

**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

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. BACKGROUND	2
A. MEASURES SUBJECT TO THE ORIGINAL PROCEEDINGS	2
B. PANEL AND APPELLATE BODY FINDINGS IN THE ORIGINAL PROCEEDINGS.....	2
C. CURRENT PROCEEDINGS	3
III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS.....	4
A. THE EUROPEAN COMMUNITIES	4
B. THE UNITED STATES.....	4
IV. ARGUMENTS OF THE PARTIES.....	5
A. FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES	5
1. Introduction.....	5
2. Certain corrosion-resistant carbon steel flat products from France	5
(a) The privatization of Usinor as a whole was at arm's length and for FMV	5
(b) The shares sold through the employee/retiree offering were at arm's length and for FMV	6
(c) The United States is not in compliance with its WTO obligations with respect to the USDOC determination in the French case	7
3. Cut-to-length Carbon Steel (CTL) Plate from the UK and from Spain	8
(a) The United States breached its WTO obligations by finding a likelihood of continuation or recurrence on the basis of insufficient evidence	8
(b) The United States also breached its WTO obligations by failing to examine the privatizations of BS plc and Aceralia.....	10
4. Failure to consider injury	11
B. FIRST WRITTEN SUBMISSION OF THE UNITED STATES	11
1. Claims not properly before the Panel.....	11
(a) Injury	11
(b) Subsidization	12
2. The European Communities bears the burden of proving its claims	13
3. USDOC's application of its new privatization methodology to the revised French sunset review is consistent with the <i>SCM Agreement</i> and the DSB recommendations and rulings	13
(a) USDOC's analysis of the Usinor privatization is entirely consistent with the <i>SCM Agreement</i> and the DSB recommendations and rulings	13
(b) USDOC properly found that the sale of shares to Usinor's employees was not at arm's length.....	14
(c) USDOC properly found that the sale of shares to Usinor's employees was not for FMV.....	15
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	16
C. SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES	17
1. The Panel's terms of reference for this Article 21.5 proceeding	17
(a) The Section 129 determinations concerning the UK and Spain were new measures based on new reasoning	17
(b) The factual findings purporting to justify the reasoning in the UK and Spanish cases are clearly different	18
(c) The claims raised by the European Communities concerning the UK and Spain are within the scope of its panel request.....	20
2. Certain corrosion-resistant carbon steel flat products from France	20
(a) The privatization of Usinor was at arm's length and for FMV.....	20
(i) The <i>SCM Agreement</i> requires that a privatization be measured as to the company as a whole.....	20
(ii) The USDOC previously found and accepted before the Appellate Body that the privatization of Usinor was at arm's length and for FMV	22
Arm's length	22
Fair market value (FMV).....	23
(b) The United States is not in compliance with its obligations under the WTO.....	23

3.	CTL plate from the UK and from Spain	24
4.	Injury	24
D.	SECOND WRITTEN SUBMISSION OF THE UNITED STATES	25
1.	Introduction	25
2.	In the revised French sunset review, USDOC properly found that a benefit continued to be countervailable	26
3.	In the revised UK sunset review, USDOC properly found that countervailable subsidies were likely to continue or recur	27
V.	ARGUMENTS OF THE THIRD PARTIES	27
A.	WRITTEN SUBMISSION OF BRAZIL	27
1.	The France Section 129 determination	27
(a)	The USDOC determination that the sale of shares to Usinor employees/former employees was not at arm's-length is inconsistent with the <i>SCM Agreement</i> and the Appellate Body's findings and recommendations	28
(b)	The USDOC determination that the Privatization of Usinor was not for FMV is inconsistent with the <i>SCM Agreement</i> and the Appellate Body's findings and recommendations.....	28
(c)	The USDOC failed to limit countervailing duties to the amount and duration of the subsidy in existence	29
2.	The UK and Spain Section 129 determinations	29
(a)	The USDOC assumptions that the UK and Spanish privatization transactions were at arm's-length and for FMV do not constitute determinations.....	29
(b)	The USDOC failed to limit countervailing duties to the amount and duration of the subsidy in existence	29
B.	WRITTEN SUBMISSION OF CHINA.....	30
1.	European Communities' allegation that USDOC shall consider the evidence about Glynwed	30
2.	European Communities' allegation that USDOC shall consider the evidence of abolishment of certain subsidy programs by the Spanish government	30
3.	European Communities' allegation that USITC shall consider injury	30
C.	WRITTEN SUBMISSION OF KOREA.....	31
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	31
2.	The USDOC improperly determined that there is a likelihood of continuation or recurrence of subsidization in the France Section 129 determination	32
3.	The United States erred in failing to reconsider whether there was a likelihood of continuation or recurrence of injury	33
VI.	INTERIM REVIEW	35
A.	REQUEST OF THE EUROPEAN COMMUNITIES	35
B.	REQUEST OF THE UNITED STATES.....	37
VII.	FINDINGS	42
A.	GENERAL CONSIDERATIONS FOR THIS DISPUTE	42
1.	The Panel's mandate	42
(a)	The measures taken to comply in these proceedings	42
(i)	Arguments of the parties	42
(ii)	Evaluation by the Panel	43
The USDOC's treatment of evidence in the likelihood-of-subsidization determination	46	
The likelihood-of-injury determination	47	
Other issues	51	
The failure to revoke the countervailing duty orders as the measure taken to comply.....	51	
The implementation status of the Section 129 determinations at issue	51	
(b)	Scope of the claims in these proceedings.....	53
(i)	Arguments of the parties	53
(ii)	Evaluation by the Panel	54
New claim not included in the Panel request	54	
Other disputed new claims.....	56	
New claim on evidence.....	59	

