I. INTRODUCTION

1. This proceeding concerns the treatment under the SCM Agreement of subsidies to government-owned companies that subsequently are sold to private investors. The EC asserts that a change in ownership automatically terminates the countervailability of previous subsidies to the company sold, even where the company remains otherwise identical. The United States believes that a change in the ownership of a subsidized company, which remains essentially the same company, has no effect on the countervailability of previous subsidies to that company.

2. The United States' position may be illustrated simply: (1) the ABC Company receives a subsidy, thereby becoming subject to countervailing duties; (2) the ABC Company is sold to a new owner, but remains the ABC Company, identical in all other respects; (3) therefore, the ABC Company still has the subsidy and remains subject to countervailing duties.

3. The EC asserts that step (2) is incorrect in that, when the ownership of ABC changes, ABC automatically becomes a different legal entity (say, the "DEF Company"). Because the subsidies in question were bestowed upon ABC, there is no basis for subjecting DEF to countervailing duties on their account. In order for DEF to be subject to CVDs, the requirements of the SCM Agreement must be satisfied anew for DEF.

4. Nowhere, however, does the EC explain why a change in the ownership of a company necessarily transforms that company into a distinct new company. Nor does the EC demonstrate that anything in the SCM Agreement automatically renders previous subsidies to such companies non-countervailable. In place of such a demonstration, the EC baldly asserts that a change in ownership "fundamentally transforms" a company, rendering it "incumbent" upon an investigating authority to determine whether subsidies granted to the "pre-privatization subsidy recipient" actually "pass through" to the "post-transaction entity." The EC's calls this a "conceptual framework." If so, it needs a foundation. All the EC has come up with so far is the completely unsupported assertion that a change in the ownership of a company *necessarily* transforms that company into a new and distinct legal person.

5. The United States agrees that a distinct new legal person may not be subject to countervailing duties ("CVDs") on account of subsidies granted to some other legal person. Accordingly, this dispute boils down to a single issue: Does a change in the ownership of a company automatically transform that company into a distinct new legal entity?[1]

6. The United States will demonstrate that a mere change in ownership is not sufficient, *per se*, to create a new legal person. Applying this ordinary legal principle – which is found in the law of many WTO Members – to liability for CVDs is perfectly consistent with the SCM

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[1] We note that the EC briefly offers a competing theory as to why a change in ownership of a company terminates the countervailability of prior subsidies to that company. This theory appears to be that the company remains the same legal person, from which the change in ownership instantly and automatically extracts the "benefit" of the subsidy. EC First Submission, paras. 69-72. However, the EC has suggested no plausible legal or economic mechanism by which this occurs. Because it is inconsistent with the EC's main theory (that the person is different, so that it possesses no benefit to extract), we will address this alternate theory separately below.

Agreement. Indeed, the EC has not cited a single provision of the SCM Agreement with which that proposition is inconsistent. All of the EC's citations are to inconsistencies that would emerge *if it were first assumed* that a change in ownership automatically creates a distinct new legal person.

7. In addition to demonstrating that its new privatization methodology is legally sound and perfectly consistent with the SCM Agreement, the United States will show that this approach makes basic economic sense. There is no reason whatsoever to believe that, once a company has been pumped up with subsidies, a mere change in ownership deflates it.

II. FACTUAL BACKGROUND: THE DEVELOPMENT OF DOC'S REVISED PRIVATIZATION METHODOLOGY

8. From the outset, DOC recognized that the privatization of subsidized companies presented a difficult question in that neither the U.S. statute nor the GATT Subsidies Code directly addressed the subject. In 1993, after struggling with the issue for several years, DOC devised a methodology which became known as the "gamma" methodology. Under gamma, DOC credited part of the price paid for a subsidized company as a repayment of those subsidies, so that the privatized company might be partly, or even entirely, free from liability for CVDs. The results in a given case would depend upon the amount of subsidies remaining unamortized at the time of the sale, in proportion to the price paid for the privatized company.

9. The gamma methodology was designed to encourage privatization, without at the same time subscribing to the theory (advanced by the foreign producers involved in U.S. CVD proceedings) that a change in the ownership of a subsidized company automatically eliminated the countervailability of those subsidies. Because gamma was simply a formula for the reallocation of subsidies, it did not matter whether the privatized company was a different legal person from the subsidy recipient or whether the price paid for the company corresponded to fair market value.

10. In *UK Lead Bar,* the panel and the Appellate Body rejected the gamma methodology as inconsistent with the SCM Agreement, because it did not involve an examination of whether the producer of the merchandise in question had itself received a financial contribution and benefit, as required by Article 1.2. As we explain in more detail below, the Appellate Body based its findings on the premise that the producer in question was a distinct new legal person from the original subsidy recipient. Given that premise, the Appellate Body quite understandably required that the conditions of the SCM Agreement be satisfied for that new person before CVDs could be imposed on goods produced by that new person.

11. Following *UK Lead Bar*, DOC revised its change-in-ownership methodology to remedy the problem identified by the Appellate Body. Under its new methodology, DOC first asks whether, following the change in ownership, the producer whose products are entering the United States (and causing injury) is the same person that received the subsidy. If that producer is the

same person that received the subsidy, then, in contrast to the situation in *UK Lead Bar*, all of the requirements of the SCM Agreement have been satisfied with respect to that person, which remains subject to CVDs.

12. If the current producer is not the person that received the original subsidy, then the United States agrees that the current producer cannot be accountable for that subsidy. The only question then is whether a new subsidy has been bestowed in connection with the privatization. To answer this question, DOC examines the privatization transaction to determine whether the government in question sold the privatized company for less than fair market value. If it did, then a new subsidy may have been created which may be attributable to the new producer.

13. DOC's new methodology rests on a very ordinary proposition – that a change in the ownership of a company does not necessarily transform that company into a distinct new legal entity. DOC derived this concept from corporate law in the United States, but the same concept appears to be reflected in the law of all industrialized countries.

14. Under corporate law in the United States, if a change in ownership is accomplished through a sale of shares, the new owner steps into the shoes of the prior owner, and the company remains legally responsible for all of the company's existing and potential liabilities. For example, if the company owes back taxes or has liabilities based on past environmental problems, it continues to owe those taxes and retain those liabilities after the sale. Should the liability materialize, the new owner may find that its earnings are less than it had hoped – but no one would question the company's responsibility to pay. In the case of a sale of assets, whether the new owner becomes legally responsible for all existing and potential liabilities of the company from whom the assets were obtained depends upon whether the new owner carries on substantially the same business. This would include the possibility of facing countervailing duties if the company, having received subsidies, elected to export and, in doing so, caused injury to an industry in the importing country.

15. In Europe, similar factors govern the determination of whether a company's liabilities survive under a new owner. These factors include whether the company under the new owner "continued to manufacture the same product at the same place with the same staff." Liabilities are not avoided because the company "merely changed its name." In fact, in the precise area at issue here, EC law treats changes in ownership as irrelevant to the question of whether prior subsidies are actionable.[2]

[2] EC state aid regulations plainly state that selling a subsidy recipient does nothing to extinguish previously-bestowed subsidies. Thus, a change in ownership is irrelevant to whether a subsidy is illegal, and if a subsidy is illegal, EC regulations require full repayment, including principal and interest from the time the aid was disbursed, whether or not the recipient is later sold or privatized.

