BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany

(AB-2002-4)

APPELLEE'S SUBMISSION OF THE UNITED STATES OF AMERICA

September 24, 2002

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Service List

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In its "other appellant's" submission, the European Communities ("EC") has appealed three basic findings of the Panel in this dispute, two of which are substantive and one of which is procedural.[1] While the United States does not agree with all aspects of the Panel's reasoning concerning these three findings, the findings themselves were correct. Therefore, the Appellate Body should affirm all three findings.

2. First, the Panel correctly found that because no evidentiary requirements are applicable to the self-initiation of countervailing duty ("CVD") sunset reviews under Article 21.3 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), U.S. law, as such, is not WTO-inconsistent to the extent that it provides for the automatic self-initiation of sunset review. The Panel correctly rejected the EC argument that the evidentiary requirements for self-initiated CVD investigations under Article 11.6 of the SCM Agreement should be read into Article 21.3. Under customary rules of interpretation of public international law, there is no support in the SCM Agreement for the EC argument.

3. Second, the Panel correctly found that U.S. law, as such, is not inconsistent with the SCM Agreement's "obligation to determine" the likelihood of continuation or recurrence of subsidization in a sunset review. Although it was error for the Panel to have even considered this particular EC claim,[2] the Panel correctly rejected the EC claim that provisions of U.S. law mandated WTO-inconsistent behavior.

4. Finally, the Panel correctly found that the EC's claim regarding the consistency of U.S.

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[1] *Other Appellant's Submission of the European Communities Pursuant to Rule 23 of the Working Procedures for Appellate Review*, 16 September 2002 ("EC Appellant Submission").

[2] *See Appellant Submission of the United States*, 9 September 2002, paras. 48-64 ("US Appellant Submission").

law, as such, with the obligation to provide "ample opportunity to submit evidence" was not within the Panel's terms of reference. As the Panel found, the EC's panel request failed to identify the specific measure at issue with respect to this particular EC claim. Moreover, with respect to this particular claim, the EC's panel request also was deficient in that it: (a) failed to identify the provision(s) of the SCM Agreement allegedly violated; and (b) failed to provide a brief summary of the legal basis of the complaint. Therefore, even if the Appellate Body should reverse the Panel's finding that the EC's panel request failed to identify the specific measure at issue, it nonetheless should affirm the Panel's rejection of the EC claim because of these two other deficiencies in the EC's panel request.

II. ARGUMENT

A. The Panel Correctly Found that the SCM Agreement Does Not Impose Evidentiary Requirements on the Self-Initiation of Sunset Reviews Under Article 21.3 and that U.S. Law, As Such, Is Not WTO-Inconsistent to the Extent that It Provides for the Automatic Self-Initiation of Sunset Reviews

5. Article 21.3 of the SCM Agreement provides that a definitive CVD ("CVD order" in U.S. parlance) must be terminated not later than five years from its imposition unless the authorities determine that expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. Article 21.3 further provides that authorities may initiate a sunset review "on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry."

6. Under U.S. law, the U.S. Department of Commerce ("Commerce") and the U.S. International Trade Commission ("USITC") jointly conduct sunset reviews pursuant to

sections 751(c) and 752 of the Act.[3] A CVD order must be revoked after five years unless Commerce and the USITC make affirmative determinations that subsidization and injury would be likely to continue or recur.[4] Commerce has the responsibility for determining whether revocation of a CVD order would be likely to lead to continuation or recurrence of subsidization, whereas the USITC has the responsibility for determining whether revocation would be likely to lead to continuation or recurrence of injury. Under U.S. law, Commerce automatically initiates a sunset review on its own initiative within five years of the date of publication of a CVD order.[5]

7. Before the Panel, the EC claimed that U.S. law, as such, is inconsistent with the SCM Agreement to the extent that it provides for the automatic self-initiation of sunset reviews. According to the EC, the evidentiary requirements for the self-initiation of a CVD *investigation* under Article 11.6 of the SCM Agreement must be read into Article 21.3 so as to apply to the self-initiation of *sunset reviews*.

8. Although the United States does not agree with every aspect of the Panel's reasoning, as explained below, the Panel nonetheless correctly found that "no evidentiary standards are applicable to the self-initiation of sunset reviews under Article 21.3" and "thus conclude[d] that US CVD law and the accompanying regulations are consistent with the SCM Agreement in

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[3] The U.S. CVD and antidumping duty statute is found in title VII of the Tariff Act of 1930, as amended ("the Act"), 19 U.S.C. 1671 *et seq.* (Exhibit EC-13). Title II of the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994), amended title VII in order to bring it into conformity with U.S. obligations under the SCM Agreement and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").

[4] Section 751(d)(2) of the Act (Exhibit EC-13). Under the U.S. CVD law, the term "revocation" is equivalent to the concept of "expiry of the duty" as used in Article 21.3 of the SCM Agreement.

[5] Sections 751(c)(1) and (2) of the Act (Exhibit EC-13); *see also* Section 351.218 of the Commerce Regulations, 19 CFR 351.218(c)(1) (Exhibit EC-14).

respect of the automatic self-initiation of sunset reviews ... ."[6]

1. Under Article 21.3 of the SCM Agreement, the Right of An Authority to Initiate a Sunset Review on Its Own Initiative Is Unqualified

9. Article 21.3 of the SCM Agreement provides that authorities may 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). The use of disjunctive language in Article 21.3 is unambiguous and, under customary rules of interpretation of public international law, must be read according to its ordinary meaning, which is that an authority may *either* self-initiate a sunset review *or* initiate a sunset review in response to a duly substantiated request. The right of an authority to initiate a sunset review on its own initiative is unqualified.

10. Notwithstanding the text of Article 21.3, the EC argues that Article 21.3 must be interpreted so as to require authorities, when self-initiating sunset reviews, to be in possession of the same evidence that would be required under Article 11.6 for the self-initiation of a CVD investigation. In other words, according to the EC, one should read into Article 21.3 the words of Article 11.6. However, such an exercise runs afoul of the Appellate Body's admonition that "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 ... ."[7]

11. The Panel correctly found that the text of Article 21.3, based on its ordinary meaning, does not provide for the application of the Article 11.6 evidentiary requirements to sunset

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[6] *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R, Report of the Panel circulated 3 July 2002, para. 8.49 ("Panel Report").

[7] *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, Report of the Appellate Body adopted 16 January 1998, para. 45.

reviews.[8] Indeed, the EC itself concedes this point, stating that "it is self-evident that Article 21.3 does not contain any explicit cross-reference to the evidentiary standard set in Article 11.6 ... ."[9] The fact that the text of Article 21.3 contains no reference to evidentiary requirements for self-initiation of sunset reviews "must have some meaning".[10] The ordinary meaning of the absence of such a reference is simply that there is no requirement to apply the Article 11.6 evidentiary requirements (or any other evidentiary requirement) when authorities initiate sunset reviews on their own initiative.[11]

12. Consideration of the ordinary meaning of the terms of Article 21.3 in their context and in light of the object and purpose of the SCM Agreement leads to the same conclusion. The immediate context of Article 21.3 is Article 21. Article 21 contains no reference to Article 11.6, yet it does contain specific references to other provisions.[12] The SCM Agreement in general also contains multiple instances where obligations set forth in one provision are made applicable in another context by means of an express cross-reference[13] or by means of an explicit statement on

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[8] Panel Report, para. 8.26 ("[N]othing 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.").

[9] EC Appellant Submission, para. 18.

