

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

*Report of the Panel*

The report of the Panel on *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 3 July 2002 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/452). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

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

## I. INTRODUCTION

### A. COMPLAINT OF THE EUROPEAN COMMUNITIES

1.1 On 10 November 2000, the European Communities requested consultations<sup>1</sup> with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Article 30 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), regarding countervailing duties ("CVDs") imposed by the United States on imports of certain corrosion-resistant carbon steel flat products originating in Germany, in particular, the sunset review of these CVDs.

1.2 The European Communities and the United States held consultations on 8 December 2000, but failed to reach a mutually satisfactory solution.

1.3 On 5 February 2001, the European Communities requested further consultations<sup>2</sup> with the United States, regarding certain aspects of the procedure followed by the United States in sunset reviews, both as such and as applied in the sunset review in question, in particular, the evidentiary standards applied for the self-initiation of these reviews.

1.4 The European Communities and the United States held further consultations on 21 March 2001, but failed to reach a mutually satisfactory solution.

1.5 On 8 August 2001, the European Communities requested the establishment of a panel<sup>3</sup> pursuant to Article 6 of the DSU, Article XXIII of GATT 1994, and Article 30 of the SCM Agreement.

### B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.6 The Dispute Settlement Body ("DSB") established a panel on 10 September 2001, with standard terms of reference. The terms of reference of the Panel are:

To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS213/3, 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.

1.7 On 18 October 2001, the European Communities requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the

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<sup>1</sup> See WT/DS213/1.

<sup>2</sup> See WT/DS213/1/Add.1.

<sup>3</sup> See WT/DS213/3.

composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

1.8 On 26 October 2001, the Director-General accordingly composed the panel as follows<sup>4</sup>:

1.9 Chairman: Mr. Hugh McPhail

Members: Mr. Ronald W. Erdmann  
Mr. Wieslaw Karsz

1.10 Japan and Norway reserved their rights to participate in the panel proceedings as third parties.

## C. PANEL PROCEEDINGS

1.11 The Panel met with the parties on 29 January 2002, and on 19 March 2002. The Panel met with the third parties on 29 January 2002.

1.12 The Panel submitted its interim report to the parties on 14 May 2002. Comments were received from the parties on the interim report on 23 May 2002, and on each other's comments on 30 May 2002 (*See* Section VII, *infra*). The Panel submitted its final report to the parties on 14 June 2002.

## II. FACTUAL ASPECTS

2.1 At issue in this dispute is the US law as such in respect of sunset reviews of CVDs, as well as its application in a sunset review carried out by the United States of a CVD order on imports of certain corrosion-resistant carbon steel flat products from Germany. The United States Department of Commerce ("DOC") determined that revocation of the order "would be likely to lead to continuation or recurrence of a countervailable subsidy".<sup>5</sup> The DOC transmitted this determination to the United States International Trade Commission ("ITC"), along with a determination regarding the magnitude of the net countervailable subsidy likely to prevail in case of revocation of the order – 0.54 per cent in the review at issue. The ITC determined that revocation of the order "would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time".<sup>6</sup> Accordingly, the United States decided not to revoke the CVD order under review<sup>7</sup> on imports of the product in question.

2.2 The European Communities considers that the relevant US laws, regulations, administrative procedures, and statement of policy practices in respect of sunset reviews of CVDs, as well as their application in this instance, violates the SCM Agreement and the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement"). The European Communities' claims therefore relate to the US sunset review system as such, as well as the specific sunset review determination by the DOC in respect of certain corrosion-resistant carbon steel flat products from Germany.

2.3 The measures that the European Communities challenges as violating Articles 10, 11.9, 21, and 32.5 of the *SCM Agreement*, and XVI:4 of the Agreement establishing the World Trade Organization are:

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<sup>4</sup> *See* WT/DS213/4.

<sup>5</sup> Certain Corrosion-Resistant Carbon Steel Flat Products, etc.; Final Results of Full Sunset Reviews ("Commerce Sunset Final"), 65 FR 47407 (2 August 2000) (Exhibit EC-9).

<sup>6</sup> Certain Carbon Steel Products, etc.; Injury Determination, 65 FR 75301 (1 December 2000) (Exhibit EC-11).

<sup>7</sup> Countervailing Duty Orders and Amendment to Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Germany, 58 FR 43756 (17 August 1993) (Exhibit EC-4).

1. the US CVD law in respect of sunset reviews: Section 751(c), as complemented by Section 752, of the Tariff Act of 1930 ("Tariff Act")<sup>8</sup>, as amended;
2. the accompanying Implementing Regulations: Procedures for Conducting Five-year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders, or "Sunset Regulations"<sup>9</sup>;
3. the accompanying statement of policy practices: Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders; Policy Bulletin, or "Sunset Policy Bulletin"<sup>10</sup>; and
4. their application in this instance, in the sunset review determination in respect of certain corrosion-resistant carbon steel flat products from Germany.<sup>11</sup>

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

#### A. EUROPEAN COMMUNITIES

3.1 The European Communities requests that the Panel find that the measures identified by the European Communities (*See* paragraph 2.3, *supra*):

1. infringe Article 21, paragraphs 3 and 1, as well as Article 10, of the SCM Agreement, by requiring that sunset reviews are automatically initiated for all existing CVD measures under the conditions specified therein;
2. violate Article 21, paragraphs 3 and 1, in conjunction with Articles 10 and 11, of the SCM Agreement, by applying expedited reviews, through automatic initiation and presumption of likelihood of continuation or recurrence;<sup>12</sup>
3. violate Article 21.3, in conjunction with Article 11, of the SCM Agreement, by requiring the automatic self-initiation of sunset reviews;
4. establish a standard of investigation for sunset reviews that violates the requirements of the SCM Agreement; and
5. violate Article 21.3, in conjunction with Article 21.1 and Article 11.9, of the SCM Agreement, by not requiring the application of the 1 per cent *de minimis* rule in sunset reviews and by enabling the continuation of CVDs for five more years in circumstances where there is no need to counter subsidisation which is likely to cause injury, and, because, in the present instance, the US authority continued a measure despite having found that the rate of subsidisation likely to prevail was less than 1 per cent.

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<sup>8</sup> Codified in 19 USC 1675(c) (Exhibit EC-13).

<sup>9</sup> 63 FR 13516 (20 March 1998), codified in 19 CFR part 351 (Exhibit EC-14).

<sup>10</sup> 63 FR 18871 (16 April 1998) (Exhibit EC-15).

<sup>11</sup> Continuation of Antidumping and Countervailing Duty Orders on Certain Carbon Steel Products from [16 countries, including Germany], 65 FR 78469 (15 December 2000) (Exhibit EC-12). *See also* Certain Corrosion-Resistant Carbon Steel Flat Products, etc.; Final Results of Full Sunset Reviews ("Commerce Sunset Final"), 65 FR 47407 (2 August 2000) (Exhibit EC-9), and accompanying Decision Memorandum ("Commerce Sunset Final Decision Memorandum") (Exhibit EC-10).

<sup>12</sup> Please note that the United States made a request for a preliminary ruling in respect of this claim of the European Communities. *See* Section 8, *infra*.

3.2 Accordingly, the European Communities requests the Panel to find the US CVD law, regulations, and statement of policy practices to be inconsistent with Article 32.5 of the SCM Agreement and, consequently, also inconsistent with Article XVI:4 of the WTO Agreement.

B. UNITED STATES

3.3 The United States disputes the claims of the European Communities, and requests that the Panel find that:

6. the US procedure for the automatic self-initiation of sunset reviews by the DOC is not inconsistent with the SCM Agreement;
7. in not applying the 1 per cent *de minimis* standard of Article 11.9 of the SCM Agreement to sunset reviews, the United States has not acted inconsistently with its obligations under the SCM Agreement; and
8. the DOC sunset review determination in respect of certain corrosion-resistant carbon steel flat products from Germany is not inconsistent with US obligations under the SCM Agreement.

**IV. REQUEST OF THE UNITED STATES FOR A PRELIMINARY RULING**

A. REQUEST OF THE UNITED STATES

4.1 The United States requests that the Panel make a preliminary ruling that the European Communities' claims with respect to the expedited sunset review procedure are not before the Panel because this procedure is not a measure within the Panel's terms of reference.

4.2 The United States submits that the European Communities did not identify any measure or type of proceeding in consultations other than (i) the sunset review determination in carbon steel; (ii) the initiation of sunset reviews by the DOC; and (iii) the *de minimis* standard employed by the DOC in sunset reviews. Nor, argues the United States, did the European Communities identify the expedited sunset review procedure in its request for consultations or in its request for the establishment of a panel.

4.3 The arguments of the United States in this regard are reflected below (*See* Section V, *infra*).

B. RESPONSE OF THE EUROPEAN COMMUNITIES

4.4 The European Communities disagrees with the United States, and submits that the European Communities' claims regarding the United States' expedited sunset review procedure are within the Panel's terms of reference. The European Communities asserts that, given the reference in its request for establishment to Section 751(c) of the Tariff Act, which contains procedural rules on sunset reviews, including expedited sunset reviews, the issue of expedited reviews has also been raised by the European Communities and is therefore within the Panel's terms of reference.

4.5 The arguments of the European Communities in this regard are reflected below (*See* Section V, *infra*).

**[Parties' arguments in Sections V and VI deleted from this version]**

## VII. INTERIM REVIEW

7.1 On 23 May 2002, both parties submitted written requests for interim review by the Panel of particular aspects of the interim report issued on 14 May 2002. On 30 May 2002, each party provided written comments on the other party's request for interim review. Neither party requested an additional meeting with the Panel. The requests made by the parties are addressed below. In addition, certain clarifying changes were made to paragraphs 9.7, 9.30, 12.1, and 13.14 of the interim report (now paragraphs 8.57, 8.80, 9.1, and 10.15 respectively, *infra*). Finally, the Panel revised the numbering of certain sections of the interim report to reflect the format normally used in WTO panel reports.

### A. REQUEST OF THE EUROPEAN COMMUNITIES FOR INTERIM REVIEW

7.2 In respect of paragraph 7.4 of the interim report (now paragraph 8.4, *infra*), the European Communities requested the Panel to include the comment made by the European Communities on the preliminary ruling of the Panel – that the ruling misinterprets the relevant provisions of the DSU, appears to confuse the distinction between "claims" and "arguments", and is not in conformity with the established case law of the Appellate Body as summarised in the *Thailand – H-Beams* report. It is true that the European Communities did make this comment. It was, however, made in response to the Panel's preliminary ruling, and not the request of the United States for a preliminary ruling. Paragraph 7.4 – and indeed Section VII.A of the interim report (now Section V, *supra*) entitled "Arguments of the parties" – reflects only those arguments made prior to the ruling of the Panel. We therefore decline to include the statement requested by the European Communities.

7.3 In respect of paragraph 8.30 of the interim report (now paragraph 8.45, *infra*), the European Communities suggested that the rest of its response – edited out of the response cited by the Panel – would explain the confusion to which the Panel confessed. Our point in that paragraph is that merely the correct interpretation of Article 21.3 yields the result pointed to by the European Communities. The notion of a "strict" interpretation has no relevance to the analysis at hand. For the purpose of clarity, we have nonetheless quoted the European Communities' response in full, and revised this paragraph accordingly.

7.4 In respect of paragraphs 8.10-8.34 of the interim report (now paragraphs 8.22-8.49, *infra*), the European Communities submitted that the Panel did not address the European Communities' argument that automatic initiation in effect shifts the US burden of proof to foreign exporters or to other Members and thus leads to a violation of its obligation to determine continuation or recurrence of subsidisation. Accordingly, we have addressed this argument (*See* paragraphs 8.40-8.42, *infra*).

7.5 The European Communities drew the attention of the Panel to a typographical error in paragraph 9.5 of the interim report (now paragraph 8.55, *infra*), which we have corrected.

7.6 In respect of footnote 286 of the interim report (now footnote 293, *infra*), the European Communities argued that there is no distinction between the expressions Article 11.9 "itself applies" and Article 11.9 "is applicable" under Article 21.3, and suggests that the latter phrase be replaced by the phrase "is implied" in Article 21.3. In light of the fact that the European Communities characterises its claim as being that Article 11.9 "is implied" in Article 21.3, we have adopted the same characterisation and revised footnote 286 accordingly. We consider, however, that there is a distinction between the expressions Article 11.9 "itself applies" and Article 11.9 "is applicable" under Article 21.3, and we have revised footnotes 249, 286, and 356 accordingly (now footnotes 253, 293, and 365, respectively, *infra*). We have also made appropriate revisions to Sections VIII.B.2, VIII.C.1(b), VIII.C.2(b), and X, *infra*.

7.7 In respect of paragraph 9.12 of the interim report (now paragraph 8.62, *infra*), the European Communities considered that this paragraph was too long and not very easy to understand. We did not consider that this paragraph was unduly lengthy, or dense. We have therefore made no change to this paragraph.

7.8 In respect of paragraph 9.14 of the interim report (now paragraph 8.64, *infra*), the European Communities considered that the last two sentences of this paragraph might be further developed. We are of the view that the last two sentences are clear as drafted. We have nonetheless made a clarifying change to this paragraph.

7.9 In respect of paragraph 9.17 and footnote 314 of the interim report (now paragraph 8.67 and footnote 322, respectively, *infra*), the European Communities submitted that the Panel include the United States' argument that the European Communities' claim under Article 21.3 regarding application of a de minimis standard does not cover injury, as it is not within the Panel's terms of reference. We have revised footnote 314 accordingly.

7.10 In respect of paragraph 9.27 of the interim report (now paragraph 8.77, *infra*), the European Communities suggested that the words "among the most relevant factors" in the 9<sup>th</sup> line be replaced by the words "a relevant factor", as the latter language would be more consistent with the Panel's reasoning (presumably in the preceding paragraph). We have revised this paragraph accordingly.

7.11 In respect of paragraphs 9.7-9.29 of the interim report (now paragraphs 8.57-8.79, *infra*), the European Communities submitted that inclusion of its argument regarding the principle of effectiveness in the interpretation of Article 21.3 would strengthen the findings. We have provided the reasoning we consider appropriate in addressing this claim. We therefore decline to include the argument requested by the European Communities.

7.12 In respect of paragraphs 10.1-10.3 of the interim report (now paragraphs 8.85-8.87, *infra*), the European Communities submitted that the Panel might wish to include and address the European Communities' arguments regarding Article 22 in support of its claim under Article 21.3. We note that we are under no obligation to address each argument made by a party under a particular claim.<sup>215</sup> What matters is that we set out clearly what we consider the party's claim to be and provide a reasoned explanation for granting / rejecting the claim. We therefore decline to include and address the argument requested by the European Communities.

7.13 In respect of paragraph 10.7 of the interim report (now paragraph 8.91, *infra*), the European Communities submitted that the first sentence of this paragraph was not very clear. We have accordingly revised this sentence.

7.14 In respect of paragraph 10.21 of the interim report (now paragraph 8.105, *infra*), the European Communities argued that an expression of concern by a panel is insufficient to enable appellate review, and suggested that the Panel explain why it reached the conclusion of WTO-consistency in paragraph 10.22 (now paragraph 8.106, *infra*) in spite of the concern it expressed. We consider that

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<sup>215</sup> The Appellate Body has stated in this regard:

Just as a panel has the discretion to address only those *claims* which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those *arguments* it deems necessary to resolve a particular claim. So long as it is clear in a panel report that a panel has reasonably considered a claim, the fact that a particular argument relating to that claim is not specifically addressed in the "Findings" section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the "objective assessment of the matter before it" required by Article 11 of the DSU. (*European Communities – Measures Affecting the Importation of Certain Poultry Products*, Report of the Appellate Body, WT/DS69/AB/R, adopted 23 July 1998, para. 135) (emphasis in original)

the last sentence of paragraph 10.21 and the first two sentences of paragraph 10.22 do explain why we make a finding of WTO-consistency in paragraph 10.22 in spite of the concern we express. We have therefore made no change to this paragraph.

7.15 In respect of paragraph 10.28 of the interim report (now paragraph 8.113, *infra*), the European Communities requested that the Panel note that the parties do not dispute that some extremely small subsidy was paid after 1986 but because it was so small no countervailable benefit would have remained after the sunset review. We note, first, that the United States has never agreed with the European Communities that the amount of subsidy paid after 1986 was small, nor has the United States agreed that no countervailable benefit would have remained after completion of the sunset review. In fact, the US position is that the subsidy rate attributable to the CIG programme cannot be determined at present because the evidence necessary to calculate it was not on the record before the US DOC.<sup>216</sup> Second, the purpose of this paragraph is simply to provide the reader basic factual information about the CIG programme. Contrary to the suggestion of the European Communities, we are not at liberty to decide whether, given the amounts received by the German exporters after 1986, there would have remained any countervailable subsidy after completion of the sunset review. Any such assessment would constitute a *de novo* review, which would run counter to the teachings of the Appellate Body.<sup>217</sup> We therefore decline to include the statement requested by the European Communities.

7.16 In respect of paragraphs 11.1-11.2 of the interim report (now paragraphs 8.120-8.121, *infra*), the European Communities submitted that its arguments should be reflected in further detail, and that the Panel's findings should address those arguments as such. In particular, the European Communities referred to the obligations that "flow from the requirement to provide ample opportunity as these are exemplified in the remaining paragraphs of this Article". We have accordingly elaborated on the European Communities' arguments (*See* paragraph 8.122, *infra*). We note, however, that we find the European Communities' claims in respect of the obligation to provide ample opportunity to be outside our terms of reference (*See* Section VIII.E, *infra*). We therefore do not address these arguments.

7.17 In respect of paragraph 12.1(b) of the interim report (now paragraph 9.1(b), *infra*), the European Communities argued that the Panel should justify further its finding of a violation of Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement. We have accordingly added paragraph 8.81, *infra*. To ensure clarity and consistency in this respect throughout the findings, paragraphs 8.50, 8.107, and 10.14 have also been added, *infra*.

7.18 In respect of paragraphs 12.1(a), (d), and (f) of the interim report (the first two are now paragraphs 9.1(a) and (d), respectively, *infra*; paragraph 12.1(f) has been deleted in light of our findings in Section VIII.E, *infra*), the European Communities indicated that it disagreed with the Panel's findings in these paragraphs and the underlying reasoning. We consider that there is no request as such by the European Communities, and have therefore made no change to these paragraphs.

#### B. REQUEST OF THE UNITED STATES FOR INTERIM REVIEW

7.19 In respect of Section IX and footnote 286 of the interim report (now Section VIII.C and footnote 293, respectively, *infra*), the United States considered that the European Communities' claim in respect of the application of a *de minimis* standard to sunset reviews is effectively that Article 11.9

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<sup>216</sup> Comments of the United States on Request of the European Communities for Interim Review, p. 3.