III. ARGUMENT

A. DOC's Revised Methodology Is Consistent with the SCM Agreement

16. In this section, we will demonstrate that DOC's revised methodology is consistent with the SCM Agreement, particularly as interpreted by the Appellate Body in *UK Lead Bar*. For this purpose, we will focus on the only measure at issue in this dispute in which DOC actually applied that methodology – *Grain-Oriented Electrical Steel ("GOES") from Italy* – in which the Italian Government first bestowed large subsidies upon an Italian steel producer and then privatized that producer. First, we will explain the standard of review applicable to the Panel's review of *GOES from Italy*. Second, we will describe the facts of the privatization in question in that case. Third, we will show that the application of DOC's new methodology in *GOES from Italy* satisfied every condition in the SCM Agreement for the imposition of CVDs. Fourth, we will explain in detail why DOC's new methodology, as applied in *GOES from Italy*, is consistent with the interpretation of the SCM Agreement made by the Appellate Body in *UK Lead Bar*.

1. The Standard of Review

17. The standard of review that applies to this case is set forth in Article 11 of the Dispute Settlement Understanding. Under that standard, this Panel's task is to determine whether an identified measure is inconsistent with some obligation in the SCM Agreement. While it is true that WTO Members have agreed to limit their exercise of sovereignty to conform with their WTO commitments, the converse is also true – to the extent that a Member has not agreed to any limitation on the exercise of its sovereign authority with respect to a particular action, that action cannot be inconsistent with the Member's WTO obligations. Because the SCM Agreement is, at most, silent on the question of the effect of changes in ownership, DOC's new methodology and the U.S. statute must be found *not inconsistent* with that Agreement.

2. DOC's Determination in GOES from Italy

18. In the early 1990s, the Italian Government decided to privatize the specialty steels division of ILVA, Italy's large, state-owned steel producer, which had received heavy subsidies for many years. This privatization was accomplished in stages. First, the specialty steels division was split-off from ILVA and separately incorporated as Acciai Speciali Terni S.r.l. ("AST"). Second, in order to make the sale of AST a realistic possibility, the Italian Government forgave outright a massive amount of debt attributable to AST. Finally, in 1994, the Italian Government sold its shares in AST through a public stock offering to KAI, a holding company jointly owned by the German steelmaker Hoesch-Krupp and a consortium of private Italian companies.

19. Following the sale of AST's shares, AST continued operations under the same name, with the same assets and liabilities, retaining substantially the same workforce to manufacture the same products in the same facilities, and selling those products to substantially the same

customers, as before the privatization. Thus, under its new ownership, AST was, and held itself out to be, essentially the same business.

20. When DOC analyzed the change in ownership of AST, it found that "all important aspects of AST's business remained essentially unchanged before and after the sale to KAI." Accordingly, DOC found AST to be essentially the same person both before and after its change in ownership. Therefore, the subsidies that the Italian Government bestowed upon AST before the sale remained attributable to AST and its production under its new ownership.

3. DOC's New Methodology, as Applied in *GOES from Italy*, Satisfies All of the Conditions in the SCM Agreement for the Imposition of CVDs

21. The basic requirements of the SCM Agreement for the imposition of CVDs are that the producer of the exported merchandise have received a financial contribution and that a benefit have been thereby conferred. DOC's revised privatization methodology ensures that these conditions are satisfied before CVDs are imposed on a privatized subsidy recipient, as shown below in the context of the privatization of AST.

22. Article 1.1(a)(1) of the SCM Agreement provides, in part, that a financial contribution is made when "government revenue that is otherwise due is foregone or not collected ... ." The Italian Government's 1993 decision to forego the collection of AST's massive debts constituted a "financial contribution" to AST. The EC does not appear to contest this proposition before this Panel.

23. Article 1.1(b) of the SCM Agreement provides that a subsidy exists if, in addition to the financial contribution, "a benefit is thereby conferred." Benefits are conveyed by the financial contribution and must be received by a legal or natural person. In the EC's own words, benefits "reside" with the legal person that receives them.

24. In accordance with Article 14(b) of the SCM Agreement, a benefit is measured as the degree to which a financial contribution was obtained on terms more favorable than the recipient would have been able to obtain in the marketplace at the time of the financial contribution. Given that forgiving debt is the opposite of "commercial" behavior, the Italian Government's forgiveness of AST's debts bestowed upon AST a benefit equal to the entire amount forgiven. The EC does not appear to contest this point before this Panel.

25. Once the existence of a countervailable subsidy to a producer of exported merchandise has been established, CVDs may be applied to imports of that merchandise.[3] The only

[3] Additional requirements for the imposition of countervailing duties are that the subsidy is specific, within the meaning of Article 2 of the SCM Agreement, and that imports of the subsidized merchandise have been determined to cause material injury to a domestic industry. However, there is no issue in the present dispute

(continued...)

remaining question is how those CVDs will be allocated. Where the subsidy is non-recurring (as opposed to being conferred on an annual basis), the amount of the benefit is allocated over time. The United States normally allocates subsidies over a period of time equal to the average useful life of assets in the relevant industry.

26. Allocating subsidies over time is simply a way of distributing the liability for CVDs over a period that bears a reasonable correspondence to their effect upon production. The SCM Agreement implicitly endorses the allocation of certain subsidies over time,[4] and it is generally recognized that this is the only practical way to assess CVDs.[5] This methodology was endorsed by an Informal Group of Experts appointed by the Committee on Subsidies and Countervailing Measures, and is used in various forms by other WTO Members, including, notably, the EC.

27. These are *all* of the requirements of the SCM Agreement for finding a countervailable subsidy to exist. There are no others. For example, the SCM Agreement does not require investigating authorities to demonstrate that subsidies have any particular effect on the recipient's production or pricing, either when received, or in each successive year over the allocation period. So far as the United States is aware, the EC has never disputed this proposition, and does not do so here.[6] Therefore, if DOC has established that these conditions are satisfied for a particular company, it may impose CVDs on goods produced by that company.

28. The EC would have the Panel create one more condition – that the original recipient in which the subsidy "resides" continues to be owned by the same person or persons that owned it when the subsidy was bestowed. The EC has neither furnished any support for this position nor demonstrated that a change in the ownership of a subsidy recipient affects the countervailability of those subsidies under the SCM Agreement.

4. Article 27.13 of the SCM Agreement Provides Contextual Support for the Proposition that Subsidies Remain Countervailable After the Recipient Has Been Privatized

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[3] (...continued)
regarding these two requirements.

[4] *See*, *e.g.*, SCM Agreement, Annex IV, para. 7.

[5] *See, e.g.*, *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather - Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW, Report of the Panel adopted 11 February 2000, para. 6.57, n.25.

[6] To the United States' knowledge, once a financial contribution is shown to have been provided and a benefit thereby conferred, every Member that has ever applied CVDs has allocated non-recurring subsidies over a reasonable period of time without annually revisiting the question of whether the company or its owners continued to enjoy that benefit. WTO Members have used this approach because, if there were a requirement for an ongoing demonstration that the original benefit still constituted a competitive advantage to the company (for example, by demonstrating that market conditions still permitted the company to take full advantage of its increased capacity), it would become nearly impossible to administer CVD laws.