[10] *See Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R-WT/DS142/AB/R, Report of the Appellate Body adopted 19 June 2000 ("*Canada Autos*"), para. 138, citing *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body adopted 4 October 1996, page 19 ("*Japan Taxes*") (discussing how the "omission" in Article III:2 of GATT 1994 of the general principle in Article III:1 "must have some meaning").

[11] As discussed below, although the Panel ultimately reached the right result, the Panel's exploration of the significance of textual silence in Article 21.3 was in error and constituted a misapplication of the dictum in *Canada Autos*. *See also* US Appellant Submission, paras. 9-13 (explaining that just because silence may not always be dispositive does not mean that silence can never be dispositive). The Panel should have found simply that the absence of an evidentiary requirement meant that the drafters did not intend there to be an evidentiary requirement.

[12] In particular, Article 21.4 expressly makes the evidentiary and procedural provisions of Article 12 applicable to reviews (including sunset reviews under Article 21.3), while Article 21.5 expressly makes the provisions of Article 21 applicable to Article 18 undertakings.

[13] *See*, *e.g.*, Article 1.2 ("A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such subsidy is specific in accordance with the provisions of (continued...)

the scope of application of the particular provision.[14] Thus, it is obvious that the drafters knew how to have obligations set forth in one provision apply in another context. Accordingly, the omission of any express link between Article 21.3 and Article 11.6 means that the Members chose not to apply the evidentiary requirements of Article 11.6 to Article 21.3.

13. The Panel performed a similar contextual analysis and reached the same conclusion.[15] If the drafters had intended to make the Article 11.6 evidentiary standards for self-initiation of investigations applicable to self-initiation of Article 21.3 sunset reviews they could easily have done so. They did not. To find a cross-reference between the two provisions when there is none is, once again, simply to read into the SCM Agreement "words that are not there."

14. Moreover, a treaty interpreter must "give meaning and effect to all the terms of the treaty" and is "not free to adopt a reading that would result in reducing whole clauses of paragraphs of a

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[13] (...continued)
Article 2."); footnote 14 ("The total ad valorem subsidization shall be calculated in accordance with the provisions of Annex IV."); footnote 37 ("The term 'initiated' as used hereinafter means a procedural action by which a Member formally commences an investigation as provided in Article 11."); Article 16.5 ("The provisions of paragraph 6 of Article 15 shall be applicable to this Article."); Article 17.5 ("The relevant provisions of Article 19 shall be followed in the application of provisional measures."); Article 22.7 ("The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 21 and to decisions under Article 20 to apply duties retroactively."); Article 27.12 ("The provisions of paragraphs 10 and 11 shall govern any determination of *de minimis* under paragraph 3 of Article 15.").

[14] *See* Panel Report, footnote 261 (noting that "[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"); definition of "levy" under footnote 51 ("As used in this Agreement").

[15] *See* Panel Report, para. 8.26 ("[W]e agree with the United States' argument that 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 ... . It is clear that the drafters knew how to have obligations set forth in one provision apply in another context.").

treaty to redundancy or inutility."[16] The EC's attempt to read into Article 21.3 a cross-reference to Article 11.6 that is quite plainly not there – in the face of, and in contrast to, other express cross-references and scope language found in the SCM Agreement – would do just that, *i.e.*, it would render the other cross-references and scope language superfluous.

15. Nonetheless, the EC, in fact, espouses a general principle that any provision of the SCM Agreement is potentially applicable *mutatis mutandis* to any other provision of the SCM Agreement.[17] According to the EC, the only limitation on this free-for-all application is that a provision must be "relevant" to the issues addressed by another provision and that its application "does not create a situation of conflict or is not specifically excluded."[18]

16. The EC's approach suffers from several fatal flaws. First, as noted above, it violates the principle of effectiveness by rendering the various cross-references and scope language of the SCM Agreement redundant.[19] Second, and more generally, the EC's approach to treaty interpretation turns a customary rule of treaty interpretation on its head.

17. Article 31(1) of the *Vienna Convention on the Law of Treaties* reflect the customary rule

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[16] *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, Report of the Appellate Body adopted 12 January 2000 ("*Korea Dairy*"), para. 80 (citations omitted).

[17] EC Appellant Submission, paras. 21-22.

[18] *Id.*, para. 21.

[19] Indeed, the EC argument in this case is similar to an EC argument that the Appellate Body rejected in *United States - Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, Report of the Appellate Body adopted 11 February 2002. In that case, the issue was whether Members are required to register trademarks that meet the requirements of Article 15.1 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS Agreement"). The EC argued that Article 15.1 did require the registration of trademarks that met the Article 15.1 requirements. The United States, on the other hand, argued that Article 15.1 was more limited and did not establish an affirmative obligation to register every trademark that was eligible for registration. The Appellate Body agreed with the United States, finding that if Article 15.1 was interpreted to require registration of all signs or combinations of signs that met the distinctiveness criteria, "it would not have been necessary to establish *positively* in Article 15.4 of the TRIPS Agreement that '[t]he nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark." *Id.*, para. 161. To do so, according to the Appellate Body, "would reduce Article 15.4 to redundancy and inutility." *Id.*

of treaty interpretation 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 interpreting the SCM Agreement 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 SCM Agreement, the EC effectively calls for the ascertainment of the object and purpose of a particular provision of the SCM Agreement and then applying that object and purpose *in spite of* the ordinary meaning of the words. This runs afoul of the Appellate Body's admonition 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."[20]

18. The use of "purposes" to override the text of the SCM Agreement is precisely the sort of "independent basis for interpretation" which the Appellate Body has condemned as incorrect, and which 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 potentially "relevant" SCM Agreement provision applied to every other SCM Agreement provision (*mutatis mutandis*) unless the application created "a situation of conflict", the purely

[20] *Japan Taxes*, page 11, footnote 20. Indeed, The EC's approach is the very sort of teleological approach about which the EC itself later complains. *See* EC Appellant Submission, paras. 32-33. *See also* Michael Lennard, *Navigating by the Stars: Interpreting the WTO Agreements*, 5(1) J. INT'L ECON. L. (JIEL) 28-29 (2002) ("Although the reference to 'object and purpose' in the Vienna Convention rules draws upon elements of a teleological approach, it is not properly a license for a 'teleological' interpretation, since the 'object and purpose' considered is a measure for testing the ordinary meaning of treaty terms in their context, a headlight for illuminating and guiding the textual analysis, not a motor for driving its interpretation."), and M.N. Shaw, INTERNATIONAL LAW (3d ed. 1995) 584 (The teleological approach "emphasizes the object and purpose of the treaty as the most important backcloth against which the meaning of any particular treaty provision should be measured. This teleological school of thought has the effect of undermining the role of the judge or arbitrator, since he will be called upon to define the object and purpose of the treaty and it has been criticized for encouraging judicial lawmaking.").

theoretical questions of what is "relevant" and what creates "a situation of conflict" would become the focus of every WTO dispute. Moreover, the EC's approach ignores the basic fact, discussed above, that where the Members wished to have obligations set forth in one provision of the SCM Agreement apply in another context, they did so expressly. If accepted, the EC's approach would nullify the Members' expectations as *explicitly* expressed in the SCM Agreement.[21]

19. Moreover, nothing in the text of Article 11.6 supports the EC's assertion that the evidentiary requirements of that provision apply when authorities self-initiate sunset reviews under Article 21.3. Article 11.6 provides as follows:

> If, in special circumstances, the authorities concerned decide to *initiate an investigation* without have 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* (emphasis added).

