state that the US Department of Commerce's *pro rata* allocation of the Usinor group's subsidies to all group producers, including GTS, has not been challenged (either by the European Communities in the present dispute or by the respondents during the US Department of Commerce investigation). The United States considers that, as written, paragraph 2.11 implies that whether GTS "received" a portion of the original French Government subsidies is a subject of dispute. The Panel has no evidence before it of whether the allocation concerned was challenged or not. The Panel agrees with the European Communities' comments of 5 June 2002 that the issue of attribution is not within the terms of reference of the Panel. In order to accommodate the United States' concerns, the Panel has revised the relevant paragraph to reflect the limited terms of reference of this Panel.

6.16 As regards paragraph 2.14, the United States claims that it does not correctly describe the facts of Usinor's evolving ownership interest in GTS, nor does it correctly describe the US Department of Commerce's analysis of those facts. Further to the United States comments on 18 April, the Panel did change the wording of its old paragraph 2.12 but did not agree with the United States' characterization of its determination and preferred its own language. The Panel recalls that the pro-rata allocation of subsidies and related percentage of countervailing duties is not a matter before this Panel. The United States claims that paragraph 2.13 continues to inaccurately describe the US Department of Commerce's remand investigation and redetermination. The United States alleges that it was at GTS' request that the US Department of Commerce focused its analysis on changes in Usinor's (as opposed to GTS') ownership. The Panel did not accept the United States' comment because it had not been presented with any evidence to support the United States' assertion that GTS requested such an analysis. Moreover the Panel does not see how this is relevant to the present dispute.

6.17 The United States considers that paragraph 2.18 contains errors in the description of the subsidy bestowal, the change in ownership transaction, and the US Department of Commerce's analysis regarding ILVA and CAS and refers to its comments of 18 April. The Panel has reviewed the evidence within the United States Federal Register, submitted by the European Communities. In particular, Federal Register (63 Fed. Reg. 810) indicates that *"[i]n 1989, the Aosta operations were transferred to ILVA. In December 1989, Cogne S.r.l.* ***was created*** *as a wholly-owned subsidiary of ILVA S.p.A., which held the Aosta operations. Cogne S.r.l. was later named Cogne Acciai Speciali S.p.A. (Cogne S.p.A.)."* (emphasis added). Therefore, the Panel stands by its previous decision not to accept the United States' request. However, the Panel has amended the text of this paragraph to show more fully the evidence in the Federal Register.

6.18 The United States considers that in paragraph 2.20, the statements concerning maximization of revenue in selling AST and the independence of the financial advisers should be deleted since they are not factual findings by the US Department of Commerce. The Panel notes that this evidence

[242] *Stainless Steel Sheet and Strip in Coils from France, supra* footnote 8, at 30776.

submitted by the European Communities was never contested by the United States before the interim review stage. The Panel has reviewed the evidence presented to it and has therefore deleted the phrase on maximizing revenue and maintained the phrase on the reported independence of the financial advisers. The Panel is of the view that these factual allegations are not relevant for its legal analysis.

6.19 The United States maintains that paragraphs 2.22, 2.23, and 2.25 do not accurately describe the subsidies in *Stainless Steel from Italy* and that paragraphs 2.32 and 2.33 do not accurately describe the facts of Case No. 12 regarding *GOES from Italy,* because they do not contain details relating to the pro-rata allocation of subsidies among the relevant corporate groups. The Panel, with a view to clarifying its Report, has decided to adjust the text of paragraph 2.22 according to the relevant Federal Register; adjust the text of paragraph 2.23, and accept the United states comments on paragraph 2.25. The European Communities points out that the allocations made by the US Department of Commerce have been contested in domestic proceedings in the United States and argues that therefore the changes requested by the United States should not be made. The Panel is merely correcting its statement to reflect more accurately what the US Department of Commerce concluded in this case. The Panel does not take any position on the validity of the US Department of Commerce's determinations on such pro-rata allocation and their relevance, if any, as this is for another forum, and constitutes a matter outside the terms of reference of this Panel.

6.20 As regards paragraph 2.31, the United States also claims that the Panel did not accept all its suggestions. The Panel did accept most of the United States suggestions of 18 April and has changed the word "findings" for "review" to respond to any remaining concerns by the United States.

6.21 As regards former paragraphs 2.33, 2.34 and 2.35, the United States would like the Panel to delete them since they do not deal with factual aspects, but instead reflect the arguments of the parties. The Panel has reviewed its previous position and has moved the relevant paragraphs to a new section IV.B ("US Department of Commerce's practice in administrative reviews") in the arguments part. The Panel has substituted the relevant paragraphs in the factual part (now 2.34 and 2.35) with some summarized information regarding the US Department of Commerce's relevant practice available in the "Countervailing Duties; Final Rule" quoted in footnote 50.

6.22 The United States considers that paragraph 2.37 (now 2.36) does not reflect the United States' comments of 18 April. The Panel amended the text to make clear that the Panel is aware that UES was the actual exporter in the *US – Lead and Bismuth II* case, but that the subsidies provided to British Steel are the same ones at issue in the case from the United Kingdom before this Panel. The Panel hopes that this addresses both the United States' concerns of 27 May 2002 and the European Communities' concerns of 5 June 2002.

6.23 The United States claims that paragraph 2.42 (now 2.41) does not reflect the changes proposed by the United States in its 18 April communication. With a view to avoiding including arguments into the factual descriptive part of the Panel Report, the Panel has revised the text to delete any reference to *how* the US Department of Commerce arrived at its conclusion that the non-recurring pre-privatization subsidies continued to benefit Usinor after privatization.

6.24 The United States considers that the assertions by the European Communities as to why exporters did not request administrative reviews should be deleted from paragraph 2.48 (now 2.47), footnote 64 (now 67). The Panel has already responded to the United States' comments of 18 April by amending the text of the footnote in question (now footnote 67) and sees no need to further amend the text; what is stated there is factually correct and was not challenged by any party.

6.25 The United States claims that paragraph 2.59 (now 2.57) contains an inaccurate description of the gamma methodology and its results. The Panel already responded to the United states' comments of 18 April by amending the text of the paragraph in question. To take into account the United States' concern, while noting that the United States had admitted that the gamma methodology was inconsistent with the SCM Agreement, the Panel has revised the text accordingly.

6.26 The United States refers to paragraph 2.60 (now 2.58) and claims that it inaccurately describes the panel and Appellate Body decisions in *US – Lead and Bismuth II.* According to the United States, these decisions found three particular countervailing duty determinations, rather than the gamma methodology itself, to be WTO-inconsistent. The Panel directs the United States to paragraph 12 of its first written submission where it states that, in *US – Lead and Bismuth II* "the panel and the Appellate Body rejected the gamma methodology as inconsistent with the SCM Agreement."[243] The Panel also notes that in other parts of this proceeding, the United States has stated that it accepted that its gamma methodology was inconsistent with the SCM Agreement, because it did not establish that the requirements of the SCM Agreement had been satisfied with respect to the current (privatized) producer.[244] To take into account the United States' concern, the Panel has revised its text.

6.27 The United States claims that paragraph 2.61 (now 2.60) mistakenly states that under the same person methodology, prior subsidies are "presumed" to "pass through" to the post change-in-ownership producer. The Panel has reconsidered the United States' concerns and has changed the text of the relevant paragraph to read "found to continue to reside in".

6.28 The United States claims that in paragraph 4.5, the Report omits its principal rebuttal to the European Communities's arguments on the subject of whether privatization triggers the need for a re-examination of the existence of benefit. The Panel recalls that the United States has admitted that a change in ownership triggers the obligation to review the conditions of application of the SCM Agreement. The Panel has stated on numerous occasions the United States' argument and has added another reference to it following the United States request of 18 April. The United States also requires that we introduce a new argument regarding its belief that no distinction should be made between privatization and any other change in ownership.[245] In the Panel's view, the United States wants to introduce a new argument at this late stage in the panel process which does not add to its main claims and arguments. The United States has not been able to point to any communications during the panel process where it would have argued that privatizations were not distinct from any other change in ownership for the reasons mentioned in its communication of 14 May. The Panel is also well aware of the United States' argument that only a change of legal personality of the producer (not any change in ownership or privatization) extinguishes the benefit *vis-à-vis* the privatized producer or, to put it differently, that unless the privatized producer is a distinct legal person from the state-owned enterprise, a countervailable subsidy continues to reside in the person upon whom it was originally bestowed.

6.29 The United States considers that paragraph 4.22 inaccurately summarizes the United States' position on subsidies and changes in ownership and its interpretation of *US – Lead and Bismuth II*. The Panel has added to its description to take into account the United States' concerns.

[243] *See* US' first written submission, para. 12.

[244] *See* US' first written submission, para. 69.

[245] In its 18 April communication the United states requested the Panel to introduce the following argument which the Panel was not able to identify in any of the US communications to the Panel:

> "For purposes of this analysis, moreover, the United States considers that privatizations do not merit special treatment different from other changes in ownership simply because the purchase price is being paid to a government and government owners are being replaced by private ones. Adopting such a distinction would imply that government ownership per se (rather than non-commercial financial contributions) had constituted the original subsidy, and that the original subsidies were limited to the cost incurred by the subsidizing government rather than the full benefit conferred to the recipient enterprise."

6.30 As regards the United States comments on paragraph 4.32, the Panel has considered the United States' proposal and revised the text as suggested by the United States.

6.31 The United States comments on paragraph 6.6 (now 7.6) to the effect that the US Department of Commerce examines the "circumstances of the privatization," including all terms of the transaction, in determining whether the person under investigation or review is the same legal person that received the subsidy. The Panel recognizes the United States' point and has revised the description of the United States' argument. The Panel maintains, however, that the US Department of Commerce does not look to the issue of whether the privatization took place at arm's length and for fair market value, in making its analysis of whether the privatized producer has received a benefit from the subsidy bestowed to the state-owned producer, unless that privatized producer is a distinct legal person from the state-owned producer.

6.32 As regards the United States' claim that paragraph 6.14 (now 7.14) contains an inaccurate description of the US Department of Commerce's test, the Panel has reconsidered the United States' concerns and has changed the text of the relevant paragraph to read "found to continue to reside in".

6.33 The United States points out some errors in the chart attached to the Interim Report as Annex A. The Panel has updated the chart to reflect the United States' comments on the data included for Case Nos. 7 and 10 and the French cases. The Panel has also considered the United States' comments regarding the use of the % symbol rather than the term "percentage points" in the column concerning alleged countervailable subsidies in Annex A. The Panel notes that this was not raised in the United States' 18 April comments on the draft descriptive part, which contained Annex A. The Panel is unclear as to the value of using the term "percentage points" rather than the percentage symbol. The reason the Panel used the % symbol was to reduce the amount of text in Annex A. However, in an effort to respond to the United States' concerns the Panel has amended the text of the column in question to duplicate the text in the corresponding portions of the descriptive part, to which the United States has not raised any objections.

6.34 With regard to paragraph 6.90 (now 7.90), the Panel has adjusted the text to reflect the Panel's terms of reference.

6.35 The United States argues that the Panel's statement that the sunset reviews in question "should be terminated" reflects several errors of law and fact. The Panel does not necessarily agree with the United States' comments. However, to accommodate the United States' concerns, the text of paragraphs 6.117 and 6.118 (now 7.116 and 7.117) have been amended to clarify that the Panel was referring only to the termination or removal of the (share of the) countervailing duty order which derived from non-recurring pre-privatization subsidies, for which no WTO-compatible determination of benefit has taken place *vis-à-vis* the privatized producer. The Panel makes no findings on recurring subsidies or post-privatization subsidies and their countervailability, as these are not within the terms of reference of the Panel.

6.36 The European Communities suggested that paragraph 6.130 (now 7.129) be revised by changing the word "purchaser" in the first line to "producer." The Panel agrees with the United States' comment of 5 June that this change would make the sentence incomprehensible and therefore has maintained the original version.

6.37 The United States notes that in three separate places, the Panel states that the United States took the position that Case No. 7 (the administrative review involving steel from Sweden) was not within the Panel's terms of reference because it was finalized prior to the Appellate Body Report in *US – Lead and Bismuth II* (paras. 6.5, 6.27, and 6.99 of the Interim Report). The United States claims that it never put forward this argument and that any reference to it should be struck from the report. The Panel points out that in paragraph 99 of its first written submission the United States contents: "[t]he European Communities' claims regarding the expedited sunset review of the CVD order on cut-to-length plate from Sweden are not within the Panel's terms of reference."[246] Since the Panel is now aware that the inclusion of this claim was an error, the Panel will therefore delete the requested passages.

6.38 The United States makes a variety of arguments against the Panel's factual findings regarding Section 1677(5)(F). First, the United States claims that the Panel erred in attempting to establish the meaning of the legislation, as a factual element, by examining the "internal elements" relevant to the construction of the statute – its legislative and judicial history. The Panel repeats its discussion contained in its findings. The Appellate Body Report in *India – Patents* stated that: where the alleged violation at issue is domestic legislation, an examination of the relevant aspects of municipal law is essential to determining whether a Member has complied with its obligations.[247] The panel in *US – Section 301 Trade Act* provided guidance for panels interpreting domestic law when it stated that: "a Panel should not interpret the law "as such", but rather establish the meaning of the disputed legislation as a *factual element* and determine whether the factual element constitutes conduct by the respondent Member contrary to its WTO obligations."[248] The Panel also feels that it was appropriate to use the legislative and judicial history of Section 1677(5)(F) in establishing the meaning of the legislation. The panel – upheld by the Appellate Body – in *US – 1916 Act*, stated that even if the text of the law in question were clear on its face, it was necessary to examine the domestic application of that law, its historical context and legislative history and subsequent declarations of US authorities in order to asses its compatibility with WTO law.[249] Based on the jurisprudence, the Panel maintains that it was correct for it to examine the relevant aspects of the United States' law and to establish the meaning of the legislation as a factual element.

6.39 The United States specifically argues that the Panel made erroneous assumptions about what the US Court of Appeals for the Federal Circuit meant when it discussed the concept of "arm's-length" in its decision in the *Delverde III* case. However, we note that the US Court of Appeals for the Federal Circuit relied specifically on the legislative history to determine the Congressional intent in promulgating the statute. The definition of "arm's-length transaction" contained in the SAA[250], which the Panel relied upon, is identical to the wording in the House of Representatives Report cited by the US Court of Appeals for the Federal Circuit as the basis for its interpretation of the meaning of the statute.[251] The Panel also notes that throughout its discussion of both the *Delverde III* case and the *Saarstahl II* case, the Court seems to use the two terms interchangeably. When we requested that the United States explain the meaning of arm's length in United States law and its difference from fair market value, the representative of the United States said there was a great deal of confusion about those terms in the United States and that he was not in a position to reply.[252] Therefore, based on the definition of arm's length provided by Congress, the interchangeable use of the terms arm's length and fair market value by the US Court of Appeals for the Federal Circuit, and the United States' inability

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[246] *See* US' first written submission, para. 99

[247] Appellate Body Report, *India – Patents (US)*, WT/DS50/AB/R, at para. 66.

[248] Panel Report, *US – Section 301 Trade Act*, WT/DS152/R, at para. 7.18 citing Appellate Body Report, *India – Patents (US)*, WT/DS50/AB/R,, at para. 66 (emphasis added)

[249] Panel Report, *US – 1916 Act (EC)*, WT/DS136/R, at para. 6.48. *See a*lso Panel Report, *United States – Section 337 of the Tariff Act of 1930* ("*US – Section 337*"), adopted 7 November 1989, BISD 36S/345.

[250] "For purposes of section 771(5)(F), the term "arm's-length transaction" means a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties." SAA 1994 U.S.C.C.A.N 3773, 4241 Exhibit EC–25 to EC's first written submission.

[251] The Panel recognizes that the House of Representatives Report is not, as such, in the record. However, it is cited by the US Court of Appeals for the Federal Circuit in *Delverde III*. The Panel has decided to look at the full document in order to respond to the United States' comments in the US' Request for Interim Review. The Panel also notes that the Federal Circuit stated that the Senate Report was "nearly identical" to the House Report it cited. *Delverde III* 202 F.3d. 1360, at 1366-67.

[252] *See* US response to question No. 15 posed by the Panel.

to explain how United States law differentiates between the two, the Panel maintains that its position is not "unsubstantiated and unwarranted." The Panel agrees with the United States that one can reasonably interpret the two concepts as being different, but maintain its position that the United States' legislation and US Court of Appeals for the Federal Court decision seem to have defined arm's length to include fair-market value.[253]

6.40 The United States also contends that the Panel erred in finding that the same person methodology had also been condemned by the US Court of Appeals for the Federal Circuit's reasoning when it condemned the "gamma methodology." The Panel has never claimed that the US Court of Appeals for the Federal Circuit has ruled specifically on the legality of the same person methodology under Section 1677(5)(F); the Panel also feels that this is not relevant. In the context of its examination of the gamma methodology, the US Court of Appeals for the Federal Circuit discussed and analysed Section 1677(5)(F) and found that a *per se* methodology would violate the statute. It is to this discussion and finding to which the Panel is referring. The Panel notes that the US Department of Commerce has itself argued that "the Federal Circuit in *Delverde III* was quite clear that 19 U.S.C. Section1677(5)(F) precludes *per se* rules, including one that would automatically treat the change in ownership as extinguishing prior subsidies."[254] The Panel again maintains its reasoning, that the effect of the interpretation of the statute by the US Court of Appeals for the Federal Circuit, is to make Section 1677(5)(F) inconsistent with the United States' WTO obligations.

6.41 The United States argues that the fundamental problem with the Panel's analysis is that it ignores the fact that under the United States' legal system, courts develop the law on a case-by-case basis. The Panel understands that law in a common law legal system is continuously evolving. However, the current state of the law in the United States today is that expressed by the US Court of Appeals for the Federal Circuit in *Delverde III*. The United States has provided no evidence of other dispositive decisions by the US Court of Appeals for the Federal Circuit or the United States Supreme Court (the only higher court), that would alter the binding nature of the US Court of Appeals for the Federal Circuit's holding in *Delverde III* or the Panel's understanding of what that decision requires of the United States Department of Commerce.[255] The United States also contends that all that can be fairly said at this time is that the US Court of Appeals for the Federal Circuit has found the gamma methodology to be unlawful, and has yet to opine on whether the type of methodology proposed by the Panel would be permitted under the United States' statute. The Panel would like to point out that in no way is it proposing that any particular methodology be adopted by the United States. The Panel examined *Delverde III*, not to assess or discuss the compatibility of the gamma methodology but to understand the nature and legal effects of Section 1677(5)(F), as interpreted by the US Court of Appeals for the Federal Circuit, in the context of its examination of the gamma methodology. Since the United States itself has argued that the *Delverde III* ruling clearly precludes *per se* rules, including one that would automatically treat the change in ownership as extinguishing prior subsidies[256], the Panel continues to believe that the current interpretation of Section 1677(5)(F) by the US Court of Appeals for the Federal Circuit, which is binding upon the CIT and the US Department of Commerce, would prevent the United States from applying Section 1677(5)(F) in a manner consistent with the SCM Agreement.

6.42 The United States believes that the Panel should explain more precisely in paragraph 7.1 (now para. 8.1) why the United States' measures in question are inconsistent with, or violate, Articles 1, 10,

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[253] *See* US' request for Interim Review, para. 44.

[254] Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment upon the agency record, *Acciai Speciali Terni et al. v. United States et al.* Court No. 01-00051 (Ct. Int'l Trade 5 October 2001). (Extracts; cover page, table of contents, and pages 9 to 18 attached as Exhibit EC-26) *cited in* EC's first written submission, para. 150.

[255] The United States itself has admitted that "many judgments are final as a practical matter at the level of the circuit court of appeals, *inter alia*, because the possibility to appeal before the Supreme Court is not automatically granted." Panel Report, *US – 1916 Act (EC)*, WT/DS136/R, at para. 6.139.

[256] *Ibid.*

14, 19.1, 19.4, 21.1, 21.2, 21.3 and 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement. In particular, the Panel agrees with the United States that *stricto sensu*, Article 1 being a definitional provision, cannot be violated as such. The Panel understands the concerns of the United States and has therefore expanded its explanation and conclusion, of the reasoning behind each of the various violations.

6.43 In its interim review submission on 27 May 2002, the European Communities submits that it would like that the Panel to explain why it did not consider it necessary to adopt the suggestions or adopt suggestions of its own. Article 19.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), simply states that a panel "may" suggest ways in which the Member concerned could implement the recommendations. This discretion is reserved to the Panel, and the Panel is under no obligation to take up suggestions of the complaining party. The Panel is of the view that its findings and conclusions are sufficiently clear and that the Members have discretion in how to bring a measure found to be WTO-inconsistent into conformity with WTO obligations.

