WORLD TRADE ORGANIZATION

WT/DS213/AB/R
28 November 2002

(02-6520)

Original: English

UNITED STATES – COUNTERVAILING DUTIES ON CERTAIN CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM GERMANY

AB-2002-4

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Canada – Patent Term	Appellate Body Report, *Canada – Term of Patent Protection*, WT/DS170/AB/R, adopted 12 October 2000
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
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US – DRAMS	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Lead and Bismuth II	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2601
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WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany

United States – *Appellant/Appellee*
European Communities – *Appellant/Appellee*

Japan – *Third Participant*
Norway – *Third Participant*

AB-2002-4

Present:

Taniguchi, Presiding Member
Ganesan, Member
Sacerdoti, Member

I. Introduction

1. The United States and the European Communities each appeal certain issues of law and legal interpretations in the Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (the "Panel Report").[1] The Panel was established to consider a complaint by the European Communities against the United States regarding the continuation of countervailing duties on certain corrosion-resistant carbon steel flat products from Germany ("carbon steel") following the conduct of a five-year, or "sunset", review of those duties.

2. On 17 August 1993, the United States imposed definitive countervailing duties on carbon steel. The imposition of the duties was based on an investigation by the United States Department of Commerce ("USDOC") in which it determined that certain German producers of carbon steel benefitted, at a total rate of 0.60 percent *ad valorem*, from five countervailable subsidy programs.[2] On 1 September 1999, USDOC gave notice of the automatic initiation of a sunset review of these countervailing duties.[3] In the course of this review, USDOC determined that revocation of the countervailing duties "would be likely to lead to continuation or recurrence of a countervailable subsidy" with respect to carbon steel and transmitted this determination to the United States

[1]WT/DS213/R, 3 July 2002, WT/DS213/R/Corr.1, 12 August 2002.

[2]"Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Germany", United States Federal Register, 9 July 1993 (Volume 58, Number 130), p. 37315; Exhibit EC-2 submitted by the European Communities to the Panel; and "Countervailing Duty Orders and Amendment to Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Germany", United States Federal Register, 17 August 1993 (Volume 58, Number 157), p. 43756; Exhibit EC-4 submitted by the European Communities to the Panel.

[3]"Initiation of Five-Year ('Sunset') Reviews of Anti-Dumping and Countervailing Duty Orders or Investigations of Carbon Steel Plates and Flat Products", United States Federal Register, 1 September 1999 (Volume 64, Number 169), p. 47767; Exhibit EC-5 submitted by the European Communities to the Panel.

International Trade Commission ("USITC").[4] Based on its finding that two of the original five subsidy programs had been terminated, the likely rate of such continuation or recurrence of a countervailable subsidy was determined by USDOC to be 0.54 percent *ad valorem.*[5] Following an affirmative determination of the likelihood of continuation or recurrence of injury by USITC, USDOC published a notice of the continuation of the countervailing duties on 15 December 2000.[6]

3. The European Communities argued before the Panel that United States law relating to sunset reviews, as such, and as applied in the sunset review of countervailing duties on carbon steel in this case, was inconsistent with United States' obligations under the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"). The European Communities argued that the United States acted contrary to Article 21.3 of the *SCM Agreement* by automatically self-initiating sunset reviews and by failing to apply in sunset reviews the *de minimis* standard of 1 percent set out in Article 11.9 of that Agreement.

4. During the course of the Panel proceedings, the Panel was called upon to determine whether three further matters were within its terms of reference. First, the Panel granted a request by the United States for a preliminary ruling that the European Communities' claim relating to the United States' expedited sunset review procedure was outside the Panel's terms of reference.[7] The other two challenges to the terms of reference arose in connection with two questions put by the Panel to the European Communities following the second meeting of the parties with the Panel. In response to these questions, the European Communities responded affirmatively to the Panel that it was making claims with respect to United States law, as such, relating to the determination to be made in a sunset review[8], and United States law, as such, dealing with the opportunity to present evidence in a sunset review.[9] On 14 May 2002, the Panel issued its interim report to the parties. In its interim report, the Panel made findings on, *inter alia*, the claims asserted by the European Communities in its responses to the questions from the Panel.

5. On 23 May 2002, the United States submitted a request for interim review, *inter alia*, objecting to the Panel's interim findings with regard to United States law, as such, relating to the

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[4]Panel Report, para. 2.1.

[5]*Ibid*.

[6]"Continuation of Antidumping and Countervailing Duty Orders on Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, South Korea, Mexico, Poland, Romania, Spain, Sweden, Taiwan and the United Kingdom", United States Federal Register, 15 December 2000 (Volume 65, Number 242), p. 78469; Exhibit EC-12 submitted by the European Communities to the Panel.

[7]Panel Report, paras. 8.5-8.12.

[8]See, European Communities' response to Question 51 posed by the Panel; Panel Report, para. 5.517.

[9]See, European Communities' response to Question 54 posed by the Panel; Panel Report, para. 5.522.

determination to be made in a sunset review[10], and with regard to the consistency of United States law, as such, and as applied, with the obligation to provide ample opportunity to submit evidence in a sunset review[11], as outside the terms of reference. The Panel rejected the first of these objections.[12] The Panel found, however, that the consistency of United States law, as such, and as applied, with the obligation to provide ample opportunity to submit evidence in a sunset review was outside its terms of reference.[13] As a consequence, certain reasoning and findings with respect to this claim, that appeared in the interim report, were not included in the Panel Report.

6. In the Panel Report, circulated to Members of the World Trade Organization ("WTO") on 3 July 2002, the Panel found that:

> (a) US CVD law and the accompanying regulations are consistent with Article 21, paragraphs 1 and 3, and Article 10 of the SCM Agreement in respect of the application of evidentiary standards to the self-initiation of sunset reviews;
>
> (b) US CVD law and the accompanying regulations are inconsistent with Article 21.3 of the SCM Agreement in respect of the application of a 0.5 per cent de minimis standard to sunset reviews, and therefore violate Article 32.5 of the SCM Agreement and, consequently, also Article XVI:4 of the WTO Agreement;
>
> (c) the United States, in applying a 0.5 per cent de minimis standard to the instant sunset review, acted in violation of Article 21.3 of the SCM Agreement;
>
> (d) US CVD law and the accompanying regulations and statement of policy practices are consistent with Article 21.3 of the SCM Agreement in respect of the obligation to determine the likelihood of continuation or recurrence of subsidisation in sunset reviews; and

[10]Panel Report, para. 7.20.

[11]*Ibid*., para. 7.24.

[12]*Ibid*., paras. 7.21-7.23.

[13]*Ibid*., paras. 8.137 and 8.145.

> (e) the United States, in failing to determine properly the likelihood of continuation or recurrence of subsidisation in the sunset review on carbon steel, acted in violation of Article 21.3 of the SCM Agreement.[14] (original underlining)

7. The Panel accordingly recommended that:

> … the Dispute Settlement Body request the United States to bring its measures … into conformity with its obligations under the WTO Agreement.[15]

8. On 30 August 2002, the United States notified the Dispute Settlement Body ("DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 9 September 2002, the United States filed its appellant's submission.[16] On 16 September 2002, the European Communities filed an other appellant's submission.[17] On 24 September 2002, the European Communities and the United States each filed an appellee's submission.[18] On the same day, Japan and Norway each filed third participant's submissions.[19]

9. The oral hearing was held on 11 October 2002. The participants and third participants each presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

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[14]Panel Report, para. 9.1. One member of the Panel dissented from the findings in paragraphs 9.1(b) and 9.1(c). That member found, at paragraph 10.15 of the Panel Report, that:

> (a) US CVD law and the accompanying regulations are consistent with Article 21.3 of the SCM Agreement in respect of the application of a 0.5 per cent de minimis standard to sunset reviews; and
>
> (b) The United States, in applying a 0.5 per cent de minimis standard to the instant sunset review, did not act in violation of Article 21.3 of the SCM Agreement. (original underlining)

[15]Panel Report, para. 9.2.

[16]Pursuant to Rule 21 of the *Working Procedures*.

[17]Pursuant to Rule 23 of the *Working Procedures*.

[18]Pursuant to Rule 22 of the *Working Procedures*.

[19]Pursuant to Rule 24 of the *Working Procedures*.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by the United States – Appellant*

1. Article 21.3 of the *SCM Agreement* – Applicability of a *De Minimis* Standard in Sunset Reviews

10. The United States appeals the findings by the Panel that United States law, as such, and, as applied in the sunset review with respect to carbon steel, is inconsistent with United States' WTO obligations because it applies a *de minimis* standard of 0.5 percent. Both these findings flow from the Panel's erroneous conclusion that the less than 1 percent *de minimis* standard applicable to countervailing duty investigations in Article 11.9 of the *SCM Agreement* is implied in Article 21.3 of the Agreement as well. The United States submits that, by implying into Article 21.3 words that are not there, the Panel failed to act in accordance with customary rules of treaty interpretation.

11. The United States emphasizes that the text of Article 21.3 does not contain any *de minimis* standard for sunset reviews. The Panel failed to give meaning to the express absence of any textual reference to a *de minimis* requirement in Article 21.3, and improperly relied upon the Appellate Body Report in *Canada – Autos* as a basis for finding that textual silence in this case was not dispositive.

12. The United States refers to Article 21 of the *SCM Agreement* as immediate context to Article 21.3. Article 21 contains no cross-reference to Article 11.9, yet does contain specific cross-references to other provisions. In particular, Article 21.4 expressly makes the evidentiary and procedural provisions of Article 12 applicable to Article 21 reviews, while Article 21.5 expressly makes the provisions of Article 21 applicable to Article 18 undertakings. These cross-references demonstrate that where the drafters wanted the obligations set forth in one provision to apply in another context, they did so expressly. In this respect, the United States notes that the dissenting panelist found the omission of any express link between Article 21.3 and Article 11.9 to be dispositive on the issue of whether the Article 11.9 *de minimis* standard is applicable to sunset review.

13. The United States also disputes the Panel's analysis and understanding of the *de minimis* standard set out in Article 11.9 of the *SCM Agreement*. The United States points to the decision of the panel in *US – DRAMS*[20] and argues that the Panel in this dispute should have interpreted Article 11.9 in the same way as that panel interpreted Article 5.8 of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-*

[20]Panel Report, *US – DRAMS*, para. 6.87.

Dumping Agreement"). That panel found that the *de minimis* standard expressed in Article 5.8 of the *Anti-Dumping Agreement* does not apply beyond the investigative stage of anti-dumping proceedings.

14. The United States objects to the Panel's reliance upon a 1987 Note by the Secretariat in order to find that the "sole or principal rationale for the de minimis standard set out in Article 11.9 is that a de minimis subsidy is considered to be non-injurious."[21] The United States further submits that recourse to the 1987 Note was inconsistent with the rules of treaty interpretation embodied in the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").[22] That Note sets out two rationales for a *de minimis* concept, but all that the negotiating history demonstrates is that there was no consensus or single reason why the drafters established a *de minimis* standard for investigations. Finally, the United States contends that it is difficult to reconcile the Panel's finding that the *de minimis* standard relates to the question of whether there is injury with the fact that the *SCM Agreement* has not one, but three different, *de minimis* standards, depending on the level of economic development of the exporting country. The United States argues that it is difficult to see how injury from subsidized imports depends upon the level of economic development in the exporting Member.

2. Article 6.2 of the DSU – Whether the Panel's Terms of Reference Included a Claim Against United States Law, As Such, Regarding the Determination to be Made in a Sunset Review

15. The United States appeals the refusal by the Panel to dismiss the European Communities' claim regarding the consistency of United States law, as such, with the obligation to determine the likelihood of continuation or recurrence of subsidization in a sunset review established by Article 21.3 of the *SCM Agreement*. The United States argues that the European Communities' panel request failed to comply with the requirements of Article 6.2 of the DSU. The United States' appeal is *conditional* upon the Appellate Body first *reversing* the Panel's finding that United States law, as such, is not inconsistent with the obligation to determine the likelihood of continuation or recurrence of subsidization in sunset reviews. However, in response to questioning at the oral hearing, the United States indicated that this condition need not be fulfilled for the Appellate Body to consider this issue.

16. According to the United States, its written submissions to the Panel demonstrate its understanding that the European Communities' challenge to United States laws, *as such*, was limited to two issues only, namely, the automatic self-initiation of sunset reviews and the *de minimis* standard employed in sunset reviews. When, following the second meeting with the Panel, the

[21]Panel Report, para. 8.61.

[22]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

European Communities purported to have included this additional challenge to United States law in its panel request, the United States promptly objected.

17. The United States insists that it was prejudiced by the European Communities' failure to comply with Article 6.2. The United States points out that, because it was unaware of any such claim until after the second meeting, its submissions to the Panel did not contain any arguments regarding the consistency of United States law, as such, with the obligation to determine the likelihood of continuation or recurrence of subsidization in sunset reviews. The United States adds that this prejudice was not mitigated by the fact that the Panel ruled in favour of the United States on the merits of this particular claim.

B. *Arguments of the European Communities – Appellee*

1. Article 21.3 of the *SCM Agreement* – Applicability of a *De Minimis* Standard in Sunset Reviews

18. The European Communities requests the Appellate Body to uphold the Panel's findings with respect to the application of the *de minimis* standard under Article 21.3. The European Communities accepts that Article 21.3 does not contain any explicit textual reference to the *de minimis* standard established in Article 11.9, and that nothing in the text of Article 11.9 provides for its *de minimis* standard to be implied in Article 21.3. However, the European Communities notes that the text of Article 21.3 requires the domestic authorities to engage in a review to determine that the expiry of the countervailing duty would be likely to lead to "continuation or recurrence of subsidization and injury". These concepts are defined elsewhere in the *SCM Agreement* for the Agreement as a whole and are not repeated each time for individual articles. In particular, the reference to "continuation or recurrence" makes Article 11.9 and the original investigation relevant and applicable. Article 11.9 prevents the authorities from making a finding on subsidization and injury when the amount of subsidy is found in the investigation to be less than 1 percent *ad valorem.* Article 15.3 of the *SCM Agreement*, dealing with the determination of injury, also refers explicitly to Article 11.9 for the purpose of establishing the *de minimis* rule. According to the European Communities, these provisions demonstrate that subsidization of less than 1 percent is irrebuttably presumed not to cause injury. If a *de minimis* subsidization cannot cause injury in an original investigation, it must follow that it also cannot cause injury in a sunset review.

19. The European Communities argues, referring in particular to Article 21.2 of the *SCM Agreement*, that the object and purpose of the requirement to demonstrate subsidization and injury in a sunset review must be the same as when subsidization and injury were determined in the original investigation. It follows that, if the *de minimis* rule is applicable to original investigations, it must

also be equally applicable to reviews generally and all the more so in the context of time-bound sunset reviews under Article 21.3. This analysis is further supported by one of the principal objectives of the *SCM Agreement* identified by the Panel, namely, the establishment of a "framework within which to offset injurious subsidisation".[23] As a result, the absence of cross-references in both Article 11.9 and Article 21.3 is explained by the drafters' belief that it is "obvious" that the same threshold of injurious subsidization should apply to investigations and sunset reviews.[24] The European Communities also defends, as justified under Article 32 of the *Vienna Convention*, the Panel's reference to the negotiating history of the *SCM Agreement*. In particular, the European Communities underlines that the interpretation of Article 21.3 proposed by the United States "produces a result which is 'manifestly absurd and unreasonable' with respect to the basic obligation".[25]

20. The European Communities emphasizes that acceptance of the United States' position would allow countervailing duties based on a *de minimis* level of subsidization to remain *ad aeternum*. This would violate the text of Articles 21.3 and 21.1 of the *SCM Agreement* because it would allow the continuation of countervailing duties in blocks of five more years without there being any real need to counter subsidization which is likely to cause injury.