Nothing in the text of the provision even suggests that its evidentiary standards must be applied in Article 21.3 sunset reviews.[22] To the contrary, the text of Article 11.6 unequivocally states that the evidentiary requirements are applicable when authorities decide to self-initiate an *investigation*.

20. Article 11, the immediate context for Article 11.6, supports this conclusion. Article 11 is entitled "Initiation and Subsequent Investigation". As the Panel correctly found, Article 11

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[21] *See, e.g.*, *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, Report of the Appellate Body adopted 23 August 2001 ("*Japan Hot-Rolled*"), para. 122 (finding no basis to read into Article 9.4 of the AD Agreement the word "entirely"), and para. 166 (finding no basis to read into Article 2.1 of the AD Agreement an additional condition that is not expressed in the text of the provision).

[22] The Panel correctly reached the same conclusion. *See* Panel Report, para. 8.34.

clearly deals with "investigations", such as that term is distinguished from "reviews" by the SCM Agreement.[23] Nothing in the text of Article 11 suggests that its provisions – including paragraph 6 – apply to anything other than the investigation phase of a CVD proceeding.[24]

21. As the Appellate Body has stated,

> The implication arises that the choice and use of different words in different places . . . are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement.[25]

Consistent with this teaching, the *Korea DRAMS* panel found that the term "investigation" means "the investigative phase leading up to the final determination of the investigating authority."[26] The panel correctly recognized that the choice and use of the word "investigation" in one article but not in another was not inadvertent, but instead had meaning. Considering the ordinary

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[23] Panel Report, footnote 293.

[24] Interestingly, in an ongoing panel proceeding, the EC is making the exact opposite argument. In *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India - Recourse by India to Article 21.5 of the DSU*, WT/DS141, the EC is arguing that Article 5.7 of the AD Agreement does not apply to subsequent reviews because Article 5.7, by its terms, is limited to "investigations". As stated by the EC in paragraph 107 of its first submission in that proceeding, this interpretation is confirmed by Article 11.4 – the AD Agreement equivalent to Article 21.4 of the SCM Agreement – "which does not mention Article 5.7 among the procedural provisions that apply to reviews carried out under Article 11."

[25] *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body adopted 13 February 1998 ("*EC Hormones*"), para. 164 (citation omitted).

[26] *See 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 ("*Korea DRAMS*"), para. 6.87, footnote 519. The panel in that case was discussing Article 5 of the AD Agreement, which is the AD Agreement's equivalent to Article 11 of the SCM Agreement.

In this regard, it should be noted that Article 32.2 of the SCM Agreement, which is a transition rule, also distinguishes between "investigations" and "reviews of existing measures." In *Brazil - Measures Affecting Desiccated Coconut*, the Appellate Body specifically recognized this distinction between the initial investigation and the post-investigation or review phase. *See* WT/DS22/AB/R, Report of the Appellate Body adopted 20 March 1997, page 9 (noting that the imposition of "definitive" duties (an "order" in U.S. parlance) ends the investigative phase); *see also United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, Report of the Appellate Body adopted 7 June 2000, paras. 53, 61 (distinguishing between Article 21.2 administrative reviews and the original determination in an investigation).

meaning of the terms of Article 11.6 of the SCM Agreement, there is no support for the proposition that the Article 11.6 evidentiary standards for self-initiation apply beyond the context of an initial investigation.[27]

2. The Functions of Original Investigations and Sunset Reviews Are Different

22. The EC attempts to avoid the results of a conventional interpretative analysis by asserting that CVD investigations and sunset reviews have the same purpose.[28] According to the EC, sunset reviews are nothing more than investigations conducted five years after the imposition of the original CVD order.[29] Because of this, the evidentiary requirements of Article 11.6 should apply to the self-initiation of sunset reviews under Article 21.3.

23. Even if the EC were correct as a factual matter that the two procedures have the same function, that still would be no basis for ignoring the text and context of the relevant provisions of the SCM Agreement. However, as explained below, the two procedures do not have the same function. Thus, it is not unreasonable to find that the initiation requirements for investigations

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[27] The EC also argues that a consideration of Articles 22.1 and 22.7 as context for Article 21.3 leads to the conclusion that the evidentiary standards that apply to self-initiation of investigations also apply to self-initiation of sunset reviews. EC Appellant Submission, paras. 30-31. The EC is wrong. Article 22 addresses "Public Notice and Explanation of Determinations". The individual provisions of Article 22 require that public notice be given for initiation of an investigation, any preliminary or final determination, imposition of provisional measures, conclusion or suspension of an investigation, and termination or suspension of an investigation. These provisions also set forth what information such public notices must contain. The EC is correct that Article 22.7 provides that the provisions of Article 22 apply "*mutatis mutandis*" to reviews. Consistent with the ordinary meaning of "*mutatis mutandis*", this simply means that the public notice and explanation provisions are applicable to reviews, but with "necessary changes" or "changes as appropriate". To suggest that Article 22.7 is a vehicle for making the evidentiary requirements of Article 11.6 for self-initiation of investigations applicable to Article 21.3 sunset reviews ignores the obvious meaning of the text of Article 22. Indeed, if anything, Article 22.7 merely reinforces the point that the drafters of the SCM Agreement knew how to make the requirements of one provision apply to another provision, and that they chose not to make the requirements of Article 11.6 apply to Article 21.3.

[28] EC Appellant Submission, paras. 22, 25-26.

[29] EC Appellant Submission, para. 22.

and sunset reviews are different.[30]

24. Contrary to the EC's assertions, investigations and sunset reviews do serve different functions and do, 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 behavior if the remedial measure is removed, not whether or to what extent subsidization currently exists, which is the focus of an investigation.[31] Therefore, it was reasonable for the drafters to adopt different initiation requirements for investigations and reviews.[32]

25. The Panel reached a similar conclusion, albeit for the wrong reasons.[33] In particular, the Panel made findings concerning the rationale for the inclusion of evidentiary standards for self-

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[30] In this regard, the EC makes an assertion that simply is not true. The EC asserts that the Panel found that the evidentiary requirements of Article 11.2 of the SCM Agreement for an application by the domestic industry for an investigation apply to the domestic industry in the case of sunset reviews. EC Appellant Submission, para. 28, citing to Panel Report, para. 8.38. The Panel found no such thing. Instead, the Panel noted merely that the evidentiary standards that must be met in the case of written applications by or on behalf of a domestic industry for a CVD investigation also must be met in the case of self-initiated investigations under Article 11.6. Panel Report, para. 8.38. The Panel never addressed – because it was not called upon to do so – the question of whether the phrase "duly substantiated request made by or on behalf of the domestic industry" in Article 21.3 is a reference to the evidentiary requirements of Article 11.2.

[31] Indeed, it should be noted that Article 11.6 requires evidence of the *existence* of a subsidy, injury and causal link. Because a sunset review deals with likely future behavior, the evidentiary requirements of Article 11.6 do not correspond exactly to the type of evidence needed for a sunset review. This is yet another reason why the requirements of Article 11.6 should not be read into Article 21.3.

[32] The United States is not advocating speculation as to the intent of the drafters, because the text of the SCM Agreement is the best evidence of their intent. The point is that should one engage in such improper speculation, one would conclude that there were plenty of reasons as to why the drafters would have chosen to have different initiation requirements for investigations and sunset reviews.