<sup>217</sup> With respect to the issue of *de novo* review, the Appellate Body stated in *US – Cotton Yarn*: [P]anels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority. (*United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ("US – Cotton Yarn"), Report of the Appellate Body, WT/DS192/AB/R, adopted 5 November 2001, para. 74)

itself applies to sunset reviews, and that the Panel's characterisation of this claim as being that Article 11.9 "is applicable under Article 21.3" was not a minor error. According to the United States, this misstatement of the Panel obscured the fact that the majority of the Panel effectively applied a provision to sunset reviews which the majority itself conceded cannot apply to sunset reviews. We consider that the changes made in response to the European Communities' request regarding its "is implied" claim address this request of the United States (*See* paragraph 7.6, *supra*).

7.20 In respect of Section X of the interim report (now Section VIII.D, *infra*), the United States submitted that the Panel should not have made any substantive findings regarding the consistency of US law as such with the "obligation to determine", because the European Communities' claims regarding this obligation were not set out in its request for establishment and are therefore not within the Panel's terms of reference. Alternatively, the United States considered that the Panel should dismiss these claims due to the failure of the European Communities to provide in its request for establishment "a brief summary of the legal basis of the complaint sufficient to present the problem clearly", as required by Article 6.2 of the DSU.

7.21 We recall that paragraph 13 of our working procedures states that "[a] party shall submit any request for a preliminary ruling not later than its first submission to the Panel . . . Exceptions to this procedure will be granted upon a showing of good cause". In this regard, while we note that the United States had raised its objection regarding the European Communities' claims in respect of the obligation to determine prior to interim review (in its comments on the responses of the European Communities to questions from the Panel following the second meeting of the Panel), we consider that the United States could reasonably have raised this objection by the time of its first written submission, as required by our working procedures. It was clear enough, in our view, from the first written submission of the European Communities that it was making a claim in respect of the obligation to determine, for the United States to be able to do so. Thus, we do not address this objection, and have made no change to Section X of the interim report.

7.22 In any event, we consider that the European Communities' request for establishment does contain a reference to the "obligation to determine" continuation or recurrence of subsidisation. We note that the request reads in relevant part:

Under Article 21.3 of the SCM Agreement, [CVDs] have to be terminated after five years, unless the investigating authorities determine that their expiry would be likely to lead to (i.e. cause), *inter alia*, the continuation or recurrence of subsidisation. It is therefore for the DOC to make a positive demonstration to this effect. In fact, the DOC has not made such a demonstration; it has merely found that subsidies of less than the *de minimis* level provided for in Article 11.9 will continue. The European Communities do not consider that the presence of a level of subsidy which would automatically lead to the termination of a new investigation can be sufficient to warrant a further five years of countervailing measures in a sunset review, unless it can be demonstrated, on the basis of positive evidence, that there is a likelihood of the amount of subsidy increasing.<sup>218</sup>

7.23 We further note that paragraph 11 of the request summarises the European Communities' challenge as being to the US decision not to revoke CVDs in the review on carbon steel as well as to "certain aspects of the sunset review procedure which led to it". In our opinion, this paragraph includes US law in respect of the obligation to determine continuation or recurrence of subsidisation as such and as applied in the review on carbon steel. Articles 21.1 and 21.3 are clearly cited in this paragraph and, while the European Communities could certainly have been more forthcoming in its request for establishment, we are of the view that references to the US decision in carbon steel and the aspects of US law which led to it inherently include the requirements set out in Article 21.3 for the

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<sup>218</sup> WT/DS213/3, para. 6 (emphasis added).

continuation of CVDs beyond the first five years of their application. We therefore do not consider that the European Communities' claims regarding the obligation to determine likelihood of continuation or recurrence of subsidisation are outside the Panel's terms of reference.

7.24 In respect of Section XI of the interim report (now Section VIII.E, *infra*) – which originally contained substantive findings on the European Communities' claims in respect of the obligation to provide ample opportunity – the United States submitted that the Panel should not have made any substantive findings regarding this obligation, because the European Communities' claims regarding this obligation were not within the Panel's terms of reference because they did not meet the standards of Article 6.2 of the DSU. The European Communities argued that the reference in its request for establishment to Article 21 *in toto* would include Article 12, as paragraph 4 of Article 21 expressly indicates that Article 12 is applicable to sunset reviews. The European Communities further submitted that the obligation under Article 12 to provide ample opportunity to submit evidence in a sunset review is expressly mentioned in its first written submission. We have addressed these arguments and found that the European Communities' claims in respect of the obligation to provide ample opportunity are outside our terms of reference. Our reasons are set out below (*See* Section VIII.E.2, *infra*).

7.25 Finally, in respect of footnote 326 of the interim report (now footnote 334, *infra*), the United States pointed out that the citation contained therein was incorrect. We have accordingly corrected this footnote.

### VIII. FINDINGS OF THE PANEL

#### A. REQUEST OF THE UNITED STATES FOR A PRELIMINARY RULING

##### 1. Arguments of the parties

###### (a) United States

8.1 The United States requests that the Panel make a preliminary ruling that the European Communities' claims with respect to the expedited sunset review procedure are not before the Panel because this procedure is not a measure within the Panel's terms of reference.<sup>219</sup>

8.2 The United States submits that the European Communities did not identify any measure or type of proceeding in consultations other than (i) the sunset review determination in carbon steel; (ii) the initiation of sunset reviews by the DOC; and (iii) the de minimis standard employed by the DOC in sunset reviews.<sup>220</sup> Nor, argues the United States, did the European Communities identify the expedited sunset review procedure in its request for consultations or in its request for the establishment of a panel.<sup>221</sup>

###### (b) European Communities

8.3 The European Communities considers the United States' request for a preliminary ruling to be without foundation. The European Communities submits that, in its request for establishment, it refers explicitly to Section 751(c) of the Tariff Act, which, among other things, sets out the procedures for the conduct of sunset reviews, including expedited reviews.<sup>222</sup>

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<sup>219</sup> First Written Submission of the United States, para. 122.

<sup>220</sup> *Id.*, para. 125.

<sup>221</sup> *Id.*, para. 126.

<sup>222</sup> Oral Statement of the European Communities at the First Meeting of the Panel, para. 56.

8.4 The European Communities considers that whether the specific issue of the expedited review procedure was discussed during consultations is, therefore, irrelevant. In any event, the European Communities argues, the issue of the procedural and substantive requirements as to the evidence which foreign producers must provide in sunset reviews was also discussed in the consultations and, under US law, whether a full or an expedited review will take place depends precisely on the evidence provided by the foreign producers. Finally, the European Communities submits that expedited reviews were discussed, whether explicitly or implicitly, in consultations.<sup>223</sup>

## 2. Findings of the Panel<sup>224</sup>

8.5 We note that the United States does not make its request for a preliminary ruling on the basis of a particular provision of the DSU. We consider the relevant provisions of the DSU to be Article 7, covering the terms of reference of panels, and Article 6, covering the establishment of panels. Article 7 clearly indicates that the terms of reference of panels are contained in the request for the establishment of a panel<sup>225</sup>. With regard to the request for establishment, Article 6.2 of the DSU provides in part:

The request for the establishment of a panel . . . shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

The Appellate Body has stated, in respect of the terms of reference of panels:

Thus, "the matter referred to the DSB" for the purposes of Article 7 of the DSU and Article 17.4 of the *Anti-Dumping Agreement* must be the "matter" identified in the request for the establishment of a panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a panel request, to "identify the *specific measures at issue* and provide a brief summary of the *legal basis of the complaint* sufficient to present the problem clearly." (emphasis added) The "matter referred to the DSB", therefore, consists of two elements: the *specific measures at issue* and the *legal basis of the complaint* (or the *claims*).<sup>226</sup>

Further, the Appellate Body has stated, in *European Communities – Bananas*:

As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. It is important that a panel request be sufficiently precise for two

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<sup>223</sup> *Id.*

<sup>224</sup> The Chairman of the Panel made the following statement at the first meeting of the Panel with the parties:

The Panel takes note of the United States' request for a preliminary ruling as set out in its first written submission and the European Communities' response to it as set out in its oral statement at the first meeting of the Panel.

The Panel has considered the arguments of both parties, and has determined that the United States' expedited sunset review procedure is *not* within its terms of reference. We therefore grant the United States' request for a preliminary ruling, and will not be addressing the European Communities' claim in respect of the United States' expedited sunset review procedure in the present dispute. The reasons for this will be set out in full in our report.

<sup>225</sup> WT/DS213/3 in the present dispute.

<sup>226</sup> *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("Guatemala – Cement I"), Report of the Appellate Body, WT/DS60/AB/R, adopted 25 November 1998, para. 72 (emphasis in original).

reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.<sup>227</sup>

8.6 Thus, the United States' request raises two separate, but related, issues: (i) whether the US expedited sunset review procedure was identified in the request for establishment as a measure challenged by the European Communities and, if so, (ii) whether the European Communities' request for establishment provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" and therefore satisfies the standard set out in Article 6.2 of the DSU.

8.7 We shall first examine the request for establishment to determine whether, on its face, the United States – and any other WTO Member – could have been reasonably expected to know that the expedited review procedure was part of "the matter referred to the DSB".

8.8 It is clear from the European Communities' request for establishment that the word "expedited" does not appear in that request. Nor does the request contain any all-encompassing reference to US procedures, generally, for sunset review. Paragraphs 1-2 of the request for establishment set out the procedural background to the request for establishment, paragraph 3 explains that the request relates particularly to the sunset review in carbon steel, paragraphs 4-7 set out the European Communities' claim in respect of the de minimis standard applied in that review, paragraphs 8-10 set out the European Communities' claim in respect of the evidentiary standards applied in relation to the initiation of that review, and paragraph 11 summarises the European Communities' challenge to the US decision in that review, as well as to "certain aspects of the sunset review procedure which led to it". This latter phrase could not be understood to include the expedited review procedure, as the sunset review in carbon steel was a full review.<sup>228</sup>

8.9 We note that the request for establishment further outlines the statutory and regulatory underpinnings of the US sunset review procedures as such, and as applied in the sunset review in carbon steel. These statutory and regulatory provisions also govern the expedited review procedure, as pointed out by the European Communities. We consider, however, that this fact alone is insufficient for us to conclude that the expedited review procedure is identified as a specific measure at issue.<sup>229</sup>

8.10 Having found that the expedited review procedure is not identified in the request for establishment, we shall consider whether that "measure" is sufficiently related to a measure or measures that are specifically identified so as to bring it within our terms of reference. We note the finding of the Panel in *Japan – Film*:

The question thus becomes whether the ordinary meaning of the terms of Article 6.2, i.e., that "the specific measures at issue" be identified in the panel request, can be met if a "measure" is not explicitly described in the request. To fall within the terms of

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<sup>227</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("European Communities – Bananas"), Report of the Appellate Body, WT/DS27/AB/R, adopted 25 September 1997, para. 142.

<sup>228</sup> Indeed, while this has no legal relevance to our examination of the European Communities' request for establishment, we note that a similar phrase is used by the European Communities in its first written submission:

The present proceeding concerns also certain aspects of the US basic sunset review legislation and procedure which led to the continuation of the duties in this case (First Written Submission of the European Communities, para. 30 (emphasis added)).

<sup>229</sup> We therefore need not, and do not, address the United States' arguments with regard to the measures identified by the European Communities in consultations, and the European Communities' response thereto (See paras. 8.2 and 8.4, *supra*).

Article 6.2, it seems clear that a "measure" not explicitly described in a panel request must have a clear relationship to a "measure" that is specifically described therein, so that it can be said to be "included" in the specified "measure". In our view, the requirements of Article 6.2 would be met in the case of a "measure" that is subsidiary, or so closely related to a "measure" specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party. The two key elements – close relationship and notice – are inter-related: only if a "measure" is subsidiary or closely related to a specifically identified "measure" will notice be adequate.<sup>230</sup>

8.11 The United States explains that, upon automatic initiation by the DOC of a sunset review within five years of the date of publication of a CVD order, a review can follow one of three basic paths: (i) revocation of the order; (ii) an expedited sunset review; and (iii) a full sunset review.<sup>231</sup> We do not consider that the European Communities' general discussion of the automatic initiation of sunset reviews by the DOC is sufficient to put the United States – as well as other Members – on notice that the expedited review procedure was also under challenge. We note that the European Communities' request refers to "certain aspects of the sunset review procedure which led to [the DOC decision not to revoke the CVDs on carbon steel]". The challenge is thus apparently to those aspects of the sunset review procedure that have some relevance to the carbon steel case, which is not true of the expedited review procedure, because the carbon steel case involved a full, not expedited, review. We do not consider the expedited review procedure to be "a 'measure' that is subsidiary, or so closely related to" any of the measures specifically identified, "that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party". We, therefore, find that the expedited review procedure is not sufficiently related to a measure or measures that are specifically identified in the request for establishment as to properly bring it within our terms of reference.<sup>232</sup>

8.12 For the foregoing reasons, we consider that the European Communities has failed to set out a claim in its request for establishment with respect to the United States' expedited sunset review procedure, and this "measure" is, therefore, outside our terms of reference. Accordingly, we grant the United States' request for a preliminary ruling.

B. WHETHER US CVD LAW AS SUCH IS INCONSISTENT WITH THE SCM AGREEMENT IN RESPECT OF THE APPLICATION OF EVIDENTIARY STANDARDS FOR THE SELF-INITIATION OF SUNSET REVIEWS

### 1. Arguments of the parties

(a) European Communities

8.13 In the view of the European Communities, the non-application of evidentiary standards to the self-initiation of sunset reviews constitutes a violation of Article 21.3 of the SCM Agreement.

8.14 The European Communities considers that the ordinary meaning of the text of Article 21.3 establishes an unequivocal obligation on WTO Members to terminate any measure imposing CVDs on a date no later than five years from its imposition.<sup>233</sup> The European Communities explains that

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<sup>230</sup> *Japan – Measures Affecting Consumer Photographic Film and Paper ("Japan – Film")*, Report of the Panel, WT/DS44/R, adopted 22 April 1998, para. 10.8.

<sup>231</sup> First Written Submission of the United States, paras. 7-10.

<sup>232</sup> Having concluded that the European Communities has not identified the expedited review procedure as a specific measure at issue in its request for establishment, we need not, and do not, consider whether the European Communities has provided "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in that request for establishment (*See* paras. 8.5-8.6, *supra*).

<sup>233</sup> First Written Submission of the European Communities, para. 48.

Article 21.3 thus renders effective the requirement in Article 21.1 that application of a CVD be limited to the time necessary to counteract injurious subsidisation, by establishing the presumption that this time elapses five years from the imposition of the CVD<sup>234</sup>, "unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury". Referring to this language, the European Communities explains that the ordinary meaning of the word "unless", which "introduces an exception to the presumption of termination, clearly conveys the notion that an exception to the basic rule is introduced"<sup>235</sup>. US law, by requiring that sunset reviews are automatically initiated for all existing CVD measures no later than 30 days before the fifth anniversary date of their imposition, "clearly transforms this exception into a rule"<sup>236</sup>, thus infringing the letter and the spirit of Article 21, paragraphs 1 and 3, as well as Article 10, of the SCM Agreement. The European Communities further submits that the US statement of policy practices "confirms the disregard for the presumption of termination of all [CVDs]"<sup>237</sup> contained in Article 21 of the SCM Agreement.

8.15 The European Communities argues that, in order to initiate a sunset review on their own initiative, the domestic authority must be in possession of evidence, as would be required in order to initiate an investigation on their own initiative, thus imputing the principle of Article 11.6 into Article 21.3. It further argues that, in order to initiate a sunset review on their own initiative, the domestic authority should be in possession of the same level of evidence as would be required in a "duly substantiated request" from the domestic industry, thus equating the level of evidence required for self-initiation under Article 21.3 with that required for initiation upon request by the domestic industry under Article 21.3. It considers that, as the purpose and effect of initial investigations and of sunset reviews are the same, it is reasonable and coherent to apply the same standards as regards initiation and conduct of reviews in both instances. Otherwise, "self-initiation would become the easy option and would lead to inconsistent results"<sup>238</sup>. According to the European Communities, the purpose of the evidentiary standard is to guarantee that genuine cases are brought which are backed by concrete evidence. In the view of the European Communities, the automatic self-initiation of sunset reviews by the DOC is simply a device for lowering the level of evidence required from the domestic industry in order to initiate a sunset review<sup>239</sup>.

8.16 In particular, the European Communities posits that a "duly substantiated request" should normally contain information, *inter alia*, on the:

- volume and value of domestic production
- volume and value of the production of petitioners
- volume and value of total imports
- volume and value of subsidised imports
- existence, amount, and nature of the subsidy, plus evidence relating to its continuation or recurrence
- effect of imports on prices, production, and sales

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<sup>234</sup> *Id.*, para. 51.

<sup>235</sup> *Id.*, para. 52.

<sup>236</sup> *Id.*, para. 53.

<sup>237</sup> *Id.*, para. 54.

<sup>238</sup> Response of the European Communities to Question 4 from the Panel.

<sup>239</sup> Response of the European Communities to Question 13(b) from the Panel.

- causality between subsidised imports and injury, and evidence of why such injury will continue or recur<sup>240</sup>

8.17 More generally – and this is also relevant to the European Communities' claim that the de minimis standard is applicable to sunset reviews (*See* Section C, *infra*) – the European Communities considers that "all provisions [of the SCM Agreement] are potentially applicable mutatis mutandis to Article 21.3, to the extent that they are relevant to the issues covered by Article 21.3 and that their application to Article 21.3 does not create a situation of conflict or is not specifically excluded"<sup>241</sup>.

(b) United States

8.18 The United States points to one of the basic principles of treaty interpretation, that a treaty interpreter cannot read into a treaty "words that are not there"<sup>242</sup>, which is precisely what, in the view of the United States, the European Communities is asking the Panel to do here by imputing into Article 21.3 the obligations contained in Article 11.6.<sup>243</sup> The European Communities' claims must therefore fail, according to the United States. The United States characterises the European Communities' argument that a parallelism exists between the investigation and sunset review provisions of the SCM Agreement as a theory, and argues that a theory, under customary rules of treaty interpretation, cannot overcome the ordinary meaning of the words of a treaty, taking into account their context and the object and purpose of the agreement.<sup>244</sup> In particular, argues the United States, if the SCM Agreement implicitly incorporates this parallelism, why then did the Members find it necessary to provide explicitly in Article 21.4 that the requirements contained in Article 12 for the conduct of investigations are also applicable to the conduct of reviews, including sunset reviews?<sup>245</sup>

8.19 The United States considers that nothing in the text of Article 21.3, or Article 11.6, imposes any evidentiary requirements on authorities who initiate sunset reviews on their own initiative. The United States also emphasises the distinction between the investigatory phase and the review phase of a CVD proceeding, as reflected in the provisions of the SCM Agreement.<sup>246</sup> In this regard, the United States cites the finding, regarding the Anti-Dumping ("AD") Agreement, of the Panel in *United States – DRAMS*:

[T]he term "investigation" means the investigative phase leading up to the final determination of the investigating authority.<sup>247</sup>

8.20 The United States does not consider sunset reviews to be an "exception" to a presumption of termination (or anything else), but instead merely one part of an overall balance of rights and obligations negotiated during the Uruguay Round.<sup>248</sup> In any event, submits the United States<sup>249</sup>, even if one were to treat sunset reviews as an "exception" to something else, the European Communities' arguments run afoul of a different principle, that set out by the Appellate Body in *European Communities – Hormones*:

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<sup>240</sup> Response of the European Communities to Question 13(a) from the Panel.