	New claim on likelihood-of-injury.....	62
	Conclusion.....	64
2.	Standard of review.....	64
3.	Burden of proof.....	66
4.	Panel's approach.....	67
B.	CERTAIN CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM FRANCE.....	67
1.	Background.....	67
2.	The measure taken to comply.....	69
3.	The claims.....	70
4.	<i>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.....</i>	70
(a)	Whether the privatization analysis must be done for the whole company.....	71
(i)	Arguments of the parties.....	71
(ii)	Evaluation by the Panel.....	72
(b)	Whether the sales of shares to employees/former employees were at arm's length and FMV.....	78
(i)	Whether the sales of shares to employees/former employees were at arm's length.....	78
	Arguments of the parties.....	78
	Evaluation by the Panel.....	80
(ii)	Whether the sales of shares to employees/former employees were for FMV.....	82
	Arguments of the parties.....	82
	Evaluation by the Panel.....	83
(iii)	Conclusion.....	88
(c)	Whether the maintenance of the existing countervailing duties is inconsistent with Articles 10, 14, 19.4, 21.1 and 21.3 of the <i>SCM Agreement</i> and Article VI:3 of the <i>GATT 1994</i>	88
C.	CUT-TO-LENGTH CARBON STEEL PLATE FROM UNITED KINGDOM.....	92
1.	Background.....	92
2.	The measure taken to comply.....	92
3.	The claims.....	92
4.	<i>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.....</i>	93
(a)	Arguments of the parties.....	93
(b)	Evaluation by the Panel.....	95
(i)	The United States' obligations pursuant to the findings in the original proceedings regarding the USDOC's privatization analysis.....	95
(ii)	The Panel's assessment of the USDOC's analysis in the UK Section 129 determination.....	98
(iii)	Conclusion.....	101
5.	<i>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.....</i>	101
(a)	Arguments of the parties.....	101
(b)	Evaluation by the Panel.....	103
(i)	The United States' obligations under Article 21.3 of the <i>SCM Agreement</i> regarding the USDOC's treatment of evidence.....	104
(ii)	The Panel's assessment of the USDOC's treatment of evidence in the UK Section 129 determination.....	105
(iii)	Conclusion.....	108
D.	CUT-TO-LENGTH CARBON STEEL PLATE FROM SPAIN.....	109
1.	Background.....	109
2.	The measure taken to comply.....	109
3.	The claims.....	109
4.	<i>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.....</i>	110
(a)	Arguments of the parties.....	110
(b)	Evaluation by the Panel.....	111
(i)	The United States' obligations pursuant to the findings in the original proceedings regarding the USDOC's privatization analysis.....	111
(ii)	The Panel's assessment of the USDOC's analysis in the Spain Section 129 determination.....	111
(iii)	Conclusion.....	113

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	113
(a) Arguments of the parties.....	114
(b) Evaluation by the Panel	115
(i) The United States' obligations under Article 21.3 of the SCM Agreement regarding the USDOC's treatment of evidence.....	115
(ii) The Panel's assessment of the USDOC's treatment of evidence in the Spain Section 129 determination	115
(iii) Conclusion	117
VIII. CONCLUSIONS AND RECOMMENDATIONS	118
Annex A - Responses of the European Communities to Questions by the Panel	121
Annex B - Responses of the United States to Questions by the Panel	130

ABBREVIATIONS USED FOR DISPUTE SETTLEMENT CASES REFERRED TO IN THE REPORT

Short Title	Full Case Title and Citation
<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)¹

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.²

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".³

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.

¹ WT/DS/212/14, p.2.

² WT/DS/212/15, p.2.

³ 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.⁴ 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 panel⁵: *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).⁶

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.⁷

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

⁴ 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.

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

⁶ WT/DS212/14, p.2.

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

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

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.⁹ 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.¹⁰ 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-determinations¹¹ 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.

⁹ 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).

¹⁰ 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).

¹¹ *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.¹²

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.¹³

[Arguments of the Parties and Third Parties and Annexes deleted from this version.]

¹² EC First written submission, para. 72.

¹³ US First written submission, para. 50, and US Oral statement, para. 34.

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

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.

¹⁴⁶ 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.

¹⁴⁷ 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.

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.¹⁴⁸ 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 7.176.¹⁴⁹ 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 obligations relating to sunset reviews.¹⁵⁰ 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.¹⁵¹ 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.¹⁵² 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.¹⁵³

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

¹⁴⁸ EC Request for interim review, p. 2.

¹⁴⁹ 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.

¹⁵⁰ (*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.

¹⁵¹ 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.

¹⁵² US Comments on EC request for interim review, para. 4.

¹⁵³ US Comments on EC request for interim review, para. 5.

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 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).¹⁵⁴

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.¹⁵⁵ 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.¹⁵⁶

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.

¹⁵⁴ EC Request for interim review, pp. 1-2.

¹⁵⁵ US Request for interim review, paras. 2, 19.

¹⁵⁶ US Request for interim review, para. 23.

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 proceedings¹⁵⁷ 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.'"¹⁵⁸ 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.¹⁵⁹ The European Communities disagrees and proposes inserting the phrase "or evidence which was not considered in the original sunset reviews was re-submitted" after "was submitted" in the sixth sentence of paragraph 7.69.¹⁶⁰

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 Communities¹⁶¹ 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.¹⁶²

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.¹⁶³

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-

¹⁵⁷ US Request for interim review, para. 4.

¹⁵⁸ US Request for interim review, para. 5.

¹⁵⁹ US Request for interim review, paras. 6-8.

¹⁶⁰ EC Comments on US request for interim review, p. 1.

¹⁶¹ See EC Response to Panel question No. 43.

¹⁶² US Request for interim review, para. 9.

¹⁶³ 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.

privatization, non-recurring subsidies.¹⁶⁴ 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".¹⁶⁵

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".¹⁶⁶ 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".¹⁶⁷ 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".¹⁶⁸

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.¹⁶⁹ 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.¹⁷⁰ Second, the United States also characterizes as inaccurate the Panel's statement that the insufficiency of

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

¹⁶⁵ US Request for interim review, para. 12.

¹⁶⁶ US Request for interim review, para. 13.

¹⁶⁷ US Request for interim review, para. 13.

¹⁶⁸ US Request for interim review, para. 13.

¹⁶⁹ US Request for interim review, para. 14.

¹⁷⁰ US Request for interim review, paras. 14-16.

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.¹⁷¹ 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.¹⁷²

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.¹⁷³ Moreover, the programme descriptions provided by the USDOC only mention the subsidization of BS plc, not Glynwed.¹⁷⁴ 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.¹⁷⁵ 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.¹⁷⁶ In the UK Section 129 determination, however, the USDOC focused solely on the benefit to Glynwed.¹⁷⁷ 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.¹⁷⁸

6.24 Regarding the United States' comments on paragraphs 7.248¹⁷⁹ and 7.281¹⁸⁰ 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)¹⁸¹, 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

¹⁷¹ US Request for interim review, paras. 17-18.