6.44 The Panel notes that, on 4 June 2002, the CIT ruled on AST's challenge to the US Department of Commerce's final determination of the administrative review in *GOES from Italy* (Case No. 12).[257] In its opinion, the Court upheld the same person methodology as being consistent with Section 1677(5)(F), in particular with the US Court of Appeals for the Federal Circuit's decision in *Delverde III*. Since this CIT decision was issued after the interim review stage, the Panel has not taken it into account within the descriptive part or the findings. Nevertheless, the Panel wishes to comment on the paragraphs of this Report on which the decision by the CIT might have some bearing.

6.45 In particular, paragraph 2.33, which indicates that AST has challenged the US Department of Commerce's final determination of the administrative review in *GOES from Italy*[258], could be completed by adding the following text:

> "… On 4 June 2002, the CIT ruled on AST's challenge to the US Department of Commerce's final determination of the administrative review. The Court remanded the case to the US Department of Commerce to 'further explain whether post-sale AST or KAI [the purchaser] become legally responsible for all of pre-sale AST's assets and liabilities.'[259] The Court upheld the same person methodology as being consistent with Section 1677(5)(F), in particular with the US Court of Appeals for the Federal Circuit's decision in *Delverde III*."

6.46 Paragraph 7.79 quotes a 4 January 2002 decision of the CIT[260] which concluded that the same person methodology was inconsistent with Section 1677(5)(F). This paragraph could be expanded to completely cover the current CIT jurisprudence on the same person methodology by noting that in the 4 June 2002 CIT decision[261], the Court concluded that the same person methodology is consistent with *Delverde III* and Section 1677(5)(F).[262] While the Panel accepts that, in the 4 June 2002 case, the CIT

[257] *Acciai Speciali Terni v. United States of America* Court No. 01-00051, at p. 29.

[258] The corresponding box of the table included in Annex A would also be affected.

[259] *Ibid*.

[260] *GTS Industries v. United States* Court No. 00-03-00118 (Ct. Int'l Trade 4 January 2002), at 14-18. Exhibit EC–30 to the EC's second written submission. *See* also, *Final Results of Redetermination pursuant to Court Remand*, *Allegheny Ludlum Corp. et al. v United States* Court No. 99-09-00566, (Ct. Int'l Trade 13 December 2000) (unpublished) ("*Allegheny Ludlum I*").

[261] *Acciai Speciali Terni v. United States of America* Court No. 01-00051, at p. 29.

[262] In particular, the CIT considered that:

> "The mere payment of more or less for the purchase of shares of stock would seem to have no impact by itself upon the amount of countervailable duty liability any more than such payment would have on the amount of a mortgage liability that was the responsibility of AST. It would simply mean the purchaser of stock paid more or less for its shares. Such payment by itself would not extinguish liabilities to third parties".

seems to validate the same person methodology, this does not change the reasoning of this Panel to the measures before us. In our view, the CIT is equating countervailing duty liability to other corporate liabilities, which can be inherited by the new owner. However, a countervailing duty liability can only exist if there is countervailable subsidization under the terms of the SCM Agreement. Therefore, the Panel considers that since, in its view, the subsidy benefit ceases to accrue to the privatized producer through the payment of fair market value for the shares of stock, there is no longer a countervailable subsidy under the SCM Agreement. In the view of this Panel, as there is no subsidy to countervail, there is therefore no outstanding importers' liability in respect of countervailing duties on the imported goods produced by the privatized producer.

6.47 Another paragraph which could benefit from reference to the 4 June 2002 CIT decision is paragraph 7.153. In this paragraph, the Panel indicates that the current interpretation of Section 1677(5)(F) by the US Court of Appeals for the Federal Circuit, which is binding upon the CIT and the US Department of Commerce, prevents the United States from applying Section 1677(5)(F) in a manner consistent with the SCM Agreement. The 4 June 2002 CIT decision supports the conclusion of the Panel that the US authorities are unable to consistently implement the SCM Agreement through Section 1677(5)(F), as interpreted by *Delverde III*.[263] In its decision, the CIT concurred with the argument put forward by the United States, in evidence submitted before this Panel[264], that "the Statute [Section 1677(5)(F)] prohibits a *per se* rule for determining whether a subsidy continues to be countervailable to a new owner following a change in ownership"[265] and thus upheld the same person methodology as being consistent with Section 1677(5)(F), in particular with the US Court of Appeals for the Federal Circuit's decision in *Delverde III*. The CIT concluded that Section 1677(5)(F) does not require the US Department of Commerce to conduct a second benefit determination if the entity that originally received the subsidy is the same person being reviewed after privatization.[266] This indicates that, pursuant to Section 1677(5)(F), the US Department of Commerce will not be required, [or even able] to make, an independent benefit assessment *vis-à-vis* the privatized producer nor will it be able to conclude that when the privatization is at arm's length and for fair market value that the benefit no longer accrues to the privatized producer.[267]

## VII. FINDINGS

### A. CLAIMS OF THE PARTIES

7.1 The European Communities has requested the Panel to rule on the WTO-consistency of 12[268] countervailing duty determinations listed in paragraph 2.1 above. Six of these countervailing duty determinations occurred in the context of original investigations[269], two in the context of

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*Ibid*. p. 16.

The Panel is of the view that the CIT, like the United States' arguments before this Panel, is elevating form over substance.

[263] *Acciai Speciali Terni v. United States of America* Court No. 01-00051, at p. 29.

[264] Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment upon the agency record, *Acciai Speciali Terni et al. v United States et al.* Court No. 01-00051 (Ct. Int'l Trade 5 October 2001). (Extracts; cover page, table of contents, and pages 9 to 18 attached as Exhibit EC-26) *cited in* EC's first written submission, para. 150.

[265] *Acciai Speciali Terni v. United States of America* Court No. 01-00051, at p. 13.

[266] *Ibid* p. 15.

[267] For example, in this case, even though the new owner of AST (i.e. KAI) paid more than the originally projected fair market value, this payment by itself was not considered by the CIT enough to extinguish the so-called countervailing duty liability. *Ibid*. p. 16.

[268] There are also allegations on the US Department of Commerce's redeterminations within remand investigations ordered by the CIT in the context of appeals against four of those 12 determinations. See AnnexA of this Panel Report.

[269] Stainless Sheet and Strip in Coils from France (C-427-815) (Case No. 1); Certain Cut-to-Length Carbon Quality Steel from France (C-427-817) (Case No. 2); Certain Stainless Steel Wire Rod from Italy

administrative reviews[270], and four others in the context of sunset reviews[271], as further detailed in that paragraph.

7.2 The European Communities claims generally that the United States has not respected its obligations pursuant to the SCM Agreement in the 12 listed determinations and that the countervailing duties in place are, therefore, inconsistent with the United States' obligations pursuant to the SCM Agreement and the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement).[272] According to the European Communities, a change in ownership, such as a privatization, creates a mandatory obligation on the investigating authority to examine the conditions of the change in ownership transaction in order to determine whether any benefit accrues to the new economic entity.[273] The European Communities argues that when a privatization takes place at arm's length and for fair market value[274], the benefit of the subsidy to the previous state-owned producer does not continue to accrue to the post-privatization economic entity. The European Communities asserts that the investigating authority's obligation to examine whether the benefit continues to accrue to the privatized producer exists for all types of countervailing duty proceedings, regardless of whether they are original investigations, administrative reviews, or sunset reviews. The European Communities claims that with both the gamma methodology and the same person methodology, the US Department of Commerce does not examine the conditions of the transaction and thus fails to determine whether a benefit continues to accrue to the current producer contrary to the requirements of Articles 1, 10, 14, 19, and 21 of the SCM Agreement.

7.3 The European Communities also claims that Section 771(5)(F) of the US Tariff Act of 1930, as amended (19 U.S.C. §1677(5)(F)) ("Section1677(5)(F)") "as such" prohibits the US Department of Commerce from systematically assessing benefit in cases of privatizations in a manner consistent with the SCM Agreement and it is, thus, also inconsistent with Article XVI:4 of the WTO Agreement.

7.4 The United States replies that the primary issue to examine when a change in ownership occurs is not whether the transaction was at arm's length and for fair market value, but whether it

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(C-475-821) (Case No. 3); Stainless Steel Plate in Coils from Italy (C-475-823) (Case No. 4); Stainless Steel Sheet and Strip in Coils from Italy (C-475-825) (Case No. 5); Certain Cut-to-Length Carbon-Quality Steel Plate from Italy (C-475-827) (Case No. 6).

[270] Cut-to-Length Carbon Steel Plate from Sweden (C-401-804) (Case No. 7); Grain-Oriented Electrical Steel from Italy (C-475-812) (Case No. 12).

[271] Cut-to-Length Carbon Steel Plate from United Kingdom (C-412-815) (Case No. 8); Certain Corrosion-Resistant Carbon Steel Flat Products from France (C-427-810) (Case No. 9); Cut-to-Length Carbon Steel Plate from Germany (C-428-817) (Case No. 10); and Cut-to-Length Carbon Steel Plate from Spain (C-469-804) (Case No. 11).

[272] Marrakesh Agreement Establishing the World Trade Organization (hereinafter WTO Agreement) including Annexes 1, 2, 3, and 4 in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 April 1994, Legal Instruments – Results of the Uruguay Round vol. 1 (1994); 33 I.L.M. 1125 (1994).

[273] In this dispute, parties had to make reference to enterprises before and after privatization. Parties have referred to pre-privatization company, pre-privatization producer, pre-privatization (economic) entity and other similar expressions. With a view to consistency, the Panel, when referring to the wholly-owned state enterprise before the privatization, will use the term "state-owned producer". Parties have also referred to the post-privatization company, post-privatization producer, post-privatization (economic) entity and other similar expressions. With a view to consistency, the Panel, when referring to the privately-owned enterprise after the privatization, will use the term "privatized producer".

[274] Initially, and then sporadically, the European Communities argued that, in case of any change of ownership at fair market value and for arm's-length, the benefit from a subsidy bestowed to the previous producer would not pass through to the new producer. The European Communities referred to concepts of "control" as a criteria to determine which change of ownership calls for such re-examination of the conditions of applications of the SCM Agreement. In its second written submission, and during the second substantive meeting, the European Communities limited its argumentation to privatization, as the 12 challenged determinations involved privatizations.

resulted in a change of the legal personality of the producer, *i.e.* whether the privatized producer is a "distinct legal person" from the pre-privatization state-owned producer. The United States maintains that a change in ownership or privatization does not necessarily result in a change of the legal personality of the producer and as such, should not change any prior determination of benefit assessed when the subsidy was bestowed to the state-owned producer, since the subsidy resides in the same legal person as before the privatization. For the United States, unless the post-privatization producer has become a new distinct legal person after the privatization, the importing Member can attribute the non-amortized part of a non-recurring subsidy provided to the state-owned producer to the privatized producer. Therefore, in its view, exports from the privatized producer can be countervailed or continue to be countervailed after the privatization pursuant to the SCM Agreement.

7.5 The United States admits that in Case Nos. 1 to 7, where the gamma methodology was applied, its determinations are WTO-inconsistent but only to the extent that it did not reconsider them under its new "same person" methodology.

7.6 The United States maintains that its same person methodology, which is a two-step process looking first to whether the post-privatization producer is a new distinct legal person and only making a benefit assessment after a determination that the post-privatization producer is a new legal person, is consistent with its WTO obligations. The United States asserts that if the post-privatization producer is not a new legal person, the benefit attributed to the state-owned producer automatically accrues to the privatized producer. The United States also states that arms length's transactions for fair market value do not necessarily result in no benefit accruing to the post-privatization producer. In addition, the United States argues that sunset reviews are an inappropriate forum for analysing complex privatization transactions. The United States believes that it is not obligated, in a sunset review, to examine any evidence regarding subsidization that is not already on the record. In its view, in the absence of an administrative review, the only evidence of subsidization to be examined in a sunset review, will be that of the original investigation.

7.7 As to the WTO-compatibility of Section 1677(5)(F), the United States argues that Section 1677(5)(F) only maintains the US Department of Commerce's discretion to determine whether or not the benefit continues to reside in the company even after a change in ownership (privatization) at arm's length and for fair market value. The United States maintains that the SCM Agreement provides no basis for concluding that a change in the ownership of a subsidy recipient, for fair market value or otherwise, automatically eliminates the benefit conferred on the company. Therefore Section 1677(5)(F) is WTO-compatible.

## B. THE MEASURES AT ISSUE

### 1. Evolution of change in ownership methodologies applied by the US Department of Commerce

7.8 It is reported that the issue of the effect of a change in ownership as a consequence of privatization for fair market value and at arm's length was first addressed by the US Department of Commerce in the administrative review of the countervailing duty order on *Lime from Mexico* in 1989.[275] It is also reported that in that review, the US Department of Commerce determined first, whether an actual sale took place, and second, whether subsidies paid to the government-owned company continued to provide benefits to the owners of the privatized company.[276] Having determined that there was an actual sale, the US Department of Commerce came to the conclusion that the price paid for the privatized company reflected its market value and that "therefore no benefits

[275] *Lime from Mexico,* 54 Fed. Reg. 1753, 1754-55 (Dep't Commerce 17 January 1989) (prelim. admin. review). *See* EC's first written submission, at para. 19.

[276] *Ibid*., at 1754.

to [the government-owned company] passed through to [the privatized company]".[277] In 1992, in a preliminary determination in the *US – Lead and Bismuth II* investigation, the US Department of Commerce followed the approach taken in *Lime from Mexico* finding that a fair market value privatization did not provide any benefit to the post-privatization entity.[278] However, in the Final Determination of 27 January 1993 in that case, the US Department of Commerce used the "pass-through" methodology to conclude that all pre-privatization countervailable subsidies passed through to the privatized company and can continue to be countervailed.[279] This pass-through methodology was replaced first by the so-called "gamma methodology" and then by the so-called "same person methodology", both of which are challenged in this dispute.

## 2. Change in ownership methodologies challenged in this dispute

7.9 This dispute covers two methodologies used by the US Department of Commerce in order to assess the impact of privatization in the determination of subsidization *vis-à-vis* the post-privatization companies. These methodologies are the gamma methodology and the same person methodology. In this regard, of the 12 determinations challenged by the European Communities, 11 were initially based on the gamma methodology. In Case No. 12 (*Grain-Oriented Electrical Steel from Italy "GOES"*[280]) the US Department of Commerce used the same person methodology. The same person methodology was first applied in the final results of the administrative review in this case which were published on 12 January 2001.[281] This methodology had been applied earlier in various remand determinations ordered by the CIT within appeal proceedings in four of the above 11 determinations.[282] The same person methodology has been challenged before the CIT in all of these remand redeterminations[283], (and also in the *GOES* determination).[284] The United States has admitted that seven (Case Nos. 1 to 7) of these 12 determinations are inconsistent with its WTO obligations to the extent that the gamma methodology was used in the determination and that the US Department of Commerce did not fully examine whether the pre- and post- change in ownership entities were the same legal persons.[285]

### (a) The gamma methodology

7.10 In July 1993, the US Department of Commerce introduced the gamma methodology.[286] According to this methodology, after assessing the existence of pre-privatization subsidies, the US Department of Commerce determines to what extent (if any) the privatization transaction price repaid unamortized subsidies, and countervails the remainder (if any). Thus, unlike the pass-through

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[277] *Ibid*., at 1755.

[278] *Certain Hot Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom* 57 Fed. Reg. 42974 (Dep't Commerce 17 September 1992) (prelim. determination).

[279] *Certain Hot Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom,* 58 Fed. Reg. 6237 (Dep't Commerce 27 January 1993). (final countervailing duty determination).

[280] *GOES Admin. Review, supra,* footnote 47. The original final countervailing duty determination was published in *GOES Final Determination, supra,* footnote 47.

[281] *See* EC's first written submission, para. 124, not contested by the United States.

[282] Stainless Sheet and Strip in Coils from France (C-427-815) (Case No. 1); Certain Cut-to-Length Carbon Quality Steel from France (C-427-817) (Case No. 2) (with respect to GTS); Stainless Steel Plate in Coils from Italy (C-475-823) (Case No. 4) and Certain Cut-to-Length Carbon-Quality Steel Plate from Italy (C-475-827) (Case No. 6); see Annex A to this Panel Report.

[283] The United States claims that since "the EC has not challenged the four remand determinations in this forum ... the Panel's review is limited to the six original determinations in which US Department of Commerce applied its old methodology." US' first written submission, para. 85.

[284] *See* EC's first written submission, para. 124.

[285] *See* US' first written submission, para. 85.

[286] The methodology was set out in a *General Issues Appendix, supra,* footnote 84, the relevant discussion of privatization is found at 37259-65.

methodology where the totality of prior subsidies passed through, in the gamma methodology only a portion of such subsidies may pass through.

7.11 In 2000, the US Court of Appeals for the Federal Circuit found that the gamma methodology was inconsistent with Section 1677(5)(F).[287] The Court found that the gamma methodology, in presuming that some benefit passed through, meant that the US Department of Commerce had adopted a *per se* rule that a pre-privatization subsidy would always pass through despite an arm's-length, fair market value transaction.[288] The Court found that Section 1677(5)(F) prevents the adoption of a *per se* rule either that a subsidy continues to be countervailable despite an arm's-length transaction or that the subsidy is no longer countervailable as a result of a such a transaction.[289]

7.12 The gamma methodology was the methodology applied in the three administrative reviews covered by the *US – Lead and Bismuth II* dispute and which the Panel and Appellate Body found to be inconsistent with the SCM Agreement.[290]

(b) The same person methodology

7.13 In *GOES from Italy*[291], the US Department of Commerce applied for the first time the same person methodology, which it had developed on remand after the *Delverde III* judgment. This methodology had first been set out in the preliminary and then final results of a redetermination pursuant to a court remand in *Acciai Speciali Terni v United States*.[292]

7.14 The same person methodology provides for a two-step test. The first step consists of an analysis of whether or not the state-owned producer and privatized producer are distinct legal persons. For this purpose, the US Department of Commerce examines the following non-exhaustive criteria: (i) continuity of general business operations; (ii) continuity of production facilities; (iii) continuity of assets and liabilities; and (iv) retention of personnel. If, as a consequence of the application of these criteria, the US Department of Commerce concludes that the post-privatization entity is a new legal person, distinct from the entity that received the prior subsidies, the benefit of a prior subsidy would not be found to continue to reside in the post-privatization producer and the US Department of Commerce would proceed to examine whether any new subsidy has accrued to the privatized producer as a result of this change in ownership (and it would do so by assessing whether the sale was at arm's length and for fair market value). If, as the result of the application of the above criteria, the US Department of Commerce concludes that no new or distinct legal person was created, all the subsidy is found to continue to reside in the post-privatization producer and the US Department of Commerce will not assess whether the privatization was at arm's length and for fair market value.

7.15 In response to Panel question No. 13[293], the United States informed the Panel that, until now, there have been no cases where the application of the same person methodology in the context of a

[287] *Delverde Srl. v. United States* ("*Delverde III*") 202 F.3rd 1360 (Fed Cir. Feb 2, 2000) rehg denied (20 June 2000). Exhibit EC-5 to the EC's first written submission

[288] *Ibid*., at 12.

[289] *Ibid*., at 10.

[290] *See* Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("*US – Lead and Bismuth II*"), WT/DS138/AB/R, adopted 7 June 2000.

[291] *GOES Admin. Review, supra*, footnote 47.

[292] *Final Results of Redetermination pursuant to Court Remand, Acciai Speciali Terni ("AST") v. United States* Court No. 99-06-00364, (Ct. Int'l Trade 19 December 2000) (unpublished) (Stainless Steel Plate in Coils from Italy) Exhibit EC–6 to the EC's first written submission

[293] "Could the United States provide examples where the application of the same person methodology in the context of a given privatization has resulted in US Department of Commerce finding that there was no benefit to the privatized entity?"

given privatization has resulted in the US Department of Commerce finding that no benefit continued to accrue to the privatized producer.

