

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

Recourse to Article 21.5 of the DSU by the European Communities

*Final Report of the Panel*



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**ABBREVIATIONS USED FOR DISPUTE SETTLEMENT CASES REFERRED TO IN THE REPORT**

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>Australia – Automotive Leather II (Article 21.5 – US)</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, 1189
<i>Australia – Salmon (Article 21.5 – Canada)</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031
<i>Brazil – Aircraft (Article 21.5 – Canada)</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS46/AB/RW, adopted 4 August 2000, DSR 2000:VIII, 4067
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003
<i>EC – Bed Linen (Article 21.5 – India)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/RW, adopted 24 April 2003, as modified by the Appellate Body Report, WT/DS141/AB/RW
<i>EC – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<i>Turkey – Textiles</i>	Panel Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/R, adopted 19 November 1999, as modified by the Appellate Body Report, WT/DS34/AB/R, DSR 1999:VI, 2363
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002

Short Title	Full Case Title and Citation
<i>US – Carbon Steel</i>	Panel Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by the Appellate Body Report, WT/DS213/AB/R
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Panel Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/R, adopted 9 January 2004, as modified by the Appellate Body Report, WTDS244/AB/R
<i>US – Cotton Yarn</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027
<i>US – Countervailing Measures on Certain EC Products</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R, adopted 8 January 2003
<i>US – Countervailing Measures on Certain EC Products</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/R, adopted 8 January 2003, as modified by the Appellate Body Report, WT/DS212/AB/R
<i>US – FSC</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1675
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
<i>US – FSC (Article 21.5 – EC)</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/RW, adopted 29 January 2002, as modified by the Appellate Body Report, WT/DS108/AB/RW, DSR 2002:I, 119
<i>US – Lead and Bismuth II</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
<i>US – Softwood Lumber IV</i>	Panel Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by the Appellate Body Report, WT/DS257/AB/R
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323



## I. INTRODUCTION

1.1 On 17 March 2004, the European Communities requested consultations with the United States pursuant to Articles 4 and 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)* and Article 30 of the *Agreement on Subsidies and Countervailing Measures (SCM Agreement)* with respect to the United States' new privatization methodology, its application to the determinations set out in the request and the findings in the sunset reviews of: *Certain Corrosion-Resistant Carbon Steel Flat Products from France* (C-427-810) (Case No. 9); *Cut-to-Length Carbon Steel Plate from United Kingdom* (C-412-815) (Case No. 8); and, *Cut-to-Length Carbon Steel Plate from Spain* (C-469-804) (Case No. 11)<sup>1</sup>

1.2 The request was circulated in document WT/DS212/14 of 19 March 2004. Consultations were held on 24 May 2004 and, although they allowed a better understanding of respective positions, they failed to settle the dispute.

1.3 On 16 September 2004, the European Communities requested the Dispute Settlement Body (DSB) to establish a panel pursuant to Articles 6 and 21.5 of the *DSU*, Article 30 of the *SCM Agreement*, and Article XXIII of the *General Agreement on Tariffs and Trade 1994 (GATT 1994)*. The request did not include the United States' new privatization methodology.<sup>2</sup>

1.4 At its meeting on 27 September 2004, the DSB decided, in accordance with Article 21.5 of the *DSU*, to refer to the original panel the matter raised by the European Communities in document WT/DS212/15.

1.5 At that meeting, the parties to the dispute agreed that the Panel should have standard terms of reference. The Panel's terms of reference are, therefore, the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS212/15, the matter referred to the DSB by the European Communities in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".<sup>3</sup>

1.6 The Panel was composed of the original members:

Chairman: Mr Gilles Gauthier

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

1.7 Brazil, China and Korea reserved their rights to participate in the Panel's proceedings as third parties.

1.8 The Panel met with the parties on 1-2 March 2005. It met with the third parties on 2 March 2005.

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<sup>1</sup> WT/DS/212/14, p.2.

<sup>2</sup> WT/DS/212/15, p.2.

<sup>3</sup> WT/DS/212/16, p.1.

## II. BACKGROUND

2.1 This dispute concerns the parties' disagreement as to the existence or consistency with the *SCM Agreement* and the *GATT 1994* of measures taken by the United States to comply with the DSB recommendations and rulings in the dispute *US – Countervailing Measures on Certain EC Products*.

### A. MEASURES SUBJECT TO THE ORIGINAL PROCEEDINGS

2.2 The original panel and Appellate Body proceedings concerned the WTO-consistency of 12 countervailing duty determinations by the United States, which included original investigations, administrative reviews, and sunset reviews.<sup>4</sup> The imposition of countervailing duties in these 12 determinations was based on the application by the USDOC of two different change-in-ownership methodologies (the so-called "gamma" and "same person" methodologies). The current Article 21.5 proceedings only concern three of the four sunset reviews in the original panel<sup>5</sup>: *Certain Corrosion-Resistant Carbon Steel Flat Products from France* (C-427-810) (Case No. 9); *Cut-to-Length Carbon Steel Plate from United Kingdom* (C-412-815) (Case No. 8); and, *Cut-to-Length Carbon Steel Plate from Spain* (C-469-804) (Case No. 11).<sup>6</sup>

2.3 The European Communities also brought a claim in the original proceedings concerning Section 771(5)(F) of the US Tariff Act of 1930.

### B. PANEL AND APPELLATE BODY FINDINGS IN THE ORIGINAL PROCEEDINGS

2.4 The original panel found that the 12 countervailing duty determinations were inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement*. It also found that Section 1677(5)(F) was inconsistent with the United States' obligations under the *SCM Agreement* and Article XVI:4 of the WTO Agreement.<sup>7</sup>

2.5 The Appellate Body upheld the Panel's findings that the determinations of United States' Department of Commerce (USDOC) in the 12 countervailing duty cases were inconsistent with the *SCM Agreement* because the USDOC had failed to ascertain the continued existence of a benefit following the privatization of recipients of prior non-recurring financial contributions. However, it reversed the Panel's finding that an investigating authority must *always* conclude that a benefit no longer exists for a firm that has been privatized at arm's length and for fair market value (FMV). The Appellate Body also reversed the Panel's finding that the relevant United

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<sup>4</sup> From the 12 countervailing duty determinations, six are original investigations: Stainless Sheet and Strip in Coils from France (C-427-815) (Case No. 1); Certain Cut-to-Length Carbon Quality Steel from France (C-427-817) (Case No. 2); Certain Stainless Steel Wire Rod from Italy (C-475-821) (Case No. 3); Stainless Steel Plate in Coils from Italy (C-475-823) (Case No. 4); Stainless Steel Sheet and Strip in Coils from Italy (C-475-825) (Case No. 5); Certain Cut-to-Length Carbon-Quality Steel Plate from Italy (C-475-827) (Case No. 6); two are administrative reviews: Cut-to-Length Carbon Steel Plate from Sweden (C-401-804) (Case No. 7); Grain-oriented Electrical Steel from Italy (C-475-812) (Case No. 12) and four are sunset reviews: Cut-to-Length Carbon Steel Plate from United Kingdom (C-412-815) (Case No. 8); Certain Corrosion-Resistant Carbon Steel Flat Products from France (C-427-810) (Case No. 9); Cut-to-Length Carbon Steel Plate from Germany (C-428-817) (Case No. 10); and Cut-to-Length Carbon Steel Plate from Spain (C-469-804) (Case No. 11). See WT/DS212/4.

<sup>5</sup> The European Communities and the United States settled the fourth sunset review, concerning cut-to-length carbon steel plate from Germany.

<sup>6</sup> WT/DS212/14, p.2.

<sup>7</sup> Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 8.2.

States internal legislation was, as such, inconsistent with the United States' obligations under the *SCM Agreement* and Article XVI:4 of the WTO Agreement.<sup>8</sup>

C. CURRENT PROCEEDINGS

2.6 On 8 January 2003, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body. The resulting DSB rulings included the recommendation that the United States brings its administrative practice (the "same person" methodology) and the twelve individual determinations found to be inconsistent with the *SCM Agreement* and the *GATT 1994* into conformity with its WTO obligations.

2.7 On 27 January 2003, the United States informed the DSB that it intended to implement the recommendations and rulings of the DSB in a manner consistent with its WTO obligations. The parties agreed under Article 21.3(b) of the *DSU* that the United States had until 8 November 2003 to implement the recommendations and rulings of the DSB.

2.8 In June 2003, the United States finalized a new privatization methodology, published in the US Federal Register.<sup>9</sup> The new methodology was then applied to the 12 individual determinations found to be inconsistent with the *SCM Agreement* and the *GATT 1994*. On 17 November 2003, the USDOC published in the US Federal Register a Notice of Implementation for these 12 countervailing duty determinations.<sup>10</sup> According to this Notice, only in four of these re-determinations, which concerned sunset reviews, did the USDOC maintain the existing countervailing duties. In the other re-determinations, the measures were either reduced or revoked. At the DSB meeting of 7 November 2003, the United States stated that it had fully complied with the DSB recommendations and rulings on this issue. The European Communities did not agree.

2.9 On 17 March 2004, the European Communities requested consultations under Article 21.5 of the *DSU*. In that request, the European Communities claimed that both the new privatization methodology and its application to three of the above-mentioned sunset review re-determinations<sup>11</sup> were inconsistent with Article VI:3 of *GATT 1994* and Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement*.

2.10 After consultations had failed, the European Communities submitted a request for establishment of a panel under Article 21.5 of the *DSU* on 16 September 2004 this time challenging only the USDOC's re-determination of the sunset reviews on *Certain Corrosion-Resistant Carbon Steel Flat Products from France; Cut-to-Length Carbon Steel Plate from United Kingdom; and, Cut-to-Length Carbon Steel Plate from Spain*. This Panel was established pursuant to that request on 27 September 2004.

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<sup>8</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 161.

<sup>9</sup> Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 Fed. Reg. 37125 (23 June 2003) (Exhibit EC-1) (Modification Notice).

<sup>10</sup> Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Steel Products from the European Communities, 68 Fed. Reg. 64858 (17 November 2003) (Notice of Implementation).

<sup>11</sup> *Certain Corrosion-Resistant Carbon Steel Flat Products from France* (C-427-810) (Case No. 9); *Cut-to-Length Carbon Steel Plate from United Kingdom* (C-412-815) (Case No. 8); *Cut-to-Length Carbon Steel Plate from Spain* (C-469-804) (Case No. 11).

### III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

#### A. THE EUROPEAN COMMUNITIES

##### 3.1 The European Communities requests the Panel to find that:

- The United States has failed to implement the recommendations and rulings of the DSB and acted inconsistently with its obligations under Articles 10, 14, 19.4, 21.1, and 21.3 of the *SCM Agreement* and Article VI:3 of the *GATT 1994* because it did not determine properly whether the privatized French company Usinor in *Certain Corrosion-Resistant Carbon Steel Flat Products from France* continued to receive any benefit from financial contributions previously bestowed on state-owned producers;
- The United States has acted inconsistently with its obligations under Article 21.3 of the *SCM Agreement* because it failed to consider evidence on the record in *Cut-to-Length Carbon Steel Plate from the United Kingdom* and *Cut-to-Length Carbon Steel Plate from Spain* demonstrating that the benefits from programmes found to confer countervailable subsidies no longer existed;
- The United States has failed to implement the recommendations and rulings adopted by the DSB and acted inconsistently with its obligations under Articles 10, 14, 19.4, 21.1, and 21.3 of the *SCM Agreement* and Article VI:3 of the *GATT 1994* by refusing to examine whether, and for failing to find that, the privatizations of BS plc in *Cut-to-Length Carbon Steel Plate from the United Kingdom* and Aceralia in *Cut-to-Length Carbon Steel Plate from Spain* were at arm's length and for FMV; and, that
- The United States has failed to meet its obligations under Article 21.3 of the *SCM Agreement* because it did not examine in *Certain Corrosion-Resistant Carbon Steel Flat Products from France*, *Cut-to-Length Carbon Steel Plate from the United Kingdom* and *Cut-to-Length Carbon Steel Plate from Spain* whether expiry of the duty would be likely to lead to continuation or recurrence of material injury.<sup>12</sup>

#### B. THE UNITED STATES

3.2 The United States contends that it has fully implemented the recommendations and rulings of the DSB in this dispute. With respect to Usinor's privatization – the only substantive matter that, in the view of the United States, is properly before this Panel – the USDOC's conclusion that the employee sales did not satisfy the arm's-length/FMV standard comports with the recommendations and rulings of the DSB, as does USDOC's finding that a corresponding amount of the remaining benefit from pre-privatization subsidies was not extinguished by the privatization. Thus, the United States believes that the European Communities' claims against implementation of the DSB recommendations and rulings are not meritorious. The United States therefore requests this Panel to find that the United States properly implemented those recommendations and rulings.<sup>13</sup>

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<sup>12</sup> EC First written submission, para. 72.

<sup>13</sup> US First written submission, para. 50, and US Oral statement, para. 34.

## IV. ARGUMENTS OF THE PARTIES

### A. FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

#### 1. Introduction

4.1 In the view of the European Communities, the measures taken with respect to the three sunset reviews at issue in this case failed to bring the United States into compliance with the DSB recommendations and rulings.<sup>14</sup> The mandate of the present Panel is to determine the consistency of the measures taken to comply with the provision or provisions cited in the Panel request.<sup>15</sup>

#### 2. Certain corrosion-resistant carbon steel flat products from France

4.2 In its France Section 129 determination, the USDOC found that "with the exception of the employee offering, which constituted 5.16 per cent of the sale, the privatization of Usinor was at arm's length and for fair market value"<sup>16</sup>. It nevertheless concluded that the "revocation of the order on [corrosion-resistant carbon steel flat products from France] would be likely to lead to continuation or recurrence of a countervailable subsidy".<sup>17</sup> There had been no basis for the USDOC's conclusion. The *SCM Agreement* obliges a Member to determine whether a privatized producer received a benefit from the financial contribution previously bestowed on state-owned producers. This cannot be deduced by considering a small part of a sale of shares in isolation.

4.3 It is clear under WTO case law<sup>18</sup>, that in determining the likelihood of continuation or recurrence of a subsidization, a Member must determine whether the privatized producers received any benefit from the financial contributions previously granted to state-owned producers and that the producers were presumed not to have received any benefit if the privatization had been at arm's length, for FMV, and under conditions that did not seriously distort the market in which the privatization occurred. As discussed below, the privatized producers did not receive any such benefit following Usinor's privatization.

(a) The privatization of Usinor as a whole was at arm's length and for FMV

4.4 In its Section 129 determination, the USDOC considered whether the sale of Usinor had been at arm's length and for FMV from the perspective of four separate categories of purchasers. Such an evaluation was not conclusive regarding whether the privatized firm *as a whole* received a benefit as required under WTO case law. The investigating authority must consider whether the entire firm had been sold for FMV, not just whether the sales to an individual category of purchasers were at FMV. The record demonstrates that the privatization of Usinor as a whole had been for FMV, because the average price paid for Usinor's shares exceeded the average price per share recognized by the Privatization Commission as necessary to recoup the value of the company. Excluding shares retained by or sold to the Government of France (GOF), directly or indirectly, the total price paid for [XXX] shares in Usinor's privatization was FF [XXX], for an average price of FF [XXX] per share.<sup>19</sup> This price exceeds the average minimum price recommended by the Privatization Commission for Usinor, FF 84.43, based on the total number of shares to be offered, 186,544,395, at the minimum

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<sup>14</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 161(a).

<sup>15</sup> Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 41-42.

<sup>16</sup> *French Section 129 determination*, p. 12 (Exhibit EC-4).

<sup>17</sup> *French Section 129 determination*, p. 12 (Exhibit EC-4).

<sup>18</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 126 and 149

<sup>19</sup> Table of Payments Received in Usinor's Privatization, submitted in GOF/Usinor 2 September 2003 Questionnaire Response, Appendix 7 (Exhibit EC-5). The numbers in brackets in the attached exhibit and in the text above contain business confidential information. The European Communities requests that this information not be used in the final report or made public.

price of FF 15,750 billion.<sup>20</sup> The average price per share was also within the range recognised by the USDOC as constituting the market clearing price (*i.e.*, between FF 86 to 89 per share).<sup>21</sup> Further, if the GOF's sale of 7.7 per cent of Usinor shares in 1997 were included in the calculation, the average price per share would increase to FF [XXX].<sup>22</sup>

4.5 Thus, when considered in the context of the privatization as a whole, there had been no doubt that Usinor shares were sold at FMV. Such a finding was consistent with the USDOC's own findings in two parallel proceedings in which the USDOC found that the privatization of Usinor had taken place at arm's length and for FMV.<sup>23</sup> As there had been no evidence that the GOF distorted the broader market conditions in any way, and the USDOC had not so found<sup>24</sup>, it follows that the privatized producers did not receive any benefit from the previous financial contributions to the state-owned producers.

(b) The shares sold through the employee/retiree offering were at arm's length and for FMV

4.6 The European Communities believed that the above analysis was sufficient to demonstrate that the USDOC wrongly decided to continue the measures. Even considering, on an alternative basis, the employee/retiree offering independently, the evidence demonstrated that the shares sold to this category of purchasers were at arm's length and for FMV. WTO case law does not provide guidance on what type of transactions are considered to be at "arm's length". As an illustration of the meaning of an "arm's-length" transaction, therefore, the European Communities referred to the *Black's Law Dictionary* which defines "arm's length" as "[o]f or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship".<sup>25</sup> For the following reasons, the employee/retiree offering did not involve related parties, and, therefore, constituted an arm's-length transaction.

4.7 At the time of Usinor's privatization, the company had been wholly owned, directly or indirectly, by the GOF.<sup>26</sup> The buyers in the employee/retiree offering included employees of Usinor - not the GOF.<sup>27</sup> Although the GOF participated in shareholder meetings and oversaw the financial management of the company, it did not "intervene in the day-to-day management of the Company, and the Company ... conducted its day-to-day operations in a manner similar to that of other major international non-state controlled steel producers".<sup>28</sup> Thus, the employee purchasers, including *former* employees, were at least two steps removed from having any relationship with the GOF. Even if some type of relationship existed between the seller and the buyers in this case, it would not have

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<sup>20</sup> "Opinion Rendered by the Privatization Commission in Regard to the Minimum Value of Usinor-Sacilor," submitted in GOF/Usinor 2 September 2003 Questionnaire Response, Appendix 4B.

<sup>21</sup> *French Section 129 determination*, p. 9 (Exhibit EC-4).

<sup>22</sup> The United States Court of International Trade, in its review of the USDOC's remand determination in the *Allegheny Ludlum* case, found that the USDOC had correctly analysed the GOF's sale of the shares in 1997 as part of the privatization process. *See Allegheny Ludlum*, 246 F. Supp. 2d, p. 1311.

<sup>23</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, footnote 4 (stating that "[t]he USDOC analyzed the sales conditions of the privatizations in two of the underlying sunset reviews (Case Nos. 8 and 10) and three of the original investigations (Case Nos. 1, 2, and 4), concluding that those five privatizations took place at arm's length and for fair market value," and citing, among others, the remand determinations in *Allegheny Ludlum* and *GTS*).

<sup>24</sup> *French Section 129 determination*, p. 12 (Exhibit EC-4) (concluding that "petitioners have not sufficiently demonstrated that French or European market conditions at the time of Usinor's privatization were distorted such that the relevant transaction price did not reflect fairly and accurately the subsidy benefits").

<sup>25</sup> *Black's Law Dictionary* 82 (7<sup>th</sup> ed. 2000).

<sup>26</sup> International Offering Prospectus, p. 25, submitted in GOF/Usinor 2 September 2003 Questionnaire Response, Appendix 4G ("International Offering Prospectus").

<sup>27</sup> The employee offering also included employees of affiliates in which Usinor held, directly or indirectly, a majority interest. *See* International Offering Prospectus, p. 21.

<sup>28</sup> International Offering Prospectus, p. 26.

affected the price at which the GOF sold Usinor shares which had been based on independent analyses of the valuation of the company.<sup>29</sup> In conducting its privatization analysis in the Section 129 determination, the USDOC concluded that "the employees of Usinor were related to Usinor" and, therefore, "sales of shares to Usinor employees ... did not constitute an arm's-length transaction".<sup>30</sup> The USDOC did not even consider the relationship between the former employees of Usinor (or its affiliates) and the seller in its analysis. Thus, there was no basis for the USDOC's conclusion that the employee offering had not been at arm's length, and, in fact, evidence on the record indicates otherwise.

4.8 Further, the sale of Usinor shares in the employee/retiree offering had also been at FMV. As discussed in the USDOC's Section 129 determination, the eligible purchasers had two options: (1) they could purchase the shares at the French public offering price of FF 86 per share; or (2) they could pay a discounted price of FF 68.80 per share, with an extended payment period, if they agreed to hold the shares for a minimum of two years.<sup>31</sup> The discount offered to employees and former employees of Usinor reflects the risk assumed by the buyers for the resale restrictions on the shares purchased. That is, because the shares purchased by employees/former employees were less liquid, they were less valuable on the market since it was unclear whether, after two years, the price for the shares would be greater or lower. Thus, the price offered to employees/former employees had been at FMV, accounting for the risk assumed by the purchasers for the non-liquidity of the shares.<sup>32</sup>

(c) The United States is not in compliance with its WTO obligations with respect to the USDOC determination in the French case

4.9 As indicated above, the *SCM Agreement* requires investigating authorities to examine the conditions of a privatization and to determine whether the privatized producers received any benefit from the prior subsidization to the state-owned producers before deciding to continue to countervail pre-privatization, non-recurring subsidies in sunset reviews. Where a privatization is at arm's length and for FMV, there is a presumption that the benefit provided to the state-owned producer has been extinguished. Here, that presumption was warranted and had not been rebutted. Accordingly, by

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<sup>29</sup> As indicated in the GOF's and Usinor's submission in the Section 129 proceedings, the USDOC noted in its Remand Redetermination in the *Stainless Steel Sheet and Strip from France* investigation that "in setting the share values, the Ministry of Economic Affairs and Finance and the French Privatization Commission were guided by independent analyses of the value of the shares. Objective and independent valuations of a company will frequently provide a measure of the privatized company's full value". GOF/Usinor 28 July 2003 Questionnaire Response, Vol. I, p. 14 (quotation omitted).

<sup>30</sup> *French Section 129 determination*, p. 6 (Exhibit EC-4).

<sup>31</sup> *French Section 129 determination*, p. 6 (Exhibit EC-4); see also Ministry of Economic Affairs and Finance, "Order of June 26, 1995 Whereby Terms for the Privatization of Usinor-Sacilor Are Defined," Art. 3, submitted in GOF/Usinor 2 September 2003 Questionnaire Response, Appendix 4F.

<sup>32</sup> It is also common among public offerings throughout the world – including in the context of privatizations – to offer shares to employees or former employees at a specific rate. See Steven L. Jones, William L. Megginson, Robert C. Nash, and Jeffry M. Netter, "Share issue privatizations as financial means to political and economic ends," 53 J. Fin. Econ. 217, 238 (1999); accord Simon Leary, "Privatization Issue 12: Key Steps in a Successful Public Offering," p. 2, available at <http://www.pwcglobal.com/extweb/manissue.nsf/DocID/00727EB5FD8A54BE85256A64002FAC91> (last visited 10 November 2004). In a study by the US General Accounting Office ("GAO") on privatization practices in major developed countries, the GAO noted that the governments of these countries, in particular the UK and France, have routinely offered set specific prices for employees in their privatizations, without suggesting that such offerings were in any way exceptional. See US General Accounting Office, "Budget Issues: Privatization/Divestiture Practices in Other Nations," p. 5-6, 13-14 (1995). In France, the privatization law itself provides for the offering of a specific rate to employees and former employees so long as those shares are retained for at least two years. See French Privatization Law of 1986, as amended, Art. 11, submitted in GOF/Usinor 2 September 2003 Questionnaire Response, Appendix 4. Thus, the offering of shares at specific prices to employees and former employees of a company in the context of privatization is common practice.

failing to revoke the countervailing duties imposed on corrosion-resistant carbon steel flat products from France, the United States had acted inconsistently with its obligations under Article VI:3 of the *GATT 1994* and Articles 10, 14, 19.4, 21.1, and 21.3 of the *SCM Agreement*, and had failed to implement the recommendations and rulings of the DSB.

### 3. Cut-to-length Carbon Steel (CTL) Plate from the UK and from Spain

4.10 The USDOC's "likelihood" determinations with respect to the UK and Spain were inconsistent with the *SCM Agreement* and the *GATT 1994* because the USDOC refused to consider: (a) evidence on the record demonstrating that in both cases subsidies would not continue or recur; and (b) whether, under the new privatization methodology, BS plc had been privatized in a manner that extinguished the benefit conferred by non-recurring pre-privatization subsidies.

- (a) The United States breached its WTO obligations by finding a likelihood of continuation or recurrence on the basis of insufficient evidence

4.11 In both the UK and Spanish cases, the USDOC failed to meet its obligations under Article 21.3 of the *SCM Agreement*. Had the USDOC performed its "likelihood" determination as required under the *SCM Agreement* and considered all of the evidence on the record, it would have determined that the subsidy programmes on which it relied had expired. In the UK case, Corus and the Government of the UK (GUK) submitted evidence showing that Glynwed<sup>33</sup> no longer produced the product under review.<sup>34</sup>

4.12 This point was reiterated in the European Communities' submission, which explained that "[w]ith regard to any alleged non-recurring subsidies, Glynwed sold its facilities for producing 'universal wide flats' to the United States' company Niagara LaSalle, well before the sunset review. This was an arms-length sale between two private companies, and would therefore have removed the benefit of any prior subsidies to the buyer".<sup>35</sup> Moreover, Corus and the GUK also submitted evidence to the USDOC in the Section 129 proceeding demonstrating that all the subsidy programmes not specific to BS plc, on which the USDOC may have relied in calculating the original CVD rate for Glynwed, had been abolished or were no longer available to the UK steel industry. Specifically, they reviewed the four UK programmes<sup>36</sup> that were not specific to British Steel, and which therefore could have been included in the USDOC's calculation of Glynwed's subsidization rate in 1993.

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<sup>33</sup> Corus/GUK Section 129 determination, p. 5-6.

<sup>34</sup> Glynwed was a UK producer of steel bar products, and apparently the width of one of its bar products had fallen within the scope of the CTL Plate petition in 1992. However, on 21 May 1999, Glynwed sold the equipment, inventory, and certain other assets of its bar-producing businesses to an unaffiliated US producer, Niagara LaSalle.

<sup>35</sup> European Communities Letter, p. 4.

<sup>36</sup> The first of these programmes involved U.K. regional development grants under the Industry Act of 1972 and the Industry Development Act of 1982. Corus/GUK stated that "no regional grants under the two statutes ... have been provided to Glynwed/Niagara LaSalle since 1988". Moreover, pursuant to Commission Decision 2496/96 of December 18, 1996, "as a matter of law regional development grants provided by HMG were no longer available to steel producers as of 1997". "Accordingly, there is no prospect that, if the plate order is revoked, any U.K. producer of plate could obtain a regional development grant under the two U.K. industrial acts".<sup>36</sup> The second programme involved regional development grants under the European Regional Development Fund ("ERDF"). Here again, Corus/GUK pointed out that "steel companies are no longer eligible to receive ERDF regional development grants from the EC". Accordingly, if the order were revoked, no U.K. producer of plate could obtain subsidies under this programme. The third programme involved the European Coal and Steel Community ("ECSC") Article 54 loans and interest rebates. As Corus/GUK explained, as of 23 July 2002, the ECSC no longer exists, so such loans and interest rebates can no longer be provided. Moreover, the last ECSC Article 53 loan had been reimbursed in 1988. The final programme involved preferential transportation rates provided by the government-owned British Rail. As Corus/GUK explained, "[t]he



4.13 These explanations as to the abolition of all the subsidy programmes not specific to British Steel, on which the original finding of subsidization for Glynwed may have been based, remain entirely un rebutted, and they eliminate any support for the assertion that the subsidization of Glynwed by either the GUK or the European Communities would continue or recur if the CVD order on CTL Plate were revoked.<sup>37</sup> For these reasons, the USDOC acted inconsistently with the United States' obligations under Article 21.3 of the *SCM Agreement* by refusing to consider evidence on the record indicating that the non-privatized producer (Glynwed) no longer manufactured the product under review and that the subsidy programmes found to be countervailable in the original investigation no longer existed or were no longer available to steel producers.

4.14 The same was true for the Spanish case. The Government of Spain (GOS) and the European Communities both submitted documents during the sunset review stating that: "most of the schemes countervailed no longer exist or have ceased to provide any meaningful benefits to the current exporters of the product concerned[,] especially in view of the fact that in the meantime most of the subsidy would have been amortized".<sup>38</sup> The European Communities then reviewed the schemes<sup>39</sup> that had originally been countervailed, and noted that they no longer existed or would shortly cease to exist.

4.15 As in the UK case, the abolition of the programmes that had been found to confer subsidies on Aceralia entirely eliminated any support for the assertion that the subsidization of the privatized Spanish producer by either the GOS or the European Communities would continue or recur if the CVD order on CTL Plate were revoked. For these reasons, the USDOC acted inconsistently with the United States' obligations under Article 21.3 of the *SCM Agreement* by refusing to consider evidence on the record that demonstrated that the subsidy programmes found to be countervailable in the original investigation no longer existed or were no longer available to steel producers.

4.16 The USDOC justified its failure to consider this evidence on the ground that in a Section 129 proceeding, it need only deal with the specific issue in which the WTO found a lack of compliance.<sup>40</sup> But this restrictive interpretation of the USDOC's role in bringing its practice into conformity with the WTO's findings was based on a serious misunderstanding of a Member's obligations following a determination that one of its measures was inconsistent with the *SCM Agreement*. It is not sufficient for a Member merely to eliminate one erroneous aspect of the measure at issue, if to do so exposes additional failures to comply with the obligations imposed by the *SCM Agreement*. Nor may the Member refuse to attempt to bring those additional failures into compliance on the ground that they

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privatization of British Rail was completed in 1997. Since the Government of the United Kingdom no longer owns the rail service, there can no longer be any countervailable subsidies provided by the Government to steel companies as a result of preferential rail transportation rates". (See Corus/GUK Section 129 Comments 7-10)

<sup>37</sup> Moreover, as Corus/GUK explained in their Section 129 Comments, even if the USDOC were to take the position that some of the subsidies allegedly received by Glynwed prior to 1991 were non-recurring, so that the benefits continued until fully amortised, the level of unamortised benefits that would have remained at the time of the sunset review POR (1999) would have been *de minimis*. See Corus/GUK Section 129 Comments, p. 10 n.14. Accordingly, this reasoning, which was not adopted by the USDOC in any event, cannot provide a basis for asserting that subsidization would continue or recur if the CTL Plate order were revoked.

<sup>38</sup> Response of the European Commission, sunset review: Countervailing Duty Proceeding on Cut-to-Length Carbon Steel Plate from Spain, p. 3 (30 September 1999) ("EC Sunset -Review Response on Spain"). Accord Response of the Kingdom of Spain, Sunset Review: Countervailing Duty Proceeding on Cut-to-Length Carbon Steel Plate from Spain, p. 3 (30 September 1999).

<sup>39</sup> Royal Decree 878/81 and the 1984 Council of Ministers Meeting, and the 1987 Government Delegated Commission on Economic Affairs, no longer applied to the steel industry (the Law 60/78), or would shortly cease to exist (Article 54 ECSC Loans) The latter programme in fact had since ceased to exist in light of the expiry of the ECSC itself in July 2002. These points were reiterated to the USDOC by the GOS and the European Communities in the Section 129 proceeding.

<sup>40</sup> *Spain Section 129 determination*, p. 5 (Exhibit EC-3); *UK Section 129 determination*, p. 5 (Exhibit EC-2).

were not considered in previous stages of the WTO dispute settlement proceedings. To the contrary, as discussed above, in an Article 21.5 proceeding, the Panel's mandate is to "examine whether the new measure ... [is] in conformity with, adhering to the same principles of[,] or compatible with" the WTO Agreement cited by the complaining Member in its Panel Request.<sup>41</sup> Accordingly, a Member's duty remains, throughout such proceedings, to ensure that the challenged measures were brought into compliance with the Member's obligations under the WTO.

(b) The United States also breached its WTO obligations by failing to examine the privatizations of BS plc and Aceralia

4.17 The USDOC also failed to act consistently with the *SCM Agreement* in these two Section 129 determinations, because it refused to examine whether the privatizations of BS plc and Aceralia were at arm's length and for FMV. In light of the arguments presented above, the USDOC could not have arrived at a conclusion of likelihood or recurrence of subsidization without having examined the nature of the UK and Spanish privatizations. Because it found independent bases for its likelihood determinations, the USDOC did not even consider whether the privatizations of BS plc or of Aceralia were at arm's length and for FMV pursuant to the methodology set forth in its Modification Notice. The USDOC's reasons for its failure were insufficient to satisfy its obligations under the *SCM Agreement*.

4.18 The undisputed evidence before the USDOC in fact demonstrated that the privatizations of BS plc and Aceralia were at arm's length and for FMV, and that, therefore, the pre-privatization subsidies granted to those companies had been extinguished. Indeed, in the Section 129 determination in the UK case, Corus and the GUK submitted comments explaining that in a prior proceeding, the USDOC had "concluded that the privatization of British Steel was an arm's length, fair market value transaction".<sup>42</sup> Based on this conclusion, the Appellate Body noted that "[t]he USDOC analyzed the sales conditions of the privatizations in two of the underlying sunset reviews [citing, *inter alia*, the CTL Plate from UK sunset review] and three of the original investigations ... , concluding that those five privatizations took place at arm's length and for fair market value".<sup>43</sup> Similarly, in the Spanish case, the evidence on the record showed that the privatization of Aceralia occurred at arm's length and for FMV. The GOS stated in the Section 129 proceedings that "[n]one of the purchasers [in the privatization] was related to the seller (the Spanish State) in any manner" and, therefore, "[t]he sale was at arm's length".<sup>44</sup> As to FMV, the record indicated that three categories of purchasers of Aceralia's shares participated in the privatization process: (1) 35 per cent of Aceralia's shares were sold to the Arbed Group of Luxembourg; (2) 12.2 per cent of its shares were sold to the Spanish industrial groups Corporación J.M. Aristrain and Corporación Gestamp S.L.; and (3) 52.76 per cent of Aceralia's shares were sold to the general public by public offering.<sup>45</sup> The share price paid by the first two categories was €17.75, while the share price of the public offering was ESP 2080 (€12.50).<sup>46</sup> When the number of shares that were purchased by each of the three categories was multiplied by

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<sup>41</sup> Appellate Body Report on *Canada – Aircraft*, para. 37 (quotation omitted).

<sup>42</sup> Corus/GUK 22 August 2003 Supplemental Questionnaire Response, Cover Letter, p. 2, citing USDOC, *Final Results Redetermination Pursuant to Court Ordered Remand on General Issue of Privatization, British Steel plc v. United States*, Consol. Ct. No. 93-09-00550-CVD, Slip Op. 95-17 and Order (CIT Feb. 9, 1995), p. 18 (17 July 1995). The USDOC had reached this conclusion in a court-ordered remand of the original investigation, in which it determined that "the UKG's sale of BS plc was at arm's length, for fair market value and consistent with commercial considerations because the BS plc shares were offered to private investors worldwide, the offering price was based on valuations of independent consultants, and private investors purchased nearly the entire share offering".

<sup>43</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, footnote.4.

<sup>44</sup> GOS 28 July 2003 Questionnaire Response, p. 5.

<sup>45</sup> GOS 28 July 2003 Questionnaire Response, p. 2 and 10-11; GOS 5 September 2003 Questionnaire Response, p. 6-7.

<sup>46</sup> GOS 28 July 2003 Questionnaire Response, p. 11 and 22.

their respective share prices, the resulting total value at which the company was privatized was approximately €1,871,488,430. This amount was at the high end of the range of valuations obtained from independent experts at the commencement of the privatization process, at the request of the GOS – which ranged from €1296.08 million to €1895.69 million.<sup>47</sup>

4.19 By refusing to examine the privatizations of BS plc and Aceralia in its Section 129 determinations, despite the undisputed evidence that they had occurred at arm's length and for FMV, the USDOC's determinations were not in compliance with the conclusion of the Appellate Body upholding the Panel's finding that the United States acted inconsistently with its obligations under Articles 10, 14, 19.4, 21.1, and 21.3 of the *SCM Agreement* by "imposing and maintaining countervailing duties without determining whether a 'benefit' continues to exist ...".<sup>48</sup>

#### **4. Failure to consider injury**

4.20 Finally, the European Communities noted that the United States had maintained the above three measures without examining whether expiry of the duty would be likely to lead to continuation or recurrence of material injury as required by Article 21.3 of the *SCM Agreement*. This was a further violation of the *SCM Agreement* and a further reason why the United States had failed to bring all three of the measures into conformity with its obligations under the *SCM Agreement*.

#### **B. FIRST WRITTEN SUBMISSION OF THE UNITED STATES**

##### **1. Claims not properly before the Panel**

4.21 The European Communities had improperly advanced claims regarding both injury and subsidization which are aspects of the determinations other than the "measure taken to comply" and therefore the Panel should reject them.

##### **(a) Injury**

4.22 The European Communities' injury argument consists of one paragraph that simply asserts the United States erred by not examining whether the expiry of the duty would be likely to lead to continuation or recurrence of injury in accordance with Article 21.3 of the *SCM Agreement*. The ITC *did* conduct this examination as part of the original sunset review, but the European Communities did not, in the original proceedings, challenge this examination, nor, consequently, did the DSB issue rulings relating to this determination. Therefore, there was no basis for the European Communities' claim, which had not been properly brought in the context of this Article 21.5 proceeding. The recommendations and rulings made by the DSB in the underlying proceeding do not pertain to the ITC determination. Thus, there can be no "measure taken to comply" with respect to the ITC determination. As the Appellate Body stated in *EC – Bed Linen (Article 21.5 – India)*: "we do not see why that part of a redetermination that merely incorporates elements of the original determination ... would constitute an inseparable element of the measure taken to comply with the DSB rulings in the original dispute".<sup>49</sup> Further, in that dispute, "India [sought] to challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings to make that measure consistent".<sup>50</sup> Likewise, in this dispute, the ITC determination had not changed, nor did the United States have to change it in order to comply with the DSB recommendations and rulings. Therefore, the European

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<sup>47</sup> GOS 28 July 2003 Questionnaire Response, p. 6-7; GOS 5 September 2003 Questionnaire Response, p. 1-2.

<sup>48</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 161(a).

<sup>49</sup> Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 86

<sup>50</sup> *ibid.*, para. 87

Communities' claim regarding injury was not within the terms of reference of this Article 21.5 proceeding.

4.23 The United States notes that the Panel and the Appellate Body made their findings in *EC – Bed Linen* in response to arguments advanced by the European Communities. For example, the European Communities argued that: "India did not challenge these aspects of the original determination in the original dispute, that the European Communities therefore had no implementation obligation with respect to those aspects of its original determination, and that the European Communities therefore did not modify them in the redetermination".<sup>51</sup> Before the Appellate Body, the European Communities argued that "it was under no obligation to correct ... its findings ... because the original panel had not ruled that these findings were inconsistent with Article 3.5".<sup>52</sup> The European Communities' logic as expressed in *EC – Bed Linen* and adopted by the DSB was equally applicable in this dispute.

(b) Subsidization

4.24 The European Communities had argued that USDOC's findings in the revised sunset reviews about Glynwed in the UK case and the recurring subsidy programmes in the Spanish case were inconsistent with the *SCM Agreement*. The findings that subsidies continued to benefit Glynwed and that there were recurring subsidy programs in the Spanish case were made in the original sunset reviews. The European Communities did not challenge these aspects of the USDOC determinations during the proceedings before the original panel, and neither the original panel nor the Appellate Body made any findings concerning these programs, which did not involve use of the privatization methodology. As the Appellate Body in *EC – Bed Linen* noted – and argued there by the European Communities – a "measure taken to comply" does not include unchanged findings from the original determination. Because the findings concerning Glynwed and the recurring subsidy program in Spain were unchanged, and because the recommendations and rulings did not require them to be changed, the European Communities cannot use the Article 21.5 process to challenge them now.

4.25 The European Communities had argued that the mandate of an Article 21.5 panel is to review the revised measure for its consistency with the agreement in question and that the Panel is not limited to reviewing only the matters on which the DSB adopted recommendations and rulings. In support of this proposition, the European Communities refers to the Appellate Body report in the Article 21.5 proceedings in *Canada – Aircraft* and the Panel report in the Article 21.5 proceedings in *EC – Bananas (Ecuador)*. However, the European Communities misunderstands the relevance of *Canada – Aircraft* and fails to take into account the Appellate Body's further clarifications in *EC – Bed Linen*. In *Canada – Aircraft*, for example, the Panel correctly evaluated whether the *measure taken to comply* was consistent with the Member's WTO obligations; however, as noted above, the measure taken to comply does not include unchanged aspects of a measure not covered by the recommendations and rulings of the DSB. Similarly, in *EC – Bananas (Ecuador)*, the Panel also evaluated whether the measure taken to comply had been consistent. In this dispute, USDOC's findings regarding Glynwed and the recurring subsidy programs in Spain were unchanged and did not have to be changed in response to DSB rulings and recommendations. Therefore, they were not "measures taken to comply" and were not subject to Article 21.5.

4.26 The United States also notes that the European Communities' panel request states its claim under Article 21.5 as follows: "The United States failed to properly determine whether, in these cases, there was continuation or recurrence of subsidization and injury, because it did not examine the nature of the privatizations in question and their impact on the continuation of the alleged subsidization".<sup>53</sup>

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<sup>51</sup> Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.30

<sup>52</sup> Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 77

<sup>53</sup> WT/DS212/15

Thus, the European Communities explicitly recognized that the privatization analysis had been the sole basis for its Article 21.5 challenge to the new sunset determination. The privatizations and their impact on the continuation of subsidization were *precisely* the matters that USDOC examined in the revised sunset determinations in response to the DSB recommendations and rulings. The European Communities' claims in the present proceeding regarding Glynwed and the recurring subsidy programs in Spain do *not* involve USDOC's treatment of the British and Spanish privatizations, or their impact and thus were not within the scope of the European Communities' Article 21.5 panel request or this proceeding.

## **2. The European Communities bears the burden of proving its claims**

4.27 It has been well established that the complaining party in a WTO dispute bears the burden of coming forward with argument and evidence that establish a *prima facie* case of a violation. If the balance of evidence and argument is inconclusive with respect to a particular claim, the European Communities, as the complaining party, must be found to have failed to establish that claim. The European Communities had not met its burden, for the reasons described as follows. Article 11 of the *DSU* sets forth the standard of review for this Panel. With respect to disputes involving a determination made by a domestic authority based upon an administrative record, the Appellate Body, in *US – Cotton Yarn*, summarized the role of a panel under Article 11.<sup>54</sup> Thus, it was clear that the Panel's task was not to determine whether the privatization had been at arm's-length or for FMV, but rather whether USDOC properly established the facts and evaluated them in an unbiased and objective way. Put differently, the Panel's task was to determine whether a reasonable, unbiased person, looking at the same evidentiary record as the USDOC, could have – not would have – reached the same conclusions.

## **3. USDOC's application of its new privatization methodology to the revised French sunset review is consistent with the *SCM Agreement* and the DSB recommendations and rulings**

4.28 As noted above, both parties accepted the general principle that non-recurring subsidies may be allocated over time. The DSB found, however, that where the subsidy recipient is privatized in an arm's-length sale for FMV, the benefit stream is presumed to be extinguished. The terms "arm's length" and "fair market value" were not used in the text of the *SCM Agreement* and were not to be interpreted as though they were treaty text. As demonstrated below, USDOC's revised determination in the corrosion-resistant steel from France case was entirely consistent with the DSB recommendations and rulings, and was supported by the evidence on the record before USDOC. This Panel should reject the European Communities' claims in their entirety.

- (a) USDOC's analysis of the Usinor privatization is entirely consistent with the *SCM Agreement* and the DSB recommendations and rulings

4.29 If the investigating authority finds that a privatization was at arm's length and for FMV, then in making its subsidy determination, it must find, absent evidence to the contrary, that the pre-privatization subsidy benefits have been extinguished. USDOC's new privatization methodology implements these principles *verbatim*. Because the arm's-length/FMV test was not found in the text of the *SCM Agreement*, that Agreement does not provide a methodology for analyzing whether a transaction is at arm's-length or for FMV. It is therefore within a Member's discretion to develop a

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<sup>54</sup> "[P]anels must examine whether the competent authority had evaluated all relevant factors; they must assess whether the competent authority had examined all the pertinent facts and assess whether an adequate explanation had been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority".

reasonable methodology for addressing these issues. Moreover, because of the fact-intensive nature of the inquiry, the appropriate analytical approach may vary from case to case. Nevertheless, the European Communities argued that USDOC was obligated to evaluate whether the *average* price for all of the French privatization transactions was at FMV. In the European Communities' view, therefore, it was impermissible for USDOC, in examining the French privatization transactions, to take into account the evidence that these transactions were accomplished by means of four distinct groupings of purchasers. There was simply no basis for this view. To the contrary, USDOC analyzed the issue of whether Usinor was sold at arm's length and for FMV in a manner that had been entirely consistent with those concepts as used by the Panel and the Appellate Body.

4.30 If a privatization at arm's length and for FMV extinguishes the subsidy benefit, it follows logically that the benefit from a non-recurring financial contribution continues if a portion of the company was *not* sold at arm's length and for FMV. This had been precisely the approach USDOC took in the Usinor case. The Usinor privatization had been divided into four separate and distinct parts, each targeting a different group of investors and resulting in a different price. One of those groups was comprised of company employees. As discussed further below, USDOC found that the relationship between the company and its employees was not at arm's length. Moreover, USDOC found that the privatization processes were different for each of the four groups and that the 5.16 per cent of Usinor's shares sold to its employees were sold for less than FMV. Thus, USDOC determined that the 5.16 per cent of the allocated pre-privatization benefit was not extinguished. The remaining 94.84 per cent of the allocated benefit was found to be extinguished by the sale of the remaining portion of the company in arm's-length transactions for FMV.

4.31 The analytical approach described above was entirely consistent with the Panel's finding that pre-privatization subsidies were extinguished where the privatized producer, an amalgam of the company and its new owners, receives "nothing for free". To the extent that a portion of the company was sold for less than FMV, the privatized producer received something "for free". USDOC's analysis of the Usinor privatization established that the privatized Usinor did, in fact, receive something "for free" to the extent that some of the purchasers – Usinor employees – did not pay FMV for the so-called "preferential" shares. It was therefore entirely reasonable for USDOC to determine that a corresponding portion of the pre-privatization benefit continues.

4.32 The European Communities had failed to provide any basis for its claim that USDOC was obligated to use an "average price" analysis. The European Communities' argument, in fact, ignores the fundamental importance of determining that the privatization was at arm's length and for FMV. There was simply no basis to conclude that USDOC had been required to disregard, for purposes of the privatization analysis, the non-arm's-length/non-FMV sale of shares to the employees of Usinor. As demonstrated below, USDOC properly considered those transactions and its conclusions were supported by the evidence.

(b) USDOC properly found that the sale of shares to Usinor's employees was not at arm's length

4.33 The evidence on record amply demonstrates that sales to Usinor's employees were not at arm's length. To the contrary, the sales were openly acknowledged to be preferential. Moreover, the evidence that the employees did not pay FMV for the portion of the company they acquired was overwhelming. The European Communities' arguments to the contrary were premised on assumptions about what constitutes an arm's-length sale that have no basis in the *SCM Agreement*, or in the recommendations and rulings of the DSB. The *SCM Agreement* does not refer to "arm's length", and neither the Panel nor the Appellate Body provided any elaboration on this term. The "arm's-length"

definition<sup>55</sup> applied by USDOC is, however, entirely consistent with the ordinary understanding of that term.

4.34 Consistent with this definition, to determine whether sales of Usinor's shares were at arm's-length, USDOC first considered the existence of relationships that would indicate the sales were not at arm's length. USDOC found such a relationship with respect to Usinor employees. USDOC's approach recognizes that the respective interests of employers and employees may not be distinguishable and that members of the "corporate family" often treat each other more favourably than they do others outside the family – a point borne out by the admittedly preferential nature of the employees stock purchases in this case. USDOC then proceeded to examine the terms of the transaction between Usinor and its employees to determine whether those terms would have existed had the transaction been between unrelated parties. As USDOC explained these purchasers [employees] had two options: (1) they could purchase shares at the French public offering price of FF 86 per share, or (2) they could pay a discounted price of FF 68.80, with an extended payment period, if they agreed to hold the shares for two years. Additionally, they were eligible to receive bonus shares if they held the shares for specified periods. Thus, the employee offering was clearly distinguishable from the public offerings and was openly characterized as "preferential" in Usinor's Prospectus.

4.35 Because there had been a preferential option available to employees that had not been available to unrelated parties, USDOC concluded that the terms of the transaction were different as a result of the relatedness of the parties and, hence, that the transactions were not at arm's length. The European Communities maintained that USDOC's arm's-length analysis had been in error because USDOC confused the company (Usinor) and its owner (the GOF), finding only that Usinor's employees were related to Usinor, not to the GOF. The facts, however, indicate that the GOF offered preferential share prices to the employees of a company that it entirely owned, demonstrating that it did not deal with those employees at arm's length for purposes of the privatization. Moreover, the DSB rationale for finding that a benefit may be extinguished by an arm's length, FMV privatization hinges on the assumption that there was little distinction between the company and its new owners. Ironically, the European Communities now appears to argue that, for purposes of determining whether a privatization transaction is at arm's length, there is a significant distinction between a company and its owners.

(c) USDOC properly found that the sale of shares to Usinor's employees was not for FMV

4.36 USDOC's finding that the sale of shares to Usinor's employees had not been for FMV was reasonable and overwhelmingly supported by the evidence on the record. Once again, the *SCM Agreement* does not contain this term. In its determination, USDOC considered what the "full amount that the company or its assets (including the value of any subsidy benefits) were actually worth under the prevailing market conditions was paid, and paid through monetary or equivalent compensation". One means of performing that analysis might be to find market benchmarks in the form of actual sales of comparable companies. In those circumstances, USDOC found none and based its examination of FMV on various aspects of the transaction process. Specifically, USDOC examined the "process factors" set forth in the Modification Notice: objective analysis, artificial barriers to entry, acceptance of the highest bid, and committed investment. USDOC's approach to the FMV analysis is supported by Article 14 of the *SCM Agreement*, which defines the benefit from government equity infusions in terms of whether the government action is consistent with "the usual investment practice (including

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<sup>55</sup> "In considering whether the evidence presented demonstrates that the transaction had been conducted at arm's length, the United States would be guided by the SAA's definition of an arm's-length transaction, noted above, as a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties. " *Modification Notice*

for the provision of risk capital) of private investors in the territory of that Member [the Member that is bestowing the benefit]".

4.37 Because the Usinor privatization was not accomplished through a bidding process, USDOC did not consider whether the GOF accepted the highest bid. Rather, USDOC considered the sales process and whether the GOF received a price that maximized its return. Further, regarding the committed investment factor, *i.e.* whether buyers of Usinor's shares were required to undertake certain post-sale investments, or observe certain post-sale restrictions, USDOC found that there was no evidence to indicate that any of the committed investments distorted the amount that the buyers were willing to pay.

4.38 USDOC found that the GOF had conducted an objective analysis that it used in structuring the Usinor privatization. That analysis indicated a minimum value of FF 15,750 billion for Usinor. Minimum value and FMV are, however, distinctly different concepts. FMV is based on the results of a market process, not merely on a pre-sale appraisal. USDOC therefore never considered the minimum value to be the FMV of the company. Regarding artificial barriers to entry for the employee sales, USDOC found that the employee shares could be purchased only by current and past employees of Usinor. Hence, by the very terms defining the employee pool, numerous potential purchasers were excluded from purchasing these shares. Unlike the terms defining the employee pool, the international offering and the French offering did not involve meaningful limitations on the competition for shares.

4.39 As to purchase price, USDOC's general approach was to look to see whether the GOF charged a market-clearing price for its shares of Usinor. A market-clearing price is one that equates the supply of shares to the demand for shares. If the GOF set the offering price for Usinor's shares too low, the offering would have been oversubscribed and many people seeking shares would have been unable to obtain them. Conversely, if the GOF set the offering price too high, the offering would have been undersubscribed. Given the oversubscription to the French offering at the FF 86 price, the fact that shares were moved from the international offering to the French offering, and the number of shares sold at each of the two prices, USDOC found that the market-clearing price for Usinor's shares was between FF 86 and 89. Usinor's employees, on the other hand, had the option of purchasing shares for FF 68 per share – well below the market-clearing price. Based on these uncontested facts, USDOC concluded that the sale of shares to Usinor employees had not been for FMV, both because of the limitations in the purchaser pool and the failure of Usinor to set the share price for employees at anything close to a market-clearing level.

4.40 The European Communities maintained that USDOC's FMV analysis had been in error because "[t]he discount offered to employees and former employees of Usinor reflects the risk assumed by the buyers for the resale restrictions on the shares purchased". Resale restrictions *per se* provide no explanation for the substantial discount afforded Usinor's employees. To the contrary, resale restrictions in the Usinor privatization were not limited to company employees. Purchasers in the French offering as well as the stable shareholders were subject to similar restrictions. Nevertheless, the share prices for the latter two groups were well above the preferential price for the employees. Moreover, if the European Communities' argument were correct, one would expect the European Communities to be able to provide evidence that employees were equally (or virtually equally) likely to participate in the French public offering as they were to participate in the employee offering. The European Communities had offered no such evidence. Nor had the European Communities offered any demonstration of *how* the discount offered to employees was supposed to reflect the risk assumed by the buyers for the resale restrictions. In sum, USDOC reasonably concluded that the sale of shares to Usinor's employees had not been at arm's length or for FMV. These conclusions should therefore be affirmed by the Panel.



**4. In the revised UK and Spain sunset reviews, USDOC assumed that all allocable pre-privatization subsidies had been extinguished by the privatizations in question and thereby implemented the DSB recommendations**

4.41 In the revised sunset review determinations in the UK and Spanish cases, USDOC assumed for purposes of its analysis that the pertinent privatizations had extinguished all allocable pre-privatization subsidies. USDOC nevertheless concluded that, in both of those cases, there remained an affirmative likelihood of continuation or recurrence of a countervailable subsidy. Those determinations were based on evidence wholly unrelated to pre-privatization subsidies. For example, in the UK case, one company (Glynwed) was never owned by the UK government. Glynwed therefore continued to benefit from all subsidies that had been bestowed upon it. In the Spanish case, there were also *recurring* (nonallocable) subsidies to the privatized company (Aceralia) that continued after privatization. Despite the fact that USDOC did not rely on pre-privatization subsidies to these companies in determining that they would continue to benefit from subsidies if the countervailing duty orders were revoked, the European Communities challenged the revised determinations on the grounds that USDOC failed to examine whether the UK and Spanish privatizations were at arm's length and for FMV. The European Communities' argument elevated form over substance. USDOC *assumed* that the privatizations in the UK and Spain were at arm's-length and for FMV. Because USDOC did not rely on pre-privatization subsidies, its revised determination simply cannot be inconsistent with the DSB recommendations.

**C. SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES**

**1. The Panel's terms of reference for this Article 21.5 proceeding**

4.42 The United States asserted that the European Communities had improperly advanced claims regarding both injury and subsidization, because these claims concern part of the United States' original sunset determinations in 2000, and that, having failed to raise those issues before the original panel and Appellate Body, the European Communities was now foreclosed from doing so in this Article 21.5 proceeding.<sup>56</sup> For the following reasons, the United States' assertion was incorrect:

- (a) The Section 129 determinations concerning the UK and Spain were new measures based on new reasoning

4.43 The Section 129 determinations at issue in this proceeding were measures taken by the United States to comply with the recommendations and rulings of the DSB. The United States admitted this in its First written submission: The United States attempted to dissociate certain aspects of these determinations – the failure to examine the evidence in respect of the UK and Spanish cases and the failure to re-examine injury – from the "measures taken to comply". The legal claim that the European Communities made in the original WTO proceedings was that the United States, in maintaining countervailing duties without properly analysing the likelihood of continuation or recurrence of subsidization, violated, *inter alia*, Article 21.3 of the *SCM Agreement*. This was confirmed by the Panel who found that the measures challenged in the original proceeding were based on insufficient determinations by the USDOC. The United States could continue to maintain the challenged measures only if it were to find alternative, sufficient grounds on which they could be based. Therefore, the USDOC responded by issuing what the United States itself acknowledged were "new determinations"<sup>57</sup>, based on a revised analysis of the UK and Spanish programmes, comprising "measures taken to comply with the recommendations and rulings" of the DSB.