<sup>241</sup> Response of the European Communities to Question 5(a) from the Panel.

<sup>242</sup> *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products ("India – Patents (US)")*, Report of the Appellate Body, WT/DS50/AB/R, adopted 16 January 1998, para. 45.

<sup>243</sup> First Written Submission of the United States, para. 2.

<sup>244</sup> Second Written Submission of the United States, para. 6.

<sup>245</sup> *Id.*, para. 7.

<sup>246</sup> First Written Submission of the United States, paras. 67-68.

<sup>247</sup> *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea ("United States – DRAMS")*, Report of the Panel, WT/DS99/R, adopted 19 March 1999, footnote 519.

<sup>248</sup> First Written Submission of the United States, para. 3.

<sup>249</sup> *Id.*

[M]erely characterising a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted . . . by applying the normal rules of treaty interpretation.<sup>250</sup>

8.21 More generally, the United States considers that "no provisions are applicable to reviews under Article 21.3, unless specifically indicated . . . [I]t is a matter of what the text of Article 21.3 provides, as interpreted in accordance with the rules of [treaty interpretation] . . . There could be a cross-reference between the two provisions, a reference in one provision to the other, or a general statement that a provision applies throughout the Agreement or throughout Part V of the Agreement"<sup>251</sup>. The United States considers that "other provisions of the SCM Agreement would apply where the Agreement says they apply"<sup>252</sup>.

## 2. Findings of the Panel

8.22 We understand the European Communities' claim in respect of the US system of automatic self-initiation of sunset reviews to be the following: that the US system of automatic self-initiation of sunset reviews runs counter to the presumption of termination of all CVDs contained in Article 21.3, because it does not satisfy the evidentiary standards of Article 11.6 that the European Communities believes are implied in Article 21.3.<sup>253</sup> The thrust of the European Communities' argument is, therefore, that automatic self-initiation transforms an exception – possible continuation of a CVD – into a general rule, because self-initiation, coupled with other characteristics of US procedure, leads to the automatic continuation of CVDs.<sup>254</sup> Further, statistical data, according to the European Communities, "provide clear evidence of the fact that US law and regulations are biased in favour of keeping and perpetuating unjustified CVD orders"<sup>255</sup>.

8.23 In response to a question from the Panel as to whether it considers the self-initiation of sunset reviews to be in and of itself WTO-inconsistent, the European Communities' states, "No . . . The [European Communities'] claim is that the investigating authority must be in possession of sufficient evidence, that is the same level or an equivalent amount of relevant evidence that would be required from the domestic industry if it initiates on its own initiative, as in [sic] the case in the initiation of new investigations."<sup>256</sup> It is, therefore, the "automatic" nature of self-initiation in the US sunset review system – that is, the fact that the DOC is not required to have any evidence of likelihood of continuation or recurrence of injurious subsidisation to initiate sunset reviews – to which the European Communities objects, and not the self-initiation of sunset reviews itself.

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<sup>250</sup> *European Communities – Measures Concerning Meat and Meat Products (Hormones)* ("European Communities – Hormones"), Report of the Appellate Body, WT/DS26/AB/R-WT/DS48/AB/R, adopted 13 February 1998, para. 104.

<sup>251</sup> Response of the United States to Question 24(a) from the Panel.

<sup>252</sup> Response of the United States to Question 24(b) from the Panel.

<sup>253</sup> We do not understand the European Communities to be alleging a violation of Article 11.6, but of Article 21.3, of the SCM Agreement. In this regard, we note that the European Communities argues that "an interpretation of Article 21.3 should be made in context and in the light of the object and purpose of Article 21.3 and of the SCM Agreement. Articles 21.1, 22.1, 22.7, 10, and 11.6 provide relevant context and help define its object and purpose. Such an interpretation . . . requires that the evidentiary standards of Article 11.6 should be implied, and hence applied, also to the evidentiary requirements in sunset reviews" (Response of the European Communities to Question 46 from the Panel (emphasis added)).

Nor could the European Communities successfully allege a violation of Article 11.6. Article 11 is entitled "Initiation and Subsequent Investigation", and clearly deals with investigations, such as that term is distinguished from reviews by the Agreement. This is also made clear in the text of Article 11.6 itself, which refers to investigations. We therefore consider whether Article 21.3 contains by implication the same type of obligation as Article 11.6, and whether the United States has violated Article 21.3 in this respect.

<sup>254</sup> Second Written Submission of the European Communities, para. 16.

<sup>255</sup> *Id.*, para. 17.

<sup>256</sup> Response of the European Communities to Question 4 from the Panel.

8.24 With regard to the evidentiary standards to be met by authorities who initiate sunset reviews on their own initiative (or "self-initiate"), the European Communities draws a parallel between sunset reviews and investigations, submitting that the Panel should consider implied in Article 21.3 the requirements of Article 11.6. The principal question before us, therefore, is whether the text of Article 21.3 imposes any evidentiary requirements on authorities in the self-initiation of sunset reviews. In other words, is the European Communities correct in arguing that, as exceptions need to be strictly interpreted and applied, and the continuation of a duty past the initial five-year period is an exception to the presumption of termination and thus equivalent to a new imposition of the original duty, it follows that the self-initiation of sunset reviews must satisfy evidentiary requirements, as is required in Article 11.6 for the self-initiation of investigations?

8.25 Article 3.2 of the DSU indicates that Members recognise that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". In this regard, the Appellate Body, in *United States – Gasoline*, refers to "a fundamental rule of treaty interpretation [which] has received its most authoritative and succinct expression in the *Vienna Convention on the Law of Treaties*"<sup>257</sup> ("Vienna Convention"), and cites Article 31.1 thereof, which reads as follows:

#### ARTICLE 31

##### *General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>258</sup>

The Appellate Body indicates that "[this] general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law'"<sup>259</sup>. We shall, therefore, begin our analysis of the European Communities' claim under Article 21.3 of the SCM Agreement on the basis of the text of that provision in its context and in light of the object and purpose of the Agreement.

8.26 We recall that Article 21.3 states:

Notwithstanding the provisions of paragraphs 1 and 2, any definitive [CVD] shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidisation and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury. The duty may remain in force pending the outcome of such a review.<sup>260</sup>

We note, at the outset, that nothing in the text of Article 21.3 specifically provides that the evidentiary standards applicable to the initiation of investigations are also applicable to the initiation of sunset reviews. We would expect that the drafters would have been able and chosen to include a clear

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<sup>257</sup> *United States – Standards for Reformulated and Conventional Gasoline* ("United States – Gasoline"), Report of the Appellate Body, WT/DS2/AB/R, adopted 20 May 1996, p. 16.

<sup>258</sup> (1969) 8 *International Legal Materials* 679.

<sup>259</sup> *United States – Gasoline*, Report of the Appellate Body, footnote 257, *supra*, p. 17 (footnote omitted).

<sup>260</sup> Footnote deleted.

indication to that effect, should that have been their intention. Indeed, we agree with the United States' argument that the absence of a clear indication, for instance, in the form of a cross-reference, is all the more significant given the context of Article 21.3 – that is, the fact that the drafters did provide explicit indications elsewhere in Article 21, in relation to Articles 12 and 18. It is clear that the drafters knew how to have obligations set forth in one provision apply in another context.<sup>261</sup> The most obvious inference we can draw from the absence of a clear indication, therefore, is that the Members chose not to imply in Article 21.3 the evidentiary requirements of Article 11.6. And we must first find that the provision contains such requirements before we can find that the United States violated the provision on the basis of its non-observance of such requirements.

8.27 We cannot, however, conclude on the basis of silence alone that the evidentiary standards of Article 11.6 necessarily do not apply to sunset reviews. Doing so would mean that the mere absence of an explicit statement as to the applicability of the evidentiary standards of Article 11.6 is conclusive. In our opinion, reading the text of Article 21.3 in its context and in light of the object and purpose of the treaty, as required by the customary rules of treaty interpretation reflected in the Vienna Convention, means that we cannot treat silence as to the applicability of Article 11.6 as conclusive. An explicit articulation of the scope of application of the evidentiary standards of Article 11.6 would certainly be conclusive, in that if the Agreement provided that they applied only in certain circumstances or did not apply in certain circumstances, such articulation would be determinative; we find it difficult, however, to consider that silence has the same dispositive value. While silence could be explained by the drafters' intention for the requirements of the provision not to apply in any other context, as suggested by the United States, silence could also be explained by the drafters' belief that it was obvious that it did. In other words, we are unable to conclude solely on the basis of silence that an evidentiary standard is not implied in Article 21.3. Rather, we believe that we must consider the context of Article 21.3 – that is, provisions of the SCM Agreement other than Article 21.3 – and the object and purpose of the SCM Agreement in reaching a conclusion.

8.28 Article 31 of the Vienna Convention does not, in our view, limit us to a literal reading of the provision in question. Were such a reading to be required, provisions such as Article 15.3 – which deals with the circumstances in which imports may be cumulated for purposes of injury determinations – and Article 19 – which deals with the imposition and collection of CVDs – would be limited in ways that would negatively affect the operation of the Agreement, particularly with respect to sunset reviews, something that cannot have been intended by the drafters.

8.29 Equally persuasive, we consider, is the case of Article 21.1, which reads:

A [CVD] shall remain in force only as long as and to the extent necessary to counteract subsidisation which is causing injury.

Were this provision to be read literally, the words "is causing injury" would suggest that a CVD could only remain in place, including under Article 21.3, where there is likelihood of continuation of subsidisation and injury, not recurrence. The notion of recurrence contained in Article 21.3, therefore, has to be implied in Article 21.1, or it would be rendered meaningless. Finally, Article 32.3<sup>262</sup>, if read

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<sup>261</sup> A number of provisions in the SCM Agreement also apply independently of cross-references in that they contain explicit statements of their scope of application: definition of "subsidy" in Article 1 ("For the purpose of this Agreement"); definition of "interested parties" in Article 12.9 ("for the purposes of this Agreement"); calculation of the amount of a subsidy under Article 14 ("For the purpose of Part V"); definition of "initiated" in footnote 37 ("as used hereinafter"); definition of "injury" under Article 15 and in footnote 45 ("Under this Agreement"); definition of "like product" in footnote 46 ("Throughout this Agreement"); definition of domestic industry in Article 16 ("For the purposes of this Agreement"); and definition of "levy" in footnote 51 ("As used in this Agreement").

<sup>262</sup> Article 32.3 provides:

literally, would apply only to investigations and reviews initiated pursuant to applications from the domestic industry, and not initiated on an ex officio basis. Again, this cannot be the case. These several instances of provisions in the Agreement that, if read literally, would yield irrational results, confirm our view that we are not limited to a literal reading of the text of Article 21.3.

8.30 We also recall certain statements of the Appellate Body in *Canada – Autos*. In addressing the Panel's finding that Article 3.1(b) of the SCM Agreement did not apply to subsidies contingent in fact upon the use of domestic over imported goods, the Appellate Body stated:

As we have said [in *Japan – Alcohol*], and as the Panel [in *Canada – Autos*] recalled, "omission must have some meaning". Yet omissions in different contexts may have different meanings, and omission, in and of itself, is not necessarily dispositive. Moreover, while the Panel rightly looked to Article 3.1(a) as relevant context in interpreting Article 3.1(b), the Panel failed to examine other contextual elements for Article 3.1(b) and to consider the object and purpose of the *SCM Agreement*.<sup>263</sup>

We consider that these statements of the Appellate Body make it clear that silence – or omission – is not controlling, and that interpretation under Article 31 of the Vienna Convention does not require that silence must be controlling.

8.31 Accordingly, it is important that we first set out the legal framework within which Article 21.3 exists and operates. We recall that paragraph 6(a) of Article VI of the General Agreement on Tariffs and Trade ("GATT") 1994, which deals with anti-dumping and CVDs, states:

No contracting party shall levy any anti-dumping or [CVD] on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidisation, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

Further, Article VI:3 states, in relevant part:

The term "[CVD]" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.<sup>264</sup>

This definition is confirmed for purposes of the SCM Agreement in footnote 36 to that Agreement, which reads:

The term "[CVD]" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

The two GATT provisions, in our view, set out the purpose of CVDs and the general circumstances in which they may be levied as well as give some indication of the object and purpose of the SCM Agreement.

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Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

<sup>263</sup> *Canada – Certain Measures Affecting the Automotive Industry* ("*Canada – Autos*"), Report of the Appellate Body, WT/DS139/AB/R-WT/DS142/AB/R, adopted 19 June 2000, para. 138 (footnote deleted, emphasis added).

<sup>264</sup> Ad notes deleted.

8.32 Part V of the SCM Agreement sets out the specific substantive and procedural conditions that must be met for the WTO-consistent imposition of CVDs. Particularly noteworthy are Articles 10 and 19.4, which read, respectively:

Members shall take all necessary steps to ensure that the imposition of a [CVD] 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. [CVDs] may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.<sup>265</sup>

No [CVD] shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidisation per unit of the subsidised and exported product.<sup>266</sup>

Article VI of the GATT 1994 and Part V of the SCM Agreement must, thus, be seen as not only explaining the purpose of CVDs but also constituting the framework of rights and obligations within which CVDs exist. This complex framework of rights and obligations is the context in which we consider we must interpret Article 21.3.

8.33 Let us now situate Article 21.3 in its immediate context. We recall that Article 21.1 sets out a fundamental obligation, which relates to the above provisions of Article VI of the GATT 1994:

A [CVD] shall remain in force only as long as and to the extent necessary to counteract subsidisation which is causing injury.

In other words, a Member must ensure that any CVD only remains in place under these circumstances. Articles 21.2 and 21.3 are, therefore, further articulations, in respect of certain specific scenarios, of the ongoing obligation contained in Article 21.1. Article 21.2 provides the modalities for compliance with this obligation during the period of application of a CVD, while Article 21.3 provides the modalities for compliance with this obligation upon expiry of that period. Both provisions emphasise the basic discipline on the imposition of CVDs, that they can only apply where subsidisation causes or is likely to cause injury.

8.34 We now examine Article 11.6, the evidentiary standards of which the European Communities argues are implied in Article 21.3, and which provides:

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

Again, we recognise, at the outset, that nothing in the text of the provision provides for its evidentiary standards to be implied in Article 21.3. What is clear from this language, however, is that a CVD investigation cannot be self-initiated by an investigating authority unless the requirement of sufficient evidence of subsidisation, injury, and causation is met. Investigating authorities must ensure that they are in the possession of such evidence. The terms of the provision are unequivocal. Such mandatory and conditional ("in special circumstances"; "only if"; "to justify") language would suggest that the drafters had an important consideration in mind in drafting this provision, reflected in the precise choice of words. In particular, the mandatory nature and conditional language of the

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<sup>265</sup> Footnotes deleted.

<sup>266</sup> Footnote deleted.

provision convey, in our view, that the drafters sought a particular outcome, to protect exporters and prevent trade harassment through initiation of groundless investigations.

8.35 It is in light of this rationale for the inclusion of evidentiary standards for self-initiation of CVD investigations and the requirement of sufficient evidence that we must address the European Communities' claim that such standards are implied in Article 21.3. In this regard, we must consider whether the rationale of protection of exporters is equally applicable to sunset reviews as it is to CVD investigations. It would seem to us that, while the initiation – whether upon application by a domestic industry or on the initiative of the investigating authorities – of a CVD investigation clearly has a chilling effect on trade in the product concerned, it is less clear that the initiation of a sunset review of an existing CVD has the same effect.

8.36 Essentially, we do not see how trade in a product subject to a CVD would suffer a chilling effect upon initiation of a sunset review additional to that already in existence. And this existing chilling effect would only be completely mitigated upon actual expiry of the CVD, not the possibility of its expiry, contrary to the suggestion of the European Communities. Certainly, the potential for impact on trade is less in case of the initiation of a sunset review than that of an investigation. If anything, the initiation of a sunset review while it might not allow for a positive impact that might otherwise have occurred through the expiry of the CVD, might also have a positive impact on trade flows (in the expectation of a possible expiry of the CVD), rather than have a negative impact per se. In sum, given the framework of disciplines that governs the imposition of CVDs and the role of the SCM Agreement in ensuring that CVDs do not unjustifiably impede international trade, we find it difficult to see how self-initiation of a CVD investigation could be considered comparable to self-initiation of a sunset review of a CVD.

8.37 While the European Communities is correct in stating that "[a]pplications under [Article] 11.5 [sic] and requests under [Article] 21.3 are aimed at securing the same objective, that is to avoid unjustified disruptions in international trade on the basis of allegations and claims that are manifestly incorrect"<sup>267</sup>, there is no dispute over the evidentiary standards required to be fulfilled for initiation upon requests under Article 21.3 by the domestic industry. Rather, the focus of this claim is self-initiation, and the dispute is over whether, in the absence of language like that contained in Article 11.6 – which clearly characterises the self-initiation of investigations as something that occurs "in special circumstances" and sets out the requirement of "sufficient evidence of a subsidy, injury and causal link" before an investigating authority may self-initiate – Article 21.3 must in respect of self-initiation be understood to include a requirement of some degree of evidentiary support as well.

8.38 We recall that Article 11.2 of the Agreement sets out in detail the evidentiary standards to be met by written applications by or on behalf of a domestic industry, and Article 11.6 indicates that the investigating authorities must satisfy the same evidentiary standards before they can proceed to self-initiate. The marked difference between the terms of Articles 11.2 and 11.6, on the one hand, and those of Article 21.3, on the other, suggests that the drafters did not intend the self-initiation of sunset reviews to be held to the same evidentiary standards as the self-initiation of investigations or indeed to any evidentiary standards at all. To our minds, the terms of Article 21.3 ("in a review initiated . . . on [the investigating authorities'] own initiative or upon a duly substantiated request made by or on behalf of the domestic industry") suggest that the drafters considered the self-initiation of sunset reviews to be simply one of two modalities for the initiation of sunset reviews – and not something that occurs "in special circumstances" – and it therefore follows that self-initiation does not require the fulfilment of particular evidentiary standards. It is simply one way for investigating authorities to commence a sunset review, something which must be undertaken to determine whether a CVD may remain in place past the five-year deadline set out in the Agreement.

8.39 Further, we note the Appellate Body's statement, in *EC – Computer Equipment*:

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<sup>267</sup> Response of the European Communities to Question 6(a) from the Panel.

