

**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.



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## 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

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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.

to the dispute. The Chairman of the DSB shall inform the Members of the 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.

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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).

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:

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

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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*.

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.

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*).

## V. ARGUMENTS OF THE PARTIES

5.1 The arguments presented by the parties in their written submissions, oral statements, responses to questions, and comments on each other's responses to questions are reflected below.<sup>13</sup>

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

#### 1. Introduction

5.2 This dispute concerns the compatibility of the United States (the "US") basic countervailing duty law (Tariff Act of 1930)<sup>14</sup>, its accompanying regulations (Sunset Regulations)<sup>15</sup> and policy practices (Sunset Policy Bulletin)<sup>16</sup>, and their concrete application in the sunset review of countervailing duties on imports of certain corrosion-resistant carbon steel flat products ("corrosion resistant steel") from Germany. This decision violates the US WTO obligations in several ways.

5.3 First, the *Agreement on Subsidies and Countervailing Measures* (the 'SCM Agreement') provides for a presumption of termination of countervailing duty measures after 5 years. In the EC's view, the automatic initiation of sunset reviews under US practice (without a requirement for any evidence to be produced) disregards this presumption for termination. As such, it contravenes Article 21.3 of the *SCM Agreement*.

5.4 Second, the SCM Agreement requires that an investigating authority determines that the expiry of the duty would be likely to lead to recurrence of subsidisation. In not considering changes or terminations in subsidy programmes in the course of the sunset review, the US Department of Commerce ("DOC") effectively refused to conduct a proper investigation of the likelihood or recurrence of subsidisation. Therefore, the US breaches Article 21.3 of the SCM Agreement also under this instance.

5.5 Third, the *SCM Agreement* provides that a level of subsidisation which is less than 1 per cent is *de minimis*. In this case, the investigation should be terminated without the imposition of measures. Under US law, this *de minimis* threshold does not apply in sunset reviews. Instead, the US practice is to apply a *de minimis* threshold of 0.5 per cent. In not applying the *de minimis* threshold provided for in the *SCM Agreement*, DOC effectively imposes and collects countervailing duties which are below the *de minimis* level. As a result, these provisions are in violation of Article 21.3, in conjunction with Articles 21.1 and 11.9, of the *SCM Agreement*.

5.6 Finally, for the same reasons identified above, the US has failed to ensure that its laws, regulations and administrative procedures are in conformity with and Article 32.5 of the *SCM Agreement* and consequently with its WTO obligations under Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement").

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<sup>13</sup> Except in cases where parties submitted executive summaries of their written submissions, oral statements, responses to questions, and comments on each other's responses, the texts – rather than executive summaries – of such documents have been incorporated into this section. In cases where the executive summaries were submitted, however, such summaries have been incorporated in place of the original documents.

<sup>14</sup> Codified in 19 USC 1675(c) (Exhibit EC-13).

<sup>15</sup> Implementing Regulations on anti-dumping and countervailing duties issued by DOC, Section 351 of Title 19 of the US CFR (Exhibit EC-14).

<sup>16</sup> DOC Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders (Exhibit EC-15).

## 2. Factual Background

5.7 Following the initiation of an investigation on 24 July 1992, DOC issued, on 9 July 1993, its final affirmative determination that exports of corrosion resistant steel from Germany were subsidised. DOC found that 5 subsidy programmes conferred a benefit to the German exporters. The subsidy level was determined at 0.60 per cent<sup>17</sup>. DOC found that two of the above programmes, the Capital Investment Grants ("CIG") and the Aid for Closure of Steel Operations (which account for 0.45 per cent of the total subsidy amount), were non-recurring grants because the recipient could not be expected to receive benefits on an ongoing basis. On the basis of the US methodology for non-recurring grants, the benefit was allocated over a 15-year period.

5.8 Following the introduction of sunset provisions in the Uruguay Round, DOC was obliged to review all of its outstanding CVD orders by the end of 1999. On 1 September 1999, DOC automatically initiated a sunset review of the definitive countervailing duties on corrosion-resistant steel from Germany<sup>18</sup>. Following the publication of the notice, the domestic interested parties filed a notice of intent to participate. Subsequently, the foreign interested parties, i.e., the German producers, the Government of Germany and the European Commission filed substantive responses within 30 days after the publication of the Notice of Initiation.

5.9 Following the investigation, on 20 March 2000, DOC issued the preliminary results of the full sunset review<sup>19</sup>. DOC preliminarily concluded that revocation of the CVD order was likely to lead to recurrence of continuation or recurrence of a countervailable subsidy at a net subsidy rate of 0.54 per cent. The German producers argued that the benefit stream would become *de minimis* after the sunset review. As regards the CIG programme, DOC stated that some payments were given up to 1990 and, based on DOC's 15-year allocation period, would continue to confer a benefit to the German producers beyond the end of the sunset review.<sup>20</sup> Only regarding the Structural Improvement Aids, DOC concluded that recurring benefits were granted up to 1986 and that no evidence was brought forward that benefits would occur after the sunset review.

5.10 In calculating the amount of benefit, DOC simply took the subsidy rate from the original investigation in 1993 and deducted the amounts related to the Structural Improvement Aid programme and the Zonal Area programme. Therefore, the original countervailing duty rate was decreased by the amount of 0.06 per cent resulting in a net subsidy rate of 0.54 per cent being reported to ITC as the rate likely to prevail.

5.11 On 2 August 2000, the DOC published the final results of its sunset review, in which the preliminary findings were confirmed.

## 3. Standard of Review

5.12 By virtue of Article 30 of the SCM Agreement, the provisions of the DSU are applicable to the settlement of disputes under the SCM Agreement, "except as otherwise specifically provided [t]herein." In the absence of any specific standard of review provided for in the SCM Agreement on the issues raised in the present dispute, the EC considers that the standard of review set forth in

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<sup>17</sup> This amount was imposed as the final CVD rate on 17 August 1993, having been increased from 0.59 per cent to 0.60 per cent due to a "ministerial error".

<sup>18</sup> 64 FR 47767, 1 September 1999 (Exhibit EC-5).

<sup>19</sup> 65 FR 16176, 27 March 2000 (Exhibit EC-6).

<sup>20</sup> Exhibit EC-7, pages 24-25.

Article 11 of the DSU is applicable in this case. The same has already been held by the panel and the Appellate Body reports in the United States – Leaded Bars case.<sup>21</sup>

5.13 As regards the standard of review contained in Article 11 of the DSU, in the *European Communities – Hormones* case, the Appellate Body stated that "the applicable standard is neither *de novo* review as such, nor 'total deference', but rather the 'objective assessment of the facts'".<sup>22</sup> This does *not* mean that panels must simply *accept* the conclusions of the competent authority. To the contrary, a panel can assess whether the US competent authority's explanation for its determination under Article 21.3 is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of all the facts before the panel. Panels must, therefore, review whether the competent authority's explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data.<sup>23</sup>

5.14 The Panel is required to "make an objective assessment of the matter before it", including an objective assessment of the applicability of and conformity with the *SCM Agreement* of the US laws and regulations that are the subject matter of the present proceedings.<sup>24</sup> For the purposes of interpreting the *SCM Agreement*, therefore, Article 11 of the DSU imposes upon panels a comprehensive obligation to make an "objective assessment of the matter" as a whole, an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal. Thus, panels should make an "objective assessment of the facts", of the "applicability" of the covered agreements, and of the "conformity" of the measure at stake with those covered agreements. Therefore, the text of Article 11 DSU and of the *SCM Agreement* clearly necessitate an *active* review or examination of all the pertinent facts.<sup>25</sup>

5.15 The requirement to conduct an "objective assessment" of a claim has, in principle, two elements. First, a panel must review whether competent authority has evaluated *all the relevant factors*<sup>26</sup> and, second, a panel must review whether the authority has provided a *reasoned and*

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<sup>21</sup> See Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom ("United States – Leaded Bars")*, WT/DS138/R, adopted 7 June 2000, at para. 6.18, as upheld by the Appellate Body Report, WT/DS138/AB/R, adopted 7 June 2000, at para. 51. These cases have also established that the standard of review set out in Article 17.6 of the *Anti-Dumping Agreement* is not applicable in the context of the *SCM Agreement*.

<sup>22</sup> Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones) ("European Communities – Hormones")*, WT/DS26/AB/R-WT/DS48/AB/R, adopted 13 February 1998, para. 117.

<sup>23</sup> Appellate Body Report, *United-States – Safeguard Measures on Imports of Fresh Chilled or Frozen Lamb Meat from New Zealand and Australia ("United-States – Lamb Safeguards")*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 106.

<sup>24</sup> This approach is entirely consistent with statements made by the Appellate Body in the *European Communities – Hormones* case, cit. *supra*, para. 118. In that report (at para. 133) the Appellate Body said:

"The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence". (emphasis added)

<sup>25</sup> Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, paras. 54 and 62.

<sup>26</sup> The Appellate Body clarified the appropriate standard of review, in particular the quantitative aspect of the assessment, in Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products ("Korea – Dairy Safeguards")*, WT/DS98/AB/R, adopted 12 January 2000, at para. 137, as follows:

"...However, under Article 11 of the DSU, a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof." (emphasis added).

*adequate explanation* of how the facts support their determination.<sup>27</sup> Thus, the panel's objective assessment involves a *formal* aspect and a *substantive* aspect.<sup>28</sup>

5.16 The relevant provisions of the DSU and *SCM Agreement* and the Appellate Body findings in the above cases require that the Panel in the present case is obliged to examine all the relevant facts and evidence presented to it by the parties to this dispute or obtained through the Panel's own initiative. It follows that the Panel is obliged to assess whether the national authority provided a reasoned and adequate explanation of how the facts in the record or otherwise available to the US competent authority supported the determinations that were made by them in the contested measure. Obviously, this goes to the heart of the panel's role in a dispute settlement case, as it relates to the panel's discretionary authority to examine and weigh all factual evidence and to assess the applicability of and conformity with the relevant covered agreements of the measure under consideration.

#### 4. Legal Arguments

(a) The standards of initiation of sunset review lead to a violation of Article 21.3 of the *SCM Agreement*

(i) *Initiation*

5.17 Under US law, sunset reviews are automatically initiated by DOC on its own initiative five years after the publication of the CVD order<sup>29</sup>. Under Article 21.3 *SCM Agreement*, WTO Members have an unequivocal obligation to terminate countervailing measures on a date no later than 5 years from their imposition, unless it is determined, following a review, that the expiry of the duties would be likely to lead to continuation or recurrence of subsidisation and injury. The rationale of this provision should be read in conjunction with Article 21.1 *SCM Agreement* which provides that a countervailing duty shall remain in force only as long as necessary and to the extent to counteract subsidisation which is causing injury. Therefore, Article 21.3 reinforces the requirement of Article 21.1 by creating a presumption that duties lapse after 5 years. These provisions provide that the continuation of measures beyond the five years is an exceptional situation (demonstrated by the term "unless"). This corresponds to the object and the purpose of Part V of the *SCM Agreement* to guarantee that trade defence measures are to be imposed and maintained only if they are necessary to offset injurious subsidisation.

5.18 By requiring that sunset reviews are automatically initiated, the US effectively transforms this exception into a general rule, thus infringing Article 21, paragraphs 1 and 3, of the *SCM Agreement*.

(ii) *Expedited reviews will "normally" result in the continuation of countervailing duties*

5.19 The automatic initiation under US law is also biased towards the continuation of countervailing duties and not towards the presumption of their termination. This is clear in the case of "expedited" sunset reviews. Under this procedure, if domestic interested parties file a "notice of intent to participate", the sunset procedure continues and interested foreign parties, i.e., exporters and the

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<sup>27</sup> In the context of the *Safeguards Agreement*, the Appellate Body clarified the concept of "objective assessment" in Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear Safeguards*"), WT/DS121/AB/R, adopted 12 January 2000, at para. 121 in fine, as follows:

"... [T]o determine whether the safeguard investigation and the resulting safeguard measure applied by Argentina were consistent with Article 4 of the *Agreement on Safeguards*, the Panel was obliged, by the very terms of Article 4, to assess whether the Argentine authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination". (emphasis added).

<sup>28</sup> Appellate Body Report, *United-States – Lamb Safeguards*, cit. *supra*, para. 103.

<sup>29</sup> 19 USC §1675(c)(1).

foreign government, are required to file substantive responses. If the foreign government, or exporters accounting for at least 50 per cent of exports, do not file substantive responses, DOC will shorten the timeframe for the review and normally presume that subsidisation continues.<sup>30</sup> Therefore, the US procedure of expedited reviews, through automatic initiation and presumption of likelihood of continuation or recurrence, is clearly biased towards continuation of countervailing duties, in violation of the duty to terminate them set in Article 21 of the SCM Agreement.

(iii) *The self-initiation of sunset reviews requires sufficient evidence of continuation or recurrence of subsidisation*

5.20 Article 21.3 *SCM Agreement* states that a sunset review can be initiated either on the initiative of the domestic producers or upon a duly substantiated request made by or on behalf of the industry. In the first case, the EC considers that Article 11 of the *SCM Agreement* on the initiation and conduct of the original subsidy investigation is of application in the case of sunset review as context to Article 21.3 of the same Agreement. It results from Article 11.2 that the initiation of an investigation to determine the existence of subsidisation should normally be based on the existence of a substantiated request made by or on behalf of the domestic industry. On the contrary, self-initiation by the domestic authority is the exception, which is justified only if domestic authority have the *same level* of sufficient evidence of subsidisation, injury and causal link (Article 11.6). In the same way, it follows that in order to initiate a sunset review on its own initiative, the domestic authority should be in possession of the same level of evidence that would be required in a "duly substantiated request" from the domestic industry. The automatic initiation requirement under US law converts the exception into a general rule, thus leading to the violation of Article 21.3 *SCM Agreement*.

(b) The domestic authority is under an obligation to "determine" the likelihood of continuation or recurrence of subsidisation

(i) *The requirements of the SCM Agreement*

5.21 Article 21.3 *SCM Agreement* set out the requirements under which the investigating authority can deviate from the presumption of termination of CVD orders after five years. It requires that authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury. The Appellate Body in the case *United States – Leaded Bars*, considered that in a review under Article 21.2 the domestic authorities are required to make a finding of subsidisation during the period of review<sup>31</sup>. If this applies for Article 21.2 reviews, *a fortiori* a positive finding that all the conditions are fulfilled is necessary in the context of an Article 21.3 investigation. The parallel drawn between sunset reviews and original investigations is confirmed by the findings of the Panel in *Brazil – Desiccated Coconut*. There, called to judge of the applicability of the *SCM Agreement* to measures taken prior to the entry into force of the WTO Agreement, the Panel recognised that:

even measures maintained and imposed under the pre-WTO regime, and not subject to a review under Article 21.2 of the SCM Agreement, will ultimately be brought under WTO disciplines under this sunset provision<sup>32</sup>.

(ii) *US law and practice*

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<sup>30</sup> 19 C.F.R. §351.218(e)(1)(ii)(B) and (C).

<sup>31</sup> Appellate Body Report, *United States – Leaded Bars*, para. 54

<sup>32</sup> Panel Report, *Brazil - Measures Affecting Desiccated Coconut ("Brazil - Desiccated Coconut")*, WT/DS22/R, adopted 20 March 1997, as upheld by the Appellate Body Report, WT/DS22/AB/R, para. 277.

5.22 US law, however, requires the DOC to consider (a) the net countervailable subsidy determined in the investigation or a review and (b) whether any changes in the subsidies occurred that may affect the countervailing duty. This is clearly stated in Section 752(b)(1) of the Tariff Act, URAA Statement of Administrative Action and Paragraph III.B.1 of the *Sunset Policy Bulletin*. In practice, DOC normally selects the CVD rate from the original investigation or a review, on the basis that it is the only rate that reflects the behaviour of governments and exporters without the discipline of an order in place. In the EC's view, this provision establishes a standard for sunset reviews that violates the *SCM Agreement*. This is clearly demonstrated in the case of corrosion resistant steel from Germany. Since there have not been any administrative reviews since the original investigation, the only available subsidisation rate is the original 1993 subsidy rate. DOC refused, in the course of the sunset review, to consider changes or terminations of subsidy programmes despite the concrete evidence submitted by the German exporters in the sunset review. DOC justified this decision by stating that no full investigation is conducted in a sunset review and decisions should be based on investigated and verified results.

5.23 The EC considers that the DOC refusal to conduct any meaningful investigation in a sunset review is in violation of the requirements of Article 21.3 of the *SCM Agreement*. This practice not only contravenes the duty placed by Article 21.3 on the domestic authorities to "determine" the likelihood of continuation or recurrence of a subsidy, but it also shifts the burden of proving a change in circumstance on the foreign exporters and to a stage of the procedure, the administrative review, which is considered by the *SCM Agreement* as non-obligatory and which is in any event overtaken by the sunset review. The fact that a party did not request an administrative review cannot relieve the domestic authorities from their duties to "determine" the likelihood of continuation or recurrence of subsidisation. In any case, in the present case the German exporters did all they could to submit relevant information.

(iii) *The US DOC refused to conduct a proper determination of the likelihood of continuation or recurrence of subsidization*

5.24 In the sunset review concerning corrosion resistant steel from Germany, the German producers stated that the major subsidy programme involved in the original investigation, the CIG programme, had been terminated and did not provide any further benefits. In particular they claimed that this programme, which provided non-recurring benefits, applied only to investments made prior to 1 January 1986.<sup>33</sup> DOC had already determined in the original investigation that this programme applied in fact only to investments made prior to 1 January 1986.<sup>34</sup> This was confirmed in the sunset review.<sup>35</sup>

5.25 Despite this evidence, DOC rejected the claims of the German exporters. It stated that since no administrative reviews of these orders had been conducted, it was unable to determine whether any additional benefits under these programmes were received subsequent to the period of investigation. It should be stressed that DOC had both the non-confidential version of the questionnaire response and the calculation memorandum as part of the record of the original investigation and could have easily verified whether the benefits received by the German manufacturers of the subject merchandise under the CIG after 1 January 1986 were *de minimis*. The fact that DOC referred back to the original subsidy rate for CIG, violated Article 21.3 SCM Agreement because it did not take into consideration the termination of the CIG programme despite evidence on the record.

(iv) *The CIG programme should have been considered as terminated*

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<sup>33</sup> Exhibit EC-7, at p. 26-28.

<sup>34</sup> Exhibit EC-2, at pp. 37316-17.

<sup>35</sup> Exhibit EC-10, at p. 34

5.26 In the present case, the German producers claimed that the CIG programme, had been terminated and did not provide any further benefits. In particular they claimed that this programme, which provided nonrecurring benefits, applied only to investments made prior to 1 January 1986<sup>36</sup>. The calculation memorandum of the original investigation<sup>37</sup> shows that Thyssen last received payments under the CIG programme in 1989, and that the amount received after 1985 was so small that it would have been automatically expensed in the year of receipt under the DOC 0.5 per cent rule<sup>38</sup>. Therefore, in accordance with their obligations under Article 21.3, the DOC should have taken this into account. DOC had already determined in the original investigation that this programme applied in fact only to investments made prior to 1 January 1986.<sup>39</sup> DOC reaffirmed this finding in the final results of the sunset review, stating that: "We agree with Dillinger and the German Group's contention that ... the CIG is applicable only to investments made prior to January 1, 1986."<sup>40</sup>

5.27 Thus, the issue in the sunset review was not whether the programme continued to exist but whether any of the old benefit would continue after the end of the sunset review<sup>41</sup>. In their response, the US producers claimed that Preussag, the predecessor to Salzgitter AG, had received benefits under this programme as late as 1990<sup>42</sup>. In their rebuttal of 15 October 1999, the German producers clarified that 99.4 per cent of the CIG paid to Preussag were received prior to the end of the 1985/86 fiscal year.<sup>43</sup> Given that, using the 15-year allocation period applied by DOC, only 0.6 per cent of the original grants should have been considered by DOC as remaining to be countervailed after the end of the sunset review, the original subsidy rate for this programme of 0.39 per cent should have diminished to only 0.00234 per cent.<sup>44</sup> Because DOC only calculates subsidy rates to the second decimal place, a rate of 0.00234 per cent would have been equivalent to zero.

5.28 In its response, the US authorities did not directly discuss this evidence or respond in substance to the German producers' evidence and arguments submitted in this regard during the sunset review. In fact, DOC rejected the German producers claim on the basis that the record of these sunset reviews is not sufficient for us to definitely conclude whether the benefits received by the German manufacturers of the subject merchandise under the CIG and/or IPA after January 1, 1985 were less than 0.5 percent of the corresponding beneficiary's annual net sales and, consequently, whether the benefits should be expensed in the year they were received. Furthermore, since no administrative reviews of these orders were conducted, we are unable to determine whether any additional benefits under these programmes were received subsequent to the period of investigation. As a result, as we did in our preliminary results, we determine that benefit streams from the CIG and IPA continue beyond the end of these sunset reviews and that, therefore, a countervailable subsidy from the CIG and IPA to manufacturers of subject merchandise would be likely if the orders were revoked<sup>45</sup>.

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<sup>36</sup> *Ibidem*, at p. 26-28.

<sup>37</sup> Exhibit EC-20 (business confidential information).

<sup>38</sup> See 19 C.F.R. § 351.524(b)(2).

<sup>39</sup> Exhibit EC-2, at pp. 37316-17.

<sup>40</sup> Exhibit EC-10, at p. 34.

<sup>41</sup> *Ibidem*, footnote 34.

<sup>42</sup> *Ibidem*, at p. 32-33. See also U.S. Producers Substantive Response of 1 October 1999, at p. 9-10 (Exhibit EC-17).

<sup>43</sup> German Producers Rebuttal of 15 October 1999, at p.2 (Exhibit EC-18).

<sup>44</sup> 0.39 per cent (original subsidy rate) x 0.6 per cent (grant received after 1985/86 fiscal year) = 0.00234 per cent.

<sup>45</sup> Exhibit EC-10, at pp. 34-35. DOC's reference to "January 1, 1985" is apparently a clerical error. There can be no dispute under DOC's declining balance methodology with a 15-year allocation period, any non-recurring assistance received in 1985 would be finally amortised no later than 1999 (i.e. before completion of the sunset review).

5.29 On the issue of the insufficiency of the record of the sunset review, it has to be noted that, on 28 April 2000, the US producers filed a submission containing a copy of the public version of Preussag's questionnaire response in the original investigation. Although the public version of the questionnaire response did not contain any payment amounts, it showed that of the fourteen CIG payments made to Preussag, only three were received after the end of the 1985/86 fiscal year.<sup>46</sup> DOC, however, had both the non-confidential version of the questionnaire response and the calculation memorandum as part of the record of the original investigation and could have easily verified whether the benefits received by the German manufacturers of the subject merchandise under the CIG after 1 January 1986 were *de minimis*. The German producers were, therefore, not asking the DOC to rely upon speculative, unverified information, but simply to acknowledge the evidence that it had collected and verified itself in the original investigation.

5.30 With regard to the argument that no administrative review had been conducted, DOC seems to argue that it was somehow prevented by law from considering the evidence because the German producers of corrosion-resistant flat products had not requested an administrative review.<sup>47</sup> As seen above, Section 752 of the Act specifically requires the DOC to consider "the net countervailable subsidy determined in the investigation and subsequent reviews, and whether any change in the programme which gave rise to the net countervailable subsidy ... has occurred that is likely to affect the net countervailable subsidy". There can be no doubt that the termination of a subsidy programme and the cessation of payments thereunder should be regarded as "change in the programme" that must be considered by the DOC. Moreover, while the relevant provisions of US law states that the DOC shall "normally" choose a net countervailable subsidy from the original investigation or an administrative review when determining the net countervailable subsidy that is likely to prevail if the order is revoked, this did not prohibit DOC from using in this case other rates or making adjustments to the rates found in an original investigation or an administrative review<sup>48</sup>.

5.31 It follows from the above that the facts on record in this case require that the responsible US authorities should have adjusted the original subsidy rate to account for the termination of the CIG programme despite the fact that there were no administrative reviews of the countervailing duty order on corrosion-resistant flat products. In any case, the fact that the amount of the net countervailable subsidy likely to prevail was close to zero and, hence, *de minimis*, should have led the US authorities to terminate the duty in accordance with Article 21.3 of the *SCM Agreement*. The US has, therefore, erred in not accounting for the termination of the CIG programme, when it calculated the net countervailable subsidy that was likely to prevail if the countervailing duty order were revoked, and this is a violation of Article 21.3 of the *SCM Agreement*.

(v) *Application of DOC's declining balance methodology*

5.32 DOC should also have reached the conclusion that the effects of the CIG programme had ended on the basis of its declining balance methodology. Under this methodology, DOC allocates non-recurring subsidies over time and in order to account for the "time value of money", it "front-loads" the amounts allocated to the early years of the allocation period. This inevitably results in a gradual year-by-year decline of the subsidy amount. In the present case, even without any consideration of individual programmes being made, it would have taken the subsidy amount even further below *de minimis*.

(vi) *Treatment of evidence*

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<sup>46</sup> Letter from Dewey Ballantine LLP to Secretary of Commerce of 28 Apr 2000 (Exhibit EC-19).

<sup>47</sup> See Exhibit EC-10, p. 18-22.

<sup>48</sup> 19 USC §1675a(b)(3).

5.33 Finally, the EC considers that the US violated the standards of Article 21.3 *SCM Agreement* regarding the treatment of evidence. The German producers presented to DOC the reasons why the CIG programme should have been considered as terminated and as not providing any further benefits. Based upon this evidence, the German producers believed that DOC would find that subsidisation under the CIG programme would not be likely to continue or recur. However, in its preliminary results of 20 March 2000, DOC continued to assign a 0.39 per cent subsidy rate for this programme.

5.34 The counsel for the German producers contacted DOC and stated that, if there were any doubts about how much was paid under the CIG programme after 1986, then DOC should make its calculation memoranda from the original investigation part of the record in the sunset review. On 13 April 2001, the German producers made a written request that DOC places the calculation memoranda on the record of the sunset review.<sup>49</sup> DOC never took any action on the German producers' request concerning the calculation memoranda and, in its final results of 27 July 2000, it claimed that the German producers' request was untimely since it should have been submitted prior to 15 October 1999.<sup>50</sup>

5.35 The EC considers that such a short deadline violates the provisions of Article 21.3, in conjunction with Articles 12.1 and 21.4, of the *SCM Agreement* because it fails to afford the producers with an "ample opportunity" to present in writing all evidence which they consider relevant in respect of the sunset review.

(c) The *de minimis* rule

5.36 The EC considers that the U.S. interpretation and application of the sunset provisions in Article 21.3, as regards the *de minimis* requirement, is inconsistent with the *SCM Agreement*.

(i) *The US law and practice*

5.37 Under the Sunset Regulations<sup>51</sup> and the Sunset Policy Bulletin,<sup>52</sup> the US will treat as *de minimis* any countervailable subsidy rate that is less than 0.5 per cent. In initial investigations, the US applies a *de minimis* threshold of 1 per cent<sup>53</sup>. The US' Statement of Administrative Action made it clear that the US considers that the *de minimis* requirements of Articles 11.9 of the *SCM Agreement* only apply to initial investigations.

(ii) *Interpretation of the relevant provisions of the SCM Agreement*

5.38 Article 21.3 of the *SCM Agreement* provides that any definitive countervailing duty shall be terminated not later than five years from its imposition, unless the authorities make a positive determination in a review that the expiry of the countervailing duty would be likely to lead to continuation or recurrence of subsidisation and injury. The continuation of the duty after a sunset review for five more years will be possible only if two conditions are met: a) *a review is initiated*; and b) *the determination is made that subsidisation and injury would be likely to continue or recur if the duty were to expire*. The Appellate Body in the *United States – Leaded Bars* case held that in order to establish the continued need for countervailing duties, an investigating authority will have to make a

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<sup>49</sup> Letter from deKieffer & Horgan to Secretary of Commerce of 13 April 2000 (Exhibit EC-21).

<sup>50</sup> Exhibit EC-10, at p. 18.

<sup>51</sup> Section 351.106(c)(1) of the *Sunset Regulations*

<sup>52</sup> Section III.A.6.(b) of the *Sunset Policy Bulletin* provides that: In accordance with section 752(b)(4)(B) of the Act and 19 CFR 351.106(c)(1), the Department will treat as *de minimis* any countervailable subsidy rate that is less than 0.5 per cent ad valorem or the equivalent specific rate".

<sup>53</sup> Section 703(b)(4)(a) of the Act

finding on *subsidisation*, 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<sup>54</sup>.

5.39 Therefore, in the context of a review under Article 21.2, the object and purpose of the requirement to demonstrate subsidisation and injury must be the same as when subsidisation and injury were determined in the original investigation. It follows then that if the *de minimis* rule is applied in original investigations, it must also remain applicable in reviews under Article 21.2. The EC submits that the above analysis in case of Article 21.2 reviews applies all the more so in the context of sunset reviews under Article 21.3. Indeed, there are compelling reasons to conclude that a countervailing duty, which is anyhow supposed to expire upon five years, will not be maintained without a clear demonstration of "*subsidisation*" and "*injury*". The Appellate Body further held that Article 21.2 sets out a review mechanism to ensure that Members comply with the rule of Article 21.1. The EC submits that the same reasoning applies *a fortiori* as regards the object and purpose of the sunset review mechanism laid down in Article 21.3 and renders sunset reviews similar to the original investigations, thus imposing on the authorities the burden of demonstrating the likelihood of a continuation or recurrence of *subsidisation* and *injury* (from a subsidy that is not *de minimis*), if the duty is not to expire.

5.40 The term "subsidisation", in Articles 21.1, 21.2 and 21.3, can only be interpreted in a systematically coherent manner, in context and in the light of the other relevant provisions of the *SCM Agreement* as a whole. One of these relevant provisions is clearly Article 11.9. This is because Article 11.9, in the context of original investigations, prevents the authorities from making a finding on subsidisation and injury on the basis of an amount of subsidy that is less than 1 per cent *ad valorem*, since it requires "immediate termination" of investigations in such circumstances. In addition, the US practice of applying a *de minimis* rule of (albeit at a WTO-inconsistent rate of 0.5 per cent) in, *inter alia*, sunset reviews provides an implicit confirmation of the need to apply a *de minimis* rule in the context of Article 21.3. Indeed, it is inherently contradictory for the US to argue that the rule of Article 11.9 of the *SCM Agreement* does not apply to sunset reviews, but nevertheless continue applying such a *de minimis* rule in practice. The US inconsistent and contradictory approach may seem to reduce the legal debate from one of principle to one about the actual amount or level of subsidy that is considered to be *de minimis* (i.e., in practice to 0.5 instead of 1 per cent). However, a closer examination of the US law and practice, as applied to the facts of the present case, would demonstrate that it could produce very perverse and inconsistent results.

(iii) *Application of the de minimis rule to the corrosion-resistant steel products case*

5.41 In the case of corrosion resistant steel from Germany, the countervailing duty rate determined in the original investigation, which stemmed essentially from non-recurring subsidies allocated over time, was 0.59 per cent. This was only 0.09 per cent above the *de minimis* level of 0.50 per cent applied in the US before the entry into force of the WTO Agreements.<sup>55</sup> Thus, if the original investigation had been conducted under the currently applicable rules for *de minimis* subsidies, the investigation should have been immediately terminated without the imposition of any countervailing duties, in accordance with Article 11.9 of the *SCM Agreement*. In the sunset review, which was conducted under WTO rules, the US, despite finding that the subsidy rate likely to prevail would be 0.53 per cent, nevertheless continued the measure, since its practice is to apply a 0.5 per cent *de minimis* threshold in sunsets. The EC submits that, for the reasons stated above, this threshold is not appropriate, and that since 0.53 per cent is below the 1 per cent *de minimis* level which should apply in sunset reviews, the US was in breach of Article 21.3 in continuing the measure

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<sup>54</sup> Appellate Body Report, *United States – Leaded Bars*, para. 54.

<sup>55</sup> See Exhibits EC-7, at pp. 24-25, and EC-10, at pp. 12-16.

(d) The Obligation to Bring its Law Into Conformity with the WTO Agreements

5.42 Article XVI:4 of the WTO Agreement and Article 32.5 of the SCM Agreement oblige Members to bring their domestic law into conformity with their obligations under the WTO Agreements. Indeed, as the panel report in *Brazil – Desiccated Coconut* has found,<sup>56</sup> countervailing duty measures applied before 1995 would have to be brought under the disciplines of WTO over time pursuant to reviews under Article 21.2 or under the sunset provision of Article 21.3 of the SCM Agreement. The EC has demonstrated that the basic US law, the accompanying regulations and practices relating to sunset reviews of countervailing duties and their concrete application to the facts of the present case are inconsistent with a number of provisions of the SCM Agreement, i.e., Articles 21, paragraphs 1, 3 and 4, Article 10 and Article 11.9. For those reasons, the EC submits that the US failed to bring its domestic law in conformity with WTO obligations and, thereby, violating Article 32.5 of the SCM Agreement and Article XVI.4 of the WTO Agreement.

## 5. Conclusions

5.43 For these reasons, the EC respectfully requests that the Panel finds that the US basic countervailing duty law (Tariff Act of 1930), its accompanying regulations (sunset regulations) and policy practices (sunset policy bulletin) as such, and their concrete application to imports of certain corrosion-resistant carbon steel flat products from Germany in the present case are inconsistent with Article 21 paragraphs 3, 1 and 4, Article 10 and Article 11.9 of the SCM Agreement. For the above reasons, the US countervailing duty law, regulations and practice should also be considered to be inconsistent with Article 32.5 of the SCM Agreement and, consequently, should be found to violate also Article XVI.4 of the WTO Agreement.

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

#### 1. Introduction

5.44 The crux of the EC's case that is properly before the Panel consists of allegations that the US countervailing duty law, as well as the sunset review determination in certain corrosion-resistant carbon steel flat products from Germany based upon that law, are inconsistent with the SCM Agreement because: (1) Commerce automatically initiates sunset reviews without first gathering evidence regarding the continuation or recurrence of subsidization; and (2) Commerce does not apply the SCM Agreement's *de minimis* standard for countervailing duty investigations to sunset reviews. The EC argues that the Panel should read into Article 21.3 – the provision of the SCM Agreement that deals with sunset reviews – the requirements of Articles 11.6 and 11.9.

5.45 The EC's claims, however, run afoul of a basic principle of treaty interpretation. As stated by the Appellate Body in *India Patent Protection*, “the principles of treaty interpretation set out in Article 31 of the *Vienna Convention* . . . neither require nor condone the imputation into a treaty of words that are not there . . . .” This is precisely what the EC is asking the Panel to do here; impute into Article 21.3 of the SCM Agreement “words that are not there”.

5.46 The EC tries to overcome this problem by repeatedly asserting that sunset reviews are “exceptions” to some other principle and, thus, must be interpreted in such a manner as to read into Article 21.3 “words that are not there.” As discussed below, sunset reviews are not “exceptions” to something else, but instead are merely one part of an overall balance of rights and obligations negotiated during the Uruguay Round. However, even if one were to treat the provision on sunset reviews as an “exception” to something else, the EC's arguments run afoul of another principle, articulated in *EC Hormones*, which is that “merely characterizing a treaty provision as an ‘exception’

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<sup>56</sup> Panel Report, *Brazil - Desiccated Coconut*, cit. *supra*, at para. 277.

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.”

## 2. Factual Background

### (a) Sunset Reviews under US Law

5.47 Commerce and the USITC jointly conduct sunset reviews pursuant to sections 751(c) and 752 of the Act. Pursuant to section 751(d)(2) of the Act, a countervailing duty order must be revoked after five years unless both Commerce and the USITC make respective affirmative determinations that subsidization and injury would be likely to continue or recur. Under the statute, Commerce automatically initiates a sunset review on its own initiative within five years of the date of publication of a countervailing duty order.

5.48 Commerce has the responsibility of determining whether revocation of a countervailing duty order would be likely to lead to continuation or recurrence of subsidization, whereas the USITC has the responsibility of determining whether revocation of a countervailing duty order would be likely to lead to continuation or recurrence of injury. If Commerce’s determination is negative – *i.e.*, if Commerce finds that there is no such likelihood – Commerce must revoke the order. If Commerce’s determination is affirmative, Commerce transmits its determination to the USITC, along with a determination regarding the magnitude of the net countervailable subsidy that is likely to prevail if the order is revoked. Under US law, the applicable *de minimis* standard in sunset reviews is the same as the standard in other types of reviews (*e.g.*, duty assessment reviews) – 0.5 per cent.

5.49 Commerce’s 1998 *Sunset Regulations* describe specifically the information to be provided by all interested parties in a sunset review and invite parties to submit, with the required information, “any other relevant information or argument that the party would like [Commerce] to consider.” These regulations function as the standard questionnaire. The *Sunset Regulations* also provide that substantive responses to a notice of initiation are due 30 days after the date of publication in the *Federal Register* of the notice of initiation; rebuttals are due five days later. The regulations provide that Commerce normally will not accept or consider any additional information from a party after the time for filing rebuttals has expired.

5.50 On 14 May 1998, Commerce published the schedule for initiation of sunset reviews of pre-1995 anti-dumping and countervailing duty orders, indicating that the sunset review of the countervailing duty order on corrosion-resistant steel would be initiated in September 1999.

5.51 Thus, with the applicable information requirements, deadlines, and initiation schedule published in the *Federal Register* by May 1998, the EC and German producers had *over 15 months to prepare* for the sunset review of the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany.

### (b) Certain Corrosion-Resistant Carbon Steel Flat Products from Germany

5.52 On 9 July 1993, Commerce published its final affirmative countervailing duty determination on certain corrosion-resistant carbon steel flat products from Germany. Commerce calculated a country-wide total *ad valorem* countervailing duty rate of 0.59 per cent, based on the German producers receipt of countervailable benefits under the following five programmes: (1) Capital Investment Grants (hereinafter “CIG”); (2) Structural Improvement Aids; (3) Special Subsidies for Companies in the Zonal Border Area; (4) Aid for Closure of Steel Operations; and (5) ECSC Redeployment Aid Under Article 56(2)(b). On 9 August 1993, the USITC notified Commerce of its final affirmative injury determination. On 17 August 1993, Commerce amended its final

determination to correct a ministerial error, which increased the *ad valorem* rate to 0.60 per cent, and issued the countervailing duty order.

5.53 On 26 August 1999, Commerce notified representatives of the EC, the German Government, and German producers, by mail, that the sunset review of the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany would be initiated on or about 1 September 1999 (consistent with the *Sunset Initiation Schedule*). On 1 September 1999, Commerce published its notice of initiation. In both its letters to German producers and the published initiation notice, Commerce highlighted the 30-day deadline for filing substantive responses, as well as the applicable information requirements.

5.54 By 4 October 1999, the EC, the German Government, German producers, and domestic interested parties filed their substantive responses. The EC, the German Government, the German producers, and the domestic interested parties filed rebuttal comments on 15 October 1999. On 20 October 1999, Commerce determined to conduct a full sunset review based on its receipt of complete substantive responses from the EC, the German Government, and German producers accounting for a significant portion of German exports to the United States.

5.55 On 27 March 2000, Commerce published its preliminary sunset determination finding likelihood of continuation or recurrence of subsidization. Based on its finding that benefit streams from non-recurring grants under the CIG programme would continue beyond the five-year mark and that the Aid for Closure of Steel Operations and ECSC programmes continue to exist, Commerce determined there was likelihood of continuation or recurrence of subsidization.

5.56 As required under US law, Commerce also determined the net countervailable subsidy likely to prevail if the order were revoked. As a general matter, and starting with the total *ad valorem* rate determined in the original investigation, Commerce considers whether, since the investigation, it has found subsidy programmes to be terminated and/or new programmes to be countervailable. Based on findings, which normally are made in the context of administrative reviews under section 751(a) of the Act, Commerce may adjust the rate determined in the original investigation to take these subsequent findings into account. Although no administrative reviews of the order on certain corrosion-resistant carbon steel flat products from Germany were ever conducted, Commerce agreed with the EC and the German producers that the Structural Improvement Aids and Special Subsidies for Companies in the Zonal Border Area programmes had been terminated with no continuing benefits and adjusted the net countervailable subsidy rate accordingly. Because no administrative reviews had been conducted, Commerce did not consider the domestic interested parties' allegations concerning additional countervailable subsidies. For the same reason, Commerce did not recalculate the subsidy rates determined in the original investigation. Based on this analysis, Commerce determined a net countervailable subsidy rate of 0.54 per cent.

5.57 In its final determination, published 2 August 2000, Commerce did not change the basis for its likelihood determination or its determination concerning the net countervailable subsidy likely to prevail. On 1 December 2000, the USITC published its determination that revocation of the countervailing duty order would be likely to lead to continuation or recurrence of injury. On 15 December 2000, the United States published notice of the continuation of the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany based on the decisions by Commerce and the USITC finding likelihood of continuation or recurrence of subsidization and injury.

### **3. Standard of Review**

5.58 With respect to disputes involving a determination made by a domestic authority based upon an administrative record, the Appellate Body, in *US Cotton Yarn*, recently summarized the standard of

review under DSU Article 11. The United States does not disagree with this standard. The EC erroneously argues, however, that the Panel cannot “disregard or refuse to consider facts and evidence *submitted to it*” by the parties to the dispute. The United States disagrees with the EC’s implication that a panel has unfettered discretion to consider any evidence in deciding the issues before it and, as discussed below, the Panel should decline to consider the document submitted by the EC.

#### 4. Substantive Argument

##### (a) Automatic Self-Initiation of Sunset Reviews is Consistent with the SCM Agreement

5.59 Article 21.3 authorizes authorities to initiate a sunset review “on their own initiative *or* upon a duly substantiated request made by or on behalf of the domestic industry” (emphasis added). This disjunctive language is unambiguous, and, under the customary rules of interpretation, must be read according to its ordinary meaning, which is that a Member may *either* self-initiate a sunset review or initiate a sunset review in response to a duly substantiated request. The right of an investigating authority to initiate a sunset review on its own initiative is unqualified and the Panel may not “diminish” this right. Despite the plain language of Article 21.3, the EC argues that the Article 11.6 requirements for self-initiation of an investigation are applicable to self-initiation of sunset reviews. The obvious flaw in the EC’s argument is that there is no reference to the Article 11.6 requirements in the text of Article 21.3 or vice versa. Furthermore, the SCM Agreement itself distinguishes between the investigatory phase and the review phase of a countervailing duty proceeding, *e.g.*, Article 11 deals with investigations, while Article 21 deals with reviews.

5.60 The EC’s arguments, therefore, find no support under customary rules of treaty interpretation. Article 21.3 explicitly provides for initiation of sunset reviews on an authority’s own initiative. Furthermore, 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. It is impossible to violate an obligation that does not exist. Therefore, the United States’ automatic initiation of sunset reviews is not inconsistent with the SCM Agreement.

##### (b) There is no *de minimis* Standard for Sunset Reviews

5.61 The focus of a sunset review under Article 21.3 is future behaviour, *i.e.*, the likelihood of continuation or recurrence of subsidization – not whether or to what extent subsidization currently exists. The analysis is perforce predictive. Under these circumstances, mathematical certainty or precision as to the exact amount of likely future subsidization is not necessarily practicable and certainly not required.

5.62 Under Article 11.9, Members must apply a one per cent *de minimis* standard in countervailing duty *investigations*. The EC erroneously argues that the Article 11.9 *de minimis* standard is applicable in sunset reviews under Article 21.3. There is no textual or contextual support for the EC’s claim.

5.63 In *Korea DRAMs*, Korea argued that the *de minimis* standard in Article 5.8 of the AD Agreement applied to reviews as well as to investigations. Article 5.8 of the AD Agreement is the parallel provision to Article 11.9 of the SCM Agreement. The panel rejected Korea’s arguments, finding that “the term ‘investigation’ [used in the context of Article 5.8] means the investigative phase leading up to the final determination of the investigating authority.” Thus, the *Korea DRAMs* panel found no textual or contextual support for Korea’s claim that the *de minimis* standard applied beyond the investigative phase.

5.64 The EC’s argument is not only devoid of support in the text of the SCM Agreement, it also fails to mention, much less reconcile, its position with relevant language in the text. Specifically,

note 52 of Article 21.3 provides that “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”. Thus, the current level of subsidization is not decisive as to whether subsidization is likely to recur. The EC’s claim that a *de minimis* standard is required in the context of Article 21.3 sunset reviews would render note 52 meaningless.

5.65 The EC would also have the panel read into the use of the word “subsidization” in Article 21 an implicit reference to Article 11.9 because authorities must terminate an investigation if the amount of the subsidy is *de minimis*. However, nothing in the word “subsidization”, as defined in the SCM Agreement implies anything about a *de minimis* standard. The term “subsidization” simply means the existence of a subsidy as defined in Article 1 of the SCM; Article 1 contains no *de minimis* standard.

5.66 In sum, giving the text of the Agreement its ordinary meaning, the only conclusion one can reach is that there is no obligation to apply the Article 11.9 *de minimis* standard in an Article 21.3 sunset review. The EC’s arguments concerning the object and purpose of Article 21.3 fail to overcome the obvious lack of any textual support for their claim.

5.67 The EC argues that a sunset review is equivalent to an investigation because it could result in re-“imposition” of an order and, as such, the same *de minimis* standard is applicable in a sunset review. This argument completely ignores the fundamental difference between investigations, in which a *de minimis* standard is required under Article 11.9, and sunset reviews. In the context of Article 11.9, the function of the *de minimis* test is to determine whether foreign government subsidies warrant the imposition of a countervailing duty order in the first instance. For example, in an investigation, if the investigating authority found that a government programme had provided recurring subsidies at a rate of more than one per cent, imposition of a countervailing duty would be warranted if the subsidized imports were found to cause injury.

5.68 In contrast, the focus of the sunset review is the future. The mere continued existence of this same programme could warrant maintaining the duty beyond the five-year point, *even if* the amount of the subsidy was currently *zero*, as stated in footnote 52, because subsidization may be likely to recur absent the discipline of the duty. This distinction between the object and purpose of an investigation and the object and purpose of a sunset review supports the conclusion that, absent an express reference to the contrary, there is no basis to assume or infer an intent that the *de minimis* standard for investigations applies in sunset reviews.

5.69 In an attempt to bolster its non-existent textual argument, the EC cites the fact that the United States applies a *de minimis* standard in sunset reviews as “confirmation” of the requirement to apply a *de minimis* rule in the context of Article 21.3 sunset reviews. In addition, the EC argues that, given the provisions of Article 32.4, it had a “reasonable and legitimate expectation” that the United States would terminate the duty. The EC is wrong on both accounts.

5.70 The United States’ *de minimis* “practice” is legally irrelevant. As demonstrated above, there is no *de minimis* standard in sunset reviews. Thus, Members are free to determine what, if any, *de minimis* standard they will apply. Furthermore, while Article 31.3(b) of the *Vienna Convention* permits consideration of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,” policy decisions made by one Member for purposes of its domestic legislation do not constitute “subsequent practice” within the meaning of Article 31.3(b).

5.71 In addition, the EC’s only legitimate expectations with respect to Articles 32.4 and 21.3 are those reflected in the Agreement itself. As the Appellate Body, in *India Patent Protection*, stated: “[P]rinciples 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.”

5.72 In sum, applying customary rules of treaty interpretation, the Panel should find that there is no *de minimis* standard for 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.

- (c) Commerce Properly Determined that the Expiry of the Countervailing Duty Order would be likely to lead to Continuation or Recurrence of Subsidization Based upon an Appropriately Conducted review of all Relevant and Properly Submitted Facts

5.73 As demonstrated above, the United States' automatic self-initiation of sunset reviews and its application of a particular *de minimis* standard do not breach any provision of the SCM Agreement. The remaining claims raised by the EC concern Commerce's findings and procedural actions in this case. An "objective assessment" of Commerce's findings and actions, pursuant to Article 11 of the DSU, would focus on the consistency of the sunset review with the requirements of Articles 21.3 and 12.

5.74 As a starting point for making its likelihood determination in the sunset review, Commerce considered the countervailable subsidies and programmes used, and the amount of the subsidy determined, in the original investigation. As explained in Commerce's preliminary sunset determination, the rationale for this approach is that the findings in the original investigation provide the only evidence reflecting the behaviour of the respondents without the discipline of countervailing measures in place. This approach makes sense given that, in a sunset review under the Article 21.3, an authority is considering whether, without the discipline of the duty, subsidization would likely continue or recur, *i.e.*, what would happen without the discipline of the order.

5.75 In the original investigation, Commerce determined that German producers of corrosion-resistant steel benefitted from five different subsidy programmes. In the sunset review, Commerce found that the benefit streams from non-recurring grants under the CIG programme will continue beyond the five-year mark; the Structural Improvement Aids and Special Subsidies for Companies in the Zonal Border Area programmes had been terminated; and the Aid for Closure of Steel Operations and ECSC Redeployment Aid Under Article 56(2)(b) programmes continue to exist. Significantly, the EC has not disputed or disproved these findings. As an initial matter, therefore, it was reasonable for Commerce to find likelihood given the continued existence and availability of countervailable subsidy programmes previously found to have been used by German producers of corrosion-resistant steel and the continuation of benefit streams from grants under the CIG programme.

5.76 Although the EC essentially concedes the continued existence of some benefits from the CIG programme, it claims that, based on routine amortization, Commerce should have considered the programme terminated without residual benefits to the German producers. With respect to non-recurring benefits (such as the benefits from the CIG programme), Commerce uses a "declining balance" formula to determine the amount of subsidization to be allocated in each period. An *ad valorem* subsidy rate, for a particular period, is derived by dividing a numerator – the subsidy benefit properly attributable to the subject merchandise – by a denominator – the value of the sales of the merchandise at issue (in the case of a domestic subsidy). Without knowing the sales volume, the *ad valorem* subsidy rate for any period cannot be determined despite the use of a "declining balance" methodology generally. The EC's claim, therefore, fails as a factual matter because there is no basis for its assumption that the sales volumes will remain constant.

5.77 The EC's amortization arguments, furthermore, are based in part on a calculation memorandum from the original countervailing duty investigation that is not part of the record considered in the sunset review (Exhibit EC-20). The request to submit this business confidential document was untimely submitted and Commerce properly declined to consider it. The German producers' request to submit this document also implicated Commerce's rules concerning treatment of

confidential information (“business proprietary information” or “BPI” in US parlance). Pursuant to US law, release of that information is not permitted without the consent of the person that submitted it. Commerce could not ignore previous requests for confidential treatment and automatically place this information from the original 1993 investigation on the record of the sunset review. Further, other parties without prior access to the document would have been prejudiced by its untimely inclusion on the record.

5.78 Under these circumstances, Commerce did not consider it practicable or appropriate to consider the document. Commerce’s decision to enforce procedural rules governing deadlines for submission of evidence and the release of confidential business information was proper and consistent with Article 12. (The evidentiary and procedural requirements of Article 12 are applicable to sunset reviews by virtue of Article 12.4.) As such, the Panel should find that Commerce appropriately declined to consider the information and that it is not this Panel’s role to consider evidence which could have been timely presented to the decision maker but was not. Furthermore, even if the Panel should consider the document, it does not prove the EC’s arguments. The calculation memorandum only provides the absolute subsidy amounts (*i.e.*, the numerator) – it does not shed any light on the value of the sales of the merchandise at issue (*i.e.*, the denominator). As demonstrated above, without a denominator, there is no way to calculate the *ad valorem* subsidy rate.

5.79 Consistent with the Appellate Body’s ruling in *UK Lead Bar* and Article 21.3, Commerce properly considered that the existing benefit streams from the CIG programmes constituted evidence of the “continuation” of subsidization. Furthermore, the continued existence of other programmes previously found to be countervailable is not in dispute. As a result, Commerce’s finding of likelihood of continuation or recurrence of subsidization is consistent with its obligations under Articles 21.3 and 12 of the SCM Agreement. In addition, as demonstrated below, Commerce’s evidentiary and procedural actions also were consistent with its obligations under Article 12.

5.80 Article 12.1 requires domestic authorities to give interested Members and parties an ample opportunity to present in writing all evidence which they consider relevant to the proceeding. The facts do not support the EC’s claims that Commerce failed to do so.

5.81 The *Sunset Regulations* describe specifically the information required to be provided by all interested parties in a sunset review, *i.e.*, they constitute the standard questionnaire. In addition, the *Sunset Regulations* specifically invite parties to submit, with the required information, “any other relevant information or arguments that the party would like [Commerce] to consider”. Consistent with Article 12.1.1, Commerce’s regulations also provide 30 days for parties to submit the required information and provide for extensions of time to meet this deadline. The EC and the German producers were on notice of the information requirements and options, as well as the applicable deadlines and extension options, over 15 months ahead of the scheduled date for initiation of the sunset review.

5.82 Yet over six months after the deadline for responding to the sunset questionnaire and submitting optional information, the German producers attempted to place new factual information on the record. The EC asserts that Commerce’s rejection of these untimely submissions was contrary to their “right” under the SCM Agreement to have an “ample opportunity to present in writing all evidence which they consider relevant in respect of the sunset review”. As a factual matter, however, the German producers and the German Government had ample time to submit factual information in the sunset review. Furthermore, as a legal matter, Commerce’s filing deadlines and its decision not to accept late-filed information fully comport with its obligations under Article 12.

5.83 Specifically, the German producers had 30 days to respond to the questionnaire. In addition, Commerce’s rejection of the German producers late-filed information was reasonable under the circumstances of this case, *i.e.*, the German producers attempted to file new factual information over

six months after Commerce's deadline. Although an authority "should" grant extensions "whenever practicable", nothing required Commerce to find that it was practicable to accept and consider documents filed six months late, particularly given the fact that the EC and the German producers had over 15 months to gather any data they considered appropriate and to prepare their submission of required and optional information. Finally, the EC's argument, that Commerce arbitrarily applied its regulation to submissions from the various parties, ignores relevant factual distinctions between the submissions from the German producers rejected by Commerce and those submissions from the US producers and the German Government that were accepted by Commerce. In particular, the accepted submissions involved public documents containing no new factual information.

5.84 In sum, the Panel should dismiss the EC's claims with respect to treatment of evidence. Commerce followed reasonable, appropriate procedures that fully comply with the evidentiary and procedural requirements of Articles 21 and 12.