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<sup>56</sup> US First written submission, paras. 14-21

<sup>57</sup> US First written submission, para. 11

4.44 The United States asserted that an aspect of a measure which was before the original panel and Appellate Body and which had not changed was not properly before an Article 21.5 panel, relying for its support on the Appellate Body's decision in *EC – Bed Linen*.<sup>58</sup> However, in *EC – Bed Linen*, India raised in the Article 21.5 proceeding the *same* claim as it had in the original proceedings regarding a component of the implementing measure that remained unchanged from, and was part of, the original measure, and which had been "*not found to be inconsistent with WTO obligations*".<sup>59</sup> Whereas, in the present case, the European Communities had raised *new* claims concerning components of the *new* measures which were not part of the original measure. Indeed, the situation before the present Panel was more akin to the situation which faced the 21.5 panel in *Canada – Aircraft (Article 21.5 – Brazil)*. Contrary to the assertions in the US First written submission, the Section 129 determinations as to the UK and Spain were "new" sunset review determinations based on different reasoning. In both of the original sunset review determinations, the USDOC concluded that there was a likelihood of continuation or recurrence because none of the producers/exporters concerned participated in the review. Because of their non-cooperation, the USDOC made the adverse assumption that there was a likelihood of continuation or recurrence of subsidization, without examining any of the facts put on the record by the Governments of Spain and the United Kingdom and the European Commission respectively, and without revisiting its analysis of any of the programmes at issue,<sup>60</sup> rather relying on findings it had made in the original investigations of the existence of certain subsidy programmes.<sup>61</sup> Thus, the reasoning of the Section 129 determinations, based on the existence of certain subsidies purporting to justify a finding of likelihood of continuation of recurrence, was different from the USDOC's reasoning in the original sunset reviews, where the finding of likelihood of continuation or recurrence was based on assumptions drawn from the respondents' failure to cooperate. Consequently, the Section 129 determinations were new measures based on new reasoning.

- (b) The factual findings purporting to justify the reasoning in the UK and Spanish cases are clearly different

4.45 Even assuming, *arguendo*, that the two forms of reasoning (*i.e.*, the likelihood of continuation or recurrence arising from the respondents' non-cooperation, and that arising from the alleged existence of certain subsidy programmes) could be considered unchanged, the underlying bases -- that

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<sup>58</sup> US First written submission, paras. 15-20

<sup>59</sup> Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 89 (emphasis added); *see also id.* at paras. 80-88.

<sup>60</sup> *Issues and Decision Memo for the Expedited Sunset Review of the Countervailing Duty Order on Cut-to-Length Carbon Steel Plate from the United Kingdom; Final Results* (29 March 2000), p. 12-14 ("*Sunset Review of CTL Plate from the UK*") (Exhibit EC-6). This document was submitted in the original panel proceeding as Exhibit EC-18. *See also Issues and Decision Memo for the Expedited Sunset Review of the Countervailing Duty Order on Cut-to-Length Carbon Steel Plate from Spain; Final Results* (29 March 2000) ("*Sunset Review of CTL Plate from Spain*"), p. 16-18. (Exhibit EC-7). This document was submitted in the original panel proceeding as Exhibit EC-22.

The Appellate Body has recently ruled that the assumption of the likelihood of continuation or recurrence of dumping in the event of non-cooperation is inconsistent with Article 11.3 of the *Anti-Dumping Agreement* (the equivalent of Article 21.3 of the *SCM Agreement*) because an investigating authority has an "obligation" to "arrive at a reasoned conclusion on the basis of positive evidence". *See* Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 234 (citation and quotation omitted).

<sup>61</sup> In the UK case, the USDOC found, that, even assuming the British Steel privatization to be at arm's length and fair market value, "we would still make an affirmative likelihood determination based on the determination in the Final Sunset Results that programs previously determined to provide countervailable subsidies and/or benefit streams from such products continue to benefit Glynwed, the other producer/exporter of the subject merchandise". *UK Section 129 determination*, p. 4 (Exhibit EC-2). In the Spanish case, USDOC held, making similar assumptions for Aceralia, that "we would still make an affirmative likelihood determination based on the fact that subsidy programs that have provided recurring, non-allocable subsidies at above *de minimis* rates continue to exist". *Spanish Section 129 determination*, p. 3 (Exhibit EC-3).

is, the factual findings purporting to justify the reasoning -- were clearly different in the two cases. In the original sunset review determinations in both the UK and the Spanish cases, although the determination of likelihood was made because of the non-cooperation of the producers/exporters, the information the USDOC reported to the United States International Trade Commission regarding the "nature of the subsidies" allegedly provided, and which were thus examined for a causal link to injury, concerned a different company or a different set of programmes from those relied upon by the USDOC in the Section 129 determinations. In its Section 129 determination in the UK case, for example, the USDOC focused exclusively on programmes that benefited Glynwed, because it assumed that all countervailable benefits that had previously been conferred upon BS plc had been extinguished through the company's privatization.<sup>62</sup> In contrast, in the sunset review determination considered in the original WTO proceedings, the USDOC identified exclusively programmes that benefited *BS plc*.<sup>63</sup> There was no reference in the USDOC's analysis of the nature of the subsidies to Glynwed at all.<sup>64</sup> Thus, assuming, *arguendo*, that the original sunset determination was not based on an assumption triggered by the producer/exporters' non-cooperation, but on a finding purporting to be positive evidence, the exclusive basis upon which the USDOC reached its finding in the Section 129 determination was distinct from that upon which it reached its conclusion in the sunset review at issue in the original WTO proceedings.

4.46 Likewise, in the Spanish case, the determination at issue in the original WTO proceedings was based primarily on thirteen subsidy programmes that allegedly conferred non-recurring and recurring benefits.<sup>65</sup> In contrast, the determination at issue in this Article 21.5 proceeding was based exclusively on programmes that allegedly provided *recurring* subsidies, and the USDOC had only specified one such programme.<sup>66</sup> Thus, the bases upon which the USDOC focused its determinations regarding the UK and Spanish cases in its original sunset review and its Section 129 determination were distinct and, therefore, the measures at issue were "different".

4.47 Because the measures at issue in this Article 21.5 proceeding were "new" and "different" from those considered in the original WTO proceedings and because they were taken to comply with the recommendations and rulings of the DSB, the function and scope of Article 21.5 proceedings discussed by the Appellate Body in *Canada – Aircraft (Article 21.5 – Brazil)* were applicable to this dispute. Accordingly, the new claims presented by the European Communities concerning the "new" and "different" measures at issue in this Article 21.5 proceeding were properly before this Panel.

4.48 Likewise, the European Communities' injury argument was properly before this Panel. In the Section 129 determinations regarding the UK and Spain, the USDOC assumed for the first time that the privatizations of BS plc and Aceralia were at arm's length and for FMV. This had the effect of significantly lowering the level of the countervailable subsidies that were found by the USDOC to be likely to continue or recur in the event that the countervailing duty orders were revoked. In the UK case, the USDOC measured the countervailable subsidies provided to Glynwed at 0.73 per cent.<sup>67</sup> As to Spain, the USDOC had previously measured the allegedly recurring subsidies provided to Aceralia at 1.73 per cent.<sup>68</sup> These figures were far lower than the 12.00 per cent for "all others"<sup>69</sup> and 36.86 per

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<sup>62</sup> *UK Section 129 determination*, p. 3-4 (Exhibit EC-2).

<sup>63</sup> *Sunset review of CTL Plate from the UK*, p. 17-19 (Exhibit EC-6).

<sup>64</sup> *Sunset review of CTL Plate from the UK*, p. 17-19 (Exhibit EC-6).

<sup>65</sup> *Sunset review of CTL Plate from Spain*, p. 16-18 (Exhibit EC-7).

<sup>66</sup> *Spanish Section 129 determination*, p. 3 (stating that even if the USDOC were to determine that non-recurring, allocable subsidies received by Aceralia prior to the 1997 privatization would not continue through or after the period of review, "we would still make an affirmative likelihood determination based on the fact that subsidy programs that have provided recurring, non-allocable subsidies at above *de minimis* rates continue to exist") (Exhibit EC-3).

<sup>67</sup> *Sunset review of CTL Plate from the UK*, p. 19 (Exhibit EC-6).

<sup>68</sup> In the Spanish determinations, the USDOC did not expressly indicate which subsidy programmes were considered recurring in its Section 129 determination or in the original sunset review. In the original

cent<sup>70</sup> figures, respectively, which the USDOC had issued in the original sunset determinations. However, because such changes to the subsidy rates resulted from the USDOC's revised subsidization findings, the European Communities logically could not have argued at an earlier stage of WTO proceedings that the USDOC's redetermination of the subsidy rates required a reconsideration of the injury determination. Had the USDOC properly analysed the UK and Spanish programmes at issue in its Section 129 determinations, the USDOC would have found that no subsidies would be likely to continue or recur and that, therefore, the continuation of countervailing duties was not warranted. In an analogous situation, the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* determined that it was appropriate for the complaining party to raise the issue of injury in an Article 21.5 proceeding where the investigating authority revised its findings regarding the amount of imports found to be dumped. Likewise here, the reductions in subsidy rates which the USDOC found in its revised Section 129 determinations would likely have an impact on the United States' finding of injury. Therefore, the United States was required to reconsider its injury determination.

(c) The claims raised by the European Communities concerning the UK and Spain are within the scope of its panel request

4.49 The European Communities noted that in its request for the establishment of a panel in this Article 21.5 proceeding, it had challenged the propriety of the United States' determinations in the UK and Spanish cases that there was a "likelihood of continuation or recurrence of subsidization and injury". That is, that the United States had failed to meet its obligations, *inter alia*, under Article 21.3 of the *SCM Agreement*. This claim was based on a number of arguments, including that the USDOC had failed to examine the nature and also the "impact [of the privatizations] on the continuation of the alleged subsidization".<sup>71</sup> The European Communities challenged the USDOC's finding of a likelihood of continuation or recurrence in light of the USDOC's assumptions in its Section 129 determinations that the privatizations of BS plc and Aceralia were at arm's length and for FMV. Thus, the United States' contention that the European Communities' claims in this proceeding regarding the UK and Spain were "not within the scope of the European Communities' Article 21.5 panel request"<sup>72</sup> was incorrect.

## **2. Certain corrosion-resistant carbon steel flat products from France**

(a) The privatization of Usinor was at arm's length and for FMV

4.50 The United States has asserted that the USDOC's revised determination in the French case was consistent with the DSB recommendations and rulings and was supported by the evidence before the USDOC.<sup>73</sup> For the following reasons, the United States' assertions are incorrect.

(i) *The SCM Agreement requires that a privatization be measured as to the company as a whole*

4.51 Before determining that pre-privatization, non-recurring subsidies are likely to continue, an investigating authority in a sunset review would be obliged under the *SCM Agreement* to examine the conditions of the privatization to determine whether the privatized producer continued to receive a

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investigation, the USDOC only expressly indicated that one programme provided recurring subsidies – the Fund for Employment Promotion and Early Retirement. The USDOC measured the recurring subsidies provided to Aceralia in that programme at 1.73 per cent. See *Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Spain*, 58 Fed. Reg. 37374, 37378 (1993).

<sup>69</sup> *Sunset review of CTL Plate from the UK*, p. 19 (Exhibit EC-6).

<sup>70</sup> *Sunset review of CTL Plate from Spain*, p. 18 (Exhibit EC-7).

<sup>71</sup> *US – Countervailing Measures on Certain EC Products, Recourse to Article 21.5 of the DSU by the European Communities*, Request for the Establishment of a Panel, WT/DS212/15 (17 September 2004), p. 2.

<sup>72</sup> US First written submission, para. 21.

<sup>73</sup> US First written submission, paras. 28-47.

benefit from prior subsidization to the state-owned producer. As the Appellate Body stated in this case:

"the obligation under Article 21.2 of the *SCM Agreement* ... requires an investigating authority in an administrative review, upon receiving information of a privatization resulting in a change in ownership, to determine whether a "benefit" continues to exist. In our view, the *SCM Agreement*, by virtue of Articles 10, 19.4, and 21.1, also imposes an obligation to conduct such a determination on an investigating authority conducting a sunset review. As we observed earlier, the interplay of GATT Article VI:3 and Articles 10, 19.4 and 21.1 of the *SCM Agreement* prescribes an obligation applicable to original investigations as well as to reviews covered under Article 21 of the *SCM Agreement* to limit countervailing duties to the amount and duration of the subsidy found to exist by the investigating authority."<sup>74</sup>

4.52 A privatization that occurs at arm's length and for FMV creates the presumption that any "benefit" from prior subsidization to the state-owned producer was extinguished and, therefore, that continuation of the countervailing duties was not warranted. As the Appellate Body explained:

"The effect of such a privatization [at arm's length and for FMV] is to shift to the investigating authority the burden of identifying evidence which establishes that the benefit from the previous financial contribution does indeed continue beyond privatization. In the absence of such proof, the fact of the arm's length, fair market value privatization is sufficient to compel a conclusion that the "benefit" no longer exists for the privatized firm, and, therefore, that countervailing duties should not be levied."<sup>75</sup>

4.53 Although this Panel and the Appellate Body did not specify a methodology for determining under what circumstances a privatization has occurred at arm's length and for FMV, these factors were nevertheless discussed in the context of the privatization of the firm *as a whole*. The Panel and Appellate Body did not discuss whether each *component* of a privatization was at arm's length and for FMV, contrary to the USDOC's incorrect method in its Section 129 determination and contrary to the United States' suggestion in its First written submission.<sup>76</sup>

4.54 For example, the Panel stated:

"[w]e believe that privatization calls for a (re)determination of the existence of a benefit to the privatized producer, and that fair market value payment by the *privatized producer (and its owners)* extinguishes the benefit resulting from the prior financial contribution (subsidization) bestowed upon the state-owned producer, because no advantage or benefit accrued to that privatized producer over and above what market conditions dictate pursuant to Article 14 of the *SCM Agreement*."<sup>77</sup>

The Panel also stated that:

"if upon privatization, fair market value is paid for all productive assets, goodwill, etc. employed by the state-owned producer, the Panel fails to see how the subsidies

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<sup>74</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 149 (citations and emphasis omitted).

<sup>75</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 126.

<sup>76</sup> *French Section 129 determination*, p. 3-12 (Exhibit EC-4); *see also* US First written submission, paras. 28-33.

<sup>77</sup> Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 7.77 (emphasis added)

bestowed to the state-owned producer could subsequently be considered to still confer a "benefit" on the *privatized producer (in the sense of the company together with its owners)* who has paid fair market value for all the shares and assets, reflecting, we must assume, the value of past subsidization."<sup>78</sup>

4.55 Likewise, quoting from its Report in *US – Lead and Bismuth II*, the Appellate Body stated that "the Panel made factual findings that *UES and BS plc/BSES* paid FMV for the productive assets, goodwill, etc. they acquired from BSC and subsequently used in the production of leaded bars imported into the United States in 1994, 1995 and 1996".<sup>79</sup>

4.56 Moreover, considering whether the "privatized producer (and its owners)"<sup>80</sup> as a whole paid FMV, rather than whether each component of the sale of the company was at FMV, was the only correct interpretation of the obligations established by the *SCM Agreement*. The contrary interpretation would allow countervailing duties to continue to be applied notwithstanding the fact that the value received by the producer *as a whole* was greater than or equal to the FMV of the company. The USDOC, however, reached this conclusion without taking into account the fact that a significant proportion of the purchasers of Usinor's shares (*i.e.*, the stable shareholders) actually paid prices that were *greater* than the prices identified by the USDOC as market-clearing prices, and that most purchasers paid prices that were within the market-clearing range. Had the USDOC evaluated the privatization *as a whole* by, for example, evaluating the average price paid per share overall, the unavoidable conclusion would have been that the privatization of Usinor was for FMV.

(ii) *The USDOC previously found and accepted before the Appellate Body that the privatization of Usinor was at arm's length and for FMV*

4.57 The finding by the USDOC in the French case that the privatization of Usinor was not at arm's length and for FMV was particularly troubling in light of the fact that the USDOC in two other cases reached precisely the opposite conclusion. As stated by the Appellate Body, "[t]he USDOC analyzed the sales conditions of the privatization of Usinor, in the remand determinations in *Allegheny Ludlum* (Case No. 1) and *GTS* (Case No. 2), concluding that those five privatizations took place at arm's length and for FMV."<sup>81</sup> Further, the United States did not contest before the Panel and the Appellate Body that "the sales [*i.e.*, all the privatizations] were at arm's length and for fair market value".<sup>82</sup> The United States has, in this proceeding, failed to offer any explanation whatsoever for these contradictory outcomes.

#### Arm's length

4.58 In considering whether a privatization has occurred at arm's length, an investigating authority must focus on the degree of post-privatization independence from the government of the purchasers of the company's shares. In the current case, it was clear that after the privatization of Usinor, there was no relationship whatsoever between the seller, the GOF, and the buyers, the employees/retirees of Usinor. After the privatization, the GOF held only an insignificant interest in Usinor, and, therefore, the relationship between GOF and the employees/retirees of Usinor was unquestionably independent (the European Communities maintains that the relationship was, in any event, independent, even before the privatization).

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<sup>78</sup> Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 7.72 (emphasis added).

<sup>79</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 142 (emphasis added and omitted).

<sup>80</sup> Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 7.77.

<sup>81</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, footnote 4.

<sup>82</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 84.

4.59 Even assuming *arguendo* that the concept of "arm's length" refers to the non-existence of some type of special relationship between the government and the purchasers at the time of the sale, it was clear that the USDOC's analysis was inadequate. The USDOC appears to have merely assumed that the employees/retirees of Usinor and the seller of Usinor's shares (the GOF) were related because "the employee offering was clearly distinguishable from the public offerings and was openly characterized as 'preferential'."<sup>83</sup> However, the mere fact that Usinor shares were offered at allegedly preferential rates to employees/retirees of Usinor *per se* does not mean that the seller and the buyers of the shares were related. Purchasers in the French public offering, for example, were also offered preferential treatment (i.e. a certain number of shares for free).<sup>84</sup> The USDOC found that the purchasers of the French public offering "were *not related* to the seller" and that, therefore, those sales "constituted arm's-length transactions".<sup>85</sup>

4.60 The United States, in its first written submission, alleged that because the GOF offered preferential share prices to employees of a company that it owned, it did not deal with those employees at arm's length.<sup>86</sup> However, just because Usinor was owned by the GOF at the time of the sale of the shares does not lead to the conclusion that Usinor's employees were employees of the Government. In fact, according to the International Offering Prospectus, despite its ownership interest, the GOF was not involved in the day-to-day management of Usinor. Therefore, the employee purchasers were at least two steps removed from having any direct relationship with the GOF, the seller of Usinor shares.<sup>87</sup> Further, the employee offering included *former*, as well as current, employees of Usinor. There was no evidence whatsoever that any relationship existed between the former employees of Usinor and the GOF that could support a conclusion that the sales to this category of purchasers were not at "arm's length".

4.61 In conducting its privatization analysis in its Section 129 determination, the USDOC failed to evaluate *how* or *why* the employees of Usinor were allegedly related to the seller. It just assumed that they were. Additionally, the USDOC did not even consider the former employees. In light of the above, it follows that there was no basis for the USDOC's conclusion that the employee/retiree offering was not at arm's length, and, in fact, evidence on the record suggests otherwise.

#### Fair market value (FMV)

4.62 Further, the sale of Usinor shares in the employee/retiree offering was at FMV. That this was so was evident from the fact that the discount offered to employees and retirees of Usinor reflects the risk assumed by the buyers for the resale restrictions on the shares purchased. The United States' argument that resale restrictions *per se* "provide no explanation for the substantial discount afforded Usinor's employees"<sup>88</sup> is unpersuasive. The restrictions placed upon the French public offering and the stable shareholder offering, to the extent they were applicable, were not as restrictive as those required of the employees/retirees of Usinor. The resale restrictions imposed on purchasers in the French public offering were applicable only where purchasers acquired free shares and were less severe than for the purchasers in the employee/retiree offering who chose to purchase the shares at a discount rate (i.e., required holding period of 18 months v. 24 months). Similarly, the resale restrictions imposed on the stable shareholders were not as severe as they were in the

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<sup>83</sup> *French Section 129 determination*, p. 6 (Exhibit EC-4).

<sup>84</sup> International Offering Prospectus for Usinor Privatization, p. 22, submitted in GOF/Usinor 2 September 2003 Questionnaire Response, Appendix 4G (indicating that "[i]n the French Public Offering, individuals will be entitled to receive from the French State a certain number of free Shares based on the number of Existing Shares purchased by such individuals and held for a period of at least 18 consecutive months") ("International Offering Prospectus") (Exhibit EC-8).

<sup>85</sup> *French Section 129 determination*, p. 5 (emphasis added) (Exhibit EC-4).

<sup>86</sup> US First written submission, para. 38.

<sup>87</sup> EC First written submission, para. 42.

<sup>88</sup> US First written submission, para. 46.

employee/former employee offering they were only prohibited from selling all of the shares for the first 3 months and were then able to sell a limited number of shares for the next 15 months. Thereafter, they were able to sell their shares to any third party.<sup>89</sup> In light of these facts, there was no merit to the United States' argument that resale restrictions did not provide a basis for offering a 20 per cent discount to Usinor's employees/retirees, or that the sales of shares to the employees/retirees were not FMV.

(b) The United States is not in compliance with its obligations under the WTO

4.63 By failing to revoke the countervailing duties imposed on certain corrosion-resistant carbon steel flat products from France in light of the fact that the privatization (whether considered as a whole or, alternatively, from the perspective of the employee/retiree offering) occurred at arm's length and for FMV, the United States has acted inconsistently with its obligations under GATT Article VI:3 and Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* and has failed to implement the recommendations and rulings of the DSB.

### 3. CTL plate from the UK and from Spain

4.64 The United States, in its first written submission, argued that the European Communities' claims challenging the USDOC's findings that subsidies continued to benefit the producers of the products involved in the sunset reviews in the UK and Spanish cases were not properly before this Panel.<sup>90</sup> As discussed above, the United States' assertions were unfounded.<sup>91</sup> Moreover, the United States failed to challenge the merits of the European Communities' arguments regarding the USDOC's subsidy findings. Nevertheless, it was clear that the United States breached its WTO obligations by finding a likelihood of continuation or recurrence on the basis of insufficient evidence. In both the UK and Spanish cases, the USDOC failed to consider evidence on the record demonstrating that the programmes found to confer countervailable benefits no longer existed and/or no longer applied to the steel industry.<sup>92</sup> No contradictory evidence whatsoever exists on the record; the USDOC simply refused to consider the point. The USDOC also failed to consider evidence on the record that Glynwed, the UK producer to which the privatization issue did not apply, had sold off certain of its assets and no longer produced the product under review.<sup>93</sup> Had the USDOC performed its likelihood determinations as required under the *SCM Agreement*, that is, had it considered all of the evidence on the record, it would have found no likelihood of continuation or recurrence of countervailable subsidies regarding CTL plate from the UK and Spain.

4.65 In light of the fact that the United States admitted in its first written submission that the USDOC had assumed that the privatizations of BS plc and Aceralia were at arm's length and for FMV,<sup>94</sup> the USDOC's sole basis for finding a likelihood of continuation or recurrence of subsidization was its reliance on programmes allegedly found to confer benefits to Glynwed and apparently one programme allegedly found to confer recurring benefits in Spain. However, because the United States had failed to consider evidence on the record demonstrating that these programmes no longer existed or applied to steel producers and that Glynwed no longer produced the product under review, the United States had acted inconsistently with its obligations under Article 21.3 of the *SCM Agreement*.

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<sup>89</sup> International Offering Prospectus, p. 23-24 (Exhibit EC-8).

<sup>90</sup> US First written submission, paras. 18-20.

<sup>91</sup> See discussion *supra* paras. 9-22.

<sup>92</sup> EC First written submission, paras. 53-62.

<sup>93</sup> EC First written submission, paras. 51-52.

<sup>94</sup> See, e.g., US First written submission, para. 49.



#### 4. Injury

4.66 In its first written submission, the United States failed to dispute on the merits the European Communities' argument that the United States was obliged to examine whether the revocation of the countervailing duty orders in the UK and Spanish cases would be likely to lead to continuation or recurrence of material injury as required by the *SCM Agreement*. The European Communities, however, maintained that Article 21.3 of the *SCM Agreement* obliges investigating authorities in sunset reviews to determine that the expiry of the duty would be likely to lead to continuation or recurrence of injury, separately from the determination as to the likelihood of continuation or recurrence of subsidization. Further, Article 21.1 of the *SCM Agreement* requires that "[a] countervailing duty rate shall remain in force only as long as and to the extent necessary to counteract subsidization which is *causing injury*".<sup>95</sup>

4.67 Given the USDOC's findings in these Section 129 determinations that the applicable subsidy rates would be substantially lower than those in the original sunset reviews,<sup>96</sup> it was highly likely that the USDOC's revised determinations would affect the causal link between those subsidies and a finding of continuation or recurrence of injury to the domestic industry.<sup>97</sup> Accordingly, by failing to reconsider its injury determination in the UK and Spanish cases, the United States violated its obligations under Articles 21.1 and 21.3 of the *SCM Agreement*. Alternatively, in light of the possibility of a finding of zero subsidies (*i.e.*, if, as discussed above, the USDOC had properly considered all of the evidence on the record),<sup>98</sup> the need for an inquiry into the likelihood of continuation or recurrence of injury would have been obviated.

#### D. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

##### 1. Introduction

4.68 Since, according to the schedule established by the Panel, the rebuttal submission of the European Communities had been due to be submitted simultaneously with this submission, and the third-party submissions were not due to be submitted until after this submission, the United States effectively had nothing to rebut. Therefore, this submission would be limited to a few additional comments regarding the EC First written submission.

4.69 At the outset, the United States wished to emphasize the Appellate Body's finding that, where the authorities examine "a benefit resulting from a prior non-recurring financial contribution bestowed on a state-owned enterprise,"<sup>99</sup> they must take into account a full privatization at arm's length and for FMV without regard to the ordinary legal distinction between a company and its owners.<sup>100</sup> The USDOC's revised privatization methodology was fully consistent with the Appellate Body's finding. In determining whether a full privatization has extinguished the benefit from prior, non-recurring financial contributions, USDOC no longer makes a distinction between a company and its owners. Thus, the focus of USDOC's new methodology was on whether the privatization transaction had extinguished the benefit from allocable, pre-privatization subsidies such that the "privatized producer" – meaning the company and its new owners<sup>101</sup> – had received no benefit. Consistent with the findings

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<sup>95</sup> Emphasis added. The Appellate Body in *US – Countervailing Measures on EC Products* found that the provisions in Article 21.1 of the *SCM Agreement* set out obligations of Members that are applicable not only in original investigations but also in administrative and sunset reviews. See Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 139.

<sup>96</sup> See discussion *supra* para. 23.

<sup>97</sup> See discussion *supra* at para. 25.

<sup>98</sup> See discussion *supra* paras. 51-57.

<sup>99</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 117.

<sup>100</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, paras. 118-119.

<sup>101</sup> Panel Report on *US – Countervailing Measures on Certain EC Products*, paras. 7.54 and 7.72.

of the Appellate Body, USDOC does not perform a new benefit calculation.<sup>102</sup> Rather, if the entire privatization is at arm's length and for FMV, USDOC presumes that the benefit from allocable, pre-privatization subsidies has been extinguished.<sup>103</sup> If the entire privatization is not arm's-length/FMV, then *all* of the benefit from allocable, pre-privatization subsidies remains countervailable (except to the extent that it had already been countervailed).<sup>104</sup> Where only a portion of the company is not sold in an arm's-length/FMV transaction, it follows that only a corresponding portion of the benefit remains countervailable. The privatized producer in the latter two situations has received something "for free" in that the government did not require FMV for all, or part, of the company.<sup>105</sup>

**2. In the revised French sunset review, USDOC properly found that a benefit continued to be countervailable**

4.70 In implementing the recommendations and rulings of the DSB in the revised French sunset review – which involved the Usinor privatization – USDOC found that the privatized Usinor received something "for free" in that the so-called "preferential" shares offered to Usinor's employees were sold at less than FMV in a non-arm's-length transaction. Therefore, USDOC reasonably determined that a corresponding portion of the allocated benefit continued to be countervailable after privatization. As explained in the U.S.' first written submission, the European Communities had failed to demonstrate that USDOC's finding of a non-arm's-length transaction at less than FMV had been in error. Moreover, there is nothing in the text of the *SCM Agreement* or the DSB recommendations and rulings that would require USDOC to follow the European Communities' suggested method for considering FMV; *i.e.*, averaging out the prices paid for all shares and, then, comparing the average price with FMV to make a *singular* judgment about the privatization.<sup>106</sup>

4.71 The European Communities attempted to buttress its unwarranted claim that all of the shares in Usinor were sold for FMV by asserting that: "Such a finding is consistent with the USDOC's own findings in two parallel proceedings concerning the privatization of Usinor in which the USDOC found that the privatization of Usinor took place at arm's length and for fair market value".<sup>107</sup> The findings to which the European Communities referred were two remand determinations made by USDOC in domestic litigation concerning countervailing duty orders other than the order on corrosion-resistant carbon steel flat products from France.<sup>108</sup> The European Communities also asserted that it was a "common" practice for privatizing governments to set aside shares for company employees.<sup>109</sup> Both European Communities assertions were misplaced. The methodology applied by USDOC in the two prior remand determinations was not the methodology described in the Modification Notice and applied in the revised French sunset review. Hence, the results of those determinations have no relevance to the present proceeding. In particular, in the remand determinations cited by the European Communities, USDOC treated Usinor's employees as "new

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<sup>102</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 117

<sup>103</sup> That presumption may be rebutted with evidence demonstrating that broader market conditions were severely distorted by government action. See *Modification Notice*, p. 37,127.

<sup>104</sup> *Modification Notice*, p. 37,127.

<sup>105</sup> Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 7.72

<sup>106</sup> EC First written submission, paras. 37-38. The European Communities' argument is akin to arguing that if a government provides a company with a subsidy in the form of a below-market-rate loan, that subsidy can be excused if the government also provides the company with a loan at a higher rate.

<sup>107</sup> EC First written submission, para. 39.

<sup>108</sup> Results of Redetermination Pursuant to Court Remand in *GTS Indus. S.A. v. United States*, No. 00-03-00118, slip op. 02-02 (Court of International Trade, January 4, 2002) ("Determination on Remand in *GTS Indus. S.A. v. United States*") (copy attached as Exhibit US-1); Results of Redetermination Pursuant to Court Remand in *Allegheny Ludlum Corp. v. United States*, No. 99-09-00566, slip op. 02-01 (Court of International Trade, January 4, 2002) ("Determination on Remand in *Allegheny Ludlum Corp. v. United States*")

<sup>109</sup> European Communities first written submission, footnote. 71.

owners," distinguishable from the company.<sup>110</sup> For this reason, USDOC, while finding that the employees paid a subsidized price for their shares, did not take that into account in analyzing whether Usinor had been sold for FMV.<sup>111</sup>

4.72 On the other hand, in implementing the recommendations and rulings of the DSB in the revised French sunset review, USDOC properly took into account the fact that shares were offered to Usinor's employees in a non-arm's-length transaction for less than FMV; since, consistent with the findings of the Appellate Body, its new methodology required it to consider the privatized company and its new owners together as the privatized producer.<sup>112</sup> Furthermore, it was irrelevant whether it was a common practice when privatizing enterprises for governments to set aside shares for company employees. The only relevant issue was whether the privatized producer, Usinor and its new owners, received something "for free" by not having to pay FMV in an arm's-length transaction. In short, the European Communities had not demonstrated that USDOC erred in finding that the employee sales were not at arm's length and for FMV. Consequently, there was no basis for the European Communities' claim that USDOC erred in finding that the subsidy benefit associated with those sales had not been extinguished by the Usinor privatization, and the Panel should reject that claim.

**3. In the revised UK sunset review, USDOC properly found that countervailable subsidies were likely to continue or recur**

4.73 With respect to the sunset review in the UK case, in implementing the recommendations and rulings of the DSB, USDOC assumed that the UK privatization extinguished entirely the allocated subsidy benefit from pre-privatization subsidies. By making that assumption, and by revising the sunset review in accordance with that assumption, USDOC fully complied with the DSB recommendations and rulings. USDOC nevertheless found that countervailable subsidies were likely to continue or recur in the event of revocation, for reasons explained in its first written submission.<sup>113</sup> The European Communities cited an earlier remand determination to suggest that USDOC did not perform the proper revised analysis<sup>114</sup>, but the reliance is misplaced. What USDOC found previously regarding the nature of the privatization of British Steel plc cannot in any way render more complete USDOC's assumption in the revised sunset determination that the privatization of British Steel plc extinguished the benefit from allocable, pre-privatization subsidies. Moreover, USDOC's new privatization methodology was not applied in the remand determination cited by the European Communities.<sup>115</sup> For that reason, even if there had been an open issue in this proceeding as to whether the privatization of British Steel plc should have been treated as satisfying the arm's-length/FMV standard – and there was not – the remand determination in question would not be germane.

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<sup>110</sup> Determination on Remand in *GTS Indus. S.A. v. United States*; Determination on Remand in *Allegheny Ludlum Corp. v. United States*.

<sup>111</sup> See, e.g., Determination on Remand in *Allegheny Ludlum Corp. v. United States* ("Accordingly, the Department has conducted a thorough analysis of the facts and circumstances of Usinor's privatization to determine whether the purchasers (i.e., the new owners) paid full value for the company. ... While we find that the Usinor employees who purchased the small per centage of remaining shares paid less than the full fair market value of those shares and, thus, did receive a subsidy from the French Government, this subsidy is not countervailable because these purchasers are distinct individuals who are not, in their individual capacity, engaged in production of the subject merchandise").

<sup>112</sup> *Modification Notice*, p. 37,137.

<sup>113</sup> USDOC made a similar finding in the revised sunset review on cut-to-length carbon steel plate from Spain, another determination that is presently challenged by the EC.

<sup>114</sup> EC First written submission, para. 68.

<sup>115</sup> Final Results of Redetermination Pursuant to Court Ordered Remand on General Issue of Privatization in *British Steel plc v. United States*, Consol. Ct. No. 93-09-00550-CVD, slip op. 95-17 (Court of International Trade, February 9, 1995) (copy attached as Exhibit US-3).

## V. ARGUMENTS OF THE THIRD PARTIES

### A. WRITTEN SUBMISSION OF BRAZIL

#### 1. The France Section 129 determination

5.1 In the French Section 129 sunset review, the USDOC determination that subsidies were likely to continue or recur if the order were revoked, was premised on a finding that little more than 5 per cent of the shares in the privatization at issue in the review were not sold at arm's-length and FMV.<sup>116</sup> Brazil found the USDOC Section 129 determination to be inconsistent with the *SCM Agreement* and the rulings and recommendations of the DSB.

- (a) The USDOC determination that the sale of shares to Usinor employees/former employees was not at arm's-length is inconsistent with the *SCM Agreement* and the Appellate Body's findings and recommendations

5.2 The USDOC found that because 5.16 per cent of Usinor shares were made available at a discount to the general offering price, the employee/former employee share offering transactions were not at arm's length.<sup>117</sup> Brazil took exception to the US argument on a number of grounds. First, USDOC never established that Usinor employees/former employees were related to the seller, the GOF, merely offering a one sentence conclusion that the employees were related to Usinor.<sup>118</sup> There may be no definition of "arm's-length" contained in the *SCM Agreement*, but the USDOC had to explain its conclusions in order to allow this Panel to consider its rationale, consistent with the Panel's standard of review under Article 11 of the *DSU*. The United States offered only post hoc justification. Brazil further agreed with the reasons offered by the European Communities as to why Usinor employees/former employee were in fact not related to the seller, the GOF.<sup>119</sup> The principal United States' argument in response is that drawing distinctions between the company and the owner of the company in this situation is inconsistent with the DSB assumption that there is little distinction between the company and its owners. Brazil found the argument was simply misplaced.<sup>120</sup> The Panel and Appellate Body were addressing whether benefits may be bestowed on a company through indirect subsidies to its owners, not whether there is an affiliation between an owner and prospective purchaser. Moreover, the Panel and Appellate Body never found that the company and the owner were one and the same for all purposes and in all instances.<sup>121</sup>

5.3 Second, even if affiliation somehow existed between the employees/former employees of Usinor and the GOF, this is not dispositive with respect to the continuation of benefit. The arm's-length test reflects a general understanding that transactions between affiliated parties *may not always* be on commercial terms. Thus, a closer review of the actual terms is warranted where affiliation exists to determine if the terms reflect usual commercial practice.<sup>122</sup> If they do, then the transaction at

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<sup>116</sup> *Issues and Decision Memorandum for the Section 129 Determination: Corrosion-Resistant Carbon Steel Flat Products from France: Final Results of Expedited Sunset Review of Countervailing Duty Order* (23 October 2003) ("France Section 129 determination"), p. 12. (Exhibit EC-4).

<sup>117</sup> *Id.*, p. 6.

<sup>118</sup> France Section 129 determination, p. 6.

<sup>119</sup> EC First written submission, paras. 41-42; EC Second written submission, paras. 40-45.

<sup>120</sup> US First written submission, para. 38, citing *US – CVDs on Certain European Communities Products (Panel)*, paras. 7.54 and 7.72 and *US – CVDs on Certain European Communities Products (AB)*, paras. 113-115.

<sup>121</sup> Panel Report on *US – Countervailing Measures on Certain EC Products*, paras. 7.54 and 7.72 and *US – CVDs on Certain European Communities Products (AB)*, paras. 113-115.

<sup>122</sup> See, e.g., US First written submission, para. 40. (USDOC will consider "the usual private practice" as to the sale of companies). We note that the Panel in this case already found that the United States in practice essentially does not distinguish between the terms "arm's length" and "fair market value," underscoring the US

issue is presumptively consistent with market principles and the terms should not be used to impugn the transaction as not representing FMV. Unfortunately, the United States did not follow through on its own apparent understanding. The United States wants to colour the employee share discount as an anomaly and highly unusual, not reflecting common commercial practice whereas, in reality, such offering discounts are extremely common.

- (b) The USDOC determination that the Privatization of Usinor was not for FMV is inconsistent with the *SCM Agreement* and the Appellate Body's findings and recommendations

5.4 The facts of the Usinor privatization are that the market value of the firm was established, and a determination made on what was necessary to recoup the value of the company. As it turns out, the total price paid for the company and the average share price met or exceeded the recommendations of the appraisal, as well as the "market clearing price" calculated by the USDOC.<sup>123</sup> The USDOC disregarded this fact and looked at just 5 per cent of the total sale to find that non-recurring subsidy benefits were not extinguished in the transaction. Brazil found that the approach taken by the USDOC was inconsistent with the ruling of the Appellate Body in *Canada – Aircraft*, as reiterated by the Appellate Body in this dispute. The Appellate Body explicitly noted: "once a fair market price is paid ... [the] market value is redeemed".<sup>124</sup>

- (c) The USDOC failed to limit countervailing duties to the amount and duration of the subsidy in existence

5.5 Because the USDOC failed to properly consider both the arm's-length nature of the Usinor privatization and the market value of the transaction, its Section 129 sunset review determination in this case is also inconsistent with GATT Article VI:3 and Articles 10, 19.4 and 21.1 of the *SCM Agreement*. Specifically, the USDOC did not establish a proper basis for determining the amount and duration of the subsidy at issue in the review and thus it was impossible to act in accordance with these particular provisions, as interpreted by the Panel and Appellate Body, to limit the countervailing duties under the respective orders by the amount and duration of the subsidy it found to exist.

## **2. The UK and Spain Section 129 determinations**

- (a) The USDOC assumptions that the UK and Spanish privatization transactions were at arm's-length and for FMV do not constitute determinations

5.6 In its Section 129 sunset review determinations of the UK and Spanish countervailing duty orders, the USDOC found "even assuming *arguendo*" that privatization in the two cases did extinguish pre-privatization subsidy benefits, it was not obliged to take any action.<sup>125</sup> Brazil recalled that the Appellate Body resolved that a "determination" must be made with respect to the effects of privatization on pre-privatization benefit streams.<sup>126</sup> The word "determination" denotes an official ruling; a sense of certainty and finality to a particular issue. This is *not* what the USDOC offered in its Section 129 determinations in the UK and Spanish cases. An assumption is not sufficient to implement the rulings and recommendations of the DSB in this case. It does not matter whether other types of subsidies or other subsidized producers were involved in the sunset review. The explicit

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consideration of the close relationship between the two terms. At the same time, the Panel noted the terms could represent different concepts. See Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 6.39. Brazil agrees. "Arm's length" reflects more of a process-oriented concept, as opposed to the valuation concept inherent in the term "fair market value". Nonetheless, the "arm's length" test ultimately provides the context for, and otherwise informs, the decision on "fair market value".

<sup>123</sup> *Id.*, para. 38.

<sup>124</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 102.

<sup>125</sup> *Id.*

<sup>126</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 149

finding of the Appellate Body is that an authority *must* render a determination on the effect of a privatization. In this regard, the United States had not brought its measures into compliance with its obligations under the *SCM Agreement* and Article VI:3 of *GATT 1994*, as elaborated by the Panel and Appellate Body.

- (b) The USDOC failed to limit countervailing duties to the amount and duration of the subsidy in existence

5.7 If the United States chose to stand by the USDOC "assumptions" regarding the effect of the privatizations at issue in the UK and Spanish sunset reviews as something more than mere argument, then the USDOC Section 129 determinations in these cases would be inconsistent with GATT Article VI:3 and Articles 10, 19.4 and 21.1 of the *SCM Agreement*. Specifically, the USDOC should have, on the basis of its assumptions, limited the countervailing duties applied under the reviewed orders, taking into account the elimination of benefits resulting from the privatizations.

B. WRITTEN SUBMISSION OF CHINA

**1. European Communities' allegation that USDOC shall consider the evidence about Glynwed**

5.8 The "measures taken to comply" should be interpreted broadly enough to accommodate the measures that a challenged Member should take to comply with the DSB recommendations and rulings. The USDOC was not obliged to consider the evidence about Glynwed in a Section 129 proceeding. Such a consideration is not a "measure taken to comply". Otherwise, the certainty of an administrative determination would be ruined. A respondent may not be allowed to cure its deficiencies in the original sunset review by having a "second-chance". The European Communities' allegation seemed to suggest that once an aspect of a sunset review was found to be inconsistent with the WTO Agreement, the investigating authority is obliged to render an entirely new review. We see no merits of this argument. We agree with the European Communities that a Member should not implement a DSB recommendation in a "formalistic" manner. However, we believe that the scope of "measures taken to comply" includes both the measures the challenged Member has actually taken and the measures the challenged Member should have taken. Because China believes that investigating authorities should not take evidence presented before them after the closure of record, China did not think the consideration of evidence in relation to Glynwed was a "measure taken to comply". More specifically, China did not think it was a measure the USDOC should have taken. Therefore, China believed that the European Communities' allegation in relation to Glynwed should not be considered by this panel.

**2. European Communities' allegation that USDOC shall consider the evidence of abolishment of certain subsidy programs by the Spanish government**

5.9 China may shortcut its analysis by relying on the reasoning of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)*. In that case, India raised the non-attribution issue before the original panel but, as found by the Panel, failed to pursue it. The Appellate Body in that case denied India's claim to include such an issue in a 21.5 proceeding by reasoning that that issue does not "constitute an *inseparable element* of a measure taken to comply".<sup>127</sup> China believed that if an issue had no connection with the DSB recommendations and rulings, it would not be a "measure taken to comply". Again, review of all the evidence in the original sunset review was not a measure that the challenged Member should have taken; and, accordingly, it was not a measure taken to comply. The European Communities' rationale, similarly, seemed to suggest that the investigating authority should render a new sunset review if an aspect of the review is found inconsistent with the WTO Agreement. China

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<sup>127</sup> Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para.86

similarly could not agree. If the European Communities intended to argue that issue, it may well initiate a new, fresh panel. An Article 21.5 proceeding was not a proper forum.

### **3. European Communities' allegation that USITC shall consider injury**

5.10 In accordance with United States law, the USDOC should provide the USITC with a net countervailable subsidy which it did in its original sunset reviews for both the UK and the Spanish cases.<sup>128</sup> The net countervailable subsidy for the UK case was 0.73 per cent for Glynwed and 12 per cent for all other producers/exporters.<sup>129</sup> In the Spanish case, it was 36.86 per cent for all producers/exporters.<sup>130</sup> In the proceedings before the original panel and the Appellate Body, non-recurring allocable subsidies had been found presumably extinguished by an arm's length privatization transaction for FMV.<sup>131</sup> In the Section 129 determinations for the UK and Spanish cases, the USDOC assumed that the privatization was at arm's length and for FMV.<sup>132</sup> In this situation, it was reasonable to conclude that the USDOC would have had to calculate a new countervailable subsidy because certain programmes had been found to have extinguished. By examination of the Section 129 determinations for the UK and Spanish cases, China found that the USDOC did not do so. The primary reason for the USDOC not to calculate this net countervailable subsidy rate was that the likelihood determination would be made on an order-wide basis.<sup>133</sup> However, even if it was assumed that the calculation of a net countervailable subsidy rate had no impact on the USDOC's likelihood determination because it was made on an order-wide basis, the USDOC failed to consider the potential impact of this rate on the USITC's determination.

5.11 Accepting the rationale of the Appellate Body in the original appeal for this case, China would have deemed the net rate communicated by the USDOC to USITC in the original sunset review inaccurate. In this situation, a portion of the USITC's original likelihood determination with respect to injury could be inferred as inconsistent with the recommendations and rulings of the Panel and the Appellate Body. This portion is where the USITC relied for its determination on the rate provided by the USDOC. USDOC's determination in a Section 129 proceeding not to provide the USITC with a new net countervailable subsidy rate rendered its effort to comply with the DSB recommendations and rulings incomplete. USITC's failure to "correct" the relevant portion of its likelihood determination was also a failure to bring its measures into conformity. The separation of the investigating authorities did not immunise the USITC from taking actions to bring its measures into conformity. Both the USDOC's provision of a new net countervailable subsidy rate to the USITC and the USITC's correction of its original likelihood determination or a portion thereof, were measures taken to comply and, therefore, were within the terms of reference of the compliance panel.

#### **C. WRITTEN SUBMISSION OF KOREA**

##### **1. The United States failed to satisfy its WTO obligations by refusing to consider evidence demonstrating the invalidity of its Section 129 likelihood determinations concerning Spain and the UK**

5.12 The United States has argued that it need not consider evidence submitted in the course of the Section 129 proceedings demonstrating that the revised measures generated new inconsistencies with

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<sup>128</sup> 65 F.R. 18,307, 18,308, and 65 F.R. 18,309, 18,310.

<sup>129</sup> 65 F.R. 18,309, 18,310.

<sup>130</sup> 65 F.R. 18,307, 18,308.

<sup>131</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para.127.

<sup>132</sup> Decision Memorandum on §129 Determination: Final Results of Expedited Sunset Review of Cut-to-Length Carbon Steel Plate from the United Kingdom; and Decision Memorandum on §129 Determination: Final Results of Expedited Sunset Review of Cut-to-Length Carbon Steel Plate from Spain.

<sup>133</sup> *Id.*

the WTO Agreements. Korea submits that the United States' argument is incorrect, because it is derived from an erroneous interpretation of a Member's obligations under Article 21.5 of the *DSU*.

5.13 When undertaking measures intended to comply with the recommendations and rulings of the DSB, a Member may not merely correct the errors identified by the DSB but rely on other grounds to reaffirm its determination. While refusing to consider arguments that have been raised before it, it could focus on other grounds which may create new inconsistencies with the covered Agreements. In its Section 129 determinations on Spain and the UK, the USDOC relied on grounds that had not been the basis of its original sunset determinations in deciding that, despite the privatizations of BS plc and Aceralia, there was a likelihood of continuation or recurrence of subsidization.<sup>134</sup> In the Spanish case, the USDOC based its determination on the assertion that, independent of the non-recurring subsidies whose benefits were assumed to be extinguished by the privatization of Aceralia, "there are countervailable recurring, non-allocable subsidies provided pursuant to programs that to the best of our knowledge continue to exist".<sup>135</sup> And as to the UK case, the USDOC based its determination on the assertion that in the original investigation, it had found a countervailable subsidy rate for Glynwed Steels Ltd. ("Glynwed").<sup>136</sup> In both of the Section 129 determinations, while relying on these alternative bases for its conclusion that there was a likelihood of continuation or recurrence of subsidization, the USDOC refused to consider evidence submitted by the European Communities and the Governments of Spain and the UK demonstrating that the alternative bases no longer existed and, therefore, could not support its determinations. The USDOC did so on the basis of an understanding of its duty to implement that is incorrect. Moreover, the United States failed to satisfy its obligations under Article 21.3 of the *SCM Agreement* to exercise an active role<sup>137</sup> when the USDOC refused to consider the evidence submitted by the European Communities, Spain and the UK that the bases for its Section 129 determinations were flawed.

5.14 In the current case, Korea was not familiar with the subsidy programs that the USDOC relied on in its Section 129 determinations, and, therefore, took no position as to the accuracy of the arguments that those programs had been abolished or no longer applied to steel production. However, Korea submitted that the United States acted inconsistently with its obligations under Article 21.3 of the *SCM Agreement* when the USDOC, in the Section 129 determinations, "remain[ed] passive in the face of possible shortcomings in the evidence submitted",<sup>138</sup> and disregarded evidence on the record demonstrating that the alternative bases on which the USDOC made its likelihood determinations no longer existed.

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<sup>134</sup> Korea notes that the United States asserts that the grounds providing the basis for its Spain and UK Section 129 Determinations are "unchanged and did not have to be changed in response to DSB rulings and recommendations. Therefore, they are not 'measures taken to comply' and are not subject to Article 21.5". US First written submission, para. 20 (8 December 2004). However, Korea agrees with the reasoning presented by the European Communities as to why this assertion is incorrect. EC Second written submission, paras. 9-26 (7 January 2005)

<sup>135</sup> Spain Section 129 determination, p. 3.

<sup>136</sup> UK Section 129 determination, p. 4.

<sup>137</sup> Panel Report on *US – Carbon Steel*, para. 8.117 (quoting Appellate Body Report on *US – Cotton Yarn*, para. 73 (in turn quoting Appellate Body Report on *US – Wheat Gluten*, para. 55)). Similarly, the Appellate Body has explained that Article 11.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, which contains nearly identical language to that of Article 21.3 of the *SCM Agreement*, "makes clear that it envisages a process combining both investigatory and adjudicatory aspects. In other words, Article 11.3 assigns an active rather than a passive decision-making role to the authorities". Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 111 (emphasis in original).

<sup>138</sup> Panel Report on *US – Carbon Steel*, para. 8.117.



**2. The USDOC improperly determined that there is a likelihood of continuation or recurrence of subsidization in the France Section 129 determination**

5.15 Korea recognized that, in these proceedings, the European Communities and the United States disputed whether the USDOC was correct in finding that the sales of shares in the employee offering were not at arm's length and for FMV. Even assuming for the purpose of this submission that the USDOC's factual finding was correct, Korea submitted that the USDOC erred in its legal conclusion that the privatization of the company did not extinguish the benefit conferred by the non-recurring pre-privatization subsidies and that, therefore, there was a likelihood of continuation or recurrence of subsidization. One of the flaws in the USDOC's reasoning is the lack of any connection between its factual finding regarding the non-arm's length/FMV sale of a very small proportion of the company's shares and its legal conclusion that the benefit conferred by the pre-privatization subsidies was not extinguished. The France Section 129 determination contains nothing but the bare assertion that such a connection existed which is insufficient to satisfy a Member's obligation "to make a finding on *subsidization*, i.e., whether or not the subsidy continues to exist",<sup>139</sup> as required by the Appellate Body.

5.16 Furthermore, the lack of an explanation as to a connection between the factual finding and the legal conclusion is particularly troublesome because of the insignificant proportion of the company's shares that were found by the USDOC to be sold at non-arm's length/FMV conditions. Korea did not understand that the Appellate Body intended that the "rebuttable presumption" that a privatization extinguishes the benefits from pre-privatization subsidies would arise only in cases in which 100 per cent of the privatized company's shares are sold at arm's length and FMV. To the contrary, Korea submitted that in a case such as this, in which the overwhelming majority of the shares (almost 95 per cent) were concededly sold at arm's length and for FMV, the burden remained upon the Member to "identify[ ] evidence which establishes that the benefit from the previous financial contribution does indeed continue beyond privatization".<sup>140</sup> The USDOC failed to satisfy this burden in its France Section 129 determination.

5.17 In addition, Korea agreed with the European Communities that a proper evaluation of a privatization must be performed for the company as a whole.<sup>141</sup> Small individual elements of a privatization cannot be evaluated in isolation to determine whether the privatization had the effect of extinguishing the benefit conferred by pre-privatization subsidies. The contrary method of analysis adopted by the USDOC in this proceeding would permit an investigating authority to conclude that a privatization failed to extinguish such benefits on the basis of non-arm's length/FMV sales of a *de minimis* proportion of the company's shares, regardless of the conditions surrounding the sales of the vast majority of the company's shares – a situation closely approached in the current case. Korea agreed with the European Communities that, if the privatization of the company, when viewed as a whole, occurred at FMV, then the United States had failed to satisfy its burden "of identifying evidence which establishes that the benefit from the previous financial contribution [did] indeed continue beyond privatization".<sup>142</sup>

5.18 Finally, in a cryptic comment to this Panel, the United States asserted that the USDOC "determined that the [sic] 5.16 per cent of the allocated pre-privatization benefit" – i.e., the same per centage as the proportion of the company's shares found not to be sold at arm's length and for FMV – "was not extinguished. The remaining 94.84 per cent of the allocated benefit was found to be extinguished by the sale of the remaining portion of the company in arm's-length transactions for fair

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<sup>139</sup> Appellate Body Report on *US – Lead and Bismuth II*, para. 54 (emphasis in original).

<sup>140</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 126.

<sup>141</sup> EC Second written submission, paras. 30-34.

<sup>142</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 126.

market value".<sup>143</sup> Such a determination regarding the proportional extinguishment of the pre-privatization benefit, however, cannot be found in the USDOC's France Section 129 determination. Moreover, if a determination that the vast majority of the pre-privatization benefit had been extinguished were in fact included in the USDOC's Section 129 determination, it becomes even less clear how the USDOC could nonetheless reach the conclusion that there was a likelihood of continuation or recurrence of subsidization sufficient to warrant continuation of the CVD order.

**3. The United States erred in failing to reconsider whether there was a likelihood of continuation or recurrence of injury**

5.19 Even assuming, for the sake of argument, that some countervailable subsidies or benefits remained unaffected by the privatizations of Aceralia and BS plc, the effect of the United States' concessions before this Panel is that the remaining countervailable subsidy rates reported to the USITC must be revised significantly. The UK case provided a particularly stark example – with the elimination of the 12.00 per cent rate for "all other" producers, the only remaining subsidy rate was Glynwed's 0.73 per cent – a rate so low that it was considered *de minimis* for investigations under Article 11.9 of the *SCM Agreement*.

5.20 Korea agreed with the European Communities that in failing to reconsider the likelihood of the continuation or recurrence of injury in light of the USDOC's revised subsidy determinations for the UK and Spain, the United States had failed to satisfy its obligations under the *SCM Agreement*.<sup>144</sup> As the Appellate Body stated in the parallel situation involving anti-dumping duties in *EC – Bed Linen (Article 21.5 – India)*: "[t]he amount of dumped imports will, of course, have an impact on the assessment of the effects of the 'dumped imports' for the purposes of determining injury. It is clear, therefore, that the revised findings on dumping and injury could have a bearing on whether a causal link exists between dumping and injury".<sup>145</sup> Thus, when a Member's investigating authority revised its conclusions regarding the factual predicates underlying its injury determination, its obligation to ensure that it maintained countervailing duties only to the extent necessary to counteract subsidization that was causing injury required that the injury determination be reconsidered in light of those changed factual conclusions. Only by doing so could the Member ensure that it was properly discharging its obligations under Articles 21.1 and 21.3 of the *SCM Agreement*.