2. Article 6.2 of the DSU – Whether the Panel's Terms of Reference Included a Claim Against United States Law, As Such, Regarding the Determination to be Made in a Sunset Review

21. The European Communities submits that the matter of the consistency of United States law, as such, relating to the determination to be made in a sunset review with its obligations under Article 21.3 of the *SCM Agreement*, was within the Panel's terms of reference. The request for establishment of a panel explained the history and basic framework of the relevant United States laws, regulations and practices, and mentioned Article 21 of the *SCM Agreement*. The request identified the relevant measure, the *SCM Agreement* provisions claimed to have been violated, and the grounds on which this claim is based. The European Communities argues that it further developed this claim and all supporting arguments in each of its written and oral submissions to the Panel, and that the United States responded to such claims and arguments in its pleadings before the Panel. The European Communities adds that the late stage of the Panel proceedings at which the objection was raised indicates that the United States was not prejudiced by any lack of clarity in the panel request.

[23]Panel Report, para. 8.66. (original underlining)

[24]European Communities' appellee's submission, para. 29.

[25]*Ibid*., para. 35.

C. *Claims of Error by the European Communities – Appellant*

1. Article 21.3 of the *SCM Agreement* – Self-Initiation of a Sunset Review by the Authorities

22. The European Communities argues that the Panel erred in its interpretation of Article 21.3 with respect to the evidentiary standards applicable to the self-initiation of sunset reviews and requests the Appellate Body to find that the standards specified in Article 11.6 of the *SCM Agreement* apply equally to the self-initiation by authorities of sunset reviews. The European Communities contends that the Panel conducted only a partial interpretation of the text of Article 21.3, but failed to analyze the context of Article 21.3 and the object and purpose of the *SCM Agreement.*

23. In the view of the European Communities, no provision in the *SCM Agreement* can be read in isolation, and all provisions are potentially applicable, *mutatis mutandis*, to Article 21.3, to the extent that they are relevant to sunset reviews and that their application does not create a situation of conflict or is not specifically excluded. This is true in particular within Part V of the *SCM Agreement*. The European Communities thus disputes the significance of the omission from Article 21.3 of any explicit reference to the evidentiary standards for the self-initiation of sunset reviews. No such reference is necessary because it is "obvious from the overall context and architecture of Part V of the *SCM Agreement*" that such evidentiary standards apply to the self-initiation of sunset reviews as well.[26]

24. The European Communities explains that, notwithstanding the lack of any explicit cross-reference to the evidentiary standard set out in Article 11.6 of the *SCM Agreement*, Article 21.3 requires domestic authorities that engage in a review to "determine" that the expiry of the countervailing duty would be likely to lead to continuation or recurrence of subsidization. The verb "to determine" means to find out, to ascertain, to establish, or to carry out all those activities necessary to reach a reasoned decision. Furthermore, Articles 11.2 and 11.6 prescribe the same evidentiary burden for both the domestic industry and the domestic authorities to initiate an investigation. It is difficult therefore to understand why, in a sunset review, the same evidentiary standard as set out in Article 11.2 applies only to initiation by the domestic industry, but not to self-initiation by the authorities.

25. The European Communities argues that the Panel also failed to consider Articles 22.1 and 22.7 of the *SCM Agreement*. It is clear from Article 22.7 that the same procedural guarantees that apply to the initiation of an original investigation also apply to the initiation of a sunset review.

[26]European Communities' other appellant's submission, para. 25.

In particular, when read in conjunction with Article 22.1, Article 22.7 clearly requires domestic authorities to have "sufficient evidence" before self-initiating sunset reviews.

26. Lastly, the European Communities questions certain reasoning used by the Panel to support its finding that there is no evidentiary standard applicable to the self-initiation by the authorities of a sunset review. In particular, the European Communities questions the Panel's reliance on its own assessment that initiation is "merely the beginning of a process leading to a determination as to whether or not subsidisation and injury are likely to continue or recur."[27] The European Communities also takes issue with the Panel's reliance on concepts such as the "chilling effect [of countervailing duty actions] on trade in the product concerned"[28] and "trade harassment"[29], in order to distinguish the initiation of investigations from the regime applicable to sunset reviews. Such concepts are not found in the *SCM Agreement* and should not have formed a basis for the Panel's interpretation of Article 21.3.

2. Article 11 of the DSU and Article 21.3 of the *SCM Agreement* – United States Law, As Such, Regarding the Determination to be Made in a Sunset Review

27. The European Communities requests the Appellate Body to reverse the Panel's finding that United States law, as such, regarding the determination to be made in a sunset review, is consistent with Article 21.3 because no provision of United States law mandates WTO-inconsistent behaviour. In addition to its appeal regarding Article 21.3, the European Communities submits that in considering the relevant United States law, as such, the Panel failed to make an "objective assessment" of the matter before it, thus also violating its duty under Article 11 of the DSU.

28. The European Communities recalls that the Panel expressed doubts with respect to the conformity of United States law with United States' obligations regarding the determination to be made in a sunset review and considered that it did not have any information to resolve these doubts.[30] Yet the Panel did nothing to obtain such information. The European Communities argues that, in "wilfully" failing to analyze United States law[31], the Panel exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence. The Panel should have gathered further

[27]Panel Report, para. 8.42.

[28]*Ibid*., para. 8.35.

[29]*Ibid*., para. 8.34.

[30]European Communities' other appellant's submission, paras. 43 and 45, referring to the Panel Report, para. 8.105.

[31]European Communities' other appellant's submission, para. 46.

information and should have considered United States practice to resolve its doubts with respect to United States law.

29. The European Communities argues that a proper analysis of United States law and practice reveals that, in a sunset review, USDOC never considers any changes or terminations of subsidy programs, unless such changes or terminations were found by it in a previous review. This refusal to conduct a new investigation in a sunset review violates the requirements of Article 21.3 of the *SCM Agreement* because it contravenes the duty placed on domestic authorities to "determine" the likelihood of continuation or recurrence of a subsidy, and shifts the burden of proving a change in circumstances to the foreign exporter.

30. The European Communities also challenges the Panel's analysis of whether the law in question was mandatory or discretionary. According to the European Communities, the Panel found that, although the law allows WTO-inconsistent determinations, the law, as such, was not inconsistent because one interpretation could lead to WTO-consistent behaviour. The European Communities claims that upholding this Panel finding "would amount to a mockery of justice"[32], since the Panel in effect confirmed that USDOC's interpretation of United States law is WTO-inconsistent, but found that the law itself is not. The European Communities urges the Appellate Body to find that United States law "mandates" outcomes that are inconsistent with Article 21.3 of the *SCM Agreement*, and consequently that the law also violates Article 32.5 of the *SCM Agreement* and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*").

3. Articles 6.2 and 11 of the DSU – The Opportunity to Submit Evidence in a Sunset Review

31. The European Communities appeals the Panel's finding that the European Communities' claims that United States law was inconsistent with the obligation in Article 12.1 of the *SCM Agreement* to provide "ample opportunity to present … evidence" were outside the Panel's terms of reference. The European Communities requests the Appellate Body to reverse the Panel's finding on this issue and either to reinstate and modify the substantive findings made by the Panel in its interim report, or to itself find the relevant United States law, as such, and as applied in this case, to be inconsistent with the obligation to afford ample opportunity to submit evidence in a sunset review.

32. The European Communities argues that the request for the establishment of a panel was sufficiently precise on this matter to comply with the requirements of Article 6.2 of the DSU. The panel request mentioned Article 21 of the *SCM Agreement* in its totality, and paragraph 4 of Article 21 applies Article 12 to sunset reviews. Moreover, the request identified the relevant United

[32]European Communities' other appellant's submission, para. 55.

States laws and regulations. Before the Panel, the European Communities made arguments with regard to Articles 21.3, 21.4, as well as Article 12 of the *SCM Agreement.* The United States did not object to the claims regarding the opportunity to submit evidence until late in the proceedings, which suggests that the United States suffered no prejudice on account of any lack of clarity in the panel request.

33. The European Communities further contends that the Panel acted inconsistently with Article 11 of the DSU in its interpretation of Article 6.2. The Panel could not, on the basis of the request for the establishment of the Panel and the first written submission of the European Communities, objectively have concluded that the European Communities' claims were not sufficiently clear, nor that the United States was not aware that such claims were being made.

D. *Arguments of the United States – Appellee*

1. Article 21.3 of the *SCM Agreement* – Self-Initiation of a Sunset Review by the Authorities

34. The United States submits that the Panel's finding that no evidentiary standards are applicable to the self-initiation of sunset reviews under Article 21.3 of the *SCM Agreement* is correct and should be affirmed. The United States argues that, under Article 21.3, the right of the authorities to initiate a sunset review on their own initiative is unqualified. The use of disjunctive language in Article 21.3 is unambiguous. Under the customary rules of treaty interpretation of public international law, the provision must be read according to its ordinary meaning, namely that the authorities may either self-initiate a sunset review, or, initiate a sunset review in response to a duly substantiated request from the domestic industry. The fact that the text of Article 21.3 contains no reference to evidentiary requirements for self-initiation of sunset reviews must have some meaning. The United States asserts that the ordinary meaning of the absence of such a reference is simply that there is no requirement to apply the evidentiary requirements in Article 11.6 of the *SCM Agreement* (or any other evidentiary requirement) when authorities initiate sunset reviews on their own initiative.

35. The United States argues that analysis of the terms of Article 21.3 in their context and in light of the object and purpose of the *SCM Agreement* leads to the same conclusion. Article 21 contains no reference to Article 11.6, yet it does contain specific references to other provisions of the Agreement. The *SCM Agreement*, in general, also contains multiple instances where obligations set forth in one provision are made applicable in another context by means of an express cross-reference or by means of an explicit statement on the scope of application of the particular provision. The omission of any express link between Article 21.3 and Article 11.6 means that the Members chose not to apply the evidentiary requirements of Article 11.6 to Article 21.3. The United States argues that

reading into Article 21.3 a cross-reference to Article 11.6 that is plainly not there would render these cross-references redundant.

36. The United States submits that nothing in the text of Article 11.6 supports the European Communities' assertion that the evidentiary requirements of that provision apply when authorities self-initiate sunset reviews under Article 21.3. To the contrary, the text of Article 11.6 unequivocally states that those evidentiary requirements are applicable when authorities decide to self-initiate an *investigation*.

37. In the view of the United States, because the functions of original investigations and sunset reviews are different, it is not unreasonable to find that the initiation requirements for investigations and sunset reviews are different. The purpose of an investigation is to determine whether the conditions necessary for the imposition of a countervailing duty currently exist. The purpose of a sunset review is to determine whether the conditions necessary for continued imposition of a countervailing duty exist. In contrast to the retrospective focus of an investigation, a sunset review is required to focus on likely future behaviour.

2. Article 11 of the DSU and Article 21.3 of the *SCM Agreement* – United States Law, As Such, Regarding the Determination to be Made in a Sunset Review

38. The United States argues that the Panel properly found that United States law, as such, is consistent with United States' obligations relating to the determination to be made in a sunset review. The United States dismisses the Panel's expression of doubt with respect to the conformity of one particular regulatory provision with such obligations[33] on the ground that the Panel drew an incorrect inference as to how that provision operates.

39. The United States submits that the European Communities misstates the standard for distinguishing between mandatory and discretionary legislation. The fact that a particular application of a law is found to be WTO-inconsistent does not mean that the law as such is automatically WTO-inconsistent. The European Communities has failed to identify and articulate how any provisions of the United States statute or regulations require USDOC to act inconsistently with obligations relating to the likelihood determination or preclude USDOC from acting consistently with such obligations. Nor has the European Communities articulated how particular text in the Statement of Administrative Action (the "SAA") or the Sunset Policy Bulletin[34] requires USDOC to interpret the statute or the

[33]Panel Report, para. 8.105.

[34]Policy Bulletin, "Policies Regarding the Conduct of Five-Year ('Sunset') Reviews of Antidumping and Countervailing Duty Orders", United States Federal Register, 16 April 1998 (Volume 63, Number 73), p. 18871.

regulations in a WTO-inconsistent manner in respect of the determination to be made in a sunset review.

40. As for the European Communities' argument that the SAA, in conjunction with the Sunset Policy Bulletin, establishes a practice which demonstrates that the United States statute violates Article 21.3, the United States puts forward two arguments. First, the European Communities misstates United States practice by suggesting that USDOC does not consider any changes or terminations of subsidy programs, unless such changes or terminations were found in a previous review of the order. In fact, United States law requires USDOC to consider whether any change to a subsidy program has occurred that is likely to affect the net countervailable subsidy. Second, noting, *inter alia*, the ruling of the Appellate Body in *US – Hot-Rolled Steel*[35], the United States argues that United States practice, even if it were WTO-inconsistent, could not render the United States statute and regulations, as such, WTO-inconsistent.

3. Articles 6.2 and 11 of the DSU – The Opportunity to Submit Evidence in a Sunset Review

41. The United States submits that the Panel properly found that the European Communities' claims regarding the consistency of United States law, as such, and as applied, in respect of the opportunity to submit evidence in a sunset review, were not within its terms of reference. As the Panel found, the European Communities' panel request failed to identify the opportunity to submit evidence in a sunset review as a specific measure at issue. Moreover, the panel request also failed to identify the provisions of the *SCM Agreement* allegedly violated and failed to provide a brief summary of the legal basis of the complaint. Therefore, even if the Appellate Body should reverse the Panel's finding that the European Communities' panel request failed to identify the specific measure at issue, the United States urges the Appellate Body to affirm the Panel's finding that these matters were beyond the Panel's terms of reference on these additional grounds.

42. On the issue of whether the Appellate Body may reinstate or modify the Panel's interim findings, the United States submits that the interim findings have no legal status and could not, therefore, be reinstated.

[35]Appellate Body Report, *US – Hot-Rolled Steel*, para. 200.

E. *Arguments of the Third Participants*

1. Japan

(a) Article 21.3 of the *SCM Agreement* – Applicability of a *De Minimis* Standard in Sunset Reviews

43. Japan submits that the *de minimis* standard under Article 11.9 of the *SCM Agreement* is applicable to sunset reviews as well, and supports the Panel's finding in this regard. Although Article 21.3 does not itself define the terms "subsidization" and "injury", the meaning of these terms can be determined from Articles 1, 14 and 15 of the *SCM Agreement*. A proper interpretation of Article 15 requires that only those subsidies that are more than *de minimis* be considered injurious and thus subject to countervailing duties. Article 11.9 supports this view as its second sentence refers not to "investigations", but rather to the broader concept of "cases" which must be read to include sunset reviews. Japan finds further support for its view in the language of Articles 21.1, 22 and 27 of the *SCM Agreement*.

44. Japan adds that the Panel's interpretation is consistent with the object and purpose of Article 21.3. In Japan's view, sunset reviews and original investigations both decide whether countervailing duties should apply. Both determinations should therefore apply the *de minimis* rule of Article 11.9 to determine the existence of a countervailable subsidy. Lastly, with respect to the reasoning of the panel in *US – DRAMS*, Japan argues that duty assessment reviews, which were at issue in that case, differ fundamentally from sunset reviews. Japan submits that the logic of the *US – DRAMS* panel supports the Panel's findings in the present proceedings.

(b) Article 21.3 of the *SCM Agreement* – Self-Initiation of a Sunset Review by the Authorities

45. Japan argues that the authorities must be in possession of "sufficient evidence" in order to self-initiate sunset reviews under Article 21.3 of the *SCM Agreement*. Japan submits that, in finding that authorities may automatically self-initiate sunset reviews without *any* evidentiary basis, the Panel misread the text of Article 21.3. The absence of even a scintilla of evidence can never be considered "sufficient". Investigating authorities must have some factual basis in order to initiate a review. Japan points to Article 22 of the *SCM Agreement* as explicitly requiring authorities to satisfy themselves that there is "sufficient evidence" to justify the initiation of sunset reviews, and faults the Panel for not examining this provision. Japan emphasizes that Article 22.7 specifically states that Article 22.1 applies, *mutatis mutandis*, to sunset reviews under Article 21.3.