(c) Section 1677(5)(F)

7.16 The European Communities also requests the Panel to find Section 1677(5)(F) of Title 19 of the US Code inconsistent with the United States' WTO obligations. Section 1677(5)(F) reads as follows:

> "a change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's-length transaction."[294]

7.17 The legislative history of this statute is discussed hereafter in Section F.

C. THE IMPACT OF PRIVATIZATION ON THE DETERMINATION OF SUBSIDIZATION AND RELATED COUNTERVAILING DUTIES

**1. Parties' claims and arguments**

(a) The European Communities' claims and arguments

*(i) The gamma methodology*

7.18 The European Communities claims that the gamma methodology applied by the United States in 11 of the countervailing duty determinations before the Panel, and the same person methodology applied, *inter alia*, in the administrative review in *GOES from Italy*, are inconsistent with the SCM Agreement. For the European Communities, the United States refuses to correctly apply the SCM Agreement as interpreted by the Panel and Appellate Body in *US – Lead and Bismuth II*. Since the United States admits that the gamma methodology is WTO-inconsistent, the European Communities focused its argumentation on the WTO-compatibility of the same person methodology.

*(ii) The same person methodology*

7.19 The European Communities submits that the same person methodology is inconsistent with Article 1.1(b) of the SCM Agreement which requires a determination of the existence of a benefit before countervailing duties can be imposed.[295] The European Communities claims that this methodology disregards criteria set down in Article 14 of the SCM Agreement that any benefit must be calculated with respect to the advantage obtained over what was available in the market.

7.20 For the European Communities, when a change in ownership takes place at arm's length and for fair market value, the benefit attributed to the prior financial contributions (subsidization) does not continue to accrue to the new economic entity. The European Communities submits that privatization is a fundamental change in ownership that *a fortiori* requires a new benefit analysis.[296] The European Communities believes that the standard for determining whether a countervailable benefit continues to accrue after privatization is not whether the new entity is the "same legal person" as before, but rather

[294] Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994); 19 U.S.C. § 1677(5)(F). Exhibit EC–4 to the EC's first written submission.

[295] The European Communities believes that any countervailing duties imposed on the basis of this methodology will be inconsistent with Articles 1.1(b), 10, 14, 19.4, and either 19.1 or 21.1, 21.2, or 21.3 (depending on whether an original or review investigation is at issue). EC's first written submission, para. 126.

[296] *See* EC's first written submission., para. 26.

whether the transaction took place at arm's length and for fair market value. Basing its argument on the reasoning of the Panel and the Appellate Body reports in *US – Lead and Bismuth II,* the European Communities contends that since the benefit does not reside in the assets themselves, a benefit does not continue to flow from untied, non-recurring financial contributions after a change in ownership for fair market value at arm's length. The European Communities submits that the only way to support a finding that the benefit passes through to the new economic entity would be "if fair market value was *not* paid for all such productive assets."(emphasis added)[297]

"Benefit" under the SCM Agreement

7.21 The European Communities asserts that, contrary to the ruling of the Panel in *US – Lead and Bismuth II,* as upheld by the Appellate Body, the United States, through its methodology, is creating a nearly irrebuttable presumption that the benefit of non-recurring countervailable subsidies resulting from financial contribution to the state-owned enterprise always passes through to the post-privatization economic entity. The European Communities believes that this United States' presumption could only be rebutted if the post-transaction entity disposed of all of its assets, and started production on another site, with another workforce, and under another brand name. The European Communities claims that the same person test does not involve any examination of the existence of a countervailable benefit: therefore it is as WTO-inconsistent as the gamma methodology.[298]

7.22 In response to the United States' argument that a change in ownership or privatization does not "extract" the subsidy or the benefit from the company, the European Communities argues that when the United States uses the word "extract", it appears to be talking about the extraction of subsidization from productive operations – whether they be workers with enhanced skills, or steel mills which have been built with the help of subsidies. In its view, the Appellate Body in *US – Lead and Bismuth II* clearly found that subsidies do not accrue to productive operations, but rather to legal persons.[299]

Distinct legal persons

7.23 The European Communities considers that the term same person is a disguise for "same activity". The European Communities argues that this new methodology continues to treat as irrelevant the terms of the sale, just as the gamma methodology did. The European Communities believes that the United States is persisting in applying its misconception that the benefit somehow resides in the assets by examining, not whether the current producer has received any benefit, and hence a countervailable subsidy, but rather whether the assets and business operations of the company can be regarded as the same before and after the transaction.

Corporate law principles

7.24 The European Communities rejects the parallels with corporate law and the distinction between owners and company invoked by the United States to maintain its position that only when the subsidy is paid back by the company recipient itself and not by its owners (shareholders) can it consider that the benefit has been extinguished. For the European Communities, countervailing duties are applied without reference to the corporate law distinction between owners and the company; this follows both from the SCM Agreement and the United States' practice. While the European

[297] Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("*US – Lead and Bismuth II*"), WT/DS138/R, as upheld by Appellate Body Report, *US – Lead and Bismuth II,* WT/DS138/AB/R, at para. 6.81, *cited in* EC's first submission, para. 53.

[298] *See* EC's first written submission, para. 125.

[299] Appellate Body Report, *US – Lead and Bismuth II,* WT/DS138/AB/R, at para. 58 (footnotes omitted).

Communities accepts that a distinction between owners and the company can be drawn for general purposes of corporate or commercial law, this distinction is not relevant for the imposition of countervailing duties since it is the economic entity which is the subject of the benefit analysis, not simply the exporting producer subject to investigation.

7.25 In response to the United States's analogy between corporate liability and potential liability for countervailing duties, the European Communities argues that unlike regulatory and tort law where liability may vest at the time of the act and liability for environmental damage which arises as of the date of the action causing the damage, liability for countervailing duties does not arise on the day that the subsidy was granted but only arises at the time of importation. A subsidized producer may decide not to export and avoid countervailing duties, while a company cannot simply avoid liability once the act has been committed. The European Communities explains that a countervailing duty is equivalent to customs duty and submits that it is inappropriate to say that liability for customs duties is akin to liability for environmental pollution, or that a corporate successorship test is applicable.

(b) The United States' claims and arguments

7.26 The United States claims that its same person methodology is consistent with the SCM Agreement and the WTO Agreement and that nothing in the SCM Agreement provides that upon a change in ownership at arm's length and for fair market value, the benefit accruing to the state-owned producer when it was provided with a subsidy does not continue to accrue to the new owner(s).

*(i) The gamma methodology*

7.27 The United States admits that, based on the ruling of the Appellate Body in *US – Lead and Bismuth II* and the ruling of the US Court of Appeals for the Federal Circuit in *Delverde III,* the gamma methodology was not consistent with either the SCM Agreement or with the United States' law. Therefore, the United States agrees that the original six investigations and one administrative review (Case Nos. 1-7), to the extent that the underlying determinations did not fully examine whether the pre- and post-change in ownership entities involved were the same legal person, are inconsistent with its WTO obligations. The United States claims to be prepared to bring these determinations into conformity, to the extent that it has not already done so. The United States points out that all six of the original investigations challenged by the European Communities that were determined under the gamma methodology are currently in litigation before the CIT.[300] The US Department of Commerce adds that although it was not obligated to do so by the Appellate Body in *US –Lead and Bismuth II*, it has, in the context of the domestic litigation, revised its determinations in the four cases (Case Nos 1, 2, 4 and 6) which are proceeding, applying its new same person methodology. Since the United States claims that the European Communities has not challenged the four remand determinations before the WTO Panel, it asserts that the Panel's review is limited to the six original determinations in which the US Department of Commerce applied its old methodology.[301]

*(ii) The same person methodology*

7.28 The United States submits that its new same person methodology is consistent with the SCM Agreement and was specifically designed to take into account the Panel and Appellate Body rulings in *US – Lead and Bismuth II* and the US Court of Appeals for the Federal Circuit ruling in *Delverde III*. The United States reminds the Panel that the only case before it where the same person methodology was applied by the US Department of Commerce is *G from Italy* (Case No. 12).

[300] Case Nos. 3 and 5 are stayed; the other four (Case Nos. 1, 2, 4 and 6) have been briefed and are in various stages before the respective judges. *See* EC's first written submission, paras. 84-101.

[301] *See* US' first written submission, para. 85.

7.29 The United States maintains that the same person methodology is firmly grounded in sound economics and in the principles of corporate successorship that apply in both the United States and the European Communities. Pursuant to the methodology, one corporate entity may be considered to be the successor of another if, in substance, it is the same legal person. As the US Department of Commerce explained, the various criteria that go into the determination of whether a nominally different company should be treated, in substance, as the same person, are just "factors" (which include: (i) continuity of general business operations; (ii) continuity of production facilities; (iii) continuity of assets and liabilities; and (iv) retention of personnel). The United States claims there is no basis for asserting that all of the criteria must weigh in favour of finding that no new corporate entity was created before such a finding is actually made.

7.30 The United States finds support for its same person methodology in the wording of the SCM Agreement, the Appellate Body ruling in *US – Lead and Bismuth II*, in corporate law principles and draws parallels with corporate liabilities.

"Benefit" in the SCM Agreement

7.31 The United States contends that the nature of countervailable benefits is made plain by Articles 1 and 14 of the SCM Agreement. It explains that a countervailable benefit is that part of a financial contribution that is obtained on terms more generous than those the recipient could have obtained commercially. In its view, countervailable benefits are, in essence, simply *fixed sums of money*, which (in the case of non-recurring benefits) are amortized over time.[302]

7.32 The United States maintains that, because countervailable benefits, once identified, and valued, are essentially, amounts of money, the method by which they may be terminated is straightforward: that amount of money is amortized over time, unless the recipient pays back the remaining non-amortized amount. The United States agrees that such a repayment could occur in conjunction with a change in ownership and, under its new methodology, it would investigate any claim that such a repayment has occurred. However, it adds, the SCM Agreement provides no basis for concluding that an arm's length and fair market value change in the ownership of a subsidy recipient, automatically eliminates or extracts the benefit conferred on the company.

7.33 The United States submits that the European Communities has not sufficiently explained how "fair market value extinguishes subsidies", nor has it shown where there is any basis for this conclusion in the SCM Agreement.[303] The United States' reasoning is based on its interpretation of the Appellate Body's finding in *US – Lead and Bismuth II* that subsidies are bestowed on legal persons. The United States believes that this means that subsidies continue to reside in the recipient legal person unless they are taken out of that person, or the person is dissolved.[304] The United States notes that the European Communities itself has acknowledged that a subsidy "resides with the natural or legal person which originally received the subsidy," not the owner of that person.[305] Based on its understanding of the fact that subsidies reside in the recipient legal person, the United States believes that what must be determined after a change in ownership has occurred is whether the subsidies have been paid back or not transferred to the new producer of the subject merchandise. The United States maintains that its current methodology examines just that; it is therefore consistent with the SCM Agreement.[306]

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[302] *See* US' second written submission, para. 4.
[303] *See* US' second written submission, para. 7.
[304] *See* US' second written submission, para. 16.
[305] The United States refers to the EC's first written submission, para. 12.
[306] *See* US' second written submission, paras. 11 and 16.

"Distinct legal person"

7.34 The United States maintains that the US Department of Commerce's revised change in ownership methodology, *i.e.* the same person methodology, is consistent with the SCM Agreement, particularly as interpreted by the Appellate Body in *US – Lead and Bismuth II*. In this regard the United States explains that, in its report, the Appellate Body agreed with the Panel (based on the Appellate Body's own findings in *Canada – Aircraft*) that a subsidy must be received by the natural or legal person that produced or exported the subject merchandise. The United States notes that the European Communities itself has accepted that, "the Appellate Body agreed that where the change in ownership has lead to *the creation of a different legal person* from the subsidy recipient any benefit must be assessed from the perspective of the post-transaction entity."[307] The United States contends that, where that basic premise is missing – that is, where a change in ownership has *not* led to "the creation of a different legal person" – the Appellate Body's reasoning in *US – Lead and Bismuth II* does not require the US Department of Commerce to find that the subsidies were eliminated.[308] The United States contends, that in reaching the conclusion that the conditions of application of the SCM Agreement had to be re-examined, the Appellate Body has put more emphasis on the fact that the privatized producers were distinct legal persons from the state-owned producer, than on the fact that there was a change in ownership for consideration. In particular, the United States insists on the fact that the Appellate Body, when quoting and upholding the Panel's conclusion, did not make any reference to change in ownership "for consideration". For the United States, this is evidence that the change in ownership for fair market value was not the dispositive criteria for the Appellate Body's reasoning.

Corporate law principles

7.35 The United States invokes corporate law principles to provide logical support for its use of a "distinct legal person" test and its consideration that fair market value payment by the shareholders (the owners) of the privatized company for the purchase of the state-owned enterprise does not extinguish a prior benefit attributed to that state-owned enterprise. The United States contends that the distinction between owners and companies is real and cannot be ignored. The United States further submits that it has demonstrated (and the European Communities does not dispute) that the distinction between a company and its owners is fundamental in most jurisdictions, including the European Communities. In its view, given this fact, it is not possible to interpret the SCM Agreement as if this distinction does not exist, or as if the WTO Members disavowed it in drafting the SCM Agreement, without giving the slightest indication that they were doing so.

7.36 For the United States, the distinction between owners and companies is unavoidable, and this is confirmed by the fact that the Appellate Body has established that subsidies are received by legal persons, not by the owners of those persons or "economic entities".[309] The United States submits that the European Communities' assertion that no distinction can be made between companies and their owners flouts the corporation laws of both the United States and the European Communities, which have as their very cornerstone the concept that companies are legal persons distinct from their owners. It further submits that while the Panel in *US – Lead and Bismuth II* may have endorsed the European Communities' position, the Appellate Body did not say that no distinction could ever be drawn between companies and their owners.[310]

[307] The United States refers to the EC's first written submission, para. 50 (emphasis added).

[308] *See* US' first written submission, para. 42.

[309] The United States refers to Appellate Body Report, *US – Lead and Bismuth II,* WT/DS138/AB/R, at para. 58.

[310] The United States compares the Panel Report, *US – Lead and Bismuth II*, WT/DS138/R, at para. 6.82 with the Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at paras. 62-64.

7.37 The United States submits that, because the European Communities cannot explain how the payment of fair market value by the new owner of a subsidized company extracts subsidies from that company, it now asserts that the admitted distinction between owners and companies should be disregarded for the purpose of analysing the existence of subsidies, because subsidies are received by "economic entities."[311] The United States submits that the European Communities wants the Panel to embrace this new concept so that the Panel will treat money taken out of an owner's pocket as having been taken out of the company, potentially eliminating subsidies that reside in that company.

7.38 The United States contends that countervailing duty exposure is very much like potential tort liabilities – both are potential burdens upon the earnings of the company that a prospective purchaser would take into account just as surely as it would take account of potential tort liabilities. As with other corporate liabilities, the United States argues that once a company receives a non-recurring subsidy, the potential for countervailing duties exists. The United States contends that that potential liability may materialize if someone (an injured industry in an importing Member) files a countervailing duty petition. Alternatively, it adds, the company can take steps to cure the harm by voluntarily repaying the subsidy or stopping its injurious exports. Moreover, the United States affirms, just as a producer that has caused environmental damage in another country could well escape that potential liability by repairing that damage or by ceasing certain operations in that country, a subsidized steel producer could avoid countervailing duties by disgorging the subsidies or by ceasing to export to countries with countervailing duty orders..[312]

## 2. Evaluation by the Panel

7.39 The main issue before the Panel is to assess the legal consequences, under the SCM Agreement, of a change in ownership leading to the privatization of state-owned producers. More precisely, the 12 countervailing duty determinations being contested all relate to a change in ownership from wholly-owned state enterprises to private producers – i.e., privatization . In all these cases, a countervailable non-recurring subsidy had been granted prior to the privatization. The non-recurring subsidy had been allocated over time (e.g., 12 years) and the privatization took place before the non-recurring subsidy had been fully amortized. In short, the question before us is whether an arm's-length privatization for fair market value can extinguish an otherwise countervailable subsidy, and if so, what are the implications for the 12 determinations at issue.

7.40 We should therefore begin our examination by reviewing the object and purpose of the SCM Agreement, and in particular the conditions of application of countervailing duties. The core legal question before us is the determination of the existence of "benefit" within the meaning of the SCM Agreement following a change in ownership through privatization.[313] In particular, the Panel will have to determine to whom the benefit accrues – more specifically whether a distinction must be

[311] The United States refers to the EC's response to question No. 9 posed by the Panel, para. 13.

[312] US' statement at the second substantive meeting, paras. 31-34.

[313] Throughout this dispute and in this Panel Report, parties and the Panel have referred to the "pass-though or continuation of benefits" from the state-owned producer to the privatized producer, or the "pass-though or continuation of a benefit from a prior subsidy or subsidization" or the "pass-through or continuation of a prior subsidy or subsidization". As further discussed hereafter, a subsidy or subsidization exists if there is a financial contribution and a benefit. Absent any benefit, there cannot be any subsidy or any subsidization. Hence the benefit resulting from (prior) financial contribution, or benefit from prior subsidy or subsidization refers to the "benefit" component of the subsidy provided to the state-owned producer, In this dispute we deal with original investigations as well as with administrative and sunset review investigations and our reasoning applies to all three types of determination. In the case of original investigations, it may be more accurate to refer to "benefit from prior financial contribution" while in the case of review determinations, it may be more accurate to refer to "benefit from prior subsidies". We note that the European Communities does not contest before this Panel that subsidization was provided to state-owned enterprises. The issue is rather whether the benefit component of this subsidization continues to accrue to the privatized producer.

made between the "benefit to the owners" of the company and the "benefit to the company itself" – and how the existence of a benefit must be established when privatization has taken place.

(a) Objective and conditions for applying countervailing duties under the SCM Agreement.

7.41 In the WTO, subsidies are regulated, and so is the use of countervailing duties imposed to offset the impact of subsidization. Article VI of GATT 1994 and footnote 36 of Article 10 of the SCM Agreement[314], specify the purpose of countervailing duties. In particular, Article VI.3 states:

> "The term 'countervailing duty' shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise."

7.42 We note at the outset that countervailing duties are not designed to counteract all market distortions or resource misallocations which might have been caused by subsidization.

7.43 Article 10 provides that countervailing duties may only be imposed consistently with the SCM Agreement, and, in particular, specifies that a countervailing duty may be imposed to offset any subsidy bestowed. The SCM Agreement provides that countervailing duties may be imposed on imported goods provided that three basic conditions are fulfilled, namely: (i) imported products are subsidized; (ii) there is injury to the domestic industry producing the like products; and (iii) there is a causal link between the subsidized imports and the injury. The focus of this dispute is mainly concerned with the fulfilment of the first condition, i.e. the determination of subsidization and in particular that of a "benefit".

(b) The existence of a "benefit"

7.44 Article 1.1 of the SCM Agreement provides that a subsidy will exist only if there is a financial contribution by a government which confers a benefit.[315] This determination of a benefit (as a component of subsidization) must be made before countervailing duties can be imposed, and permits a calculation of the extent of subsidization, as required under Articles 19.4 and 21.1.

7.45 However, the SCM Agreement does not define "benefit". In its *Canada – Aircraft* Report the Appellate Body held that benefit should be understood as a benefit to a "recipient", i.e. a natural or legal person:

> "A 'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a 'benefit' can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. The term "benefit", therefore, implies that there must be a recipient."[316]

7.46 As the Appellate Body has found, any "benefit", and hence the benefit stream from non-recurring subsidies, must be viewed from the perspective of a natural or legal person. The benefit is

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[314] Footnote 36 to Article 10 of the *SCM Agreement*, which provides: "The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI GATT 1994."

[315] Article 1.1 of the SCM Agreement states: "For the purpose of this Agreement, a subsidy shall be deemed to exist if:

> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as 'government'), … and
> (b) a benefit is thereby conferred."

[316] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*"), WT/DS70/AB/R, at para.154.

not to be determined with reference to "cost to government" [317] and does not reside in or attach to the productive assets:

> "The United States argues, on the basis of footnote 36 to Article 10 of the *SCM Agreement* and Article VI:3 of the GATT 1994, that the relevant "benefit" is a benefit to a company's *productive operations*, rather than, as the Panel held, a benefit to *legal or natural persons*. It is true, as the United States emphasizes, that footnote 36 to Article 10 of the *SCM Agreement* and Article VI:3 of the GATT 1994 both refer to subsidies bestowed or granted directly or indirectly "upon the manufacture, production or export of any merchandise". In our view, however, it does not necessarily follow from this wording that the "benefit" referred to in Article 1.1(b) of the *SCM Agreement* is a benefit to *productive operations*."[318]

7.47 Indeed, in *US - Lead and Bismuth II* the Appellate Body rejected the United States' argument that the subsidy "resides" in the productive operations of the company. The benefit determination is concerned with the advantage[319] to the producer exporting the goods subject to a countervailing duty investigation or order. This provides textual support for the view that the focus of the inquiry under Article 1.1(b) should be on the recipient and not on the granting authority.[320] We believe that the enquiry should be on the benefit to a natural or legal person, and not on the "productive operations or the products".[321]

*(i) Who is the recipient of the benefit in the case of a change in ownership?*

7.48 The "benefit" in Articles 1.1 and 14 of the SCM Agreement is concerned with the "benefit *to the recipient*". In the present dispute which involves a change in ownership, the issue is to identify the relevant entity for the purpose of determining the recipient of a benefit. We agree with the United States that a subsidy is "paid" or "given" to a legal person, to a company and not directly to the owners or the shareholders themselves.