The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties.<sup>268</sup>

Given the marked difference between the terms of Articles 11.2 and 11.6, on the one hand, and those of Article 21.3, on the other, we cannot conclude that the "common intentions of the parties" were to have the evidentiary standards of Article 11.6 apply to sunset reviews. As the Appellate Body has stated, in *India – Patents (US)*:

The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.<sup>269</sup>

8.40 We note that the European Communities argues:

The current US law requires the automatic initiation of sunset reviews without any evidence. This ignores the presumption of termination under Article 21.3 and reverses the burden of proof, which should be on the petitioners or the investigating authority to justify the initiation of a review and not on the exporters to justify the termination and the non-initiation of such a review.<sup>270</sup>

We find this argument to be rather circular. The claim we are deciding is made in respect of the application of evidentiary standards to the self-initiation of sunset reviews. The above argument presupposes that evidentiary standards do apply to the self-initiation of sunset reviews. We do not find that it provides further grounds for the application of evidentiary standards to the self-initiation of sunset reviews.

8.41 The European Communities also argues that US CVD law:

"shift[s] the burden of proof on foreign exporters and governments to demonstrate no likelihood of continuation or recurrence of subsidisation and injury in violation of Articles 21.1 and 21.3, which require termination of [the] CVD unless the domestic authorities demonstrate the opposite".<sup>271</sup>

We recall that Article 21.3 requires that a CVD be terminated after five years unless the investigating authority determines that expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury. What the European Communities characterises as "an important and burdensome action from exporters"<sup>272</sup> to produce evidence that the measure should expire does not, in our view, relieve the United States from – or run counter to – the obligation to make the determination required by Article 21.3 before the United States can extend application of a CVD beyond five years. It seems to us that, while the action of exporters may result in expiry of the measure, it may also result in a sunset review in which the United States would have to satisfy the conditions of Article 21.3 in order to take a decision not to revoke the measure.

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<sup>268</sup> *European Communities – Customs Classification of Certain Computer Equipment ("EC – Computer Equipment")*, Report of the Appellate Body, WT/DS62/AB/R-WT/DS67/AB/R-WT/DS68/AB/R, adopted 22 June 1998, para. 84.

<sup>269</sup> *India – Patents (US)*, Report of the Appellate Body, footnote 242, *supra*, para. 45.

<sup>270</sup> Response of the European Communities to Question 2 from the Panel (emphasis in original).

<sup>271</sup> Response of the European Communities to Question 42 from the Panel.

<sup>272</sup> Response of the European Communities to Question 13(b) from the Panel.

8.42 Thus, while we neither adopt nor endorse the "shift[s] the burden of proof" language used by the European Communities – language not used by the Agreement itself – it is clear that, in the absence of an affirmative determination by an investigating authority, CVDs may not be maintained beyond a five-year period. It is also clear that any such determination must be correctly reasoned and based on positive evidence. We cannot, however, see how the automatic self-initiation of sunset reviews runs afoul of that obligation in any way. The initiation of a review is merely the beginning of a process leading to a determination as to whether or not subsidisation and injury are likely to continue or recur. The standards for the initiation of a review – whether on the initiative of an investigating authority or upon request by the domestic industry – in no way prejudice the standards applied by an investigating authority in reaching the substantive determination to be made in that review. In sum, it seems to us that the European Communities' argument is based upon an incorrect equation of the standards for the initiation of a review with those for the substantive determination to be made in a review.

8.43 We note that the European Communities posits that "the purpose and effect of initial investigations and of sunset reviews are the same" and "the object and purpose of both provisions . . . remains the same". In the view of the European Communities, therefore, the requirement that certain evidentiary standards be fulfilled for the self-initiation of investigations must have its equivalent in the self-initiation of sunset reviews. We see no difficulty, however, with an interpretation under which investigating authorities may not self-initiate investigations without certain evidence, but may self-initiate sunset reviews without any evidence.<sup>273</sup> Given that evidentiary standards for the self-initiation of investigations are understood to exist for the purpose of avoiding trade harassment, the drafters could very reasonably have intended such standards to be inapplicable to the self-initiation of sunset reviews, as sunset reviews do not have the same potential for trade harassment as investigations, as discussed above (*See* paragraph 8.36, *supra*). We consider it perfectly rational for them to have established a set of disciplines in respect of investigations, and have some of them apply to sunset reviews and others not. To accept the European Communities' proposition would require us first to accept as fact that "the purpose and effect of initial investigations and of sunset reviews are the same", and then to conclude that this purpose and effect somehow override conclusions based on our reading of the text itself. We see no sound legal basis for the conclusion that the purpose and effect of proceedings governed by certain provisions trump textual analysis of those provisions in their context and in light of the object and purpose of the treaty.

8.44 Moreover, it is not a foregone conclusion that "the purpose and effect of initial investigations and of sunset reviews are the same". The European Communities argues, in respect of the substantive assessments to be made in each, "There are not [sic] differences except that in the case of Article 21.3 there are CVD measures already in force . . . [T]his inevitably involves a certain element of prediction based on the facts presented of what would happen if the measures were left to expire"<sup>274</sup> . . . "The difference in the wording of the provisions on new investigations and sunset reviews merely reflects the fact that, in the latter case, there is a need to take account of an existing measure in establishing whether the conditions still exist for applying [CVD] measures; the object and purpose of both provisions, however, remains the same"<sup>275</sup>. While it is factually correct that both types of proceedings (or both segments of the proceeding) have the same effect in that they can result in the imposition / continuation of CVDs for a period of five years, whether the purpose of, and the substantive assessment involved in, each is the same is certainly at least debatable.

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<sup>273</sup> We note, in this regard, that Article 21.2 – which sets out the obligation of investigating authorities to review the need for the continued imposition of a CVD – contains the phrase "where warranted". The marked difference between the terms of Articles 11.6 and 21.2, on the one hand, and those of Article 21.3, on the other, would support our view that self-initiation of various proceedings – or segments of a proceeding – do not necessarily require fulfilment of the same evidentiary standards, and that this situation was intended by the parties.

<sup>274</sup> Response of the European Communities to Question 7(b) from the Panel.

<sup>275</sup> Response of the European Communities to Question 7(a) from the Panel.

8.45 The European Communities explains that "[CVD] measures are exceptional, non-MFN measures that are permitted only and so long as it is necessary to offset injurious subsidies. This is true as regards both the original imposition of [CVDs] and their review under the sunset provisions of the SCM Agreement"<sup>276</sup> . . . [T]he provisions of Article 21.3 [of the] SCM Agreement relating to continuation of a CVD measure constitute an exception to the general rule which provides that CVD orders should in principle expire after 5 years"<sup>277</sup> . . . The phrase 'strict interpretation' in this context [reading the text of Article 21.3 to include obligations not explicitly set out therein] simply stands for the proposition that the terms of Article 21.3 have to be interpreted also in light of their object and purpose and in context, which is the entire SCM Agreement and, in particular, Articles 11.6, 11.9 and 15.3 thereof. It is further meant to clarify the proposition that a subsidy which is found to be less than 1% in the original investigation – before the entry into force of the *SCM Agreement* – would not benefit from a lenient or relaxed interpretation of Article 21.3 so as to permit its unjustified continuation even if it is likely to be below the 1% *de minimis* rule in the sunset review. This relaxed interpretation is the basic US argument which proposes to read the terms of Article 21.3 in complete isolation of the rest of the Agreement"<sup>278</sup>. In our view, the correct – whether or not "strict" – interpretation of the terms of Article 21.3 would involve precisely the type of analysis proposed by the European Communities. Moreover, the Appellate Body has stated, in *European Communities – Hormones*:

[M]erely characterising a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted . . . by applying the normal rules of treaty interpretation.<sup>279</sup>

8.46 It would seem to us that it is the very analysis characterised by the European Communities as "strict" – which we consider simply to be that outlined in Article 31 of the Vienna Convention – that the European Communities asks us to ignore by focusing on the notion that "the purpose and effect of initial investigations and of sunset reviews are the same" and "the object and purpose of both provisions . . . remains the same". With regard to the object and purpose of parties to a treaty and of the treaty, we note that the Appellate Body has stated, in *US – Shrimp*:

A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.<sup>280</sup>

The context of a particular provision and the object and purpose of a treaty – or of the provision at issue – do not override the plain meaning of the text of the provision; rather, the text is to be read in its context and in light of the object and purpose of the treaty. In sum, we do not find that the text of Article 21.3 lends itself to the interpretation proposed by the European Communities.

8.47 While we do not disagree that application of evidentiary standards to self-initiation of sunset reviews would ensure a certain balance between the disciplines applicable to investigations and those applicable to sunset reviews, it is nonetheless difficult to conclude on that basis alone that the same evidentiary standards apply to self-initiation in both instances. As the Appellate Body has stated, in *EC – Hormones*:

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<sup>276</sup> Oral Statement of the European Communities at the First Meeting of the Panel, para. 3.

<sup>277</sup> Response of the European Communities to Question 8(a) from the Panel.

<sup>278</sup> Response of the European Communities to Question 8(b) from the Panel.

<sup>279</sup> *EC – Hormones*, Report of the Appellate Body, footnote 250, *supra*, para. 104.

<sup>280</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*US – Shrimp*"), Report of the Appellate Body, WT/DS58/AB/R, adopted 6 November 1998, para. 114.

The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, not words the interpreter may feel should have been used.<sup>281</sup>

In our opinion, the conclusion to be reached in applying the customary rules of treaty interpretation to Article 21.3 is quite clear. Article 21.3 establishes no requirement that investigating authorities have any evidence before they may self-initiate sunset reviews.

8.48 Seeking to confirm the meaning resulting from the application of Article 31, as permitted by Article 32<sup>282</sup> of the Vienna Convention, we found that the negotiating history of the SCM Agreement does not provide guidance in respect of this question. An examination of the work of the Negotiating Group on Subsidies and Countervailing Measures and, in particular, of the discussion of a sunset clause, reveals no reference to evidentiary standards for the initiation of sunset reviews, whether for self-initiation or initiation upon request by the domestic industry.

8.49 We therefore find that no evidentiary standards are applicable to the self-initiation of sunset reviews under Article 21.3.<sup>283</sup> We thus conclude that US CVD law and the accompanying regulations are consistent with the SCM Agreement in respect of the automatic self-initiation of sunset reviews, and accordingly reject the European Communities' claim in this regard.

8.50 Further, we note that the European Communities claims that, owing to the lack of consistency with Article 21.3 of the SCM Agreement in respect of the application of evidentiary standards to the self-initiation of sunset reviews, US CVD law is also inconsistent with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement, which provisions require that Members ensure the WTO-conformity of their laws, regulations, and administrative procedures. Having found, however, that US CVD law and the accompanying regulations are consistent with Article 21.3 of the SCM Agreement in respect of the application of evidentiary standards to the self-initiation of sunset reviews, we need not, and do not, consider whether US CVD law and the accompanying regulations are inconsistent with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

C. WHETHER US CVD LAW AS SUCH AND AS APPLIED IN THE INSTANT SUNSET REVIEW ARE INCONSISTENT WITH THE SCM AGREEMENT IN RESPECT OF THE APPLICATION OF A DE MINIMIS STANDARD TO SUNSET REVIEWS

**1. Whether US CVD law as such is inconsistent with the SCM Agreement in respect of the application of a de minimis standard to sunset reviews**

(a) Arguments of the parties

(i) *European Communities*

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<sup>281</sup> *EC – Hormones*, Report of the Appellate Body, footnote 250, *supra*, para. 181 (emphasis added).

<sup>282</sup> We recall that Article 32 of the Vienna Convention states:

ARTICLE 32

*Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable. ((1969) 8

*International Legal Materials* 679)

<sup>283</sup> Having found that no evidentiary standards apply for the self-initiation of sunset reviews, we need not, and do not, consider the question of what those standards might be.

8.51 In the view of the European Communities, the non-application of a de minimis standard to sunset reviews constitutes a violation of Article 21.3 of the SCM Agreement. The European Communities considers that a de minimis standard is applicable to the likely future rate of subsidisation.

8.52 The European Communities submits that the ordinary meaning of the terms "subsidisation" and "injury" in context, taking also into account the object and purpose of the SCM Agreement as a whole, suggests that if there can be no "subsidisation" and "injury" finding in case of a de minimis amount of subsidy in an original investigation, the same must hold true *a fortiori* in the case of sunset reviews.<sup>284</sup> The European Communities focuses here on the various paragraphs of Article 21 that contain the word "review", that is, paragraphs 2, 3, and 4. It considers that reviewing the need for a CVD to be continued under Article 21.2 is equivalent to determining whether the original substantive conditions on the basis of which it was initially imposed (subsidisation causing injury) continue to exist.<sup>285</sup> It follows then, for the European Communities, that the same de minimis rule, applied in investigations – 1 per cent<sup>286</sup> – must also be applied in reviews under Article 21.2. This analysis, in the opinion of the European Communities, applies all the more so in the context of reviews under Article 21.3.

8.53 The European Communities argues that the de minimis provision in the SCM Agreement is based on the fact that a subsidy level of less than 1 per cent is presumed not to cause injury. If this subsidy level cannot cause injury in an investigation, it is logically and legally unavoidable, in the view of the European Communities, to conclude that it cannot cause injury in a sunset review.<sup>287</sup> According to the European Communities, holding otherwise would run contrary to the very object and purpose of the SCM Agreement, most likely lead to "contradictory results and unjustified protectionism"<sup>288</sup>, and violate the text of Articles 21.3 and 21.1 because it would allow the continuation of CVDs for five more years "without there being any real need to counter subsidisation which is likely to cause injury"<sup>289</sup>.

(ii) *United States*

8.54 The United States submits that there is no de minimis standard for sunset reviews, that nothing in Article 21.3 or elsewhere in the SCM Agreement sets a de minimis standard for sunset reviews, and that a contextual analysis of Article 21.3 in light of the object and purpose of the SCM Agreement provides no support for the European Communities' de minimis claims.

8.55 In particular, argues the United States, footnote 52 states that the mere continued existence of a subsidy programme could warrant maintaining the duty beyond the five-year point, even if the amount of the subsidy was currently zero, because subsidisation may be likely to recur absent the discipline of the duty.<sup>290</sup> The United States submits that the European Communities seems to think that footnote 52 serves no other purpose than to make a point about administrative reviews. If that is so, continues the United States, then why did the Members include footnote 52 in Article 21.3, the provision governing sunset reviews? The United States considers that footnote 52 means that the

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<sup>284</sup> First Written Submission of the European Communities, para. 116.

<sup>285</sup> *Id.*, para. 111.

<sup>286</sup> We note, in this regard, that the European Communities recognises that this threshold does not apply to developing country Members in investigations, as such Members receive special and differential treatment in the form of higher de minimis thresholds. It considers that "[t]he higher de minimis thresholds for developing countries are equally applicable to initial investigations and reviews examining the need for continued imposition of the CVD (under Article 21.2) and sunset reviews (under Article 21.3)" (Response of the European Communities to Question 1(d) from the Panel).

<sup>287</sup> First Written Submission of the European Communities, para. 115.

<sup>288</sup> *Id.*, para. 116.

<sup>289</sup> *Id.*

<sup>290</sup> First Written Submission of the United States, para. 81.

current level of subsidisation is not decisive as to whether subsidisation is likely to recur, and accepting the European Communities' claim in respect of a *de minimis* standard in the context of sunset reviews would render footnote 52 meaningless.<sup>291</sup>

8.56 The United States also submits that the focus of sunset reviews is future behaviour and, thus, mathematical certainty or precision as to the exact amount of likely future subsidisation is not necessarily practicable and certainly not required.<sup>292</sup>

(b) Findings of the Panel

8.57 Again, the overarching question before us is whether a specific obligation applicable to CVD investigations is also applicable to sunset reviews. In particular, we must consider whether, applying the customary rules of treaty interpretation – set out above (*See* para. 8.25 and footnote 282, *supra*) – to Article 21.3, we should consider implied in that provision the *de minimis* standard of Article 11.9.<sup>293</sup> In other words, is the European Communities correct in arguing that, as reviewing the need for continuation of a CVD past the initial five-year period (involving consideration of whether expiry of that CVD would be likely to lead to continuation or recurrence of subsidisation and injury) is equivalent to considering the need for an original duty (involving consideration of whether subsidisation is causing or threatens to cause injury), it follows that the same *de minimis* standard must apply to sunset reviews as to investigations?<sup>294</sup>

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<sup>291</sup> Second Written Submission of the United States, para. 12.

<sup>292</sup> First Written Submission of the United States, para. 70.

<sup>293</sup> We do not understand the European Communities to be alleging a violation of Article 11.9, but of Article 21.3, of the SCM Agreement. In this regard, we note that the European Communities argues that "an interpretation of the terms of Article 21.3 should be made in context and in the light of the object and purpose of Article 21.3 and of the SCM Agreement. Articles 21.1, 11.9, 15, and 10 provide relevant context and help define its object and purpose. Such an interpretation . . . requires that the 1 [per cent] *de minimis* level of Article 11.9 should be implied, and hence applied, also to investigations and determinations made in sunset reviews" (Response of the European Communities to Question 47 from the Panel (emphasis added)).

Further, the European Communities "objects to the [United States] suggestion to use only the phrase 'Article 11.9 itself applies to sunset reviews'" (Comments of the European Communities on Request of the United States for Interim Review, para. 3). Indeed, the European Communities argues that it "has taken particular care to explain that there is an omission in Article 21.3 and that only a systematic interpretation can fill up [sic] this gap by implying the *de minimis* standard of Article 11.9" (Comments of the European Communities on Request of the United States for Interim Review, para. 3 (emphasis added)). Nor could the European Communities successfully allege a violation of Article 11.9. Article 11 is entitled "Initiation and Subsequent Investigation", and clearly deals with investigations, such as that term is distinguished from reviews by the Agreement. This is also made clear in the text of Article 11.9 itself, which refers to investigations. We therefore consider whether Article 21.3 contains by implication the same type of obligation as Article 11.9, and whether the United States has violated Article 21.3 in this respect.

<sup>294</sup> We note that US CVD law and the accompanying regulations require the application of a 1 per cent *de minimis* standard to CVD investigations and a 0.5 per cent *de minimis* standard in reviews, including sunset reviews. Section 703(b)(4)(a) of the Tariff Act provides:

In making a determination under this subsection, the administering authority shall disregard any *de minimis* countervailable subsidy. For purposes of the preceding sentence, a countervailable subsidy is *de minimis* if the administering authority determines that the aggregate of the net countervailable subsidies is less than 1 percent *ad valorem* or the equivalent specific rate for the subject merchandise (19 USC Section 1675a(b)(4)(B)).

Section 351.106(c)(1) of the *Sunset Regulations* provides:

In making any determination other than a preliminary or final . . . [CVD] determination in an investigation . . . , the Secretary will treat as *de minimis* any . . . countervailable subsidy rate that is less than 0.5 percent *ad valorem*, or the equivalent specific rate.

The SAA accompanying the URAA explains:

The *de minimis* requirements of Articles 11.9, 27.10, and 27.11 of the Subsidies Agreement are applicable only to initial CVD investigations. Thus, under section 705(a)(3) these

8.58 We recall that Article 21.3 reads:

Notwithstanding the provisions of paragraphs 1 and 2, any definitive [CVD] shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidisation and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury.<sup>52</sup> The duty may remain in force pending the outcome of such a review.