46. Japan also argues that Article 11.6 of the *SCM Agreement* requires that authorities have "sufficient evidence" to initiate sunset reviews under Article 21.3. Japan submits that Article 11 specifically applies to sunset reviews due to Article 22.7, which requires the *mutatis mutandis* application of Article 22.1 in such reviews. Japan argues that the Panel improperly focused its interpretation on Article 11.6 in isolation, without examining its relationship to Articles 22.1 and 22.7.

47. Japan submits that the Panel failed to focus on the purpose of initiation. In Japan's view, Article 21.3 contemplates that some countervailing duties may terminate without review. The duty may be continued beyond five years only when this is necessary to counteract injurious subsidization. Under Article 11.6, authorities must have sufficient evidence to self-initiate an original investigation. It makes no sense, in Japan's view, for the *SCM Agreement* to limit the discretion to self-initiate in some instances but allow unfettered discretion in other instances.

48. Japan adds that the *de minimis* rule under Article 11.9, and the obligation under Article 21.1 to continue the imposition of countervailing duties "only as long as" necessary to counteract injurious subsidization, also support an interpretation of Article 21.3 that would require authorities to be in possession of sufficient evidence to initiate sunset reviews under that provision.

2. Norway

(a) Article 21.3 of the *SCM Agreement* – Applicability of a *De Minimis* Standard in Sunset Reviews

49. Norway argues that the Panel correctly found that the *de minimis* requirement of Article 11.9 also applies to sunset reviews. A proper analysis of the context of Article 21.3 reveals that all provisions of the *SCM Agreement* are applicable, *mutatis mutandis*, to Article 21.3, to the extent that they are relevant to sunset reviews. The immediate context of Article 21.3 is Article 21.1, which establishes that, where subsidization does not cause such injury, the Agreement does not authorize the imposition of countervailing duties. Furthermore, Article 11.9 requires that there shall be immediate termination in cases where the amount of subsidy is *de minimis.* There is no reason why the same *de minimis* standard should not apply to sunset reviews. Sunset reviews and the original investigation share the same object and purpose, and all impositions of countervailing duties must fulfil the same requirements. Finally, Norway attaches no significance to the absence in Article 21 of any mention of, or cross-reference to, Article 11.9. Norway argues that certain basic concepts such as "subsidy" and "injury", once defined, need not be repeated, and that Article 21.3 must be interpreted in good faith.

(b) Article 21.3 of the *SCM Agreement* – Self-Initiation of a Sunset Review by the Authorities

50. Norway argues that the Panel erred in finding that the United States standard of initiation for sunset reviews of countervailing duties is consistent with Articles 21 and 11 of the *SCM Agreement.* Article 11 applies to sunset reviews, as do all the provisions of Part V of the *SCM Agreement*. Norway finds support for this view in the reference made to Article 12 in Article 21.4 of the Agreement. Norway points to the context of Article 21.3, in particular paragraphs 1 and 2 of Article 21; as well as Article 11, which sets out evidentiary requirements for the initiation of countervailing duty investigations. According to Norway, the requirement of sufficient evidence in Article 11 is also clearly set forth in Article 22.1, which is explicitly applied to sunset reviews by virtue of Article 22.7.

(c) Article 11 of the DSU and Article 21.3 of the *SCM Agreement* – United States Law, As Such, Regarding the Determination to be Made in a Sunset Review

51. Norway submits that United States law violates Article 21.3 and 21.1 and the purpose of Part V of the *SCM Agreement* (and consequently also Article 32.5 of the *SCM Agreement* and Article XVI:4 of the *WTO Agreement*) by not requiring a new investigation in sunset reviews. Article 21.3 establishes a positive obligation upon the domestic authorities to "determine" the likelihood of continuation or recurrence of subsidization. This means that Article 21.3 requires the authorities to undertake an unbiased review, independent of the results of the original investigation, in full conformity with all the procedural and substantive requirements for an initial determination. There is no reason to understand the requirement of "determination" of subsidization and injury differently in Article 21.3 as compared to, *inter alia*, Articles 11 and 15. This is also sustained by Article 21.1 and the purpose of Part V of the *SCM Agreement*. United States law limits the ability of the authorities to conduct a proper determination in a sunset review. For this reason, Norway also supports the European Communities' argument that the Panel mischaracterized the distinction made in previous WTO rulings between discretionary and mandatory laws.

III. Issues Raised in this Appeal

52. The following issues are raised in this appeal:

(a) as to the *de minimis* standard in sunset reviews:

whether the Panel erred in finding, in paragraphs 8.80, 8.81, 8.84, 9.1(b) and 9.1(c) of its Report that, in not applying a less than 1 percent *de minimis* standard in sunset reviews, United States law, as such, and as applied in the sunset review of countervailing duties on carbon steel, is inconsistent with Article 21.3 and, therefore, with Article 32.5, of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"), and consequently is also inconsistent with Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*");

(b) as to the evidentiary standards for the self-initiation of sunset reviews:

whether the Panel erred in finding, in paragraphs 8.49 and 9.1(a) of its Report, that United States law, as such, with respect to the automatic self-initiation by authorities of sunset reviews, is consistent with paragraphs 1 and 3 of Article 21, and with Article 10, of the *SCM Agreement*;

(c) as to the determination to be made in sunset reviews:

(i) whether the Panel erred in finding, in paragraph 7.23 of its Report, that the request for the establishment of the Panel satisfied the requirements of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") with respect to a claim regarding the consistency of United States law, as such, with the obligation to determine the likelihood of continuation or recurrence of subsidization in sunset reviews;

(ii) whether the Panel erred in finding, in paragraphs 8.106 and 9.1(d) of its Report, that United States law, as such, is not inconsistent with the obligation in Article 21.3 of the *SCM Agreement* to determine the likelihood of continuation or recurrence of subsidization in sunset reviews; and whether the Panel acted inconsistently with its duties under Article 11 of the DSU in so finding; and

(d) as to the opportunity to present evidence in sunset reviews:

whether the Panel erred in finding, in paragraph 8.145 of its Report, that the request for the establishment of the Panel failed to satisfy the requirements of Article 6.2 of the DSU with respect to claims regarding the consistency of United States law, as such, and as applied in the sunset review of countervailing duties on carbon steel, with obligations regarding the opportunity to present evidence in sunset reviews; and whether the Panel acted inconsistently with its duties under Article 11 of the DSU in so finding.

IV. Background

53. This appeal raises a number of issues relating to Members' obligations under the *SCM Agreement* in the conduct of five-year, or "sunset", reviews of countervailing duties. We consider it useful, at the outset, to set out a brief overview of our understanding of the relevant United States' legal framework relating to sunset reviews, based on the explanations provided by the participants in the course of these proceedings.

54. In United States law, sunset reviews are governed primarily by Sections 751(c) and 752 of the Tariff Act of 1930, as amended (the "Tariff Act"), which correspond, respectively, to Sections 1675(c) and 1675a of Title 19 of the United States Code.[36] Pursuant to Section 751(c)(1), the United States Department of Commerce ("USDOC") is directed, in a sunset review, to "determine, in accordance with Section 752, whether revocation of the countervailing … duty order … would be likely to lead to continuation or recurrence of … a countervailable subsidy".[37] Section 752 sets forth certain "special rules" that apply, *inter alia*, to the determination to be made by USDOC in sunset reviews. Specifically, Section 752(b)(1) provides that USDOC "shall consider":

> (A) the net countervailable subsidy determined in the investigation and subsequent reviews, and
>
> (B) whether any change in the program which gave rise to the net countervailable subsidy described in subparagraph (A) has occurred that is likely to affect that net countervailable subsidy.

[36]As the participants, and the Panel, have referred primarily to Sections 751(c) and 752 of the Tariff Act, rather than to Sections 1675(c) and 1675a of Title 19 of the United States Code, we will also refer to the Tariff Act provisions in this Report. By way of background, Title 19 of the United States Code deals with matters relating to customs duties. Chapter 4 of Title 19 corresponds to the Tariff Act of 1930, as amended. Its Subtitle IV sets forth the legislative rules relating to anti-dumping and countervailing duties.

[37]Under United States law, USDOC is charged with responsibility for determinations relating to subsidization. A separate agency, the United States International Trade Commission, is responsible for injury determinations. None of the issues in this appeal relates to an injury determination.

55. Section 752(b)(2) of the Tariff Act provides that, "if good cause is shown", USDOC shall also consider, in certain circumstances and within specified limits, certain other subsidy programs that are either determined in other investigations or reviews to provide net countervailable subsidies, and certain programs newly alleged to provide countervailable subsidies. Section 752(b)(3) requires USDOC to provide to the United States International Trade Commission ("USITC") "the net countervailable subsidy that is likely to prevail if the order is revoked". It further stipulates that USDOC "shall normally" choose a net countervailable subsidy that was determined in the final determination made in an investigation[38], or in a subsequent review of the countervailing duty.[39]

56. These statutory provisions are implemented through additional provisions contained in the United States Code of Federal Regulations (the "Regulations"). Specifically, Part 351 of Title 19 of the Regulations sets forth regulations relating to anti-dumping and countervailing duties and related procedures as they relate to USDOC, and Section 218 of Part 351 deals with sunset reviews.

57. In their discussion of the framework governing the conduct of sunset reviews, the participants have also referred to the Statement of Administrative Action[40] (the "SAA") and USDOC's "Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders"[41] (the "Sunset Policy Bulletin"). The SAA, which was submitted to the United States Congress along with the proposed Uruguay Round Agreements Act[42] (the "URAA"), "represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements".[43] According to the URAA, the SAA is to be:

[38]Pursuant to Section 705 of the Tariff Act.

[39]Pursuant to Section 751(a) or 751(b)(1) of the Tariff Act. We observe that in addition to sunset reviews, Section 751 of the Tariff Act provides for two other types of reviews, namely "periodic review of amount of duty", and "reviews based on changed circumstances". Periodic reviews, dealt with in Section 751(a), are sometimes referred to as "administrative reviews". Pursuant to Section 751(a), USDOC is required, upon request, to "review and determine the amount of any net countervailable subsidy" once a year, and then publish "the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed." Paragraph (b) of Section 751 deals with "reviews based on changed circumstances", and applies to both USDOC and USITC. When USDOC or USITC receives information, or a request from an interested party, which "shows changed circumstances sufficient to warrant a review", then USDOC or USITC (as the case may be) must conduct a review of the relevant determination or agreement.

[40]H.R. 5110, H.R. Doc. 316, Vol. 1, 103d Congress, 2nd Session, 656 (1994).

[41]Policy Bulletin, United States Federal Register, 16 April 1998 (Volume 63, Number 73), p. 18871.

[42]Public Law 103-465, 108 Stat. 4809, which became law in the United States on 8 December 1994.

[43]SAA, *supra*, footnote 40, p. 656.

> … regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.[44]

The Sunset Policy Bulletin, issued by USDOC, is "intended to complement the applicable statutory and regulatory provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations".[45]

V. Article 21.3 of the *SCM Agreement* – Applicability of a *De Minimis* Standard in Sunset Reviews (Appeal by the United States)

58. The Panel was of the view that, for sunset reviews, the "less than 1 percent" *de minimis* standard[46] specified, with respect to the amount of the subsidy, in Article 11.9 of the *SCM Agreement* is "implied in Article 21.3".[47] Based on this view, the Panel found that:

> US CVD law and the accompanying regulations are inconsistent with Article 21.3 of the SCM Agreement in respect of the application of a 0.5 per cent de minimis standard to sunset reviews, and therefore violate Article 32.5 of the SCM Agreement and, consequently, also Article XVI:4 of the WTO Agreement.[48] (original underlining)

> [T]he United States, in applying a 0.5 per cent de minimis standard to the instant sunset review, acted in violation of Article 21.3 of the SCM Agreement.[49] (original underlining)

59. The United States appeals these findings. The United States argues that the Panel failed properly to apply the customary rules of treaty interpretation and wrongly "read into" Article 21.3 of the *SCM Agreement* words and obligations that simply do not exist under that provision. According to the United States, if the text of Article 21.3 is properly interpreted, in its context and in the light of the object and purpose of the *SCM Agreement* as a whole, it is clear that this provision does not

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[44]URAA, Section 102(d); 19 U.S.C. § 3512(d).

[45]Sunset Policy Bulletin, *supra*, footnote 41, p. 18871. In response to questioning at the oral hearing, the United States indicated that the Sunset Policy Bulletin represents a statement of existing USDOC practice. The United States explained that the Sunset Policy Bulletin, as such, is not binding upon USDOC, but that USDOC may not depart from it in an arbitrary or capricious manner. The European Communities submitted that the Sunset Policy Bulletin "contains a compendium of the DOC policies with regard to sunset reviews of AD and CVD orders, i.e. it illustrates the normal best practice of the domestic investigating authority on the issue under dispute". (European Communities' other appellant's submission, para. 47)

[46]We observe that Article 11.9 of the *SCM Agreement* defines as *de minimis* an amount of subsidy of *less than* 1 percent *ad valorem.* For the sake of simplicity, we will refer to this standard as either the "1 percent *de minimis* standard" or as the "*de minimis* standard in Article 11.9".

[47]Panel Report, para. 8.80.

[48]*Ibid*., para. 9.1(b).

[49]*Ibid*., para. 9.1(c).

require the application of any *de minimis* standard in a sunset review.[50] The United States underlines that one member of the Panel expressed that view in his separate dissenting opinion.[51]

60. This issue requires us to consider whether, as the Panel found, the *same* 1 percent *de minimis* standard that must be applied, pursuant to Article 11.9 of the *SCM Agreement*, in countervailing duty *investigations*, must also be applied in *sunset reviews* carried out pursuant to Article 21.3 of that Agreement. The issue arises because United States law does not require application of a 1 percent *de minimis* standard in sunset reviews. Rather, United States law prescribes a *de minimis* standard of 0.5 percent *ad valorem* for sunset reviews[52] In its legislation and regulations implementing the results of the Uruguay Round, the United States provided for a *de minimis* standard of 1 percent to be applied in *investigations*[53], but maintained its pre-existing *de minimis* standard of 0.5 percent for *reviews*.[54] These modifications reflected the view of the United States Administration, as expressed in the SAA, that the "*de minimis* requirements of

[50]United States' appellant's submission, para. 33.

[51]One member of the Panel dissented from the findings of the Panel in paragraphs 9.1(b) and 9.1(c). That member found, at paragraph 10.15 of the Panel Report, that:

> (a) US CVD law and the accompanying regulations are consistent with Article 21.3 of the SCM Agreement in respect of the application of a 0.5 per cent de minimis standard to sunset reviews; and
>
> (b) The United States, in applying a 0.5 per cent de minimis standard to the instant sunset review, did not act in violation of Article 21.3 of the SCM Agreement. (original underlining)

[52]Section 752(b)(4)(B) of the Tariff Act provides that the same *de minimis* standard that applies in periodic reviews and changed circumstances reviews shall also apply to sunset reviews. This rate is not specified in the Tariff Act, but is set at 0.5 percent *ad valorem* in Section 351.106(c)(1) of Title 19 of the Regulations.

[53]Sections 703(b)(4) and 705(a)(3) of the Tariff Act.

[54]Sunset reviews did not exist under United States law prior to the passage of the URAA. By virtue of Section 752(b)(4)(B) of the Tariff Act, the same *de minimis* standard that applies in periodic reviews and changed circumstances reviews is also applied to sunset reviews. The SAA explains that:

> [in reviews of countervailing duty orders], the Administration intends that Commerce will continue its present practice of waiving the collection of estimated deposits if the deposit rate is below 0.5 percent *ad valorem*, the existing regulatory standard for *de minimis*.

(SAA, *supra*, footnote 40, p. 939)

Articles 11.9, 27.10 and 27.11 of the Subsidies Agreement are applicable *only* to initial CVD *investigations*. Thus … these standards are *not applicable* to reviews of CVD orders."[55]

61. At the outset of our analysis, we recall that Article 3.2 of the DSU recognizes that interpretative issues arising in WTO dispute settlement are to be resolved through the application of customary rules of interpretation of public international law. It is well settled in WTO case law that the principles codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*") are such customary rules. Article 31(1) provides in relevant part that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

62. Thus, the task of interpreting a treaty provision must begin with its specific terms. Accordingly, we turn, first, to Article 21.3 of the *SCM Agreement*, which deals with sunset reviews:

> Notwithstanding the provisions of paragraphs 1 and 2, 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 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 own 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.[52] The duty may remain in force pending the outcome of such a review.