7.49 In terms of identifying the relevant legal or natural person for the purpose of determining the existence of a benefit and its recipient, the United States makes a distinction between the owners (shareholders) and the company itself. It claims that the financial contribution and, the benefit therefrom, "reside" in the legal person or company and continue to accrue to the same legal person, even when the ownership changes. The United States submits that if the company itself is the same legal person as before the privatization, that company may still benefit from the prior financial contributions. For the United States, privatization does not automatically result in a change of the legal personality of the producer. If the state-owned producer and privatized producer are the same legal person, the financial contribution and benefit therefrom, provided to the state-owned producer "resides", *per se,* that legal person or company and continues to accrue to the legal person now owned by the shareholders of the privatized producer. For the United States, the change in ownership itself does not affect the determination of the existence of benefit which remains in the company.[322] That same company, that same legal person, is the recipient of the benefit. The United States argues that the Panel should not treat money taken out of an owner's pocket as having been taken out of the company, potentially eliminating subsidies that reside in the company.

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[317] Appellate Body Report, *Canada – Aircraft*, WT/DS70/AB/R, at para.153.

[318] Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 56 (footnote omitted).

[319] Appellate Body Report, *Canada – Aircraft*, WT/DS70/AB/R, at para.153.

[320] *Ibid.,* at para. 154.

[321] *Ibid.,* at paras. 154–155. *See* also Appellate Body Report, *Brazil – Export Financing Programme for Aircraft ("Brazil – Aircraft")* WT/DS46/AB/R, adopted 20 August 1999, para. 157; *and* Appellate Body Report, *US – Lead and Bismuth II,* WT/DS138/AB/R, at paras. 56-58. Note that benefit is also a concept distinct from that of the "costs" to the government granting the subsidy.

[322] *See supra,* para. 4.59.

7.50 We are of the view that the distinction between a company and its shareholders as used by the United States is not appropriate in the context of the SCM Agreement. We agree that for the purpose of the national corporate law of the United States and many other WTO Members, a distinction may be drawn between shareholders and the company. However the SCM Agreement does not make any reference or any distinction between shareholders and the company when it discusses the need to establish the benefit. Articles 1, 10 and 14 of the SCM Agreement make references only to "recipient" (or "benefit to recipient") and to "producer". The concept of benefit is independent of the legal business structure established pursuant to national corporate law. This is so because the SCM Agreement is concerned with identified adverse trade effects of subsidization on the domestic industry producing the like product. The production and export of goods is done by a producer for the purpose of generating an economic benefit to its owners. When the existence of a subsidy improves the ability of a producer to produce and export a good, it necessarily impacts on its profitability, and, therefore, on the rate of return to shareholders.

7.51 In fact, in a market-based economy, the value of a company depends on its ability to generate returns for its shareholders. Where this ability has been improved by the subsidization, the value of the benefit conferred by a financial contribution should be reflected in the overall market value of the company which received it. When someone purchases a company for fair market value, the purchase price includes the value of the benefit conferred to that company. For the purpose of benefit determination based on market criteria (an element which we develop further below), there should be no distinction between the advantage or benefit conferred by the financial contribution to the company or to the shareholders, i.e. the owners of the company.

7.52 We note that the Panel in *US – Lead and Bismuth II* reached the same conclusion with regard to UES and BS plc/BSES companies and its owners:

> "In our view, it is irrelevant that the aforementioned fair market value was paid by the (new) owners of UES and BS plc/BSES respectively, rather than those companies themselves. Any approach requiring that fair market value be paid by the company itself, rather than its owners, would elevate form over substance. In the context of privatizations negotiated at arm's-length, for fair market value, and consistent with commercial principles, the distinction between a company and its owners is redundant for the purpose of establishing "benefit". Following privatization at arm's-length, for fair market value, and consistent with commercial principles, the owners of the privatized company will be profit-maximizers, set on obtaining a market return on the entirety of their investment in the privatized company. Ultimately, therefore, the owners' investment in the privatized company will be recouped through the privatized company providing its owners a market return on the full amount of their investment. In such circumstances, it would be misleading in the extreme to suggest that the price paid by the owners of the privatized company is not ultimately paid by the privatized company itself."[323]

7.53 The Panel also notes that in 1993 the US Department of Commerce expressed this same view very clearly:

> "Merely because a company has been incorporated to protect its owners from the company's legal liabilities or for beneficial tax and accounting purposes (or both), it does not follow that the financial condition of the owners is irrelevant to the financial position of the firm. The form in which new owners purchase the government company creates no appreciable difference in how that company will be operated overall. The fact that the owners are shareholders and raise capital to purchase the government-owned company through new share issuings, rather than the company

[323] Panel Report, *US – Lead and Bismuth II*, WT/DS138/R, at para. 6.82.

itself taking on debt, does not mean that the owners can be indifferent to the profit margin the company generates, as petitioners assert. Rather, in the real-world marketplace, the owner-shareholders' expectations of a return on their investment cannot be separated from the profitability of the newly privatized company. (…) The owners will seek to extract a rate of return from their company at least equal to that of alternative investments of similar risk. There is, then, no appreciable difference, as reflected in the marketplace, between the profit-making ability of the company and the owners' realization of a profitable return on their investment in that firm (…) To adopt the petitioners' rationale that only a full repayment by the new company can extinguish past subsidies would create a test that would elevate form over substance and produce incentives for foreign governments merely to alter the form of the privatization to satisfy this artificial distinction."[324]

7.54 We conclude that, for the purpose of the benefit determination under the SCM Agreement, no distinction should be made between a company and its shareholders, as together they constitute a producer, a natural or legal person that may be the "recipient" of the benefit to be assessed. Any artificial distinction between owners (shareholders) and company ignores the relationship between a company and its owners, and it is this relationship that changes upon privatization. When the SCM Agreement refers to the recipient of a benefit it means the company and its shareholders together, being the producer of the exported goods subject to the countervailing investigation (order).

7.55 We note that the criteria used in the United States' same person methodology: (i) continuity of general business operations; (ii) continuity of productive facilities; (iii) continuity of assets and liabilities; and (iv) retention of personnel, all relate to the production assets of the concerned enterprises. The continuous reference by the United States to the fact that privatization would not "extract" subsidization from the company, appears to link the subsidization and the benefit accrued to the productive operations and assets.[325] The United States maintains that, because countervailable benefits, once identified and valued are essentially amounts of money, the only methods by which they may be terminated are: amortization over time or the reimbursement of the non-amortized amount by the recipient company. In doing so, the United States seems to be "attaching" the benefit to the productive operation and neglecting the fundamental purpose of productive operations in a market-based economy which is to generate returns on someone's investment. The Panel recalls that benefit does not accrue to productive operations, but rather to legal persons, as the Appellate Body made clear in *Canada – Aircraft*[326] and in *US – Lead and Bismuth II*.[327]

7.56 The Panel is of the view that in a countervailing duty investigation the focus should be on the producer (company and its owners) exporting the products alleged to be subsidized with a view to assessing whether it is the recipient of a benefit pursuant to the SCM Agreement.

*(ii) How the benefit should be assessed: Against the market*

7.57 The term "benefit" effectively represents the "financial advantage" that, by reference to a market benchmark, the recipient gets for "free". This financial advantage is what the recipient has not "paid for". In the case of a "benefit" conferred by untied, non-recurring "financial contributions", the United States seems to presume that such a "benefit" is used to the advantage of future production

[324] The full statement of the US Department of Commerce can be found in *General Issues Appendix*, *supra*, footnote 84, at 37262.

[325] Note that the United States admits that a benefit resides with the natural or legal person which originally received the subsidy. See US' first written submission, para. 50.

[326] Appellate Body Report, *Canada – Aircraft*, WT/DS70/AB/R, at paras. 154-156.

[327] Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 56.

through investment in productive assets. In this sense, the beneficiary of untied, non-recurring "financial contributions" is deemed to have acquired productive assets for "free".[328]

7.58 We are of the view that the word "benefit", as used in Article 1.1(b), implies a comparison which we believe is market-based. Indeed, in Article 14, all the benchmark comparisons relate to market conditions: "usual investment practice" in 14(a); "comparable commercial loan … on the market" in 14(b); "comparable commercial loan absent the government guarantee" in 14(c); "adequate remuneration … in prevailing market conditions" in 14(d).

7.59 In *Canada – Aircraft* the Appellate Body confirmed this view that the "benefit" analysis implies a comparison, and that the comparison should be made with the marketplace:

> "This must be so, for there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient "better off" than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", in the sense of determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.[329]

(c) The particular circumstances of privatization

*(i) A particular change in ownership*

7.60 Privatization is a very particular and complex change in ownership. It involves a fundamental transformation of a government-owned and controlled entity into a privately-owned, market-oriented company. Following privatization and consistent with commercial principles, the owners of the privatized company should be profit-maximizers, set on obtaining a market return on the entirety of their investment in the privatized company. Ultimately, therefore, the owners' investment in the privatized company will be recouped through the privatized company providing its owners a market return on the full amount of their investment.

7.61 We note again that the US Department of Commerce statement in this regard is most relevant:

> "Rather, in the real-world marketplace, the owner-shareholders' expectations of a return on their investment cannot be separated from the profitability of the newly privatized company. Privatized companies (and their assets) are now owned and controlled by private parties who are profit-maximizers. Unlike the former company, which did not need to earn a return on capital when owned and controlled by the government (i.e., when the government is 100 percent owner there is no necessity of paying dividends to itself), the privatized firm now faces the same capital market as its competitors. … Put another way, the privatized company now has an obligation to provide to its private owners a market return on the company's full value."'[330]

7.62 In their arguments before the Panel, both parties referred to the issue of change in ownership *per se*, and developed a distinction between a partial and a complete change in ownership. The European Communities initially argued that any change in ownership would necessitate a re-evaluation of the benefit. The United States argued that since ownership of publicly traded companies and their market value change every day, a re-evaluation at every change in ownership would be impracticable. The European Communities responded that the change in ownership must be of a sufficient magnitude so as to change the control of the enterprise and thus trigger a re-evaluation of

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[328] Panel Report, *US – Lead and Bismuth II*, WT/DS138/R, at footnote 80.
[329] Appellate Body Report, *Canada – Aircraft*, WT/DS70/AB/R, at para. 157.
[330] *General Issues Appendix*, *supra*, footnote 84, at 37262.

the conditions of application of the SCM Agreement. We have not considered it necessary to address all those situations, as we have before us 12 determinations where the relevant government had sold all, or substantially all, its ownership interest and clearly no longer had any controlling interest in the privatized producer. state-owned.

*(ii) Whether privatization triggers the obligation to (re-)examine the conditions of application of the SCM Agreement*

7.63 The European Communities claims, and the United States admits, that in case of a change in ownership (including privatization), the investigating Member is under the obligation to (re)consider the conditions of application of the SCM Agreement.[331] The dispute arises over a difference in what examination fulfils that obligation. The European Communities claims that the investigating authority must determine whether the privatization took place at arm's-length and for fair market value. The United States maintains that the investigating authority need only look into the nature of the privatization transaction if the post-privatization entity is a "distinct legal person" from the original state-owned producer.[332]

7.64 The Panel is of the view that the SCM Agreement requires that when a Member is informed of a privatization of a state-owned producer whose exports are subject to a countervailing duty order or investigation, the importing Member must (re)examine the conditions of application of the SCM Agreement *vis-à-vis* the new privatized producer. There is a fundamental reason for that requirement.

7.65 As we mentioned before, after the privatization, a new privatized producer is exporting the products which are the object of the countervailing duty investigation. In the 12 cases before us the governments had severed their control over the state-owned producers upon privatization. The privatized producers could no longer rely on government financing for their operations and could no longer receive things for free. Indeed, it is reasonable to assume that the act of privatization has involved a payment for the assets and the shares of the state-owned producer. A payment for consideration necessarily implies that the privatized producer may not have received anything for free. In fact, as we explain in greater detail hereafter, if this payment for consideration reflects fair market value in an arm's-length transaction, the privatized producer will not have received any benefit.[333] Therefore, after a privatization, the conditions of the SCM Agreement should be (re-)examined *vis-à-vis* the privatized producer, since it is possible that the advantage, the benefit from the prior financial contribution (subsidization), has been extinguished *vis-à-vis* the privatized producer.

7.66 For the United States, in case of a change in ownership, the focus of this benefit determination is only the company/producer, which, the United States claims, may not have changed into a distinct legal person when privatized; since the benefit resides in the company, so long as the company remains the same legal person, the benefit continues to accrue to the privatized producer.

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[331] *See* EC's second written submission, para. 26; *and* US's second written submission, para. 11.

[332] The United States has admitted that in a situation where a person purchased 100 per cent of the shares of a producer at fair market value, the new owner does not receive any benefit from the transaction. *See* US' first written submission, para. 53; US' second written submission, para. 9; *and* US' statement at the second substantive meeting, para. 19.

[333] The economic reasoning behind this is that the subsidy bestowed to the state-owned producer will necessarily be reflected in the balance sheet of the state-owned producer. Following privatization (where ownership shifts from the public to private sector), the sale price paid for the assets and shares of the state-owned producer will include a valuation of the advantage brought by the financial contribution, i.e. the benefit pursuant to the SCM Agreement. As we will elaborate further below, when this valuation reflects market conditions, the benefit would be extinguished, since it has been fully paid for.

7.67 The Appellate Body in *US – Lead and Bismuth II*[334], has recognized that following the privatization of the state-owned producer BSC, the US Department of Commerce should have re-examined and reconsidered the continuing existence of the benefit stream for the new privatized producers, UES and BS plc/BSES.

> "We agree with the panel that … the changes in ownership leading to the creation of UES and BS plc/BSES should have caused the USUS Department of Commerce to examine whether the production of leaded bars by UES and BS plc/BSES respectively, *and not BSC*, was subsidized."[335] (emphasis added)

7.68 From our reading of the Panel and the Appellate Body reports in *US – Lead and Bismuth II*, the Appellate Body does not seem to have based any of its findings on the premise that BSC and, UES and BS plc/BSES were two distinct legal persons or that UES and BS plc/BSES were engaged in commercial and industrial activities that were distinct from that of BSC, as suggested by the United States. The parties seem to have accepted that the operations of BSC were the same as those of UES and BS plc/BSES.[336] To us, it seems that the privatization of BSC that led to the creation of UES and BS plc/BSES did not appear to have led to distinct legal persons using the criteria applied by the United States in the same person methodology (i.e. continuity of general business operations, continuity of production facilities, continuity of assets and liabilities, and retention of personnel). Still, the Appellate Body concluded that the focus of the benefit determination was to be the privatized producer and not the state-owned producer, the company, or the productive operations.

7.69 The United States also insists on the fact that, in its view, the Appellate Body's conclusion in *US – Lead and Bismuth II* – that the condition of application of the SCM had to be re-examined *vis-à-vis* the privatized producer – was based on the assumption that the privatized producers was a distinct legal person from the state-owned producer, and not on the fact that there had been a change in ownership for consideration. In particular, the United States insists that the Appellate Body, when quoting and upholding the Panel's conclusion, did not make any reference to change in ownership "for consideration". For the United States, this is evidence that the change in ownership at arm's-length and for a fair market value was not relevant to the Appellate Body's reasoning.

7.70 We disagree with the United States' reading of the Appellate Body Report in *US – Lead and Bismuth II.* In our view, when the Appellate Body wanted to express disagreement with the Panel report, it did so quite explicitly (as it did with regard to the nature of the examination process under administrative review[337]). In addition, since the parties had admitted that the privatization had taken place at fair market value, it would follow that full consideration was paid; therefore the Appellate Body did not have to address the issue of consideration. We note also that the Appellate Body upheld the Panel's conclusion that it was the change in ownership leading to the creation of the privatized producers that triggered the obligation to re-examine the conditions of application of the SCM Agreement.[338] Since the US Department of Commerce's finding of the continuing countervailable "benefit" to the privatized producer was effectively based on the old state-owned company acquiring productive assets etc. for free, a privatization for consideration raises the possibility that the original "benefit" determination in respect of the state-owned producer is no longer valid for the new

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[334] In that case the change of ownership was invoked in the context of an administrative review.

[335] Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 62.

[336] See the Panel Report, *US – Lead and Bismuth II*, WT/DS138/R, at para. 6.70 referring to the US' responses to that Panel's questions where the United States itself argued that the state-owned producer and the privatized producers were conducting the same operations.

[337] *See* Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 63.

[338] "In this case, given the changes in ownership leading to the creation of UES and BS plc/BSES, the US Department of Commerce was required under Article 21.2 to examine, on the basis of the information before it relating to these changes, whether a "benefit" accrued to UES and BS plc/BSES." Appellate Body Report *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 62.

privatized producer (the company and/or its owners). This is even more so when there is an allegation of a fair market value transaction at arm's-length.

7.71 The Panel concludes, therefore, that when informed of the privatization in each of the 12 determinations at issue, the United States should have examined whether each privatized producer "was subsidized", namely whether it had received any benefit from the prior financial contribution (subsidization) to the state-owned producer.

*(iii) Did the privatized producer get any "benefit" from the prior financial contribution?*

7.72 When a state-owned company/producer receives subsidies from the government, the advantage conferred by the subsidy should be reflected in the fair market value (sale price) of the state-owned enterprise to be privatized. Thus, if upon privatization, fair market value is paid for all productive assets, goodwill, etc. employed by the state-owned producer, the Panel fails to see how the subsidies bestowed to the state-owned producer could subsequently be considered to still confer a "benefit" on the privatized producer (in the sense of the company together with its owners) who has paid fair market value for all the shares and assets, reflecting, we must assume, the value of past subsidization. The privatized producer will not have received a benefit or any advantage, because it has received nothing for free: all assets which it has acquired, further to the privatization transaction, have been fully paid for under normal market conditions, and it is those market conditions that serve as a benchmark for assessing the benefit to the privatized producer, as envisaged in Article 14 of the SCM Agreement. Furthermore, since the fair market value paid to the state-owned producer is deemed to include (*de facto*) the value of the advantage or benefit already received, the Panel considers that the privatization transaction for fair market value includes the repayment to the government of the subsidy as valued by the market at the time of privatization.[339]

7.73 The United States admits that the owners of the privatized producer have not received any new benefit from the transaction, since they paid fair market value for what they purchased and have not received anything for free. The United States claims, however, that the benefit from prior financial contributions (subsidization) to the state-owned producer remains in the privatized company/producer, because the United States makes a distinction between the owners and the post-privatization company itself. It claims that privatization does not automatically result in a change of the legal personality of the producer; hence the state-owned producer and privatized producer being the same, the financial contribution and benefit therefrom, provided to the state-owned producer "reside" in the legal person or company and continues to accrue to the legal person now owned by the privatized producer.

7.74 To the argument that the new owners have paid for everything they got upon the privatization, the United States replies that the owners may not have received any new benefit if the transaction was made at arm's-length and for fair market value, but the company itself, the producer – if it is still the same legal person as before the privatization, may still benefit from the prior financial contributions. The United States argues that the Panel should not treat money taken out of an owner's pocket as having been taken out of the company, potentially eliminating subsidies that reside in the company. It adds that if the company (not the owners) producing the goods subject to countervailing duties, <u>itself</u> pays back the subsidy, or if the assets of the state-owned producer are sold to a new and distinct legal person producing the same goods, then the benefit (and thus subsidization) may be extinguished. The United States insists that a distinction must be drawn between the shareholders and the company; that the subsidy "resides" in the company and remains there; and that payment of fair market value by the

[339] This does not suggest a "cost-to-government" approach to a determination of benefit. The nominal cost of the financial contribution may have little to do with the price sold, which will be dictated by the market, not by the government past financing situation. What this clearly entails is that there has been a market assessment of the value of the benefit bestowed to the state-owned producer and that that benefit has now been fully paid for.

owners of the producer does not extinguish the benefit to that same pre/post privatization producer. Therefore, it considers that it is obliged to examine the conditions of the transaction – and whether the change in ownership took place at arm's-length and for fair market value – only when the privatized producer is determined to be a distinct legal person from the state-owned producer which received the prior financial contribution.

