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UNITED STATES – IMPOSITION OF COUNTERVAILING DUTIES ON CERTAIN HOT-ROLLED LEAD AND BISMUTH CARBON STEEL PRODUCTS ORIGINATING IN THE UNITED KINGDOM

AB-2000-1

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom

United States, *Appellant*
European Communities, *Appellee*

Brazil, *Third Participant*
Mexico, *Third Participant*

AB-2000-1

Present:

Matsushita, Presiding Member
El-Naggar, Member
Lacarte-Muró, Member*

I. Introduction

1. The United States appeals certain issues of law and legal interpretations in the Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (the "Panel Report").[1] The Panel was established to consider a complaint by the European Communities with respect to countervailing duties imposed by the United States on certain hot-rolled lead and bismuth carbon steel products ("leaded bars") originating in the United Kingdom.

2. The alleged subsidies countervailed relate principally to equity infusions granted by the British Government to a state-owned company, British Steel Corporation ("BSC"), between 1977 and 1986.[2] In 1986, BSC and Guest, Keen and Nettlefolds ("GKN"), a privately-owned company, created United Engineering Steels Limited ("UES") as a joint venture. Both BSC and GKN provided assets to UES, in return for equal shares in the joint venture. In particular, BSC spun-off its leaded bar-producing assets to UES. Negotiations concerning the spin-off were conducted at arm's length, consistent with commercial considerations. BSC ceased producing leaded bars after the spin-off of its leaded bar-producing assets to UES.[3] In preparation for the privatization of BSC, British Steel plc ("BSplc") assumed, in September 1988, the property, rights and liabilities of BSC, including BSC's

*Mr. Christopher Beeby, who was originally assigned to the Division hearing this appeal, passed away on 19 March 2000. Subsequently, Mr. Julio Lacarte-Muró was assigned to the Division. See *infra*, para. 8.

[1]WT/DS138/R, 23 December 1999.

[2]Panel Report, para. 2.5.

[3]*Ibid*., para. 6.22.

holding in UES. In December 1988, the British government completed the privatization through a sale of BSplc shares on the stock market.[4] The United States Department of Commerce ("USDOC") found that the sale of BSplc shares was at arm's length, for fair market value and consistent with commercial considerations.[5] On 20 March 1995, BSplc purchased GKN's holding in UES, whereupon UES was renamed British Steel Engineering Steels ("BSES").[6]

3. Countervailing duties on imports of leaded bars were originally imposed in 1993.[7] Since then, the USDOC has undertaken a number of annual reviews of the countervailing duties applied to imports of leaded bars originating in the United Kingdom. The European Communities' claims in this case relate to the countervailing duties imposed following administrative reviews initiated in 1995, 1996 and 1997, which dealt with leaded bar imports in the calendar years 1994, 1995 and 1996, respectively.[8] In each of these reviews, the USDOC applied its allocation methodology for untied, non-recurring subsidies to determine the amount of the benefit from the pre-1986 subsidies to BSC allocable to the relevant period of review.[9] The USDOC also applied its "change-in-ownership" methodology to determine the extent to which the pre-1986 subsidies granted to BSC "travelled" to UES and/or BSplc/BSES.[10] The USDOC imposed countervailing duties on the basis that a certain proportion of the subsidies granted to BSC had "passed through" to UES and BSplc/BSES.[11] The factual aspects of this dispute are set out in greater detail in paragraphs 2.1 to 2.9 and 6.22 to 6.30 of the Panel Report.

4. In its Report, circulated to Members of the World Trade Organization (the "WTO") on 23 December 1999, the Panel concluded that:

> … by imposing countervailing duties on 1994, 1995 and 1996 imports of leaded bars produced by UES and BSplc/BSES respectively, the United States violated Article 10 of the SCM Agreement.[12]

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[4]Panel Report, para. 6.23.

[5]*Ibid*.

[6]*Ibid*.

[7]*Ibid*., para. 6.24.

[8]*Ibid*., paras. 2.6-2.9.

[9]*Ibid*., paras. 6.25-6.30.

[10]*Ibid*.

[11]*Ibid*., para. 2.5.

[12]*Ibid*., para. 7.1.

5. The Panel recommended that the United States bring its measures into conformity with the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*").[13] The Panel suggested "that the United States [take] all appropriate steps, including a revision of its administrative practices, to prevent the aforementioned violation of Article 10 of the SCM Agreement from arising in the future."[14]

6. On 27 January 2000, the United States notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 7 February 2000, the United States filed its appellant's submission.[15] On 21 February 2000, the European Communities filed its appellee's submission.[16] On the same day, Brazil and Mexico each filed a third participant's submission.[17]

7. The oral hearing in the appeal was held on 13 March 2000. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

8. On 19 March 2000, Mr. Christopher Beeby, a Member of the Division hearing this appeal, passed away. On 20 March 2000, the Appellate Body, pursuant to Rule 13 of the *Working Procedures*, selected Mr. Julio Lacarte-Muró to replace Mr. Beeby. In view of these extraordinary circumstances, the newly-constituted Division decided, pursuant to Rule 16(1) of the *Working Procedures*, and in the interests of fairness and orderly procedure in the conduct of this appeal, to hold another oral hearing on 4 April 2000. On that date, the participants and third participants presented oral arguments and responded to questions put to them by the Members of the newly-constituted Division. Due to these same extraordinary circumstances, the participants in this appeal, the European Communities and the United States, agreed to a two week extension of the 90-day time limit for the consideration of this appeal, and thus agreed that this Report should be circulated no later than 10 May 2000.[18]

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[13]Panel Report, para. 8.1.

[14]*Ibid*., para. 8.2.

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

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

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

[18]WT/DS138/7, 4 April 2000.

II. Arguments of the Participants and Third Participants

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

1. Standard of Review

9. The United States argues that the standard of review set forth in Article 17.6 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") applies to panel review of WTO Members' countervailing duty measures. In the view of the United States, this standard of review applies by virtue of the *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures* (the "*Declaration*"), which refers to "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures."