**VI. INTERIM REVIEW**

6.1 On 29 April 2005, the Panel issued its Interim Report to the parties. On 13 May 2005, both the European Communities and the United States submitted written requests for the Panel to review several aspects of the Interim Report. On 20 May 2005, both parties submitted written comments on the other party's request for interim review. Neither party requested an interim review meeting with the Panel.

6.2 The Panel has carefully reviewed the arguments and proposed amendments to the text of the Interim Report and addresses them below. Where necessary, the Panel has also made certain revisions to the Report.

**A. REQUEST OF THE EUROPEAN COMMUNITIES**

6.3 The European Communities has asked the Panel to address three points. First, the European Communities questions the accuracy of the comparison of the restrictions and incentives applicable to the French public offering and the employee share offering. The European Communities then

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<sup>143</sup> US First written submission, para. 31 (footnote omitted).

<sup>144</sup> See EC First written submission, para. 71; EC Second written submission, paras. 58-60.

<sup>145</sup> Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 86 (emphasis omitted).

proposes to amend paragraph 7.153 of the Interim Report (paragraph 7.153 of this Report).<sup>146</sup> The United States also proposes to amend the paragraph and states that its version follows the Panel's original draft more closely.<sup>147</sup>

6.4 The Panel considers that the description of the various restrictions and incentives applicable to both share offerings in paragraph 7.153 of its Interim Report was not inaccurate although brief. The Panel does not object to expanding its description as requested by the parties and has therefore amended paragraph 7.153 of the Interim Report (paragraph 7.153 of this Report) accordingly.

6.5 Second, as regards paragraphs 7.175 and 7.176 of the Interim Report (paragraphs 7.175 and 7.176 of this Report), the European Communities argues that the Panel's reasoning that the US action is further justified by the fact that it has a retrospective system of duty collection and exporters can request annual or changed circumstances reviews is erroneous and dangerous.<sup>148</sup> The European Communities argues that an investigating authority's obligation to conduct periodic reviews is independent of the obligation to properly conduct a sunset review under the *SCM Agreement*. The European Communities contends that distinguishing between systems of duty collection suggests that an investigating authority in a retrospective system can take certain actions that an investigating authority in a prospective system cannot. In addition, the European Communities asserts that the United States never argued the points at issue in paragraphs 7.175 and 7.176 and thus request that the Panel delete paragraph 7.175 and a portion of paragraph 7.176.<sup>149</sup> The United States disagrees and believes the European Communities' proposed deletion is inappropriate. The United States maintains that the Panel is not implying that a retrospective system permits a Member to derogate from its

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<sup>146</sup> The European Communities proposes the following paragraph:

"Based on the evidence from the record, employees and retirees can either participate in the public offering or buy shares with a discount of 20per cent, but then with the obligation to hold them for 24 months. They can then obtain a free share for the first 71 shares purchased and 1 free share per subsequent 5 shares purchased. Persons taking part in the public offering are not subject to an obligation to hold their shares for any amount of time unless they want to obtain one free extra share for each 10 shares purchased (up to a ceiling of 30 000 francs for the purchased shares). The required duration for holding shares is then 18 months. As a result, for the first 100 shares, shareholders under the discounted employee offering receive 6 free shares, while shareholders under the French public offering receive 10 free shares provided that the shareholders in both cases agree to the holding restrictions."

EC Request for interim review, pp. 1-2.

<sup>147</sup> The United States proposes the following paragraph:

"Based on the evidence on the record, under both the employee offering and the French public offering, purchasers may receive free shares. The condition is that purchasers under the employee offering must hold their shares for 24 months. Purchasers under the French public offering must only hold their shares for 18 months. While purchasers under the discounted employee offering get 1 free share for the first 71 shares purchased and 1 free share per subsequent 5 share purchased, the purchasers under the French public offering get 1 free share per 10 shares purchased (up to a ceiling of 30 000 francs for the purchased shares). For the first 100 shares, a shareholder under the discounted employee offering receives 6 free shares while a shareholder under the French public offering receives 10 free shares."

US Comments on EC request for interim review, para. 2.

<sup>148</sup> EC Request for interim review, p. 2.

<sup>149</sup> The European Communities requests that the Panel delete the text "and given the fact that the United States is not relying on the sunset review as a basis for collecting duties at a particular rate" in paragraph 7.176. EC Request for interim review, p. 2.

obligations relating to sunset reviews.<sup>150</sup> The United States emphasizes that the Panel does not mean that Members with prospective systems incur greater obligations than those with retrospective systems. Instead, the United States understands the Panel to mean that the margin established in the original investigation is not necessarily the rate at which duties are collected because the exporter has the option to seek review to establish that rate.<sup>151</sup> In addition, the United States disagrees with the European Communities' statement that paragraph 7.175 of the Interim Report (paragraph 7.175 of this Report) is unnecessary to the Panel's reasoning. The United States insists that it did argue throughout the proceedings that assessment reviews, as opposed to sunset reviews, are the means by which an individual company can obtain a modified assessment rate.<sup>152</sup> Finally, the United States disagrees with the European Communities' proposal to delete a phrase in paragraph 7.176 and explains that the reasoning in paragraph 7.176 is related to sunset reviews and does not have to be deleted even upon the deletion of paragraph 7.175, which the United States considers as related to the original investigation.<sup>153</sup>

6.6 Contrary to the European Communities' characterization of the Panel's reasoning, the Panel does not consider that the United States' retrospective assessment system somehow further justifies the USDOC's continuation of the measure. In paragraphs 7.175 and 7.176, the Panel is simply addressing the issue of whether the continuation of the measure is inconsistent with Article VI:3 of *GATT 1994* and Articles 10, 19.4 and 21.1 of the *SCM Agreement* as regards the obligation to ensure that the duties collected are limited to the amount and duration of the subsidy found to exist by the investigating authority. We note that the Panel had already concluded in paragraph 7.172 of the Interim Report (paragraph 7.172 of this Report) that the USDOC's consideration of Usinor's privatization when making its likelihood-of-subsidization analysis is not inconsistent with Articles 14 and 21.3 of the *SCM Agreement*. If the Panel would have found that, on the contrary, the USDOC's consideration of Usinor's privatization was inconsistent with Articles 14 and 21.3 of the *SCM Agreement*, then the measure at issue would automatically be inconsistent with the provisions requiring the United States to limit the duties collected to the amount of subsidization; at that point, any duty would be unjustified. However, having found that the USDOC's consideration of Usinor's privatization is not inconsistent with Articles 14 and 21.3 of the *SCM Agreement*, the Panel went on to analyse the European Communities' claim that the United States acted inconsistently with its obligations under Article VI:3 of the *GATT 1994* and Articles 10, 19.4 and 21.1 of the *SCM Agreement*. In doing so, the Panel does not find that a retrospective system somehow renders the USDOC's affirmative likelihood-of-subsidization re-determination not inconsistent with the relevant provisions of the *GATT 1994* and the *SCM Agreement*. Rather, the Panel notes that the United States' retrospective system functions in a way that ensures that excess duties are not collected pursuant to a sunset review. Moreover, the Panel never states that an investigating authority in a retrospective system can take certain actions that an investigating authority in a prospective system cannot. On the contrary, an investigation authority in a prospective system can always adopt a mechanism to ensure that excess duties are not collected pursuant to a sunset review. Given the nature of a prospective system, that mechanism would probably be different from that of the United States, for example, a

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<sup>150</sup> (footnote original) The United States would further note that the Panel found that the United States had respected the obligations relating to sunset reviews, based in large part on the persuasive reasoning of Appellate Body reports. Therefore, paragraph 7.175 is not a justification for a derogation from obligations but rather confirmation that the European Communities has sought to attach obligations to Article 21.3 that simply do not exist.

<sup>151</sup> US Comments on EC request for interim review, para. 3.

The United States also notes that the reference in footnote 281 of the Interim Report (footnote 328 of this Report) should refer to paragraph 33 of the European Communities' first written submission instead of paragraph 32. US Comments on EC request for interim review, para. 3, footnote 2. The Panel disagrees, considers that paragraph 32 reflects the arguments made in the paragraph cited, and therefore will not amend the footnote.

<sup>152</sup> US Comments on EC request for interim review, para. 4.

<sup>153</sup> US Comments on EC request for interim review, para. 5.

refund mechanism. The Panel, therefore, has not deleted the contested portions of paragraphs 7.175 and 7.176 as requested by the European Communities. However, to further clarify this Panel's ruling, we have amended the text of the relevant paragraphs accordingly.

6.7 Finally, the European Communities identifies the erroneous numbering of an exhibit as "EC Exhibit-11" instead of "EC Exhibit-10" in footnotes 375, 377, 378, 379, and 380, and a line of typing error in footnote 390 of the Interim Report (footnotes 422, 424, 425, 426, 427, and 437 of this report).<sup>154</sup>

6.8 The Panel has amended the text of the relevant footnotes to correct these typographical errors.

#### B. REQUEST OF THE UNITED STATES

6.9 In its request for interim review, the United States comments on several portions of the Interim Report. The United States does not, however, suggest any specific amendments to it.

6.10 Regarding paragraphs 7.16-7.17 of the Interim Report (paragraphs 7.16-7.17 of this Report), the United States submits that the Interim Report provides no explanation as to how the USDOC had "changed the basis" of its affirmative likelihood-of-subsidization finding in the Spain Section 129 determination.<sup>155</sup> Regarding paragraph 7.293 of the Interim Report (paragraph 7.293 of this Report), the United States again submits that paragraph 7.293 and paragraphs 7.16-7.18, which are referenced therein, contain no analysis of how the basis of the affirmative finding changed in the Spain Section 129 determination.<sup>156</sup>

6.11 The Panel notes that paragraphs 7.289 and 7.290 of the Interim Report specifically indicate that, in the Spain Section 129 determination, the USDOC based its likelihood-of-subsidization re-determination on the existence of *recurring subsidies* to Aceralia, whereas in the original sunset determination, the USDOC based its likelihood-of-subsidization determination on the *insufficiency of evidence* due to lack of cooperation from foreign producers. The Panel however notes the comment of the United States and has amended paragraph 7.17 of this Report to further clarify the changed bases of the affirmative likelihood-of-subsidisation re-determinations as set out in the UK Section 129 determination and the Spain Section 129 determination. Having done this, the Panel does not consider that paragraph 7.293, which crossreferences paragraph 7.17, needs further clarification.

6.12 Regarding paragraph 7.69 of the Interim Report (paragraph 7.69 of this Report), the United States submits that the European Communities never identified any new evidence placed on the record during the Spain Section 129 proceedings<sup>157</sup> and that, regarding the UK Section 129 determination, it is "inaccurate to state that the evidence regarding Glynwed's cessation of production is 'new evidence, which could not have been presented before.'".<sup>158</sup> The United States also argues that the Panel inaccurately characterized the UK Section 129 determination and the Spain Section 129 determination when the Panel stated that the determinations are based on different reasoning than the original sunset reviews. The United States challenges the Panel's statement that the different or relative "weight" given to the evidence in the re-determination regarding Glynwed's subsidisation is an aspect of the measure taken to comply. The United States emphasizes that the Report does not provide any reasoning as to how the Spain Section 129 determination was based on different reasoning.<sup>159</sup> The European Communities disagrees and proposes inserting the phrase "or evidence

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<sup>154</sup> EC Request for interim review, pp. 1-2.

<sup>155</sup> US Request for interim review, paras. 2, 19.

<sup>156</sup> US Request for interim review, para. 23.

<sup>157</sup> US Request for interim review, para. 4.

<sup>158</sup> US Request for interim review, para. 5.

<sup>159</sup> US Request for interim review, paras. 6-8.

which was not considered in the original sunset reviews was re-submitted" after "was submitted" in the sixth sentence of paragraph 7.69.<sup>160</sup>

6.13 The Panel agrees with the United States that the European Communities has not identified any new evidence that was submitted during the Spain Section 129 proceedings. As regards the evidence on Glynwed's sale of its production facilities, the Panel considers it as *new* evidence since, as submitted by the European Communities<sup>161</sup> and not contested by the United States, it was presented for the first time during the Section 129 proceedings. Whether the evidence could have been submitted before has no bearing on whether it is *new* evidence submitted for the first time during the Section 129 proceedings. The Panel has nevertheless amended paragraph 7.69 to remove its statement that the relevant evidence "which could not have been submitted before". As regards the United States' comments on the Panel's findings on the relevance of the weight given to the evidence during the Section 129 determinations, the Panel considers that it has sufficiently explained its reasoning in the Report.

6.14 Regarding the analysis of the Panel's mandate in paragraph 7.71 of the Interim Report (paragraph 7.71 of this Report), where the Panel states that the United States introduced the issue of the treatment of evidence by revising the determination and by changing the legal basis of the determination, the United States insists that the USDOC did not change the legal basis of the affirmative determination.<sup>162</sup>

6.15 The Panel considers that it has sufficiently addressed this issue in paragraph 6.11 above.

6.16 Regarding paragraphs 7.214-7.215 of the Interim Report (paragraphs 7.214-7.215 of this Report), the United States argues that Article 21.3 of the *SCM Agreement* requires a sunset review determination, not a privatization determination, and the Interim Report does not explain how an analysis of privatization is equivalent to an analysis of a sunset review.<sup>163</sup>

6.17 The Panel recalls that, as explained in paragraphs 7.199 and 7.209 below, the Appellate Body upheld this Panel's findings in the original proceedings that, before deciding to continue to countervail pre-privatization, non-recurring subsidies, the USDOC is required to examine the conditions of the privatization and to *determine whether the privatised producer continues to benefit* from pre-privatization, non-recurring subsidies.<sup>164</sup> In paragraphs 7.214-7.215 of its Report, the Panel has referred to this finding from the original proceedings. Given the existence of the privatizations concerned, the USDOC is obliged to examine the conditions of these privatizations and to *determine* whether the privatised producer received any benefit from the financial contributions bestowed on the state-owned producers. In other words, the latter "determination" is one specific determination as required by Article 21.3 in cases of sunset reviews involving privatizations.

6.18 Regarding paragraph 7.216 of the Interim Report (paragraph 7.216 of this Report), the United States notes that there is no textual analysis to support a statement of the Panel, which the United States interprets as requiring "that a determination must be made in a sunset review for purposes of assisting respondent interested parties in an assessment proceeding".<sup>165</sup>

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<sup>160</sup> EC Comments on US request for interim review, p. 1.

<sup>161</sup> See EC Response to Panel question No. 43.

<sup>162</sup> US Request for interim review, para. 9.

<sup>163</sup> The United States takes issue with the Panel's statement: "'Nor was there a 'determination' on whether the privatized producers received any benefit ...'. The Panel considers that there is a difference between 'assumption' and 'determination' ...'. In this regard, what Article 21.3 explicitly requires is a 'determination'. ...'" US Request for interim review, paras. 10-11.

<sup>164</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 149.

<sup>165</sup> US Request for interim review, para. 12.

6.19 The Panel disagrees with the United States' interpretation of the Panel's reasoning in paragraph 7.216 of this Report. Requiring the USDOC to examine the conditions of the privatisation and determine whether the benefit continues is not for purposes of assisting respondent interested parties in an assessment proceeding. The reference to the situation where an assessment is requested is used simply to illustrate the legal uncertainty that would arise from an assumption. .

6.20 Regarding paragraphs 7.234-7.238 of the Interim Report (paragraphs 7.234-7.238 of this Report), the United States asserts that the Panel is "imputing the requirements necessary to make a *determination of likelihood* to a *finding* regarding the effects of privatization".<sup>166</sup> The United States argues that neither Article 11.3 of the *Anti-Dumping Agreement* nor the Appellate Body addressed "the issue of whether an administering authority may make an assumption where there are sufficient other bases for making the likelihood determination in question".<sup>167</sup> The United States insists that the assumption about privatization does not compromise or affect the overall likelihood-of-subsidization determination; therefore, the assumption about privatization did not prevent the USDOC from making its likelihood-of-subsidization determination on the basis of positive evidence. Consequently, the United States maintains "that it is inaccurate to conclude that Commerce erred in assuming, rather than determining, that privatization extinguished the benefit".<sup>168</sup>

6.21 The Panel notes that paragraphs 7.234-7.238 simply review a number of Appellate Body and panel reports regarding the legal requirements on the treatment of evidence during sunset reviews conducted under Articles 21.3 of the *SCM Agreement* and Article 11.3 of the *Anti-Dumping Agreement*. The issue of why an assumption is not sufficient to meet the requirement of making a determination is a different issue and has been analysed in paragraphs 7.198 to 7.217 below.

6.22 Regarding paragraph 7.245 of the Interim Report (paragraph 7.245 of this Report), the United States raises two issues. First, the United States characterizes as inaccurate the Panel's statement that the USDOC based its affirmative likelihood-of-subsidization re-determination in the UK Section 129 determination on a finding from the original investigation that there was a subsidy benefit to Glynwed.<sup>169</sup> The United States argues that the findings in the UK Section 129 determination were based on the evidence and findings from the original sunset review proceedings, not the original investigation. In the United States' view, the finding in the original sunset review determination that there was insufficient evidence to conclude that the benefit had been extinguished is the same as the finding in the UK Section 129 determination that a subsidy continued for Glynwed.<sup>170</sup> Second, the United States also characterizes as inaccurate the Panel's statement that the insufficiency of information on the termination of subsidy programmes due to the non-cooperation of respondents was the basis of the original sunset review determination and that this basis is different than the basis of the UK Section 129 determination. The United States emphasizes that the affirmative finding in the original sunset review was based on the fact that there was no evidence that the benefit had been extinguished; respondents' non-cooperation is only one of the reasons for the absence of evidence since any other interested party could have put forth evidence.<sup>171</sup> The European Communities disagrees and asserts that the USDOC did not assess the evidence provided by the European Commission and the GOUK. The European Communities insists that the only explanation for the USDOC's refusal to assess the information provided by the European Communities and the GOUK is that the relevant exporters/producers had not participated.<sup>172</sup>

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<sup>166</sup> US Request for interim review, para. 13

<sup>167</sup> US Request for interim review, para. 13.

<sup>168</sup> US Request for interim review, para. 13.

<sup>169</sup> US Request for interim review, para. 14.

<sup>170</sup> US Request for interim review, paras. 14-16.

<sup>171</sup> US Request for interim review, paras. 17-18.

<sup>172</sup> EC Comments on US request for interim review, p. 2.

6.23 As regards the first comment, the Panel notes that the original sunset review determination focused almost exclusively on the benefit to BS plc. The text of the original sunset review determination only mentioned Glynwed in a description of findings from the original countervailing duty order and as part of the description of the domestic interested parties' *arguments*, never in the USDOCs analysis. While the USDOC also restated the rate for Glynwed at the end of the determination, the USDOC explained that it normally selects the rate from the original investigation.<sup>173</sup> Moreover, the programme descriptions provided by the USDOC only mention the subsidization of BS plc, not Glynwed.<sup>174</sup> In addition, the reasoning of the original sunset review determination as set out in "The Department's Position" focused only on the "subsidy programmes" and the insufficiency of evidence demonstrating that some programmes had been fully amortized.<sup>175</sup> Therefore, the Panel considers that the "basis" or the "reasoning" of the original sunset determination as set out in "The Department's Position" was not specifically that a benefit continued to exist for Glynwed.<sup>176</sup> In the UK Section 129 determination, however, the USDOC focused solely on the benefit to Glynwed.<sup>177</sup> The Panel therefore disagrees with the United States' assertions. As regards the United States' second comment, the Panel notes that the respondents' non-cooperation is one of the reasons for the insufficiency of evidence in the original sunset review. Since nevertheless the focus of the Panel's statement was the insufficiency of evidence, we agree to delete the reference to non-cooperation in paragraph 7.245 of this Report.<sup>178</sup>

6.24 Regarding the United States' comments on paragraphs 7.248<sup>179</sup> and 7.281<sup>180</sup> of the Interim Report (paragraphs 7.248 and 7.281 of this Report), the Panel has addressed these concerns in paragraph 6.11 above.

6.25 As regards the United States' comments on paragraph 7.252 of the Interim Report (paragraph 7.252 of this Report)<sup>181</sup>, the Panel refers to its comments in paragraph 6.13 above.

6.26 Regarding paragraph 7.291 of the Interim Report (paragraph 7.291 of this Report), the United States characterizes as inaccurate the Panel's statement that "the 1987 Government Delegated Commission on Economic Affairs: Fund For Employment Promotion and Early Retirement was the programme that the USDOC found to be 'recurring' and that the USDOC used as the basis for its affirmative likelihood-of-subsidization determination in the Spain Section 129 determination". Quoting page three of the UK Sunset Review Issues and Decision Memo, the United States insists that the programme is an example of a recurring subsidy programme.<sup>182</sup> The European Communities comments that the United States identified no other programme as recurring and therefore proposes amending paragraph 7.291 as follows: "was the only programme that the USDOC ~~found~~ identified to be as 'recurring'".<sup>183</sup>

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<sup>173</sup> Issues and Decision Memo for the Expedited Sunset Review of the Countervailing Duty Order on Cut-to-Length Carbon Steel Plate from the United Kingdom; Final Results, p. 14-15, 19 (7 April 2000) (Exhibit EC-6) ("UK Sunset Review Issues and Decision Memo").

<sup>174</sup> UK Sunset Review Issues and Decision Memo, footnote 173 above, pp. 17-19.

<sup>175</sup> UK Sunset Review Issues and Decision Memo, footnote 173 above, pp. 2, 12-14.

<sup>176</sup> US Request for interim review, para.18.

<sup>177</sup> Issues and Decision Memorandum: Section 129 Determination: Final Results of Expedited Sunset Review of Cut-to-Length Carbon Steel Plate from the United Kingdom, p. 4 (24 October 2003) (Exhibit EC-2).

<sup>178</sup> US Request for interim review, paras. 17-18.

<sup>179</sup> The United States reiterates that similar conclusions in paragraphs 7.16 and 7.17 are also incorrect. US Request for interim review, para. 19.

<sup>180</sup> US Request for interim review, para. 21.

<sup>181</sup> US Request for interim review, para. 20.

<sup>182</sup> US Request for interim review, para. 22.

<sup>183</sup> EC Comments on US request for interim review, p. 2.



6.27 The Panel notes the United States' clarification that the recurring subsidy programmes collectively form the basis of the Spain Section 129 determination, even though the USDOC has not identified any other recurring programmes in the determination. The Panel has therefore clarified this point in paragraph 7.291 of this Report.

6.28 Regarding paragraph 7.291, footnote 492 of the Interim Report (paragraph 7.291, footnote 539 of this Report), the United States notes that page 17 of the Issues and Decision Memorandum cited does not exist.<sup>184</sup> The European Communities states that it does exist.<sup>185</sup> The Panel has verified that the page exists and therefore does not need to amend footnote 539 of this Report.

6.29 Regarding paragraph 7.296 of the Interim Report (paragraph 7.296 of this Report), the United States characterizes as inaccurate the Panel's statement that the USDOC rejected evidence on the termination of subsidy programmes as insufficient due to the non-cooperation of respondents. Citing page thirteen of the Spain Sunset Review Issues and Decision Memo, the United States emphasizes that the determination states that no evidence of termination was provided and therefore the respondents' arguments were unsubstantiated.<sup>186</sup> The European Communities disagrees and asserts that the USDOC did not assess the evidence provided by the European Commission and the Government of Spain. The European Communities insists that the non-cooperation of respondents was the only reason that the USDOC provided for not assessing the evidence at issue.<sup>187</sup>

6.30 The Panel notes that in the original sunset review determination, the USDOC summarized the European Communities and the GOS' arguments that a number of subsidy schemes no longer existed and that the subsidization of the steel sector was prohibited since 1997 following the adoption of a series of European Commission Decisions. In the section entitled "The Department's Position", the USDOC did mention that "the Department did not receive a response from the foreign producer/exporter and, pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation".<sup>188</sup> Immediately following this statement, the USDOC stated "[b]ecause there have been no administrative reviews of this order and no evidence has been submitted to the Department demonstrating the termination of the countervailable programs, the Department assumes that these programs continue to exist and are utilized."<sup>189</sup> The USDOC further based its affirmative determination on the following grounds: "[absence of] evidence that the programs have been terminated, [absence of evidence] that the benefits from programs for which benefits are allocated over time will not continue beyond this sunset review, or [lack of] participation in this review of a foreign producer/exporter..."<sup>190</sup> It remains unclear which of those grounds are the ones on which the USDOC relied in this case. In any event, the Panel will delete the reference to non-cooperation in paragraph 7.296 of this Report and will add a footnote referring to those grounds.

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<sup>184</sup> US Request for interim review, para. 22.

<sup>185</sup> EC Comments on US request for interim review, p. 2.

<sup>186</sup> US Request for interim review, para. 24.

<sup>187</sup> EC Comments on US request for interim review, p. 2.

<sup>188</sup> Issues and Decision Memo for the Expedited Sunset Review of the Countervailing Duty Order on Cut-to-Length Carbon Steel Plate from Spain; Final Results, p. 13 (7 April 2000) (Exhibit EC-7) ("Spain Sunset Review Issues and Decision Memo").

<sup>189</sup> Spain Sunset Review Issues and Decision Memo, footnote 188 above, p. 13.

<sup>190</sup> Spain Sunset Review Issues and Decision Memo, footnote 188 above, pp. 13-14.

## VII. FINDINGS

### A. GENERAL CONSIDERATIONS FOR THIS DISPUTE

#### 1. The Panel's mandate

7.1 Article 21.5 of the *DSU* provides that "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings", an Article 21.5 panel shall decide the dispute. We note that the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* emphasized that an Article 21.5 proceeding is similar to the original proceedings and thus, the "matter" at issue consists of the same elements: the specific "measures" at issue and the legal basis of the complaint, i.e. the *claims*.<sup>191</sup> The mandate of an Article 21.5 panel is therefore to determine (i) whether *measures* have been *taken to comply* and, if so, (ii) whether such measures are fully *consistent* with the covered agreements, as disputed by the *legal claims* included in the Panel request.<sup>192</sup>

7.2 Both the identity and scope of the measures taken to comply as well as the claims that can be considered by this Panel have been the object of controversy between the parties to this dispute. We will therefore consider both elements of the matter before us in order to identify the measures taken to comply and the legal claims properly before this Panel.

(a) The measures taken to comply in these proceedings

(i) *Arguments of the parties*

7.3 At first, the parties seemed to agree that the measures taken to comply by the United States were the *three Section 129 determinations* (France, UK and Spain), each including a revision of the likelihood-of-subsidization determination from the original sunset review. However, during the proceedings it became patent that the parties do not agree on either the identity or the scope of the measures taken to comply.

7.4 After having said that it was "treating the USDOC's failure to revoke [the three countervailing duty] orders as the purported 'implementation' of the USDOC's findings"<sup>193</sup>, the European Communities asserted in its Second written submission that the "Section 129 determinations at issue in this proceeding are measures taken by the United States to comply with the recommendations and rulings of the DSB".<sup>194</sup> Yet in response to a question by this Panel, the European Communities clarified its position and insisted that the measures taken to comply are "the maintenance of (or in other words the failure to revoke or amend) the countervailing duties" and that the Section 129 determinations constitute the statement of reasons for the maintenance of the duties.<sup>195</sup>

7.5 The United States' position is very different. It argues that the "measure" taken by USDOC to comply with the recommendations and rulings of the DSB relates only to the treatment of allocable, pre-privatization subsidies.<sup>196</sup> All other aspects of the Section 129 determinations such as USDOC's findings regarding subsidies to Glynwed in the UK case and the recurring subsidy programmes in the Spain case are unchanged aspects of the measure that were not addressed by the DSB recommendations and rulings and therefore are not within the scope of the "measure taken to comply"

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<sup>191</sup> Appellate Body Report on *EC – Bed Linen (Article 21.5)*, para. 78.

<sup>192</sup> Appellate Body Report on *EC – Bed Linen (Article 21.5)*, para. 79.

<sup>193</sup> EC First written submission, para. 8.

<sup>194</sup> EC Second written submission, para. 12.

<sup>195</sup> EC Response to Panel questions Nos. 17, 21.

<sup>196</sup> US First written submission, para. 2.

in the Article 21.5 proceedings.<sup>197</sup> Further to a question by the Panel, the United States clarified that the measures taken to comply are those aspects of the Section 129 determinations that represent revisions to the original determinations in order to comply with the DSB recommendations and rulings. With respect to these revised determinations, the revised privatization analysis of Usinor is a measure taken to comply. By contrast, the United States argues, any findings regarding Glynwed and the Spanish subsidy programmes in the revised sunset review are not measures taken to comply because they are unchanged aspects of the original determination that have nothing to do with privatization and therefore did not need to be changed to comply with the DSB recommendations and rulings.<sup>198</sup>

(ii) *Evaluation by the Panel*

7.6 The concept of "measures taken to comply" has been interpreted by the Appellate Body in *Canada – Aircraft (Article 21.5 – Brazil)* as referring to those "measures which *have been*, or which *should be*, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB".<sup>199</sup> In other words, a complaining Member can challenge either a Member's implementing actions, i.e. "measures which *have been*... adopted," or their omissions, i.e. "measures which *should be*... adopted".

7.7 Establishing which are the measures taken to comply is a necessary step in these proceedings since, as expressed by the Appellate Body in *EC – Bed Linen (Article 21.5 – India)*, an Article 21.5 panel can *only* consider *measures* that are *taken to comply*: "If a *claim* challenges a *measure* which is not a 'measure taken to comply', that *claim* cannot properly be raised in Article 21.5 proceedings."<sup>200</sup> As it provides the basis for including or excluding legal claims, identifying the "measures taken to comply" is therefore of primary importance.

7.8 Deciding what constitutes a "measure taken to comply" in an Article 21.5 proceeding is a matter subject to decision by the panel, not by the parties.<sup>201</sup> As affirmed by the Appellate Body<sup>202</sup>, the panel in *EC – Bed Linen (Article 21.5 – India)* concluded that it is for an Article 21.5 panel to decide whether certain measures have been "taken to comply" with a DSB recommendation or ruling.<sup>203</sup> The Panel request, while providing a *point de départ*, does not require an Article 21.5 panel to consider all the measures contained therein as measures taken to comply. Therefore, while the

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<sup>197</sup> US First written submission, paras. 19-20.

<sup>198</sup> US Response to Panel question 21.

<sup>199</sup> Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36 (emphasis added).;

<sup>200</sup> Appellate Body Report on *EC – Bed Linen (Article 21.5)*, para. 78 (emphasis in original).

<sup>201</sup> The Panel in *Australia – Salmon (Article 21.5 – Canada)* ruled:

"We note that an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether a measure is one 'taken to comply'. If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures 'taken to comply'".

Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, subparagraph 22. *See also* Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*, paras. 6.4-6.5.

<sup>202</sup> "We agree with the Panel that it is, ultimately, for an Article 21.5 panel – and not for the complainant or the respondent – to determine which of the measures listed in the request for its establishment are 'measures taken to comply'." Appellate Body Report on *EC – Bed Linen (Article 21.5)*, para. 78.

<sup>203</sup> Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.15.

parties dispute the scope of the measures taken to comply, it is ultimately up to this Panel, not the parties, to identify which measures in the Panel request are the measures taken to comply.<sup>204</sup>

7.9 As the first step in determining which measures are the "measures taken to comply" by the United States in these proceedings, we shall look at the measures identified by the European Communities in the Panel request since it defines the outer limits of our mandate.<sup>205</sup>

7.10 In the Panel request, the European Communities identifies three out of the twelve countervailing duty determinations that were the subject of the original panel proceedings. All three are *sunset reviews*:

- (a) Certain Corrosion-Resistant Carbon Steel Flat Products from France (C-427-810) (Case No. 9);.
- (b) Cut-to-Length Carbon Steel Plate from United Kingdom (C-412-815) (Case No. 8);
- (c) Cut-to-Length Carbon Steel Plate from Spain (C-469-804) (Case No. 11).<sup>206</sup>

7.11 In footnotes 1 through 3 of its Panel request, which cite each of the three sunset reviews, the European Communities further refers to three unpublished memoranda that the USDOC had issued and posted on its website.<sup>207</sup> It is these memoranda that contain the revised likelihood-of-subsidization determinations for the sunset reviews conducted by the USDOC pursuant to Section 129 of the Uruguay Round Agreements Act ("Section 129").<sup>208</sup>

7.12 Section 129 is the US procedure aimed at rendering an administering authority's action, which was previously found WTO-inconsistent by the DSB, "*not inconsistent* with the *findings* of the panel or the Appellate Body".<sup>209</sup> We shall therefore examine the three Section 129 determinations issued by

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<sup>204</sup> Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 78.

<sup>205</sup> In *US – Carbon Steel*, the Appellate Body stated that the request for establishment governs a panel's terms of references and must contain the specific measures at issue. Appellate Body Report on *US – Carbon Steel*, paras. 124-125.

<sup>206</sup> Request for establishment, p. 2. In the background information provided earlier in the Request itself, the European Communities stated that the United States had finalized a new "change-in-ownership" methodology and subsequently issued new determinations in which the United States had applied this methodology to the twelve determinations challenged by the European Communities in the original proceedings. Request for establishment, p. 1; *see* Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 Fed. Reg. 37125 (23 June 2003) (Exhibit EC-1) (Modification Notice). The Panel notes that the United States' new privatization methodology as such is *not* part of the current proceedings. Request for establishment, p.2; EC First written submission, para. 2.

<sup>207</sup> Request for establishment, p.2, footnotes 1-3.

<sup>208</sup> *See* Issues and Decision Memorandum for the Section 129 Determination: Corrosion-Resistant Carbon Steel Flat Products from France; Final Results of Expedited Sunset Review of Countervailing Duty Order (23 October 2003) ("France Section 129 determination") (Exhibit EC-4); Issues and Decision Memorandum: Section 129 Determination: Final Results of Expedited Sunset Review of Cut-to-Length Carbon Steel Plate from the United Kingdom (24 October 2003) ("UK Section 129 determination") (Exhibit EC-2); Issues and Decision Memorandum: Section 129 Determination: Final Results of Expedited Sunset Review of Cut-to-Length Carbon Steel Plate from Spain (24 October 2003) ("Spain Section 129 determination") (Exhibit EC-3).

<sup>209</sup> The relevant excerpt of Section 129 reads as follows:

"Notwithstanding any provision of the Tariff Act of 1930 (19 U.S.C. 1202 et seq.), the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would

the USDOC to determine what the United States has done to implement the DSB rulings and recommendations.

7.13 The wording of two of the three Section 129 determinations at issue (UK, Spain) specifically refers to the USDOC's task of implementing the Appellate Body findings:<sup>210</sup>

"This memorandum constitutes our Section 129 Determination regarding the affirmative likelihood determination in the final results of the expedited sunset review of the order on cut-to-length carbon steel plate ("CTL Plate") from [the United Kingdom or Spain]...

...

Section 129 of the URAA is the applicable provision governing the nature and effect of determinations issued by the [USDOC] to implement findings by WTO panels and the Appellate Body. Specifically, section 129(b)(2) provides that '{n}otwithstanding any provision of the Tariff Act of 1930 . . .,' within 180 days of a written request from the US Trade Representative ("USTR"), the [USDOC] shall issue a determination that would render its actions not inconsistent with an adverse finding of a WTO panel or the Appellate Body.<sup>211</sup>

...

The [USDOC's] duty, in rendering a determination in this case under Section 129(b)(2) of the URAA, is not to reconduct the original sunset review in its totality, but to render it not inconsistent with the findings of the Appellate Body..."<sup>212</sup>

7.14 The above wording is not present in the France Section 129 determination. However, this determination does refer to the change in the privatization methodology further to the adoption of the Appellate Body report in the original proceedings and to the application of that new methodology to Usinor's privatization pursuant to Section 129.<sup>213</sup>

7.15 Both the legal basis of the three Section 129 determinations at issue and the above wording indicate that these determinations were intended as the means of rendering the original sunset reviews "not inconsistent" with the DSB recommendations and rulings in the original proceedings. The United States argues that the measures taken to comply have a narrow scope and only include those aspects of the Section 129 determinations that revise portions of the original sunset reviews in order to

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render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body."

Section 129(b)(2) of the Uruguay Round Agreements Act; 19 U.S.C. Section 3538(b)(2) (2003) (emphasis added).

<sup>210</sup> In response to a question by the Panel, the United States confirmed that the USDOC's intention was to render the original sunset reviews not inconsistent with the DSB recommendations and rulings, meaning both the Appellate Body findings and this Panel's findings as modified by the Appellate Body. US Response to Panel question 16.

<sup>211</sup> UK Section 129 determination, footnote 208 above, pp. 1-2; Spain Section 129 determination, footnote 208 above, pp. 1-2.

<sup>212</sup> UK Section 129 determination, footnote 208 above, p. 9. The language in the Spain Section 129 determination is virtually identical. Spain Section 129 determination, footnote 208 above, p. 6.

<sup>213</sup> France Section 129 determination, footnote 208 above, pp. 1-2.

comply with the DSB recommendations and rulings.<sup>214</sup> Specifically, the United States insists that the revisions only concern the privatization analysis.

7.16 The Panel agrees with the United States that those aspects of the Section 129 determinations that represent revisions to the original determinations in order to comply with the DSB recommendations and rulings are measures taken to comply. The Panel does not however agree with the United States that the revisions only concern the privatization analysis.

7.17 The Panel notes that the United States often refers in its submissions to these determinations as "revised" sunset reviews.<sup>215</sup> However, the "revision" undertaken by the United States consists of an affirmative re-determination of the likelihood of continuation or recurrence of subsidization, as set out in each of the three Section 129 determinations.<sup>216</sup> In the France Section 129 determination, the USDOC does examine Usinor's privatization and makes a re-determination of likelihood of continuation or recurrence of subsidization on the basis of that examination.<sup>217</sup> In the UK and Spain Section 129 determinations though, the USDOC does not analyse the privatizations at issue and instead revises its likelihood-of-subsidization determination by *changing the basis* for its affirmative conclusion, i.e. the subsidies benefiting Glynwed instead of the non-recurring subsidies to BS plc, in the UK case, and the recurring subsidies benefiting Aceralia instead of the non-recurring subsidies benefiting that same producer.<sup>218</sup> In the latter two Section 129 determinations, USDOC's "revisions" thus are not restricted to the privatization aspects of the likelihood-of-subsidization determination in the Section 129 determinations.

7.18 The Panel therefore considers that the measures taken to comply in these proceedings are not limited to the privatization aspects of the Section 129 determinations. The Panel finds that the affirmative likelihood-of-subsidization analysis as set out in the Section 129 determinations in the UK and Spain cases, is a measure taken to comply in each case.

7.19 The parties dispute two main issues regarding the scope of the measures taken to comply. Both issues are intrinsically related to whether this Panel can consider certain legal claims. These issues concern the USDOC's treatment of evidence in the likelihood-of-subsidization determination in the UK and Spain Section 129 determinations and the likelihood-of-injury determination in the three sunset reviews at issue.<sup>219</sup>

#### The USDOC's treatment of evidence in the likelihood-of-subsidization determination

7.20 Regarding the treatment of evidence, we note that, as already indicated, the affirmative likelihood-of-subsidization re-determinations set out in the Section 129 determinations, are measures taken to comply. The Panel understands that the evidence at issue concerns aspects of the likelihood-of-subsidization analysis pertaining to the re-determinations since it refers to matters regarding the changed basis for the affirmative conclusions. Specifically the evidence in question relates to the termination and/or non-application of various subsidy programmes other than the pre-privatization non-recurring programmes, and to whether one of the UK producers, Glynwed, stopped producing the product concerned. The Panel also understands that the respondents invoked this evidence during the

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<sup>214</sup> US Response to Panel question 21.

<sup>215</sup> US First written submission, paras. 2, 11, 13, 18, 21, 48; US Second written submission, paras. 2, 5, 7-8, 13-14; US Oral statement, paras. 23, 28-29; US Response to Panel questions 3, 21, 28, 33, 36, 39, 41, 51.

<sup>216</sup> France Section 129 determination, footnote 208 above; UK Section 129 determination, footnote 208 above; Spain Section 129 determination, footnote 208 above.

<sup>217</sup> France Section 129 determination, footnote 208 above, pp. 3-12.

<sup>218</sup> UK Section 129 determination, footnote 208 above, pp. 3-4; Spain Section 129 determination, footnote 208 above, p. 3.

<sup>219</sup> The Panel notes that while the USDOC conducts the likelihood-of-subsidization analysis, it is a different agency, the USITC, that conducts the likelihood-of-injury analysis.

Section 129 proceedings for both the UK and Spain Section 129 determinations<sup>220</sup> and submitted new evidence in the UK Section 129 proceedings.<sup>221</sup>

7.21 Since the whole of the affirmative likelihood-of-subsidization re-determinations, as set out in the Section 129 determinations at issue, are measures taken to comply in these proceedings, the Panel considers that the treatment of the evidence relating to the subsidy programmes upon which that affirmative re-determination is based, is also part of the measures taken to comply.

#### The likelihood-of-injury determination

7.22 As regards the likelihood-of-injury determination, none of the Section 129 determinations at issue includes a revision of the likelihood of continuation or recurrence of injury.<sup>222</sup> The European Communities claims that the United States should have re-determined the likelihood of continuation or recurrence of injury further to revising its likelihood-of-subsidization determination. The United States, on the contrary, argues that the measures taken to comply in these proceedings are only those aspects of the Section 129 determinations that revise portions of the original sunset reviews in order to comply with the DSB recommendations and rulings.<sup>223</sup>

7.23 The question is therefore whether the failure to re-determine the likelihood of continuation or recurrence of injury is also a measure taken to comply or represents the failure of taking a measure necessary to comply. In principle, an omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.<sup>224</sup> Specifically in the context of an Article 21.5 review, as stated above, the concept "measures taken to comply" refers to those "measures which have been, or which *should be*, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB".<sup>225</sup> Hence, the Panel arguably has the authority to identify omissions that could render the United States' implementation inconsistent with the covered agreements.

7.24 The United States invokes the Appellate Body's reasoning in *EC – Bed Linen (Article 21.5 – India)* to argue that the measures taken to comply exclude any unchanged aspects of the original sunset determinations, such as, in this case, the injury analysis.

7.25 In *EC – Bed Linen (Article 21.5 – India)*, to comply with the DSB recommendations and rulings in the original proceedings, the European Communities issued a complete anti-dumping regulation that encompassed not only the revisions of certain aspects of the dumping, injury and

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<sup>220</sup> UK Section 129 determination, footnote 208 above, pp. 6-7; Spain Section 129 determination, footnote 208 above, p. 6.

<sup>221</sup> UK Section 129 determination, footnote 208 above, pp. 8-9.

<sup>222</sup> See France Section 129 determination, footnote 208 above, p. 12; UK Section 129 determination, footnote 208 above, p. 9; Spain Section 129 determination, footnote 208 above, p. 9.

<sup>223</sup> US Response to Panel question 21.

<sup>224</sup> In particular, the Appellate Body stated that:

"any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch." Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 81. In a footnote, the Appellate Body specified that "[b]oth specific determinations made by a Member's executive agencies and regulations issued by its executive branch can constitute acts attributable to that Member. ..."

Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, footnote 79.

<sup>225</sup> Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36 (emphasis added).

causality analysis, but also the remaining aspects of those analyses from the original regulation that the European Communities had not been asked to bring into conformity with WTO law and thus had not revised. India challenged the re-determination on the grounds that the European Communities did not also re-examine the impact of the reduced amount of dumped imports on the effects of "other factors", for the purpose of the injury analysis.<sup>226</sup>

7.26 The Article 21.5 panel, however, declined to consider India's claim on the "other factors" analysis after finding that the original panel dismissed the claim and India did not appeal.<sup>227</sup> The Appellate Body affirmed, explaining that there is no reason to conclude that a "part of the redetermination that merely incorporates elements of the original determination ... would constitute an inseparable element of a measure taken to comply with the DSB rulings in the original dispute". The "other factors" analysis was such an element – an unrevised aspect of the original measure – that "the investigating authorities of the European Communities were able to treat ... separately" when conducting the re-determination.<sup>228</sup> Therefore, it fell outside the scope of the measures taken to comply.

7.27 While the findings and reasoning in *EC – Bed Linen (Article 21.5 – India)* may seem tailored to this dispute, the facts and circumstances are not entirely similar. Like *EC – Bed Linen (Article 21.5 – India)*, the likelihood-of-injury analysis is an unrevised aspect of the original sunset review. Unlike *EC – Bed Linen (Article 21.5 – India)*, however, the likelihood-of-injury analysis was never incorporated in the Section 129 determinations. Moreover, unlike India in *EC – Bed Linen (Article 21.5 – India)*, the European Communities never raised any claims on the issue of injury in the original proceedings.

7.28 Distinct from the issue of whether an unrevised aspect is part of the measure taken to comply, *EC – Bed Linen (Article 21.5 – India)* also stands for the proposition that the *effects* of the investigating authorities' actions are relevant to identifying the scope of the measures taken to comply. To comply with the DSB recommendations and rulings in the original proceedings, the European Communities' investigating authorities recalculated the dumping margins without relying on zeroing, found that two producers were no longer dumping, thereby reducing the amount of dumped imports, and evaluated whether this reduction had an impact on the effect of dumped imports for the purpose of determining injury. Since the revised dumping and injury findings may have had an impact on the causal link, the investigating authorities also examined whether the causal link between two revised elements – dumping and injury – still existed. The investigating authorities, however, did not reconduct the "other factors" analysis since it was unaffected by the revisions. India challenged the European Communities' failure to reconduct this analysis. The Article 21.5 panel refused to consider the issue, concluding that the issue was not properly before it. India appealed. The Appellate Body affirmed the panel and explained that the reduction in the amount of dumped imports would have an impact on the effect of dumped imports for the purposes of determining injury, which would then have a bearing on whether a causal link exists. The Appellate Body, however, could not find any reason to conclude that a reduction in the amount of dumped imports would also have an impact on the effect of "other factors" for the purposes of determining injury. The Appellate Body therefore concluded that the European Communities did not have to reconduct the "other factors" analysis as it was unaffected by the reduction in dumping. Hence, the Appellate Body concluded that the issue was not properly before the panel.<sup>229</sup>

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<sup>226</sup> Panel Report on *EC – Bed Linen (Article 21.5 – India)*, paras. 2.6-2.11.

<sup>227</sup> Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.53; *see* Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 75.

<sup>228</sup> Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 86.

<sup>229</sup> The Appellate Body used the terminology "impact on" and "bearing upon" to refer to the effects of one aspect on another:



7.29 Following that line of reasoning, it therefore appears that whether the failure to revise the likelihood-of-injury analysis is necessarily part of a measure taken to comply depends on the potential effect of the re-determination of the likelihood-of-subsidization on the likelihood-of-injury analysis.

7.30 Whether a change in the likelihood-of-subsidization determination can affect the likelihood-of-injury analysis is not an easy issue to decide in the abstract. If we look at the circumstances of this dispute, we note that the USDOC conducted an expedited sunset review on an order-wide basis. The USDOC did not recalculate the rate of subsidization in either the original sunsets or in Section 129 determinations and did not make any separate calculation for each producer/exporter.<sup>230</sup> Both the practice of conducting sunset reviews on an order-wide basis<sup>231</sup> and the absence of the requirement to recalculate subsidization margins in sunset reviews<sup>232</sup> have been condoned by the Appellate Body in

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"We agree with India that the investigating authorities of the European Communities were required to revise the original determination of dumping and injury in order to comply with the DSB recommendations and rulings. Towards this end, the European Communities recalculated the dumping margins *without* applying the practice of 'zeroing' that had been found to be inconsistent with WTO obligations in the original dispute. According to the recalculation, two of the *individually* examined Indian producers were *not* dumping. The investigating authorities deducted the imports attributable to those two producers from the *volume* of dumped imports, and, accordingly, the volume of dumped imports in the redetermination was *lower* than in the original determination. According to EC Regulation 1644/2001, the investigating authorities of the European Communities also 're-examined' whether a causal link between the two *revised* elements – dumped imports and the injury to the domestic industry – still existed, and the Panel reviewed that re-examination.

The *amount* of dumped imports will, of course, have an impact on the assessment of the *effects* of the 'dumped imports' for the purposes of determining *injury*. It is clear, therefore, that the revised findings on dumping and injury could have a bearing on whether a causal link exists between dumping and injury. But whilst a revised finding of *dumping* will, in all likelihood, have an impact on the 'effect of *dumped* imports', we see no reason to conclude as well that this revised finding would have any impact on the 'effects ... of known factors *other than* the dumped imports' in this dispute. Accordingly, we are of the view that the investigating authorities of the European Communities were not required to change the determination as it related to the 'effects of other factors' in this particular dispute. Moreover, we do not see why that part of the redetermination that merely incorporates elements of the original determination on 'other factors' would constitute an inseparable element of a measure taken to comply with the DSB rulings in the original dispute. Indeed, the investigating authorities of the European Communities were able to treat this element separately. Therefore, we do not agree with India that the redetermination can only be considered 'as a whole new measure'".

Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, paras. 85-86 (original footnotes omitted).

<sup>230</sup> The Panel recalls, as stated in footnote 219 above, that while the USDOC conducts the likelihood-of-subsidization analysis, it is a different agency, the USITC, that conducts the likelihood-of-injury analysis.

<sup>231</sup> We note that the requirement to calculate company-specific rates in original investigations of the *Anti-dumping Agreement* does *not* exist in the *SCM Agreement*. Nevertheless, in the context of anti-dumping sunset reviews, the Appellate Body has ruled that the sunset review provision does not oblige investigating authorities in a sunset review to make "company-specific" likelihood determinations. Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 149-150; *see also* Appellate Body Report on *Oil Country Tubular Goods Sunset Reviews*, para. 231.

<sup>232</sup> The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* analysed the extent of an investigating authority's obligation under Article 11.3 of the *Anti-Dumping Agreement* and concluded that:

"Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. ... Thus,

previous disputes. Furthermore, the Appellate Body has ruled that since the United States has chosen to conduct its sunset reviews on an order-wide basis, the consistency of the likelihood determination must be evaluated in the context of an order-wide determination. Indeed, in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body ruled that "because the United States has chosen to make order-wide determinations in sunset reviews, an allegation that a measure prevents the United States from making a likelihood determination consistent with Article 11.3 [of the *Anti-Dumping Agreement*] must be evaluated by reference to the relevance of that measure for the *order-wide* determination."<sup>233</sup> We will therefore analyse the potential effect of a likelihood-of-subsidization determination on the likelihood-of-injury determination in the context of a sunset review conducted on an order-wide basis and without recalculating the rate of subsidization.

7.31 The result of a likelihood-of-subsidization determination conducted on an order-wide basis, without calculating the subsidization rate per producer/exporter, can only be a "yes" or "no" decision. If the decision is "no", there would be no need to proceed any further because there would be no subsidized imports to cause injury. If the decision is "yes", the Panel finds it difficult to see how the likelihood-of-injury analysis would necessarily be affected. Where no new rate of subsidization is calculated and no exporter-specific decision on likelihood-of-subsidization is made, as here, we can see no basis for concluding that the re-determination of the likelihood of recurrence or continuation of subsidization affects the likelihood-of-injury analysis.<sup>234</sup> The Panel therefore considers that

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Article 11.3 neither explicitly requires authorities in a sunset review to calculate fresh dumping margins, nor explicitly prohibits them from relying on dumping margins calculated in the past. This silence in the text of Article 11.3 suggests that no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review."

Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 123-24; *see also* Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 178. Although the Appellate Body examined an investigating authorities' obligations under the *Anti-Dumping Agreement*, the jurisprudence regarding an investigating authorities' obligations applies equally to identical or almost identical provisions on sunset reviews under the *SCM Agreement*. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body stated that:

"Article 11.3 is textually identical to Article 21.3 of the *SCM Agreement*, except that, in Article 21.3, the word "countervailing" is used in place of the word "anti-dumping" and the word "subsidization" is used in place of the word "dumping". Given the parallel wording of these two articles, we believe that the explanation, in our Report in *US – Carbon Steel*, of the nature of the sunset review provision in the *SCM Agreement* also serves, *mutatis mutandis*, as an apt description of Article 11.3 of the *Anti-Dumping Agreement*. (Appellate Body Report on *US – Carbon Steel*, paras. 63 and 88)."

Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 104, footnote 114.

<sup>233</sup> Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 231.

<sup>234</sup> We note that in the *Anti-Dumping Agreement*, the "the magnitude of the margin of dumping" is listed as an injury factor in Article 3.4. There is, however, no corresponding provision on the amount or rate or margin of subsidization in Article 15.4 of the *SCM Agreement*. Thus, while the amount of subsidization *could* be considered in both an original injury determination and in a likelihood-of-injury determination, this Panel understands that the failure to do so does not violate any specific provision of the *SCM Agreement*. Even assuming that the rate of subsidization is relevant to the likelihood-of-injury analysis, the USDOC conducted its affirmative re-determination on an order-wide basis and without recalculating the rate of subsidization. Therefore, the rate of subsidization is unchanged and has no effect on the volume aspects of the likelihood-of-injury determination.

As to the potential implication of a reduced amount of subsidized imports, this Panel considers that it is only relevant if it is clear that a change in the subsidy benefit to BS plc and Aceralia necessarily affected the volume of likely subsidized imports and only where it is necessary as a legal matter to make company-specific determinations of the likelihood of subsidization. By analogy to Article 11.3 of the *Anti-Dumping Agreement*,

reconducting a likelihood-of-injury determination, given the particular circumstances in this dispute, is not a measure that *should be* adopted by the United States to bring about compliance with the recommendations and rulings of the DSB and thus the failure to reconduct the likelihood-of-injury determination is not an aspect of the measures taken to comply.

#### Other issues

The failure to revoke the countervailing duty orders as the measure taken to comply

7.32 As indicated above, the European Communities also argues that it is treating the USDOC's *failure* to revoke the countervailing duty orders in all three sunset reviews as the purported implementation taken by the United States to comply with the DSB recommendations and rulings.<sup>235</sup> In response to questions by the Panel, the European Communities clarified that the measures taken to comply are "the maintenance of (or in other words the failure to revoke or amend) the countervailing duties" and that the Section 129 determinations constitute the statement of reasons for the maintenance of the duties.<sup>236</sup>

7.33 The Panel disagrees with the European Communities' characterization of the measure taken to comply as the USDOC's failure to revoke the countervailing duty orders. As explained above, the measures taken to comply are the affirmative likelihood-of-subsidization re-determinations as set out in the three Section 129 determinations at issue. The maintenance of the duties is a consequence of the affirmative re-determination of the likelihood of continuation or recurrence of subsidization. Whether the United States should have reached a different conclusion on likelihood and revoked or amended the countervailing duties as part of the implementation process relates to the adequacy of the measures taken to comply rather than their scope.

The implementation status of the Section 129 determinations at issue

7.34 While the Panel considers the affirmative likelihood-of-subsidization re-determinations as set out in the three Section 129 determinations as the measures taken to comply, the Panel must address the possibility that these determinations may not have been implemented and consequently not "taken"<sup>237</sup> by the United States. The European Communities drew our attention to the possible lack of implementation in its First written submission, where it indicated that "[i]f the USDOC in fact refused to implement its findings in its Section 129 issues and decision memoranda for the three sunset reviews at issue here, there is all the more reason for this Panel to find that the United States has failed to comply with the recommendations and rulings of the Dispute Settlement Body."<sup>238</sup> While none of the parties pursued the issue, the apparent lack of implementation concerns this Panel as it might mean that the Section 129 determinations are not and will never be in force and that the United States has not actually "taken" any measures to comply.

7.35 In an Article 21.5 proceeding, the measure or measures taken to comply go to the heart of panel's mandate. The Appellate Body has ruled that panels have a duty to examine issues of a "fundamental nature", issues that go to the root of their jurisdiction, on their *own motion* if the parties

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however, there is no such obligation in Article 21.3 of the *SCM Agreement*. In the absence of company-specific determinations of the likelihood of subsidization, the USDOC's order-wide-based conclusion that subsidization is likely to continue or recur seems to apply to the entire volume of likely imports, as no imports were explicitly excluded.

<sup>235</sup> EC First written submission, para. 8; *see* paragraph 7.4 above.