¹⁷² EC Comments on US request for interim review, p. 2.

¹⁷³ 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").

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

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

¹⁷⁶ US Request for interim review, para.18.

¹⁷⁷ 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).

¹⁷⁸ US Request for interim review, paras. 17-18.

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

¹⁸⁰ US Request for interim review, para. 21.

¹⁸¹ US Request for interim review, para. 20.

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.¹⁸² 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'".¹⁸³

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.¹⁸⁴ The European Communities states that it does exist.¹⁸⁵ 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.¹⁸⁶ 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.¹⁸⁷

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".¹⁸⁸ 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."¹⁸⁹ 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...".¹⁹⁰ It remains unclear which of those grounds are the

¹⁸² US Request for interim review, para. 22.

¹⁸³ EC Comments on US request for interim review, p. 2.

¹⁸⁴ US Request for interim review, para. 22.

¹⁸⁵ EC Comments on US request for interim review, p. 2.

¹⁸⁶ US Request for interim review, para. 24.

¹⁸⁷ EC Comments on US request for interim review, p. 2.

¹⁸⁸ 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").

¹⁸⁹ Spain Sunset Review Issues and Decision Memo, footnote 188 above, p. 13.

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

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.

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*.¹⁹¹ 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.¹⁹²

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"¹⁹³, 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".¹⁹⁴ 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.¹⁹⁵

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.¹⁹⁶ 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

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

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

¹⁹³ EC First written submission, para. 8.

¹⁹⁴ EC Second written submission, para. 12.

¹⁹⁵ EC Response to Panel questions Nos. 17, 21.

¹⁹⁶ US First written submission, para. 2.

recommendations and rulings and therefore are not within the scope of the "measure taken to comply" in the Article 21.5 proceedings.¹⁹⁷ 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.¹⁹⁸

(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".¹⁹⁹ 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."²⁰⁰ 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.²⁰¹ As affirmed by the Appellate Body²⁰², 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.²⁰³ 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

¹⁹⁷ US First written submission, paras. 19-20.

¹⁹⁸ US Response to Panel question 21.

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

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

²⁰¹ 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.

²⁰² "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.

²⁰³ 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.²⁰⁴

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.²⁰⁵

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).²⁰⁶

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.²⁰⁷ 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").²⁰⁸

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*".²⁰⁹ We shall therefore examine the three Section 129 determinations issued by

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

²⁰⁵ 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.

²⁰⁶ 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.

²⁰⁷ Request for establishment, p.2, footnotes 1-3.

²⁰⁸ *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).

²⁰⁹ 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 render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body."

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:²¹⁰

"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.²¹¹

...

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...²¹²

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 129.²¹³

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

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

²¹⁰ 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.

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

²¹² 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.

²¹³ France Section 129 determination, footnote 208 above, pp. 1-2.

²¹⁴ US Response to Panel question 21.

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.²¹⁵ 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.²¹⁶ 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.²¹⁷ 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.²¹⁸ 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.²¹⁹

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

²¹⁵ 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.

²¹⁶ France Section 129 determination, footnote 208 above; UK Section 129 determination, footnote 208 above; Spain Section 129 determination, footnote 208 above.

²¹⁷ France Section 129 determination, footnote 208 above, pp. 3-12.

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

²¹⁹ 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 determinations²²⁰ and submitted new evidence in the UK Section 129 proceedings.²²¹

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.²²² 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.²²³

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.²²⁴ 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".²²⁵ 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 causality analysis, but also the remaining aspects of those analyses from the original regulation that

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

²²¹ UK Section 129 determination, footnote 208 above, pp. 8-9.

²²² 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.

²²³ US Response to Panel question 21.

²²⁴ 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.

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

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.²²⁶

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.²²⁷ 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.²²⁸ 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.²²⁹

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

²²⁷ 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.

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

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

"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

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.²³⁰ Both the practice of conducting sunset reviews on an order-wide basis²³¹ and the absence of the requirement to recalculate subsidization margins in sunset reviews²³² have been condoned by the Appellate Body in

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).

²³⁰ 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.

²³¹ 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 *US – Oil Country Tubular Goods Sunset Reviews*, para. 231.

²³² 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, 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."

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."²³³ 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.²³⁴ The Panel therefore considers that reconducting a likelihood-of-injury determination, given the particular circumstances in this dispute,

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.

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

²³⁴ 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*, 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.

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.²³⁵ 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.²³⁶

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"²³⁷ 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."²³⁸ 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 to the dispute remain silent on those issues.²³⁹ 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.

²³⁵ EC First written submission, para. 8; *see* paragraph 7.4 above.

²³⁶ EC Response to Panel questions 17, 21 (emphasis added).

²³⁷ 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.

²³⁸ EC First written submission, para. 8, footnote 10.

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

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".²⁴⁰ 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 applied²⁴¹, can be challenged by another WTO Member."²⁴² 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.²⁴³ 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.

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.

²⁴⁰ 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).

²⁴¹ (*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.

²⁴² Panel Report on *Turkey – Textiles*, para. 9.37.

²⁴³ 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*").

(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.²⁴⁴ 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.²⁴⁵ 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.²⁴⁶ 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".²⁴⁷ 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.²⁴⁸

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.²⁴⁹ 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.²⁵⁰

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.²⁵¹

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 the *SCM Agreement*.²⁵² In the European Communities' view, the Section 129 determinations are measures taken by the United States to comply with the DSB recommendations and rulings.²⁵³ Hence, these determinations are new measures based on new reasoning²⁵⁴ and on new factual findings.²⁵⁵ The

²⁴⁴ US First written submission, para. 14.

²⁴⁵ US First written submission, para. 2.

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

²⁴⁷ US Oral statement, para. 3 (emphasis added).

²⁴⁸ US Response to Panel question No. 21.

²⁴⁹ 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.

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

²⁵¹ EC Second written submission, para. 15.

²⁵² EC First written submission, para. 62; EC Second written submission, para. 11.

²⁵³ EC Second written submission, para. 15.