10. According to the United States, the Panel erred in finding that the *Declaration* does not have "mandatory authority". A Ministerial Declaration can and does create binding obligations, and this *Declaration* demonstrates the clear intent of the Ministers to apply the standard of review contained in Article 17.6 of the *Anti-Dumping Agreement* to disputes involving countervailing duty measures under the *SCM Agreement.* The United States adds that, "under any standard of review", the USDOC's approach for handling pre-privatization subsidies cannot be found to be inconsistent with the United States' obligations under the *SCM Agreement* because that Agreement does not address the issue of privatization.

2. Articles 21 and 1.1(b) of the *SCM Agreement*

11. The United States appeals two principal findings made by the Panel. First, the United States argues that the Panel erred in finding that, in its review proceedings, the USDOC should have examined the continued existence of a benefit to UES and BSplc/BSES. Second, the United States challenges, on both substantive and procedural grounds, the Panel's finding that UES and BSplc/BSES received no benefit from the subsidies granted to BSC.

12. The United States argues that the ordinary meaning of Article 1.1 of the *SCM Agreement*, read in the light of its context and the object and purpose of the *SCM Agreement*, confirms that the benefit of a subsidy is determined as of the time of bestowal. The requisite financial contribution and benefit are described by Article 1.1 in the present tense. Thus, the benefit is created by the terms on which the financial contribution is made, and arises at the same time the financial contribution is made. The United States argues that f WTO Members were required to conduct an "ongoing

demonstration" that the original benefit still constitutes an advantage to the relevant company, it would become "nearly impossible" to administer countervailing duty laws. The United States also asserts that the panel report in *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* ("*Australia – Automotive Leather*")[19] supports the view that, due to a lack of express guidelines in the *SCM Agreement,* subsidy benefits may be allocated over time without revisiting the benefit issue.

13. According to the United States, the context provided by other provisions of the *SCM Agreement,* in particular Articles 14 and 27.13, supports this interpretation. Article 14, which describes how an investigating authority should measure the benefit of subsidies, looks only to the time of the subsidy bestowal, and not to any subsequent point in time. The United States also argues that the wording of Article 27.13 strongly implies a general rule that subsidies bestowed on a government-owned company prior to privatization *are* actionable after privatization.

14. In the view of the United States, the provisions relied on by the Panel as evidence that a benefit must be demonstrated again after a change in ownership – Articles 10, 19.1, 19.4 and 21.1 of the *SCM Agreement* and Article VI:3 of the GATT 1994 – do not provide guidance on this issue. Finally, the United States notes that the practice of investigating authorities in the European Communities confirms that there is no need to re-evaluate a subsidy's benefit after it is bestowed.

15. With respect to the Panel's finding that UES and BSplc/BSES received no benefit, the United States asserts that the Panel engaged in a flawed analysis that led directly to its erroneous conclusion that pre-privatization subsidies are automatically "extinguished" when a subsidized company is sold for fair market value. According to the United States, the Panel first found that the USDOC must establish that the company that produced or exported the relevant products "personally received" the benefit. Then, the Panel decided that the successor, privatized company was not the same company as the predecessor, government-owned company because the two companies had different owners. The Panel then asked itself whether the privatization transaction itself conferred a benefit on the post-privatization company. The United States argues that this analysis confuses old subsidies and new subsidies, and wrongly switches the focus from the company that received the subsidy to its new owners. According to the United States, whether a privatization transaction confers a "new" subsidy is unrelated to whether the transaction eliminates the unamortized portion of "old" subsidies.

[19]Panel Report, WT/DS126/RW, adopted 11 February 2000.

16. In the view of the United States, the *SCM Agreement* provides that subsidies are bestowed upon *production*. Since a mere change in ownership does not have an automatic or immediate effect upon production which has benefitted from subsidies, there is no basis in the Agreement for the Panel's conclusion that the purchase of a subsidized company for fair market value automatically extracts the benefit of that subsidy from the production of that company. Rather, Article 10 of the *SCM Agreement* and Article VI:3 of the GATT 1994 make clear that it is a company's *productive operations* that are relevant to the determination of whether a subsidy exists under Article 1.1. The United States adds that, to the extent that the *SCM Agreement* requires a connection between subsidies and producers, rather than between subsidies and production, legal successorship to a subsidized company is sufficient. Furthermore, the United States points out that, for both state aid and countervailing duty purposes, the law of the European Communities treats changes in ownership as irrelevant to the question of whether prior subsidies are actionable.

17. The United States contends that the Panel's conclusions are contrary to the object and purpose of the *SCM Agreement.* As established in the panel report in *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*")[20], the object and purpose of the *SCM Agreement* is "to offset government subsidies that distort trade, thereby causing injury to competing industries in other countries."[21] Subsidies, particularly when they reach high levels, create and maintain injurious production that would not otherwise have existed, and this defeats the essential purpose of the *SCM Agreement.* The United States stresses that the sale of a subsidized company at a fair market price does not automatically undo these changes, or eliminate the subsidies' benefit to production.

18. The United States also makes two arguments of an essentially procedural nature with respect to the Panel's finding that UES and BSplc/BSES received no benefit from the pre-privatization subsidies granted to BSC. First, the United States argues that the Panel erred in making findings that were not necessary to resolve this dispute. As it had already found that the USDOC erred in failing to establish the continued existence of a benefit, and therefore resolved the dispute, the Panel had no authority to make further rulings, as demonstrated by Articles 3.2, 3.4, 3.7, 3.9 and 11 of the DSU and Article IX of the *WTO Agreement.* In the present case, the Panel "made law" by going on to rule that no benefit from pre-privatization subsidies can be attributed to UES or BSplc/BSES. During the 13 March oral hearing, the United States explained that this argument is based on the principle that panels may not render advisory opinions, which is found in Article IX of the *WTO Agreement* and Article 3.9 of the DSU, as recognized by the Appellate Body in *United States – Measure Affecting*

[20]Panel Report, WT/DS70/R, adopted 20 August 1999, as upheld by the Appellate Body Report, WT/DS70/AB/R.

[21]United States' appellant's submission, para. 46.

Imports of Woven Wool Shirts and Blouses from India ("*United States – Shirts and Blouses*").[22] In this case, the United States contends, the Panel "exceeded its authority" by, in effect, dictating a methodology that a privatization at fair market value automatically precludes any benefit from pre-privatization subsidies from being attributed to the successor, privatized company.