29. Not only does the SCM Agreement *not* suggest that a change in ownership of a subsidized company automatically terminates the countervailability of those subsidies, the only provision in the Agreement that actually addresses pre-privatization subsidies – Article 27.13 – suggests that the general rule is that pre-privatization subsidies remain countervailable.

30. This provision creates an exception from Part III (on Actionable Subsidies) for certain types of subsidies provided by developing country Members in conjunction with privatization. Although Article 27.13 does not expressly state the general rule to which this exception applies, it strongly implies that there is a general rule that subsidies bestowed on a government-owned company prior to privatization *may be actionable after privatization*. Plainly, there would be no need for such an exception if, under Article 1, a change in ownership *automatically* cut off liability for pre-privatization subsidies *in every case.*

31. In *UK Lead Bar*, the Appellate Body found that "nothing in Article 27.13 supports the United States' position" that no determination of a benefit to the current producer had to be made following the change in ownership at issue there. That statement does not diminish the importance of Article 27.13 in this proceeding. The Appellate Body based its findings on the understanding that a distinct new legal person was created in conjunction with the change in ownership. It then concluded that Article 27.13 did not support the United States' position that no new benefit determination need be made *with regard to that distinct new person*. This conclusion is not relevant with respect to *GOES from Italy*, where the current producer is exactly the same person upon which the subsidy was bestowed.

32. Moreover, recent WTO negotiations (subsequent to *UK Lead Bar)* demonstrate that Members, notably including the EC, regard Article 27.13 as an exception to the general rule that subsidies remain actionable after a privatization. In the negotiations over China's WTO accession, China's ability to invoke and benefit from the various "special and differential" provisions in Article 27 of the SCM Agreement was negotiated on a line-by-line basis. Members ultimately agreed to permit China to benefit from certain of those provisions, but obtained an agreement that China may not invoke others. Article 27.13 was placed in the latter category, in no small part at the insistence of EC negotiators. The EC was seeking to preserve the possibility of SCM Agreement-consistent action against subsidies (such as debt relief) that may be bestowed by China shortly before, but in the context of, the privatization of subsidy recipients. The only possible interpretation is that the EC, like the United States, understood that Article 1 does not preclude trade actions based on subsidies given prior to a privatization.

5. DOC's Revised Methodology Is Consistent With the Findings of the Appellate Body in *UK Lead Bar*

33. The *UK Lead Bar* dispute involved large subsidies that the British Government bestowed upon British Steel Corp. ("BSC") in the 1970's and 1980's, followed by the sale of BSC's lead bar division, which was combined with a privately-owned lead bar operation to create United Engineering Steels ("UES"). Because UES was the producer and exporter of the lead bar upon

which the CVDs were assessed that became the subject of the WTO inquiry, we will use the name "UES" throughout the discussion that follows.

34. As we have noted above, under DOC's gamma methodology, it did not matter whether BSC and UES were distinct legal persons. Consequently, DOC had made no findings on this issue for the *UK Lead Bar* panel or the Appellate Body to review.

35. The reports of the panel and the Appellate Body in *UK Lead Bar* share the same basic premise – both the panel and the Appellate Body treated the subsidy recipient (BSC) and the producer of the subject merchandise (UES) as distinct legal persons. Accordingly, both the panel and the Appellate Body reasoned that the requirements of the SCM Agreement for imposing CVDs had to be satisfied anew for UES, and both found that the DOC had failed to meet this requirement. Accordingly, both concluded that DOC could not impose CVDs on steel produced by UES. However, the findings of the panel and the Appellate Body do not apply here, where DOC has shown that AST remained exactly the same legal person, both in name and in substance, before and after the change in its ownership.

a. The Panel Decision

36. The reasoning of the panel in *UK Lead Bar* followed three basic steps: First, the panel found that in order for CVDs to be imposed on imported merchandise, an investigating authority must find that the company that produced the merchandise received a government financial contribution and a benefit. Second, the panel found that BSC and UES were distinct corporate entities, so that DOC could not attribute subsidies bestowed upon BSC to UES, but instead was required to determine whether UES had received a new subsidy. The panel based this conclusion on the premise that the change in ownership *alone* rendered the subsidy recipient (BSC) distinct from the company that produced the merchandise (UES). Third, because the *new owners* of UES had paid fair market value for the company, the panel held that UES had not received any subsidy in connection with the privatization. Because the new owners could not be held responsible for the old subsidies to BSC, and because they themselves had received no new subsidy, the panel concluded that DOC had no basis for imposing CVDs upon exports from UES.

b. The Appellate Body Report

37. In basic outline, the Appellate Body's analysis followed that of the panel. First, the Appellate Body agreed with the panel (based upon the Appellate Body's own findings in *Canada Aircraft*) that a subsidy must be received by the natural or legal person that produced or exported the subject merchandise (*i.e.*, UES). Second, the Appellate Body accepted the panel's finding that UES was a distinct new legal person entitled to an independent subsidy determination (which it had not received from DOC). Third, because UES' new owners had paid fair market value for UES, the Appellate Body found no error in the panel's conclusion that the financial contributions bestowed upon BSC could not be deemed to confer a benefit upon UES.

38. Although the Appellate Body accepted the panel's conclusion that BSC and UES were distinct legal persons, it did *not* adopt the panel's reason for reaching this conclusion. Whereas the panel found that BSC and UES were distinct legal persons *purely* because of the change in ownership, the Appellate Body simply stated that, given the changes in ownership leading to the creation of UES, DOC was required to determine whether UES, had itself received a financial contribution and benefit. The Appellate Body did not identify the specific factors dictating that UES must be treated as a distinct legal person, and twice stated that its determination was based on "the particular circumstances of this case."

c. DOC's New Methodology Is Consistent With the Appellate Body Report

39. The EC portrays DOC as drawing its new privatization methodology on a blank slate following the *UK Lead Bar* (and *Delverde*). As we have shown, however, the inquiry into whether the producer in question is the same person that received the subsidy follows directly from the Appellate Body's conclusion that the producer of the subject merchandise in that case (UES) was not the same person that received the subsidy (BSC). As the EC itself has noted, "the Appellate Body agreed that where the change-in-ownership had lead to *the creation of a different legal person* from the subsidy recipient any benefit must be assessed from the perspective of the post-transaction entity."

40. DOC's new approach simply inquires into the acknowledged premise of the Appellate Body report in *UK Lead Bar* – whether the change in ownership has led to "the creation of a different legal person." Where that basic premise is missing – that is, where a change in ownership has *not* led to "the creation of a different legal person" – the Appellate Body's reasoning in *UK Lead Bar* does not require DOC to find that the subsidies were eliminated.

B. The EC's Arguments Are Without Merit

41. Although the EC's argument is highly diffuse, there are three basic threads. First, the EC argues that a change in the ownership of a company automatically turns that company into a distinct new legal person, so that any legal liabilities of the company sold (including any liability for CVDs) do not apply to the new person created. Second, the EC argues (as its "economic rationale") that the payment of fair market value for a company prevents the purchaser from obtaining any benefit through that transaction. Third, the EC presents various other arguments that are tangential to the main issues. As we explain below, the United States disagrees with the first argument, largely agrees with the second (although not the implications that the EC attempts to draw from it), and, to the extent that they are relevant, disagrees with the final group.