7.75 In the Panel's view, the United States' methodology does not recognize that privatization by itself can change the benefit determination under the SCM Agreement; the United States attempts to identify the recipient of the benefit determination with reference to the initial recipient of the financial contribution. The Panel understands that it is a normal and accepted practice (including both in the United States and the European Communities), for the importing Member to presume that a non-recurring subsidy will provide a benefit over a period of time, which is normally presumed to be the average useful life of assets in the relevant industry. We note that nothing in Article 1.1 nor Article 14 of the SCM Agreement explicitly provides for such a possibility. This practice is based on the fact that a non-recurring financial contribution will not be treated by a company as attributable solely to the current period but will be considered as providing a lasting benefit over an extended period of time. The investigating authority normally assumes that this extended period of time will be the amortization period used in the relevant sector.[340]

7.76 In our view, a privatization at arm's-length and for fair market value extinguishes the benefit to the privatized producer, which benefit the market has valued when assessing the fair market price which the privatized producer has fully paid for upon the privatization. This is to say that a privatization at arm's-length and for fair-market value reverses the presumption that the benefit of a non-recurring financial contribution which has been allocated within a given period of time will continue to accrue to a recipient during the allocated period. Therefore, if it wants (to continue) to apply countervailing duties, the importing Member must demonstrate, based on its examination of the conditions of the privatization, that the privatized producer (still) benefits from the prior financial contribution (subsidization).

7.77 In the Panel's view, the United States' same person methodology, as such, prohibits the examination of the conditions of the privatization-transaction when the privatized producer is not a distinct legal person based on criteria relating mainly to the industrial activities of the producers concerned. In applying its methodology the US Department of Commerce does not assess whether the privatized producer has received any benefit from prior financial contributions. In fact the United States twice admitted that the new owner(s) of the privatized company do not get any new benefit from the prior financial contribution when it/they paid fair market value for the assets and the shares of the state-owned producer. But the United States argues that the company continues to "carry" the benefit stream allocated over the lifetime of certain productive assets. We disagree. We believe that privatization calls for a (re)determination of the existence of a benefit to the privatized producer, and that fair market value payment by the privatized producer (and its owners) extinguishes the benefit resulting from the prior financial contribution (subsidization) bestowed upon the state-owned producer, because no advantage or benefit accrued to that privatized producer over and above what market conditions dictate pursuant to Article 14 of the SCM Agreement.

7.78 The United States admitted that when the new privatized producer is not a distinct legal person (based on the activities, productive assets, management, staff) from the previous state-owned producer, it considers that the benefit attributed to the state-owned producer can be automatically attributed to the privatized producer without any examination of the condition of the transaction. We are of the view that with the same person methodology (as it did with the gamma methodology), the US Department of Commerce, in failing to examine the conditions of the privatizations, does not focuss its analysis on the relevant issues: it does not determine whether subsidization (and in particular benefit) exists for the privatized producer under investigation.

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[340] *See* US' and EC's responses to question No. 6 posed by the Panel.

7.79 We note that this was one of the base for the reasoning of the CIT[341] when it concluded that the same person methodology was inconsistent with US Section 1677(5)(F):

> "… the new statute required two actions from Commerce: one, that the terms of the sale must be examined, and must include analysis of the entire transaction to determine if the subsidy (not the corporate entity) passed through to a person now under investigation. … In addition, such examination must focus on the new owner. … Commerce … must look at facts and circumstances of the TRANSACTION, to determine whether the PURCHASER, received a subsidy, directly or indirectly, for which it did not PAY ADEQUATE COMPENSATION."

7.80 We would like to address an additional matter. The United States seems to be "attaching" the benefit to the production activity, which may not have changed with privatization, even though the privatized producer must now compete according to market rules and can no longer take advantage of the below-market cost benefits to which the state-owned producer had access. Although the United States declares that the SCM Agreement does not require investigating authorities to investigate whether a subsidy recipient derives any competitive advantage from a subsidy[342], it seems to complain about the fact that prior subsidization may have distorted the market and may have artificially maintained producers that would not otherwise be there. Indeed, the United States developed its arguments using hypothetical examples of companies that would not be in the market, absent subsidization.[343] We understand the concerns of the United States. However, as indicated in paragraph 7.42, countervailing duties are not designed to counteract all market distortions or resource misallocations which might have been caused by subsidization. For the purpose of determining the existence of a benefit under the SCM Agreement, it is irrelevant whether or not any potential market distortions resulting from the prior subsidy remain after the privatization at arm's-length and for fair market value.[344] The existence of a benefit should be determined only with reference to the terms on which a financial contribution could be obtained by the recipient on the market.[345]

7.81 For the reasons mentioned above, we conclude that the same person methodology – applied in Case No. 12 – is inconsistent with the SCM Agreement, as interpreted by the Panel and the Appellate Body reports in *US – Lead and Bismuth II* and this Panel, because it does not require that in all cases of privatization, the US Department of Commerce examine the conditions of such privatization with a view to determining whether the benefit resulting from the financial contribution received by the state-owned producer continues to accrue to the privatized producer. The same person methodology is inconsistent with the SCM Agreement because in situations of privatization at arm's-length and for

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[341] *GTS Industries v. United States* Court No. 00-03-00118 (Ct. Int'l Trade 4 January 2002), at 14-18. Exhibit EC–30 to the EC's second written submission. *See* also, *Final Results of Redetermination pursuant to Court Remand*, *Allegheny Ludlum Corp. et al. v United States* Court No. 99-09-00566, (Ct. Int'l Trade 13 December 2000) (unpublished) ("*Allegheny Ludlum I")*.

[342] *See* US' response to question No. 14 posed by the Panel.

[343] *See* for instance, US' first written submission, paras 62-63.

[344] Panel Report, *US – Lead and Bismuth II*, WT/DS138/R, at footnote 95 to para. 6.81. We recall that in dispute settlement and in their recommendations, panels are prohibited from adding or diminishing rights and obligations of Members under the covered agreements, Article 3.2 and 19.2 of the DSU.

[345] It is interesting to note that in *Saarstahl I*, the CIT concluded that the US Department of Commerce's interpretation "[would] impose a heavy burden on commercial transactions as it effectively requires buyers to value the potential liability of purchasing productive units which previously received a subsidy. A purchaser could no longer value a business based on market considerations; he would have to investigate whether there had been previous subsidies that were being, or possibly might be, countervailed in the future. The burden would be especially onerous where a productive unit which had received subsidies and never exported to the US under prior ownership begins such exportation." *Saarstahl AG v. United States* 858 F. Supp. 187 (Ct. Int'l Trade 1994) (hereinafter *Saarstahl I),* at para. 9. Note that this decision was overturned by the US Court of Appeals for the Federal Circuit based on the interpretation of US legislation prior to the pre–URAA implementing Act.

fair market value, the US Department of Commerce is prohibited from reaching the systematic conclusion that the privatized producer has not received any benefit, thus rebutting the presumption, if any, that the benefit from prior financial contributions (or subsidization) continues to accrue to the privatized producer, unless it finds that the privatized producer is a person legally distinct from the state-owned producer based on the criteria used in the same person methodology.

7.82 In our view, in privatization situations, the importing Member must always examine the conditions of the privatization to determine whether the privatized producer has received any benefit from a prior financial contribution bestowed on the state-owned producer, independently of whether the privatized producer is a distinct legal person from the state-owned producer. Privatizations at arm's-length and for fair market value must lead to the conclusion that the privatized producer paid for what he got and thus did not get any benefit or advantage from the prior financial contribution bestowed upon the state-owned producer. While Members may maintain a rebuttable presumption that the benefit from prior financial contributions (or subsidization) continues to accrue to the privatized producer, privatizations at arm's-length and for fair market value is sufficient to rebut such a presumption. Furthermore, since the fair market value paid for the state-owned producer is deemed to include the market value of the benefit received, the Panel considers that the privatization transaction for fair market value includes the repayment to the government, as the shareholder of the state-owned producer, of the subsidy as valued by the market at the time of privatization.

7.83 As mentioned before, the United States' same person methodology was applied in Case No. 12, in the context of an administrative review. Members' specific obligations in administrative reviews are discussed in the following section of this report and we shall complete our examination of the application of the same person methodology in the administrative review of Case No. 12 in Section D below.

7.84 In all the other cases before us, the determinations were performed using the gamma methodology which has already been condemned by the Panel and Appellate Body reports in *US – Lead and Bismuth II*. The United States admits that in the original investigation of Case Nos. 1 to 6 and in the administrative review in Case No. 7, it must re-examine its benefit determinations since they were based on the gamma methodology; the United States notes that pursuant to domestic court orders, these six cases have been remanded for redetermination.

7.85 We do not need to examine fully all the aspects of the gamma methodology, as it has already been condemned by the Panel and Appellate Body in *US – Lead and Bismuth II*.[346] We recall the Appellate Body's findings that when it applied the gamma methodology in the determination against UES and BS plc/BSES, it found that the United States had violated the SCM Agreement:

> "On the basis of the above reasoning, we uphold the Panel's finding that, in the particular circumstances of this case, the USUS Department of Commerce should have examined in its 1995, 1996 and 1997 administrative reviews whether a 'benefit' accrued to UES and BS plc/BSES following the changes in ownership; as well as the Panel's finding that, on the facts of this case, no 'benefit' was conferred on UES or BS plc/BSES as a result of the 'financial contributions' made to BSC."[347]

7.86 In light of the European Communities' claims and our terms of reference, the Panel concludes that the original investigations' determinations in Case Nos. 1, 2, 3, 4, 5 and 6, based on the gamma

[346] The Appellate Body made clear in *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("*US – Shrimp (Article 21.5 – Malaysia)*"), (WT/DS58/AB/RW, adopted 21 November 2001, that the interpretations and findings by the Appellate Body create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute; at paras. 108-109.

[347] Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 74.

methodology, are inconsistent with Articles 10, 14 and 19.1 and 19.4 of the SCM Agreement. In failing to examine the conditions of the concerned privatizations, namely whether they occurred at arm's-length and for fair market value, the United States had not first determined whether the privatized producers had received any benefit, pursuant to the SCM Agreement, from the prior financial contribution (subsidization).

7.87 The SCM Agreement only allows countervailing duties to be imposed when an importing Member has determined that the producer under examination – that is the company and its owners – have received an unfair benefit. Thus, in Case Nos. 1, 2, 3, 4, 5 and 6, the United States was not entitled to impose duties to countervail pre-privatization non-recurring subsidies as it did. Since these countervailing duties were imposed without legal basis pursuant to the SCM Agreement they should be removed accordingly.

7.88 The gamma methodology was also used in the context of the administrative review in Case No. 7. We examine further the determination in Case No. 7 in Section D hereafter.

7.89 The gamma methodology was used as well in the four sunset reviews (Case Nos. 8, 9, 10 and 11). The United States raises specific arguments and defences regarding its sunset review obligations, which we examine in Section E hereafter, where we complete our examination of those determinations.

7.90 The United States proposes to reconduct these determinations on the basis of the same person methodology and argues that these remand redeterminations, which have not been concluded, are not part of the terms of reference of the Panel. The Panel agrees with the United States that these remand redeterminations are not part of the terms of reference of the Panel, *stricto sensu*. The Panel notes, however, that the same person methodology is itself inconsistent with the SCM Agreement for the reasons mentioned above.

7.91 We now proceed to examine the application of the above findings on the consequence of privatization pursuant to the SCM Agreement, when the issue is raised in administrative reviews and sunset reviews.

## D. EXAMINATION OF PRIVATIZATIONS IN ADMINISTRATIVE REVIEWS

### 1. Claims and arguments of the parties

7.92 The European Communities claims that in the context of the administrative review of Case No. 7[348], the US Department of Commerce has applied the gamma methodology in a manner inconsistent with Articles 21.1 and 21.2 of the SCM Agreement. The United States has admitted that its determination in Case No. 7 is inconsistent with its WTO obligations to the extent that it was not made using the same person methodology. The United States does not make such a similar admission for Case No. 12[349], whose administrative review determination was based on the same person methodology and which is also challenged by the European Communities as being inconsistent with Articles 21.1 and 21.2 of the SCM Agreement.

### 2. Evaluation by the Panel

7.93 We must determine whether and how the United States is obliged to examine and take into account privatizations when so requested under the administrative review procedure.

[348] *Sweden Admin. Review, supra,* footnote 43.
[349] *GOES Admin. Review, supra,* footnote 47.

7.94 Article 21.1 of the SCM Agreement provides that a countervailing duty shall remain in force only as long as, and to the extent necessary, to counteract subsidization. Article 21.2 states that the authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review.

7.95 In *US – Lead and Bismuth II*, the Appellate Body made clear that the importing Member cannot simply ignore facts that may reveal that no benefit, and thus no subsidization, exist *vis-à-vis* the privatized producer. The Appellate Body stated

> "on the basis of its assessment of the information presented to it by interested parties, as well as of other evidence before it relating to the period of review, the investigating authority must determine whether there is a continuing need for the application of countervailing duties. *The investigating authority is not free to ignore such information*. If it were free to ignore this information, the review mechanism under Article 21.2 would have no purpose."[350] (emphasis added)

7.96 The Appellate Body added that it was of the view that the privatization of BSC – the change in ownership leading to the creation of UES and BS plc/BSES – was such as to require the United States to re-examine, in the context of that administrative review, whether the privatization had occurred at fair market value so that if there was no benefit to the new privatized producer, it should terminate its countervailing duties orders.

> "*In this case, given the changes in ownership leading to the creation of UES and BS plc/BSES, the USDOC was required under Article 21.2 to examine, on the basis of the information before it relating to* <u>*these changes*</u>*, whether a 'benefit' accrued to UES and BS plc/BSES*." (emphasis added)[351]

7.97 We recall also that "in order to establish the continued need for countervailing duties, an investigating authority will have to make a finding on *subsidization*, i.e., whether or not the subsidy continues to exist. If there is no longer a subsidy, there would no longer be any need for a countervailing duty."[352] As discussed in Part C above, in order to conclude that subsidization existed in these Case Nos. 7 and 12, the US Department of Commerce was obliged to examine the conditions of the privatization with a view to assessing whether benefit to the prior state-owned producer continued to accrue to the privatized producer. Without such prior determination of benefit (and therefore subsidization) no countervailing duty orders could be maintained.

7.98 Although the investigation performed under an administrative review differs from that under an original investigation[353], we are of the view that in the context of the administrative review of Case Nos. 7 and 12, the United States, which had been informed of the privatizations by the interested producers and by the European Communities (and its member States concerned), was obligated to re-examine the conditions of application of the SCM Agreement *vis-à-vis* the privatized producer. In

[350] Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 61.

[351] Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 62.

[352] Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 54.

[353] *See* Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 63:

"… We believe that it is important to distinguish between the original investigation leading to the imposition of countervailing duties and the administrative review. In an original investigation, the investigating authority must establish that *all* conditions set out in the *SCM Agreement* for the imposition of countervailing duties are fulfilled. In an administrative review, however, the investigating authority must address those issues which have been raised before it by the interested parties or, in the case of an investigation conducted on its own initiative, those issues which warranted the examination."

particular, being informed of the privatization of a state-owned producer, the United States was obliged to determine whether the privatized producer continued to receive any benefit from the prior subsidization, before it could reach any conclusion that countervailing duties should be continued. If such privatization was at arm's-length and for fair market value, the United States was obliged to conclude that the privatized producer no longer obtained any benefit from the prior subsidization to the state-owned producer. In refusing to examine the conditions of such privatizations, the United States acted inconsistently with Article 21.1 and 21.2 of the SCM Agreement.

7.99 The Panel is rather of the view, that while the United States is correct in stating that *US – Lead and Bismuth II* did not require the US Department of Commerce to retroactively change closed countervailing duty orders and that WTO remedies are generally prospective, it did not preclude the European Communities from challenging other orders determined under the gamma methodology simply because they occurred prior to the Appellate Body ruling in *US –Lead and Bismuth II.* The Panel and Appellate Body rulings in *US – Lead and Bismuth II* were that, in the case of BSC privatization, countervailing duty orders against BSC should be terminated because benefit to UES and BS plc/BSES pursuant to the SCM Agreement had not been established. The European Communities, and other WTO Members, remain free to request that the United States bring any other allegedly WTO-inconsistent (ongoing) countervailing duty measures into conformity with the WTO Agreement, even if the implementation of the present Panel report will be prospective.

7.100 In sum, in its administrative review determinations in Case Nos. 7 and 12, the United States acted inconsistently with Articles 10, 14, 19.4, 21.1 and 21.2 of the SCM Agreement since the US Department of Commerce did not take into account the privatizations that occurred after the original investigation and did not re-examine the conditions of application of the SCM *vis-à-vis* the privatized producers. In failing to examine the conditions of the said privatizations (whether they were at arm's-length and for fair market value) the US Department of Commerce did not determine whether the privatized producers continued to receive any benefit from any prior financial contribution (subsidization). Therefore, in Case Nos. 7 and 12, the United States was not entitled to continue to impose duties to countervail pre-privatization, non-recurring subsidies as it did. Since these countervailing duties were imposed without legal basis pursuant to the SCM Agreement they should be removed accordingly.

## E. EXAMINATION OF PRIVATIZATIONS IN SUNSET REVIEWS

### 1. Claims and arguments of the parties

7.101 The European Communities claims that the application of the US sunset review procedures in Case Nos. 8, 9, 10 and 11 is inconsistent with Article 21.1 and 21.3 of the SCM Agreement. The United States contests this claim.

7.102 The European Communities submits that an investigating authority cannot determine whether there is a likelihood of continuation or recurrence of subsidization without considering whether, and the extent to which, a benefit continues to accrue and that this requires the authority to carry out a new, detailed investigation, in which it determines, on the basis of positive evidence, the likelihood of continuation or recurrence.[354] The European Communities argues that, under Article 21.3 of the SCM Agreement, it is for the investigating authority to make a determination of continuing injurious subsidization. In this regard, it indicates that to premise examination of evidence in a determination under Article 21.3 on the evidence having been examined in a review under Article 21.2 is inconsistent with the SCM Agreement, especially in the case of non-exporting producers which under the United States' regulation are precluded from requesting an Article 21.2 administrative review. The European Communities points out that the CIT reached the same conclusion in the *Dillinger* case

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[354] *See* EC's second written submission, paras. 71-72.

when it found that the US Department of Commerce was not entitled to base its findings in sunset reviews only on evidence gathered in the initial investigation.[355]

7.103 The European Communities also argues that the United States inappropriately reverses the burden of proof in sunset reviews to the exporting producers when they do not respond to the notice of initiation of the sunset review. The European Communities argues that the investigating authority cannot just presume that there is a likelihood of continuation or recurrence of injurious subsidization merely because certain interested parties have not responded to a notice of initiation. The European Communities believes that under Article 21.3 of the SCM Agreement it is for the authorities to determine, and not for the respondent to disprove that there is a likelihood of continuation or recurrence.[356] Therefore, the European Communities concludes that this reversal of the burden of proof is inconsistent with Article 21.3 of the SCM Agreement.[357]

7.104 The United States considers that an investigating authority need not revisit *ex officio* its subsidy determination in a sunset review under Article 21.3 of the SCM Agreement. The United States considers that where there have been no administrative reviews of a countervailing duty order, the only evidence of subsidization which an investigating authority need take into account is evidence from the original investigation. The United States submits that in the four sunset reviews covered by this dispute, the US Department of Commerce was under no obligation, pursuant to Article 21.3, to convert its sunset reviews into full-blown administrative reviews of the respective countervailing duty orders.[358]

7.105 The United States does not seem to contest the issue of the burden of proof as such, but rather the nature of the sunset review obligation. The United States believes that, absent an administrative review, the only evidence of subsidization it is required to evaluate in a sunset review, in order to determine the likelihood of continuation or recurrence of the countervailable subsidies, is that contained in the original investigation. The United States maintains that sunset reviews are not the appropriate proceedings to evaluate new and complex evidence of subsidization.

**2. Evaluation by the Panel**

7.106 The parties have made frequent references to the ongoing dispute in *United States – Corrosion Resistant Carbon Steel Flat Products from Germany* (WT/DS213) where the European Communities is claiming that the United States' sunset review legislation, administrative rules and practice are contrary to the United States' obligations under the SCM Agreement and the WTO Agreement. In the present dispute the European Communities is limiting its claims on the WTO-compatibility of the "application" of this sunset review practice in Cases No. 8, 9, 10 and 11.