19. Second, in its appellant's submission, the United States claims that the Panel "violated its mandate" under Article 11 of the DSU in finding that, as a factual matter, fair market value was paid for the productive assets, goodwill, etc., employed by UES and BSplc/BSES in the production of leaded bars, and that these findings did not have support in the record. In response to questioning at the 13 March oral hearing, the United States acknowledged that it is not challenging these factual findings in and of themselves. Rather, the United States contends that these factual findings were brought up in, and made in the context of, the Panel's finding that the companies concerned received no benefit.

B. *Arguments by the European Communities – Appellee*

1. Standard of Review

20. The European Communities requests the Appellate Body to uphold the Panel's conclusion that Article 11 of the DSU establishes the proper standard of review. The standard in Article 11 applies to all disputes under the covered agreements unless otherwise expressly provided. Moreover, in the view of the European Communities, Article 30 of the *SCM Agreement* provides that the DSU shall apply to all disputes arising under that Agreement, except as otherwise provided therein.

21. According to the European Communities, if WTO Members had wanted the standard articulated in Article 17.6 of the *Anti-Dumping Agreement* to apply to countervailing duty disputes, they would have written this standard into the *SCM Agreement.* The *Declaration* accompanied the *Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Decision*"). While the *Declaration* and the *Decision* contain hortatory language expressing the desire of Members for consistency in the resolution of disputes arising from anti-dumping and countervailing duty measures, neither evidences agreement on any single standard of review to be applied in such cases. The European Communities also points out that the issue of the possible application of Article 17.6 of the *Anti-Dumping Agreement* to other covered agreements has been considered and rejected by the Appellate Body in both *EC Measures*

[22] Appellate Body Report, WT/DS33/AB/R, adopted 23 May 1997, pp. 19-20.

Concerning Meat and Meat Products (*Hormones*) ("*European Communities – Hormones*")[23] and *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear Safeguards*").[24]

2. Articles 21 and 1.1(b) of the *SCM Agreement*

22. According to the European Communities, the Panel properly concluded that the United States' practice of "irrebuttably" presuming the existence of a benefit during a period of review, without regard to changes in ownership at fair market value, violates the *SCM Agreement*. As the Appellate Body Report in *Canada – Aircraft* demonstrates, the use of the present tense in Article 1.1 of the *SCM Agreement* does not indicate that the required determinations of financial contribution and benefit should only be made as of the moment a financial contribution was made.[25] Rather, the use of the word "thereby" in Article 1.1 shows that the financial contribution is the cause and the benefit is the effect. The European Communities also agrees with the Panel that Article 14 of the *SCM Agreement* does not allow investigating authorities to ignore fundamental changes in circumstances in determining whether a benefit and thereby a subsidy exists during a period of investigation or review. Similarly, Article 27.13 of the *SCM Agreement* does not support the position of the United States. Article 27.13 applies only to developing country Members and does not address the question of subsidies granted to a state-owned company prior to privatization and unconnected with the privatization.

23. The European Communities asserts that Articles 10, 19 and 21 of the *SCM Agreement* and Article VI:3 of the GATT 1994 are central to the issue of when benefit must be determined under the *SCM Agreement*. Article 10 requires that "Members shall take all necessary steps to ensure" that their imposition of countervailing duties is consistent with the provisions of Article VI of the GATT 1994 and the terms of the *SCM Agreement*. The *SCM Agreement* prohibits the imposition of countervailing duties where there is no subsidy or the subsidy has been withdrawn (Articles 19.1 and 19.4), and requires that duties not be imposed in excess of the amount of any subsidy that does exist (Article 19.4). The obligation under Article 10 to "take all necessary steps" is continuous; countervailing duty measures may remain in effect "only as long as and to the extent necessary to counteract subsidization which is causing injury" (Article 21.1).

24. The European Communities believes that the United States is not assisted by its references to the allocation practices of WTO Members, the panel report in *Australia – Automotive Leather*, or the

[23]Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 114, footnote 79.

[24]Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000, para. 118.

[25]Appellate Body Report, WT/DS70/AB/R, adopted 20 August 1999.

European Communities' state aid and countervailing duty rules. Even if it is true that WTO Members allocate non-recurring subsidies over time "without annually revisiting the question of whether the company or its owners continued to enjoy that benefit"[26], this begs the question whether there continues to be a benefit, and, therefore, a subsidy, when a fundamental change in circumstances has occurred. The case considered by the *Australia – Automotive Leather* panel did not involve a countervailing duty investigation or a fundamental change in circumstances. The European Communities also considers that its state aid and countervailing duty rules have been mischaracterized by the United States. The European Communities emphasizes that under its countervailing duty law, the investigating authority must in all cases examine the existence of benefit during the period of investigation, and cannot irrebuttably presume that a benefit conferred some time in the past continues.

25. The European Communities argues that the Panel correctly determined that, in the circumstances of this case, the United States is not excused from making a determination of benefit consistent with Article 1.1 of the *SCM Agreement.* Contrary to the United States' position that the various companies involved were the same, UES, BSplc and BSC are in fact separate legal entities, with different economic interests, owners, constitutions, capital and objectives. The European Communities also points out that, in its reasoning, the Panel did not rely solely on the fact that the different companies have different owners, but instead focused on the full consideration paid for the assets. The European Communities cautions that to endorse the United States' interpretation of the relevant *SCM Agreement* provisions would allow a Member to impose countervailing duties on a producer if *any* nexus can be shown between that producer and a subsidy recipient.

26. The European Communities requests the Appellate Body to uphold the Panel's rejection of the United States' argument that untied subsidies become "embedded" in a company and its production. As the Panel held, and consistent with the Appellate Body Report in *Canada – Aircraft*[27], financial contributions benefit the act of production, manufacture or export and provide an advantage to business enterprises. The European Communities thus submits that financial contributions are received and enjoyed by legal persons, not inanimate objects.

27. The European Communities also submits that the Panel properly rejected the United States' claim that countervailing duties may be imposed on the basis of market distortions. This attempt to justify the use of countervailing duties to correct alleged market distortions is contradicted by the provisions of the USDOC's own General Issues Appendix, which the USDOC claims represents its

[26]United States' appellant's submission, para. 56.