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

We recognise, at the outset, that nothing in the text of Article 21.3 specifically provides that the de minimis standard applicable to investigations is also applicable to sunset reviews. For the same reasons that we could not conclude on the basis of silence alone that the evidentiary standards of Article 11.6 necessarily do not apply to sunset reviews (*See* paragraphs 8.27-8.30, *supra*), however, we cannot conclude on the basis of silence alone that the de minimis standard of Article 11.9 necessarily does not apply to sunset reviews. Accordingly, we believe that we must consider the context of Article 21.3 – that is, provisions of the SCM Agreement other than Article 21.3 – and the object and purpose of the SCM Agreement in reaching a conclusion. In particular, we are of the view that we must interpret Article 21.3 in respect of the de minimis standard set out in Article 11.9 in the context of the same complex framework of rights and obligations as we did Article 21.3 in respect of the evidentiary standards set out in Article 11.6 (*See* paragraphs 8.31-8.33, *supra*).

8.59 We now examine Article 11.9, the de minimis standard of which the European Communities argues is implied in Article 21.3, and which provides:

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

Again, we recognise, at the outset, that nothing in the text of the provision provides for its de minimis standard to be implied in Article 21.3. What is clear from this language, however, is that a de minimis subsidy cannot be countervailed, and that, upon a finding of a de minimis subsidy, the Agreement mandates but one outcome. Investigating authorities must not only terminate the investigation, but they must do so immediately. The terms of the provision are unequivocal. Such mandatory ("shall")

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standards are not applicable to reviews of CVD orders. In such reviews, the Administration intends that Commerce will continue its present practice of waiving the collection of estimated deposits if the deposit rate is below 0.5 % *ad valorem*, the existing regulatory standard for *de minimis* (Exhibit EC-16, pp. 938-939).

We further note that the United States submits that "[t]he statute itself does not set forth the *de minimis* standard for reviews, but the [Statement of Administrative Action] clarifies the intent of Congress and the Administration that [the DOC] continue to apply to reviews the pre-URAA standard of 0.5 per cent *ad valorem*" (First Written Submission of the United States, para. 13).

and strong ("immediate") language would suggest that the drafters had an important consideration in mind in drafting this provision, reflected in the precise choice of words. In particular, the mandatory nature and strong language of the provision convey, in our view, that the drafters sought a particular outcome, to protect exporters under investigation and prevent trade harassment through continuation of an investigation of a de minimis subsidy.

8.60 Let us first consider the ordinary meaning of the Latin phrase "de minimis", which is defined in law dictionaries as "lacking significance or importance: so minor as to be disregarded"<sup>295</sup>. In the context of the SCM Agreement, we take this to mean that a de minimis level of subsidy lacks significance or importance because the effects attributable to it are so small as not to be material. In this regard, it is useful to consider the rationale for the application of a de minimis standard to investigations, as reflected in a Note by the Secretariat prepared in April 1987 for the Uruguay Round Negotiating Group on Subsidies and Countervailing Measures. This note reads in relevant part:

There are two alternative (and not mutually exclusive) theoretical justifications for the de minimis concept.

- The first view holds that [CVD] actions and measures may be taken only when the trade distorting effect of the subsidy and its effects on the industry in the importing country so require. Thus, no action should be taken where it would be clearly out of proportion to the objective sought, or as Article 2:12 states, 'where the effect of the subsidy on the industry in the importing country is not such as to cause material injury'.

- The second theory treats the issue of de minimis subsidy as a completely separate issue from the determination of injury in an investigation. If it can be established that the totality of subsidies on the product investigated are minimal (so small per unit that they are practically non-existent), the investigating authorities may determine that, as Article 2:12 states, 'no subsidy exists'. Thus, as the maxim states, 'de minimis non curat lex': the law does not take notice of minimal matters.<sup>296</sup>

While it is not known which of the two rationales, if not both ("not mutually exclusive"), served as a basis for Article 11.9, the language of that provision suggests to us that it was the first rationale that was the basis for, or was at least paramount in, the drafting of that provision. Were the basis of Article 11.9, either solely or principally, simple administrative convenience, that would be a matter for investigating authorities to decide. There would arguably be no need for the Agreement to address the consequences of de minimis subsidisation. In that case, Article 11.9 might permit or encourage authorities to terminate an investigation in case of a finding of de minimis subsidisation, but would not need to require it, and immediately upon such finding.

8.61 Administrative convenience where a de minimis subsidy is concerned is, after all, a question of individual Members' policies vis-à-vis trade remedies and vis-à-vis allocation of resources to their trade remedy regimes, issues over which they should arguably have discretion. Why require Members to avail themselves of administrative convenience? We note, in this regard, that the above-cited discussion of the rationale of non-injurious subsidisation uses the phrase "no action should be taken" – suggesting the desirability of such an outcome – while discussion of the rationale of administrative convenience uses the phrase "the investigating authorities may determine" – suggesting the possibility of such an outcome. The clear difference between the two phrases would support our reasoning that the drafters considered a de minimis subsidy to be non-injurious, as the language of Article 11.9 mirrors the former phrase, that relating to the rationale of non-injurious subsidisation.

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<sup>295</sup> Merriam-Webster's Dictionary of Law, Merriam-Webster, Inc., p. 131.

<sup>296</sup> MTN.GNG/NG10/W/4, p. 2 (emphasis in original).

For the foregoing reasons, we are of the view that the sole or principal rationale for the de minimis standard set out in Article 11.9 is that a de minimis subsidy is considered to be non-injurious.

8.62 We note that, in any event, both the rationale of non-injurious subsidisation and that of administrative convenience would be as relevant in the context of sunset reviews as in that of investigations. We do not see how it would be reasonable to hold the view, on the one hand, that a rate of subsidy that would be deemed to be non-injurious in investigations should be found to be so in sunset reviews as well, but not the view, on the other hand, that a rate of subsidy that would be found to be minimal in investigations should be deemed to be so in sunset reviews as well. In other words, we see no particular distinction between the two rationales that would suggest that, depending on which one served as the basis for Article 11.9, a de minimis standard might not apply to sunset reviews.

8.63 We note that Article 11.9 sets out certain other grounds for termination of CVD proceedings as well: (i) insufficient evidence of either subsidisation or of injury; (ii) negligible volume of subsidised imports; and (iii) negligible injury. It would seem clear to us that all three bases for termination are fundamentally grounded in the notion of, and seek to limit CVD proceedings to cases of, injurious subsidisation. We consider that all grounds for termination of CVD proceedings – including de minimis subsidisation – link expressly with the purpose of CVDs and with the object and purpose of the SCM Agreement as set out in Article VI of the GATT 1994. The recurrent theme, in our view, is that CVD proceedings serve to counter injurious subsidisation and therefore may not continue if injurious subsidisation does not (or is not likely to) exist. The nature of the other bases set out in Article 11.9 for termination of CVD proceedings supports our view that the rationale for the de minimis standard is that relating to non-injurious subsidisation.

8.64 It would also seem to us that the lack of reference to the term "de minimis" in Article 27.10 of the SCM Agreement – which sets out special and differential treatment for developing countries – is further recognition of the rationale that the de minimis standard relates to non-injurious subsidisation. As it is not possible to have different de minimis levels depending on the source of the subsidised imports, Article 27.10 simply provides for special and differential treatment for developing country Members. In this regard, we note that Article 11.9 includes the following sentence:

For the purpose of this paragraph, the amount of the subsidy shall be considered to be de minimis if the subsidy is less than 1 per cent ad valorem.

The use of the phrase "[f]or the purpose of this paragraph" reflects, in our opinion, a desire to clarify that the termination requirement is triggered by a 1 per cent subsidy under this paragraph, as opposed to the differing percentage under Article 27.10. Accordingly, in our opinion, the language of Article 11.9 does not prevent its de minimis standard from being implied in Article 21.3.

8.65 It is in light of this rationale of non-injurious subsidisation for the inclusion of the de minimis standard and the requirement to terminate if de minimis subsidisation is found that we must address the European Communities' claim that such a standard is implied in Article 21.3. Given the framework of disciplines that governs the imposition of CVDs and the role of the SCM Agreement in ensuring that CVDs do not unjustifiably impede international trade, we find it difficult to see how de minimis rate of likely subsidisation could be considered injurious at the stage of sunset review and continuation of a CVD, when the same rate is considered non-injurious at the stage of investigation and imposition of a CVD.

8.66 An interpretation of Article 21.3 under which the de minimis standard set out in Article 11.9 does not apply to sunset reviews would, in our view, have serious implications for the operation of the SCM Agreement and the framework of disciplines it sets out in conjunction with Article VI of the GATT 1994. To hold that a threshold of injurious subsidisation that applies for the first five years of the life of a CVD becomes inapplicable for the remainder of its life, should the CVD be continued,

would seem to us to run counter to the object and purpose of the Agreement, which is to provide Members a framework within which to offset injurious subsidisation.

8.67 In particular, we believe it would pave the way for Members to maintain CVDs indefinitely, when CVDs are typically measures which would otherwise be WTO-inconsistent and are therefore only permitted upon fulfilment of certain conditions set out in the SCM Agreement: subsidisation, injury, and causation. We fail to see why the threshold of injurious subsidisation – which we consider to be an important substantive criterion – would become inapplicable simply by virtue of the age of the CVD. We note, in this regard, that if an investigating authority were to revoke the CVD, but subsequently find the need to initiate a new investigation on the concerned product, this threshold would once again become applicable. A suspension of the de minimis standard that is triggered solely by the fact that the CVD is five years old does not, in our opinion, reconcile with the fundamental rationale of the SCM Agreement and thereby negates the operation of the Agreement.

8.68 One of the objectives of the SCM Agreement is to discipline the use of CVDs by Members through the establishment of a set of rules by which WTO Members must abide. Investigating authorities would therefore have to be bound by the substantive rules of the Agreement, including following imposition of a CVD. Under the US view, no de minimis standard would be implied in Article 21.2 either. In other words, the moment a CVD is imposed, no de minimis standard applies. A suspension of the de minimis standard is therefore triggered not by the fact that the CVD is five years old, but by its mere existence, whatever its age. We find it difficult to reconcile the suspension of a criterion relating to non-injurious subsidisation in the context of a regulatory framework that seeks to limit the use of CVDs to cases of injurious subsidisation.

8.69 Equally, as discussed above, an interpretation of Article 21.3 – on the basis of a literal reading of Article 21.3 – under which the de minimis standard set out in Article 11.9 does not apply to sunset reviews would render certain provisions of the SCM Agreement inapplicable to sunset reviews so as to undermine the object and purpose of the Agreement. Such an interpretation would also yield irrational results in respect of other provisions of the Agreement.

8.70 As earlier discussed, Article 31 of the Vienna Convention does not, in our view, limit us to a literal reading of the provision in question. Were such a reading to be required, provisions such as Article 15.3 – which deals with the circumstances in which imports may be cumulated for purposes of injury determinations – and Article 19 – which deals with the imposition and collection of CVDs – would be limited in ways that would negatively affect the operation of the Agreement, particularly with respect to sunset reviews, something that cannot have been intended by the drafters.

8.71 For the reasons outlined above, we consider equally persuasive the case of Article 21.1, which reads:

A [CVD] shall remain in force only as long as and to the extent necessary to counteract subsidisation which is causing injury.

Were this provision to be read literally, the words "is causing injury" would suggest that a CVD could only remain in place, including under Article 21.3, where there is likelihood of continuation of subsidisation and injury, not recurrence. The notion of recurrence contained in Article 21.3 therefore has to be implied in Article 21.1, or that notion would be rendered meaningless. Finally, Article 32.3, if read literally, would apply only to investigations and reviews initiated pursuant to applications from the domestic industry, and not initiated on an ex officio basis. Again, this cannot be the case. These several instances of provisions in the Agreement that, if read literally, would yield irrational results, confirm our view that we are not limited to a literal reading of the text of Article 21.3.

8.72 We note that the United States is of the view that there is no obligation under the SCM Agreement to quantify an amount of subsidisation in the context of sunset reviews: "Indeed, just

the fact that it is necessary to ask the question as to the relevant time period demonstrates that there was no agreement to include a *de minimis* standard – these are the types of questions that would have had to have been asked and negotiated at the time"<sup>297</sup>. We disagree. Nor are we persuaded by the US argument that, as there is no obligation to quantify subsidisation in sunset reviews, there can be no obligation to apply a *de minimis* standard. We consider that, because there is an obligation to apply a *de minimis* standard, and this cannot be done unless subsidisation is quantified, there is a consequential obligation to quantify the likely future rate of subsidisation.

8.73 The United States submits that the focus of a sunset review is the future behaviour of foreign exporters, and there is therefore no need or legal obligation to quantify the amount of subsidy during such reviews.<sup>298</sup> We note also the United States' argument that "nothing in the SCM Agreement *requires* a consideration of the magnitude of subsidisation in determining the likelihood of continuation or recurrence of subsidisation and injury"<sup>299</sup>. We consider, however, that investigating authorities are required to assess the rate at which subsidisation is likely to continue or recur for purposes of their assessment of likelihood of continuation or recurrence of injury which arises from the likely continuation or recurrence of subsidisation. Article 15 of the SCM Agreement sets out the substantive assessment that must go into making a determination of injury:

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidised imports and the effect of the subsidised imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products.<sup>300</sup>

Further, Article 15.5 states, in relevant part:

It must be demonstrated that the subsidised imports are, through the effects<sup>47</sup> of subsidies, causing injury within the meaning of this Agreement.

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<sup>47</sup>As set forth in paragraphs 2 and 4.

We simply do not see how these provisions of Article 15 can be given meaning in an assessment of likelihood of continuation or recurrence of subsidisation and injury without assessment of a likely rate of subsidisation.<sup>301</sup>

8.74 The United States submits that "one could never *calculate* a future rate of subsidisation for obvious reasons, although it may be possible to infer a future rate based on past rates (which is in essence what the [US DOC] does under US law)"<sup>302</sup>. The European Communities, on the other hand, argues that "subsidisation does not exist in the abstract, and quantification of the rate at which continuation or recurrence of subsidisation is likely to continue or recur in the future should always be feasible"<sup>303</sup>. We agree. While we certainly acknowledge the difficulty of calculating a precise likely rate and we agree with the United States that it is perhaps better described as "inferred" rather than "calculated", we are of the view that quantification of the future rate of subsidisation is entirely

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<sup>297</sup> Response of the United States to Question 45 from the Panel.

<sup>298</sup> Response of the United States to Question 1(a) from the Panel.

<sup>299</sup> Response of the United States to Question 45 from the Panel.

<sup>300</sup> Footnote deleted.

<sup>301</sup> We note, in this regard, that the US DOC is required, under US law, to send to the ITC the net countervailable subsidy that is likely to prevail if the CVD order is revoked (*See* Section 1675(a)(b)(3) of the Tariff Act (Exhibit EC-13)).

<sup>302</sup> Response of the United States to Question 45 from the Panel (emphasis in original).

<sup>303</sup> Response of the European Communities to Question 45 from the Panel.

feasible. We do not, in other words, see the difficulty of assessing a likely rate of subsidisation as being great enough to suggest that a de minimis standard could not possibly have been intended to apply to sunset reviews.

8.75 The issue of assessment of the rate of subsidisation brings up the related issue of footnote 52 to the SCM Agreement, which reads:

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

We note the United States' argument that the location of this footnote in the SCM Agreement – in a provision governing sunset reviews – indicates that it is relevant to the present question and suggests that no de minimis standard is applicable to sunset reviews. We note also the European Communities' response that this footnote refers only to duty assessment proceedings and therefore sheds no light on the possible existence of a de minimis standard as being applicable to sunset reviews. In our view, under both interpretations, footnote 52 has no implications for the question before us. We do not see how the results of duty assessment proceedings – which establish a level of duty for a prior period – could be dispositive of the likelihood of continuation or recurrence of subsidisation or of the rate at which subsidisation is likely to continue or recur. Thus, there is no inconsistency, in our opinion, between footnote 52 and the requirement to apply a de minimis standard to sunset reviews.

8.76 When asked by the Panel, supposing application of a de minimis standard to sunset reviews, whether this standard would be based on (i) the rate of subsidisation during the period of application of the CVD, (ii) the rate of subsidisation at the time of sunset review, or (iii) the rate at which subsidisation is likely to continue or recur, the European Communities argues that "[t]he rate that should determine the outcome of a sunset review is . . . the rate likely to continue or recur if the CVD measure were allowed to expire"<sup>304</sup>. The United States, on the other hand, responds that "all of these options might inform a determination of the likelihood of continuation or recurrence of subsidisation – but they just as easily might not"<sup>305</sup>. While we accept that, depending on the facts of the case before the investigating authorities, one, two, or all of the above-mentioned rates might be relevant to an assessment of the likelihood of continuation or recurrence of subsidisation, there is no doubt in our minds that the rate to which the de minimis standard is to be applied in sunset reviews is the likely future rate of subsidisation.

8.77 Whatever the rate of subsidisation at the time of sunset review, any de minimis standard could not be applicable to that rate, as such a practice would encourage deliberate diminution of subsidies at the time of sunset review with a view to ensuring that the rate falls below the de minimis threshold. Nor could a de minimis standard apply to the past rate of subsidisation – that during the period of application of the CVD – as that would mean that non-subsidisation during that period is determinative of the likelihood of continuation or recurrence, which cannot be the case. Such an interpretation would seriously call into question the notion of recurrence contained in Article 21.3. Of course this is not to suggest that the past level of subsidisation is not a relevant consideration in an assessment of likelihood of continuation or recurrence; it is without doubt a relevant factor in such an assessment. But the existence or absence of past subsidisation cannot be dispositive of the likelihood of continuation or recurrence of subsidisation. Accordingly, the de minimis standard applicable to sunset reviews could only be based on the rate at which subsidisation is likely to continue or recur. This also reflects the purpose and substance of a sunset review, i. e., an assessment of the likelihood of continuation or recurrence of subsidisation and injury.

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<sup>304</sup> Response of the European Communities to Question 45 from the Panel.

<sup>305</sup> Response of the United States to Question 45 from the Panel.

8.78 The United States cites the decision of the Panel in *United States – DRAMS* as support for its argument that no de minimis standard is required by the Agreement in sunset reviews.<sup>306</sup> The Panel in that case held that the de minimis standard contained in Article 5.8 of the AD Agreement – the parallel provision to Article 11.9 of the SCM Agreement – did not apply beyond the investigative phase.<sup>307</sup> It is important to note, however, that that case did not address the question of whether the de minimis standard was applicable to sunset reviews, or even in reviews in general. Rather, the *United States – DRAMS* case addressed the question of whether a de minimis standard was applicable to duty assessment procedures under Article 9.3 of the AD Agreement. The retrospective calculation of a duty payable arguably has no relationship with the duration of the duty or the possible continuation of the duty. Retrospective calculation is a method of calculation used by some Members for purposes of calculating the amount of duty payable during the period of application of the duty. The issue before us is whether the de minimis standard is applicable to sunset reviews as it is to investigations. Calculating the amount of duty to be collected under an order which is not in and of itself being reviewed is different from reviewing whether an order may be continued. At least in principle, any amount of dumping (or subsidy) should lead to a collection of that amount of duty. That any, or less than the de minimis, level of subsidy should justify continuation of a CVD order would undermine the object and purpose as well as operation of the SCM Agreement.