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[52] When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

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[55]SAA, *supra*, footnote 40, p. 939. (emphasis added) These expressed views of the United States contrast with the practice of the European Communities. The European Communities' legislation does not deal explicitly with the *de minimis* standard to be applied in a sunset review (or, in European Communities' terminology, "Expiry Review"). (See Article 17 of Council Regulation (EC) 2026/97 of 6 October 1997 on the protection against subsidised imports of countries not members of the European Community, Official Journal L288/1 of 21 October 1997; Exhibit EC-26 submitted by the European Communities to the Panel) However, in a specific case where a subsidy granted by a developing country was found to be less than 2 percent, the European Commission terminated the duty at the expiry review stage as a consequence of its finding that the subsidy was *de minimis*. (EC Commission Decision of 12 June 1998, terminating the countervailing duty proceeding concerning imports of polyester fibres and polyester yarns originating in Turkey, Official Journal L168/46 of 13 June 1998; Exhibit EC-27 submitted by the European Communities to the Panel)

63. Article 21.3 imposes an explicit temporal limit on the maintenance of countervailing duties. For countervailing duties that have been in place for five years, the terms of Article 21.3 require their termination *unless* certain specified conditions are met. Specifically, a Member is permitted *not* to terminate such duties only if it conducts a review and, in that review, determines that the prescribed conditions for the continued application of the duty are satisfied. The prescribed conditions are "that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury". If, in a sunset review, a Member makes an affirmative determination that these conditions are satisfied, it may continue to apply countervailing duties beyond the five-year period set forth in Article 21.3. If it does not conduct a sunset review, or, having conducted such a review, it does not make such a positive determination, the duties must be terminated.

64. As the Panel observed, and as all of the participants in this appeal agree, the text of Article 21.3 does not mention any *de minimis* standard to be applied in sunset reviews. Nor does it make any express reference to the *de minimis* standard set forth in Article 11.9 of the *SCM Agreement*.

65. We have previously observed that the fact that a particular treaty provision is "silent" on a specific issue "must have some meaning".[56] In this case, the lack of any indication, in the text of Article 21.3, that a *de minimis* standard must be applied in sunset reviews serves, at least at first blush, as an indication that no such requirement exists. However, as the Panel itself observed, the task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement.[57] Such silence does not exclude the possibility that the requirement was intended to be included by implication.

66. With this in mind, we next consider Article 11.9 of the *SCM Agreement*, which sets forth, for original investigations, the *de minimis* standard that the Panel found to be "implied" in sunset reviews carried out pursuant to Article 21.3. Article 11.9 provides:

> An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is *de minimis*, or where the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be *de minimis* if the subsidy is less than 1 per cent ad valorem.

[56]Appellate Body Report, *Japan – Alcoholic Beverages II*, at 111. See also, Appellate Body Report, *Canada – Patent Term*, para. 78.

[57]Panel Report, paras. 8.27-8.30.

67. This provision is one of the eleven paragraphs of Article 11. The various paragraphs set forth rules of a mainly procedural and evidentiary nature. All of them relate to the authorities' initiation and conduct of a countervailing duty *investigation*, as would be expected given the overall title of Article 11 – "*Initiation and Subsequent Investigation*". Paragraph 9 of Article 11 requires authorities to terminate immediately investigative action in three situations. One of these is when the authorities are satisfied that the amount of the subsidy is less than 1 percent *ad valorem.*

68. Although the terms of Article 11.9 are detailed as regards the obligations imposed on authorities thereunder, none of the words in Article 11.9 suggests that the *de minimis* standard that it contains is applicable *beyond* the investigation phase of a countervailing duty proceeding.[58] In particular, Article 11.9 does *not* refer to Article 21.3, nor to reviews that may follow the imposition of a countervailing duty.

69. We observe, in this regard, that the technique of cross-referencing is frequently used in the *SCM Agreement*. Article 21.4 refers to the obligations set forth in Article 12, and Article 21.5 subjects undertakings given in accordance with Article 18 to the review mechanisms contemplated in Article 21. Similarly, Article 22.7 of the *SCM Agreement* explicitly applies the provisions of Article 22, entitled "*Public Notice and Explanation of Determinations*", to reviews carried out under Article 21. Furthermore, Article 11.9 is specifically referred to in Article 15.3 of the *SCM Agreement*, and the provisions of Article 11, more generally, are referred to in a number of other provisions of the *SCM Agreement*.[59] These cross-references suggest to us that, when the negotiators of the *SCM Agreement* intended that the disciplines set forth in one provision be applied in

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[58]We do not subscribe to the view, expressed by Japan, that the use of the word "cases" (rather than the word "investigation") in the second sentence of Article 11.9 means that the application of the *de minimis* standard set forth in that provision must be applied in *all* phases of countervailing duty proceedings—not only in investigations. The use of the word "cases" does not alter the fact that the terms of Article 11.9 apply the *de minimis* standard only to the investigation phase. We note further that the panel in *US – DRAMS* rejected a similar argument with respect to the meaning of the word "cases" in Article 5.8 of the *Anti-Dumping Agreement*, a provision almost identical to Article 11.9 of the *SCM Agreement.* (Panel Report, *US – DRAMS*, para. 6.87)

[59]See, for example, Articles 12.13, 13.1, 17.1 and 22.1 of the *SCM Agreement.* Moreover, as the Panel noted that:

> [a] number of provisions in the SCM Agreement also apply independently of cross-references in that they contain explicit statements of their scope of application: definition of "subsidy" in Article 1 ("For the purpose of this Agreement"); definition of "interested parties" in Article 12.9 ("for the purposes of this Agreement"); calculation of the amount of a subsidy under Article 14 ("For the purpose of Part V"); definition of "initiated" in footnote 37 ("as used hereinafter"); definition of "injury" under Article 15 and in footnote 45 ("Under this Agreement"); definition of "like product" in footnote 46 ("Throughout this Agreement"); definition of domestic industry in Article 16 ("For the purposes of this Agreement"); and definition of "levy" in footnote 51 ("As used in this Agreement").

(Panel Report, footnote 261 to para. 8.26.)

another context, they did so expressly. In the light of the many express cross-references made in the *SCM Agreement*, we attach significance to the absence of any textual link between Article 21.3 reviews and the *de minimis* standard set forth in Article 11.9. We consider this to be noteworthy, having regard to the fact that both the adoption of a *de minimis* standard for investigations, and the introduction of a "sunset" provision, were regarded as important additions to the Tokyo Round Subsidies Code for improving GATT disciplines on subsidies and countervailing duties.[60]

70. Turning to the immediate context of Article 21.3, we observe the title to Article 21 of the *SCM Agreement* reads "*Duration and Review of Countervailing Duties and Undertakings*". The first paragraph of Article 21 stipulates that a countervailing duty "shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury". We see this as a general rule that, after the imposition of a countervailing duty, the continued application of that duty is subject to certain disciplines. These disciplines relate to the *duration* of the countervailing duty ("only as long as … necessary"), its *magnitude* ("only … to the extent necessary"), and its *purpose* ("to counteract subsidization which is causing injury"). Thus, the general rule of Article 21.1 underlines the requirement for periodic review of countervailing duties and highlights the factors that must inform such reviews. This does not, however, assist us in determining whether a specific *de minimis* standard is intended to be applied in an Article 21.3 review.

71. Continuing our examination of Article 21 with its second paragraph, we recall that, as we explained in *US – Lead and Bismuth II*, "Article 21.2 provides a review mechanism to ensure that Members comply with the rule set out in Article 21.1 of the *SCM Agreement.*"[61] Moreover, the last sentence of Article 21.2 emphasizes the principle that the countervailing duty must be terminated "immediately" when "the authorities determine that the countervailing duty is no longer warranted". As we explained in our Report in *US – Lead and Bismuth II*, the determination made in a review under Article 21.2 must be a meaningful one:

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[60]See *infra*., para. 90.

[61]Appellate Body Report, *US – Lead and Bismuth II*, para. 53. Article 21.2 of the *SCM Agreement* provides 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. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

> [o]n 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.[62]

While the requirement of a rigorous review cannot be denied, Article 21.2 does not expressly establish a *de minimis* standard. Accordingly, its terms do not, in our view, shed light on whether such a standard must be "implied" either for reviews carried out pursuant to that provision or pursuant to Article 21.3.

72. The immediate context of Article 21.3 also includes paragraph 4 of Article 21, the first sentence of which provides that "[t]he provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article." Article 12 sets out obligations, primarily of an evidentiary and procedural nature, that apply to the conduct of an *investigation*. It comes immediately after Article 11, which sets forth a number of procedural, evidentiary as well as substantive rules related to the initiation and conduct of an *investigation*. Given that the requirements of Articles 11 and 12 are placed consecutively in the Agreement, and the fact that both Articles expressly set out obligations in relation to *investigations*, we read the express reference in Article 21.4 to Article 12, but not to Article 11, as an indication that the drafters intended that the obligations in Article 12, but not those in Article 11, would apply to reviews carried out under Article 21.3.

73. Looking beyond the immediate context of Article 21.3, we turn to the object and purpose of the *SCM Agreement*. We note, first, that the Agreement contains no preamble to guide us in the task of ascertaining its object and purpose. In *Brazil – Desiccated Coconut*, we observed that the "*SCM Agreement* contains a set of rights and obligations that go well beyond merely applying and interpreting Articles VI, XVI and XXIII of the GATT 1947."[63] The *SCM Agreement* defines the concept of "subsidy", as well as the conditions under which Members may not employ subsidies. It establishes remedies when Members employ prohibited subsidies, and sets out additional remedies available to Members whose trading interests are harmed by another Member's subsidization practices. Part V of the *SCM Agreement* deals with one such remedy, permitting Members to levy countervailing duties on imported products to offset the benefits of specific subsidies bestowed on the manufacture, production or export of those goods. However, Part V also conditions the right to apply such duties on the demonstrated existence of three substantive conditions (subsidization, injury, and a causal link

[62]Appellate Body Report, *US – Lead and Bismuth II*, para. 61.

[63]Appellate Body Report, *Brazil – Desiccated Coconut*, at 181.

between the two) and on compliance with its procedural and substantive rules, notably the requirement that the countervailing duty cannot exceed the amount of the subsidy.[64] Taken as a whole, the main object and purpose of the *SCM Agreement* is to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures.[65]

74. We thus believe that the Panel properly identified, as among the objectives of the *SCM Agreement*, the establishment of a framework of rights and obligations relating to countervailing duties[66], and the creation of a set of rules which WTO Members must respect in the use of such duties.[67] Part V of the Agreement is aimed at striking a balance between the right to impose countervailing duties to offset subsidization that is causing injury, and the obligations that Members must respect in order to do so. While we agree that Part V strikes such a balance, this alone does not assist us in the task of determining whether the 1 percent *de minimis* standard in Article 11.9 is intended to be applied in reviews carried out pursuant to Article 21.3.

75. This brings us to an examination of the reasoning used by the Panel to find that the *de minimis* standard of Article 11.9 "must be applicable to sunset reviews as it is to investigations".[68] The Panel was of the view that "the sole or principal rationale for the de minimis standard set out in Article 11.9 is that a de minimis subsidy is considered to be non-injurious."[69]

76. Using this rationale, the Panel reasoned that it would be "difficult to see how de minimis rate of likely subsidisation could be considered injurious at the stage of sunset review and continuation of a CVD, when the same rate is considered non-injurious at the stage of investigation and imposition of a CVD."[70] The Panel summarized its reasoning as follows:

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[64]See Article 19.4 of the *SCM Agreement*. We also note that Article 19.2 expressly states that "[i]t is desirable … that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry".

[65]We recall that the 1986 Punta del Este Ministerial Declaration, which initiated the Uruguay Round, and charted the course of the negotiations, provided that:

> [n]egotiations on subsidies and countervailing measures shall be based on a review of Articles VI and XVI and the MTN agreement on subsidies and countervailing measures *with the objective of improving GATT disciplines relating to all subsidies and countervailing measures that affect international trade*. (emphasis added)

(Ministerial Declaration on the Uruguay Round, GATT Doc. No. MIN.DEC (20 September 1986), p. 7)

[66]Panel Report, para. 8.32.

[67]*Ibid*., para. 8.68.

[68]*Ibid*., para. 8.79.

[69]*Ibid*., para. 8.61.

[70]*Ibid*., para. 8.65.

> … the rationale for the de minimis standard set out in Article 11.9 is clearly that CVDs are to be used to counter injurious subsidisation, and the threshold set out in this provision demarcates the level below which subsidisation is deemed to be so small as to be non-injurious for purposes of the imposition of CVDs. Having found this to be the case, and having established that one of the objects and purposes of the SCM Agreement is to regulate the imposition of CVDs and to create a disciplinary framework therefor, we are of the view that the de minimis standard must be applicable to sunset reviews as it is to investigations. Finding otherwise would compromise the very object and purpose of the SCM Agreement and the disciplinary framework that the drafters sought to create through the Agreement.[71]

77. The Panel's approach was centered on the premise that the *de minimis* standard set forth in Article 11.9 represents a threshold below which subsidization is always *non-injurious*. The Panel formed this opinion after examining a 1987 Note prepared by the Secretariat for the Uruguay Round Negotiating Group on Subsidies and Countervailing Measures[72], which was brought to the Panel's attention by the European Communities.[73] The Panel cited part of the Note which recognized that there are two alternative (but not mutually exclusive) theoretical justifications for a *de minimis* rule.[74] The Panel continued:

> [w]hile it is not known which of the two rationales, if not both ("not mutually exclusive"), served as a basis for Article 11.9, the language of that provision suggests to us that it was the first rationale that was the basis for, or was at least paramount in, the drafting of that provision.[75]

78. We observe, first, that in taking this approach, the Panel did not explain why it thought that it was appropriate to rely on the 1987 Note, but simply stated that "it is useful to consider the rationale for the application of a de minimis standard to investigations, as reflected in a Note by the Secretariat prepared in April 1987".[76] In any event, it seems to us that the 1987 Note does not support the Panel's

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[71]Panel Report, para. 8.79.

[72]*Ibid*., para. 8.60, referring in footnote 296 to MTN.GNG/NG10/W/4, 28 April 1987.

[73]The 1987 Note was first referred to by the European Communities in its comments on the responses of the United States to questions from the Panel following the first meeting of the Panel with the parties. (Panel Report, para. 5.320.) For further discussion of the Note by the parties, see also, Panel Report, paras. 5.464-5.466, 5.501-5.504 and 5.530-5.536. The 1987 Note was submitted by the United States to the Panel as Exhibit US-7.

[74]The first view that "no action should be taken … 'where the effect of the subsidy on the industry in the importing country is not such as to cause material injury'". The second was that "'de minimis non curat lex': the law does not take notice of minimal matters". (original underlining) (Panel Report, para. 8.60, quoting from the 1987 Note, MTN.GNG/NG10/W/4, p. 2)

[75]Panel Report, para. 8.60.

[76]*Ibid*., para. 8.60. It is, for example, unclear to us whether the Panel considered the Note to form part of the preparatory work of the treaty and intended to use it as a supplementary means of treaty interpretation within the meaning of Article 32 of the *Vienna Convention*.

conclusion that the "rationale" for the *de minimis* standard in Article 11.9 is that a *de minimis* subsidy is considered to be non-injurious. As the Panel itself recognized, the 1987 Note sets forth *two* rationales for *de minimis* standards, but does not suggest which of them is more compelling or preferable. Nor was any evidence adduced before the Panel suggesting that the negotiators of the *SCM Agreement* considered these or other rationales and expressed a preference for any of them. The Panel chose to base its interpretation of Article 11.9 on only one of these rationales. Even if it were appropriate to rely on the 1987 Note in interpreting the *SCM Agreement* in accordance with the rules of interpretation set forth in the *Vienna Convention*, selective reliance on such a document does not provide a proper basis for the conclusion reached by the Panel in this regard.