[27]*Supra*, footnote 25.

official policy on these matters. Moreover, in the view of the European Communities, this "market distortion" argument finds no support in the *SCM Agreement*.

28. With respect to the procedural arguments raised by the United States, the European Communities argues that the issue of whether the Panel exceeded its mandate under the DSU, by making factual findings not supported by the record, is not properly before the Appellate Body. First, the Notice of Appeal did not state any claim that the Panel had made factual findings unsupported by the record. As the Appellate Body Reports in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*[28] and *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States – Shrimp*")[29] demonstrate, a failure to raise an issue in the Notice of Appeal is contrary to Rule 20 of the *Working Procedures* and precludes consideration of that issue by the Appellate Body. Second, the European Communities submits that this claim – which by the United States' own admission is a "factual matter" – is outside the scope of appellate review. The claim that the Panel erred in finding that fair market value was paid for the productive assets, goodwill, etc., employed by UES and BSplc/BSES in the production of leaded bars is, in the view of the European Communities, "shocking"[30] given that the United States acknowledged to the Panel that these were fair market value transactions and did not object to this finding at the interim review stage.

29. The European Communities also argues that, in finding that no benefit from the pre-privatization subsidies was conferred on UES and BSplc, the Panel did not "exceed its mandate". Instead, as requested by the European Communities, the Panel examined a challenged United States' practice and deemed it inconsistent with United States' obligations under the *SCM Agreement.* The Panel's determination will, if implemented, resolve this dispute. The United States, however, misinterprets the Appellate Body Report in *United States – Shirts and Blouses* as establishing a radical principle that a panel may only address claims that are "necessary", in a very narrow sense, to resolve the dispute. This is a flawed notion of judicial economy. In fact, the European Communities asserts, a panel has a broad discretion to determine which claims, properly before it, need to be addressed in order to achieve appropriate resolution of a dispute.

[28]Appellate Body Report, WT/DS27/AB/R, adopted 25 September 1997.

[29]Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998.

[30]European Communities' appellee's submission, para. 128.

C. *Arguments by the Third Participants*

1. Brazil

30. Brazil is of the view that the Panel applied the correct standard of review. Since the *SCM Agreement* does not set out any specific standard of review, the standard contained in Article 11 of the DSU must apply. Brazil contends, first, that the very existence of the *Declaration* demonstrates the existence of a disparity between the standards of review contained in the *SCM Agreement* and the *Anti-Dumping Agreement* and, second, that it does not follow from the *Declaration's* recognition of a need for consistent resolution of disputes that the Members have accepted that the appropriate standard of review for the *SCM Agreement* is the one contained in Article 17.6 of the *Anti-Dumping Agreement*.

31. Brazil submits that the Panel correctly determined that the text of the *SCM Agreement*, and, in particular, Articles 1, 10, 19 and 21, requires a "current benefit determination", that is, a determination that a benefit exists during the period of investigation or review. The *SCM Agreement*, like the *Anti-Dumping Agreement*, has a "structural bias" against the application of presumptions over time, and instead contemplates the consideration of all relevant and current information in making findings. Brazil believes that this "bias" is evidenced by the requirement for regular reviews. In this context, the United States' insistence that it can determine the existence of a benefit at one point in time, and then presume that nothing other than amortization can affect the benefit over a period of fifteen to twenty years, is "unacceptable". Brazil also doubts the relevance of Article 27.13 of the *SCM Agreement* to this issue, and adds that, to the extent that it is relevant, Article 27.13 does not support the United States' position.

32. Brazil further contends that the Panel correctly rejected the United States' position that a benefit determination can be made without regard to the identity of a company's owners. As the Panel found, any benefit analysis under the *SCM Agreement* must consider whether there is a benefit to the owners of a company, since the ultimate beneficiary of a countervailable subsidy is the owner of the company at the time the subsidy is conferred. If a new owner has paid market value for an asset or an ownership interest in the asset, then the benefit remains with the original owner of the asset or the ownership interest. Thus, Brazil concludes, the Panel correctly rejected the position that the USDOC is free to disregard the owners of a company and their relationship to the company's assets in determining whether there is a countervailable benefit. Finally, as regards the United States' arguments on market distortion, Brazil stresses that the *SCM Agreement* does not broadly authorize Members to redress any actions they might feel distort the market. Rather, the *SCM Agreement*

allows a Member to apply countervailing duties to the products of a particular company, during a particular period, only after certain conditions are met.

33. Brazil disagrees with the United States' claim that the Panel "exceeded its mandate" by considering what benefit, if any, could reasonably have accrued to the successor companies of BSC. Brazil stresses that no issue was more central to this dispute, or more thoroughly briefed, than the question whether subsidy benefits can be countervailed after an arm's length change in ownership. According to Brazil, the Panel's explanation of how the *SCM Agreement*, properly interpreted, applies to privatized companies, was indispensable to the issue before the Panel, and should be upheld.

2. Mexico

34. Mexico agrees with the Panel that the standard of review set out in Article 11 of the DSU is applicable in this case. This conclusion is consistent with WTO dispute settlement provisions and with the Appellate Body Report in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*.[31] Mexico notes that, since the *Declaration* is not one of the "special or additional rules and procedures" listed in Appendix 2 of the DSU, Article 1.1 of the DSU must apply.

35. Mexico requests the Appellate Body to confirm the Panel's finding of a requirement that the benefit be calculated before and after a company has been privatised, as well as the finding that the USDOC violated Article 10 of the *SCM Agreement* by not showing that a subsidy had been bestowed on the imports for each year reviewed. Mexico believes that the United States' arguments, if accepted, would lead to an absurd result – that a benefit follows the enterprise that received a subsidy *ad infinitum.* On such a view, countervailing duties could legitimately be applied to that enterprise even after it had been privatized and all or most of its market value paid. The United States relies on the difficulty of quantifying a benefit and on its "perpetual benefit theory", but ignores the fact that an investigating authority is obliged, by the wording of Article VI:3 of the GATT 1994, to calculate the way in which the amount paid for a company affects the benefit. The United States is also wrong to imply that Article 21.1 of the *SCM Agreement* merely suggests that the subsidy must occur before the injury. Rather, Mexico argues, Article 21 makes clear that an investigating authority, in reviewing the need for the continued imposition of the duty, must terminate the duties when the injury, or the subsidy causing the injury, disappears.