(d) The Panel should make a Preliminary Ruling that the EC's Claims Regarding the Expedited Sunset Review Procedure are not within the Panel's Terms of Reference

5.85 The United States requests that the Panel make a preliminary ruling that the EC's claims regarding the US expedited sunset review procedure are not properly before the Panel, because this procedure is not a measure within the Panel's terms of reference. Not until its first written submission to the Panel did the EC ever give any indication that it was complaining about this procedure.

5.86 In its initial request for consultations, the EC identified Commerce's determination in the *full* sunset review of the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany as the challenged measure, alleging that Commerce's determination is inconsistent with Articles 10, 11.9 and 21 of the SCM Agreement. In its second request for consultations, the EC identified Commerce's *procedures for initiation* of sunset reviews, both as applied by Commerce in the sunset determination in question and in general, as an additional challenged measure, alleging that such initiation procedures are inconsistent with Articles 21.1, 21.3 and 32.5 of the SCM Agreement and Article XIV:4 of the Marrakesh Agreement. The EC did not allege that any other sunset determination or procedure violated US WTO obligations. Furthermore, the parties did not discuss the expedited sunset review procedure at either the 8 December 2000, or 21 March 2001 consultations. Finally, there is no mention of the expedited sunset review procedure in the EC's request for the establishment of a panel.

5.87 Articles 4.7 and 6.2 of the DSU, therefore, preclude the EC's claims with respect to the expedited sunset review procedure, because the EC never identified this procedure as a measure in its consultation requests, in the consultations themselves, or in its panel request. It is well-established that a complaining party cannot add new measures after a panel's terms of reference have been established.

## 5. Conclusion

5.88 For the reasons set out in this submission, the United States respectfully requests that the Panel make the following findings:

- (1) The US procedure for the automatic self-initiation of sunset reviews by Commerce is not inconsistent with the SCM Agreement;
- (2) 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;

- (3) The Commerce sunset review determination in certain corrosion-resistant carbon steel flat products from Germany is not inconsistent with United States obligations under the SCM Agreement.

5.89 In addition, the United States respectfully requests that the Panel make a preliminary ruling that the EC's claims with respect to the expedited sunset review procedure are not within the Panel's terms of reference.

C. ORAL STATEMENT OF THE EUROPEAN COMMUNITIES AT THE FIRST MEETING OF THE PANEL

**1. Introduction**

5.90 The complaint concerns the decision of the US authorities to continue the countervailing duties on imports of corrosion-resistant carbon steel flat products from Germany (the product). The decision of the US authorities in this case is a result that is mandated by the basic US statute, the implementing legislation and administrative practice on sunset reviews of countervailing duty orders. For these reasons, the present proceeding covers certain aspects of the US basic sunset review legislation, their procedures and their implementation which led to the unlawful continuation of the countervailing duties in this case.<sup>57</sup>

5.91 The oral statement is organised as follows: (a) a presentation of the facts, (b) a review of the substantive legal claims, and (c) the issue of standard of review and the US request to make a preliminary ruling on expedited reviews.

5.92 The basic thrust of the EC case is that countervailing duty 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 countervailing duties and their review under the sunset provisions of the *SCM Agreement*.

**2. Factual Background**

5.93 On 9 July 1993, DOC decided that exports of the product were subsidised. DOC countervailed five subsidy programmes (CVD rate 0.60 per cent). DOC found that two programmes, the Capital Investment Grants (CIG) (0.39 per cent) and the Aid for Closure of Steel Operations (0.06 per cent) were non-recurring grants and the benefit was allocated over a 15-year period. The other three programmes were found to be recurring subsidies (0.15 per cent of the total subsidy amount).

5.94 On 1 September 1999, DOC automatically initiated a sunset review of the definitive duties. On 20 March 2000, concluded that revocation of the CVD order was likely to lead to recurrence of continuation or recurrence of a countervailable subsidy at a net subsidy rate of 0.54 per cent. DOC found that the CIG programme would continue to confer a benefit beyond the end of the sunset review. The US simply took the subsidy rate from the original investigation in 1993 and deducted the amounts related to two programmes. On 2 August 2000, the DOC confirmed these findings in the final results.

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<sup>57</sup> These acts are: 1) Section 751(c) of the Tariff Act of 1930, as amended, (hereinafter "the Act"), 2) the Implementing Regulations on anti-dumping and countervailing duties issued by DOC, now Section 351 of Title 19 of the US Code of Federal Regulations (hereinafter the "*Sunset Regulations*") and 3) the DOC Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders (so-called "*Sunset Policy Bulletin*").

### 3. Legal Arguments

- (a) The US standard of initiation applied to sunset reviews leads inevitably to a violation of Article 21.3 of the *SCM Agreement*

5.95 Pursuant to Article 21.3 *SCM Agreement*, WTO Members have an obligation to terminate CVD measures no later than 5 years from their imposition, unless the authorities determine that the expiry of the duties would be likely to lead to continuation or recurrence of subsidisation and injury. The EC considers that Article 21.3 reinforces the requirement of Article 21.1 by creating an obligation to terminate duties not later than 5 years from their imposition. Therefore, the effect of these provisions is that the continuation of CVD measures beyond the five years period is the exception. Indeed, a proper interpretation of the provisions of Article 21.1 and of the terms "not later than" in Article 21.3 suggest clearly that a CVD should be terminated even before 5 years, if its application is not necessary to counteract injurious subsidisation. Therefore, the combined effect of these provisions is that the continuation of CVD measures beyond the five years period is an exceptional situation. This corresponds to the object and the purpose of the *SCM Agreement*, which – as explained above – is to guarantee that trade defence measures are to be imposed and maintained only if they are necessary to offset injurious subsidisation.

5.96 The EC considers that self-initiation without the necessary supporting evidence is in violation of the above principle. In this respect, self-initiation is justified only if the domestic authorities have an equivalent level of evidence that would be required in such a request from the domestic industry. Indeed, without requiring a sufficient amount of evidence of subsidisation and injury in sunset reviews, these become biased in favour of keeping in place unjustified CVD measures. It is clear that the investigating authority has the burden of demonstrating that subsidisation and injury is likely to continue or recur and cannot devise and apply a system that shifts this burden on the exporters and third countries.

5.97 The US attempts (at para. 63-66) to justify this inconsistency by reading the terms of Article 21.3 in "clinical isolation" and out of context, and without taking into account the proper object and purpose of these provisions. The US also draws (at para. 67) the wrong conclusions from the distinction between the investigation phase and the review phase of a CVD proceeding. Contrary to what the US argues in para. 67, it follows from Article 22.7, in conjunction with Article 21.1 and Article 11.6 of the *SCM Agreement*, that without sufficient evidence the authorities should not self-initiate automatically sunset reviews, but they should leave CVD orders to expire (unless a valid request is made by the domestic industry). Sunset reviews are not a neutral exercise and do not involve, as the US claims (at para. 58), "taking stock of the situation". Rather, in such cases there is a presumption of expiry of duties and the investigating authority is required to demonstrate that it has sufficient evidence when initiating the sunset review, and that the conditions for initially imposing the CVD measure would still be present in the absence of such measure. It is clear from the language of Article 21.3, read in context and in the light of the object and purpose of these provisions, that the investigating authority has the burden of demonstrating that subsidisation and injury is likely to continue or recur.

5.98 The EC submits that there is no difference as regards the object and purpose of the initial investigations and of sunset reviews. Their common objective is to determine if there is subsidisation and injury which will enable the application of CVD measures in principle for the next five years. It is generally admitted that every text, no matter how clear on its face it is claimed to be, as the US argues here of Article 21.3, requires to be scrutinised in its context and in the light of the object and purpose which is designed to serve. The US arguments throughout their written submission also run counter to the basic principle of good faith interpretation, because they lead unavoidably to results

which are manifestly absurd and unreasonable<sup>58</sup> and, as explained above, would reduce parts of Article 21.3 to inutility. So, the question is not whether the Community proposes to read into Article 21.3 words which are not there, as the US now argues, but whether the interpretation it proposes makes sense in the light of the object and purpose of these provisions in their context.

5.99 The EC claim will be better understood if the automatic initiation under US law is examined in two situations: first, in the case of "expedited" sunset reviews, and, second, as applied to the facts in the present case.

5.100 Under the expedited procedure, if domestic interested parties file a "notice of intent to participate", the sunset procedure continues and interested foreign parties, i.e. exporters and the foreign government, are required to file substantive responses. This of course imposes serious economic and other costs on foreign exporters and other WTO Members. If the foreign government, or exporters accounting for at least 50 per cent of exports, do not file substantive responses for whatever reason, DOC will shorten the timeframe for the review and will normally presume without further investigation that subsidisation continues.<sup>59</sup> Therefore, the US procedure of expedited reviews, through automatic initiation and presumption of likelihood of continuation or recurrence, is applied so as to absolve the US authorities from their basic duty of investigation and demonstration of likely subsidisation and injury and, hence, is clearly biased towards continuation and perpetuation of countervailing duties, in violation of the duty to terminate them as set in Articles 21.3 and 21.1 of the *SCM Agreement*. It also enables the DOC, without any support in the *SCM Agreement*, to potentially ignore information submitted by a significant number of exporters.

(b) The domestic authorities are under an obligation to "determine" the likelihood of continuation or recurrence of subsidisation

5.101 Article 21.3 *SCM Agreement* requires that the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury. However, US law does not require a new investigation but requires in sunset reviews the DOC to consider only: (a) the net countervailable subsidy determined in the original investigation, and (b) whether there were any changes in the subsidies since the original investigation. In the EC's view, DOC's refusal to conduct any meaningful fresh investigation in a sunset review is in violation of the requirements of Article 21.3 of the *SCM Agreement*.

5.102 The EC considers that the DOC's refusal to conduct any meaningful fresh investigation in a sunset review is in violation of the requirements of Article 21.3 of the *SCM Agreement*. The US practice not only contravenes the duty placed by Article 21.3 on the domestic authorities to make a fresh "determination" about the likelihood of continuation or recurrence of a subsidy, but, by arguing that administrative reviews should have been requested, it also shifts the burden of proving a change in circumstances on the foreign exporters and at a previous stage of the procedure. Such reviews, however, are considered by the *SCM Agreement* as non-obligatory and are in any event overtaken by the sunset review. The fact that a party did not request an administrative review cannot, therefore, relieve in any way the domestic authorities from their basic and primary duty to "determine" the likelihood of continuation or recurrence of subsidisation [In the present case, the exporters could not request an administrative reviews, as no shipments to the US had been made since the original CVD order]. In fact, DOC sunset practice has been to consistently ignore reduced subsidy rates found in administrative reviews. At any rate, in the present case the German exporters did all they could to submit relevant information to DOC.

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<sup>58</sup> See Sinclair, pp.116, 120.

<sup>59</sup> 19 C.F.R. §351.218(e)(1)(ii)(B) and (C).

5.103 In this case, the German producers stated that the CIG programme had been terminated and could not provide any further benefits. DOC had already determined in the original investigation that this programme applied only to investments made prior to 1 January 1986. Despite this evidence, DOC stated that it was unable to determine whether any additional benefits under these programmes were received subsequent to the period of investigation. The US admits that DOC did not recalculate the rate but used the original subsidy rate for CIG. This violates Article 21.3 *SCM Agreement* because DOC did not take into consideration the termination of the CIG programme despite evidence on the record.

5.104 Despite this evidence, DOC rejected the claims of the German exporters. It stated that since no administrative reviews of these orders had been conducted, it was unable to determine whether any additional benefits under these programmes were received subsequent to the period of investigation. It should be stressed that, DOC had also the complete record from the original investigation, including the questionnaire responses and the calculation memoranda, and could have easily verified whether the benefits received by the German manufacturers of the subject merchandise under the CIG after 1 January 1986 were *de minimis*. The US now admits (at para. 40) that DOC did not recalculate the rate but referred back to the original subsidy rate for CIG. This violates Article 21.3 *SCM Agreement* because DOC did not take into consideration the termination of the CIG programme despite evidence on the record. Indeed, the grounds of the US explanation violate the "likely to lead" requirement in Article 21.3 and the "necessity" requirement laid down in Article 21.1 of the Agreement. It also runs counter to Article 21.4, in conjunction with Article 12.5, because the US authorities did not make any effort to satisfy themselves of the accuracy of the claims made by the German exporters. Therefore, the US failed to provide an adequate and reasonable explanation of how the facts support their decision in this case.

5.105 Moreover, DOC should have also reached the conclusion that the effects of the CIG programme had ended on the basis of its declining balance methodology.

5.106 As the Appellate Body held several times, the requirement to conduct an "objective assessment" of a claim imposes upon the Panel the obligation to review, first, whether the competent authorities have evaluated *all the relevant factors*<sup>60</sup> and, second, whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination.<sup>61</sup> It follows that although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities. Panels should instead examine the explanation offered in depth and in the light of all the facts before it.

5.107 It should further be stressed that in the present case, the calculation memorandum of the original investigation<sup>62</sup> shows that Thyssen last received payments under the CIG programme in 1989, and that the amount received after 1985 was so small that it would have been automatically expensed in the year of receipt under the DOC 0.5 per cent rule.<sup>63</sup> Therefore, in accordance with their obligations under Article 21.3 and 4, the DOC should have taken this into account.

5.108 The EC also considers that in the present case the US violated the standards of Article 21.3 *SCM Agreement* regarding the treatment of evidence. The German producers presented to DOC during the sunset review the reasons why the CIG programme should have been considered as

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<sup>60</sup> See Appellate Body Report in Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products ("Korea – Dairy Safeguards"), WT/DS98/AB/R, adopted 12 January 2000, at para. 137.

<sup>61</sup> See the Appellate Body Report in *Argentina – Safeguard Measures on Imports of Footwear* ("Argentina – Footwear Safeguards"), WT/DS121/AB/R, adopted 12 January 2000, at para. 121.

<sup>62</sup> Exhibit EC-20.

<sup>63</sup> See 19 C.F.R. § 351.524(b)(2).

terminated and as not providing any further benefits. Based upon this evidence, the German producers believed that DOC would find that subsidisation under the CIG programme would not be likely to continue or recur. However, in its preliminary results of 20 March 2000, DOC continued to assign a 0.39 per cent subsidy rate for this programme.

5.109 It follows from the above that DOC's refusal to conduct any fresh investigation in a sunset review and take into account all relevant and available evidence is in violation of the requirements of Article 21.3 of the *SCM Agreement*

(c) The *de minimis* rule under Article 21.3 of the *SCM Agreement*

5.110 The EC considers that the U.S. interpretation and application of the sunset provisions in Article 21.3 as regards the *de minimis* requirement is inconsistent with the *SCM Agreement*. The *de minimis* requirements of Articles 11.9 of the *SCM Agreement* are applied by the US only to original investigations (but a 0.5 per cent *de minimis* rule is applied in sunset and administrative reviews under its domestic laws).

5.111 The EC believes that the object and purpose of the sunset reviews and of the original investigations is the same, i.e. the application of a CVD measure for the next five years and, therefore, the *de minimis* rule of 1 per cent in Article 11.9 should apply to sunset reviews.

5.112 Indeed, a systematic and good faith interpretation of Article 21.3 with Articles 21.1, 22.1, 22.7 and 11.9 of the *SCM Agreement*, would suggest clearly that the *de minimis* rule of 1 per cent should be applied also in sunset reviews. The US has failed to demonstrate so far how it is that essentially non-recurring and expensed subsidies of 0.60 per cent in the original investigation are likely to continue and cause injury in a sunset review.<sup>64</sup> The absurdity of the US approach is that a subsidy that, if examined in a new investigation after 1995, would have been found to be *de minimis* under Article 11.9 of the *SCM Agreement*, would now become not *de minimis* under a sunset review and would continue to be applied for 5 more years, even in the absence of a change of circumstances. It is therefore particularly revealing to examine the application of the US approach to the facts of the present case.

5.113 There is common agreement that of the five subsidy programmes examined in the original investigation, 2 have been terminated, i.e. the Structural Improvement Aids (0.05 per cent) and the Zonal Border Area (0.01 per cent). Two of the three programmes that, according to DOC, continued to exist, i.e. the Aid for Closure for Steel Operations (0.06 per cent) and the ECSC Redevelopment Aid (0.08 per cent) would have expired definitively in 2002. The last and most important programme, the Capital Investment Grants, was found by DOC to be non-recurring, and its original net subsidy rate of 0.39 per cent would have been reduced to 0.00234 per cent in accordance with the DOC's 15-year allocation period and calculation methodology. Because DOC only calculates subsidy rates to the second decimal point, a net rate of 0.00234 per cent would have been equivalent to zero. Therefore, on the basis of DOC's own calculation methods, the only 2 likely to continue subsidies would have provided a net amount of 0.14 per cent (i.e. 0.06% + 0.08%).

5.114 The US provides now no credible explanation. In particular, we fail to see the reason for which the US cites (at para. 94) that there were 2 more programmes under the ECSC treaty which provided zero benefit to these products in the period of investigation, and the reason for which it

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<sup>64</sup> In footnote 98, the US states that the EC is not challenging the injury determination in this proceeding but draws no conclusion. The EC in this proceeding is not challenging the injury requirement only for the purpose of verifying the accuracy of the ITC injury determination as such, but it is doing so for the purpose of the *de minimis* challenge, i.e. as a requirement that needs to be demonstrated in the context of a sunset review under Article 21.3 of the Agreement.

states (at para. 34) that "domestic parties made allegations concerning new subsidy programmes providing benefits to the German steel industry", but later rejected these claims (at para. 40) because no administrative reviews had been conducted.<sup>65</sup> We cannot help but come to the conclusion that this is yet another ingenious way of DOC and the US to convey the impression (e.g., at paras. 95-96) that there were in place a number of important subsidy programmes ready to be re-deployed soon after the CVD order were to expire. One need only look carefully into the facts of this case to realise that this is absolutely not correct.

5.115 The US states that original investigations and sunset reviews are different and the *SCM Agreement* does not require recalculation of CVD in sunsets. However, there is nothing in Article 21.3 to prevent the US DOC from recalculating the amount of subsidy in a sunset by establishing a relevant investigation period and doing a recalculation. Moreover, it is required to quantify the amount of subsidy likely to prevail in the absence of measures. DOC should have based its quantification on the facts, and examine whether it can meet its burden of proof by positively demonstrating likelihood of continuation of subsidisation and injury. It has failed to do so in this case.

5.116 The US advanced further the argument that "the mere continued existence of the CIG programme could warrant maintaining the duty beyond the five-year point, *even if* the amount of the subsidy was currently *zero*, as stated in footnote 52, because subsidisation may be likely to recur absent the discipline of the duty" (at para. 81). Footnote 52 refers only to assessment proceedings, which are carried out annually on demand and involve retrospective calculations of the amount of subsidy for a particular period. Sunset reviews are completely different and involve an element of prospective analysis, i.e. whether subsidisation and injury is likely to recur. There is, consequently, no basis for the argument which the US is attempting to draw from the text of Footnote 52 of the *SCM Agreement*.

5.117 The US also alleges that the current level of subsidisation is not decisive as to whether subsidisation is likely to recur (at para. 74). Although the current level of subsidy might not be decisive as to whether a subsidy is likely to recur, it is nevertheless a very important factor. Especially in the case of a non-recurring subsidy which is already at *de minimis* level, because the future level of the subsidy is known and, under the US declining balance methodology, the subsidy amount will always go down in the future. In the present case, the CVD was based on non-recurring subsidies allocated over time (0.60 per cent). Because no new subsidies were granted and on the basis of all available facts in this case, the US should have terminated this measures as the level of subsidy likely to continue in this case was by far too low, even much lower than the 0.50 per cent applied unilaterally by the US domestically. The EC submitted that the 0.50 per cent *de minimis* threshold applied by the US domestically is not appropriate, and that since the rate of 0.54 per cent in the review is below the 1 per cent *de minimis* level which should apply in sunset reviews, the US was in breach of Article 21.3 in continuing the CVD measure.

(d) The Obligation to Bring its Law Into Conformity with the WTO Agreements

5.118 Article XVI:4 of the WTO Agreement and Article 32.5 of the SCM Agreement oblige Members to bring their domestic law into conformity with their obligations under the WTO Agreements. The EC has demonstrated that the basic US law, the accompanying regulations and practices relating to sunset reviews of countervailing duties and their concrete application to the facts of the present case are inconsistent with a number of provisions of the SCM Agreement, i.e. Articles 21, paragraphs 1, 3 and 4, Article 10 and Article 11.9. For those reasons, the EC submits that

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<sup>65</sup> Incidentally, the record shows that as regards new subsidy allegations DOC did not reject the petitioners' new subsidy allegations because no administrative reviews had been conducted. It rejected them because the petitioners failed to show good cause, i.e. their allegations were vague and unsupported by evidence. DOC should have investigated if the petitioners had indeed shown good cause.

the US failed to bring its domestic law in conformity with WTO obligations and, thereby, violating Article 32.5 of the SCM Agreement and, consequently, Article XVI.4 of the WTO Agreement.

#### 4. Standard of review

5.119 The applicable standard is Article 11 DSU. However, the US claims that the panel cannot consider facts and evidence which were not considered by the US authorities in the sunset review. The EC disagrees based on Appellate Body decisions regarding Article 11 DSU. In *European Communities – Hormones*, it stated that "the applicable standard is neither *de novo* review as such, nor 'total deference', but rather the 'objective assessment of the facts'". In *Argentina – Footwear Safeguards*, the Appellate Body clarified the concept of "objective assessment". The requirement to conduct an "objective assessment" of a claim has thus two elements: a review of whether competent authorities have evaluated all the relevant factors and, second, a review of whether the authorities have provided a reasoned and adequate explanation of how the facts support their determination. The EC believes the US has failed to provide an adequate and reasonable explanation of how the facts support their decision in this case.

5.120 As with regard to requirement of a *reasonable and adequate explanation*, in the United States - *Lamb Safeguards* case, the Appellate Body held that panels must review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data.<sup>66</sup>

5.121 It follows also that although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities. Panels should instead examine the explanation offered in depth and in the light of all the facts before it.

#### 5. US Request for preliminary ruling

5.122 The EC consider without foundation the US request that the Panel issue a preliminary ruling that the EC's claims regarding the expedited sunset review procedure are not within its terms of reference.

5.123 This Panel was established by the DSB on 10 September 2001 with standard terms of reference. The matter referred to it is, therefore, the one described by the EC in its request for the establishment of the Panel (document WT/DS213/3). The EC referred explicitly to Section 751. c) of the Tariff Act of 1930, which sets out the procedures to conduct sunset reviews and this includes also expedited reviews. The expedited reviews have also been discussed explicitly or implicitly in the consultations, as the procedural and substantive requirements on evidence which foreign producers have to provide in all types of sunset reviews were indeed the subject of the consultations. The US was therefore not deprived of its rights of defence.

#### 6. Conclusions

5.124 For these reasons, the EC respectfully requests that the Panel finds that the US basic countervailing duty law (Tariff Act of 1930), its accompanying regulations (sunset regulations) and policy practices (sunset policy bulletin), and their concrete application to imports of certain corrosion-resistant carbon steel flat products from Germany in the present case are inconsistent with Article 21 paragraphs 3, 1 and 4, Article 10 and Article 11.9 of the *SCM Agreement*. For the above reasons, the

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<sup>66</sup> Appellate Body Report, United-States – Safeguard Measures on Imports of Fresh Chilled or Frozen Lamb Meat from New Zealand and Australia ("United-States – Lamb Safeguards"), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 106.

US countervailing duty law, regulations and practice should also be considered to be inconsistent with Article 32.5 of the *SCM Agreement* and, consequently, should be found to violate also Article XVI.4 of the *WTO Agreement*.

D. ORAL STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

5.125 On behalf of the United States delegation, I would like to thank the Panel for this opportunity to comment on certain issues raised by the EC in its First Written Submission. We do not intend to offer a lengthy statement today; you have our written submission, and we will not repeat all of the comments that we made there. We will be pleased to receive any questions you may have at the conclusion of our statement.

5.126 Mr. Chairman, this proceeding presents three basic questions. The first is a purely legal question: Does the United States act inconsistently with Article 21.3 by self-initiating sunset reviews without regard to the evidentiary provisions of Article 11.6? The second is also a purely legal question: Does the United States act inconsistently with Article 21.3 by *not* applying the *de minimis* provisions of Article 11.9 in sunset reviews? The answer to both of these questions is no, for a simple, yet fundamental reason – it is impossible to act inconsistently with an obligation that does not exist.

5.127 I will return to these two issues in a moment, but first let me address the third question, which goes to the specific CVD determination at issue in this proceeding – Commerce’s determination that expiry of the countervailing duty on certain corrosion-resistant carbon steel flat products from Germany would be likely to lead to continuation or recurrence of subsidization. The question here is whether Commerce’s determination was based upon an appropriately conducted review of all relevant and properly submitted facts. An “objective assessment” of Commerce’s findings and actions supports an answer in the affirmative.

**1. Commerce Properly Determined That Expiry Of The Duty Would Be Likely To Lead To Continuation Or Recurrence Of Subsidization**

5.128 Article 21.3 defines the point in time at which the authorities must take stock of or terminate a duty – that is every five years. Article 21.3 also defines the circumstances under which maintaining a duty may be considered “necessary” – that is when continuation or recurrence of subsidization and injury is likely. An authority’s decision to maintain a duty must be supported by evidence of these requisite circumstances.

5.129 Setting aside the issue of injury, which is not being challenged in this case, what does it mean to determine likelihood of continuation or recurrence of subsidization?

5.130 First, we consider, individually, the words establishing the circumstances under which maintaining a duty may be considered necessary. The word “likely” carries with it the ordinary meaning of “probable”. Where continuation or recurrence of subsidization is probable, this probability would then constitute a proper basis for entitlement to the continued imposition of a countervailing duty.

5.131 The word “continuation” expresses a temporal relationship between past and future. Something that happened in the past may continue in the future. An example might be where benefits from an untied, non-recurring financial contribution continue to flow.

5.132 The word “recurrence” also expresses a temporal relationship between past and future. Something that happened in the past may happen again in the future. An example might be where there was not a recent financial contribution under a particular subsidy programme, but the

programme still exists and may be used in the future. In this situation, the existing programme is a source for new financial contributions – in other words, its continued existence enables recurrence of subsidization.

5.133 Considered together then, these words indicate that determining likelihood of continuation or recurrence requires a consideration of future, rather than present, circumstances. What are the prospects of subsidization in the future? Without the discipline of the duty, is subsidization likely to continue or recur? The analysis required in a sunset review, therefore, is necessarily prospective in nature.

5.134 Support for this proposition is found in the text of Article 21.3 itself. As discussed in our First Written Submission, note 52 provides that 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. This indicates that the current level of subsidization is not decisive as to whether subsidization is likely to continue or recur.

5.135 In the sunset review involving German corrosion-resistant steel, Commerce found likelihood based on two unrefuted facts. The first fact is the continued existence and availability of countervailable subsidy programmes previously found to have been used by German producers. The second fact is the continued existence of benefit streams from a countervailable subsidy programme previously found to benefit German producers.

5.136 The EC argues that there are a number of factual and procedural flaws with Commerce's sunset determination, such that Commerce's determination is in violation of provisions of the SCM Agreement. In our First Written Submission, we address and rebut the EC's claims in greater detail. Today, I will only briefly touch upon the EC's two main claims. The first concerns the Capital Investment Grants, or CIG, Programme; the second concerns whether the German producers and the EC were afforded "ample opportunity" to participate in the underlying sunset review.

5.137 At the outset, I would note that rather than demonstrating that Commerce's findings or procedural actions were inconsistent with the SCM Agreement, the EC's claims present essentially another view of the facts. However, Article 11 of the DSU directs panels to make an "objective assessment" of the facts of the case and of the applicability and conformity with relevant agreements. This "objective assessment" must necessarily focus on the consistency of the sunset review with the requirements of Article 21.3 and Article 12.

5.138 With respect to the CIG Programme, the EC theorizes that, using Commerce's declining balance methodology, the benefits remaining from the programme would be *de minimis*. You will recall that in the original investigation, Commerce found that German producers of corrosion-resistant steel benefitted from non-recurring grants under this programme. In the sunset review, Commerce found that benefit streams from the CIG grants would continue beyond the five-year period. While the EC's declining balance theories are not unreasonable, they only address half of the equation. In particular, it is not possible to calculate a particular rate of subsidization using this methodology without information concerning sales of the subject merchandise. The EC's claim presumes that sales volumes have remained constant, a presumption for which there is no evidence in the record.

5.139 In addition, the EC's argument in this regard is based partly on a calculation memorandum which Commerce properly declined to consider in the sunset review below. As we demonstrate in our First Written Submission, it is not appropriate for the Panel to now consider this business confidential document. Nevertheless, even if this document were appropriately part of the record before the Panel, it does not prove the EC's argument. This is because the memorandum only provides absolute subsidy amounts; it does not contain the information on sales volumes necessary to calculate the *ad valorem* rate of subsidization.

5.140 Nothing in the SCM Agreement requires consideration of the magnitude of subsidization in determining the likelihood of continuation or recurrence of subsidization. Furthermore, as the Appellate Body recognized in *UK Lead Bar*, benefits from a non-recurring subsidy continue to flow. As a result, Commerce's "continuation of subsidization" finding with respect to the CIG programme is correct.

5.141 With respect to Commerce's procedural actions in the sunset review, the EC argues that Commerce did not provide an "ample opportunity" to present in writing all evidence which the parties considered relevant to the proceeding. As a factual matter, this assertion is simply incorrect.

5.142 Commerce's published *Sunset Regulations* contain the standard sunset questionnaire and provide an opportunity for parties to submit any argument and information they consider relevant to Commerce's sunset determination. Commerce's regulations also set a 30-day deadline for the submission of such information and provide for extensions of that 30-day deadline. The German Producers and the EC were on notice of these information requirements and options, as well as the applicable deadlines, at least *15 months* prior to the initiation date for the sunset review.

5.143 The EC has not demonstrated how Commerce's actions in this regard violate any of the evidentiary and procedural requirements of Article 12. Fifteen months certainly seems to provide "ample opportunity" to gather and present any evidence the German Producers and the EC considered pertinent to Commerce's sunset determination. I would also note that 15 months is longer than the normal deadline in Article 21.4 for the conduct and completion of sunset reviews. That the German Producers and the EC failed to avail themselves of the ample opportunity to present evidence is not a dereliction that can be ascribed to Commerce's procedural actions in this case.

## **2. It is impossible to act inconsistently with an obligation that does not exist**

5.144 I will turn now to the two purely legal claims raised by the EC. The first claim is that an authority must satisfy the evidentiary requirements of Article 11.6 before self-initiating a sunset review under Article 21.3. The second claim is that application of the Article 11.9 *de minimis* standard in a sunset review is required under the SCM Agreement. As set out more fully in our First Written Submission, there is no support in the SCM Agreement for these claims.

5.145 Article 31 of the *Vienna Convention* contain some very basic principles of treaty interpretation. As articulated by the Appellate Body, these principles "neither require nor condone the imputation into a treaty of words that are not there...." The EC's arguments in this case run afoul of this fundamental proposition.

5.146 With respect to the self-initiation issue, the EC argues that the Panel should read into Article 21.3, the requirements of Article 11.6 – the provision of the SCM Agreement that deals with evidentiary requirements for self-initiation of an *investigation*. With respect to the *de minimis* issue, the EC argues that the Panel should read into Article 21.3, the requirements of Article 11.9 – the provision of the SCM Agreement that deals with the *de minimis* standard for an *investigation*. There is no support in the Agreement for the EC's theories.

5.147 With no textual foundation, the EC simply asserts that, under the SCM Agreement, sunset reviews are essentially nothing more than new investigations. It then takes that unsupported assertion and makes a further leap of logic to the conclusion that various provisions of Article 11 (addressing "Initiation and Subsequent Investigation") *must* therefore apply in sunset reviews carried out under Article 21 (addressing "Duration and Review of Countervailing Duties").

5.148 Japan, in its third party submission, makes an even more impressive leap of logic, arguing that Article 11 requirements are made applicable to Article 21.3 sunset reviews by virtue of the fact

that Article 22 – which addresses “Public Notice and Explanation of Determinations” – applies to reviews under Article 21 (pursuant to paragraph 7 of Article 22). Apparently, according to Japan, the mere *mention* of Article 11 in Article 22.1 creates an obligation *to apply* Article 11 in Article 21.3 sunset reviews. I would also note that the provisions of Article 22 apply “*mutatis mutandis*” to reviews. This means that the public notice and explanation provisions are applicable to reviews, but with “necessary changes” or “changes as appropriate.”

5.149 Mr. Chairman, it goes without saying that treaty interpretation does not work that way. One cannot create a new set of international obligations through unsupported theories and unfounded suppositions that ignore the very words of the treaty being interpreted. It is well-accepted that, under the *Vienna Convention*, the ordinary meaning of a treaty is the basis for interpreting that treaty. The fact that the EC and Japan have to try so hard to find a connection between Article 11 and Article 21 is itself evidence of the lack of the very connection that they seek. Put differently, the United States agrees with the EC and Japan that Article 11 provides context for purposes of interpreting Article 21.3; but it is context that disproves their assertions.

5.150 As discussed in our First Written Submission, the drafters clearly knew how to cross-reference a particular provision to make it applicable in the context of Article 21 reviews. For example, Article 21.4 expressly makes the evidentiary requirements of Article 12 applicable in Article 21 reviews. Even Japan’s argument proves the point – Article 22.7 makes the public notice and explanation requirements of Article 22 applicable in Article 21 reviews on a *mutatis mutandis* basis.

5.151 The uncontested fact is that the drafters did not make the initiation and subsequent investigation requirements of Article 11 applicable in Article 21 reviews. And no amount of lawyering can override the plain text of the SCM Agreement or create an obligation that does not exist. The Article 11.6 evidentiary prerequisite simply does not apply to Article 21.3 sunset reviews; and neither does the Article 11.9 *de minimis* standard.

5.152 The EC makes claims based on its “reasonable and legitimate expectations” on these issues; yet it is the legitimate expectations of the Members as a whole, as expressed in the agreed text of the treaty, that are at risk of being infringed in this case. As the Appellate Body has stated in *India Patent Protection* at paragraph 45:

The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. 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.*

(Emphasis added.) If the Members had actually agreed that various provisions of Article 11 should apply in sunset reviews carried out under Article 21, the text would reflect that agreement, just as it does with respect to the application of Article 12 to Article 21 reviews. The EC is improperly trying to have the Panel do what the negotiators did not.

5.153 The EC is asking the Panel to read into Article 21.3 words, and hence obligations, that are not there. For this reason, the EC’s claims concerning self-initiation and *de minimis* must fail.

E. RESPONSES OF THE EUROPEAN COMMUNITIES TO QUESTIONS FROM THE PANEL FOLLOWING THE FIRST MEETING

**Both parties**

**Q1. In your view:**

- (a) **Is the *de minimis* standard contained in Article 11.9 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement" or "the Agreement") applicable to reviews under Article 21.2?**

**Reply**

5.154 Article 21.2 deals with reviews during the lifetime of the measure with the aim of examining whether the continued imposition of the measure remains necessary (based on the principle set out in Article 21.1). In the EC's view, with regard to the US system, we should distinguish between two types of review under Article 21.2, i.e. duty assessment reviews (administrative reviews under US law) and reviews where the effective need for continued imposition of the measure is examined (changed circumstances review under US law). As regards a changed circumstances review, the *de minimis* standard under 11.9 is applicable because Article 21.2 requires that if the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately. Changed circumstances reviews can thus affect the scope and, indeed, the continued imposition of the measure. Under Article 11.9 of the Agreement, the subsidy amount must be above 1 per cent to permit the imposition of a countervailing duty in the first place. It follows that if an interested party can show, in a changed circumstances review, that the subsidy amount will not rise above 1 per cent upon removal of the measure, the measure should be terminated immediately. It should be noted that virtually the same terminology "immediate termination" and "immediately terminated" is used in Articles 11.9 and 21.2 respectively.

5.155 On the other hand, a *de minimis* amount of subsidy found during a simple administrative review would not by itself oblige the authorities to terminate the proceeding, since the purpose of such a review is only to determine what amount of duty has to be collected. (Footnote 52 of the *SCM Agreement*). Thus, as the *Korea – DRAMS* panel determined, simple administrative reviews have no effect on the scope and continued imposition of a measure and cannot lead to its termination. As the EC explained in its first submission, administrative reviews in the *SCM Agreement* appear to fall under Article 21.2 by default, whereas in the Anti-Dumping Agreement (Footnote 21) they are not considered to be reviews at all.

- (b) **Are the negligible import volume and injury standards contained in Article 11.9 and the negligible injury standard contained in Article 15.3 applicable to reviews under Article 21.2?**

**Reply**

5.156 Negligible import volume and injury standards are provided for in the *SCM Agreement* because WTO members consider that such a small volume of imports can not be the cause of any injury sustained by the domestic industry. The use of the term "shall" indicates that this is not a refutable presumption. Therefore, if a certain volume of imports cannot cause injury at the initiation of an investigation, this irrefutable presumption applies to reviews under Article 21.2. in cases where it is demonstrated that the amount of the subsidy is less than 1 per cent ad valorem and is not going to increase above this level or that imports would not rise above *de minimis* upon removal of the measure. The terms, object and purpose of Article 21.2 in context compel such a conclusion.

- (c) **Are the negligible import volume and injury standards contained in Article 11.9 and the negligible injury standard contained in Article 15.3 applicable to reviews under Article 21.3?**

Reply

5.157 Article 21.3 lays down clearly a presumption of termination ("shall be terminated"). The authorities are required, therefore, to show that the conditions for imposing the original measure would, in its absence, continue to exist or recur and it is for the domestic industry and the investigating authority to show that, if the measure were removed, imports would be likely to again rise above *de minimis*. For essentially the same reasons stated in the reply to the previous question above and those explained more detail in the first written submission of the EC, the EC considers that the standards contained in Articles 11.9 and 15.3 of the *SCM Agreement* are applicable to reviews under Article 21.3 thereof.

- (d) **Are the negligible import volume standards for developing countries set out in Article 27.10 applicable to reviews under Article 21 in general, and to reviews under Article 21.3 in particular? Is the 2 per cent *de minimis* standard for developing countries set out in Article 27.10(b) applicable to reviews under Article 21 in general, and to reviews under Article 21.3 in particular? And is the 3 per cent *de minimis* level for certain developing countries set out in Article 27.11 applicable to reviews under Article 21 in general, and to reviews under Article 21.3 in particular?**

**Please explain in detail.**

Reply

5.158 The 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 21.3). The purpose of special *de minimis* thresholds for developing countries lies in Article 27.1 of the *SCM Agreement*. WTO members recognize that subsidies play an important role in the further economic development of developing countries and, therefore, agreed in Articles 27.10 and 27.11 to increase the minimum import volumes and subsidy amounts below which injury is presumed not to be caused. Likewise, this is an irrefutable presumption.

5.159 Article 27.10 states that "Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities determine...". It would be contrary to the explicit provisions of the *SCM Agreement* to grant certain exemptions because they are considered essential for development needs and only apply them to original countervailing investigations. It would also be contrary to the terms of Articles 27.10 and 27.11, read in conjunction with Articles 21.1, 21.2 and 21.3, not to apply them in reviews. Clearly the reference to "subsidization" in these Articles must be taken to refer to a level of subsidization which has been determined to be injurious with reference to the Member concerned.

5.160 An example may illustrate this point. Article 27.11 provides for a developing country Member, which eliminates export subsidies in less than eight years to benefit from an increased *de minimis* subsidy threshold of 3 per cent instead of 2 per cent. This provision aims to reward developing countries which have accelerated compliance with their obligations. Suppose a certain Member were able to benefit from this provision and the following year was involved in a US CVD sunset review involving one of its products. If the rate of subsidy likely to prevail was found to be 2.5 per cent, i.e. below the *de minimis* rate now applicable to the Member concerned, the US would

continue to impose a CVD order and the Member involved would have obtained absolutely no benefit from its efforts to remove early the export subsidies.

### European Communities

**Q2. The Panel notes the European Communities' argument regarding the presumption of termination of all countervailing duties ("CVDs") contained in Article 21 of the SCM Agreement and the claim that the US law and statement of policy practice in reviews under Article 21.3 disregard this presumption through the automatic initiation of reviews under Article 21.3, and thereby violate Article 21.3. In what precise manner would the US law and statement of policy practice have had to be different for them to be WTO-consistent? Please respond in light of the phrase "in a review initiated . . . on their own initiative" contained in Article 21.3 of the SCM Agreement.**

#### Reply

5.161 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.

5.162 The problem with US law is that it transforms the text and basic rationale of Article 21.3 and provides for self-initiation without taking account of the standard of evidence required under Articles 21.3 and 4 to meet the burden of proof of either the petitioner or the investigating authority in conjunction with Articles 11.6, 22.1 and 22.7 of the SCM Agreement. It follows that the investigating authority must be in possession of the same or an equivalent amount of sufficient evidence as the domestic industry at the time of initiating the review. The basic US law and its implementing regulations would have to provide for this in order to be WTO consistent. In particular, the US law will have to provide that:

- An applied CVD order shall terminate 5 years after its imposition and will not be reviewed unless the authorities, at the time of initiating the review, possess an amount of relevant evidence that is the same or equivalent to that required in original investigations;
- The burden of providing such evidence is placed on domestic industry or the authorities themselves;
- No reverse or negative inference is drawn from the fact that foreign exporters or producers or third countries do not participate at the initial call for the sunset review, except where Article 12.7 is applicable.

**Q3. How, if at all, do the European Communities' own statutory and regulatory provisions in respect of the initiation of reviews under Article 21.3 give meaning to the presumption of termination of all CVDs that the European Communities considers is contained in Article 21 of the SCM Agreement?**

#### Reply

5.163 Article 18 of Council Regulation (EC) No 2026/97 of 6 October 1997, the Community's basic CVD regulation, contains the relevant provisions on sunset reviews (known as "expiry reviews"). In accordance with Article 18.4, the Commission publishes a notice of impending expiry of a countervailing measure during the last year of its duration; our practice is to do this nine months before the date of expiry (the five-year anniversary date).

5.164 The notice of impending expiry states that unless a review is initiated, the measures will expire. In order for a review to be initiated, Community producers must, no later than three months before the expiry date, lodge a request containing sufficient evidence that the removal of the measures would be likely to result in continuation or recurrence of subsidy and injury. If the EU Commission considers that the request contains sufficient evidence, it initiates an expiry review. If there is no request, or if the request contains insufficient evidence, the Commission publishes a notice of expiry and the measures lapse on the five-year anniversary date. This notice of expiry is of purely declaratory nature.

5.165 There is consequently a presumption of termination, since in the absence of the provision of sufficient positive evidence by the Community producers justifying a review, the measures lapse automatically.

**Q4. Does the European Communities consider self-initiation of reviews under Article 21.3 by investigating authorities to be in and of itself WTO-inconsistent?**

Reply

5.166 No. Article 21.3 explicitly provides for the possibility of self-initiation, as does Article 18.1 of Regulation 2026/97. In fact, Article 21.3 provides for either self-initiation or initiation on the basis of a "duly motivated request" from the domestic industry. The Community's 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 the case in the initiation of new investigations (Articles 11.1 and 11.6). Otherwise, self-initiation would become the easy option and would lead to inconsistent results.

**Q5. The Panel notes the European Communities' arguments contained in paragraph 15 of its oral statement at the first meeting of the Panel.**

- (a) **Does the European Communities consider that there is a presumption in the SCM Agreement that *all* provisions of the Agreement are applicable to reviews under Article 21.3?**

Reply

5.167 The EC believes that no provision of the *SCM Agreement* can be read in isolation, and that all provisions 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.

- (b) **In what circumstances might some provisions of the Agreement not apply to reviews under Article 21.3?**

Reply

5.168 Subject to the above, there are provisions which clearly have no relevance to Article 21.3. As explained below, the provisions concerning multilateral subsidy disciplines, to the extent that they do not apply to countervailing duties at all, are not applicable to sunsets. Furthermore, a small number of provisions which concern countervailing duties cannot, for practical reasons, apply to sunsets. However, one has to be very careful before determining that a certain provision has no such relevance, since certain WTO Members may choose to take account of them in their own practice. For instance, the US, in its sunset practice, takes account of whether the subsidies fall under Articles 3

or 6.1 of the *SCM Agreement*, although neither of these provisions has any obvious relationship to countervailing duties.

- (c) **If there are particular provisions that, in the view of the European Communities, do not apply to reviews under Article 21.3, what are they, and why do they not apply?**

Reply

5.169 The *SCM Agreement* contains two major divisions: multilateral obligations for WTO members and provisions regarding the conduct of countervailing investigations. It is obvious that certain provisions imposing multilateral obligations on WTO members by nature do not apply to countervailing investigations.

5.170 The EC will provide an overview of the different parts of the *SCM Agreement* and explain whether provisions apply to countervailing proceedings and reviews under Article 21.3 in particular.

Part I:

5.171 Article 1 applies to sunset reviews since only subsidies as defined in Article 1 could fall within the concept of "subsidization".

5.172 Article 2 regarding specificity applies equally to sunset reviews.

Part II:

5.173 Article 3: the prohibition of certain subsidies as such does not apply to CVD. However, read in conjunction with Article 2.3 *SCM Agreement*, the definition of prohibited subsidies plays a role for CVD and reviews under Article 21.3 because these subsidies are deemed to be specific.

5.174 Article 4: is not applicable for CVD and sunsets since it covers specific dispute settlement rules regarding those prohibited subsidies.

Part III:

5.175 This part deals with actionable subsidies and possible multilateral remedies against those subsidies. It does not apply to CVD and sunsets. In addition, Article 6.1 has now expired.

Part IV:

5.176 Expired pursuant to Article 31 *SCM Agreement* on 31.12.99. When applicable, it created a category of non-actionable subsidies which made them non-countervailable in all CVD actions, including sunsets. For example, a regional aid countervailed pre-1995 could have been green-lighted and found non-countervailable in a post-1995 sunset review.

Part V:

5.177 All provisions of Part V regarding countervailing investigations is in principle applicable mutatis mutandis to sunset reviews under 21.3. For Article 12, there is an explicit reference. For other provisions, e.g. Article 15 on injury, it is clear that the word "injury" in Article 21.3 can only be interpreted with reference to Article 15. The same is true for "domestic industry" with relation to Article 16.

5.178 In those cases where there is no explicit reference to a specific article or term in Article 21.3, the EC submits that all provisions are in principle applicable to Article 21.3. The only exceptions are provisions which cannot, for practical reasons, serve any purpose in a sunset review. For instance:

- Article 17 regarding provisional measures can only apply to new investigation, where no measure is yet in force. Provisional measures can be imposed when a preliminary determination is made that a subsidy exists and there is injury. It is mainly intended to prevent injury during the remainder of the investigation and also serves to provide interested parties with an opportunity to comment on the preliminary finding regarding subsidies and injury. It is obvious that this provision is not relevant to a sunset review, where a duty is already in force and can remain effective pending the outcome of the review.
- Article 20 covers issues of retroactive collection of duties. This provides for the retroactive collection of provisional duties, and in critical circumstances, retroactive assessment for up to 90 days prior to the provisional stage. Since in a sunset review the duty is already in force this provision does not apply.

5.179 Part VI regards the establishment and the operation of the Committee on Subsidies and Countervailing Measures. As such, it does not have an impact on the conduct of countervailing proceedings including sunsets. However, the Committee may deal with issues regarding sunset investigations if a WTO Member puts a particular investigation on the agenda for discussion in the Committee.

5.180 Part VII deals with notifications and does not impact on the conduct of sunset reviews.

5.181 Part VIII deals with special and differential treatment for developing country members. Articles 27.10 to 27.12 refer to special CVD *de minimis* thresholds for developing countries, which are equally applicable to new investigations and sunset reviews (Question 1(d)). Article 27.15 deals with Committee review of any CVD measure, including the result of a sunset review. Article 27.1 is a declaratory provision which contributes to justifying the S&D provisions, including those relating to CVD.

5.182 Part IX does not apply to CVD since it covers some transitional multilateral obligations.

5.183 Part X concerning dispute settlement covers all aspects of the *SCM Agreement*. It also covers sunset reviews.

5.184 Part XI. Its provisions on "other final provisions" apply to sunsets.

5.185 Article 31. - The expiry of Article 8 removed the non-countervailable category of specific subsidies ; these are now countervailable in sunsets, even if, to reverse the example given under Part IV, the original subsidy had been green lighted in the first investigation.

5.186 Article 32 applies to sunsets (Article 32.4 explicitly).

**Q6. With respect to reviews under Article 21.3, does the European Communities consider that:**

- (a) **All the requirements of Articles 11.4, 11.5, and 11.11 apply to the initiation or self-initiation of reviews under Article 21.3? Why or why not?**

Reply

5.187 The standing requirements in Article 11.4 apply to reviews initiated under Article 21.3. These two articles require that applications or requests must be made "by or on behalf of the domestic industry", which is defined in Article 11.4.

5.188 Article 11.5 also applies to both. There is no reason why Members should be required to avoid publicising applications under Article 11, but should be allowed to publicise review requests under Article 21.3. Applications under 11.5 and requests under 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. Article 11.11 does not apply to Article 21.3 reviews. Article 21.4 explicitly governs the timing and duration of all reviews under Article 21, and its provisions differ from those of Article 11.11.

- (b) **Article 13.1 applies to reviews under Article 21 in general, and to reviews under Article 21.3 in particular? Why or why not?**

Reply

5.189 Article 13.1 refers explicitly to applications under Article 11 and "in any event before the initiation of any investigation". Footnote 44 refers to the fact that "no affirmative determination" shall be made without reasonable opportunity for consultations having been given. Such a determination may be made in either a new investigation or review, which implies that consultations should have been offered in the framework of a sunset. Thus, it would seem that Articles 13.1 and 13.2 would apply *mutatis mutandis* to Article 21.3 reviews.

- (c) **Article 19.4 applies to reviews under Article 21 in general, and to reviews under Article 21.3 in particular? Why or why not?**

Reply

5.190 Yes, it applies to both types of reviews ("no countervailing duty..."). Moreover, this interpretation is in conformity with the overriding principles laid down in Articles 10 and 21.1 of the *SCM Agreement*.

**Q7. The Panel notes the European Communities' arguments contained in paragraph 37 of its oral statement at the first meeting of the Panel.**

- (a) **Could the European Communities explain its view that the object and purpose of reviews under Article 21.3 and original investigations is the same, in light of the fact that an original investigation determines the existence of subsidization and injury *ab initio*, while a review under Article 21.3 occurs in the context of the existence of a prior finding of subsidization and injury?**

Reply

5.191 New investigations and Article 21.3 reviews with a positive outcome both have the same result – the application of a countervailing duty for a period of up to 5 years. In order for such duties to be imposed or maintained, the investigating authority must in both cases determine that the conditions for the imposition of a countervailing duty, as laid down in Article 19.1, are fulfilled. The only difference is that Article 21.3 reviews take place with a measure already in force, so that the investigating authority must determine whether, in the absence of that measure, the Article 19.1 conditions would be met. 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 countervailing measures; the object and purpose of both provisions, however, remains the same.

- (b) **Could the European Communities address specifically the difference, if any, between a finding of "the existence of and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury", so as to justify imposition of a CVD under Article 19.1, and a finding that "expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury" sufficient to justify continuation of the CVD under Article 21.3?**

Reply

5.192 There are not differences except that in the case of Article 21.3 there are CVD measures already in force. The purpose of an Article 21.3 review is to determine whether, absent the measures in force, all the conditions for the imposition of a duty under Article 19.1 would still be present. Since an Article 21.3 review always takes place with a measure in force, this inevitably involves a certain element of prediction based on the facts presented of what would happen if the measures were left to expire. The investigating authorities are required to meet the "likely" standard, while applying the provisions of Article 21.1. However, the concepts of subsidization, causality and injury have to be interpreted in the same way in the context of both provisions. Moreover, it has to be based on "evidence", not on pure conjecture and speculation. This follows from Article 21.4, which makes Article 12 relating to evidence applicable to reviews. Moreover, the requirement to re-establish the existence of the Article 19.1 conditions in a sunset review flows from the general presumption of termination in Article 21.3, in conjunction with the basic requirements of Article 21.1.

5.193 In this regard, it should be noted that, regardless of the presence or absence of measures, some factual situations are inherently more predictable than others. For example, while it may be relatively difficult to determine to what extent a company will resume dumping practices if a measure is dropped, sovereign States normally behave differently and in a more predictable way as regards the granting of subsidies. Moreover, a non-recurring subsidy in a CVD case (as is the case here) will always be predictable, since the benefit stream calculated is known for the whole allocation period of the subsidy. In such a case, it would be for the investigating authority to justify, on the basis of positive evidence, a finding that any other related factors, e.g. the denominator, would change.

**Q8. The European Communities refers, in paragraph 3 of its oral statement at the first meeting of the Panel, to the fact that CVD measures are exceptional, non-MFN measures. The European Communities further relies on a characterization of continuation of a measure after a review as an "exception" in arguing that the provisions of Article 21.3 must be strictly interpreted.**

- (a) **First, does the European Communities consider that this requirement of strict interpretation applies to the entirety of Part V of the SCM Agreement?**

Reply

5.194 The EC considers that the provisions of Article 21.3 *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. The exceptional character of continuation of the duty beyond the five-year period is reflected in the use of "unless" which introduces the exception. The EC considers that a number of provisions of the *SCM Agreement* (e.g. Articles 10, 11.3, 11.5, 11.9, 19.4, 21.1, etc.) provide implicit support for the proposition that CVD orders should be imposed after careful and strict interpretation of all the provisions of the *SCM Agreement*.

- (b) **Second, could the European Communities explain how, in its view, reading the text of Article 21.3 to include obligations not explicitly set out therein, but set out in Article 11.6 (or 11.9), is a "strict interpretation" of Article 21.3?**

Reply

5.195 The phrase "strict interpretation" in this context 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 per cent 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 per cent *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.