<sup>236</sup> EC Response to Panel questions 17, 21 (emphasis added).

<sup>237</sup> We recall that the Appellate Body in *Canada – Aircraft (Article 21.5 – Brazil)* considered that measures taken to comply are measures which have been or should be *adopted*. *See* paragraph 7.6 above.

<sup>238</sup> EC First written submission, para. 8, footnote 10.

to the dispute remain silent on those issues.<sup>239</sup> Therefore, even though the parties have not argued this issue, we must determine whether the three Section 129 determinations, despite the absence of direction by the USTR to implement, still constitute measures "taken" to comply.

7.36 The Notice of Implementation to which the European Communities refers in its First written submission indicates that "[b]ecause the US Trade representative declined to direct the [USDOC] to implement the revised determinations with regard to the four sunset reviews involved in the WTO dispute, we are *not implementing* these Section 129 Determinations. See sections 129(b)(4) and 129(c)(1)(B) of the URAA".<sup>240</sup> This wording appears to indicate that the three Section 129 determinations at issue were not implemented in the sense that they did not enter into force.

7.37 The fact that a measure may not be in force does not impede it from being challenged in dispute settlement proceedings. As indicated by the panel in *Turkey – Textiles*, "[i]t is customary practice of GATT/WTO dispute settlement procedures to address applied measures". However, the panel also stated that "previous adopted GATT panels have always considered that mandatory legislation of a Member, even if not yet in force or not applied"<sup>241</sup>, can be challenged by another WTO Member."<sup>242</sup> The wording of the Notice of Implementation does not however indicate that the three Section 129 determinations are binding.

7.38 In response to a question by the Panel, the United States clarified that the absence of direction from the USTR to implement is due to the fact that no specific implementation was needed. In US administrative law terms, this means that the USDOC did not have to order US Customs to change the deposit rates as these were maintained at the same levels as before.<sup>243</sup> The United States thus confirmed that the three Section 129 determinations are in force.

7.39 Since the United States confirmed that the three Section 129 determinations are in force and the European Communities did not contest this fact, the Panel considers the affirmative likelihood-of-subsidization re-determinations as set out in the three Section 129 determinations as the measures "taken" by the United States to comply with the DSB rulings and recommendations.

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<sup>239</sup> Appellate Body Report on *Mexico – Corn Syrup (Article 21.5)*, para. 36; *see also* Appellate Body Report on *US – Carbon Steel*, para 123.

<sup>240</sup> *See* Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Steel Products from the European Communities, 68 Fed. Reg. 64858, 64859 (17 November 2003) (emphasis added) (Notice of Implementation).

<sup>241</sup> (footnote original) *See for instance* the Panel Report on *United States – Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136 ("*US – Superfund*"), paras. 5.2.1-5.2.2; Panel Report on *EEC – Regulation on Imports of Parts and Components*, adopted on 16 May 1990, BISD 37S/132, paras. 5.25-5.26; Panel Report on *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted 19 June 1992, BISD 39S/206, para. 5.39.

<sup>242</sup> Panel Report on *Turkey – Textiles*, para. 9.37.

<sup>243</sup> The United States refers to an excerpt from the Statement of Administrative Action which reads as follows:

"The Trade Representative may decline to request implementation of the [revised] determination. This might be the case, for example, if [the USDOC] issued a final affirmative subsidy determination and a WTO panel subsequently finds that [the USDOC's] analysis was not consistent with the Subsidies Agreement. On making a new determination at the Trade Representative's direction, [the USDOC] could correct the analytical flaw found by the panel without changing the original outcome. In such a case, there would be no need to implement the new determination as a matter of domestic law."

Statement of Administrative Action, p. 356 (Exhibit US-7) ("*SAA*").

7.40 The Panel therefore finds that the measures taken to comply in these proceedings are the affirmative re-determinations of the likelihood of continuation or recurrence of subsidization, as set out in the three Section 129 determinations at issue.

(b) Scope of the claims in these proceedings

(i) *Arguments of the parties*

7.41 The United States argues that the European Communities has improperly advanced claims regarding both the non-pre-privatization subsidy and injury aspects of the original sunset review determinations. According to the United States, these aspects were not challenged during the original panel proceedings and remained unchanged in the Section 129 process and re-determinations.<sup>244</sup> For the United States, the measures taken by the USDOC to comply with the DSB recommendations and rulings relate only to the treatment of allocable, pre-privatization subsidies.<sup>245</sup> All other aspects of the Section 129 determinations, which relate to aspects of the original sunset review determinations that were not addressed by the DSB, fall outside the scope of the "measure taken to comply" in the Article 21.5 proceedings.<sup>246</sup> In its Oral statement, the United States insisted that "[a] 'measure taken to comply' consists of those *aspects* of a determination that implement the findings and recommendations of the DSB".<sup>247</sup> For the United States, the claims on the evidence regarding non-pre-privatization subsidies and injury raised by the European Communities are outside this Panel's mandate.<sup>248</sup>

7.42 The United States cites the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* as support for its position that claims other than those regarding the privatization analysis fall outside the Panel's mandate.<sup>249</sup> The United States asserts that according to Appellate Body jurisprudence, an investigating authority's findings that are "unchanged" during the original proceedings cannot be challenged in Article 21.5 proceedings.<sup>250</sup>

7.43 The European Communities considers that the factual circumstances in *EC – Bed Linen (Article 21.5 – India)* are different from those in the current proceedings. The European Communities maintains that it raised *new* claims concerning components of the *new* measures which were not part of the original measure and therefore were not and could not have been before the Panel and Appellate Body in the original proceedings.<sup>251</sup>

7.44 The European Communities argues that the panel's mandate in an Article 21.5 proceeding is to examine whether the new measure is consistent with the provisions of the covered agreements cited by the complaining Member in its panel request. In its view, it is not sufficient to eliminate only one erroneous aspect of the measure if doing so exposes additional inconsistencies with the obligations of

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<sup>244</sup> US First written submission, para. 14.

<sup>245</sup> US First written submission, para. 2.

<sup>246</sup> See US First written submission, paras. 2, 5, 15-16, 18-20; US Oral statement, paras. 3, 8-9, 15.

<sup>247</sup> US Oral statement, para. 3 (emphasis added).

<sup>248</sup> US Response to Panel question No. 21.

<sup>249</sup> US First written submission, para. 16. The United States refers *inter alia* to two excerpts from the Appellate Body Report: "we do not see why that part of a redetermination that merely incorporates elements of the original determination... would constitute an inseparable element of the measure taken to comply with the DSB rulings in the original dispute"; and "India [sought] to challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings to make that measure consistent...." Appellate Body Report on *EC – Bed Linen (Article 21.5)*, paras. 86 and 87, respectively.

<sup>250</sup> US First written submission, paras. 16, 18-20; see US Oral statement, paras. 3-5.

<sup>251</sup> EC Second written submission, para. 15.

the *SCM Agreement*.<sup>252</sup> In the European Communities' view, the Section 129 determinations are measures taken by the United States to comply with the DSB recommendations and rulings.<sup>253</sup> Hence, these determinations are new measures based on new reasoning<sup>254</sup> and on new factual findings.<sup>255</sup> The European Communities thus has raised new claims concerning components of these new measures which were not before the panel and the AB in the original proceedings.<sup>256</sup>

7.45 The European Communities argues that its claims challenging the lack of injury re-determinations in the UK and Spain cases are properly before this Panel. It is in these two Section 129 determinations that the USDOC assumed for the first time that the privatizations of British Steel plc (BS plc) and Aceralia were at arm's length and for fair market value (FMV). In its view, these assumptions would significantly lower the levels of subsidization from those in the original sunset reviews, which in turn may require a reconsideration of likelihood of injury in the two Section 129 determinations.<sup>257</sup>

(ii) *Evaluation by the Panel*

7.46 The parties dispute the scope of the legal claims that this Panel can consider. Specifically, regarding the French case, the parties disagree whether the United States should have revised the likelihood-of-injury determination made by the USITC in the original sunset reviews, in addition to revising its likelihood-of-subsidization analysis of the USDOC. As regards the UK and Spain cases, the parties dispute whether the Panel should consider the European Communities' claims challenging the USDOC's alleged failure to adequately consider evidence in the likelihood-of-subsidization re-determinations and the United States' alleged failure to revise the likelihood-of-injury determination.

New claim not included in the Panel request

7.47 The United States argues in a footnote to its First written submission that the European Communities' claim that the United States should have reconsidered the likelihood-of-injury determination in the French case is outside this Panel's terms of reference because it is not included in the Panel request.<sup>258</sup> The European Communities, which only addressed this point in its First written submission, disagrees. In response to a question by the Panel, the European Communities asserts that "[t]he claim is made in paragraph 1 of the second paragraph on page 2 of the Request for Establishment. It is there that the EC claims that the US is maintaining duties inconsistently, with, *inter alia*, Articles 21.1 and 21.3. Those provisions require that subsidies be maintained only where subsidization is causing injury." In a footnote to the second sentence, the European Communities insists that "[a] claim is an allegation that particular measures are inconsistent with specific provisions of the covered agreements."<sup>259</sup>

7.48 As indicated above, the Appellate Body has ruled that panels have a duty to examine issues of a "fundamental nature", issues that go to the root of their jurisdiction, on their own motion if the parties to the dispute remain silent on those issues.<sup>260</sup> Whether a claim falls within our terms of reference is clearly an issue that goes to the root of our jurisdiction. Therefore, even though the

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<sup>252</sup> EC First written submission, para. 62; EC Second written submission, para. 11.

<sup>253</sup> EC Second written submission, para. 15.

<sup>254</sup> EC Second written submission, paras. 14, 17.

<sup>255</sup> EC Second written submission, para. 18.

<sup>256</sup> EC Second written submission, para. 15.

<sup>257</sup> EC Second written submission, paras. 23, 25.

<sup>258</sup> US First written submission, para. 15, footnote 19.

<sup>259</sup> EC Response to Panel question 25; *see* Request for establishment, p. 2.

<sup>260</sup> Appellate Body Report on *Mexico – Corn Syrup (Article 21.5)*, para. 36; *see also* Appellate Body Report on *US – Carbon Steel*, para 123.

parties have barely argued this issue, we must determine whether this claim is within our terms of reference.

7.49 The Panel notes that the Panel request includes the following text describing the claims on the French case:

"That in the sunset review Certain Corrosion-Resistant Carbon Steel Flat Products from France (C-427-810) (Case No. 9), the United States failed to properly examine the existence, continuation or likelihood of recurrence of subsidization. In particular, with regard to the privatization concerned, it improperly analysed whether the price for employees and retirees' shares constituted a subsidy or that it led to any continuation of a countervailable subsidy. This is inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* and Article VI: 3 of GATT 1994."<sup>261</sup>

7.50 Unlike the UK and Spain cases, where the word "injury" is explicitly mentioned when making the claims pursuant to Articles 10, 14, 19.4, 21.1, and 21.3 of the *SCM Agreement* and Article VI:3 of *GATT 1994*<sup>262</sup>, the claims for the French case do not contain the word "injury". The text does, however, explicitly refer to the likelihood-of-subsidization determination. The European Communities' argument that the mere listing of one provision covering both likelihood-of-subsidization and likelihood-of-injury determinations is sufficient to imply the particular violation claimed cannot stand in this case. In *Korea – Dairy*, the Appellate Body explained that the mere listing of the articles of an agreement alleged to have been breached may not necessarily be sufficient for the purposes of Article 6.2 of the *DSU*. The Appellate Body opined that such a case may arise "where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2".<sup>263</sup> Article 21.3 of the *SCM Agreement* contains at least two obligations, one referring to the likelihood of subsidization, the other to the likelihood of injury. The claim on the likelihood of subsidization is identified in the Panel request but there is no mention of the likelihood-of-injury aspect.<sup>264</sup> The Panel considers that this is one of the cases where the mere listing of an article, coupled with the reference to only one of the obligations provided for in that article, falls short of meeting the requirements in Article 6.2 of the *DSU*. Thus, in our view, the European Communities failed to state a claim regarding the likelihood of injury in the Panel request.

7.51 The fact that the European Communities argued this claim in its First written submission cannot cure the absence of a sufficiently specified claim in the Panel request. We recall that the Appellate Body in *EC – Bananas III* ruled that:

"Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow

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<sup>261</sup> Request for establishment, p. 2.

<sup>262</sup> In this regard, the Request for establishment reads as follows: "[t]he United States failed to properly determine whether, in these cases, there was continuation or recurrence of subsidization and *injury*". Request for establishment, p. 2 (emphasis added).

<sup>263</sup> Appellate Body Report on *Korea – Dairy*, para. 124.

<sup>264</sup> The Appellate Body in *India – Patents (US)* stated that:

"[t]he jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference. A panel cannot assume jurisdiction that it does not have."

Appellate Body Report on *India – Patents (US)*, para. 92; *see also* Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, paras. 87-88.

the defending party and any third parties to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding."<sup>265</sup>

7.52 Therefore, since we have concluded that it is not properly specified in the Panel request, the Panel finds that the claim on the failure to revise the likelihood-of-injury determination regarding the France Section 129 determination falls outside this Panel's terms of reference and thus we cannot rule on it.

#### Other disputed new claims

7.53 As regards the UK and Spain cases, the parties dispute whether the Panel should consider the European Communities' legal claims that challenge the USDOC's alleged failure to adequately consider evidence in the likelihood-of-subsidization re-determination and the United States' alleged failure to reconsider the likelihood-of-injury determination.

7.54 We have already concluded in paragraph 7.18 above that the measures taken to comply in these proceedings are the affirmative likelihood-of-subsidization re-determinations. We have also concluded in paragraphs 7.21 and 7.31 above that the measures taken to comply include the treatment of evidence by the USDOC and that the alleged failure to re-determine the likelihood of injury is not an aspect of the measures taken to comply.

7.55 A legal claim is properly before an Article 21.5 panel if it challenges the measures taken to comply on the basis of inconsistency with the covered agreements.<sup>266</sup> A panel is thus not limited to the claims raised in the original proceedings. Instead, as the Appellate Body has confirmed, Article 21.5 panels can consider "*new* claims, arguments, and factual circumstances different from those raised in the original proceedings, because a 'measure taken to comply' may be *inconsistent* with WTO obligations *in ways different* from the original measure". The Appellate Body explained that "an Article 21.5 panel could not properly carry out its mandate to assess whether a 'measure taken to comply' is *fully consistent* with WTO obligations if it were precluded from examining claims additional to, and different from, the claims raised in the original proceedings".<sup>267</sup> Article 21.5 panels appear to have a broad mandate, a mandate almost akin to the original panel, and thus can consider any properly-raised new claims regarding the measures taken to comply.

7.56 A closer look at the Appellate Body's reasoning, however, indicates that an Article 21.5 panel's mandate is not as broad as it seems. The Appellate Body reasons that new claims should fall within the scope of an Article 21.5 panel's mandate because the measure taken to comply may be inconsistent with WTO obligations *in ways different* from the original measure. The question before us here is whether this reasoning should also apply to *new* claims that allege that the measures taken to comply are inconsistent *in ways identical* to the original measure and were not raised or resolved in the original proceedings. The Appellate Body has stressed that the utility of Article 21.5 proceedings as an expedited verification of implementation would be seriously undermined if a panel was limited to examining the measure taken to comply from the perspective of the claims, arguments, and facts in the original proceedings because an Article 21.5 panel would not be capable of examining fully the

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<sup>265</sup> Appellate Body Report on *EC – Bananas III*, para. 143

<sup>266</sup> *EC – Bed Linen (Article 21.5 – India)*, paras. 78-79.

<sup>267</sup> Appellate Body Report on *EC – Bed Linen (Article 21.5)*, para. 79 (emphasis in original); *see also* Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41; Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, paras. 86-87.



consistency of the measure taken to comply with the covered agreements.<sup>268</sup> The question is whether this utility principle requires that all new claims must be considered by Article 21.5 panels, even if the claims regard unchanged aspects of the original measure and thus could have been raised, but were not, in the original proceedings.

7.57 To determine which claims an Article 21.5 panel can consider, the Panel has followed the same analytical process as the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* by examining the facts and circumstances in previous Article 21.5 proceedings and by reviewing the Appellate Body's conclusions in those cases.

7.58 In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body examined whether an Article 21.5 panel could consider a *new claim*<sup>269</sup> that challenges an aspect of the measure taken to comply which was *not part* of the original measure and had not been, and could not have been, previously raised before the panel in the original proceedings.<sup>270</sup> The Appellate Body explained that an Article 21.5 panel is not limited solely to examining whether the Member complied with the DSB recommendations and rulings, but rather must examine the consistency of the new measure with the relevant provisions of the *SCM Agreement*.<sup>271</sup> The Appellate Body, invoking the utility of Article 21.5 proceedings, concluded that the panel therefore should have considered Brazil's new claim.<sup>272</sup>

7.59 In *US – FSC (Article 21.5 – EC)*, the Appellate Body upheld a ruling on a *new claim* challenging an aspect of the measure taken to comply that was a revision of the original measure.<sup>273</sup> Although neither the panel nor the Appellate Body explicitly considered the issue of whether an Article 21.5 panel can consider a new claim, both analysed the substance of the claim and made findings, which indicates that they believed the claim was properly before them.<sup>274</sup> As in *Canada – Aircraft (Article 21.5 – Brazil)*, the new claim in *US – FSC (Article 21.5 – EC)* could not have been raised in the original panel proceedings because the allegedly inconsistent aspect first appeared during the implementation process. The same argument regarding the utility of Article 21.5 proceedings would therefore seem to apply.<sup>275</sup>

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<sup>268</sup> Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

<sup>269</sup> In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body refers to Brazil's claim as an "argument" when it is in fact a new claim. Although Brazil challenged the same provision, Article 3.1(a) of the *SCM Agreement*, it alleged new grounds for the violation that render it a new claim. See Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 27-31.

<sup>270</sup> In the original proceedings of *Canada – Aircraft*, the DSB adopted findings that a Canadian programme is inconsistent with Article 3.1(a) SCM on the grounds that the qualification for a subsidy programme is based on export performance and therefore constitutes a prohibited export subsidy. The DSB recommendations and rulings required Canada to withdraw the inconsistent aspects of the programme, which Canada did. Canada then revised the programme. In the Article 21.5 proceedings, Brazil challenged the consistency of the revised programme with Article 3.1(a) SCM, arguing, *inter alia*, that the revised programme was inconsistent with Article 3.1(a) SCM because it targeted the aircraft industry only because of the industry's export-orientation. The Article 21.5 panel refused to consider the new claim, explaining that it was unrelated to the panel's reasoning in the original proceedings and unrelated to the DSB recommendations and rulings. The Appellate Body reversed. Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 25, 27-28, 33-34 and 42.

<sup>271</sup> Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 40.

<sup>272</sup> Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

<sup>273</sup> Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 222.

<sup>274</sup> Panel Report on *US – FSC (Article 21.5 – EC)*, paras. 8.123-8.159; Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 197-222. Compare Panel Report on *US – FSC*, para. 3.2 (including *no claim* on Article III:4 of *GATT 1994*) with Panel Report on *US – FSC (Article 21.5 – EC)*, para. 3.1 (including a claim on Article III:4 of *GATT 1994*).

<sup>275</sup> See Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

7.60 In *EC – Bed Linen (Article 21.5 – India)*, which both parties cited repeatedly, the Appellate Body examined whether an Article 21.5 panel could consider the *same* claim raised in the original proceeding challenging an aspect of the measure taken to comply that was unchanged from the original measure and had been previously dismissed by the panel in the original proceedings. The parties have discussed extensively whether the circumstances in *EC – Bed Linen (Article 21.5 – India)* are similar to this dispute.

7.61 In *EC – Bed Linen (Article 21.5 – India)*, India raised a claim regarding an aspect of the measure taken to comply that was unchanged from the original measure: the European Communities' evaluation of the relevance of "other factors" in its injury analysis. The original panel had already considered the claim, found that India failed to establish a *prima facie* case, and dismissed the claim. India never appealed the finding. By adopting the panel and Appellate Body reports, the DSB effectively resolved this issue. The Article 21.5 panel therefore concluded that India was precluded from raising an issue that had already been decided.<sup>276</sup>

7.62 India appealed, asserting that the new measure before the Article 21.5 panel should be considered as a whole and not separated into elements. India argued that given the revised dumping and injury findings, the European Communities also had to re-examine the "other factors" analysis.<sup>277</sup> After analyzing the re-determination, the Appellate Body found that the investigating authorities were required to change some aspects of the original determination, but not others. Thus, while the causation analysis was a new aspect of the measure taken to comply with the DSB recommendations and rulings, the "other factors" analysis remained unchanged from the original determination. The Appellate Body affirmed the panel's finding, explaining that the unchanged aspects were not inseparable elements of the measure taken to comply.<sup>278</sup>

7.63 The Appellate Body upheld the Article 21.5 panel's finding that a claim which was "disposed of" by the original panel and not appealed was outside its terms of reference. The Appellate Body explained that based on other provisions of the *DSU*, namely Articles 16.4, 19.1, 21.1, 21.3 and 22.1, "an *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of that claim." This occurs, it said, "in the same way and with the same finality as a finding included in an Appellate Body Report adopted by the DSB".<sup>279</sup>

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<sup>276</sup> Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.53; see Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 75.

<sup>277</sup> Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, paras. 75, 82.

<sup>278</sup> Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 86.

<sup>279</sup> In particular, the Appellate Body reasoned as follows:

"... an *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of that claim. This conclusion is supported by Articles 16.4 and 19.1, paragraphs 1 and 3 of Article 21, and Article 22.1 of the *DSU*. Where a panel concludes that a measure is inconsistent with a covered agreement, that panel shall *recommend*, according to Article 19.1, that the Member concerned bring that measure into conformity with that agreement. A panel report, including the *recommendations* contained therein, shall be *adopted* by the DSB within the time period specified in Article 16.4 – unless appealed. Members are to *comply* with recommendations and rulings *adopted* by the DSB promptly, or within a reasonable period of time, in accordance with paragraphs 1 and 3 of Article 21 of the *DSU*. A Member that does not comply with the recommendations and rulings adopted by the DSB within these time periods must face the consequences set out in Article 22.1, relating to compensation and suspension of concessions. Thus, a reading of Articles 16.4 and 19.1, paragraphs 1 and 3 of Article 21, and Article 22.1, taken together, makes it abundantly clear that a panel finding which is not

7.64 This analysis of the Appellate Body decisions leads us to conclude that an Article 21.5 panel can consider a new claim on an aspect of the measure taken to comply that constitutes a new or revised element of the original measure, which claim could not have been raised in the original proceedings. This was the case in both *Canada – Aircraft (Article 21.5 – Brazil)* and *US – FSC (Article 21.5 – EC)*. On the other hand, an Article 21.5 panel cannot consider the same claim on an aspect of the measure taken to comply that is an unchanged element of the original measure and was already challenged in the original proceedings and dismissed in an adopted report. This was the case in both *EC – Bed Linen (Article 21.5 – India)* and *US – Shrimp (Article 21.5 – Malaysia)*.<sup>280</sup>

7.65 None of these Appellate Body reports explicitly addresses the situation in this dispute: Contrary to *EC – Bed Linen (Article 21.5 – India)*, where the same claim was raised, the claims on treatment of evidence and likelihood of injury raised by the European Communities are new claims, meaning claims that were not raised in the original proceedings. Contrary to *Canada – Aircraft (Article 21.5 – Brazil)* and *US – FSC (Article 21.5 – EC)*, although we are dealing with new claims, the new claims in this dispute refer to aspects of the original measure that were not changed by the United States during the implementation, although, allegedly, they should have been changed.

7.66 We will therefore examine whether these new claims fall within this Panel's mandate.

#### New claim on evidence

7.67 As regards the claim on evidence, the parties differ on whether the claim concerns a changed or unchanged aspect of the original measure and whether it should have been raised during the original proceedings. The United States argues that the consideration of the evidence by the USDOC in the sunset review was not revised in the UK and Spain Section 129 determinations and thus the claim on evidence regards an unchanged aspect of the original measure. The United States insists that the European Communities could have and should have raised this claim during the original proceedings.<sup>281</sup> The European Communities counters that the measures taken to comply are based on new reasoning<sup>282</sup> and on new factual findings<sup>283</sup>, and therefore the new claims refer to aspects of the original measures that were revised in the implementation process. The European Communities insists that it has raised "*new* claims concerning components of the *new* measures which were not part of the original measure and therefore were not and could not have been before the Panel and Appellate Body in the proceedings arising from the original sunset determinations".<sup>284</sup> The European Communities argues that it could not have raised the claim on the treatment of evidence in the original

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appealed, and which is included in a panel report *adopted* by the DSB, must be accepted by the parties as a *final* resolution to the dispute between them, in the same way and with the same finality as a finding included in an Appellate Body Report adopted by the DSB – with respect to the particular claim and the specific component of the measure that is the subject of the claim."

Appellate Body Report on *EC – Bed Linen (Article 21.5)*, para. 93.

<sup>280</sup> The United States seems to suggest that an Article 21.5 panel cannot consider a claim that the *domestic* investigating authority considered and dismissed. US First written submission, paras. 18-20. The scope of an Article 21.5 panel's mandate, however, is only limited by a prior panel or Appellate Body decision, not by a decision of a Member's investigating authority.

<sup>281</sup> See US First written submission, paras. 16, 18-20; US Oral statement, paras. 5-6, 17-22; US Response to Panel question No. 1.

<sup>282</sup> EC Second written submission, paras. 14, 17.

<sup>283</sup> EC Second written submission, para. 18.

<sup>284</sup> EC Second written submission, para. 15.

proceedings because the legal and factual basis for the original affirmative sunset review determination are different from those of the Section 129 determination.<sup>285</sup>

7.68 The Panel considers the claim on evidence to be a *new* claim since it was not raised during the original proceedings. Whether this new claim regards *changed* or *unchanged* aspects of the measures taken to comply is more complex. At first sight, the USDOC's treatment of the evidence in the measures taken to comply might appear to be unchanged if compared to the original sunset reviews. In the original sunset reviews, the USDOC found that respondents i.e. the European Communities and the national governments at issue, failed to provide substantive evidence because there were no cooperating exporters/producers and thus the USDOC could not verify whether the benefit from some of the programmes at issue had been fully amortized.<sup>286</sup> During the Section 129 proceedings, further

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<sup>285</sup> EC Second written submission, para. 4; EC Oral statement, para. 14.

<sup>286</sup> The USDOC concluded as follows:

"The Department notes that, although the EC and GOUK assert that these programs have been terminated, as they involved specific governmental action, and that subsidization of the steel sector in the EU is strictly prohibited following the adoption of the EC Decision, the Department normally will determine that a countervailable subsidy will continue to exist where the benefit stream will continue beyond the end of the sunset review. Without evidence that some programs have been fully amortized, or participation in this review of a foreign producer/exporter, we determine that countervailable subsidy programs continue to confer benefits above *de minimis*, and that revocation of the countervailing duty order is likely to lead to continuation or recurrence of a countervailable subsidy."

Issues and Decision Memo for the Expedited Sunset Review of the Countervailing Duty Order on Cut-to-Length Carbon Steel Plate from the United Kingdom; Final Results, p. 13 (7 April 2000) (Exhibit EC-6) ("UK Sunset Review Issues and Decision Memo"); *see also* Cut-to-Length Carbon Steel Plate From the United Kingdom; Final Results of Expedited Sunset Review of Countervailing Duty Order, 65 Fed. Reg. 18309 (7 April 2000) (Exhibit US-4) ("UK Sunset Review Final Results").

"Although the EC and GOUK claim that some programs noted above, in accordance with the EC Commission Decision, can no longer provide countervailable benefits to producers/exporters of subject merchandise, they did not provide substantive evidence to the Department with respect to the termination of these programs."  
UK Sunset Review Issues and Decision Memo, p. 16.

In the original Spain sunset review, the USDOC concluded in the same vein:

"The Department notes that, although the EC and GOS assert that these programs have been terminated as they involved specific governmental action and subsidization of the steel sector in the EU that it is strictly prohibited following the adoption of the EC Commission Decision, the Department normally will determine that a countervailable subsidy will continue to exist until it is fully amortized. Without evidence that the programs have been terminated, that the benefits from programs for which benefits are allocated over time will not continue beyond this sunset review, or participation in this review of a foreign producer/exporter, we determine that revocation of the countervailing duty order is likely to lead to continuation or recurrence of a countervailable subsidy."

Issues and Decision Memo for the Expedited Sunset Review of the Countervailing Duty Order on Cut-to-Length Carbon Steel Plate from Spain; Final Results, pp. 13-14 (7 April 2000) (Exhibit EC-7) ("Spain Sunset Review Issues and Decision Memo"); *see also* Cut-to-Length Carbon Steel Plate From Spain; Final Results of Expedited Sunset Review of Countervailing Duty Order, 65 Fed. Reg. 18307, 18308 (7 April 2000) (Exhibit US-5) ("Spain Sunset Review Final Results").

"Although the EC and GOS claim that some programs, including *Law 60/78*, the *Royal Decree 878/8* and the *1984 Counsel of Minister's Meeting*, no longer exist to provide

to the USDOC's issuance of the draft determinations where the basis for the affirmative likelihood-of-subsidization had changed and was now subsidy programmes other than pre-privatization non-recurring programmes, the respondents invoked the evidence submitted during the sunset review plus, in the UK case, additional evidence regarding Glynwed's sale of relevant production facilities. The USDOC refused to consider the evidence in the Section 129 proceedings, stating that it was not reopening issues that were resolved in the sunset review and were not found by the Appellate Body to be inconsistent with the SCM Agreement.<sup>287</sup>

7.69 In this Panel's view, the relative importance of the evidence concerning non-pre-privatization subsidies and Glynwed's sale of relevant production facilities has *changed* as a consequence of the new basis for the affirmative likelihood-of-subsidization re-determinations. In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body explained that an Article 21.5 panel should be able to consider new claims where "the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings".<sup>288</sup> In this dispute, the affirmative likelihood-of-subsidization re-determinations are now based on different reasoning and different factual circumstances than those in the original sunset review. As discussed in Sections VII.C and VII.D below, the affirmative likelihood-of-subsidization determination in the original sunset reviews rested only upon the continuation of the benefit from pre-privatization, non-recurring subsidies, while the affirmative likelihood-of-subsidization determination in the UK and Spain Section 129 determinations rested only upon subsidy programmes other than pre-privatization non-recurring programmes. Thus, the weight given in the re-determination to the subsidy programmes to which the evidence relates is necessarily different than in the original sunset review. In addition, the fact that new evidence was submitted during the UK Section 129 proceedings<sup>289</sup> also indicates that this aspect of the measure taken to comply has *changed vis-à-vis* the original measure. We also note that in the UK Section 129 proceedings, Corus, one of the exporters/producers, cooperated during the Section 129 proceedings. Therefore, under these circumstances, we consider that the new claims on evidence refer to aspects of the measure taken to comply which have changed in respect of the original measure.

7.70 In addition, the European Communities could not have meaningfully raised the treatment of evidence in the original proceedings because the basis for the affirmative likelihood-of-subsidization determination in the original sunset review was different than that in the affirmative likelihood-of-subsidization re-determination set out in the Section 129 determinations. Nevertheless, even if the

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countervailable benefits to producers/exporters of subject merchandise, they did not provide substantive evidence to the Department with respect to the termination of these programs."

Spain Sunset Review Issues and Decision Memo, p. 15 (emphasis in original).

<sup>287</sup> The USDOC concluded:

"The Department's duty, in rendering a determination in this case under section 129(b)(2) of the URAA, is not to reconduct the original sunset review in its totality, but to render it not inconsistent with the findings of the Appellate Body. The Department has done this by determining that, based on the conclusions in the sunset review regarding Glynwed, an affirmative likelihood determination continues to be appropriate.

The Department is not reopening issues in this determination that were resolved in the sunset review and were not found by the Appellate Body to be inconsistent with the SCM Agreement. The result, as explained above, is that we continue to find on an order-wide basis that revocation of the order would likely lead to the continuation or recurrence of a countervailable subsidy."

UK Section 129 determination, footnote 208 above, p. 9. The text of the Spain Section 129 determination is similar. Spain Section 129 determination, footnote 208 above, p. 6.

<sup>288</sup> Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

<sup>289</sup> See EC Response to Panel question No. 43.

European Communities could have raised a claim on the USDOC's treatment of the evidence in the original proceedings, this would not affect the Panel's conclusion since the new claim challenges the treatment of the evidence in the Section 129 determinations, which concerns an aspect of the measure taken to comply that has changed relative to the original measure. An Article 21.5 proceeding aims to ensure the effective resolution of disputes by providing the complaining Member with an expeditious procedure to challenge the implementation of the DSB recommendations and rulings. This Article 21.5 Panel can therefore consider new claims arising from the implementation.<sup>290</sup>

7.71 When determining whether to consider a new claim, however, an Article 21.5 panel should also consider the impact on the parties' due process rights. In this dispute, permitting the claims on the treatment of evidence does not unduly deprive the United States of its due process rights. The United States itself introduced the issue of treatment of evidence by revising the entire likelihood-of-subsidization determination and by changing the legal basis of the affirmative conclusion of likelihood of continuation or recurrence of subsidization. The United States therefore could have anticipated a claim on the USDOC's treatment of evidence. Accordingly, the Panel concludes that the European Communities' claim on evidence falls within this Panel's mandate.

#### New claim on likelihood-of-injury

7.72 The parties also dispute whether the Panel can consider the claim on the failure to re-determine the likelihood of continuation or recurrence of injury. This claim is also a *new* claim. However, as found in paragraph 7.31 above, the likelihood-of-injury determination is not an aspect of the measures taken to comply, but an aspect of the original measures in the UK and Spain cases. As explained above, the Appellate Body has ruled that an Article 21.5 panel can only consider those claims relating to a measure taken to comply.<sup>291</sup> Since this Panel has concluded in paragraph 7.31 above that the failure to reconduct the likelihood-of-injury determination is not an aspect of the measure taken to comply in the UK and Spain cases, we cannot therefore consider the European Communities' claim on failure to reconsider likelihood of injury.

7.73 Even if we were to consider that the likelihood-of-injury analysis were an aspect of the *measures taken to comply*, we would nevertheless still conclude that the European Communities' claim on failure to reconsider likelihood of injury is not within our mandate. The Appellate Body jurisprudence summarized in *EC – Bed Linen (Article 21.5 – India)* seems to indicate that the European Communities is not precluded from raising claims that it did not raise in the original proceedings, provided that these claims concern the measures taken to comply and are included in the Panel request. We recall that the Appellate Body's reasoning for the inclusion of new claims in the scope of Article 21.5 proceedings was that "the 'measure taken to comply' may be *inconsistent* with WTO obligations *in ways different* from the original measure".<sup>292</sup> The question here is whether this conclusion should also apply to *new* claims where the measure taken to comply is unchanged from the original measure and thus allegedly inconsistent with WTO obligations *in ways identical to (not different from)* the original measure.

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<sup>290</sup> Article 21.5 panels can consider "*new* claims, arguments, and factual circumstances different from those raised in the original proceedings, because a 'measure taken to comply' may be *inconsistent* with WTO obligations in ways different from the original measure". The Appellate Body explained that "an Article 21.5 panel could not properly carry out its mandate to assess whether a 'measure taken to comply' is *fully consistent* with WTO obligations if it were precluded from examining claims additional to, and different from, the claims raised in the original proceedings". Appellate Body Report on *EC – Bed Linen (Article 21.5)*, para. 79 (emphasis in original).

<sup>291</sup> Appellate Body Report on *EC – Bed Linen (Article 21.5)*, para. 78.

<sup>292</sup> Appellate Body Report on *EC – Bed Linen (Article 21.5)*, para. 79. (emphasis added); *see also* Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41; Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, paras. 86-87.

7.74 In this dispute, this Panel confronts the issue of whether to consider new claims on aspects of the original measure that are unchanged and were not challenged in the original proceedings. The purpose of Article 21.5 is to provide an expeditious procedure to establish whether a Member has properly implemented the DSB recommendations and rulings. Admitting such a new claim would mean providing the European Communities with a second chance to raise a claim that it failed to raise in the original proceedings. The Appellate Body, however, has found that a party cannot cure the failure to include a claim in the panel request by raising the claim in subsequent submissions or statements.<sup>293</sup>

7.75 Moreover, the Panel is concerned that allowing a new claim on the likelihood-of-injury in the current proceedings may jeopardize the principles of fundamental fairness and due process. In our view, it would be unfair to expose the United States to the possibility of a finding of violation on an aspect of the original measure that the United States was entitled to assume was consistent with its obligations under the relevant agreement given the absence of a finding of violation in the original report.<sup>294</sup>

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<sup>293</sup> In *EC – Bananas III*, the Appellate Body explained that:

"Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding."

Appellate Body Report on *EC – Bananas III*, para. 143; *see also* Appellate Body Report on *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 167, at p. 186 (stating that a claim falls outside a panel's terms of reference unless it is identified in the document specifying the panel's terms of reference); Appellate Body Report on *India – Patents (US)*, para. 88 (emphasizing the difference between the claims, which must be included in the request for establishment as they establish the panel's terms of reference, and the arguments, which are set out and clarified in the written submissions and oral statements throughout the panel proceedings).

<sup>294</sup> The Panel notes that in *EC – Bed Linen (Article 21.5 – India)*, the panel explained that, in such a situation, a defending Member would not have the opportunity to bring the measure into conformity. Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.40. Indeed, there is no provision for a "reasonable period" to implement the ruling in an Article 21.5 dispute. Thus, an Article 21.5 panel ruling on such a new claim may immediately give rise to rights for compensation or suspension of concessions under Article 22 DSU. Moreover, the parties do not have the same opportunity to present evidence and arguments in Article 21.5 proceedings.

The circumstances of the present case illustrate the potential procedural unfairness. The European Communities did not agree that the United States could submit consecutive rebuttals and required that the rebuttals be simultaneous. Therefore, the United States could only rebut the arguments in the European Communities' Second written submission during the sole meeting with the parties. Consequently, important facts and issues continued to surface quite late into the Article 21.5 proceedings, proceedings that are already abbreviated. In addition, we note that the record of the original proceedings does not even include evidence regarding the likelihood-of-injury determinations which, as noted above, were made by a different agency than the likelihood-of-subsidization determinations at issue in the original dispute. Thus, were we to consider the injury claim as within our mandate, we would have an extremely limited evidentiary basis on which to rule. Finally, the shorter timeline significantly limits both the panel's opportunity to interact with the parties and the panel's time to deliberate. The panel typically has only one opportunity to meet with the parties, unlike the normal proceedings where two substantive meetings take place.

7.76 In sum, permitting the European Communities to introduce a new claim on an aspect of the original measure that was never challenged and remained unchanged raises serious issues regarding the United States' due process rights. On balance, the utility of an Article 21.5 proceeding should not override the basic due process rights of the parties to a dispute.<sup>295</sup>

### Conclusion

7.77 The Panel therefore concludes that the European Communities' claims on the failure to re-determine the likelihood of continuation or recurrence of injury in the three Section 129 determinations are not properly before this Panel. The Panel also concludes that the European Communities' claims on evidence are properly before this Panel.

## **2. Standard of review**

7.78 The standard of review applicable to *SCM Agreement*-related disputes is the general "objective assessment" standard of Article 11 of the *DSU*. In *EC – Hormones*, the Appellate Body clarified that "the applicable standard [pursuant to Article 11 of the *DSU*] is neither *de novo* review as such, nor 'total deference', but rather the 'objective assessment of the facts'".<sup>296</sup>

7.79 In *US – Cotton Yarn*, the Appellate Body indicated that its Reports in *Argentina – Footwear (EC)*, *US – Lamb* and *US – Wheat Gluten*, all concerning disputes under the *Agreement on Safeguards*, "spell out key elements of a panel's standard of review under Article 11 of the *DSU* in assessing whether the competent authorities complied with their obligations in making their determinations". The Appellate Body stated:

"This standard may be summarized as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority."<sup>297</sup>

7.80 Precisely, in the context of the analysis of Usinor's privatization, we note that the United States, with reference to the Appellate Body Report in *US – Cotton Yarn*, argues that the Panel's task under Article 11 of the *DSU* is not to determine whether the privatization was at arm's-length or for FMV, but rather whether the USDOC properly established the facts and evaluated them in an unbiased and objective way. "Put differently, the Panel's task is to determine whether a reasonable,

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<sup>295</sup> As indicated by the Panel in *EC – Bed Linen (Article 21.5 – India)*:

"[s]uch an outcome would not seem to be consistent with the overall object and purpose of the *DSU* to achieve satisfactory resolution of disputes, effective functioning of the WTO, to maintain a proper balance between the rights and obligations of Members, and to ensure that benefits accruing to any Member under covered agreements are not nullified or impaired."

Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.40.

<sup>296</sup> Appellate Body Report on *EC – Hormones*, para 117.

<sup>297</sup> Appellate Body Report on *US – Cotton Yarn*, para. 74.



unbiased person, looking at the same evidentiary record as [the USDOC], could have – not would have – reached the same conclusions.”<sup>298</sup>

7.81 The Panel notes that several panels and the Appellate Body have addressed the scope of a panels' task in the specific context of sunset reviews. Most of these disputes concerned the anti-dumping sunset review provision under Article 11.3 of the *Anti-Dumping Agreement*. We note that the Appellate Body has considered that its interpretation of Article 21.3 of the *SCM Agreement* applies *mutatis mutandis* to Article 11.3 of the *Anti-Dumping Agreement* due to the provisions' (almost) identical wording.<sup>299</sup> We also note that the *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures* recognizes "the need for the consistent resolution of disputes from anti-dumping and countervailing duty measures".<sup>300</sup> On this basis, the Panel considers that the following description of a panel's task in considering the investigating authorities' behaviour, even if referring to anti-dumping sunset reviews, should also apply to sunset reviews under the *SCM Agreement*.

7.82 In this respect, the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* cited with approval the panel's description of the investigating authority's duties in an anti-dumping sunset review in *US – Corrosion-Resistant Steel Sunset Review*.<sup>301</sup> According to this description, Article 11.3 of the *Anti-Dumping Agreement* imposes an obligation on the investigating authority to make a determination on the basis of positive evidence and with sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence.<sup>302</sup> The Appellate Body concluded that a panel must evaluate the investigating authority's sunset review determination in light of that obligation and assess whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner:

"These obligations of investigating authorities inform the task of a panel called upon to evaluate the consistency of an investigating authority's determination with

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<sup>298</sup> US First written submission, para. 25.

<sup>299</sup> In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body stated:

"Article 11.3 is textually identical to Article 21.3 of the *SCM Agreement*, except that, in Article 21.3, the word 'countervailing' is used in place of the word 'anti-dumping' and the word 'subsidization' is used in place of the word 'dumping'. Given the parallel wording of these two articles, we believe that the explanation, in our Report in *US – Carbon Steel*, of the nature of the sunset review provision in the *SCM Agreement* also serves, *mutatis mutandis*, as an apt description of Article 11.3 of the *Anti-Dumping Agreement*. (Appellate Body Report on *US – Carbon Steel*, paras. 63 and 88)."

Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 104, footnote 114.

<sup>300</sup> We note that, in *US – Softwood Lumber VI*, the panel was called on to consider a case involving a single injury determination with respect to both subsidized and dumped imports. The claims therefore involved identical or almost identical provisions of the *SCM Agreement* and the *Anti-Dumping Agreement*. The panel concluded that given its understanding of the applicable standards of review under Article 11 of the *DSU* and Article 17.6 of the *Anti-Dumping Agreement*, it nonetheless did not consider that it was either necessary or appropriate to conduct separate analyses of the injury determination under the two agreements. In arriving to this conclusion, the panel relied on the *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*. Panel Report on *US – Softwood Lumber VI*, para. 7.18.

<sup>301</sup> Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, paras. 179, 321. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body considered that the "Panel's description of the obligations of investigating authorities in conducting a sunset review closely resembles our own, and we agree with it". Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 115.

<sup>302</sup> Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271.

Article 11.3 of the *Anti-Dumping Agreement*. The task of the panel is to assess whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner.<sup>303</sup> We agree with the Panel that '[its] task [was] not to perform a *de novo* review of the information and evidence on the record of the underlying sunset review, nor to substitute [its] judgment for that of the US authorities'.<sup>304</sup> If the panel is satisfied that an investigating authority's determination on continuation or recurrence of dumping or injury rests upon a sufficient factual basis to allow it to draw reasoned and adequate conclusions, it should conclude that the determination at issue is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.<sup>305,306</sup>

7.83 We shall therefore apply the above standard of review when evaluating the affirmative likelihood-of-subsidization re-determinations at issue in these proceedings.

### 3. Burden of proof

7.84 The Appellate Body summarised its prior findings on the burden of proof in *US – Wool Shirts and Blouses*, indicating that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.<sup>307</sup>

7.85 The Appellate Body also specifically considered the application of the burden of proof in the context of an Article 21.5 proceeding. In *Canada – Aircraft (Article 21.5 – Brazil)*, it ruled that the examination of "measures taken to comply" must be based on the relevant facts proved by the complainant to the Article 21.5 panel during the panel proceedings.<sup>308</sup> In its sister case, *Brazil – Aircraft (Article 21.5 – Canada)*, the Appellate Body confirmed that the fact that the measure at issue was 'taken to comply' with the 'recommendations and rulings' of the DSB does not alter the allocation of the burden of proving a defence.<sup>309</sup>

7.86 In determinations on subsidization, we recall that in the original proceedings in *US – Countervailing Measures on Certain EC Products*, the Appellate Body found that, when the investigating authority determines that a privatization has taken place at arm's length and for FMV, the investigating authority has the burden to prove that the benefit still passed through to the privatized producer:

"We understand the Panel to be stating that privatization at arm's length and for fair market value privatization *presumptively* extinguishes any benefit received from the non-recurring financial contribution bestowed upon a state-owned firm. The effect of

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<sup>303</sup> (footnote original) *Anti-Dumping Agreement*, Article 17.6(i).

<sup>304</sup> (footnote original) Panel Report, para. 7.5.

<sup>305</sup> (footnote original) There are analogies between this description of the panel's task and what the Appellate Body stated in *US – Lamb* in the context of the application of safeguard measures. In that case, the Appellate Body recalled that the applicable standard is neither *de novo* review, nor total deference, but rather the objective assessment of the facts. (Appellate Body Report on *US – Lamb*, para. 101) The Appellate Body went on to state that "[f]irst, a panel must review whether competent authorities have evaluated *all relevant factors*, and, second, a panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination." (*Ibid.*, para. 103) (original emphasis; footnote omitted)

<sup>306</sup> Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 322.

<sup>307</sup> Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 323, at p. 335.

<sup>308</sup> Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 38.

<sup>309</sup> Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 66.

such a privatization is to shift to the investigating authority the burden of identifying evidence which establishes that the benefit from the previous financial contribution does indeed continue beyond privatization. In the absence of such proof, the fact of the arm's-length, fair market value privatization is sufficient to compel a conclusion that the 'benefit' no longer exists for the privatized firm, and, therefore, that countervailing duties should not be levied. This is an accurate characterization of a Member's obligations under the *SCM Agreement*.

... Privatization at arm's length and for fair market value *may* result in extinguishing the benefit. Indeed, we find that there is a rebuttable presumption that a benefit ceases to exist after such a privatization. Nevertheless, it does not *necessarily* do so. There is no inflexible rule *requiring* that investigating authorities, in future cases, *automatically* determine that a 'benefit' derived from pre-privatization financial contributions expires following privatization at arm's length and for fair market value. It depends on the facts of each case."<sup>310</sup>

#### 4. Panel's approach

7.87 Having concluded that the measures taken to comply in these proceedings are the affirmative likelihood-of-subsidization re-determinations set out in the three Section 129 determinations at issue, we will address the claims raised by the European Communities concerning each of these three re-determinations.

#### B. CERTAIN CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM FRANCE

##### 1. Background

7.88 On 8 January 2003, the DSB adopted the original panel and Appellate Body Reports. The Panel found that the sunset review determination on *Certain Corrosion-Resistant Carbon Steel Flat Products from France* (C-427-810) (Case No. 9), which was based on the so-called gamma methodology, was inconsistent with the *SCM Agreement*, since the USDOC did not examine whether the privatization, that occurred after the original imposition of countervailing duties, was at arm's length and for FMV and had failed to determine whether the privatized producer received any benefit from the financial contributions previously bestowed on the state-owned producer. The Panel considered that by failing to determine the likelihood of continuation or recurrence of a subsidization, prior to its decision to maintain countervailing duties, the United States had violated Articles 14, 19.4, 21.1 and 21.3 of the *SCM Agreement*, which prohibit a Member, pursuant to a sunset review, from maintaining countervailing duties where there has not been any determination of likelihood of continuation or recurrence of subsidization and thus of a continued need for countervailing duties. It also concluded that, since the United States had maintained countervailing duties that were inconsistent with Articles 14, 19.4, 21.1 and 21.3 of the *SCM Agreement*, it had also violated Article 10 of the *SCM Agreement* which requires that countervailing duties be imposed or maintained consistently with the *SCM Agreement*.<sup>311</sup> The Appellate Body upheld these Panel findings.<sup>312</sup>

7.89 Following the adoption of the Panel and Appellate Body Reports by the DSB, the USDOC published a new privatization methodology ("Modification Notice"), which is not being challenged by the European Communities in these proceedings.<sup>313</sup> The USDOC also reviewed its determination of

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<sup>310</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, paras. 126-127.

<sup>311</sup> Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 8.1(c).

<sup>312</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 161(a).

<sup>313</sup> The new privatization methodology includes a "baseline presumption" that non-recurring subsidies benefit the recipient over a period of time, usually the average useful life of the recipient's assets, and are

the likelihood of continuation or recurrence of subsidization contained in the original sunset review, which had been found to be inconsistent with the *SCM Agreement* and the *GATT 1994*. Accordingly, the USDOC issued its *Issues and Decision Memorandum for the Section 129 Determination: Corrosion-Resistant Carbon Steel Flat Products from France; Final Results of Expedited Sunset Review of Countervailing Duty Order* of 23 October 2003 ("France Section 129 determination").<sup>314</sup>

7.90 In the France Section 129 determination, the USDOC applied its new privatization methodology to Usinor's privatization. According to the France Section 129 determination, the Government of France ("GOF") incrementally privatized Usinor over a three-year period (July 1995-August 1998). Prior to the privatization, the GOF wholly owned Usinor, holding 80 per cent directly and 20 per cent through the government-controlled Crédit Lyonnais (or later, its division, Clindus).<sup>315</sup> In effectuating the privatization, the GOF issued four types of share offerings to four different classes of purchasers: 1) French resident nationals and European Communities or European Economic Area nationals in France ("French public offering"); 2) current and qualifying former employees of Usinor throughout the world ("employee/former employee offering"); 3) stable shareholders comprising various institutional investors, both public and private ("stable shareholder offering"); and 4) the general public in the French and international financial markets ("international offering"). The GOF subjected the four types of share offerings to different restrictions.<sup>316</sup>

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therefore allocable over that period of time, i.e. the allocation period. With an adequate showing, however, the recipient of the subsidy can rebut this baseline presumption and demonstrate that a privatization extinguished all pre-sale benefits. To do so, the recipient must prove that the government sold "all or substantially all" of its assets during the allocation period; that the government retains no control over the privatized company or its assets; and that the sale was at arm's length and for FMV. In determining whether the sale was at arm's length, USDOC follows the definition of "arm's length" provided in the Statement of Administrative Action. Specifically, USDOC examines whether the "transaction [was] negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties." Modification Notice, footnote 206 above, p. 37127 (*quoting* SAA, footnote 243 above, p. 258).

In determining whether the sale was for FMV, the USDOC asks whether the purchaser(s) paid "the full amount that the company or its assets (including the value of any subsidy benefits) were actually worth under the prevailing market conditions." Payment can be through either monetary or equivalent compensation. As part of this analysis, the USDOC examines "whether the government, in its capacity as seller, acted in a manner consistent with the normal sales practices of private, commercial sellers in that country." A primary indicator of "acting in a manner consistent with the normal sales practice" is whether the government maximized its return on the sale. To ascertain whether a government maximized its return, the USDOC considers information on the sale process and any comparable benchmark prices. The USDOC also analyzes a non-exhaustive list of factors: whether the government conducted an objective analysis of appropriate sale price; whether artificial barriers to entry exist, i.e. placing unreasonably burdensome requirements in bidding; whether the government accepted the highest bid; and whether the government required a committed investment, i.e. offered inducement in exchange for promise of future investment.

Finally, if the recipient establishes that the privatization occurred at arm's length and for FMV, the injured party can still prove the benefit was not extinguished by showing that broader market conditions were not present or were distorted by the government. To do so, the injured party must either demonstrate the absence of basic conditions for a properly functioning market or the existence of legal/fiscal incentives that distort terms of sale. Modification Notice, footnote 206 above, pp. 37127-37128.

<sup>314</sup> France Section 129 determination, footnote 208 above.

<sup>315</sup> France Section 129 determination, footnote 208 above, p. 3.

<sup>316</sup> International Offering Prospectus for Usinor Privatisation, pp. 21-24, 84-86 (Exhibit EC-8) ("Usinor Prospectus"); Order of the French Minister of Economic Affairs and Finance: Order of June 26, 1995 Whereby Terms for the Privatization of Usinor-Sacilor Are Defined (26 June 1995) (Exhibit EC-10) ("Order Defining Terms for the Usinor Privatization"). A table describing the different conditions and restrictions attached to each of the four share offerings is included in paragraph 7.150 below.

7.91 According to the France Section 129 determination, by the end of 1995, private shareholders held the majority of shares with over 75 per cent. The GOF and Clindus had reduced their holdings to 9.8 per cent and 2.5 per cent, respectively. Stable shareholders held 15.8 per cent. Of those stable shareholders, three were directly or indirectly government-controlled ("public stable shareholders"). Usinor employees held only 3.55 per cent.<sup>317</sup>

7.92 Also according to the France Section 129 determination, the USDOC stated that in January 1997, the GOF delivered approximately 1.2 per cent of total Usinor shares to French individual shareholders and employees who had complied with the share restrictions. In October 1997, the GOF sold another approximately 7.7 per cent of total Usinor shares. By year-end 1997, private shareholders held over 85 per cent of total Usinor shares. The GOF held 0.93 per cent directly. "Clindus and the public stable shareholders remained unchanged at 2.5 per cent and 10.1 per cent, respectively".<sup>318</sup> Usinor employees held 5.16 per cent.<sup>319</sup> In August 1998, the GOF completed the privatization by delivering the remaining 0.93 per cent to shareholders as free shares. The GOF no longer held any direct ownership in Usinor.<sup>320</sup>

7.93 After analysing Usinor's privatization in the France Section 129 determination, the USDOC found that the privatization of Usinor was at arm's length and for FMV with the exception of the employee/former employee offering, which constituted 5.16 per cent of the sale. The USDOC therefore reaffirmed the affirmative likelihood determination in its original sunset review, indicating that "[t]he sale of shares to Usinor employees at prices below fair market value did not extinguish certain allocable, nonrecurring, pre-privatization subsidies that continue at an above *de minimis* rate beyond the original sunset review".<sup>321</sup> The USDOC affirmed its original likelihood-of-subsidization determination, which reported the net countervailable subsidy rate likely to prevail upon revocation of the order as an *ad valorem* country-wide countervailing duty rate of 15.13 per cent.<sup>322</sup>

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<sup>317</sup> France Section 129 determination, footnote 208 above, p. 3. The Panel notes that the USDOC provided these values in its Section 129 determination and these values appear to add up to 106.65 per cent. The parties, however, do not dispute the precise per centages. Therefore, the Panel considers it unnecessary to address this particular discrepancy.

<sup>318</sup> The Panel notes that it is unclear whether the public stable shareholders held 10.1 per cent of total shares or 10.1 per cent of the 15.8 per cent stable shareholder portion, which would be 1.6 per cent of total shares. See France Section 129 determination, footnote 208 above, p. 3. Again, as the parties do not dispute the precise per centages, the Panel considers it unnecessary to address this particular discrepancy.

<sup>319</sup> France Section 129 determination, footnote 208 above, p. 3.

<sup>320</sup> France Section 129 determination, footnote 208 above, p. 3.

<sup>321</sup> France Section 129 determination, footnote 208 above, p. 12.