[31] Appellate Body Report, WT/DS60/AB/R, adopted 25 November 1998, para. 64.

III. Preliminary Procedural Matter

36. On 7 February 2000, we received two documents, described in their respective covering letters as "*amicus curiae* briefs", from the American Iron and Steel Institute and the Specialty Steel Industry of North America. On 15 February 2000, the European Communities filed a letter arguing that these *amicus curiae* briefs are "inadmissible" in appellate review proceedings, and stating that it did not intend to respond to the content of the briefs. According to the European Communities, the basis for allowing *amicus curiae* briefs in *panel* proceedings is Article 13 of the DSU, as explained in *United States – Shrimp*. The European Communities notes that Article 13 of the DSU does not apply to the Appellate Body and that, in any case, that provision is limited to *factual information and technical advice*, and would not include *legal arguments or legal interpretations* received from non-Members. Furthermore, the European Communities contends, neither the DSU nor the *Working Procedures* allow *amicus curiae* briefs to be admitted in Appellate Body proceedings, given that Article 17.4 of the DSU and Rules 21, 22 and 28.1 of the *Working Procedures* confine participation in an appeal to participants and third participants, and that Article 17.10 of the DSU provides for the confidentiality of Appellate Body proceedings.

37. By letter dated 16 February 2000, we requested the United States, Brazil and Mexico to comment on the arguments made by the European Communities. Brazil, in its third participant's submission, and Mexico, in a letter submitted to us on 23 February 2000, agree with the European Communities that the Appellate Body does not have the authority to accept *amicus curiae* briefs. Brazil and Mexico emphasize that neither the DSU nor the *Working Procedures* allow the Appellate Body to receive factual information of the type contemplated by Article 13 of the DSU, much less briefs from private entities containing legal arguments on the issues under appeal. Mexico underlines that the DSU and the *Working Procedures* limit participation in appellate proceedings and require those proceedings to be confidential. Brazil adds that Members of the WTO and, in particular, parties and third parties to a dispute, are uniquely qualified to make legal arguments regarding panel reports and the parameters of WTO obligations.

38. In a letter submitted on 23 February 2000, the United States argues that the Appellate Body has the authority to accept *amicus curiae* briefs, and urges us to accept the briefs submitted by the steel industry associations. The United States notes that, in *United States – Shrimp,* the Appellate Body explained that the authority to accept unsolicited submissions is found in the DSU's grant to a panel of *"ample and extensive authority to undertake and to control the process* by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable

to such facts."[32] To the United States, it is clear that the Appellate Body also has such authority, given that Article 17.9 of the DSU authorizes the Appellate Body to draw up its own working procedures, and Rule 16(1) of the *Working Procedures* authorizes a division to create an appropriate procedure when a question arises that is not covered by the *Working Procedures*. The United States does not agree that acceptance of an unsolicited *amicus curiae* brief would compromise the confidentiality of the Appellate Body proceedings, or give greater rights to a non-WTO Member than to WTO Members that are not participants or third participants in an appeal.

39. In considering this matter, we first note that nothing in the DSU or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal. On the other hand, neither the DSU nor the *Working Procedures* explicitly prohibit acceptance or consideration of such briefs. However, Article 17.9 of the DSU provides:

> Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

This provision makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements. [33] Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.

40. We wish to emphasize that in the dispute settlement system of the WTO, the DSU envisages *participation* in panel or Appellate Body proceedings, as a matter of legal right, *only* by parties and third parties to a dispute. And, under the DSU, *only* Members of the WTO have a legal right to participate as parties or third parties in a particular dispute. As we clearly stated in *United States – Shrimp*:

> … access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental.[34]

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[32]Appellate Body Report, *supra*, footnote 29, para. 106. (emphasis added by the United States)

[33]In addition, Rule 16(1) of the *Working Procedures* allows a division hearing an appeal to develop an appropriate procedure in certain specified circumstances where a procedural question arises that is not covered by the *Working Procedures*.

[34]Appellate Body Report, *supra*, footnote 29, para. 101.

We also highlighted in *United States – Shrimp* that:

> … under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding.[35]

41. Individuals and organizations, which are not Members of the WTO, have no legal *right* to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal *duty* to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations, not Members of the WTO. The Appellate Body has a legal *duty* to accept and consider *only* submissions from WTO Members which are parties or third parties in a particular dispute.[36]

42. We are of the opinion that we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so. In this appeal, we have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering our decision.

IV. Issues Raised in This Appeal

43. The following issues are raised in this appeal:

(a) whether the Panel erred in applying to this dispute the standard of review set forth in Article 11 of the DSU, rather than the standard set forth in Article 17.6 of the *Anti-Dumping Agreement*;

(b) whether the Panel erred in finding that, in the particular circumstances of this case, the USDOC should have examined in its 1995, 1996 and 1997 administrative reviews whether a "benefit" accrued to UES and BSplc/BSES following the changes in ownership; and

(c) whether the Panel erred in finding that no "benefit" was conferred on UES or BSplc/BSES as a result of the "financial contributions" made to BSC.

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[35] Appellate Body Report, *supra*, footnote 29, para. 101.

[36] Article 17.4 of the DSU and Rules 21 to 24 of the *Working Procedures*.

V. Standard of Review

44. The United States argues that the Panel erred in applying the standard of review set forth in Article 11 of the DSU, rather than the standard of review set forth in Article 17.6 of the *Anti-Dumping Agreement.*

45. To determine the standard of review that applies in disputes involving countervailing duty measures under Part V of the *SCM Agreement,* we begin with Article 1 of the DSU, which provides, in relevant part:

> 1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). …
>
> 2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. …

We also note that Article 30 of the *SCM Agreement* specifies:

> The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

We further note that the *SCM Agreement* does not contain any "special or additional rules" on the standard of review to be applied by panels.

46. We recall that, in our Report in *European Communities – Hormones*, which concerned a dispute that arose under the *Agreement on the Application of Sanitary and Phytosanitary Measures*, we stated that Article 11 of the DSU:

> … bears directly on [the] matter [of standard of review] and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements.[37]

More recently, in our Report in *Argentina – Footwear Safeguards*, which involved a dispute under the *Agreement on Safeguards*, we observed that:

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[37] *Supra*, footnote 23, para. 116.