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

8.80 We therefore find that the de minimis standard of Article 11.9 is implied in Article 21.3. We thus conclude that US CVD law and the accompanying regulations are inconsistent with the SCM Agreement in respect of the application of a de minimis standard to sunset reviews, and accordingly grant the European Communities' claim in this regard.

8.81 Further, we note that the European Communities claims that, owing to inconsistency with Article 21.3 of the SCM Agreement in respect of the de minimis standard applicable to sunset reviews, US CVD law is also inconsistent with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement, which provisions require that Members ensure the WTO-conformity of their laws, regulations, and administrative procedures. On the basis of our finding that US CVD law and the accompanying regulations are inconsistent with Article 21.3 of the SCM Agreement in respect of the de minimis standard applicable to sunset reviews, we find that US CVD law and the accompanying regulations are also inconsistent with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement, and accordingly grant the European Communities' claim in this regard.

## **2. Whether US CVD law as applied in the instant sunset review is inconsistent with the SCM Agreement in respect of the application of a de minimis standard to sunset reviews**

(a) Arguments of the parties

(i) *European Communities*

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<sup>306</sup> First Written Submission of the United States, para. 73.

<sup>307</sup> *US – DRAMS*, Report of the Panel, footnote 247, *supra*, para. 6.87.

8.82 The European Communities considers that the United States violated the SCM Agreement by failing to apply to the instant sunset review the de minimis standard applicable to investigations. The European Communities indicates that the United States, despite finding that the subsidy rate likely to prevail would be 0.53 per cent, nevertheless continued the CVD. The European Communities submits that, for the reasons stated above (*See* Section VIII.C.1(a)(i), *supra*), this threshold is not appropriate, and that since 0.53 per cent is below the 1 per cent de minimis level which *should* apply to sunset reviews, the United States was in breach of Article 21.3, in conjunction with Article 11.9, in continuing the CVD on carbon steel.<sup>308</sup>

(ii) *United States*

8.83 As stated above (*See* Section VIII.C.1(a)(ii), *supra*), the United States argues that no de minimis is applicable to sunset reviews under Article 21.3 of the SCM Agreement. The United States also asserts that the fact that it has in its domestic law a de minimis provision for sunset reviews is legally irrelevant because Members are free to go beyond their obligations under the Agreement.<sup>309</sup> In the view of the United States, therefore, the determination of the US DOC in the instant sunset review was not inconsistent with the Agreement in this respect.

(b) Findings of the Panel

8.84 We note the US argument, in respect of the previous claim of the European Communities, that applying the customary rules of treaty interpretation, the Panel should find that there is no de minimis standard applicable to sunset reviews in the SCM Agreement and, therefore, the United States' application of a 0.5 per cent de minimis standard in sunset reviews does not constitute a violation of its obligations under the SCM Agreement.<sup>310</sup> We note that the United States accordingly applied this standard – and not the 1 per cent threshold set out in Article 11.9 – in the instant sunset review.<sup>311</sup> Having found that the de minimis standard set out in Article 11.9 is applicable to sunset reviews and that US CVD law is inconsistent with the SCM Agreement in this respect, we find that the United States violated the SCM Agreement by failing to apply such a de minimis standard to the instant sunset review.

D. WHETHER US LAW AS SUCH AND AS APPLIED IN THE INSTANT SUNSET REVIEW ARE INCONSISTENT WITH THE SCM AGREEMENT IN RESPECT OF THE INVESTIGATING AUTHORITY'S OBLIGATION TO DETERMINE THE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF SUBSIDISATION IN A SUNSET REVIEW

**1. Whether US law as such is inconsistent with the SCM Agreement in respect of the investigating authority's obligation to determine the likelihood of continuation or recurrence of subsidisation in a sunset review**

(a) Arguments of the Parties

(i) *European Communities*

8.85 The European Communities submits that US law as such is inconsistent with Article 21.3 of the SCM Agreement in respect of the investigating authorities' obligation to "determine" the likelihood of continuation or recurrence of subsidisation in a sunset review. In particular, the European Communities asserts that Section 751(c) of the Act, as complemented by Section 752 and

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<sup>308</sup> First Written Submission of the European Communities, para. 119.

<sup>309</sup> First Written Submission of the United States, para. 83.

<sup>310</sup> First Written Submission of the United States, para. 87.

by US regulations and administrative practices, runs counter to the requirements of Article 21.3 in this respect.<sup>312</sup>

8.86 According to the European Communities, Article 21.3 imposes a positive obligation on the investigating authorities to find whether subsidisation continues to exist or not.<sup>313</sup> This, argues the European Communities, needs to be a new, proper determination.<sup>314</sup> In the view of the European Communities therefore an investigating authority in a sunset review is required to play an active role in the process of gathering facts that the authority will use in its likelihood analysis.<sup>315</sup>

8.87 With respect to the determination of the likelihood of subsidisation, the European Communities argues that the same factors used by an investigating authority in an original CVD investigation in a retrospective manner should be analysed prospectively in the sunset review.<sup>316</sup> According to the European Communities, these factors are those set out in Articles 11, 12 and 15 of the SCM Agreement. However, the European Communities argues that the range of factors to be considered as part of the analysis of the likelihood of continuation or recurrence of subsidisation should be decided on a case by case basis, depending on the type of subsidy involved.<sup>317</sup>

(ii) *United States*

8.88 The United States points out that what an investigating authority is required to do in a sunset review under Article 21.3 is to determine whether subsidisation would be likely to continue or recur without the discipline of the duty in place.<sup>318</sup> This analysis, in the view of the United States, requires a consideration of future rather than present circumstances. Therefore the analysis required under Article 21.3, according to the United States, is prospective in nature.<sup>319</sup> Thus, in the view of the United States, there is no contradiction between the provisions of the SCM Agreement and US law in this respect.

(b) Findings of the Panel

(i) *Requirements of Article 21.3 of the SCM Agreement in respect of the investigating authority's obligation to determine the likelihood of continuation or recurrence of subsidisation in a sunset review*

8.89 We now proceed to our analysis of Article 21.3 of the SCM Agreement in order to address the obligation to "determine" the likelihood of continuation or recurrence of subsidisation in a sunset review. The text of Article 21.3 reads:

Notwithstanding the provisions of paragraphs 1 and 2, any definitive [CVD] shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidisation and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to

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<sup>312</sup> First Written Submission of the European Communities, para. 76.

<sup>313</sup> *Id.*, para. 68.

<sup>314</sup> Second Written Submission of the European Communities, para. 29.

<sup>315</sup> First Written Submission of the European Communities, para. 71.

<sup>316</sup> Second Written Submission of the European Communities, para. 32.

<sup>317</sup> *Id.*

<sup>318</sup> First Written Submission of the United States, para. 92.

<sup>319</sup> First Oral Statement of the United States, para. 9.

continuation or recurrence of subsidisation and injury. The duty may remain in force pending the outcome of such a review.<sup>320</sup>

8.90 In accordance with customary rules of treaty interpretation as reflected in Article 31 of the Vienna Convention, we base our interpretation of Article 21.3 on its text read in context and in the light of the object and purpose of the SCM Agreement. Accordingly, we shall first consider the ordinary meaning of the word "determine". "Determine" is defined, *inter alia*, as "settle or decide (a dispute, controversy, etc., or a sentence, conclusion, issue, etc.) as a judge or arbiter"<sup>321</sup>. This definition would seem to fit the usage in Article 21.3, which requires termination of a CVD unless the authorities "determine ... that the expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury".

8.91 Article 21.3 reflects the application of the general rule set out in Article 21.1 – that a CVD shall remain in place only as long as necessary – in the specific instance where five years have elapsed since the imposition of a CVD. Article 21.2 reflects the same general rule in a different circumstance, when a reasonable period has elapsed since the imposition of the duty, and it is deemed necessary to review the need for the continued imposition of the duty. We also note that one of the principal objects of the SCM Agreement is to regulate the imposition of CVD measures. Article 21.3 effectuates that purpose by providing that after five years, a CVD should be terminated unless the investigating authorities determine that there is a likelihood of continuation or recurrence of subsidisation and injury.

8.92 The question we must consider next is what it means to "determine" that subsidisation is likely to continue or recur.<sup>322</sup> In our opinion, although there is no specific language in the SCM Agreement to that effect, it goes without saying that any determination made by investigating authorities under the SCM Agreement must be properly substantiated in order for that determination to be legally justified. In this regard, the Appellate Body has stated in *US – Lamb*:

[C]ompetent authorities must have a sufficient factual basis to allow them to draw reasoned and adequate conclusions concerning the situation of the "domestic industry".<sup>323</sup>

We recognise that the Appellate Body's statement refers to the basis of an injury determination in a safeguard investigation. Yet, as far as the adequacy of the factual basis for a determination is concerned, we see no reason to distinguish between injury determinations in a safeguard investigation

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<sup>320</sup> Footnote deleted.

<sup>321</sup> The New Shorter Oxford English Dictionary, Oxford University Press, p. 651.

<sup>322</sup> The European Communities states that it is not challenging the injury determination of the US ITC *per se* in this dispute, but that it is doing so as part of its claim regarding the application of a de minimis standard (Oral Statement of the European Communities at the First Meeting of the Panel, footnote 27 (emphasis added)). The United States argues that the European Communities has not raised the claim of "non-injurious subsidisation" in its request for consultations nor in its request for the establishment. Therefore, according to the United States, the European Communities' "new claim with respect to non-injurious subsidization is not within the Panel's terms of reference, but instead is at most an argument in support of the [European Communities'] claim" (Comments of the United States on the Response of the European Communities to Question 50 from the Panel, paras. 10-11). We consider – and both parties agree that – the European Communities' argument relating to non-injurious subsidisation is an additional argument in support of its claim that the de minimis rule set forth in Article 11.9 also applies in sunset reviews. Therefore, in our view, the argument of the European Communities regarding non-injurious subsidisation raises no question in respect of the scope of our terms of reference because we are not, in this dispute, concerned with the question of whether the ITC properly determined that expiry of the duty was likely to lead to continuation or recurrence of injury, and do not address that issue.

<sup>323</sup> *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("US – Lamb"), Report of the Appellate Body, WT/DS177/AB/R-WT/DS178/AB/R, adopted 16 May 2001, para. 131(emphasis in original).

and a determination of the likelihood of continuation or recurrence of subsidisation in a CVD sunset review.

8.93 We also note the decision of the Panel in *US – DRAMS* in which the Panel stated:

Accordingly, we must assess the essential character of the necessity involved in cases of continued imposition of an anti-dumping duty. We note that the necessity of the measure is a function of certain objective conditions being in place, *i.e.* whether circumstances require continued imposition of the anti-dumping duty. That being so, such continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of positive evidence that circumstances demand it. In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.<sup>324</sup>

Although the decision of the Panel was made as part of a review under Article 11.2 of the AD Agreement we believe this excerpt provides helpful guidance for our case relative to the adequacy of the factual basis for a determination.

8.94 Based on the two foregoing decisions, we consider that a determination of likelihood under Article 21.3 must rest on a sufficient factual basis.

8.95 An investigating authority's determination of the likelihood of continuation or recurrence of subsidisation should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews and finally the sunset review. In our view, a likelihood analysis based on this evidentiary framework would be consistent with the requirements of Article 21.3.

8.96 In our view, one of the components of the likelihood analysis in a sunset review under Article 21.3 is an assessment of the likely rate of subsidisation. We do not consider, however, that an investigating authority must, in a sunset review, use the same calculation of the rate of subsidisation as in an original investigation. What the investigating authority must do under Article 21.3 is to assess whether subsidisation is likely to continue or recur should the CVD be revoked. This is, obviously, an inherently prospective analysis. Nonetheless, it must itself have an adequate basis in fact. The facts necessary to assess the likelihood of subsidisation in the event of revocation may well be different from those which must be taken into account in an original investigation. Thus, in assessing the likelihood of subsidisation in the event of revocation of the CVD, an investigating authority in a sunset review may well consider, *inter alia*, the original level of subsidisation, any changes in the original subsidy programmes, any new subsidy programmes introduced after the imposition of the original CVD, any changes in government policy, and any changes in relevant socio-economic and political circumstances.

(ii) *Is US CVD law as such consistent with the requirements of Article 21.3 of the SCM Agreement in respect of the investigating authority's obligation to determine the likelihood of continuation or recurrence of subsidisation in a sunset review?*

8.97 Having addressed the substance of the obligation of investigating authorities to assess the likelihood of continuation or recurrence of subsidisation, we now turn to the question of whether US law is consistent with that obligation.

8.98 We recall that the European Communities argues that the governing provisions in US law (Section 751(c), as complemented by Section 752, of the Tariff Act<sup>325</sup>, as amended, the Implementing

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<sup>324</sup> *US – DRAMS*, Report of the Panel, footnote 247, *supra*, para. 6.42.

<sup>325</sup> 19 U.S.C.A. Section 1675(c) (Exhibit EC-13).

Regulations<sup>326</sup>, and the accompanying statement of policy practices<sup>327</sup>) preclude the US DOC from making the determination required under Article 21.3.

8.99 Turning to our analysis, we note that Section 751(c) of the Tariff Act reads, in relevant part:

(b) Five-year review

In general

... 5 years after the date of publication of —

(A) a countervailing duty order ...

the administering authority and the Commission shall conduct a review to determine...whether revocation of the countervailing...duty order...would be likely to lead to continuation or recurrence of ... a countervailable subsidy (as the case may be) and of material injury...<sup>328</sup>

8.100 Section 752 of the Tariff Act provides, in relevant part:

(b) Determination of likelihood of continuation or recurrence of a countervailable subsidy

(1) In general

In a review... the administering authority shall determine whether revocation of a countervailing duty order... would be likely to lead to continuation or recurrence of a countervailable subsidy... The administering authority shall consider--

(A) the net countervailable subsidy determined in the investigation and subsequent reviews, and

(B) whether any change in the programme which gave rise to the net countervailable subsidy ... has occurred that is likely to affect that net countervailable subsidy.

(2) Consideration of other factors

If good cause is shown, the administering authority shall also consider--

(A) programmes determined to provide countervailable subsidies in other investigations or reviews ...

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<sup>326</sup> Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, or "Sunset Regulations". 63 FR 13516 (20 March 1998), codified in 19 CFR part 351 (Exhibit EC-14).

<sup>327</sup> 63 FR 18871 (16 April 1998) (Exhibit EC-15). The United States explains: "Under [US] law, the Sunset Policy Bulletin would be considered a non-binding statement, providing evidence of [the DOC's] understanding of sunset-related issues not explicitly addressed by the statute and regulations. In this regard, the Sunset Policy Bulletin has a legal status comparable to that of agency precedent . . . As with its administrative precedent, [the DOC] normally would follow its policy bulletin or explain why it did not do so" (First Written Submission of the United States, footnote 37). In this context, the findings of the Panel in *United States – Export Restraints* in respect of the legal status of the measures challenged by the European Communities in that case may provide useful guidance. (*See United States – Measures Treating Exports Restraints as Subsidies* ("United States – Export Restraints"), Report of the Panel, WT/DS194/R and Corr.2, adopted 23 August 2001.)

<sup>328</sup> 19 U.S.C.A. Section 1675(c) (Exhibit EC-13).

(B) programmes newly alleged to provide countervailable subsidies but only to the extent that the administering authority makes an affirmative countervailing duty determination with respect to such programmes and with respect to the exporters or producers subject to the review.

(3) Net countervailable subsidy

The administering authority shall provide to the Commission the net countervailable subsidy that is likely to prevail if the order is revoked or the suspended investigation is terminated.<sup>329</sup>

8.101 With respect to the DOC's obligation to "determine", the Sunset Regulations essentially repeat the language of the Statute. They provide, in relevant part:

[T]he Secretary must determine whether dumping or countervailable subsidies would be likely to continue or resume if an order were revoked or a suspended investigation were terminated...

Even where the Department conducts a full sunset review, only under the most extraordinary circumstances will the Secretary rely on a countervailing duty rate or a dumping margin other than those it calculated and published in its prior determinations...<sup>330</sup>

The Sunset Policy Bulletin and the Statement of Administrative Action<sup>331</sup> ("SAA") basically elaborate further on the provisions of the Statute and the Sunset Regulations within the limits set out in the Statute.

8.102 In this case, the question we must address is whether US law mandates WTO-inconsistent behaviour or gives rise to executive authority that can be exercised with discretion. If we find that US law provides the executive branch with discretionary authority, we will conclude that US law as such is not inconsistent with the SCM Agreement in respect of the investigating authorities' duty to "determine" the likelihood of continuation or recurrence of subsidisation. If, on the other hand, we find that US law mandates WTO-inconsistent behaviour, we will find that it violates Article 21.3 of the SCM Agreement. Our approach in this respect is consistent with the established jurisprudence of the Appellate Body that distinguishes between mandatory and discretionary legislation in proceedings where a Member's legislation as such is challenged before a WTO Panel.<sup>332</sup>

8.103 At the outset, we observe that the words of Section 751(c) of the Tariff Act reflect closely the language of Article 21.3 of the SCM Agreement. Indeed the operative language with which we are concerned is almost identical. The US DOC is required to "determine whether revocation" of a CVD would be likely to lead to the continuation or recurrence of subsidisation and injury in order to extend the application of a CVD beyond the initial five-year period. After setting out this general rule,

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<sup>329</sup> 19 U.S.C.A. Section 1675a (Exhibit EC-13).

<sup>330</sup> 19 CFR 351.218(a) (Exhibit EC-14).

<sup>331</sup> We note that US law, 19 U.S.C. Section 3512(d), provides that "[t]he statement of administrative action approved by Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application".

<sup>332</sup> For the most recent application of this test by the Appellate Body, *see, United States – Section 211 Omnibus Appropriations Act of 1998* ("US – Section 211 Appropriations Act"), Report of the Appellate Body, WT/DS176/AB/R, adopted 2 February 2002, para. 259.

Section 751(c) lays down further procedural rules that the investigating authorities have to follow in sunset reviews.<sup>333</sup>

8.104 Section 752 of the Tariff Act sets out, in subsection (b), rules on the consideration of the rate of subsidisation. Section 751(b) in subsection (1) states that the original rate of subsidisation – or the rate obtained in a later review – should be taken into account, together with subsequent changes that occurred in the original subsidy programmes, that affect the net countervailable subsidy. Section 751(b)(2) stipulates that potential new programmes shall be taken into account. Section 751(b)(3) states that the administering authority should report to the US ITC the rate of subsidisation that is likely to continue or recur should the existing measure be revoked.