**Q9. What precise evidentiary standards does the European Communities consider as being required for the initiation of reviews under Article 21.3, particularly in light of the linkages the European Communities sees between Articles 21.3 and 11.6? In the view of the European Communities, is there any difference between the evidentiary standards required for the initiation of original investigations and those required for the initiation of reviews under Article 21.3?**

Reply

5.196 When an investigating authority decides to initiate a review under Article 21.3, it should have sufficient evidence of subsidization, injury and a causal link between those requirements. The level of evidence required in a sunset review is the same or equivalent to the evidence required in an original investigation. Article 21.3 requires the investigating authority to make a determination of likelihood of continuation or recurrence of subsidization and injury. Therefore, before opening the sunset review there should be sufficient evidence of the two aspects which are likely to continue or recur. The final review determination should positively demonstrate both likelihood of subsidization causality and injury.

5.197 Article 11.6 requires that when an investigating authority self-initiates an original investigation, the standard of evidence is sufficient evidence. Since an original investigation and a sunset review have the same object and purpose, this standard should apply to self-initiated sunset reviews, as it is the practice under US law. Articles 22.1 and 22.7 confirm this proposition.

**Q10. Please comment on the relevance, if any, of the retrospective and prospective nature of the assessment to be made, respectively, in original investigations and in reviews under Article 21.3. In particular, how is an assessment of the existence of injurious subsidization similar to and/or different from an assessment of the effects of the revocation of a duty in terms of injurious subsidization? How precisely would the European Communities suggest that the relevant subsidization rate for a review under Article 21.3 should be calculated?**

Reply

5.198 Both types of investigation involve some retrospective and prospective assessment. This is because original investigations and sunset reviews are quite similar by nature and operation. The original investigation must necessarily involve retrospective calculations of the amount of subsidy for a particular period (an investigation period prior to the initiation of the case or the review). The purpose is to determine the amount of benefit granted to a particular company during a specific period

of time. Likewise, sunset reviews also involve a retrospective analysis since the subsidization of the past years is often the basis for the sunset finding, especially when the subsidy is non-recurring. The retrospective analysis is consequently extrapolated for the five coming years (prospective nature).

5.199 In view of the prospective character of the measure which is the outcome of the original investigation and the sunset review, it is essential that a determination is made of the amount of subsidy. According to Article 19.1, an original investigation aims to measure the need for offsetting injury while in a sunset review the purpose is to examine in addition at what level subsidization will recur or continue if the measure were to be removed.

5.200 However, in a sunset review, as in an original investigation, the subsidy rate should be calculated exactly during the period of review since the investigating authority (particularly for non-recurring subsidies for which the benefit is known) should use this as the basis for establishing the level at which subsidization will continue or recur if the measure were to be removed. The "likelihood" element of the determination relates to the continuation or recurrence of the subsidy and injury, but if the amount found likely to continue or recur, on the basis of the amount found in the review period, is *de minimis*, the case should be terminated immediately.

**Q11. Article 11.6 allows investigating authorities to proceed to initiation without having received a written application by or on behalf of a domestic industry "only if they have sufficient evidence of the existence of a subsidy, injury and causal link, as described in paragraph 2". Article 11.2 of the SCM Agreement sets out, in subparagraph (iii), that this evidence should include "evidence with regard to the existence, amount and nature of the subsidy in question". Could the European Communities comment on the proposition that the CVD order itself, or the results of the most recent review under Article 21.2, is evidence of the existence, amount, and nature of the subsidy in question, consistent with the requirements of Article 11.2(iii)?**

Reply

5.201 The EC would agree that a sufficient amount of evidence on the existence, nature and amount of the subsidy is necessary for initiating a sunset review. However, the initial CVD order, dating from five or more years ago, is not by itself sufficient to meet the burden of proof for initiating a sunset review. There must be the same or equivalent evidence that the original subsidy is likely to continue to exist and to confer a benefit to the current exporters of the product, or there must be evidence of new subsidies.

5.202 The evidence of a more recent Article 21.2 review may in principle be more relevant, but it will not by itself be sufficient either. Furthermore, such evidence, as applied in the US system, must work both ways. For instance, if a recent administrative review shows that a subsidy amount is *de minimis* and the subsidy is non-recurring, this should confirm the presumption against initiating, unless compelling evidence of new subsidies is brought forward. Under the present US rules, the US takes no account of such factors when initiating reviews or when continuing CVD measures.

**Q12. Please respond to the following:**

**In the view of the European Communities, is there any similarity between the evidentiary standards required for the self-initiation of reviews under Article 21.2 ("where warranted") and those required for the self-initiation of reviews under Article 21.3?**

Reply

5.203 Subject to the kind of review that is to be carried out under Article 21.2, there is similarity to the extent that, in both cases, the investigating authority would need to be in possession of the same or equivalent amount of sufficient information required from an interested party ("positive information" in the case of a 21.2 review) or the domestic industry ("a duly motivated request" in the case of a 21.3 review). This similarity stems from the fact that in both cases the authorities are required to possess a sufficient amount of evidence in order to initiate review. This is because both types of review are not neutral, in the sense that both may impose costs on the parties involved and disrupt international trade.

- (b) **Could the European Communities explain its view – expressed in response to an oral question from the Panel at its first meeting – that the requirements for evidence necessary to justify self-initiation under Article 21.2 are lower than the requirements necessary to justify self-initiation under Article 21.3?**

Reply

5.204 This will essentially depend on the type of review carried out under Article 21.2. In 21.2 reviews, the investigating authority, reflecting the burden of proof imposed on interested parties, would need to be convinced that the continued imposition of the duty was no longer necessary ("where warranted" in Article 21.2). Such a conviction **may** sometimes require a high standard of evidence but may sometimes be based on very simple evidence, for instance, the allocation period for a subsidy may have expired or domestic production in the country imposing the measure may have ceased. In addition, a 21.2 review may be limited to an examination of **either** subsidy or injury. Therefore, a 21.2 review may, in some circumstances, require a smaller amount of evidence.

5.205 In contrast, the purpose of sunset reviews under 21.3 is to rebut the presumption of termination of the measure. Such reviews **always** require a minimum (and rather high) standard of evidence to demonstrate that **both** subsidy and injury is likely to continue or recur if the measure were to be removed.

- (c) **Where in the SCM Agreement does the European Communities find the support for lower evidentiary standards applicable to self-initiation under Article 21.2?**

Reply

5.206 See answer above. It will essentially depend on the kind of Article 21.2. reviews under consideration (i.e. administrative review, charge of circumstances reviews, etc.). The term "were warranted" can provide the basis for such a proposition.

- (d) **How is an assessment of the need for the continued imposition of the duty similar to and/or different from an assessment of the effects of the revocation of a duty in terms of injurious subsidization?**

Reply

5.207 Leaving aside the situations where the authorities initiate the review, the assessment concerning the need for continued imposition (Article 21.2) and the effects of revocation of a duty (Article 21.3) are quite similar. Both examinations focus on the prospective nature of the exercise, i.e. would the removal of the duty lead to continued subsidization and injury. The main difference is the burden of proof. For example, in an Article 21.2 review, the burden of proof is essentially on the interested party (usually a foreign exporter) to justify that there is no need for continued imposition. In an Article 21.3 review, in contrast, the domestic industry must meet the burden of proof to rebut the

presumption of expiry of a duty. In both cases, however, the authorities are required to make a positive determination about subsidization, causality and injury.

**Q13. The European Communities argues that, "in order to initiate a sunset review on its own initiative, the domestic authorities should be in possession of the same level of evidence that would be required in a 'duly substantiated request' from the domestic industry".<sup>67</sup>**

**(a) What does the European Communities understand by the term "duly substantiated request"?**

Reply

5.208 In the EC's view, therefore, a "duly substantiated request" is a request by or on behalf of the domestic industry that contains sufficient evidence that the expiry of the measures would be likely to result in a continuation or recurrence of subsidization and injury, in order to justify a review under Article 21.3. Such a likelihood may, for example, be indicated by evidence of continued subsidization and injury, or evidence that the removal of existing injury is due to the existence of measures. A "duly substantiated" request should normally, inter alia, contain information on:

- the volume and value of domestic production
- the volume and value of the production of petitioners
- volume and value of total imports
- volume and value of subsidized imports
- evidence with regard to the existence, amount and the nature of the subsidy, plus - evidence relating to its continuation or recurrence
- information regarding the effect of imports on prices, production, lost sales
- causality between subsidized imports and injury, and evidence of why such injury will continue or recur.

Although the exact content of a duly substantiated request under Article 21.3 will differ in some ways from the content of an application under Article 11.2, since an Article 21.3 request will relate to a situation where measures are in force and injurious subsidization has already been established, the elements contained in an Article 11.2 should normally be present.

**(b) In the view of the European Communities, is there any difference between the evidentiary standards required for the initiation of reviews under Article 21.3 upon request from the domestic industry and those required for the self-initiation of reviews under Article 21.3 by investigating authorities?**

Reply

5.209 The evidence required in a request from the industry and self-initiation should for all practical purposes be the same. The purpose of the evidentiary standard is to guarantee that genuine cases are brought which are backed-up by concrete evidence. If a different standard would apply to self-initiation, this would seriously alter the rights of affected parties and would allow circumvention of these mandatory provisions. This would open the door for situations where the domestic industry does not succeed in creating a prima facie case, but the investigating authority could circumvent it by self-initiating since the evidentiary standard would be different (i.e. lower).

5.210 The EC's point is that a correct interpretation of the purpose of Article 21.3 requires investigating authorities to self-initiate reviews only on the basis of sufficient evidentiary support.

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<sup>67</sup> First Written Submission of the European Communities, para. 65.

Where investigating authorities are free to initiate, as it is the case in the US, without any evidentiary support at all, a major distortion of the system as established by the *SCM agreement* was a parallel between the EC "automatic" notice of impending expiry and the US "automatic" notice of initiation of a CVD measure. The EC duly emphasized the fundamental difference between the "legal effect" attached to these notices: one (the EC) notifies that an expiry is impending, and placing the onus on the domestic industry to produce evidence, without putting any burden on the exporters; the other (the US) actually initiates an investigation without evidence and requires an important and burdensome action from exporters to produce evidence that the measure should not expire. This is a clear reversal of the burden of proof.

5.211 However, it should be noted that *de facto* the actual function and scope of the EC notice of impending expiry and the US notice of initiation is the same: to notify the domestic industry the imminent deadline. Actually, the two documents look quite alike and contain the same type of information. The substantial difference is that, under EC law, following a notice of impending expiry the domestic industry must produce a "duly substantiated request" in order to have the sunset review initiated, whereas under US law it is enough for one company to simply manifest its interest. Without such so-called "adequate response" from a domestic producer (which can be a two-line letter), DOC must terminate the sunset review by law.<sup>68</sup> This clearly shows that the automatic self-initiation by DOC is simply a device for lowering the level of evidence required from the domestic industry in order to initiate a sunset review. Such is possible only if one admits that an investigating authority can initiate a sunset review automatically, i.e. by definition without any shred of evidence.

**Q14. In paragraph 52 of its oral statement at the first meeting of the Panel, the European Communities comments that "a panel must not only revise the evidence submitted to it by the parties, but also all other evidence, including evidence it might consider necessary to get it [sic] itself under Article 13 DSU". Could the European Communities explain this view in light of the recent decision of the Appellate Body in *United States – Cotton Yarn*<sup>69</sup> concerning the evidence a panel may consider in reviewing a determination by a Member?**

#### Reply

5.212 The EC agrees with the Appellate Body's findings in paragraphs 62-81 of the report in *United States – Cotton Yarn*. The Appellate Body has taken particular care to clarify that its findings in that case were limited only "to facts which predate the determination, but which was not in existence at the time the determination was made" by the competent authorities of a Member (at paragraphs 67 and 78). It also clarified that the evidence it was dealing with in that case was "evidence in the form of data that had not been compiled at the time of the determination and, hence, could not have been known." (at footnotes 39 and 51). It follows from the above description that the factual basis of the EC's claim in the present case is very different from the one examined by the Appellate Body in the *Cotton Yarn* case. The evidence the EC claims the US authorities should have taken into account is evidence that definitively existed at the time the determination made by the DOC and, moreover, it was well known to the US authorities since they were the actual authors of that evidence (which is also in the form of data on the declining balance methodology and the level of subsidization of the German exporters under the CIG programme). The accuracy of the above is not

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<sup>68</sup> Section 751(c)3(A) of the Tariff Act 1930 states under the heading "No response": "*If no interested party responds to the notice of initiation under this subsection, the administering authority shall issue a final determination, within 90 days after the initiation of a review, revoking the order or terminating the suspended investigation to which such notice relates*".

<sup>69</sup> *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ("United States – Cotton Yarn"), Report of the Appellate Body, WT/DS192/AB/R, adopted 5 November 2001, paras. 67-81.

denied even by the DOC in its final determination in this case nor by the US's submissions to the Panel so far.

5.213 The EC also agrees with the summary of the "key elements" the Appellate Body laid down on the standard of review that panels should follow under Article 11 of the DSU (at para. 74). The EC notes that the Appellate Body cited with approval its previous finding that the national authorities "must undertake additional investigative steps, when the circumstances so require, in order to fulfil their obligation to evaluate all relevant factors" (at para. 73). That is why the EC considers that for the purpose of determining whether the US authorities have evaluated all relevant factors and examined all pertinent facts, the Panel can take advantage of the provision of Article 13 of the DSU. It is also noteworthy that in the view of the Appellate Body "in describing the duties of competent authorities, we simultaneously define the duties of panels in reviewing the investigations and determinations carried out by competent authorities" (at para. 73). Furthermore, the EC agrees that the standard of review laid down by the Appellate Body with respect to the Safeguards Agreement are equally applicable to the standard of review to be applied under the *SCM Agreement* (at para. 76).

5.214 What is particularly important is the finding by the Appellate Body that "a panel reviewing the due diligence exercised by a Member in making its determination ... has to put itself in the place of that Member at the time it makes its determination" (at para. 78). Application of this principle to the facts of the present case would clearly require the present Panel to consider the evidence that existed and was made available to the US DOC but which it refused to take into account on the erroneous allegation that it was submitted outside the time limit. This was not only relevant evidence but evidence indispensable for the proper conduct of the sunset review. The legal consequence of the US DOC's refusal to consider it should lead to the reversal of the DOC's findings. The EC does not request the Panel to carry out a *de novo* review in this case but simply to find that the DOC's determination is inconsistent with the US obligations under Article 21.3 of the *SCM Agreement* to determine subsidization, causality and injury, and because it refused to consider highly relevant evidence that existed at the time of the determination and of the existence of which they were fully aware at that time.

**Q15. The Panel notes the following US statement: "As a starting point for making its likelihood determination in the sunset review, Commerce considered the countervailable subsidies and programmes used, and the amount of the subsidy determined, in the original investigation. As explained in Commerce's preliminary sunset determination, the rationale for this approach is that the findings in the original investigation provide the only evidence reflecting the behaviour of the respondents without the discipline of countervailing measures in place".<sup>70</sup> The Panel further notes the European Communities' arguments contained in paragraph 23 of its oral statement at the first meeting of the Panel. On what legal basis does the European Communities challenge the US Department of Commerce's ("DOC") use of the CVD rate from the original investigation (or a review under Article 21.2), and the rationale for the use of this rate?**

#### Reply

5.215 The legal basis is Article 21.3, which imposes a clear obligation on the US authorities to make a fresh determination of likelihood of subsidization, causality and injury. The CVD rate from the original investigation may in some cases be an element to take into account in the fresh determination in a sunset review. However, the US law and practice is to use invariably this rate from the original investigation in sunset reviews, even in cases, such as the present one, where exporters and foreign governments have presented concrete and verifiable evidence to show that the subsidy has changed or ceased to exist.

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<sup>70</sup> First Written Submission of the United States, para. 92 (footnote deleted).

5.216 The US argument that "...the findings in the original investigation provide the only evidence reflecting the behaviour of the respondents without the discipline of countervailing measures in place" is without merit, particularly in the case of a subsidy recognized by the US DOC to be a non-recurring one. In such a case, in the absence of new subsidies, it is definitively known that the amount of the subsidy will fall and is bound to disappear within the determined period of time in the original investigation.

5.217 The US DOC systematically refuses to change the original duty rate likely to prevail, even where administrative reviews have shown massive fall in non-recurring subsidies. In such cases, it always recommends the original rate, even if, as in some cases, this rate dates back to 15 years. For example, in the case of **Certain carbon steel products from Sweden**, for which the expedited review was concluded on 29 March 2000, the US DOC alleged that the Swedish exporters will continue to benefit from two subsidy programmes beyond the end of the review. In light of this position, DOC has decided to confirm the original subsidy rate of 8.77 per cent, which dates from October 1985, even though in the most recent administrative review (covering the year 1997) the subsidy rate was determined to be only 0.72 per cent. Since the subsidies in question are long-term loans allocated over time, the future amounts of benefit are clearly predictable and are not going to increase. It is, therefore, hard to see how the subsidy amount will ever go beyond 0.72 per cent.

5.218 Similarly, in the case of **Corrosion-resistant carbon flat steel products from France**, also concluded on 29 March 2000, the DOC has opted for the rate from the original investigation of 15.13 per cent, first imposed in 1993. Although no administrative reviews have been carried out in this case, a recent new countervailing duty investigation<sup>71</sup>, presumably reflecting the level of subsidy without the discipline of an order in place, found a subsidy rate of 5.38 per cent for the company Usinor, the same exporter as in the above case. Given that the subsidies appear to be untied in both cases, there is no reason for the US DOC not to refer to sheet and strip rate in the context of the sunset review and to report a lower rate to the ITC. Furthermore, the US DOC appears to have much more flexibility when it comes to **increasing** the rate of a countervailing duty likely to prevail. In the **Cut-To-Length Carbon Steel Plate from Belgium case (C-423-806)**, DOC increased the CVD rate which is likely to prevail from 0.96 per cent in the original investigation (of 1993) to 1.05 per cent in the sunset review. Although one administrative review was conducted by DOC in which the CVD rate was established at 0.69 per cent, DOC did not take these findings into account because it considers that all the subsidy programmes countervailed in the original investigation remained in place. Likewise, in the sunset review in the case of **Sugar from the EC (C-408-046)**, a measure which dates from 1978, the CVD rate was increased from 10.8 cts/pound to 23.69 cts/pound.

5.219 If a final determination of likelihood of recurrence or continuation of subsidization and injury in a sunset review had to be based exclusively on evidence reflecting the behaviour of the exporters in the original investigation without taking into account the order in force, it is self-evident that a respondent will never succeed in getting rid of a CVD duty on such basis. As a matter of fact this is what happens in the US: DOC has never found until now that there was no likelihood of recurrence or continuation of subsidization in a CVD sunset review against EC exports.

5.220 There is, therefore, a need to understand what exactly the US means by using the terms "the findings in the original investigation provide the only evidence reflecting the behaviour of the respondents without the discipline of the countervailing measures in place". This reference to the so-called "discipline in place" in fact assimilates CVD orders to antidumping duties. The rationale of granting subsidies and imposing CVD orders are, however, drastically different from those pertaining to dumping and the imposition of AD duties. In the latter case there is one actor, the individual exporter, who can swiftly decide the whole strategy of the company regarding when, where and at what price to export, if the AD duty were to expire. Conversely, in the case of subsidies the situation

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<sup>71</sup> Stainless steel sheet and strip from France, July 1999.

is not the same, because governments normally do not behave commercially in the same way as individual companies. For instance, in case of non-recurring subsidies, it is more reasonable to assume that governments will not rush again to grant a new subsidy if a CVD order were allowed to expire. The principle is that granting a new subsidy or increasing the level of an existing one is normally subject to rather different considerations (e.g. availability of funds, existence of social, regional, restructuring, environmental or other reasons in favour of continuing the subsidy, etc.), which distinguish them clearly from the natural desire of individual companies to swiftly divert exports in order to increase profits when an AD order is left to expire. Moreover, subsidies take normally time to be discussed and decided in national parliaments and this further distinguishes them from dumping practices. To speak of a "discipline in place", therefore, is to disregard completely the peculiarities and specificities of the reasons for which governments usually grant subsidies, compared to the risk of recurrence of dumping. It follows that as a matter of fact and law a CVD order is not a "discipline" in particular in case of non-recurring, declining subsidies, since such a subsidy has been given in the past, has been consumed for the period of time lapsed and is known that it will not recur in the future. It can, therefore, be said with confidence that in such cases the CVD order has no "disciplining" effect on exporters' behaviour. It also follows that applying again the rate of subsidy determined in the original investigation is a clear violation of Article 21.3 and the obligation to make a fresh determination on likelihood of subsidization, causality and injury.

**Q16. Please respond to the following:**

- (a) **Could the European Communities comment on the difficulty inherent in a review under Article 21.3 of making a forward-looking assessment, given that the data for the previous five years reflect government and exporter behaviour with "the discipline of countervailing measures in place"<sup>72</sup>?**

Reply

5.221 First, as explained above, the EC contests the US assumption that there is "a discipline in place" which is likely to modify in any significant way the behaviour of governments and of the exporters in case a CVD order were allowed to expire. Second, a determination about the likelihood of continuation or recurrence of subsidization, causality and injury must necessarily be based on projections extrapolating from existing data. There is nothing unusual or especially difficult in this regard because governments are quite used to make this type of determinations in a number of situations. For example, in a different but, *mutatis mutandis*, comparable situation, the Appellate Body said in *United States – Lamb Safeguard* report the following:

*"As facts, by their very nature, pertain to the present and the past, the occurrence of future events can never be definitively proven by facts. There is, therefore, a tension between a future-oriented "threat" analysis, which, ultimately, calls for a degree of "conjecture" about the likelihood of a future event, and the need for a fact-based determination. Unavoidably, this tension must be resolved through the use of facts from the present and the past to justify the conclusion about the future, namely that serious injury is "clearly imminent".<sup>73</sup>*

Had the US used facts from the present, and if necessary from the past, to justify its conclusions about the future in the present case, there should have been only one possible outcome, i.e. the termination of the CVD order in question because the level of the subsidy would have been clearly below the

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<sup>72</sup> First Written Submission of the United States, para. 92.

<sup>73</sup> See Appellate Body Report, *United States - Safeguard Measures on Imports of Fresh or Frozen Lamb Meat from New Zealand and Australia ("United States - Lamb Safeguard")*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 136, emphasis added.

1 per cent ad valorem *de minimis* rule applicable in reviews.<sup>74</sup> As explained time and time again, the CIG programme was determined by the US to be a non-recurring, declining subsidy. Applying the US's own calculation methodology, the amount that would have continued after 2000 is equivalent to zero. No new subsidies have been shown by DOC to exist or were likely to be granted in the period in question. There were, therefore, clearly no present or past facts that could justify a conclusion about the future different from the need to terminate immediately the CVD order applicable to the products in question.

5.222 The EC does not accept, therefore, the view that a review under Article 21.3 involves difficulties. Governments are used to this type of calculations and there can be no excuse to merely side step any need to undertake a fresh forward-looking determination in a sunset review on the basis of such alleged difficulties. Therefore, the EC considers that, as a general rule, the same elements, which the investigating authorities took into account in the original investigation in a retrospective manner, should be analysed in a prospective way during the sunset review.

**(b) What range of factors needs to be taken into account, in the view of the European Communities, in making this forward-looking assessment?**

Reply

5.223 As explained above, the EC considers that, as a general rule, the same elements and factors that the investigating authorities took into account in the original investigation in a retrospective manner should be analysed in a prospective way during the sunset review. These are laid down essentially in Articles 11, 12 and 15 of the *SCM Agreement*. However, the range of factors to be taken into account in making the forward-looking assessment necessary to establish the likelihood of recurrence or continuation of subsidization has to be evaluated on case by case basis, as it mainly depends on the kind of subsidy under examination. For example, if it is a recurring unemployment subsidy, the investigating authorities should consider the likelihood of lay-offs within the reasonable future. In the case at issue, however, the main subsidy was a non-recurring subsidy that by definition cannot recur. There could have been no continuation of benefits in such a case, if the US authorities were simply to take into consideration the calculation memorandum that was part of the file of the original investigation.

5.224 As noted above, an aspect to be considered in order to determine the likelihood of recurrence or continuation of subsidization may also be the CVD rate from the original investigation. But there are several other factors and some of them may be more relevant and important ones. For example, consideration should be given to old subsidy programmes now terminated, new subsidy programmes that did not exist at the time the original investigation was made, changes in existing programmes, economic situation of the exporting company, its production, etc. These are some very important factors to be taken into account in a sunset review, together with the expected behaviour of the foreign government. In a sunset review, the forward-looking aspect of the assessment, implied by the terms "would be likely to lead to", refers in particular to the continuation or recurrence of subsidization, causality and injury. Because this involves a certain amount of projections extrapolating from existing data, it may be argued that Article 21.3 somewhat "softens" the requirements in particular of Articles 11.2 and 11.3 of the *SCM Agreement* relating to the "existence" of subsidization and injury. However, a sunset review determination that is based only on the CVD rate established in the original investigation or one that does not apply the 1 per cent *de minimis* rule violates clearly the whole object and purpose of the *SCM Agreement*. The US, instead of conducting a fresh "determination" in the proper sense of this term, advance as excuse reasons pertaining to the difficulties in calculating the numerator or denominator in the formula used to calculate the subsidy. These are not exceptional nor

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<sup>74</sup> Moreover, it would have also been below the 0.5 per cent ad valorem *de minimis* rule applied by the US under national law.

insurmountable difficulties, however, and the US takes no concrete steps and does absolutely nothing positive to deal with them, other than simply acknowledge their existence.

- (c) **In this regard, the Panel notes the view of the European Communities – expressed in response to an oral question posed by the Panel at its first meeting – that the CVD rate from the original investigation can only be "a starting-point". Please explain in detail.**

#### Reply

5.225 As explained above, the CVD rate from the original investigation may be just one of the factors to take into account in a sunset review. In this sense only it is a "starting point". For example, it is obvious that in a case of a non-recurring, declining subsidy the original CVD rate cannot be used as such, since the benefits of the subsidy are bound to expire.

5.226 On a more general plane, it should be noted that the text of Article 21.3 does not state expressly how exactly to conduct a sunset determination. However, there is nothing unusual in that, as other provisions of the same Agreement or of other WTO Agreements do not always laid down in detail provisions about their concrete application and implementation. This is because the applicable rules can be easily inferred. The identification of those rules is normally done on the basis of the customary rules of interpretation of public international law (Art. 3.2 DSU). One such recent example provides the Appellate Body report in *United States – Cotton Yarn* case, where the Appellate Body recognized the lack of explicit provisions on how to conduct a comparative analysis of the effects of imports under Article 6.4, second sentence, of the ATC Agreement (at paragraph 117), and resolved the issue by having recourse to the generally accepted rules of interpretation in the ensuing paragraphs (paras. 117-121) before turning to the specific provision of Article 6.4 and the facts of that case (at paras. 122-127).

5.227 This is what the EC proposes the Panel to do also in the present case. As explained above, as well as in the written and oral submissions, a sunset determination has, as a starting point, to take account of the same elements and factors that the investigating authorities took into account in the original investigation. This is, however, obviously not enough in the context of a sunset review for a number of reasons, e.g. because old subsidy programmes may now be terminated, new subsidy programmes may enter into force that did not exist at the time the original investigation was made, changes in existing programmes, economic situation of the exporting company, its production, etc. The non-recurring and declining nature of the subsidy is also a very important factor to take into account. To interpret the text of Article 21.3 otherwise would be to reduce the terms "shall determine" and the whole object and purpose of sunset reviews to inutility, as the Appellate Body said in the *United States – Cotton Yarn* case (at para. 121), because this will lead to the unjustified continuation of CVD measures for five more years. The US law and practice on sunset reviews provides a concrete example of such a flagrant violation of these basic principles of interpretation, because the US does not apply the 1 per cent *de minimis* rule in sunset reviews. The result is that a subsidy that was found to be below the 1 per cent *de minimis* rule in the original investigation will continue for five more years because the US uses in sunset reviews the CVD rate established in the original investigation.

**Q17. Please explain what the European Communities understands by the term "total steel sales", contained in paragraph 5 of the European Communities' oral statement at the first meeting of the Panel, and how it applies to the calculation of likely ad valorem subsidy rates.**

Reply

5.228 The term "total steel sales" contained in paragraph 5 of the EC's oral statement refers to the total sales of the respondent companies in 1991. Pursuant to its regulations, the US DOC calculates an ad valorem subsidy rate for domestic subsidies by dividing the amount of the benefit allocated to the period of investigation by the sales value of all products sold by the respondent during the period of investigation (19 C.F.R. § 351.525(a) & (b)(3)).

**Q18. In the view of the European Communities, were the EC respondent parties given "ample opportunity [by the DOC] to present in writing all evidence which they consider[ed] relevant in respect of the investigation in question", within the meaning of Article 12.1:**

- (a) Prior to the DOC's determination of 20 October 1999 to conduct a full review under Article 21.3;**
- (b) Following such determination and prior to the DOC's preliminary determination of 27 March 2000; and**
- (c) Following such determination and prior to the DOC's final determination of 2 August 2000?**

**Why or why not?**

Reply

5.229 As regards (a) above, the EC respondent parties were not given any opportunity, let alone an ample one, to present in writing "all evidence which they considered relevant in respect of the investigation in question". This is because the US authorities initiated automatically and of their initiative the sunset review. The US argument that the affected respondents had 15 months to prepare (e.g. para. 103 of 1<sup>st</sup> US written submission) is, therefore, totally misleading, false and irrelevant because the type of comments the respondents could and were allowed to submit before the initiation concerned only "the proposed schedule and grouping of reviews", not the substance of the conditions applicable for a sunset review (see Exhibit US-1, Federal Register/Vol. 63, No. 103/Friday, 29 May 1998/Notices, page 29373).

5.230 As regards (b) above, the US informed the respondents by letter of 26 August 1999, i.e. four days before the actual initiation of the reviews (1 September 1999) (See Exhibit US-2). This letter provided 15 days to file a "notice of intent to participate" and 30 more days therefrom to file "substantive responses". The rest of the information contained in the letter provided information on the formalities on such filings. The vague nature of the US DOC's information request, however, coupled with its refusal to accept any factual information after the initial 35 days of a sunset review proceeding violate the provisions of Article 12.1. Unlike in new countervailing duty investigations and administrative reviews, the US DOC does not issue questionnaires in a sunset review. Instead, the US DOC requires the interested parties to respond to a short list of questions contained in its regulations (see 19 C.F.R. § 351.218(d)(3)). Most of these questions are perfunctory in nature, seeking information concerning the name and address of the party's legal representative and the party's historic countervailing duty rates (see 19 C.F.R. § 351.218(d)(3)(ii)(A) & (iii)(A)). For example, with respect to the key issue of the likely continuation or recurrence of subsidization, the US DOC regulations simply request the interested party to provide a "statement regarding the likely effects of revocation of the order...under review, which must include any factual information, argument, and reason to support such statement." (see 19 C.F.R. § 351.218(d)(3)(ii)(F)).

5.231 In addition to this vague request for information, the US DOC regulations provide that "the Secretary normally will not accept or consider any additional information from a party after the time for filing rebuttals has expired." (see 19 C.F.R. § 351.218(d)(4)). Under the sunset regulations, rebuttals are required to be filed within 35 days of the publication of the notice of initiation in the Federal Register (see 19 C.F.R. § 351.218(d)(3) & (4)). Thus, under the US DOC's regulations, an interested party, guided only by the vague request to provide any factual information regarding the likely effects of revocation of the countervailing duty order, has merely 35 days to provide all of its factual information in the sunset review. Moreover, until the preliminary determination is made it knows completely nothing of the information possibly submitted by the other parties, the domestic industry or taken ex officio into account by DOC. In light of the fact that the sunset review statute provides DOC with 240 days in which to make its sunset review determination, there can be no justification for such a restrictively short period for providing factual information and to respond to the information submitted by the other interested parties (see 19 U.S.C. § 1675(c)(5)). Moreover, the fact that the US DOC's decision as to whether or not to conduct a full sunset review is not issued until 50 days after publication of the notice of initiation means that, even after the US DOC makes a determination to conduct a full sunset review, the parties will be given no additional opportunity whatsoever to submit factual information in this regard (see 19 C.F.R. § 351.218(e)(1)(ii)(C)(1)). The EC submits that in order to comply with the provisions of Article 12.1, the US DOC must inform the parties of the specific information it requires to complete its determination in the particular case, allow the parties access to the information submitted by the other interested parties and give all the parties ample opportunity to provide the information at a meaningful point in the proceedings. That is not done by the US in sunset reviews under the existing laws, regulations and practices and it was definitively not done in the present case.

5.232 As regards (c) above, the first time that the US DOC commented on the information submitted by the parties in this case was in its preliminary results of 20 March 2000. In its issues and decision memo, the US DOC ignore the evidence submitted by the Government of Germany and the German producers showing that the CIG programme applied only to investments made prior to 1 January 1986 and that the amount of Capital Investment Grants paid after 1986 was so small that no countervailable benefit would remain after the end of the sunset review (see Issues and Decision Memo at p. 24-25, Exhibit EC-7). The DOC simply stated that, because there was evidence that Capital Investment Grants were received as late as 1990, it would "determine that benefit streams from this programme continue beyond the end of this sunset review." (Ibidem, at 25). It is important to underline that the US DOC did not give the German respondents any opportunity to submit additional evidence to respond to its comments in the preliminary determination. As explained in our written and oral submissions, the US DOC even refused a request to review its own calculation memoranda from the original investigation to determine the exact amount of the original grant payments made after 1986. The EC believes that such a procedure that leaves respondents in complete darkness as to precisely what information an investigating authority requires until it is too late to provide the information cannot satisfy the requirements of Article 12.1. The US law and practice does not respect several provisions of Article 12 of the *SCM Agreement*, which by virtue of Article 21.4 is fully applicable to sunset reviews. 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 such 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 present counter-evidence and to defend their interests at all stages

leading up to the final determination. As explained above, all these procedural rights and due process requirements are not respected by the US DOC in sunset reviews and in the present case.

**Q19. Does the European Communities consider that a review under Article 21.3 must involve a full CVD investigation? Please explain.**

Reply

5.233 In principle yes. As stated above in response to question 7, investigating authorities in a sunset review must determine that all the conditions for the imposition of a countervailing duty, as laid down in Article 19.1, will continue or recur if the duty is terminated. However, since a CVD measure is already in force, this cannot be entirely identical to a new countervailing duty investigation. However, the investigating authority must collect, consider and, where appropriate, verify all available and relevant evidence in making its sunset determination. As explained above, it must also allow parties access to and provide them with ample opportunity to comment and defend their interests at all stages of the review, as happens in an original investigation.

5.234 The US DOC failed to do this in the present sunset review. For example, with respect to the CIG programme, US DOC ignored evidence that the CIG programme applied only to investments made prior to 1 January 1986 and that the amount of Capital Investment Grants paid after 1986 was so small that no countervailable benefit would remain after the end of the sunset review. The US DOC made no attempt to actually measure the benefit that would remain under the CIG programme after the end of the sunset review or to adjust the subsidy rate for the grants that were made prior to the end of 1986, the benefit of which would have expired under the 15-year allocation period. The US DOC simply continued to apply the 0.39 per cent subsidy rate calculated for this programme for the 1991 period covered by the original investigation, as if the programme were likely to confer the same benefit in 2001 as it did ten years earlier in 1991. The US DOC even refused to consult its calculation memoranda from the original investigation to determine the amount of grants paid after 1986.

5.235 This irrefutable presumption that the benefit of the CIG programme remained unchanged since 1991 is directly contrary to the evidence presented in the case. Because the CIG programme applied only to investments made prior to 1 January 1986, there is no conceivable way that the benefit in 2001 would continue at the same level as in 1991. This is especially true in light of the evidence that the last grant payment under this programme was made in 1990. Even the US producers conceded that the CIG programme had expired (see Issues and Decision Memo at 25 n.36 (Exhibit EC-7)).

**Q20. In the view of the European Communities, does the SCM Agreement require the record of the original investigation, in its entirety, to be made part of the record of the review under Article 21.3? Please explain in detail.**

Reply

5.236 Yes. It is beyond doubt that Article 21.4 requires ("shall apply") the authorities to give parties in a sunset review access to the entire record (that is all information and evidence relevant to an investigation and not covered by the confidentiality provisions) in the same way as in the original investigation. For example, to the extent that the US DOC relies upon the rates calculated in its original investigation, it must, at minimum, make its original determination and all documents showing how the rates therein were calculated (i.e., the calculation memoranda) part of the record of the sunset review. Moreover, Article 12.2 requires that any decision must be based only on information what is in the record and which has been made available to all parties. Article 12.3 requires that all parties should be able to see all information that is relevant, and Article 12.8 requires

that all essential facts should be made available in sufficient time for the parties to defend their interests.

5.237 It follows that the US DOC cannot evade this responsibility by claiming that it is somehow prohibited by US law from making the memoranda part of the record in the sunset review (see U.S. 1<sup>st</sup> written submission, at para. 104). The US International Trade Commission ("ITC") is subject to the same procedures regarding the treatment of business proprietary information as the US DOC. However, unlike DOC, the US ITC in its sunset reviews automatically makes the confidential version of its original determination, as well as the complete staff report from the original investigation, part of the record of the sunset review. This is done automatically right at the beginning of the review so that all parties will be able to use this information in preparing their arguments. The ITC simply provides the documents the same confidential status in the review that they enjoyed in the original investigation.

F. RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL FOLLOWING THE FIRST MEETING OF THE PANEL

5.238 With respect to the Panel's question concerning the Article 11.9 *de minimis* standard and reviews under Article 21.2, for essentially the same reasons set forth in the United States' First Written Submission and Oral Statement, the *de minimis* standard contained in Article 11.9 is not applicable to reviews under Article 21.2. In particular, as is the case with respect to Article 21.3, there is no reference to Article 11.9 or any other *de minimis* standard in Article 21.2. It seems evident that had the drafters of the SCM Agreement wished such a reference, one could have been easily made. Furthermore, the panel in *Korea DRAMs* addressed this issue (albeit in the context of antidumping administrative reviews) and came to the same conclusion.

5.239 With respect to the Panel's question concerning negligible import volume and injury standards under Article 11.9 and the negligible injury standard under Article 15.3, and reviews under Article 21.2, with respect to Article 11.9, as stated above, Article 21.2 neither refers to nor incorporates any provisions of Article 11.9. With respect to Article 15.3, the United States directs the Panel's attention to the fact that this article does not refer to a "negligible *injury* standard." Rather, in connection with cumulation, Article 15.3 addresses the question of whether the *volume of imports* in an original investigation is negligible. Article 21.2 does not incorporate the provisions of Article 15.3.

5.240 With respect to the Panel's question concerning negligible import volume and injury standards under Article 11.9 and the negligible injury standard under Article 15.3, and reviews under Article 21.3, the negligibility provisions do not apply to Article 21.3 for the same reasons they do not apply to Article 21.2.

5.241 With respect to the Panel's questions concerning the applicability of the Article 27.10 negligible import volume standards and the Article 27.10(b) and Article 27.11 *de minimis* standards to reviews under Article 21, these negligibility provisions, like those contained in Articles 11.9 and 15.3, apply only to original investigations. Similarly, the *de minimis* standards for various developing countries, like the standard contained in Article 11.9, only apply to original investigations.

5.242 With respect to the Panel's questions concerning the impact of the large volume of "transition" orders on the genesis of the United States' sunset rules, on January 1, 1995, the date on which the WTO Agreement entered into force with respect to the United States, there were over 300 antidumping and countervailing duty orders in existence. Pursuant to its obligations under Article 32.4 of the SCM Agreement (and Article 18.3.2 of the AD Agreement), the United States deemed all of these "transition" orders to be imposed on January 1, 1995. Consequently, the United States was obligated to initiate sunset reviews of all of these transition orders no later than

1 January 2000, the *de jure* five-year anniversary date of the orders. In its First Written Submission, the United States described in detail the process it used to determine and publicly announce the schedule for the conduct of the sunset reviews of the transition orders.

5.243 When developing its procedures for sunset reviews, the United States certainly took into account the monumental task of initiating over 300 sunset reviews of transition orders. However, it is difficult to measure the extent to which the volume of the transition orders initially shaped both the procedural and substantive rules now in place. Procedurally, the rules with respect to sunset reviews of transition orders and those of non-transition orders differ very little. One notable difference that takes into account the volume of transition orders concerns Commerce's ability to extend its deadlines for its preliminary and final determinations. Substantively, Commerce's analysis is the same for transition orders and non-transition orders.

5.244 With respect to the Panel's question concerning when a sunset review is considered to be initiated, section 351.218(c)(1) of Commerce's *Sunset Regulations* provides that no later than 30 days before the fifth anniversary date of an order or suspension of an investigation, the Secretary will publish a notice of initiation of a sunset review. In order to provide to the public advance notice of the initiation of sunset reviews, Commerce provides on its website (<http://ia.ita.doc.gov/sunset/schedule.htm>) the schedule for sunset review initiations through calendar year 2005. With respect to the sunset reviews of transition orders, Commerce published its initiation schedule in the *Federal Register* on 28 May 1998.

5.245 With respect to the Panel's question concerning Commerce's adequacy determination and information collected after that determination, following normal procedures, Commerce promulgated its determination to conduct a full sunset review in the form of a decision memorandum issued and made public on October 20, 1999. The specific factual information needed to determine whether to conduct a full sunset review (*i.e.*, aggregate export figures) is only *a small part* of the information and argument contained in the original substantive responses submitted by the interested parties. Commerce normally does not collect additional information after it makes its adequacy determination. Commerce, therefore, did not collect any additional information between its 20 October 1999, adequacy determination and its 27 March 2000, preliminary determination. Between the time of its adequacy determination and its preliminary determination, Commerce analyzes and considers all of the remaining information and argument provided by the parties; *i.e.*, the bulk of the responses.

5.246 With respect to the Panel's questions concerning whether there is a "presumption" in the SCM Agreement that no provision of the Agreement is applicable to reviews under Article 21.3 unless specifically indicated, the United States considers that, in light of the text and context of Article 21.3, no provisions are applicable to reviews under Article 21.3, unless specifically indicated. In the view of the United States, it is not a matter of there being a "presumption". Instead, it is a matter of what the text of Article 21.3 provides, as interpreted in accordance with the rules of Article 31 of the *Vienna Convention on the Law of Treaties*. There are several ways in which other provisions of the Agreement may be applicable to the provisions of Article 21.3. 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. There are no such references with respect to the Article 11.6 evidentiary requirements for self-initiation or the Article 11.9 *de minimis* standard.

5.247 The United States considers that other provisions of the SCM Agreement would apply to reviews under Article 21.3 where the Agreement says they apply. Examples of other provisions that apply to Article 21.3 are: 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"); calculation of the amount of a subsidy under Article 14 ("For the purpose of Part V"); definition of "injury" under Article 15 and footnote 45 ("Under this Agreement"); definition of "like

product” under footnote 46 (“Throughout this Agreement”); definition of domestic industry in Article 16 (“For the purposes of this Agreement”); definition of “levy” under footnote 51 (“As used in this Agreement”).

5.248 With respect to the Panel’s questions concerning the methodology for the calculation of the level of subsidization and the *ad valorem* rate in reviews under Article 21.3 versus in original investigations, the United States notes, as an initial matter, that the SCM Agreement does not specify a methodology for calculating the *ad valorem* rate. If Commerce were to calculate the level of subsidization in the context of reviews conducted under Article 21.3, it certainly would apply the same calculation methodology as it applies in original investigations conducted under Article 11. However, Commerce does not *calculate* the level of subsidization in sunset reviews. Article 21.3 does not require such a calculation. What Article 21.3 does require is that a countervailing duty be terminated not later than five years from the date upon which it is imposed, unless the authorities determine that expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.

5.249 With respect to the Panel’s question as to whether the injury test applicable to investigations is also applicable to reviews under Article 21.3, the Article 21.3 injury standard is not the same as the standard for injury in original investigations, although it contains some of the same elements. The injury determinations in original investigations are governed by the provisions of Article 15 of the SCM Agreement and Article VI of GATT 1994. Paragraph 6 of Article VI conditions the levying of countervailing duties on a determination that the effects of the subsidized imports are “such as to cause or threaten material injury to an established domestic industry, or [ ] such as to retard materially the establishment of a domestic industry.” Article 15 of the SCM Agreement further specifies the factors that investigating authorities must consider in reaching “[a] determination of injury for purposes of Article VI of GATT 1994”.

5.250 The aim of the Article 21.3 review is to determine whether revocation of the countervailing duty would be likely to lead to continuation or recurrence of injury. Footnote 45 to Article 15 indicates that the term *injury* as used throughout the Agreement “shall be interpreted in accordance with the provisions of this Article.” In turn, Article 15 specifies three general criteria – volume, price effects and impact on the domestic industry – that are pertinent to any *injury* determination under the Agreement.

5.251 The focus of a review under Article 21.3, however, differs from that of an original investigation under Article 15. The nature and practicalities of the two types of inquiries demonstrate that the tests for the two cannot be identical. In an original investigation, the investigating authorities examine the condition of an industry that has been exposed to the effects of the subsidized imports. In that investigation, an authority examines the relationship between import-related factors (such as relative and absolute increases in import volumes and underselling and other price effects) to industry-related factors (such as trade, financial and employment data that have a bearing on the state of the industry and that may be indicative of present injury or imminent threat of injury). *See* Articles 15.5 and 15.7. Five years later, as a result of the countervailing duty order, subsidized imports may have either decreased or exited the market altogether, or if they maintain their presence in the market, may be priced higher than they were during the original investigation, when they were entering the market unencumbered by any additional duties. Thus, the inquiry contemplated in a review conducted pursuant to Article 21.3 is counterfactual in nature, and entails application of a somewhat different standard with respect to the volume, price and relevant industry factors. An authority must decide the likely impact of a prospective change in the status quo, *i.e.*, the revocation of the countervailing duty order and the elimination of its restraining effects on volumes and prices of imports.

5.252 With respect to the Panel's question as to whether, under US law, the Article 11.4 industry support provisions are applicable in a review under Article 21.3, the conditions of Article 11.4, with respect to industry support, are not required to be fulfilled in order for Commerce to conduct a sunset review under US law. Article 21.3 itself contains no requirement in this regard and contains no reference to Article 11.4 or the industry support requirements of that provision.

5.253 With respect to the Panel's question as to whether the Article 16 definition of domestic industry must be taken into account in the USITC's assessment of the likelihood of continuation or recurrence of injury in a review under Article 21.3, the answer is yes. Article 21.3 addresses the inquiry into whether revocation of the countervailing duty would be likely to lead to continuation or recurrence of *injury*. Footnote 45 to Article 15 of the SCM Agreement specifies that, "[u]nder this Agreement, the term 'injury' shall, unless otherwise specified, be taken to mean material injury *to a domestic industry*, threat of material injury *to a domestic industry*, or material retardation of the establishment of *such industry*...". (Emphasis added). Article 21.3 does not contain an exception to the general definition, and therefore, the *injury* referred to in that Article is relative to the condition of *the domestic industry*. Article 16 addresses the definition of the domestic industry "[f]or the purposes of this Agreement," and therefore applies in the context of addressing the continuation or recurrence of injury under Article 21.3.

5.254 With respect to the Panel's question as to what textual support exists in the SCM Agreement for the proposition that no *de minimis* standard is applicable to reviews under Article 21.3 as it is in original investigations, under Article 11.9, Members must apply a 1 per cent *de minimis* standard in countervailing duty *investigations*. Nothing in the text of Articles 11.9 or 21.3 requires application of the Article 11.9, 1 per cent *de minimis* standard in Article 21.3 sunset reviews, or any other type of review. As discussed above, there is no reference in Article 21.3 to a *de minimis* standard and the text of Article 11.9 makes no reference to Article 21.3.

5.255 With respect to the Panel's request that the United States respond to arguments in the EC's Oral Statement concerning the use and relevance of footnote 52, in its Oral Statement, the EC opined that the United States has confused the purposes of an administrative (*i.e.*, assessment) review and a sunset review and the application of footnote 52. It is the EC that is confused. Pursuant to Article 21.3 and footnote 52, the mere existence of a subsidy programme, even with a net countervailable subsidy rate of zero, could form the basis for a determination of likelihood of future subsidization in accordance with Article 21.3 and footnote 52. The United States agrees with the EC that footnote 52 refers to a situation where the authority determines that the subsidy rate for a particular time period is zero and that, in the United States, that determination takes place in the context of an administrative review. (Although not necessarily germane to the instant dispute, the United States does not agree with the EC's statement that footnote 52 refers to a situation where a subsidy is "*de minimis*" in an administrative review. Footnote 52 only discusses a finding in the most recent assessment proceeding that "no duty" is to be levied.) The EC seems to think, however, that footnote 52 serves no other purpose than to make a point about administrative reviews. The EC posits that "[s]unset reviews under Article 21.3 are completely different from administrative reviews". If that is so, why then did the Members include footnote 52 in Article 21.3, the provision governing sunset reviews? There must be a reason. The United States considers that footnote 52 means that the current level of subsidization is not decisive as to whether subsidization is likely to recur. The EC has not offered any alternative interpretation. The reason for this gap in the EC's argumentation is that the EC's claim that a *de minimis* standard is required in the context of Article 21.3 sunset reviews would render note 52 meaningless.

5.256 With respect to the Panel's question concerning the rationale for the United States' application of a 0.5 per cent *de minimis* standard in sunset reviews, as a matter of domestic policy, Commerce has long applied a 0.5 per cent *de minimis* standard in administrative (*i.e.*, assessment) reviews. The application of this standard pre-dates the Uruguay Round negotiations. The entry into

force of the WTO Agreement did not require a change in this standard, because the Article 11.9 *de minimis* standard is only applicable to investigations. For this same reason, when the United States amended its law in 1994 to provide for sunset reviews, it chose to apply its long-standing 0.5 per cent *de minimis* standard to sunset reviews. The United States could have chosen to apply no *de minimis* standard to sunset reviews at all.

5.257 In a sunset review, the *de minimis* standard has particular application in several respects. For example, if Commerce determined in a sunset proceeding, based on the original investigation and any administrative reviews, that the existing countervailable subsidy programmes had been terminated and that the likely net countervailable rate of subsidization was *de minimis*, Commerce normally would determine that there was *no* likelihood of continuation or recurrence of subsidization. In addition, if the combined benefits of all programmes considered in the sunset review have never been above *de minimis* at any time the order was in effect, and there is no likelihood that the combined benefits of such programmes would be above *de minimis* in the event of removal of the duty, Commerce normally would determine that there is no likelihood of continuation or recurrence of subsidization.

5.258 In 1987, following a notice and comment rulemaking proceeding, Commerce published a final regulation codifying its long-standing practice of applying a 0.5 per cent *de minimis* standard in investigations and administrative reviews. In response to Commerce stated that “[t]he doctrine of *de minimis non curat lex*, that the law does not concern itself with trifles, is a basic tenet of Anglo-American jurisprudence, inherent in all US laws. With respect to the antidumping and countervailing duty laws, the Department has concluded that the potential benefits to domestic petitioners from orders on dumping margins or net subsidies below 0.5% are outweighed by the gains in productivity and efficiency provided by a *de minimis* rule.... [I]t would be unreasonable for the Department and the US Customs Service to squander their scarce resources administering orders for which the dumping margins or the net subsidies are below 0.5%”. 52 FR at 30661.

5.259 With respect to the Panel’s question concerning the relationship between duty assessment proceedings (“administrative reviews”) and reviews under Article 21.3, the United States has a “retrospective” assessment system under which the amount of final liability for countervailing duties is determined after the subject merchandise is imported. The normal procedure used for determining the amount of final liability is the administrative review procedure. In contrast, a sunset review is not a procedure for determining the amount of final countervailing duty liability. The purpose of the sunset review is to determine the likelihood of the continuation or recurrence of subsidization in the event that the countervailing duty is revoked. Thus, a sunset review involves a prediction of a government’s future behaviour without the discipline of an order in place. The focus of the analysis is predictive, as opposed to a focus on the present or the past.

5.260 With respect to the Panel’s question concerning the ability of the German producers, the German government, and the EC Commission to request an administrative review of the countervailing duty order on certain steel flat products from Germany, Commerce’s regulations provide no absolute requirement for shipments as a pre-requisite to an administrative review and provide Commerce with the discretion to conduct a “no shipment” administrative review of an order. Concerning the textual basis for this in the SCM Agreement, as discussed above, Commerce’s regulations do not make the existence of shipments an absolute prerequisite for an administrative review. Instead, the regulations provide Commerce with the discretion to conduct a “no shipment” administrative review of an order. In this regard, Articles 19 and 21.2 of the SCM Agreement do not preclude no shipment administrative reviews.

5.261 In response to the Panel’s question concerning the option of a changed circumstances review, yes, a “changed circumstances” review is discretionary and may be initiated when Commerce (or the

USITC) determines that conditions warranting such a review exist. Such reviews normally are initiated based on a request from an interested party.

5.262 In response to the Panel's questions concerning the administrative record from the original investigation, no, the administrative record from Commerce's original countervailing duty investigation does not automatically become part of the administrative record of the sunset review. Under US law and Commerce regulations, each individual review (whether administrative, sunset, or changed circumstances) by Commerce is considered a separate segment of the proceeding, with a separate and distinct administrative record, and separately reviewable by domestic courts. Pursuant to section 751(c) of the Act and consistent with Article 21.3 of the SCM Agreement, Commerce automatically self-initiates sunset reviews. Therefore, Commerce did not use any information from the original investigation to initiate the sunset review of the order on corrosion-resistant carbon steel flat products from Germany.

5.263 In response to the Panel's question concerning a particular calculation memorandum from the original investigation, yes, 13 April 2000 was the first time that the German exporters made a request to have the calculation memorandum placed on the administrative record of the sunset review. In response to the Panel's questions concerning other requests to place information from the administrative record in the original investigation on the administrative record of the sunset review, with respect to business confidential information, no other interested parties placed, or requested that Commerce place, such information on the administrative record during the sunset review. As discussed in the United States' First Written Submission, in the instant case, Commerce accepted and considered submissions or parts of submissions from the US producers and the German Government which included public information from the original investigation. Specifically, Commerce accepted a submission from the US producers dated 28 April and portions of a German government submission of 18 April.