²⁵⁴ EC Second written submission, paras. 14, 17.

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.²⁵⁶

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.²⁵⁷

(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.²⁵⁸ 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."²⁵⁹

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.²⁶⁰ 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 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

²⁵⁵ EC Second written submission, para. 18.

²⁵⁶ EC Second written submission, para. 15.

²⁵⁷ EC Second written submission, paras. 23, 25.

²⁵⁸ US First written submission, para. 15, footnote 19.

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

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

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."²⁶¹

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*²⁶², 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".²⁶³ 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.²⁶⁴ 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 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."²⁶⁵

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

²⁶¹ Request for establishment, p. 2.

²⁶² 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).

²⁶³ Appellate Body Report on *Korea – Dairy*, para. 124.

²⁶⁴ 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.

²⁶⁵ Appellate Body Report on *EC – Bananas III*, para. 143

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.²⁶⁶ 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".²⁶⁷ 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 consistency of the measure taken to comply with the covered agreements.²⁶⁸ 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.

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

²⁶⁷ 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.

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

7.58 In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body examined whether an Article 21.5 panel could consider a *new claim*²⁶⁹ 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.²⁷⁰ 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*.²⁷¹ The Appellate Body, invoking the utility of Article 21.5 proceedings, concluded that the panel therefore should have considered Brazil's new claim.²⁷²

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.²⁷³ 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.²⁷⁴ 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.²⁷⁵

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

²⁶⁹ 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.

²⁷⁰ 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.

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

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

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

²⁷⁴ 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*).

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

effectively resolved this issue. The Article 21.5 panel therefore concluded that India was precluded from raising an issue that had already been decided.²⁷⁶

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.²⁷⁷ 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.²⁷⁸

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".²⁷⁹

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

²⁷⁶ 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.

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

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

²⁷⁹ 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 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.

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)*.²⁸⁰

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.²⁸¹ The European Communities counters that the measures taken to comply are based on new reasoning²⁸² and on new factual findings²⁸³, 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*".²⁸⁴ The European Communities argues that it could not have raised the claim on the treatment of evidence in the original proceedings because the legal and factual basis for the original affirmative sunset review determination are different from those of the Section 129 determination.²⁸⁵

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.²⁸⁶ During the Section 129 proceedings, further

²⁸⁰ 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.

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

²⁸² EC Second written submission, paras. 14, 17.

²⁸³ EC Second written submission, para. 18.

²⁸⁴ EC Second written submission, para. 15.

²⁸⁵ EC Second written submission, para. 4; EC Oral statement, para. 14.

²⁸⁶ 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

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.²⁸⁷

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 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).

²⁸⁷ 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.

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".²⁸⁸ 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 proceedings²⁸⁹ 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 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.²⁹⁰

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-

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.

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

²⁸⁹ See EC Response to Panel question No. 43.

²⁹⁰ 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).

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.²⁹¹ 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".²⁹² 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.

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.²⁹³

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

²⁹² 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.

²⁹³ 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

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.²⁹⁴

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).

²⁹⁴ 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.²⁹⁵

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'".²⁹⁶

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."²⁹⁷

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, unbiased person, looking at the same evidentiary record as [the USDOC], could have – not would have – reached the same conclusions."²⁹⁸

²⁹⁵ 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.

²⁹⁶ Appellate Body Report on *EC – Hormones*, para 117.

²⁹⁷ Appellate Body Report on *US – Cotton Yarn*, para. 74.

²⁹⁸ US First written submission, para. 25.

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.²⁹⁹ 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".³⁰⁰ 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*.³⁰¹ 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.³⁰² 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 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.³⁰³ We agree with the Panel that '[its] task [was] not to perform a *de novo* review of the information and evidence on the record

²⁹⁹ 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.

³⁰⁰ 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.

³⁰¹ 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.

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

³⁰³ (footnote original) *Anti-Dumping Agreement*, Article 17.6(i).

of the underlying sunset review, nor to substitute [its] judgment for that of the US authorities'.³⁰⁴ 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*.^{305,306}

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.³⁰⁷

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.³⁰⁸ 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.³⁰⁹

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 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

³⁰⁴ (footnote original) Panel Report, para. 7.5.

³⁰⁵ (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)

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

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

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

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

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."³¹⁰

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*.³¹¹ The Appellate Body upheld these Panel findings.³¹²

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.³¹³ The USDOC also reviewed its determination of

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

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

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

³¹³ 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 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

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").³¹⁴

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).³¹⁵ 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.³¹⁶

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.³¹⁷

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.

³¹⁴ France Section 129 determination, footnote 208 above.

³¹⁵ France Section 129 determination, footnote 208 above, p. 3.

³¹⁶ 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.

³¹⁷ 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.

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".³¹⁸ Usinor employees held 5.16 per cent.³¹⁹ 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.³²⁰

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".³²¹ 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.³²²

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.

The parties, however, do not dispute the precise per centages. Therefore, the Panel considers it unnecessary to address this particular discrepancy.

³¹⁸ 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.

³¹⁹ France Section 129 determination, footnote 208 above, p. 3.

³²⁰ France Section 129 determination, footnote 208 above, p. 3.

³²¹ France Section 129 determination, footnote 208 above, p. 12.

³²² 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 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).

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.³²³ 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.³²⁴ 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.³²⁵

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*.³²⁶

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.³²⁷

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.

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

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

³²⁴ EC Request for establishment, p. 2.

³²⁵ EC First written submission, paras. 36.

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

³²⁷ US Second written submission, para. 10.

Communities also challenges the maintenance of countervailing duties on the basis of a finding that 5.16 per cent of the benefit passed through.³²⁸

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.³²⁹ 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.³³⁰ 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.³³¹ 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".³³² 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 determination³³³, 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 transaction is for FMV.³³⁴ 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*.³³⁵ 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

³²⁸ EC First written submission, para. 32.

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

³³⁰ EC First written submission, paras. 37-38; EC Second written submission, para. 36.

³³¹ EC Oral Statement, para. 5.

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

³³³ France Section 129 determination, footnote 208 above, pp. 8-9.

³³⁴ EC Oral Statement, para. 5.

³³⁵ EC Second written submission, paras. 30-33.