> We have stated, on more than one occasion, that, for all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels.[38]

47. Article 17.6 of the *Anti-Dumping Agreement* sets out a special standard of review for disputes arising under that Agreement. The *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures* (the "*Declaration*") provides as follows:

> *Ministers*,
>
> *Recognize*, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.

48. The United States argues that, by virtue of the *Declaration*, the standard of review specified in Article 17.6 of the *Anti-Dumping Agreement* also applies to disputes involving countervailing duty measures under Part V of the *SCM Agreement.* In the view of the United States, the Panel erred in applying the standard of review set out in Article 11 of the DSU in this case.

49. We consider this argument to be without merit. By its own terms, the *Declaration* does not impose an obligation to apply the standard of review contained in Article 17.6 of the *Anti-Dumping Agreement* to disputes involving countervailing duty measures under Part V of the *SCM Agreement.* The *Declaration* is couched in hortatory language; it uses the words "Ministers *recognize*". Furthermore, the *Declaration* merely acknowledges "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures." It does not specify any specific action to be taken. In particular, it does not prescribe a standard of review to be applied.

50. Furthermore, the *Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Decision*") provides:

> The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article VI of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application.

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[38] *Supra*, footnote 24, para. 118.

This *Decision* provides for review of the standard of review in Article 17.6 of the *Anti-Dumping Agreement* to determine if it is "capable of general application" to other covered agreements, including the *SCM Agreement.* By implication, this *Decision* supports our conclusion that the Article 17.6 standard applies only to disputes arising under the *Anti-Dumping Agreement*, and not to disputes arising under other covered agreements, such as the *SCM Agreement.* To date, the DSB has not conducted the review contemplated in this *Decision*.

51. We, therefore, conclude that the Panel was correct in applying the standard of review set forth in Article 11 of the DSU to this dispute arising under Part V of the *SCM Agreement.*[39]

VI. Articles 21 and 1.1(b) of the *SCM Agreement*

52. The principal question before the Panel in this case was whether the countervailing duties at issue were inconsistent with the obligations of the United States under the *SCM Agreement.* The Panel concluded:

> … the countervailing duties imposed as a result of the USDOC's 1995, 1996 and 1997 administrative reviews are not in accordance with the premise underlying Articles 19.1, 19.4 and 21.2 of the SCM Agreement, Article VI:3 of the GATT 1994, and the object and purpose of countervailing duties as expressed in footnote 36 to Article 10. … Accordingly, we conclude that the countervailing duties imposed as a result of the USDOC's 1995, 1996 and 1997 administrative reviews are inconsistent with Article 10 of the SCM Agreement.[40]

In reaching this conclusion, the Panel found:

> … the USDOC should have examined the continued existence of "benefit" already deemed to have been conferred by the pre-1985/86 "financial contributions" to BSC, and it should have done so from the perspective of UES and BSplc/BSES respectively, and not BSC.[41]
>
> …

[39]We note the argument by the United States that "under any standard of review" the Panel could not come to the conclusion that the United States has violated its obligations under the *SCM Agreement* because that Agreement simply does not address the issues that were before the Panel. This argument is dealt with in the following section of our Report.

[40]Panel Report, para. 6.86.

[41]*Ibid*., para. 6.70.

> … fair market value was paid for all productive assets, goodwill etc. employed by UES and BSplc/BSES in the production of leaded bars imported into the United States in 1994, 1995 and 1996. In these circumstances, we fail to see how pre-1985/86 "financial contributions" bestowed on BSC could subsequently be considered to confer a "benefit" on UES and BSplc/BSES during the relevant periods of review.[42]

The United States appeals the above findings of the Panel.[43]

53. Before we begin our analysis, we note that the measures at issue in this case are the duties imposed as a result of the 1995, 1996 and 1997 *administrative reviews*, not the duties imposed as a result of the original 1993 final countervailing duty determination. Nevertheless, the Panel based its reasoning in part on Articles 19.1 and 19.4 of the *SCM Agreement*, which are provisions dealing with the imposition of countervailing duties as a result of a final determination. We believe that Articles 19.1 and 19.4 provide useful context in interpreting the obligations regarding administrative reviews, but that the applicable provision covering administrative reviews is Article 21, which provides in paragraph 2:

> The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

Pursuant to this paragraph, the authorities of a Member applying a countervailing duty must, where warranted, "review the need for the continued imposition of the duty". In carrying out such a review, the authorities must "examine whether the continued imposition of the duty is necessary to offset subsidization" and/or "whether the injury would be likely to continue or recur if the duty were removed or varied". Article 21.2 provides a review mechanism to ensure that Members comply with the rule set out in Article 21.1 of the *SCM Agreement*, which stipulates:

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

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[42]Panel Report, para. 6.81.

[43]United States' appellant's submission, paras. 28-91.

54. Setting aside the issue of injury, which does not arise in this case, we note that in order to establish the continued need for countervailing duties, an investigating authority will have to make a finding on *subsidization*, i.e., whether or not the subsidy continues to exist. If there is no longer a subsidy, there would no longer be any need for a countervailing duty.

55. Article 1.1 of the *SCM Agreement* defines a "subsidy" as follows:

> For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member …
>
> and
>
> (b) a benefit is thereby conferred.

The existence of a "financial contribution" is not at issue in this appeal. The principal issue in this appeal concerns the interpretation of the term "benefit" in Article 1.1 above.

56. The United States argues, on the basis of footnote 36 to Article 10 of the *SCM Agreement* and Article VI:3 of the GATT 1994, that the relevant "benefit" is a benefit to a company's *productive operations*, rather than, as the Panel held, a benefit to *legal or natural persons*.[44] It is true, as the United States emphasizes, that footnote 36 to Article 10 of the *SCM Agreement* and Article VI:3 of the GATT 1994 both refer to subsidies bestowed or granted directly or indirectly "upon the manufacture, production or export of any merchandise". In our view, however, it does not necessarily follow from this wording that the "benefit" referred to in Article 1.1(b) of the *SCM Agreement* is a benefit to *productive operations.*

57. In our Report in *Canada – Aircraft,* we stated, with regard to the term "benefit" in Article 1.1(b):

> A "benefit" does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a "benefit" can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. The term "benefit", therefore, implies that there must be a recipient. …[45]

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[44]United States' appellant's submission, paras. 38-40.