5.264 In accepting the US producers' submission, Commerce considered that the submission contained the *public* version of Preussag's questionnaire response from the original investigation and that the US producers had submitted the document because the German producers had cited to the questionnaire response in one of their submissions prior to the deadline for factual information without submitting the document itself. Commerce also accepted portions of the German Government's 18 April submission. Commerce, however, only accepted those portions of the German Government's submission that were part of the original investigation, contained *no new factual information*, and were *publicly available*. None of the information accepted by Commerce in this instance was confidential information that would have been unavailable to other parties such as the US producers.

5.265 With respect to the Panel's question concerning the use of the word "determine" as used in Article 21.3, Article 21.3 establishes that in the context of the sunset review, Commerce is obligated to determine whether expiry of the countervailing duty would be likely to lead to continuation or recurrence of subsidization. The definition of "determine" in the context of Article 21.3 requires a decision about something. In *The New Shorter Oxford English Dictionary*, "determine" is defined as to "settle or decide (a dispute, controversy, etc., or a sentence, conclusion, issue, etc.) as a judge or arbiter." Further, this entry contains the notation "follo{wed} by simple obj{ect}, subord{inate} cl{ause} w{ith} *that, what, whether, etc.*" The United States considers that this is precisely the manner in which the word "determine" is used in Article 21.3. Article 21.3 requires the authorities to determine or decide something, *i.e.*, whether subsidization is likely to continue or recur. The United States considers that it may determine, in accordance with Article 21.3, whether subsidization is likely to continue or recur without conducting its own investigation, but, rather, by making its decision based on the evidentiary record developed during the sunset review because all parties, both foreign and domestic, have every opportunity under the US system to provide any information they deem relevant.

5.266 With respect to the Panel's question concerning the methodology used by the United States to determine the likelihood of continuation or recurrence of subsidization and injury, the substantive provisions governing likelihood of continuation or recurrence of subsidization are contained in Commerce's *Sunset Policy Bulletin*. In determining whether subsidization is likely to continue or recur, Commerce will consider the net countervailable subsidy determined in the investigation and subsequent reviews, and whether any change has occurred in programmes which gave rise to the net countervailable subsidy determined in the investigation and subsequent reviews. The USITC's regulations, at 19 CFR 207.60-207.69, address the procedures for conducting five-year review investigations to determine whether continuation of the countervailing duty would be likely to lead to continuation or recurrence of material injury.

5.267 With respect to the Panel's question as to whether, under the US system, original investigations and reviews under Article 21.3 are different segments of one proceeding, the answer is yes. Under the US system, a "proceeding" begins on the date of the filing of a petition and ends on, *inter alia*, the revocation of an order. A countervailing duty proceeding consists of one or more "segments". "Segment" refers to a portion of the proceeding that is separately judicially reviewable. For example, a countervailing duty investigation, an administrative review, or a sunset review each would constitute a segment of a proceeding. Each segment contains its own discrete administrative record. A final determination, and the discrete record upon which it is based, is subject to judicial review.

5.268 With respect to the Panel's questions concerning whether administrative reviews are prerequisites for conducting sunset reviews, under the US system, administrative reviews are not prerequisites for conducting full sunset reviews. However, as a starting point for making its likelihood determination in a sunset review, Commerce considers the countervailable subsidies and programmes found to be used, and the amount of the subsidy determined, in the original investigation. The rationale for this approach is that the findings in the original investigation provide the only evidence reflecting the behaviour of the respondents without the discipline of countervailing measures in place. This makes sense given that, in a sunset review under Article 21.3, an authority is considering whether, without the discipline of the duty, subsidization would likely continue or recur; *i.e.*, what would happen without the discipline of the duty. Commerce also considers its findings in administrative reviews subsequent to the original investigation because information developed during administrative reviews concerning subsidization – *e.g.*, additional subsidies and accompanying benefits granted after issuance of an order or programme terminations – may be an indicator of possible future subsidization or may demonstrate the cessation of subsidization. Finally, even if there has been no administrative review, Commerce will consider if is evidence demonstrating that programmes have been terminated with no residual benefits. In the instant case, even though no administrative review had been conducted, Commerce agreed with the EC and German producers that two programmes had been terminated with no residual benefits and adjusted the net subsidy rate accordingly.

5.269 With respect to the Panel's questions concerning a particular calculation memorandum and the use of this business confidential document in Commerce's sunset review, on 13 April 2000, the German producers in the sunset review sought to have *all* the calculation memoranda from the original investigation placed on the record of the sunset review. Commerce, however, could not move business confidential information from the record of one segment of the proceeding (*i.e.*, the investigation) to another separate segment of the proceeding (*i.e.*, the sunset review) without the express permission of the person who submitted the confidential information.

5.270 Article 12.4 of the SCM Agreement provides that confidential information shall not be disclosed without the specific permission of the party submitting it. Consistent with the obligations concerning the treatment of confidential information under Article 12, US law and Commerce regulations provide stringent requirements and safeguards regarding the disclosure and use of

business confidential information in the context of countervailing duty proceedings under what is called an administrative protective order or “APO”. The APOs granted during the original 1993 investigation would only have allowed for the disclosure of business confidential information in the context of that investigation, per the agreement of the party submitting the confidential information. As a result, Commerce could not accede to the German producers’ request in the sunset review to move all the calculation memoranda from the record of the original investigation to the record of the sunset review without the permission of the parties who originally submitted the information. The request from the German producers in the sunset review contained no indication of such permission.

5.271 Under US law and regulations, certain information provided by interested parties in an administrative proceeding, whether an investigation or review, may be accorded business confidential treatment. Section 351.304 of Commerce’s regulations sets forth the requirements for parties to claim that factual information should be considered business proprietary information and afforded protection from public disclosure. The claim for proprietary treatment must be made by the owner of the information, the information must be clearly identified, and the claim must be accompanied by an explanation why the information should be afforded proprietary treatment. The calculation memoranda from the original investigation would have contained the business confidential information of the three German producers of certain corrosion-resistant carbon steel flat products that were involved in the original investigation: Hoesch, Preussag, and Thyssen. These producers would have requested business confidential treatment for their data at the time they submitted the data during the original countervailing duty investigation in 1992-93. The German producers in the sunset review were Thyssen Krupp Stahl AG, Stahlwerke Bremen GmbH, EKO Stahl GmbH, and Salzgitter AG. The request from the German producers in the sunset review to move the business confidential information from the record of the original investigation to the record of the sunset review contains no indication that the German producers in the sunset review were authorized to permit the movement of such information. The particular document submitted by the EC in the instant case appears to contain business confidential information for Thyssen. In its First Written Submission, the EC itself notes that this exhibit contains business confidential information.

5.272 With respect to the Panel’s questions concerning acceptance and consideration of certain evidence from respondent interested parties, section 351.218(d)(3)(v)(B) of Commerce’s *Sunset Regulations* provides that interested parties may submit *any* relevant information or argument that the party would like Commerce to consider. Generally, therefore, Commerce will accept any evidence from foreign respondents, including evidence with respect to the issues set out in the Panel’s question. In the context of a sunset review (or any other segment of a countervailing duty proceeding), Commerce considers all relevant evidence that is timely filed. Regarding the extent to which Commerce might base a particular determination on such evidence, it is difficult to say in the abstract. The relevance and probative value of a particular piece of evidence will vary from case to case. Suffice it to say that in the sunset review at issue in this dispute, Commerce considered information and argument from the EC and German producers in finding that two programmes had been terminated with no residual benefits. As a general proposition, Commerce’s *Sunset Policy Bulletin* provides detailed guidance on analytical issues related to Commerce’s determination of likelihood of continuation or recurrence of subsidization and the net countervailable subsidy rate likely to prevail if the duty were revoked.

5.273 With respect to the Panel’s request for a schematic representation of the timing and information requirements under US law for sunset reviews, the United States provided copies of Annex VIII of Commerce’s *Sunset Regulations*, which contains detailed schedules with timing and information requirements for Commerce sunset reviews, and Annex B of the ITC’s *Sunset Regulations*, which provides a sample schedule for five-year reviews.

5.274 With respect to the Panel’s request for certain figures concerning the United States’ initiation and conduct of sunset reviews under Article 21.3, the United States indicated as follows: The number

of sunset reviews under Article 21.3 initiated since 1 January 1995 is 56. The number of such reviews which resulted in revocation of the CVD order in question due to no filing by the domestic industry of a notice of intent to participate is 17. The number of expedited sunset reviews conducted since 1 January 1995 is 24. The number of such reviews which resulted in revocation of the CVD order in question, due to a finding of no likelihood of continuation or recurrence of subsidisation is 0, and due to a finding of no likelihood of continuation or recurrence of injury is 5. The number of full sunset reviews conducted since 1 January 1995 is 15. The number of such reviews which resulted in revocation of the CVD order in question, due to a finding of no likelihood of continuation or recurrence of subsidisation is 3, and due to a finding of no likelihood of continuation or recurrence of injury is 4.

G. RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE EUROPEAN COMMUNITIES FOLLOWING THE FIRST MEETING OF THE PANEL

5.275 As an introductory matter, the United States observes that the EC in its questions makes various assumptions regarding the “purposes” of SCM Agreement provisions. In this regard, it is important to recall the explanation of the Appellate Body in *Japan – Alcoholic Beverages*: “the treaty’s ‘object and purpose’ is to be referred to in determining the meaning of the ‘terms of the treaty’ and not as an independent basis for interpretation.” In this dispute, the EC purports to find or discern various “purposes” without reference to the text of the SCM Agreement, and then refers to obligations not found in the text which presumably derive from these “purposes”. This use of “purposes” is precisely the “independent basis for interpretation” which the Appellate Body described as incorrect, and operates to circumvent the requirement in DSU Article 3.2 that Dispute Settlement Body rulings cannot add to or diminish the rights and obligations provided in the covered agreements.

5.276 With respect to the EC’s question concerning the meaning of “duly substantiated request”, Article 21.3 of the SCM Agreement authorizes authorities to initiate a sunset review “on their own initiative *or* upon a duly substantiated request made by or on behalf of the domestic industry” (emphasis added). Under US law, Commerce automatically initiates a sunset review on its own initiative within five years of the date of publication of a countervailing duty order. US law does not contain a provision regarding initiation of sunset reviews based upon a “duly substantiated request”.

5.277 With respect to the EC’s question concerning “expression of interest” as applicable to initiation of sunset reviews, section 351.218(d)(1)(i) of Commerce’s regulations provides for filing of a notice of intent to participate by domestic interested parties that intend to participate in a sunset review. Section 351.218(d)(1)(ii) sets forth the required contents of the notice of intent to participate, which includes, *inter alia*, information related to the identity of the domestic interested party and its legal counsel, whether the domestic interested party is related to foreign producers or exporters, the subject merchandise and country subject to the sunset review, and the applicable *Federal Register* citation. Section 351.303 of Commerce’s regulations governs the filing, format, translation, service, and certification of documents, and applies to all persons submitting documents to Commerce for consideration in any segment of an antidumping or countervailing duty proceeding, including sunset reviews. All filings, including a notice of intent to participate in a sunset review, must be in writing in accordance with the provisions of section 351.303.

5.278 With respect to the EC’s question concerning burden of proof in sunset reviews, Article 21.3 does not impose a burden of proof on US authorities. In order to withstand scrutiny under Article 11 of the DSU, however, an Article 21.3 sunset determination must be supported by sufficient evidence and be based on proper legal interpretations. The burden of proof is on the complaining party – in this instance, the EC – to demonstrate that Commerce’s determination was not supported by adequate evidence or proper legal interpretations.

5.279 Article 21.3 does not contain the word “demonstrate”. Instead, Article 21.3 provides for termination of a countervailing duty unless the authorities “determine” that the expiry of the duty would likely lead to continuation or recurrence of subsidization and injury. In the case at issue, Commerce determined that expiry of the countervailing duty on certain corrosion-resistant carbon steel flat products from Germany would be likely to lead to continuation or recurrence of subsidization. Commerce’s determination is supported by adequate evidence and is based on a proper legal interpretation of the applicable provisions.

5.280 With respect to the EC’s questions concerning the purpose and consequence of an investigation versus a sunset review, the purpose of a countervailing duty investigation is to determine the existence and degree of foreign government subsidization and whether the subsidized imports are causing injury. In contrast, the purpose of a sunset review is to determine whether revocation of a countervailing duty order would be likely to lead to continuation or recurrence of subsidization and injury. The consequence of an affirmative finding of subsidization and injury in an investigation is the imposition of a countervailing duty. The consequence of an affirmative finding of likelihood of continuation or recurrence of subsidization and injury in a sunset review is the continued maintenance of the countervailing duty. The completion of a sunset review does not trigger the assessment of duties or change cash deposit requirements.

5.281 With respect to the EC’s questions concerning preliminary determinations under US system, the purpose of Commerce’s preliminary determination in a full sunset review is to provide an explanation of Commerce’s findings concerning the likelihood of continuation or recurrence of subsidization and the net countervailable subsidy likely to prevail if the countervailing duty were revoked. Commerce’s preliminary determination takes into account the factual information and arguments submitted by the parties in their substantive responses and rebuttals.

5.282 Section 351.218(d)(3)(i) of Commerce’s *Sunset Regulations* provide that substantive responses to a notice of initiation are due 30 days after the date of publication in the *Federal Register* of the notice of initiation. Rebuttal to a substantive response is due five days after the date the substantive response is filed. (Section 351.218(d)(4).) Section 351.218(d)(4) of the *Sunset Regulations* also provide that Commerce normally will not accept or consider any additional information from a party after the time for filing rebuttals has expired. Section 351.302(c), however, provides that a party may request an extension of a specific time limit. Unless expressly precluded by statute, Commerce may, for good cause, extend any time limit established by its regulations. (Section 351.302(b).) The US countervailing duty statute does not contain deadlines for submission of information in a sunset review.

5.283 The preliminary determination provides interested parties with an opportunity to review Commerce’s analysis of the information on the record. Commerce issues preliminary determinations in investigations and administrative reviews as well. Preliminary determinations provide interested parties with an opportunity to comment, in case and rebuttal briefs, on Commerce’s preliminary findings. Commerce is not precluded from requesting factual information after the issuance of a preliminary determination, but normally it does not do so.

5.284 With respect to the EC’s questions concerning data collection periods, section 351.301(c)(2)(iii) of Commerce’s regulations provides that interested parties will have at least 30 days from the date of receipt to respond to a questionnaire. This rule applies to original countervailing duty investigations. Similarly, section 351.218(d)(3)(i) provides for a 30-day deadline with respect to a response to the sunset questionnaire. Furthermore, as discussed above, a party may request an extension of a specific time limit.

5.285 With respect to the EC's question concerning Article 12, the United States agrees that Article 21.4 of the SCM Agreement expressly provides that the provisions of Article 12 – as opposed to the provisions of Article 11 – apply to these types of reviews.

5.286 With respect to the EC's questions concerning Commerce's application of a 0.5 per cent *de minimis* standard in sunset reviews, as well as its questions concerning the subsidy rate Commerce reports to the USITC, because Article 21 of the SCM Agreement does not contain any *de minimis* standard, these questions is not relevant to the issues raised in this dispute. Nevertheless, the United States notes that, as a matter of domestic policy, Commerce has applied a 0.5 per cent *de minimis* standard in administrative (*i.e.*, assessment) reviews. The application of this standard pre-dates the Uruguay Round negotiations. The entry into force of the WTO Agreement did not require a change in this standard, because the Article 11.9 *de minimis* standard is only applicable to investigations. For this same reason, when the United States amended its law in 1994 to provide for sunset reviews, it chose to apply its long-standing 0.5 per cent *de minimis* standard to sunset reviews. The United States could have chosen to apply no *de minimis* standard to sunset reviews at all.

5.287 Commerce's *de minimis* standard in reviews is different from its *de minimis* standard in investigations. Prior to the entry into force of the WTO Agreement, Commerce applied a 0.5 per cent *de minimis* standard in investigations. However, in order to conform to Article 11.9 of the SCM Agreement, Congress amended the US statute so as to require the use of a 1 per cent *de minimis* standard in investigations.

5.288 In a sunset review, the *de minimis* standard has particular application in several respects. For example, if Commerce determined in a sunset proceeding, based on the original investigation and any administrative reviews, that the existing countervailable subsidy programmes had been terminated and that the likely net countervailable rate of subsidization was *de minimis*, Commerce normally would determine that there was *no* likelihood of continuation or recurrence of subsidization.

5.289 In addition, the *Sunset Policy Bulletin* (section III.A.6.b) provides that, if the combined benefits of all programmes considered in the sunset review have never been above *de minimis* at any time the order was in effect, and there is no likelihood that the combined benefits of such programmes would be above *de minimis* in the event of removal of the duty, Commerce normally would determine that there is no likelihood of continuation or recurrence of subsidization.

5.290 In 1987, following a notice and comment rulemaking proceeding, Commerce published a final regulation codifying its long-standing practice of applying a 0.5 per cent *de minimis* standard in investigations and administrative reviews. 52 FR 30660 (17 August 1987). Pursuant to the regulation, net aggregate subsidies (and ad valorem dumping margins) of less than 0.5 per cent would be disregarded for purposes of publishing or revoking orders, setting cash deposit rates, or assessing countervailing duties. In response to comments regarding Commerce's decision to set 0.5 per cent as the *de minimis* threshold, Commerce stated as follows:

The doctrine of *de minimis non curat lex*, that the law does not concern itself with trifles, is a basic tenet of Anglo-American jurisprudence, inherent in all US laws. With respect to the antidumping and countervailing duty laws, the Department has concluded that the potential benefits to domestic petitioners from orders on dumping margins or net subsidies below 0.5% are outweighed by the gains in productivity and efficiency provided by a *de minimis* rule. Even in price-sensitive markets, the effect of requiring a deposit or assessment of duty based on a rate of 0.5% *ad valorem* would be negligible. No party submitting comments has provided any information to support a different conclusion. Accordingly, it would be unreasonable for the Department and the US Customs Service to squander their scarce resources administering orders for which the dumping margins or the net subsidies are below

0.5%. The fact that the Department of Treasury and Commerce may not always have applied a uniform *de minimis* standard in the past is an additional reason supporting the adoption of a fixed standard which can be applied consistently in the future.

52 FR at 30661. In response to comments that the *de minimis* threshold be set at 1 per cent, Commerce also stated that,

After many years of applying a 0.5 per cent *de minimis* threshold, the Department has developed no basis to conclude that 1 per cent represents a level of benefit not worth the expense of investigations or annual reviews....

5.291 As explained in the United States First Written Submission, Commerce starts with the total *ad valorem* rate determined in the original investigation and considers whether, since the investigation, it has found subsidy programmes to be terminated and/or new programmes to be countervailable. Based on findings, which normally are made in the context of administrative reviews, Commerce may adjust the rate determined in the original investigation to take these subsequent findings into account.

5.292 With respect to the EC's question concerning the amount of subsidy in the context of a sunset review, Article 21.3 provides for consideration of whether expiry of a countervailing duty would likely lead to a continuation or recurrence of subsidization and injury. Footnote 52 states that a finding, in the most recent administrative review, that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty. This is consistent with the prospective nature of a sunset review. Thus, the level of subsidization at the time of a sunset review is not necessarily determinative of the outcome of a sunset review. However, if Commerce determined in a particular sunset review that there was no likelihood that the net countervailable subsidy rate would exceed 0.5 per cent *ad valorem* in the event of revocation of the countervailing duty, Commerce would determine that there was no likelihood of continuation or recurrence of subsidization and revoke the duty.

5.293 With respect to the EC's question concerning use of the 1 per cent, Article 11.9 *de minimis* standard, for the reasons set forth in the United States' First Written Submission and Oral Statement, the Article 11.9 *de minimis* standard does not apply to Article 21.3 sunset reviews. Article 21.3 does not contain any *de minimis* standard. Commerce does apply a 0.5 per cent *de minimis* standard in sunset reviews, but does not do so because of any obligation imposed by the SCM Agreement. In the final results of the full sunset review of corrosion resistant steel from Germany, Commerce determined that revocation of the order would be likely to lead to continuation or recurrence of a countervailable subsidy and found that the net countervailable subsidy likely to prevail if the order was revoked was 0.54 per cent *ad valorem*, which is above the *de minimis* standard under US law.

5.294 With respect to the EC's questions concerning calculation of a current rate of subsidization in a sunset review, Commerce normally does not determine the present net countervailable subsidy rate in a sunset review, and it did not calculate the level of subsidization present at the time of the sunset review in the corrosion-resistant steel from Germany case. Commerce did, however, adjust the net countervailable subsidy rate determined in the investigation to account for two programmes that the EC and German producers argued had been terminated with no continuing benefits. Nevertheless, nothing in Article 21.3 or any other provision of the SCM Agreement mandates a particular methodology for determining whether subsidization is likely to continue or recur if the duty were revoked.

5.295 The focus of a sunset review is necessarily on the possible future behaviour of foreign governments and exporters. The best evidence of that behaviour is the net countervailable subsidy rate determined in the original investigation because it is indicative of behaviour without the

discipline of a countervailing duty in place. Starting with the net countervailable subsidy rate from the original investigation, Commerce may make adjustments, including adjustments for subsidies for which benefits were allocated over time, in accordance with the *Sunset Policy Bulletin*. (See section III.B.3.) Commerce, however, normally makes such determinations in the context of an annual administrative review where interested parties may submit, *inter alia*, information concerning the level of subsidization present during the period of review for Commerce's examination.

5.296 With respect to the EC's question regarding Commerce's declining balance methodology, as explained in the United States' First Written Submission, the *ad valorem* subsidy rate for any period cannot be determined without knowing the applicable sales volume.

5.297 With respect to the EC's questions concerning the rationale for the 1 per cent *de minimis* standard, the only *de minimis* standard found in the SCM Agreement is in Article 11.9 which, by its terms, is limited to investigations. Neither Article 11.9 nor any other provision of the SCM Agreement provides a rationale for the *de minimis* standard. This standard is a product of negotiations. As discussed in more detail above, when Commerce codified its own *de minimis* standard in its regulations, it considered several rationales, including administrative efficiency, as providing a basis for the standard.

5.298 With respect to the EC's questions concerning new countervailable subsidies granted since 1993, as discussed in Commerce's preliminary sunset determination, there were no administrative reviews of this order. As a result, Commerce had not considered whether German producers benefitted from additional subsidies granted since the original investigation. Commerce did not consider domestic interested parties' allegations concerning new subsidies in the context of the sunset review because US law intends that such allegations should normally be made in the context of administrative reviews and the lack of any administrative reviews, in and of itself, was not sufficient to constitute good cause to consider the petitioners' allegations in the context of the sunset review. Furthermore, once Commerce found likelihood based on previously investigated subsidies, a finding of additional new subsidies would not have changed its affirmative likelihood determination.

5.299 With respect to the EC's question concerning the application of footnote 52, footnote 52 stands for the proposition that an existing subsidy programme could be the basis for a determination in a sunset review that the expiry of the countervailing duty would likely lead to the continuation of subsidization even if Commerce found a net countervailable subsidy rate of *zero* attributable to that programme in the most recent administrative review. In other words, footnote 52 means that the current level of subsidization is not decisive as to whether subsidization is likely to recur.

5.300 With respect to the EC's questions concerning Commerce's findings in other sunset determinations, the dispute before this Panel involves Commerce's sunset determination concerning certain corrosion-resistant carbon steel flat products from Germany. As a general matter, Commerce sunset determinations involving other merchandise and other countries are available as public, published documents and can be found on Commerce's website, the website of the US Government Printing Office, or through commercial database services such as Lexis. We note, however, that to date, Commerce has found no likelihood of continuation or recurrence of subsidization in the following three full sunset reviews: C-122-404, Live Swine from Canada, 64 Fed. Reg. 60301 (November 4, 1999); C-333-401, Cotton Shop Towels from Peru, 64 Fed. Reg. 66884 (November 30, 1999); and C-201-505, POS Cookware from Mexico, 65 FR 284, (January 4, 2000).

5.301 With respect to the EC's question concerning the effect of the net subsidy rate on volume of exports, issues concerning the volume of exports to the United States are properly considered in the context of the USITC's injury determination, which has not been challenged by the EC in this dispute. Nevertheless, the United States would point out that the *ad valorem* countervailing duty rate

determined in the investigation was 0.60 per cent and, according to the EC, the German producers stopped shipping to the United States once this 0.60 per cent countervailing duty was in place.

5.302 With respect to the EC's questions concerning amounts for certain denominators or numerators, Commerce's finding of likelihood of continuation or recurrence of subsidization is based on and supported by the administrative record of the sunset review. The EC's questions are not really questions. Rather, the EC is asking the United States to research and perform new calculations in the context of the EC's challenge to the United States' laws and regulations concerning sunset reviews and to a particular Commerce sunset determination. The United States does not believe it is appropriate to do so in this context.

#### H. COMMENTS OF THE EUROPEAN COMMUNITIES ON THE RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL FOLLOWING THE FIRST MEETING OF THE PANEL

##### **Introduction**

5.303 The US points (para. 2) that the EC is not challenging the injury determination in this proceeding. However, the EC in this proceeding is not challenging the injury requirement only for the purpose of verifying the accuracy of the ITC injury determination as such, but it is doing so for the purpose of the *de minimis* challenge, i.e. as a requirement that needs to be demonstrated positively in the context of a sunset review under Article 21.3 of the SCM Agreement (see First Oral Statement of EC, footnote 27).

##### **Question 1(a)**

5.304 Throughout its responses to the questions from the Panel, the US espouses a formalistic interpretation of Article 21.3 *SCM Agreement* that would essentially strip Articles 21.1 and 21.3 of any practical effect. An example of this is the US's statement in paragraph 5 that Article 21.3 contains "no requirement to quantify the amount of subsidization likely to continue or recur". Article 21.3 permits the continuation of a countervailing duty order only if the authorities affirmatively determine that "the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury". In turn, Article 15.5 defines "injury" as that injury caused by subsidized imports "through the effects of subsidies". Thus, an authority can only make a proper determination concerning the continuation or recurrence of injury if it considers the amount of subsidization that is likely to continue or recur if the duties were to expire. Under the US system, this means that DOC must provide the ITC with an accurate calculation of the amount of subsidization that is likely to continue or recur if the countervailing duty order were revoked. The US DOC has failed to do that in this case but simply continued to apply the countervailing duty rate calculated for 1991 despite the clear and indisputable evidence provided by the Government of Germany and the German producers establishing that this rate was no longer accurate.

5.305 As regards the references to paragraph 6.87 of the *Korea DRAMS* panel report, the US draws the wrong conclusions. In that report, the Panel had not dealt with a sunset review in the sense of Article 11.3 of the AD Agreement, but a claim for a duty assessment review under Article 9.3 of the AD Agreement. But there is no exact equivalent of Article 9.3 AD Agreement in the SCM agreement. Such duty assessment reviews fall by default within the scope of Article 21.2 of the SCM Agreement. In addition, and more importantly, the basic reason for which that Panel interpreted Articles 5.8 and 9.3 of the AD Agreement in the way it did is stated in paragraph 6.90 of the report, to which the US omits to make any reference. There the Panel held that: "In the context of Article 9.3 duty assessment procedures, however, the function of any *de minimis* test applied by Members is to determine **whether or not an exporter should pay a duty**. A *de minimis* test in the context of an Article 9.3 duty assessment procedure will **not** remove an exporter from the scope of the order." (emphasis added) This is clearly not the case of a CVD sunset review determination, because the

basic principle laid down by Article 21.3 and 21.1 of the SCM Agreement is the termination of the CVD order unless a fresh, positive finding about likelihood of subsidization, injury and causality is made by the authorities.

### **Questions 1(b) and (c)**

5.306 Contrary to the US responses, the US ITC does consider negligibility in its sunset review determinations. Under US law, cumulation is specifically prohibited in a sunset review if “imports are likely to have no discernable adverse impact on the domestic industry”. 19 U.S.C. § 1675a(a)(7). This provision was added to US law by the Uruguay Round Agreements Act. In its report to that Act, the US Senate specifically stated that this cumulation provision was being added because Congress “believe[d] that it is appropriate to preclude cumulation where imports are likely to be negligible”. S. Rep. No. 103-412, at 51 (1994). Similarly, the US ITC also considers differences in the “conditions of competition” in making its cumulation decision in a sunset review. *See Sugar from the European Union*, USITC Pub. No. 3238 at 15 (1999) <ftp://ftp.usitc.gov/pub/reports/opinions/PUB3238.pdf>.

5.307 Moreover, for the reasons explained in the comment to the previous question, the combined effect of paragraphs 6.43-6.6.50 of the *Korea DRAMS* panel report supports the proposition that the standards of Article 11.9 and 15.3 should apply to Article 21.2 and to Article 21.3 reviews.

### **Questions 1(d)**

5.308 Acceptance of the US position would render the provisions of Article 27, paragraphs 10 to 12, useless once the initial CVD order is in place. This position is totally unreasonable when proper consideration is given to the context, object, purpose and scope of special rules for developing country members laid down in the SCM and, more generally, the WTO Agreements.

### **Question 21**

5.309 As the US readily admits, its rules apply with equal force to both “transition orders” and “non-transition” orders. Article 21.3 also makes no distinction between transition and non-transition orders and does not in any way permit an authority to apply a lower level of review or procedure with respect to transition orders.

### **Question 23**

5.310 The US’s response to this question reveals how its system of automatic self-initiation results in the conduct of a sunset review without the requirement that the domestic industry ever provide evidence substantiating the likelihood of the continuation or recurrence of subsidization. In paragraph 18, the US concedes that the “**only** specific factual information” that it considers in making the decision as to whether to conduct a full sunset review is the “aggregate export figures provided by respondent interested parties”. The other factual information submitted by the parties does not play any role in DOC’s adequacy determination and is not discussed by DOC until its preliminary determination, which occurs after the time for submitting additional factual information has long expired (See EC Second Written Submission at paras. 41-42).

### **Question 24**

5.311 The US arguments omit to mention another generally accepted principle of interpretation that “omissions in different contexts may have different meanings, and omission, in and of itself, is not necessarily dispositive”. This is what the Appellate body has held in several cases. For example, in the *Canada – Automotive Industry* report, the Appellate Body held that the panel in that case had

erred because it failed to examine the ordinary meaning of the terms in their relevant context and in light of the object and purpose of the entire *SCM Agreement* in order to identify the proper meaning of an omission in the text.<sup>75</sup> Another example provides the US reasoning in paragraph 48 of its response to question no 32(b) from the Panel, where it states that “Articles 19 and 21.2 of the *SCM Agreement* do not preclude no shipment administrative reviews”. Without passing judgment on the substance of this US claim, what is important to note here is the *reasoning by inference* resorted to by the US, which is an accepted method of interpretation under the generally principles of public international law on treaty interpretation.

### **Question 25**

5.312 In its response, the US concedes that it does not calculate the level of subsidization in a sunset review but simply reports to the US ITC the rate that was already calculated in the original investigation (at paras. 23-24). This in turn taints the US ITC injury determination because it is not based upon the level of subsidization that would be likely to continue or recur if the countervailing duties were terminated as required by Article 21.3. While the US contends that the rate from the original investigation is the “only calculated rate that reflects the behaviour of exporters and foreign governments without the discipline of an order in place”, this reliance upon the rates from the original investigation cannot be applied as an irrefutable presumption. To do so would render the provisions of Articles 21.1 and 21.3, requiring the termination of countervailing duties after five years, meaningless because the fact that countervailing duties were originally imposed would be used as the justification for keeping those duties in place indefinitely.

5.313 The US’s discussion (at para. 25) demonstrates a blatant violation of Article 12 *SCM Agreement* as made applicable to sunset reviews by virtue of Article 21.4. In paragraph 25 of its replies, the US states that, in making its determination in a sunset review, it “*only* uses information developed in the original investigation or prior administrative proceedings” (emphasis added). The US tries to justify this practice by stating that “this information has been subject to the rigors of the administrative process in those proceedings, such as interested party briefing and onsite verification”. In our view, what the US fails to discuss is that reviews under Article 21.3 are, by virtue of Article 21.4, subject to the same evidentiary and procedural requirements as investigations and administrative reviews, including the ability to conduct onsite verifications.

5.314 Moreover, DOC’s stated preference for information developed in the original investigation cannot justify its refusal to adjust the subsidy determination for changes in the CIG programme. All of the information submitted by the Government of Germany and the German producers, showing the termination of the CIG programme with no significant residual benefit after 2000, comes directly from the original investigation and was subject to full briefing and verification in that case. The conditions and requirements of Article 12 are fully applicable to sunset reviews and no distinction is made therein whether the information is collected in the original investigation or in an Article 21.2 or an Article 21.3 review. Most importantly, what the US terms “*a relationship of ...convenience*” (at para. 25) under its domestic law cannot derogate from the basic principles of Articles 21.3 and 21.4 of the *SCM Agreement* to make a fresh, proper determination of likelihood of subsidization, injury and causality on the basis of positive evidence.

### **Question 26**

5.315 While the United States concedes that the definition of injury contained in Article 15 applies throughout the *SCM Agreement*, it reads (at paras. 26-29) unduly restrictively Article 15, by applying only those provisions that it finds favourable. By doing so, however, it seems to contradict its

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<sup>75</sup> Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* (“*Canada – Automotive Industry*”), WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, paras. 138-143.

previous replies to question 24 (a) and (b) from the Panel (at paras 19-21). Indeed, the reference in Footnote no 45 to “threat of material injury”<sup>76</sup> appears already to accommodate, albeit in a different context, the prospective nature of the analysis claimed by the US under the “likelihood” test of an Article 21.3 sunset review. Moreover, as stated in the comment to question 1(a) above, the definition of injury must include the element of causation. Article 15.3 also makes clear that the *de minimis* and negligibility provisions of Article 11.9 are an integral part to the definition of injury. As the *Korea DRAMS* panel has held, in the comparable situation of an Article 11.2 of the AD Agreement review, “while mathematical certainty of recurrence of dumping is not required, the conclusions must still be demonstrable on the basis of the evidence adduced” (at paras. 6.43 and 6.50 of the report). The obligation to adduce such “evidence” in a CVD sunset review is squarely placed, by virtue of Article 21.4, on the authorities undertaking the review for the purpose of making a “determination” under 21.3.

### Question 27

5.316 The US reply to question no 27(a) is another illustration of the isolationist interpretation of Article 21.3 advanced by it. There is indeed no valid reason to interpret the term “domestic industry” in Article 21.3 differently from that laid down in Article 11.4 in conjunction with Article 16 of the SCM Agreement. It follows that a request made by “at least one domestic interested party” is not a “duly” made request under Article 21.3 because it would not comply with the initiation requirements of Article 11.4.

### Question 28

5.317 Here the US appears to be placing undue importance on the use of the word “investigation” in Article 11.9, as opposed to the use of the word “review” in Article 21.3. The same undue reliance on the word “investigation” is shown by the US in its reply to question 1(d) above concerning Article 27.10. Although it is true that Article 11 lays down provisions on “initiation and subsequent investigation”, the term “investigation” denotes the “process or an instance of investigating” or “a formal examination or study”.<sup>77</sup> It follows that although this term encompasses a substantive exercise relating to this process of fact finding, it is more accurate to say that its scope is narrower than the scope of the term “determine” as this is used in a number of Articles in the Agreement, such as in Articles 19 or 21.3. Indeed, an investigation may lead to the imposition and collection of countervailing duties when the Member makes a final “determination” under the conditions laid down in Article 19. Therefore, what is particularly important in Article 11.9 is not the use of the term “investigation”, as the US claims, but rather the use of the terms *“the authorities concerned are satisfied that”*<sup>78</sup>, which is the equivalent to the concept of making a “determination” used in Article 19 or Articles 21.3 of the SCM Agreement. In other words, Article 11.9 comports an element of substantive determination, which, although made in the process of the original *investigation*, is not different from the substantive point of view of the finding that needs to be made in a sunset *determination* about likelihood of subsidization, injury and causality. What is significant, therefore, is the substantive determination that should be made by the authorities about the level of subsidization under both Articles 11.9 and 21.3, which must in both cases entail a determination on *de minimis* level of the subsidy, injury and causal link rather than the procedural process or stage at which this occurs. In other words, a determination in a sunset review requires the conduct of an investigation as much as an investigation is required prior to the original determination. Therefore, the fact that the word “investigation” does not appear in Article 21.3 makes no difference. Investigating authorities are not absolved of their obligation to **investigate** from the day after an original measure is imposed. This would amount to saying that authorities are entitled to apply a lower standard of examination to issues

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<sup>76</sup> As this is defined in Article 15.7 of the SCM Agreement.

<sup>77</sup> Oxford Concise English Dictionary, 9<sup>th</sup> ed. 1995.

<sup>78</sup> The corresponding phrase in Article 5.8 of the AD Agreement is “the authorities *determine* that...”.

raised in reviews, compared to that which applies in original investigations. It follows that the US insistence only on the word “investigation” in Article 11.9 or 27.10 of the SCM Agreement, to exclude the application of the *de minimis* rule in sunset reviews, amounts to simply reading these provisions outside their context, object and purpose.

### **Questions 29 and 30**

5.318 The US claims (at paras. 34-36) that the interpretation proposed by the EC would render Footnote 52 a nullity and asserts that there must be a reason for its inclusion in Article 21.3. This answer is rather puzzling. The EC does not dispute that “a finding in the most recent assessment procedure that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty”. Such a finding may be based on a finding on the zero subsidy or on some other reason. But Footnote 52 does not support the conclusion the US attempts to draw from it.

5.319 The US argument is based on an understanding of the concept of *de minimis* in Article 11.9 that reflects the Latin proverb “*de minimis non curat lex*”. As the US has explained in several places (e.g. in its reply to question 30 from the Panel and its reply to question 8 from the EC, respectively at paras. 41 and 16 of its replies), it applies voluntarily the *de minimis* rule of 0.50 per cent under domestic law for reasons of administrative efficiency because the US law is not supposed to “concern itself with trifles”.

5.320 The preparatory history of Article 11.9 and the corresponding provision in the AD Agreement, however, indicate that the rationale of the *de minimis* rule in these Agreements is different from that on which the *de minimis* rule is applied in the US. In these two WTO Agreements, the level of 1 per cent ad valorem was agreed to be the *de minimis* threshold **not** for reasons of administrative efficiency but **because for imports below this level the causal link between subsidized imports and the material injury to domestic industry would not exist.**<sup>79</sup> This is a significantly different rationale, because it demonstrates that the US continued under its domestic law its old practice going back to 1980, as codified in the 1987 Guideline on the minimis rule (see Exhibit US-6). Based on that understanding of the *de minimis* rule, the US then extrapolates from Footnote 52 by making several illogical leaps: First, it argues that if a zero rate of subsidy cannot require the authorities to terminate the CVD duty, that means that the level of the subsidy, even if zero, is not relevant for deciding likelihood of continuation or recurrence of subsidization, injury and causality. Second, it draws the operational conclusion that it is not necessary to calculate the actual level of subsidy in a sunset review. Third, it does consider that the *de minimis* rule of Article 11.9 applies to Article 21.3 reviews.

5.321 The EC considers that the current level of subsidy is not always “determinative” of the outcome of a sunset review. However, the “prospective nature of a sunset review” is subject to the requirement for the authorities to positively determine that subsidization is likely to continue or recur. Thus, if the current level of subsidy is zero or de-minimis, this does not *by itself* end the measure, but it does require the US DOC to demonstrate what change of circumstances will lead to the subsidy increasing to a level above de-minimis, if it wishes to continue the measure. In the case of a non-recurring subsidy which is already de-minimis and subject to the US declining balance methodology, the DOC must adduce and rely on positive evidence of new subsidies or of a sharp fall in the denominator in order to find likelihood of subsidization, injury and causality.

5.322 Moreover, the US states that the “focus” of a sunset review is on the possible future behaviour of foreign governments and exporters. This is misleading. First, we do not see in what respect the behaviour of the **exports** would be relevant in this context. Second, a sunset review determination requires positive evidence to demonstrate that subsidization, injury and causality is likely to continue or recur. The review should therefore focus on “demonstrable evidence adduced by the authorities”

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<sup>79</sup> E.g., MTN.GNG/NG10/W/9/Rev. 3, point E, of 26 May 1988, and MTN.GNG/NG10/W/4, page 42.

rather than on pure speculation and conjecture derived by applying the level of subsidization from the original investigation. The US states that the “best evidence” of future behaviour of governments and exporters is the rate from the original investigation. However, in the case of *Corrosion-resistant steel from Germany*, how can this be? The DOC has itself established that there are no new subsidies and that the non-recurring subsidies found in the original investigation, 9 years ago, have now declined to a level that is equivalent zero by its own calculation methodology.

5.323 There appears therefore to be only one reasonable conclusion: the US has modified its past practice after the WTO Agreements on AD and SCM entered into force only as regards determinations made in the initial investigation, but left its domestic legislation on sunset reviews unchanged by applying its 0.50 per cent *de minimis* rule based on a completely different rationale (i.e. administrative convenience and efficiency).

### **Question 30**

5.324 In addition to what has been explained above, the US’s response to question 30 again reveals its refusal to provide parties to a sunset review with the evidentiary and procedural rights established in Article 12. In paragraph 39, the US reiterates that its determination in a sunset review is “based on the original investigation and any administrative reviews”. It states:

“In a sunset review, the *de minimis* standard has particular application in several respects. For example, if Commerce determined in a sunset proceeding, based on the original investigation and any administrative reviews, that the existing countervailable subsidy programs had been terminated and that the likely net countervailable rate of subsidization was *de minimis*, **Commerce normally would determine that there was no likelihood of continuation or recurrence of subsidization.**” (emphasis added)

5.325 A closer look into this statement reveals that the US’s reasoning is, from a purely logical point of view, inherently contradictory. When the US DOC finds in a sunset review that the net subsidy rate is likely to be below its domestic 0.50 per cent rule, it makes a positive empirical finding that the subsidy is likely to continue at that level. But since this level of subsidy is not considered under US law worth pursuing, it draws the conclusion (which is literally a legal fiction) that there “will be no likelihood of continuation or recurrence of subsidization”. In reality, however, this legal conclusion of no likelihood of continuation of subsidization is not empirically correct, because the subsidy will continue albeit at a level below the 0.50 per cent. Therefore, in reality this legal conclusion is equivalent to a finding that there is no causal link of material injury for the purposes of a sunset review under Article 21.3 of the SCM Agreement. For this reason as well, it simply makes no sense the US’s refusal to recognize the need to apply in sunsets the 1 per cent *de minimis* rule of Article 11.9, but continue to apply a 0.50 per cent *de minimis* rule under its domestic law.

### **Question 31**

5.326 The US’s response to question 31 begs the issue. In paragraph 44, the US states that it “does not calculate the present rate [of subsidization in a sunset review] because the purpose of a sunset review is to determine the likelihood of the continuation or recurrence of subsidization” and that this “necessarily involves a prediction of a government’s future behaviour without the discipline of a countervailing duty order in place”. The issue is not whether DOC must determine the current level of subsidization rather than the likely future rate of subsidization in a sunset review. Instead, the issue is whether DOC may irrefutably presume that the likely level of future subsidization is the same as the rate of subsidization determined in the original investigation.

5.327 Moreover, the US does not answer the basic question why it can conduct on site verifications and apply the full rigors of an investigation in the context of an administrative review but cannot do or does not wish to do so in the context of a sunset review. Attempting to predict the future behaviour of a government in no way prevents the US authorities from conducting a proper, fresh, new investigation to find out about the numerator or denominator of the exporters' sales, the likelihood of the subsidy programme been modified or withdrawn or whether there is a non-recurring subsidy the amount of which has already been expensed and the remaining benefit flowing from it is nearly zero.

5.328 Furthermore, the US *Sunset Policy Bulletin* (see Exhibit EC-15) provides in Section III.A.5 some criteria about the way future government behaviour could be predicted. They include in particular the **legal method** by which the government granted or eliminated a programme, i.e. whether this is done by **administrative** action or through **legislative** action. The US *Sunset Policy Bulletin* proposes to the authorities to draw different conclusions depending on the legal method applied. This supports clearly the arguments the EC made in paragraph 34 of its Second Written Submission. This is all the more important here, as the programmes under review in the present case and, in particular the CIG programme, were granted by legislative action and could not as such be reinstated by administrative action only.

5.329 In addition, the improper nature of the irrefutable presumption used by the US DOC is clear from the facts of this case. In this proceeding, DOC determined that the CIG programme would continue to provide benefits after the end of the sunset review (*i.e.*, after 2000) in the same amount as was determined for the year 1991 in the original investigation (*i.e.*, 0.39 per cent). This determination that the CIG programme would continue to pay benefits in the future at the rate of 0.39 per cent is in direct conflict with all of the evidence submitted in the sunset review, showing that the CIG programme applied only to investments made prior to 1 January 1986 and that the amount of residual benefits that would continue after the year 2000 was close to zero by DOC's own calculation method.

5.330 The EC would also note the US admission, in its response to question 31, that, in a sunset review, it "**only** uses information developed in the original investigation or prior administrative review". (at para. 45, emphasis added).

### **Question 32**

5.331 While the US contends that its regulations theoretically permit "no shipment reviews", it readily admits that its "long-standing policy is to refrain from conducting administrative reviews where there have been no shipments of the subject merchandise" (at para. 47). In fact, the US points to no cases in which it has ever conducted a no-shipment administrative review of a countervailing duty order. The US DOC's uniform practice has always been to terminate any reviews in which it finds that no shipments were made during the administrative review.<sup>80</sup>

5.332 With respect the US's discussion of "change circumstances" reviews, it must be noted that DOC's determination whether or not to initiate a change circumstances review is entirely discretionary. In addition, the *SCM Agreement* does not make a review under Article 21.3 in any way dependent upon a review under 21.2. Moreover, the complete evidentiary and procedural requirements contained in Article 12 apply in full to reviews under Article 21.3.

5.333 The EC would request the Panel to note the evasive nature of the US replies which stem in particular from the highly discretionary nature of the basic US law, regulations and practice. The US law does not provide any security or predictability to exporters and is, in addition, inconsistent with the relevant provisions of the *SCM Agreement*. The US cannot unilaterally decide simply not to

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<sup>80</sup> See, e.g., *Certain Hot-Rolled Lead & Bismuth Carbon Steel Products from Germany*, 64 Fed. Reg. 44,489 (DOD 1999) (termination administrative review).

conduct administrative reviews for reasons of administrative convenience in view of the very important legal consequences this refusal can give rise to, as in the present case.

### **Question 33**

5.334 US law does not prohibit DOC from making confidential documents from the original investigation part of the confidential record in a sunset review. In fact, as discussed in the EC's second written submission, the US ITC automatically makes the confidential version of its original determination, as well as the complete staff report from the original investigation, part of the confidential record in a sunset review (EC Second Written Submission at para. 39). The US argument that these constitute "separate segments of the proceeding" is made exclusively for purposes of domestic US law which has no basis on the SCM Agreement and in particular Article 12 thereof (see EC Second Written Submission, at paras. 41-44).

### **Question 34(a)**

5.335 In addition to the written request on April 13, 2000, the German producers in this case made several oral requests at the beginning of April 2000 (*i.e.*, directly after issuance of the preliminary results) that DOC make the calculation memoranda from the original investigation part of the record in the sunset review. These requests were prompted by DOC's failure in the preliminary determination to properly consider the evidence concerning the termination of the CIG programme timely submitted by the Government of Germany and the German Producers. **It must be clearly understood that, even without the calculation memoranda, the Government of Germany and the German producers submitted sufficient evidence to establish that the CIG programme had been terminated and ceased to pay any significant benefits after 1986.** There can be no dispute that under DOC's own allocation methodology, any nonrecurring subsidies received in 1986 would be fully amortized no later than 2000.<sup>81</sup>

### **Question 34(b)**

5.336 The US DOC's regulation concerning the deadline for filing factual information does not make any distinction between confidential and public information. *See* 19 C.F.R. § 351.218(d)(4). Accordingly, the US DOC could not properly treat the German producers' request concerning the calculation memoranda as untimely but then accept factual information submitted by other parties after that date. Moreover, it is in this case necessary to conclude that the German producers, by making several specific requests to the DOC to place the data and memoranda from the original investigation into the sunset file, have renounced the confidential nature of the data, if any such confidentiality existed. It also follows that if the US DOC had any doubts about this, it should have taken positive steps and direct contact with the German producers to find out about this question instead of staying inactive until its final determination made in August 2000 by which it rejected it.

### **Question 35(a)**

5.337 As discussed above in the comments to question 25, the sunset reviews conducted by DOC violate the provisions of Article 12 and, therefore, cannot be seen as a proper determination under Article 21.3. Moreover, the US's reasoning on this point is belied by the answers it has made to the Panel's other questions. The US claims at para. 58 that:

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<sup>81</sup> Under DOC's methodology, year one in the allocation period is always the year that the subsidy is received. *See* 19 C.F.R. § 351.524(d). Accordingly, using a fifteen-year allocation period as DOC did in this case, the benefit of any nonrecurring subsidies received in 1985 would have expired in 1999 and the benefit of any nonrecurring subsidies received in 1986 would have expired, at the latest, in 2000.

“..it may determine, in accordance with the requirements of Article 21.3, whether subsidization is likely to continue or recur without conducting its own investigation, but, rather, by making its decision based on the evidentiary record developed during the sunset review because all parties, both foreign and domestic, have every opportunity under the US system to provide any information they deem relevant.”

5.338 In numerous other places in its response, however, the US concedes that, in making its determination in a sunset review, it “*only* uses information developed in the original investigation or prior administrative proceedings”. (e.g., US Answers to Panel Questions at paras. 25, 45 & 75, emphasis added). Similarly, the US concedes that, in practice, any foreign producer that does not export subject merchandise to the US after imposition of countervailing duties would be prohibited from seeking an administrative review (*Ibid* at para. 47). Thus, the US’s assertions that its determinations are “based on the evidentiary record developed during the sunset review” and that parties “have every opportunity under the US system to provide any information they deem relevant” are purely incorrect and misleading.

5.339 Moreover, accepting the US interpretation of the verb “determine” in Article 21.3 would entitle the US authorities and the national authorities of any WTO Member to become in reality passive observers and paper-collecting authorities as regards conducting an investigation and determining subsidization, material injury and causality (See EC First Written Submission, at paras. 67-71).

#### **Question 35(b)**

5.340 The US’s response well demonstrates that its *Sunset Policy Bulletin* establishes a series of irrefutable presumptions that almost invariably lead to a determination that subsidization is likely to continue or recur. This is confirmed by the results of the available cases so far, as is explained below and in para. 17 of the EC Second Written Submission. As regards the US claims in paras. 62-65, the EC refers the Panel to its previous comments regarding the US replies to questions 28-31.

5.341 In paragraph 67, the US in fact admits that the rate it reports to the ITC for the injury determination is indeed the net countervailable subsidy determined by DOC.

#### **Question 35(c)**

5.342 As regards the US replies in paras. 69-70, the EC refers the Panel to its above comment to the US reply to question 33.

#### **Question 36**

5.343 The US’s response is simply a matter of semantics. In paragraph 71, the US claims that, “[u]nder the US system, administrative reviews are not prerequisites for conducting full sunset reviews” but then, in paragraph 75, it concedes that, in a sunset review, it “only uses information developed in the original investigation or prior administrative proceedings”. In addition, the US’s statement in paragraph 73 that it makes adjustments to the net countervailable subsidy determined in the investigation when “there is evidence demonstrating that programmes have been terminated with no residual benefits” is proved wrong by the facts of this case. As detailed in the EC’s written submissions, the Government of Germany and the German producers provided clear evidence that the CIG programme was terminated without any meaningful residual benefit continuing after the end of the sunset review (see EC First Written Submission at paras. 83-91, and EC Second Written

Submission at paras. 38-44). Despite this evidence, the US DOC refused to adjust the rate from the original investigation to reflect this change.

5.344 Moreover, in para. 71 the US writes:

“The rationale for this approach is that the findings in the original investigation provide the only evidence reflecting the behaviour of the respondents without the discipline of countervailing measures in place. This makes sense given that, in a sunset review under Article 21.3, an authority is considering whether, without the discipline of the duty, subsidization would likely continue or recur; *i.e.*, what would happen without the discipline of the duty.”

5.345 The EC has replied to this argument in particular with its response to written question no 15 from the Panel (at pages 28-29 of its replies). In addition to those replies, the EC would like to draw the attention of the Panel to the fact that an amount of net countervailable subsidy of 0.60 per cent determined in the original determination or of 0.54 per cent determined in the sunset review **do not constitute nor do they put in place “a discipline”**. This is because a CVD order reflecting that rate is highly unlikely to discourage exporters from exporting to the US. There is as much admission of this reality in the US 1987 *De minimis* Guidelines (see Exhibit US-6, at page 30661) where it is accepted that:

“Even in price-sensitive markets, the effect of requiring a deposit or assessment of duty based on a rate of a 0.50 per cent ad valorem would be negligible. No party submitted comments has provided any information to support a different conclusion”.

5.346 In the same US 1987 *De minimis* Guidelines (see Exhibit US-6, at page 30661), “several parties suggested that the *de minimis* threshold be set at 1 per cent, on the basis that 1 per cent represents a level of benefit not worth the expense of an investigation or annual review”. This also partly explains why the 1 per cent ad valorem rule was laid down in the SCM Agreement, although the rationale in this latter case is based on the fact that no causality exists between such a level of subsidization and material injury. Accordingly, there is no valid substantive reason to apply in sunset determinations a *de minimis* rule that is different from that applied in original determinations.

### **Question 37**

5.347 The US’s assertion that the parties to the sunset review were different than those in the original investigation and that “the record of the sunset review contains no indication that the German producers in the sunset review were authorized to permit the movement of [confidential] information” from the record of the original investigation to the record of the sunset review is patently false (*See* US Answers to Panel Questions at para. 83). In the substantive response of 1 October 1999, the German Producers carefully explained that Thyssen Krupp Stahl AG was the legal successor to Hoesch and Thyssen and that Salzgitter AG was the legal successor to Preussag (see the German Producers Substantive Response at 5 (1999), copy attached hereto as **Exhibit EC-23**). Thus, there could have been no confusion over the authority of the German Producers to request that the calculation memoranda be placed on the record of the sunset review.