42. The discussion will be complicated by the fact that the EC frequently intertwines the first two arguments. For the most part, the EC argues that a change in ownership, *as such*, creates a distinct new entity (what the EC calls the "post-transaction entity") which cannot be held responsible for subsidies bestowed upon the so-called "pre-privatization subsidy recipient." If

accepted, this conclusion would hold *regardless* of whether the new owner paid fair market value for the company. Nevertheless, the EC frequently makes references to the payment of fair market value in connection with the issue of whether benefits from the *original* subsidy may continue to be countervailed.

43. Confusion is created because the EC fails to distinguish between two distinct questions: (1) whether a change in ownership automatically terminates the countervailability of prior subsidies; and (2) whether a change in ownership creates a new subsidy. The two questions, however, are quite distinct. For example, suppose a company receives a $40 million subsidy. Five years later, the remaining unamortized amount of that subsidy is $25 million, and the value of the company is $30 million. The company is sold for $29 million – $1 million less than its fair market value. In this case, the purchasers obtain a new subsidy of $1 million – the difference between the fair market value of the company and the price actually paid. However, this amount has nothing to do with the $25 million in remaining unamortized subsidies.

44. To eliminate this confusion, the United States asks the Panel to address the following question to the EC:

> What *exactly* is it about a change in ownership for fair market value that transforms the legal person sold into a distinct new legal person? Is it the change in ownership of the legal person, *per se*, or the payment of fair market value for that legal person? Why? If the EC believes that a new legal person is automatically created by a change in ownership, how does the EC reconcile this conclusion with provisions of European company law?

1. A Change in the Ownership of a Company Does Not Automatically Create a Distinct New Legal Person

45. The crux of the EC's argument is that the sale of AST somehow transformed AST into a new legal person, distinct from the "original" AST that received subsidies. This proposition – that a change in the ownership of a company automatically creates a new legal person – is precisely the point that the EC fails to explain and support. With respect to *GOES from Italy*, the EC cites no provision of Italian or EC law which so much as suggests that a mere change in ownership transforms a company into a new and distinct legal person. In fact, any such conclusion is contrary to the law of most (if not all) industrialized states.

46. Having no explanation for this entirely unorthodox assertion, the EC simply asserts that "[t]he United States' assumption of a benefit stream is, of course, affected when consideration is paid for a company ... ." The EC then attempts to give this assertion the appearance of having some substance by assigning the company that is sold (in this case, AST) different *names* before and after the privatization. The EC calls AST the "pre-privatization subsidy recipient" before the change in ownership and the "post-transaction entity" afterwards.

47. The Panel should not accept this new nomenclature as a substitute for substantive analysis. The comprehensive analysis conducted by DOC demonstrates that, both in name and by any substantive measure, AST remains "the legal person that originally received the subsidy." The EC cannot change this basic fact simply by calling AST the "post-transaction entity" after the sale. The EC goes farther even than AST, which did *not* change its name after the sale, for a very good reason – AST was, in fact, the same company continuing in the same business, and wanted to be recognized as such. AST, the producer of the merchandise under investigation, *is* the company that received the subsidies. By so finding, DOC satisfied the requirement that the Appellate Body found unsatisfied in *UK Lead Bar*.

48. The EC claims that the subsidy determination, which originally was conducted for the subsidy recipient itself (AST), must, purely as a result of the change in ownership, now be conducted anew, not for the subsidy recipient (still AST) but *for the new owners* of that recipient (KAI). It is as if, suddenly, KAI, rather than AST, were the respondent company in the CVD investigation and the producer of the Italian steel products subject to investigation.

49. As the EC itself has acknowledged, a subsidy "resides with the natural or legal person which originally received the subsidy", not the owner of that person. AST's original owner (the Italian Government) was the *provider* of the subsidy, not the recipient. Just as the subsidy to AST never resided with AST's original owner, it does not now reside with AST's new owners. The subsidy continues to reside with AST, "the natural or legal person that originally received it."

50. Because the process by which the EC claims that a new legal person is created by a change in ownership is, to say the least, mysterious, it would be helpful if the Panel would address the following question to the EC, so that it might clarify this matter:

> What happens to the former self of the new company that is created by a change in ownership? Does that former self continue to exist, so that it may retain other legal liabilities, or are these liabilities also erased? Why? Is there any authority for this conclusion in the law of either the EC or any of its Member States?

2. The Fact that the Payment of Fair Market Value for a Company Prevents the New Owner from Personally Obtaining a Benefit Does Not Mean that Existing Subsidies Are Somehow Extracted from that Company

51. The EC also presents (as its "economic rationale") the argument that the purchaser for fair market value and at arm's-length of previously subsidized production does not *personally* obtain any benefit. There is no dispute about this proposition. All parties agree that new owners who pay fair market value (for anything, including a subsidized company) personally obtain no benefit. The new owners give equal value for what they obtain, and so do not personally receive any benefit – their financial circumstances are unchanged. There is no *new* subsidy in such a

case. The purchasers simply become the owners of the entity or "person" in which the subsidy has always resided, and continues to reside.

52. What the EC is really suggesting with this argument is that, somehow, when the new owners pay fair market value for a company, not only do they not personally obtain a benefit, but the benefit from any previous subsidies is somehow extracted from the company. Lacking any evidence whatsoever to support this assertion, the EC simply insists that it "indisputably" occurs. As a mechanism for this extraction, the EC posits that the new private owners will be more intent than the Italian Government on extracting profits from AST, so that, over time, they would recover from AST any extra amount that they paid on account of the previous subsidies to AST.

53. There are two problems with this approach. First, it is inconsistent with the EC's main explanation that the "post privatization entity" is a new and distinct person from the recipient of the subsidy. If that is so, then the original subsidy is not there to be extracted from the "post-transaction" entity by its owners. According to the EC, "post transaction" AST (for example) is a new company which sprang into existence as a result of the privatization, pure of any taint from prior subsidies, which disappeared along with "the pre-privatization subsidy recipient."

54. Second, the EC's theory is based on *pure* speculation. There is no basis whatsoever on either the record before DOC or before this Panel for assuming that AST's new owners will extract some extra margin of profit from the company. Prices are set by supply and demand. The new owners cannot simply increase the price of the goods; nor can they simply increase production without further pushing prices downward. Put simply, no matter how profit-minded they are, they can extract no more from the company than could the prior owners. This is particularly true in the steel industry, which is plagued with chronic overcapacity that frustrates the efforts of even the most ravenous investor to realize a reasonable profit.

55. We demonstrate the economic bankruptcy of the EC's extraction theory in detail, below.

a. Economically, a Change in Ownership Does Not Remove or Offset Prior Subsidies

56. From the perspective of the *economy*, a subsidy artificially enhances production and misallocates resources into a sector. Because a change in the ownership of a subsidized company or factory does not shift resources back out of that sector, the harm to the subsidized industry's foreign competitors is in no way reduced. The most fundamental purpose of the SCM Agreement is to offset and discourage such wealth-reducing resource misallocations.