8.105 We note, however, the following statement in the Sunset Regulations:

Even where the Department conducts a full sunset review, only under the most extraordinary circumstances will the Secretary rely on a countervailing duty rate or a dumping margin other than those it calculated and published in its prior determinations...<sup>334</sup>

While this statement does not preclude the assessment and provision of a likely rate of subsidisation by the DOC to the ITC, the introduction of the additional criterion of "the most extraordinary circumstances" seems to us to be dubious. The language is strong, and apparently places the burden of proof to demonstrate "the most extraordinary circumstances" on the exporting parties. We consider that this criterion imposes fairly severe legal limitations on the ability of the DOC to come up with a new rate of subsidisation. While not requiring WTO-inconsistent behaviour in this regard, US law nonetheless curtails the discretion of the investigating authority such that, in the absence of information about what might constitute "the most extraordinary circumstances", we feel compelled to express some concern about the effect of this regulation.

8.106 We recall our finding in paragraph 8.102, *supra*, however, that unless US CVD law mandates WTO-inconsistent behaviour, we will find that it is not inconsistent with the SCM Agreement. Having considered the provisions challenged by the European Communities, we find no provision in US law that mandates WTO-inconsistent behaviour. We also note that the Regulations, the Sunset Policy Bulletin and the SAA do not contain any provision that changes US law in this respect. We therefore find that US law is not inconsistent with Article 21.3 of the SCM Agreement with respect to the obligation that the investigating authorities determine the likelihood of continuation or recurrence of subsidisation in a sunset review.

8.107 Further, we note that the European Communities claims that, owing to the lack of consistency with Article 21.3 of the SCM Agreement in respect of the obligation that the investigating authorities determine the likelihood of continuation or recurrence of subsidisation in a sunset review, US CVD law is also inconsistent with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement, which provisions require that Members ensure the WTO-conformity of their laws, regulations, and administrative procedures. Having found that US CVD law and the accompanying regulations are consistent with Article 21.3 of the SCM Agreement in respect of the obligation that the investigating authorities determine the likelihood of continuation or recurrence of subsidisation in a sunset review, we need not, and do not, consider whether US CVD law and the accompanying regulations are inconsistent with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

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<sup>333</sup> Subtitles under this section are: (1) In general, (2) Notice of initiation of review, (3) Responses to notice of initiation, (4) Inadequate response, (5) Conduct of review, (6) Special transition rules, and (7) Exclusions from computations.

<sup>334</sup> 19 CFR 351.218(e)(2)(i) (Exhibit EC-14).

**2. Whether US CVD law as applied in the instant sunset review is inconsistent with the SCM Agreement in respect of the investigating authority's obligation to determine the likelihood of continuation or recurrence of subsidisation in a sunset review**

(a) Arguments of the Parties

(i) *European Communities*

8.108 The European Communities argues that the DOC failed to "determine" the likelihood of continuation or recurrence of subsidisation in the instant case. The European Communities asserts that during the sunset review in question, the DOC refused to consider changes or terminations in the original subsidy programmes that occurred after the imposition of the original CVD order simply because no administrative review had been requested by the German exporters and conducted by the DOC during this period.<sup>335</sup>

8.109 According to the European Communities, the US DOC had in its possession the non-confidential version of the German exporters' responses to the questionnaires in the original investigation as well as the calculation memorandum as part of the record of the original investigation. Thus, the European Communities maintains the DOC could have easily determined whether the benefits received by the German exporters under the CIG programme after 1 January 1986 were de minimis.<sup>336</sup> According to the European Communities therefore the US DOC failed to fulfill its obligation to determine the likelihood of continuation or recurrence of subsidisation by declining to consider a document that allegedly contained information that could be relevant in its likelihood analysis.

(ii) *United States*

8.110 The United States points out that in the sunset review at issue, the DOC considered the subsidy programmes and the rate of subsidisation calculated in the original investigation. According to the United States, this approach conforms to the requirements of Article 21.3 because what that article requires an investigating authority to do in a sunset review is to determine the likelihood of continuation or recurrence of subsidisation.<sup>337</sup>

8.111 The United States also argues in this respect that even using the calculation memorandum that was part of the original CVD investigation would not shed light on the rate of subsidisation because that memorandum contained no information concerning the value of the German exporters' sales.<sup>338</sup>

(b) Findings of the Panel

8.112 Having found that US law as such is not inconsistent with the SCM Agreement in respect of the investigating authority's obligation to determine the likelihood of continuation or recurrence of subsidisation under Article 21.3, we now turn to the consistency of US CVD law as applied in the instant sunset review with the SCM Agreement in respect of the investigating authority's obligation to determine the likelihood of continuation or recurrence of subsidisation under Article 21.3.

8.113 We note that among all the subsidy programmes involved in this sunset review, the Capital Investment Grants ("CIG") programme had the highest share. The CIG programme was the major subsidy programme involved in the original CVD investigation. There is no dispute between the

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<sup>335</sup> First Written Submission of the European Communities, para. 77.

<sup>336</sup> *Id.*, para. 87.

<sup>337</sup> First Written Submission of the United States, para. 92.

<sup>338</sup> *Id.*, para. 106.

parties that this programme was terminated after the imposition of the original CVD order. It provided non-recurring subsidies and applied only to investments made prior to 1 January 1986.<sup>339</sup>

8.114 In this context, we will consider the analysis and explanation underlying the US DOC's determination that subsidisation was likely to continue or recur in this sunset review. US DOC stated in its final determination in the instant sunset review that it had determined that the revocation of the CVD order at issue would be likely to lead to the continuation or recurrence of subsidisation at the rate of 0.54 per cent.<sup>340</sup>

8.115 Thus, it appears that the US DOC made an assessment of the rate at which subsidisation was likely to continue or recur. We recall, however, our finding above that the determination of the investigating authority must rest on an adequate factual basis. We therefore consider whether the US DOC's assessment of the likelihood of whether subsidisation would continue or recur rested on an adequate factual basis, consistent with the requirements of Article 21.3. We consider that in the context of a sunset review under Article 21.3 of the SCM Agreement, an investigating authority should collect relevant facts and base its likelihood analysis on those facts. These facts will include, among others, changes in the original subsidy programmes, any new subsidy programmes introduced following the imposition of the original CVD, potential subsidy programmes, and benefits that flow or may flow from these programmes to the exporters. Such relevant facts may be in the possession of either the investigating authorities or the interested parties. Article 12 of the Agreement, which governs, *inter alia*, the collection of evidence, is specifically incorporated into Article 21. Therefore, where necessary in sunset reviews, the investigating authorities may make use of the methods provided for in Article 12 for the collection of evidence, as they do in original investigations.

8.116 In the instant case, the DOC took the original CVD rate found in the original investigation as a starting-point and then subtracted from that rate the share of two subsidy programmes found to have been terminated after the imposition of the original CVD. Thus the factual basis of the DOC's determination was limited to the original rate of subsidisation and the fact that two of the original subsidy programmes were terminated after the imposition of the original CVD order.

8.117 In our view, the DOC's likelihood determination, which did not go beyond simple arithmetic calculation, lacks sufficient factual basis. In particular, we note that the US DOC refused to accept information that would have been relevant to the assessment of the likelihood of subsidisation. With respect to the obligations of the investigating authorities regarding the establishment of an adequate factual basis for their determinations, the Appellate Body, in the *US – Cotton Yarn* case, stated:

[A]n investigation by a competent authority requires a proper degree of activity. Their "duties of investigation and evaluation preclude them from remaining passive in the face of possible shortcomings in the evidence submitted." They "must undertake additional investigative steps, when the circumstances so require, in order to fulfil their obligation to evaluate all relevant factors."<sup>341</sup>

8.118 In the instant sunset review, as discussed further below, the DOC declined the request made by the German exporters that the calculation memorandum from the original investigation be placed on the record of the sunset review on the grounds that the submission was untimely. In our view, and in light of the Appellate Body's ruling in *US – Cotton Yarn*, the investigating authorities are required to consider factual evidence already in their possession that is relevant to the assessment of the likelihood of continuation or recurrence of subsidisation, particularly where, as in this case, that information may be relevant to the assessment of the rate at which subsidisation is likely to continue or recur.

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<sup>339</sup> Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Germany, 58 FR 37316 (9 July 1993) (Exhibit EC – 2).

<sup>340</sup> Final Results of Full Sunset Reviews, 65 FR 47407 (2 August 2000) (Exhibit EC – 9).

<sup>341</sup> *US – Cotton Yarn*, footnote 217, *supra*, para. 73 (footnotes omitted, emphasis in original).

Investigating authorities cannot remain completely passive and expect the exporters to formally submit information that is in the possession of the investigating authorities in connection with the original investigation. Applying that test to our case, the DOC's failure to accept the German exporters' request that the calculation memorandum be placed on the record of the sunset review indicates that the DOC did not even consider a document that was in its possession and that would have been relevant in its likelihood analysis, let alone taking additional steps.

8.119 In light of the foregoing, we conclude that the US DOC failed to properly determine the likelihood of continuation or recurrence of subsidisation in the instant sunset review because its decision regarding the rate at which subsidisation was likely to continue or recur lacked an adequate factual basis. Therefore, we conclude that US CVD law as applied in the instant sunset review is inconsistent with the SCM Agreement in respect of the investigating authority's obligation to determine the likelihood of continuation or recurrence of subsidisation under Article 21.3.

E. WHETHER US CVD LAW AS SUCH AND AS APPLIED IN THE INSTANT SUNSET REVIEW ARE INCONSISTENT WITH THE SCM AGREEMENT IN RESPECT OF THE INVESTIGATING AUTHORITY'S OBLIGATION TO PROVIDE AMPLE OPPORTUNITY TO INTERESTED MEMBERS AND PARTIES TO SUBMIT RELEVANT EVIDENCE IN A SUNSET REVIEW

## 1. Arguments of the parties

### (a) European Communities

8.120 The European Communities argues that US law violates Article 12.1 of the SCM Agreement in that it fails to provide ample opportunity to the interested parties to present in writing all evidence which they consider relevant in respect of a sunset review. In particular, the European Communities refers to Section 351.218(d)(4) of the US Sunset Regulations – which, together with Section 351.218(d)(3), provides 35 days for the parties to respond to the questionnaires – and submits that this short deadline violates the provisions of Article 21.3, in conjunction with Articles 12.1 and 21.4, of the SCM Agreement.<sup>342</sup>

8.121 The European Communities also asserts that US CVD law is inconsistent with the SCM Agreement in that, under US CVD law, the DOC does not send questionnaires to interested parties in sunset reviews and requires them to respond only to a short list of questions which, in the European Communities' view, are perfunctory in nature.<sup>343</sup>

8.122 Further, the European Communities argues as follows:

The US law and practice does [sic] not respect several provisions of Article 12 of the SCM Agreement . . . . In particular, Articles 12.1 and 12.1.1 lay down a general obligation to provide "ample opportunity" to exporters to present in writing all evidence they consider relevant. Article 12.2 allows also for the right to present information orally. Article 12.3 establishes in effect a procedure of mutual dialogue by providing that the affected exporters should be given timely opportunity "to see all information that is relevant to the presentation of their cases . . . and to prepare presentations on the basis of this information". Moreover, Article 12.8 provides that before the final determination is made, disclosure should take place "in sufficient time for the parties to defend their interests". The principle underlying Article 12 of the SCM Agreement, therefore, is that during all stages of the reviews the interested parties should be given ample opportunity to present evidence, to have access to the evidence presented by the other parties (except where confidentiality applies), to

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<sup>342</sup> First Written Submission of the European Communities, paras. 98-99.

<sup>343</sup> Second Written Submission of the European Communities, para. 41.

present counter-evidence and to defend their interests at all stages leading up to the final determination.<sup>344</sup>

8.123 The European Communities also submits that the United States acted inconsistently with Article 12.1 of the SCM Agreement by failing to consider in its likelihood analysis in the instant sunset review the calculation memorandum that was in the DOC's possession as part of the record of the original investigation. In the view of the European Communities, had the US DOC taken this memorandum into account in its sunset determination, it would have found no likelihood of continuation or recurrence of subsidisation.<sup>345</sup>

8.124 In response to the US DOC's argument that the calculation memorandum contained confidential information, the European Communities argues that this document was drafted by the DOC and that it did not contain confidential information that was not known to the DOC or the other interested parties in this sunset review.<sup>346</sup> Similarly, the European Communities counters the US arguments that the request made by the German exporters was untimely because, in the view of the European Communities, the US DOC could still conclude this sunset review in a timely manner had it taken this calculation memorandum into account.<sup>347</sup>

8.125 In its response to a question from the Panel following the second meeting of the Panel, the European Communities clarified that it was indeed making a separate claim regarding the obligation set out in Article 12.1 to provide ample opportunity to interested Members and parties to submit all relevant evidence.<sup>348</sup>

8.126 In its comments on the request of the United States for interim review (*See* paragraph 8.134, *infra*), the European Communities argued that the reference in its request for establishment to Article 21 *in toto* would include Article 12, as paragraph 4 of Article 21 expressly indicates that Article 12 is applicable to sunset reviews. The European Communities further submitted that the obligation to provide ample opportunity under Article 12 is expressly mentioned in its first written submission. The European Communities considered that it had fully complied with the standards of Article 6.2 of the DSU.

8.127 Finally, the European Communities argued that the United States was not only "somewhat foreclosed", following the first meeting of the Panel, from raising such an issue but that, in addition, the Panel had not proceeded "in any extension of its authority or jurisdiction". The European Communities based its objection on what it considered "the clear and verifiable evidence" that the United States was never in any doubt about the European Communities' claims under Article 12 throughout the consultations, request for establishment, and subsequent written and oral submissions of the European Communities. The European Communities indicated that it had "serious difficulties" in understanding the US argument that the United States only had the opportunity to raise this issue following the European Communities' responses to questions from the Panel following the second meeting of the Panel.

(b) United States

8.128 In response to the European Communities' claim regarding "ample opportunity" under Article 12 of the Agreement, the United States first points out that, consistent with Article 12.1.1 of the Agreement, the US Sunset Regulations provide 30 days for the parties to submit the required

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<sup>344</sup> Second Written Submission of the European Communities, para. 44.

<sup>345</sup> Second Written Submission of the European Communities, para. 32.

<sup>346</sup> First Oral Statement of the European Communities, para. 33.

<sup>347</sup> *Id.*, para. 33.

<sup>348</sup> Response of the European Communities to Question 54 from the Panel.

information. The United States also points out that, also consistent with Article 12.1.1, the Sunset Regulations provide for the extension of this time-limit.<sup>349</sup>

8.129 With respect to the European Communities' argument concerning the US' failure to send questionnaires in sunset reviews, the United States submits that in addition to the information requirements set out in the Sunset Regulations – which constitute the standard questionnaire in US sunset reviews – the Sunset Regulations allow interested parties to submit additional information that they would like the DOC to consider.<sup>350</sup> In the view of the United States, therefore, the provisions of US law are fully consistent with Article 12 of the SCM Agreement.<sup>351</sup>

8.130 The United States counters the European Communities' arguments made in respect of the inclusion of the calculation memorandum from the original investigation basically on two grounds, i.e., lack of timeliness of the request and the confidential nature of the information contained therein.

8.131 The United States argues that the request made by the German exporters to have the calculation memorandum made part of the record of the sunset review was untimely because it was made over six months after the deadline for filing information in the instant sunset review.<sup>352</sup> The United States also points out that the German producers failed to file any request for the extension of this deadline although under US law they were entitled to do so.<sup>353</sup> Finally, the United States submits that the lack of timeliness of the German producers' request is all the more obvious given that they were on notice of the information requirements and applicable deadlines over fifteen months before the initiation of this sunset review.<sup>354</sup>

8.132 The United States asserts that another reason the US DOC declined to place this memorandum on the record of the sunset review was because it contained confidential information that could not be released without the consent of the person submitting it.<sup>355</sup> The United States argues in this respect that the DOC could not ignore previous requests for the confidential treatment of this document and automatically place it on the record of the sunset review.<sup>356</sup>

8.133 In its comments on the response of the European Communities to a question from the Panel following the second meeting of the Panel (*See* paragraph 8.125, *supra*), the United States submitted that the European Communities' claims under Article 12 were new, as the European Communities' request for establishment does not reference Article 12 or the fact pattern which the European Communities believes gives rise to a violation of Article 12.<sup>357</sup> The United States argued that the new claims did not satisfy the standards of Article 6.2 of the DSU, and requested the Panel to dismiss these new claims.

8.134 In its request for interim review, the United States again submitted, for the above reasons, that the Panel should not have made any substantive findings regarding the obligation to provide ample opportunity to interested members and parties to submit evidence in a sunset review, because the European Communities' claims regarding this obligation were not within the Panel's terms of reference.

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<sup>349</sup> First Written Submission of the United States, para. 111.

<sup>350</sup> *Id.*, para.110.

<sup>351</sup> *Id.*, para. 108.

<sup>352</sup> First Written Submission of the United States, para. 103.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*, para. 104.

<sup>356</sup> *Id.*

<sup>357</sup> Comments of the United States on Responses of the European Communities to Questions from the Panel following the Second Meeting of the Panel, paras. 21-22.

## 2. Findings of the Panel

8.135 We recall that paragraph 13 of our working procedures states that "[a] party shall submit any request for a preliminary ruling not later than its first submission to the Panel . . . Exceptions to this procedure will be granted upon a showing of good cause". In this regard, we note, at the outset, that, although it was in the course of interim review that we addressed the objection of the United States regarding the claims of the European Communities in respect of the investigating authority's obligation to provide ample opportunity, the United States had registered this objection prior to that time. The United States first presented this objection in its comments on the responses of the European Communities to questions from the Panel following the second meeting.

8.136 Further, as the European Communities had up to that point only discussed the obligation to provide ample opportunity in the context of the obligation to determine continuation or recurrence of subsidisation, it was not clear to us that the European Communities was making a separate claim in respect of the obligation to provide ample opportunity. It was on this basis that we posed a question to the European Communities following our second meeting with the parties, requesting clarification. And the United States made its objection known following the response by the European Communities that it was indeed making a separate claim in respect of this obligation. Therefore, this is not a situation in which we need to decide whether we can address an objection which could have been raised in a timely manner, but was not.

8.137 Thus, we have addressed the issue raised by the United States regarding the European Communities' claims in respect of the obligation to provide ample opportunity<sup>358</sup>, and concluded that these claims are outside our terms of reference. Our reasons are set out below.