5.348 It must also be clearly understood that the German producers were not requesting that the memoranda be disclosed to the public. Their only request was that the memoranda be made part of the confidential record in the sunset review, thereby maintaining their confidential status. Accordingly, contrary to the United States’ assertion, granting the German producers’ request would not have violated the provisions of Article 12.4 (see US Answers to Panel Questions at para. 78). Moreover, as discussed above in the comment to question 33, US law does not prohibit the DOC from making confidential documents from the original investigation part of the confidential record in a

sunset review. In fact, the US ITC automatically makes the confidential version of its original determination, as well as the complete staff report from the original investigation, part of the confidential record in a sunset review (see EC Second Written Submission at para. 39).

5.349 Moreover, paragraphs 77-79 of the US replies is a clear indication of how the US DOC perceives its role in sunset investigations and determinations, i.e. as a passive, paper-collecting authority. See in this regard the US reply to written question no 5 from the EC, at paras. 8-9 of the US replies.

5.350 As regards the US response in para. 82, this is confusing the EC claim and the level and venue of this proceeding.

### **Question 38**

5.351 As discussed in the EC's Second Written Submission, DOC's vague request for "all relevant evidence" violates the requirements of Article 12 (see EC Second Written Submission at paras. 40-44). It is not until the preliminary results (*i.e.*, after the time for submitting evidence has already expired) that DOC comments upon the sufficiency of the evidence submitted by the parties (EC, *Ibid* at 42). Moreover, even when the DOC technically permits the submission of evidence, the presumptions dictated by the *Sunset Policy Bulletin* result in the evidence being either later excluded or given no weight (see EC Replies to the Panel Written Questions at question 19).

5.352 Moreover, the US in this case did not provide any rational explanation of its decision that the German producers' request about placing the data from the original investigation was untimely and how this would have affected DOC's decision making.

I. COMMENTS OF THE EUROPEAN COMMUNITIES ON THE RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE EUROPEAN COMMUNITIES FOLLOWING THE FIRST MEETING OF THE PANEL

### **Question 3**

5.353 The word "demonstrate" does not appear for example in Articles 11.1, 11.2, 11.9, Article 19.1, etc. Is the US suggesting that in all these instances the burden of demonstrating that subsidization, injury and causal link exist is upon the foreign producers and Members to establish? In the view of the EC, the US is confusing the two different level and venue of proceedings and misinterprets the established case law in the WTO on the burden of proof and burden of persuasion.

### **Question 4**

5.354 The US does not draw the logical conclusions from its answer. As the EC says, the consequences of a CVD investigation and a positive sunset finding are the same – five more years of countervailing duties. The fact that a sunset review does not change the deposit rate is irrelevant; the important point is that duties continue to apply. In fact, the only real difference between a new investigation and an investigation in a sunset determination is a question of timing. The sunset takes place five years after the original investigation. If we accept the US argument that the sunset has a different purpose and consequence, we effectively reverse the presumption in favour of expiry in Article 21.3.

### **Question 6**

5.355 The US misstates the length of the data collection period in original investigations. Pursuant to 19 C.F.R. § 351.301(b)(1), parties have until 7 days prior to verification to submit factual

information. Because verification does not take place until after the preliminary determination, this gives parties well over 65 days in which to submit factual information. This compares to only 35 days in a sunset review although the time for completing a full sunset review is considerably longer than that for completing an original countervailing duty investigations (*i.e.*, 240 days in a sunset review compared to 140 days in an original investigation). *Compare* 19 C.F.R. § 351.218(f)(3)(i) *with* 19 C.F.R. § 351.210(b)(1). Moreover, the time to submit factual information in a sunset review expires long before issuance of the preliminary results so that a party can file no additional information in response to that determination. *See* 19 C.F.R. § 351.218(d)(4).

5.356 Moreover, the US approach seems to depend entirely on when a firm is investigated. This can be illustrated by the example of a new exporter or “new shipper” review under Article 19.3. In this situation, a firm which starts exporting after the original investigation period and therefore could not have participated during the original investigation even if it had wanted to, is entitled to an individual CVD rate. However, in such cases, the US will apply a 0.5 per cent *de minimis* threshold, while a firm investigated on exactly the same basis in an original investigation would have been subject to a 1 per cent *de minimis* level. There are simply no grounds for such a discrimination. In addition, in sunsets the US is asking the Panel to accept discrimination which is nowhere provided for in the SCM Agreement. It argues that it is entitled to determine the likelihood of continuation or recurrence of subsidization, but at only half the rate required at the stage of initiation.

#### **Question 8**

5.357 Again, the US comments are very revealing. The US, having rejected the introduction of a 1 per cent *de minimis* threshold in 1987 in favour of a 0.5 per cent rate, does not really accept the use of the SCM Agreement’s 1 per cent *de-minimis* threshold in countervailing duty investigations. It thus chooses to apply this threshold only in new investigations, and to attempt to make a spurious distinction between the purpose of such investigations and sunset reviews. It does this in order to cling on to its pre-Uruguay Round *de-minimis* rate, which it considers to be the “proper” level for *de minimis*. As well as depriving the EC of the benefit of the correct *de-minimis* level in sunsets, such an approach also deprives developing countries of the special and differential treatment embodied in the 2 per cent and 3 per cent *de-minimis* thresholds under Articles 27.10 and 27.11.

5.358 Moreover, the EC notes that in sunsets the DOC will take no notice of the progressive decline in the amount of non-recurring subsidies invariably found in administrative reviews.

#### **Question 9**

5.359 The US’s response confirms the fact that it reverses the standard provided in Article 21.3 and requires foreign producers to prove “no likelihood” of continuation or recurrence of subsidization (see US Answers to EC Questions at para. 18). The proper standard under Article 21.3 requires the automatic termination of countervailing duties unless it is affirmatively determined that “the expiry of the duty would be *likely* to lead to continuation or recurrence of subsidization and injury” (Article 21.3 *SCM* (emphasis added)).

#### **Question 12**

5.360 To the extent that DOC finds it necessary to have current sales information before it can calculate an *ad valorem* subsidy rate in a sunset review, it is incumbent upon DOC to request such information from the parties (see US Answers to EC Questions at para. 23). Although DOC’s sunset regulations do request that foreign producers provide information on exports to the United States during the five years preceding initiation of the sunset review, the regulations do not request information on total sales (see 19 C.F.R. § 351.218(d)(3)(iii)(B)).

5.361 The US's statement that it must ignore the annual diminution in the value of nonrecurring subsidies under its declining balance methodology because it does not have revised sales information to use as the denominator in its calculation of an *ad valorem* subsidy rate is based upon faulty reasoning. The effect of the annual diminution in the value of a nonrecurring subsidy (*i.e.*, the numerator in the calculation of the *ad valorem* subsidy rate) can only be offset if there has been a significant decline in the value of total sales (*i.e.*, the denominator in the calculation of the *ad valorem* subsidy rate) since the original investigation. In this case, there is no evidence that total sales have declined. To the contrary, the sales information submitted by the German producers in their 15 October 1999 rebuttal reveals that the total sales of Preussag/Salzgitter more than doubled between 1991 and 1998 (*Compare* Exhibit EC-18 at Appendix 1 with Exhibit EC-22 at p. 43). This dramatic increase in total sales would have resulted in an even greater decline in the *ad valorem* subsidy rate, pushing the rate even further below the *de minimis* level.

5.362 Finally, as the US DOC did with respect to the Structural Improvement Aids and Zonal Border Area programmes, it could have adjusted the subsidy rate calculated for the CIG programme by subtracting the benefit assigned to that programme without needing a revised value for total sales. As with the Structural Improvement Aids and Zonal Border Area programmes, the German producers submitted evidence demonstrating that the CIG programme had been terminated without any residual benefit accruing after the end of the sunset review.

### **Question 13**

5.363 As regards the US statement in para. 24 about the possible rationales for including the *de minimis* rule of 1 per cent *ad valorem*, it states that there is no rationale for a de-minimis threshold in the SCM Agreement, and that the 1 per cent standard is the product of negotiations. Once again, the US makes little secret of its distaste for the 1 per cent de-minimis threshold. In fact, all provisions of WTO Agreements are the product of negotiations, but this does not mean that their appropriate application can simply be ignored. As regards the true rationale behind the *de minimis* rule of 1 per cent in the SCM Agreement, we refer the Panel to our comments in paragraphs 17-20 above on the US replies to questions 29-30 from the Panel.

### **Question 14**

5.364 The US mischaracterize DOC's reason for rejecting the domestic interested parties' allegation of new subsidies (see US Answers to EC Questions at para. 25). The US DOC did not base its decision on the lack of administrative reviews alone. Instead, DOC made clear that the domestic interested parties failed to provide "concrete evidence" of new subsidies (see Final Results Decision Memo at 43, Exhibit EC-10).

### **Question 16**

5.365 When one analyses the only 3 cases in which DOC found that a countervailing subsidy is not likely to continue or recur, it is evident that DOC applied very different procedures in those cases than the ones applied in this case. In *Live Swine from Canada*, DOC considered new information submitted by the Government of Nova Scotia specifically because foreign producers had been prevented from requesting administrative reviews due to a lack of US shipments. Final Results of Full Sunset Review: Live Swine From Canada, 64 Fed. Reg. 60301, 60304 (1999). In *Cotton Shop Towels from Peru*, parties were permitted to submit new evidence, and DOC even conducted verification. Final Results of Full Sunset Review & Termination of Suspended Investigation: Cotton Shop Towels From Peru, 64 Fed. Reg. 66894, 66895 (1999). Finally, unlike the present proceeding, *Porcelain-on-Steel Cooking Ware from Mexico*, exclusively involved recurring subsidies. See Final Results of Full Sunset Review & Revocation of Countervailing Duty Order: Porcelain-on-Steel Cooking Ware from Mexico, 65 Fed. Reg. 284 (2000). Accordingly, the DOC presumption

concerning nonrecurring subsidies, under which DOC refused to treat the CIG programme as terminated, was not applicable in *Porcelain-on-Steel Cooking Ware from Mexico*.

### **Questions 18 and 19**

5.366 The US is arguing that the EC's questions 18 and 19 are "not really questions", and suggests that the EC is asking the US to research and perform "new calculations", which were not on the record of the sunset review. The fact is that the DOC should have investigated both the projected denominator and the remaining amount of subsidy, in order to make a determination under 21.3. It is therefore saying that it was not required to look at these factors in a sunset. The EC would request the Panel to take due note of this statement.

#### **J. COMMENTS OF THE UNITED STATES ON THE RESPONSES OF THE EUROPEAN COMMUNITIES TO QUESTIONS FROM THE PANEL FOLLOWING THE FIRST MEETING OF THE PANEL**

5.367 The United States does not intend to comment on every response by the EC to the Panel's questions, particularly where the issues raised have been addressed in prior written submissions of the United States. Instead, the United States will comment briefly on those specific responses where additional points or emphasis is warranted. First, however, there are several overarching theories or assumptions in the EC's answers that are best addressed in general.

5.368 In particular, the United States observes that the EC in its answers espouses a general principle that any provision of the SCM Agreement is potentially applicable *mutatis mutandis* to any other provision of the SCM Agreement.<sup>82</sup> According to the EC, the only limitation on this free-for-all application is that a provision must be "relevant to the issues" covered by another Article and that its application "does not create a situation of conflict or is not specifically excluded". The EC's approach to treaty interpretation turns the customary rule of treaty interpretation on its head.

5.369 Article 31 of the *Vienna Convention* reflects the basic principle of treaty interpretation. In particular, Article 31(1) provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the *terms* of the treaty in their *context* and in the light of its *object and purpose*". (Emphasis added). The EC's approach to treaty interpretation is the very antithesis of this customary rule. Rather than reading the words of a provision and interpreting them "in light of the object and purpose" of the Agreement, the EC would require Members to interpret the object and purpose and then, regardless of the plain meaning of the words, interpret those words in light of the "object and purpose" as divined by the Member. This runs afoul of the Appellate Body's admonition in *Japan – Alcoholic Beverages*, that "the treaty's 'object and purpose' is to be referred to in determining the meaning of the 'terms of the treaty' and not as an independent basis for interpretation."<sup>83</sup>

5.370 In its answers to the Panel's questions, the EC makes various assumptions regarding the "purposes" of various provisions of the SCM Agreement without reference to the text of the SCM Agreement, and then refers to obligations not found in the text which presumably derive from these "purposes". This use of "purposes" is precisely the "independent basis for interpretation" which the Appellate Body has described as incorrect, and operates to circumvent the requirement in DSU Article 3.2 that Dispute Settlement Body rulings cannot add to or diminish the rights and obligations provided in the covered agreements. If every "relevant" SCM Agreement provision applied to every other SCM Agreement provision (*mutatis mutandis*) unless the application created "a situation of

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<sup>82</sup> See, e.g., EC responses to Panel Questions 5(a) and (b).

<sup>83</sup> *Japan – Taxes on Alcoholic Beverages*, p.11, n.20 ("[T]he treaty's 'object and purpose' is to be referred to in determining the meaning of the 'terms of the treaty' and not as an independent basis for interpretation.").

conflict”, the purely theoretical questions of what is “relevant” and what creates “a situation of conflict” would become the focus of every WTO dispute. The EC’s approach ignores a fundamental tenet that where the Members wished to have explicit obligations set forth in one provision apply in another context, they did so expressly.<sup>84</sup> If accepted, the EC’s approach would result in the nullification the Members’ expectations as *explicitly* expressed in the SCM Agreement.<sup>85</sup>

5.371 Turning now to the EC’s answers to specific questions, with respect to Question 1(a), the EC has applied its treaty interpretation approach to the Panel’s question as to whether the Article 11.9 *de minimis* standard applies to reviews under Article 21.2. The result is that, according to the EC, sometimes Article 11.9 is applicable to reviews under Article 21.2 and sometimes Article 11.9 is not applicable to reviews under Article 21.2. According to the EC, whether Article 11.9 is relevant in Article 21.2 reviews is dependent on the purpose of the review. This type of analysis combines the worst of the EC’s relevance- and purpose-based treaty interpretation approach and results in what is certain to be the standard answer to this type of inquiry based on the EC’s approach: it depends.<sup>86</sup>

5.372 With respect to Questions 1(b) and (c), the EC’s answers reflect reliance on assumptions concerning the purpose of the negligibility standards and its interpretation theory that every provision can be considered applicable to every other provision barring explicit conflict. However, as the United States demonstrated in its responses to the Panel’s questions, neither the text of the SCM Agreement nor the practicalities associated with conducting a five-year review support the EC’s view that a negligibility test is required under Article 21.3. Furthermore, even under the EC’s proposed approach towards negligibility, the EC recognizes that there must be a demonstration that the amount of the subsidy “is not going to increase above [the current] level or that imports would not rise above *de minimis* upon removal of the measure”. Thus, the EC and the United States are in concurrence that current subsidy or volume levels by themselves, without a prospective inquiry into likely future levels, are not sufficient to require termination of an order.

5.373 The EC’s answer to Question 1(d) relies upon what it claims is “an irrefutable presumption” as to the purpose of the *de minimis* and negligible import standards. The EC again purports to discern a purpose without reference to the text of the SCM Agreement. The EC then refers to obligations not found in the text which presumably derive from this “purpose” (*i.e.*, according to the EC, these standards must apply in sunset reviews under Article 21.3). As the United States demonstrated in its answers to the Panel’s questions, by their very terms, Articles 27.10 and 27.11 apply only in investigations. The EC’s use of “purposes” as an independent basis for interpretation in this case is incorrect and results in imputation into the SCM Agreement of “words that are not there.”<sup>87</sup>

5.374 With respect to the EC’s answers to Questions 2, 4, 9, and 13(b), the United States notes that the EC’s responses fail to address the phrase “in a review initiated . . . on their own initiative” contained in Article 21.3. The EC merely restates its argument that the evidentiary prerequisites of

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<sup>84</sup> Article 21 itself illustrates this point in paragraph 4, which makes the provisions of Article 12 applicable to Article 21.3 reviews, and in paragraph 5, which expressly makes the provisions of Article 21 applicable to Article 18 undertakings. Examples of provisions that apply in other contexts include: 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”); calculation of the amount of a subsidy under Article 14 (“For the purpose of Part V”); definition of “injury” under Article 15 and footnote 45 (“Under this Agreement”); definition of “like product” under footnote 46 (“Throughout this Agreement”); definition of domestic industry in Article 16 (“For the purposes of this Agreement”); definition of “levy” under footnote 51 (“As used in this Agreement”).

<sup>85</sup> See *Japan - Taxes on Alcoholic Beverages* (“*Japan Taxes*”), page 19 (discussing how the “omission” in Article III:2 of GATT 1994 to the general principle in Article III:1 “must have some meaning”).

<sup>86</sup> See also EC’s response to Panel Question 12(c).

<sup>87</sup> See *India Patent Protection*, para. 45.

Article 11.6 apply to sunset reviews under Article 21.3. As demonstrated in the United States First Written Submission (paras. 60-62), the right of an authority to initiate a sunset review on its own initiative, as explicitly stated in Article 21.3, is unqualified. Whether a Member chooses to initiate a sunset review in every case through self-initiation or to initiate a review only in response to a “duly substantiated request” from the domestic industry is a decision that the plain text of Article 21.3 leaves to the Members.

5.375 With respect to the EC’s answers to Questions 3, 11, and 13(b), the EC’s answers either assume or specifically claim that Commerce self-initiates sunset reviews “without any shred of evidence”. The EC is wrong. The results of the original countervailing duty order and of the most recent administrative reviews, if any, in general can be considered evidence of the existence of subsidization. The EC’s argument that something more is required prior to initiation of a sunset review amounts to an argument that an authority must conduct the review before it initiates the review.

5.376 With respect to the EC’s answers to Questions 5 and 6, the United States demonstrated above that the EC’s approach to treaty interpretation (*i.e.*, any provision is in principle applicable *mutatis mutandis* to any other provision) is not consistent with customary rules of treaty interpretation. At the very least, the EC’s response to these questions demonstrates the futility of relying on the EC’s approach to interpret the meaning of the words contained in Article 21.3. According to the EC, Members may not rely on the plain text of the SCM Agreement to determine their obligations. Instead, the “object and purpose” of the SCM Agreement – as identified, of course, by the EC – trump the text of the Agreement.

5.377 In the *US Shrimp* case, the Appellate Body rejected this type of unconventional approach to treaty interpretation, stating as follows:<sup>88</sup>

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.

Thus, while the object and purpose of an agreement can be instructive in interpreting the text, the object and purpose cannot be used to override the text. In other words, object and purpose cannot be used to write into the text “words that are not there”.<sup>89</sup>

5.378 In its response to Question 14, the EC suggests that Commerce did not exercise due diligence in refusing to consider the calculation memorandum from the original investigation. As the United States demonstrated in its First Written Submission (paras. 102-105), the calculation memorandum was not on the administrative record of the sunset review because the German producers failed to place it there in a timely fashion. Although cited by the EC as such, the Appellate Body’s decision in *Pakistan Yarn* does not stand for the proposition that “new” evidence should be considered by a Panel in a dispute. The EC emphasizes that in *Pakistan Yarn* the Appellate Body addressed only the

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<sup>88</sup> *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body adopted 6 November 1998, para. 114 (footnote omitted).

<sup>89</sup> As another blatant example of the EC’s efforts to rewrite the text of the Agreement, the United States notes that throughout its responses (*e.g.*, *EC Responses to Questions 9, 12, 14, 15, 16(a) and 16(b)*), the EC misquotes the text of the Agreement by inserting a “causality” test into Article 21.3. Aside from the EC’s obvious misquoting of the Agreement, the United States finds this particularly troublesome given that the injury-related aspects of the United States’ action are not within the terms of reference in this dispute.

question of whether the Panel should have considered extra-record evidence consisting of facts that were not in existence at the time the administrative determination was made and hence could not have been known. However, that was because the United States specifically limited its appeal to the issue of whether a panel can consider evidence that was not in existence at the time of the national authority's determination. As the United States demonstrated in its First Written Submission (paras. 49-51), similar restrictions apply with respect to a panel's review of other types of extra-record information. Nothing in *Pakistan Yarn* or other Appellate Body or adopted Panel reports suggests that the restrictions on a Panel's review of evidence would not likewise apply with respect to properly-rejected information that had existed at the time the authorities made their determination.

5.379 In response to Question 15, the EC asserts that Commerce systematically "refuses" to change the rate from the original subsidy rate determined in the investigation. The EC is wrong. In the instant case, Commerce in fact agreed with the EC and the German producers that two programmes had been terminated with no continuing benefits. Commerce, therefore, adjusted the net countervailable subsidy rate accordingly.<sup>90</sup> More importantly however, the United States would point out that, as demonstrated in our First Written Submission (70-87), nothing in the SCM Agreement requires consideration of the magnitude of subsidization in determining the likelihood of continuation or recurrence of subsidization.

5.380 Question 18 addresses the evidentiary and procedural aspects of Commerce's sunset review. The EC's response to this question is disingenuous and misleading. As a general matter, and as discussed in greater detail in the United States' First Written Submission (paras. 14-23, 109-116), Commerce's sunset review followed reasonable, appropriate procedures that fully comply with the evidentiary and procedural requirements of Articles 21 and 12. The EC is wrong when it claims that the respondent interested parties, including the German producers, "were not given *any* opportunity" to present all evidence which they considered relevant in the sunset review. (Emphasis added). If the respondent interested parties failed to *gather and prepare* evidence during the 15 months prior to the scheduled initiation of the sunset review, they have only themselves to blame. Contrary to the EC's response, the United States never suggested that respondent interested parties could *submit* this information prior to initiation of the sunset review.

5.381 The EC's assertion that sunset information requirements were "vague" or "perfunctory" is also wrong. Fifteen months before initiation of the sunset review, the statutory requirements, the regulatory requirements (including the standard questionnaire), and Commerce's extensive *Sunset Policy Bulletin*, providing detailed guidance on methodological and analytical issues not explicitly addressed by the statute and regulations, were all available to respondent interested parties. Again, if the parties' failed to review and consider the guidance provided in these documents in preparation of their submissions, they have only themselves to blame. Finally, the EC's assertion that the respondent interested parties did not have access to the evidence presented by the other parties in the sunset review is simply false. Commerce's regulations require service of all submissions on all parties to the proceeding; there is no evidence that the parties did not do so in this case.

## K. SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

### 1. Introduction

5.382 The European Communities ("EC") will concentrate in this submission on responding to and commenting on the facts and arguments submitted by the US so far, in particular those that emerged in the oral statements to the first meeting of the Panel and in the questions from the Panel.

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<sup>90</sup> See *Sunset Calculation Memorandum*, p.1 (Exhibit EC-8).

5.383 It is interesting to see how little the US has had to offer in terms of justifying its position. This may be summarised as follows: Article 21.3 of the *SCM Agreement* has to be read in a literal, formalistic way, without regard to its object and purpose and in complete isolation from the remaining provisions of the *SCM Agreement*.

5.384 At this stage, the EC would also like to point out that it respectfully disagrees with the preliminary ruling issued by the Panel at its first meeting with the Parties on its terms of reference and expedited sunset reviews. Having not yet seen the actual reasoning of the Panel, the EC is obliged to reserve its right in this respect for the remaining stages of the proceeding. The EC is firmly of the view that the Panel's ruling on this point is an error in law. For those reasons, the EC will clarify, to the extent still necessary, only the factual aspects of its argument relating to expedited reviews, as this may be necessary in subsequent adjudication of this matter.

## 2. Standard of Review

5.385 The EC agrees with the summary of the “key elements” of the report in the *United States – Cotton Yarn* case,<sup>91</sup> where Appellate Body laid down the standard of review that panels should follow under Article 11 of the DSU (at para. 74). The EC notes that the Appellate Body cited there with approval its previous finding that the national authorities “must undertake additional investigative steps, when the circumstances so require, in order to fulfil their obligation to evaluate all relevant factors” (at para. 73). Indeed, this echoes the Appellate Body's finding in particular in the *United States – Lamb Safeguard* case, where it held that:

“...competent authorities have an *independent* duty of investigation and that they cannot “remain[] passive in the face of possible short-comings in the *evidence* submitted, and *views* expressed, by the *interested parties*.”<sup>92</sup> (emphasis added) In short, competent authorities are obliged, in some circumstances, to go beyond the arguments that were advanced by the interested parties during the investigation. As *competent authorities* themselves are obliged, in some circumstances, to go beyond the arguments of the interested parties in reaching their own determinations, so too, we believe, *panels* are not limited to the arguments submitted by the interested parties to the competent authorities in reviewing those determinations in WTO dispute settlement.”<sup>93</sup>

5.386 That is why the EC considers that for the purpose of determining whether the US authorities have evaluated all relevant factors and examined all pertinent facts, the Panel can take advantage of the provision of Article 13 of the DSU. It is also noteworthy that in the view of the Appellate Body “in describing the duties of competent authorities, we simultaneously define the duties of panels in reviewing the investigations and determinations carried out by competent authorities” (at para. 73). Furthermore, the EC agrees that the standard of review laid down by the Appellate Body with respect to the Safeguards Agreement is equally applicable to the standard of review to be applied under the *SCM Agreement* (at para. 76).

5.387 What is particularly important is the finding by the Appellate Body that “a panel reviewing the due diligence exercised by a Member in making its determination...has to put itself in the place of that Member at the time it makes its determination” (at para. 78). Application of this principle to the

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<sup>91</sup> Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, circulated 8 October 2001, paras. 66-81.

<sup>92</sup> *Ibid.*, para. 55.

<sup>93</sup> Appellate Body Report, *United-States – Safeguard Measures on Imports of Freshn Chilled or Frozen Lamb Meat from New Zealand and Australia* (“United-States – Lamb Safeguards”), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 114.

facts of the present case would clearly require the present Panel to consider the evidence that existed and was made available to the US DOC but which it refused to take into account on the erroneous allegation that it was submitted outside the time limit. The evidence the EC claims the US authorities should have taken into account is evidence that definitively existed at the time the DOC made the determination. Moreover, it was well known to the US authorities since they were the actual authors of that evidence. As in the *Cotton Yarn* case, this evidence is in the form of data on the declining balance methodology and the level of subsidisation of the German exporters under the CIG programme. The accuracy of the above is not denied even by DOC in its final determination in this case nor by the US's submissions to the Panel so far. It follows that this was not only relevant evidence but evidence indispensable for the proper conduct of the sunset review. The legal consequence of the DOC's refusal to consider it should lead to the reversal of the DOC's findings.

5.388 The EC does not request the Panel to carry out a *de novo* review in this case but simply to find that the DOC's determination is inconsistent with the US obligations under Article 21.3 of the *SCM Agreement* "to determine" subsidisation, causality and injury, also because it refused to consider highly relevant evidence that existed at the time of the determination and of the existence of which they were fully aware at that time.

### 3. Article 21.3 of the SCM Agreement

5.389 The text of Article 21.3 of the *SCM Agreement* mandates that WTO Members shall terminate any countervailing duty on a date not later than five years from its imposition (or from the date of a most recent review that has covered both subsidisation and injury, or of a sunset review). Thus, the obligation clearly spelt out in the text of this Article is that of an ending in the life of any countervailing duty after five years.

5.390 The text of Article 21.3 then proceeds to envisage one possible exception to this obligation, which is that a countervailing duty could be continued if the domestic authorities (1) initiate a review before the five years' deadline on the domestic authorities' own initiative or on the request of domestic industry prior to the five years deadline; and (2) determine that the expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury.

5.391 The second of the above requirements reflects the *ratio* of the obligation and of its limited exception. These are to be found in the first paragraph of Article 21, which provides that "a countervailing duty shall remain in force only as long as and to the extent necessary to prevent subsidisation that is causing injury". In other words, as a countervailing duty is a trade defence measure which hinders trade, it can only be justified for a limited period of time – as long as necessary or, at the most, 5 years – unless the elements which had justified its imposition in the first place (i.e. subsidisation, causality and injury) are likely to continue or recur. In order to ascertain the likelihood of continuation or recurrence of these elements, a determination should be conducted as laid down in Article 21.3, as well as a series of other procedural and substantive requirements as laid down in other provisions of the *SCM Agreement* must be undertaken. These other provisions constitute therefore the necessary context of Article 21.3 and it is necessary to take them into account in order to give proper meaning and apply correctly its provisions.

5.392 In order to ascertain the likelihood of continuation or recurrence of these elements, a determination should be made as laid down in Article 21.3, and a series of other procedural and substantive requirements as laid down in other provisions of the *SCM Agreement* must be undertaken. For the purposes of this specific case, Article 21.3 should therefore be read in conjunction with the other relevant provisions of the *SCM Agreement*, in particular on initiation and subsequent investigation (Article 11) and the *de minimis* rule (Article 11.9).

#### 4. Initiation of Sunset Reviews

- (a) By automatically initiating sunset reviews the US acts inconsistently with the obligation of termination laid down in Article 21.3 of the *SCM Agreement*.

5.393 US law, by requiring that sunset reviews be automatically initiated, violates Article 21.3 of the *SCM Agreement* because it transforms an exception into a general rule. This is not only contrary to the letter and the object and purpose of the *SCM Agreement* but, coupled with the other characteristics of US procedure that will be analysed below, leads to the automatic continuation and perpetuation of countervailing duties.

5.394 As a matter of fact, a simple look at the outcome of the sunset reviews conducted by the DOC proves the above point. It seems that since July 1998, DOC conducted 204 full sunset reviews of Anti-Dumping and CVD duty orders. It appears that as far as Anti-Dumping duty orders were concerned, in only 3 out of about 150 cases, the DOC found that there was no likelihood of recurrence or continuation of dumping. On the other hand, with regard to CVD orders, of the 54 sunset reviews conducted, DOC did not find likelihood of recurrence or continuation of subsidisation and injury only in 3 cases after a full review. In 2 more cases DOC found likelihood of recurrence or continuation of subsidisation on *de minimis* grounds. These data provide clear evidence of the fact that the US law and regulations are biased in favour of keeping and perpetuating unjustified CVD orders.

5.395 Even when DOC “conducts” a full sunset review, the evidentiary presumptions that it applies are so unyielding that a foreign respondent has no chance of succeeding in the sunset review. For example, as detailed below, DOC irrefutably presumes that, if the allocation period of a non-recurring subsidy has not expired before the end of the sunset review, then the benefit of the programme will continue undiminished at the same level calculated during the original investigation. Because DOC normally applies a 15-year allocation period in cases involving steel, application of this presumption means that, if a foreign company receives a non-recurring subsidy during the original period of investigation that results in the assessment of countervailing duties, DOC will automatically find a likelihood of continuation of subsidisation for the next 15 years regardless of the time period that has lapsed in the meantime and of any other changes in that subsidy programme. US law is clearly biased towards the unjustified continuation and perpetuation of countervailing duties, in violation of the undisputed duty to terminate them laid down in Article 21 of the *SCM Agreement*.

- (b) The self-initiation of sunset reviews requires sufficient evidence of the likelihood of continuation or recurrence of subsidisation, causality and injury.

5.396 Under US law, sunset reviews are always self-initiated by DOC not later than 30 days before the fifth anniversary of an order. Therefore, as the US has admitted at the first meeting of the Panel, the possibility of waiting for a request of the domestic industry has just not been implemented in US law.

5.397 The purpose and effect of new investigations (under Article 11 of the *SCM Agreement*) and sunset reviews (under Article 21.3) are essentially the same. Under Article 11, the self-initiation of an original investigation by domestic authorities is an exceptional hypothesis, which is justified only if the domestic authorities have sufficient evidence of subsidisation, injury and causal link. Thus, without sufficient evidence the domestic authorities should not initiate an investigation. As Article 21.3 requires the investigating authority to make a determination of likelihood of continuation or recurrence of subsidisation and injury, it is reasonable to require that the domestic authorities, in order to initiate a sunset review on their own initiative, should be in possession of a level of evidence that is also sufficient as regards likelihood of continuation or recurrence of subsidisation, causality and injury. Articles 22.1 and 22.7 provide further support for this proposition.

5.398 The response of the US to this claim is essentially that the EC purports to read into Article 21.3 language that is not there. In other words, the US is proposing a interpretation of the terms of Article 21.3 which is formalistic and in complete isolation of its object, purpose and context. As the EC has already explained with its previous submissions, all the US arguments in defence should be rejected. The Appellate Body has held several times that “omissions in different contexts may have different meanings, and omission, in and of itself, is not necessarily dispositive”.<sup>94</sup> For example, in the *Canada – Automotive Industry* report, the Appellate Body held that the panel in that case had erred because it failed to examine the ordinary meaning of the terms in their relevant context and in light of the object and purpose of the entire *SCM Agreement*.<sup>95</sup>

5.399 The EC submits that the US arguments in this case suffer from the same defect. The fact that US law requires sunset reviews to be automatically self-initiated, without the need that sufficient evidence of likelihood of continuation or recurrence of subsidisation and injury be present, violate Article 21.3, read in conjunction with Article 21.1, Article 11, Article 12, Article 15 and Article 22, because it leads to continuation of CVD measures that are not necessary to counteract subsidisation and injury.

#### **5. US law, regulations and administrative practices are inconsistent with the obligation to "determine" the likelihood of continuation or recurrence of subsidization and injury**

5.400 As set out at length in the EC's first written submission<sup>96</sup>, the second requirement that Article 21.3 of the *SCM Agreement* imposes in order to allow a derogation from the presumption of termination of countervailing duties is that the domestic authorities determine, i.e. make a positive finding on subsidisation, causality and injury.<sup>97</sup>

5.401 This requirement is reinforced by the overall object and purpose of Article 21.3 of the *SCM Agreement* as laid down in Article 21.1: that countervailing duties should remain in force only as long as and to the extent necessary to counteract injurious subsidisation. In other words, Article 21.1 of the *SCM Agreement* permits a countervailing duty to continue after five years only if it is established in a proper fresh determination that injurious subsidisation is likely to continue if the order were to expire. As the Appellate Body held in the comparable case *Korea DRAMS*, the continued imposition of the duty “must be essentially dependent on, and therefore assignable to, a foundation of positive evidence that the 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>98</sup>.

5.402 Under US law, Section 751(c), in conjunction with Section 752, mandates the DOC to consider only: (a) the net countervailable subsidy determined in the original investigation, and (b) whether there were any changes in the subsidies since the original investigation that may affect the countervailing duty. The EC does not deny that the CVD rate from the original investigation, which the DOC normally selects on the basis that it is the only rate that “reflects the behaviour of governments and exporters without the discipline of an order in place”, may in some cases be a factor to take into account. However, as it has been explained, the object and purpose of the terms of Article 21.3 in context clearly require domestic authorities to make a new, proper “determination”.

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<sup>94</sup> Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* (“Canada – Automotive Industry”), WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 138.

<sup>95</sup> *Ibidem*, paras. 139-143.

<sup>96</sup> EC first written submission, para. 67-71.

<sup>97</sup> Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (“United States – Lead Bars”), WT/DS138/AB/R, adopted 7 June 2000, at para. 54.

<sup>98</sup> Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea* (“United States – DRAMS”), WT/DS99/R, adopted 19 March 1999, para. 6.41.

This is because CVD orders can only be maintained for a limited period of time unless it is demonstrated that the elements which had justified their imposition in the first place, i.e. subsidisation, causality and injury, are likely to continue or recur in the absence of the order.

5.403 The US admitted in its first written submission and in the oral hearing that no fresh investigation is ever conducted in a sunset review<sup>99</sup>. This practice is in violation of the requirements of Article 21.3 of the *SCM Agreement* to make a new “determination” about the likelihood of continuation or recurrence of subsidisation and injury. Moreover, by in fact requiring that likelihood of continuation or recurrence of a subsidy be undertaken in previous administrative reviews, it in reality shifts the burden of proving a change in circumstances on the foreign exporters. Administrative reviews are considered by the *SCM Agreement* as non-obligatory. Therefore, the fact that a party did not request an administrative review cannot relieve in any way the domestic authorities from their basic and primary duty to make a fresh determination about the likelihood of continuation or recurrence of subsidisation under Article 21.3 sunset reviews.

5.404 Moreover, in the case of a non-recurring subsidy, maintaining that “the findings in the original investigation provide the only evidence reflecting the behaviour of the respondents without the discipline of countervailing measures in place” is misleading. In such a case, it is positively known that, in the absence of new subsidies or other evidence, the amount of the subsidy is diminishing and is bound to disappear in accordance with DOC’s method of calculation. For example, in the present case, the main subsidy, the CIG programme, was a non-recurring subsidy. Thus, the continuation or not of its benefits was easy to establish by taking into account DOC’s calculation memorandum, which was part of the file of the original investigation. DOC was the actual author of this memorandum and it was fully aware of its existence and relevance in determining that there could be no “likelihood” of continuation or recurrence of subsidisation and injury in this case<sup>100</sup>.

5.405 If a final determination of likelihood of recurrence or continuation of subsidisation in a sunset review had to be based exclusively on evidence reflecting the behaviour of the respondents without the order in force, it is self-evident that a respondent will never get rid of a CVD duty on such basis. For those reasons, the EC considers that, as a general rule, the same elements and factors that the investigating authorities took into account in the original investigation in a retrospective manner can be analysed in a prospective way during a sunset review. These are laid down essentially in Articles 11, 12 and 15 of the *SCM Agreement*. However, the range of factors to be taken into account in making the forward-looking assessment necessary to establish the likelihood of recurrence or continuation of subsidisation has to be evaluated on case by case basis, as it mainly depends on the kind of subsidy under examination. For example, if it is a recurring unemployment subsidy, the investigating authorities should consider the likelihood of lay-offs within the reasonable future. In the case at issue, however, the main subsidy was a non-recurring subsidy that by definition cannot recur. There could have been no continuation of benefits in such a case, if the US authorities were simply to take into consideration the calculation memorandum that was part of the file of the original investigation.

5.406 The US argues that “...the findings in the original investigation provide the only evidence reflecting the behaviour of the respondents without the discipline of countervailing measures in place”. There is, therefore, a need to understand what exactly the US means by using the terms “discipline in place”. The EC submits that this reference in fact assimilates CVD orders to antidumping duties. The rationale of granting subsidies and imposing CVD orders are, however,

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<sup>99</sup> At pp. 21-22.

<sup>100</sup> A copy of the calculation memorandum that DOC prepared for Preussag in the original investigation is attached to this submission as Exhibit EC-22. As shown, this memorandum confirms the evidence submitted by the Government of Germany and the German producers during the sunset review demonstrating that no meaningful amount of subsidies were paid under the CIG programme after 1986.

drastically different from those pertaining to dumping and the imposition of AD duties. In the latter case there is one actor, the individual exporter, who can swiftly decide the whole strategy of the company regarding when, where and at what price to export, if the AD duty were to expire. Conversely, in the case of subsidies the situation is not the same, because governments normally do not behave commercially in the same way as individual companies. For instance, in case of non-recurring subsidies, it is more reasonable to assume that governments will not rush again to grant a new subsidy soon after a CVD order were allowed to expire. To speak of a “discipline in place”, therefore, is to disregard completely the peculiarities and specificities of the reasons for which governments usually grant subsidies, compared to the risk of recurrence of dumping. It follows that, as a matter of fact and law, a CVD order is not a “discipline” in particular in case of non-recurring, declining subsidies, since such a subsidy has been given in the past, has been consumed for the period of time lapsed and is known that it will not recur in the future. It can, therefore, be said that in such cases the CVD order has no “disciplining” effect on exporters’ behaviour. It also follows that applying again the rate of subsidy determined in the original investigation is a clear violation of Article 21.3 and the obligation to make a fresh determination on likelihood of subsidisation, causality and injury.

5.407 It follows that the US defence is without merit, particularly in the case of a subsidy recognised by the US DOC to be a non-recurring one. In such a case, in the absence of new subsidies, it is definitively known that the amount of the subsidy will fall and is bound to disappear within the determined period of time in the original investigation. The EC does not accept, therefore, the view that a review under Article 21.3 involves difficulties. Governments are used to this type of calculations and there can be no excuse to merely side step any need to undertake a fresh forward-looking determination in a sunset review on the basis of such alleged difficulties.

5.408 In a sunset review, the forward-looking aspect of the assessment, implied by the terms “would be likely to lead to”, refers in particular to the continuation or recurrence of subsidisation, causality and injury. Because this involves a certain amount of projections extrapolating from existing data, it may be argued that Article 21.3 somewhat “softens” the requirements in particular of Article 11.2 and 11.3 of the *SCM Agreement* relating to the “existence” of subsidy, injury and causal link. However, a sunset review determination that is based only on the CVD rate established in the original investigation or one that does not apply the 1 per cent *de minimis* rule violates clearly the whole object and purpose of the *SCM Agreement*. The US, instead of conducting a fresh “determination” in the proper sense of this term, advance as excuses reasons pertaining to the difficulties in calculating the numerator or denominator in the formula used to calculate the subsidy. These are neither exceptional nor insurmountable difficulties, however, and the US takes no concrete steps and does absolutely nothing positive to deal with them, other than simply acknowledging their existence. Article 21.3 does not provide a particular methodology to be followed in making the “likelihood” determination. However, this is nothing exceptional or unusual as other WTO Agreements are equally short in providing all the details about the application and implementation of comparable provisions.<sup>101</sup> For example, the Appellate Body has found recently with regard to Articles 4.1(b) and 4.2(a) of the Agreement on Safeguards that:

“As facts, by their very nature, pertain to the present and the past, the occurrence of future events can never be definitively proven by facts. There is, therefore, a tension between a future-oriented “threat” analysis, which, ultimately, calls for a degree of “conjecture” about the likelihood of a future event, and the need for a fact-based determination. Unavoidably, this tension must be resolved through the use of facts

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<sup>101</sup> See Appellate Body Report, United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (“United States – Lamb Safeguard”), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 137.

from the present and the past to justify the conclusion about the future, namely that serious injury is “clearly imminent”.<sup>102</sup>

5.409 As the Appellate Body has stressed in both the *Thailand – H-Beams* and in the *United States – Lamb Safeguard* reports, omissions in the text of WTO Agreements are not dispositive and the true meaning of the provision in question should be examined in the light of its object and purpose in the appropriate context. In the present case, by virtue of Article 21.4, the determination of “likelihood” of continuation or recurrence of subsidisation and injury has to be made on the basis of “evidence”, as this is defined in Article 12 of the SCM Agreement. Moreover, the term “likelihood” means “the state or fact of being likely”.<sup>103</sup> Therefore, the domestic authorities in a sunset review cannot base their determination on mere conjecture or speculation in total disregard of the factual record and evidence available. In addition, the domestic authorities cannot escape of their duty to conduct a fresh, proper determination, on the ground that this is a difficult exercise or that some factors, as the US argues about the numerator or denominator in this case, are missing or difficult to calculate.

5.410 In this regard, the Panel should take account of the fact that DOC even refused to consult its own calculation memoranda from the original investigation to determine the amount of grants paid under the CIG programme after 1986. In fact, to the extent DOC relied upon the rates calculated in its original investigation, the duty of investigation laid down in Article 21.3 of the *SCM Agreement* would also require at a minimum that DOC made all documents showing how the rates were calculated in the original investigation also part of the record in the sunset review.

5.411 The US DOC cannot hide behind the argument that it is prohibited by US law from making the memoranda of the original investigation part of the record in the sunset review<sup>104</sup>. The US International Trade Commission (“ITC”) is subject to the same procedures regarding the treatment of business proprietary information as DOC. However, unlike DOC, the ITC in its sunset reviews automatically makes the confidential version of its original determination, as well as the complete staff report from the original investigation, part of the record of the sunset review. This is done automatically right at the beginning of the sunset review so that all parties will be able to use this information in preparing their arguments. The ITC simply provides the documents the same confidential status in the review that they enjoyed in the original investigation.

5.412 Furthermore, the US DOC did not give to the EC respondent parties “ample opportunity” to present in writing all evidence to present in writing all evidence which they consider[ed] relevant in respect of the investigation in question”, as required by Article 21.3, in conjunction with Articles 12.1 and 21.4, of the *SCM Agreement*.

5.413 Before DOC's determines to conduct a full review under Article 21.3, interested parties are only requested to provide responses to the notice of initiation. The vague nature of the US DOC's information request, however, coupled with its refusal to accept any factual information after the initial 35 days of a sunset review proceeding violate the provisions of Article 12.1. In addition to this vague request for information, the US DOC regulations provide that “the Secretary normally will not accept or consider any additional information from a party after the time for filing rebuttals has expired.”<sup>105</sup> Under the sunset regulations, rebuttals are required to be filed within 35 days of the publication of the notice of initiation in the Federal Register.<sup>106</sup> Thus, under the US DOC's regulations, an interested party, guided only by the vague request to provide any factual information regarding the likely effects of revocation of the countervailing duty order, has merely 35 days to

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<sup>102</sup> See *United States – Lamb Safeguard*, para. 136, emphasis added.

<sup>103</sup> Concise Oxford English Dictionary, 1995.

<sup>104</sup> See US First Written Submission at para. 104.

<sup>105</sup> 19 C.F.R. § 351.218(d)(4).

<sup>106</sup> 19 C.F.R. § 351.218(d)(3) & (4).

provide all of its factual information in the sunset review, despite that fact that the sunset review statute provides DOC with up to 240 days to make its determination. Moreover, the fact that the US DOC's decision as to whether or not to conduct a full sunset review is not issued until 50 days after publication of the notice of initiation means that, even after the US DOC makes a determination to conduct a full sunset review, the parties will be given no additional opportunity whatsoever to submit factual information in this regard.<sup>107</sup>

5.414 With regards to the rights of defence and provision of information in the present case, the first time that the US DOC commented on the information submitted by the parties was in its preliminary results of 20 March 2000. In its issues and decision memo, the US DOC ignored the evidence submitted by the Government of Germany and the German producers showing that the Capital Investment Grants ("CIG") programme applied only to investments made prior to 1 January 1986 and that the amount of CIG paid after 1986 was so small that no countervailable benefit would remain after the end of the sunset review.<sup>108</sup> The DOC simply stated that, because there was evidence that CIG funds were received as late as 1990, it would "determine that benefit streams from this programme continue beyond the end of this sunset review."<sup>109</sup> It is important to underline that the US DOC did not give the German respondents any opportunity to submit additional evidence to respond to its comments in the preliminary determination. As explained in our written and oral submissions, the US DOC even refused a request to review its own calculation memoranda from the original investigation to determine the exact amount of the original grant payments made after 1986.

5.415 The EC believes that such a procedure that leaves respondents in complete darkness as to precisely what information an investigating authority requires until it is too late to provide the information cannot satisfy the requirements of Article 12.1. The US law and practice does not respect several provisions of Article 12 of the *SCM Agreement*, which by virtue of Article 21.4 is fully applicable to sunset reviews. 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 such 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 present counter-evidence and to defend their interests at all stages leading up to the final determination. As explained above, none of these procedural rights and due process requirements are respected by the US DOC in sunset reviews and in the present case.

## 6. The *de minimis* rule requirement

5.416 US law does not provide for the application of *de minimis* requirement for CVD reviews. Section 703(b)(4)(a) of the Act, in fact, establishes a 1 per cent *de minimis* rule only for the initial determination of a countervailable subsidy. It is in Section 351.106(c)(1) of the *Sunset Regulations* and in Section III.A.6.(b) of the *Sunset Policy Bulletin* that a general rule requiring to apply a 0.5 per cent *de minimis* rule in all reviews, including sunset reviews, is to be found.

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<sup>107</sup> 19 C.F.R. § 351.218(e)(1)(ii)(C)(1).

<sup>108</sup> Issues and Decision Memo, at p. 24-25, Exhibit EC-7.

<sup>109</sup> *Ibidem*, at 25.

5.417 As explained at length in its first written submission<sup>110</sup> and oral statement<sup>111</sup>, the EC considers that the 0.5 per cent *de minimis* threshold applied by the US in sunsets differs from the 1 per cent *de minimis* level which *should* apply in sunset reviews, and thus is in breach of Article 21.3, in conjunction with Article 11.9. The US response to this claim is again that the EC purports to read into Article 21.3 language that is not there. In other words, the US is proposing again a formalistic interpretation of the terms of Article 21.3 and in complete isolation of its object, purpose and context. As the EC has already explained with its previous submissions, all the US arguments in defence should be rejected. The Appellate Body has held several times that “omissions in different contexts may have different meanings, and omission, in and of itself, is not necessarily dispositive”.<sup>112</sup>

5.418 Article 21.3 of the *SCM Agreement* clearly establishes a presumption of termination. It is only where the domestic authorities establish likelihood of the continued existence of an injurious subsidy that the countervailing duty under review can be maintained in place. However, in the *SCM Agreement* a subsidy level of less than 1 per cent is irrefutably presumed not to cause injury. This practice is codified in Article 11.9 of the *SCM Agreement*, which prevents the authorities from making a finding on subsidisation and injury on the basis of an amount of subsidy that is less than 1 per cent *ad valorem*. The EC sees no valid reason to depart from the application of the definition of injurious subsidisation under Article 11.9 in the context of sunset reviews under Article 21.3. Indeed, there appears to be no reason in the *SCM Agreement* that would plead in favour of a different interpretation. 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. Indeed, holding otherwise would run contrary to the very object and purpose of the *SCM Agreement* and would most likely lead to contradictory results and unjustified protectionism. It would also violate the text of Articles 21.3 and 21.1 of the *SCM Agreement* because it would allow the continuation of countervailing duties for five more years without there being any real need to counter subsidisation which is likely to cause injury.

5.419 The US has been arguing until now that it is being generous in applying the 0.5 per cent *de minimis* threshold under domestic law in sunsets. However, the absurdity of the US approach is that a subsidy that, if examined in a new investigation after 1995, would have been found to be *de minimis* under Article 11.9 of the *SCM Agreement*, would now become not *de minimis* under a sunset review and would continue to be applied for 5 more years. This is contrary not only to the text, context, and object and purpose of Article 21.3, but also to the WTO report *Brazil – Desiccated Coconut* where Article 21.3 was interpreted as the means by which, ultimately, even measures taken prior to the entry into force of the *WTO Agreement* will be brought in line with the disciplines of the *SCM Agreement*.<sup>113</sup>

## 7. Conclusion

5.420 In conclusion, the EC requests the Panel to find that the US basic countervailing duty law (Section 751(c), as complemented by Section 752, of the Act), its accompanying regulations (*Sunset Regulations*) and policy practices (*Sunset Policy Bulletin*), and their concrete application to imports of certain corrosion-resistant steel products from Germany in the present case are inconsistent with Article 21 paragraphs 3, 1 and 4, Article 10 and Article 11.9 of the *SCM Agreement*.

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<sup>110</sup> See under Heading 6.3.

<sup>111</sup> See paragraphs 35-46.

<sup>112</sup> Appellate Body Report, *Canada – Automotive Industry* cit. supra, para. 138.

<sup>113</sup> Panel Report, *Brazil - Desiccated Coconut*, cit. supra.

5.421 The US countervailing duty law, regulations and practice should also be considered to be inconsistent with Article 32.5 of the *SCM Agreement* and, consequently, should be found to violate also Article XVI.4 of the WTO Agreement.

L. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

**1. Introduction**

5.422 We are now midway through this very straightforward dispute. The questions generated by the Panel after the first meeting address most of the issues arising in this case, and the United States' answers to those questions are separately provided together with this submission. Given the comprehensive nature of the Panel's questions, the United States intends to use this second submission to highlight the major legal and factual errors underlying the EC's claims.

5.423 At the outset, the United States reiterates that most of the EC's claims can be disposed of merely by applying fundamental principles of treaty interpretation. With respect to the EC's systemic challenge to US sunset review procedures, the EC asserts that the initiation standards and *de minimis* requirement of Article 11 must be read into Article 21.3. The EC's assertion, however, finds no support in the SCM Agreement and runs afoul of basic principles of treaty interpretation reflected in Article 31 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"), which "neither require nor condone the imputation into a treaty of words that are not there ... ." <sup>114</sup> The Panel should reject the EC's assertion and refuse to impute into Article 21.3 of the SCM Agreement "words that are not there."

5.424 The EC also is wrong with respect to its case-specific claims regarding the sunset determination by the US Department of Commerce ("Commerce") in corrosion-resistant carbon steel flat products from Germany. Commerce's determination that the expiry of the countervailing duty order would be likely to lead to the continuation or recurrence of subsidization is based on the continued existence and availability of the two programmes <sup>115</sup> previously found to have been used by German producers and the continued existence of benefit streams from the CIG programme previously found to benefit German producers. The EC has not disputed or refuted these facts. Thus, the Panel should reject the EC's claims concerning Commerce's sunset determination.

5.425 With this overview of the case as background, the United States will now briefly discuss some of the specific issues that have been raised in the case.

**2. With respect to its claims concerning US Sunset Review Procedures, the EC has failed to demonstrate that the United States has acted inconsistently with any obligation under the SCM Agreement**

5.426 As noted, the Panel can dispose of the EC's claims concerning US sunset review procedures simply by applying basic rules of treaty interpretation. Article 3.2 of the DSU directs panels to "clarify" WTO provisions "in accordance with customary rules of interpretation of public international law." The Appellate Body has recognized that Article 31 of the *Vienna Convention* reflects customary rules of interpretation. Article 31(1) provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the *terms* of the treaty in their *context* and in the light of its *object and purpose*." (Emphasis added). In applying Article 31,

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<sup>114</sup> *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India Patent Protection*"), WT/DS50/AB/R, Report of the Appellate Body adopted 16 January 1998, para. 45.

<sup>115</sup> The two programmes are the Aid for Closure of Steel Operations and the ECSC Redeployment Aid under Article 56(2)(b). Both of these programmes still exist. Furthermore, during the sunset review, the German Government, the EC, and German producers admitted that both of these programmes continued to provide some benefits. See *Commerce Sunset Preliminary Decision Memorandum*, p.12-14 (Exhibit EC-7).

however, the Appellate Body has cautioned that an interpreter's role is limited to the words and concepts used in the treaty, and that the principles of interpretation set out in Article 31 "neither require nor condone the imputation into a treaty of words that are not there ...".<sup>116</sup> It goes without saying that a panel cannot "clarify" a treaty provision that does not exist.