[33] *See* Panel Report, paras. 8.43-8.44.

initiation of investigations – that initiations of investigations have a "chilling effect" on trade and that the evidentiary standards for self-initiation of investigations "are understood to exist for the purpose of avoiding trade harassment".[34] The Panel then reasoned that the initiation of sunset reviews do not have the same effect and so the same evidentiary standards for self-initiation need not apply.[35] The EC argues that "[t]his kind of teleological approach is alien to the interpretive criteria of the Vienna Convention and should be discouraged by the Appellate Body."[36] The United States agrees. The use of rationales found nowhere in the text of the SCM Agreement as independent bases for interpretation runs afoul of basic principles of treaty interpretation.

26. Moreover, it bears emphasis that in an initial investigation, authorities are dealing with a situation where there have never been any determinations one way or the other as to whether imported merchandise is being subsidized and whether the domestic industry is being injured as a result. In this context, it is not unreasonable to require some evidentiary showing before an investigation is commenced. In a sunset review, however, the situation is markedly different – a remedy has been provided because the conditions warranting the remedy have previously been determined to exist. In this context, it is not unreasonable to refrain from requiring an evidentiary showing simply for purposes of triggering a review to determine whether the remedy does or does not remain necessary to offset the injurious subsidization.[37]

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[34] Panel Report, paras. 8.35-8.36 and 8.43.

[35] *Id*.

[36] EC Appellant Submission, paras. 32-33. The United States notes, however, that the EC's condemnation of an approach that focuses on "object and purpose" seems inconsistent with its advocation of an unrestricted *mutatis mutandis* approach (*see* EC Appellant Submission, paras. 21-22), discussed above.

[37] Again, the United States is not advocating this type of speculation. The point simply is that even if, as proposed by the EC, one were to consider the functions of investigations and sunset reviews, one still would have to conclude that it is eminently reasonable to have different evidentiary requirements for the two different procedures.

27. To suggest, as does the EC, that authorities must already have considered the issues of subsidization and injury in determining whether to *initiate* a sunset review is like putting the cart before the horse.[38] Article 21.3 does not require such a nonsensical exercise. The Panel concurs in this regard:

> The initiation of a review is merely the beginning of a process leading to a determination as to whether or not subsidization and injury are likely to continue or recur. The standards for *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.[39]

As the Panel properly concluded, the EC's argument "is based upon an incorrect equation of the standards for initiation with those for the substantive determination to be made in a review."[40]

28. In sum, the words contained in Articles 21.3 and 11.6, read in their context and in light of the object and purpose of the SCM Agreement, provide no support for the EC's proposition that the Article 11.6 evidentiary requirements for self-initiation of a CVD investigation apply in Article 21.3 sunset reviews initiated on by authorities on their own initiative. The EC simply seeks to read into Article 21.3 "words that are not there." The Panel's finding that no evidentiary standards are applicable to the self-initiation of sunset reviews under Article 21.3 is correct and should be affirmed.

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[38] EC Appellant Submission, paras. 18-20. Arguably, the results of the initial investigation (and of the most recent administrative reviews, if any) in general could be considered evidence of the existence of subsidization.

[39] Panel Report, para. 8.42 (emphasis in original).

[40] *Id*.

B. The Panel Correctly Found That U.S. Law, As Such, Is Consistent with the SCM Agreement in Respect of the Investigating Authority's Obligation to Determine the Likelihood of Continuation or Recurrence of Subsidization in a Sunset Review

29. The EC has appealed the Panel's finding that U.S. law, as such, is consistent with Article 21.3 of the SCM Agreement in respect of the "obligation to determine" the likelihood of continuation or recurrence of subsidization in sunset reviews. As the United States previously has explained, the Panel should have rejected this particular EC claim and should not have considered it on the merits.[41] Nevertheless, should the Appellate Body disagree, the United States will now take the opportunity to respond to the EC's substantive arguments concerning this claim.[42]

1. U.S. Law, As Such, Is Consistent with the "Obligation to Determine"

30. In 1995, pursuant to the URAA, the United States amended its CVD statute to include provisions for the conduct of sunset reviews of CVD measures. As such, Commerce and the USITC jointly conduct sunset reviews pursuant to sections 751(c) and 752 of the Act. Commerce has the responsibility of determining whether revocation of a CVD order would be likely to lead to continuation or recurrence of subsidization, whereas the USITC has the responsibility of determining whether revocation would be likely to lead to continuation or recurrence of injury. Pursuant to section 751(d)(2) of the Act, a CVD order must be revoked after five years unless Commerce and the USITC make affirmative determinations that

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[41] *See* US Appellant Submission, paras. 48-64.

[42] The United States did not have an opportunity to respond to the EC arguments before the Panel because it was not until the EC responded to the questions posed by the Panel at the second substantive meeting that the United States became aware that the EC was even making a claim regarding the consistency of U.S. law, as such, with the "obligation to determine."

subsidization and injury would be likely to continue or recur. In 1998, Commerce published regulations setting forth procedures for participation in, and the conduct of, sunset reviews.[43]

31. In its panel request, the EC did not identify exactly *which* portion or portions of sections 751(c) or 752 or Commerce's *Sunset Regulations* it considered to be inconsistent with the "obligation to determine". In fact, the EC failed to do so in any of its submissions before the Panel. Furthermore, the EC failed to articulate exactly *how* any portion or portions of sections 751(c) or 752 or Commerce's *Sunset Regulations* are inconsistent with the "obligation to determine". The EC Appellant Submission is equally uninformative. The EC's failure to explain which specific U.S. statutory or regulatory provisions are WTO-inconsistent, and how they are WTO-consistent, simply confirms the United States' position that the EC never properly raised a claim concerning U.S. law, as such, and the "obligation to determine".

32. Nevertheless, the EC seeks to have the Appellate Body find that U.S. CVD law, as such, is inconsistent with Article 21.3 of the SCM Agreement in respect of the investigating authority's "obligation to determine" the likelihood of continuation or recurrence of subsidization in a sunset review.[44] In order to address the EC's claim, the Appellate Body must first consider the statutory and regulatory provisions now at issue.

33. Paragraphs 8.99 and 8.100 of the Panel Report set out the applicable statutory provisions concerning the "obligation to determine". As the Panel properly found, the operative language of section 751(c) of the Act is essentially identical to the language in Article 21.3 of the SCM

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[43] *Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders* ("*Sunset Regulations*"), 63 FR 13516 (March 20, 1998), codified in 19 CFR part 351. *See* Exhibit EC-14.

[44] EC Appellant Submission, para. 62.

Agreement.[45] The Panel correctly found no WTO-inconsistencies in the U.S. sunset statute for the simple reason that there are none.

34. With respect to the regulations, with one exception, neither the EC nor the Panel ever addressed whether specific Commerce regulatory provisions could be considered inconsistent with the "obligation to determine". Again, the simple reason is that there is no inconsistency.

35. With respect to the *one sentence* in Commerce's *Sunset Regulations* that the Panel did address, it simply drew an incorrect inference. Further, regardless of whether the Panel's "concerns" are well-founded, the fact remains that the provision does not mandate WTO-inconsistent behavior. The Panel properly came to this same conclusion.[46]

36. The sentence in questions appears in Section 351.218(e)(2)(i) of the *Sunset Regulations*.[47] The Panel seemed concerned that the "extraordinary circumstances" language in 19 CFR 351.218(e)(2)(i) has the effect of "curtailing the discretion" of Commerce to come up with a new rate of subsidization and placing an unfair burden of proof on the exporting parties.[48] The language in the regulatory provision, however, does no such thing. Rather, the provision simply requires Commerce to justify a decision to rely on a rate of subsidization other than the one

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[45] Panel Report, para. 8.103. In this regard, the Panel's findings as to the meaning of U.S. law constitute findings of fact.