<sup>322</sup> France Section 129 determination, footnote 208 above, p. 16. The Panel understands that the USDOC first issued a final determination in July 1993, where the USDOC found countervailable subsidies to exist and determined the country-wide *ad valorem* cash deposit rate to be 15.49 per cent. Final Affirmative Countervailing Duty Determinations: Certain Steel Products From France, 58 Fed. Reg. 37304, 37314 (9 July 1993). We also note that the USDOC subsequently recalculated this cash deposit rate to correct ministerial errors before issuing the order in August 1993 to countervail subsidies at the revised country-wide *ad valorem* cash deposit rate of 15.12 per cent. Countervailing Duty Order and Amendment to Final Affirmative Countervailing Duty Determination: Certain Steel Products from France, 58 Fed. Reg. 43759, 43760-61 (17 August 1993). In April 2000, the USDOC published the final results of its sunset review and maintained the order based on its finding that the "revocation of the countervailing duty order would be likely to lead to continuation or recurrence of the subsidy". Corrosion-Resistant Carbon Steel Flat Products from France; Final Results of Expedited Sunset Review of Countervailing Duty Order, 65 Fed. Reg. 18063, 18064 (6 April 2000). In the Issues and Decision Memo, the USDOC explained that it was taking the cash deposit rate from the original investigation because that was the "only calculated rate that reflects the behaviour of exporters and foreign governments without the discipline of an order or suspension agreement in place". Issues and Decision Memo for the Sunset Review of the Countervailing Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from France; Final Results, pp. 7-8 (6 April 2000). We note that the countervailing duty rate

## 2. The measure taken to comply

7.94 As concluded in paragraph 7.18 above, the measure taken to comply as regards *Certain Corrosion-Resistant Carbon Steel Flat Products from France* is the affirmative likelihood-of-subsidization re-determination set out in the France Section 129 determination.

## 3. The claims

7.95 The European Communities claims that, by failing to revoke the countervailing duties on *Certain Corrosion-Resistant Carbon Steel Flat Products from France*, the United States failed to implement the DSB recommendations and acted inconsistently with its WTO obligations.<sup>323</sup> In particular, the European Communities claims that the USDOC failed to properly determine whether the privatized French company Usinor continued to receive any benefit from financial contributions previously bestowed on the state-owned producer.<sup>324</sup> The European Communities, referring to the findings of this Panel and the Appellate Body in the original proceedings, argues that, in determining the likelihood of continuation or recurrence of subsidization, a Member must determine whether the privatized producers received any benefit from the financial contributions previously granted to state-owned producers. Where a privatization is at arm's length, for FMV and under conditions that did not seriously distort the market in which the privatization occurred, it argues, there is a presumption that the benefit provided to the state-owned producer has been extinguished. In its view, the privatized producers did not receive any such benefit following Usinor's privatization, so that presumption is warranted and has not been rebutted. In the alternative, the European Communities also challenges the USDOC's maintenance of countervailing duties based on the France Section 129 determination on the grounds that the USDOC's finding that 5.16 per cent of the benefit passes through does not justify such a maintenance.<sup>325</sup>

7.96 Accordingly, the European Communities requests that this Panel finds that the United States has failed to implement the recommendations and rulings of the DSB and acted inconsistently with its obligations under Articles 10, 14, 19.4, 21.1, and 21.3 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*.<sup>326</sup>

7.97 The United States contests these allegations and requests the Panel to affirm that the USDOC reasonably concluded that the sale of shares to Usinor's employees was not at arm's length or for FMV. It argues that the European Communities has not demonstrated that the USDOC erred in making that finding and in maintaining the duties on those bases, and that therefore the Panel should reject the European Communities' claims.<sup>327</sup>

7.98 We recall that we have found in paragraph 7.52 above that the European Communities' claim on the USDOC's alleged failure to revise the likelihood-of-injury determination in this case does not fall within this Panel's terms of reference.

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likely to prevail in the sunset review is 15.13 per cent, which is 0.01 per cent higher than the rate provided in the amended final determination. The USDOC explained that it revised the rate from the original investigation as a result of domestic court rulings. *Corrosion-Resistant Carbon Steel Flat Products from France*; Final Results of Expedited Sunset Review of Countervailing Duty Order, 65 Fed. Reg. 18063, 18064 (6 April 2000).

<sup>323</sup> EC First written submission, paras. 30, 46 and , 72; Second written submission, para. 50.

<sup>324</sup> EC Request for establishment, p. 2.

<sup>325</sup> EC First written submission, paras. 36.

<sup>326</sup> EC Request for establishment, p. 2; EC First Written submission, paras. 30, 46 and 72; Second written submission, para. 50.

<sup>327</sup> US Second written submission, para. 10.

**4. *Whether the measure taken to comply is inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the SCM Agreement and Article VI:3 of the GATT 1994***

7.99 The European Communities claims that the USDOC failed to examine the conditions of Usinor's privatization and to determine whether Usinor continued to benefit from non-recurring, pre-privatization subsidies. This claim rests upon two main grounds: First, the European Communities alleges that the USDOC wrongly applied its new methodology to Usinor's privatization by performing a segmented analysis instead of analysing the privatization as a whole. Second, the European Communities asserts that the USDOC did not properly evaluate whether the sales of shares to employees/former employees were at arm's length and for FMV. In the alternative, the European Communities also challenges the maintenance of countervailing duties on the basis of a finding that 5.16 per cent of the benefit passed through.<sup>328</sup>

7.100 We shall examine these grounds one at the time. We recall that, as explained in paragraph 7.79 above, the task of this Panel is to assess whether the USDOC properly established the facts and evaluated them in an unbiased and objective manner. In doing so, we are not to perform a *de novo* review of the information and evidence on the record of the determination, nor to substitute our judgement for that of the USDOC.

(a) Whether the privatization analysis must be done for the whole company

(i) *Arguments of the parties*

7.101 The European Communities argues that when viewed in the context of the company as a whole, the privatization of Usinor occurred at arm's length and for FMV.<sup>329</sup> The European Communities contends that the privatization of Usinor as a whole occurred at FMV because the average price paid for Usinor's shares exceeded the average price per share recognised by the Privatization Commission as necessary to recoup the value of the company and fell within the market-clearing price range that the USDOC identified.<sup>330</sup> The European Communities maintains that the United States should have therefore concluded that because the privatization overall was at FMV, no benefit from pre-existing non-recurring subsidies could be attributed to the newly privatized producer.<sup>331</sup> In its First written submission, the European Communities emphasizes that regardless of the minimum value or the price paid within an individual share offering, "the total price paid for [XXX] shares in Usinor's privatization was FF [XXX], for an average price of FF [XXX] per share".<sup>332</sup> The European Communities argues that the United States should have compared the market-clearing price range, FF 86 to FF 89, which the USDOC identified in the France Section 129 determination<sup>333</sup>, with this actual average price per share obtained, instead of with the price per category of share offering as set out in the Usinor prospectus. The European Communities maintains that as a result of the comparison of the market-clearing price range with this actual average price per share obtained, the USDOC would have been obliged to conclude that the entire privatization was for FMV.

7.102 The European Communities asserts that the USDOC's analysis constitutes a kind of "zeroing" because the USDOC considers that if one portion is sold at less than FMV, a benefit for the company as a whole survives the transaction even if other portions are sold at prices that ensure that the whole

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<sup>328</sup> EC First written submission, para. 32.

<sup>329</sup> EC First written submission, paras. 37-39; EC Second written submission, paras. 30-36; EC Oral statement, para. 5.

<sup>330</sup> EC First written submission, paras. 37-38; EC Second written submission, para. 36.

<sup>331</sup> EC Oral Statement, para. 5.

<sup>332</sup> EC First written submission, para. 38. The European Communities has asked the Panel to treat these figures as confidential information.

<sup>333</sup> France Section 129 determination, footnote 208 above, pp. 8-9.

transaction is for FMV.<sup>334</sup> In the European Communities' view, although this Panel and the Appellate Body did not specify a methodology for determining under which circumstances a privatization has occurred at arm's length and for FMV, these factors were nevertheless discussed in the context of the privatization of the firm *as a whole*.<sup>335</sup> The European Communities argues that the consistent finding made by this Panel was that what mattered was whether the privatized producer, comprising the company and its owners, had received something for free. It emphasizes that privatizations frequently involve the sale of shares to different groups of persons at different prices. Nonetheless, no suggestion was made that if one of the new owners paid less than FMV, the whole transaction would be regarded as not occurring under FMV conditions.<sup>336</sup>

7.103 The United States disagrees with the European Communities and contends that nothing prevents the United States from conducting an analysis of four distinct categories of purchasers to determine whether Usinor was sold for FMV. In its view, the European Communities cannot oblige the USDOC to use an "average price" analysis.<sup>337</sup> In fact, the United States emphasises that neither the DSB recommendations and rulings nor the *SCM Agreement* prescribe a particular methodology for analysing a privatization.<sup>338</sup> The United States therefore contends that it is within a Member's discretion to develop a "reasonable" methodology.<sup>339</sup>

7.104 The United States also argues that the European Communities' averaging methodology insufficiently incorporates the arm's length and FMV analyses. Specifically, the United States argues that the averaging of share values ignores the arm's length issue and treats FMV as a purely quantitative analysis. The United States insists that the USDOC's FMV analysis is not purely quantitative, but instead encompasses several "process-oriented" factors, e.g. limitations on the purchaser pool and the nature of the bidding process.<sup>340</sup> In the United States' view, if a portion of the company was not sold at arm's length and for FMV, logically, the benefit from a non-recurring subsidy remains countervailable.<sup>341</sup> The United States asserts that the rationale of the panel's finding is that pre-privatization subsidies are extinguished where the privatized producer receives nothing "for free". Therefore, it argues, to the extent that a portion of the company was sold for less than FMV, the privatized producer received something "for free". If the entire privatization is not arm's-length/FMV, then all of the benefit from allocable, pre-privatization subsidies remains countervailable (except to the extent that it has already been countervailed).<sup>342</sup> Where only a portion of the company is not sold in an arm's-length/FMV transaction, it follows that only a corresponding portion of the benefit remains countervailable.<sup>343</sup> In this case, the Usinor employees did not pay FMV for the preferential shares and therefore, Usinor received something "for free" and that corresponding portion of the pre-privatization benefit continues.<sup>344</sup>

(ii) *Evaluation by the Panel*

7.105 The European Communities challenges the United States' "segmented" analysis of Usinor's privatization. It argues that the USDOC should have examined Usinor's privatization as a whole because the segmented analysis does not take into account the fact that FMV was paid for the whole

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<sup>334</sup> EC Oral Statement, para. 5.

<sup>335</sup> EC Second written submission, paras. 30-33.

<sup>336</sup> EC Oral Statement, para. 6.

<sup>337</sup> US First written submission, paras. 29, 33; US Second written submission, para. 5; US Oral statement, para. 27.

<sup>338</sup> US Oral statement, para. 27.

<sup>339</sup> US First written submission, paras. 28-29.

<sup>340</sup> US Oral statement, para. 28.

<sup>341</sup> US First written submission, para. 3; US Oral statement, paras. 25-26.

<sup>342</sup> US Oral Statement, para. 25.

<sup>343</sup> US Oral Statement, para. 26.

<sup>344</sup> US First written submission, para. 32; US Oral statement, paras. 26.



of the company.<sup>345</sup> For the European Communities, because the average price per share obtained falls within the range of market-clearing prices, the USDOC should have concluded that the entire privatization occurred for FMV.<sup>346</sup> The United States disagrees and justifies its "segmented" methodology on the grounds that both the selling methods and the price of the shares were different for each category of share offering.<sup>347</sup> It also argues that the European Communities' averaging methodology ignores the arm's-length issue and treats FMV as a purely quantitative analysis. The

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<sup>345</sup> EC First written submission, para. 37; EC Second written submission, paras. 35-36. Regarding the privatization as a whole, the European Communities also argued that the USDOC had already found in two prior domestic remand determinations that the very same privatization of Usinor was at arm's length and for FMV and that, therefore, the benefits conferred by the pre-privatization subsidies had been extinguished. EC First written submission, para. 12, footnote 19; EC Second written submission, para. 37; see Results of Redetermination Pursuant to Court Remand, *GTS Industries S.A. v. United States*, No. 00-03-00118, Remand Order (Ct. Int'l. Trade, 4 January 2002) (Exhibit US-1); Results of Redetermination Pursuant to Court Remand, *Alleghany Ludlum Corp., et al v. United States*, No. 99-09-00566, Remand Order (Ct. Int'l. Trade, 4 January 2002) (Exhibit US-2). The European Communities also referred to the Panel and Appellate Body's findings not contested by the United States whereby "the sales [i.e., all the privatizations] were at arm's length and for FMV." EC Second written submission, para. 37; see Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 84.

The United States countered that the prior remand determinations are inapposite since they apply a methodology that was found to be inconsistent with the covered agreements. US Second written submission, paras. 6-7. The United States also insists that it made no admissions as to the conditions of sale surrounding these privatizations in the underlying proceedings. US Oral statement, para. 29.

In the Comments to the France Section 129 determination, the USDOC actually addresses the issue of the two remand determinations and disagrees with the respondent's contentions regarding the relevance of these precedents. The USDOC explains that it did not consider in those determinations whether the sale was at arm's length or whether the broader market conditions were distorted. Moreover, the USDOC never found that all four share offerings were at arm's length and for FMV. In fact, the USDOC found that the employee share offering was *restricted* and served to limit potential purchasers, and that Usinor employees paid *less* than full FMV. In addition, the USDOC also states that both Stainless Remand and CTL Remand were under review by the Court of Appeals for the Federal Circuit at the time and therefore do not constitute a final and conclusive decision regarding the legality of the change-in-ownership methodology used by the USDOC in those cases. France Section 129 determination, footnote 208 above, p. 14.

The Panel notes that, in those remand investigations, the USDOC was applying the same person methodology, which this Panel found inconsistent with the *SCM Agreement* in the original proceedings. As the Panel explained at the time, the same person methodology presented a different legal issue, i.e. whether the pre-privatized and the privatized companies were the same person. By applying this methodology, the USDOC did not consider whether the privatization of Usinor was at arm's length and for FMV, it just found that, because the state-owned Usinor and the privatized Usinor were not the same person, the benefit received by the state-owned Usinor did not pass through to the employees.

<sup>346</sup> EC First written submission, para. 38; EC Comment on US response to Panel question No. 32.

A third-party to these proceedings suggests that the approach taken by the USDOC may be inconsistent with the ruling of the Appellate Body in *US – Countervailing Measures on Certain EC Products*, where the Appellate Body explicitly noted, "once a fair market price is paid ... [the] market value is redeemed." Appellate Body in *US – Countervailing Measures on Certain EC Products*, para. 102 (emphasis in original). The third-party feels that the Appellate Body did not say that an investigating authority could dissect a broader transaction where the market value is recouped in order to render a contradictory determination. Brazil Third-party submission, para. 22. This Panel, however, does not believe that this excerpt either prescribes or precludes any particular methodology for analysing a privatization.

<sup>347</sup> France Section 129 determination, footnote 208 above, p. 5.

United States insists that the USDOC's FMV analysis is not purely quantitative, pointing to the "process-oriented" factors in its methodology.<sup>348</sup>

7.106 We are therefore called upon to decide whether the USDOC was obliged to examine Usinor's privatization as a whole, as claimed by the European Communities.

7.107 We shall first examine how the USDOC conducted its analysis of Usinor's privatization as set out in the France Section 129 determination. We note that the USDOC separately considered the sales transactions pertaining to the four different categories of share offerings (international offering, French public offering, employee/former employee offering and stable shareholder offering).<sup>349</sup> The USDOC then applied its new privatization methodology to the four categories of share offerings to evaluate whether the sales transactions in each share offering occurred at arm's length and for FMV and to thus determine whether the privatization had extinguished the benefit from non-recurring pre-privatization subsidies.

7.108 To determine whether the privatization of Usinor was conducted at arm's length, the USDOC applied the definition of arm's length provided in the Modification Notice.<sup>350</sup> The United States analysed the four categories of transactions *individually*, explaining that it was necessary to analyse them individually because both the selling methods and the share price differ among categories.<sup>351</sup> The USDOC found that all categories except the employee/former employee share offering were at arm's length.<sup>352</sup>

7.109 The USDOC explained that in examining whether Usinor was privatized for FMV, the USDOC first considered whether there was a contemporaneous, benchmark price. Concluding there was no such price, the USDOC stated that it would then analyse the sales process according to several factors on the non-exhaustive list in the Modification Notice: objective analysis, purchase price, artificial barriers to entry, committed investment and concurrent subsidies.<sup>353</sup>

7.110 When examining the valuation of Usinor, the USDOC concluded that "the GOF commissioned and followed the recommendations of objective analyses of the value of Usinor".<sup>354</sup> The Privatization Commission determined the average minimum share price to be FF 84.43, based on the total number of shares to be offered, 186,544,395, at the minimum price of FF 15,750 billion.<sup>355</sup> Looking at the USDOC's analysis, the Panel understands that the USDOC found that the Privatization Commission based this minimum value on independent evaluations of Usinor's value and therefore found that the formulation of Usinor's value was based on objective analysis.<sup>356</sup>

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<sup>348</sup> US Oral statement, para. 28.

<sup>349</sup> Usinor Prospectus, footnote 316 above, pp. 21-24, 84-86.

<sup>350</sup> The USDOC cites the definition of "arm's length" in the Statement of Administrative Action, which provides that an arm's length transaction is "a transaction [that was] negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties." Modification Notice, footnote 206 above, p. 37127 (*quoting* SAA, footnote 243 above, p. 258).

<sup>351</sup> French Section 129 determination, footnote 208 above, p. 5.

<sup>352</sup> French Section 129 determination, footnote 208 above, pp. 5-6.

<sup>353</sup> France Section 129 determination, footnote 208 above, pp. 6-11.

<sup>354</sup> France Section 129 determination, footnote 208 above, p. 10.

<sup>355</sup> EC First written submission, para. 38.

<sup>356</sup> In evaluating whether there was an objective analysis of FMV, the USDOC explained that:

"[t]he decision to privatize Usinor and the terms of privatization were executed through an order of the Ministry of Economic Affairs and Finance, based on an opinion by the Privatization Commission, both issued in June 1995. Share prices were set by the Ministry,

7.111 When analysing the purchase price, however, the USDOC explained that the analysis focuses on whether the GOF obtained a market-clearing price, not whether it obtained the minimum value. The USDOC emphasized that the market-clearing price, not the minimum value, reflects FMV, i.e. the price at which the GOF maximised its return.<sup>357</sup> The USDOC defined the market-clearing price as "one that equates the supply of shares with the demand for shares".<sup>358</sup> The USDOC explained that if the Government of France had set the price too low or too high for a particular share offering, that share offering would be over-subscribed or under-subscribed, respectively. The USDOC then determined that the market clearing price fell between FF 86 and FF 89 because that is the price range at which supply balanced demand for the French public offering and the international offering. The USDOC found that the shares for the international offering and French public offering were within the market-clearing price, the stable shareholder offering was above the market-clearing price, and only the employee share price was below the market-clearing price.<sup>359</sup>

7.112 Further to its "segmented" analysis, the USDOC found that:

"[t]he evidence presented on the record of [the Section 129] determination demonstrates that, with the exception of the employee offering, which constituted 5.16 per cent of the sale, the privatization of Usinor was at arm's length and for fair market value. While certain aspects of the sales process for stable shareholders made the process less open, the price paid by the stable shareholders was an arm's-length price and it exceeded [the USDOC's] measure of fair market value, FF 86 - 89. Regarding the shares sold to Usinor's employees, [the USDOC] determine[s] that these sales were not at arm's length. Nor can the sales at FF 68 be considered transactions at fair market value."<sup>360</sup>

7.113 The USDOC therefore determined that every share offering except the employee/former employee share offering was at FMV.<sup>361</sup> The USDOC thus reaffirmed the *affirmative likelihood determination* in its original sunset review, indicating that "[t]he sale of shares to Usinor employees at prices below fair market value did not extinguish certain allocable, nonrecurring, pre-privatization subsidies that continue at an above *de minimis* rate beyond the original sunset review".<sup>362</sup>

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based on the opinion of the Privatization Commission, in consultation with Banque S.G. Warburg ("Warburg") and the other Global Coordinators of the share offerings, and in accordance with the privatization law. The Privatization Commission stated that it relied upon various valuation methodologies for Usinor including, *inter alia*, stock-exchange-based comparisons and net liquidity flows. Based on its analysis, the Commission recommended a minimum value for Usinor of FF 15,750 billion. ... The minimum value set by the Privatization Commission was consistent with the range of values established in the Warburg valuation. ... Given the number of shares the GOF expected to sell and the prices for those shares, the expected revenue was consistent with the various valuations."

France Section 129 determination, footnote 208 above, pp. 6-7.

<sup>357</sup> France Section 129 determination, footnote 208 above, pp. 8-9. In its response to a Panel question, the United States emphasized that the appraised value provided by the Privatization Commission is a minimum value, not a fair market value. US Response to Panel question No. 32.

<sup>358</sup> France Section 129 determination, footnote 208 above, p. 8; US First written submission, para. 44.

<sup>359</sup> France Section 129 determination, footnote 208 above, pp. 8-9; *see also* US Oral statement, para. 33.

<sup>360</sup> France Section 129 determination, footnote 208 above, p. 12.

<sup>361</sup> France Section 129 determination, footnote 208 above, pp. 8-9; *see also* US Oral statement, para. 33.

<sup>362</sup> France Section 129 determination, footnote 208 above, p. 12. The USDOC also referred to new subsidy allegations "timely submitted" by the petitioners but decided not to pursue them because, in its view, it would have no impact on the outcome of the determination. France Section 129 determination, footnote 208

7.114 When considering whether the USDOC was required to consider Usinor's privatization as a whole, we note that the *SCM Agreement* does not provide a particular methodology for analysing whether a privatization is conducted at arm's length and for FMV. Article 14 of the *SCM Agreement* only provides that "any" method used by investigating authorities to calculate the benefit to the recipient shall be provided for in a WTO Member's legislation or regulations, and it requires that its application be transparent and adequately explained. As found by the Appellate Body in *US – Softwood Lumber IV*, "[t]he reference to 'any' method... clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient".<sup>363</sup>

7.115 Moreover, neither this Panel nor the Appellate Body addressed this issue in the original proceedings. Instead, the Appellate Body, paraphrasing the Panel, ruled that, "in sunset reviews, the investigating authority, before deciding to continue to countervail pre-privatization, non-recurring subsidies is obliged to 'examine the conditions of such privatizations and to determine whether the privatized producers received any benefit from the prior subsidization to the state-owned producers'".<sup>364,365</sup> Neither the panel nor the Appellate Body established a precise methodology for an investigating authority to follow when examining the conditions of the privatization at issue.

7.116 The European Communities, although conceding that the Panel and the Appellate Body in the original proceedings did not require a particular methodology, argues that the factors – arm's length and FMV – were nevertheless discussed in the context of the privatization of the firm *as a whole*. The European Communities refers to the Panel Report where the Panel explained that the payment of FMV by the privatized producer and its owners extinguishes the benefit of non-recurring, pre-privatization benefits that were bestowed upon the state-owned company because no benefit can accrue to the privatized producer beyond what market conditions dictate.<sup>366</sup> The European

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above, p. 13. We note that the USDOC also found that there were no concurrent subsidies at the time of the privatization. France Section 129 determination, footnote 208 above, p. 10.

<sup>363</sup> Appellate Body Report on *US – Softwood Lumber IV*, para. 91.

<sup>364</sup> (footnote original) Panel Report [on *US – Countervailing Measures on Certain EC products*,] para.

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<sup>365</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC products*, para. 149.

<sup>366</sup> EC Second written submission, paras. 30-33.

The Panel stated:

"that privatization calls for a (re)determination of the existence of a benefit to the privatized producer, and that fair market value payment by the *privatized producer (and its owners)* extinguishes the benefit resulting from the prior financial contribution (subsidization) bestowed upon the state-owned producer, because no advantage or benefit accrued to that privatized producer over and above what market conditions dictate pursuant to Article 14 of the *SCM Agreement*."

Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 7.77 (emphasis added).

The Panel explained that:

"if upon privatization, fair market value is paid for all productive assets, goodwill, etc. employed by the state-owned producer, the Panel fails to see how the subsidies bestowed to the state-owned producer could subsequently be considered to still confer a 'benefit' on the *privatized producer (in the sense of the company together with its owners)* who has paid fair market value for all the shares and assets, reflecting, we must assume, the value of past subsidization."

Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 7.72 (emphasis added).

Communities emphasized that the Panel's most important finding was that the primary factor for consideration is whether the privatized producer, comprising the company and its owners, had received something for free.<sup>367</sup>

7.117 The Panel, however, fails to see how this reference, which emphasises the fact that FMV was paid by the privatized producer meaning the company and its owners, engenders an obligation to *exclusively* examine the conditions of the privatization by looking at the company *as a whole*. In the Panel's view, these excerpts neither require an analysis of the conditions of the privatization as a whole nor preclude segmenting such an analysis.

7.118 In the absence of a legally prescribed methodology, the Panel agrees with the United States that it is within a Member's discretion to develop a *reasonable* methodology which, as required by Article 14 of the *SCM Agreement*, must be applied in a transparent manner and be adequately explained. Again, we recall that the task of this Panel is to assess whether the USDOC examined all the pertinent facts and adequately explained its conclusion. The Panel's task is neither to perform a *de novo* review of the information and evidence on the record of the determination, nor to substitute our judgement for that of the USDOC.<sup>368</sup> Accordingly, the issue before this Panel is not whether the Panel would have preferred that the USDOC analyse Usinor's privatization as a whole but whether the USDOC's segmented analysis of Usinor's privatization is reasonable and was transparently applied and adequately explained.

7.119 The Panel does not find that the USDOC's individual analysis of each category of share offering is unreasonable. On the contrary, the USDOC's segmented analysis appears rather logical and systematic given the conditions of the privatization. As described in paragraphs 7.90-7.92 above, instead of a single transaction, the GOF incrementally privatized Usinor over a period of three years through a multitude of sales transactions grouped in four share offerings that were each subject to distinct conditions and restrictions.<sup>369</sup> The organization of the USDOC's analysis of the conditions of Usinor's privatization actually mirrored that of the share offerings. We also consider that the USDOC applied its methodology in a transparent manner: the USDOC published a description of its new methodology in the Federal Register and then applied it accordingly.<sup>370</sup> The adequacy of the USDOC's explanation of its conclusions, however, is not entirely satisfactory, as we will see when examining the USDOC's arm's-length analysis on the employee/former employee share offering.

7.120 We note that the United States argues that the European Communities' averaging methodology ignores the arm's-length issue. We agree with the United States. Indeed, given the diversity of the purchasers and sales conditions, the Panel has difficulty formulating an arm's length analysis for Usinor's privatization as a whole.

7.121 The United States also argues that the European Communities' averaging methodology treats FMV as a purely quantitative analysis and ignores its "process-oriented" factors. We note that, in conducting its FMV analysis, the USDOC states that it is "weighing these various factors" – including objective analysis, artificial barriers to entry, purchase price, committed investment and concurrent subsidies. However, it later appears to nevertheless take the finding of the non market-clearing price for the employee/former employee share offering as definitive.<sup>371</sup> Although the USDOC insists that

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<sup>367</sup> EC Oral statement, para. 6.

<sup>368</sup> See discussion in paragraphs 7.78-7.83 above.

<sup>369</sup> France Section 129 determination, footnote 208 above, pp. 3-4. See the table describing the conditions applicable to each share offering in paragraph 7.150 below.

<sup>370</sup> See Modification Notice, footnote 206; France Section 129 determination, footnote 208 above, pp. 3-12.

<sup>371</sup> The USDOC concluded:

it conducted a qualitative FMV analysis, its reliance on the non market-clearing price for the employee share offering indicates that the conclusion is actually heavily quantitative. The Panel thus considers that unlike the case of the arm's length analysis, the FMV analysis could have been done either in a segmented manner or as a whole, as suggested by the European Communities. The USDOC could have just as easily compared the average price obtained to the market-clearing price in its analysis of the privatization as a whole, as it compared the individual price of each share offering to the market-clearing price in its segmented analysis. The Panel, however, cannot find any legal basis to require the USDOC to conduct its analysis in a particular manner.

7.122 Consequently, given the complexity of the privatization process, we find that the USDOC's segmented analysis of the conditions of Usinor's privatization is not unreasonable and was applied in a transparent manner.

(b) Whether the sales of shares to employees/former employees were at arm's length and FMV

7.123 The European Communities has argued that, even considering the employees/former employees share offering independently, the evidence demonstrates that the sales of Usinor's shares to this category of purchasers were nevertheless at arm's length and for FMV.<sup>372</sup> The United States disagrees. We shall therefore examine the USDOC's analysis of the sales transactions pertaining to the employees/former employees share offering. We shall commence by explaining the USDOC's arm's length analysis, followed by the FMV analysis.

(i) *Whether the sales of shares to employees/former employees were at arm's length*

#### Arguments of the parties

7.124 The European Communities argues that the shares sold through the employees/former employees offering were at arm's length. The European Communities refers to the *Black's Law Dictionary* definition of arm's length as a term "[o]f or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship"<sup>373</sup> to support its view that the employees/former employee offering did not involve related parties, and, therefore, did constitute an arm's-length transaction.<sup>374</sup>

7.125 The European Communities also argues that the United States wrongly examined whether a pre-privatization relationship existed rather than a post-privatization relationship.<sup>375</sup> In addition, the

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"Based on our review of the factors relevant to FMV, the privatization of Usinor presents a somewhat mixed picture. On the one hand, there were some barriers in the bidding process that might have limited the number of potential purchasers. On the other hand, there is substantial record evidence that the privatization of Usinor was accomplished through a fair-market-value transaction, with the exception of the employee offering. First, the GOF commissioned and followed the recommendations of objective analyses of the value of Usinor. Second, the value/cost of any committed investment was known to bidders and reflected in the prices offered. Third, the GOF set and received a market-clearing price for Usinor's shares, except in the employee offering which constituted only 5.16 per cent of the sale; in the stable shareholder offering, the GOF set and received an above market-clearing price. After weighing these various factors, we determine that, with the exception of the employee offering, FMV was paid for Usinor."

France Section 129 determination, footnote 208 above, pp. 10-11.

<sup>372</sup> EC Second written submission, para. 38.

<sup>373</sup> EC First written submission, para. 41 (*citing Black's Law Dictionary* (West Group, 1999), 7<sup>th</sup> ed., p. 82).

<sup>374</sup> EC First written submission, para. 41.

<sup>375</sup> EC Second written submission, para. 39; EC Oral statement, para. 8.

European Communities argues, although Usinor was wholly-owned, directly or indirectly, by the GOF, the buyers in the employee/retiree offering included employees of Usinor, not employees of the GOF. In its view, although the GOF participated in shareholder meetings and oversaw the financial management of the company, it did not “intervene in the day-to-day management of the Company, and the Company ... conducted its day-to-day operations in a manner similar to that of other major international non-state controlled steel producers.”<sup>376</sup> Thus, it argues, the employee purchasers were at least two steps removed from having any relationship to the GOF.<sup>377</sup> Furthermore, it contends, the employee/former employee offering also included *former* employees of Usinor.<sup>378</sup> There is no evidence whatsoever that there was any relationship between the *former* employees of Usinor and the GOF. Even if some type of relationship existed between the seller and the buyers in this case, it was not the type of relationship that would affect the price at which the GOF sold Usinor shares.<sup>379</sup> The European Communities points out that the France Section 129 determination contains no explanation/reasoning as to how and why employees/former employees are related to the GOF, just a conclusion that they are related to Usinor.<sup>380</sup>

7.126 The United States disagrees, arguing that the *SCM Agreement* does not refer to “arm’s length,” and neither the Panel nor the Appellate Body provided any elaboration on this term.<sup>381</sup> It contends that the “arm’s-length” analysis applied by the USDOC is, however, entirely consistent with the ordinary understanding of that term. The United States quotes the New Shorter Oxford Dictionary and Black’s Law Dictionary in support.<sup>382</sup>

7.127 The United States also argues that the European Communities misconstrued the logic of the USDOC’s arm’s-length finding. Contrary to the European Communities’ assertion, the United States insists that the “preferential” rate offered to the employees was not the sole basis of the USDOC’s non arm’s-length finding.<sup>383</sup> The United States explains that the USDOC’s arm’s length test consists of two steps.<sup>384</sup> The first step is to evaluate the relationship between the parties, i.e. the relationship between the company, Usinor, and its employees. The United States concludes that in this case, the employees are inarguably affiliated to Usinor.<sup>385</sup> The United States argues that the USDOC’s approach recognizes that the respective interests of employers and employees may not be distinguishable and that members of the “corporate family” often treat each other more favourably than they do others outside the family; and that this point is demonstrated by the admittedly preferential nature of the employee stock offering.<sup>386</sup> The United States further explains that after evaluating the relationship, the USDOC proceeds to the second step to examine the terms of the

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<sup>376</sup> EC First written submission, para. 42 (*quoting* Usinor Prospectus, footnote 316 above, p. 26); *see also* EC Oral statement, para. 8.

<sup>377</sup> EC Oral statement, para. 8.

<sup>378</sup> In addition to including former employees of Usinor, the employee offering included former employees of affiliates in which Usinor held, directly or indirectly, a majority interest. *See* Usinor Prospectus, footnote 316 above, p. 21.

<sup>379</sup> EC First written submission, paras. 40-44.

<sup>380</sup> EC First written submission, para. 44.

<sup>381</sup> US First written submission, para. 35; US Oral statement, para. 27.

<sup>382</sup> US First written submission, para. 35 (*citing The New Shorter Oxford English Dictionary* (Oxford University Press, 1993), Thumb Index Edition, Vol. I, p. 114 (at arm’s length: “without undue familiarity; (of dealings) with neither party controlled by the other.”) and *Black’s Law Dictionary* (West Group, 1999), 7<sup>th</sup> ed., p. 103 (“Of or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship. ...”)).

<sup>383</sup> US Oral statement, para. 31.

<sup>384</sup> US Oral statement, para. 31; *see* US First written submission, paras. 36-37.

<sup>385</sup> US Oral statement, para. 31; *see* US First written submission, para. 36 (where the US characterises this step in the analysis somewhat differently as “consider[ing] the existence of relationships that would indicate the sales were not at arm’s length”).

<sup>386</sup> US First written submission, para. 36.

transaction between Usinor and its employees to determine whether those terms would have existed had the transaction been between unrelated parties.<sup>387</sup> In other words, to determine "whether the price charged the affiliated party was different from what it would have been absent the affiliation".<sup>388</sup> The United States argues that it was at this step of the analysis that the USDOC relied on the "preferential" nature of the employee share offering to explain the lower share price.<sup>389</sup> Because there was a preferential option available to employees that was not available to unrelated parties, the USDOC concluded that the terms of the transaction were different as a result of the relatedness of the parties and, hence, that the transactions were not at arm's length.<sup>390</sup> The United States emphasises that the evidence on the record amply supports the conclusion that the sales were not at arm's length; specifically, "the sales were openly acknowledged to be preferential".<sup>391</sup> The United States also insists that the European Communities provided no factual basis to contradict the USDOC's conclusion that the "preferential" nature of the relationship resulted in a lower share price.<sup>392</sup>

7.128 The United States disagrees with the European Communities' argument that the USDOC's arm's-length analysis was in error because it confused the company (Usinor) and its owner (the GOF), finding only that Usinor's employees were related to Usinor, not to the GOF.<sup>393</sup> The United States contends that the facts indicate that the GOF offered preferential share prices to the employees of a company that it entirely owned, demonstrating that it did not deal with those employees at arm's length for purposes of the privatization.<sup>394</sup> Moreover, it argues, the DSB rationale for finding that a benefit may be extinguished by an arm's length, FMV privatization hinges on the assumption that there is little distinction between the company and its new owners.<sup>395</sup> In its view, that fact that the new methodology requires the USDOC to consider the privatized company and its owners as a single privatized producer is consistent with the findings of the Appellate Body.<sup>396</sup>

7.129 The United States disputes the European Communities' argument that the USDOC should have considered the relationship after the privatization. The United States explains that the DSB recommendations and rulings focused on whether the *transaction* extinguished the benefit. What occurs after the privatization is therefore irrelevant.<sup>397</sup>

#### Evaluation by the Panel

7.130 The European Communities is challenging the USDOC's finding that Usinor's employees and former employees are related to Usinor and that, in view of the preferential nature of the share offering, the sales transactions pertaining to the employee/former employee share offering were not at arm's length.

7.131 We are therefore called upon to examine whether the USDOC properly determined that the sales transactions pertaining to the employee/former employee share offering were not at arm's length.

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<sup>387</sup> US First written submission, para. 37.

<sup>388</sup> US Oral statement, para. 31.

<sup>389</sup> US Oral statement, para. 31.

<sup>390</sup> US First written submission, para. 37.

<sup>391</sup> US First written submission, para. 34.

<sup>392</sup> US Oral statement, para. 31.

<sup>393</sup> US First written submission, para. 38; US Oral statement, para. 32; *see also* EC First written submission, para. 42.

<sup>394</sup> US First written submission, para. 38; *see also* EC First written submission, para. 42 (where the European Communities states that Usinor was wholly owned, directly or indirectly, by the GOF).

<sup>395</sup> US First written submission, para. 38. The United States refers to the Panel Report on *US – Countervailing Measures on Certain EC Products*, paras. 7.54 and 7.72 and the Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, paras. 113-115.

<sup>396</sup> US Second written submission, para. 8; US Oral statement, para. 32.

<sup>397</sup> US Oral statement, para. 30.



We shall commence by looking at the USDOC's analysis and conclusions as set out in the France Section 129 determination.

7.132 In the France Section 129 determination, as already explained, the USDOC applied its new privatization methodology and found that the sales transactions in all share offerings except the employee/former employee share offering were at arm's length.<sup>398</sup> In the case of Usinor's employees/former employees, the USDOC found:

"Finally, an even smaller number of shares (eventually comprising 5.16 per cent) were sold exclusively to current and qualifying former Usinor employees. These purchasers had two options: (1) they could purchase shares at the French public offering price of FF 86 per share, or (2) they could pay a discounted price of FF 68.80, with an extended payment period, if they agreed to hold the shares for two years. Additionally, they were eligible to receive bonus shares if they held the shares for specified periods. Thus, the employee offering was clearly distinguishable from the public offerings and was openly characterized as 'preferential' in Usinor's *International Offering Prospectus* ("Prospectus").

We determine that the employees of Usinor were related to Usinor and that the sales of shares to Usinor employees at the discounted price did not constitute an arm's-length transaction."<sup>399</sup>

7.133 We note that neither the *SCM Agreement* nor prior reports have defined the concept of "arm's length". The parties have referred to various dictionary definitions of "arm's length" to support their positions. For instance, the *Black's Law Dictionary* defines arm's length as "[o]f or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship". The *New Shorter Oxford Dictionary* defines arm's length as "without undue familiarity; (of dealings) with neither party controlled by the other".<sup>400</sup>

7.134 The United States contends that the definition contained in its new privatization methodology corresponds to the ordinary meaning of arm's length.<sup>401</sup> The definition provides that an arm's-length transaction is "a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties".<sup>402</sup> This definition appears to coincide with the above dictionary definitions in that all highlight the independence of the parties in an arm's length transaction: either the parties have equal bargaining power, neither party controls the other, or each party is acting in its own interest.

7.135 In any case, the European Communities has not challenged the definition of arm's length in the USDOC's new privatization methodology, but its application to the sales transactions pertaining to Usinor's employee/former employee share offering. Therefore, determining whether the definition on the new privatization methodology corresponds to the ordinary meaning of the concept, as described in the above dictionaries, is not our task. We are asked to examine the appropriateness of the USDOC's analysis and conclusion on arm's length that results from the application of that definition to the sales transactions involving the employee/former employee share offering.

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<sup>398</sup> France Section 129 determination, footnote 208 above, pp. 4-6.

<sup>399</sup> France Section 129 determination, footnote 208 above, p. 6.

<sup>400</sup> US First written submission, para. 35, footnote 44.

<sup>401</sup> US First written submission, para. 35.

<sup>402</sup> Modification Notice, footnote 206, p. 37127 (*quoting* SAA, footnote 243 above, p. 258).

7.136 As shown in paragraph 7.132 above, the USDOC analysis as regards the employees/former employees share offering consists of a description of the conditions of that offering, followed by a conclusion that "the employees of Usinor were related to Usinor and that the sales of shares to Usinor employees at the discounted price did not constitute an arm's-length transaction".<sup>403</sup>

7.137 The Panel considers that the USDOC's arm's-length analysis in the France Section 129 determination fails to ask and respond to the basic question in an arm's-length test, i.e. *whether the purchaser is related to the seller*. The France Section 129 determination contains *no* reasoned conclusion that the purchasers of the shares pertaining to the employees/former employees share offering are related to the seller of those shares, i.e. the GOF. It only contains a conclusion that Usinor's employees are related to Usinor.<sup>404</sup> One could be entitled to assume that an employee is related to his/her employer; the same goes for a former employee (for example, a retiree's pension may depend on the employer's performance). But from there, a conclusion that the employees/former employees are related to another entity that owns the employer company requires at least some explanation. We recall that Article 14 of the *SCM Agreement* requires that the method to determine the existence of a benefit be adequately explained.<sup>405</sup> The USDOC should have therefore explained why by being related to their employer, the employees/former employees are somehow related to the GOF.

7.138 The Panel therefore concludes that the USDOC did not properly establish that the sales transactions pertaining to Usinor's employee/former employee share offering were not at arm's length because the USDOC failed to provide an adequate and reasoned conclusion on why Usinor's employees and former employees were related to the GOF.

7.139 The European Communities also argues that the United States wrongly examined whether a pre-privatization relationship existed rather than a post-privatization relationship.<sup>406</sup> The United States disagrees and contends that the DSB recommendations and rulings focused on whether the *transaction* extinguished the benefit. In its view, what occurs after the privatization is therefore irrelevant.<sup>407</sup> The Panel agrees that the arm's length analysis should focus on the relationship between the seller and the purchaser at the time of the transaction, since the purpose of the analysis is to determine whether the terms of that transaction are affected by the relation between those parties.

7.140 Notwithstanding the absence of an adequate and reasoned conclusion, the Panel notes that whether Usinor's employees are related to the GOF is not dispositive with respect to the continuation of a benefit. The Panel agrees that the arm's-length test is an ancillary examination that provides the context for, and otherwise informs, the decision on FMV. The arm's-length test by itself is not a bright-line test for determining whether a benefit is eliminated. Rather, the arm's length test reflects a general understanding that transactions between related parties *may not always* be on commercial terms.<sup>408</sup> Therefore, the arm's-length test merely affects the level of scrutiny for the FMV analysis. Where a relationship exists, a closer analysis of the actual terms is warranted to determine if the transaction at issue is consistent with market principles. Thus, regardless of whether the transaction occurred at arm's length, an investigating authority must analyse whether the privatization was for FMV to ultimately determine whether a benefit passed through. We shall therefore examine whether the USDOC appropriately found that the employee/former employee shares were not sold for FMV.

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<sup>403</sup> France Section 129 determination, footnote 208 above, p. 6.

<sup>404</sup> The Panel notes that the conclusion does not mention Usinor's former employees.

<sup>405</sup> Appellate Body Report on *US – Softwood Lumber IV*, para. 91.

<sup>406</sup> EC Second written submission, para. 39; EC Oral statement, para. 8.

<sup>407</sup> US Oral statement, para. 30.

<sup>408</sup> See Brazil Third-party submission, para. 19.

(ii) *Whether the sales of shares to employees/former employees were for FMV*

Arguments of the parties

7.141 The European Communities challenges the USDOC's conclusion that the employee share offering was not at FMV. The European Communities argues that the discount offered to Usinor employees and former employees reflects the risk assumed by the buyers for the resale restrictions on the shares purchased. Because the shares purchased by some Usinor employees and former employees were less liquid, they were less valuable on the market since it was unclear whether, after two years, the price for the shares would be higher or lower.<sup>409</sup> The European Communities argues that the restrictions placed upon the French public offering and the stable shareholders, to the extent they were applicable, were not as restrictive as those on the employee/former employee offering. The French public offering restricted sales only where purchasers acquired free shares. The stable shareholders were precluded from selling shares for three months, allowed to sell a limited number of shares for the following 15 months, and no longer precluded from selling shares after 15 months.<sup>410</sup>

7.142 The European Communities argues that it is also common among public offerings throughout the world, including in the context of privatizations, to offer shares to employees or former employees at a specific rate.<sup>411</sup>

7.143 The United States contests the European Communities' arguments by asserting that resale restrictions *per se* provide no explanation for the substantial discount afforded Usinor's employees. To the contrary, it argues, resale restrictions in the Usinor privatization were not limited to company employees. Purchasers in the French offering as well as the stable shareholders were subject to similar restrictions. Nevertheless, it argues, the share prices for the latter two groups were well above the preferential price for the employees. In its view, were the European Communities' argument correct, one would expect the European Communities to be able to provide evidence that employees were equally (or virtually equally) likely to participate in the French public offering as they were to participate in the employee/former employee offering.<sup>412</sup> The European Communities, it argues, has offered no such evidence nor has the European Communities offered any demonstration of *how* the discount offered to employees was supposed to reflect the risk assumed by the buyers for the resale restrictions.<sup>413</sup> Moreover, the United States alleges, the European Communities avoids explaining how it calculated the employee share price, thereby failing to contextualize the seller's basis for characterizing the employee share offering as "preferential".<sup>414</sup> It also contends that it is irrelevant

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<sup>409</sup> EC First written submission, para. 45.

<sup>410</sup> EC Second written submission, para. 47; EC Oral statement, para. 7.

<sup>411</sup> The Panel notes that the European Communities explicitly refers to the term "specific" and not to the term "preferential". The European Communities cites Steven L. Jones, William L. Megginson, Robert C. Nash, and Jeffry M. Netter, "Share issue privatizations as financial means to political and economic ends," 53 J. Fin. Econ. 217, 238 (1999); accord Simon Leary, "Privatization Issue 12: Key Steps in a Successful Public Offering," at 2, available at <http://www.pwcglobal.com/extweb/manissue.nsf/DocID/>. The EC also indicates that, in a study by the US General Accounting Office ("GAO") on privatization practices in major developed countries, the GAO noted that the governments of these countries, in particular the UK and France, have routinely offered set specific prices for employees in their privatizations, without suggesting that such offerings were in any way exceptional. See US General Accounting Office, "Budget Issues: Privatization/Divestiture Practices in Other Nations," at 5-6, 13-14 (1995). In France, the privatization law itself provides for the offering of a specific rate to employees and former employees so long as those shares are retained for at least two years. See French Privatization Law of 1986, as amended, Art. 11, submitted in GOF/Usinor 2 September 2003 Questionnaire Response, Appendix 4. Thus, the offering of shares at specific prices to employees and former employees of a company in the context of privatization is common practice. EC First written submission, footnote 71; see EC Oral statement, paras. 6-7.

<sup>412</sup> US First written submission, para. 46.

<sup>413</sup> US First written submission, para. 46; US Oral statement, para. 33.

<sup>414</sup> US Oral statement, para. 33.

whether it is common practice for a government to set aside shares for government employees when privatizing an enterprise.<sup>415</sup>

Evaluation by the Panel

7.144 The European Communities claims that the sales of shares to Usinor's employees and former employees were for FMV and argues that the discount offered to this category of buyers reflects the risk they assumed for the resale restrictions on the shares purchased. Specifically, the European Communities maintains that the share price reflects the 24-month resale restriction and its accompanying risk. In its view, this restriction is stricter than those on the French public offering and the stable shareholders offering so the risk is accordingly higher and the share price lower. The United States disagrees.

7.145 We shall therefore examine whether the USDOC reasonably concluded that the sales transactions pertaining to the employee/former employee share offering were not for FMV. To this end, we shall commence by examining the USDOC's FMV analysis in the France Section 129 determination.

7.146 In the France Section 129 determination, the USDOC explained that in examining whether Usinor was privatized for FMV, the USDOC first considered whether there was a contemporaneous, benchmark price. Concluding there was no such price, the USDOC stated that it would then analyse the sales process according to several factors on the non-exhaustive list in the Modification Notice: objective analysis, artificial barriers to entry, purchase price, committed investment, and concurrent subsidies.<sup>416</sup> The USDOC then proceeded to analyse each category of share offering separately within each factor to determine whether the sales in each category were at FMV.

7.147 We note that during the FMV analysis, the USDOC examined the employee/former employee share offering within the context of several of the factors listed above. Specifically, when examining artificial barriers to entry, the USDOC found that the sales process was restricted with respect to the employee pool because it excluded numerous potential purchasers who were not employees/former employees.<sup>417</sup> When analysing purchase price, the USDOC focused on the conditions of the French public offering and the international offering and determined that the prices for those two share offerings, FF 86 and FF 89, respectively, set the range for the market-clearing price, i.e. "[the price] that equates the supply of shares with the demand for shares".<sup>418</sup> The USDOC, however, performed

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<sup>415</sup> US Second written submission, para. 9.

<sup>416</sup> France Section 129 determination, footnote 208 above, pp. 6-11.

<sup>417</sup> France Section 129 determination, footnote 208 above, p. 7.

<sup>418</sup> The USDOC explained that

"[i]n regard to the price, we have sought to determine whether the GOF charged a market-clearing price for its shares of Usinor. A market-clearing price is one that equates the supply of shares with the demand for shares. If the GOF had set the prices for Usinor's shares too low, the offering would have been over-subscribed and many people seeking shares would not have been able to purchase them in the initial offering. Conversely, if the prices were set too high, the offering would have been under-subscribed and the GOF would not have been able to sell as many shares as it had planned.

As noted above, the prices in the French and international public offerings were FF 86 and FF 89, respectively. The evidence on the record shows that because of the high level of demand, the number of shares made available in the French offering had to be increased. First, shares were moved from the international offering to the French offering. Additional shares subsequently were made available... Regarding the international offering, shares were originally moved from there to the French offering but, subsequently, the number of shares sold under the international offering was increased. ...

no qualitative analysis of the conditions of the employee/former employee offering and simply concluded that the FF 68 price for the employee/former employee share offering fell outside this range of market-clearing prices.<sup>419</sup> The USDOC also analysed whether the conditions/restrictions of the employee/former employee share offering constituted a committed investment. The USDOC concluded that since the restrictions were known prior to purchase, they were fully reflected in the share price.<sup>420</sup>

7.148 The USDOC concluded that the employee/former employee share offering was not at FMV because the employee/former employee share offering was subject to "some barriers in the bidding process that might have limited the number of potential purchasers" and because the Government of France did not set or receive a market-clearing price for the employee/former employee share offering.<sup>421</sup>

7.149 The parties dispute whether the "preferential" terms, including the 20 per cent discount that the GOF offered Usinor's employees and former employees, justify a finding that the employee/former employee share offering was not at FMV. As indicated above, the European Communities argues that the 20 per cent discount reflects the actual risk assumed by the employees/former employees for the resale restrictions on the shares purchased.<sup>422</sup> The United States contests this argument and contends that if this were the case, the European Communities should have provided the USDOC with sufficient evidence during the Section 129 proceedings to demonstrate that the additional restrictions on the employee/former employee share offering account for the 20 per cent discount.<sup>423</sup>

7.150 To assess this issue, it may be worth clarifying the different conditions applicable to each of the share offerings. The following table displays these conditions and the price per share of each offering:

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Given the over-subscription at the FF 86 price, the fact that shares were moved from the international offering to the French offering, and the number of shares sold at each of the two prices, it appears that the market clearing price for Usinor's shares was between FF 86 and 89. Therefore, we determine that the GOF maximized its return on the shares sold in the French and international public offerings."

France Section 129 determination, footnote 208 above, pp. 8-9.

<sup>419</sup> France Section 129 determination, footnote 208 above, p. 9.

<sup>420</sup> France Section 129 determination, footnote 208 above, pp. 9-10.

<sup>421</sup> France Section 129 determination, footnote 208 above, pp. 10-11.

<sup>422</sup> See EC Response to Panel questions Nos. 30, 34 and 36; *see generally* Usinor Prospectus, footnote 316 above, pp. 21, 23 (providing the general conditions of the employee share offering); Order Defining Terms for the Usinor Privatization, footnote 316 above, art. 3 (specifying the terms of the employee share offering).

<sup>423</sup> See US Response to Panel question No. 30.

Combined Offering	Factors Affecting Share Price: Restrictions/Incentives/Sale Mechanism	Price Per Share (FRF)
<b>International Offering</b> <sup>424</sup>	<p>Sale mechanism: Underwritten by three regional groups (France, US, Rest of the World), collectively referred to as the International Underwriters, under the following conditions:</p> <ul style="list-style-type: none"> <li>▪ Payment by GOF, Clindus, and Usinor of a management commission and underwriting commission of .60 per cent of the aggregate international offering price;</li> <li>▪ Payment by GOF, Clindus, and Usinor of a selling concession of 1.80 per cent of the aggregate international offering price;</li> <li>▪ Payment by GOF, Clindus, and Usinor of FRF 2,000,000 for certain expenses; and</li> <li>▪ Indemnification by GOF, Clindus, and Usinor against certain liabilities</li> </ul>	89
<b>French Public Offering</b> <sup>425</sup>	<p>Restrictions/Incentives:</p> <ul style="list-style-type: none"> <li>▪ Holding period: A minimum holding period of 18 months applies;</li> <li>▪ Free shares: Shareholders receive 1 free share for each 10 shares purchased after the minimum holding period</li> </ul> <p>Sale mechanism: Terms pursuant to the French OPV Underwriting Agreement</p>	86
<b>Employee Offering</b> <sup>426</sup>	<p>Restrictions/Incentives:</p> <ul style="list-style-type: none"> <li>▪ Purchase price: <ul style="list-style-type: none"> <li>○ At the French public share offering price of FF 86, or</li> <li>○ At a 20 per cent discount on the price of the French public share offering, which is FF 68.8;</li> </ul> </li> <li>▪ Holding period: Only the shares purchased at the discount price are subject to a 24-month holding period;</li> <li>▪ Free shares: <ul style="list-style-type: none"> <li>○ At the French public share offering price, 1 free share for each 3 shares purchased, or</li> <li>○ At a 20 per cent discount on the price of the French public share offering, 1 free share for the first 71 shares purchased and 1 free share per five purchased from the 72nd share onwards;</li> </ul> </li> <li>▪ Delayed payment terms: <ul style="list-style-type: none"> <li>○ At the French public share offering price, immediate payment in cash, or</li> <li>○ At a 20 per cent discount on the price of the French public share offering, either immediate payment in cash or 30 per cent at purchase, 30 per cent after 1 year, and remaining 40 per cent after 2 years.</li> </ul> </li> </ul> <p>Sale mechanism: No underwriter</p>	86 or 68.8 (20 per cent discount on the French public offering price)
<b>Stable Shareholders</b> <sup>427</sup>	<p>Restrictions: Stable shareholders signed an agreement ("Protocole") agreeing to</p> <ul style="list-style-type: none"> <li>▪ Hold all existing shares for three months from the date of publication of the French Public Offering results;</li> <li>▪ After those three months, sell a maximum of 20 per cent;</li> <li>▪ Hold the remaining 80 per cent for another 15 months or sell only to another Stable Shareholder; and</li> <li>▪ After the 15 months (a total 18 months), respect the other Stable Shareholders' pre-emption rights when selling to third parties.</li> </ul> <p>Sale mechanism: No underwriter</p>	90.78 (102 per cent of the International Offering Price)

7.151 The above table shows that different degrees and/or types of restrictions apply to each of the four share offerings. We recall that our task is to evaluate whether the USDOC has examined all the

<sup>424</sup> Usinor Prospectus, pp. 21-24, 84-86; *see* Order Defining Terms for the Usinor Privatization, footnote 316 above.

<sup>425</sup> Usinor Prospectus, pp. 21-24, 84-86; *see* Order Defining Terms for the Usinor Privatization, footnote 316 above.

<sup>426</sup> Order Defining Terms for the Usinor Privatization, footnote 316 above, art. 3.

<sup>427</sup> Usinor Prospectus, pp. 21-24, 84-86; *see* Order Defining Terms for the Usinor Privatization, footnote 316 above.

pertinent facts and to assess whether the USDOC provided an adequate and reasoned explanation as to how those facts support its determination.