79. More importantly, leaving aside the 1987 Note, the *SCM Agreement* does not, in our view, support the "rationale" attributed by the Panel to the *de minimis* standard in Article 11.9. Article 15 of the *SCM Agreement*, which deals with injury and how it is to be determined, refers, in its paragraph 3, to the *de minimis* standard in Article 11.9 only for the purpose of cumulation of imports. Moreover, footnote 45 to Article 15 indicates that, in the *SCM Agreement*, the term "injury" is, "unless otherwise specified", to:

> … be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of [Article 15].

In defining the concept of injury, footnote 45 does not make any reference to the amount of subsidy involved.

80. Similarly, Article 1 of the *SCM Agreement* sets out a definition of "subsidy" that applies to the whole of that Agreement. This definition includes *all* such subsidies, regardless of their amount. None of the provisions in the *SCM Agreement* that uses the term "subsidization" confines the meaning of "subsidization" to subsidization at a rate equal to or in excess of 1 percent *ad valorem*, or to any other *de minimis* threshold.[77] It is also worth noting that, under Part II of the *SCM Agreement*, prohibited subsidies are prohibited regardless of the amount of the subsidy.

81. Thus, in our view, the terms "subsidization" and "injury" each have an independent meaning in the *SCM Agreement* which is not derived by reference to the other. It is *unlikely* that very low levels of subsidization could be demonstrated to *cause* "material" injury. Yet such a possibility is

[77]The term "subsidization" is used in the following Articles of the *SCM Agreement*: 6.1(a); 8.3; 11.9; 12.10; 15.3; 17.2; 18.2; 18.4; 19.4; 21.1; 21.2; 21.3; as well as in Annex IV.

not, *per se*, precluded by the Agreement itself, as injury is not defined in the *SCM Agreement* in relation to any specific level of subsidization.

82. We note, too, that Articles 27.10 and 27.11 of the *SCM Agreement* require termination of a countervailing duty *investigation* with respect to a developing country Member whenever "the overall level of subsidies granted does not exceed" 2 or 3 percent, depending on the circumstances. These provisions require authorities, in a countervailing duty investigation, to apply a higher *de minimis* subsidization threshold to imports from developing country Members. To accept the Panel's reasoning—that *de minimis* subsidization is non-injurious subsidization—would imply that, for the same product, imported into the same country, and affecting the same domestic industry, the *SCM Agreement* establishes different thresholds at which the same industry can be said to suffer injury, depending on the origin of the product. This unreasonable implication casts further doubt on the "rationale" attributed by the Panel to Article 11.9's *de minimis* standard.

83. To us, there is nothing in Article 11.9 to suggest that its *de minimis* standard was intended to create a special category of "*non-injurious*" subsidization, or that it reflects a concept that subsidization at less than a *de minimis* threshold *can never* cause injury. For us, the *de minimis* standard in Article 11.9 does no more than lay down an agreed rule that if *de minimis* subsidization is found to exist in an original investigation, authorities are obliged to terminate their investigation, with the result that no countervailing duty can be imposed in such cases.

84. Accordingly, we do not believe that there is a clear "rationale" behind the 1 percent *de minimis* rule of Article 11.9 that must also apply in the context of reviews carried out under Article 21.3. However, the Panel reasoned that it would be "difficult to see how de minimis rate of likely subsidisation could be considered injurious at the stage of sunset review and continuation of a CVD, when the same rate is considered non-injurious at the stage of investigation and imposition of a CVD."[78] The Panel added that "[s]uch an interpretation would also yield irrational results".[79] For the reasons that follow, we are not persuaded that this is so.

85. Under the *SCM Agreement*, it is the *countervailing duty* that comes up for a review under Article 21.3. Once the Agreement has been in operation for a sufficient number of years, a countervailing duty subject to such a review will typically be a duty that was imposed after the entry

[78]Panel Report, para. 8.65.

[79]*Ibid*., para. 8.69.

into force of the *SCM Agreement*.[80] For this reason the underlying subsidy will have been found, in a proper investigation conducted in accordance with the requirements of the *SCM Agreement*, to be a subsidy that was in excess of the *de minimis* standard of Article 11.9 (or Article 27.10 or Article 27.11 as the case may be) at the time of imposition of the countervailing duty. There would be no countervailing duty to be reviewed where, in the original investigation, the amount of subsidy was found to be less than the *de minimis* standard. In that case, the investigation itself would have been terminated and no duty could have been imposed.[81]

86. We believe that the relevant question to be addressed is, therefore, what obligations the negotiators intended to apply in the case of a review of a countervailing duty where the underlying subsidy has fallen below the *de minimis* standard of Article 11.9 subsequent to the original investigation. It is not inconceivable that the negotiators of the *SCM Agreement* took the view that when a subsidy, originally found to be in excess of the *de minimis* level and to be causing injury, has fallen below the *de minimis* level subsequent to the investigation stage, authorities conducting a sunset review should nevertheless determine whether revocation of the duty is still likely to lead to continuation or recurrence of the injury to the domestic industry. The automatic termination of the countervailing duty may not have been considered desirable in such a situation.

87. We further observe that original investigations and sunset reviews are distinct processes with different purposes. The nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation. For example, in a sunset review, the authorities are called upon to focus their inquiry on what would happen if an existing countervailing duty were to be removed. In contrast, in an original

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[80]Articles 32.3 and 32.4 of the *SCM Agreement* provide:

> Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.
>
> For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph.

By virtue these provisions, even countervailing duties imposed as a result of investigations initiated prior to the date of entry into force of the *WTO Agreement* are subjected to sunset review in accordance with the requirements of Article 21.3. With the passage of time, however, countervailing duties reviewed under Article 21.3 will increasingly be countervailing duties that were imposed as a result of an investigation initiated *after* the date of entry into force of the *WTO Agreement.*

[81]We note that in the instant case of carbon steel, the original countervailing duty was imposed in 1993, before the *SCM Agreement* came into force. Had this been a case where the original subsidy was the subject of an investigation under the *SCM Agreement*, the investigation would have been terminated under Article 11.9 as the original subsidy was below the 1 percent *de minimis* standard.

investigation, the authorities must investigate the existence, degree and effect of any alleged subsidy in order to determine whether a subsidy exists and whether such subsidy is causing injury to the domestic industry so as to warrant the imposition of a countervailing duty. These qualitative differences may also explain the absence of a requirement to apply a specific *de minimis* standard in a sunset review.

88. At the same time, we wish to underline the thrust of Article 21.3 of the *SCM Agreement*. An automatic time-bound termination of countervailing duties that have been in place for five years from the original investigation or a subsequent comprehensive review is at the heart of this provision. Termination of a countervailing duty is the rule and its continuation is the exception. The continuation of a countervailing duty must therefore be based on a properly conducted review and a positive determination that the revocation of the countervailing duty would "be likely to lead to continuation or recurrence of subsidization and injury." Where the level of subsidization at the time of the review is very low, there must be persuasive evidence that revocation of the duty would nevertheless lead to injury to the domestic industry. Mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient.[82] Rather, a fresh determination, based on credible evidence, will be necessary to establish that the continuation of the countervailing duty is warranted to remove the injury to the domestic industry.

89. For these reasons, we consider that the non-application of an express *de minimis* standard at the review stage, and limiting the application of such a standard to the investigation phase alone, does not lead to irrational or absurd results. Accordingly, we do not consider it strictly necessary to have recourse to the supplementary means of interpretation identified in Article 32 of the *Vienna Convention*.

90. In any event, we consider that recourse to the negotiating history of the *SCM Agreement* tends to confirm our view as to the meaning of Article 21.3. We note that the two issues, namely the application of a specific *de minimis* standard in investigations, and the introduction of a time-bound limitation on the maintenance of countervailing duties, were considered to be highly important and were the subject of protracted negotiations. Specific provisions dealing with each of these two issues were viewed as necessary to improve the existing disciplines of the GATT and of the Tokyo Round Subsidies Code. The final texts of Article 11.9 and of Article 21.3 were the result of a carefully negotiated compromise that drew from a number of different proposals, reflecting divergent interests and views. We further note in this respect that none of the participants in this appeal pointed to any

[82]As we noted earlier, no issues relating to the injury determination are raised in this case.

document indicating that the inclusion of a *de minimis* threshold was ever considered in the negotiations on sunset review provisions leading to the text of Article 21.3.[83]

91. We are of the view that a finding on our part that the *de minimis* standard of Article 11.9 is implied in sunset reviews under Article 21.3 would upset the delicate balance of rights and obligations attained by the parties to the negotiations, as embodied in the final text of Article 21.3. Such a finding would be contrary to the requirement of Article 3.2, repeated in Article 19.2 of the DSU, that our findings and recommendations "cannot add to or diminish the rights and obligations provided in the covered agreements".

92. For the reasons set forth above, we are unable to conclude that the *de minimis* standard set forth in Article 11.9 of the *SCM Agreement* is implied in Article 21.3 of the Agreement. We, therefore, reverse the finding of the Panel that "the de minimis standard of Article 11.9 is implied in Article 21.3."[84]

93. Having found that there is no *de minimis* standard implied in Article 21.3 of the *SCM Agreement*, it follows that United States law as such is not inconsistent with Article 21.3 of the *SCM Agreement* on the ground that it does not require application of a 1 percent *de minimis* standard in sunset reviews. Accordingly, we also reverse the Panel's finding, in paragraph 9.1(b) of the Panel Report, that:

> US CVD law and the accompanying regulations are inconsistent with Article 21.3 of the SCM Agreement in respect of the application of a 0.5 per cent de minimis standard to sunset reviews, and therefore violate Article 32.5 of the SCM Agreement and, consequently, also Article XVI:4 of the WTO Agreement. (original underlining)

94. The Panel also found, at paragraph 9.1(c) of the Panel Report, that the United States acted inconsistently with Article 21.3 of the *SCM Agreement* in not applying a 1 percent *de minimis* standard in the sunset review of countervailing duties on carbon steel at issue in this case. The United States requests us to reverse this finding, for the same reasons that it requests reversal of the Panel's

[83]Having examined a number of proposals made by delegations, Notes by the Secretariat summarizing the discussions, and a succession of drafts of the Agreement, we are also unable to find any sign that this issue was addressed during the negotiations. (See, notably, the so-called "Cartland drafts" of 1990, MTN/GNG/NG10/W/38 and Rev. 1, 2 and 3; and the "Dunkel Draft" of 1991, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA, 20 December 1991). Our review of certain commentaries on and summaries of the negotiation of the *Anti-Dumping Agreement* and the *SCM Agreement* – the negotiations of which were in part closely linked – also gives no indication that the issue arose during the negotiations.

[84]Panel Report, para. 8.80.

finding that the United States law, as such, relating to the *de minimis* standard to sunset reviews, is inconsistent with Article 21.3 of the *SCM Agreement*.

95. The Panel's reasoning on this issue consisted almost entirely of the following sentence:

> … [h]aving found that the de minimis standard set out in Article 11.9 is applicable to sunset reviews and that US CVD law is inconsistent with the SCM Agreement in this respect, we find that the United States violated the SCM Agreement by failing to apply such a de minimis standard to the instant sunset review.[85]

96. In other words, the Panel's finding that the United States acted inconsistently with its obligations under Article 21.3 of the *SCM Agreement* in its sunset review of carbon steel depended on, and was the inevitable consequence of its finding that United States law, as such, is inconsistent with those obligations. Logic compels us to take the same approach. Indeed, none of the participants suggests that we should reach a different conclusion regarding the consistency with Article 21.3 of USDOC's application of its *de minimis* standard in this case from the one we reach with respect to the consistency of United States law as such in this regard.

97. We therefore reverse also the Panel's finding, in paragraph 9.1(c) of the Panel Report, that:

> … the United States, in applying a 0.5 per cent de minimis standard to the instant sunset review, acted in violation of Article 21.3 of the SCM Agreement.[86] (original underlining)

VI. Article 21.3 of the *SCM Agreement* – Self-Initiation of a Sunset Review by the Authorities (Appeal by the European Communities)

98. The Panel found that:

> … no evidentiary standards are applicable to the self-initiation of sunset reviews under Article 21.3. We thus conclude that US CVD law and the accompanying regulations are consistent with the SCM Agreement in respect of the automatic self-initiation of sunset reviews, and accordingly reject the European Communities' claim in this regard.[87]

99. The European Communities asks us to reverse this finding on the ground that the Panel erred in its interpretation of Article 21.3. According to the European Communities, the evidentiary standards specified in Article 11.6 of the *SCM Agreement* for authorities to initiate an *investigation*

[85]Panel Report, para. 8.84.

[86]*Ibid*., para. 9.1(c).

[87]*Ibid*., para. 8.49. (footnote omitted)

on their own initiative also apply to the initiation by such authorities of a *sunset review* on their own initiative. Specifically, the European Communities considers that Article 21.3 requires investigating authorities, if they wish to self-initiate a sunset review, to be in possession of the same level of evidence as would be required in a "duly substantiated request" from the domestic industry.[88] Because United States law provides for the *automatic* self-initiation of sunset reviews by USDOC, in every case, regardless of whether USDOC is in possession of *any* evidence, the European Communities asks us to find that such law is inconsistent with Article 21.3 of the *SCM Agreement*, as well as with Article 32.5 of the *SCM Agreement* and Article XVI:4 of the *WTO Agreement*.

100. Japan supports the assertion of the European Communities that the Panel misinterpreted Article 21.3 of the *SCM Agreement* in finding that no evidentiary standard applies to the self-initiation of sunset reviews by the authorities. For Japan, however, the evidentiary standard that applies is not necessarily the same as would be required under Article 11.6 or as would be required in a request by the domestic industry under Article 21.3. Rather, Japan submits that the authorities must be in possession of "sufficient evidence". Although what constitutes "sufficient evidence" will vary from case to case, Japan insists that the automatic initiation of sunset reviews, "without even a scintilla of evidence" can never be considered "sufficient".[89]

101. Before commencing our analysis, we note that United States law provides for the automatic self-initiation of sunset reviews by the authorities in each and every case. Section 751(c)(2) of the Tariff Act directs USDOC to publish a notice of initiation of a sunset review no later than 30 days before, *inter alia*, the fifth anniversary of the date of publication of a countervailing duty order. Section 351.218(b) of Title 19 of the Regulations confirms that USDOC will conduct a sunset review of *each* countervailing duty order. Both the Sunset Policy Bulletin and the SAA describe the initiation of sunset reviews by USDOC as "automatic".[90]

102. We begin our consideration of this issue with the text of Article 21.3 of the *SCM Agreement*, the relevant part of which provides that:

[88]In footnote 9 to paragraph 13 of its other appellant's submission, the European Communities refers to paragraphs 8.15 and 8.16 of the Panel Report for details as to the type of evidence that it considers must be included in such a "duly substantiated request".

[89]Japan's third participant's submission, para. 32.

[90]Sunset Policy Bulletin, *supra*, footnote 41, p. 18872; SAA, *supra*, footnote 40, p. 889.

> … any definitive countervailing duty shall be terminated on a date not later than five years from its imposition … unless the authorities determine, in *a review initiated before that date on their own 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. (emphasis added)

103. As we have seen, Article 21.3 requires the termination of countervailing duties within five years unless the prescribed determination is made in a review. Article 21.3 contemplates initiation of this review in one of two alternative ways, as is made clear through the use of the word "or". Either the authorities may make their determination "in a review initiated … on their own initiative"; *or, alternatively*, the authorities may make the determination "in a review initiated … upon a *duly substantiated* request made by or on behalf of the domestic industry …". The words "duly substantiated" qualify only the authorization to initiate a review upon request made by or on behalf of the domestic industry. No such language qualifies the first method for initiating a sunset review, namely self-initiation of a review by the authorities.