8.138 We note that Article 7 of the DSU covers the terms of reference of panels, and Article 6 the establishment of panels. Article 7 clearly indicates that the terms of reference of panels are contained in the request for the establishment of a panel<sup>359</sup>. With regard to the request for establishment, Article 6.2 of the DSU provides in part:

The request for the establishment of a panel . . . shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

The Appellate Body has stated, in respect of the terms of reference of panels:

Thus, "the matter referred to the DSB" for the purposes of Article 7 of the DSU and Article 17.4 of the *Anti-Dumping Agreement* must be the "matter" identified in the request for the establishment of a panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a panel request, to "identify the *specific measures at issue* and provide a brief summary of the *legal basis of the complaint*

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<sup>358</sup> See also the following ruling of the Appellate Body, in *United States – Anti-Dumping Act of 1916*:

. . . we also agree with the Panel's consideration that "some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time". We do not share the European Communities' view that objections to the jurisdiction of a panel are appropriately regarded as simply "procedural objections". The vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings. We, therefore, see no reason to accept the European Communities' argument that we must reject the United States' appeal because the United States did not raise its jurisdictional objection before the Panel in a timely manner. (*United States – Anti-Dumping Act of 1916* ("US – 1916 Act"), Report of the Appellate Body, WT/DS136/AB/R-WT/DS162/AB/R, adopted 26 September 2000, para. 54 (footnote omitted))

<sup>359</sup> WT/DS213/3 in the present dispute.

sufficient to present the problem clearly." (emphasis added) The "*matter* referred to the DSB", therefore, consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*).<sup>360</sup>

Further, the Appellate Body has stated, in *European Communities – Bananas*:

As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.<sup>361</sup>

8.139 Thus, the United States' request raises two separate, but related, issues: (i) whether US CVD law in respect of the opportunity to submit evidence in a sunset review was identified in the request for establishment as a measure challenged by the European Communities and, if so, (ii) whether the European Communities' request for establishment provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" and therefore satisfies the standard set out in Article 6.2 of the DSU.

8.140 We shall first examine the request for establishment to determine whether, on its face, the United States – and any other WTO Member – could have been reasonably expected to know that US CVD law in respect of the opportunity to submit evidence in a sunset review was part of "the matter referred to the DSB".

8.141 It is clear from the European Communities' request for establishment that the words "opportunity to submit evidence" or the like do not appear in that request. Nor, as we have noted above, does the request contain any all-encompassing reference to US procedures, generally, for sunset review. Paragraphs 1-2 of the request for establishment set out the procedural background to the request for establishment, paragraph 3 explains that the request relates particularly to the sunset review in carbon steel, paragraphs 4-7 set out the European Communities' claim in respect of the de minimis standard applied in that review, paragraphs 8-10 set out the European Communities' claim in respect of the evidentiary standards applied in relation to the initiation of that review, and paragraph 11 summarises the European Communities' challenge to the US decision in that review, as well as to "certain aspects of the sunset review procedure which led to it". This latter phrase could not be understood to include US CVD law in respect of the opportunity to submit evidence.

8.142 We note that the request for establishment further outlines the statutory and regulatory underpinnings of the US sunset review procedures as such, and as applied in the sunset review in carbon steel<sup>362</sup>. These statutory and regulatory provisions also govern the opportunity to submit evidence in a sunset review. We consider, however, that this fact alone is insufficient for us to conclude that US CVD law in respect of the opportunity to submit evidence in a sunset review is identified as a specific measure at issue.

8.143 Having found that US CVD law in respect of the opportunity to submit evidence in a sunset review is not identified in the request for establishment, we shall consider whether that "measure" is sufficiently related to a measure or measures that are specifically identified so as to bring it within our terms of reference. We note the finding of the Panel in *Japan – Film*:

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<sup>360</sup> *Guatemala – Cement I*, Report of the Appellate Body, footnote 226, *supra*, para. 72 (emphasis in original).

<sup>361</sup> *European Communities – Bananas*, Report of the Appellate Body, footnote 227, *supra*, para. 142.

<sup>362</sup> WT/DS213/3, para. 12.

The question thus becomes whether the ordinary meaning of the terms of Article 6.2, i.e., that "the specific measures at issue" be identified in the panel request, can be met if a "measure" is not explicitly described in the request. To fall within the terms of Article 6.2, it seems clear that a "measure" not explicitly described in a panel request must have a clear relationship to a "measure" that is specifically described therein, so that it can be said to be "included" in the specified "measure". In our view, the requirements of Article 6.2 would be met in the case of a "measure" that is subsidiary, or so closely related to a "measure" specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party. The two key elements – close relationship and notice – are inter-related: only if a "measure" is subsidiary or closely related to a specifically identified "measure" will notice be adequate.<sup>363</sup>

8.144 We note that the European Communities' request refers to "certain aspects of the sunset review procedure which led to [the DOC decision not to revoke the CVDs on carbon steel]". We do not consider US CVD law in respect of the opportunity to submit evidence in a sunset review to be "a 'measure' that is subsidiary, or so closely related to" any of the measures specifically identified, "that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party". To consider otherwise would mean that the general sentence "certain aspects of the sunset review procedure which led to [the DOC decision not to revoke the CVDs on carbon steel]" put Members on notice that any aspect of US CVD law of relevance in the sunset review on carbon steel might be before the Panel. This cannot be, for that universe is potentially extremely large. We therefore find that US CVD law in respect of the opportunity to submit evidence in a sunset review is not sufficiently related to a measure or measures that are specifically identified in the request for establishment as to properly bring it within our terms of reference.<sup>364</sup>

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

## IX. CONCLUSIONS AND RECOMMENDATIONS

9.1 In conclusion, we find that:

- (a) US CVD law and the accompanying regulations are consistent with Article 21, paragraphs 1 and 3, and Article 10 of the SCM Agreement in respect of the application of evidentiary standards to the self-initiation of sunset reviews;
- (b) US CVD law and the accompanying regulations are inconsistent with Article 21.3 of the SCM Agreement in respect of the application of a 0.5 per cent de minimis standard to sunset reviews, and therefore violate Article 32.5 of the SCM Agreement and, consequently, also Article XVI:4 of the WTO Agreement;

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<sup>363</sup> *Japan – Film*, Report of the Panel, footnote 230, *supra*, para. 10.8.

<sup>364</sup> Having concluded that the European Communities has not identified US CVD law in respect of the opportunity to submit evidence in a sunset review as a specific measure at issue in its request for establishment, we need not, and do not, consider whether the European Communities has provided "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in that request for establishment (*See paras. 8.5-8.6, supra*).

- (c) the United States, in applying a 0.5 per cent de minimis standard to the instant sunset review, acted in violation of Article 21.3 of the SCM Agreement;
- (d) US CVD law and the accompanying regulations and statement of policy practices are consistent with Article 21.3 of the SCM Agreement in respect of the obligation to determine the likelihood of continuation or recurrence of subsidisation in sunset reviews; and
- (e) the United States, in failing to determine properly the likelihood of continuation or recurrence of subsidisation in the sunset review on carbon steel, acted in violation of Article 21.3 of the SCM Agreement.

9.2 We recommend that the Dispute Settlement Body request the United States to bring its measures mentioned in paragraph 9.1(b), (c), and (e) above into conformity with its obligations under the WTO Agreement.

#### **X. DISSENTING OPINION OF ONE MEMBER OF THE PANEL ON THE ASSESSMENT OF THE PANEL RELATING TO THE APPLICATION OF A DE MINIMIS STANDARD TO SUNSET REVIEWS**

10.1 One member of the Panel dissociated himself from the above assessment relating to the US CVD law as such and as applied in the sunset review on carbon steel in respect of application of a de minimis standard to sunset reviews (*See* Sections VIII.C.1(b) and VIII.C.2(b), *supra*) and expressed the following dissenting opinion<sup>365</sup>:

10.2 I agree with the statement of the majority of the Panel, that "nothing in the text of Article 21.3 specifically provides that the de minimis standard applicable to investigations is also applicable to sunset reviews"<sup>366</sup>. I do not, however, share the view of the majority that, such silence in the relevant provision as to the applicability of a de minimis standard to sunset reviews is not dispositive given an examination of the text of Article 21.3 in its context and in light of the object and purpose of the SCM Agreement, as required by Article 31 of the Vienna Convention. I consider that an examination of Article 21.3 pursuant to the customary rules of treaty interpretation yields the conclusion that no de minimis standard is applicable to sunset reviews.

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<sup>365</sup> Like the majority of the Panel, I do not understand the European Communities to be alleging a violation of Article 11.9, but of Article 21.3, of the SCM Agreement. In this regard, I note that the European Communities argues that "an interpretation of the terms of Article 21.3 should be made in context and in the light of the object and purpose of Article 21.3 and of the SCM Agreement. Articles 21.1, 11.9, 15, and 10 provide relevant context and help define its object and purpose. Such an interpretation . . . requires that the 1 [per cent] de minimis level of Article 11.9 should be implied, and hence applied, also to investigations and determinations made in sunset reviews" (Response of the European Communities to Question 47 from the Panel (emphasis added)).

Further, the European Communities "objects to the [United States'] suggestion to use only the phrase 'Article 11.9 itself applies to sunset reviews'" (Comments of the European Communities on Request of the United States for Interim Review, para. 3). Indeed, the European Communities argues that it "has taken particular care to explain that there is an omission in Article 21.3 and that only a systematic interpretation can fill up [sic] this gap by implying the de minimis standard of Article 11.9" (Comments of the European Communities on Request of the United States for Interim Review, para. 3 (emphasis added)). Nor could the European Communities successfully allege a violation of Article 11.9. Article 11 is entitled "Initiation and Subsequent Investigation", and clearly deals with investigations, such as that term is distinguished from reviews by the Agreement. This is also made clear in the text of Article 11.9 itself, which refers to investigations. I therefore consider whether Article 21.3 contains by implication the same type of obligation as Article 11.9, and whether the United States has violated Article 21.3 in this respect.

<sup>366</sup> Para. 8.58, *supra*.

10.3 In my view, the drafters would have been able and chosen to include a clear indication to the opposite effect, should that have been their intention. Indeed, I am persuaded by the United States' argument that the absence of a clear indication, for instance, in the form of a cross-reference, is all the more significant given the immediate context of Article 21.3 – that is, the fact that the drafters did provide explicit cross-references elsewhere in Article 21, to Articles 12 and 18. It is clear that the drafters knew how to have obligations set forth in one provision apply in another context. The most obvious inference one can draw from the absence of a cross-reference, therefore, is that the Members chose not to have the de minimis standard of Article 11.9 be implied in Article 21.3. There appears to me to be no textual basis to read Article 21.3 in the manner argued for by the European Communities. Given the marked difference in the terms of Article 21.3 and those of other provisions of the SCM Agreement which do explicitly establish cross-cutting obligations, I cannot conclude that it was the drafters' intention to have Article 11.9 be implied in Article 21.3.

10.4 To consider the question of cross-references or other explicit statements of cross-application in the broader context of Article 21.3 – that is, provisions of the SCM Agreement other than Article 21 – I note that a number of provisions in the Agreement contain an explicit indication where the drafters wished to make their scope of application clear<sup>367</sup>. Take Article 11.9, which sets out the de minimis standard applicable to investigations (except for products originating in developing country Members). I agree with the statement of the majority of the Panel, that "nothing in the text of [Article 11.9] provides for its de minimis standard to be implied in Article 21.3"<sup>368</sup>. I therefore cannot conclude, given the explicit language elsewhere in the Agreement, and in the absence of such language in Article 11.9, that the de minimis standard set out in that provision must nonetheless be understood to be implied in Article 21.3.

10.5 I note the Appellate Body's statement, in *US – Gasoline*:

One of the corollaries of the "general rule of interpretation" in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.<sup>369</sup>

I am of the opinion that to consider provisions relating to investigations applicable by implication under provisions relating to sunset reviews does not give meaning and effect to the explicit statements of cross-application in the SCM Agreement, and effectively renders such statements redundant. In other words, if all provisions are applicable to sunset reviews, except perhaps where impracticable, then there would be no need for such explicit statements to exist.

10.6 I recall that Article 11.9 requires the termination of an investigation in cases of de minimis subsidisation, negligible volume of subsidised imports, or negligible actual or potential injury. It seems to me that, if the rationale for the inclusion of a de minimis subsidisation standard were that de minimis subsidisation is deemed to be non-injurious, as the majority of the Panel considers (*See* paragraphs 8.60-8.64), then there would be no need to include a further standard of negligible actual or potential injury. It should be noted, in this context, that negligible actual or potential injury is nonetheless material injury, as footnote 45 to the Agreement states that "[u]nder this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry,

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<sup>367</sup> The definition of "subsidy" in Article 1 ("For the purpose of this Agreement"); the definition of "interested parties" in Article 12.9 ("for the purposes of this Agreement"); the calculation of the amount of a subsidy under Article 14 ("For the purpose of Part V"); the definition of "injury" under Article 15 and footnote 45 ("Under this Agreement"); the definition of "like product" under footnote 46 ("Throughout this Agreement"); definition of domestic industry in Article 16 ("For the purposes of this Agreement"); and the definition of "levy" under footnote 51 ("As used in this Agreement").

<sup>368</sup> Para. 8.59, *supra*.

<sup>369</sup> *United States – Gasoline*, Report of the Appellate Body, footnote 257, *supra*, p. 23.

threat of material injury to a domestic industry or material retardation of the establishment of such an industry".

10.7 I recall also that Article 27.10 reads:

Any [CVD] investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

- (a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis;

...

The use of the word "investigation" in this provision confirms, in my opinion, that the two de minimis subsidisation thresholds specified in the SCM Agreement apply only to investigations. Were the de minimis standard to apply to sunset reviews, the special and differential treatment provided to developing countries in the context of investigations would presumably have been extended to include sunset reviews. The word "investigation" in Article 27.10 clearly indicates that that is not the case. It is difficult to see why the drafters would intend the de minimis standard to apply to both investigations and sunset reviews, but provide special and differential treatment in this respect only in the context of investigations. In other words, the text of Article 27.10 suggests that no de minimis standard applies to sunset reviews.

10.8 I am of the view that the European Communities' argument is largely contextual; indeed, the European Communities has characterised its argument as a reading of Article 21.3 "in the context of" Article 11.9. It is not a given, however, that, because the negotiators agreed to certain standards for purposes of investigations, they necessarily agreed to the same for purposes of sunset reviews. The context of a legal provision – i.e., other paragraphs of the provision or related provisions elsewhere in the text – does not in and of itself create a legal obligation. The legal obligation must be found first and foremost in the text of the provision.<sup>370</sup> Otherwise, one would be forced to accept the view that consistency reasons may constitute sufficient grounds for the so-called "implication" of obligations.

10.9 While I do not disagree that application of the same de minimis standard to sunset reviews as to investigations would ensure a certain balance between the disciplines applicable to investigations and those applicable to sunset reviews, it is difficult to conclude on that basis alone that the same de minimis standard applies to both instances. Policy arguments alone are not sufficient for me to find that this is the case; rather, I would have to find that there is a proper legal basis for the European Communities' position, interpreting Article 21.3 pursuant to the customary rules of treaty interpretation.<sup>371</sup> While it would not be illogical – and it would reflect a degree of consistency in the

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<sup>370</sup> In this regard, I recall the statement of the Appellate Body, in *Japan – Alcoholic Beverages II*:

Article 31 of the *Vienna Convention* provides that the words of the treaty form the foundation for the interpretive process: "interpretation must be based above all upon the text of the treaty". (*Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), Report of the Appellate Body, WT/DS8/AB/R-WT/DS10/AB/R-WT/DS11/AB/R, adopted 1 November 1996, p. 12 (footnote deleted))

<sup>371</sup> In this regard, I recall the statement of the Appellate Body, in *EC – Hormones*, that:

The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, not words the interpreter may feel should have been used. (*EC – Hormones*, Report of the Appellate Body, footnote 250, *supra*, para. 181 (emphasis added))

treatment of investigations and sunset reviews – to apply the same de minimis standard to sunset reviews as to investigations, I cannot conclude on those grounds alone that that is the case, and I consider that the text of the SCM Agreement does not require investigating authorities to do so. I consider that the text of Article 21.3 – literally and in its context – clearly fails to establish an obligation on investigating authorities to apply a de minimis standard to sunset reviews.

10.10 Nor do I consider it impossible that the drafters might have intended there to be different rules for sunset reviews from those for investigations. It is arguably perfectly rational for there to be different disciplines for sunset reviews than for investigations. For instance, the negotiators might well have considered that application of a de minimis standard in the form of a specific numeric threshold was not feasible in the context of sunset reviews because any assessment of the rate at which subsidisation is likely to continue or recur would be but an approximation. One important observation in this regard is that Article 19.1 of the Agreement requires investigating authorities to make a final determination of both the existence and the amount of the subsidy (and that the subsidised imports are causing injury) before they may impose a CVD. It is therefore entirely reasonable that a de minimis threshold of 1 per cent is set out in this respect in Article 11.9. There is, however, no language similar to that of Article 19.1 in Article 21.3. In other words, were the de minimis standard set out in Article 11.9 implied in Article 21.3, the drafters would have set out in Article 21.3 the requirement to make a determination of both the existence and the amount of the subsidy. I consider that there is nothing in a decision that the de minimis standard applicable to investigations does not apply to sunset reviews that would undermine the operation of the Agreement or the ability of investigating authorities to operate under the Agreement. I see the framework of CVD disciplines as supporting the conclusion that a de minimis standard is not required under Article 21.3. In other words, it is not necessary to – and there could be entirely rational reasons not to – have the de minimis standard of Article 11.9 be implied in Article 21.3 to make the latter, or another, provision functional or ensure that the basic framework of CVD disciplines is preserved.

10.11 Finally, I consider that it is worth noting that, while the negotiating history of the SCM Agreement does not specifically address the question of whether a de minimis standard should apply to reviews, the questions of definition of a subsidy, investigation, imposition of measures, and review of need for measures were negotiated as separate items. De minimis as a concept was addressed in the context of the question of the imposition of measures; it does not seem to have been addressed at all in the context of the discussion of the need for a sunset clause or review mechanism. I am of the view that this would tend to confirm the results of my textual analysis above.

10.12 In sum, I recognise that the negotiators may well have had differing views as to whether it was desirable to apply the same de minimis standard to sunset reviews as to investigations – and it is indeed likely that some of them believed it would be. I do not, however, see that a rigorous and faithful reading of Article 21.3 in its context and in light of the object and purpose of the SCM Agreement leads to the conclusion that they agreed to impose such an obligation on investigating authorities.

10.13 I therefore find that the de minimis standard of Article 11.9 is not implied in Article 21.3. I thus conclude that US CVD law and the accompanying regulations are consistent with the SCM Agreement in respect of the application of a de minimis standard to sunset reviews, and accordingly reject the claim of the European Communities in this regard.

10.14 Further, I note that the European Communities claims that, owing to the lack of consistency with Article 21.3 of the SCM Agreement in respect of the application of a de minimis standard to sunset reviews, US CVD law is also inconsistent with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement, which provisions require that Members ensure the WTO-conformity of their laws, regulations, and administrative procedures. Having found that US CVD law and the accompanying regulations are consistent with Article 21.3 of the SCM Agreement in respect of the application of a de minimis standard to sunset reviews, I need not, and do not, consider whether

US CVD law and the accompanying regulations are inconsistent with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

10.15 Accordingly, in conclusion, in contrast with paragraphs 9.1(b) and 9.1(c), I find that:

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