[45]*Supra*, footnote 25, para. 154. This statement was made in the context of our consideration in that appeal of the issue of whether a "benefit" is measured by the cost to government or the advantage conferred on the recipient. However, this does not affect the relevance of this statement regarding the meaning of the term "benefit" in Article 1.1 (b) of the *SCM Agreement*.

We find support for this reading in Article 14 of the *SCM Agreement*, which constitutes context for the interpretation of "benefit" in Article 1.1(b). Article 14 reads, in relevant part:

> *Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient*
>
> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. …

Article 14 refers to the calculation of the "benefit *to the recipient* conferred *pursuant to paragraph 1 of Article 1*" (emphasis added). As we reasoned in our Report in *Canada – Aircraft*:

> This explicit textual reference to Article 1.1 in Article 14 indicates to us that "benefit" is used in the same sense in Article 14 as it is in Article 1.1. Therefore, the reference to "benefit *to the recipient*" in Article 14 also implies that the word "benefit", *as used in Article 1.1*, is concerned with the "benefit *to the recipient*" ... [46]

58. We, therefore, agree with the Panel's findings that benefit as used in Article 1.1(b) is concerned with the "benefit to the recipient", that such recipient must be a natural or legal person[47], and that in the present case:

> … in order to determine whether any subsidy was bestowed on the production by UES and BSplc/BSES respectively of leaded bars imported into the United States in 1994, 1995 and 1996, it is necessary to determine whether there was any "benefit" to UES and BSplc respectively (*i.e.*, the producers of the imported leaded bars at issue).[48]

59. The United States also appeals the Panel's finding that the investigating authority must demonstrate the existence, during the relevant period of investigation or review, of a continued "benefit" from a prior "financial contribution".[49] The United States argues that the use of the present tense of the verb "is conferred" in Article 1.1 of the *SCM Agreement* shows that an investigating authority must demonstrate the existence of "benefit" only at the time the "financial contribution" was made. The United States also relies on the context of Article 1.1, in particular Articles 14 and 27.13 of the *SCM Agreement*, in support of this interpretation.

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[46] *Ibid.*, para. 155.

[47] Panel Report, para. 6.66.

[48] *Ibid.*, para. 6.69.

[49] United States' appellant's submission, paras. 52 ff.

60. Article 1.1 sets out the definition of a subsidy for the purposes of the *SCM Agreement*. However, Article 1.1 does not address the *time* at which the "financial contribution" and/or the "benefit" must be shown to exist. We therefore consider that Article 1.1 does not provide a basis for the argument made by the United States. We also find nothing in Articles 14 or 27.13 of the *SCM Agreement* that supports the United States' position.

61. We have already stated that in a case involving countervailing duties imposed as a result of an administrative review, Articles 21.1 and 21.2 of the *SCM Agreement* are relevant. As discussed above, Article 21.1 allows Members to apply countervailing duties "only as long as and to the extent necessary to counteract subsidization … ". Article 21.2 sets out a review mechanism to ensure that Members comply with this rule. In an administrative review pursuant to Article 21.2, the investigating authority may be presented with "positive information" that the "financial contribution" has been repaid or withdrawn and/or that the "benefit" no longer accrues. On the basis of its assessment of the information presented to it by interested parties, as well as of other evidence before it relating to the period of review, the investigating authority must determine whether there is a continuing need for the application of countervailing duties. The investigating authority is not free to ignore such information. If it were free to ignore this information, the review mechanism under Article 21.2 would have no purpose.

62. Therefore, we agree with the Panel that while an investigating authority may presume, in the context of an administrative review under Article 21.2, that a "benefit" continues to flow from an untied, non-recurring "financial contribution", this presumption can never be "irrebuttable".[50] In this case, given the changes in ownership leading to the creation of UES and BSplc/BSES, the USDOC was *required* under Article 21.2 to examine, on the basis of the information before it relating to these changes, whether a "benefit" accrued to UES and BSplc/BSES. We thus agree with the Panel's finding that:

> … the changes in ownership leading to the creation of UES and BSplc/BSES should have caused the USDOC to examine whether the production of leaded bars by UES and BSplc/BSES respectively, and not BSC, was subsidized. In particular, the USDOC should have examined the continued existence of "benefit" already deemed to have been conferred by the pre-1985/86 "financial contributions" to BSC, and it should have done so from the perspective of UES and BSplc/BSES respectively, and not BSC.[51]

63. The Panel, however, also stated:

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[50]Panel Report, para. 6.71.

[51]Panel Report, para. 6.70.

> … when an investigation or review takes place, the investigating authority must establish the existence of a "financial contribution" and "benefit" during the relevant period of investigation or review. Only then will that investigating authority be able to conclude, to the satisfaction of Article 1.1 (and Article 21), that there **is** a "financial contribution", and that a "benefit" **is** thereby conferred.[52]

We do not agree with the Panel's implied view that, in the context of an administrative review under Article 21.2, an investigating authority must *always* establish the existence of a "benefit" during the period of review *in the same way as* an investigating authority must establish a "benefit" in an original investigation. We believe that it is important to distinguish between the original investigation leading to the imposition of countervailing duties and the administrative review. In an original investigation, the investigating authority must establish that *all* conditions set out in the *SCM Agreement* for the imposition of countervailing duties are fulfilled. In an administrative review, however, the investigating authority must address those issues which have been raised before it by the interested parties or, in the case of an investigation conducted on its own initiative, those issues which warranted the examination.

64. Having found that, in the particular circumstances of this case, the USDOC, in its 1995, 1996 and 1997 administrative reviews, should have examined the continued existence of a "benefit" to UES and BSplc/BSES, the Panel subsequently examined whether the "financial contributions" bestowed on BSC between 1977 and 1986 could be considered to confer a "benefit" on UES and BSplc/BSES. The Panel found that:

> … fair market value was paid for all productive assets, goodwill etc. employed by UES and BSplc/BSES in the production of leaded bars imported into the United States in 1994, 1995 and 1996. In these circumstances, we fail to see how pre-1985/86 "financial contributions" bestowed on BSC could subsequently be considered to confer a "benefit" on UES and BSplc/BSES during the relevant periods of review.[53]

The United States also appeals this finding.