7.152 In contesting the European Communities' argument that the 20 per cent discount on the employee/former employee share price is a risk premium for the resale restrictions, the United States asserts that purchasers in other categories, namely the French public offering and the stable shareholders, were subject to similar restrictions as the employee/former employee share offering.<sup>428</sup>

7.153 Based on the evidence on the record, under both the employee/former employee offering and the French public offering, purchasers may receive free shares and be subject to holding restrictions. Employees and retirees can either participate in the French public offering or buy shares with a discount of 20 per cent, but then with the obligation to hold them for 24 months. They can then obtain a free share for the first 71 shares purchased and one free share per subsequent five shares purchased. Purchasers taking part in the French public offering are not subject to an obligation to hold their shares for any amount of time unless they want to obtain one free extra share for each ten shares purchased (up to a ceiling of 30 000 francs for the purchased shares). The required duration for holding shares is then 18 months. As a result, for the first 100 shares, shareholders under the discounted employee/former employee offering receive six free shares, while shareholders under the French public offering receive ten free shares provided that the shareholders in both cases agree to the holding restrictions.

7.154 The Panel notes that the USDOC never actually analysed the effect of the different restrictions and instead merely asserted that the "[r]esale restrictions *per se* provide no explanation for the substantial discount afforded Usinor's employees."<sup>429</sup> We recall that the Appellate Body has assigned an *active* rather than a passive decision-making role to an investigating authority performing a sunset review.<sup>430</sup> The question is whether this active role obliges the USDOC, in this case, to search for evidence that provides the basis for the 20 per cent discount beyond the evidence on the record, or

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<sup>428</sup> US First written submission, para. 46; US Response to Panel question No. 30.

<sup>429</sup> US First written submission, para. 46; *see* US Oral statement, para. 33.

In addition, we note that the Usinor Prospectus describes the terms of an international underwriting and selling agreement for the International Share Offering. This agreement required the GOF, Clindus and Usinor to pay the International Underwriters a management commission, an underwriting commission, a selling concession, and FRF 2,000,000 to cover certain expenses. The GOF, Clindus and Usinor also agreed to indemnify the International Underwriters against certain liabilities. Usinor Prospectus, footnote 316 above, pp. 84-86.

We also note that the French Share Offering was underwritten with terms provided in a French Underwriting Agreement, which is not detailed in the Usinor Prospectus. The Employee Share Offering and Stable Shareholders were not underwritten. Usinor Prospectus, footnote 316 above, pp. 23-24, 84.

<sup>430</sup> The Appellate Body indicated:

"This language in Article 11.3 makes clear that it envisages a process combining *both* investigatory and adjudicatory aspects. In other words, Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words 'review' and 'determine' in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination. In view of the use of the word 'likely' in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated – and not simply if the evidence suggests that such a result might be possible or plausible."

Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 111 (footnotes omitted).

whether it was for the respondents to justify that discount. In a subsidy case such as this one, the government that is privatising its own company is best placed to provide specific information regarding the conditions of that privatization. It is therefore reasonable to conclude that it is incumbent on the GOF to provide the justification for the 20 per cent discount on the employee share offering. The Panel has closely examined the France Section 129 determination and failed to find that the respondents provided such evidence. We have also asked the European Communities to specify which evidence it provided. Even after a specific question by the Panel, however, the European Communities declined to submit any additional evidence or explanation and merely reiterated its argumentation that the 20 per cent discount reflects a risk premium.<sup>431</sup>

7.155 The European Communities also argues that the USDOC should have considered normal commercial practices in this context. The European Communities asserts that it is common among public offerings throughout the world, including in the context of privatizations, to offer shares to employees or former employees at a specific rate.<sup>432</sup> The Panel does not consider this to be a valid argument. Whether it may be common practice to make shares available to one's employees/former employees at non-FMV prices is irrelevant. The issue is whether the transactions at issue occurred at FMV or not.

7.156 The Panel therefore concludes that, given the evidence in the record of the France Section 129 determination, the USDOC's analysis and subsequent conclusion that the employee/former employee share offering was not for FMV was not unreasonable.

(iii) *Conclusion*

7.157 We have found that the USDOC did not properly establish that the sales transactions pertaining to Usinor's employee/former employee share offering were not at arm's length because the USDOC did not provide an adequate and reasoned explanation as to why Usinor's employees and former employees were related to Usinor and, more importantly, to the GOF. However, we have also explained that the USDOC's conclusion on arm's length is not dispositive with respect to the continuation of benefit since the arm's-length test is an ancillary examination linked to the concept of FMV, which ultimately provides the context for, and otherwise informs, the decision on FMV.

7.158 We have also found that, given the evidence on the record of the France Section 129 determination, the USDOC's analysis and subsequent conclusion that the sale transactions pertaining to the employee/former employee share offering were not for FMV was not unreasonable. Therefore, we conclude that, although the USDOC failed to provide an adequate and reasoned explanation as to why Usinor's employees and former employees were related to Usinor and, more importantly, to the GOF, the USDOC's analysis of the conditions of Usinor's privatization, specifically whether the employee/former employee share offering occurred at arm's length and for FMV, was neither inadequate nor unreasonable.

(c) Whether the maintenance of the existing countervailing duties is inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*

7.159 Having found that the USDOC's conclusion that the employee/former employee share offering was not at arm's length and for FMV was not inadequate or unreasonable, we shall examine whether the United States, by maintaining the countervailing duties on the basis of that finding, acted inconsistently with its obligations under Article VI:3 of the *GATT 1994* and Articles 10, 14, 19.4, 21.1, and 21.3 of the *SCM Agreement*, and has therefore failed to implement the recommendations and rulings of the DSB.

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<sup>431</sup> EC Response to Panel question No. 30.

<sup>432</sup> EC First written submission, footnote 71; EC Oral statement, para. 6.



7.160 We shall commence by examining the USDOC's affirmative conclusion to maintain the countervailing duties on the grounds that there is a likelihood of continuation or recurrence of subsidization if these duties were to be revoked. The USDOC states the following in the France Section 129 determination:

"The evidence presented on the record of this determination demonstrates that, with the exception of the employee offering, which constituted 5.16 per cent of the sale, the privatization of Usinor was at arm's length and for fair market value. While certain aspects of the sales process for stable shareholders made the process less open, the price paid by the stable shareholders was an arm's-length price and it exceeded our measure of fair market value, FF 86 - 89. Regarding the shares sold to Usinor's employees, we determine that these sales were not at arm's length. Nor can the sales at FF 68 be considered transactions at fair market value."<sup>433</sup>

7.161 The USDOC further concluded that "[t]he sale of shares to Usinor employees at prices below fair market value did not extinguish certain allocable, nonrecurring, pre-privatization subsidies that continue at an above *de minimis* rate beyond the original sunset review. Under these circumstances, the [USDOC] finds that countervailable subsidies are likely to continue or recur in the event of revocation".<sup>434</sup> The Panel finds the scope of this conclusion unclear.

7.162 We note that, in response to respondent's comments, the USDOC explains:

"In this determination, we have applied the approach laid out in our Modification Notice, which states that, where we find that the baseline presumption is not rebutted because a transaction was not made at arm's length and for fair market value, or because of severe market distortions, 'we will find that the company continues to benefit from the prior subsidies in the full amount of the remaining unallocated balance of the subsidy benefit'. "<sup>435</sup>

7.163 Although the USDOC never explicitly identified the remaining unallocated balance, it did find that only 5.16 per cent of the shares was not sold at arm's length/FMV.<sup>436</sup> Therefore, it seems reasonable to conclude that the remaining unallocated balance of the subsidy benefit consisted of the 5.16 per cent.<sup>437</sup> The United States confirmed this understanding through its written submissions and later in response to a question by the Panel.<sup>438</sup>

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<sup>433</sup> France Section 129 determination, footnote 208 above, p. 12.

<sup>434</sup> France Section 129 determination, footnote 208 above, p. 12.

<sup>435</sup> France Section 129 determination, footnote 208 above, p. 15.

<sup>436</sup> France Section 129 determination, footnote 208 above, p. 12.

<sup>437</sup> The Panel notes that the USDOC issued two Section 129 determinations concerning the Usinor privatization on two original investigations subject to this Panel during the original proceedings. In both cases, the USDOC revised its analysis of Usinor's privatization further to its new privatization methodology and found that the privatization was at arm's length/FMV except for 5.16 per cent of the sales transactions that pertained to the employee share offering. The USDOC concluded that only 5.16 per cent of the benefit passed through to the privatized company and recalculated the rates of subsidization to exclude the pre-privatization subsidies found to be non-countervailable. Since the recalculated rates were *de minimis*, the USDOC decided to revoke the countervailing duties. Issues and Decision Memorandum for the Section 129 Determination: Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils from France, pp. 11-12 (24 October 2003); Issues and Decision Memorandum for the Section 129 Determination: Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon Quality Steel Plate from France, p. 12 (23 October 2003).

<sup>438</sup> US First written submission, paras. 31, 32; US Oral statement, paras. 24-26; US Response to Panel question No. 33.

7.164 Having found that only 5.16 per cent of the benefit continues, the question is why the United States maintained the duties at the original level. We recall that the USDOC conducted an order-wide review where no company-specific calculations took place. As explained in paragraphs 7.30-7.31 above, in the absence of recalculation, the finding that *any* subsidization remains serves as the basis of an affirmative conclusion of likelihood of continuation or recurrence of subsidization.

7.165 We shall now examine whether the maintenance of the existing countervailing duties on the basis of a finding that only 5.16 per cent of the benefit passes through is inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*, as claimed by the European Communities. It is useful to recall briefly these provisions:

7.166 Article 10 of the *SCM Agreement* provides that "Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement."<sup>439</sup> (footnote omitted) Article VI:3 of GATT 1994 precisely permits Members of the WTO to impose a "countervailing duty" on products imported from other Members of the WTO "for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise."<sup>440</sup>

7.167 Article 14 of the *SCM Agreement* requires that "any method used by the investigating authority" of a WTO Member "to calculate the benefit to the recipient ... shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained."<sup>441</sup>

7.168 Article 19.4 of the *SCM Agreement* further provides that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product".

7.169 Article 21.1 of the *SCM Agreement* reads: "[a] countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury".

7.170 Article 21.3 of the *SCM Agreement* further emphasizes the exceptional character of countervailing measures by providing for the general rule of termination of the CVDs no later than five years from imposition, with one exception i.e., the likelihood of continuation or recurrence of subsidization and injury to be established by means of a review investigation:

"[n]otwithstanding 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 ... , unless the authorities determine, in a review initiated before that date ... that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury." (Footnote omitted.)

7.171 In this regard, the Appellate Body in the original proceedings agreed with this Panel that, under Article 21.3 of the *SCM Agreement*, regardless of whether administrative reviews under Article 21.2 of the *SCM Agreement* had been requested since the original investigation, the importing Member is obliged to consider evidence before it relating to subsidization and obliged to determine whether a "benefit" continues to exist following the privatization of the investigated firm before concluding "whether subsidization exists and is likely to continue or recur". The Appellate Body also agreed with this Panel in that, in sunset reviews, the investigating authority, before deciding to

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<sup>439</sup> Article 10 of the *SCM Agreement*.

<sup>440</sup> Article VI:3 of the *GATT 1994*.

<sup>441</sup> Article 14 of the *SCM Agreement*.

continue to countervail pre-privatization, non-recurring subsidies, is obliged to examine the conditions of such privatizations and to determine whether the privatized producers received any benefit from the prior subsidization to the state-owned producers.<sup>442</sup>

7.172 We have found in paragraph 7.122 above that the USDOC's segmented analysis of Usinor's privatization was not unreasonable. We have further concluded in paragraphs 7.138 and 7.140 above that, although the USDOC did not provide an adequate and reasoned explanation on arm's length, the arm's length test is merely an ancillary examination that provides the context for, and otherwise informs, the decision on FMV. In addition, in paragraph 7.156 above, we concluded that the USDOC provided a reasoned and adequate conclusion on whether the employee/former employee share offering occurred for FMV. Therefore, the USDOC has not failed to examine the conditions of Usinor's privatization and to determine that the privatized Usinor continued to receive some benefit from pre-privatization subsidization to the state-owned Usinor. We therefore find that the United States did not act inconsistently with Articles 14 and 21.3 of the *SCM Agreement* as regards the consideration of Usinor's privatization when making its likelihood-of-subsidization analysis.

7.173 We shall now examine whether the continuation of the measure is inconsistent with Article VI:3 of the *GATT 1994* and Articles 10, 19.4 and 21.1 of the *SCM Agreement*, as claimed by the European Communities. In this regard, the Appellate Body found in the original proceedings that the interplay of Article VI:3 of the *GATT 1994* and Articles 10, 19.4 and 21.1 of the *SCM Agreement* prescribes an obligation to limit countervailing duties to the amount and duration of the subsidy found to exist by the investigating authority. It also concluded that this obligation applies to both original investigations as well as reviews covered by Article 21 of the *SCM Agreement*, thus including sunset reviews under Article 21.3 of the *SCM Agreement*, such as the re-determinations at issue in this dispute.<sup>443</sup>

7.174 The Panel is conscious that the Appellate Body has condoned the practice of order-wide sunset reviews and that it has actually ruled that since the United States has chosen to conduct its sunset reviews on an order-wide basis, the consistency of the likelihood determination must be evaluated in the context of an order-wide determination.<sup>444</sup> In that context, the Panel understands that where no recalculation of the rate of subsidization as found in the original investigation is made, the finding that a small part of the benefit passes through to the privatized producer can serve as the basis of the affirmative likelihood-of-subsidization conclusion and thus the maintenance of the duties.

7.175 However, this does not mean that the United States will necessarily be collecting countervailing duties at the level set by the original order. We recall that the United States has a retrospective system for the assessment and collection of duties.<sup>445</sup> In the context of this system, the Panel understands that an exporter can request an annual or changed circumstances review. Accordingly, the Panel has no reason to believe that the USDOC finding that 5.16 per cent of the benefit from pre-privatization, non-recurring subsidies passed through to the privatized producer, will not be reflected in the level of any countervailing duty actually imposed on Usinor.<sup>446</sup>

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<sup>442</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, paras. 148-149; Panel Report on *US – Countervailing Measures on Certain EC Products*, paras. 7.114–7.116.

<sup>443</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 149; see Panel Report on *US – Countervailing Measures on Certain EC Products*, paras. 7.114–7.116.

<sup>444</sup> See paragraphs 7.30-7.31 above.

<sup>445</sup> See 19 U.S.C. § 1671 (2003) (concerning the imposition of countervailing duties); 19 U.S.C. § 1675(a) (2003) (concerning administrative reviews); 19 U.S.C. § 1675(b) (2003) (concerning changed circumstances reviews); 19 U.S.C. § 1505 (2003) (concerning the deposit of estimated duties); 19 U.S.C. § 1520 (2003) (concerning the refund of excess deposits).

<sup>446</sup> The Panel notes that it is not finding that a retrospective system somehow renders the USDOC's affirmative likelihood-of-subsidization re-determination not inconsistent with the relevant provisions of the

7.176 Therefore, in the absence of an obligation to recalculate a rate of subsidization in the context of a sunset review and given the fact that the United States is not relying on the sunset review as a basis for collecting duties at a particular rate, the Panel finds that the USDOC's affirmative likelihood-of-subsidization re-determination as set out in the France Section 129 determination is not inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* and Article VI:3 of the *GATT 1994* in regard to the obligation to limit countervailing duties to the amount and duration of the subsidy. Therefore, the United States has not failed to implement the recommendations and rulings of the DSB.

## C. CUT-TO-LENGTH CARBON STEEL PLATE FROM UNITED KINGDOM

### 1. Background

7.177 On 8 January 2003, the DSB adopted the reports of the original panel and the Appellate Body. The Panel found that the sunset review determination on *Cut-to-Length Carbon Steel Plate From the United Kingdom* was inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement*.<sup>447</sup> The Appellate Body subsequently affirmed the Panel's conclusion.<sup>448</sup>

7.178 As indicated in paragraph 7.89 above, following the adoption of the original panel and Appellate Body reports by the DSB on 8 January 2003, the USDOC issued the Modification Notice, which the European Communities did not challenge in this dispute. It also reviewed its determination on the likelihood of continuation or recurrence of subsidization contained in the original sunset review, which had been found inconsistent with the *SCM Agreement*. Accordingly, the USDOC issued its *Issues and Decision Memorandum: Section 129 Determination: Final Results of Expedited Sunset Review of Cut-to-Length Carbon Steel Plate From the United Kingdom* ("UK Section 129 determination") on 24 October 2003.

7.179 The original countervailing duty on these products from the UK was imposed on 17 August 1993 with a countrywide *ad valorem* rate of 12 per cent and a company-specific *ad valorem* rate for Glynwed of 0.73 per cent.<sup>449</sup> The sunset review determination, published on 7 April 2000, found that "revocation of the countervailing duty order would be likely to lead to continuation or recurrence of a subsidy". The USDOC reported to the USITC that the net countervailable subsidy rate likely to prevail was 0.73 per cent for Glynwed and 12 per cent for all other British producers and exporters.<sup>450</sup>

### 2. The measure taken to comply

7.180 As concluded in paragraph 7.18 above, the measure taken to comply as regards *Cut-to-Length Carbon Steel Plate From the United Kingdom* is the affirmative likelihood-of-subsidization re-determination set out in the UK Section 129 determination.

### 3. The claims

7.181 With respect to the UK Section 129 determination, the European Communities requests the Panel to make the following findings:

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GATT 1994 and the *SCM Agreement*. Rather, the Panel notes that the United States' retrospective system functions in a way that ensures that excess duties are not collected pursuant to a sunset review.

<sup>447</sup> Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 8.1(c).

<sup>448</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 161(a).

<sup>449</sup> Countervailing Duty Order: Certain Steel Products from the United Kingdom, 58 Fed. Reg. 43748, 43749 (17 August 1993); see Final Affirmative Countervailing Duty Determination: Certain Steel Products from the United Kingdom, 58 Fed. Reg. 37393, 37399 (9 July 1993).

<sup>450</sup> *Cut-to-Length Carbon Steel Plate From the United Kingdom; Final Results of Expedited Sunset Review of Countervailing Duty Order*, 65 Fed. Reg. 18309, 18310 (7 April 2000) (Exhibit US-4).

(i) that the United States has failed to implement the recommendations and rulings adopted by the DSB and acted inconsistently with its obligations under Articles 10, 14, 19.4, 21.1, and 21.3 of the *SCM Agreement* and Article VI:3 of the *GATT 1994* by refusing to examine whether, and for failing to find that, the privatization of BS plc in Cut-to-Length Carbon Steel Plate from the United Kingdom was at arm's length and for FMV.

(ii) that the United States has acted inconsistently with its obligation under Article 21.3 of the *SCM Agreement* because it failed to consider evidence on the record in Cut-to-Length Carbon Steel Plate from the United Kingdom demonstrating that the benefits from programmes found to confer countervailable subsidies no longer existed.

(iii) that the United States failed to meet its obligations under Articles 21.3 of the *SCM Agreement* because it did not examine in, *inter alia*, Cut-to-Length Carbon Steel Plate from the United Kingdom, whether expiry of the duty would be likely to lead to continuation or recurrence of material injury.<sup>451</sup>

7.182 The United States rejects all the claims that the European Communities raised arguing that the USDOC assumed that the privatization of BS plc was at arm's length and for fair market value and that it was not required to consider the evidence submitted during the Section 129 proceedings for the purpose of rendering the sunset review determination "not inconsistent" with the recommendations and rulings of the DSB. It was also not obliged to make a new likelihood-of-injury determination.

7.183 The Panel recalls its findings in paragraphs 7.31 and 7.72-7.76 above that the likelihood-of-injury determination is not part of the measure taken to comply and that therefore the claim on the failure to re-determine the likelihood of continuation or recurrence of injury is not part of this Panel's mandate. Thus, the Panel will not address the European Communities' injury claim in these Article 21.5 proceedings.

7.184 In light of the European Communities' claims and parties' debates on these claims during the Panel proceeding, the Panel will proceed to examine each one of the two claims in the following sections for the purpose of reaching conclusions on the consistency of the UK Section 129 determination with the recommendations and rulings of the DSB and the relevant provisions of the covered agreements as invoked by the European Communities in its Panel request.

**4. Whether the USDOC's failure to examine the privatization of BS plc and to determine whether the privatization occurred at arm's length and for FMV is inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* and Article VI:3 of the *GATT 1994***

(a) Arguments of the parties

7.185 The European Communities argues that the USDOC refused to consider in the UK Section 129 determination whether, under the modified privatization methodology, BS plc had been privatized in a manner that extinguished the benefits conferred by the non-recurring subsidies bestowed to the state-owned producer prior to its privatization.<sup>452</sup>

7.186 The European Communities submits that there was evidence in the record demonstrating that the privatization of the BS plc was conducted at arm's length and for FMV. Article 21.3 of the *SCM*

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<sup>451</sup> EC First written submission, para. 72.

<sup>452</sup> EC First written submission, para. 14.

*Agreement* obliges authorities to evaluate all evidence on the record in determining whether subsidies are likely to continue or recur, not merely to assume that the likelihood of continuation or recurrence exists. By refusing to consider evidence of privatization which demonstrated that the benefit no longer existed, the United States acted inconsistently with Article 21.3 of the *SCM Agreement*.<sup>453</sup>

7.187 The European Communities also argues that Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* as well as Article VI:3 of the *GATT 1994* require that an investigating authority examine, in a sunset review, whether a benefit continues to exist after privatization before imposing or maintaining a duty. By refusing to examine the privatization, the United States acted inconsistently with its obligations under these provisions.<sup>454</sup>

7.188 In this regard, the European Communities cites the original panel report conclusion, in paragraph 8.1(c), which was upheld by the Appellate Body Report in paragraph 153, that in the original sunset review determinations, the USDOC "did not examine whether the privatizations, that occurred after the original imposition of countervailing duties, were at arm's length and for fair market value. Thus the United States failed to determine whether the privatized producers received any benefit from the financial contributions previously bestowed to the state-owned producers. By failing to determine the likelihood of continuation or recurrence of a subsidization, prior to its decision to maintain countervailing duties, the United States has violated Articles 14, 19.4, 21.1 and 21.3 of the *SCM Agreement*".<sup>455</sup> The European Communities also points out the original Panel's finding, confirmed by the Appellate Body, that because the United States had maintained countervailing duties that were inconsistent with these provisions, the United States also violated Article 10 of the *SCM Agreement* which requires that countervailing duties must be imposed or maintained consistently with the *SCM Agreement*.<sup>456</sup>

7.189 The European Communities also argues that by refusing to examine the privatization, the Section 129 determination is not in compliance with the conclusion of the Appellate Body in paragraph 161 (a) that the United States acted inconsistently with its obligations under Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* by "imposing and maintaining countervailing duties without determining whether a 'benefit' continue to exist".<sup>457</sup>

7.190 The United States argues that the USDOC assumed for purpose of its likelihood determination that the privatization of BS plc was conducted at arm's length and for FMV and entirely extinguished all benefits from pre-privatization, non-recurring subsidies in question. Therefore, the USDOC did not rely on any benefit from allocable, pre-privatization subsidies in determining whether subsidization was likely to continue or recur if the order were revoked.<sup>458</sup>

7.191 Rather, the United States argues that the UK Section 129 determination was based on evidence wholly unrelated to the (allocable, non-recurring) pre-privatization subsidies. One private company Glynwed continued to benefit from all subsidies that had been bestowed upon it.<sup>459</sup>

7.192 The United States points out that despite the fact that the USDOC did not rely on the non-recurring pre-privatization subsidies to the state-owned companies in determining whether the privatized company would continue to benefit from subsidies if the countervailing duty order were

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<sup>453</sup> EC First written submission, paras. 47-50; EC Second written submission, paras. 7, 53, 57, 61.

<sup>454</sup> EC First written submission, para. 30.

<sup>455</sup> Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 8.1(c); Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 153.

<sup>456</sup> EC First written submission, paras. 66-67.

<sup>457</sup> EC First written submission, para. 70 (*quoting* Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 161(a)).

<sup>458</sup> US First written submission, paras. 4, 48; US Second written submission, para. 11.

<sup>459</sup> US First written submission para. 48.

revoked, the European Communities nevertheless challenges the UK Section 129 determination on the ground that the USDOC failed to examine whether the privatization was at arm's length and for FMV. In the view of the United States, the European Communities' argument elevates form over substance.<sup>460</sup>

7.193 The US argues that because the USDOC assumed that the privatization of the BS plc was at arm's length and for FMV, and that thus it did not rely on pre-privatization subsidies in making the determination, the revised determination can not be inconsistent with the DSB recommendations and rulings.<sup>461</sup>

7.194 The United States argues that the original sunset review in the UK case expressly stated that Glynwed continued to be subsidized, and that the European Communities did not challenge that aspect of the original sunset review determination in the original proceedings. Therefore, neither the original panel nor the Appellate Body considered the issue in the underlying proceedings. Because the European Communities did not challenge that conclusion in the original proceedings, the United States maintains that it cannot ask this Panel to examine this aspect of the original sunset review for the first time in these Article 21.5 proceedings.<sup>462</sup>

7.195 The USDOC explained in its UK Section 129 determination that as the sunset review determination was made on an order-wide rather than company-specific basis, examining privatization was not necessary for the USDOC to arrive at an affirmative sunset likelihood determination with respect to the order as a whole.<sup>463</sup>

(b) Evaluation by the Panel

7.196 The European Communities argues that the USDOC refused to examine the privatization of BS plc and to determine whether the privatization was at arm's length and for FMV and consequently extinguished the benefit of pre-privatization subsidies. It claims that the failure to examine and to determine these issues is inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*. In response, the United States contends that the USDOC assumed that the privatization of BS plc was at arm's length and for FMV. However, the United States argues, the affirmative likelihood-of-subsidization determination in the UK Section 129 determination was made on another basis, namely, that another private firm, Glynwed, was still benefiting from non-recurring subsidy programmes. Therefore, in its view, the determination cannot be inconsistent with the recommendations and rulings of the DSB.

7.197 With these arguments in mind, the Panel considers that it is appropriate to first have recourse to the relevant findings of the original panel and the Appellate Body to identify the specific requirements imposed by the *SCM Agreement* on the investigating authorities regarding the privatization analysis during a sunset review. Based on these requirements, the Panel will then determine whether these requirements were actually met in the UK Section 129 determination.

(i) *The United States' obligations pursuant to the findings in the original proceedings regarding the USDOC's privatization analysis*

7.198 The Appellate Body found in the original proceedings that where an investigating authority receives information regarding a privatization in the process of an administrative or sunset review,

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<sup>460</sup> US First written submission para. 49.

<sup>461</sup> US First written submission, para. 49; US Second written submission, para. 11.

<sup>462</sup> US Oral statement, paras. 18, 22.

<sup>463</sup> UK Section 129 Determination, footnote 208 above, p. 5.

the investigating authority is under an obligation *to make a finding on whether a subsidy benefit continues to exist*:

"We have already determined, in *US – Lead and Bismuth II*, that the *gamma* method is inconsistent with the obligation under Article 21.2 of the *SCM Agreement*. That obligation requires an investigating authority in an *administrative* review, *upon receiving information of a privatization* resulting in a change in ownership, *to determine whether a 'benefit' continues to exist*. In our view, the *SCM Agreement*, by virtue of Articles 10, 19.4, and 21.1, also imposes an obligation to conduct such a determination on an investigating authority conducting a *sunset* review."<sup>464</sup>

It is clear from this finding that such an obligation is imposed by Articles 10, 19.4 and 21.1 of the *SCM Agreement* in the case of a sunset review.

7.199 More specifically, the Appellate Body also upheld the Panel's finding that, when informed of a privatization, the authority is required, by Articles 10, 19.4, and 21.1 of the *SCM Agreement* as well as Article VI:3 of the *GATT 1994*, *to examine the conditions of privatization and to determine whether the privatized producer continues to benefit* from non-recurring pre-privatization subsidies before deciding to countervail those subsidies:

"As we observed earlier, the interplay of GATT Article VI:3 and Articles 10, 19.4, and 21.1 of the *SCM Agreement* prescribes an obligation applicable to *original investigations as well as to reviews covered under Article 21* of the *SCM Agreement* to limit countervailing duties to the amount and duration of the subsidy found to exist by the investigating authority. Consequently, *we see no error in the Panel's finding that, in sunset reviews, the investigating authority, before deciding to continue to countervail pre-privatization, non-recurring subsidies, is obliged to 'examine the conditions of such privatizations and to determine whether the privatized producers received any benefit from the prior subsidization to the state-owned producers'*. Therefore, we agree with the Panel that the 'four determinations made in the context of sunset reviews and based on the *gamma* methodology are inconsistent with the *SCM Agreement* [because] the United States failed to determine whether the privatized producers received any benefit from the financial contributions previously bestowed to the state-owned producers."<sup>465</sup>

In fact, here the Appellate Body upheld the original panel's conclusion that the inconsistency of the four sunset review determinations, which were based on the *gamma* methodology<sup>466</sup>, with relevant

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<sup>464</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 149 (emphasis added).

<sup>465</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 149 (emphasis added).

<sup>466</sup> As indicated in paragraph 7.198 above, the Appellate Body already upheld a panel finding that the *gamma* methodology was inconsistent with the *SCM Agreement* in *US – Lead and Bismuth II*. Appellate Body Report on *US – Lead and Bismuth II*, paras. 62, 75(b). The *gamma* methodology was also one of the measures at issue during the original proceedings. In the original proceedings, the Appellate Body explained:

"The *gamma* method was formerly used by the USDOC to determine the extent to which a non-recurring financial contribution provided to a state-owned enterprise should be amortized over time to arrive at a countervailable subsidy rate, particularly after sale of the subsidized entity to a private firm. In applying this method, the USDOC employed an 'irrebuttable presumption' that the benefits of the financial contribution would remain with the recipient over a standard period of time, such that 'USDOC does not undertake an inquiry into whether and, if so, to what extent the subsidy continues to benefit production at any subsequent point



provisions of the *SCM Agreement* was exactly because of the absence of a determination on whether the privatized producer received any benefit from the pre-privatization subsidies given to the state-owned enterprises.

7.200 On the issue of how the examination of conditions of privatization bears on the determination of whether a "benefit" continues to exist for the privatized producer, the Appellate Body found that *an arm's-length and FMV privatization establishes a rebuttable presumption that benefits from pre-privatization subsidies bestowed to the state-owned company cease to exist for the privatized producer*:

"The effect of such a privatization is to shift to the investigating authority the burden of identifying evidence which establishes that the benefit from the previous financial contribution does indeed continue beyond privatization. *In the absence of such proof, the fact of the arm's-length, fair market value privatization is sufficient to compel a conclusion that the 'benefit' no longer exists for the privatized firm, and, therefore, that countervailing duties should not be levied.* This is an accurate characterization of a Member's obligations under the *SCM Agreement*."<sup>467</sup>

7.201 The original panel made the following conclusion with regard to the four sunset review measures (including the sunset reviews regarding UK, Spain and France):

"The four determinations made in the context of sunset reviews and based on the gamma methodology are inconsistent with the *SCM Agreement*, since the US Department of Commerce *did not examine whether the privatizations*, that occurred after the original imposition of countervailing duties, *were at arm's-length and for fair market value*. Thus the United States *failed to determine whether the privatized producers received any benefit* from the financial contributions previously bestowed to the state-owned producers. By failing to determine the likelihood of continuation or recurrence of a subsidization, prior to its decision to maintain countervailing duties, the United States has *violated Articles 14, 19.4, 21.1 and 21.3 of the SCM Agreement*, which prohibit a Member, pursuant to a sunset review, from maintaining countervailing duties where there has not been any determination of likelihood of continuation or recurrence of subsidization and thus of a continued need for countervailing duties. Since the United States has maintained countervailing duties that are inconsistent with Articles 14, 19.4, 21.1 and 21.3 the United States has also *violated Article 10* which requires that countervailing duties be imposed or maintained consistently with the *SCM Agreement*.

Therefore, the countervailing duty orders in

- *Cut-to-Length Carbon Steel Plate from United Kingdom* (C-412-815) (Case No. 8);
- *Certain Corrosion-Resistant Carbon Steel Flat Products from France* (C-427-810) (Case No. 9);

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of time. Rather the USDOC simply will countervail the amount of the subsidy originally allocated to the year' under review."

Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 12.

<sup>467</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 126 (emphasis added).

- *Cut-to-Length Carbon Steel Plate from Germany* (C-428-817) (Case No. 10);  
and
- *Cut-to-Length Carbon Steel Plate from Spain* (C-469-804) (Case No. 11).

are inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the SCM Agreement."<sup>468</sup>

7.202 This conclusion of the original panel on the four sunset review measures was upheld by the Appellate Body in its conclusion stating that it:

"*upholds* the Panel's findings, in paragraphs 8.1 (a), (b) and (c) of the Panel Report, that the United States has acted inconsistently with Articles 10, 14, 19.1, 19.4, 21.1, 21.2 and 21.3 of the *SCM Agreement*, by imposing and maintaining countervailing duties *without determining whether a 'benefit' continues to exist* in the following countervailing duty determinations..."<sup>469</sup>

7.203 From these findings of the Appellate Body and the original panel, it is clear that in a sunset review process involving privatization information, the investigating authority is obliged under Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* to examine whether the privatization was at arm's length and for FMV in order to determine whether the benefit from the non-recurring subsidies bestowed upon a pre-privatized company continues to exist for the privatized producer and to maintain the countervailing duties after making an affirmative likelihood of continuation or recurrence of subsidization determination.

(ii) *The Panel's assessment of the USDOC's analysis in the UK Section 129 determination*

7.204 With these findings of the original panel and the Appellate Body in mind, the Panel will now examine the UK Section 129 determination to determine whether these obligations were met in the USDOC's privatization analysis. Under the heading "Privatization of British Steel plc", the UK Section 129 determination begins with a general description of the privatization process:

"In December 1987,<sup>470</sup> the UK Secretary of State for Trade and Industry announced that the GOUK<sup>471</sup> intended to privatize the British Steel Corporation ("BSC"). In order to comply with corporate laws in the United Kingdom, BSC was reorganized as British Steel plc ("BS plc"). In November 1988, the GOUK sold two billion shares, at 125p per share, of BS plc to UK citizens and UK institutions. The GOUK also sold shares on equity markets in the United States, Canada, Japan, and Europe at the same price. The GOUK retained one special share which gave it the authority to prohibit any person or persons acting in concert from acquiring more than 15 per cent of the shares. Employees of BS plc received a nominal amount of free shares and

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<sup>468</sup> Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 8.1(c) (emphasis added).

<sup>469</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 161 (emphasis added).

<sup>470</sup> (*footnote original*) All factual statements contained in this section regarding the privatization of British Steel plc ("BS plc") were derived from National Audit Report, Report by the Comptroller and Auditor General entitled "Department of Trade and Industry: Sale of Government Shareholding in British Steel plc," February 8, 1990 (submitted July 28, 2003 as Exhibit 12 of the Response of the United Kingdom and Corus Group plc to the Department's Questionnaire of July 2, 2003 in *Cut-to-Length Carbon Steel Plate from the United Kingdom*).

<sup>471</sup> GOUK stands for Government of the United Kingdom.

preferential treatment in obtaining shares. Pensioners of the company also received preferential treatment in obtaining shares."<sup>472</sup>

7.205 Then, the UK Section 129 determination goes on to explain the main elements of the new privatization methodology in the Modification Notice. Following this, the UK Section 129 determination does not apply the new methodology to the privatization of the BS plc. Rather, the following statement is made:

"However, even assuming *arguendo*, that, pursuant to an analysis under section 129(b)(2) of the URAA, the [USDOC] were to find that the privatization of BS plc met all the criteria for rebutting the baseline presumption set forth in the [USDOC's] Modification Notice, such a finding would not affect the results in the instant determination that there would be a likelihood of continuation or recurrence of a countervailable subsidy if the order were revoked."<sup>473</sup>

7.206 The UK Section 129 determination then refers to the legislative history of the URAA and the USDOC's Sunset Policy Bulletin of 1998 to clarify that pursuant to Section III.A.2 of the Sunset Policy Bulletin, the determination of likelihood would be made on an "order-wide" basis. It then addresses the subsidies to Glynwed and concludes:

"During the underlying CVD investigation, the [USDOC] investigated another UK producer of subject merchandise, Glynwed, and determined a subsidy rate for Glynwed that was above *de minimis*. In the Final Sunset Results, the [USDOC] determined that countervailable subsidies would likely continue or recur in the event of revocation. ... *Even if we were to determine, pursuant to an analysis under the privatization methodology set forth in the Modification Notice, that subsidies received by BS plc prior to the sale of shares would not continue through or after the POR of the sunset review, we would still make an affirmative likelihood determination based on the determination in the Final Sunset Results that programs previously determined to provide countervailable subsidies and/or benefit streams from such programs continue to benefit Glynwed, the other producer/exporter of the subject merchandise, for whom privatization is not an issue.*"<sup>474</sup>

7.207 In sum, the USDOC made an affirmative likelihood of continuation or recurrence of subsidization determination based on the reason that the subsidy programmes continued to benefit another company, Glynwed. The US argues that the revised sunset review was based on an "assumption" that the BS plc privatization was conducted at arm's length and for FMV and that the benefit from the pre-privatization subsidies were entirely extinguished for the privatized firm BS plc. The phrases used in the UK Section 129 determination include "even assuming *arguendo*...", and "even if we were to determine...".

7.208 In fact, the last paragraph of the UK Section 129 determination states that the arm's length/FMV issue on the privatization of British Steel plc was not addressed in this determination:

"The [USDOC] has received allegations that the privatization here was affected by 'market distortions' such that any arm's length/fair market value findings would not warrant a determination that countervailable subsidies were extinguished by the privatization. We do not need to address the market distortion allegations, *because*

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<sup>472</sup> UK Section 129 determination, footnote 208 above, p. 3.

<sup>473</sup> UK Section 129 determination, footnote 208 above, p. 3.

<sup>474</sup> UK Section 129 determination, footnote 208 above, pp. 3-4 (emphasis added).

*we have not—for the reasons explained above—addressed the arm's length/fair market value issue.*"<sup>475</sup>

7.209 In this regard, the Panel recalls the findings of the original panel which were upheld by the Appellate Body stating that the original sunset review regarding UK was inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* because the USDOC "*did not examine whether the privatizations, that occurred after the original imposition of countervailing duties, were at arm's-length and for fair market value* therefore the United States *failed to determine whether the privatized producers received any benefit* from the financial contributions previously bestowed to the state-owned producers and which resulted in the failure to make an affirmative likelihood of subsidization determination prior to the decision to maintain the countervailing duties."<sup>476</sup>

7.210 The Panel considers that the issue here is whether an assumption, if indeed such an assumption was made, meets the obligation set out by the original panel and the Appellate Body for a sunset review determination involving privatization, which is, "to examine the privatization" and to "determine whether the privatized producer, the BS plc, received any benefit" from the non-recurring subsidies bestowed to the state-owned producer.

7.211 The Panel notes in this regard, that the Appellate Body interpreted the words "review" and "determine" in the context of an anti-dumping sunset review as requiring that the authority must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of the process of reconsideration and examination:

"This language in Article 11.3 makes clear that it envisages a process combining *both* investigatory and adjudicatory aspects. ... Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words 'review' and 'determine' in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of the process of reconsideration and examination."<sup>477</sup>

7.212 The Appellate Body also stated that the ordinary meaning of the word "determine" includes "[c]onclude from reasoning or investigation, deduce" as well as "[s]ettle or decide (a dispute, controversy, etc., or a sentence, conclusion, issue, etc.) as a judge or arbiter".<sup>478</sup>

7.213 Considering the similarity of the text of Article 11.3, the anti-dumping sunset review provision, and that of Article 21.3, the countervailing duty sunset review provision, as well as the similarity in their functions in the *Anti-Dumping Agreement* and the *SCM Agreement*, respectively, the Panel considers that the same meaning of the word "determine" in Article 11.3 of the *Anti-Dumping Agreement* also applies to the word "determine" under Article 21.3 in the context of countervailing duty sunset review. Therefore, the authorities conducting a countervailing duty sunset review must act with an appropriate degree of diligence and arrive at a *reasoned* conclusion.

7.214 Turning back to the UK Section 129 determination, the USDOC stated that "we have not – for the reasons explained above – addressed the arm's length/fair market value issue". Therefore, it is clear that there was no "examination" on "*whether the privatization was at arm's length and for fair market value*". Nor was there a "determination" on "*whether the privatized producers received any benefit from the financial contributions previously bestowed to the state-owned producers*" because there was no analysis in the UK Section 129 determination to that effect.

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<sup>475</sup> UK Section 129 determination, footnote 208 above, p. 4 (emphasis added).

<sup>476</sup> See paragraph 7.27 above.

<sup>477</sup> Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 111.

<sup>478</sup> Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 110.

7.215 The Panel considers that there is a difference between "assumption" and "determination" in that a determination is required to be based on sufficient evidence and adequate reasoning<sup>479</sup> whereas an "assumption" needs not to be supported by evidence or reasoning.<sup>480</sup> In this regard, what Article 21.3 explicitly requires is a "determination", an obligation more burdensome for the investigating authority than that of an "assumption".

7.216 In practice, the legal certainty of an assumption would also be different from that of a determination to the interested parties. The United States argues that the USDOC "assumed" that the privatization was at arm's length and for FMV and that the privatization therefore extinguished the benefit from the non-recurring subsidies bestowed on the state-owned enterprise. However, for example, if BS plc were to request an assessment review in the future, it is not clear whether such an assumption would be treated as a *determination* that the privatization was conducted at arm's length and for FMV and that the subsidy benefit was extinguished for BS plc.<sup>481</sup>

(iii) *Conclusion*

7.217 For the reasons set out above, the Panel finds that the United States failed to examine and to determine whether the privatization was at arm's length and for FMV and whether the benefit from the non-recurring subsidies bestowed to the state-owned producer extinguished for the privatized BS plc. By failing to properly determine the likelihood of continuation or recurrence of subsidization prior to its decision to maintain countervailing duties, the United States acted inconsistently with obligations under Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* and Article VI:3 of the *GATT 1994* and therefore failed to implement the recommendations and rulings of the DSB.

**5. Whether the USDOC's treatment of evidence on the record during the Section 129 proceedings is inconsistent with Article 21.3 of the *SCM Agreement***

(a) Arguments of the parties

7.218 The European Communities argues that during the UK Section 129 proceedings, the USDOC refused to consider evidence in the Corus/GOUK Section 129 Comments which demonstrated that the subsidies would not continue or recur with respect to Glynwed. Those Comments showed that (i) Glynwed no longer produced the product subject to review because that component of its business had been sold to another private company, Niagara LaSalle Corp., in 1999; (ii) there is no evidence that Glynwed had been benefiting from subsidies even at the time of the original countervailing duty investigation in 1993; and (iii) most importantly, all of the subsidy programmes that were not specific to BS plc (i.e., that could have been applied to Glynwed) either no longer existed or were no longer available to the UK steel industry.<sup>482</sup>

7.219 In particular, the European Communities argues that Corus and GOUK submitted evidence in the Section 129 proceeding indicating that all of the subsidy programmes not specific to BS plc, on which the USDOC might have relied in calculating the original countervailing duty for Glynwed, had been abolished or were no longer available to the UK steel industry. Specifically, they explained in

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<sup>479</sup> See paragraphs 7.211 -7.213 above.

<sup>480</sup> The ordinary meaning of "assumption" is, *inter alia*, "[t]he action or an act of taking of something for granted; the taking of something as being true, for the sake of argument or action; something so assumed; a supposition". *The New Shorter Oxford English Dictionary*, *The New Shorter Oxford English Dictionary* (Oxford University Press, 1993), 4<sup>th</sup> ed., Vol. I, p 134.

<sup>481</sup> In this regard, the US clarified in its replies to Panel questions that imports from BS plc were still treated as subsidized imports and countervailing duties were levied against BS plc even after the UK Section 129 determination. To change that, the privatized firm, BS plc, would have to request an assessment review. See US Replies to Panel questions Nos. 41-42.

<sup>482</sup> EC First written submission, paras. 17, 51-53.

their Comments the non-availability of four subsidies programs to Glynwed, namely, the UK regional development grant under the Industry Act of 1972 and the Industry Development Act of 1982, the European Regional Development Fund, the ECSC Article 54 loans and interest rebates, and the preferential transportation rates provided by the government-owned British Rail.<sup>483</sup>

7.220 The European Communities also indicates in its reply to a Panel question that it also submitted evidence during the Section 129 proceedings on the privatization of BS plc to support its claim that the privatization extinguished the prior non-recurring privatization benefit.<sup>484</sup>

7.221 The European Communities cites the panel in *US – Carbon Steel*, where the panel stated that the authority's determination under Article 21.3 "should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews and finally the sunset review"<sup>485</sup> and that "[t]heir 'duties of investigation and evaluation preclude them from remaining passive in the face of possible shortcomings in the evidence submitted.' They 'must undertake additional steps, when the circumstances so require, in order to fulfil their obligation to evaluate all relevant factors.'"<sup>486</sup> Therefore, in the European Communities' view, Article 21.3 requires more than merely assuming that the likelihood of subsidization exists; rather, the conclusion to that effect must be based on the information gathered in the process.<sup>487</sup> The European Communities also cited the Appellate Body's statements on standard of review for anti-dumping sunset review determinations in *US – Corrosion-Resistant Steel Sunset Review* and *US – Oil Country Tubular Goods Sunset Reviews* to argue that an investigating authority conducting a sunset review must "arrive at a reasoned conclusion" on the basis of "positive evidence".<sup>488</sup>

7.222 The European Communities argues that the USDOC did not consider all of the evidence on the record, and that by refusing to consider evidence indicating that privatization of BS plc was at arm's length and for FMV and evidence demonstrating that subsidies no longer exist or were no longer available, it failed to meet the obligation under Article 21.3 that authorities evaluate all the evidence on the record in making a likelihood-of-subsidization determination.<sup>489</sup> In particular, the European Communities argues that the USDOC failed to consider evidence on the record demonstrating that subsidy programs found to confer benefits no longer existed or no longer applied to the UK steel industry and that Glynwed had sold off the relevant assets and no longer produced the subject merchandise.<sup>490</sup>

7.223 The United States argues that as the USDOC assumed that the pertinent privatization had extinguished all allocable pre-privatization subsidies, the affirmative likelihood-of-subsidization determination in the UK Section 129 determination was based on evidence wholly unrelated to pre-privatization subsidies. It points out that the company Glynwed continued to benefit from all subsidies that had been bestowed on it.<sup>491</sup>

7.224 The United States argues that neither the Appellate Body nor the original panel made any findings concerning these subsidy programs, which did not involve the privatization methodology.

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<sup>483</sup> EC First written submission, paras. 53-57.

<sup>484</sup> EC Response to Panel question No. 42.

<sup>485</sup> EC First written submission, para. 47 (quoting Panel Report on *US – Carbon Steel*, para 8.95).

<sup>486</sup> EC First written submission, para. 48 (quoting Panel Report on *US – Carbon Steel*, para 8.117) (footnotes omitted); see also Appellate Body Report on *US – Cotton Yarn*, para. 73.

<sup>487</sup> EC First written submission, para. 49.

<sup>488</sup> EC Second written submission, para. 55 (citing Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 114 (quoting Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271) and Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 234).

<sup>489</sup> EC First written submission, paras. 47, 50, 58; EC Second written submission, paras. 53, 56-57.

<sup>490</sup> EC First written submission, para. 51-57.

<sup>491</sup> US First written submission, para. 48.

The USDOC findings concerning Glynwed in the UK case were *unchanged* in the UK Section 129 determination from the original sunset determination. Because the recommendations and rulings of the DSB did not require them to be changed, the European Communities cannot use the Article 21.5 process to challenge them.<sup>492</sup>

7.225 In the UK Section 129 determination, the USDOC explained the refusal to consider the issue regarding Glynwed with its understanding that the duty of the authority in a Section 129 determination is not to re-conduct the original sunset review in its totality, but to render it not inconsistent with the findings of the Appellate Body. The USDOC has done this and based on the conclusion regarding Glynwed in the original sunset review, the likelihood-of-subsidization determination in the UK Section 129 determination was proper. In the view of the USDOC, it did not need to reopen issues that were resolved in the original sunset review and were not found to be inconsistent with the SCM Agreement.<sup>493</sup>

7.226 In particular, the United States argues that the European Communities' arguments regarding Glynwed are not properly before this Article 21.5 Panel because these arguments have nothing to do with privatization. The United States submits that the USDOC had decided in the original sunset review that Glynwed continued to receive countervailable subsidies and the USDOC relied on that conclusion in its revised determination. The fact that the European Communities did not challenge the conclusion regarding Glynwed in the original panel proceedings prevents this Panel from examining the Glynwed issue for the first time as a part of these Article 21.5 proceedings.<sup>494</sup>

7.227 The European Communities argues that as the Appellate Body stated in *Canada – Aircraft (Article 21.5 – Brazil)* that an Article 21.5 panel's mandate is to examine whether the new measure is in conformity with the WTO agreement cited by the complaining Member in its panel request. It is therefore not sufficient for a Member merely to eliminate one erroneous aspect of the measure, if doing so exposes additional failures to comply with the *SCM Agreement*, nor may the Member refuse to bring those additional failures into compliance on the ground that they were not considered in previous stages of the WTO proceedings.<sup>495</sup>

7.228 The European Communities also argues that it was impossible for the European Communities to raise issues regarding the expiry of the subsidy programs in the original panel proceedings as this issue only arose in the UK Section 129 determination when the USDOC relied on the application of these subsidy programmes to a specific firm as the basis of its likelihood-of-subsidization determination. Whereas the legal basis for the original affirmative sunset review determination was the assumption that there would be a likelihood of continuation or recurrence of subsidisation because of the non-cooperation of the producers concerned.<sup>496</sup>

7.229 The European Communities contends that its arguments regarding the non-existence of certain subsidies and those regarding the necessity of fresh likelihood-of-injury findings made during the current proceedings are warranted since they are different from the situation in the *EC – Bed Linen (Article 21.5 – India)* case, where the complaining party raised, in the Article 21.5 proceedings, a claim that had already been dismissed by the original panel in that dispute.<sup>497</sup>

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<sup>492</sup> US First written submission, para. 18.

<sup>493</sup> UK Section 129 determination, footnote 208 above, p. 7.

<sup>494</sup> US Oral Statement, paras. 15, 18-20.

<sup>495</sup> EC First written submission, para. 62 (*citing* Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 37).

<sup>496</sup> EC Second written submission, para. 4; EC Oral statement, para. 14.

<sup>497</sup> EC Oral statement, paras. 12-13.

(b) Evaluation by the Panel

7.230 The Panel recalls that we found in paragraphs 7.18 and 7.71 above, that the measure taken to comply with the recommendations and rulings of the DSB is the affirmative likelihood-of-subsidization re-determination set out in the UK Section 129 determination and that the European Communities' new claim regarding the treatment of evidence by the USDOC during the Section 129 proceeding is within the mandate of this Panel.

7.231 Given that the European Communities' evidence claim is made under Article 21.3 of the *SCM Agreement*, the Panel considers it suitable to first identify the obligations under Article 21.3 of the *SCM Agreement* regarding the treatment of evidence by the investigating authority during the sunset review process. After that, the Panel will assess whether the treatment of evidence by the USDOC in the UK Section 129 determination is consistent with such an obligation.

(i) *The United States' obligations under Article 21.3 of the SCM Agreement regarding the USDOC's treatment of evidence*

7.232 The Panel notes that in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body elaborated on the specific requirements of Article 11.3 of the *Anti-Dumping Agreement*, a provision that is almost identical to Article 21.3 of the *SCM Agreement*. The requirements imposed on the investigating authority in the process of conducting a sunset review are as follows:

"This language in Article 11.3 makes clear that *it envisages a process combining both investigatory and adjudicatory aspects*. In other words, Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words "review" and "determine" in Article 11.3 suggest that authorities conducting a sunset review *must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination*. In view of the use of the word "likely" in Article 11.3, *an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated – and not simply if the evidence suggests that such a result might be possible or plausible*."<sup>498</sup>

7.233 The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* also upheld the panel's findings on the duty of an investigating authority:

"The text of Article 11.3 contains an obligation "to determine" likelihood of continuation or recurrence of dumping and injury. The text of Article 11.3 does not, however, provide explicit guidance regarding the meaning of the term "determine". The ordinary meaning of the word "determine" is to "find out or establish precisely" or to "decide or settle". *The requirement to make a "determination" concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists*. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that *the investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. An investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate*

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<sup>498</sup> Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 111 (emphasis added).



*conclusions* concerning the likelihood of such continuation or recurrence. (footnotes omitted)."<sup>499</sup>

7.234 The Panel considers that the same requirements given to the term "determine" under Article 11.3 of the *Anti-Dumping Agreement* are also applicable to the same term in a countervailing duty sunset review process by virtue of Article 21.3 of the *SCM Agreement*, given the fact that the texts of these two provisions are almost identical and so are the functions of these two provisions. The obligation of an investigating authority in conducting a countervailing duty sunset review is therefore to make a likelihood-of-subsidization determination based on positive evidence, not on assumption, and to arrive at a reasoned and adequate conclusion with the support of sufficient factual basis.

7.235 The Panel also notes that the panel in *US – Carbon Steel* reached the same conclusion regarding the evidentiary requirements under Article 21.3 of the *SCM Agreement*, that:

"[A] determination of likelihood under Article 21.3 must rest on a sufficient factual basis.

An investigating authority's determination of the likelihood of continuation or recurrence of subsidization should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews and finally the sunset review."<sup>500</sup>

7.236 The original panel in this dispute also stated that the investigating authority is obliged to consider all evidence provided by any interested party in a sunset review:

"[I]n a sunset review investigation the importing Member is obliged to examine at least all the evidence provided by any interested party, not just the importing producer, and relating to the existence or removal of the subsidization forming the basis for the countervailing measures; only then can the investigating Member be able to conclude whether subsidization exists and is likely to continue or recur."<sup>501</sup>

7.237 From the review of the findings of the Appellate Body and the panels in relevant previous cases, it is clear that under Article 21.3 of the *SCM Agreement*, the investigating authority has an obligation in sunset review proceedings to consider all evidence placed on its record to make a likelihood of subsidization and likelihood of injury determination. The Panel considers that the same obligation also applies to the Section 129 proceedings regarding the UK in the present dispute since it was designed to make revised sunset review determinations.

7.238 The Panel therefore concludes that an investigating authority has the obligation to consider all evidence placed on the record in making a likelihood of continuation or recurrence of subsidization re-determination. Without so doing, the investigating authority could not ensure that the new measure, that is, the likelihood-of-subsidization re-determination set out in the Section 129 determination, is based on a sufficient factual record and therefore satisfies the requirements of Article 21.3 of the *SCM Agreement*.

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<sup>499</sup> Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 114 (citing Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271) (emphasis added).

<sup>500</sup> Panel Report on *US – Carbon Steel*, paras. 8.94-8.95.

<sup>501</sup> Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 7.114.

(ii) *The Panel's assessment of the USDOC's treatment of evidence in the UK Section 129 determination*

7.239 The Panel notes that the affirmative likelihood of subsidization re-determination in the UK Section 129 determination was solely based on subsidies provided to Glynwed:

"Even if we were to determine, pursuant to an analysis under the privatization methodology set forth in the Modification Notice, that subsidies received by BS plc prior to the sale of shares would not continue through or after the POR of the sunset review, we would still make an affirmative likelihood determination based on the determination in the Final Sunset Results that *programs previously determined to provide countervailable subsidies and/or benefit streams from such programs continue to benefit Glynwed*, the other producer/exporter of the subject merchandise, for whom privatization is not an issue."<sup>502</sup>

7.240 With regard to Glynwed, the Corus group and the GOUK presented comments and evidence to the USDOC during the Section 129 proceedings to support their argument that Glynwed no longer benefited from any subsidy programmes because these programmes either no longer existed or were no longer available to the UK steel industry. In particular, they alleged the non-availability of four subsidy programmes to Glynwed, namely, the UK regional development grants under the Industry Act of 1972 and the Industry Development Act of 1982, the European Regional Development Fund, the ECSC Article 54 loans and interest rebates, as well as the preferential transportation rates provided by the government-owned British Rail.<sup>503</sup>

7.241 The USDOC did not consider the evidence produced by Corus and the GOUK during the Section 129 proceedings. The Section 129 determination explained the reason for this refusal:

"The [USDOC's] duty, ... is not to re-conduct the original sunset review in its totality, but to render it not inconsistent with the findings of the Appellate Body. The [USDOC] has done this by determining that, based on the conclusions in the sunset review regarding Glynwed, the [USDOC's] sunset likelihood determination was proper.