- (a) Automatic Self-Initiation of Sunset Reviews is consistent with the SCM Agreement because Article 21.3 explicitly authorizes authorities to initiate Sunset Reviews on their own initiative

5.427 The EC alleges that the provisions of US law providing for the automatic self-initiation of sunset reviews by Commerce are inconsistent with Article 21.3 of the SCM Agreement. For purposes of evaluating the EC's claims, customary rules of treaty interpretation dictate that the words of a treaty form the starting point for the process of interpretation. Therefore, the analysis begins with the text of Article 21.3, which provides:

Notwithstanding the provisions of paragraphs 1<sup>[117]</sup> and 2<sup>[118]</sup>, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition . . ., unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.<sup>52</sup> The duty may remain in force pending the outcome of such a review.

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

5.428 The plain text of Article 21.3 clearly and unambiguously permits authorities to initiate a review on "their own initiative." Notwithstanding this clear and unqualified text, the EC argues that authorities should not be able to self-initiate sunset reviews unless they have first satisfied the evidentiary requirements for the initiation of an investigation under Article 11. The EC believes that this is so because, according to the EC, a "parallelism" exists between the investigation and sunset review provisions of the SCM Agreement.<sup>119</sup> The EC's parallelism theory is just that – a theory. Under customary rules of treaty interpretation, a theory cannot overcome the ordinary meaning of the words of a treaty, taking into account their "context" and the "object and purpose" of the agreement.

5.429 If, as the EC posits, the SCM Agreement implicitly incorporates a parallelism between investigation and sunset review provisions, why then did the Members feel it necessary to provide *explicitly* that the evidentiary and procedural requirements for conduct of an investigation in Article 12 are made applicable in the conduct of sunset reviews *pursuant to Article 21.4*? Where Members wished to have an obligation set forth in one provision apply in another context, they did so expressly. The fact is that the Members chose not to incorporate the evidentiary requirements of

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<sup>116</sup> *India Patent Protection*, para. 45; see also *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, Report of the Appellate Body circulated 15 February 2002 (unadopted) ("[W]ords must not be read into the Agreement that are not there.").

<sup>117</sup> Paragraph 1 of Article 21 provides that "[a] countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury."

<sup>118</sup> Paragraph 2 of Article 21 is relevant to types of reviews, other than sunset reviews, such as countervailing duty assessment reviews. See, e.g., *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("UK Lead Bar"), WT/DS138/AB/R, Report of the Appellate Body adopted 7 June 2000, para. 53.

<sup>119</sup> EC Oral Statement, paras. 13-15.

Article 11.6 for the self-initiation of sunset reviews. The Panel should decline the EC's request to create an evidentiary obligation for self-initiation under Article 21.3 where no textual support exists for such an interpretation.

(b) There is no *de minimis* standard for Sunset Reviews in the SCM Agreement

5.430 The other systemic challenge by the EC involves its claim that the *de minimis* standard of Article 11.9 applies to sunset reviews under Article 21.3. As the United States demonstrated in its First Written Submission and Oral Statement, nothing in Article 21.3 or elsewhere in the Agreement establishes a *de minimis* standard for sunset reviews. Furthermore, a contextual analysis of Article 21.3, in light of the object and purpose of the SCM Agreement and the particular provisions at issue, provides no support for the EC's claim that the Article 11.9 *de minimis* standard is applicable in sunset reviews under Article 21.3. Once again, the EC is asking the Panel to read into Article 21.3 "words that are not there."

5.431 The EC has failed to refute the United States' textual and contextual arguments. Instead, the EC attempts to commingle its factual, case-specific claims regarding the Commerce sunset determination on corrosion-resistant steel with the separate, purely legal issue of whether the Article 11.9 *de minimis* standard applies to sunset determinations under Article 21.3.<sup>120</sup> The factual and the legal issues are distinct, however, and the United States has addressed them separately in significant detail in its First Written Submission and Oral Statement. In addition, the United States addresses certain of the EC's factual claims in more detail below.

5.432 With respect to the purely legal issue, the EC merely reiterates its previous argument that the *de minimis* standard for investigations contained in Article 11.9 "should" apply in sunset reviews conducted pursuant to Article 21.3 because investigations and sunset reviews serve the same purpose.<sup>121</sup> The United States disagrees. The purpose of an investigation is to determine whether and to what extent subsidization exists. In this context, the function of the one percent *de minimis* standard contained in Article 11.9 is to determine whether foreign government subsidies warrant the imposition of a countervailing duty in the first instance. Using the example given in our First Written Submission (para. 80), if the investigating authority found that a government programme had provided recurring subsidies at a rate of more than one percent, imposition of a countervailing duty would be warranted if the subsidized imports were found to cause injury. In contrast, the focus of a sunset review is the future, *i.e.*, whether subsidization is likely to continue or recur. Therefore, 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 were currently zero*, because subsidization may be likely to recur absent the discipline of the countervailing duty. To read a particular *de minimis requirement* for sunset reviews into the Agreement would render footnote 52 a nullity.

5.433 In its Oral Statement, the EC opined that the United States has confused the purposes of an administrative (*i.e.*, assessment) review and a sunset review and the application of footnote 52.<sup>122</sup> It is the EC that is confused. Pursuant to Article 21.3 and footnote 52, the mere existence of a subsidy programme, even with a net countervailable subsidy rate of zero, could form the basis for a determination of likelihood of future subsidization in accordance with Article 21.3 and footnote 52. The United States agrees with the EC that footnote 52 refers to a situation where the authority determines that the subsidy rate for a particular time period is zero and that, in the United States, that determination takes place in the context of an administrative review.<sup>123</sup> The EC seems to think,

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<sup>120</sup> See EC Oral Statement, para. 38.

<sup>121</sup> EC Oral Statement, para. 37.

<sup>122</sup> EC First Oral Statement, para.44.

<sup>123</sup> EC Oral Statement, para. 44. Although not germane to the instant dispute, the United States does not agree with the EC's statement that footnote 52 refers to a situation where a subsidy is "*de minimis*" in an

however, that footnote 52 serves no other purpose than to make a point about administrative reviews. The EC posits that “[s]unset reviews under Article 21.3 are completely different from administrative reviews.” If that is so, why did the Members include footnote 52 in Article 21.3, the provision governing sunset reviews? There must be a reason.

5.434 The United States considers that footnote 52 means that the current level of subsidization is not decisive as to whether subsidization is likely to recur. The EC has not offered any alternative interpretation. The reason for this gap in the EC’s argumentation is that the EC’s claim that a *de minimis* standard is required in the context of Article 21.3 sunset reviews would, if accepted, render note 52 meaningless.

5.435 In sum, the EC’s claim that a *de minimis* standard exists for sunset reviews under Article 21.3 is without merit. Applying customary rules of treaty interpretation, the Panel should find that there is no *de minimis* standard for sunset reviews in the SCM Agreement.

**3. With respect to Commerce’s Sunset determination involving corrosion-resistant steel from Germany, the EC has failed to demonstrate that the United States acted inconsistently with any obligation under the SCM Agreement**

5.436 In the original countervailing duty investigation, Commerce determined that German producers of corrosion-resistant steel benefitted from five different subsidy programmes. In the sunset review, Commerce made the following findings with respect to these five programmes:<sup>124</sup>

1. Capital Investment Grants (“CIG”). The benefit streams from non-recurring grants will continue beyond the five-year mark.
2. Structural Improvement Aids. The programme has been terminated.
3. Special Subsidies for Companies in the Zonal Border Area. The programme has been terminated.
4. Aid for Closure of Steel Operations. The programme continues to exist.
5. ECSC Redeployment Aid Under Article 56(2)(b). The programme continues to exist.

5.437 Commerce also found that two additional subsidy programmes which were found to provide a zero-benefit to corrosion-resistant products in the period of investigation still existed: ECSC Article 54 Long-Term Loans, and Interest Rebates on ECSC Article 54 Loans.<sup>125</sup>

5.438 Significantly, the EC has not disputed the facts which form the basis for Commerce’s sunset determination. On the contrary, the EC admits in its Oral Statement that payments under the CIG

administrative review. Footnote 52 only discusses a finding in the most recent assessment proceeding that “no duty” is to be levied.

<sup>124</sup> *Commerce Sunset Preliminary Decision Memorandum*, pp.24-29 (Exhibit EC-7); *Commerce Sunset Final Decision Memorandum* (Exhibit EC-10).

<sup>125</sup> *Commerce Sunset Preliminary Decision Memorandum*, p.29 (Exhibit EC-7); *Commerce Sunset Final Decision Memorandum* (Exhibit EC-10). In the investigation, Commerce determined that long-term loans under ECSC Article 54 had been provided to the following German producers of corrosion-resistant carbon steel flat products: Hoesch, Preussag, and Thyssen. Commerce also determined that Preussag and Thyssen received interest rebates with respect to interest expenses incurred on ECSC Article 54 loans. See *Commerce Investigation Final*, 58 FR at 37316-21 (Exhibit EC-2).

programme were made as late as February 1990.<sup>126</sup> The EC also admits in its Oral Statement that the Aid for Closure of Steel Operations and the ECSC Redeployment Aid under Article 56(2)(b) programmes continue to exist.<sup>127</sup> Also, during the sunset review itself, the German Government, the EC, and German producers admitted that both of these programmes continued to provide some benefits.<sup>128</sup>

5.439 The EC, however, continues to assert that Commerce acted inconsistently with the SCM Agreement by failing to consider the CIG programme terminated and its benefits expired based on the EC's theory that a *de minimis* standard of one percent is required in sunset reviews. Based on this theory, the EC argues that Commerce should have terminated the countervailing duty.

5.440 In advocating this position, the EC misconstrued, in its Oral Statement, the United States' position with respect to the CIG programme and the effect of footnote 52.<sup>129</sup> Concerning the CIG programme, Commerce determined that benefits from the non-recurring grants would continue beyond the five-year mark.

5.441 With respect to the effect of footnote 52 in sunset determinations, the United States stated in its First Written Submission that “[t]he mere continued existence of this same programme could warrant maintaining a duty beyond the five-year point, *even if* the amount of the subsidy was currently *zero*, as stated in footnote 52, because subsidization may recur absent the discipline of the duty.”<sup>130</sup> *The reference to the “same programme” was not to the CIG programme, per se, but to a hypothetical programme discussed by the United States as an example in the preceding paragraph 80 in drawing a distinction between the object and purpose of an investigation versus the object and purpose of a review.*<sup>131</sup> In its sunset determination, Commerce found that the CIG programme was terminated, but its benefit stream continued past the sunset review period. In paragraph 81, however, the United States was explaining that footnote 52 stands for the proposition that an existing subsidy programme could be the basis for a determination in a sunset review that the expiry of the countervailing duty would likely lead to the continuation of subsidization even if Commerce found a net countervailable subsidy rate of *zero* attributable to that programme in the most recent administrative review.

5.442 Article 11 of the DSU directs panels to make an “objective assessment” of the facts of the case. The facts in this case include the continuation of benefit streams and the continued existence and availability of countervailable subsidy programmes previously found to have been used by German producers of corrosion-resistant steel. The Panel's objective assessment of these facts should result in a finding that Commerce's determination was not inconsistent with the SCM Agreement.

#### 4. Conclusion

5.443 Based on the foregoing, the United States renews its request that the Panel make the findings described in paragraph 127 of its First Written Submission.

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<sup>126</sup> EC First Oral Statement, para. 26. Using the 15-year allocation period, the benefit stream from subsidies received after 1985 would continue past the five-year mark (*i.e.*, 1 January 2000).

<sup>127</sup> EC First Oral Statement, para. 39.

<sup>128</sup> See *Commerce Sunset Preliminary Decision Memorandum*, p.12-14 (Exhibit EC-7).

<sup>129</sup> EC First Oral Statement, para. 44.

<sup>130</sup> US First Submission, para. 81 (emphasis in original).

<sup>131</sup> US First Submission, para. 80.

M. ORAL STATEMENT OF THE EUROPEAN COMMUNITIES AT THE SECOND MEETING OF THE PANEL

**1. Introduction**

5.444 The European Communities ("EC") presentation aims at responding at the basic US arguments by focusing mainly on four issues: (1) the proper interpretation of Article 21.3 of the *SCM Agreement* as regards the obligation to conduct a sunset review and to apply the *de minimis* rule of 1 per cent *ad valorem*; (2) what does it mean to determine in a sunset review whether the expiry of the duty is likely to lead to continuation or recurrence of subsidisation and injury; (3) the meaning and scope of Footnote 52 in sunset reviews; (4) the extent to which the Opinion of the US Court of International Trade (CIT) of 28 February 2002 has clarified some legal issues raised also in this Panel proceedings (Exhibit EC-24).

5.445 The US has offered very little to justify its laws, regulations and practices in the present case and even this very little explanation has now been substantially disapproved by the Opinion of the US CIT of 28 February 2002. Unfortunately, the CIT had to interpret the case on the basis of the US law, which is inconsistent with the *SCM Agreement*, and therefore it could not go as far as the EC would have liked it to go in clarifying the legal situation. Moreover, the judgement is not final and it does not ensure that the underlying dispute in the present case will be resolved in a way that is consistent with the US obligations under the WTO and SCM Agreements.

**2. Interpretation of Article 21.2 SCM Agreement**

(a) Generally accepted rules on treaty interpretation

5.446 Whilst the US pretends to agree that the principles laid down in Articles 31 and 32 of the Vienna Convention should be used to interpret the terms of Article 21.3, in reality it quotes the Appellate Body report in *India - Patent* to rely on one criterion only, the wording of Article 21.3. The US pays no attention at all to the context and to the object and purpose of the *SCM Agreement*. However, as it is evident from the whole of paragraph 45 of the *India - Patent* and from the recent report in *US - Safeguard of Line Pipe from Korea*, the Appellate Body maintains that its customary approach is to seek the meaning of the terms of a provision in their context and in the light of the object and purpose of the Agreement (at para. 251). This is what the EC proposes the Panel to do in the present case, i.e. to read the terms of Article 21.3 in their context, and in light of the object and purpose of the *SCM Agreement*.

5.447 On the contrary, the US interpretation does not conform to the object and purpose of the *SCM Agreement* - which is to allow a CVD only as long as and to the extent necessary to counteract subsidisation and injury - as it is also evident by the clear terms of Article 21. In particular, it does not explain how is that a subsidy rate of less than 1 per cent would lead to subsidisation, injury and causality in a sunset review, when the same rate found in the original investigation would lead to automatic termination. If an interpretation is incompatible with the object and purpose of a treaty, this interpretation may well be wrong (Oppenheim, p. 1273).

5.448 The strict textual and isolationist interpretation proposed by the US runs also counter to the basic principle of good faith interpretation, because they will lead unavoidably to results which are manifestly absurd and unreasonable and would reduce Article 21.3 to inutility (Sinclair, p. 116, 120), and to the principle of effectiveness, according to which the parties to a treaty are assumed to intend its provisions to have the fullest value and effect and not to be meaningless (Oppenheim, p. 1281).

5.449 "Good interpretation is often no more than the application of common sense" (Aust, p. 202). Indeed, although it is normally not for an international tribunal to revise a treaty by reading into it provisions which it does not contain, it is nevertheless sometimes necessary to interpret its terms as

implying such a term (Aust, p. 201). The EC provided several examples of panel and Appellate Body reports which, despite an identified omission in the relevant text, interpreted the provisions in the light of the object and purpose of the WTO Agreement in question so as not to render it a nullity (e.g. AB report in *US - Safeguard of Line pipe from Korea*, the AB report in *Brazil - Desiccated Coconut*, the AB report in *Argentina - Footwear Safeguards*, the AB report in *Korea - Dairy Safeguards*, the AB report in *US - Section 211 Omnibus Appropriations Act*). This well established case law suggests that the determination of the ordinary meaning cannot be done in the abstract, but only in the context of the treaty and in the light of its object and purpose. The task of interpreting a treaty is one of ascertaining "the logic inherent in the treaty" (Aust, p. 185) in its entirety. The interpretation proposed by the EC of the terms of Article 21.3 is consistent with the above principles and with the preparatory history.

- (b) Initiation of a sunset review and interpretation of the term "to determine" the likelihood of continuation or recurrence of subsidisation and injury

5.450 The US argues that it does not have to conduct its own investigation in order "to determine" whether the expiry of the duty is likely to lead to continuation or recurrence of subsidisation and injury. The EC submits that this interpretation is inconsistent with the *SCM Agreement*, which places upon the national authorities the clear obligation to conduct an investigation and to determine on the basis of positive evidence whether expiry of the duty is likely to lead to continuation or recurrence of subsidisation and injury. The duty "to determine" entails the obligation to carry out a new, fresh investigation on continuation or recurrence and provide a rational explanation why this is likely to lead to subsidisation and injury.

5.451 The US CIT opinion of 28 February 2002 confirmed that the DOC (even under US law) did not fulfil its obligations pursuant to a full sunset review, because "it failed to consider adequately the evidence on the record, or to seek additional evidence necessary to make its determination".

- (c) Article 21.3 and likelihood of continuation of subsidisation and injury

5.452 The US argument has constantly been that it "does not calculate the present rate of subsidization in a sunset review because the purpose of a sunset review is to determine the likelihood of the continuation or recurrence of subsidization", and that this "necessarily involves a prediction of a government's future behaviour without the discipline of a countervailing duty order in place". For this reason, the US "uses only information developed in the original investigation or prior administrative reviews because this information has been subject to the rigors of the administrative process in those proceedings". The EC respectfully disagrees with these propositions.

5.453 The EC agrees that there is a forward-looking aspect to a sunset review, but submits that a sunset review determination that is based only on the CVD rate established in the original investigation or one that does not apply the 1 per cent *de minimis* rule violates clearly the whole object and purpose of the *SCM Agreement*.

5.454 The determination of "likelihood" of continuation of subsidisation and injury has to be made on the basis of "evidence", as this is defined by Articles 21.4 and 12 of the *SCM Agreement*. The domestic authorities cannot escape of their duty to conduct a fresh, proper investigation, on the ground that this is a difficult or time consuming exercise or that some factors, as the US argues about the numerator or denominator in this case, are missing or difficult to calculate.

5.455 The US argues that "the findings in the original investigation provide the only evidence reflecting the behaviour of the respondents without the discipline of countervailing measures in place". There is, therefore, a need to understand what exactly the US means by using the terms "discipline in place". The EC submits that this reference in fact assimilates CVD orders to

antidumping duties. The rationale of granting subsidies and imposing CVD orders are, however, substantially different from those pertaining to dumping and the imposition of AD duties. In the latter case there is one actor, the exporter, who can swiftly decide the whole strategy of the company regarding when, where and at what price to export, if the AD duty were to expire. In the case of subsidies the situation is not the same as AD, because governments normally do not behave commercially in the same way as individual companies. For instance, in case of non-recurring subsidies, it is more reasonable to assume that governments will not rush to grant again a new subsidy soon after a CVD order were allowed to expire. The principle is that granting a new subsidy increasing the level of an existing one is normally subject to rather different considerations which distinguish them clearly from the natural desire of individual companies to swiftly divert exports in order to increase profits when an AD order is left to expire. Moreover, subsidies take normally time to be discussed and decided in national parliaments, depending also on the type of procedure to be followed, and this further distinguishes them from dumping practices. To speak of a "discipline in place", therefore, is to disregard completely the peculiarities and specificities of the reasons for which governments usually grant subsidies, compared to the risk of recurrence of dumping.

5.456 Moreover, as the CIT Opinion clarified, the US does not answer the basic question why it can conduct on site verifications and apply the full rigors of an investigation in the context of an administrative review, but claims that it cannot do so in the context of a sunset review. Attempting to predict the future behaviour of a government in no way prevents the US authorities from conducting a proper, fresh, new investigation. In this regard, the Panel should take account of the fact that DOC even refused to consult its own calculation memoranda from the original investigation to determine the amount of grants paid under the CIG programme after 1986.

5.457 The above proposition is as much acknowledged by the US law and regulations in place, which lay down the following criteria in deciding continuation or recurrence. The US *Sunset Policy Bulletin* (see Exhibit EC-15) provides, in Section III.A.5, some criteria about the way future government behaviour could be predicted. They include in particular the legal method by which the government granted or eliminated a programme, i.e. whether this is done by administrative action or through legislative action. The US *Sunset Policy Bulletin* proposes to the authorities to draw different conclusions depending on the legal method applied. This is all the more important here, as the programmes under review in the present case and, in particular the CIG programme, were granted by legislative action and could not as such be reinstated by administrative action only.

5.458 It follows that a CVD order is not a "discipline in place" in the sense these terms are used by the US, in particular in case of a non-recurring, declining subsidy, since such a subsidy has been given in the past, has been largely consumed for the period of time up to the sunset review, and is known that it will not recur in the future. The US law that allows the DOC to use the subsidy rate determined in the original determination, unless a programme is terminated, is inconsistent with the provisions of Article 21.3 of the *SCM Agreement*.

5.459 Moreover, as the CIT Opinion clarified, the US does not answer the basic question why it can conduct on site verifications and apply the full rigors of an investigation in the context of an administrative review, but claims that it cannot do so in the context of a sunset review. Attempting to predict the future behaviour of a government in no way prevents the US authorities from conducting a proper, fresh, new investigation to find out about the numerator or denominator of the exporters' sales, the likelihood of the subsidy programme been modified or withdrawn or whether there is a non-recurring subsidy the amount of which has already been expensed and the remaining benefit flowing from it is nearly zero. As the US CIT has put it:

Commerce cannot justify its failure to consider Plaintiffs arguments based on its conjecture that this information might be unavailable or otherwise incapable of being

verified Presumably, sales values since 1993 would be readily available to commerce had it requested submissions regarding this information.<sup>132</sup>

- (d) Need to conduct prior administrative reviews, timely submission of data, and obligation to consider the record from the original investigation

5.460 The US claims that "under the US system, administrative reviews are not prerequisites for conducting full sunset reviews" but then it concedes that, in a sunset review, it "only uses information developed in the original investigation or prior administrative proceedings." This is just one typical example of how fluid and sometimes contradictory is the US law and practice on sunset reviews, characterised by the use of terms such as "normally", "as a general rule", etc. In addition, the US argues that "normally" it makes adjustments to the net countervailable subsidy determined in the investigation when "there is evidence demonstrating that programmes have been terminated with no residual benefits". However, this apparent flexibility of US law in sunsets is not borne out in practice. Moreover, this flexibility and plasticity of US law are not virtues but serious legal defects, because they eliminate legal security and predictability in the interpretation and application of the US law on sunset reviews to the detriment of foreign exporters and international trade. In this case, the Government of Germany and the German producers provided clear evidence that the CIG programme was terminated without any meaningful residual benefit continuing after the end of the sunset review. Despite this evidence, the US DOC refused to adjust the rate from the original investigation to reflect this change. There could have been no continuation of benefits in such a case, if the US authorities had simply taken into consideration the calculation memorandum that was part of the file of the original investigation.

5.461 The US has been claiming that the German exporters had 15 months to prepare for the sunset review and that they are alone to blame if they did not submit in time the evidence regarding the calculation memoranda from the original investigation. This has been a particularly ingenious attempt by the US to exclude crucial evidence from the sunset review. The US CIT Opinion now lends support to the EC's claims in this regard. The CIT said:

The record from the original investigation may be incorporated into the record for purposes of the sunset review ... Further, in the past, even in an expedited sunset review Commerce apparently has accepted untimely submissions relating to "important factual information that is already on the record of this [sunset review] proceeding, i.e., in the [prior] administrative review segment."...Thus, it is sufficient that Plaintiffs alerted the agency in their substantive response or rebuttal to the other interested parties' substantive response that the countervailable benefits accruing from the nonrecurring subsidies would be *de minimis* ... The court finds that the issue was raised with sufficient clarity to put Commerce reasonably on notice in a timely manner that it needed to consider the data underlying the calculation of the original CVD rate ... To the extent Commerce needed information beyond these calculation memoranda, it could have requested the information from the parties or from a third source ... Accordingly, Commerce shall consider the calculation memoranda as part of the record in this proceeding.<sup>133</sup>

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<sup>132</sup> Exhibit EC-24, at page 25 and footnote 22 thereto.

<sup>133</sup> Exhibit EC-24, at pages 17-18, references and footnotes omitted. Moreover, the UC CIT found on page 24 of its Opinion that "Commerce does not dispute that the information in the calculation memoranda and Preussag's questionnaire had been verified in the original investigation". The CIT also clarified (on page 38) that: "Commerce ignores the statutory provision that it may seek an extension of time for "extraordinarily complicated" sunset reviews."

5.462 For those reasons, the EC considers that under the *SCM Agreement*, as a general rule, the same elements and factors that the investigating authorities took into account in the original investigation in a retrospective manner can be analysed in a prospective way during a sunset review. These are laid down essentially in Articles 11, 12 and 15 of the *SCM Agreement*. However, the range of factors to be taken into account in making the forward-looking assessment necessary to establish the likelihood of recurrence or continuation of subsidisation has to be evaluated on case by case basis, as it mainly depends on the kind of subsidy under examination. For example, if it is a recurring unemployment subsidy, the investigating authorities should consider the likelihood of lay-offs within the reasonable future. In the case at issue, however, the main subsidy was a non-recurring subsidy that by definition cannot recur. There could have been no continuation of benefits in such a case, if the US authorities had simply taken into consideration the calculation memorandum that was part of the file of the original investigation.

(e) The *de minimis* rule in sunset reviews and the meaning and scope of Footnote 52

5.463 The US argues that there is no rationale for including the 1 per cent *de minimis* rule in sunset reviews. This proposition does not explain, however, why the US considers useful to apply the 0.50 per cent *de minimis* rule under its domestic law; nor has the US offered any credible explanation for doing so.

5.464 The EC submits that Article 21.3 of the *SCM Agreement* clearly establishes a presumption of termination, and sees no valid reason to depart from the application of the definition of injurious subsidisation under Article 11.9 (that a subsidy of less than 1 per cent cannot cause injury) in the context of sunset reviews under Article 21.3. The preparatory history of Article 11.9 indicates that the *de-minimis* rule is based on a presumption that levels below *de-minimis* do not cause injury, rather than, as the US suggests, reasons of administrative efficiency. Exhibit EC-25 demonstrates that other WTO Members have also understood the preparatory history and the interpretation to be given to Article 21.3 as regards *de minimis* in the same way as the one proposed here to the Panel by the EC.

5.465 The US claims that the interpretation proposed by the EC would render Footnote 52 a nullity. It also asserts that there must be a reason for the inclusion of Footnote 52 in Article 21.3. These suggestions are puzzling. The EC does not dispute the essential function of this Footnote. A determination not to terminate the CVD order may indeed be compatible with a finding of zero subsidy rate in the most recent administrative review or be based on some other reason. But Footnote 52 does not support the extrapolation made of it by the US in order to reach the conclusion that there is no *de minimis* rule of 1 per cent *ad valorem* in sunset reviews. Furthermore, based on that understanding of the *de minimis* rule, the US then extrapolates from Footnote 52 by making several illogical leaps. First, it argues that a zero rate of subsidy cannot require the authorities to terminate the CVD duty. That means that the level of the subsidy, even if zero, is not relevant for deciding likelihood of continuation or recurrence of subsidisation, injury and causality. Second, it draws the operational conclusion that it is not necessary to calculate the actual level of subsidy in a sunset review. Third, it does consider that the *de minimis* rule of Article 11.9 does not apply to Article 21.3 reviews.

5.466 The preparatory history of Article 11.9 and the corresponding provision in the AD Agreement, however, indicate that the rationale of the *de minimis* rule in these Agreements is different from that on which the *de minimis* rule is applied in the US. In these two WTO Agreements, the level of 1 per cent *ad valorem* was agreed to be the *de minimis* threshold not for reasons of administrative efficiency but because for imports below this level the causal link between subsidised imports and the material injury to domestic industry would not exist.<sup>134</sup> This is a significantly different rationale,

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<sup>134</sup> E.g., MTN.GNG/NG10/W/9/Rev. 3, point E, of 26 May 1988, and MTN.GNG/NG10/W/4, page 42.

because it demonstrates that the US wrongly continued under its domestic law its old practice going back to 1980, as codified in the 1987 Guideline on *the minimis* rule (see Exhibit US-6).

5.467 The EC considers that the current level of subsidy is not always dispositive of the outcome of a sunset review. If the current level of subsidy is zero or *de minimis*, this does not by itself end the measure, but it does require the US DOC to demonstrate what change of circumstances will lead to the subsidy increasing to a level above *de minimis*, if it wishes to continue the measure. In the case of a non-recurring subsidy, which is already *de minimis*, and subject to the US declining balance methodology, the DOC must adduce and rely on positive evidence of new subsidies or of a sharp fall in the denominator in order to find likelihood of subsidisation, injury and causality.

5.468 Moreover, the US states that the "focus" of a sunset review is on the possible future behaviour of foreign governments and exporters. This is misleading. First, as already explained, a sunset review determination requires positive evidence to demonstrate that subsidisation, injury and causality is likely to continue or recur. The US keeps repeating that the "best evidence" of future behaviour of governments and exporters is the rate from the original investigation. However, in the case of *Corrosion-resistant steel from Germany*, how can this be? The DOC has itself established that there are no new subsidies and that the non-recurring subsidies found in the original investigation, 9 years ago, have now declined to a level that is equivalent zero by its own calculation methodology.

5.469 The US has modified its past practice after the WTO Agreements on AD and SCM entered into force only as regards determinations made in the initial investigation, but left its domestic legislation on sunset reviews unchanged by applying its 0.50 per cent *de minimis* rule based on a completely different rationale (i.e. administrative convenience and efficiency).

### 3. Conclusions

5.470 The EC considers that not only the application of the basic US laws, regulations and policy guidelines in the present case are inconsistent with the US obligations under the WTO and *SCM Agreement*, but these US laws, regulations and guidelines are in themselves incompatible with the WTO and the *SCM Agreement*.

5.471 As the US CIT Opinion of 28 February 2002 put it, the DOC cannot act irrationally and arbitrarily. The DOC cannot accept domestic parties' "late" submissions and reject those of respondents. It cannot make some adjustments to an original CVD rate and then state it will not consider evidence of other adjustments because all adjustments are barred. It cannot avoid applying changes in the law because it is burdensome or inconvenient. It must conduct meaningful sunset reviews. It cannot erect barriers simply to avoid considering complicated problems.

5.472 In conclusion, the EC respectfully asks the Panel to find in accordance with our request as stated in the conclusions of our first written submission.

#### N. ORAL STATEMENT OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

5.473 On behalf of the United States delegation, I would like to thank the Panel for this opportunity to comment on certain issues raised in this proceeding. We do not intend to offer a lengthy statement today. Instead, we will focus briefly on the central issues in this dispute.

5.474 Mr. Chairman, as we stated in our Oral Statement at the First Meeting of the Panel, this proceeding presents three basic questions. The first question is, does the United States act inconsistently with Article 21.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement") by self-initiating sunset reviews without regard to the evidentiary provisions of Article 11.6? The second question is, does the United

States act inconsistently with Article 21.3 by *not* applying the *de minimis* provisions of Article 11.9 in sunset reviews? The third question is, whether Commerce's determination in the sunset review on corrosion-resistant steel was based upon an appropriately conducted review of all relevant and properly submitted facts?

5.475 The purely legal issues – can an authority automatically self-initiate a sunset review? is there a *de minimis* standard applicable to sunset reviews? what are the evidentiary and procedural requirements applicable to sunset reviews? – are all addressed in the SCM Agreement. This, of course, is no great revelation to any of us. Where the United States and the EC diverge, however, is on how the Panel should interpret what the SCM Agreement says on these issues.

5.476 Consistent with accepted WTO jurisprudence, the United States has argued that the Panel should interpret the SCM Agreement, and in particular Article 21.3, in accordance with the ordinary meaning of the terms of the Agreement in their context and in light of their object and purpose. This should be a straightforward exercise because the terms themselves are straightforward.

5.477 Simply put, Article 21.3 provides that a definitive countervailing duty must be terminated unless the requisite finding – likelihood of continuation or recurrence of subsidization and injury – is made. This likelihood finding is made in the context of a sunset review that, according to the explicit terms of Article 21.3, may be initiated on one of two bases – on an authority's "own initiative" *or* upon a "duly substantiated request" by or on the behalf of the domestic industry. There is no requirement in Article 21.3 or elsewhere in the Agreement to consider the magnitude of current subsidization in determining the likelihood that, absent the countervailing duty, subsidization would be likely to continue or recur. Finally, under the terms of Article 21.4, a sunset review must be conducted in accordance with the evidentiary and procedural requirements of Article 12. Commerce's sunset determination in corrosion-resistant steel comports with all of these terms of the SCM Agreement.

5.478 In contrast to the United States' text-based analysis, the EC makes various assumptions regarding the "purposes" of various provisions of the SCM Agreement *without* reference to the text of the SCM Agreement, and then refers to obligations not found in the text which presumably derive from these "purposes." According to the EC, the Panel should derive the object and purpose of the SCM Agreement and then ignore the plain meaning of the words in order to achieve that object and purpose. This, of course, is the very antithesis of the basic principles of treaty interpretation reflected in Article 31 of the *Vienna Convention*.

5.479 For example, despite the plain text permitting initiation of a sunset review on an authority's "own initiative," the EC argues that the Article 11.6 evidentiary prerequisites for self-initiation of investigations must be satisfied in sunset reviews as well. Similarly, the EC reads a *de minimis* requirement into Article 21.3, notwithstanding that no such obligation exists. In both instances, the EC's arguments are based on its assumptions as to the purpose of investigations and sunset reviews. This approach to treaty interpretation runs afoul of the Appellate Body's admonition in *Japan - Alcoholic Beverages*, that "the treaty's object and purpose is to be referred to in determining the meaning of the 'terms of the treaty' and not as an independent basis for interpretation."<sup>135</sup>

5.480 In the *US Shrimp* case, the Appellate Body rejected the EC's type of unconventional approach to treaty interpretation, stating that "[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."<sup>136</sup>

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<sup>135</sup> *Japan - Alcoholic Beverages*, p.11, n.20.

<sup>136</sup> *US Shrimp*, para. 114 (footnote omitted).

5.481 The Appellate Body went on to say that “[w]here the meaning imparted by the text itself is equivocal or inconclusive ... light from the object and purpose of the treaty as a whole may usefully be sought”. The United States submits that the meaning imparted by the text of Article 21.3 is neither equivocal nor inconclusive. Article 21.3 states unequivocally, and without qualification, that authorities may initiate sunset reviews on “their own initiative.” There is not a shred of textual support for the notion that some sort of evidentiary prerequisite applies to this explicit right. Similarly, Article 11.9 states unequivocally that the one percent *de minimis* standard applies in investigations. Again, there is not a shred of textual support for the notion that this standard *must* be applied in sunset reviews as well.

5.482 The Appellate Body in *US Shrimp* also stated that “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.” So let us consider for a moment whether the object and purpose of the treaty as a whole confirms the correctness of the United States’ reading of the text.

5.483 The United States submits that the object and purpose of the SCM Agreement as a whole is to define certain trade distorting practices, that is, subsidies, and to establish a framework for addressing such practices, for example, application of countervailing measures. Both the definitions and the framework reflect a carefully negotiated balance of obligations and rights – obligations to, for example, eliminate certain types of subsidies, and rights to, for example, take countervailing measures against certain types of subsidies.

5.484 The United States’ reading of the text of Article 21.3 – that it permits automatic self-initiation of a sunset review and that it contains no explicit requirement to quantify the current rate of subsidization when considering the likelihood of continuation or recurrence of subsidization – is consistent with the notion that the SCM Agreement sets out an agreed upon framework for addressing trade distorting practices. In other words, the SCM Agreement recognizes that it is appropriate to continue to apply countervailing measures where trade distorting practices are likely to continue or recur absent that countervailing measure.

5.485 In addition to the general legal issues just discussed, the EC also has made case-specific claims regarding Commerce’s sunset determination involving corrosion-resistant carbon steel flat products from Germany. Commerce’s determination – that the expiry of the countervailing duty order would be likely to lead to the continuation or recurrence of subsidization – is based on the *continued existence and availability* of programmes previously found to have been used by German producers and the continued existence of benefit streams from programmes previously found to benefit German producers.

5.486 The EC has focused almost exclusively on the Capital Investments Grant, or CIG, programme, arguing that the benefit stream that continues to exist after the five-year mark is very small. The United States has already demonstrated that there is no *de minimis* standard in the Agreement with respect to sunset reviews and the fact that a benefit stream continues after the five-year mark can be a basis for finding likelihood of continuation of subsidization. As important in Commerce’s likelihood determination, however, are its findings concerning the continued existence and availability of subsidy programmes previously found to have been used by the German producers.

5.487 In particular, Commerce determined that the Aid for Closure of Steel Operations and the ECSC Redeployment Aid under Article 56(2)(b) programmes continue to exist. The EC has admitted as much in its Oral Statement. In addition, during the sunset review itself, the German Government, the EC, and German producers admitted that both of these programmes continued to provide some benefits. Commerce’s findings regarding these programmes remain undisputed and unrefuted by the EC. Thus, with or without the CIG programme, an “objective assessment” of Commerce’s

determination supports its finding of likelihood of continuation or recurrence of subsidization beyond the five-year mark.

5.488 Finally, we would like make a few points with respect to the 28 February ruling of the US domestic court mentioned in the EC's March 4<sup>th</sup> letter to the Panel. A WTO panel is required to construe the meaning of a treaty provision and the consistency of, for example, a US statutory provision, with that treaty provision. In contrast, a US domestic court is required to interpret the US statutory provision itself. The United States' domestic court in the *Dillinger* case did just that; it did not interpret the WTO SCM Agreement or the consistency of US statutory provisions with the SCM Agreement.

5.489 Second, the decision is interlocutory. In other words, it is not a final court decision. The Court has remanded the case back to the US Department of Commerce to consider the Court's ruling and issue a new administrative determination. The Department of Commerce is in the process of doing just that in order to issue a re-determination on remand.

5.490 Third, although we are in the process of analyzing the Court's ruling, as an initial matter we believe that the Court's ruling is wrong as a matter of US law on a number of issues.

5.491 Finally, we note that the US Government, and private parties, have the right to appeal a Court of International Trade ruling and frequently do so. As a result, decisions of the Court of International Trade are often reversed by the appellate court. Thus the EC's desire for the Panel to consider and be guided by the US domestic court's interlocutory ruling is misplaced.

5.492 The United States would like to highlight and respond to two points in the oral statement of the EC today. Of course highlighting these two points is not to imply agreement with the other points contained in that statement.

5.493 First, in paragraph 5 of that statement, the EC says that the interpretation advanced by the United States in this proceeding "is not a good faith interpretation." The United States is quite surprised to see such a statement and takes sharp exception to this characterization. It should be obvious by now that the US interpretation is offered in good faith. It is completely inappropriate for the EC to make such a claim.

5.494 Second, the United States notes that the EC has referred to "uncertainty and predictability" in its oral statement, for example in paragraph 41 and elsewhere. In paragraph 41 the EC has said that the US measures at issue are inconsistent with the WTO because they "create uncertainty and unpredictability in international trade." The EC is again reading words into the text. The EC apparently is confusing the language in Article 3.2 of the DSU, which is a narrative statement that the WTO dispute settlement system is a central element in providing security and predictability to the multilateral trading system, with some obligation on Members to provide security and predictability in international trade through their measures. There of course is no such vague obligation in the WTO.

5.495 This concludes our presentation today. We will be pleased, of course, to answer any questions you may wish to pose. Thank you.

O. RESPONSES OF THE EUROPEAN COMMUNITIES TO QUESTIONS FROM THE PANEL FOLLOWING THE SECOND MEETING OF THE PANEL

### **Both parties**

**Q41. Do you consider it impossible that the drafters might have intended there to be different rules for sunset reviews from those for investigations? In other words, in your view, would it**

**have been irrational for the drafters to establish a set of disciplines in respect of investigations, and intend some of them apply to sunset reviews and others not? If so, what might be the reasons for such differences? If not, why not?**

Reply

5.496 The EC looked into the preparatory history of the SCM Agreement, and in particular Article 21.3 thereof, in order to verify what was the intention of the drafters on these issues. To the extent use can be made of the available texts, they seem to confirm the interpretation of Article 21.3 proposed by the EC. This interpretation is based on the terms of Article 21.3 in their context and takes also into account the object and purpose of the SCM Agreement (and the WTO Agreement) as a whole. In the context of a legal interpretation of texts, it is probably more appropriate to speak in terms of unreasonable rather than impossible or irrational (see Article 32 of 1969 Vienna Convention).

5.497 The EC has explained in its submissions (e.g., EC comments on the US answer to question no 28 from the Panel) why the US proposition, that in sunset reviews a proper, fresh investigation is not required, seems unreasonable. A systematic interpretation of Articles 21.3, 21.4, 22.1, 22.7, 12 and 11 of the SCM Agreement does not support the suggestion that some elements or requirements in the conduct of an original investigation are not required in the context of sunset reviews. Unless Article 21.3 excludes explicitly such elements, the most reasonable and generally accepted interpretation is to consider that they are all applicable. This is in conformity with a more classic way of drafting and interpreting treaties. The use of the word "determine" also supports this view, because the determination must necessarily entail the conduct of an investigation by the domestic authorities (or how else could they determine?). Article 10 also confirms the above view because it clearly states that to impose any type of CV duties, i.e. whether in the context of an initial determination or in the context of sunset determination, the conduct of an investigation is required. In this regard, as the EC has noted before, the effect of new investigations and sunset reviews is the same, i.e. they may both lead to the imposition of a countervailing duty for up to 5 years. Therefore, if the drafters of the SCM Agreement had wished to exclude in sunset reviews certain elements from the set of the disciplines from the original investigations they would have explicitly said so, as they did for instance in Article 21.4 as regards the 12 months period for the completion of a sunset review. It follows that the domestic authorities have to demonstrate in their sunset investigation and determination that expiry of the duty is likely to lead to continuation or recurrence of subsidization and injury. Consequently, in sunset determinations the only notable difference with determinations made in original investigations, as the EC has explained (e.g. with its answers to written question no 16(b) of the Panel and in para. 36 of its second written submission), is that in the former it is not the existence but only the "likelihood" of continuation or recurrence of subsidization and injury that is required to be demonstrated. Moreover, because the terms subsidization and injury need to be interpreted consistently throughout the Agreement, it follows that a rate of subsidy that is below 1 per cent *ad valorem* is not countervailable because it is irrefutably presumed not to cause injury whether in an original or sunset determination. This is further confirmed by the text of Article 15, in particular paragraph 5, of the SCM Agreement.

**Q42. Footnote 37 to the SCM Agreement states:**

**The term "initiated" as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.**

**Please comment on the meaning of this footnote in the context of the issues in this dispute.**

Reply

5.498 This footnote provides further support to the position advocated by the EC in the present dispute. Indeed, the placing of this footnote in the SCM Agreement and the ordinary meaning of its terms suggest that: first, an investigation is obligatory before any kind of CV duties can be imposed (i.e. whether following an original or sunset determination); second, the term "initiated" has to be understood in the same way throughout the entire SCM Agreement, that is as provided (i.e. laid down) in Article 11; third, the term "initiated" refers to the commencement rather than to the actual conduct of an investigation, as the text of Article 10 clearly distinguished these two terms. Therefore, in addition to Article 11, other provisions of the SCM Agreement have also to be applied in the conduct of any kind of investigation, such as Articles 12 or 22.

5.499 Finally, one of the claims of the EC in the present case is that the US laws, regulations and practices as such and as applied to the present case violate also Article 10, including footnote 37, because:

- they permit the automatic initiation of a sunset review without the authorities having a sufficient amount of evidence in their possession or even the slightest amount of evidence as in the case of expedited reviews; and
- they shift the burden of proof on foreign exporters and governments to demonstrate no likelihood of continuation or recurrence of subsidization and injury in violation of Articles 21.1 and 21.3, which require termination of CVD unless the domestic authorities demonstrate the opposite.

**Q43. What textual support, if any, is there, in your view, for the proposition that the term "investigation" includes sunset reviews? Please comment, in particular, on the relevance, if any, of footnote 37 to and Article 32.3 of the SCM Agreement.**

Reply

5.500 As explained with the answer to the previous question, footnote 37 and accompanying text provide clear support for the proposition that a determination in a sunset review requires the conduct of a proper, fresh investigation. The same can be said of Article 32.3, whose text clearly states that the provisions of the entire SCM Agreement apply to investigations and reviews of existing measures initiated on or after the entry into force of the WTO Agreements. In addition, both these provisions provide relevant context for the purpose of interpreting the terms of Article 21.3, as the EC has explained with its submissions to the Panel.

**Q44. Please explain why, in your view, the drafters established a *de minimis* standard for investigations, providing support from the text and/or the negotiating history of the SCM Agreement. Do the mandatory nature and the strong language of the statement in Article 11.9 ("There shall be immediate termination in cases where the amount of a subsidy is *de minimis* . . . ") indicate anything about the rationale for this standard?**

Reply

5.501 The EC has already explained in detail the reasons for which it considers that a *de minimis* standard was established in investigations (see, e.g., paragraphs 114-117 of the first EC written submission; paragraphs 37-40 of EC oral statement in first substantive meeting of the Panel with the parties; paragraph 47 of the second EC written submission; EC replies to written questions no 1(b) and (c) from the Panel; EC comments on US responses to written questions no 28, 29 and 30 from the Panel; and paragraphs 32-40, in particular paragraph 36, of the EC oral statement in the second substantive meeting of the Panel with the parties).

5.502 To summarize the arguments again, the *de minimis* threshold was introduced in the Uruguay Round negotiations. The EC considers that the rationale for this introduction was that a certain level of subsidization could not be the cause of any injury sustained by the domestic industry, in the sense the term injury is given in the Agreement. For this reason, it was clearly written into the text of the SCM Agreement as an irrefutable presumption ("shall be immediate termination").

5.503 This rationale was clearly spelled out in the negotiating history of the SCM Agreement. Thus, in the Checklist of issues for negotiation in the Uruguay Round, the Secretariat prepared in 1987 a paper stating:

"Article 2:12 of the Code provides that an investigation shall be terminated when the investigating authorities are satisfied either that no subsidy exists or that the effect of the alleged subsidy on the industry is not such as to cause injury. It stands to reason that in case of a *de minimis* subsidy, a causal link does not exist between subsidized imports and material injury to a domestic industry. It would be useful to reach agreement on the level below which a subsidy should be deemed to be *de minimis*."<sup>137</sup>

5.504 Moreover, later in the negotiations, the rationale of introducing a *de minimis* threshold was further discussed. What it emerges from this preparatory history is that the rationale of the *de minimis* rule in the SCM Agreement is different from that on which the *de minimis* rule is applied in the US. In the SCM Agreement, the level of 1 per cent *ad valorem* was agreed to be the *de minimis* threshold not for reasons of administrative efficiency but because for imports below this level the causal link between subsidized imports and the material injury to domestic industry would not exist.<sup>138</sup> This is a significantly different rationale from that claimed to be applied by the US domestically, because it demonstrates that the US wrongly continued under its domestic law its old practice going back to 1980, as codified in the 1987 Guideline on *the minimis* rule (see Exhibit US-6). The preparatory history, therefore, appears to confirm the view that the rationale for introducing *de minimis* standards was exclusively the effect of low subsidization on injury, and not reasons of administrative efficiency or convenience as suggested by the US. Norway and Japan who submitted third party submissions in the present case appear to read in the same way the preparatory history on this point. Administrative efficiency is something left to the discretion of Members and is not normally the basis for international trade provisions, such as Article 11.9 of the SCM Agreement. For instance, some WTO Members find it inefficient or unnecessary to have any countervailing or anti-dumping laws at all.

5.505 Further support for this interpretation can be found in the text of Article 15.5 SCM Agreement, which states that it must be demonstrated that subsidized imports are, through the effects of subsidies, causing injury. It should be stressed that this provision was already present in the Tokyo Round Subsidies Code (Article 6) and the Uruguay Round drafters reproduced in the SCM Agreement. The EU is of the view that there is clear link between Article 15.5 and Article 11.9 SCM Agreement. The "effects" of a subsidy necessarily include the level of subsidization. The terms of those Articles and the preparatory history make, therefore, plainly clear that a subsidy can only impact on the injury if it reaches a certain level. Footnote 45 defines injury as "material", which means that injury must reach a certain level before it becomes material. Therefore, this provision further implies that a low level of subsidization cannot produce the required effect as provided for in Article 15.5 of the SCM Agreement.

5.506 There is even more evidence elsewhere in the SCM Agreement that the drafters intended the amount of subsidy to be linked to the extent of the injury. In Article 6.1(a), subsidies which exceed 5 per cent *ad valorem* are deemed to cause serious prejudice, which means that it is for the subsidizing

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<sup>137</sup> Negotiating Group on Subsidies and Countervailing Measures, Checklist of issues for negotiations, Note by the Secretariat, MTN.GNG/GNG/NG10/W/9/Rev.2, 2 December 1987.

<sup>138</sup> E.g., MTN.GNG/NG10/W/9/Rev. 3, point E, of 26 May 1988, and MTN.GNG/NG10/W/4, page 42.

country to rebut this presumption under Article 6.2. This provision, which the preparatory history indicates that it was inserted at the insistence of the US, is based on the argument that subsidization above a certain amount triggers a presumption of injury. Although the application of the provision of Article 6.1(a) expired on 31 December 1999 (See Article 31), it is nevertheless supports the argument that the level of the subsidy, by itself, creates certain presumptions regarding injury.

5.507 Still another example is Article 6.3(c) of the Agreement. This relates to cases where serious prejudice must be demonstrated and covers, for example, the situation where “the effect of the subsidy is a significant price undercutting”. This language suggests that the “effect” of a subsidy can only be “significant” price undercutting if the amount of the subsidy is itself significant. This implies that a certain minimum level of subsidy is required to lead to a serious prejudice and, by analogy, material injury.

**Q45. Assuming for the sake of argument, and without prejudice to the outcome in the matter before the Panel, that a *de minimis* standard applies in respect of subsidization to sunset reviews, would this *de minimis* standard be based on: (i) the rate of subsidization during the period of application of the countervailing duty ("CVD"); (ii) the rate of subsidization at the time of sunset review; or (iii) the rate at which subsidization is likely to continue or recur? How would you calculate that rate of subsidization on which the *de minimis* standard would be based?**

Reply

5.508 The rate that should determine the outcome of a sunset review is the third one, i.e. the rate likely to continue or recur if the CVD measure were allowed to expire. Article 21.3 permits the continuation of a countervailing duty only if it is demonstrated, on the basis of positive evidence, that if the CVD measure were left to expire this is likely to lead to continuation or occurrence of subsidization, injury and causality. Some guidance may be drawn, *inter alia*, from the rate of subsidization applicable at the time of the sunset review, the existence of new programmes or the elimination of existing ones, the nature of the subsidies in question, etc., for the purpose of making the likelihood determination. However, subsidization does not exist in the abstract, and quantification of the rate at which continuation or recurrence of subsidization is likely to continue or recur in the future should always be feasible. The US DOC does much the same when it reports the rate to the US ITC under its domestic rule of 0.50 per cent, but it now claims that this is done on an autonomous, voluntary basis!

5.509 As to the method of calculation, it is acknowledged that it is for the investigating authorities to establish the level of subsidy likely to continue or recur, on a verifiable and reasonable basis and taking account of relevant evidence and data obtained in the course of the sunset review. If the amount of subsidy is currently below the 1 per cent *de minimis* threshold, it is for the investigating authorities to show that it will rise above the *de minimis* threshold in the near future. In the case of a non-recurring subsidy, the amount of which is declining year by year, this means showing that the denominator will fall sufficiently to take the *ad valorem* level of the subsidy above the *de minimis* threshold. In the case of a recurring subsidy, this means showing that circumstances will change sufficiently enough for the subsidy to go above the *de minimis* threshold. The US has demonstrated none of the above in the present case.

European Communities

**Q46. The European Communities states:**

**[T]he US law and practice to automatically self-initiate sunset reviews violate Articles [sic] 21.3 of the SCM Agreement, as complemented by Article 11.<sup>139</sup>**

**Is the Panel correct in understanding that the European Communities is making a claim that the evidentiary standards of Article 11.6 are incorporated into Article 21.3, or is it the European Communities' claim that these standards apply to sunset reviews on the face of Article 11.6?**

Reply

5.510 It is not entirely clear what the Panel means by the terms "apply in the face of" as opposed to "incorporated". As to their practical legal effects, however, it does not appear to the EC that there is much of a difference between the two. The EC follows the generally accepted rules on treaty interpretation. The EC claim is 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, in particular of the terms "...unless the authorities determine, in a review initiated..." in Article 21.3, requires that the evidentiary standards of Article 11.6 should be implied, and hence applied, also to the evidentiary requirements in sunset reviews.

**Q47. The European Communities states:**

**[S]ince 0.53 per cent [sic] is below the 1 per cent de minimis level which should apply in sunset reviews, the US was in breach of Article 21.3, in conjunction with Article 11.9, in continuing the measure<sup>140</sup>.**

**Is the Panel correct in understanding that the European Communities is making a claim that the *de minimis* standard of Article 11.9 is incorporated into Article 21.3, or is it the European Communities' claim that this standard applies to sunset reviews on the face of Article 11.9?**

Reply

5.511 As with the previous question, it is not entirely clear what the Panel means by the terms "apply in the face of" as opposed to "incorporated". As to their practical legal effects, however, it does not appear to the EC that there is much of a difference between the two. The EC follows the generally accepted rules on treaty interpretation. The EC claim is 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, in particular of the terms "would be likely to lead to continuation or recurrence of subsidization and injury" in Article 21.3, 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.

**Q48. Please provide the Panel the relevant statutory, regulatory, or other texts, including internal guidelines, if any, which set out the European Communities' methodology in respect of the determination of likelihood of continuation or recurrence of subsidization and injury in a sunset review, including calculation of the relevant rate of subsidization and application of any *de minimis* standard.**

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<sup>139</sup> First Written Submission of the European Communities, para. 66.

<sup>140</sup> First Written Submission of the European Communities, para. 119.

Reply

5.512 The relevant statutory provision is Article 18 of Council Regulation (EC) 2026/97 of 6 October 1997 (see Exhibit EC-26).<sup>141</sup> This provision reflects the relevant provisions of the SCM Agreement, in particular Article 21.3. Paragraphs 1 and 2 of Article 18 of Council Regulation (EC) 2026/97 provide:

"1. A definitive countervailing duty shall expire 5 years from its imposition or 5 years from the most recent review which has both covered subsidization and injury, unless it is determined in a review that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. Such an expiry review shall be initiated on the initiative of the Commission or upon a request made by or on behalf of the Community producers, and the measure shall remain in force pending the outcome of such a review.