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.³³⁶

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.³³⁷ 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.³³⁸ The United States therefore contends that it is within a Member's discretion to develop a "reasonable" methodology.³³⁹

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.³⁴⁰ 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.³⁴¹ 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).³⁴² 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.³⁴³ 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.³⁴⁴

(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 of the company.³⁴⁵ For the European Communities, because the average price per share obtained falls

³³⁶ EC Oral Statement, para. 6.

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

³³⁸ US Oral statement, para. 27.

³³⁹ US First written submission, paras. 28-29.

³⁴⁰ US Oral statement, para. 28.

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

³⁴² US Oral Statement, para. 25.

³⁴³ US Oral Statement, para. 26.

³⁴⁴ US First written submission, para. 32; US Oral statement, paras. 26.

³⁴⁵ 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

within the range of market-clearing prices, the USDOC should have concluded that the entire privatization occurred for FMV.³⁴⁶ 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.³⁴⁷ It also argues that the European Communities' averaging methodology 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, pointing to the "process-oriented" factors in its methodology.³⁴⁸

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).³⁴⁹ 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

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.

³⁴⁶ 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.

³⁴⁷ France Section 129 determination, footnote 208 above, p. 5.

³⁴⁸ US Oral statement, para. 28.

³⁴⁹ Usinor Prospectus, footnote 316 above, pp. 21-24, 84-86.

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.³⁵⁰ 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.³⁵¹ The USDOC found that all categories except the employee/former employee share offering were at arm's length.³⁵²

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.³⁵³

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".³⁵⁴ 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.³⁵⁵ 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.³⁵⁶

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.

³⁵⁰ 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).

³⁵¹ French Section 129 determination, footnote 208 above, p. 5.

³⁵² French Section 129 determination, footnote 208 above, pp. 5-6.

³⁵³ France Section 129 determination, footnote 208 above, pp. 6-11.

³⁵⁴ France Section 129 determination, footnote 208 above, p. 10.

³⁵⁵ EC First written submission, para. 38.

³⁵⁶ 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, 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.

the price at which the GOF maximised its return.³⁵⁷ The USDOC defined the market-clearing price as "one that equates the supply of shares with the demand for shares".³⁵⁸ 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.³⁵⁹

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."³⁶⁰

7.113 The USDOC therefore determined that every share offering except the employee/former employee share offering was at FMV.³⁶¹ 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".³⁶²

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".³⁶³

³⁵⁷ 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.

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

³⁵⁹ France Section 129 determination, footnote 208 above, pp. 8-9; *see also* US Oral statement, para. 33.

³⁶⁰ France Section 129 determination, footnote 208 above, p. 12.

³⁶¹ France Section 129 determination, footnote 208 above, pp. 8-9; *see also* US Oral statement, para. 33.

³⁶² 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 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.

³⁶³ Appellate Body Report on *US – Softwood Lumber IV*, para. 91.

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'.^{364,365} 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.³⁶⁶ The European 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.³⁶⁷

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

³⁶⁴ (footnote original) Panel Report [on *US – Countervailing Measures on Certain EC products*,] para. 7.116.

³⁶⁵ Appellate Body Report on *US – Countervailing Measures on Certain EC products*, para. 149.

³⁶⁶ 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).

³⁶⁷ EC Oral statement, para. 6.

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.³⁶⁸ 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.³⁶⁹ 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.³⁷⁰ 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.³⁷¹ Although the USDOC insists that 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

³⁶⁸ See discussion in paragraphs 7.78-7.83 above.

³⁶⁹ 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.

³⁷⁰ See Modification Notice, footnote 206; France Section 129 determination, footnote 208 above, pp. 3-12.

³⁷¹ The USDOC concluded:

"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.

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.³⁷² 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"³⁷³ to support its view that the employees/former employee offering did not involve related parties, and, therefore, did constitute an arm's-length transaction.³⁷⁴

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.³⁷⁵ In addition, the 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."³⁷⁶ Thus, it argues, the employee purchasers were at least two steps removed from having any relationship to the GOF.³⁷⁷ Furthermore, it contends, the employee/former employee offering also included *former* employees of Usinor.³⁷⁸ 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

³⁷² EC Second written submission, para. 38.

³⁷³ EC First written submission, para. 41 (*citing Black's Law Dictionary* (West Group, 1999), 7th ed., p. 82).

³⁷⁴ EC First written submission, para. 41.

³⁷⁵ EC Second written submission, para. 39; EC Oral statement, para. 8.

³⁷⁶ EC First written submission, para. 42 (*quoting* Usinor Prospectus, footnote 316 above, p. 26); *see also* EC Oral statement, para. 8.

³⁷⁷ EC Oral statement, para. 8.

³⁷⁸ 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.

not the type of relationship that would affect the price at which the GOF sold Usinor shares.³⁷⁹ 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.³⁸⁰

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.³⁸¹ 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.³⁸²

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.³⁸³ The United States explains that the USDOC’s arm’s length test consists of two steps.³⁸⁴ 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.³⁸⁵ 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.³⁸⁶ The United States further explains that after evaluating the relationship, the USDOC proceeds to the second step 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.³⁸⁷ In other words, to determine “whether the price charged the affiliated party was different from what it would have been absent the affiliation”.³⁸⁸ 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.³⁸⁹ 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.³⁹⁰ 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”.³⁹¹ The United States also

³⁷⁹ EC First written submission, paras. 40-44.

³⁸⁰ EC First written submission, para. 44.

³⁸¹ US First written submission, para. 35; US Oral statement, para. 27.

³⁸² 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), 7th 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. ..."))).

³⁸³ US Oral statement, para. 31.

³⁸⁴ US Oral statement, para. 31; see US First written submission, paras. 36-37.

³⁸⁵ 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").

³⁸⁶ US First written submission, para. 36.

³⁸⁷ US First written submission, para. 37.

³⁸⁸ US Oral statement, para. 31.

³⁸⁹ US Oral statement, para. 31.

³⁹⁰ US First written submission, para. 37.

³⁹¹ US First written submission, para. 34.

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.³⁹²

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.³⁹³ 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.³⁹⁴ 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.³⁹⁵ 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.³⁹⁶

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.³⁹⁷

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. 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.³⁹⁸ 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

³⁹² US Oral statement, para. 31.