104. In principle, when a provision refers, without qualification, to an action that a Member may take, this serves as an indication that no limitation is intended to be imposed on the manner or circumstances in which such action may be taken. However, because the task of interpreting a treaty provision does not end with a bare examination of its text, the absence of an express limitation on Members' ability to take a certain action is not dispositive of whether any such limitation exists.[91]

105. Before leaving our analysis of the *text* of Article 21.3 of the *SCM Agreement*, we, lastly, note that the provision contains no explicit cross-reference to evidentiary rules relating to initiation, such as those contained in Article 11.6. We believe the absence of any such cross-reference to be of some consequence given that, as we have seen[92], the drafters of the *SCM Agreement* have made active use of cross-references, *inter alia*, to apply obligations relating to *investigations* to review proceedings. In our view, the omission of any express cross-reference thus serves as a further indication that the negotiators of the *SCM Agreement* did not intend the evidentiary standards applicable to the self-initiation of *investigations* under Article 11 to apply to the self-initiation of *reviews* under Article 21.3.

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[91]"[O]missions in different contexts may have different meanings, and omission, in and of itself, is not necessarily dispositive." (Appellate Body Report, *Canada – Autos*, para. 138)

[92]*Supra*, paras. 69 and 72.

106. We now turn to the immediate context of Article 21.3 of the *SCM Agreement*, namely the other paragraphs of Article 21.

107. Article 21.2 provides, in relevant part:

> 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*. (emphasis added)

108. Article 21.2 differs from Article 21.3 in that the former identifies certain circumstances in which the authorities are under an *obligation* to review ("shall review") whether the continued imposition of the countervailing duty is necessary. In contrast, the principal obligation in Article 21.3 is not, *per se*, to conduct a review, but rather to *terminate* a countervailing duty *unless* a specific determination is made in a review. We note that Article 21.2 sets down an explicit evidentiary standard for requests by interested parties for a review under that provision. In order to trigger the authorities' obligation to conduct a review, such requests must, *inter alia*, include "positive information substantiating the need for review". Article 21.2 does not, on its face, apply this same standard to the initiation by authorities "on their own initiative" of a review carried out under that provision. Thus, Article 21.2 contemplates that, for reviews carried out pursuant to that provision, the self-initiation by the authorities of a review is not governed by the same standards that apply to initiation upon request by other parties.

109. As we have noted earlier, the fourth paragraph of Article 21 explicitly applies to Article 21.3 reviews the detailed rules set out in Article 12 of the *SCM Agreement* regarding evidence and procedure in the *conduct* of investigations.[93] However, the rules on evidence and procedure contained in Article 12 do not relate to the *initiation* of such investigations.[94] Rather, the rules relating to evidence needed to *initiate* an investigation are set out in Article 11, which is not referred to in Article 21.4. The fact that the rules in Article 11 governing such matters are not incorporated by reference into Article 21.3 suggests that they are not, *ipso facto*, applicable to sunset reviews.

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[93]*Supra*, para. 72.

[94]One provision in Article 12 of the *SCM Agreement* deals indirectly with the *initiation* of an investigation. Paragraph 12 reads, in relevant part:

> The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation … in accordance with relevant provisions of this Agreement.

110. Looking further into the context of Article 21.3, we turn to Article 22 of the *SCM Agreement*, which is entitled "*Public Notice and Explanation of Determinations*". Paragraph 1 of Article 22 provides:

> When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein *shall be notified and a public notice shall be given*. (emphasis added)

111. Article 22.1 imposes *notification and public notice obligations* upon Members that have decided, in accordance with all the requirements of Article 11, that the initiation of a countervailing duty investigation is justified. Article 22.1 does not itself establish any evidentiary rule, but only refers to a standard established in Article 11.9.

112. Article 22.7 applies the provisions of Article 22 "*mutatis mutandis* to the initiation and completion of reviews pursuant to Article 21". To us, in the same way that Article 22.1 imposes notification and public notice requirements on investigating authorities that have decided, in accordance with the standards set out in Article 11, to initiate an *investigation*, Article 22.1 (by virtue of Article 22.7) also operates to impose notification and public notice requirements on investigating authorities that have decided, in accordance with Article 21, to initiate a *review*. Similarly, in the same way that Article 22.1 does *not* itself establish evidentiary standards applicable to the initiation of an *investigation*, it does *not* itself establish evidentiary standards applicable to the initiation of sunset reviews. Such standards, if they exist, must be found elsewhere.

113. We, therefore, turn next to Article 11 of the *SCM Agreement* as possible relevant context in our interpretation of Article 21.3. It is, in fact, Article 11 that sets forth the evidentiary standards that apply to the *initiation* by authorities of a countervailing duty investigation.

114. We recall that Article 11 is entitled "*Initiation and Subsequent Investigation*". Paragraph 2 of Article 11 sets forth guidance as to what may constitute "sufficient evidence" for purposes of an application by or on behalf of domestic industry seeking initiation of an *investigation*. It provides, in part, that:

> An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph.

115. The remainder of Article 11.2 sets forth the type of evidence that should be included in the application. Article 11.3 directs the authorities to "review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation." Article 11.6 applies the "sufficient evidence" standard in Article 11.2 to the self-initiation of investigations by investigating authorities, and Article 11.9 requires the authorities to reject an application that does not contain "sufficient evidence of subsidization and injury".[95] Thus, Article 11 sets out a number of evidentiary requirements that must be satisfied in order to initiate a countervailing duty investigation.

116. In sum, our review of the context of Article 21.3 of the *SCM Agreement* reveals no indication that the ability of authorities to self-initiate a sunset review under that provision is conditioned on compliance with the evidentiary standards set forth in Article 11 of the *SCM Agreement* relating to initiation of investigations. Nor do we consider that any other evidentiary standard is prescribed for the self-initiation of a sunset review under Article 21.3.

117. This is not to say that authorities may continue the countervailing duties after five years in the absence of evidence that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. Article 21.3 prohibits the continuation of countervailing duties unless a review is undertaken and the prescribed determination, based on adequate evidence, is made.[96]

118. For all of these reasons, we agree with the Panel that Article 21.3 of the *SCM Agreement* does not prohibit the automatic self-initiation of sunset reviews by investigating authorities.[97] Accordingly, we uphold the Panel's finding in paragraph 9.1(a) of the Panel Report that:

> US CVD law and the accompanying regulations are consistent with Article 21, paragraphs 1 and 3, and Article 10 of the SCM Agreement in respect of the application of evidentiary standards to the self-initiation of sunset reviews.

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[95]Article 11.6 of the *SCM Agreement* provides:

> If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of the existence of a subsidy, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation.

[96]We note that, by virtue of the last sentence of Article 21.3, a countervailing duty "may remain in force pending the outcome of" an ongoing sunset review that was initiated before the five-year anniversary of the imposition of the countervailing duty. Moreover, Article 21.4 provides that such a review "shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review."

[97]Panel Report, para. 8.49.

VII. The Determination to be Made in a Sunset Review

A. *Article 6.2 of the DSU – Whether the Matter was Within the Panel's Terms of Reference (Appeal by the United States)*

119. The United States appeals the Panel's refusal to dismiss, as outside its terms of reference, the European Communities' claim under Article 21.3 of the *SCM Agreement* against United States law, as such, regarding the determination to be made in a sunset review.[98]

120. Before the Panel, this issue arose in the following manner. Following the second meeting of the Panel with the parties, the Panel posed a question to the European Communities asking whether it was to understand that the European Communities was "making a claim that US law as such violates the SCM Agreement in respect of the obligation to '"determine" the likelihood of continuation or recurrence of subsidization' contained in Article 21.3".[99] The European Communities responded in the affirmative.[100] In its comments on the responses of the European Communities to questions from the Panel, the United States asserted that any such claim was outside the Panel's terms of reference.[101] This assertion was reiterated in the United States' request for interim review, after the Panel had issued its interim report, which included findings on this matter.[102]

121. In addressing this issue, the Panel, first, stated that it would not address the objection because the United States could have, and should have, raised it at an earlier stage in the proceedings.[103] Nevertheless, the Panel went on to examine the request for establishment of the Panel, and stated that it did "not consider that the European Communities' claims regarding the obligation to determine likelihood of continuation or recurrence of subsidisation are outside the Panel's terms of reference."[104]

122. The United States disputes the Panel's rejection of the United States' objection as untimely, and submits that the panel request did not satisfy the requirements of Article 6.2 of the DSU with

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[98]Panel Report, paras. 7.21 and 7.23. In its Notice of Appeal and appellant's submission, the United States has stated that its appeal on this issue is conditional upon our reversing the Panel's findings with regard to the consistency of United States law, as such, with the obligation to determine the likelihood of continuation or recurrence of subsidization in a sunset review. However, in response to questioning at the oral hearing, the United States withdrew this condition and suggested that we should consider this issue before turning to the substance of the European Communities' appeal. The European Communities objected to the withdrawal by the United States of this condition to its appeal, arguing that it was too late to do so.

[99]Question 51 posed by the Panel; Panel Report, para. 5.517.

[100]Panel Report, para. 5.517.

[101]*Ibid*., para. 5.581.

[102]*Ibid*., para. 7.20.

[103]*Ibid*., para. 7.21.

[104]*Ibid*., para. 7.23.

respect to the claim regarding the consistency of United States law, as such, with its obligations relating to the determination to be made in a sunset review.

123. In considering this issue, we recall that we have consistently held that, in the interests of due process, parties should bring alleged procedural deficiencies to the attention of a panel at the earliest possible opportunity.[105] In this case, we see no reason to disagree with the Panel's view that the United States' objection was not raised in a timely manner. At the same time, however, as we have observed previously, certain issues going to the *jurisdiction* of a panel are so fundamental that they may be considered at any stage in a proceeding.[106] In our view, the Panel was correct, therefore, in turning to consider its terms of reference and in satisfying itself as to its jurisdiction with respect to this matter.

124. We thus turn to consider the United States' assertion that the Panel erred in its finding that this matter was within its terms of reference.[107] We recall that, pursuant to Article 7 of the DSU, a panel's terms of reference are governed by the request for establishment of a panel. Article 6.2 of the DSU sets forth the requirements applicable to such requests. It provides, in relevant part:

> The request for the establishment of a panel shall … identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

125. There are, therefore, two distinct requirements, namely identification of *the specific measures at issue*, and the provision of a *brief summary of the legal basis of the complaint* (or the *claims*). Together, they comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[108]

126. The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the *due process* objective of notifying the parties and third parties of the nature

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[105]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50; Appellate Body Report, *US – FSC*, para. 166; and Appellate Body Report, *US – 1916 Act*, WT/DS136/AB/R, para. 54.

[106]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36; and Appellate Body Report, *US – 1916 Act*, para. 54.

[107]As we have just stated, this jurisdictional issue is one that may properly be considered at any stage in the proceedings. In our view, irrespective of the condition initially placed by the United States upon its appeal, it is appropriate in this case to ascertain the scope of the Panel's terms of reference *before* turning to the merits of the European Communities' appeal with regard to the consistency of United States law, as such, with the obligation to determine the likelihood of continuation or recurrence of subsidization in a sunset review.

[108]Appellate Body Report, *Guatemala – Cement I*, paras. 69-76.

of a complainant's case.[109] When faced with an issue relating to the scope of its terms of reference, a panel must scrutinize carefully the request for establishment of a panel "to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU."[110]

127. As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings.[111] Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced.[112] Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.[113]

128. With these considerations in mind, we turn to the request for the establishment of the Panel to ascertain whether it satisfies the requirements of Article 6.2 of the DSU with respect to the claim that United States law, as such, regarding the determination to be made in a sunset review, is inconsistent with Article 21.3 of the *SCM Agreement*. The panel request states, in relevant part:

> Under Article 21.3 of the SCM Agreement, countervailing duties have to be terminated after five years, unless the investigating authorities determine that their expiry would be likely to lead to (i.e. cause), *inter alia*, the continuation or recurrence of subsidisation. It is therefore for the DOC to make a positive demonstration to this effect. In fact, the DOC has not made such a demonstration; it has merely found that subsidies of less than the *de minimis* level provided for in Article 11.9 will continue. …

[109]Appellate Body Report, *Brazil – Dessicated Coconut*, at 186. See also, Appellate Body Report, *EC – Bananas III*, para. 142.

[110]Appellate Body Report, *EC – Bananas III*, para. 142.

[111]*Ibid*., para. 143.

[112]See, for example, Appellate Body Report, *Korea – Dairy*, para. 127; Appellate Body Report, *Thailand – H-Beams*, para.95.

[113]Appellate Body Report, *Korea – Dairy*, paras. 124-127.

> The EC consider that the US decision of 2 August 2000 not to revoke the countervailing duties imposed on imports of corrosion resistant steel (Issue No. 65 FR 47407), as well as certain aspects of the sunset review procedure which led to it (regulated by Section 751 c) of the Tariff Act of 1930 and the implementing regulations and interim final rules issued by the DOC –see footnote 2) are inconsistent with the obligations of the United States under the SCM Agreement and, in particular, Articles 10, 11.9, 21 (notably paragraphs 1 and 3), and 32.5 thereof, and under Article XVI:4 of the Agreement establishing the World Trade Organization.[114] (underlining added)

129. As observed by the Panel[115], the panel request expressly refers to the obligation to determine the likelihood of continuation or recurrence of subsidization in sunset reviews and to the need to make a "positive demonstration to this effect." In addition, the request mentions "certain aspects of the sunset review procedure which led to [the decision not to revoke countervailing duties on carbon steel]", and specifically refers to the United States statutory provision governing sunset reviews, to related regulatory provisions, and to the Sunset Policy Bulletin. Together, these provisions govern USDOC's conduct of a sunset review, including the determination that must be made in such a review.

130. Further, the panel request identifies obligations under, and alleges violation of, Article 21.3 of the *SCM Agreement*. This statement of the legal basis for the European Communities' claim is, indeed, very brief. But this alone does not mean that it falls short of the standard required by Article 6.2 of the DSU. As we have observed, although the listing of the treaty provisions allegedly violated is always a *necessary* "minimum prerequisite" for compliance with Article 6.2, whether such a listing is *sufficient* to constitute a "brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 will depend on the circumstances of each case, and in particular on the extent to which mere reference to a treaty provision sheds light on the nature of the obligation at issue.[116] In examining the provision at issue in this case, we note that Article 21.3 of the *SCM Agreement* is a relatively short provision, and the determination to be made in a sunset review is one of its central features. In addition, we read the words in the panel request that it is "for the DOC to make a positive demonstration to this effect" as further elaboration of the relevant obligation imposed on domestic authorities by Article 21.3.

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[114]WT/DS213/3, pp. 2 and 3. Footnote 2 to the request for the establishment of the Panel refers to:

> Section 751 c) of the Tariff Act of 1930, in the Implementing Regulations on anti-dumping and countervailing duties issued by USDOC (F.R. Vol. 62 No. 96 Monday, May 19, 1997 p 27296 - 19 CFR Parts 351, 353, and 355 Antidumping Duties; Countervailing Duties Final rule) and in the USDOC's Interim final rules on procedures for conducting five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders (19 CFR Section 351- FR Doc. 98-7165 Filed 3-19-98).

[115]Panel Report, paras. 7.22-7.23.

[116]Appellate Body Report, *Korea – Dairy*, para. 124.

131. Thus, although we agree with the Panel that "the European Communities could certainly have been more forthcoming in its request for establishment"[117], we find that the Panel did not err in concluding that the request for establishment of the panel satisfied the requirements of Article 6.2 of the DSU with respect to the European Communities' claim regarding the consistency of United States law, as such, with the obligation to determine the likelihood of continuation or recurrence of subsidization in a sunset review.