2. An expiry review shall be initiated where the request contains sufficient evidence that the expiry of the measures would be likely to result in a continuation or recurrence of subsidization and injury. Such a likelihood may, for example, be indicated by evidence of continued subsidization and injury or evidence that the removal of injury is partly or solely due to the existence of measures or evidence that the circumstances of the exporters, or market conditions, are such that they would indicate the likelihood of further injurious subsidization."

5.513 There are no other regulatory or administrative texts or guidelines concerning the conduct of countervailing duty expiry reviews in the EC. However, it should be noted that the EC has conducted one countervailing duty expiry review since the entry into force of the WTO SCM Agreement, which clearly demonstrates the EC's practice in expiry reviews.

5.514 This investigation concerned imports of polyester fibres and polyester yarns originating in Turkey (Exhibit EC-27).<sup>142</sup> This investigation was terminated on 12 June 1998 because the amount of subsidization was found to be *de minimis*, i.e. less than 2 per cent (as Turkey was considered to be a developing country). Following the publication of a notice of impending expiry, the investigation was initiated on 21 September 1996, on the basis of a duly substantiated request by the Community industry alleging that the repeal of the measures would be likely to result in a continuation or recurrence of injury. Following the initiation of the investigation, the European Commission sent questionnaires to the Community producers, exporting producers in Turkey and the Turkish government. After the examination of the questionnaire responses and verification visits in the Community and Turkey (see preambular paragraph 6, Exhibit EC-27), the European Commission found that the levels of subsidization lied between 0.55 per cent and 1.15 per cent. It concluded that the level of benefit for all producers was *de minimis* and, consequently, terminated the proceeding (see preambular paragraph 34, Exhibit EC-27).

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<sup>141</sup> Council Regulation (EC) 2020/97 of 6 October 1997 on the protection against subsidized imports of countries not members of the European Community, OJ L 288, 21.10.1997, p.1.

<sup>142</sup> Commission Decision of 12 June 1998 terminating the countervailing duty proceeding concerning imports of polyester fibres and polyester yarns originating in Turkey, O.J. L168, 1.6.1998, p.46.

**Q49. The European Communities states:**

**In that case [United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom], the Appellate Body considered that a finding on the part of the domestic authority was needed for the purposes of reviews under Article 21.2 of the SCM Agreement. If this is true for a review under Article 21.2, which is not obligatory and takes place during the life time of the original countervailing duty, a fortiori a positive finding that all the conditions are fulfilled is necessary in the context of an Article 21.3 investigation, where the basic obligation is the termination of the original duty and the possibility of continuing a duty following a sunset review represents only an exception.<sup>143</sup>**

**Could the European Communities explain in what sense it uses the term *a fortiori* and why a fortiori reasoning applies here.**

Reply

5.515 The EC uses the terms *a fortiori* here to mean *all the more so*. Indeed, if a positive finding on subsidization is necessary for an interim review under Article 21.2, it should all the more so apply to an Article 21.3 review. In an article 21.2 review, there is no presumption of termination. It is for the exporters or the foreign government to allege that circumstances have changed sufficiently to warrant the removal of the measures or, in the case of an administrative review, a reduction in the level of duty payable. Conversely, the finding on likelihood of continuation or recurrence of subsidization and injury is deviating from the general presumption laid down in Article 21.3, which is termination of the CVD. Of course, although a positive finding on subsidization is necessary under both paragraphs, the actual content of what is required to be determined or found is different. Under Article 21.3 what is required to be determined is whether expiry of the duty "would be likely to lead to continuation ...of subsidization...", whereas under Article 21.2 demonstration of the actual existence of subsidization is required.

**Q50. The European Communities states:**

**The EC in this proceeding is not challenging the injury requirement only for the purpose of verifying the accuracy of the ITC injury determination as such, but it is doing so for the purpose of the *de minimis* challenge, i.e. as a requirement that needs to be demonstrated in the context of a sunset review under Article 21.3 of the Agreement.<sup>144</sup>**

**Please explain in detail.**

Reply

5.516 In a sunset review under Article 21.3 the domestic authorities have to establish that expiry of the CV duty would be likely to lead to continuation or recurrence of subsidization **and injury**. In the request for consultations and in the request for the establishment of the Panel, the EC has clearly based its claims on Article 21.3 in its entirety and explained that a subsidy rate below the 1 per cent *de minimis* rule can never cause injury. This was clearly discussed during the consultations held with the US. The EC claim, therefore, is that the US laws, regulations and practices as such and their concrete application to the facts of the present case are inconsistent with Article 21.3 because there

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<sup>143</sup> First Written Submission of the European Communities, para. 70 (emphasis in original).

<sup>144</sup> Oral Statement of the European Communities at the First Meeting of the Panel, footnote 27.

cannot be injurious subsidization of a subsidy rate likely to be below the 1 per cent *ad valorem* threshold. Because the US does not contest that the rate of subsidy likely to continue in this case is below 1 per cent (indeed DOC found that the rate of subsidization likely to continue here is 0.53 per cent), the EC considers that it is not necessary at this stage to initiate separate panel proceedings in order to verify whether the US ITC has correctly followed all the procedural and substantive requirements and accurately concluded that this level of subsidy is likely to cause injury to US industry. As said, such proceedings against the actual ITC findings are not necessary for the time being because the EC's point of departure and claim is that there can never be injurious subsidization, in the sense of Article 21.3, from the subsidy found likely to continue in this case by the US DOC. The US has never contested before the EC claim on this point, nor does it deny that a condition necessary in a sunset review determination is to establish whether injurious subsidization is likely to continue or recur.

**Q51. In the context of its argument that "[t]he domestic authorities are under an obligation to 'determine' the likelihood of continuation or recurrence of subsidization", the European Communities claims:**

**[T]he EC considers that Section 751(c) of the Act, as complemented by Section 752 and by US regulations and administrative practices, establishes a standard of investigation for sunset reviews that violates the requirements of the SCM Agreement.<sup>145</sup>**

**Is the Panel to understand that the European Communities is making a claim that US law as such violates the SCM Agreement in respect of the obligation to "'determine' the likelihood of continuation or recurrence of subsidization" contained in Article 21.3?**

Reply

5.517 Yes. The US law as such is a web of provisions (basic law, regulations and guidelines) which permit the authorities to maintain CVD measures without there being any need to counter injurious subsidization. The US law as such allows the authorities to reach this result by laying down a standard of investigation in a sunset determination which is inconsistent with Article 21.3 of the SCM Agreement.

**Q52. The European Communities states:**

**In fact, to the extent DOC relied upon the rates calculated in its original investigation, the duty of investigation laid down in Article 21.3 of the SCM Agreement would also require at a minimum that DOC made all documents showing how the rates were calculated in the original investigation also part of the record in the sunset review.<sup>146</sup>**

**Please explain this argument.**

Reply

5.518 The EC has explained with its written and oral submissions that the relevant authority in a sunset review must determine that all the conditions for the continued imposition of the countervailing duty are fulfilled. For that purpose, the relevant authority must carry out an investigation so as to collect, consider and verify all available and relevant evidence that is necessary in making the sunset

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<sup>145</sup> First Written Submission of the European Communities, para. 76.

<sup>146</sup> Oral Statement of the European Communities at the Second Meeting of the Panel, para. 26.

determination. It must also allow parties access to and provide them with ample opportunity to comment on and defend their interests at all stages of the review, as happens in an original investigation.

5.519 It is beyond doubt that Article 21.4 makes the application of Article 12 obligatory ("shall apply"). Thus, in a sunset review the interested parties must have access to the entire record on the basis of which the sunset determination is made, that is all the information and evidence relevant to an investigation, in the same way as in the original investigation (Article 12.1). For example, to the extent that the US DOC relies upon the rates calculated in its original investigation, it must, at minimum, make its original determination and all documents showing how the rates therein were calculated (i.e., the calculation memoranda) part of the record of the sunset review. This is a basic requirement of due process and respect of the rights of defence. Indeed, Article 12.2 requires that any decision must be based only on information what is in the record and which has been made available to all parties. Article 12.3 requires that all parties should be able to see all information that is relevant, and Article 12.8 requires that all essential facts should be made available in sufficient time for the parties to defend properly their interests. It follows that the US DOC cannot evade this responsibility by claiming that it is somehow prohibited by US law from making the memoranda part of the record in the sunset review or that they are confidential. The US International Trade Commission ("ITC") is subject to the same procedures regarding the treatment of business proprietary information as the US DOC. However, unlike DOC, the US ITC in its sunset reviews automatically makes the confidential version of its original determination, as well as the complete staff report from the original investigation, part of the record of the sunset review. This is done automatically right at the beginning of the review so that all parties will be able to use this information in preparing their arguments. The ITC simply provides the documents the same confidential status in the review that they enjoyed in the original investigation.

**Q53. The European Communities states:**

**[T]his flexibility and plasticity of US law are not virtues but serious legal defects, because they eliminate legal security and predictability in the interpretation and application of the US law on sunset reviews to the detriment of foreign exporters and international trade.<sup>147</sup>**

**Please explain why, in the view of the European Communities this "flexibility and plasticity" are inconsistent with the SCM Agreement, and the textual basis for this assertion.**

Reply

5.520 The WTO lays down certain rights and obligations and provides the means to ensure that they are observed. The WTO Agreement states, in its last preambular paragraph, that the Members are "determined to preserve the basic principles and to further the objectives underlying this multilateral trading system". Security and predictability in international trade have been recognized both under the previous GATT 47 and the new WTO system to constitute part of the pursued objectives.<sup>148</sup> It should also be noted that one of the objectives of any system of law, including that of the WTO, is to lay down rules that are clear and enforceable. Discretion in the interpretation and application of the

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<sup>147</sup> Oral Statement of the European Communities at the Second Meeting of the Panel, para. 29.

<sup>148</sup> As the Appellate Body has clarified in the *Shrimps* case: "Maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the WTO Agreement; but it is not a right or an obligation, nor is it an interpretative rule which can be employed in the appraisal of a given measure under the chapeau of Article XX". See Appellate Body report in *United States - Import Prohibition of certain Shrimp and Shrimp Products*, AB-1998-4, WT/DS58/AB/R, 12 October 1998, at para. 116.

WTO provisions is tolerated as long as it does not undermine the rights and obligations of the Members.<sup>149</sup> This principle underlies also the DSU, which in Article 3.2 states: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." For this reason, too, Article 3.2 and Article 19.2 of the DSU provide that: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

5.521 More specifically, the SCM Agreement, in particular Articles 10, 19 and 21 thereof, lay down the basic principle that no countervailing duty shall be imposed or remain in force if it is not necessary to counteract subsidization that is causing injury. This basic obligation is bound to be frustrated if a Member does not interpret in good faith the provisions of the SCM Agreement, as laid down in Articles 31 and 32 of the 1969 Vienna Convention. The argument of the Community quoted by the Panel in this question aims to underscore this basic premise and objective. The basic US laws, regulations and administrative guidelines on the issue of sunset reviews are as such incompatible for the additional reason that they leave too much of a discretion and room for interpretation in their application to the relevant authorities which is inconsistent with the provisions of the Article 21.3 as interpreted by the EC, that is in context and in light of its object and purpose.

**Q54. In the context of a discussion of the deadline for the submission of information by a party to the United States Department of Commerce ("DOC") in a sunset review, the European Communities states:**

**Such a short deadline violates the provisions of Article 21.3, in conjunction with Articles 12.1 and 21.4, of the SCM Agreement because it fails to afford the producers with an 'ample opportunity' to present in writing all evidence which they consider relevant in respect of the sunset review<sup>50</sup>.**

**Is the Panel to understand, from this statement, that the European Communities is making a claim that the US law as such violates the SCM Agreement in respect of the obligation to "give[] [interested Members and all interested parties] . . . ample opportunity to present in writing all evidence which [the authorities] consider relevant in respect of the investigation in question" contained in Article 12.1?**

#### Reply

5.522 Yes, the EC has explained in detail (e.g., in paras. 40-44 of its second written submission) that the US law as such violates Articles 21.3 and 4 and Article 12, in particular paragraph 1 thereof. The EC claim is that in order to comply with the provisions of Article 12.1, the US DOC must inform the parties of the specific information it requires to complete its determination in the particular case, allow the parties access to the information submitted by the other interested parties and give all the parties ample opportunity to provide the information at a meaningful point in the proceedings. 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 such sufficient time for the parties to defend their interests". The principle underlying Article 12 of the *SCM Agreement*, therefore, is that during

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<sup>149</sup> A related aspect of this proposition is that under the WTO system, as under the previous GATT 47, even non-mandatory provisions of a Member, such as an administrative guidance, may qualify as a measure the consistency of which with the WTO Agreements can be examined and has indeed been found in some cases to violate certain provisions of such Agreements.

<sup>150</sup> First Written Submission of the European Communities, para. 99.

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 present counter-evidence and to defend their interests at all stages leading up to the final determination. All these due process and rights of defence requirements should take place before the final determination is made in a sunset review. As explained above, all these procedural rights and due process requirements are not respected by the US DOC in sunset reviews under the existing laws, regulations and practices and were definitively not respected in the present case. The EC submits that a law or regulation that is open in fact to any type of interpretation by, or leaves too much of unbounded discretion to, the administrative authorities violates as such the provisions of the SCM Agreement in question.

P. RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL FOLLOWING THE SECOND MEETING OF THE PANEL

**Questions to Both Parties**

**Q41. Do you consider it impossible that the drafters might have intended there to be different rules for sunset reviews from those for investigations? In other words, in your view, would it have been irrational for the drafters to establish a set of disciplines in respect of investigations, and intend some of them apply to sunset reviews and others not? If so, what might be the reasons for such differences? If not, why not?**

Reply

5.523 As the United States previously discussed in response to the Panel's first set of questions, applying the customary rules of interpretation of public international law to Article 21.3 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), the United States considers that no provisions of the SCM Agreement are required to be applied to reviews under Article 21.3 unless expressly indicated.<sup>151</sup> Where the drafters intended to require that the rules for sunset reviews and investigations be the same, they made an express provision to that effect.<sup>152</sup> As a result, it is both possible and rational that the drafters intended there to be different rules for sunset reviews and investigations.<sup>153</sup>

5.524 The reason for such differences is straightforward – investigations and sunset reviews serve different functions and, in essence, gauge different things. The purpose of an investigation is to determine whether the conditions necessary for the *imposition* of a countervailing duty currently exist; *i.e.*, injury caused by subsidized imports. The purpose of a sunset review is to determine whether the conditions necessary for *continued imposition* of a countervailing duty exist; *i.e.*, expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. The focus of a sunset review under Article 21.3 is likely future behaviour if the remedial measure is removed, not whether or to what extent subsidization currently exists, which is the focus of an investigation.

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<sup>151</sup> *Answers of the United States to Questions from the Panel* ("US Answers"), 21 February 2002, paras. 19-21.

<sup>152</sup> *Id.*, paras. 19 and 21, providing examples of provisions that apply to both investigations and sunset reviews.

<sup>153</sup> Of course, the United States is mindful that it is problematic to speculate on the intent of the drafters of treaty text and that the text itself is the best evidence of the drafters' intent.

**Q42. Footnote 37 to the SCM Agreement states:**

**The term "initiated" as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.**

**Please comment on the meaning of this footnote in the context of the issues in this dispute.**

Reply

5.525 Footnote 37 defines the term “initiated” as used initially in Article 10 in the context of investigations. Article 10 provides that countervailing duties “may only be imposed pursuant to investigations initiated” in accordance with the SCM Agreement. Footnote 37 defines “initiated” in this context to mean “procedural action by which a Member formally commences an investigation as provided in Article 11”. The term “initiated” in Article 21.3 is used in a different context, one to which footnote 37 does not apply. “Initiated” in Article 21.3 cannot be a reference to an “investigation as provided in Article 11” because sunset reviews are not “an investigation as provided in Article 11”, and Article 21.3 states that the administering authority, on its own initiative, may “initiate” a “review” to determine the likelihood of continuation or recurrence of subsidization and injury. Thus, the definition of “initiated” in footnote 37 is limited to those instances where it refers to a procedural action - an investigation - “as provided in Article 11”.

**Q43. What textual support, if any, is there, in your view, for the proposition that the term "investigation" includes sunset reviews? Please comment, in particular, on the relevance, if any, of footnote 37 to and Article 32.3 of the SCM Agreement.**

Reply

5.526 There is no textual support in the SCM Agreement for the proposition that the term “investigation” includes Article 21.3 sunset reviews.

5.527 The SCM Agreement distinguishes between the investigatory phase and the review phase of a countervailing duty proceeding. Article 11 deals with investigations, while Article 21 deals with reviews. This structure is reflected in other provisions of the SCM Agreement. For example, Articles 22.1 through 22.6 set forth obligations concerning the contents of public notices issued during an investigation, while Article 22.7 sets forth comparable obligations with respect to reviews. As the panel in *Korea DRAMs* concluded, “the term ‘investigation’ means the investigative phase leading up to the final determination of the investigating authority”.<sup>154</sup>

5.528 Article 32.3, which is a transition rule, also distinguishes between “investigations” and “reviews of existing measures”. In *Brazil Desiccated Coconut*, the Appellate Body specifically recognized this distinction between the initial investigation and the post-investigation phase, noting that the imposition of “definitive” duties (an “order” in US parlance) ends the investigative phase.<sup>155</sup>

5.529 As discussed in response to Question 42 above, footnote 37 defines the term “initiated” as used in the context of the commencement of an investigation under Article 11. Footnote 37 has no application to reviews under Article 21.

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<sup>154</sup> *United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/R, Report of the Panel adopted 19 March 1999, para. 6.48, note 494.

<sup>155</sup> *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, Report of the Appellate Body adopted 20 March 1997, p. 9.

**Q44. Please explain why, in your view, the drafters established a *de minimis* standard for investigations, providing support from the text and/or the negotiating history of the SCM Agreement. Do the mandatory nature and the strong language of the statement in Article 11.9 ("There shall be immediate termination in cases where the amount of a subsidy is *de minimis* ..") indicate anything about the rationale for this standard?**

Reply

5.530 As demonstrated in the United States' previous submissions in this case, an analysis of the text and context of Article 21.3 and the object and purpose of the SCM Agreement leads to the conclusion that the Article 11.9 *de minimis* standard does not apply to reviews under Article 21, including sunset reviews under Article 21.3. This should be the end of the analysis. However, the EC has brought up the negotiating history of the SCM Agreement in a vain attempt to overcome the conclusion to which the text, context, and object and purpose inexorably lead. Significantly, in its attempted reliance on negotiating history, the EC does not explain how its invocation of negotiating history is justified under the customary rule of treaty interpretation reflected in Article 32 of the *Vienna Convention*, which permits recourse to supplementary means of interpretation:

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.

5.531 Nothing in the SCM Agreement with respect to the Article 11.9 *de minimis* standard is ambiguous or obscure. Under Article 11.9, Members must apply a one per cent *de minimis* standard in countervailing duty *investigations*. Nothing in Article 21.3 or elsewhere in the Agreement sets a *de minimis* standard for sunset reviews. Nothing in the Agreement requires Members to quantify an amount of subsidization when determining likelihood of continuation or recurrence of subsidization.

5.532 Furthermore, this absence of a *de minimis* standard or quantification requirement for sunset reviews does not lead to a manifestly absurd or unreasonable result. Determining likelihood of continuation or recurrence of subsidization requires a consideration of future, rather than present circumstances. What are the prospects of subsidization in the future? Without the discipline of the duty, is subsidization likely to continue or recur? The analysis required in a sunset review, therefore, is necessarily prospective and predictive in nature.

5.533 In the context of an investigation, the function of the Article 11.9 *de minimis* test is to determine whether foreign government subsidies warrant the imposition of a countervailing duty order in the first instance. For example, in an investigation, if the investigating authority found that a government programme had provided recurring subsidies at a rate of more than one per cent, imposition of a countervailing duty would be warranted if the subsidized imports were found to cause injury. In contrast, the focus of the sunset review is the future. The mere continued existence of this same programme could warrant maintaining the duty beyond the five-year point, *even if* the amount of the subsidy was currently *zero*, as stated in footnote 52, because subsidization and injury may be likely to recur absent the discipline of the duty. This distinction between the object and purpose of an investigation and the object and purpose of a sunset review supports the conclusion that, absent an express reference to the contrary, there is no basis to assume or infer an intent that the *de minimis* standard for investigations applies in sunset reviews.

5.534 Moreover, contrary to the EC's claim in its Second Oral Statement (para. 36), the negotiating history of the SCM Agreement reveals not one, but two theoretical justifications for the *de minimis*

concept. The EC's claim is all the more astonishing given that the document it cites explicitly sets out both theories as follows:

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

- The first view holds that countervailing duty 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>156]</sup>

In other words, one of the two plausible and recognized theories, which is similar to the justification under US law for a *de minimis* standard, is unrelated to the subject of injury and merely considers that the law should not concern itself with subsidization that is of a trifling amount.

5.535 Thus, the only thing the negotiating history demonstrates is that there was *no* consensus or single reason why the drafters established a *de minimis* standard for investigations. Furthermore, under either theoretical justification for a *de minimis* standard, there is no magic or empirical economic logic in the choice of the one per cent standard currently set forth in Article 11.9. Rather, the one per cent standard is simply a negotiated number. The negotiating history itself reflects that the original proposal for the *de minimis* standard set the threshold at 2.5 per cent.<sup>157</sup> The negotiators did not agree to include a *de minimis* standard in Article 21.3 for sunset reviews.

5.536 In addition, it is difficult to reconcile the EC's assertion that the *de minimis* standard relates to the question of whether there is injury when the SCM Agreement reflects not one, but three different, *de minimis* standards.<sup>158</sup> Furthermore, the *de minimis* standard in these provisions depends on the economic level of development of the exporting country. It is difficult to see how the injury in the importing Member from subsidized imports depends on the level of economic development in the exporting Member.

**Q45. Assuming for the sake of argument, and without pre-judice to the outcome in the matter before the Panel, that a *de minimis* standard applies in respect of subsidization to sunset reviews, would this *de minimis* standard be based on: (i) the rate of subsidization during the period of application of the countervailing duty ("CVD"); (ii) the rate of subsidization at the time of sunset review; or (iii) the rate at which subsidization is likely to continue or recur? How**

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<sup>156</sup> MTN.GNG/NG10/W/4 (28 April 1987), page 51 (emphasis added) (copy attached as Exhibit US-7). This document, prepared by the Secretariat, was a reference paper which reproduced existing GATT rules on countervailing measures and subsidies and which summarized the status of the discussions concerning possible modifications of those rules.

<sup>157</sup> *Id.* page 50 (Exhibit US-7).

<sup>158</sup> See SCM Agreement, Articles 11.9, 27.10(a), and 27.11.

would you calculate that rate of subsidization on which the *de minimis* standard would be based?

Reply

5.537 There is no obligation under the SCM Agreement to quantify an amount of subsidization in the context of a sunset review. All three of the options posited in this question demonstrate the error in suggesting that there is a requirement to do so. 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.

5.538 The consideration in a sunset review is whether subsidization and injury are likely to *continue or recur* in the absence of the duty. The rate of subsidization during the period of the application of the duty (option i), if above zero, would certainly demonstrate that subsidization continued with the discipline of the duty in effect and that, therefore, one could find a likelihood that subsidization would *continue* were the duty removed – for example, if benefits were being received under a recurring subsidy programme or the benefit stream from a non-recurring subsidy would continue. The same logic would apply if the rate of subsidization at the time of the sunset review (option ii) also was above zero. Nevertheless, even if the rate of subsidization were zero under either of these options, one might find a likelihood of *recurrence* of subsidization<sup>159</sup> – for example, if subsidy programs, whether providing recurring or non-recurring benefits, originally found to benefit exporters still exist. With respect to the rate at which subsidization is likely to continue or recur (option iii), one could never *calculate* a future rate of subsidization for obvious reasons, although it may be possible to infer a future rate based on past rates (which is in essence what the US Department of Commerce does under US law).

5.539 In sum, all of these options might inform a determination of the likelihood of continuation or recurrence of subsidization – but they just as easily might not. The only obligation in a sunset review under Article 21.3 is to determine whether expiry of the duty would be likely to lead to the continuation or recurrence of subsidization and injury. This is an inherently predictive exercise which may call for a reliance upon findings made in the original investigation or subsequent administrative (assessment) reviews, if any. However, nothing in the SCM Agreement *requires* a consideration of the magnitude of subsidization in determining the likelihood of continuation or recurrence of subsidization and injury.

Questions to the EC

5.540 Consistent with the Panel's instructions, the United States intends to file comments on the EC's answers to questions 46-54 on Tuesday, 9 April 2002.

Questions to the United States

**Q55. The European Communities states:**

**In fact, to the extent DOC relied upon the rates calculated in its original investigation, the duty of investigation laid down in Article 21.3 of the SCM Agreement would also require at a minimum that DOC made all documents**

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<sup>159</sup> See *US First Submission*, para. 81; *US Second Submission*, paras. 11-12 and 19; and *US Answers*, paras. 34-36.

**showing how the rates were calculated in the original investigation also part of the record in the sunset review.**

**Please respond to this argument.**

Reply

5.541 There is no “duty of investigation” contained in Article 21.3, nor has the EC demonstrated that any such obligation exists. Article 21.3 requires that the administering authority “determine” whether the expiry of the duty would likely lead to a continuation or recurrence of subsidization and injury. The United States considers that an appropriate definition for the term “determine” as used in Article 21.3 is “to decide” something – namely, that the administering authority is required to decide the likelihood issue in the affirmative or terminate the duty.<sup>160</sup> This is the only obligation under Article 21.3. Nothing in the SCM Agreement *requires* consideration of the magnitude of subsidization in determining the likelihood of continuation or recurrence of subsidization and injury.

5.542 In conducting sunset reviews, the US Department of Commerce determines whether the expiry of the duty would be likely to lead to the continuation or recurrence of subsidization and, if so, the level of that subsidization. The US Department of Commerce’s likelihood determination does not “rely” on any particular *level* of subsidization. The US Department of Commerce does not *calculate* the level of subsidization in the context of the sunset review. Rather, as explained in the US Department of Commerce’s *Sunset Policy Bulletin* (Section III.B)<sup>161</sup>, the US Department of Commerce relies on rates previously calculated in the original investigation. These rates are contained in public, published determinations in the *Federal Register*. If the EC and the German producers believed that the data and documents underlying these public, published figures were germane to their arguments in the sunset review, they had ample opportunity to place such information on the sunset review record.

**Q56. Could the United States point to the statutory or regulatory provisions, if any, of US law which provide an indication to interested Members and parties as to the parts of the record of a CVD investigation that would normally be expected to be made part of the record of the sunset review of any resulting CVD order. Please also point to any such provisions of US law in respect of the parts of the record of a duty assessment proceeding as well as the parts of the record of a review under Article 21.2 that would normally be expected to be made part of the record of the sunset review of the CVD order in question. Please provide the relevant statutory or regulatory texts, if any.**

Reply

5.543 As the United States has explained previously<sup>162</sup>, under the US system, a “proceeding” begins on the date of the filing of a petition and ends on, *inter alia*, the revocation of an order.<sup>163</sup> A countervailing duty proceeding consists of one or more “segments”.<sup>164</sup> “Segment” refers to a portion of the proceeding that is separately judicially reviewable. For example, a countervailing duty

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<sup>160</sup> See *US Answers*, paras. 57-58.

<sup>161</sup> Exhibit EC-15.

<sup>162</sup> *US Answers*, paras. 69-70.

<sup>163</sup> 19 CFR 351.102 (definition of “proceeding”). A copy of section 351.102 and other regulatory provisions discussed herein is attached as Exhibit US-8.

<sup>164</sup> 19 CFR 351.102 (definition of “segment of proceeding”) (Exhibit US-8).

investigation, an administrative review, or a sunset review each would constitute a segment of a proceeding.<sup>165</sup>

5.544 Under the US statute and the US Department of Commerce regulations, the administrative record from one segment of a proceeding never automatically becomes part of the administrative record of another segment of the proceeding. In other words, the administrative record from the investigation (one segment) or an administrative (duty assessment) review (another segment), never automatically become parts of the administrative record of a sunset review (yet another segment). Each segment of a proceeding contains its own discrete administrative record. Each final determination is based solely on the information placed upon and contained in the administrative record for that segment. Each final determination made in a particular segment, and the discrete record upon which it is based, is subject to judicial review.

**Q57. The United States indicated, in response to an oral question from the Panel at the second meeting of the Panel, that the DOC's final determination in a CVD investigation is not made part of the record of the sunset review of any resulting CVD order, because that final determination is published and, therefore, publicly available. Is the Panel to understand, from this statement, that the DOC only makes part of the record of a sunset review information/documents which are not publicly available? If so, is the Panel to understand that the DOC may base its determination in a sunset review on publicly available information without making that information part of the record of the sunset review? Please explain in detail.**

Reply

5.545 The administrative record of a sunset review (or any other segment of a proceeding) before the US Department of Commerce consists of all factual information, written argument, or other material developed by, presented to, or obtained by the US Department of Commerce during the course of the sunset review.<sup>166</sup> This record may include public as well as business proprietary information.<sup>167</sup> However, a relevant public, published decision, such as a prior US Department of Commerce determination (*e.g.*, the final determination in the original investigation which is published in the *Federal Register*) or a decision from a US court, need not be placed on the record to be considered by the US Department of Commerce in making its determination. This is simply a generally accepted precept of US administrative law.

**Q58. The Panel notes the following comment in the Statement of Administrative Action accompanying the Uruguay Round Agreements Act:**

**[The DOC] normally will select . . . net countervailable subsidies determined in the original investigation or in a prior review.**

The Panel further notes that the United States indicated, in response to an oral question from the Panel at the second meeting of the Panel, that no information/documents from the record of a CVD investigation are automatically made part of the record of the sunset review of any resulting CVD order. Is the Panel to understand, from this statement, that the DOC relies in a sunset review on the net countervailable subsidy determined in the original investigation, where there have been no prior reviews, without taking into account the information /

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<sup>165</sup> See 19 CFR 351.102 (definition of "segment of proceeding", examples under para. 2) (Exhibit US-8).

<sup>166</sup> See 19 CFR 351.104 (record of proceedings) (Exhibit US-8).

<sup>167</sup> *Id.*

**documents underlying the calculation of such subsidy? If so, could the United States explain how the DOC does so. In particular, how does the DOC make any appropriate adjustments to the subsidy without reliance on such information/documents? Please explain in detail.**

Reply

5.546 There is no obligation under the SCM Agreement to quantify an amount of subsidization in the context of a sunset review. Under US law, however, the USITC has the discretion to consider the magnitude of the net countervailable subsidy that is likely to prevail if the order is invoked.<sup>168</sup> As reflected in the portion of the SAA quoted by the Panel, the US Department of Commerce determines the likely magnitude in order to report it to the Commission.<sup>169</sup>

5.547 In determining the magnitude of the net countervailable subsidy, the US Department of Commerce begins with the net countervailable subsidy rate determined in the investigation. As explained in prior US submissions to the Panel, the US Department of Commerce begins with this rate because it is the only evidence reflecting the behaviour of the respondents without the discipline of countervailing measures in place. The US Department of Commerce may make adjustments to the net countervailable subsidy in accordance with the guidance contained in the *Sunset Policy Bulletin*.<sup>170</sup> However, a sunset review is not a procedure for determining the amount of final countervailing duty liability. Instead, a sunset review is conducted to determine the likelihood of the continuation or recurrence of subsidization and injury in the event that the countervailing duty order is revoked. Consequently, the US Department of Commerce does not *calculate* the net countervailable rate of subsidization in a sunset review. Rather, the US Department of Commerce starts with the rate determined in the investigation and may adjust that rate by simple subtraction or addition – for example, if, since the investigation a programme has been terminated without residual benefits, the US Department of Commerce will subtract the rate determined for that particular programme from the total rate determined for all programmes. This is, in fact, what happened in this case. The mechanics of this kind of adjustment are set forth in Exhibit EC-8.

**Q59. The Panel notes the following statement of the DOC in its final determination in the sunset review on carbon steel:**

**With respect to Dillinger's contention that the [DOC] should have included in the record of these sunset reviews the calculation memoranda the [DOC] prepared in the original investigation, we disagree. Insofar as Dillinger could have submitted some version of the memoranda in the sunset reviews, we determined that, in these sunset reviews, Dillinger did not file the information in a timely manner.**

**Did the DOC communicate to Dillinger, or any other German producer, notably Hoesch, Preussag, or Thyssen, prior to publication of this final determination, the DOC's refusal to include in the record of these sunset reviews the calculation memoranda the DOC prepared in the original investigation and its reasons therefor? If so, please indicate when and provide a copy of this communication.**

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<sup>168</sup> Section 752(a)(6) of the Act.

<sup>169</sup> Section 752(b)(3) of the Act.

<sup>170</sup> See *US Answers*, paras. 59-66.

Reply

5.548 On 13 April 2000, the German producers in the sunset review – Thyssen Krupp Stahl AG, Stahlwerke Bremen GmbH, EKO Stahl GmbH, and Salzgitter AG – sought to have *all* the calculation memoranda from the original investigation placed on the record of the sunset review. Three German producers of certain corrosion-resistant carbon steel flat products were involved in the original investigation: Hoesch Stahl AG (Hoesch), Preussag Stahl AG (Preussag), and Thyssen Stahl AG (Thyssen). Prior to the issuance of the final determination in the sunset review, the US Department of Commerce did not communicate to Dillinger (who was not a party in the corrosion-resistant case) or any other German producer that the request to have all calculation memoranda placed on the record of the sunset review was determined to be untimely submitted.

**Q60. Does the DOC make the full record of a sunset review available to parties (including under administrative protective orders) prior to or after the publication of its preliminary determination? Is this a matter of law or policy? If the former, please point to the relevant statutory or regulatory provisions of US law, and provide the statutory or regulatory texts. Did the DOC make the full record of the sunset review on carbon steel available to parties? If so, when?**

Reply

5.549 Under the US statute and the US Department of Commerce regulations, the public portion of the record of the sunset review, updated on a daily basis as information is placed on the record, is maintained in the US Department of Commerce's Central Record Unit, which is open to the public during normal business hours.<sup>171</sup> Under the US statute and the US Department of Commerce regulations, the business proprietary portion of the record of the sunset review is available to any person covered by, and subject to, an Administrative Protective Order ("APO") for the sunset review segment of the proceeding.<sup>172</sup> All documents submitted by interested parties must be served on all other interested parties at the same time as they are filed with the US Department of Commerce. This includes service of public documents on all parties and service of business proprietary documents on all parties under APO.<sup>173</sup> A copy of the proprietary portion of the record of the sunset review also is kept in the US Department of Commerce's Central Records Unit.<sup>174</sup> The respondents in the sunset review on carbon steel had continuous access to the administrative record as it was continuously updated.

**Q61. Please respond to paragraphs 34 and 46 of the European Communities' comments on the responses of the United States to the questions from the Panel following the first meeting of the Panel, regarding the use - as opposed to disclosure - by the DOC of confidential information/documents in sunset reviews.**

Reply

5.550 In paragraph 34, the EC suggests that the US Department of Commerce could have placed the proprietary calculation memoranda from the investigation on the record of the sunset review because, by making requests to place such data on the sunset review record, the German producers have "renounced the confidential nature of the data". There is no merit to the EC's argument.

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<sup>171</sup> See section 777(a)(4) of the Act. A copy of section 777(a)(4) and certain other provisions of the US statute discussed herein is attached as Exhibit US-9. See also 19 CFR 351.103 and 351.104(b) (Exhibit US-8).

<sup>172</sup> See section 777(c)(1) of the Act (Exhibit US-9); 19 CFR 351.305 (Exhibit US-8).

<sup>173</sup> See section 777(d) of the Act (Exhibit US-9); 19 CFR 351.303(f) (Exhibit US-8).

<sup>174</sup> See 19 CFR 351.103 and 351.104(a) (Exhibit US-8).

5.551 Article 12.4 of the SCM Agreement provides that business confidential information “shall not be disclosed without specific permission of the party submitting it”. In other words, before business confidential may be disclosed: 1) the party submitting it, 2) must have given specific permission. Notwithstanding the EC’s assertions, neither of those factors is present in this case. Furthermore, on such an extremely serious matter as the protection of business proprietary information, it is irresponsible to suggest that an administering authority simply should *infer* that a particular party has given the requisite permission.

5.552 Consistent with Article 12.4, the US statute provides that information submitted to the US Department of Commerce “which is designated as proprietary by the person submitting the information shall not be disclosed to any person without the consent of the person submitting the information ... .”<sup>175</sup> The parties that submitted the business proprietary information in the original investigation were Hoesch Stahl AG, Preussag Stahl AG, and Thyssen Stahl AG. The German producers in the sunset review were Thyssen Krupp Stahl AG, Stahlwerke Bremen GmbH, EKO Stahl GmbH, and Salzgitter AG. In the record of the sunset review, there is no evidence of express consent to move the information from the record of one segment of the proceeding to another, nor is there any explicit claim that the parties in the sunset review had the authority to give such consent.

5.553 There is no distinction between “use” and “disclosure” on this issue. Any information used by the US Department of Commerce as a basis for a determination is subject to disclosure. If the information is public, it must be disclosed to the public; if the information is business proprietary, it must be disclosed to any party under APO. The concern is not, as the EC asserts in paragraph 46, that placing the business proprietary information from the investigation on the record of the sunset review might result in public disclosure. Business proprietary information remains proprietary unless and until the submitter explicitly indicates otherwise. Rather, the issue in this case is that the original submitter of the business proprietary information relied upon the fact that its proprietary information would only be used during the investigation phase and would be subject to disclosure only to parties under APO involved in the investigation phase for their use during that phase. The EC’s suggested cavalier treatment of business proprietary information is not consistent with either US law or Members’ obligations under the SCM Agreement.

Q. COMMENTS OF THE EUROPEAN COMMUNITIES ON THE RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL FOLLOWING THE SECOND MEETING OF THE PANEL

#### **US response to Panel's question 44**

5.554 In paragraph 13 of its responses, the US affirms that the Uruguay Round negotiators did not agree on the inclusion of a *de minimis* standard for sunset reviews. The European Communities contests this statement. There is nothing in the legislative history of the *SCM Agreement* that suggests such a conclusion. A *de minimis* threshold was simply not expressly included in Article 21.3 because it is clear from the overall context and object and purpose of the Agreement that this requirement applies to initial as well as sunset investigations alike.

5.555 Furthermore, in paragraph 14 of its responses, the US contests the EC's position that the *de minimis* standard is related to injury on the basis that the *SCM Agreement* contains three different *de minimis* standards.

5.556 The increased *de minimis* thresholds, established respectively by Articles 27.10(a) and 27.11 SCM Agreement for developing (2 per cent) and least developed (3 per cent) countries, do not affect the inherent relationship between *de minimis* level of subsidization and injury. They are, in fact, part of the special development package included in Article 27 of the SCM Agreement together with a

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<sup>175</sup> Section 777(b)(1)(A) of the Act (Exhibit US-9).

number of concessions granted to developing countries in order to meet their development needs. An increased *de minimis* threshold does therefore not alter the ratio legis of the *de minimis* principle. For example, developing country members were also entitled to maintain export subsidies for a period of eight years (Article 27.2). This does not alter the principle that export subsidies are prohibited because they are presumed to be trade distorting. It is simply a relaxation of, an exemption to WTO requirements, as there are many in the WTO Agreements, granted in order to meet the development needs of specific WTO members.

5.557 Incidentally, if the US logic that the different *de minimis* thresholds of Article 27 have not to be interpreted as exceptions has to be followed, it appears difficult to reconcile these thresholds with the rationale of administrative efficiency put forward by the US for the *de minimis* rule. It is, in fact, difficult to understand how the administrative efficiency of collecting a countervailing duty at the border can depend on the origin of a product.

#### **US response to Panel's question 45**

5.558 In paragraph 16 of its responses, the US claims that a finding of likelihood of continuation or recurrence of a subsidy could be made if benefits were being received under a recurring subsidy programme or the benefit stream of a non-recurring programme would continue. The EC does not dispute that fact but the US argument evades the basic argumentation of the EC. Indeed, the US has to demonstrate the subsidization is likely to continue or recur above the *de minimis* threshold set out in Article 11.9 *SCM Agreement*. In the corrosion-resistant steel case from Germany, it was clear that subsidization (originally found at 0.54 per cent in 1993) could not continue or recur above the *de minimis* level of 1 per cent since a major proportion of the subsidy margin, i.e. the CIG programme, was based on a non-recurring subsidy programme where, in addition, the benefit stream is declining and would expire in the near future.

5.559 Likewise, if the rate of subsidization is zero, the investigating authority has to demonstrate how this zero-rate will increase above the *de minimis* threshold. A failure to do so results in a violation of Article 21.3 *SCM Agreement*. With regard to subsidy programmes, it is not sufficient to show that they “still exist”. The investigating authority, in a sunset review, must demonstrate that such programmes are likely to be used, and explain why. In addition, it is not sufficient to “infer a future rate” of subsidy; a sunset review requires a determination of subsidization, and subsidization does not exist in the abstract.

#### **Question 55**

5.560 In its response, the US forgets that the conditions and requirements of Article 12 *SCM Agreement* are fully applicable to sunset reviews. Accordingly, the same rules regarding the disclosure of evidence that applies to investigations would also apply to sunset reviews.

#### **Question 56**

5.561 The response of the US to this question points to no statutory provision and discusses only two general regulatory provisions dealing with “segments” of a proceeding. From the conduct of the US ITC in similar sunset review proceedings, it is clear that US law does not prohibit automatic inclusion of key documents, even confidential documents, from the original investigation in the record of these sunset reviews.

#### **Questions 57 & 58**

5.562 It must be noted that the US’ statement that there is no obligation under the *SCM Agreement* to quantify an amount of subsidization in the context of a sunset review is erroneous. This statement

is also belied by the DOC's own policy bulletin, which makes it clear that "the purpose of the net countervailable subsidy in the context of sunset reviews is to provide the Commission with a rate which represents the countervailable rate that is likely to prevail if the order is revoked or the suspended investigation is terminated." DOC Sunset Policy Bulletin at para. III B3 (Exhibit EC -15). It is contradictory for the US to put so much importance on the rates from the original investigation and claim that they are the best evidence of the conduct of foreign producers and governments but then staunchly refuse to place DOC's own calculation memoranda on the record, showing how these rates were calculated. DOC's refusal to place the calculation memoranda on the record of this case was found to be unlawful by the US Court of International Trade. AG der Dillinger Hüttenwerke v. United States, Slip Op. 02-25 at 16-18 (Exhibit EC-24). It must be remembered that, under the US legal system, this decision has the force and effect of law and must be followed by the DOC. The decision is presumed correct unless later overturned by a court of competent jurisdiction.

### **Question 59**

5.563 As previously explained by the EC, the parties to the corrosion-resistant sunset review were the legal successors to the parties in the original investigation (EC Comments to US responses after the first meeting with the Panel, at para. 45). Accordingly, there can be no dispute but that the parties to the review were authorized to request placement of the calculation memoranda from the original investigation on the record of the review. Indeed, during the sunset review, DOC never questioned the parties' authority to make their request concerning the memoranda.

### **Question 60**

5.564 The problem faced by the German Producers was not that DOC did not make the record of the sunset review available to the parties prior to the preliminary determination. The German Producers timely submitted substantial evidence showing that subsidization was not likely to continue or recur if the countervailing duty order were revoked. The German Producers also timely submitted evidence rebutting all of the claims made by the US producers.

5.565 The problem was that the preliminary determination was the first time that the DOC made any statements concerning the adequacy of this evidence. Thus, despite the fact that the German Producers submitted evidence to rebut the claims of the US producers on every point, DOC claimed that it required even more evidence to confirm the German Producers' arguments. DOC, however, then proceeded to reject all additional evidence from the German Producers or even consult its own calculation memoranda from the original investigation, claiming that such information was untimely. DOC made this claim despite the fact that it had accepted additional information from other parties. The US Court of International Trade strongly rebuked DOC for this conduct, stating that "Commerce cannot act irrationally and arbitrarily." (Dillinger v. United States, at 41).

### **Question 61**

5.566 Throughout this proceeding, the US has continually changed its rationale for refusing to make the calculation memoranda from the original investigation part of the record of the sunset review. In the final results of the sunset review, DOC stated simply that the request to make the calculation memoranda part of the record was untimely. At the beginning of this proceeding, the US stated that it was prohibited from granting the request because it could not disclose confidential information. Now the US claims that it is not a question of disclosing confidential information but one of "moving" confidential information from one segment of the proceeding to another segment without the party's consent. As stated above in the comments to question 59, the US completely ignores the fact that the parties to the sunset review were the legal successors to the parties in the original investigation. In their 1 October 1999 substantive response, the German Producers carefully explained that Thyssen Krupp Stahl AG was the legal successor to Hoesch and Thyssen and that Salzgitter AG was the legal

successor to Preussag. (German Producers Substantive Response at 5 (1999), submitted as Exhibit EC-23). Thus, there could have been no confusion over the authority of the German Producers to request that the calculation memoranda be placed on the record of the sunset review.

5.567 The EC is not suggesting any “cavalier” treatment of business proprietary information as claimed by the US. The EC is merely arguing that confidential information from the original investigation that is necessary to the determination in the sunset review should have been made part of the confidential record in the sunset review. This is precisely what is done by the US ITC in its sunset review and therefore is clearly not inconsistent with US law. This procedure would also be fully consistent with Article 12.4 SCM Agreement.

R. COMMENTS OF THE UNITED STATES ON THE RESPONSES OF THE EUROPEAN COMMUNITIES TO QUESTIONS FROM THE PANEL FOLLOWING THE SECOND MEETING OF THE PANEL

5.568 The United States does not intend to comment on every response by the European Communities (“EC”) to the Panel’s second set of questions, particularly where the issues raised have been addressed in prior written submissions of the United States. Instead, the United States will comment briefly on those specific responses where additional points or emphasis is warranted.

5.569 At the outset, however, the United States notes the faulty assumption underlying many of the EC’s arguments. In its answers, the EC discusses the SCM Agreement as if the text issued from a body of drafters that shared a common vision. In fact, the text was drafted by countries that did not agree on a lot of things. It is a *negotiated* text. As such, it simply reflects those areas where countries did manage to agree on something. For example, the negotiators agreed on a 1 per cent *de minimis* standard for investigations, but the negotiating history reveals no agreement on the theory underlying this negotiated rule.<sup>176</sup>

5.570 As the United States previously has demonstrated, if one applies customary rules of treaty interpretation, the issues in this case are fairly straightforward. In response, the EC has proposed an approach to treaty interpretation – what it alleges is “a more classic way of drafting and interpreting treaties”<sup>177</sup> – that is contradicted by numerous Appellate Body reports. The EC’s approach in fact simply attempts to impute into the SCM Agreement words and obligations that are not there.

5.571 Turning now to the EC’s answers to specific questions, with respect to Question 41, the EC’s answer reflects a reliance on assumptions that: (1) the purpose of a sunset review is the same as that of an initial investigation; and (2) every provision of the SCM Agreement automatically should be considered applicable to every other provision. As the United States previously has demonstrated, these assumptions simply are incorrect.<sup>178</sup>

5.572 Furthermore, the EC’s approach ignores the fact that where the drafters wished to have obligations set forth in one provision apply in another context, they did so expressly. *Article 21 itself illustrates this point.* Paragraph 4 of Article 21 makes the provisions of Article 12 applicable to Article 21.3 reviews. If, as the EC argues, the drafters intended that the provisions of other articles

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<sup>176</sup> See *Responses of the United States of America to the Questions from the Panel Following the Second Meeting* (“US Second Responses”), April 2, 2002, paras. 12-13.

<sup>177</sup> *Replies of the European Communities to the second set of written questions from the Panel at the Second Substantive Meeting with the Parties* (“EC Replies”), 2 April 2002, page 2.

<sup>178</sup> With respect to the purpose of a sunset review, see *US First Submission*, paras. 79-81; *US Second Responses*, para. 2; and *Answers of the United States of America to Question from the European Communities*, February 21, 2002, para. 6. With respect to the EC’s approach to treaty interpretation, see *Answers of the United States of America to Questions from the Panel*, February 21, 2002, paras. 19-21; and *Comments of the United States of America on the EC’s Answers to Questions from the Panel*, February 28, 2002, paras. 2-4 and 10-11.

apply to Article 21, why did they bother with the first sentence of Article 21.4? Under the EC approach, the first sentence becomes superfluous, an outcome which violates the principle of effectiveness of treaty interpretation.<sup>179</sup>

5.573 With respect to Question 42, the EC's assertion that it has made a "claim" with respect to an alleged shifting of the burden of proof under the US system is incorrect. In its panel request (which established the terms of reference in this proceeding), the EC's "claim" was that, under Article 21.3, the United States cannot automatically self-initiate a sunset review.<sup>180</sup> In making this claim, the EC panel request included only an *argument* that automatic initiation somehow shifted the burden of proof. Accordingly, the Panel should treat the EC's discussion of burden of proof as an *argument*, not as a separate and independent *claim*.

5.574 Moreover, as a substantive matter, the EC is wrong when it asserts that the United States imposes a burden of proof on foreign exporters and governments to demonstrate no likelihood of continued or recurring subsidization and injury.<sup>181</sup> As a matter of US administrative law, there is no burden of proof – in the sense of the ultimate burden of persuasion – imposed on either foreign exporters/governments or the US industry. Instead, the burden is on Commerce to make a determination that can withstand review by a domestic court.

5.575 With respect to the EC's answer to Question 44, the EC omits any explanation – let alone a demonstration – as to how its invocation of negotiating history is justified under the customary rules of treaty interpretation reflected in Article 32 of the *Vienna Convention*.<sup>182</sup> Nevertheless, as the United States has demonstrated, the only thing the negotiating history demonstrates is that there was *no* consensus or single reason why the drafters established a *de minimis* standard.<sup>183</sup> More importantly, however, an analysis of the text and context of Article 21.3 and the object and purpose of the SCM Agreement leads to the conclusion that the Article 11.9 *de minimis* standard does not apply to reviews under Article 21, including sunset reviews under Article 21.3.

5.576 With respect to the EC's answer to Question 49, by using the terms "presumption" and "all the more so", the EC seems to suggest that a sunset review is some sort of exceptional procedure that warrants a stricter interpretation of Article 21.3, as opposed to Article 21.2. Articles 21.2 and 21.3, however, are specific implementations of the general rule, found in Article 21.1, that a countervailing duty order shall remain in force only as long as and to the extent necessary to counteract subsidization that is causing injury. Nothing in the general rule found in Article 21.1 suggests any presumption concerning how long countervailing duties may continue to be necessary. Article 21.3 simply defines the point in time (*i.e.*, after five years) at which the authorities must do one of two things: automatically terminate the countervailing duty or take stock of the situation by conducting a review to determine whether continuation or recurrence of subsidization and injury is likely. If so, the duty may be maintained; if not, the duty must be terminated. As the Appellate Body has stated, "describing [or] characterizing a treaty provision as an 'exception' does not by itself justify a 'stricter'

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<sup>179</sup> See, e.g., *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body adopted 20 May 1996, page 23 ("[I]nterpretation must give meaning and effect to all the terms of a treaty.").

<sup>180</sup> WT/DS213/3 (10 August 2001).

<sup>181</sup> *EC Replies*, page 3.

<sup>182</sup> As discussed in the *US Second Responses*, para. 8, Article 32 permits recourse to supplementary means of interpretation 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. See also *US Second Responses*, paras. 9-10.

<sup>183</sup> *US Second Responses*, paras. 12-13.

or ‘narrower’ interpretation of that provision than would be warranted by . . . applying the normal rules of treaty interpretation.”<sup>184</sup>

5.577 In its answers to Questions 50-54, the EC asserts new claims that were not included in its panel request. Because these claims were not included in the Panel’s terms of reference, the Panel should dismiss them.

5.578 With respect to Question 50, the EC’s asserts that it has made a “claim” that there can never be “injurious subsidization” as a result of a subsidy rate below 1 per cent. This is incorrect. There is no mention of “injury” or “injurious subsidization” in the EC’s panel request. Rather, the EC’s claim in its panel request was that the Article 11.9 *de minimis* standard for investigations applies also in sunset reviews. Thus, the EC’s 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 EC’s claim.

5.579 Furthermore, as the United States has demonstrated in prior submissions, nothing in the text of Article 11.9 or 21.3 requires the application of the Article 11.9 one per cent *de minimis* standard in Article 21.3 sunset reviews, or any other type of review. Finally, the provision of a *de minimis* standard in Article 11.9 is not reflective of the EC’s theory that subsidization below one per cent is non-injurious. Rather, the *de minimis* standard for investigations under Article 11 is a creature of negotiation.<sup>185</sup>

5.580 With respect to Question 51, the EC now asserts that it has made a “claim” that US law as such violates the SCM Agreement in respect of the obligation to “determine” the likelihood of continuation or recurrence of subsidization. The EC now argues that US law is equivalent to a “web of provisions (basic law, regulations and guidelines)” which allegedly violate the obligations of the SCM Agreement.

5.581 It is impossible to read the EC’s panel request as articulating this type of claim. In its panel request, the EC essentially challenged three things: (1) the US system of automatic self-initiated sunset reviews, as such; (2) the US failure to apply a 1 per cent *de minimis* standard in sunset reviews, as such; and (3) Commerce’s application of the principles described in (1) and (2) in the sunset review on corrosion-resistant steel from Germany. The EC’s new claims concerning the definition of “determine” and the issue of “injurious subsidization” are simply not within the terms of reference of this dispute.

5.582 With respect to Question 52, the EC now alleges that by not making certain documents part of the record of the sunset review, Commerce violated various provisions of Article 12 of the SCM Agreement. However, Article 12 is nowhere mentioned in the EC’s panel request, nor does the panel request refer to the alleged inadequacy of the record of Commerce’s sunset review. Thus, once again, the EC appears to be advancing claims that are not within the Panel’s terms of reference. Accordingly, the Panel should dismiss these new and improper claims.