³⁹³ US First written submission, para. 38; US Oral statement, para. 32; *see also* EC First written submission, para. 42.

³⁹⁴ 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).

³⁹⁵ 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.

³⁹⁶ US Second written submission, para. 8; US Oral statement, para. 32.

³⁹⁷ US Oral statement, para. 30.

³⁹⁸ France Section 129 determination, footnote 208 above, pp. 4-6.

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.³⁹⁹

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".⁴⁰⁰

7.134 The United States contends that the definition contained in its new privatization methodology corresponds to the ordinary meaning of arm's length.⁴⁰¹ 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".⁴⁰² 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.

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".⁴⁰³

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.⁴⁰⁴ 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

³⁹⁹ France Section 129 determination, footnote 208 above, p. 6.

⁴⁰⁰ US First written submission, para. 35, footnote 44.

⁴⁰¹ US First written submission, para. 35.

⁴⁰² Modification Notice, footnote 206, p. 37127 (*quoting* SAA, footnote 243 above, p. 258).

⁴⁰³ France Section 129 determination, footnote 208 above, p. 6.

⁴⁰⁴ The Panel notes that the conclusion does not mention Usinor's former employees.

the existence of a benefit be adequately explained.⁴⁰⁵ 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.⁴⁰⁶ 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.⁴⁰⁷ 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.⁴⁰⁸ 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.

(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.⁴⁰⁹ 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.⁴¹⁰

⁴⁰⁵ Appellate Body Report on *US – Softwood Lumber IV*, para. 91.

⁴⁰⁶ EC Second written submission, para. 39; EC Oral statement, para. 8.

⁴⁰⁷ US Oral statement, para. 30.

⁴⁰⁸ See Brazil Third-party submission, para. 19.

⁴⁰⁹ EC First written submission, para. 45.

⁴¹⁰ EC Second written submission, para. 47; EC Oral statement, para. 7.

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.⁴¹¹

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.⁴¹² 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.⁴¹³ 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".⁴¹⁴ It also contends that it is irrelevant whether it is common practice for a government to set aside shares for government employees when privatizing an enterprise.⁴¹⁵

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.

⁴¹¹ 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 Jeffrey 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.

⁴¹² US First written submission, para. 46.

⁴¹³ US First written submission, para. 46; US Oral statement, para. 33.

⁴¹⁴ US Oral statement, para. 33.

⁴¹⁵ US Second written submission, para. 9.

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.⁴¹⁶ 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.⁴¹⁷ 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".⁴¹⁸ The USDOC, however, performed 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.⁴¹⁹ 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.⁴²⁰

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

⁴¹⁶ France Section 129 determination, footnote 208 above, pp. 6-11.

⁴¹⁷ France Section 129 determination, footnote 208 above, p. 7.

⁴¹⁸ 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. ...

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.

⁴¹⁹ France Section 129 determination, footnote 208 above, p. 9.

⁴²⁰ France Section 129 determination, footnote 208 above, pp. 9-10.

France did not set or receive a market-clearing price for the employee/former employee share offering.⁴²¹

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.⁴²² 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.⁴²³

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:

⁴²¹ France Section 129 determination, footnote 208 above, pp. 10-11.

⁴²² 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).

⁴²³ See US Response to Panel question No. 30.

Combined Offering	Factors Affecting Share Price: Restrictions/Incentives/Sale Mechanism	Price Per Share (FRF)
International Offering ⁴²⁴	Sale mechanism: Underwritten by three regional groups (France, US, Rest of the World), collectively referred to as the International Underwriters, under the following conditions: <ul style="list-style-type: none"> ▪ Payment by GOF, Clindus, and Usinor of a management commission and underwriting commission of .60 per cent of the aggregate international offering price; ▪ Payment by GOF, Clindus, and Usinor of a selling concession of 1.80 per cent of the aggregate international offering price; ▪ Payment by GOF, Clindus, and Usinor of FRF 2,000,000 for certain expenses; and ▪ Indemnification by GOF, Clindus, and Usinor against certain liabilities 	89
French Public Offering ⁴²⁵	Restrictions/Incentives: <ul style="list-style-type: none"> ▪ Holding period: A minimum holding period of 18 months applies; ▪ Free shares: Shareholders receive 1 free share for each 10 shares purchased after the minimum holding period Sale mechanism: Terms pursuant to the French OPV Underwriting Agreement	86
Employee Offering ⁴²⁶	Restrictions/Incentives: <ul style="list-style-type: none"> ▪ Purchase price: <ul style="list-style-type: none"> ○ At the French public share offering price of FF 86, or ○ At a 20 per cent discount on the price of the French public share offering, which is FF 68.8; ▪ Holding period: Only the shares purchased at the discount price are subject to a 24-month holding period; ▪ Free shares: <ul style="list-style-type: none"> ○ At the French public share offering price, 1 free share for each 3 shares purchased, or ○ 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; ▪ Delayed payment terms: <ul style="list-style-type: none"> ○ At the French public share offering price, immediate payment in cash, or ○ 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. Sale mechanism: No underwriter	86 or 68.8 (20 per cent discount on the French public offering price)
Stable Shareholders ⁴²⁷	Restrictions: Stable shareholders signed an agreement ("Protocole") agreeing to <ul style="list-style-type: none"> ▪ Hold all existing shares for three months from the date of publication of the French Public Offering results; ▪ After those three months, sell a maximum of 20 per cent; ▪ Hold the remaining 80 per cent for another 15 months or sell only to another Stable Shareholder; and ▪ After the 15 months (a total 18 months), respect the other Stable Shareholders' pre-emption rights when selling to third parties. Sale mechanism: No underwriter	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 pertinent facts and to assess whether the USDOC provided an adequate and reasoned explanation as to how those facts support its determination.

⁴²⁴ Usinor Prospectus, pp. 21-24, 84-86; *see* Order Defining Terms for the Usinor Privatization, footnote 316 above.

⁴²⁵ Usinor Prospectus, pp. 21-24, 84-86; *see* Order Defining Terms for the Usinor Privatization, footnote 316 above.

⁴²⁶ Order Defining Terms for the Usinor Privatization, footnote 316 above, art. 3.