57. From the perspective of the *recipient enterprise*, regardless of how subsidy proceeds are used – buying new equipment that would be unattainable without the subsidy, training workers, paying down debt, *etc.* – the benefit is unaffected by a later change in ownership. A sale does not remove the new equipment, extract knowledge from the workers, or increase the previously lowered debt load. In particular, a steel maker's debt per ton of steel output, and the price it must

receive to cover fixed or total costs, does not change simply by virtue of a sale. The artificially-enhanced competitiveness generated by the subsidies is not reduced. On the day before and the day after the sale, the same products are made on the same equipment by the same workers at the same costs and in the same volumes. Certainly, where record evidence shows this to be true, and shows a continuity of the enterprise which received the subsidy, there should be no question about the appropriateness of completing the amortization of prior subsidies.

58. The absence of a personal benefit to owners who pay fair market value does not change this analysis. Owners can benefit from a subsidy to a company they own, to the extent that it increases the value of their investment. But that benefit is distinct from the countervailable benefit accruing to the recipient enterprise and the merchandise it continues to produce. This is most clear when the subsidizing government itself is the owner. When a government bestows a $30 million grant upon a company it owns, the "benefit to the recipient" is $30 million. The benefit to *the government* (the increase in the value of its stock) may be much lower, because the government's investment may not increase the expected earnings of the company enough to raise the value of the government's stock by the full $30 million.

59. As with a government, a private owner of a company's stock simply has a claim on its earnings. Stock purchasers may be flush with cash or penniless following the purchase; they may be patient or impatient with respect to quarterly dividends; they may be interventionist or passive with respect to company management; but their nature as private owners *cannot* change earnings, which are purely a function of supply and demand. Thus, while privatizing a state-owned manufacturer may reduce the likelihood of *future* subsidies, there is no economic justification for excusing *prior* subsidies. A new exemption for pre-privatization subsidies might encourage privatization, but it would also encourage wasteful new subsidies.

60. As further proof of the hollowness of the EC's economic "analysis," consider the following example: the governments of several EC Member States decide to create a supercomputer industry. Together, they pour $100 million in subsidies into a new supercomputer manufacturer, creating a giant new enterprise which otherwise would never have been created.[7] As a result of the subsidies, more supercomputers are produced, at lower prices, than would otherwise have been the case – all to the detriment of pre-existing supercomputer manufacturers.

61. A few years later, the governments sell the supercomputer producer to private investors for its market value. All would agree that the new private investors do not *personally* obtain a benefit. That benefit is embodied in the new producer, which would not otherwise exist. It would be ludicrous to suggest that this subsidy is somehow extinguished by the change in ownership. The injury to the other members of the world supercomputer industry caused by the subsidies is unabated.

[7] This is inherent in the definition of an equity subsidy – an investment inconsistent with the usual practice of private investors.

b. Questions for the EC

62. In light of the discussion above, the United States requests that the Panel instruct the EC to answer the following questions. Neither the United States nor any other Member can implement a rule similar to the one proposed by the EC without guidance on these points.

1. Leaving changes in ownership aside, can allocated benefits from a cash subsidy (*e.g.*, debt relief) be countervailed for a reasonable number of years after bestowal, without a demonstration of current competitive benefit? If not, presumably, the authority must conduct a self-initiated administrative review for each post-bestowal year and show some price-output effect directly attributable to the original subsidy in each successive year in order to continue countervailing. Is this the EC's position? If it is, how does the EC recognize this position with the EC's countervailing duty practice?

2. What *precisely* is it about a subsequent change in ownership that prevents the corporate recipient of a cash subsidy from continuing to benefit from that subsidy for the remainder of the allocation period? Does the answer depend on the new owner making different kinds of decisions than the original owner – *i.e.*, running the company differently? If so, what if the sale is from one profit-minded private owner to another?

3. What kinds of post-bestowal events *other* than a change in ownership would, in the EC's view, require that the countervailable benefit stream established in such a case (cash subsidy) be discontinued?

4. Assume that a cash subsidy is provided to a publicly-traded company whose stock trades daily on an exchange. As a result, the day after the subsidy, the company has somewhat different owners. A person that buys stock after the subsidy pays fair market value for that stock. Is the subsidy eliminated with one day's trading? Diminished? Does each stock transaction dilute the benefit thereafter enjoyable by (and attributable to) the company itself? If so, how can a subsidy given to a publicly-traded company (whose stock generally turns over in a matter of months) ever be countervailed? How does the EC's countervailing duty practice take this into account?

5. Assume that the same publicly-traded company's stock is bought and sold in large chunks – *e.g.*, on one unusual day, owners of 20% of the stock cash out and sell to new investors, and a week later the owners of another 20% do the same, and a week later another 20%. Has a new "legal person" been created? Is the company's benefit stream affected?

6. Now assume the company has just one shareholder, A, who sells his shares to thousands of individual investors. Those investors derive no personal benefit from the prior subsidies. But has a new "legal person" been created? Is the company's benefit stream affected? Does the answer depend on whether A is a government? Why should it?

3. The EC's Additional Arguments Also Lack Merit

63. The EC's remaining arguments consist of challenging the fundamental distinction between companies and their owners, attacking DOC's previous methodology, distorting the decision of the U.S. Court of Appeals for the Federal Circuit in *Delverde*, and mischaracterizing DOC's current methodology. We briefly answer these points below.

a. The Legal Distinction Between Companies and Their Owners Cannot Be Ignored

64. The EC briefly asserts that no distinction can be made between companies and their owners. This proposition flouts the corporation laws of both the United States and the EC, laws which have as their very cornerstone the concept that companies are legal persons distinct from their owners. Although the *UK Lead Bar* panel arguably endorsed this position, the Appellate Body did not say that no distinction could be drawn between companies and their owners.[8]

65. Indeed, much of the EC's first submission would have to be rewritten in order to be consistent with this glib assertion. To give just a few examples, without a distinction between companies and their owners, it would make no sense for the EC to insist that DOC should analyze whether the "purchaser" received a benefit from buying a company, or to suggest that new owners subsequently will extract subsidies from the company purchased. Without the distinction, it would be impossible to say that a government owner subsidized a company at all. Indeed, most of the EC's submission seeks to increase the number of entities that are distinct from the owner (the pre- and post-privatization entities) rather than to deny the distinction.