132. We are confirmed in this view by our reading of the European Communities' first written submission to the Panel. This submission clearly addresses United States law, as such, governing the likelihood determination. Section 6 of the submission, entitled "Claims", is divided into four subsections. Subsection 6.2 deals with the determination to be made in a sunset review, and in part 6.2.2 of that subsection, headed "US laws and practice", the European Communities alleges, *inter alia*, that United States law is inconsistent with the United States' obligations under Article 21.3 of the *SCM Agreement*.[118]

133. In the light of the references to the requirement to make a likelihood determination in the panel request, and the arguments elaborated in the European Communities' first written submission to the Panel, we believe that the United States was given adequate notice of the European Communities' claim. The absence of prejudice to the United States is also reflected in the fact that the Panel did not sustain the claim of the European Communities in relation to United States law, as such, regarding the likelihood determination, but rather found United States law in this regard to be consistent with the obligations in Article 21.3 of the *SCM Agreement*.

134. We therefore uphold the Panel's finding that:

> [w]e therefore do not consider that the European Communities' claims regarding the obligation to determine likelihood of continuation or recurrence of subsidisation are outside the Panel's terms of reference.[119]

[117]Panel Report, para. 7.23.

[118]European Communities' first submission to the Panel, para. 76.

[119]Panel Report, para. 7.23.

B. *Article 11 of the DSU and Article 21.3 of the SCM Agreement – Whether the Panel Erred in its Assessment of United States Law (Appeal by the European Communities)*

135. The Panel found that:

> … US law is not inconsistent with Article 21.3 of the SCM Agreement with respect to the obligation that the investigating authorities determine the likelihood of continuation or recurrence of subsidisation in a sunset review.
>
> … Having found that US CVD law and the accompanying regulations are consistent with Article 21.3 of the SCM Agreement in respect of the obligation that the investigating authorities determine the likelihood of continuation or recurrence of subsidisation in a sunset review, we need not, and do not, consider whether US CVD law and the accompanying regulations are inconsistent with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.[120]

136. The European Communities requests us to reverse these findings and to find that United States law, as such, is inconsistent with Article 21.3 of the *SCM Agreement* in respect of the investigating authorities' obligation to determine the likelihood of continuation or recurrence of subsidization in a sunset review. The European Communities also asks us to make consequential findings that United States law, as such, is inconsistent with United States' obligations under Article 32.5 of the *SCM Agreement* and Article XVI:4 of the *WTO Agreement*.[121]

137. The Panel's analysis of this issue consists of two distinct parts. First, the Panel interpreted Article 21.3 to ascertain what that provision requires of investigating authorities making a "determination" in a sunset review.[122] In this part of its analysis, the Panel opined that "a determination of likelihood under Article 21.3 must rest on a sufficient factual basis"[123], namely "on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews and finally the sunset review."[124] Furthermore, according to the Panel:

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[120]Panel Report, paras. 8.106 and 8.107. See also, Panel Report, para. 9.1(d).

[121]We note that neither party has appealed the additional Panel finding, set out in para. 9.1(e) of the Panel Report, that the specific determination made in the sunset review of countervailing duties on carbon steel was inconsistent with the requirements of Article 21.3 of the *SCM Agreement*.

[122]See Section VIII.D(1)(b)(i) of the Panel Report, paras. 8.89-8.96.

[123]Panel Report, para. 8.94.

[124]*Ibid*., para. 8.95.

> [w]hat the investigating authority must do under Article 21.3 is to assess whether subsidisation is likely to continue or recur should the CVD be revoked. This is, obviously, an inherently prospective analysis. Nonetheless, it must itself have an adequate basis in fact. The facts necessary to assess the likelihood of subsidisation in the event of revocation may well be different from those which must be taken into account in an original investigation. Thus, in assessing the likelihood of subsidisation in the event of revocation of the CVD, an investigating authority in a sunset review may well consider, *inter alia*, the original level of subsidisation, any changes in the original subsidy programmes, any new subsidy programmes introduced after the imposition of the original CVD, any changes in government policy, and any changes in relevant socio-economic and political circumstances.[125]

138. These Panel findings are *not* appealed by the European Communities. Accordingly, we are *not* called upon, in this particular appeal, to review the Panel's the *interpretation* of Article 21.3 and the obligations it sets forth with respect to the determination to be made in a sunset review.

139. It is, rather, the second part of the Panel's analysis of this matter that forms the subject of this appeal. The European Communities' appeal is limited to the findings made by the Panel in its assessment of whether the relevant United States law, as such, conforms to the requirements of Article 21.3 of the *SCM Agreement*.[126]

140. In appealing this part of the Panel Report and the resulting finding that United States law "is not inconsistent with Article 21.3" of the *SCM Agreement* with respect to the likelihood determination, the European Communities argues that the Panel did not ascertain the meaning of United States law in accordance with its duty, under Article 11 of the DSU, to make an "objective assessment of the matter". The European Communities further contends that the Panel erred in its interpretation and application of the distinction between mandatory and discretionary laws. The European Communities' appeal rests upon both Article 11 of the DSU and Article 21.3 of the *SCM Agreement.*

[125]Panel Report, para. 8.96.

[126]In response to questioning at the oral hearing, the European Communities confirmed that its appeal is limited to the reasoning and findings contained in Section VIII.D(1)(b)(ii) of the Panel Report, paras. 8.97-8.107.

1. Article 11 of the DSU – Limitations Imposed by United States Law

141. Article 11 of the DSU provides, in relevant part:

> … a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

142. We recall that "the standard of review set forth in Article 11 of the DSU [applies to disputes] arising under Part V of the *SCM Agreement*".[127] As we have observed previously, Article 11 requires panels to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence.[128] Nor may panels make affirmative findings that lack a basis in the evidence contained in the panel record.[129] Provided that panels' actions remain within these parameters, however, we have said that "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings"[130], and, on appeal, we "will not interfere lightly with a panel's exercise of its discretion".[131]

143. In arguing that the Panel acted inconsistently with Article 11 of the DSU and "ignored the legal limitations imposed by United States law on investigating authorities [in making their determination in a sunset review]", the European Communities challenges: (i) the Panel's failure to accord sufficient weight to the Sunset Policy Bulletin and the SAA in determining the meaning of Sections 751(c) and 752 of the Tariff Act; (ii) the Panel's failure to draw the appropriate inferences from USDOC's "consistent practice" as to the meaning of United States law; and (iii) the Panel's failure to engage in the additional fact-finding necessary properly to appreciate the meaning of Section 351.218(e)(2)(i) of the Regulations.[132] We will examine the Panel's treatment of each of these issues in turn.

144. With respect to the first point, we note that, before the Panel, the European Communities introduced the Sunset Policy Bulletin and the SAA into evidence.[133] In its arguments before the Panel, the European Communities cited certain provisions from the Sunset Policy Bulletin and the

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[127]Appellate Body Report, *US – Lead and Bismuth II*, para. 51.

[128]Appellate Body Report, *EC – Hormones*, para. 133.

[129]Appellate Body Report, *US – Wheat Gluten*, paras. 161-162.

[130]Appellate Body Report, *EC – Hormones*, para. 135.

[131]Appellate Body Report, *US – Wheat Gluten*, para. 151.

[132]European Communities' other appellant's submission, paras. 44-54.

[133]Exhibits EC-15 and EC-16 submitted by the European Communities to the Panel.

SAA, but did not make arguments as to the precise nature of the relationship between these instruments, on the one hand, and the relevant statutory and regulatory provisions, on the other hand.

145. In its analysis, the Panel reproduced the relevant portions of Sections 751(c) and 752 of the Tariff Act, referred to Section 315.218(a) of the Regulations, and observed that:

> [t]he Sunset Policy Bulletin and the Statement of Administrative Action ("SAA") basically elaborate further on the provisions of the Statute and the Sunset Regulations within the limits set out in the Statute.[134] (footnote omitted)

146. Thus, the Panel specifically referred to the Sunset Policy Bulletin and the SAA, and took the view that they operated "within the limits set out" in the legislation—namely Sections 751(c) and 752 of the Tariff Act.[135] The Panel also stated that these instruments did not "change" United States law as set forth in those statutory provisions.[136] It is clear, from these statements, that the Panel took account of, and did not disregard, the evidence placed before it by the European Communities. Accordingly, bearing in mind that Article 11 does not oblige panels to attach to a particular piece of evidence the same weight as the party submitting that evidence[137], we see no reason to disturb the Panel's treatment of the Sunset Policy Bulletin and the SAA in its assessment of the meaning of United States law.

147. The European Communities' second point alleges that, in considering United States law as such, the Panel did not draw the correct inferences from the "consistent practice" of USDOC. Specifically, the European Communities argues that such practice demonstrates that, under United States law, USDOC does not consider *any* changes or terminations of subsidy programs, unless such changes or termination were found in a previous review of the duty, and that this is tantamount to a "refusal to conduct any investigation in a sunset review".[138] Before the Panel, and on appeal, the European Communities referred to the sunset review of carbon steel at issue in this case as evidence of the "consistent practice" of USDOC.

148. We are not persuaded that the conduct of a single sunset review can serve as conclusive evidence of USDOC practice, and, thereby, of the meaning of United States law. This is particularly so in the absence of information as to the number of sunset reviews that have been conducted, the

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[134]Panel Report, para. 8.101.

[135]*Ibid*., para. 8.101.

[136]*Ibid*., para. 8.106.

[137]Panel Report, *Korea – Alcoholic Beverages*, para. 164.

[138]European Communities' other appellant's submission, para. 50.

methodology employed by USDOC in other reviews, and the overall results of such reviews.[139] We also point out that, as the Panel noted, even in the sunset review at issue in this case, USDOC did make certain adjustments to the rate of subsidization determined in the original investigation, notwithstanding the absence of any intervening review of the duty.[140] Furthermore, the European Communities itself put evidence before the Panel, in the form of a decision by a United States domestic court, suggesting that USDOC's sunset review of countervailing duties on carbon steel in this case was not conducted in accordance with United States law.[141] Accordingly, the evidentiary foundation upon which the European Communities sought to have the Panel draw an inference from USDOC practice seem to us to have been a weak one. For all of these reasons, we believe that the Panel acted well within the scope of its discretion in its appreciation of the evidence relating to USDOC practice in its analysis of United States law relating to the likelihood determination.

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[139]We note that, although the European Communities does not seem to have submitted such evidence to the Panel, the United States provided, in response to a question from the Panel, a broader picture of the results of sunset reviews. (Panel Report, para. 5.274) The European Communities did refer, briefly, to three other sunset reviews conducted by USDOC, but did not introduce the text of the determinations made in those cases into the Panel record. (Panel Report, para. 5.218)

[140]Panel Report, para. 8.116.

[141]On 4 March 2002, after the parties had made their second written submissions to the Panel but before their second meeting with the Panel, the European Communities transmitted to the Panel a decision of the United States Court of International Trade dated 28 February 2002 (*AG der Dillinger Hüttenwerke v. United States* ("*Dillinger I*"), 193 F. Supp. 2d 1339 (Ct. Int'l Trade 2002); Exhibit EC-24 submitted by the European Communities to the Panel). By letter dated 5 March 2002, the Panel invited the United States to submit any comments on the European Communities' submission of that decision by 12 March 2002. The United States did not submit any comments. In its decision, the Court found that USDOC had not complied with its duties under United States statutory law in making its determination in the sunset review of carbon steel. The Court opined, *inter alia*, that United States law imposes a "fact-gathering" obligation on USDOC in a full sunset review. (*Dillinger I*, p. 1348) The Court also rejected USDOC's argument that, when no administrative review has been conducted, the SAA and the Sunset Policy Bulletin preclude USDOC, in a sunset review, from making adjustments to the countervailable subsidy rate determined in the original investigation. The Court stated that:

> … the SAA indicates that Congress contemplated that Commerce is to engage in some fact gathering when conducting a full sunset review. … Such fact gathering would be pointless if Commerce were prohibited from considering those facts in order to determine whether adjustments to the original CVD rate are warranted.
>
> … the court finds no support for such a restriction in the statute, the regulations or the SAA. In fact, the court finds that such an interpretation … would directly conflict with the SAA and the statutory scheme, and is therefore impermissible.

(*Dillinger I*, pp. 1353-1354). In this appeal, the European Communities also submitted, as exhibits to its appellee's submission, USDOC's redetermination pursuant to the Court's remand, together with a 5 September 2002 decision by the Court of International Trade with respect to this remand determination (*AG der Dillinger Hüttenwerke v. United States*, Slip Op. 02-107, Ct. No. 00-09-00437 (Ct. Int'l Trade, 5 September 2002)). At the oral hearing in this appeal, the United States stated that these decisions of the Court of International Trade are interlocutory in nature and may yet be appealed.

149. The third point raised by the European Communities relates to the Panel's treatment of the phrase "extraordinary circumstances" in Section 351.218(e)(2)(i) of Title 19 of the Regulations, which provides, in relevant part, that:

> … only under the most extraordinary circumstances will the Secretary rely on a countervailing duty rate or a dumping margin other than those it calculated and published in its prior determinations.

150. In considering whether United States law restricted the determination that authorities are to make in a sunset review, the Panel noted the similarity between the language of Section 751(c) of the Tariff Act and Article 21.3 of the *SCM Agreement*, and then summarized the provisions of Article 752 of the Tariff Act, which govern USDOC's assessment of the likely rate of subsidization in a sunset review. The Panel went on to express "some concern" about the possible limiting effects of the phrase "extraordinary circumstances" in Section 351.218(e)(2)(i) of Title 19 of the Regulations.[142]

151. In its challenge to the Panel's approach, the European Communities does *not* claim that the Panel failed to take account of relevant evidence submitted by the European Communities. Instead, the European Communities alleges that the Panel "failed" to engage in the fact-finding the European Communities thinks necessary to appreciate properly the meaning of the phrase "extraordinary circumstances".

152. We observe, in this regard, that although Section 351.218(e)(2)(i) of the Regulations was one of the many provisions submitted by the European Communities in Exhibit EC-14 to the Panel, the submissions made by the European Communities to the Panel do not specifically refer to Section 351.218(e)(2)(i) of the Regulations, much less elaborate its meaning. Nor did the European Communities explain how this provision operates to preclude USDOC from making a determination consistent with Article 21.3 of the *SCM Agreement*. In these circumstances, the European Communities has failed to make its case and we cannot fault the Panel for its treatment of Section 351.218(e)(2)(i).

153. We also wish to underline that although panels enjoy a *discretion*, pursuant to Article 13 of the DSU[143], to seek information "from any relevant source", Article 11 of the DSU imposes no *obligation* on panels to conduct their own fact-finding exercise, or to fill in gaps in the arguments made by parties. In consequence, given that the European Communities itself had submitted no

[142]Panel Report, para. 8.105.

[143]As we have stated, "[t]his is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision." (Appellate Body Report, *Argentina – Textiles and Apparel*, para. 84)

evidence—other than the text of the provision—on this point, the Panel did not act inconsistently with Article 11 in refraining from seeking additional information on its own initiative.

2. The Panel's Treatment of the Distinction Between Mandatory and Discretionary Legislation

154. Turning to the part of the European Communities' appeal relating to the Panel's treatment of the distinction between mandatory and discretionary legislation, we recall that the Panel found that:

> [h]aving considered the provisions challenged by the European Communities, we find no provision in US law that mandates WTO-inconsistent behaviour. We also note that the Regulations, the Sunset Policy Bulletin and the SAA do not contain any provision that changes US law in this respect.[144] (original underlining)

155. The European Communities challenges this finding, arguing that the Panel could not properly have found that the United States law at issue in this case was a "discretionary" law. The European Communities draws a distinction between a "genuinely discretionary law", where the authorities are afforded discretion of sufficient breadth and nature to allow for the law to be applied in a WTO-consistent manner, and a deliberately "complex and ambiguous web of provisions, such as the one at issue", which creates "a smoke screen of procedures in order to show a (*de facto* inexistent) discretion".[145] In short, the European Communities alleges that any discretion afforded to USDOC under United States law is illusory.