7.107 As mentioned before, Article 21.1 of the SCM Agreement sets out a general rule:

> "A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury."

7.108 The first sentence of Article 21.3 seems to provide a specific application of the general rule in Article 21.1 when it states:

> "Any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under

[355] *AG Dillinger Huttenwerke et al v United States* ("*Dillinger*"); Court No. 00-09-00437 (Ct. Int'l Trade 28 February 2002), at 14. Exhibit EC-34 to the EC's second written submission.
[356] *See* EC's second written submission, paras. 70 and 72.
[357] *See* EC's second written submission, para. 76.
[358] *See* US' first written submission, para. 89.

> paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury."

7.109 The Panel reads these provisions as imposing a presumption that a countervailing duty will be terminated after five years unless the investigating authority initiates a review (*ex officio* or upon a request from the domestic industry) and determines, in that review, that there is a likelihood of continuation or recurrence of subsidization and injury. Both parties in fact admit that it is for the importing Member to "determine", at the expiry of the first five-year application period, that there is a likelihood of continuation or recurrence of subsidization and injury upon expiry of the countervailing duty.

7.110 The parties disagree, however, on the extent of this obligation to "determine" the likelihood of continuation or recurrence of injurious subsidization and whether this obligation requires consideration of the "magnitude" of subsidization. The parties also disagree on whether developments taking place since the initial investigation should be taken into account when determining whether injurious subsidization is likely to continue or recur. Given our terms of reference, we are of the view that we need to respond to this claim only to the extent that the sunset reviews involve privatizations.

7.111 The United States considers that when there have been no administrative reviews of a countervailing duty order, the only evidence of subsidization which an investigating authority need take into account in a sunset review is evidence from the original investigation. We disagree with this contention. The object of a sunset review is to determine, in light of developments that have occurred since the original investigation, whether subsidization and injury will continue or recur. Article 21.3 provides clearly that the importing state must determine whether subsidization "is likely to lead to continuation or recurrence". To ignore any such development and to limit the evidence that the importing Member is to examine only to that included in the original investigation renders the sunset review a mere formality. We are of the view that the sunset review is a mechanism distinct from the administrative review which, pursuant to Article 21.2 of the SCM Agreement, can be requested by any interested party provided that a reasonable period of time has elapsed since the imposition of the duties. To subject the operationalization of the sunset review to prior administrative review procedures would effectively nullify the presumption that countervailing duties must terminate after five years unless the importing Member determines that subsidization and injury are likely to continue or recur.

7.112 During the second hearing the representative of the United States stated that the privatization of a company whose exports are subject to a countervailing duty order following the original imposition of a countervailing duty may be a fact that the US Department of Commerce would examine in a sunset review, providing that the exporting company or the exporting Member brings evidence that the subsidy was, for instance, paid back on the occasion of privatization. As discussed above, the United States is of the view that an arm's-length privatization at fair market value, as such, cannot serve to demonstrate the absence of benefit relevant to the sunset review countervailing determination. The United States maintains that evidence of arm's-length and fair market value privatization could not automatically alter its prior decision to amortize a subsidy for a period extending after the privatization.

7.113 The Panel is of the view that privatization of the state-owned producer (of the goods subject to countervailing orders), is a fact that the importing Member is obliged to consider and examine in the context of a sunset review- as it may yield evidence that subsidization does not exist which in itself is relevant to assessing the likelihood of continuation or recurrence of subsidization and injury, as mandated by Article 21.3 of the SCM Agreement.

7.114 We consider that in a sunset review investigation the importing Member is obliged to examine at least all the evidence provided by any interested party, not just the importing producer, and relating to the existence or removal of the subsidization forming the basis for the countervailing measures; only then can the investigating Member be able to conclude whether subsidization exists and is likely to continue or recur.[359] Privatization is a fact that the importing Member "cannot simply ignore", as it may bring evidence that subsidization was terminated. As further discussed in paragraphs 7.60-7.89above, if privatization at arm's-length and for fair market value has taken place, the benefit resulting from a prior subsidization bestowed upon the state-owned producer no longer accrues to the privatized producer under investigation. In the absence of any benefit there cannot be any subsidization. Without subsidization, a Member cannot impose countervailing duties. Although speaking about the administrative review procedure, the Appellate Body made clear that "in order to establish the continued need for countervailing duties, an investigating authority will have to make a finding on *subsidization*, i.e., whether or not the subsidy continues to exist. If there is no longer a subsidy, there would no longer be any need for a countervailing duty".[360]

7.115 In the present dispute, the United States argues that in Case Nos. 8, 9, and 11, the exporting firms did not cooperate with the US Department of Commerce.[361] There is evidence that, for the sunset reviews in Case Nos. 8[362], 9[363] and 11[364], the European Communities (and its member States) had informed the US Department of Commerce of the said privatizations and offered further information on the fair market value and arm's-length conditions of such transactions. The United States does not deny this fact. To the extent that the United States was informed of such privatizations and there is evidence that the European Communities offered further information on the conditions of the privatization transactions, the Panel considers that the US Department of Commerce, in failing to take into account such privatizations and to examine the conditions of the said privatization, chose to ignore relevant evidence and therefore its conduct in the sunset reviews at issue was inconsistent with Article 21.1 and 21.3 of the SCM Agreement.

7.116 Since the sunset reviews in Case Nos 8, 9, 10, and 11 were conducted on the basis of the gamma methodology, the Panel finds that the United States failed to examine the conditions of such privatizations and to determine whether the privatized producers received any benefit from the prior subsidization to the state-owned producers, in violation of Articles 10, 14, 19.4 and 21.1 and 21.3 of the SCM Agreement. In those Cases, the United States was not entitled to continue to countervail pre-privatization, non-recurring subsidies as it did. Since these countervailing duties were therefore maintained without legal basis pursuant to the SCM Agreement, they should be removed accordingly.

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[359] We note that the CIT reached a similar conclusion when it found that the US Department of Commerce's practices in sunset reviews are inconsistent with the US legislation, as "[b]y its nature, then, a sunset review is designed to account for changes in law that have a bearing on whether countervailable subsidies will continue or recur." We note also that the US Court rejected the US Department of Commerce's arguments that it was not appropriate to reach the privatization issue in a sunset review or that an interested party participating in a sunset review must have first requested and completed an administrative review. *Dillinger,* Court No. 00-09-00437, at 32.

[360] Appellate Body Report in *US – Lead and Bismuth II*, WT/DS138/AB/R, at para. 54.

[361] Case No.10 is the *Dillinger* dispute, and the exporting producer participated in all the investigations and reviews.

[362] *Cut-to-Length Carbon Steel Plate from the United Kingdom* (exp. sunset review), *supra,* footnote 51 In this case the Department Of Commerce determined that the submissions by the GOUK and the European Communities were "inadequate for purposes of conducting a full sunset review." *Ibid*.

[363] *Corrosion-Resistant Carbon Steel Flat Products from France*, footnote 58, at 18063.

[364] *Cut-to-Length Carbon Steel Plate from Spain, supra,* footnote 67, at 18308.

7.117 We note that in Case Nos. 8 and 10, the United States admits that the privatizations took place at arm's-length and for fair market value.[365] Therefore, the US Department of Commerce should have concluded that the privatization at arm's length and for fair market value rebutted the presumption, if any, that the benefit from the prior subsidization bestowed upon the state-owned producer continued to accrue to the privatized producer under investigation since the latter had paid full market value for the assets and shares of the state-owned producer. The sunset review determinations in Case Nos. 8 and 10 are, therefore, inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the SCM Agreement. The United States was therefore not entitled to impose duties to countervail pre-privatization non-recurring subsidies since no benefit accrued to those privatized producers. These countervailing duties were therefore maintained contrary to the SCM Agreement and should therefore be removed accordingly.

## F. THE WTO COMPATIBILITY OF US SECTION 1677(5)(F)

### 1. Claims and arguments of the parties

7.118 The European Communities claims that Section 1677(5)(F), as interpreted by the US Court of Appeals for the Federal Circuit, prevents the United States from systematically recognizing the principle that an arm's-length, fair market value transaction precludes the pass through of any benefits from pre-transaction financial contributions to the post-transaction entity. The European Communities is of the view that Section 1677(5)(F) was specifically designed to prevent the US Department of Commerce from applying a "*per se* rule" that a benefit stream does not survive a fair market value arm's-length transaction.[366] The European Communities asserts that Section 1677(5)(F), to the extent that it allows the US Department of Commerce to impose countervailing duties without assessing the existence of countervailable subsidization after a privatization or change in ownership, is inconsistent with Articles 1.1(b), 10, 14, 19 and 32.5 of the SCM Agreement and with Article XVI.4 of the WTO Agreement.

7.119 The United States contends that Section 1677(5)(F) does not mandate an either/or approach to the question of whether pre-privatization subsidies benefit a post-privatization entity.[367] The United States argues that the plain language of Section 1677(5)(F) demonstrates its discretionary nature. In this regard, the United States contends that the text of Section 1677(5)(F) clearly provides that a change in ownership does not by itself mean that a past countervailable subsidy is no longer countervailable, nor does it mean that it continues to be countervailable. The United States argues that the statute leaves the investigating authority discretion to make its decision. It further argues that the SAA also supports the view that Section 1677(5)(F) is discretionary and not mandatory. The SAA states that the purpose of Section 1677(5)(F) is to clarify that "the sale of a firm at arm's-length does not automatically, and in all cases, extinguish any prior subsidies conferred," and that it is the Administration's intent that "Commerce retains the discretion to determine whether, and to what extent…previously conferred countervailable subsidies" are eliminated."[368]

[365] See the admission from the United States *infra*, paras. 2.39 and 2.45.

[366] To support its view the European Communities refers to *Final Results of Redetermination pursuant to Court Remand, Delverde Srl. v. United States* Consol. Ct. No. 96-08-01997 (Ct. Int'l Trade 2 December 1997), at 33. Exhibit EC–28 to the EC's first written submission. (In the version of this Remand Redetermination supplied to the Panel, the relevant text can be found on page 16).

[367] *See* US' first written submission, para. 91.

[368] *See* US' first written submission, paras. 94-96.

## 2. Evaluation by the panel

(a) Possibility to challenge a legislation as such - mandatory/discretionary distinction

7.120 Under GATT and WTO dispute settlement procedures, a measure can be challenged if it is binding and not discretionary, even if it is not yet applied or in force.[369] Only legislation that "requires" a violation of GATT/WTO rules can be found to be inconsistent with WTO rules.[370] The Appellate Body in *US – 1916 Act* confirmed that:

> "the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a *threshold consideration* in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's GATT 1947 obligations.[371] The practice of GATT panels was summed up in *United States – Tobacco*[372] as follows:
>
>> … panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the *executive authority* of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge.[373] (emphasis added)[374]

[369] Panel Report, *United States - Taxes on Petroleum and Certain Imported Substances* ("*Superfund")*, adopted 17 June 1987, BISD 34S/136, paras 5.26-5.29.

[370] *See* Panel Report, *United States – Anti-Dumping Act of 1916 – Complaint by the European Communities* ("*US – 1916 Act (EC)*"), WT/DS136/R and *United States – Anti-Dumping Act of 1916 – Complaint by Japan* ("*US – 1916 Act (Japan)*"), WT/DS162/R and WT/DS162/Add.1, adopted 26 September 2000, as upheld by the Appellate Body Report, *United States Anti-Dumping Act of 1916* ("*US – 1916 Act*") WT/DS136/AB/R,WT/DS162/AB/R; Panel Report, *United States – Measures Affecting the Importation, Internal Sale, and Use of Tobacco*, adopted 4 October 1994, BISD 41S/131; Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the Panel, adopted 7 November 1990, BISD 37S/200; Panel Report, *European Economic Community – Regulation on Imports of Parts and Components*, adopted 16 May 1990, BISD 37S/132; *and* Panel Report, *Superfund*, BISD 34S/136.

[371] [Original footnote] Panel Report, *US – Superfund*, BISD 34S/136 - The reason it must be possible to find legislation as such to be inconsistent with a Contracting Party's GATT 1947 obligations was explained as follows: [the provisions of the GATT 1947] are not only to protect current trade but also to create the predictability needed to plan future trade. That objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade.

[372] [Original footnote] Appellate Body Report, *US – 1916 Act,* WT/DS136/AB/R, WT/DS162/AB/R quoting: Panel Report, *United States – Measures Affecting the Importation, Internal Sale, and Use of Tobacco,* adopted 4 October 1994, BISD 41S/131.

[373] [Original footnote] Appellate Body Report at para. 118 *Ibid*., para. 118, referring in footnote to: Panel Report, *United States - Superfund*, BISD 34S/136, p. 160; Panel Report, *EEC - Parts and Components*, *supra*, footnote 20, pp. 198-199; Panel Report, *Thailand - Cigarettes*, *supra*, footnote 34, pp. 227-228; Panel Report, *United States - Malt Beverages*, *supra*, footnote 34, pp. 281-282 and 289-290; Panel Report, *United States - Denial of Most-Favoured Nation Treatment as to Non-Rubber Footwear from Brazil*, adopted 19 June 1992, BISD 39S/128, p. 152.

[374] Appellate Body Report, *US – 1916 Act*, WT/DS136/AB/R, WT/DS162/AB/R, at para. 88. See also at footnote 45 to para. 88*:*

> "The reason it must be possible to find legislation as such to be inconsistent with a Contracting Party's GATT 1947 obligations was explained as follows: [the provisions of the GATT 1947] are not only to protect current trade but also to create the predictability needed to plan future trade. That objective could not be attained if contracting parties could not

"Thus, the relevant discretion, for purposes of distinguishing between mandatory and discretionary legislation, is a discretion vested in the *executive branch* of the government".[375]

7.121 Three recent panel reports provided that legislation "as such" is considered mandatory if it cannot be applied in a manner consistent with the SCM Agreement. In these three cases, the panels concluded that although it was possible to conceive that the laws would be applied in a manner incompatible with WTO rules, the relevant competent authorities had the discretion to apply them consistently with such rules. Therefore, the said laws did not necessarily violate the SCM Agreement.[376]

7.122 In sum, a piece of legislation would not violate the WTO if it can be applied by the executive authority of the WTO Member in a manner consistent with the WTO Agreement; WTO Members are presumed to administer their national laws in conformity with their WTO obligations.[377]

7.123 While only legislation that mandates a violation of WTO obligations can be WTO-inconsistent, we are of the view that the existence of some form of executive discretion alone is not enough for a law to be *prima facie* WTO-consistent, what is important is whether the government has an effective discretion to interpret and apply its legislation in a WTO-consistent manner.[378]

(b) The examination by the Panel of national laws and other domestic legal instruments.

7.124 Where the alleged violation at issue is domestic legislation, an examination of the relevant aspects of municipal law is essential to determining whether a Member has complied with its obligations.[379] It is a well-established practice of legal interpretation in international jurisprudence

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challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade. Panel Report, *United States – Superfund*, BISD 34S/136, footnote 34, para. 5.2.2."

[375] See Appellate Body Report, *US – 1916 Act*, WT/DS136/AB/R, WT/DS162/AB/R, at para. 89.

[376] See Panel Report, *United States – Measures Treating Export Restraints as Subsidies* ("*US – Export Restraints*"), WT/DS194/R, adopted 23 August 2001, paras. 8.126–8.132; Panel Report, *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU* ("*Brazil – Aircraft (Article 21.5 – Canada II*")), WT/DS46/RW/2, adopted 23 August 2001, paras. 5.11-5.13, 5.43, 5.48, 5.5, 5.55, 5.126, 5.142; and Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft* ("*Canada – Aircraft Credits and Guarantees*") WT/DS222/R, adopted 19 February 2002, paras. 7.56–7.62.

[377] Article 26 of the Vienna Convention on the Law of Treaties. Done in Vienna, 23 May 1969, 1155 U.N.T.S. 331. The Panel in *US – Section 301 Trade Act* also accepted the US submission that: "In US law, it is an elementary principle of statutory construction that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.' *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804). While international obligations cannot override inconsistent requirements of domestic law, 'ambiguous statutory provisions. . . [should] be construed, where possible to be consistent with international obligations of the United States.' *Footwear Distributors and Retailers of America v. United States*, 825 F. Supp. 1078, 1088 (Ct. Int'l Trade), appeal dismissed, 43 F. 3d 1486 (Fed. Cir. 1994) citing *DeBartolo Corp. v. Florida Gulf Coast Building and Trades Council*, 485 U.S. 568 (1988)." Panel Report, *United States – Sections 301 – 310 of the Trade Act of 1974* ("*US – Section 301 Trade Act*"), WT/DS152/R, adopted 27 January 2000, at footnote 681 to para. 7.108. Members are also presumed not to contravene their mandatory legislation in order to administer their WTO obligations. Appellate Body Report, *India – Patents (US)*, WT/DS50/AB/R , adopted 16 January 1998, at paras. 69-70.

[378] Panel Report, *US – Section 301 Trade Act*, WT/DS152/R, at paras. 7.53-7.54 concludes, while discussing claims under Article 23 of the DSU, that legislation that maintains executive discretion may also violate WTO obligation if such discretion is prohibited by the relevant WTO agreement.

[379] Appellate Body Report, *India – Patents (US)*, WT/DS50/AB/R, at para. 66.

that "where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts."[380]

7.125 When analysing municipal law, a Panel should not interpret the law "as such", but rather establish the meaning of the disputed legislation as a *factual element* and determine whether the factual element constitutes conduct by the respondent Member contrary to its WTO obligations.[381] In *India – Patents (US)*, the Appellate Body said:

> "There was simply no way for the Panel to make this determination without engaging in an examination of Indian law. But, … in this case, the Panel was not interpreting Indian law "as such"; rather, the Panel was examining Indian law solely for the purpose of determining whether India had met its obligations under the TRIPS Agreement."[382]

7.126 In *US – 1916 Act (EC)*, the panel – upheld by the Appellate Body, stated that even if the text of the law in question were clear on its face, it was necessary to examine the domestic application of that law, its historical context and legislative history and subsequent declarations of the United States' authorities in order to asses its compatibility with WTO law.[383]

7.127 In *US – Section 301 Trade Act*, while examining claims of violation of Article 23 of the DSU, the panel concluded that in cases where the violation is legislation as such, "internal elements legally relevant to the construction of the legislation should be determinative."[384] That panel also concluded that the elements of national laws are often inseparable and "should not be read independently from each other when evaluating the overall conformity of the law with WTO obligations."[385] In addition, the panel noted that US Government action includes not only the legislature and executive, but the *judiciary* as well.[386]

7.128 The Panel considers that in its examination of the compatibility of Section 1677(5)(F), it should consider the United States' internal elements, legally relevant to the construction of the legislation under examination, to see whether the US Department of Commerce has the effective discretion to apply Section 1677(5)(F) consistently with the WTO Agreement.

(c) Can US Section 1677(5)(F) be effectively applied in a WTO-consistent manner?

7.129 As we developed in paragraphs 7.60 to 7.89above, if the purchaser (the company and the shareholders of the privatized producer) of the state-owned producer pays fair market value, it has paid for the advantage conferred by a prior financial contribution (subsidization). Thus the privatized producer has not received any countervailable benefit under the SCM Agreement. When informed of such a change in ownership for consideration, the importing Member is obliged to examine the conditions of the privatization transaction since it is possible that the benefit may cease to accrue to the privatized producer. Where the privatization takes place at arm's-length and for fair market value, the importing Member must reach the conclusion that no benefit accrued to the privatized producer.

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[380] *Brazilian Loans*, PCIJ, Series A, Nos. 20/21, p.124 cited in *Elettronica Sicula S.p.A. (ELSI)*, Judgment, ICJ Reports 1989, p. 47, para. 62.

[381] Panel Report, *US – Section 301 Trade Act*, WT/DS152/R, at para. 7.18 citing Appellate Body Report, *India – Patents (US)*, WT/DS50/AB/R, adopted 16 January 1998, at para. 66.

[382] Appellate Body Report, *India – Patents (US)*, WT/DS50/AB/R, para. 66.

[383] Panel Report, *US – 1916 Act (EC)*, WT/DS136/R, at para. 6.48. *See a*lso Panel Report, *United States – Section 337 of the Tariff Act of 1930*, adopted 7 November 1989, BISD 36S/345.

[384] Panel Report, *US – Section 301 Trade Act*, WT/DS152/R, at para. 7.114.

[385] Panel Report, *US – Section 301 Trade Act*, WT/DS152/R, at para. 7.27.

[386] *Ibid.*, at footnote 700 to para. 7.136 (emphasis added).