66. Even if one were to accept, *arguendo,* that a privatized company and its new owner must be considered together, it is easy to see why, as a matter of economics, privatization does not extinguish previously bestowed subsidies. What goes into the company initially (say a $3 billion subsidy) yields an artificial competitive advantage. When the company is later sold (say, for $2 billion) what the new owner/company parts with ($2 billion cash) is precisely balanced by

[8] *Compare UK Lead Bar (Panel)*, para. 6.82 with *UK Lead Bar (AB)*, paras. 62-64. At the same time, the Appellate Body did, in this context, confirm that: (1) an authority may allocate subsidy benefits to particular post-bestowal years and countervail those benefits without analyzing whether the recipient continues to enjoy a demonstrable competitive advantage, and (2) the burden rests upon a respondent in a CVD proceeding to demonstrate in the context of a review that such a subsidy has been rescinded if it wishes to have its countervailing duties lifted or adjusted. Had any mere change in ownership been adequate to satisfy this requirement, this entire discussion by the Appellate Body would have been surplusage.

something worth $2 billion coming in (stock – an expected earning stream with a net present value of $2 billion). It is no more defensible to find extinguishment of the $3 billion subsidy here than if the owner/company, after receiving the $3 billion, pays the government $2 billion in exchange for $2 billion worth of coal. The coal purchase, a fair market value transaction, obviously does not "repay" $2 billion of prior government aid. Like the stock transaction, it is an exchange of value for equal value.

b. DOC's Previous Methodology Is Irrelevant

67. The EC also devotes considerable space to attacking DOC's previous "gamma" methodology, which DOC abandoned following the adoption of the *UK Lead Bar* reports. Lest there be any doubt, the United States accepts that this methodology was inconsistent with the SCM Agreement, because it did not establish that the requirements of the SCM Agreement had been satisfied with respect to the current (privatized) producer.[9]

c. DOC's Current Methodology Is Consistent with the Decision of the U.S. Court of Appeals in *Delverde*

68. The EC also mischaracterizes the decision of the U.S. Court of Appeals for the Federal Circuit in *Delverde*, which found DOC's gamma methodology to be inconsistent with the U.S. statute. *Delverde* involved the sale of a pasta producer from one private party to another. Like the panel and the Appellate Body in *UK Lead Bar*, the Federal Circuit understood the post-sale producer to be a completely distinct legal person, for which the requirements of the U.S. statute (which generally parallels the SCM Agreement) would have to be satisfied anew before CVDs could be imposed. As in *UK Lead Bar*, the Federal Circuit found that DOC had failed to show that these conditions were satisfied for the new person.

69. The EC asserts that *Delverde* was based on the Federal Circuit's understanding that, under the gamma methodology, DOC would always find that subsidies "passed through" to the new owner when a company was sold, regardless of the facts of the transactions. Of course, this is not correct. The Federal Circuit actually held (similarly to what the Appellate Body found in *UK Lead Bar)* that*, where there is a distinct new legal person* after the sale of a subsidized business, DOC must establish that a subsidy was bestowed upon that person (and that DOC had failed to do so in the case before it).

[9] This does not mean that the post-privatization producer necessarily was free from subsidies that would have been countervailable under a different methodology, consistent with the SCM Agreement.

d. The EC Mischaracterizes DOC's Current Methodology as Automatically Leading to a Determination that the Producer Is the Same Person that Received the Subsidy

70. The EC states that DOC's "same person" test is a "same activity" test, which can only be satisfied if "the post-transaction entity disposed of all of its assets, and started production on another site, with another workforce, and under another brand name ... ." This is little more than a caricature of DOC's actual methodology, which is firmly grounded in sound economics and in the principles of corporate successorship that apply in both the United States and the EC. Under that test, one corporate entity may be considered to be the successor of another if, in substance, it is the same person.

71. As DOC explained in the determination, the various factors that go into the determination of whether a nominally different company should be treated, in substance, as the same person are just that – factors. There is no basis for asserting that *all* of the factors must weigh in favor of finding that a new corporate entity was created before such a finding may be made.

72. The EC cites *UK Lead Bar (Panel)* as support for the proposition that two different companies cannot be treated as the same person "simply by virtue of their operations remaining the same." However, in *UK Lead Bar* neither the panel nor the Appellate Body said any such thing. Faced with the very particular and complex facts of that case, the panel simply stated (without explanation) that it "had no doubt" that BSC and UES were different companies. For its part, the Appellate Body merely stated that "given the changes of ownership leading to the creation of UES, the [DOC] was *required* . . . to examine, on the basis of the information before it relating to these changes, whether a "benefit" accrued to UES ... ." There is no indication that the Appellate Body would have required a new subsidy determination had it been confronted with a determination involving the very same corporate entity accompanied by a fully-developed record demonstrating the continuity of that legal person.

C. With Respect to Each of the Twelve Determinations at Issue, the United States Has Complied Fully and in Good Faith with Its Obligations Under Article 21 of the SCM Agreement

73. With respect to each of the twelve determinations which the EC has challenged in this case, the United States has complied fully and in good faith with its obligations under the WTO and Article 21 of the SCM Agreement.[10] Yet the EC accuses the United States of a "lack of good faith," a "recalcitrant attitude," and a "wanton disregard" in its implementation of its WTO obligations. These accusations are unfounded, as demonstrated above with regard to DOC's new

[10] As noted above, the United States does not disagree that its prior change-in-ownership approach, to the extent that it is applied in the seven determinations discussed below, is inconsistent with its obligations under the SCM Agreement.

change-in-ownership methodology generally, and as discussed below with regard to the measures at issue.

74. In particular, DOC gave every opportunity, in accordance with U.S. law, to the exporting steel companies to exercise their rights to request reviews of the challenged CVD orders in light of the *UK Lead Bar* reports. Some of those companies chose to exercise those rights, others did not. DOC was not obligated, on its own, to re-open and re-examine every one of those orders with regard to each country, each producer or exporter, and each product. Indeed, the EC itself does not follow such an approach in similar circumstances, as we discuss below. There is good reason for this: a respondent in a CVD proceeding may, for its own business reasons, prefer to leave well enough alone with regard to a particular CVD rate. Investigating authorities cannot and should not second guess a respondent's motives in requesting, or declining to request, a review.

1. The United States Complied Fully with Its Obligations Under Article 21.2 of the SCM Agreement by Giving Respondent Steel Companies Every Opportunity to Request Reviews of the CVD Order Applicable to Them

75. With respect to each of the twelve measures the EC has challenged, DOC has given each responding steel company, for each of the countries and products involved, every opportunity to request an administrative review of the pertinent countervailing duty order, where the jurisdictional grounds to do so exist as a matter of domestic law. In several cases, companies have requested reviews; in other cases they have not. Why some companies chose to request a review of their orders and others did not can depend upon a host of reasons, all of which are specific to those particular companies. As the United States explained to the EC at the consultations in this dispute, if an exporter disagreed with DOC's application of its privatization methodology to its particular case, the proper administrative remedy was to request a review before DOC so that DOC could apply its new, WTO-consistent methodology. In addition, in the context of litigation in its domestic court, DOC has, in effect, conducted reviews of the first six cases (the six investigations), by requesting remands from the court and applying its new WTO-consistent methodology.

a. Article 21 of the SCM Agreement Cannot Be Used to Convert the Appellate Body Report in *UK Lead Bar* into Binding Precedent for Other Cases

76. Despite the United States' compliance with its obligations under Article 21 to provide for a review of CVD orders, the EC accuses the United States of acting in bad faith with regard to implementation of the Appellate Body's *UK Lead Bar* report. The EC contends that Articles 21.1 and 21.2 required DOC to review, "*ex officio*" and "where warranted," all twelve determinations. Such an interpretation represents a gross distortion of Articles 21.1 and 21.2 and the dispute settlement process.