[46] Panel Report, para. 8.105. In order for legislation, as such, to be found WTO-inconsistent, the legislation must be "mandatory"; *i.e.*, it must require WTO-inconsistent action or preclude WTO-consistent action. *See, e.g., United States - Measures Treating Export Restraints as Subsidies*, WT/DS194, Report of the Panel adopted 23 August 2001 ("*U.S. Export Restraints*"), paras. 8.126-8.132.

[47] As discussed in the US Appellant Submission, para. 63, the first reference to this language appears in the interim report itself. None of the submissions of the parties discussed this regulatory language. The absence of any discussion is attributable to the fact that the EC did not raise the WTO-consistency of U.S. law, as such, with the "obligation to determine" until the end of the panel proceeding.

[48] Panel Report, para. 8.105, quoting part of 19 CFR 351.218(e)(2)(i), which provides that "[e]ven where the Department conducts a full sunset review, only under the most extraordinary circumstances will the Secretary rely on a countervailing duty rate . . . other than those it calculated and published in its prior determinations...."

calculated in the investigation or a prior administrative review. The domestic parties are equally likely to seek such a decision, because they typically want Commerce to determine a higher rate of subsidization. The Panel is, therefore, wrong to suggest that the provision somehow places an unfair or unequal burden on respondent parties.

37. As explained previously, Commerce has the responsibility of determining whether revocation of a CVD order would be likely to lead to the continuation or recurrence of subsidization, whereas the USITC has the responsibility of determining whether revocation would be likely to lead to the continuation or recurrence of injury. The regulation considered by the Panel relates to the *rate* of subsidization that Commerce will report to the USITC for consideration in its determination of likelihood of continuation or recurrence of injury. This regulation does not in any way relieve Commerce of the Article 21.3 obligation to determine the *likelihood* of continuation or recurrence of subsidization. As such, the regulation does not on its face mandate WTO-inconsistent behavior.

38. The EC also argues that U.S. law is not "genuinely discretionary" as evidenced by the fact that the Panel found that U.S. law as applied in the particular sunset review at issue in this case was WTO-inconsistent.[49] Here, the EC simply misstates the standard for distinguishing between mandatory and discretionary legislation. The fact that a particular *application* of a law is found

[49] EC Appellant Submission, paras. 57-61. While the EC criticizes the Panel for "abuses of the distinction between discretionary and mandatory laws", *id.*, Section 3.4, it appears that the EC simply does not understand how the distinction operates. The EC considers it significant that "[t]he Panel, in fact, does not exclude that the law is drafted in such a way that it allows WTO-inconsistent determinations." *Id.*, para. 55. However, this is a misstatement of the distinction. Members are not required to enact legislation that is guaranteed to never be applied in a WTO-inconsistent manner. *See Canada - Measures Affecting the Export of Civilian Aircraft - Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, Report of the Appellate Body adopted 4 August 2000, para. 38. Instead, as noted above, under the mandatory/discretionary distinction, Members are obligated to refrain from enacting legislation that mandates WTO-inconsistent action or that precludes WTO-consistent action.

to be WTO-inconsistent does not mean that the law *as such* is automatically WTO-inconsistent.[50] The fact is that the EC has failed to identify and articulate how any provisions of the U.S. statute or regulations require Commerce to act inconsistently with the "obligation to determine", or preclude Commerce from acting consistently with that obligation.

2. The SAA and the *Sunset Policy Bulletin* Do Not Require Commerce to Apply the Statute or the Regulations in a WTO-Inconsistent Manner

39. Concurrent with the passage of the URAA, the U.S. Congress approved and published a "Statement of Administrative Action" (or "SAA"). The SAA is a type of legislative history which, under U.S. law, provides interpretive guidance in respect of the statute.[51] Subsequent to passage of the URAA, Commerce published a policy bulletin related to sunset reviews.[52] Under U.S. law, the *Sunset Policy Bulletin* is considered a non-binding statement, providing evidence of Commerce's understanding of sunset-related issues not explicitly addressed by the statute and regulations. Neither the SAA nor the *Sunset Policy Bulletin* have operational life or status independent of the statute or regulations.[53] Nor do they require Commerce to interpret the statute in a WTO-inconsistent manner.

40. In the EC Appellant Submission, the EC faults the Panel for "willfully" failing to analyze what the EC considers to be the "highly relevant" text of the SAA and the *Sunset Policy*

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[50] *See, e.g.*, *Japan Hot-Rolled*, para. 240(g), in which the Appellate Body affirmed the panel's finding that the captive production provision of the U.S. statute, as such, is not inconsistent with the AD Agreement, but reversed the panel's other finding, and found that the USITC's application of the captive production provision in the anti-dumping investigation in question was inconsistent with the AD Agreement.

[51] *See U.S. Export Restraints*, paras. 8.99-8.100 (discussing the status in U.S. law of the SAA).

[52] *Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin* ("*Sunset Policy Bulletin*"), 63 FR 18871 (April 16, 1998) (Exhibit EC-15).

[53] *See U.S. Export Restraints*, para. 8.99 (discussing the unique legal status of the SAA). The legal status of the *Sunset Policy Bulletin* is comparable to that of agency precedent. *See Id.*, paras. 8.120-8.129 (discussing the non-binding status of Commerce CVD precedent). As with its administrative precedent, Commerce normally would follow its policy bulletin or explain why it did not do so.

Bulletin.[54] Yet the fault here lies with the EC. The EC never articulated how particular text in the SAA or the *Sunset Policy Bulletin* requires Commerce to interpret the statute or the regulations in a WTO-inconsistent manner in respect of the "obligation to determine".

41. The EC suggests that the SAA, in conjunction with the *Sunset Policy Bulletin*, establishes a U.S. "practice" which demonstrates that the U.S. statute violates Article 21.3 in respect of the "obligation to determine".[55] The EC is wrong for two reasons.

42. First, as a factual matter, the EC misstates U.S. practice. According to the EC, Commerce "does *not* consider *any* changes or terminations of subsidy programs, *unless* such changes or terminations were found in a *previous review* of the order."[56] The EC's statement, however, is belied by the very facts of the particular sunset review at issue in this case. Even though *no* administrative review had been conducted with respect to the CVD order on corrosion-resistant steel from Germany, Commerce agreed with the EC and the German producers that two programs had been terminated with no residual benefits. Commerce adjusted the net subsidy rate accordingly.[57]

43. U.S. law, in fact, requires Commerce to consider whether any change to a subsidy program which gave rise to a net countervailable subsidy determination in the investigation or subsequent administrative reviews has occurred that is likely to affect the net countervailable subsidy.[58] Commerce may make adjustments to the net countervailable subsidy determined in

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[54] EC Appellant Submission, paras. 45-46.

[55] *See* EC Appellant Submission, paras. 48, 50.

[56] EC Appellant Submission, paras. 50 (emphasis added).

[57] *See Answers of the United States to Questions from the Panel* (21 February 2002), para. 73, and *US First Written Submission*, para. 40.