⁴²⁷ Usinor Prospectus, pp. 21-24, 84-86; *see* Order Defining Terms for the Usinor Privatization, footnote 316 above.

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.⁴²⁸

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."⁴²⁹ 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.⁴³⁰ 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 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

⁴²⁸ US First written submission, para. 46; US Response to Panel question No. 30.

⁴²⁹ 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.

⁴³⁰ 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).

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.⁴³¹

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.⁴³² 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.

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:

⁴³¹ EC Response to Panel question No. 30.

⁴³² EC First written submission, footnote 71; EC Oral statement, para. 6.

“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.”⁴³³

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”.⁴³⁴ 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'.”⁴³⁵

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.⁴³⁶ Therefore, it seems reasonable to conclude that the remaining unallocated balance of the subsidy benefit consisted of the 5.16 per cent.⁴³⁷ The United States confirmed this understanding through its written submissions and later in response to a question by the Panel.⁴³⁸

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.

⁴³³ France Section 129 determination, footnote 208 above, p. 12.

⁴³⁴ France Section 129 determination, footnote 208 above, p. 12.

⁴³⁵ France Section 129 determination, footnote 208 above, p. 15.

⁴³⁶ France Section 129 determination, footnote 208 above, p. 12.

⁴³⁷ 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).

⁴³⁸ US First written submission, paras. 31, 32; US Oral statement, paras. 24-26; US Response to Panel question No. 33.

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."⁴³⁹ (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."⁴⁴⁰

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."⁴⁴¹

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 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.⁴⁴²

⁴³⁹ Article 10 of the *SCM Agreement*.

⁴⁴⁰ Article VI:3 of the *GATT 1994*.

⁴⁴¹ Article 14 of the *SCM Agreement*.

⁴⁴² 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.

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.⁴⁴³

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.⁴⁴⁴ 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.⁴⁴⁵ 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.⁴⁴⁶

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

⁴⁴³ 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.

⁴⁴⁴ See paragraphs 7.30-7.31 above.

⁴⁴⁵ 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).

⁴⁴⁶ 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 *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.

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*.⁴⁴⁷ The Appellate Body subsequently affirmed the Panel's conclusion.⁴⁴⁸

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.⁴⁴⁹ 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.⁴⁵⁰

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:

- (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.

⁴⁴⁷ Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 8.1(c).

⁴⁴⁸ Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 161(a).

⁴⁴⁹ 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).

⁴⁵⁰ *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).

(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.⁴⁵¹

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.⁴⁵²

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 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*.⁴⁵³

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,

⁴⁵¹ EC First written submission, para. 72.

⁴⁵² EC First written submission, para. 14.

⁴⁵³ EC First written submission, paras. 47-50; EC Second written submission, paras. 7, 53, 57, 61.

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.⁴⁵⁴

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".⁴⁵⁵ 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.⁴⁵⁶

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".⁴⁵⁷

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.⁴⁵⁸

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.⁴⁵⁹

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 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.⁴⁶⁰

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

⁴⁵⁴ EC First written submission, para. 30.

⁴⁵⁵ 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.

⁴⁵⁶ EC First written submission, paras. 66-67.

⁴⁵⁷ EC First written submission, para. 70 (*quoting* Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 161(a)).

⁴⁵⁸ US First written submission, paras. 4, 48; US Second written submission, para. 11.

⁴⁵⁹ US First written submission para. 48.

⁴⁶⁰ US First written submission para. 49.

determination, the revised determination can not be inconsistent with the DSB recommendations and rulings.⁴⁶¹

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.⁴⁶²

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.⁴⁶³

(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, 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

⁴⁶¹ US First written submission, para. 49; US Second written submission, para. 11.

⁴⁶² US Oral statement, paras. 18, 22.

⁴⁶³ UK Section 129 Determination, footnote 208 above, p. 5.

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."⁴⁶⁴

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."⁴⁶⁵

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* methodology⁴⁶⁶, with relevant 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*

⁴⁶⁴ Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 149 (emphasis added).

⁴⁶⁵ Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 149 (emphasis added).

⁴⁶⁶ 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 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.

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*."⁴⁶⁷

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);
- *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*."⁴⁶⁸

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:

⁴⁶⁷ Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 126 (emphasis added).

⁴⁶⁸ Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 8.1(c) (emphasis added).

"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..."⁴⁶⁹

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 1987,⁴⁷⁰ the UK Secretary of State for Trade and Industry announced that the GOUK⁴⁷¹ 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 preferential treatment in obtaining shares. Pensioners of the company also received preferential treatment in obtaining shares."⁴⁷²

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

⁴⁶⁹ Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 161 (emphasis added).

⁴⁷⁰ (*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).

⁴⁷¹ GOUK stands for Government of the United Kingdom.

⁴⁷² UK Section 129 determination, footnote 208 above, p. 3.

determination that there would be a likelihood of continuation or recurrence of a countervailable subsidy if the order were revoked."⁴⁷³

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.*"⁴⁷⁴

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 we have not—for the reasons explained above—addressed the arm's length/fair market value issue.*"⁴⁷⁵

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."⁴⁷⁶

⁴⁷³ UK Section 129 determination, footnote 208 above, p. 3.

⁴⁷⁴ UK Section 129 determination, footnote 208 above, pp. 3-4 (emphasis added).

⁴⁷⁵ UK Section 129 determination, footnote 208 above, p. 4 (emphasis added).

⁴⁷⁶ See paragraph 7.27 above.

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."⁴⁷⁷

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".⁴⁷⁸

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.

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 reasoning⁴⁷⁹ whereas an "assumption" needs not to be supported by evidence or reasoning.⁴⁸⁰ 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

⁴⁷⁷ Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 111.

⁴⁷⁸ Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 110.

⁴⁷⁹ See paragraphs 7.211 -7.213 above.

⁴⁸⁰ 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), 4th ed., Vol. I, p 134.

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.⁴⁸¹

(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.⁴⁸²

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 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.⁴⁸³

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.⁴⁸⁴

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"⁴⁸⁵ and that "[t]heir 'duties of investigation and evaluation preclude them from remaining

⁴⁸¹ 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.

⁴⁸² EC First written submission, paras. 17, 51-53.

⁴⁸³ EC First written submission, paras. 53-57.

⁴⁸⁴ EC Response to Panel question No. 42.