7.130 We note at the outset that Section 1677(5)(F) only refers to transactions at arm's-length and no reference is made to "fair market value". When we requested that the United States explain the meaning of arm's-length in the United States' law and its difference from fair market value, the representative of the United States said there was a great deal of confusion about those terms in the United States and that he was not in a position to reply.[387] We also note that the SAA, in interpreting Section 1677(5)(F), makes it clear that an arm's-length transaction is presumed to be a transaction in normal market conditions, i.e. a transaction at fair market value. This is especially so as it includes in its definition of arm's-length transactions, transactions between related parties when the terms of the transactions are as if the parties were not related, i.e. subject to full and normal market conditions:

> "For purposes of section 771(5)(F), the term 'arm's-length transaction' means a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties."[388]

7.131 So for the purpose of these findings, we shall consider the definition of "arm's-length transaction" in Section 1677(5)(F) as to include the concept of "fair market value" as well.

7.132 The Panel is asked whether Section 1677(5)(F) would allow the United States to systematically conclude that in cases of arm's-length and fair market value privatizations, no benefit initially determined for the state-owned producer continues to accrue to the privatized producer and thus, no countervailing duty can be imposed or maintained against products exported by the privatized producer.

7.133 Section 1677(5)(F) provides that:

> "A change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's-length transaction."[389]

7.134 We note that Section 1677(5)(F) does not expressly mandate the same person methodology. In fact, it does not prescribe any specific methodology for determining whether a change in ownership extinguishes the benefit from a prior financial contribution. What it does, however, is to make it clear that a change in ownership at arm's-length cannot, in and of itself, be dispositive of the determination of the existence of benefit. As the United States explained before the Panel, the legislation provides the US Department of Commerce with a degree of discretion to assess the impact of the change in ownership on the continued existence of a benefit and that the US Department of Commerce chose to exercise such discretion in developing its same person methodology.

7.135 The Panel acknowledges that privatizations are very complex matters and the assessment of the conditions under which the privatization takes place – i.e., whether it was at 'arm's-length and for fair market value – are also complex. Thus, in situations of allegations of privatization for consideration, the importing Member must be able to determine whether the transaction was at 'arm's-length and for fair market value.

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[387] *See* US' response to question No. 15 posed by the Panel.

[388] SAA 1994 U.S.C.C.A.N 3773, 4241. Exhibit EC–25 to EC's first written submission. (Note that in the version supplied to the Panel the quoted text appears on page 928.)

[389] Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994); 19 U.S.C. § 1677(5)(F). Exhibit EC–4 to the EC's first written submission.

7.136 In our view, once it has determined that the privatization took place at 'arm's-length and for fair market value, the importing Member must conclude, pursuant to the SCM Agreement, that the benefit from prior financial contribution (subsidization) to the state-owned producer does not continue to accrue to the privatized producer.[390]

7.137 The issue before us is whether, in situations of arm's-length privatizations for fair market value, Section 1677(5)(F) can be applied without violating the SCM Agreement, as interpreted by the Panel and the Appellate Body report in *US – Lead and Bismuth II* and by this Panel. In other words, the issue is whether, in situations of arm's-length privatizations for fair market value, the application of Section 1677(5)(F) will necessarily violate the SCM Agreement.

7.138 The Panel believes that if, and to the extent that, the US Department of Commerce could exercise its own executive discretion in a manner compatible with the WTO - that is to reach systematic conclusions that in cases of an arm's-length privatization for fair market value, no benefit accrues to the privatized producer from the prior financial contribution (subsidization) bestowed to the state-owned producer – it could be concluded that the plain wording of Section 1677(5)(F) does not require the United States to violate the WTO Agreement. Although it is possible to conceive that Section 1677(5)(F) would be applied in a manner incompatible with WTO rules, the statutory language alone indicates that the competent authority could have the discretion to implement Section 1677(5)(F) consistently with WTO law. As such, the legislation alone could not be said to be inconsistent with the SCM Agreement.

7.139 We are of the view, however, that when examining internal legislation, a Panel must look to all the elements that establish its meaning, not just the statutory language. Therefore, it is also necessary to look at other domestic interpretive tools such as the legislative history, the SAA, and relevant judicial interpretations to the extent that they form part of the effective operationalization of the legislation.[391]

7.140 As we discuss hereafter, in the particular circumstances of this case, it seems that the aggregate impact of the object and purpose of Section 1677(5)(F), its legislative history, its interpretation by the US Court of Appeals for the Federal Circuit and the SAA, are such as to prohibit the United States from exercising its executive discretion so that it can systematically conclude that in cases of 'arm's-length privatization for fair market value, no benefit accrues to the privatized producer from prior financial contribution bestowed to the state-owned producers, as provided for by our findings in paragraphs 7.60 to 7.89 above. We proceed to examine these potentially legally relevant internal elements.

*(i) The legislative history of US Section 1677(5)(F)*

7.141 The origins of Section 1677(5)(F) lie in the pre-Uruguay Round litigation in the United States courts over the US Department of Commerce's change in ownership methodology. The European Communities claims, and the United States has not contested, that Section 1677(5)(F) was designed to reverse the decisions of the CIT in *Saarstahl I*[392] and *Inland Steel*[393] and therefore neutralize the effect

[390] The Panel recalls that: "if it is found that specific WTO obligations prohibit a certain type of legislative discretion, the existence of such discretion in the statutory language would presumptively preclude WTO consistency". Panel Report, *US – Section 301 Trade Act,* WT/DS152/R, at para. 7.54.

[391] Panel Report, *US – Section 301 Trade Act,* WT/DS152/R, at paras. 7.25 - 7.27. The Appellate Body seemed to endorse this principle in, Appellate Body Report, *India – Patents (US)*, WT/DS50/AB/R, at paras. 60-63 when it examined the relative importance of various administrative and legislative actions taken by India to fulfill its obligations under Article 70.8(a) of the *TRIPS Agreement*.

[392] *Saarstahl I,* 858 F. Supp. 187.

[393] *Inland Steel Bar co. v. United States* 858 F. Supp. 179 (Ct. Int'l Trade 1994).

of the CIT's rulings in *Saarstahl I* and *Inland Steel* declaring the gamma methodology contrary to US law.[394]

7.142 In the *Delverde III* case, the US Department of Commerce argued before the US Court of Appeals for the Federal Circuit that Section 1677(5)(F) had been adopted in order to overrule the decisions in *Inland Steel* and *Saarstahl I*[395] that had concluded that "[b]ecause the countervailable benefit does not survive the arm's-length transaction, there is no benefit conferred to the purchaser and, therefore, no countervailable subsidy within the meaning of the [the US CVD statute]".[396]

*(ii) The US SAA's interpretation of Section 1677(5)(F)*

7.143 This understanding is confirmed by the United States itself. The SAA points out that:

> "Section771(5)(F) provides that a change in the ownership of 'all or part of a foreign' enterprise" (i.e. a firm or a division of a firm) or the productive assets of a firm, even if accomplished through an arm's-length transaction, does not by itself require Commerce to find that past countervailable subsidies received by the firm no longer continue to be countervailable. For purposes of section 771(5)(F), the term 'arm's-length transaction' means a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties.
>
> Section 771(5)(F) is being added to clarify that the sale of a firm at arm's-length does not automatically, and in all cases, extinguish any prior subsidies conferred. Absent this clarification, some might argue that all that would be required to eliminate any countervailing duty would be to sell subsidized productive assets to an unrelated party. Consequently, it is imperative that the implementing bill correct and prevent such an extreme interpretation."[397]

7.144 The SAA refers to itself as "an authoritative expression of the Administration's views regarding the interpretation of the Uruguay Round agreements and the United States' obligations in implementing them, including under domestic law, as agreed between the Administration and Congress". The same Panel (*US – Export Restraints*) considered:[398]

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[394] The European Communities refers to David Codevilla, *Discouraging the practice of what we preach, Saarstahl I, Inland Steel and the implementation of the Uruguay Round of GATT 1994* 3 Geo. Mason Independent L. Rev. 435 The European Communities explains that the author was a key Congressional staffer associated with the drafting of § 1677(5)(F) and the URAA more generally. LEXIS-NEXIS version attached as Exhibit EC–23 to EC's first written submission.

[395] See *Delverde III*, 202 F.3rd 1360 where the US Court of Appeals for the Federal Circuit noted, in footnote 3: "Both parties tell us that the Change of Ownership provision was intended to overrule the decision of the Court of International Trade in *Saarstahl AG v. United States*, 858 F. Supp. 187 (Ct. Int'l Trade 1994) ("*Saarstahl I*")."

[396] The following excerpt explains the gist of the *Saarstahl I* Court judgment: "Where a determination is made that a given transaction is at arm's-length, one must conclude that the buyer and the seller have negotiated in their respective self-interests, the buyer has taken into consideration all relevant facts, and the buyer has paid an amount which represents the market value of all it is to receive. Because the countervailable benefit does not survive the arm's-length transaction, there is no benefit conferred to the purchaser and, therefore, no countervailable subsidy within the meaning of the [the US countervailing duty statute]. The purchaser, thus, will not realize any competitive countervailable benefit and any countervailable duty assigned to it amounts to a penalty […] Taken from the EC first written submission, para. 140.

[397] SAA 1994 U.S.C.C.A.N 3773, 4241 Exhibit EC–25 to EC's first written submission.

[398] Panel Report, *US – Export Restraints*, WT/DS194/R, at para. 8.95. The Panel in *US – Section 301 Trade Act*, explained the importance of the SAA as follows: "The SAA thus contains the view of the

> "Accordingly, we consider that the SAA constitutes authoritative interpretive guidance in respect of the statute. As such, given its unique authority as interpretive guidance, the SAA is of fundamental importance in this dispute, in the sense that the statute cannot be properly interpreted without reference to the SAA."[399]

*(iii) Object and purpose of the legislation.*

7.145 We note that the SAA states that "it is imperative that the implementing bill correct and prevent such an *extreme interpretation*" (referring to the ruling in *Saarstahl I*). We understand that the object and purpose of Section 1677(5)(F) is to prohibit the US Department of Commerce from doing what we believe the SCM Agreement, as interpreted by the Appellate Body and Panel Reports in *US – Lead and Bismuth II* and this Report, requires the US Department of Commerce to do; i.e. to reach systematic conclusions that in cases of arm's-length privatizations for fair market value, the exporting Member has rebutted the presumption, if any, that the benefit from prior financial contributions (or subsidization) continues to accrue to the privatized producer. The SAA qualifies as an "extreme interpretation to be corrected", what we believe to be the correct interpretation of the SCM Agreement.

7.146 It seems clear to this Panel, and the United States admits as much, that Section 1677(5)(F) was designed so as to ensure that in situations of arm's-length change in ownership for fair market value, benefit from prior subsidy is never automatically considered to have passed to the new privatized producer. The United States, in the course of the *Delverde III* litigation quoted the US Department of Commerce in one of its findings:

> "Section 771(5)(F) only acts to preserve the ability of the Department to exercise its discretion, and it accomplishes this goal by overturning the approach ordered in *Saarstahl I*, which had mandated that the Department find that an arm's-length transaction, in and of itself, precludes any pass-through to the purchaser."[400]

*(iv) The US judicial interpretation of Section 1677(5)(F)*

7.147 While the legislative history and the SAA are relevant, the decision of the US Court of Appeals for the Federal Circuit in the *Delverde III* case is determinative in establishing the meaning of Section 1677(5)(F) in the United States. In the context of its examination of the gamma methodology, the US Court of Appeals for the Federal Circuit in *Delverde III* discussed and analysed Section 1677(5)(F) and interpreted it as preventing the adoption of a *per se* (i.e. systematic) rule on the effect of a change in ownership transaction. The US Court of Appeals for the Federal Circuit stated:

> "This provision [§1677(5)(F)] clearly states that a subsidy cannot be concluded to have been extinguished solely by an arm's-length change in ownership. However, it is also clear that Congress did not intend the opposite, that a change in ownership always requires a determination that a past countervailable subsidy continues to be countervailable, regardless whether the change in ownership is accomplished through an arm's-length transaction or not. If that had been Congress's intent, the statute

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Administration, submitted by the President to Congress and receiving its imprimatur, concerning both interpretation and application and containing commitments, to be followed also by future Administrations, on which domestic as well as international actors can rely." Panel Report, *US – Section 301 Trade Act*, WT/DS152/R, at para. 7.111. The Panel also concluded that the SAA is "an important interpretive element in the construction of the statutory language." *Ibid.*, at 7.133.

[399] Panel Report, *US – Export Restraints*, WT/DS194/R, at para. 8.100.

[400] Final Results of Redetermination pursuant to Court Remand, *Delverde Srl. v United States* Consol. Ct. No. 96-08-01997. (Note that in the version of this Remand Redetermination supplied to the Panel, the quoted text can be found on page 16.)

would have so stated. Rather, the Change of Ownership provision simply prohibits a *per se* rule either way."[401]

7.148 We note that the US Court of Appeals for the Federal Circuit relied specifically on the legislative history to determine the Congressional intent in promulgating the statute. The definition of "arm's-length transaction" contained in the SAA[402], quoted in para. 7.143above, is identical to the wording in the House of Representatives Report cited by the US Court of Appeals for the Federal Circuit as the basis for its interpretation of the meaning of the statute.[403] The Panel also notes that throughout its discussion of both the *Delverde III* case and the *Saarstahl II* case, the Court seems to use the two terms interchangeably. Therefore, based on the definition of arm's-length provided by Congress, the interchangeable use of the terms arm's-length and fair market value by the US Court of Appeals for the Federal Circuit, and the United States' inability to explain how United States law differentiates between the two, the Panel is of the view that although one can reasonably interpret the two concepts as being different, the United States' legislation and US Court of Appeals for the Federal Court decision seem to have defined arm's-length to include fair market value."[404]

7.149 So, according to the US Court of Appeals for the Federal Circuit, Section 1677(5)(F) prevents a *per se* rule that privatization at arm's-length and for fair market value extinguishes the benefit *vis-à-vis* the privatized producer. In other words, the US Court of Appeals for the Federal Circuit has determined that Section 1677(5)(F) prevents the US Department of Commerce from developing any methodology implementing Section1677(5)(F) whereby it is required to find that the benefit from the prior financial contribution (or subsidization) is extinguished *vis-à-vis* the privatized producer solely by arm's-length privatizations at fair market value. The Panel notes that the US Department of Commerce has itself argued that "the Federal Circuit in *Delverde III* was quite clear that 19 U.S.C. Section1677(5)(F) precludes *per se* rules, including one that would automatically treat the change in ownership as extinguishing prior subsidies."[405]

7.150 The Panel understands that law, in a common law legal system, is continuously evolving. However, the current state of the law in the United States today is that expressed by the US Court of Appeals for the Federal Circuit in *Delverde III*. The United States has provided no evidence of other dispositive decisions by the Federal Circuit or the United States Supreme Court (the highest court in the United States), that would alter the binding nature of the US Court of Appeals for the Federal Circuit's holding in *Delverde III* or the Panel's understanding of what that judgment requires of the US Department of Commerce. The Panel would like to point out that in no way is it proposing that any particular methodology be adopted by the United States. The Panel examined *Delverde III*, not to assess or discuss the compatibility of the gamma methodology with the statute, but to understand the nature and legal effects of Section 1677(5)(F), as interpreted by the US Court of Appeals for the Federal Circuit, in the United States' legal system.

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[401] *Delverde III.*, 202 F.3rd 1360, at 5.

[402] "For purposes of section 771(5)(F), the term "arm's-length transaction" means a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties." SAA 1994 U.S.C.C.A.N 3773, 4241 Exhibit EC–25 to EC's first written submission

[403] The Panel recognizes that the House of Representatives Report is not, as such, in the record. However, it is cited by the Federal Circuit in *Delverde III*. The Panel has decided to look at the full document in order to respond to the United States' comments in the US' Request for Interim Review. The Panel also notes that the US Court of Appeals for the Federal Circuit stated that the Senate Report was "nearly identical" to the House Report it cited. *Delverde III* 202 F.3d. 1360, at 1366-67.

[404] US' request for Interim Review, para. 44.

[405] Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment upon the agency record, *Acciai Speciali Terni et al. v United States et al.* Court No. 01-00051 (Ct. Int'l Trade 5 October 2001). (Extracts; cover page, table of contents, and pages 9 to 18 attached as Exhibit EC-26) *cited in* EC's first written submission, para. 150.

7.151 We are of the view that benefit and thus subsidization are extinguished *vis-à-vis* the privatized producer solely by an arm's-length and fair market value privatization. While Section 1677(5)(F) prohibits a *per se* rule that benefit and thus subsidization are extinguished *vis-à-vis* the privatized producer solely by an arm's-length and fair market value privatization, the SCM Agreement, as interpreted by the panel and the Appellate Body in *US – Lead and Bismuth II* and this Panel, requires that the domestic laws and regulations and practices mandate the authorities to find that in all cases of arm's-length fair market value privatization, no benefit from prior financial contributions (subsidization) to the state-owned producer continues to accrue to the privatized producer.

7.152 Since the United States itself has argued that the *Delverde III* ruling clearly precludes *per se* rules, including one that would automatically treat the change in ownership as extinguishing prior subsidies[406], the Panel believes that the current interpretation of Section 1677(5)(F) by the US Court of Appeals for the Federal Circuit, which is binding upon the Court of International Trade and the US Department of Commerce, would prevent the United States from applying Section 1677(5)(F) in a manner consistent with the SCM Agreement.

7.153 We would like to note that a distinction must be drawn with the conclusion of the Appellate Body in *US – 1916 Act* on the relevance of judicial opinion as discretionary governmental action under WTO law. In *US – 1916 Act*, the Appellate Body stated:

> "Lastly, we note that, before the Panel and before us, the United States invoked the distinction between mandatory and discretionary legislation to argue that the 1916 Act cannot be mandatory legislation because United States' courts have interpreted or may interpret the 1916 Act in ways that would make it consistent with the WTO obligations of the United States. As we have seen, in the case law developed under the GATT 1947, the distinction between mandatory and discretionary legislation turns on whether there is relevant discretion vested in the *executive branch* of government. The United States, however, does not rely upon the discretion of the executive branch of the United States' government, but on the interpretation of the 1916 Act by the United States' courts. In our view, this argument does not relate to the distinction between mandatory and discretionary legislation."[407]

7.154 In this Report, we examine the US Court of Appeals for the Federal Circuit, not as the "exerciser" of governmental discretion but rather in its role as establishing a determinative meaning of Section 1677(5)(F) for the United States.[408] Both the *US – 1916 Act* dispute and the current dispute are concerned with the relationship between the Executive and Judicial Branches of the United States. The Appellate Body in *US – 1916 Act* recognized that the Executive Branch cannot instruct the Judiciary, and therefore the United States could not rely on the Judiciary's exercise of discretion in a manner compatible with the WTO.[409] However, it is known that in the United States' law, the Judiciary can make binding determinations. Therefore, we can rely on judicial interpretations as an indicator of how the US Department of Commerce is required to apply Section 1677(5)(F).

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[406] *Ibid.*

[407] *See* Appellate Body Report, *US – 1916 Act*, WT/DS136/AB/R, WT/DS162/AB/R, at para. 100.

[408] There is a well established principle of jurisprudence in the United States that "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 177 (1804). *See* also Panel Report, *US – 1916 Act (EC)*, WT/DS136/R, para. 2.14 and footnote 21.

[409] The Appellate Body in *India – Patents (US)*, WT/DS50/AB/R, also concluded that conformity with WTO obligations cannot be obtained by an administrative promise to disregard its own binding internal legislation, i.e. by an administrative undertaking to act illegally. Appellate Body Report, *India – Patents (US)*, at paras. 69-71. We are of the view that this principle extends to any binding law, independently from the source.

*(v) Does Section 1677(5)(F) mandate a violation of the WTO Agreement?*

7.155 During the second hearing the Panel asked the representative of the United States whether Section 1677(5)(F) would allow it to reach systematic conclusions that in cases of fair market value privatization, no benefit initially determined for the state-owned producer continued to accrue to the privatized producer and thus, no countervailing duty can be imposed or maintained. The answer provided by the representative of the United States was that even if the Panel was to reach the conclusion that there was such a rule, the United States' legislation did not have to be amended, as the US Department of Commerce could comply with such findings within the parameters of the existing Section 1677(5)(F). The United States' representative did not discuss the impact of the SAA or the US Court of Appeals for the Federal Circuit judgment on this discretion.