5.583 In any event, the EC’s statement that the USITC is “subject to the same procedures regarding the treatment of business proprietary information as the US DOC” is patently false. Commerce and the USITC each have practices and regulations which govern the collection, protection, and use of business proprietary information. There are significant differences between Commerce and USITC practices and regulations. One of those differences is that the USITC automatically makes certain

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<sup>184</sup> *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body adopted 13 February 1998, para. 104.

<sup>185</sup> *US Second Responses*, paras. 12-13.

parts of the record of the original investigation part of the record of the sunset review;<sup>186</sup> Commerce, by regulation, can not and does not automatically do the same. The EC is well aware of the fact that Commerce and the USITC have distinct roles in the United States' conduct of sunset reviews and that the two agencies have distinct sets of practices and regulations on this issue in particular.

5.584 In its response to Question 53, the EC appears to advance a new claim that US law violates the SCM Agreement because it provides too much discretion to Commerce in making a sunset determination, thereby allegedly eliminating "legal security and predictability" in the review "to the detriment of foreign exporters and international trade." It is not entirely clear from the EC answer which provisions of the SCM Agreement allegedly have been violated by the existence of "too much discretion", but the Panel need not concern itself with the lack of precision in the EC's answer. Here, too, the Panel should dismiss the EC's claim, because the claim was not included in the EC's panel request.

5.585 Nevertheless, the United States notes that it has statutory provisions (sections 751(c) and 752 of the Tariff Act) governing sunset reviews which provide the basic legal and procedural requirements for the conduct of a sunset review. In addition, Commerce has promulgated regulatory provisions (e.g., portions of sections 351.102, 351.104, 351.218, 351.221-222, 351.308-310), primarily procedural in nature, to formalize the sunset review process and provide guidance for effective participation in sunset reviews. Commerce also has issued its *Sunset Policy Bulletin* which outlines the methodology Commerce will employ in making its sunset determination. These provisions provide parties with all the information on the procedural and substantive requirements necessary to participate meaningfully in a sunset review.

5.586 By contrast, the EC provides extremely limited guidance under its own system with respect to the conduct of sunset reviews. As explained in its answer to Panel Question 48, the EC has promulgated a Council Regulation which governs sunset reviews (Exhibit EC-26). This regulation does little more than mirror Article 21. The EC then admits that it has "no other regulatory or administrative texts or guidelines concerning the conduct of countervailing duty expiry reviews" and cites a single sunset review to illustrate the EC's "practice" in sunset reviews. Thus, while the United States provides expansive guidance on its conduct of sunset reviews, through statutory, regulatory and policy provisions, the EC provides no guidance beyond the limited language of the Council Regulation and the single instance where the EC has made a final countervailing duty sunset determination. Therefore, it would seem that if, *arguendo*, the EC's assertions regarding the US system were correct (and within the Panel's terms of reference), it must follow automatically that the EC system also violates the SCM Agreement. Also in violation would be those Members who have chosen to implement their obligations by simply incorporating the SCM Agreement into their domestic law.

5.587 In its response to Question 53, the EC also asserts that the "flexibility and plasticity" of US law eliminates security and predictability in the interpretation and application of that law, and thereby violates the SCM Agreement. Again, however, the EC is reading words into the text of the SCM Agreement that are not there. The EC apparently is confusing the language in Article 3.2 of the DSU, which is a narrative statement that the WTO *dispute settlement system* is a central element in providing security and predictability to the multilateral trading system, with some obligation on *Members* to provide security and predictability in international trade through their measures. Of course, there is no such vague obligation in the WTO.

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<sup>186</sup> See USITC's *Notice of Proposed Amendments to Rules of Practice and Procedure*, 62 FR 55185, 55190 (October 23, 1997); and USITC's *Rules of Practice and Procedure*, 63 FR 30599, 30606 (June 5, 1998) (final rulemaking) ("[T]he material from the record of the original investigation that the Commission will release to the parties will include the Commission opinion(s) in the original investigation and staff reports and non-privileged memoranda, where available.").

5.588 Finally, with respect to Question 54, the EC states that it is alleging violations of various provisions of Article 12 of the SCM Agreement relating to what it describes as “due process and rights of defense requirements”. Of course, in its panel request, the EC does not reference Article 12 at all (let alone any particular paragraph of Article 12) or the fact pattern which the EC believes gives rise to a violation of Article 12 (allegedly short deadlines for submissions). While the EC’s panel request does mention Article 21, the only reference to particular paragraphs of Article 21 are to paragraphs 1 and 3.

5.589 This new claim comes nowhere close to satisfying the standards of Article 6.2 of the DSU, which requires that panel requests “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.” No objective person could read the EC’s panel request and discern that the EC had a problem concerning the deadline for submissions in Commerce sunset reviews. Accordingly, the Panel should dismiss this new EC claim.

## **VI. ARGUMENTS OF THE THIRD PARTIES**

6.1 The arguments presented by the third parties – Japan and Norway – in their written submissions and oral statements are reflected below.

### **A. THIRD-PARTY SUBMISSION OF JAPAN**

#### **1. Introduction**

6.2 The WTO Agreement, in particular the Agreement on Subsidies and Countervailing Measures (hereinafter referred to as “the SCM Agreement”), permits the use of countervailing duty measures, to offset prohibited subsidies only under strict conditions. A Member must adhere strictly to the rules of the SCM Agreement when initiating a countervailing duty investigation or a sunset review of a previous investigation. The Government of Japan (hereinafter “Japan”) has increasingly become concerned with how the United States (hereinafter “US”), and particularly the US Department of Commerce (hereinafter “DOC”), has conducted sunset reviews pursuant to its interpretation and application of the SCM Agreement.

6.3 The Government of Japan supports the European Communities’ (hereinafter “EC”) position in this case. Japan believes the proper interpretation of the SCM Agreement has broader implications for the WTO Agreements as a whole. The facts of this case illustrate the extent to which the DOC will go to maintain import restrictions under Title VII of the Tariff Act of 1930 (hereinafter “Title VII”) that are directly contrary to US obligations under the SCM Agreement.

6.4 We believe the EC submission appropriately summarizes the key facts of this case. Before turning to our analysis of the legal issues in this case, we simply wish to note the rather extreme facts in this case. Continuing a CVD order at the level of 0.54 per cent -- an order that never would have been imposed under the standards of the SCM Agreement - shows just how extreme the US has been in continuing orders regardless of the circumstances.

#### **2. Article 21.3 of the SCM Agreement**

(a) The Proper Scope of Article 21 of the SCM Agreement

(i) *The provisions of Article 21 of the SCM Agreement must be read as an integrated part of the entire SCM Agreement*

6.5 Article 31 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*") provides that the words of a treaty must form the starting point for the process of interpretation. In this regard, words must be interpreted according to their "ordinary meaning" taking into account their "context" (*i.e.*, other provisions of the treaty) and the "object and purpose" of the agreement<sup>187</sup>. Although recourse to a treaty's object and purpose is permissible, it may not override the clear meaning of the text. As the Appellate Body in the *Japan Taxes* case recognized, a "treaty's 'object and purpose' is to be referred to in determining the meaning of the 'terms of the treaty' and not as an independent basis for interpretation".<sup>188</sup> All the provisions of the SCM Agreement must be given their ordinary meaning taking into account the context and purpose of the provision.

(ii) *Article 21.3 of the SCM Agreement expressly requires the termination of the CVD duty after five years*

6.6 The provisions of Article 21.3 of the SCM Agreement create a specific obligations that a countervailing duty ("CVD") order must be terminated five years after the date of its imposition. The Article states:

Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty **shall** be terminated on a date not later than five years from its imposition . . . , **unless** the authorities **determine**, in a review . . . that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization.<sup>189</sup>

6.7 This language stands for the proposition that termination of countervailing duties after five years is the rule, not the exception. First, the verb "shall" signals that termination is an obligation. Second, the term "[n]otwithstanding the provisions of paragraphs 1 and 2" sets forth that a CVD order shall be terminated even though continuation of the order would be justified under Articles 21.1 or 21.2. Finally, the ordinary meaning of the term "unless" means that the continuation of an CVD order is an exception of the general rule that a definitive countervailing duty must be terminated.

(iii) *Article 21.3 requires that the administering authority must have sufficient evidence to initiate a sunset review before determining whether to continue the order*

6.8 The language in Article 21.3 sets forth evidentiary standards that the administering authority must follow to initiate a sunset review. Article 21.3 also obliges the administering authority to establish with positive evidence that subsidization will continue or recur in the absence of the order. The mere possibility of continuation or recurrence of subsidization is not enough.

6.9 The EC correctly states that the self-initiation of sunset reviews requires sufficient evidence of the continuation or recurrence of subsidization.<sup>190</sup>

6.10 In addition to arguments made by the EC, Articles 22.1, 22.7, and 11.6 further clarify the point that Article 21 requires the authorities to satisfy themselves that sufficient evidence exists to self-initiate an investigation. Article 22.1 provides that, "[w]hen the authorities are satisfied that there is *sufficient evidence* to justify the initiation of an investigation pursuant to *Article 11*, the . . . interested parties . . . shall be notified and a public notice shall be given." (emphasis added)

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<sup>187</sup> See, e.g., *Competence of the General Assembly for the Admission of a State to the United Nations (Second Admissions Case)*, [1950], ICJ Rep., at 8 ("The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they are occur.")

<sup>188</sup> *Appellate Body Report, Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 10 (1 November 1996).

<sup>189</sup> Agreement on Subsidies and Countervailing Measures, Art. 21.3 (emphasis added).

<sup>190</sup> See EC Submission, at para 65.

Article 22.7 provides that Article 22.1 “apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 21”. Thus, Article 22.1 obliges the authorities to give notice when initiating a sunset review. The Article further obliges the authorities to have sufficient evidence to justify the initiation of the sunset review pursuant to Article 11.

6.11 Paragraph 6 of Article 11 provides that the authorities “shall proceed only if they have sufficient evidence of the existence of a subsidy, injury and causal link . . . to justify the initiation of an investigation”. By operation of Article 22.1 and 22.7, therefore, the authorities are required to have sufficient evidence to self-initiate a sunset review under Article 21.3.

6.12 In addition to the “sufficient evidence” requirement to initiate sunset reviews, Article 21.3 further requires the authorities to have “positive evidence” on a prospective basis to warrant continuing a CVD order.

6.13 Article 21.3 requires the authorities to “determine” that the expiry of a CVD order would be likely to lead to continuation or recurrence of subsidization in the absence of the order. The plain and ordinary meaning of “determine” is to establish, or ascertain definitely.<sup>191</sup> The plain meaning of “determine” thus requires the authorities to make a new analysis, not simply repeat stale conclusions.

6.14 Previous Appellate Body and Panel decisions instruct that a determination of continued or recurrent subsidization must be based on positive evidence. In the context of Article 11.2 of the Anti-Dumping Agreement, the Panel in *United States - DRAMS*,<sup>192</sup> determined that “the continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of positive evidence”.<sup>193</sup> Since both Article 11.2 and 11.3 of AD Agreement require the determination of necessity to continue an anti-dumping duty, the rationale in *DRAMS* also applies to Article 11.3 of AD Agreement. The rationale in *DRAMS* applies with equal force to the SCM Agreement because the language in Article 11 of the AD Agreement is nearly identical to the language in Article 21 in the SCM Agreement. Further, Vienna Convention Article 31 requires that these Articles must be given the same meaning because the object and purpose of both articles is the same.<sup>194</sup>

6.15 The Appellate Body in *United States -- Leaded Bars* confirmed this textual interpretation where it found 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”.<sup>195</sup> The Appellate Body’s finding therefore, lends further support to the interpretation in the *DRAM* panel.

6.16 Article 21.3 requires that the positive evidence of subsidization must be prospective, while current subsidization may be relevant. The panel in *DRAMS* found that the authorities need to

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<sup>191</sup> See *American Heritage Dictionary*, at 235 (3<sup>rd</sup> ed. 1994).

<sup>192</sup> See *Panel Report, United States - Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of one Megabit or Above from Korea*, (“United States -- DRAMS”), WT/DS99/R, at para. 6.40 (29 Jan. 1999) (finding that Article 11.1 of the AD Agreement contains a general rule that anti-dumping duties shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury; this the general rule is implemented through Article 11.2 (and Article 11.3)).

<sup>193</sup> See *id.* at para. 6.42 (“In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.”).

<sup>194</sup> This fundamental principle was recognized by the Dispute Settlement Panel in *United States - DRAMS*. See *United States - DRAMS*, WT/DS99/R, at para. 4.65 -- 4.67 (29 Jan. 1999) (citing the Vienna Convention on the Law of Treaties, art. 31.2 (23 May 1969)).

<sup>195</sup> *Appellate Body Report, United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, (“United States -- Leaded Bars”) WT/DS138/AB/R, at para. 54 (7 June 2000) (finding that the US, in an administrative review regarding a non-recurring subsidy allocated over time, should have made a finding on subsidization).

establish “a status regarding the prospects of dumping”<sup>196</sup> in determining likely to continue or recur.<sup>197</sup> The Panel in *DRAMs* also noted that “there is nothing in the text of Article 11.2 of the AD Agreement that explicitly limits a Member to a ‘present’ analysis, and forecloses a prospective analysis”.<sup>198</sup> Thus, the potential subsidization and the current CVD order are relevant to the determination in the sunset review.

6.17 In sum, Article 21.3 obliges the authorities to have sufficient evidence to initiate a sunset review. It also obliges the authorities to base their determination on positive evidence illustrating the likelihood of future subsidization. Indeed, the very purpose of a sunset review is to examine whether an injurious subsidy will continue for the next five years. The only proper way for the administering authority to determine whether or not subsidization will continue is to undertake a prospective analysis.

(b) Automatic Initiation by DOC of a Sunset Review Violates Article 21.3 of the SCM Agreement

6.18 The US statute and DOC practice of automatic initiation of sunset reviews is contrary to US obligations under the SCM Agreement.

6.19 Both the US. statute and DOC’s practices mandate automatic initiation of a sunset review five years after imposition of the original order. Section 751(c)(2) of the Tariff Act of 1930 (hereinafter “the Act”) mandates that DOC publish a “notice of initiation” in the Federal Register no later than 30 days before the fifth anniversary of the CVD order’s publication.<sup>199</sup> DOC’s regulations contain the identical obligation.<sup>200</sup> Section 351.218(c)(1) of DOC’s regulations provides that, “no later than 30 days before the fifth anniversary date of an order ... the Secretary will publish a notice of initiation of a sunset review (see section 751(c)(2).” Finally, DOC published the initiation schedule of upcoming sunset reviews based solely on the date of the original order.<sup>201</sup> DOC in fact initiated this case five years from the date of the imposition of the original order.<sup>202</sup> DOC has never showed sufficient evidence to initiate a sunset review. In fact, DOC initiates all sunset reviews without any evidence to justify initiation. The United States admitted as much in their 15 January submission.<sup>203</sup>

6.20 As we discuss above, however, the authorities must have sufficient evidence to justify the initiation of sunset reviews. The automatic initiation by the United States of sunset reviews thus does not satisfy the sufficient evidence requirement under Article 21.3.

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<sup>196</sup> *Id.* at para 6.28

<sup>197</sup> As discussed above, the decision regarding ADA Article 11.2 is applicable to Article 11.3 of AD Agreement, and Article 21.3 of SCM Agreement.

<sup>198</sup> *Id.* at para. 6.29.

<sup>199</sup> 19 U.S.C. § 1675(c)(1).

<sup>200</sup> 19 C.F.R. § 351.218(c)(1).

<sup>201</sup> See 19 C.F.R. §351, Annex VIII-A-B-C; see also *Transition Orders; Final Schedule and Grouping of Five-Year Reviews*, 63 *Fed. Reg.* 29372, 29380 (29 May 1998) (“*Sunset Initiation Schedule*”); *Sunset Reviews - Upcoming Deadlines by Initiation Month*, available at [www.ita.doc.gov/ia/suncase.nsf/aeab85e5a579ee7a852568950050843d!OpenView](http://www.ita.doc.gov/ia/suncase.nsf/aeab85e5a579ee7a852568950050843d!OpenView) (visited 17 January 2002).

<sup>202</sup> Compare *Countervailing Duty Order and Amendment to Final Determination of Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, 58 *Fed. Reg.* 43756 (17 Aug. 1993), with *Notice of Initiation of Five-Year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders or Investigations of Carbon Steel Plates and Flat Products*, 64 *Fed. Reg.* 47767 (1 Sep. 1999).

<sup>203</sup> United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany, First Written Submission of the United States of America, WTDS213, at para. 7 (15 January 2002).

6.21 Japan believes that the Panel should find the US statute, regulations, and practices to be inconsistent with the SCM Agreement.

(c) Failure to “Determine” the Likelihood of Continued Subsidization Based on Positive Evidence of Current and Prospective Subsidization Violates Article 21.3 of the SCM Agreement

6.22 The US determination of likelihood of continuation or recurrence of dumping is inconsistent with Article 21.3.

6.23 As discussed above, Article 21.3 requires the determination be based on a prospective analysis, with the presumption being termination of the duty. Also as discussed above, the obligations of Article 21.3 requires positive evidence to make the determination to continue CVD orders.

6.24 The US rules and practices do not satisfy these requirements. The SAA specifically states that:

Commerce normally will select ... net countervailable subsidies determined in the original investigation or in a prior review .... Commerce normally will select the rate from the investigation, because that is the only calculated rate that reflects the behaviour or the exporters and foreign governments without the discipline of an order or suspension agreement in place.<sup>204</sup>

6.25 The United States admits, in its 15 January submission, that it based the sunset review determination in question on the CVD finding in the original investigation.

6.26 The SAA language and the United States’ admission of its own practice are not based on positive evidence of continued or future subsidization as required by Article 21.3, as discussed above. Japan thus submits that the use of the out-dated information, instead of current or prospective CVD rates, is inconsistent with Article 21.3.

(d) The US *de minimis* standard applied in Sunset Review is inconsistent with the SCM Agreement

6.27 Contrary to the US argument, the proper *de minimis* standard for the sunset review is 1 per cent *ad valorem* as provided in Article 11.9. The United States’ application of the 0.5 per cent *de minimis* standard to the sunset review is inconsistent with the SCM Agreement.

(i) *The US statute provides for two different de minimis standards: 1 per cent in an original investigation and 0.5 per cent in a sunset review*

6.28 Section 703(b)(4)(a) of the Trade Act of 1930 states that in the original investigation US authorities shall regard a CVD rate of less than 1 per cent as *de minimis*.<sup>205</sup> The statute is silent, however, on the *de minimis* standard applicable to sunset reviews. The DOC regulations provide that a *de minimis* rate of less than 0.5 per cent *ad valorem* shall apply to sunset reviews.<sup>206</sup> The

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<sup>204</sup> Statement of Administrative Action, at 890.

<sup>205</sup> See 19 U.S.C. § 1671b(b)(4)(A) “In making a determination under this subsection, the administering authority shall disregard any *de minimis* countervailable subsidy. [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.” *Id.*

<sup>206</sup> 19 C.F.R. § 351.106(c)(1) (“In making any determination other than a preliminary or final antidumping or countervailing duty determination in an investigation ..., the Secretary will treat as *de minimis*

United States confirmed in its submission that it applied a 0.5 per cent *de minimis* standard to the sunset review in question.

(ii) The One Per cent *De Minimis* Standard Must Apply to Sunset Reviews

6.29 The 1 per cent *de minimis* standard under Article 11.9 applies to both the original investigations and sunset reviews. The arguments of the United States on this issue should be rejected.

6.30 Evidentiary standards of the sunset review require that the 1 per cent *de minimis* standard of Article 11.9 apply to the sunset review. As discussed above, Article 21.3 requires the authorities to have sufficient evidence to initiate sunset reviews. Also as discussed above, Articles 22.1 and 22.7 set forth that the sufficient evidence rule under Article 11 applies to the initiation of sunset reviews. The sufficient evidence rule under Article 11 includes Article 11.9, which states that the subsidy of less than 1 per cent *ad valorem* does not constitute sufficient evidence of subsidization. The authorities, therefore, may not initiate a sunset review if the evidence demonstrates that the subsidy is less than 1 per cent *ad valorem*.

6.31 In the same token, the positive evidence rule under Article 21.3, as discussed above, also prohibits the authorities from finding a likelihood of continuation or recurrence of subsidization when they have already found the subsidy to be less than the 1 per cent. These reasons are supported by Article 22.5, which requires the authorities to publish their “reasons for acceptance or rejection of relevant arguments” in the final determination. Article 22.7 states that these notice requirements *mutatis mutandis* apply to Article 21 reviews. The provisions of Article 11, referenced in Article 22.1, therefore fully apply to reviews under Article 21. Thus, the *de minimis* standard in Article 11.9 should apply to the sunset review under Article 21.3 .

6.32 Moreover, the purposes of the sunset review and the original investigation are essentially identical. The purpose of a sunset review under Article 21.3 is to determine whether CVD orders should be imposed for the next five years or should be terminated. The original investigation is also to determine whether or not a CVD order should be imposed for the next five year period.

6.33 Vienna Convention Article 31 requires that “a treaty shall be interpreted . . . in light of its object and purpose”.<sup>207</sup> The sunset review and the original investigation share the same object and purpose. Determinations in these two proceedings thus must apply the same standard.

6.34 Indeed, the underlying purpose provides no justification for a stricter standard for sunset reviews. The sunset review is not to determine a precise level of subsidization, as the United States does in annual reviews of countervailing duty orders called “administrative reviews”. Rather, the sunset review addresses the continued existence of the order itself - precisely the same function served by the original investigation.

6.35 As such, the authorities are obliged not to initiate the sunset review, and not to determine continuation of the CVD order for the next five year in the sunset review, if the subsidy is less than the 1 per cent.

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any weighted-average dumping margin or countervailable subsidy rate that is less than 0.5 per cent *ad valorem*”).

<sup>207</sup> Vienna Convention on the Law of Treaties (“Vienna Convention”), Articles 31 and 32, U.N. Doc. A/CONF.39/27\* (23 May 1969).

(iii) *The Panel finding in United States - DRAMs, that different de minimis standards in Articles 5.8 and 9.3 of the AD Agreement do not violate the Agreement, is distinguishable*

6.36 Contrary to the US argument, the Panel's finding in *United States - DRAMs*<sup>208</sup>, regarding the applicability of Article 5.8 of the AD Agreement in fact supports our view that the *de minimis* standard for the original investigation also apply to the sunset review under Article 21.3 of the SCM Agreement.

6.37 The scope of the Panel's consideration of the non-applicability of Article 5.8 in DRAMs was limited to the retroactive duty assessment procedures under Article 9.3 of the AD Agreement. The Panel analyzed the term "case" in Article 5.8, and concluded that the *de minimis* standard in Article 5.8 of the AD Agreement did not apply to the duty assessment procedures.<sup>209</sup>

6.38 A sunset review is clearly distinguishable from the duty assessment procedures. The duty assessment procedures determines the exact amount of antidumping (or countervailing) duty to be collected from importers for their past imports of subject merchandise. The US calls these procedures "administrative reviews". A sunset review, on the other hand, considers the prospect of future dumping or subsidization, not the past history thereof.

6.39 The Panel's construction of applicability of Article 5.8 to the duty assessment procedures thus does not apply to the sunset review.

6.40 To the contrary, the Panel in *DRAMs* in fact supports the point that Article 5.8 may apply to a sunset review. The Panel stated that:

in the context of Article 5.8, the function of the *de minimis* test is to determine whether or not an exporter is subject to an anti-dumping order. In the context of Article 9.3 duty assessment procedures, however, the function of any *de minimis* test applied by Members is to determine whether or not an exporter should pay a duty.<sup>210</sup>

6.41 As discussed above, the function of the sunset review is, to determine whether or not an exporter should be subject to anti-dumping or countervailing duties for the next five years. The sunset review is thus analogous to the original investigation. The *DRAMs* Panel's logic thus supports our argument that Article 5.8 of the AD Agreement and its complementary Article 11.9 in the SCM Agreement apply to the sunset review.

6.42 In sum, the *de minimis* standard under Article 11.9 of SCM Agreement applies to the sunset review. Japan believes the Panel should find that the US practice of applying 0.5 per cent to sunset review proceedings is inconsistent with the SCM Agreement.

### 3. Conclusion

6.43 For the reasons stated above, Japan requests the Panel find that the US countervailing duty law (Section 751(c), as complemented by Section 752, of the Act), its accompanying regulations and policy practices (*Sunset Policy Bulletin*), and their concrete application to imports of certain corrosion-resistant steel products from Germany in the present case are inconsistent with Article 21 paragraphs 3, 1, and 4, Article 10, and Article 11.9 of the SCM Agreement.

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<sup>208</sup> *United States -- DRAMs*, WT/DS99/R, at para. 6.87 (29 Jan. 1999).

<sup>209</sup> *Id.* at para. 6.87.

<sup>210</sup> *Id.* at para. 6.90.

## B. THIRD-PARTY SUBMISSION OF NORWAY

### 1. Introduction

6.44 The present case concerns whether the US basic countervailing duty law (Tariff Act of 1930, Sunset regulations) and policy practices (Sunset Policy Bulletin) and their concrete application to imports of certain corrosion-resistant steel products from Germany are inconsistent with the obligations of the United States under the WTO Agreement and annexed agreements.

6.45 Norway has systemic interests in the interpretation and application of the “sunset provisions” of the Agreement on subsidies and countervailing measures (SCM), and thus reserved its third party rights in the case during the Dispute Settlement Body meeting on 10 September 2001 (WT/DS213/3).

6.46 In deciding the case, Norway submits that the Panel should base its arguments on the following:

### 2. **The United States Department of Commerce (DOC) initiation of the Sunset Review for countervailing duties on import of corrosion-resistant steel products from Germany has infringed Article 21 of the Agreement on Subsidies and Countervailing Measures (SCM) in a number of ways**

(a) Automatic reviews infringe Articles 21.1 and 21.3 of the SCM Agreement and Article 10 of the SCM Agreement in combination with Article VI of GATT 1994

6.47 Under Article 21.3 of the SCM Agreement, WTO Members are required to terminate countervailing measures on a date no later than five years from their imposition, unless it is determined in a review, that the expiry of the duties would be likely to lead to continuation or recurrence of subsidization and injury. This corresponds to the purpose of Article 21.1 of the SCM Agreement, which provides that a countervailing duty shall be maintained only as long as necessary and to the extent to counteract subsidization which is causing injury.

6.48 Article 10 of the SCM Agreement that refers to Article VI of GATT 1994 also sustains these provisions. Article VI paragraph 6 (a) of GATT 1994 provides that: No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of anti dumping or subsidization, 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.

6.49 It follows from Article 21.3 that as a main rule countervailing duties shall be terminated no later than five years from their imposition - the presumption being that subsidization is counteracted after such period. A review is meant only to take place on exceptional occasions when there is a clear assumption based on the situation existing at the time of review that the expiry of the duty would be likely to lead to continuation or recurrence of both subsidization and injury.

6.50 Under US law sunset reviews are automatically initiated by DOC on its own initiative five years after the publication of the countervailing duty order. Regardless of the situation existing at the time of initiation of review, or the complete lack of information supporting an assumption that continuation or recurrence of both subsidization and injury will occur, a review is initiated.

6.51 In this way the United States transforms an exception into a general rule, thus infringing Articles 21.1 and 21.3 of the SCM Agreement and Article 10 of the SCM Agreement in conjunction with Article VI of GATT 1994.

- (b) Expedited reviews are biased towards the continuation of countervailing duties and violate Article 21.3 of the SCM Agreement

6.52 The Norwegian Government is of the opinion that a sunset review has to be unbiased and independent of the original investigation. It follows from the letter of Article 21.3 of the SCM Agreement that if exception from the presumption of terminating countervailing duties after five years is to be made, the authorities have to determine in a review that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.

6.53 It's our assertion that the US procedures of expedited sunset reviews are biased towards the continuation of countervailing duties. If domestic interested parties file a "notice of intent to participate" in the sunset review, the foreign government or exporters counting at least 50 per cent of exports are required to file substantive responses to the notice of initiation within a 30 days deadline. If no responses are given by those instances within 30 days, DOC will shorten the timeframe for the review and base the review on the facts available. This normally leads to a presumption of continued subsidization and thus to continuation of the countervailing duty.

6.54 This is also the case if the foreign respondents do not account for 50 percent or more of total exports of the subject product to the US. DOC then normally will conduct an expedited review and, not later than 120 days after the date of publication in the Federal Register of the notice of initiation, issue without further investigation, final results of review based on the facts available.

6.55 Norway considers that this represents a violation of the duty to terminate the countervailing measures set forth in Article 21.3 of the SCM Agreement.

- (c) The self-initiation of sunset reviews by the domestic authorities does not correspond to the requirements set out in Article 21.3 as complemented by Article 11.1 and 11.6 of the SCM Agreement

6.56 Article 21.3 of the SCM Agreement states that a review can be initiated either on the initiative of the domestic authorities or upon a duly substantiated request made by or on behalf of the industry. Norway considers that Article 11 on the initiation and conduct of the original subsidy investigation also applies to sunset reviews as referred to in Article 21.3 of the SCM Agreement. In fact also the procedures and procedural guarantees of the other articles of Chapter V of the SCM Agreement are meant to apply, and not to be disregarded in a sunset review context. The reference made to Article 12 in Article 21 is but one particular example of this. The contrary solution would otherwise create a "free for all" for the duty-imposing Member, and leave the foreign exporters without proper legal guarantees.

6.57 Article 11.1 of the SCM Agreement provides that the initiation of an investigation to determine the existence of subsidization should normally be based on the existence of a substantiated request made by or on behalf of the domestic industry. Self-initiation by domestic authorities constitutes on the other hand an exceptional measure, which is only to be accepted if domestic authorities have sufficient evidence of the existence of a subsidy, injury and causal link as described in Article 11.6<sup>211</sup>.

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<sup>211</sup> Article 11.6 reads:

"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."

6.58 In the United States, sunset reviews are always self-initiated by the domestic authorities. According to Section 751-(c) (1) and (2) of the Tariff Act of 1930 and of Section 351.218 of the Sunset regulations, DOC does not even have to wait for a request by the domestic industry before initiating sunset reviews.

6.59 Thus the United States hereby makes a general rule out of a clear exception, disregarding the requirement that sufficient evidence of continuation or recurrence of subsidization be present. Norway claims that this represents a violation of Article 21.3 in conjunction with Article 11.1 and 11.6 of the SCM Agreement.

**3. The US standard of investigation for Sunset Reviews violates the requirements of the SCM Agreement in particular Article 21.3 because:**

(a) Not making a new investigation in sunset reviews represents an infringement to Article 21.3 and 21.1 and the purpose of Part V of the SCM Agreement

6.60 Article 21.3 of the SCM Agreement provides that:

“..Any definitive countervailing duty shall be terminated on a date not later than five years from its imposition...unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization”. (emphasis added)

6.61 This represents a positive obligation upon the domestic authorities to “determine” the likelihood of continuation or recurrence of subsidization. In the case United States-Leaded Bars the Appellate Body considered that (in the context of a review under Article 21.2)<sup>212</sup>:

”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”.

6.62 When such requirements are applied to a review under Article 21.2, which is not obligatory and takes place during the life time of the original countervailing duty, it should be clear that a positive finding on subsidization is necessary also in the context of an Article 21.3 investigation.

6.63 In an Article 21.3 investigation the basic obligation is the termination of the original duty, while the possibility of continuing a duty following a sunset review constitutes the exception. In the opinion of the Norwegian government the latter requires an unbiased review independent of the results of the original investigation to be undertaken in full conformity with all the procedural and substantive requirements for an initial determination of subsidy and injury set forth in Articles 10 *et sec*. There is no reason to understand the requirement of “determination” of subsidization and injury differently in Article 21.3 as compared to *inter alia* Articles 11 and 15. This is also sustained/supported by Article 21.1 and the purpose of Part V of the SCM Agreement.

6.64 According to the written submission of the European Communities, the factual situation of the present case seems to be as follows: In determining whether any changes in the subsidies have

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<sup>212</sup> See Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead Bismuth Carbon Steel Products Originating in the United Kingdom (“United States – Leaded Bars”)*, WT/DS138/R, adopted 7 June 2000, at para. 6.18, as upheld by the Appellate Body Report, WT/DS138/AB/R, adopted 7 June 2000, at para. 51.

occurred that may affect the countervailing duty, DOC normally selects the countervailing duty from the original investigation or a review, on the basis that it is the only rate that reflects the behaviour of governments and exporters without the discipline of an order in place. This means that no new investigation takes place during the sunset review. In the case of corrosion resistant steel from Germany no administrative reviews have taken place since the original investigation and the only (available) subsidization rate applied is the original 1993 subsidy rate. Even though German exporters have delivered concrete evidence, according to the first written submission of the EC, DOC refused during the sunset review, to consider changes/terminations of subsidy programmes. The reason for this decision given by the DOC was that no full investigation is conducted in a sunset review.

6.65 Norway considers that to the extent that United States' legislation or practice requires or implies that a full, objective and unbiased review is not undertaken, Article 21.3 of the SCM Agreement is violated.

(b) Not requiring the application of the 1 % *de minimis* rule in sunset reviews is in violation of Article 21.3. in conjunction with Articles 21.1 and 11.9 of the SCM Agreement

6.66 Article 21.1 of the SCM Agreement provides:

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

6.67 The purpose of the countervailing action is to counteract subsidization, which is causing injury. According to Article 21.3 of the SCM Agreement the authorities are obliged to "determine" if the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.

6.68 As stated above Norway considers that Article 11 of the SCM Agreement is applicable also for sunset reviews. Article 11.9 of the SCM Agreement provides in the context of original investigations:

"[...] There shall be immediate termination in cases where the amount of a subsidy is *de minimis*.[...] For the purpose of this paragraph, the amount of a subsidy shall be considered to be the *de minimis* if the subsidy is less than 1 per cent ad valorem. "

6.69 The Member States of the WTO have agreed that subsidization below this threshold does not permit a countervailing action. There is no exception to this rule, and immediate termination shall be the result in such cases.

6.70 The relevant US laws and administrative practice is to apply a 1 per cent *de minimis* rule in the initial determination of a countervailable subsidy as required by the SCM Agreement, but to apply, as a general rule, a 0.5 per cent *de minimis* rule in all reviews, including sunset reviews.

6.71 According to the facts submitted by the European Communities in its written submission, in the case of corrosion resistant steel from Germany, the countervailing duty rate determined in the original investigation was only 0.09 per cent above *de minimis* level of 0.50 per cent applied in the US before the entry into force of the WTO Agreements. The sunset review was conducted under the WTO rules and hence a *de minimis* level of 1 per cent. Despite finding that the subsidy rate likely to prevail would be 0.53 per cent, the US continued the measure because of their 0.5 per cent *de minimis* threshold in sunset reviews.

6.72 Reviewing the need for a duty to continue under Article 21.3, in conjunction with Articles 21.1 and 11.9 has the same implications as determining whether the original substantive conditions on the basis of which it was initially imposed continue to exist. 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 cannot cause injury in an original investigation, it is logically and legally unavoidable to conclude that it cannot cause injury in a sunset investigation. Consequently the United States should have lifted the countervailing duties and changed the *de minimis* threshold to 1 per cent in all review processes.

6.73 Based on the above, Norway submits that the 0.5% level used by the United States for sunset reviews represents a clear violation of Article 21.3 of the SCM Agreement read in conjunction with Article 11.9 of the SCM Agreement.

#### **4. US countervailing legislation is inconsistent with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement**

6.74 Article 32.5 of the SCM Agreement provides that:

“Each member shall take all necessary steps, of a general and particular character, to ensure not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.”

6.75 Furthermore, Article XVI:4 of the WTO Agreement requires that Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

6.76 Thus, by being inconsistent with Article 21 and related articles of the SCM Agreement as they apply to a sunset review, the US law, regulations and practices as such, and as applied to the products in question in this case, are also inconsistent with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

#### **5. Conclusion**

6.77 For the reasons stated in the submission, Norway respectfully requests the Panel to consider the US law, regulations and practices inconsistent with the obligations of the United States under Article 21 and related articles of the SCM Agreement as they apply to a sunset review, Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

6.78 Finally, Norway respectfully requests the Panel to recommend that the United States bring its legislation into conformity with the corresponding covered agreements.

#### **C. ORAL STATEMENT OF JAPAN AT THE FIRST MEETING OF THE PANEL**

6.79 The Government of Japan (“Japan”) would like to appreciate this opportunity to express our views in this dispute.

6.80 Japan supports the European Communities’ (“EC”) position in this case. The facts of this case illustrate vividly the problem with the United States (“US”) laws and practices. Continuing a CVD order at the negligible level of 0.54 per cent -- an order that never would have been imposed in the first place under the standards of the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”)- shows problems with the current US system. We would like to briefly discuss today problems with the US system, focusing on the flaws in the US’s argument.

6.81 First, the text of Article 21.3 expressly requires the termination of the CVD duty after five years. US fundamentally misinterprets Article 21.3. The text clearly states that any “definitive countervailing duty **shall** be terminated” not later than five years from its imposition ... “**unless** the authorities determine” to continue the order. The terms “shall” and “unless” set forth a basic rule and an exception. The order may continue beyond the five years only if the authorities make an affirmative finding that subsidization will continue in the absence of the order, and follow all the rules and procedures for invoking the exception. In addition, Article 21.1 provides greater understanding to the object and purpose of Article 21.3. Article 21.1, states that the order “shall only remain in force as long as and to the extent necessary to counteract the subsidization which is causing injury.” (emphasis added) For invoking the exception, there must be an affirmative finding based on positive evidence that subsidization is “likely” to continue or recur.

6.82 Second, Article 21.3 allows the US to self-initiate sunset reviews only after establishing the existence of sufficient evidence that subsidization will continue in the absence of the order. The US misunderstands the phrase “on their own initiative” in Article 21.3 to argue that it provides the necessary authority automatically to initiate a sunset review without any factual basis. As discussed in our submission, the appropriate contextual interpretation of Article 21.3 in the context of the SCM Agreement particularly Articles 22.1 and 22.7, requires the sufficient evidence standard of Article 11.6 to be applied to initiation of sunset reviews “on their own initiative”.

6.83 Third, Article 21.3 requires the authority to conduct, at least to some degree, a new investigation into whether subsidization is likely to continue or recur. Use of the present tense verb “determine” in Article 21.3, followed by “likely to lead to continuation or recurrence of subsidization”, requires independent prospective analysis of the future, not mechanical reference to the past. US’s simple reference to stale conclusions would not justify a finding of continued subsidization or constitute a prospective determination.

6.84 The obligation to “determine” under Article 21.3 also must be read in light of “necessary” in Article 21.1. The Panel in *DRAMs* interpreted “necessary” to require a “foundation of positive evidence that circumstances” require continuation of the order (WT/DS99/R, para. 6.42). The Panel also stated that “mathematical certainty is not required, but the conclusions should be demonstrable on the basis of the evidence adduced.” (WT/DS99/R, para. 6.43). The Panel’s finding in *DRAMs* with regard to Article 11 of the AD Agreement provides analysis equally compelling with regard to the nearly identical language in the SCM Agreement. This reading of necessary means that an administering agency’s “determination” must be based on a foundation of positive evidence. The US’s practice of applying the original CVD rates to its sunset determination violates Article 21.3.

6.85 Finally, the US’s application of 0.5 per cent *de minimis* standard to sunset reviews is inconsistent with the SCM Agreement. All of the arguments the US uses to support its inconsistent application of *de minimis* standards between the investigation and sunset review reflect flawed treaty interpretation. As discussed in our submission, the US’s reading of the SCM Agreement ignores the textual references in Article 22 to the standards in Article 11 and their applicability to Article 21.3.

6.86 The US also erroneously asserts that the *DRAMs*’ Panel found no support for extending the *de minimis* standard beyond the initial investigation. The Panel’s finding in *DRAMs* in fact supports our view that the *de minimis* standard for the original investigation also applies to sunset reviews. The Panel of the *DRAMs* distinguishes proceedings to determine prospective application of antidumping duties from retroactive duty assessment procedures. The Panel then concluded that *de minimis* standard does not apply to the retroactive duty assessment procedures. Duty assessment procedures determine the exact amount of antidumping (or countervailing) duty to be collected from importers for their past imports of subject merchandise. A sunset review, on the other hand, is to determine whether or not an exporter should remain subject to the AD or CVD duty for the next five years.

Therefore, the sunset review is analogous to the original investigation, and consequently, the same *de minimis* standard should apply to both.

6.87 Taking the US's interpretation to its logical conclusion leads to contradictory results. If an exporter found to have a 0.7 per cent net CVD rate in an original investigation would have been excluded from the original determination. However, if the investigation happened to be a sunset review, the same exporter would have been found to be receiving a countervailable subsidy. A proper contextual interpretation of Article 11.9 and 21.3 would not allow such an inconsistent application of the *de minimis* standard. If the order could not have been imposed in the first place it makes no sense for the order to be continued.

6.88 We would like to thank the Panel for their attention today. Japan believes that when the Panel examines the US's countervailing duty law, accompanying regulations and policy practices, it will find them to be inconsistent with the SCM Agreement.

#### D. ORAL STATEMENT OF NORWAY AT THE FIRST MEETING OF THE PANEL

##### 1. Introduction

6.89 The present case concerns whether the US basic countervailing duty law (Tariff Act of 1930, Sunset regulations) and policy practices (Sunset Policy Bulletin) and their concrete application to imports of certain corrosion-resistant steel products from Germany are inconsistent with the obligations of the United States under the WTO Agreement and annexed agreements.

6.90 Norway has systemic interests in the interpretation and application of the "sunset provisions" of the Agreement on subsidies and countervailing measures (SCM), and thus reserved its third party rights in the case during the Dispute Settlement Body meeting on 10 September 2001 (WT/DS213/3).

6.91 In deciding the case, Norway submits that the Panel should base its arguments on the following:

##### 2. **The United States Department of Commerce (DOC) initiation of the Sunset Review for countervailing duties on import of corrosion-resistant steel products from Germany has infringed Article 21 of the Agreement on Subsidies and Countervailing Measures (SCM) in a number of ways**

(a) Automatic reviews infringe Articles 21.1 and 21.3 of the SCM Agreement and Article 10 of the SCM Agreement in combination with Article VI of GATT 1994

6.92 Under Article 21.3 of the SCM Agreement, WTO Members are required to terminate countervailing measures on a date no later than five years from their imposition, unless it is determined in a review, that the expiry of the duties would be likely to lead to continuation or recurrence of subsidisation and injury. This corresponds to the purpose of Article 21.1 of the SCM Agreement, which provides that a countervailing duty shall be maintained only as long as necessary and to the extent to counteract subsidisation which is causing injury.

6.93 Article 10 of the SCM Agreement that refers to Article VI of GATT 1994 also sustains these provisions. Article VI paragraph 6 (a) of GATT 1994 provides that: No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of 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.

6.94 It follows from Article 21.3 that as a main rule countervailing duties shall be terminated no later than five years from their imposition - the presumption being that subsidisation is counteracted after such period. A review is meant only to take place on exceptional occasions when there is a clear assumption based on the situation existing at the time of review that the expiry of the duty would be likely to lead to continuation or recurrence of both subsidisation and injury.

6.95 Under US law sunset reviews are automatically initiated by DOC on its own initiative five years after the publication of the countervailing duty order. Regardless of the situation existing at the time of initiation of review, or the complete lack of information supporting an assumption that continuation or recurrence of both subsidisation and injury will occur, a review is initiated.

6.96 In this way the United States transforms an exception into a general rule, thus infringing Articles 21.1 and 21.3 of the SCM Agreement and Article 10 of the SCM Agreement in conjunction with Article VI of GATT 1994.

(b) Expedited reviews are biased towards the continuation of countervailing duties and violate Article 21.3 of the SCM Agreement

6.97 The Norwegian government is of the opinion that a sunset review has to be unbiased and independent of the original investigation. It follows from the letter of Article 21.3 of the SCM Agreement that if exception from the presumption of terminating countervailing duties after five years is to be made, the authorities have to determine in a review that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.

6.98 It's our assertion that the US procedures of expedited sunset reviews are biased towards the continuation of countervailing duties. If domestic interested parties file a "notice of intent to participate" in the sunset review, the foreign government or exporters counting at least 50 per cent of exports are required to file substantive responses to the notice of initiation within a 30 days deadline. If no responses are given by those instances within 30 days, DOC will shorten the timeframe for the review and base the review on the facts available. This normally leads to a presumption of continued subsidisation and thus to continuation of the countervailing duty.

6.99 This is also the case if the foreign respondents do not account for 50 per cent or more of total exports of the subject product to the US. DOC then normally will conduct an expedited review and, not later than 120 days after the date of publication in the Federal Register of the notice of initiation, issue without further investigation, final results of review based on the facts available.

6.100 Norway considers that this represents a violation of the duty to terminate the countervailing measures set forth in Article 21.3 of the SCM Agreement.

(c) The self-initiation of sunset reviews by the domestic authorities does not correspond to the requirements set out in Article 21.3 as complemented by Article 11.1 and 11.6 of the SCM Agreement

6.101 Article 21.3 of the SCM Agreement states that a review can be initiated either on the initiative of the domestic authorities or upon a duly substantiated request made by or on behalf of the industry. Norway considers that Article 11 on the initiation and conduct of the original subsidy investigation also applies to sunset reviews as referred to in Article 21.3 of the SCM Agreement. In fact also the procedures and procedural guarantees of the other articles of Chapter V of the SCM Agreement are meant to apply, and not to be disregarded in a sunset review context. The reference made to Article 12 in Article 21 is but one particular example of this. The contrary solution would otherwise create a "free for all" for the duty-imposing Member, and leave the foreign exporters without proper legal guarantees.

6.102 Article 11.1 of the SCM Agreement provides that the initiation of an investigation to determine the existence of subsidisation should normally be based on the existence of a substantiated request made by or on behalf of the domestic industry. Self-initiation by domestic authorities constitutes on the other hand an exceptional measure, which is only to be accepted if domestic authorities have sufficient evidence of the existence of a subsidy, injury and causal link as described in Article 11.6.<sup>213</sup>

6.103 In the United States, sunset reviews are always self-initiated by the domestic authorities. According to Section 751-(c) (1) and (2) of the Tariff Act of 1930 and of Section 351.218 of the Sunset regulations, DOC does not even have to wait for a request by the domestic industry before initiating sunset reviews.

6.104 Thus the United States hereby makes a general rule out of a clear exception, disregarding the requirement that sufficient evidence of continuation or recurrence of subsidisation be present. Norway claims that this represents a violation of Article 21.3 in conjunction with Article 11.1 and 11.6 of the SCM Agreement.

**3. The US standard of investigation for sunset reviews violates the requirements of the SCM Agreement in particular Article 21.3 because:**

- (a) Not making a new investigation in sunset reviews represents an infringement to Article 21.3 and 21.1 and the purpose of Part V of the SCM Agreement

6.105 Article 21.3 of the SCM Agreement provides that:

“..Any definitive countervailing duty shall be terminated on a date not later than five years from its imposition...unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidisation”. (emphasis added)

6.106 This represents a positive obligation upon the domestic authorities to “determine” the likelihood of continuation or recurrence of subsidisation. In the case United States-Leaded Bars the Appellate Body considered that (in the context of a review under Article 21.2).<sup>214</sup>

“In order to establish the continued need for countervailing duties, an investigating authority will have to make a finding on *subsidisation* i.e. whether or not the subsidy continues to exist”.

6.107 When such requirements are applied to a review under Article 21.2, which is not obligatory and takes place during the life time of the original countervailing duty, it should be clear that a positive finding on subsidization is necessary also in the context of an Article 21.3 investigation.

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<sup>213</sup> Article 11.6 reads:

“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.”

<sup>214</sup> See Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead Bismuth Carbon Steel Products Originating in the United Kingdom* (“United States – Leaded Bars”), WT/DS138/R, adopted 7 June 2000, at para. 6.18, as upheld by the Appellate Body Report, WT/DS138/AB/R, adopted 7 June 2000, at para. 51.

6.108 In an Article 21.3 investigation the basic obligation is the termination of the original duty, while the possibility of continuing a duty following a sunset review constitutes the exception. In the opinion of the Norwegian government the latter requires an unbiased review independent of the results of the original investigation to be undertaken in full conformity with all the procedural and substantive requirements for an initial determination of subsidy and injury set forth in Articles 10 *et sec.* There is no reason to understand the requirement of “determination” of subsidisation and injury differently in Article 21.3 as compared to *inter alia* Articles 11 and 15. This is also sustained/supported by Article 21.1 and the purpose of Part V of the SCM Agreement.

6.109 According to the written submission of the European Communities, the factual situation of the present case seems to be as follows: In determining whether any changes in the subsidies have occurred that may affect the countervailing duty, DOC normally selects the countervailing duty from the original investigation or a review, on the basis that it is the only rate that reflects the behaviour of governments and exporters without the discipline of an order in place. This means that no new investigation takes place during the sunset review. In the case of corrosion resistant steel from Germany no administrative reviews have taken place since the original investigation and the only (available) subsidisation rate applied is the original 1993 subsidy rate. Even though German exporters have delivered concrete evidence, according to the first written submission of the EC, DOC refused during the sunset review, to consider changes/terminations of subsidy programmes. The reason for this decision given by the DOC was that no full investigation is conducted in a sunset review.

6.110 Norway considers that to the extent that United States’ legislation or practice requires or implies that a full, objective and unbiased review is not undertaken, Article 21.3 of the SCM Agreement is violated.

(b) Not requiring the application of the 1 per cent *de minimis* rule in sunset reviews is in violation of Article 21.3. in conjunction with Articles 21.1 and 11.9 of the SCM Agreement

6.111 Article 21.1 of the SCM Agreement provides:

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

6.112 The purpose of the countervailing action is to counteract subsidisation, which is causing injury. According to Article 21.3 of the SCM Agreement the authorities are obliged to ”determine” if the expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury.

6.113 As stated above Norway considers that Article 11 of the SCM Agreement is applicable also for sunset reviews. Article 11.9 of the SCM Agreement provides in the context of original investigations:

”[...] There shall be immediate termination in cases where the amount of a subsidy is *de minimis*.[...] For the purpose of this paragraph, the amount of a subsidy shall be considered to be the *de minimis* if the subsidy is less than 1 per cent ad valorem. “

6.114 The Member States of the WTO have agreed that subsidisation below this threshold does not permit a countervailing action. There is no exception to this rule, and immediate termination shall be the result in such cases.

6.115 The relevant US laws and administrative practice is to apply a 1per cent *de minimis* rule in the initial determination of a countervailable subsidy as required by the SCM Agreement, but to apply, as a general rule, a 0.5 per cent *de minimis* rule in all reviews, including sunset reviews.

6.116 According to the facts submitted by the European Communities in its written submission, in the case of corrosion resistant steel from Germany, the countervailing duty rate determined in the original investigation was only 0.09 per cent above *de minimis* level of 0.50 per cent applied in the US before the entry into force of the WTO Agreements. The sunset review was conducted under the WTO rules and hence a *de minimis* level of 1 per cent. Despite finding that the subsidy rate likely to prevail would be 0.53 per cent, the US continued the measure because of their 0.5 per cent *de minimis* threshold in sunset reviews.

6.117 Reviewing the need for a duty to continue under Article 21.3, in conjunction with Articles 21.1 and 11.9 has the same implications as determining whether the original substantive conditions on the basis of which it was initially imposed continue to exist. 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 cannot cause injury in an original investigation, it is logically and legally unavoidable to conclude that it cannot cause injury in a sunset investigation. Consequently the United States should have lifted the countervailing duties and changed the *de minimis* threshold to 1 per cent in all review processes.

6.118 Based on the above, Norway submits that the 0.5 per cent level used by the United States for sunset reviews represents a clear violation of Article 21.3 of the SCM Agreement read in conjunction with Article 11.9 of the SCM Agreement.

#### **4. US countervailing legislation is inconsistent with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement**

6.119 Article 32.5 of the SCM Agreement provides that:

“Each member shall take all necessary steps, of a general and particular character, to ensure not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.”

6.120 Furthermore, Article XVI:4 of the WTO Agreement requires that Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

6.121 Thus, by being inconsistent with Article 21 and related articles of the SCM Agreement as they apply to a sunset review, the US law, regulations and practices as such, and as applied to the products in question in this case, are also inconsistent with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

#### **5. Conclusion**

6.122 For the reasons stated in the submission, Norway respectfully requests the Panel to consider the US law, regulations and practices inconsistent with the obligations of the United States under Article 21 and related articles of the SCM Agreement as they apply to a sunset review, Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

6.123 Finally, Norway respectfully requests the Panel to recommend that the United States bring its legislation into conformity with the corresponding covered agreements.

## 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

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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)

paragraph 10.22 (now paragraph 8.106, *infra*) in spite of the concern it expressed. We consider that 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.

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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)

## 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 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

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

"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 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>

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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.

## (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>

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

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

<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.

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 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

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<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).

<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)).

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 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.

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<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*).

<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*).

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 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>.

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

<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.

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
- 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

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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.

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*:

[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,

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<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.*

<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.

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.

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

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<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.

<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).

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 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.

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<sup>260</sup> Footnote deleted.

<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").

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 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.

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

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).

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.

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.

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

<sup>265</sup> Footnotes deleted.

<sup>266</sup> Footnote deleted.

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 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

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

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*:

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

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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).

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.

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 prejudge 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

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<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.

<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.

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.

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>

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<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.

<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.

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*:

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.

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<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.

<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

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*

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.

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<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.

<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).

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 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

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<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.

<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)).

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>

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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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 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).

<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") 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

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

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. 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

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

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

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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.

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 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,

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<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.

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.

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

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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.

<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.

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*

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

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

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 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>

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

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

<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.

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 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

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<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.

<sup>320</sup> Footnote deleted.

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

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 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>

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<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).

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

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 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

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

<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.)

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 ...

(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:

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

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

[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, 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:

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<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.

<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.

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.

**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

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

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 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>

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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.

<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).

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. 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

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

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 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

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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.

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

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 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

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<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.

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

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.

## 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

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<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.

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* 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>

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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.

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

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>62</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*:

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

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

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

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;
- (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;

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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*).

- (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.

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

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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*.

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

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 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

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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))

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.
-