156. We note, first, that, in dispute settlement proceedings, Members may challenge the consistency with the covered agreements of another Member's laws, as such, as distinguished from any specific application of those laws. In both cases, the complaining Member bears the burden of proving its claim. In this regard, we recall our observation in *US – Wool Shirts and Blouses* that:

> … it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that *the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence*.[146] (emphasis added)

157. Thus, a responding Member's law will be treated as WTO-*consistent* until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to

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[144]Panel Report, para. 8.106.

[145]European Communities' other appellant's submission, para. 61.

[146]Appellate Body Report, *US – Wool Shirts and Blouses*, at 335. See also, Appellate Body Report, *EC – Hormones*, para. 98; and Appellate Body Report, *EC – Sardines*, para. 281.

substantiate that assertion.[147] Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.

158. In this case, the European Communities asserts that United States law has three main characteristics which effectively remove USDOC's discretion to make a determination consistent with the requirements of Article 21.3 of the *SCM Agreement*: first, "no change or termination of subsidy program can be considered unless such change or termination were found in a previous review of the order"; second, United States law establishes "a mechanism that results in a reversal of the presumption of termination of CVD orders"; and, third, the law generates "a consistent and persistent practice of WTO-inconsistent continuation of CVD orders".[148] We will consider each of the points raised by the European Communities.

159. First, we address the allegation that USDOC is precluded from considering any changes to or termination of subsidy programs when there has been no review of the duty between the time of the final determination in the original investigation and the sunset review. On this point, we recall that the Panel relied on the specific language in Section 752(b)(1) of the Tariff Act in order to dismiss the claim of the European Communities.[149] This provision, *inter alia*, mandates USDOC to consider "whether any change in the program that gave rise to such net countervailable subsidy … has occurred that is likely to affect that net countervailable subsidy." The Panel also noted that "the words of Section 751(c) of the Tariff Act reflect closely the language of Article 21.3 of the SCM Agreement."[150] We believe that it was appropriate for the Panel to rely on the express provisions of the statute. Furthermore, we have already noted that, in this case: (i) USDOC did make certain adjustments to the rate of subsidization determined in the original investigation, notwithstanding the absence of any intervening review of the duty[151]; and (ii) the European Communities itself introduced a decision by the United States Court of International Trade finding not only that United States law does not preclude USDOC from taking account of changes in subsidy

[147]See, for example, Appellate Body Report, *US – Wool Shirts and Blouses*, at 335.

[148]European Communities' other appellant's submission, para. 60.

[149]Panel Report, para. 8.104.

[150]*Ibid*., para. 8.103.

[151]*Ibid*., para. 8.116.

programs when no review has been conducted, but that any interpretation of the law that would include such a restriction is "impermissible".[152]

160. Second, with respect to the alleged "reversal of the presumption of termination" of countervailing duties will be terminated after five years, this argument also seems to depend on the premise that USDOC will not consider changes in subsidy programs. The European Communities seems to argue that when a subsidy program was found, in an original investigation, to provide countervailable subsidies, then United States law requires USDOC automatically to make the same finding in a sunset review. However, as we have just stated, the Panel properly held that United States law requires changes in a subsidy program to be taken into account in a sunset review.

161. Third, as to the argument that United States law generates a consistent practice of WTO-inconsistent continuation of countervailing duty orders, we recall that, in support of this assertion, the European Communities relied primarily on the conduct of the sunset review in this case. This was not sufficient to require the Panel to make any finding as to USDOC's "consistent practice".[153]

162. It follows that, in this case, the European Communities did not satisfy its burden of proving either that United States law mandates USDOC to act inconsistently with Article 21.3 of the *SCM Agreement*, or that such law restricts in a material way USDOC's discretion to make a determination consistent with Article 21.3 in a sunset review. Thus, we conclude that the Panel did not err in finding that United States law had not been shown to be inconsistent with Article 21.3 of the *SCM Agreement*. Given the evidence before it, the Panel was entitled to rely on the language of Sections 751(c) and 752 of the Tariff Act in finding that United States law, as such, is not inconsistent with the obligations that the Panel found to be contained in Article 21.3 of the *SCM Agreement*.[154]

163. Accordingly, we uphold the Panel's findings, at paragraph 8.106, that:

> US law is not inconsistent with Article 21.3 of the SCM Agreement with respect to the obligation that the investigating authorities determine the likelihood of continuation or recurrence of subsidisation in a sunset review.[155]

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[152]*Dillinger I*, *supra*, footnote 141, p. 1354.

[153]In this regard, we recall our reasoning *supra* in paragraph 148 and the footnotes thereto.

[154]We also recall that the Panel's *legal interpretation* of the requirements imposed under Article 21.3—*inter alia*, that "a determination of likelihood under Article 21.3 must rest on a sufficient factual basis", and specifically "on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews and finally the sunset review"—has not been appealed. (Panel Report, paras. 8.94-8.96)

[155]See also, Panel Report, para. 9.1(d).

VIII. Articles 6.2 and 11 of the DSU – The Opportunity to Submit Evidence in a Sunset Review (Appeal by the European Communities)

164. The European Communities requests that we reverse the Panel's finding that the European Communities' claims with respect to the consistency of United States law, as such, and as applied in the case, with the obligation to provide "ample opportunity" to present evidence in a sunset review, were outside the Panel's terms of reference.[156]

165. Before the Panel, this issue arose in the following manner. Following the second meeting of the Panel, the Panel posed a question inquiring whether it was to understand that the European Communities was making claims, pursuant to Article 12.1 of the *SCM Agreement*, regarding the consistency of United States law with obligations with respect to the opportunity to present evidence in sunset reviews.[157] The European Communities responded in the affirmative.[158] The United States asserted, in its comments on the European Communities' response to this question, that such claims were outside the Panel's terms of reference.[159] This objection was reiterated in the United States' request for interim review, after the Panel had issued its interim report, which included findings on these matters.[160]

166. In its Report, the Panel found:

> … that the European Communities has failed to set out a claim in its request for establishment with respect to the United States' CVD law in respect of the investigating authority's obligation to provide ample opportunity to interested members and parties to submit relevant evidence in a sunset review. This "measure" is therefore outside our terms of reference. Accordingly, we do not address the European Communities' claims under Article 12 of the SCM Agreement.[161]

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[156]Panel Report, para. 8.145.

[157]Question 54 posed by the Panel; Panel Report, para. 5.522.

[158]Panel Report, para. 5.522.

[159]*Ibid*., para. 5.589.

[160]*Ibid*., paras. 7.24 and 8.133.

[161]*Ibid*., para. 8.145. See also, Panel Report, para. 8.137.

167. As a consequence, the Panel omitted from its Report certain substantive findings and reasoning, which had appeared in the interim report.[162] On appeal, in addition to asking us to reverse the Panel's finding on its terms of reference, the European Communities requests that we "reinstate and modify" these findings from the interim report, or issue our own substantive findings on the basis of material on the record.

168. The European Communities further asserts that, in considering whether these matters were within its terms of reference, the Panel committed "serious legal errors in its appreciation of the facts"[163] and thereby failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU. In the view of the European Communities, the Panel could not reasonably have concluded that it was not clear that the European Communities was making claims regarding the opportunity to present evidence in sunset reviews.

169. In considering the European Communities' appeal, we first set out the portions of the request for establishment of the Panel that the European Communities asserts demonstrate its compliance with the requirements of Article 6.2 of the DSU to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The penultimate paragraph of the panel request sets forth the following summary of the preceding parts of the request:

[162]In its interim report, the Panel made the following findings in relation to these matters:

> 12.1 In conclusion, we: …
>
> (f) reject the claim of the European Communities that US CVD law and the accompanying regulations and statement of policy practices are inconsistent with Article 12.1 of the SCM Agreement in respect of the obligation to provide ample opportunity to interested Members and all interested parties to present in writing all relevant evidence, and therefore violate Article 32.5 of the SCM Agreement and, consequently, also Article XVI:4 of the WTO Agreement; and
>
> (g) uphold the claim of the European Communities that the United States, in failing to provide ample opportunity to interested Members and all interested parties to present in writing all relevant evidence in the instant sunset review, acted in violation of Article 12.1 of the SCM Agreement.

[163]European Communities' other appellant's submission, para. 77.

> The EC consider that the US decision of 2 August 2000 not to revoke the countervailing duties imposed on imports of corrosion resistant steel (Issue No. 65 FR 47407), as well as certain aspects of the sunset review procedure which led to it (regulated by Section 751 c) of the Tariff Act of 1930 and the implementing regulations and interim final rules issued by the DOC –see footnote 2) are inconsistent with the obligations of the United States under the SCM Agreement and, in particular, Articles 10, 11.9, 21 (notably paragraphs 1 and 3), and 32.5 thereof, and under Article XVI:4 of the Agreement establishing the World Trade Organization.[164] (underlining added)

170. As the Panel noted, the panel request contains no explicit reference to the opportunity to present evidence in a sunset review.[165] Indeed, it does not contain the word "evidence" at all. Nor does the request give any indication as to *why* or *how* USDOC allegedly failed to afford sufficient opportunity to present evidence in the sunset review of carbon steel. Furthermore, the panel request does not cite any particular provisions of United States law, or other examples of United States practice, that relate specifically to the submission of evidence.

171. In our view, the references in the panel request to "certain aspects of the sunset review procedure", to the United States statutory provisions governing sunset reviews, to related regulatory provisions, and to the Sunset Policy Bulletin, can be read to refer, generally, to United States law regarding the determination to be made in a sunset review.[166] However, we do not believe they can be read to refer to *distinct* measures, consisting of United States law, as such, and as applied, relating to the submission of evidence. Accordingly, we agree with the Panel that the matters relating to the submission of evidence in a sunset review were not within its terms of reference because the *specific measures at issue were not adequately identified* in the request for the establishment of the panel[167], as required by Article 6.2 of the DSU.

172. We would add that, in our view, the panel request also fails to comply with the second requirement of Article 6.2—to set out the legal basis of the European Communities' complaints with regard to these matters. The panel request does not refer to Article 12.1 of the *SCM Agreement*,

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[164]WT/DS213/3. Footnote 2 to the request for the establishment of the Panel refers to:

> Section 751 c) of the Tariff Act of 1930, … the Implementing Regulations on anti-dumping and countervailing duties issued by USDOC (F.R. Vol. 62 No. 96 Monday, May 19, 1997 p 27296 - 19 CFR Parts 351, 353, and 355 Antidumping Duties; Countervailing Duties Final rule) and … the USDOC's Interim final rules on procedures for conducting five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders (19 CFR Section 351- FR Doc. 98-7165 Filed 3-19-98).

[165]Panel Report, para. 8.141.

[166]*Supra*, paras. 129 to 134.

[167]Panel Report, para. 8.145.

which deals with the treatment of evidence in a sunset review. The panel request neither identifies the first paragraph of Article 12 of the *SCM Agreement* as relevant. Nor does it contain any language—such as the phrase "ample opportunity to present evidence"—that would at least suggest the legal basis of the claims. Nor does the request specifically identify Article 21.4, which applies the requirements of Article 12 to sunset reviews. We recall that the identification of the treaty provisions claimed to have been violated is a "minimum prerequisite" for stating of the legal basis of a complaint.[168] In this appeal, the panel request falls short of this minimum prerequisite with respect to the issue of submission of evidence.

173. Our view is confirmed by a review of the European Communities' submissions to the Panel. The *arguments* of the European Communities relating to the opportunity to present evidence were made *exclusively* in the context of its claims regarding the obligation to determine the likelihood of continuation or recurrence of subsidization.[169] However, as we have previously observed, it is important to distinguish between *claims*, which must be sufficiently identified in the panel request, and the *arguments* in support of those claims, which are set out in the written submissions and statements made by the parties during panel proceedings.[170] Here, the European Communities made *arguments* on the rules relating to the submission of evidence in support of *claims* concerning the determination to be made in a sunset review.

174. Accordingly, we uphold the Panel's finding that its terms of reference did not include claims against United States law, as such, and as applied in the sunset review of countervailing duties on carbon steel, relating to the obligation to provide "ample opportunity" to present evidence in a sunset review.[171]

175. Lastly, we consider the European Communities' assertion, invoking Article 11 of the DSU, that the Panel did not comply with its duty to make an objective assessment of the matter before it, by failing to find that the European Communities was making claims with respect to the opportunity to present evidence in a sunset review.[172]

176. In this case, we have upheld the Panel's finding that the request for the establishment of the Panel failed to comply with the requirements of Article 6.2 of the DSU in relation to matters

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[168]Appellate Body Report, *Korea – Dairy*, para. 124.

[169]See, European Communities' first submission to the Panel, paras. 99 and 101; European Communities' second submission to the Panel, paras. 40-44; European Communities' second oral statement to the Panel, para. 20. See also Panel Report, paras. 5.35, 5.412-5.415, and 5.454.

[170]Appellate Body Report, *EC – Bananas III*, paras. 141 and 143.

[171]Panel Report, para. 8.145. See also, Panel Report, para. 8.137.

[172]European Communities' other appellant's submission, para. 77.

regarding the opportunity to submit evidence in sunset reviews. We did so on the basis of our review of the reasoning upon which this finding of the Panel was based—with which we agree—as well as on the basis of our own examination of the panel request. In sum, we are satisfied that the Panel complied with its duties under Article 11 of the DSU in finding that its terms of reference did not include the European Communities' claims relating to the opportunity to submit evidence in a sunset review.[173]

IX. Findings and Conclusions

177. For the reasons set out in this Report:

(a) as to the *de minimis* standard in sunset reviews, the Appellate Body:

reverses the Panel's findings, in paragraphs 8.80, 8.81, 8.84, 9.1(b) and 9.1 (c) of its Report, that, in not applying a less than 1 percent *de minimis* standard in sunset reviews, United States law, as such, and as applied in the sunset review of countervailing duties on carbon steel, is inconsistent with Article 21.3 and, therefore, with Article 32.5, of the *SCM Agreement*, and consequently is also inconsistent with Article XVI:4 of the *WTO Agreement*;

(b) as to the evidentiary standards for the self-initiation of sunset reviews, the Appellate Body:

upholds the Panel's finding, in paragraphs 8.49 and 9.1(a) of its Report, that United States law, as such, with respect to the automatic self-initiation by authorities of sunset reviews, is consistent with paragraphs 1 and 3 of Article 21, and with Article 10, of the *SCM Agreement*;

(c) as to the determination to be made in sunset reviews, the Appellate Body:

(i) upholds the Panel's finding, in paragraph 7.23 of its Report, that the request for the establishment of the Panel satisfied the requirements of Article 6.2 of the DSU with respect to a claim regarding the consistency of United States law, as such, with the obligation to determine the likelihood of continuation or recurrence of subsidization in sunset reviews;

[173]As a result of our findings in this section, we are not required to, and do not, consider the European Communities' request that we "reinstate and modify" findings included in the interim report, but omitted from the Panel Report.

(ii) upholds the Panel's finding, in paragraphs 8.106 and 9.1(d) of its Report, that United States law, as such, is not inconsistent with the obligation in Article 21.3 of the *SCM Agreement* to determine the likelihood of continuation or recurrence of subsidization in sunset reviews; and finds that the Panel acted consistently with its duties under Article 11 of the DSU in so finding;

(d) as to the opportunity to present evidence in sunset reviews, the Appellate Body:

upholds the Panel's finding, in paragraph 8.145 of its Report, that the request for the establishment of the Panel failed to satisfy the requirements of Article 6.2 of the DSU with respect to claims regarding the consistency of United States law, as such, and as applied in the sunset review of countervailing duties on carbon steel, with obligations regarding the opportunity to present evidence in sunset reviews; and finds that the Panel acted consistently with its duties under Article 11 of the DSU in so finding.

178. The Appellate Body *recommends* that the DSB request that the United States bring its measure found in the Panel Report, as modified by this Report, to be inconsistent with the *SCM Agreement* into conformity with its obligations under that Agreement.

Signed in the original at Geneva this 12th day of November 2002 by:

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Yasuhei Taniguchi
Presiding Member

_____ _____

A.V. Ganesan
Member

Giorgio Sacerdoti
Member