77. As is clear from the text, there is no requirement in Article 21.2, or anywhere in the SCM Agreement, that a Member must self-initiate reviews of existing orders on the basis of the DSB adopting reports in other, unrelated cases – or in any other circumstance. Rather, Article 21.2 gives Members the choice between self-initiating reviews, where warranted, or conducting reviews upon request by an interested party. U.S. law provides for reviews upon request, and thus is fully consistent with the SCM Agreement. If Article 21.2 were interpreted to require self-initiated reviews, as the EC suggests, the latter half of the provision (after the word "or") would be rendered superfluous and meaningless.

78. Even if Article 21.2 were interpreted to require self-initiated reviews, such a requirement would still not apply in this circumstance, because self-initiation is not "warranted." The Appellate Body findings were made in an entirely different case, concerning lead bar from the United Kingdom, and the Appellate Body expressly limited its findings to the particular facts before it. Reconsideration of twelve other CVD orders to determine the possible application of any broader interpretative guidance discernible from *UK Lead Bar* is not warranted, absent a request. The Appellate Body declined to suggest that DOC remove or revise any order other than the UK Lead Bar order itself. It did not go beyond its terms of reference and require the United States – or any other Member – *sua sponte* to reopen an undefined number of other CVD cases, involving an undefined other number of countries and products.

79. Indeed, the Appellate Body has, as a general matter, refused to find that its reports have binding precedential effect beyond the particular dispute they resolve. As the Appellate Body stated recently: "[I]t is certainly not the task of either panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of the *WTO Agreement*. Only WTO Members have the authority to amend the DSU or to adopt such interpretations."[11] This admonition applies with equal force to the SCM Agreement. In short, the Appellate Body does not "make law;" only WTO Members have authority to adopt such cross-cutting and binding interpretations.

80. In fact, the EC's position, if taken to its logical extreme, would lead to absurd results. For example, assume that an Appellate Body report were adopted with regard to Issue X under the Anti-Dumping or SCM agreements, and that one hundred Members promptly applied this ruling to a thousand different anti-dumping or countervailing duty investigations or reviews. Then, assume that six months later, the Appellate Body made findings with regard to Issue Y under one of these agreements, and the same one hundred Members then re-visited all of their administrative proceedings to account for the resolution of Issue Y. Given the issue-intensive nature of these complex proceedings, this could continue with a third issue or more, until the resources of the investigating authorities of dozens of Members would be exhausted.

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[11] *United States - Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, Report of the Appellate Body adopted 10 January 2001, para. 92.

81. Nothing in the SCM Agreement or the DSU suggests that such an outcome was intended. Discretion was left not only to the investigating authorities, but to the interested parties as well. Respondents who might not have sufficient incentive to care about the application of Issue X or Y to their order would simply decline to request a review. Or, they might be concerned that the application of the ruling would cause their rate to increase. Thus, an overly simplistic approach, such as the EC advocates, with regard to the impact of panel and Appellate Body reports could harm the functioning of the Anti-Dumping and SCM Agreements as much as advance their aims.

b. The EC Itself Does Not Treat DSB Decisions as Requiring the Re-Opening of Investigations or Reviews, or the Self-Initiation of Reviews, in Unrelated Cases

82. Moreover, the EC itself does not treat DSB decisions as requiring the re-opening of investigations or reviews, or the self-initiation of reviews, in unrelated cases – at least not when its own practices are involved. In *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, the Appellate Body found the EC's calculation of dumping margins using "zeroing" to be WTO-inconsistent. The EC's response was limited to imports of bed linen from India. Rather than reopening other earlier AD cases where the dumping margin was calculated using "zeroing," the EC has sensibly left it to interested parties to request reviews. Indeed, although the EC has authority to implement WTO AD/CVD decisions broadly, the EC has provided no indication that it actually believes in broadly opening existing AD/CVD measures to search out instances of potential non-conformity with the latest DSB-adopted reports. An evaluation of EC decisions since March 2001, after the Appellate Body report in *Bed Linen*, demonstrates that 15 ongoing proceedings had a dumping margin calculated or could have had a dumping margin re-calculated based on the new, WTO-approved methodology. Yet in none of these cases did the EC self-initiate any review to apply the new methodology. In only one of them (other than the original, India *Bed Linen* case) did the EC apply the new methodology, based on an exporter's specific request for a review to benefit from that methodology. In most of the other cases, the EC continued applying the WTO-inconsistent zeroing methodology; in some of them, the EC continued to zero, but based on a different rationale ("targeting"). In short, the EC has applied the zeroing methodology prohibited by the Appellate Body in all other cases except one – and that one, by request.

2. The United States Does Not Dispute That the First Seven Determinations (Six-Investigations and One Administrative Review) Require Additional Explanation

83. The first six determinations challenged by the EC all involve determinations made in countervailing duty investigations based on the old change-in-ownership methodology. All six are in litigation in the U.S. Court of International Trade. Although not obligated to do so by *UK Lead Bar (AB)*, DOC has, in the context of the domestic litigation, revised its determinations in the four cases which are proceeding, applying its new change-in-ownership approach. The EC has not challenged the four remand determinations in this forum. Thus, the Panel's review is

limited to the six original determinations in which DOC applied its old methodology. The United States agrees that these measures, to the extent that the underlying determinations did not fully examine whether the pre- and post-change-in-ownership entities involved were the same legal persons, are for that reason not in conformity with U.S. WTO obligations, and the United States is fully prepared to bring them into conformity, to the extent this has not already occurred.

84. The EC also challenges the DOC's final results of administrative review, issued almost five years ago, of a 1993 countervailing duty order on cut-to-length carbon steel plate from Sweden (Case No. 7).[12] Because this review is likewise based on the prior change-in-ownership methodology, the United States agrees that the determination requires additional explanation to bring it into conformity with its WTO obligations, to the extent that the underlying DOC determination did not fully examine whether the pre- and post-change-in-ownership entity was the same legal person.

85. In agreeing to revisit these measures, however, the United States wants to make perfectly clear to the Panel that each of these measures involves a different set of facts, a different product, a different set of interested parties, and a different administrative record, and therefore has no pre-determined outcome. Thus, re-examination must be done on a careful, case-by-case basis, with regard to highly complex transactions, which the Panel should not pre-judge.

3. The Four DOC Sunset Reviews Are in Accordance with the United States' Obligations under the SCM Agreement

86. The EC also challenges four DOC final results of sunset reviews, regarding various steel products from the United Kingdom, France, Germany, and Spain. The EC appears to be suggesting that DOC was obligated, under Article 21.3, to have opened up each of the sunset reviews to apply its post-*UK Lead Bar* methodology. Article 21.3 contains no such obligation.

87. In each of these four cases, DOC, on its own initiative, initiated sunset reviews at the appropriate time. Pursuant to its publicly announced implementation policy for sunset reviews, DOC requested that any interested parties who wished to participate in the sunset review submit such a request and comments on the likelihood of continuation or recurrence of subsidization. In three of the four sunset reviews, DOC received no comments from the European steel companies involved. Accordingly, in those cases and pursuant to its procedures, DOC conducted expedited reviews. In the one case where the European company (Dillinger) did file comments, DOC conducted a full sunset review and thoroughly considered those comments. In all four cases, DOC determined that subsidization was likely to continue or recur – the only evidence, in each case, of what level of subsidies would likely exist, absent an order, coming from the original

[12] First EC Submission, para. 105. The EC also cites to an expedited sunset review issued in 2000, regarding this CVD order. *Id.*, para. 103, n. 89. The EC does not, as indeed it cannot, request the Panel to make findings with regard to this sunset review, because it is nowhere mentioned in the EC's panel request and is thus outside the Panel's terms of reference.