The [USDOC] is not reopening issues in this determination that were resolved in the sunset review and were not found by the Appellate Body to be inconsistent with the SCM Agreement."<sup>504</sup>

7.242 The United States also argued during these proceedings that the USDOC had decided in the original sunset review that Glynwed continued to receive countervailable subsidies and that the USDOC had merely relied on that conclusion in the UK Section 129 determination. Since the European Communities did not challenge the conclusions regarding Glynwed in the original panel proceedings, the United States contended that the European Communities' claim does not constitute a part of the mandate of this Article 21.5 Panel.<sup>505</sup>

7.243 The European Communities argues that it could not have raised a claim regarding the evidence pertaining to Glynwed because the determination in the original sunset review was based not

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<sup>502</sup> UK Section 129 determination, footnote 208 above, p. 4 (emphasis original).

<sup>503</sup> EC First written submission, paras. 53-57.

<sup>504</sup> UK Section 129 determination, footnote 208 above, p. 7.

<sup>505</sup> US Oral statement paras. 15, 18-20.

on subsidies to Glynwed, but on the assumption of likelihood of continuation or recurrence of subsidization because of the non-cooperation of the producers/exporters.<sup>506</sup>

7.244 The Panel notes that in the original sunset review determination, the USDOC stated that it received responses from the GOUK and the European Communities, but not from any foreign producers/exporters because they did not participate in the original sunset review.<sup>507</sup> The domestic interested parties argued, *inter alia*, that the subsidy program, "Regional Development Grants", had benefit streams for Glynwed that continued up to the year 2004 and that Glynwed could benefit from the "Interest Rebates Article 54 Loans" in the future. The European Communities and the GOUK, on the other hand, argued that most of the schemes countervailed no longer existed or had ceased to provide meaningful benefits to the current exporter of the subject merchandise.<sup>508</sup> However, the USDOC's reasoning for its likelihood determination in the original sunset review did not mention the name of any specific firm:

"[A]lthough the EC and GOUK assert that these programmes have been terminated, as they involved specific governmental action, and that subsidization of the steel sector in the EU is strictly prohibited following the adoption of the EC Decision, the [USDOC] normally will determine that a countervailable subsidy will continue to exist where the *benefit stream* will continue beyond the end of the sunset review. Without *evidence* that some programs have been fully *amortized*, or *participation* in this review of a foreign producer/exporter, we determine that countervailable subsidy programs continue to confer benefits above *de minimis*, and that revocation of the countervailing duty order is likely to lead to continuation or recurrence of a countervailable subsidy."<sup>509</sup>

7.245 The Panel observes that no specific name of the subsidy recipient was mentioned in the findings of the original sunset determination. Given the fact that Glynwed had been determined to be one of the subsidy recipients during the original countervailing duty determination, the Panel therefore understands that the USDOC actually used its findings regarding a subsidy benefit to Glynwed, which the USDOC made in the original countervailing duty determination, as the basis for its affirmative likelihood-of-subsidization re-determination set out in the UK Section 129 determination. Therefore the basis of the UK Section 129 determination, that a subsidy benefit continued for Glynwed, is different from the basis of the original sunset review determination, that there was insufficient evidence to conclude that the benefit stream from subsidy programmes had ceased to exist. In other words, the factual circumstance relating to the new measure, that is, the continuation of a subsidy benefit to Glynwed as the basis of the new measure, is different from the factual circumstance in the original sunset review measure, where the insufficiency of information on the termination of subsidy programmes from foreign producers/exporters was the basis of the sunset determination.

7.246 As for the US argument that the new evidence was not considered because whether there was a subsidy benefit to Glynwed was not a part of the DSB recommendations and rulings in the original dispute, the European Communities responds that the Panel's mandate is to determine whether the new measure is in conformity with the covered agreements as cited in the Panel request, therefore, it is not sufficient for the new measure to merely eliminate one erroneous aspect of the measure, if to do so would expose additional failures to comply with the obligations of the *SCM Agreement*.<sup>510</sup>

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<sup>506</sup> EC Second written submission, para. 4; EC Oral statement, para. 14.

<sup>507</sup> UK Sunset Review Issues and Decision Memo, p. 4.

<sup>508</sup> UK Sunset Review Issues and Decision Memo, pp. 7-8.

<sup>509</sup> UK Sunset Review Issues and Decision Memo, p. 13.

<sup>510</sup> EC First written submission, para. 62.

7.247 In this regard, the Panel notes that there is a difference in the "factual circumstances" in the the UK Section 129 determination as compared with the original sunset review determination. This difference, which concerns the subsidies other than pre-privatization subsidies to BS plc., includes: (i) the participation of the private firm Corus in the Section 129 proceedings as compared with the non-participation of the foreign producers/exporters in the original sunset proceedings; and (ii) the provision by the interested parties of new evidence during the Section 129 proceedings demonstrating that Glynwed no longer produced the product concerned.

7.248 The Panel recalls its previous findings in paragraphs 7.16-7.18 above that in the UK Section 129 determinations, the USDOC revised its likelihood-of-subsidization determination by *changing the basis* for its affirmative conclusion. Since the revision was not limited to the privatization analysis, the "measure taken to comply" by the United States in the UK case encompasses the whole affirmative likelihood-of-subsidization analysis as set out in the UK Section 129 determination. The Panel also found in previous paragraphs 7.69-7.71 above that the European Communities' new claim on the treatment of evidence concerns the changed aspect of the measure taken to comply and therefore it is within the mandate of this Article 21.5 Panel.

7.249 On the obligation of Members in implementing the recommendations and rulings of the DSB, the Panel recalls that Article 21.5 of the DSU obliges the implementing Member to ensure that the "new measures taken to comply" with such recommendations and rulings are not inconsistent with the relevant covered agreement. Consequently, the investigating authority is obliged to ensure that the UK Section 129 determination meets the requirement of Article 21.3 of the *SCM Agreement* in respect of the treatment of evidence.

7.250 In examining the treatment of evidence by the USDOC during the Section 129 proceedings, the Panel considers it necessary to distinguish two categories of evidence, namely, the evidence that the European Communities and the GOUK already submitted during the original sunset proceedings and the USDOC rejected as insufficient, and the new evidence that the interested parties submitted during the Section 129 proceedings.

7.251 Regarding the evidence that the European Communities and the GOUK had already submitted during the original sunset review and which was rejected by the USDOC as insufficient, the Panel is of the view that, given that this evidence has *not* changed and that the treatment of this evidence by the USDOC was neither contested by the European Communities nor addressed during the original proceedings, the USDOC was not obligated to re-examine this evidence during the Section 129 proceedings. Therefore, the Panel finds that the USDOC's refusal to re-consider evidence in the UK Section 129 determination that it had already considered and rejected during the original sunset review is not inconsistent with Article 21.3 of the *SCM Agreement*.

7.252 Regarding the second category of evidence, namely, evidence provided for the first time by the interested parties during the Section 129 proceedings, the Panel notes that Corus and the GOUK provided *new* evidence during the Section 129 proceedings to demonstrate that Glynwed sold the business of the production of the product concerned to another company, Niagara, LaSalle Corp.; therefore, it no longer produced the product concerned.<sup>511</sup> The Panel notes that there might be other new evidence that the interested parties may have presented during the Section 129 proceedings.<sup>512</sup>

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<sup>511</sup> EC First written submission, para. 17.

<sup>512</sup> The Panel understands that the European Communities and the GOUK provided some evidence during the original sunset review proceedings relating to the non-availability of a benefit from certain subsidy programmes. They also provided evidence during the Section 129 proceedings to demonstrate the non-existence of a number of subsidy programmes. However, from the text of the sunset determination and the text of the Section 129 determination as well as the information available to this Panel, it is not possible to clearly identify

7.253 The Panel recalls its previous findings in paragraph 7.238 above that Article 21.3 of the *SCM Agreement* imposes an obligation on the investigating authority during sunset review or revised sunset review proceedings to take into account all the evidence placed on its record in making its determination of likelihood of continuation or recurrence of subsidization.

7.254 The Panel considers that by refusing to take into account the evidence that the respondents provided for the first time in the Section 129 proceedings<sup>513</sup>, which was not evidence already considered and rejected with reason during the original sunset review, the USDOC may have precluded the consideration of evidence that could have been essential to the determination of the existence of a subsidy benefit. The Panel considers that by refusing to consider such evidence, the USDOC findings on the continuation of a subsidy benefit to Glynwed and therefore its conclusion on the likelihood of continuation or recurrence of subsidisation in the UK Section 129 determination may be based on an insufficient, or even an incorrect factual basis.

(iii) *Conclusion*

7.255 Therefore, the Panel finds that the refusal to consider new evidence presented during the Section 129 proceedings as well as the findings regarding the continuation of the subsidy benefit to Glynwed in the UK Section 129 determination are inconsistent with the requirement of Article 21.3 of the *SCM Agreement*.

D. CUT-TO-LENGTH CARBON STEEL PLATE FROM SPAIN

1. **Background**

7.256 On 8 January 2003, the DSB adopted the reports of the original panel and the Appellate Body. The panel found that the sunset review determination on *Cut-to-Length Carbon Steel Plate From Spain* was inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement*.<sup>514</sup> This conclusion of the Panel was upheld by the Appellate Body in its report.<sup>515</sup>

7.257 As indicated in paragraph 7.89 above, following the adoption of the original panel and Appellate Body Reports by the DSB on 8 January 2003, the USDOC issued the Modification Notice, which the European Communities did not challenge in this dispute. It also reviewed its determination on the likelihood of continuation or recurrence of subsidization contained in the original sunset review results, which had been found to be inconsistent with the *SCM Agreement*. Accordingly, the USDOC issued its *Issues and Decision Memorandum: Section 129 Determination: Final Results of Expedited Sunset Review of Cut-to-Length Carbon Steel Plate from Spain* ("Spain Section 129 determination") on 24 October 2003.<sup>516</sup>

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whether the European Communities, the GOUK or Corus have provided any *new* evidence during the Section 129 proceedings relating to the expiry of any specific subsidy programmes.

<sup>513</sup> In paragraph 7.252 and footnote 512, the Panel mentioned the possibility of the existence of new evidence provided during the Section 129 proceedings relating to the expiry of specific subsidy programmes, in addition to the evidence demonstrating the sale of the business concerned by Glynwed. Were it the case, the Panel considers that it should also be treated as new evidence provided for the first time by the interested parties during the Section 129 proceedings.

<sup>514</sup> Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 8.1(c).

<sup>515</sup> Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 161(a).

<sup>516</sup> The USDOC then published a Notice of Implementation in the Federal Register on 17 November 2004 indicating that the USTR declined to direct the USDOC to implement this revised sunset review determination. Notice of Implementation, footnote 240, p. 64859. The US considers that the issuance of the Section 129 determination itself satisfies the obligation of bringing the measure into conformity with the recommendations and rulings of the DSB. The US in its reply to Panel questions explained that the USTR

7.258 The original countervailing duty on these products from Spain was imposed on 17 August 1993 with a countrywide *ad valorem* rate of 36.82 per cent.<sup>517</sup> The sunset review determination, published on 7 April 2000, found that "revocation of the countervailing duty order would be likely to lead to continuation or recurrence of the subsidy". The USDOC reported to the USITC that the net countervailable subsidy rate likely to prevail was 36.86 per cent for all producers and exporters from Spain.<sup>518</sup>

## **2. The measure taken to comply**

7.259 As concluded in paragraph 7.18 above, the measure taken to comply as regards *Cut-to-length Carbon Steel Plate From Spain* is the affirmative likelihood-of-subsidization re-determination as set out in the Spain Section 129 determination.

## **3. The claims**

7.260 With respect to the Spain Section 129 determination regarding *Final Results of Expedited Sunset Review of Cut-to-Length Carbon Steel Plate from Spain*, the European Communities requests the Panel to make the following findings:

- (a) that the United States has failed to implement the recommendations and rulings adopted by the DSB and acted inconsistently with its obligations under Articles 10, 14, 19.4, 21.1, and 21.3 of the *SCM Agreement* and Article VI:3 of the *GATT 1994* by refusing to examine whether, and for failing to find that, the privatization of Aceralia in Cut-to-Length Carbon Steel Plate from Spain was at arm's length and for fair market value;
- (b) that the United States has acted inconsistently with its obligation under Article 21.3 of the *SCM Agreement* because it failed to consider evidence on the record in Cut-to-Length Carbon Steel Plate from Spain demonstrating that the benefits from programmes found to confer countervailable subsidies no longer existed;
- (c) that the United States failed to meet its obligations under Articles 21.3 of the *SCM Agreement* because it did not examine in, *inter alia*, Cut-to-Length Carbon Steel Plate from Spain, whether expiry of the duty would likely to lead to continuation or recurrence of material injury.<sup>519</sup>

7.261 The Panel recalls its findings in paragraphs 7.27-7.31 that the likelihood of injury determination is an unrevised aspect of the original sunset review, which was not challenged during the original panel proceedings and that there is no basis for concluding that the re-determination of the likelihood of continuation or recurrence of subsidization affects the likelihood-of-injury determination, therefore, the failure to re-conduct a likelihood-of-injury determination is not a measure that the United States should have taken to comply with the DSB rulings and recommendations. Moreover, as the Panel found in paragraphs 7.73-7.77, even if the likelihood-of-injury analysis were an aspect of the measure taken to comply, the European Communities' claim on the failure to re-determine the likelihood of continuation or recurrence of injury in the Spain Section

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exercised discretion not to direct the implementation as there was no need for a change as a matter of US law in the implementation of the determinations. See US Response to Panel questions Nos. 18-20.

<sup>517</sup> Countervailing Duty Order: Certain Steel Products From Spain, 58 Fed. Reg. 43761, 43762 (17 August 1993) (finding a countrywide *ad valorem* rate of 36.82 per cent); see Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Spain, 58 Fed. Reg. 37374, 37385 (9 July 1993) (finding a countrywide *ad valorem* rate of 36.86 per cent).

<sup>518</sup> Spain Sunset Review Final Results, footnote 286 above, p. 18308.

<sup>519</sup> EC First written submission, para. 72.

129 determination is not properly before this Panel. Therefore, the Panel will not address the European Communities' injury claim in this Article 21.5 proceedings. With this in mind, the Panel will proceed to examine each one of the other two claims in the following paragraphs.

**4. Whether the USDOC's failure to examine the privatization of Aceralia and to determine whether the privatization occurred at arm's length and for FMV is inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the SCM Agreement and Article VI:3 of the GATT 1994**

(a) Arguments of the parties

7.262 The European Communities makes similar arguments on this issue as those made with respect to the UK Section 129 determination as reflected in paragraphs 7.185-7.189 above. It mainly argues that the USDOC refused to consider in the Spain Section 129 determination whether under the modified privatization methodology, Aceralia had been privatized in a manner that extinguished the benefits conferred by the non-recurring subsidies bestowed to the state-owned producer prior to its privatization.<sup>520</sup>

7.263 The European Communities also argues that Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* as well as Article VI:3 of the *GATT 1994* require that an investigating authority examine in a sunset review, whether a benefit continues to exist after privatization before imposing or maintaining a duty. By refusing to examine the privatization, the US acted inconsistently with its obligations under these provisions.<sup>521</sup>

7.264 The European Communities also argues that by refusing to examine the privatization, the USDOC's Spain Section 129 determination is not in compliance with the conclusion of the Appellate Body in paragraph 161(a) of its report that the United States acted inconsistently with its obligations under Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* by "imposing and maintaining countervailing duties without determining whether a 'benefit' continues to exist..."<sup>522</sup>

7.265 The United States argues that the USDOC assumed for purpose of its likelihood-of-subsidization determination that the privatization of Aceralia was conducted at arm's length and for FMV and entirely extinguished all benefits from the pre-privatization, non-recurring subsidies in question. Therefore, the USDOC did not rely on any benefit from allocable, pre-privatization subsidies in determining whether subsidization was likely to continue or recur if the order were revoked.<sup>523</sup>

7.266 Rather, the United States argues that the Spain Section 129 determination was based on evidence wholly unrelated to the (allocable, non-recurring) pre-privatization subsidies. In the Spain Section 129 determination, the basis of its likelihood of subsidization determination was that there were recurring (non-allocable) subsidies to the privatized company Aceralia that continued after privatization.<sup>524</sup>

7.267 The United States argues that because the USDOC assumed that the privatization of Aceralia was at arm's length and for FMV, and that the USDOC did not rely on pre-privatization subsidies in

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<sup>520</sup> EC First written submission, para. 21.

<sup>521</sup> EC First written submission, paras. 63-65.

<sup>522</sup> EC First written submission, paras. 70.

<sup>523</sup> US First written submission, paras 4, 48; US Second written submission, para. 11.

<sup>524</sup> US First written submission, para. 48.

making the determination, the revised determinations cannot be inconsistent with the DSB recommendations and rulings.<sup>525</sup>

(b) Evaluation by the Panel

(i) *The United States' obligations pursuant to the findings in the original proceedings regarding the USDOC's privatization analysis*

7.268 The Panel summarized the findings of the original panel and of the Appellate Body in paragraphs 7.198-7.203 above. These findings make clear that an investigating authority is obliged under Articles 10, 14, 19.4, 21.1, and 21.3 of the *SCM Agreement* to examine whether the privatization was at arm's length and for FMV in order to determine whether the benefit from the non-recurring subsidies bestowed upon a pre-privatized company continues to exist for the privatized producer. These findings also make it clear that, in a sunset review, countervailing duties can only be maintained after making an affirmative likelihood of continuation or recurrence of subsidization determination.

(ii) *The Panel's assessment of the USDOC's analysis in the Spain Section 129 determination*

7.269 The privatization analysis that the USDOC adopted in this case was the same as it used in the UK case. Under the heading "Privatization of Aceralia", the Spain Section 129 determination begins with a general description of the privatization process in 1997. Then the determination states that the USDOC's privatization analysis, as provided for in the Modification Notice, is predicated on a baseline presumption that "allocable, non-recurring subsidies can benefit the recipient over a period of time normally corresponding to the average useful life of the recipient's assets". To rebut this presumption, a party is required to demonstrate that the privatization was conducted through an arm's-length transaction for FMV.

7.270 After that, without addressing the details of the privatization of Aceralia, the determination states:

"However, even assuming *arguendo*, that, pursuant to an analysis under Section 129(b)(2) of the URAA, the [USDOC] were to find that the privatization of ACERALIA met all the criteria for rebutting the baseline presumption set forth in the [USDOC's] Modification Notice, such a finding would not affect the results in the instant determination that there would be a likelihood of continuation or recurrence of a countervailable subsidy if the order were revoked."<sup>526</sup>

7.271 The determination then refers to the legislative history of the URAA and the USDOC's Sunset Policy Bulletin of 1998 to clarify that pursuant to Section III.A.2 of the Sunset Policy Bulletin, the determination of likelihood would be made on an "order-wide" basis. It then concludes:

"In the Final Sunset Results, our affirmative likelihood determination was based, in part, on our determination that there are countervailable recurring, non-allocable subsidies provided pursuant to programs that to the best of our knowledge continue to exist, including, for example, the 1987 Government Delegated Commission on Economic Affairs: Fund for Employment Promotion and Early Retirement. *Even if we were to determine, pursuant to an analysis under the privatization methodology set forth in the Modification Notice, that non-recurring, allocable subsidies received by ACERALIA prior to the 1997 privatization would not continue through of after the*

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<sup>525</sup> US First written submission, para. 49; US Second written submission, para. 11.

<sup>526</sup> Spain Section 129 determination, footnote 208 above, p. 3.



*period of review ("POR") of the sunset review, we would still make an affirmative likelihood determination based on the fact that subsidy programs that have provided recurring, non-allocable subsidies at above *de minimis* rates continue to exist.*"<sup>527</sup>

7.272 In sum, the USDOC made an affirmative likelihood-of-subsidization determination based on the reason that recurring subsidy programs, such as the 1987 Government Delegated Commission on Economic Affairs: Fund for Employment Promotion and Early Retirement continued to exist and to benefit Aceralia. The United States argues that the Spain Section 129 determination was based on an assumption that the privatization of Aceralia was conducted at arm's length for FMV and that the benefit from the non-recurring pre-privatization subsidies was entirely extinguished for the privatized firm, Aceralia. The phrases used in the determination include "even assuming *arguendo*..." and "even if we were to determine...".

7.273 The Panel recalls its previous analysis of the original panel and the Appellate Body's findings in this regard in paragraphs 7.198-7.203, and its conclusion that the investigating authority is obliged by Articles 10, 14, 19.4, 21.2 and 21.3 of the *SCM Agreement* to "examine" whether the privatization was conducted at arm's length and for FMV in order to "determine" whether the privatized producer received any benefit from the financial contributions previously bestowed to the state-owned producers and to maintain the countervailing duties only after making an affirmative likelihood of continuation or recurrence of subsidization determination.

7.274 The Panel is of the view that in order to meet the obligation set out for a sunset review determination involving privatization, which is "to examine" the privatization and "to determine" whether the privatized producer Aceralia continued to receive subsidy benefit, the investigating authority is required to make definite findings, rather than assumptions.

7.275 As the Panel has discussed above, in paragraphs 7.213, 7.214 and 7.215, the obligations to "examine" and to "determine" in the context of countervailing duty sunset review require that the investigating authority act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information in the record of the proceedings, rather than simply make an assumption.

7.276 In the Spain Section 129 determination however, the last paragraph of the privatization analysis states the following:

"[T]he [USDOC] has received allegations that the privatization here was effected by 'market distortion' such that any arm's length/fair market value findings would not warrant a determination that countervailable subsidies were extinguished by the privatization. We do not need to address the market distortion allegations, *because we have not—for the reasons explained above—addressed the arm's length/fair market value issue.*"<sup>528</sup>

7.277 It is clear to the Panel that the USDOC did not examine whether the privatization of Aceralia was at arm's length and for FMV because it did not address this issue. Nor did the USDOC make a "determination" that non-recurring pre-privatization subsidies ceased to benefit Aceralia as there was no language to that effect in the Spain Section 129 determination.

7.278 The Panel considers that there is a difference between "assumption" and "determination" in that a determination is required to be based on sufficient evidence and adequate reasoning whereas an assumption need not be supported by evidence or reasoning. In this regard, what Article 21.3 of the

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<sup>527</sup> Spain Section 129 determination, footnote 208 above, p. 3 (emphasis added).

<sup>528</sup> Spain Section 129 determination, footnote 208 above, p. 4 (emphasis added).

*SCM Agreement* explicitly requires is a "determination", an obligation more burdensome for the investigating authority than that of an assumption.

7.279 In practice, the legal certainty of an assumption would also be different from that of a determination to the interested parties involved. The United States argues that the USDOC assumed that the privatization extinguished non-recurring pre-privatization subsidies to Aceralia. However, for example, if Aceralia were to request an assessment review in future, it is not clear whether such an assumption would be treated as a *determination* that the privatization was conducted at arm's length and for FMV and that the non-recurring subsidy benefit was extinguished for Aceralia.

(iii) *Conclusion*

7.280 For these reasons, the Panel finds that the United States failed to examine whether the privatization of Aceralia was at arm's length and for FMV and to determine whether the benefit from non-recurring subsidies bestowed to the state-owned producer extinguished for the privatized Aceralia. By failing to properly determine the likelihood of continuation or recurrence of subsidization determination prior to its decision to maintain countervailing duties in its Spain Section 129 determination, the United States acted inconsistently with the obligations under Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* and Article VI:3 of the *GATT 1994* and therefore failed to implement the recommendations and rulings of the DSB.

**5. Whether the USDOC's treatment of evidence on the record during the Section 129 proceedings is inconsistent with Article 21.3 of the SCM Agreement**

7.281 We recall that in paragraph 7.18 above, we found that the measure taken to comply as regards *Cut-to-length Carbon Steel Plate from Spain* is the affirmative likelihood-of-subsidization re-determination set out in the Spain Section 129 determination. In paragraph 7.71 above, we also found that the European Communities' new claim regarding the treatment of evidence by the USDOC during the Section 129 proceeding is within the mandate of this Panel. The Panel will therefore proceed to examine the European Communities' claim on the USDOC's treatment of evidence.

(a) *Arguments of the parties*

7.282 The European Communities argues that in the Spain Section 129 determination, the USDOC made its affirmative findings of likelihood of continuation or recurrence of subsidies based on the "recurring" subsidies provided to Aceralia despite evidence on the record in the Section 129 proceedings, which consisted of statements by the Government of Spain (GOS) and the European Communities that the specific programme cited by the USDOC, namely, the 1987 Government Delegated Commission on Economic Affairs measures, no longer existed.<sup>529</sup> The European Communities indicates that both the European Communities and the GOS had explained in submissions *during the original sunset review* that other *recurring*, non-allocable subsidies found to exist at the time of original investigation in 1993 were no longer granted. They explained that these programs included, the 1987 Government Delegated Commission on Economic Affairs measures (no longer in existence), Law 60/78 (no longer applied to the steel sector); Royal Decree 878/8 and the 1984 Council of Ministers Meeting programme (no longer in existence); and Article 54 ECSC loans (would shortly cease to exist<sup>530</sup>).<sup>531</sup> In sum, the European Communities argues that it had already

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<sup>529</sup> EC First written submission, para. 24.

<sup>530</sup> The Panel notes that the USDOC issued the Spain Sunset Review Final Results on 29 March 2000, before the expiry of this subsidy. Spain Sunset Review Final Results, footnote 286 above.

<sup>531</sup> EC First written submission, para. 24, footnote 44.

explained *during the original sunset review* that most of the schemes no longer existed or had ceased to provide a meaningful benefit.<sup>532</sup>

7.283 The European Communities and the GOS reiterated these arguments to the USDOC during the Section 129 proceedings and confirmed the fact that the ECSC Article 54 loan programme expired in July 2002. The European Communities argues that the USDOC nevertheless based its Section 129 determination on a finding that was demonstrated by the evidence on the record to be palpably incorrect.<sup>533</sup>

7.284 The European Communities' arguments that Article 21.3 of the *SCM Agreement* requires an investigating authority to consider all evidence in its record also apply to the Spain Section 129 determination, as do the US arguments to the effect that it is not under an obligation to reopen issues already resolved in the original sunset review. These arguments are reflected in paragraphs 7.221-7.229 above.

7.285 The United States argues that as the USDOC assumed that the privatization of Aceralia had extinguished all allocable, pre-privatization subsidies, the affirmative likelihood-of-subsidization determination in the Spain Section 129 determination was based on evidence wholly unrelated to pre-privatization subsidies. It cited the recurring subsidies benefiting Aceralia in the Spain case.<sup>534</sup>

7.286 The United States also argues that neither the Appellate Body nor the original panel made any findings concerning these subsidy programmes, which did not involve the privatization methodology. The USDOC's findings concerning the recurring subsidy programme for Aceralia in the Spain case are *unchanged*. Because the recommendations and rulings of the DSB did not require them to be changed, the European Communities cannot use the Article 21.5 process to challenge them.<sup>535</sup>

7.287 In the Spain Section 129 determination, the USDOC explained its refusal to consider the issue of recurring subsidy on its understanding that the duty of the authority in Section 129 determination is not to re-conduct the original sunset review in its totality, but to render it not inconsistent with the findings of the Appellate Body. The USDOC stated that it was not reopening issues that had been resolved in the original sunset review and had not been found by the Appellate Body to be inconsistent with the *SCM Agreement*.<sup>536</sup>

(b) Evaluation by the Panel

(i) *The United States' obligations under Article 21.3 of the SCM Agreement regarding the USDOC's treatment of evidence*

7.288 As the Panel concluded in paragraph 7.238 above, an investigating authority has the obligation to consider all evidence placed on the record in making a likelihood of continuation or recurrence of subsidization re-determination. Otherwise, in the view of this Panel, the investigating authority could not ensure that the new measure, that is, the likelihood-of-subsidization re-determination set out in the Section 129 determination, is based on a sufficient factual record and therefore satisfies the requirement of Article 21.3 of the *SCM Agreement*.

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<sup>532</sup> EC First written submission, para. 59.

<sup>533</sup> EC First written submission, paras. 24, 59.

<sup>534</sup> US First written submission, para. 48.

<sup>535</sup> US First written submission, para. 18.

<sup>536</sup> Spain Section 129 determination, footnote 208 above, p. 6.

(ii) *The Panel's assessment of the USDOC's treatment of evidence in the Spain Section 129 determination*

7.289 The Panel notes that in the revised sunset review determination, i.e., the Spain Section 129 Determination, the USDOC based its likelihood determination on the existence of "recurring subsidies" to Aceralia found to exist in the original sunset review but only specified one subsidy program that was found to be "recurring":

"In the Final Sunset Results, our affirmative likelihood determination was based, in part, on our determination that there are countervailable *recurring, non-allocable subsidies* provided pursuant to programs that to the best of our knowledge continue to exist, including, for example, *the 1987 Government Delegated Commission on Economic Affairs: Fund For Employment Promotion and Early Retirement*. Even if we were to determine, pursuant to an analysis under the privatization methodology set forth in the Modification Notice, that non-recurring, allocable subsidies received by ACERALIA prior to the 1997 privatization would not continue through or after the period of review ("POR") of the sunset review, we would still make an affirmative likelihood determination based on the fact that subsidy programs that have provided recurring, non-allocable subsidies at above *de minimis* rates continue to exist."<sup>537</sup>

7.290 The Panel also notes that during the original sunset review, the European Communities and the GOS argued and provided evidence to the USDOC to demonstrate that subsidy programmes no longer existed or were no longer available to the steel sector. The USDOC made an affirmative likelihood of continuation or recurrence of subsidization determination in its original sunset review determination and listed six subsidy programs as the basis of the affirmative sunset determination. The main reason for this affirmative determination was that the subsidies had not been fully amortized and the evidence of termination of the subsidy programs or subsidy benefit was not sufficient due to the non-participation of the producers/exporters:

"The [USDOC] notes that, although the EC and the GOS assert that these programs have been terminated as they involved specific governmental action and subsidization of the steel sector in the EU that is strictly prohibited following the adoption of the EU Commission Decision, the [USDOC] normally will determine that a countervailable subsidy will continue to exist until it is fully amortized. *Without evidence that the programs have been terminated, that the benefits from programs for which benefits are allocated over time will not continue beyond this sunset review, or participation in this review of a foreign producer/exporter*, we determine that revocation of the countervailing duty order is likely to lead to continuation or recurrence of a countervailable subsidy."<sup>538</sup>

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<sup>537</sup> Spain Section 129 determination, footnote 208 above, p. 3 (emphasis added).

<sup>538</sup> Spain Sunset Review Issues and Decision Memo, footnote 286 above, pp. 13-14 (emphasis added). This original sunset determination also stated in another paragraph:

"In addition to considering the guidance on likelihood cited above, section 751(c)(4)(B) of the Act provides that the Department shall determine that revocation of an order is likely to lead to continuation or recurrence of a countervailable subsidy where a respondent interested party waives its participation in the sunset review. In the instant review, the Department did not receive a response from the foreign producer/exporter and, pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation."

Spain Sunset Review Issues and Decision Memo, footnote 286 above, p. 13.

7.291 It is noteworthy that, among the six listed subsidy programmes found to still exist in the original sunset determination, the 1987 Government Delegated Commission on Economic Affairs: Fund For Employment Promotion and Early Retirement was the programme that the USDOC later found to be "recurring" and that the USDOC used as the basis for its affirmative likelihood-of-subsidization determination in the Spain Section 129 determination. We note that the Section 129 determination does not identify other recurring subsidy programmes although it implies their existence.<sup>539</sup>

7.292 The United States argues that it is not required to reopen issues that were resolved in the original sunset review and that the aspect of the recurring subsidies to Aceralia, which was not raised by the European Communities in the original panel proceedings, is not properly within the mandate of this Panel.<sup>540</sup> The European Communities responds that the mandate of this Panel, pursuant to Article 21.5, is to determine whether the measure is in conformity with the covered agreements as cited in the Panel request. The European Communities further argues that it is not sufficient to merely eliminate one erroneous aspect of the measure, if to do so would expose additional failures to comply with the obligations of the *SCM Agreement*.<sup>541</sup>

7.293 In this regard, the Panel recalls its previous findings in paragraphs 7.16-7.18 above that in the Spain Section 129 determinations, the USDOC revised its likelihood-of-subsidization determination by *changing the basis* for its affirmative conclusion. Since the revision was not limited to the privatization analysis, the "measure taken to comply" by the United States in the Spanish case encompasses the whole affirmative likelihood-of-subsidization analysis as set out in the Spain Section 129 determination. The Panel also found in paragraphs 7.69-7.71 above, that the European Communities' new claim on the treatment of evidence concerns the changed aspect of the measure and therefore it is within the mandate of this Article 21.5 Panel.

7.294 Turning back to the European Communities' claim that the refusal to consider evidence in the record of the Spain Section 129 determination is inconsistent with Article 21.3 of the *SCM Agreement*, the Panel recalls its findings in paragraph 7.238 above, that the obligation in the Section 129 proceeding is for the investigating authorities to consider all evidence placed on the record of that proceeding in making a likelihood of continuation or recurrence of subsidization determination. Under Article 21.3 of the *SCM Agreement*, if the investigating authority fails to do so, it cannot ensure that the new measure, that is, the Section 129 determination is based on a sufficient factual record and therefore satisfies the requirement of Article 21.3 of the *SCM Agreement*.

7.295 On the issue of the submission of evidence, the European Communities argues that the European Communities and GOS presented evidence that they had already provided in the original sunset review regarding the non-existence of subsidy programmes or the non-availability of these programmes to the Spanish steel industry during the Section 129 proceedings. The European Communities argues that it also confirmed the actual expiry of the ECSC Article 54 loan programme in 2002 during the Spain Section 129 proceeding.

7.296 In particular, the Panel understands that the European Communities provided statements and documents to the USDOC during the original sunset review demonstrating that the programme "1987 Government Delegated Commission on Economic Affairs" no longer existed. This evidence was rejected by the USDOC in the original sunset determination as insufficient.<sup>542</sup> The European

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<sup>539</sup> See Spain Sunset Review Issues and Decision Memo, footnote 286 above, p. 17.

<sup>540</sup> See parties arguments in paras. 7.285-7.287; US First written submission, para. 18.

<sup>541</sup> EC First written submission, para. 62.

<sup>542</sup> The Panel notes that the USDOC based its affirmative likelihood-of-subsidisation determination on the following grounds: "[absence of] evidence that the programs have been terminated, [absence of evidence] that the benefits from programs for which benefits are allocated over time will not continue beyond this sunset

Communities and the GOS reiterated these arguments to the USDOC during the Section 129 proceedings. The USDOC refused to reconsider this evidence and relied on the abovementioned recurring subsidy programme as the basis for the affirmative likelihood-of-subsidization re-determination set out in the Spain Section 129 determination.

7.297 In examining the treatment of evidence by the USDOC during the Spain Section 129 proceedings, the Panel, as in the UK case, distinguishes between two categories of evidence: the evidence that the European Communities and the GOS had already submitted during the original sunset review and which the USDOC had rejected as insufficient; and any new evidence that the interested parties may have submitted for the first time during the Spain Section 129 proceedings.

7.298 Regarding the evidence that the European Communities and the GOS had already submitted during the original sunset review and which was rejected by the USDOC as insufficient, the Panel is of the view that, given that this evidence has *not* changed and that the treatment of this evidence by the USDOC was neither contested by the European Communities nor addressed during the original proceedings, the USDOC was not obligated to re-examine this evidence during the Section 129 proceedings. Therefore, the Panel finds that the USDOC's refusal to re-consider evidence in the Spain Section 129 determination that it had already considered and rejected during the original sunset review is not inconsistent with Article 21.3 of the *SCM Agreement*.

7.299 Regarding the second category of evidence, i.e. evidence that may have been provided for the first time by the interested parties during the Section 129 proceedings, the Panel considers that, in line with its previous findings in paragraph 7.238 above, Article 21.3 of the *SCM Agreement* imposes an obligation on the investigating authority during the sunset review to account for all the evidence placed on its record in making its likelihood of continuation or recurrence of subsidization determination. Therefore, the USDOC was obliged under Article 21.3 of the *SCM Agreement* to consider such new evidence, if any, during the Spain Section 129 proceedings. However, the Panel is not aware, from the information available to this Panel, of any *new* evidence presented by the European Communities or the GOS during the Spain Section 129 proceedings.

(iii) *Conclusion*

7.300 The Panel therefore concludes that the European Communities failed to demonstrate that the USDOC's treatment of evidence in the Spain Section 129 determination is inconsistent with the obligation under Article 21.3 of the *SCM Agreement*.

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review, or [lack of] participation in this review of a foreign producer/exporter". Spain Sunset Review Issues and Decision Memo, footnote 286 above, p. 13-14.

## VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the findings contained in Section VII above, we therefore conclude that:

- (a) the affirmative likelihood-of-subsidization re-determinations set out in each of the Section 129 determinations at issue are the measures taken to comply by the United States with the DSB recommendations and rulings in the original proceedings;
- (b) regarding the UK and Spain Section 129 determinations, the European Communities' claims on the treatment of evidence in the likelihood-of-subsidization analyses are properly before this Panel;
- (c) regarding all three Section 129 determinations, the European Communities' claims on the failure to re-determine the likelihood of continuation or recurrence of injury are not properly before this Panel;
- (d) regarding the France Section 129 determination, since the USDOC did not fail to examine the conditions of Usinor's privatization and did not fail to determine that the privatized Usinor continued to receive some benefit from pre-privatization subsidization of the state-owned Usinor, the United States did not act inconsistently with Articles 14 and 21.3 of the *SCM Agreement* as regards the USDOC's consideration of Usinor's privatization in its likelihood-of-subsidization analysis.

In the absence of an obligation to recalculate a rate of subsidization in the context of a sunset review and given the fact that the United States is not relying on the sunset review as a basis for collecting duties at a particular rate, the Panel finds that the USDOC's affirmative likelihood-of-subsidization re-determination as set out in the France Section 129 determination is not inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* and Article VI:3 of the *GATT 1994* in regard to the obligation to limit countervailing duties to the amount and duration of the subsidy and therefore, the United States has not failed to implement the recommendations and rulings of the DSB;

- (e) regarding the UK Section 129 determination, the USDOC failed to examine whether the privatization of BS plc was at arm's length and for FMV and failed to determine whether the privatized producer received any benefit from the prior non-recurring subsidization of the state-owned BS plc. By failing to properly determine the likelihood of continuation or recurrence of subsidization, prior to its decision to maintain countervailing duties, the United States acted inconsistently with Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* and Article VI:3 of the *GATT 1994* and therefore failed to implement the recommendations and rulings of the DSB;
- (f) regarding the Spain Section 129 determination, the USDOC failed to examine whether the privatization of Aceralia was at arm's length and for FMV and failed to determine whether the privatized producer received any benefit from the prior non-recurring subsidization of the state-owned Aceralia. By failing to properly determine the likelihood of continuation or recurrence of subsidization, prior to its decision to maintain countervailing duties, the United States acted inconsistently with Articles 10, 14, 19.4, 21.1 and 21.3 of the *SCM Agreement* and Article VI:3 of the *GATT 1994* and therefore failed to implement the recommendations and rulings of the DSB;

- (g) regarding the UK Section 129 determination, the USDOC's refusal to re-consider evidence that it had already considered and rejected during the original sunset review is not inconsistent with Article 21.3 of the *SCM Agreement*;
- (h) regarding the UK Section 129 determination, the USDOC's refusal to consider new evidence submitted during the UK Section 129 proceedings is inconsistent with the obligations under Article 21.3 of the *SCM Agreement*;
- (i) regarding the Spain Section 129 determination, the European Communities failed to demonstrate that the USDOC's treatment of evidence in the Spain Section 129 determination is inconsistent with Article 21.3 of the *SCM Agreement*.

8.2 Since Article 3.8 of the *DSU* provides that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment", we conclude that to the extent the United States has acted inconsistently with the *SCM Agreement* and the *GATT 1994* it has nullified or impaired the benefits accruing to the European Communities under those agreements.

8.3 The Panel *recommends* that the Dispute Settlement Body requests the United States to bring its measures into conformity with its obligations under the *SCM Agreement* and the *GATT 1994*.

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## ANNEX A

### RESPONSES OF THE EUROPEAN COMMUNITIES TO QUESTIONS BY THE PANEL

#### SCOPE OF THE PANEL'S MANDATE

**Question 2:** *In reference to the European Communities' argument on judicial economy, is the European Communities stating that it did not argue the injury claim in the original proceedings because it was already attacking the change-in-ownership methodology and that doing so obviates the need to make any claims on injury? (European Communities)*

**Answer:** Yes. The European Communities does not consider that complaining parties are required to attack all inconsistencies in a proceeding and still less inconsistencies that may only arise once another inconsistency has been established (such as is the case with the injury findings).

Just as the objective of prompt settlement of disputes expressed in Article 3.2 *DSU* justifies judicial economy by Panels, so also does it justify a similar restraint by complaining parties.

**Question 5:** *If by implementing the DSB recommendations and rulings, another inconsistency arises, do the parties believe that an investigating authority is obligated to address this further inconsistency in the context of the DSB recommendations and rulings? Please comment in light of the following excerpt from paragraph 79 of the Appellate Body Report in EC – Bed Linen:*

*"... It is to be expected, therefore, that the claims, arguments, and factual circumstances relating to the "measure taken to comply" will not, necessarily, be the same as those relating to the measure in the original dispute.<sup>543</sup> Indeed, a complainant in Article 21.5 proceedings may well raise new claims, arguments, and factual circumstances different from those raised in the original proceedings, because a "measure taken to comply" may be inconsistent with WTO obligations in ways different from the original measure. In our view, therefore, an Article 21.5 panel could not properly carry out its mandate to assess whether a "measure taken to comply" is fully consistent with WTO obligations if it were precluded from examining claims additional to, and different from, the claims raised in the original proceedings.<sup>544</sup>" (European Communities/United States)*

**Answer:** Yes. The European Communities believes that this excerpt speaks for itself.

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<sup>543</sup> (footnote original) *Ibid.*

<sup>544</sup> (footnote original) As we put it in *Canada – Aircraft (Article 21.5 – Brazil)*:

Indeed, the utility of the review envisaged under Article 21.5 of the *DSU* would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply", as required by Article 21.5 of the *DSU*.

(Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41) We defined the function of Article 21.5 proceedings in the same vein in our Report in *US – Shrimp (Article 21.5 – Malaysia)* (para. 87).

## SECTION 129 PROCEEDINGS

[No questions for the European Communities]

## US SUNSET REVIEWS

**Question 17:** *In its Request for establishment, the European Communities seems to focus on three sunset reviews as the relevant measures taken to comply.<sup>545</sup> In the background information provided earlier in the Request itself, however, the European Communities also states that the United States finalized a new "change-in-ownership" methodology and subsequently issued new determinations in which the United States applied this methodology to the twelve determinations challenged by the European Communities before the original Panel.<sup>546</sup> Moreover, in footnotes 1 through 3, the European Communities refers to three unpublished memoranda that the USDOC issued and posted on its website.<sup>547</sup> Then, in its First written submission, the European Communities clarifies that it "is requesting the Panel to review the measures taken by the United States concerning the sunset reviews."<sup>548</sup> Later in the same submission, the European Communities states that it "is treating the USDOC's failure to revoke [the three countervailing duty] orders as the purported 'implementation' of the USDOC's findings".<sup>549</sup> Yet in its Second written submission, the European Communities clearly states that the "Section 129 determinations at issue in this proceeding are measures taken by the United States to comply with the recommendations and rulings of the DSB".<sup>550</sup> In its Oral Statement, however, the European Communities argued that the measures taken to comply by the US are the failure to revoke the CVD orders. Can the European Communities please clarify which are the measures taken to comply in these proceedings and where in the Request for establishment these measures are identified? (European Communities)*

**Answer:** The "measures taken to comply" are the maintenance of (or in other words the failure to revoke or amend) the countervailing duties in the three proceedings.

The "measures taken to comply" must relate to the duties (rather than the determinations) since the findings of the Panel that were adopted by the DSB and were required to be implemented concerned the countervailing duties imposed on exports from the three EC Member States concerned.

It is therefore these duties that were declared WTO-inconsistent and were required to be brought into conformity with the *SCM Agreement*.

The Section 129 determinations constitute the statement of reasons for this maintenance of these duties. The EC identified these measures (that is the sunset reviews in the three proceedings) in the second paragraph on page 2 of its Request for Establishment.

Where a "measure taken to comply" is necessary (and in this case the US admits that it was and indeed has claimed to have taken such a measure), maintenance or confirmation of the pre-existing measures may in certain cases constitute a sufficient implementation, where there are new findings, determinations or explanations as to why this is so. The maintenance or confirmation cannot be judged in isolation from the reasons on which it is based (especially where a reasoned explanation is a WTO obligation as is the case of countervailing duty measures). The "measure taken to comply" can also be considered to be the maintenance or confirmation combined with the statement of reasons.

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<sup>545</sup> Request for establishment, p.2.

<sup>546</sup> Request for establishment, p.1.

<sup>547</sup> Request for establishment, p.2, footnotes 1-3.

<sup>548</sup> EC First written submission, para. 3. The EC lists the three cases by case number. *Id.*

<sup>549</sup> EC First written submission, para. 5.

<sup>550</sup> EC Second written submission, para 12.

## IMPLEMENTATION

**Question 18:** *How did the United States implement the DSB recommendations and rulings in the three sunset reviews at issue? In the Notice of Implementation, the USDOC indicates that "[b]ecause the US Trade Representative declined to direct the Department to implement the revised determinations with regard to the four sunset reviews involved in the WTO dispute, [the USDOC is] not implementing these Section 129 Determinations". What constitutes "implementation" in these cases? (European Communities/United States)*

**Answer:** The European Communities, like the Panel, would appreciate clarification from the United States on how the United States considers that it implemented the DSB recommendations and rulings in the three sunset reviews at issue.

The European Communities set out in response to Question 17 above what it considers the measures taken to comply are in the sunset reviews.

**Question 21:** *Do the parties agree that the three Section 129 determinations at issue are the measures taken to comply in these Article 21.5 proceedings? (European Communities/United States)*

**Answer:** See answer to Questions 17 and 18.

**Question 24:** *Does the European Communities suggest that because of the significant impact of the new privatization methodology, the United States should not make its likelihood determination on an order-wide basis in the sunset reviews at issue? (European Communities)*

**Answer:** The European Communities does not consider that the "order-wide" approach of the United States is sufficient to ensure proper compliance in this case. At the same time, even if the "order-wide" approach is taken, the European Communities does not consider that the United States has acted consistently with the *SCM Agreement*.

The findings of the Panel that were adopted by the DSB and were required to be implemented concerned the failure of the United States to ensure that any countervailing duties which were applied were limited to an amount corresponding to injurious subsidization (Article 21.1 of the *SCM Agreement* makes it clear that duties must "remain in force only as long and to the extent necessary to counteract subsidization which is causing injury"). In particular, the Panel focussed on the issue of privatization, finding that an investigating authority must examine the effect of a privatization in order to ensure that any duties applied corresponded to the amount of injurious subsidization. The United States has failed to respect this obligation in its "arguendo findings", in respect of the British and Spanish cases.

## FRENCH CASE

**Question 25:** *The United States alleges that the claim on likelihood of injury as regards the French Section 129 determination is outside this Panel's mandate because it is not included in the Request for establishment. Can the European Communities confirm that this is the case? If not, could the European Communities indicate where in the Request for establishment this claim is included? (European Communities)*

**Answer:** The claim is made in paragraph 1 of the second paragraph on page 2 of the Request for Establishment. It is there that the EC claims that the US is maintaining duties inconsistently, with,

*inter alia*, Articles 21.1 and 21.3.<sup>551</sup> Those provisions require that subsidies be maintained only where subsidization is causing injury.

**Question 26:** *Did the four classes of share offering result in different classes of shares, one common stock, or some combination? (European Communities)*

**Answer:** Usinor has only one class of shares. According to the International Offering Prospectus, all shareholders have the right to participate in general meetings and to vote according to the number of shares they hold. Each share confers on the holder the right to one vote. There is no distinction on the basis of the share offering in which the specific shares were purchased.<sup>552</sup>

**Question 30:** *Did the European Communities provide information related to the effect of different incentives and restrictions on the respective risk premiums of the four classes of share offering? If so, did the USDOC take this information into account? Please see the Usinor Prospectus, inter alia, at pages 21-24. (European Communities/United States)*

**Answer:** In the French Section 129 proceeding, the Government of France (GOF) and Usinor put on the record information regarding the effect of the different incentives and restrictions on the respective prices of the shares. For example, in its comments on the USDOC's preliminary determination in the Section 129 proceeding, Usinor indicated that "the sale of Usinor shares to employees included restrictions on resale that entailed the purchasers to bear increased risks of loss in the market." According to Usinor, "the fair market value of these shares was naturally lower than the Usinor shares sold without similar resale restrictions."<sup>553</sup>

The EC finds no reference to such evidence in the USDOC determination.

**Question 31:** *Where can the Panel find more specific information than that provided in the Usinor Prospectus on the terms of the employee share offering? (European Communities)*

**Answer:** The European Communities has provided the Panel the Order of the French Minister of Economic Affairs and Finance of 26 June 1995 Whereby the Terms for the Privatization of Usinor-Sacilor Are Defined.<sup>554</sup> This order provides in its Article 3:

"9 352 175 actions cédées par l'Etat sont réservées à la souscription des salariés et anciens salariés d'Usinor-Sacilor et de ses filiales visés à l'article 11 de la loi du 6 août 1986 modifiée susvisée.

Les actions ainsi réservées seront cédées au prix de l'offre publique de vente ou avec un rabais de 20 p. 100 sur ce prix, soit au prix de 68,80 F par action. Les actions acquises avec un rabais de 20 p. 100 ne pourront être cédées pendant deux ans."

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<sup>551</sup> A claim is an allegation that particular measures are inconsistent with specific provisions of the covered agreements.

<sup>552</sup> "International Offering Prospectus", p. 78, submitted in GOF/Usinor 2 September 2003 Questionnaire Response, Appendix 4G.

<sup>553</sup> "Comments of Usinor, S.A.," 1 October 2003, p. 3, n.6. Note that the GOF and/or Usinor had submitted similar information in other proceedings before the DOC.

<sup>554</sup> Exhibit EC- 10. This document was provided to USDOC as Appendix 4F to the response of the French Government in the s129 Determination. The original of the document provided, and its English translation, are provided for the facility of the Panel.

Article 2 concerns the general public offer and states:

"Les personnes mentionnées au deuxième alinéa du présent article bénéficieront d'une action gratuite pour dix actions acquises directement de l'Etat à l'occasion de la présente offre, dans la limite, pour ces dernières, d'une contre-valeur ne dépassant pas 30 000 F, à condition qu'elles aient été conservées au moins dix-huit mois."

**Question 32:** *At page 6 of the French Section 129 determination, the USDOC states:*

*"The decision to privatize Usinor and the terms of privatization were executed through an order of the Ministry of Economic Affairs and Finance, based on an opinion by the Privatization Commission, both issued in June 1995. Share prices were set by the Ministry, based on the opinion of the Privatization Commission, in consultation with Banque S.G. Warburg ("Warburg") and the other Global Coordinators of the share offerings, and in accordance with the privatization law. The Privatization Commission stated that it relied upon various valuation methodologies for Usinor including, inter alia, stock-exchange-based comparisons and net liquidity flows. Based on its analysis, the Commission recommended a minimum value for Usinor of FF 15,750 billion."*

*Do the parties consider that this price of FF 15,750 billion is the fair market value (FMV) for Usinor? For what price did the Government of France actually sell Usinor? (European Communities/United States)*

**Answer:** Based on various objective criteria, including those identified by the USDOC in its Section 129 determination discussed above, the Privatization Commission determined that the value of Usinor was not less than FF 15,750 billion. This price, therefore, represents the minimum value of the company on the market. The price for Usinor identified by the Privatization Commission was for the sale of 186,544,395 shares, for an average minimum price of FF 84.43.

By 1997, [XXX] shares had been transferred by the GOF, directly or indirectly, to the public.<sup>555</sup> The total price paid for the shares transferred, directly or indirectly, by the GOF was FF [XXX]. Thus, the average price paid for Usinor shares FF [XXX] exceeded the average minimum price recommended by the Privatization Commission, noted above, of FF 84.43.<sup>556</sup>

**Question 34:** *The Panel understands that the employee/retiree offering was characterised as "preferential" by the Government of France itself. Was this term "preferential" only used to characterize the employee/retiree share offering? (European Communities)*

**Answer:** The term "preferential" was used in the International Offering Prospectus in reference to the employee/retiree share offering. The European Communities does not believe that the Government of France referred to other share offerings as "preferential." However, it clearly considered other share offerings provided advantages (see, e.g. the reference to certain shareholders who had retained their shares, benefiting from free shares - cited in para. 19 above, response to Question 31)

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<sup>555</sup> This figure includes shares sold in 1997 which were considered to be part of the privatization of Usinor. The US Court of International Trade, in its review of the USDOC's remand determination in the *Allegheny Ludlum* case, found that the USDOC had correctly analysed the GOF's sale of the shares in 1997 as part of the privatization process. See *Allegheny Ludlum Corp. v. United States*, 246 F. Supp. 2d. 1304, 1311 (CIT 2002).

<sup>556</sup> The numbers in brackets in the text above contain business confidential information. The European Communities requests that this information not be used in the final report or made public.

**Question 35:** *Did most Usinor employees participate in the employee share offering? (European Communities)*

**Answer:** Yes. Around 35,000 out of Usinor's workforce of 61,000 participated in the employee/retiree offering. Around 30 per cent of the company's retirees purchased shares under this offering.

**Question 36:** *In the French Section 129 determination, the USDOC concludes that the employee share price was "preferential", i.e. lower than the market-clearing price. Yet it also concludes that the employee share resale restriction, together with restrictions on the French offering and the stable shareholders offering, constituted a "committed investment" because these restrictions "were aimed at encouraging the purchasers to hold onto their shares for a period of time".<sup>557</sup> The USDOC stated that "there is no evidence indicating that these commitments distorted the amount that share purchasers were willing to pay"; therefore it concluded that "any committed investments were fully reflected in the share price". Do these findings indicate that the employee share price accurately and fully reflects the employees' willingness to hold onto the shares for a minimum period? Please explain how these findings relate. (European Communities/United States)*

**Answer:** The European Communities would be grateful for an explanation from the United States as to how these two findings relate, after which it will be in a position to offer more specific comments.

#### UK CASE

**Question 41:** *Which subsidy programmes is the United States currently countervailing? Which recurring programmes form the basis of the USDOC's affirmative determination of likelihood of continuation or recurrence of subsidisation in the UK Section 129 determination? (European Communities/United States)*

**Answer:** The European Communities would, like the Panel, welcome clarification from the United States on these issues.

**Question 42:** *What evidence did the European Communities/UK Government/Corus provide regarding recurring subsidisation? When did they provide it? In the Section 129 determination? In the sunset review? Please distinguish between evidence on general programmes and those specific to either British Steel or Glynwed, if applicable. In the Section 129 determination, did they provide any evidence on the same programmes additional to that evidence already provided in the sunset review? Did the evidence regarding non applicable/non longer available subsidy programmes submitted during the sunset review concern the countervailed subsidy programmes benefiting Glynwed? (European Communities/United States)*

**Answer:** The European Communities, the UK Government and Corus provided evidence demonstrating that: (i) Glynwed no longer produced the subject merchandise; (ii) the benefits conferred by certain of the subsidy programmes that were not specific to BS plc were entirely amortised, and (iii) the subsidy programmes that were not specific to BS plc had been abolished or were no longer available to the UK steel industry.<sup>558</sup> This evidence was submitted in the Section 129 proceeding, after the USDOC issued its draft Section 129 determination on 24 September 2003. Prior to the USDOC's issuance of its draft Section 129 determination (i.e., in the sunset review and in the early stages of the Section 129 proceedings), the entire focus by both the USDOC and the parties had

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<sup>557</sup> France Section 129 determination, p. 9.