[58] *See* Panel Report, para. 8.100, quoting section 752(b)(1) of the Act.

the investigation if, for example, there is evidence demonstrating that programs have been terminated with no residual benefits. Contrary to the EC's claim, Commerce may make such adjustments *regardless* of whether it has conducted an administrative review. The EC is simply wrong, therefore, when it claims that Commerce refuses to consider changes or terminations of subsidy programs unless Commerce has already considered such changes or terminations in the context of a previous review of the order.

44. Second, U.S. "practice", even if it were WTO-inconsistent, could not render the U.S. statute and regulations, as such, WTO-inconsistent. First, as noted above, the Appellate Body recognized in the *Japan Hot-Rolled* case that the fact that legislation is applied in a WTO-inconsistent manner does not mean that the legislation, as such, is WTO-inconsistent. Second, as a matter of U.S. administrative law, Commerce practice is not binding in the sense that Commerce is not obliged to follow its own precedent so long as it explains departures from such precedent.[59] Thus, as a matter of law, Commerce practice cannot transform discretionary legislation into mandatory legislation.

45. In sum, the EC has failed to identify and articulate how any provision of the U.S. statute or the Commerce *Sunset Regulations*, as such, is inconsistent with the "obligation to determine" under Article 21.3.[60] Accordingly, the Appellate Body should affirm the Panel's finding that

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[59] *See U.S. Export Restraints*, para. 8.126, for a discussion of the status of Commerce precedent under U.S. law.

[60] With respect to the consistency of the U.S. legislation, as such, with the "obligation to determine", the EC accuses the Panel of having failed to make an "objective assessment of the matter" within the meaning of Article 11 of the DSU. The Appellate Body has found that a failure to make an "objective assessment" entails a disregard or distortion of evidence submitted to a panel such that the party submitting the evidence has been denied due process of law or natural justice. *EC Hormones*, para. 133. The EC fails to demonstrate how the Panel's consideration of the EC evidence rises to the level of a denial of due process or natural justice. Because of the deficiencies in the EC's arguments noted above, the Panel simply found that the EC had failed to make its case.

U.S. legislation is consistent with that obligation.

C. The Panel Correctly Found That the EC's Claim Regarding the Consistency of U.S. Law, As Such, with the Obligation to Provide "Ample Opportunity to Submit Evidence" Was Not Within the Panel's Terms of Reference

46. Before the Panel, the United States argued that the Panel should not have made any substantive findings regarding the consistency of U.S. law, as such, with the obligation to provide "ample opportunity to submit evidence" in a sunset review. First, the United States argued that this particular claim was not within the Panel's terms of reference under Article 7 of the DSU because Article 12 of the SCM Agreement (the claim)[61] was not identified in the EC's panel request and the specific provisions of U.S. law governing the opportunity to submit evidence (the measure) were not identified in the EC's panel request.[62] Second, the United States argued that even if this claim was within the Panel's terms of reference, the EC had not complied with the obligation of Article 6.2 to provide a sufficient summary of its complaint and the United States was prejudiced thereby.[63]

47. In its interim report, the Panel disregarded the U.S. objections, and made findings in favor of the EC. However, after the United States pointed out in its interim comments that the Panel had disregarded the U.S. objections, the Panel reconsidered its findings and found instead that the provisions of U.S. law dealing with "opportunity to submit evidence" are not identified

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[61] Article 12 sets out evidentiary and procedural requirements for the conduct of CVD investigations. Article 21.4 expressly makes these requirements applicable to reviews carried out under Article 21, which would include sunset reviews under Article 21.3.

[62] *See* Panel Report, para. 8.133; and *Comments of the United States on Responses of the European Communities to Questions from the Panel following the Second Meeting of the Panel* (9 April 2002), paras. 21-22; and *Request by the United States for Interim Review* (23 May 2002), paras. 17-26.

[63] *See* Panel Report, para. 8.133; and *Comments of the United States on Responses of the European Communities to Questions from the Panel following the Second Meeting of the Panel* (9 April 2002), paras. 21-22; and *Request by the United States for Interim Review* (23 May 2002), paras. 17-26.

explicitly or implicitly in the EC's panel request.[64] The Panel concluded that the EC's claim under Article 12 of the SCM Agreement were outside the Panel's terms of reference and, as such, determined not to address it.[65] For the reasons set forth below, the Panel's findings in this regard are correct and should be affirmed by the Appellate Body.

1. The Panel Correctly Found that the EC's Panel Request Failed to Identify the Specific Measure at Issue

48. Article 7 of the DSU provides that the terms of reference are contained in the request for establishment of a panel. Article 6 of the DSU provides for the establishment of panels. Article 6.2 provides, in part:

> The request for establishment of a panel ... shall ... *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).

49. In respect of the terms of reference of panels, the Appellate Body has stated:

> Thus, "the matter referred to the DSB" for the purposes of Article 7 of the DSU ... must be the "matter" identified in the request for establishment of a panel under Article 6.2 of the DSU ... . 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*).[66]

50. Further, the Appellate Body has stated:

> 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*

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[64] Panel Report, paras. 8.142-8.144.

[65] Panel Report, para. 8.145.

[66] *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, Report of the Appellate Body adopted 25 November 1998, para. 72 (emphasis in original).

the third parties of the legal basis of the complaint.[67]

51. In the view of the United States, no reasonable person could read the EC panel request and conclude that the EC was complaining about the consistency of U.S. law, as such, with respect to anything other than the fact that the United States automatically self-initiates sunset reviews and does not apply the *de minimis* standard of Article 11.9 to sunset reviews. There is no reference in the panel request to the "opportunity to submit evidence".

52. The Panel itself made similar factual findings concerning the EC's panel request:

> 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 evidentiary standards applied in relation to the initiation of that review, and paragraph 11 summarizes the European Communities' challenge to the US decision in that review, as well as to "certain aspects of the sunset review procedures which let to it". This latter phrase could not be understood to include US CVD law in respect of the opportunity to submit evidence.[68]

53. The EC's panel request did make a broad general reference to the U.S. statutory and regulatory provisions that provide the framework for the conduct of sunset reviews.[69] While the provisions that govern the opportunity to submit evidence in a sunset review are included within this legislative framework, as the Panel properly found, "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."[70] The Panel properly concluded, therefore, that U.S.

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[67] *Korea Dairy*, para. 122 (emphasis in original), citing *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, Report of the Appellate Body adopted 25 September 1997, para. 142.

[68] Panel Report, para. 8.141.

[69] WT/DS213/3, para. 12.

[70] Panel Report, para. 8.142.

law, as such, in respect of the "opportunity to submit evidence" in a sunset review was not identified by the EC in its panel request.

54. Based on the reasoning of the panel in *Japan Film*, the Panel also considered whether the measure – *i.e.*, U.S. law, as such, in respect of the "opportunity to submit evidence" – was sufficiently related to a measure or measures that were specifically identified in the EC's panel request, so as to bring the measure within the Panel's terms of reference.[71] In *Japan Film*, the panel considered 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. The panel there found in the affirmative – that, in essence, the *implicit* identification of a measure could suffice under Article 6.2 of the DSU under certain conditions:

> 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.[72]

In the instant case, the Panel correctly found that there was no reference to a measure in the EC's panel request that could be seen as being closely related to U.S. law, as such, in respect of the "opportunity to submit evidence".

55. The Panel noted that the EC's request refers to "certain aspects of the sunset review

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[71] *See* Panel Report, para. 8.143, citing *Japan - Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998 ("*Japan Film*"), para. 10.8.