1993 investigation. Accordingly, DOC was under no obligation, pursuant to Article 21.3, to convert its sunset reviews into full-blown administrative reviews of the respective CVD orders.

4. The *GOES from Italy* Administrative Review Is in Accordance with the United States' Obligations Under the SCM Agreement.

88. For all of the reasons outlined above, the *GOES from Italy* (Case No. 12) administrative review, applying DOC's new change-in-ownership methodology, is fully in accordance with the United States' obligations under the SCM Agreement.

D. Section 771(5)(F) of the Tariff Act of 1930 – the "Change-in-Ownership" Provision – Is Not Inconsistent with United States' Obligations Under the SCM Agreement and the WTO Agreement

89. The EC contends that Section 771(5)(F) of the Act – the "change-in-ownership" provision – is inconsistent with the United States' obligations under the SCM Agreement and the WTO Agreement. In fact, Section 771(5)(F) does not mandate an either/or approach to the question of whether pre-privatization subsidies benefit a post-privatization entity. Thus, as is shown below, the EC's attack on Section 771(5)(F) fails because of the statutory provision's discretionary nature.

1. Under the Mandatory/Discretionary Distinction, Only Legislation Mandating a Violation of WTO Obligations Can Be Challenged "As Such"

90. It is well established that, pursuant to the mandatory/discretionary distinction, only legislation which precludes authorities from complying with WTO obligations can be successfully challenged "as such." In *United States – Measures Treating Export Restraints as Subsidies*, the panel discussed the considerable dispute settlement practice under both GATT and the WTO which stands for the principle that "only legislation that *mandates* a violation of GATT/WTO obligations can be found as such to be inconsistent with those obligations." If a law provides for even the possibility of WTO consistent action, whether by allowing for discretion in compliance or the possibility of future WTO consistent action that might be taken, then the law is deemed discretionary. Thus, in *Export Restraints*, the panel found that the United States' statute did not mandate the treatment of export restraints as financial contributions, and hence did not violate the SCM Agreement. From the substantial number of panel and Appellate Body cases which have applied the mandatory/discretionary distinction, it is clear that this doctrine enjoys continued support and validity.

2. The Change-in-Ownership Provision Is Discretionary

91. The plain language of Section 771(5)(F) demonstrates its discretionary nature:

> A change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise *does not by itself* require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction. (Emphasis added).

92. As the text of Section 771(5)(F) clearly provides, a change in ownership *does not by itself* mean that a past countervailable subsidy is no longer countervailable. Nor does it mean that it *is* countervailable. The statute leaves the investigating authority discretion to make its decision. The EC's contention that the United States could not implement a finding of the Panel that rejected the "same person" methodology is incorrect.[13] If the facts justified a finding that the producer of the merchandise under investigation did not receive subsidies, DOC could simply apply the Panel's finding to the particular measure in question and modify its determination accordingly, based on the facts and circumstances of that particular case.

93. The Statement of Administrative Action ("SAA") also supports the view that Section 771(5)(F) is discretionary and not mandatory. The SAA is an authoritative expression of the United States' interpretation of the Uruguay Round Agreements Act, which added Section 771(5)(F) to the Act. The SAA states that the purpose of Section 771(5)(F) is to clarify that "the sale of a firm at arm's length does not automatically, and in all cases, extinguish any prior subsidies conferred." The SAA goes on to clarify that it is the Administration's intent that "Commerce retains the **discretion** to determine whether, and to what extent . . . previously conferred countervailable subsidies" are eliminated (emphasis added). The SAA further emphasizes the scope of this discretion by stating that "Commerce must exercise this **discretion** carefully through its consideration of the facts of each case and its determination of the appropriate methodology to be applied" (emphasis added). It is clear from the language of the SAA that the legislative intent was to provide for administrative discretion and that the discretion is to be reasonably tailored to the facts of each case. Under this interpretation, Section 771(5)(F) is far from legislation that mandates WTO-inconsistent action.

94. The Preamble of DOC's CVD regulations also supports this conclusion. It states that "section 771(5)(F) . . . purposely leaves much **discretion** to the Department with regard to the impact of a change in ownership on the countervailability of past subsidies. Specifically, a change in ownership neither requires nor prohibits a determination that prior subsidies are no

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[13] First EC Submission, para. 158. In this regard, In *Allegheny Ludlum Corp. v. United States*, slip op. 02-01 (Ct. Int'l Trade Jan. 4, 2002); and *GTS Industries S.A. v. United States*, slip op. 02-02 (Ct. Int'l Trade Jan. 4, 2002), the issue of DOC's new change-in-ownership methodology and its consistency with Section 771(5)(F) was before the U.S. Court of International Trade. In each opinion, the court stated that "any methodology adopted by Commerce must recognize *the possibility that a subsidy can be extinguished by a privatization*, even the privatization of an entire company, if a thorough analysis of the transaction supports that conclusion." Slip op. 02-01 at 16, slip op. 02-02 at 16 (emphasis added). Thus, there is no question that Section 771(5)(F) gives DOC the *discretion* to find that subsidies can be extinguished in the context of a change in ownership.

longer countervailable. Rather, the Department is left with the discretion to determine, on a case-by-case basis, the impact of a change in ownership on the countervailability of past subsidies."

95. In sum, the plain language of the statute, supported by the SAA as well as the Preamble, demonstrates that Section 771(5)(F) is discretionary legislation. In this case, the Panel's findings with regard to any of the twelve measures in dispute can be applied by DOC to the facts of each of those determinations. Accordingly, because Section 771(5)(F) is discretionary legislation, within the meaning of the mandatory/discretionary distinction, Section 771(5)(F) cannot be found to be inconsistent with United States' WTO obligations. For this reason, the Panel should reject the EC's claims that Section 771(5)(F) is inconsistent with U.S. obligations under Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

IV. CONCLUSION

96. For the reasons set forth in this submission, the United States respectfully requests that the Panel make the following findings:

(1) By not self-initiating reviews to reconsider change in ownership situations in light of the Appellate Body's report in *UK Lead Bar*, the United States has not acted inconsistently with its obligations under the SCM Agreement;

(2) The seven DOC determinations (six investigations and one administrative review (Case Nos. 1-7)) are inconsistent with the United States' obligations under the SCM Agreement only to the extent that DOC did not fully examine whether the pre- and post-change-in-ownership entities involved were the same legal persons;

(3) The four DOC sunset determinations (Case Nos. 8-11) are not inconsistent with the United States' obligations under the SCM Agreement;

(4) The *GOES from Italy* administrative review (Case No. 12) is not inconsistent with the United States' obligations under the SCM Agreement;

(5) The U.S. change-in-ownership provision, section 771(5)(F) of the Tariff Act of 1930 (19 U.S.C. 1677(5)(F)), is not inconsistent with the United States' obligations under the SCM Agreement and the WTO Agreement; and

(6) The EC's claims regarding the expedited sunset review of the CVD order on cut-to-length plate from Sweden are not within the Panel's terms of reference.