<sup>558</sup> See EC FWS, paras. 51-58.

been on the privatization of BS plc and its impact on the subsidies that had previously been found to confer a benefit on the government-owned entity.

The Panel's question also asks whether evidence was also submitted regarding the subsidies bestowed upon BS plc. However, the evidence regarding that entity submitted in the sunset review and the Section 129 proceeding focused on its privatization, and whether the privatization extinguished the prior non-recurring subsidies that it had received when it was a government-owned entity.

**Question 43:** *When did Glynwed stop production of the product at issue? When did respondents first submit this evidence? Why didn't the respondents provide this evidence during the sunset review investigation? (European Communities)*

**Answer:** At the time of the investigation in 1993, Glynwed was primarily a producer of steel bar products, which are outside the scope of the investigation and the countervailing duty order. However, the width of one of its bar products appeared to fall within the scope of the CTL Plate petition filed in 1992. On 21 May 1999, Glynwed sold the equipment, inventory, and certain other assets of its bar-producing businesses to an unaffiliated US producer, Niagara LaSalle.<sup>559</sup> After that date, Glynwed no longer produced merchandise that could have fallen within the scope of the countervailing duty order.

This evidence was submitted in the Section 129 proceeding, after the USDOC issued its draft Section 129 determination on 24 September 2003. Prior to the USDOC's issuance of its draft Section 129 determination (i.e., in the sunset review and in the early stages of the Section 129 proceedings), the entire focus by both the USDOC and the parties had been on the privatization of BS plc and its impact on the subsidies that had previously been found to confer a benefit on the government-owned entity.

The USDOC was certainly aware that Niagara-LaSalle had purchased equipment, inventory and other assets from Glynwed. In fact, as early as November 1999, the USDOC determined that Niagara-LaSalle was the successor-in-interest to Glynwed in an antidumping and countervailing duty review concerning hot-rolled lead and bismuth carbon steel products from the UK.<sup>560</sup>

**Question 45:** *What is the cash deposit rate(s) for the relevant products in this case? Is the legal basis for this cash deposit rate(s) the original investigation, the original sunset review, or the revised sunset review provided in the Section 129 determination? (European Communities/United States)*

**Answer:** The cash deposit rates for imports of the subject merchandise remain 0.79 per cent for Glynwed and 12.00 per cent for "all other" manufacturers/exporters.

**Question 49:** *Given the text of Article 21.1 SCM, which provides that "a countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidisation which is causing injury", could one assume that a change in circumstances, especially one affecting the level of subsidised imports, would require an authority to reevaluate injury? What is the relationship between the obligations in Article 21.1 SCM and Article 21.3 SCM? (European Communities/United States)*

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<sup>559</sup> See EC FWS, paras. 51-52.

<sup>560</sup> See: (Case C-412-810) Certain Hot-Rolled Lead and Bismuth Carbon Steel Products From the United Kingdom: Final Results of Changed- Circumstances Antidumping and Countervailing Duty Administrative Review; Decision of 30 November 1999 (64 FR 66880) (Exhibit EC-11).

**Answer:** The European Communities believes that Article 21.1 is a general rule which finds specific expression in Article 21.3.<sup>561</sup> There is, therefore, in the circumstances before the Panel, an obligation to reevaluate injury.

#### SPANISH CASE

**Question 50:** *In its First written submission, the United States argues that "USDOC assumed that the privatization[] in ... Spain [was] at arm's-length and for fair market value"<sup>562</sup> Can the United States identify in the text of the Spain Section 129 determination the facts and circumstances on the basis of which the USDOC "assumed" that the privatization of Aceralia was at arm's length and for FMV? (United States)*

**Question 51:** *Which subsidy programmes is the United States currently countervailing? Which recurring programmes form the basis of the USDOC's affirmative determination of likelihood of continuation or recurrence of subsidisation in the Spain Section 129 determination? (European Communities/United States)*

**Answer:** The European Communities would, like the Panel, welcome clarification from the United States on these issues.

**Question 52:** *What evidence did the European Communities/Government of Spain provide regarding recurring subsidisation? When did they provide it? In the Section 129 determinations? In the sunset reviews? Please distinguish between evidence on general programmes and those specific to Aceralia. In the Section 129 determination, did they provide any evidence on the same programmes additional to that evidence already provided in the sunset review? (European Communities/United States)*

**Answer:** The European Communities and the Government of Spain provided evidence as to the "recurring subsidies", which demonstrated that the programmes that had been found to be countervailable by the USDOC in the investigation had been abolished or had ceased to provide any meaningful benefits to the exporters of the subject merchandise. Specifically, the European Communities reviewed the programmes that had originally been countervailed in the investigation, and noted that they either no longer existed (the Royal Decree 878/81 and the 1984 Council of Ministers Meeting, and the 1987 Government Delegated Commission on Economic Affairs), no longer applied to the steel industry (the Law 60/78), or would shortly cease to exist (Article 54 ECSC Loans).<sup>563</sup> The latter programme in fact has since ceased to exist in light of the expiry of the ECSC itself in July 2002.

The European Communities and the Government of Spain submitted this evidence to the USDOC in the sunset review, and reiterated these points in the Section 129 proceeding, after the USDOC issued its draft Section 129 determination.<sup>564</sup>

Although the Panel's question also asks to distinguish between evidence on general programmes and those specific to Aceralia, the information submitted specifically regarding Aceralia focused on the privatization of the former government-owned entity and whether the privatization extinguished the prior non-recurring subsidies bestowed upon that entity. In addition, as noted above, the Government of Spain and the European Communities had provided information to the USDOC demonstrating generally that the programs that had previously been identified as providing recurring

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<sup>561</sup> See paras. 7.107 and 7.108 of the Panel's original report.

<sup>562</sup> US First written submission, para. 49.

<sup>563</sup> EC Sunset Review Response on Spain, p. 3.

<sup>564</sup> See EC FWS, paras. 24, 59.



subsidies to the government-owned entity, had been abolished or ceased to provide meaningful benefits to the exporters of the subject merchandise. This information had been provided to the USDOC in both the sunset review and the Section 129 proceeding.

**Question 53:** *What is the cash deposit rate(s) for the relevant products in this case? Is the legal basis for this cash deposit rate(s) the original investigation, the original sunset review, or the revised sunset review provided in the Section 129 determination? (European Communities/United States)*

**Answer:** The cash deposit rate for imports of the subject merchandise remains 36.86per cent for both Aceralia and "all other" manufacturers/exporters.

## ANNEX B

### RESPONSES OF THE UNITED STATES TO QUESTIONS BY THE PANEL

#### SCOPE OF THE PANEL'S MANDATE

**Question 1:** *In its written submissions, the United States refers inter alia to two excerpts from the Appellate Body Report in EC- Bed Linen: "we do not see why that part of a redetermination that merely incorporates elements of the original determination ... would constitute an inseparable element of the measure taken to comply with the DSB rulings in the original dispute"; and "India [sought] to challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings to make that measure consistent ... ." Given the specific facts and circumstances in EC – Bed Linen, please explain how the Appellate Body ruling applies to this dispute. In other words, how do the relevant facts and circumstances in EC – Bed Linen apply to the facts and circumstances of the three Section 129 determinations at issue? (United States)*

**Answer:** In EC – Bed Linen, India sought to use the Article 21.5 proceeding to have the Panel address issues that were not related to compliance with the Dispute Settlement Body's ("DSB") recommendations and rulings in the underlying dispute. The European Communities ("EC") opposed India's efforts and explained why permitting India to advance such claims in an Article 21.5 proceeding would be "manifestly unfair":

"Article 21.5 advances the purpose of achieving a 'prompt' settlement of the disputes by providing an expeditious procedure to establish whether a Member has properly implemented the DSB recommendations and rulings ... . The accelerated process provided for in Article 21.5 is not necessary, however, with respect to claims that could have already been pursued before the original panel. Article 21.5 is not intended to provide a 'second service' to complaining parties which, by negligence or calculation, have omitted to raise (or argue) certain claims during the original proceeding.

India's reading of Article 21.5 would diminish the procedural rights of defendants for no good reason, thereby altering the balance of rights and obligations of Members which the DSU purports to maintain. In the first place, the deadlines are shorter in Article 21.5 proceedings, thus rendering more difficult the defence. Second, and more importantly, the defending party would not be entitled to a "reasonable period of time", with the consequence that ... 'A Member ... might, depending on the nature of the violation, be subjected to suspension of concessions'.

In so far as India did not pursue a claim with respect to a finding set out in the original measure before the original panel, the EC could assume legitimately that such finding was WTO consistent and did not need to be corrected. It would be manifestly unfair to expose the EC to the possibility of an immediate suspension of concessions under Article 22 of the DSU in response to a violation which the EC could not have anticipated when the implementing measures were taken and which it will be given no opportunity to correct."<sup>565</sup>

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<sup>565</sup> Appellee Submission of the European Communities, paras. 139-142 (citations omitted) (Exhibit US-6).

The EC argued that "the right to make a claim must be exercised promptly, with the consequence that Article 21.5 of the *DSU* must be interpreted as excluding the possibility to raise or argue for the first time a claim before an Article 21.5 Panel when the same claim could have been pursued before the original panel."<sup>566</sup> In short, the EC did not appear to believe, when it was a respondent, that the limitations inherent in an Article 21.5 proceeding were a "technicality," a position the EC is now adopting as a complainant.

The Appellate Body agreed with the position the EC adopted at that time, and which the EC appears to disagree with now, *i.e.*, that unchanged parts of an original measure, which did not have to be changed in order to comply with the DSB recommendations and rulings, are not subject to Article 21.5 proceedings. The quotation in the Panel's question confirms that point.

The facts of this dispute conform precisely to the scenario in *EC – Bed Linen*. Just as the EC argued that India should not be permitted to use Article 21.5 to advance claims that "could have already been pursued before the original panel" because the EC "could assume legitimately that such finding was WTO consistent and did not need to be corrected," so the EC should not be permitted to do so here.

In this dispute, the DSB recommendations and rulings concerned privatization and privatization alone. With respect to the British sunset review, the EC's arguments concerning Glynwed are unchanged findings from the original proceeding. In the original sunset review, USDOC determined that subsidization was likely to continue or recur not only because of British Steel, but also because of Glynwed. USDOC's conclusion regarding Glynwed was *not* predicated on a privatization analysis.<sup>567</sup> Therefore, USDOC's finding regarding Glynwed is an aspect of the original determination that did not change and did not have to change to comply with the DSB recommendations and rulings. As the EC noted in *EC – Bed Linen*, "the re-determination confirmed, without making any changes, the findings made in the original determination ... . That confirmation was made for reasons of transparency and legal certainty and was not, from a legal point of view, strictly necessary ... ."<sup>568</sup> The same is true for the finding regarding Glynwed. As a result, consistent with *EC – Bed Linen*, an Article 21.5 proceeding is not the appropriate forum to address any grievances the EC might have regarding USDOC's Glynwed findings.

The posture of the Spanish sunset review is the same. In the original sunset review, USDOC determined that subsidization was likely to continue or recur not only because USDOC concluded that the privatization of Aceralia did not extinguish the benefit from non-recurring (and hence allocable), pre-privatization subsidies, but because of the existence of other subsidy programs that do not confer allocable subsidies (because they provide recurring subsidies).<sup>569</sup> Therefore, USDOC's finding regarding the other subsidy programs is an aspect of the original determination that did not change and did not have to change to comply with the DSB recommendations and rulings and, as the EC argued in *EC – Bed Linen*, is not subject to Article 21.5 proceedings.

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<sup>566</sup> Appellee Submission of the European Communities, para. 147 (Exhibit US-6). Indeed, the EC even went so far as to suggest that permitting a complaining Member to advance a claim in an Article 21.5 proceeding when that claim could have been brought in the original proceeding implicated the "requirement to engage in dispute settlement procedures in good faith." *Id.*, para. 143.

<sup>567</sup> *Issues and Decision Memorandum in Cut-to-Length Carbon Steel Plate from the United Kingdom: Final Results of Expedited Review of Countervailing Duty Order*, 65 Fed. Reg. 18309 (April 7, 2000) (Exhibit EC-6).

<sup>568</sup> Appellee Submission of the European Communities, para. 131 (Exhibit US-6).

<sup>569</sup> *Issues and Decision Memorandum in Cut-to-Length Carbon Steel Plate from Spain*, p. 13-14 (Exhibit EC-7).

With respect to arguments about the International Trade Commission's ("ITC") likelihood of injury determination, the EC in *EC – Bed Linen* again provides an apt assessment of the situation. "Those elements of the original determination that were not addressed in the re-determination ... are not part of the measure 'taken to comply'. Instead, they are part of the original measure and, as such, cannot be challenged before an Article 21.5 Panel but only before an ordinary Panel established in accordance with Article 4.7 of the *DSU*."<sup>570</sup> The United States agrees, as did the Appellate Body when it confirmed that unchanged parts of a measure that did not have to be changed to comply with the DSB recommendations and rulings are not properly part of an Article 21.5 proceeding.

The United States is not arguing that all of the EC's claims are beyond the scope of this Panel. For the sunset review from France, the United States agrees that it is proper for this Panel, as part of its Article 21.5 jurisdiction, to review USDOC's revised privatization analysis of Usinor. USDOC's revised privatization analysis was not part of the original determination and was a change necessary to comply with the DSB recommendations and rulings.

In the words of the EC, to permit consideration of the claims regarding Glynwed, the recurring Spanish subsidy programs, and injury in this forum would provide a "second service" to a complaining party that, "by negligence or calculation" omitted to raise the claims during the original proceeding; it would "diminish the procedural rights" of the United States "for no good reason;" and would deprive the United States of a "reasonable period time" to come into compliance. The United States "could assume legitimately" that these findings were "WTO consistent and did not need to be corrected." It would be "manifestly unfair to expose" the United States to the "possibility of an immediate suspension of concessions ... in response to a violation which the" United States "could not have anticipated when the implementing measures were taken and which it will be given no opportunity to correct." Thus, the material facts and circumstances of *EC – Bed Linen* are perfectly analogous to the facts and circumstances in this dispute.

The EC has argued that *EC – Bed Linen* is factually distinct from the present dispute because in the former India advanced the same claim in both the original proceeding as well as the Article 21.5 proceeding. However, as the excerpts from the EC's appellee submission in that dispute confirm, the argument the EC advanced, and which the Panel and the Appellate Body accepted, was not limited to situations in which the "same claim" was being advanced; the EC logically argued that a claim that could have been brought in the original proceeding could not for the first time be brought in an Article 21.5 proceeding. Indeed, the fact that India was attempting to raise the same claim merely provided, in the EC's view, "additional grounds"<sup>571</sup> – not the only grounds – for considering India's claim beyond the scope of an Article 21.5 proceeding. The Appellate Body's conclusions, as quoted by the Panel in this question, demonstrate that its conclusions regarding the scope of an Article 21.5 proceeding are not limited to situations in which the same claim is advanced. Instead, they apply more broadly to situations in which a Member raises a claim that does not pertain to the measure taken to comply.

**Question 3:** *Is the USDOC asserting that the change-of-ownership methodology had no material effect on the other elements of the sunset review determination? Is the USDOC arguing that even if the new change-of-ownership methodology resulted in a changed amount of subsidisation, this finding would not require the USDOC to revise the entire determination? (United States)*

**Answer:** The United States does assert that application of its new privatization methodology did not change the challenged subsidy likelihood determinations – those determinations remained affirmative despite the reexaminations performed in the revised sunset reviews. In addition, the United States

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<sup>570</sup> Appellee Submission of the European Communities, para. 134 (Exhibit US-6).

<sup>571</sup> Appellee Submission of the European Communities, para. 149 (Exhibit US-6) (Emphasis added).

disputes, for the reasons explained below, that the revised sunset reviews could have resulted in a changed amount of subsidization.

Article 21.3 of the *SCM Agreement* provides that a definitive countervailing duty must be terminated after five years unless the authorities determine that the "expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury." The focus of a sunset review under Article 21.3 is thus on future behavior, *i.e.*, whether subsidies and injury are likely to continue or recur in the event of expiry of the duty.

USDOC's subsidy likelihood determination is not dependent on the *magnitude* of the subsidy rate in any prior segment of the countervailing duty proceeding, and USDOC does not calculate a subsidy rate for purposes of the subsidy likelihood determination itself.<sup>572</sup> Further, USDOC conducts its subsidy likelihood determination on an order-wide, not company-specific, basis, unlike certain determinations in investigations and assessment reviews.<sup>573</sup>

In sum, application of USDOC's new privatization methodology to the revised sunset review determinations cannot have had any impact on subsidy calculations. Application of the new privatization methodology did not result in the elimination of subsidization on an order-wide basis. In the British review, the analysis of Glynwed's subsidies was not based on the privatization methodology; similarly, in the Spanish review, the analysis of the recurring Spanish subsidy programs was not based on any privatization methodology.

**Question 4:** *Does the United States consider that the amount of subsidisation is relevant for the purpose of determining injury? Is the same consideration also relevant in the context of a Sunset review? (United States)*

**Answer:** Nothing in Article 15 of the *SCM Agreement* requires investigating authorities to consider the level of subsidization in an injury analysis. Nor does Article 21.3 require that the authorities consider the level of likely subsidization in determining whether injury is likely to continue or recur. If the Panel is asking about the relationship between Article 15 and Article 21.3, the United States notes that Article 3 of the Antidumping Agreement does not apply to sunset reviews under Article 11.3 of that Agreement;<sup>574</sup> by direct analogy, Article 15 of the *SCM Agreement* does not apply to Article 21.3 sunset reviews of countervailing duty orders.

**Question 5:** *If by implementing the DSB recommendations and rulings, another inconsistency arises, do the parties believe that an investigating authority is obligated to address this further inconsistency in the context of the DSB recommendations and rulings? Please comment in light of the following excerpt from paragraph 79 of the Appellate Body Report in EC – Bed Linen:*

*"... It is to be expected, therefore, that the claims, arguments, and factual circumstances relating to the "measure taken to comply" will not, necessarily, be the same as those relating to the measure in the original dispute.<sup>575</sup> Indeed, a complainant in Article 21.5 proceedings may well raise new claims, arguments, and factual circumstances different from those raised in the original proceedings, because a "measure taken to comply" may be inconsistent with WTO obligations in ways*

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<sup>572</sup> Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, para. 127 (the authorities in an antidumping sunset review need not "calculate or rely" on dumping margins).

<sup>573</sup> *Id.* at paras. 155-158 (Sunset likelihood determination may be made on an order-wide basis).

<sup>574</sup> See, Appellate Body Report, *United States – Sunset Reviews of Antidumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted December 17, 2004, para. 280.

<sup>575</sup> (footnote original) *Ibid.*

*different from the original measure. In our view, therefore, an Article 21.5 panel could not properly carry out its mandate to assess whether a "measure taken to comply" is fully consistent with WTO obligations if it were precluded from examining claims additional to, and different from, the claims raised in the original proceedings.*<sup>576</sup> (European Communities/United States)

**Answer:** At the outset, the United States notes that the factual situation put forth in the question is not the factual situation before the Panel. The newly alleged inconsistencies did not arise in the implementation of the DSB recommendations and rulings. USDOC's findings regarding Glynwed, the Spanish subsidy programs, and the ITC's likelihood of injury determination were unchanged parts of the original measure. Therefore, the EC's claims in that regard are not alleged "inconsistencies" "arising" out of implementation of the recommendations and rulings but rather are aspects of the original determination that are simply, in the words of the EC, "confirmed, without making any changes ... for reasons of transparency" in the revised determination.<sup>577</sup>

In the *Bed Linen* quotation that the Panel cites above, the Appellate Body cited to *Canada – Aircraft*. The quotation from *Canada – Aircraft* makes clear that if the measure taken to comply is itself WTO-inconsistent, then an Article 21.5 panel may review the measure taken to comply for WTO-inconsistencies. Article 21.5 provides two bases for review of a "measure taken to comply" – either there is a claim that no such measure exists, or there is a claim that the measure is inconsistent with a covered agreement. In either case, though, the Panel is reviewing only a "measure taken to comply." There is no reference in Article 21.5 to any other type of measure, and therefore there is no jurisdiction under Article 21.5 to review any other measure. Accordingly, a panel's review under Article 21.5 of a measure taken to comply is not limited to the DSB recommendations and rulings; if inconsistencies with WTO obligations other than those addressed in the DSB recommendations and rulings arise with respect to those aspects of the determination that changed to comply with the recommendations and rulings, then an Article 21.5 panel would have jurisdiction to review those changed aspects for WTO consistency.

**Question 6:** *Which laws and regulations govern a Section 129 proceeding? How does the Section 129 procedure work in practice? Please explain the respective responsibilities of the USTR and the USDOC in Section 129 proceedings and how these agencies interrelate. (United States)*

**Answer:** Section 129(b) of the Uruguay Round Agreements Act, codified at 19 U.S.C. 3538(b), addresses instances in which the DSB has found that an action taken by USDOC in an antidumping or countervailing duty proceeding is inconsistent with US obligations under the AD or SCM Agreement.<sup>578</sup> In such an instance, USTR may ask USDOC to issue a determination that would render that agency's action not inconsistent with the recommendations and rulings of the DSB. USTR plays no role in that determination. USDOC will then issue the revised determination within 180 days of receiving the request from USTR.

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<sup>576</sup> (footnote original) As we put it in *Canada – Aircraft (Article 21.5 – Brazil)*:

Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply", as required by Article 21.5 of the DSU.

(Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41) We defined the function of Article 21.5 proceedings in the same vein in our Report in *US – Shrimp (Article 21.5 – Malaysia)* (para. 87).

<sup>577</sup> Appellee Submission of the European Communities, para. 131 (Exhibit US-6).

<sup>578</sup> See *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted August 30, 2002.

Section 129(b) also provides that USTR may direct USDOC to "implement" its revised determination for purposes of US law. The Statement of Administrative Action provides an explanation of what this language means in the context of the statute:

"The Trade Representative may decline to request implementation of the [revised] determination. This might be the case, for example, if USDOC issued a final affirmative subsidy determination and a WTO panel subsequently finds that USDOC's analysis was not consistent with the Subsidies Agreement. On making a new determination at the Trade Representative's direction, USDOC could correct the analytical flaw found by the Panel without changing the original outcome. In such a case, there would be no need to implement the new determination as a matter of domestic law."<sup>579</sup>

The circumstances discussed in this passage describe precisely the situation in the Article 21.5 matter before the Panel.

The present dispute involves three sunset reviews. Under the US system, a sunset review only determines whether an order is continued or revoked. It does not affect companies on an individual basis except if the order is revoked. With respect to these three reviews, USDOC's revised determinations were affirmative and the orders were therefore continued. For that reason, companies' entries were not affected by the revised determination, and there was no need to "implement" for purposes of US law.

**Question 7:** *What are the implications if the USTR does or does not direct implementation? (United States)*

**Answer:** In the case of the three reviews at hand, the absence of a direction to implement has no implications. Under US law, there was no need to implement because the revised determinations did not affect the outcome; for example, the revised determinations did not result in revocation of the order. Therefore, USTR exercised its discretion not to direct implementation.

**Question 8:** *Does the USDOC have the discretion to implement DSB recommendations and rulings on its own initiative? Has the USDOC done so on any occasion? If so, under which circumstances? (United States)*

**Answer:** USDOC has no independent authority to implement DSB recommendations and rulings on its own initiative. The Section 129 process is the standard procedure through which USDOC revises determinations to come into compliance.

**Question 9:** *Does the USDOC have the discretion to recalculate the margin of subsidisation in a Section 129 proceeding? If so, under which conditions could a revised margin lead to a new likelihood-of-injury determination? (United States)*

**Answer:** As stated above, USDOC does not, and is not required to, recalculate margins of subsidization in sunset reviews. Consequently, any revisions to USDOC's sunset determinations that might be occasioned by a proceeding under Section 129 cannot result in any recalculations to margins of subsidization.

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<sup>579</sup> Statement of Administrative Action, p. 356 (Exhibit US-7).

**Question 10:** *Does the USDOC have the discretion to open the record and consider new evidence in a Section 129 proceeding? Has the USDOC done so on any occasion? If so, under which circumstances? (United States)*

**Answer:** USDOC may consider new evidence where it is relevant to the measure taken to comply, which in this case involved the application of USDOC's new privatization methodology. Under the *Modification Notice*, a number of factual issues must be resolved when USDOC applies its new privatization methodology. Consequently, where it was necessary for USDOC to apply the new methodology for purposes of resolving those factual issues, USDOC gave the interested parties an opportunity to submit new evidence, and USDOC considered that evidence.

**Question 11:** *In a Section 129 proceeding, does the USDOC have the discretion to reconsider evidence already on the record in the underlying determination? Has the USDOC done so on any occasion? If so, under which circumstances? (United States)*

**Answer:** In a proceeding under Section 129, USDOC may consider relevant evidence from the underlying determination. USDOC may, however, either take action on its own to move such evidence onto the record of the Section 129 proceeding or offer interested parties the opportunity to place such evidence on the record. Evidence from the underlying determinations was placed on the record of several of the Section 129 proceedings occasioned by the DSB recommendations and rulings in this case – including all of the revised French and Italian reviews – and USDOC considered that evidence.<sup>580</sup>

**Question 12:** *What are the main features of an "expedited" sunset review? How does this compare to other types of sunset reviews? (United States)*

**Answer:** In an "expedited" sunset review under section 751(c)(3)(B) of the Tariff Act of 1930, as amended ("Act"), USDOC normally will issue a final determination within 120 days of the initiation of the sunset review; in a "full" sunset review, USDOC's deadline is 240 days under section 751(c)(5)(A) of the Act.

The additional difference between "expedited" and "full" sunset reviews at USDOC is that, in the case of the latter, USDOC will issue preliminary results before issuing final results in the review.

**Question 13:** *In a sunset review, as a matter of practice, does the USDOC make a finding on the rate of subsidisation? (United States)*

**Answer:** No. See Response to Question 3.

**Question 14:** *Does US law require the USDOC to determine a rate likely to prevail and report this rate to the ITC in the sunset review? For what purpose? (United States)*

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<sup>580</sup> See, for example, *Issues and Decision Memorandum for the Determination Under Section 129 of the Uruguay Round Agreements Act: Countervailing Duty Administrative Review: Grain-Oriented Electrical Steel from Italy* (24 October 2003), p. 4 (Exhibit US-8) (USDOC looked at new evidence in concluding that privatization extinguished the benefit).



**Answer:** In a sunset review, US law requires that USDOC report to the ITC a rate likely to prevail in the event of revocation. That rate is not calculated in the sunset review, and it is not used for the imposition, collection, or assessment of duties. Nor does USDOC use it to determine whether countervailable subsidization is likely to continue or recur in the event of revocation. The ITC *may* consider the rate in making its likelihood of injury determination. In these reviews, the ITC did not rely on the rates.

**Question 15:** *Does the USDOC have the discretion to open the record and consider new evidence in an expedited sunset review? Does the USDOC have the discretion to open the record and consider new evidence in other types of sunset reviews? (United States)*

**Answer:** During the course of a sunset review, expedited or otherwise, USDOC solicits and accepts information from parties, all of which is then considered in making a final determination. For expedited sunset reviews, *see* 19 C.F.R. §351.308(f); 19 C.F.R. §351.218(d)(3). For sunset reviews in general, *see* 19 C.F.R. §351.218(e)(2); 19 C.F.R. §351.218(d)(3).

**Question 16:** *At page 7 of the UK Section 129 determination the USDOC states: "The Department's duty, in reaching a determination under Section 129(b)(2) of the URAA for this case, is not to reconduct the original sunset review in its totality, but to render it not inconsistent with the findings of the Appellate Body." Does the UK Section 129 determination also intend to render the original sunset review not inconsistent with the adopted findings of the Panel? (United States)*

**Answer:** USDOC's Section 129 determination was intended to render the original sunset review not inconsistent with the recommendations and rulings of the DSB. The DSB adopted both the Appellate Body report and the Panel report as modified by the Appellate Body.

**Question 18:** *How did the United States implement the DSB's recommendations and rulings in the three sunset reviews at issue? In the Notice of Implementation, the USDOC indicates that "[b]ecause the US Trade Representative declined to direct the Department to implement the revised determinations with regard to the four sunset reviews involved in the WTO dispute, [the USDOC is] not implementing these Section 129 Determinations". What constitutes "implementation" in these cases? (European Communities/United States)*

**Answer:** As a previous panel has noted, terms used in a Member's municipal law and those used in WTO provisions "do not necessarily have the same meaning."<sup>581</sup> In this dispute, the United States implemented the recommendations and rulings of the DSB by revising the determinations to render them not inconsistent with those recommendations and rulings. However, for purposes of US law, USTR determined that it was unnecessary to "implement" the revised determinations because, as discussed in greater detail above, the revisions could not have resulted in revocation of any of the orders.

**Question 19:** *If the Section 129 determinations constitute "implementation" in the four sunset cases, what is the relevance of the fact that the USTR declined to direct implementation? Does the absence of the USTR's direction to implement affect the legal status of the three Section 129 determinations at issue? If so, to what extent? (United States)*

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<sup>581</sup> *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted January 27, 2000, para. 7.20.

**Answer:** As noted above, the United States implemented for purposes of the WTO by revising the determinations in question. However, because complying with the DSB recommendations and rulings did not require the United States to change the outcome of the determinations, there was no need, under US law, for USDOC to "implement." Accordingly, the absence of USTR direction to implement means that the three determinations remain unimplemented under US law, but implementation would not have resulted in the revocation of any of the orders.

**Question 20:** *Why did the USTR direct the USDOC to implement eight of the twelve Section 129 determinations and then decline to direct the USDOC to implement the other four Section 129 determinations? (United States)*

**Answer:** Bringing eight of the twelve determinations into compliance with the DSB recommendations and rulings resulted in either a change to the cash deposit rate or revocation of the order. Therefore, USTR "directed" USDOC to implement in order to modify the cash deposit rate or revoke the order. Bringing the remaining four determinations into compliance only required USDOC to correct – as the SAA describes it – an "analytical flaw" (the privatization methodology) and did not affect the outcome of the review. As a result, there was no need to implement as a matter of US law.

**Question 21:** *Do the parties agree that the three Section 129 determinations at issue are the measures taken to comply in these Article 21.5 proceedings? (European Communities/United States)*

**Answer:** Those aspects of the Section 129 determinations that represent revisions to the original determinations in order to comply with the DSB recommendations and rulings are the measures taken to comply in these proceedings. With respect to these revised determinations, the revised privatization analysis of Usinor is a measure taken to comply. By contrast, any findings regarding Glynwed and the Spanish subsidy programs in the revised sunset review are not measures taken to comply because they are unchanged aspects of the original determination having nothing to do with privatization, and they therefore did not need to be changed in order to come into compliance with the DSB recommendations and rulings.

**Question 22:** *During the meeting, the United States said it understood its obligation to implement the DSB recommendations and rulings in respect of privatization as requiring it to "remove the taint". What did the United States mean by the term "remove the taint"? What impact does it have on the revised sunset determinations? (United States)*

**Answer:** The DSB recommendations and rulings addressed the WTO-consistency of USDOC's privatization methodology. The Panel and the Appellate Body concluded that USDOC's analysis of the continuing benefit inuring to British Steel after its privatization was not consistent with US WTO obligations.

As the Panel stated, the sunset reviews "based on the gamma methodology" are inconsistent with the *SCM Agreement*.<sup>582</sup> Thus, USDOC eliminated its reliance on a flawed privatization methodology by assuming that the privatization of British Steel extinguished any continuing benefit. As the United States has noted, USDOC's original determination to continue the sunset order was not based solely on findings resulting from use of the flawed methodology; the *Issues and Decision Memorandum* in the original sunset determination noted that Glynwed also benefited from a subsidy program, and Glynwed's subsidization was not subject to a privatization analysis.<sup>583</sup> Therefore, the

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<sup>582</sup> Panel, para. 8(1)(c).

<sup>583</sup> *Issues and Decision Memorandum in Cut-to-Length Carbon Steel Plate from the United Kingdom: Final Results of Expedited Review of Countervailing Duty Order*, 65 Fed. Reg. 18309 (April 7, 2000) (Exhibit EC-6), p. 6, 13.

revised determination is no longer based on the flawed methodology, and the United States has thereby complied with the recommendations and rulings of the DSB.

The same is true of the Spanish review, where the original sunset determination was based not only on the existence of non-recurring subsidies, but also on the existence of recurring subsidies. The latter are not affected by privatization and therefore were not subject to the DSB recommendations and rulings.

**Question 23:** *Does the United States argue that it has complied with the DSB recommendations and rulings by referring a respondent company to an alternate procedure, i.e. an administrative review, to obtain a company-specific rate based on the new privatization methodology? (United States)*

**Answer:** No. The DSB recommendations and rulings addressed the following issue: Whether the privatization methodology then used by the United States was consistent with US WTO obligations and whether the US decision, in the context of a sunset review, to continue the order was WTO-consistent in light of the fact that it was based on a flawed analysis of whether the benefit survived the privatization. The Appellate Body confirmed in *Japan Sunset* that order-wide Sunset reviews are permissible and that the United States is not obligated to make company-specific determinations in those reviews.<sup>584</sup> If British Steel wishes to obtain a revised company-specific rate, then the appropriate venue, under US law, is for British Steel to seek an administrative review. However, that would be unrelated to the question of complying with the DSB recommendations and rulings.

**Question 27:** *Can the United States clarify to whom Usinor's employees/retirees are related? Are they related to Usinor, as indicated in the French Section 129 determination, and/or to the Government of France, as argued in the written submissions? (United States)*

**Answer:** For purposes of the application of the new privatization methodology, USDOC does not distinguish between the company and its owner. As employees of Usinor, the employees are related to (or affiliated with) Usinor and, therefore, related to (or affiliated with) the seller, the combined Usinor/Government of France entity.

**Question 28:** *In its Oral Statement, the United States referred for the first time to the concept of "affiliation" to describe the alleged relation between Usinor and its employees/retirees. Could the United States explain what this concept means from a legal point of view? Could the United States provide a citation to US law? Where does the concept of affiliation appear in the French Section 129 determination? (United States)*

**Answer:** "Affiliation" appears in section 771(33) of the Act. It informs USDOC's interpretation of the term "related" as that term was applied in the revised French sunset review under Section 129 in that section 771(33) of the Act makes it clear that the relationship between employers and employees is one of "affiliation." In fact, Question 8 in the questionnaire sent to French respondents in the Section 129 proceeding referred both to relatedness and affiliation in setting forth possible criteria for determining whether the privatization transaction was at arm's length.

Regardless of whether one uses the term "related" or "affiliated," the issue before USDOC was whether there was a relationship between buyer and seller such that it would be prudent to investigate whether that relationship had an impact on the result of the sales process. USDOC concluded that the relationship between Usinor and its employees did necessitate further inquiry. In this regard, the United States notes that Article 15.4 of the Customs Valuation Agreement provides that employers and employees are considered to be related parties. USDOC's view that the

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<sup>584</sup> Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, para. 150.

relationship between employer and employee might influence the price is not without precedent. Thus, for purposes of customs valuation, Members have already agreed that a relationship between an employee and its employer can be grounds for further examination as to whether the price actually paid whether the price actually paid was influenced by the relationship between the buyer and the seller. Similarly, in the French privatization, the fact that USDOC considered the employer and employee – the buyer and the seller – related (or affiliated) simply led to further examination of whether the price the employees paid for the shares, which the seller described as "preferential," was in fact at arm's length and for fair market value.

**Question 29:** *In the French Section 129 determination the USDOC states: "We determine that the employees of Usinor were related to Usinor..."<sup>585</sup> Can the United States indicate the excerpt(s) in this French Section 129 determination where the reasoning for such a conclusion lies? (United States)*

**Answer:** US law provides that employers and employees are to be considered affiliated (related). The fact that USDOC finds parties to be affiliated (related) does not result in a conclusion about whether the transaction was for fair market value; instead, that finding suggests that the transaction merits further scrutiny. USDOC made this precise finding in the draft determination, and no one, including the interested parties, challenged the conclusion.

**Question 30:** *Did the European Communities provide information related to the effect of different incentives and restrictions on the respective risk premiums of the four classes of share offering? If so, did the USDOC take this information into account? Please see the Usinor Prospectus, inter alia, at pages 21-24. (European Communities/United States)*

**Answer:** The EC never provided USDOC with evidence demonstrating that the "costs" of any restrictions on the different share classes fully account for the differences in the prices offered to the buyers. Most especially, the EC never provided USDOC with evidence demonstrating how restrictions on the employee shares might have fully accounted for the special ("preferential") price offered to the employees. Rather, as here, the EC provided USDOC with nothing more than conclusory allegations.

**Question 32:** *At page 6 of the French Section 129 Determination, the USDOC states:*

*"The decision to privatize Usinor and the terms of privatization were executed through an order of the Ministry of Economic Affairs and Finance, based on an opinion by the Privatization Commission, both issued in June 1995. Share prices were set by the Ministry, based on the opinion of the Privatization Commission, in consultation with Banque S.G. Warburg ("Warburg") and the other Global Coordinators of the share offerings, and in accordance with the privatization law. The Privatization Commission stated that it relied upon various valuation methodologies for Usinor including, inter alia, stock-exchange-based comparisons and net liquidity flows. Based on its analysis, the Commission recommended a minimum value for Usinor of FF 15,750 billion."*

*Do the parties consider that this price of FF 15,750 billion is the fair market value (FMV) for Usinor? For what price did the Government of France actually sell Usinor? (European Communities/United States)*

**Answer:** No. That was an appraised value, not a fair market value. An appraised value is – by definition – only an pre-sale estimate. It is not the result of a market process. See Modification

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<sup>585</sup> French Section 129 Decision Determination, p. 6.

Notice, 68 FR at 37131. Moreover, as pointed out in the Issues and Decision Memorandum for the Section 129 Determination: Corrosion-Resistant Carbon Steel Flat Products from France at 7, this particular appraised value was treated by the seller as a "minimum value," not even an estimated sales price.

**Question 33:** *In its First written submission, the United States argues that "although approximately 95 percent of the benefit from previously allocated subsidies was extinguished by the privatization of Usinor, the remaining 5 percent of the allocated subsidy continued to benefit the privatized entity".<sup>586</sup> In its Second written submission, it further states that "USDOC reasonably determined that a corresponding portion of the allocated benefit continued to be countervailable after privatization".<sup>587</sup> During the meeting with the Panel, the United States argued that the privatization extinguished approximately 95 percent of the pre-privatization, non-recurring subsidies. Can the United States please indicate to the Panel the excerpt of the Section 129 determination where that finding can be found? How does the United States reconcile this with the USDOC's position in the Section 129 determination? Specifically, please see the USDOC's statement at page 15 of the French Section 129 determination where the USDOC explains:*

*"In this determination, we have applied the approach laid out in our Modification Notice, which states that, where we find that the baseline presumption is not rebutted because a transaction was not made at arm's length and for fair market value, or because of severe market distortions, "we will find that the company continues to benefit from the prior subsidies in the full amount of the remaining unallocated balance of the subsidy benefit." See Modification Notice, 68 FR at 37138." (United States)*

**Answer:** USDOC found that the benefit associated solely with the employee shares was a sufficient basis for an affirmative subsidy likelihood finding in the revised French sunset review – USDOC took the 95 per cent of the shares that were not sold to Usinor employees out of the analysis because the benefit associated with those shares had been extinguished by an arm's-length/fair market value privatization. See Issues and Decision Memorandum for the Section 129 Determination: Corrosion-Resistant Carbon Steel Flat Products from France; Final Results of Expedited Sunset Review of Countervailing Duty Order, at 10 ("Third, the GOF set and received a market-clearing price for Usinor's shares, except in the employee offering which constituted only 5.16 per cent of the sale. ..."); and at 16 ("As described in the 'Conclusion' section above [p.12], we have determined that the sale of shares to Usinor employees permitted the continuation of certain allocable, non-recurring, pre-privatization subsidies at an above de minimis rate beyond the original sunset review. On this basis, we reaffirm our original likelihood determination. ...").

These findings are entirely consistent with USDOC's statement from page 15 of the France Section 129 determination. The statement quoted by the Panel was USDOC's response to the respondent's argument that, where something less than fair market value (but greater than zero) is paid for a share, the continuing benefit amount should only be the difference between the price actually paid and the fair market value. USDOC had already rejected that approach when formulating its new privatization methodology. Modification Notice, 68 FR at 37138. Rather, under USDOC's new methodology, where less than fair market value is paid for a share, the entire remaining allocable subsidy benefit attributable to that share continues to be countervailable.

**Question 36:** *In the French Section 129 determination, the USDOC concludes that the employee share price was "preferential", i.e. lower than the market-clearing price. Yet it also concludes that the employee share resale restriction, together with restrictions on the French offering and the stable*

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<sup>586</sup> US First written submission, para. 12.

<sup>587</sup> US Second written submission, para. 5.

*shareholders offering, constituted a "committed investment" because these restrictions "were aimed at encouraging the purchasers to hold onto their shares for a period of time".<sup>588</sup> The USDOC stated that "there is no evidence indicating that these commitments distorted the amount that share purchasers were willing to pay"; therefore it concluded that "any committed investments were fully reflected in the share price". Do these findings indicate that the employee share price accurately and fully reflects the employees' willingness to hold onto the shares for a minimum period? Please explain how these findings relate. (European Communities/United States)*

**Answer:** In responding to this question, it is necessary first to clarify the general purpose and scope of USDOC's examination of potential "committed investments." We direct the Panel's attention to the thorough explanation of this issue in the Modification Notice, 68 FR at 37133. A fundamental concern underlying USDOC's examination of committed investments is transparency, that is, whether the parties to the privatization were aware of the committed investment requirements. If the facts of a particular privatization demonstrate the requisite level of transparency, USDOC will generally find that the presence of committed investment requirements is not a basis for finding that the sale was for less than fair market value.

In the revised French sunset review, by finding that the committed investment met the enumerated criteria, USDOC found that any restrictions and requirements were fully known to the potential buyers and, thus were fully reflected in the "amount that share purchasers were willing to pay." This finding was only intended to indicate that the existence of committed investments did not provide an additional reason for concluding that the transaction was not for fair market value, over and above USDOC's other findings with respect to fair market value.

In sum, USDOC's determination that any restrictions or requirements were reflected in the employee sales price does not mean, and was not intended to mean, that the entire discount or extent of the "preference" in the employee share price is fully accounted for by such restrictions or requirements.

**Question 37:** *In its First written submission, the United States argues that "USDOC assumed that the privatization[] in the UK ... [was] at arm's-length and for fair market value".<sup>589</sup> Can the United States identify in the text of the UK Section 129 determination the facts and circumstances on the basis of which the USDOC "assumed" that the privatization of British Steel was at arm's length and for FMV? (United States)*

**Answer:** The United States assumed that the privatization of British Steel was at arm's length and at fair market value based on the recognition that this issue could not affect the outcome of the sunset review, given that the continuation of the order independently relied on the subsidization of Glynwed. As the United States has noted, its task was to bring its measure into compliance with the DSB recommendations and rulings. In doing so, USDOC reviewed the bases for continuation of the order. Because one of the bases for continuing the order was the subsidization of Glynwed, which did not involve privatization and therefore was not affected by the DSB recommendations and rulings, an in-depth privatization analysis of British Steel could not have changed the outcome. Therefore, USDOC simply assumed that the privatization was at arm's length and for fair market value.<sup>7</sup> Because USDOC conducts its sunset reviews on an order-wide basis, the outcome of the sunset review would not have been affected had USDOC instead made a "determination" regarding British Steel, as opposed to simply assuming the privatization was at arm's length and for fair market value.

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<sup>588</sup> France Section 129 determination, p. 9.

<sup>589</sup> US First written submission, para. 49.

**Question 38:** *On the issue of privatization, Brazil cited the following Appellate Body finding:*

*"We have already determined, in US – Lead and Bismuth II, that the gamma method is inconsistent with the obligation under Article 21.2 of the SCM Agreement. That obligation requires an investigating authority in an administrative review, upon receiving information of a privatization resulting in a change in ownership, to determine whether a "benefit" continues to exist. In our view, the SCM Agreement, by virtue of Articles 10, 19.4, and 21.1, also imposes an obligation to conduct such a determination on an investigating authority conducting a sunset review. As we observed earlier, the interplay of GATT Article VI:3 and Articles 10, 19.4 and 21.1 of the SCM Agreement prescribes an obligation applicable to original investigations as well as to reviews covered under Article 21 of the SCM Agreement to limit countervailing duties to the amount and duration of the subsidy found to exist by the investigating authority. Consequently, we see no error in the Panel's finding that, in sunset reviews, the investigating authority, before deciding to continue to countervail pre-privatization, non-recurring subsidies, is obliged to 'examine the conditions of such privatizations and to determine whether the privatized producers received any benefit from the prior subsidisation to the state-owned producers'."*<sup>590</sup>

*In the UK Section 129 determination, the USDOC assumes arguendo that the privatization was at arm's length and for FMV. Then, however, the USDOC states that it received allegations that the privatization was affected by "market distortions"; concludes that such a privatization would not warrant a finding that the privatization extinguished pre-privatization, non-recurring subsidies; and dismisses the issue, explaining that it would not address this issue because it did not address the arm's length/FMV issue. Given all of this, what is the determination on the privatization? (United States)*

**Answer:** USDOC did not make any company-specific determinations on privatizations in the UK Section 129 determination. Rather, USDOC determined that, assuming arguendo that the privatization of British Steel plc was at arm's-length and for fair market value (so that all pre-privatization subsidies were eliminated), there remained a sufficient basis for an affirmative subsidy likelihood determination, i.e., the finding in the original sunset review that other subsidies, not affected by privatization, continued during the life of the order.

**Question 39:** *Given the Appellate Body's recommendations and rulings, how did the USDOC remove the so-called "taint" in this case? Does the United States consider that its removal of the "taint" consists of "assuming arguendo"?* (United States)

**Answer:** USDOC assumed that the privatization of British Steel plc was at arm's length and for fair market value and thereby rendered the revised UK sunset review consistent with the DSB recommendations and rulings. As noted above, USDOC found that there remained a sufficient basis for an affirmative subsidy likelihood determination absent the benefit associated with allocable, pre-privatization subsidies conferred upon British Steel plc. Because the revised determination was not based on a privatization analysis of any kind, the revised determination was no longer "tainted".

**Question 40:** *The United States argues in its submissions that the USDOC assumed in its Section 129 determination that British Steel plc was privatized at arm's length and for FMV. The Panel understands that the only subsidy programmes benefiting British Steel prior to its privatization were non-recurring. Is that correct? If this is the case, if the privatization did in fact extinguish the benefit of those non-recurring subsidies, what is the basis for maintaining the CVD order vis-à-vis British Steel plc?* (United States)

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<sup>590</sup> Appellate Body Report, para. 149 (emphasis added).

**Answer:** As explained above, consistent with Article 21.3 of the *SCM Agreement*, USDOC's subsidy likelihood determination is made on an order-wide basis. Thus, a sunset review does not result in maintenance of an order vis-a-vis one company or another. Rather, the order is simply continued, and those companies subject to the order remain subject to the order. As the United States has noted, if British Steel wishes to have the order revoked vis-a-vis itself, rather than on an order-wide basis, then British Steel may request an assessment review to begin that process.

**Question 41:** *Which subsidy programmes is the United States currently countervailing? Which recurring programmes form the basis of the USDOC's affirmative determination of likelihood of continuation or recurrence of subsidisation in the UK Section 129 determination? (European Communities/United States)*

**Answer:** The current deposit rate for Glynwed is .73 per cent *ad valorem*. For all other exporters, the deposit rate is 12 per cent *ad valorem*. These deposit rates are based on the results of the original investigation, not on the results of the sunset review or the revised sunset review. The original investigation resulted in affirmative findings with respect to the following programs: Equity Infusions into British Steel, Cancelled NLF Debt, Regional Development Grants, the European Regional Development Fund, ECSC Article 54 Loans/Interest Rebates, and Transportation Assistance.<sup>591</sup> There have been no assessment reviews conducted with respect to the UK countervailing duty order, and, thus, there has been no opportunity to revise the deposit rates.

Regarding USDOC's revised likelihood determination in the UK case, USDOC based the affirmative result on its finding in the underlying sunset review that Glynwed is likely to continue to benefit from countervailable subsidies.<sup>592</sup>

**Question 42:** *What evidence did the European Communities/UK Government/Corus provide regarding recurring subsidisation? When did they provide it? In the Section 129 determination? In the sunset review? Please distinguish between evidence on general programmes and those specific to either British Steel or Glynwed, if applicable. In the Section 129 determination, did they provide any evidence on the same programmes additional to that evidence already provided in the sunset review? Did the evidence regarding non applicable/no longer available subsidy programs submitted during the sunset review concern the countervailed subsidy programs benefiting Glynwed? (European Communities/United States)*

**Answer:** The European Communities/the Government of the UK/Corus offered arguments concerning a number of programs in the original sunset review, including programs that benefit or are likely to benefit Glynwed. USDOC rejected those arguments. In the Section 129 proceeding, the EC sought to re-introduce arguments regarding programs that benefit or are likely to benefit Glynwed. However, because the purpose of the Section 129 proceeding was to bring the United States into compliance with the DSB recommendations and rulings, which were limited to privatization, those arguments (and the underlying information) were inapposite.

**Question 44:** *At page 19 of the original sunset review Issues and Decision Memorandum (Exhibit EC-6), the USDOC provides a company-specific rate for Glynwed (0.73 percent) and an all others rate (12.00 percent). Does this mean that the USDOC would have a sufficient basis to recalculate the countervailing duty in a sunset review? If not, what is the source for this rate? (United States)*

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<sup>591</sup> *Issues and Decision Memorandum in Cut-to-Length Carbon Steel Plate from the United Kingdom: Final Results of Expedited Review of Countervailing Duty Order*, 65 Fed. Reg. 18309 (April 7, 2000) (Exhibit EC-6).

<sup>592</sup> *Issues and Decision Memorandum in Cut-to-Length Carbon Steel Plate from the United Kingdom: Final Results of Expedited Review of Countervailing Duty Order*, 65 Fed. Reg. 18309 (April 7, 2000) (Exhibit EC-6), p. 13-14.



**Answer:** Those are the rates from the original investigation. They were not calculated, or recalculated, in the sunset review.

**Question 45:** *What is the cash deposit rate(s) for the relevant products in this case? Is the legal basis for this cash deposit rate(s) the original investigation, the original sunset review, or the revised sunset review provided in the Section 129 determination? (European Communities/United States)*

**Answer:** In addition to the deposit rates for the UK case (see answer to Question # 41), the deposit rate in the Spanish case is 36.86 per cent country-wide, and the deposit rate in the French case is 15.13 per cent (Usinor and country-wide). In both cases, these deposit rates were determined in the investigation (which, in the French case, included recalculation as a result of domestic litigation); no party has requested an assessment review in either of these cases.

**Question 46:** *The Panel notes that sunset reviews in the United States are conducted on an order-wide basis. Please explain why the UK Section 129 determination provides a company-specific rate for Glynwed. (United States)*

**Answer:** USDOC did not assign Glynwed a new company-specific rate in the UK Section 129 determination. The reference to the rate relates back to the rate that USDOC assigned to Glynwed in the original investigation (there were no administrative reviews) and reported to the Commission in the initial sunset determination. As discussed above, in the initial sunset determination, USDOC reported company-specific rates only because the US statute requires USDOC to report likely-to-prevail rates to the ITC.

**Question 47:** *Would a decrease in the volume of subsidized imports pursuant to a likelihood-of-subsidisation determination have an impact on the likelihood-of-injury analysis? (United States)*

**Answer:** The volume of subsidized imports would not be affected by a Section 129 determination finding likelihood-of-subsidization on an order-wide basis. The Appellate Body has clarified that Members are not obligated to make company-specific determinations in sunset reviews of antidumping orders; by analogy, Members are not obligated to make such determinations in sunset reviews of countervailing duty orders.<sup>593</sup> Thus, where, as in the case of the UK Section 129 determination, there is a finding that order-wide subsidization is likely to continue or recur, there would be no change in the volume of imports covered by the order. If, on the other hand, a Section 129 determination by USDOC resulted in an order-wide finding of no likely subsidization, the USTR could direct USDOC to "implement" by revoking the order altogether.

**Question 48:** *Can the United States confirm that the USDOC did not need to revisit the privatization analysis in the UK (and Spain) case(s) because it relied on other grounds for its likelihood-of-subsidization determination? (United States)*

**Answer:** Yes.

**Question 49:** *Given the text of Article 21.1 SCM, which provides that "a countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidisation which is causing injury", could one assume that a change in circumstances, especially one affecting the level of subsidised imports, would require an authority to reevaluate injury? What is the relationship between the obligations in Article 21.1 SCM and Article 21.3 SCM? (European Communities/United States)*

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<sup>593</sup> Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, para. 150.

**Answer:** As this Panel has noted, Article 21.1 establishes a "general rule," and Article 21.3 "seems to provide a specific application" of that general rule.<sup>594</sup> The United States provides for change-in-circumstance reviews pursuant to Article 21.2.

**Question 50:** *In its First written submission, the United States argues that "USDOC assumed that the privatization[] in ... Spain [was] at arm's-length and for fair market value"<sup>595</sup> Can the United States identify in the text of the Spain Section 129 determination the facts and circumstances on the basis of which the USDOC "assumed" that the privatization of Aceralia was at arm's length and for FMV? (United States)*

**Answer:** As was the case with the UK review, it was unnecessary for USDOC to conduct a privatization analysis because there were other, non-privatization grounds for continuing the order. See the US answer to Question 39.

**Question 51:** *Which subsidy programmes is the United States currently countervailing? Which recurring programmes form the basis of the USDOC's affirmative determination of likelihood of continuation or recurrence of subsidisation in the Spain Section 129 determination? (European Communities/United States)*

**Answer:** In the original affirmative countervailing duty determination, the following programs were found to confer countervailable subsidies: (1) Law 60/70 – Long-term Loans from the Bank of Industrial Credit and Equity Infusion; (2) Royal Decree 878/81 – BCI Exceptional Credits, Grants, and Equity Infusion; (3) 1984 Council of Ministers Meeting – Equity Infusions, Loan Guarantees, Share "Issue Premium," and Grant; (4) 1987 Government Delegated Commission on Economic Affairs – Deferral of Social Security and Other Tax Obligations, Grants, and Fund for Employment Promotion and Early Retirement; (5) Contributions Made to INI Special Finance Accounts; and (6) ECSC Article 54 Loans and Loan Guarantees. There have been no assessment reviews to take into account changes to these programs and/or changes to the subsidy rates associated with these programs.

In the Spanish sunset review (and in the revised Spanish sunset review), USDOC's affirmative likelihood determination was based in part on a determination that there are countervailable recurring, non-allocable subsidies provided by programs that continue to exist such as the 1987 Government Delegated Commission on Economic Affairs: Fund For Employment Promotion and Early Retirement.

**Question 52:** *What evidence did the European Communities/Government of Spain provide regarding recurring subsidisation? When did they provide it? In the Section 129 determinations? In the sunset reviews? Please distinguish between evidence on general programmes and those specific to Aceralia. In the Section 129 determination, did they provide any evidence on the same programmes additional to that evidence already provided in the sunset review? (European Communities/United States)*

**Answer:** The European Communities and the Government of Spain offered arguments concerning a number of programs in the original sunset review. USDOC rejected these arguments in the original review.<sup>596</sup> In the Section 129 proceeding, the EC and the Government of Spain sought to re-introduce their earlier arguments regarding recurring subsidies. However, because the purpose of the Section 129 proceeding was to bring the United States into compliance with the DSB recommendations and

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<sup>594</sup> Panel Report, paras. 7.107-7.108.

<sup>595</sup> US First written submission, para. 49.

<sup>596</sup> *Issues and Decision Memorandum in Cut-to-Length Carbon Steel Plate from Spain* (Exhibit EC-7).

rulings, which were limited to privatization, the arguments (and underlying information) on recurring subsidy programs were inapposite.

**Question 53:** *What is the cash deposit rate(s) for the relevant products in this case? Is the legal basis for this cash deposit rate(s) the original investigation, the original sunset review, or the revised sunset review provided in the Section 129 determination? (European Communities/United States)*

**Answer:** See response to Question 45.

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