[72] *See Panel Report*, para. 8.143, quoting *Japan Film*, para. 10.8.

procedure which led to [the DOC decision not to revoke the CVDs on carbon steel]".[73] The Panel correctly found, however, that this reference was too general to have put the United States on notice of the EC's alleged claims concerning U.S. law, as such, in respect of the obligation to provide "opportunity to submit evidence".[74] The Panel correctly concluded that,

> To consider otherwise would mean that [the United States was put] 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.[75]

The Panel correctly found, therefore, that U.S. law, as such, 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 panel establishment so as to properly bring it within the Panel's terms of reference.[76] The Appellate Body should affirm the Panel's finding that the EC's panel request failed to identify the specific measure at issue in respect of the "opportunity to submit evidence."

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[73] Panel Report, para. 8.144.

[74] *Id*.

[75] *Id*. (emphasis in original). The EC seems to suggest that the United States should have been on notice of the EC's specific claims concerning U.S. law, as such, in respect of the obligation to provide "opportunity to submit evidence", based upon the context of the sunset determination at issue before the Panel and U.S. domestic court litigation. EC Appellant Submission, para. 81. However, the mere fact that an issue may have been raised in domestic court proceedings cannot satisfy the EC's obligation to provide notice of the claims it intended to raise in a WTO dispute settlement proceeding. The United States would also point out a misstatement in footnote 63 of the EC's Appellant Submission with respect to ongoing domestic court litigation. In the 30 April 2002 determination, referenced by the EC, Commerce determined that it was unable, in the time allotted by the Court, to determine the rate of subsidization likely to prevail.

[76] *Id*.

2. With Respect to the EC's Claim Concerning the "Opportunity to Submit Evidence", the EC's Panel Request Fails to Identify the Provisions of the SCM Agreement that Allegedly Are Violated

56. An additional deficiency in the EC's panel request is that it did not identify the provisions of the SCM Agreement that allegedly are violated with respect to the "opportunity to submit evidence." More specifically, the EC's panel request did not refer to Article 12 of the SCM Agreement in general, or to any paragraph of Article 12 in particular. The Panel did not need to address this failure on the part of the EC because it found that the EC panel request was deficient due to the EC's failure to identify the specific measure at issue. However, should the Appellate Body reverse the Panel with respect to this finding, the Appellate Body should complete the Panel's analysis and find that the EC's claim regarding the "opportunity to submit evidence" is not within the Panel's terms of reference due to the EC's failure to identify the provisions of the SCM Agreement that allegedly have been violated.

3. The EC's Panel Request Fails to "Provide 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

57. An additional deficiency in the EC's panel request is that it fails to "provide 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.[77] The summary of the legal basis of the complaint may be brief, but it must be "sufficient to present the problem clearly". As the Appellate Body has cautioned, "[i]t is

[77] Because the Panel found that the EC panel request failed to identify a specific measure, it declined to address the question of whether the EC panel request satisfied the requirement to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Panel Report, footnote 364. Should the Appellate Body reverse the Panel's finding that the EC panel request failed to identify a specific measure, the Appellate Body should complete the Panel's analysis and find that the EC panel request failed provide the summary called for by Article 6.2 of the DSU.

not enough . . . that 'the legal basis of the complaint' is summarily identified; *the identification must 'present the problem clearly*'."[78]

58. The EC argues that U.S. law, as such, violates Article 12 in respect of the obligation to provide "ample opportunity to submit evidence" in a number of ways.[79] Yet none of these ways are mentioned in its panel request. The EC argues, however, that its panel request is sufficiently precise because it mentions Article 21 "in its totality" as well as the Commerce *Sunset Regulations*.[80] Neither of these facts is sufficient – whether individually or in combination – to establish that the EC's panel request provides 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.

59. The problem with the EC's panel request is not simply that it fails under Article 6.2 to "present the problem clearly", but that it fails to present the problem at all. There is simply no discussion in the panel request related to how U.S. law, as such, is in violation of the Article 12 obligation concerning the "opportunity to submit evidence". In fact, as noted above, the EC's panel request does not even refer to Article 12.

60. Furthermore, the EC's reliance on *Thai Angles* in support of its precision argument is inapposite.[81] The Appellate Body's finding in that case suggest just the opposite – that the EC's panel request fails to present the problem clearly.

61. The mere listing of treaty articles in a panel request might, in light of attendant

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[78] *Korea Dairy*, para. 120 (emphasis added).

[79] EC Appellant Submission, para. 73.

[80] EC Appellant Submission, para. 70.

[81] EC Appellant Submission, paras. 82-86, discussing *Thailand - Anti-dumping duties on Angles, Shapes and Sections of Iron or Non-alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, Report of the Appellate Body adopted 5 April 2001 ("*Thai Angles*").

circumstances, be sufficient to meet the standard of clarity required by Article 6.2 of the DSU.[82] On the other hand, mere listing of articles might not satisfy the standard of Article 6.2 where, for example, the article listed establishes not one single, distinct obligation, but rather multiple obligations.[83]

62. In *Thai Angles*, Poland stated in its panel request that "Thai authorities initiated and conducted this investigation in violation of the procedural . . . requirements of Article VI of GATT 1994 and Article 5 . . . of the Antidumping Agreement".[84] The Appellate Body observed that Article 5 sets out "various but closely related procedural steps" that investigating authorities must comply with in initiating and conducting an anti-dumping investigation. The Appellate Body found that in view of the "interlinked nature of the obligations" in Article 5, Poland's reference to the "procedural requirements" of Article 5 was sufficient to meet the clarity requirements of Article 6.2 of the DSU.[85] In light of the circumstances in the instant case, however, the EC's mere reference to Article 21 does not.

63. First, unlike Article 5 of the AD Agreement, Article 21 of the SCM Agreement does not establish a distinct obligation or a series of interlinked obligations. Presumably, this is why the EC felt compelled to specifically "note" particular paragraphs of Article 21 in the claims set forth in its panel request (*i.e.*, paragraphs 1 and 3).[86] Second, unlike Poland's reference to "initiation and conduct of the investigation in violation of procedural requirements", the EC never references "opportunity to submit evidence" or similar language that might arguably have

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[82] *Thai Angles*, para. 87.
[83] *Id.*
[84] *Id.*, para. 93.
[85] *Id.*
[86] *See* WT/DS213/3, para. 12.

provided the brief summary of the legal basis of the claim sufficient to present the problem clearly. Finally, the EC's reference to the U.S. regulations governing sunset reviews was in the context of its clearly-stated claim concerning self-initiation of sunset reviews. Consistent with its findings in *Thai Angles*, the Appellate Body should find that the EC's mere listing of Article 21 in its panel request does not satisfy the clarity standard of Article 6.2 of the DSU.

64. The EC also argues that because it referenced Article 12 in its First Written Submission, its panel request clearly meets the minimum sufficiency requirements laid down in DSU Article 6.2.[87] Needless to say, making arguments in the context of a post-request submission does not retroactively cure the failure to summarize the legal basis for a claim in the panel request.

65. Furthermore, as a factual matter, the EC's references to Article 12 in the context of its first and subsequent submissions were exclusively in the context of the specific sunset determination at issue in this case.[88] The fact that the EC addressed Commerce's *application* of Article 12 evidentiary obligations in the context of the particular sunset determination as WTO-inconsistent does not *per se* mean that the EC identified *U.S. law, as such*, as WTO-inconsistent. The EC simply never articulated any legal basis for a complaint in respect of a claim that U.S. law, as such, is inconsistent with WTO obligations under Article 12 in respect of the

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[87] EC Appellant Submission, paras. 73-74.