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[52] *Ibid*., para. 6.73.

[53] Panel Report, para. 6.81.

65. In examining this issue, we note that, according to the Panel:

> The United States has not denied that the BSC spin-off was negotiated for fair market value.[54]

and that:

> Both parties agree that the privatization of British Steel plc was "at arm's length, for fair market value and consistent with commercial considerations".[55]

However, the United States, in its appellant's submission, argued that the Panel engaged "in a *de novo* review" and made factual findings "not adequately supported by the record" by finding "that the purchase price in each of the two BSC privatization transactions was a 'fair market value' purchase price".[56]

66. During the oral hearing of 13 March, the United States acknowledged that the Panel's findings that fair market value was paid for all productive assets, were *factual* findings. The United States also acknowledged during the oral hearing that it does not challenge these *factual* findings. In view of the United States' acknowledgement, we consider that the issue raised in its appellant's submission has become moot. For the same reason, the contention of the European Communities that the "claim" made by the United States with regard to these findings was not properly before the Appellate Body because the United States failed to raise this issue in its Notice of Appeal, has also become moot.

67. Therefore, the issue before us is whether, given these factual findings, the Panel erred in finding that the "financial contributions" bestowed on BSC could not be considered to confer a "benefit" on UES and BSplc/BSES.[57] We note that in our Report in *Canada – Aircraft*, we stated:

> … the word "benefit", as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient "better off" than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.[58]

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[54] *Ibid*., para. 6.81.

[55] *Ibid*., para. 2.3.

[56] United States' apppellant's submission, paras. 88-91.

[57] Panel Report, para. 6.81.

[58] *Supra*, footnote 25, para. 157.

68. The question whether a "financial contribution" confers a "benefit" depends, therefore, on whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market. In the present case, the Panel made factual findings that UES and BSplc/BSES paid fair market value for all the productive assets, goodwill, etc., they acquired from BSC and subsequently used in the production of leaded bars imported into the United States in 1994, 1995 and 1996. We, therefore, see no error in the Panel's conclusion that, in the specific circumstances of this case, the "financial contributions" bestowed on BSC between 1977 and 1986 could not be deemed to confer a "benefit" on UES and BSplc/BSES.

69. The United States further appeals the Panel's finding regarding the "benefit" conferred on UES and BSplc/BSES on the additional ground that the Panel exceeded its mandate under the *WTO Agreement* and the DSU. The United States argues that the Panel had resolved the dispute between the parties once it had established that in its 1995, 1996 and 1997 administrative reviews, the USDOC should have examined the continued existence of a "benefit" to UES and BSplc/BSES. According to the United States, any additional finding by the Panel was beyond the Panel's mandate because Article IX of the *WTO Agreement* and Article 3.9 of the DSU, as well as our Report in *United States – Shirts and Blouses*, make clear that panels may not render advisory opinions.

70. In our Report in *United States – Shirts and Blouses*, we observed that, as affirmed in Articles 3.4 and 3.7 of the DSU, the basic aim of WTO dispute settlement is the resolution of disputes. We further stated:

> Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.[59]

We added that :

> … Article IX of the *WTO Agreement* provides that the Ministerial Conference and the General Council have the "exclusive authority" to adopt interpretations of the *WTO Agreement* and the Multilateral Trade Agreements. This is explicitly recognized in Article 3.9 of the *DSU* …[60]

71. The United States seems to consider that our Report in *United States – Shirts and Blouses* sets forth a general principle that panels may not address any issues that need not be addressed in order to

[59]Appellate Body Report, *United States – Shirts and Blouses*, *supra*, footnote 22, p. 19.

[60]Appellate Body Report, *United States – Shirts and Blouses*, *supra*, footnote 22, pp. 19-20.

resolve the dispute between the parties. We do not agree with this characterization of our findings. In that appeal, India had argued that it was entitled to a finding by the Panel on each of the legal claims that it had made. We, however, found that the principle of judicial economy allows a panel to decline to rule on certain claims.

72. In this case, the European Communities' *claim* is that the countervailing duties imposed on imports of leaded bars produced by UES and BSplc/BSES as a result of the 1995, 1996 and 1997 administrative reviews were inconsistent with the obligations of the United States under the *SCM Agreement*, and, in particular, with Articles 1.1(b), 10, 14 and 19.4 of that Agreement.[61] The European Communities relied upon two principal *arguments* in support of that claim. First, the European Communities argued that the USDOC was, in the circumstances of this case, required to examine whether there was any continuing "benefit" to UES and/or BSplc/BSES from the "financial contribution" to BSC. Second, the European Communities argued that, given that the USDOC had itself found that the sale of assets to UES and the privatization of BSC were arm's length transactions for fair market value, no benefit could have accrued to UES or BSplc/BSES.

73. In order to resolve the claim of the European Communities, the Panel deemed it necessary to address the two principal arguments made in support of this claim. In doing so, the Panel acted within the context of resolving this particular dispute and, therefore, within the scope of its mandate under the DSU.

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

VII. Findings and Conclusions

75. For the reasons set out in this Report, the Appellate Body:

(a) concludes that the Panel was correct in applying the standard of review set forth in Article 11 of the DSU to this dispute arising under Part V of the *SCM Agreement*;

(b) upholds the Panel's finding that, in the particular circumstances of this case, the USDOC should have examined in its 1995, 1996 and 1997 administrative reviews

[61]See WT/DS138/4 on the terms of reference of the Panel, which refers to the request for the establishment of a panel, WT/DS138/3 and WT/DS138/3/Corr.1.

whether a "benefit" accrued to UES and BSplc/BSES following the changes in ownership; and

(c) upholds the Panel's finding, that, on the facts of this case, no "benefit" was conferred on UES or BSplc/BSES as a result of the "financial contributions" made to BSC.

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

Signed in the original at Geneva this 10th day of April 2000 by:

_____

Mitsuo Matsushita
Presiding Member

_____ _____

Said El-Naggar
Member

Julio Lacarte-Muró
Member