7.156 In our view, the plain wording of Section 1677(5)(F), in maintaining the US Department of Commerce's discretion, does not require a violation of the SCM Agreement. However, the SAA (which is an authoritative interpretation of the obligations contained in Section 1677 (5)(F)) and the US Court of Appeals of the Federal Circuit's decision in *Delverde III* (which constitutes a binding determination of what Section 1677(5)(F) actually means in the United States' law and what the legislation requires from the United States' authorities) clearly demonstrate that the United States is bound to a non-compliant application of Section 1677(5)(F). In sum, we are of the view that together with the other provisions of the SCM Agreement, Article 32.5 as well as Article XVI.4 of the WTO Agreement require the United States to maintain a legislation, regulations and practices that guarantee that in cases of fair market value privatization at arm's-length no benefit *vis-à-vis* the privatized producer is determined to continue from prior subsidization or financial contributions bestowed on a state-owned producer. In the United States' legal system, Section 1677(5)(F) prohibits de facto the US Department of Commerce from recognizing that in all cases where an 'arm's-length privatization for fair market value takes place, no benefit from prior financial contributions (subsidization) to the state-owned producer can continue to accrue to the privatized producer. We fail to see how the US Department of Commerce could exercise its alleged executive discretion under 1677(5)(F) in a WTO-compatible manner when it is prohibited by its Courts (and the SAA) from systematically concluding that in cases of 'arm's-length privatization for fair market value, no benefit continues to accrue to the privatized producer from prior financial contributions (or subsidization) to the state-owned producer, as provided for by our findings in paragraphs 7.60 to 7.89 above.

7.157 Article 32.5 of the SCM Agreement and Article XVI.4 of the WTO Agreement require that a Member ensure the conformity of its legislation with the SCM Agreement and the covered agreements respectively. The Panel concludes that the aggregate effect of the legislative history, object and purpose of Section 1677(5)(F), the SAA, and the determinative interpretation of that legislation by the US Court of Appeals for the Federal Circuit, is to mandate an application of Section 1677(5)(F) that will be inconsistent with Articles 10, 14, 19, and 21 of the SCM Agreement since it prohibits the relevant authority from adopting a general rule that in all situations of arm's-length privatizations for fair market value, no benefit from prior financial contributions (or subsidization) to the state-owned producer continues to accrue to the privatized producer, even though Section 1677(5)(F)'s statutory language alone would not mandate a violation of the SCM Agreement and the WTO Agreement.[410]

7.158 As Section 1677(5)(F) is found to be inconsistent with the SCM Agreement, the United States has failed to ensure conformity with the SCM Agreement as required by Article 32.5 of the

[410] We would like to recall that our conclusions and findings are limited to cases of full privatization and for consideration at fair market value and we have not examined the broader issue of whether any change of ownership triggers the obligation to re-examine the conditions of application of the SCM Agreement *vis-à-vis* the new owner(s). We note that Section 1677(5)(F) deals with all and any such change of ownership and therefore also addresses situations, other than situations involving full privatization as those covered by the present Panel Report.

SCM Agreement and Article XVI.4 of the WTO Agreement. In maintaining such WTO-incompatible laws, regulations and practices, the Panel concludes that the United States is also acting in a manner inconsistent with Article 32.5 of the SCM Agreement and with Article XVI.4 of the WTO Agreement.

## VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 Therefore, pursuant to the findings above, the Panel concludes that:

(a) The six determinations in the original investigations, based on the gamma methodology, are inconsistent with the SCM Agreement, since the US Department of Commerce did not examine whether the privatizations were at arm's-length and for fair market value; thus the United States failed to determine whether the new privatized producer received any benefit from prior financial contributions previously bestowed to state-owned producers. By failing to determine the existence of a benefit prior to imposing countervailing duties the United States has violated Articles 14, 19.1, and 19.4 of the SCM Agreement, which prohibit the imposition of countervailing duties where there has been no subsidization or in excess of any existing subsidization. Since the United States has imposed countervailing duties that are inconsistent with Articles 14, 19.1 and 19.4 the United States has also violated Article 10 which requires that countervailing duties be imposed consistently with the SCM Agreement.

Therefore the countervailing orders in:

– *Stainless Sheet and Strip in Coils from France* (C-427-815) (Case No. 1);

– *Certain Cut-to-Length Carbon Quality Steel from France* (C-427-817) (Case No. 2);

– *Certain Stainless Steel Wire Rod from Italy* (C-475-821) (Case No. 3);

– *Stainless Steel Plate in Coils from Italy* (C-475-823) (Case No. 4);

– *Stainless Steel Sheet and Strip in Coils from Italy* (C-475-825) (Case No. 5);

– *Certain Cut-to-Length Carbon-Quality Steel Plate from Italy* (C-475-827) (Case No.6).

are inconsistent with Articles 10, 14, 19.1 and 19.4 of the SCM Agreement.

(b) The two determinations made in the context of administrative reviews and based on the gamma methodology (Case No. 7) and on the same person methodology (Case No. 12), are inconsistent with the SCM Agreement since the US Department of Commerce did not examine whether the privatization that occurred after the original imposition of countervailing duties, was at arm's-length and for fair market value; thus the United States failed to determine whether the privatized producers received any benefit from the financial contributions previously bestowed to the state-owned producers. By failing to determine the continued existence of a benefit, prior to its decision to maintain countervailing duties, the United States has violated Articles 14, 19.4, 21.1 and 21.2 of the SCM Agreement, which prohibit a Member pursuant to an administrative review from maintaining countervailing duties where there has not been any determination of continued subsidization and thus of a continued need for countervailing duties. Since the United States has maintained countervailing duties that are inconsistent with Articles 14, 19.4, 21.1 and 21.2 the United States has also violated Article 10 which requires that countervailing duties be imposed and thus maintain consistently with the SCM Agreement.

Therefore the countervailing duty orders in

- *Cut-to-Length Carbon Steel Plate from Sweden* (C-401-804) (Case No. 7); and
- *Grain-Oriented Electrical Steel from Italy* (C-475-812) (Case No. 12).

are inconsistent with Articles 10, 14, 19.4, 21.1 and 21.2 of the SCM Agreement.

(c) The four determinations made in the context of sunset reviews and based on the gamma methodology are inconsistent with the SCM Agreement, since the US Department of Commerce did not examine whether the privatizations, that occurred after the original imposition of countervailing duties, were at arm's-length and for fair market value. Thus the United States failed to determine whether the privatized producers received any benefit from the financial contributions previously bestowed to the state-owned producers. By failing to determine the likelihood of continuation or recurrence of a subsidization, prior to its decision to maintain countervailing duties, the United States has violated Articles 14, 19.4, 21.1 and 21.3 of the SCM Agreement, which prohibit a Member, pursuant to a sunset review, from maintaining countervailing duties where there has not been any determination of likelihood of continuation or recurrence of subsidization and thus of a continued need for countervailing duties. Since the United States has maintained countervailing duties that are inconsistent with Articles 14, 19.4, 21.1 and 21.3 the United States has also violated Article 10 which requires that countervailing duties be imposed or maintained consistently with the SCM Agreement.

Therefore, the countervailing duty orders in

- *Cut-to-Length Carbon Steel Plate from United Kingdom* (C-412-815) (Case No. 8);
- *Certain Corrosion-Resistant Carbon Steel Flat Products from France* (C-427-810) (Case No. 9);
- *Cut-to-Length Carbon Steel Plate from Germany* (C-428-817) (Case No. 10); and
- *Cut-to-Length Carbon Steel Plate from Spain* (C-469-804) (Case No. 11).

are inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the SCM Agreement.

Moreover, since the United States has admitted that the privatizations in Case Nos. 8 and 10 were at arm's-length and for fair market value, no benefit accrued to the privatized producers from the prior financial contribution to the state-owned producer. In maintaining countervailing duties in response to pre-privatization non-recurring subsidies, notwithstanding the absence of any benefit to the privatized producer, the United States violated Articles 10, 14, 19.4, 21.1 and 21.3 of the SCM Agreement.

(d) Once an importing Member has determined that a privatization has taken place at arm's-length and for fair market value, it must reach the conclusion that no benefit resulting from the prior financial contribution (or subsidization) continues to accrue to the privatized producer. To the extent that Section 1677(5)(F), as interpreted by the US Court of Appeals for the Federal Circuit and the SAA, requires the US Department of Commerce to apply a methodology where the benefit from a prior

> financial contribution is not systematically found to no longer accrue to the privatized producer solely by virtue of an arm's-length for fair market value privatization, is preventing the United States from exercising a WTO-compatible discretion. Therefore, Section 1677(5)(F) is inconsistent with Articles 10, 14, 19 and 21 of the SCM, as interpreted by the Panel and the Appellate Body Reports in *US – Lead and Bismuth II* and this Panel. As Section 1677(5)(F) is found to be inconsistent with the *SCM Agreement*, the United States has failed to ensure conformity with Article 32.5 of the *SCM Agreement* and Article XVI.4 of the WTO Agreement respectively.

8.2 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. The United States did not provide any evidence to rebut this presumption. Accordingly, the Panel concludes that, to the extent the United States has acted inconsistently with the provisions of the SCM Agreement and of the WTO Agreement, it has nullified or impaired benefits accruing to the European Communities under these Agreements.

8.3 The Panel recommends that the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the SCM Agreement and the WTO Agreement.

## ANNEX A

| Case No. | Product/Company | Type of investigation/Date/ rate of imposition of CVD | Alleged countervailable subsidies (contributions made prior to privatization) | Privatization | Methodology | Status of the case |
|---|---|---|---|---|---|---|
| 1 | ***Stainless Sheet and Strip in Coils from France***<br>C-427-815<br>Usinor-Sollac | **original investigation**<br>8.6.99 – CVD: 5.38% | Loans with special characteristics; shareholders advances<br>Steel intervention fund.<br>(accounts for bulk of CVD imposed). | Pre-July 1995: French Gov't [GOF] 90.2%;<br>Public offering – July 1995<br>§§Post-July 1995: GOF 9.8%, "stable shareholders" 14% (of these 10% were GOF controlled banks or entities),<br>By 22 Oct. 1997: GOF 1%<br>1998: GOF 0% | gamma methodology<br><br>NB: Court remand investigation (same person methodology) | Appeal before US CIT Judgment rendered on 4 January 2002, condemning same person methodology – (Exhibit EC-29). |
| 2 | ***Certain Cut-to-Length Carbon Quality Steel from France***<br>C-427-817<br>Usinor-Sollac; GTS Industries | **original investigation**<br>29.12 99 – CVD: 5.56% (Usinor); 6.86% (GTS) | Equity infusion as a result of conversion of Loans with Special Characteristics and Steel Intervention Fund bonds into shares of common stock, and shareholders advances.<br>(accounts for all of countervailing duties imposed)<br>Subsidies in question granted to Usinor group, and allocated pro-rata to GTS (a member of the group). | GTS – pre-1992: Dillinger 10.27%<br>Change in ownership – 28 Dec 1992<br>1992 – 1995:<br>GTS: Dillinger 100%<br>Dillinger: DHS 95.3%<br>DHS: Usinor 70%<br>Usinor: *see supra*<br>post-1996:<br>DHS: Usinor 48.75% | gamma methodology<br><br>NB: Court remand investigation (same person methodology) | Appeal before US CIT. Judgment rendered on 4 January 2002, condemning same person methodology – (Exhibit EC-30) |
| 3 | ***Certain Stainless Steel Wire Rod from Italy***<br>C-475-821<br>Cogne Acciai Speciali | **original investigation**<br>29.7.98 – CVD: 22.22% | Equity infusions to Finsider and ILVA<br>Pre-privatization Assistance<br>Debt forgiveness<br>(accounts for at least 21.74 per cent of the CVD rate). | Early 1990's:<br>Instituto per la Riconstruzione Industriale (IRI) (Italian Gov't): 100%, thereafter by IRI subholding companies, Finsider S.p.A., Deltasider S.p.A. or ILVA S.p.A. 31 Dec. 1992 (CAS) created:<br>CAS: 100% Cogne S.p.A., also a state-owned company.<br>27 Dec. 1993:<br>CAS: 100% GE.VAL. S.p.A. | **gamma** methodology | Final determination 7.1.98 |

| Case No. | Product/Company | Type of investigation/Date/ rate of imposition of CVD | Alleged countervailable subsidies (contributions made prior to privatization) | Privatization | Methodology | Status of the case |
|---|---|---|---|---|---|---|
| **4** | ***Stainless Steel Plate in Coils from Italy***<br>C-475-823<br>Acciai Speciali Terni | **original investigation**<br>31.3.99 – CVD: 15.16% | Equity infusions to Terni, TAS and ILVA<br>Benefits from 1988-90 restructuring of Finsider<br>Debt forgiveness of ILVA to AST<br>(accounts for at least 13.42 per cent of the CVD rate) | Sept. 1993<br>ILVA speciality steels division was spun-off to create Acciai Speciali Terni (AST) first as a limited liability company and then as a stock company.<br>AST: 100% IRI<br>14 July 1994:<br>AST: 100% KAI (holding company of a private investor consortium) | gamma methodology<br><br>NB: Court remand investigation ("***same person***" methodology) | Appeal before US CIT.<br>Judgment rendered on 1 February 2002, condemning same person methodology – (Exhibit EC-31) |
| **5** | ***Stainless Steel Sheet and Strip in Coils from Italy***<br>C-475-825<br>Acciai Speciali Terni | **original investigation**<br>8.6.99 – CVD: 12.22% | see supra<br>(accounts for 10.49 per cent of the CVD rate) | see supra | gamma methodology | Appeal before US CIT (suspended pending resolution in appeal in case 4). |
| **6** | *Certain Cut-to-Length Carbon-Quality Steel Plate from Italy*<br>C-475-827<br>ILVA | **original investigation**<br>29.12.99 – CVD: 26.12% | Equity infusions to Nuova Italsider and (old) ILVA<br>Debt forgiveness<br>Capital grants to Nuova Italsider under law 675/77<br>(accounts for 22.68 per cent of CVD rate) | Sept. 1993:<br>ILVA's (old) carbon steel flat products division was spun-off to create Laminati Piani (ILP), incorporated as a stock company (S.p.A.),<br>ILP: 100% IRI<br>March. 1995: privatization<br>ILP: 100% Riva Acciaio S.p.A<br>January 1997<br>ILP renamed ILVA (new). | gamma methodology<br><br>NB: Court remand investigation ("***same person***" methodology) | Appeal before US CIT |

| Case No. | Product/Company | Type of investigation/Date/ rate of imposition of CVD | Alleged countervailable subsidies (contributions made prior to privatization) | Privatization | Methodology | Status of the case |
|---|---|---|---|---|---|---|
| **7** | ***Cut-to-Length Carbon Steel Plate from Sweden***<br>C-401-804<br>SSAB Sventskt Stal | **administrative review**<br>7.4.97 – CVD: 1.91% | Equity infusions .51% *ad valorem*<br>Structural Loans .26% *ad vlaorem*<br>Forgiven Reconstruction Loans 1.14% *ad valorem*<br><br>CVD measures imposed of 1.91 per cent *ad valorem* 7 April 1997. | SSAB was privatized in three stages:<br>Pre privatization:<br>SSAB: 100% Gov't of Sweden (GOS)<br>**Stage 1: 1987**<br>SSAB: 66% GOS. GOS sold one third of its shares to a consortium of international investors.<br>**Stage 2: 1989**<br>SSAB: 47.8% GOS. GOS and the investors sold part of their remaining shares. Shortly afterwards SSAB's shares were introduced on the stock exchange.<br>**Stage 3: 1992:**<br>GOS floated bonds to which were attached warrants to purchase the remaining GOS shares.<br>By **Feb. 1994** all warrants were exercised<br>SSAB now held by more than 30,000 small shareholders. | gamma methodology | Final determination 7.04.1997<br>Never challenged in the US Courts. |
| **8** | ***Cut-to-Length Carbon Steel Plate from UK***<br>C-412-815<br>British Steel plc | **sunset review**<br>7.4.00 – CVD: 12.00%<br>(original duty imposed 1993) | Government equity infusions<br>Cancelled NLF debt<br>(accounts for bulk of CVD rate) | Pre-1988, British Steel Corporation (BSC) 100%.owned by UK Gov't, no shares.<br>26 July 1988: a Public Limited Company named British Steel plc (BS plc) was incorporated. UK Gov't: 100% shares<br>23 Nov. 1988: public offering of 2 billion ordinary shares | gamma methodology | Final determination on 7.4.00. |
| **9** | ***Certain Corrosion-Resistant Carbon Steel Plate Products from France***<br>C-427-810<br>Usinor | **sunset review**<br>6.4.00 – CVD: 15.13%<br>(original duty imposed 1993) | Equity infusions as a result of the conversion of Loans with Special Characteristics Shareholders and Steel Intervention Fund bonds into shares of common stock; shareholders advances<br><br>(accounts for bulk of CVD rate) | see supra Usinor history. | gamma methodology | Final determination on 7.4.00. |

| Case No. | Product/Company | Type of investigation/Date/ rate of imposition of CVD | Alleged countervailable subsidies (contributions made prior to privatization) | Privatization | Methodology | Status of the case |
|---|---|---|---|---|---|---|
| **10** | ***Cut-to-Length Carbon Steel Plate from Germany***<br>C-428-817<br>Dillinger Huttenwerke Saarstahl | **sunset review**<br>2.8.00- CVD: 14.84%<br>(original duty imposed 1993) | Structural improvement aids<br>Subsidies in form of debt relief provided to DHS in connection with its creation in 1989<br>(accounts for full amount of CVD rate) | Pre-1989:<br>Saarstahl Völkingen GmbH: 76 % by Gov't of Saarland (a German lander) and 24 % by, Arbed-Finanz Deutschland GmbH, a subsidiary of Arbed Luxembourg<br>15 June 1989: merger of Saarstahl Völkingen GmbH with Dillinger (owned by Usinor Sacilor) into a holding company (DHS). After the merger<br>DHS: 70% Usinor Sacilor, 27.5% Saarland, 2.5 %<br>On 30 June 1989, DHS transferred the assets and liabilities of the former Saarstahl Völkingen GmbH into the newly created subsidiary, Saarstahl. Thus DHS became a holding company with two operating subsidiaries, Saarstahl and Dillinger.<br>1993 –DHS sold its 100% interest in Saarstahl to Gov't of Saarland.<br>1997 – Gov't of Saarland transfers majority of shareholdings in Saarstahl to third parties pursuant to plan of reorganization. | "***gamma***" methodology in original investigation | Appeal before the CIT. Judgment rendered on 28 February 2002 finding various aspects of the US Department of Commerce's sunset practice inconsistent with the US statute. (Exhibit EC-34). |
| **11** | ***Cut-to-Length Carbon Steel Plate from Spain***<br>C-469-804<br>Aceralia | **sunset review**<br>7.4.2000 – CVD: 36.86%<br>(original duty imposed 1993) | law 60/78 (loans and infusions)<br>Royal decree 878/81 (Loans, grants and infusions)<br>1984 council of ministers meeting (infusions, loan guarantees and grants)<br>1987 government delegated commission on economic affairs (loans, grants and retirement benefits) (accounts for bulk of CVD) | Three phase privatization:<br>CSI – Corporacion Siderurgica (predecessor of Aceralie)<br>**Phase one** Arbed purchased 35% of shares and became the "*technological partner*" (1 Aug. 1997)<br>**Phase two:** Corporacion JM. Aristrain purchased 11% and Gestamp SL purchased 1% and became "*supporting partners*" (17 Oct. 1997)<br>**Phase three**: the remaining shares were sold by an international subscription open to private investors. (March 1998). | gamma methodology | The US Department of Commerce published its final determination on 7.4.00. |

| Case No. | Product/Company | Type of investigation/Date/ rate of imposition of CVD | Alleged countervailable subsidies (contributions made prior to privatization) | Privatization | Methodology | Status of the case |
|---|---|---|---|---|---|---|
| **12** | ***Grain-Oriented Electrical Steel from Italy***<br>C-475-812<br>Acciai Speciali Terni | **administrative review**<br>7.7.00 – CVD: 14.25%<br>**sunset review**<br>1.11.00 – CVD: maintenance of original CVD imposed 1994 | Equity infusions to Terni, TAS and ILVA<br>Benefits from 1988-90 restructuring of Finsider<br>Debt forgiveness of ILVA to AST<br>Pre-privatization benefits under law 451/94 for ILVA Residua (accounts for 11.50 per cent of CVD) | Acciai Speciali Terni privatized Dec 1994 (see Case No. 4 supra). | same person methodology | On appeal before US CIT. |