⁴⁸⁵ EC First written submission, para. 47 (quoting Panel Report on *US – Carbon Steel*, para 8.95).

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.'"⁴⁸⁶ 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.⁴⁸⁷ 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".⁴⁸⁸

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.⁴⁸⁹ 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.⁴⁹⁰

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.⁴⁹¹

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. 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.⁴⁹²

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.⁴⁹³

⁴⁸⁶ 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.

⁴⁸⁷ EC First written submission, para. 49.

⁴⁸⁸ 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).

⁴⁸⁹ EC First written submission, paras. 47, 50, 58; EC Second written submission, paras. 53, 56-57.

⁴⁹⁰ EC First written submission, para. 51-57.

⁴⁹¹ US First written submission, para. 48.

⁴⁹² US First written submission, para. 18.

⁴⁹³ UK Section 129 determination, footnote 208 above, p. 7.

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.⁴⁹⁴

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.⁴⁹⁵

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.⁴⁹⁶

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.⁴⁹⁷

(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.

⁴⁹⁴ US Oral Statement, paras. 15, 18-20.

⁴⁹⁵ EC First written submission, para. 62 (*citing* Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 37).

⁴⁹⁶ EC Second written submission, para. 4; EC Oral statement, para. 14.

⁴⁹⁷ EC Oral statement, paras. 12-13.

- (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*."⁴⁹⁸

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 conclusions concerning the likelihood of such continuation or recurrence*. (footnotes omitted)."⁴⁹⁹

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:

⁴⁹⁸ Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 111 (emphasis added).

⁴⁹⁹ 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).

"[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."⁵⁰⁰

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."⁵⁰¹

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*.

(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.*"⁵⁰²

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

⁵⁰⁰ Panel Report on *US – Carbon Steel*, paras. 8.94-8.95.

⁵⁰¹ Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 7.114.

⁵⁰² UK Section 129 determination, footnote 208 above, p. 4 (emphasis original).

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.⁵⁰³

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."⁵⁰⁴

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.⁵⁰⁵

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 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.⁵⁰⁶

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.⁵⁰⁷ 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.⁵⁰⁸ 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

⁵⁰³ EC First written submission, paras. 53-57.

⁵⁰⁴ UK Section 129 determination, footnote 208 above, p. 7.

⁵⁰⁵ US Oral statement paras. 15, 18-20.

⁵⁰⁶ EC Second written submission, para. 4; EC Oral statement, para. 14.

⁵⁰⁷ UK Sunset Review Issues and Decision Memo, p. 4.

⁵⁰⁸ UK Sunset Review Issues and Decision Memo, pp. 7-8.

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."⁵⁰⁹

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*.⁵¹⁰

7.247 In this regard, the Panel notes that there is a difference in the "factual circumstances" in 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.

⁵⁰⁹ UK Sunset Review Issues and Decision Memo, p. 13.

⁵¹⁰ EC First written submission, para. 62.

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.⁵¹¹ The Panel notes that there might be other new evidence that the interested parties may have presented during the Section 129 proceedings.⁵¹²

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 proceedings⁵¹³, 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

⁵¹¹ EC First written submission, para. 17.

⁵¹² 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 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.

⁵¹³ 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.

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*.⁵¹⁴ This conclusion of the Panel was upheld by the Appellate Body in its report.⁵¹⁵

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 2003.⁵¹⁶

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.⁵¹⁷ 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 that the net countervailable subsidy rate likely to prevail was 36.86 per cent for all producers and exporters from Spain.⁵¹⁸

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:

⁵¹⁴ Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 8.1(c).

⁵¹⁵ Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 161(a).

⁵¹⁶ 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 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.

⁵¹⁷ 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).

⁵¹⁸ Spain Sunset Review Final Results, footnote 286 above, p. 18308.

- (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.⁵¹⁹

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 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.⁵²⁰

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.⁵²¹

⁵¹⁹ EC First written submission, para. 72.

⁵²⁰ EC First written submission, para. 21.

⁵²¹ EC First written submission, paras. 63-65.

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...".⁵²²

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.⁵²³

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.⁵²⁴

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 making the determination, the revised determinations cannot be inconsistent with the DSB recommendations and rulings.⁵²⁵

(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.

⁵²² EC First written submission, paras. 70.

⁵²³ US First written submission, paras 4, 48; US Second written submission, para. 11.

⁵²⁴ US First written submission, para. 48.

⁵²⁵ US First written submission, para. 49; US Second written submission, para. 11.

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."⁵²⁶

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 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.*"⁵²⁷

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

⁵²⁶ Spain Section 129 determination, footnote 208 above, p. 3.

⁵²⁷ Spain Section 129 determination, footnote 208 above, p. 3 (emphasis added).

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.*"⁵²⁸

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 *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.

⁵²⁸ Spain Section 129 determination, footnote 208 above, p. 4 (emphasis added).

(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.⁵²⁹ 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 exist⁵³⁰).⁵³¹ In sum, the European Communities argues that it had already explained *during the original sunset review* that most of the schemes no longer existed or had ceased to provide a meaningful benefit.⁵³²

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.⁵³³

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.⁵³⁴

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.⁵³⁵

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

⁵²⁹ EC First written submission, para. 24.

⁵³⁰ 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.

⁵³¹ EC First written submission, para. 24, footnote 44.

⁵³² EC First written submission, para. 59.

⁵³³ EC First written submission, paras. 24, 59.

⁵³⁴ US First written submission, para. 48.

⁵³⁵ US First written submission, para. 18.

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*.⁵³⁶

(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*.

(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."⁵³⁷

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*

⁵³⁶ Spain Section 129 determination, footnote 208 above, p. 6.

⁵³⁷ Spain Section 129 determination, footnote 208 above, p. 3 (emphasis added).

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."⁵³⁸

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.⁵³⁹

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.⁵⁴⁰ 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*.⁵⁴¹

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*.

⁵³⁸ 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.

⁵³⁹ See Spain Sunset Review Issues and Decision Memo, footnote 286 above, p. 17.

⁵⁴⁰ See parties arguments in paras. 7.285-7.287; US First written submission, para. 18.

⁵⁴¹ EC First written submission, para. 62.

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.⁵⁴² The European 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*.

⁵⁴² 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 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*.

* * * * *