[88] For example, the EC cites its response to the Panel's question 18 after the first panel meeting as evidence that its claim concerning U.S. law, as such, and the "opportunity to submit evidence" was sufficiently clear throughout the course of the panel proceeding. EC Appellant Submission, para. 77. On the contrary, the Panel's question and the EC's response thereto are with respect to submission of evidence by the EC respondent parties in the context of the particular sunset review at issue. *See Replies of the European Communities to the Questions of the Panel at the First Substantive Meeting* (21 February 2002), pages 35-38.

Moreover, in its various submissions, the EC was never clear as to exactly which provision of Article 12 was being violated. For example, in paragraph 27 of its Oral Statement at the First Meeting with the Panel, the EC claimed that Article 12.5 was being violated. However, in its Second Written Submission, the EC alleged violations of Article 12.1, 12.1.1, 12.2, 12.3, and 12.8.

"opportunity to submit evidence."[89]

66. The EC also argues that the United States' objection to its Article 12 claim is untimely.[90] On the contrary, the United States raised an objection as soon as it became clear that the EC was making such a claim.[91] As a factual matter, it was not until the second panel meeting that the United States learned for the first time that the EC was purporting to have included an additional challenge to U.S. law, as such, in its panel request.[92] The United States promptly registered its objections with the Panel, asserting that the new EC claim was not properly before the Panel.[93]

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[89] In fact, the EC itself admits that "[t]he specific measure at issue is the measure that was the subject matter of the present dispute." EC Appellant Submission, para. 79.

[90] EC Appellant Submission, paras. 75-77.

[91] In this regard, it is useful to describe the United States' response to the EC's panel request and first written submission. At paragraph 127 of its first written submission of 15 January 2002, the United States asked the Panel to make the following findings: (1) The U.S. procedure for the automatic self-initiation of sunset reviews by Commerce is not inconsistent with the SCM Agreement; (2) In not applying the 1 percent *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. Thus, insofar as challenges to U.S. law "as such" were concerned, the United States understood the EC to be challenging: (1) the automatic self-initiation of sunset reviews by the United States; and (2) the non-application by the United States of the *de minimis* standard in Article 11.9 of the SCM Agreement to sunset reviews. The United States proceeded to defend itself with respect to these two EC challenges, as well as with respect to the EC's case-specific challenges.

[92] Specifically, in Question 54 of the Panel's questions to the parties following the second meeting, the Panel quoted a statement made by the EC in its First Written Submission to the effect that Commerce's deadline for submission of information in a sunset review was inconsistent with the SCM Agreements' obligation to provide "ample opportunity to submit evidence". The Panel then asked the EC the following:

> Is the Panel to understand, from this statement, that the European Communities is making a claim that 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?

The EC replied "Yes". *See EC Replies to Second Set of Questions from the Panel following the Second Substantive Meeting* (2 April 2002), page 14.

[93] *U.S. Comments on the EC's Answers to the Second Set of Questions from the Panel* (9 April 2002), paras. 21-22. The EC's claim regarding the "opportunity to submit evidence" was only one of several new claims that the EC tried to introduce at the last minute.

Moreover, this issue is one of jurisdiction to the extent that it relates to the Panel's terms of reference. As such, it may be addressed by the Panel at any time. *See* Panel Report, footnote 358, quoting from *United States -*

(continued...)

67. The Panel, however, disregarded the U.S. objection, issuing an interim report that rejected the EC claim on the merits without acknowledging that the United States had raised a procedural objection concerning the claim. Accordingly, in its interim review comments, the United States explained that the Panel should not even have addressed the substance of the EC claim, but instead should have rejected the claim under either Article 7.1 or Article 6.2.[94] The Panel agreed, and in its final report, properly determined to reject the EC's claim regarding U.S. law, as such, in respect of the obligation to provide "ample opportunity to submit evidence" because the "measure" is outside the Panel's terms of reference.

68. Insofar as the EC's belated claim concerning the consistency of U.S. law, as such, with the "ample opportunity to submit evidence" is concerned, the EC panel request failed to "present the problem clearly" as it was required to do by Article 6.2 of the DSU. As such, the Appellate Body should refuse to modify the Panel's findings with respect to the EC's claim.

4. The United States Was Prejudiced by the EC's Failure to Comply with Article 6.2 of the DSU

69. The Appellate Body previously has found that a failure to comply with Article 6.2 of the DSU can be excused if the responding Member is not prejudiced thereby.[95] In this case, the EC's failings cannot be excused because the United States was prejudiced by the EC's failure to comply with Article 6.2.

70. The U.S. submissions to the Panel do not contain any arguments regarding the

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[93] (...continued)
Antidumping Act of 1916, WT/DS136/AB/R, WT/DS162/AB/R, Report of the Appellate Body adopted 26 September 2000, para. 54 (footnote omitted).

[94] *Request by the United States for Interim Review* (23 May 2002), paras. 17-26.

[95] *See, e.g., Korea Dairy*, para. 131.

consistency of U.S. law, as such, with the obligation to provide "ample opportunity to submit evidence" in a sunset review. Instead, insofar as U.S. law, as such, is concerned, the U.S. submissions responded to the EC's claims regarding the automatic self-initiation of sunset reviews and the non-application of the Article 11.9 *de minimis* standard to sunset reviews. The reason for this, as noted earlier, is that it was not until the EC's submitted its answers to the Panel's questions following the second meeting with the Panel that the EC indicated that it was advancing such a claim. However, by that time, the United States already had made its two written submissions and had had its two meetings with the Panel. The four key opportunities for the United States to make its case had already come and gone.

71. Indeed, there was little, if any, argumentation with respect to this claim by either party, a fact observed by the United States in request for review of the interim report. As noted by the United States:

> Equally telling is the fact that the EC's belated claims regarding the 'obligation to provide amply opportunity" are not referenced in paragraph 3.1 of the Interim Report, the paragraph which summarizes the EC's claims as understood by the Panel.[96]

As such, the United States was prejudiced by the EC's failure to comply with Article 6.2 of the DSU.

5. If the Appellate Body Reverses the Panel's Findings, It Cannot Reinstate the Panel's Interim Findings

72. In paragraph 88 of the EC Appellant Submission, the EC makes a remarkable assertion as to what should happen if the Appellate Body were to reverse the Panel's finding and conclude that the EC's claim regarding the "opportunity to submit evidence" is within the Panel's terms of

[96] *Request by the United States for Interim Review* (23 May 2002), para. 23.

reference and otherwise in conformity with the requirements of Article 6.2 of the DSU. Specifically, the EC claims that the Appellate Body should "reinstate" the factual and legal findings on this claim contained in the Panel's interim report of 14 May 2002.

73. In the view of the United States, in the unlikely event that the Appellate Body should reverse the Panel's findings on this issue, the Appellate Body cannot reinstate the Panel's interim findings. An interim report is simply a draft. As such, the findings contained in an interim report have no legal status and, thus, cannot be reinstated.

III. CONCLUSION

74. For the foregoing reasons, the United States respectfully requests that the Appellate Body:

(1) affirm the Panel's finding in paragraph 9.1(a) of the Panel Report that U.S. 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;

(2) affirm the Panel's finding in paragraph 9.1(d) of the Panel Report that U.S. 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 subsidization in sunset reviews; and

(3) affirm the Panel's finding in paragraph 8.145 of the Panel Report that the EC 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, and that this "measure" therefore is outside the Panel's terms of reference.