BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2002-4)

APPELLANT SUBMISSION OF THE UNITED STATES OF AMERICA

September 9, 2002

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Service List

APPELLEE
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I. INTRODUCTION AND ALLEGATIONS OF ERROR

> [T]he Appellate Body's task of treaty interpretation [has much in common with] the early navigators scanning the stars to guide their uncertain journeys. [I]n drawing up a map to guide itself, and particularly the Panels, the Appellate Body has taken its basic bearings from the essentially text-based approach of the Vienna Convention, and has generally avoided other distracting points of light.
>
> While some may regard this as an 'unadventurous' form of navigation, there is no doubt that these bearings represent, in most part, the essence of modern public international rules on treaty interpretation.
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> The Vienna Convention rules represent the rules most generally agreed as best calculated to give effect to the language of a treaty, as the authentic expression of the negotiators' *collectively expressed* intent (the *consensus ad idem*) and to give confidence that promises between countries expressed in carefully constructed written terms can be relied on in international relations ... .[1]

1. As the WTO membership embarks upon a new negotiating round, it is more important than ever that WTO dispute settlement tribunals give effect to the *consensus ad idem* as expressed in the carefully constructed written terms of the WTO agreements. Members will be less likely to conclude agreements to the extent that panels display a proclivity to rewrite the terms of agreements years after the fact.

2. Regrettably, the Panel in this dispute – or, to be more precise, two of the panelists – demonstrated precisely this proclivity. By misapplying customary rules of treaty interpretation, the Panel imputed into Article 21.3 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") words that are not there. In so doing, the Panel committed legal error, because, as the Appellate Body has previously stated, customary rules of treaty interpretation

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[1] Michael Lennard, *Navigating by the Stars: Interpreting the WTO Agreements*, 5(1) J. Int'l Econ. L. (JIEL) 85-86 (2002) (emphasis in original).

"neither require nor condone the imputation into a treaty of words that are not there ... ."[2]

3. Turning to the specifics of this case, the United States appeals three findings, two of which are substantive and one of which is procedural.[3]

4. The two substantive findings are the Panel's findings that U.S. law, as such, and the U.S. sunset determination in corrosion-resistant carbon steel flat products from Germany are inconsistent with U.S. WTO obligations to the extent that they employ a *de minimis* standard of 0.5 percent. These two different findings, however, flow from a single error; namely, the Panel's erroneous conclusion that the *de minimis* standard applicable to countervailing duty investigations in Article 11.9 of the SCM Agreement is "implied" in Article 21.3 of that same Agreement and, thus, is applicable to sunset reviews.[4] In essence, the Panel relied on a broad rationale for a *de minimis* standard of its own devising, which it then used to form the basis for its conclusion that the *de minimis* standard of Article 11.9 is implied in Article 21.3. This pure policy-based approach does not comport with customary rules of treaty interpretation, is inconsistent with prior panel reports, and resulted in the Panel impermissibly reading into Article 21.3 "words that are not there."

5. The procedural finding appealed by the United States is the Panel's refusal to dismiss the claim of the European Communities ("EC") regarding the consistency of U.S. law, as such, with the "obligation to determine" the likelihood of continuation or recurrence of subsidization in a

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

[3] WT/DS213/6 (3 September 2002).

[4] *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("Panel Report"), WT/DS213/R, Report of the Panel circulated 3 July 2002, paras. 8.80, 8.84.

sunset review. Although the Panel correctly found that "U.S. law, as such," is not inconsistent with this obligation, the Panel should not have even made this finding because the EC claim was not properly before the Panel. With respect to this claim, the EC panel request did not present the problem clearly, as required by Article 6.2 of the DSU. This failure to comply with Article 6.2 deprived the United States of its right to defend its interests.[5]

II. ARGUMENT

A. By Reading Into Article 21.3 the *De Minimis* Requirement of Article 11.9, the Panel Misapplied Customary Rules of Treaty Interpretation and Read Into the Treaty "Words that Are Not There"

6. Article 21.3 of the SCM Agreement provides that a definitive countervailing duty must be terminated after five years unless authorities determine in a review – commonly referred to as a "sunset review" – that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. Article 21.3 does not a contain a *de minimis* standard regarding the degree of likely subsidization. The Panel, however, found that the 1 percent *de minimis* standard in Article 11.9 applicable to countervailing duty *investigations* could be "implied" in Article 21.3, thereby rendering that standard applicable to sunset *reviews*.[6] In so finding, the

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[5] As indicated in the U.S. notice of appeal, the Appellate Body will need to address this issue only if the EC appeals, and the Appellate Body reverses, the Panel's finding on the merits in favor of the United States. WT/DS212/6 (3 September 2002), para. 3.

[6] As discussed in more detail below, a countervailing duty proceeding, like an anti-dumping proceeding, consists of two phases. The first phase is the "investigation" phase during which the importing Member determines whether the criteria for the imposition of definitive duties are present. Article 11 of the SCM Agreement deals with the investigation phase.

The second phase of a proceeding (assuming definitive duties are imposed) is the "review" phase. Article 21 of the SCM Agreement deals with the review phrase, and provides for different types of reviews. Regardless of the type of review, however, Article 21 presupposes that the initial investigation phase has ended. As previously observed by the Appellate Body, "a decision to impose a definitive countervailing duty [is] the *culminating* act of a domestic legal process ... ." *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, Report of the Appellate Body adopted 20 March 1997, page 11 (emphasis added).

Panel misapplied the customary rules of treaty interpretation and committed legal error.

1. Nothing in the Text of Article 21.3 Requires Application of the Article 11.9 *De Minimis* Standard in Sunset Reviews

7. It is well-accepted that Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") reflect customary rules of treaty interpretation. Article 31(1) of the Vienna Convention provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." In applying this rule, the Appellate Body has cautioned that a "treaty interpreter must begin with, and focus upon, the text of a particular provision to be interpreted."[7]

8. The particular provision that the Panel had to interpret was Article 21.3 of the SCM Agreement, which deals with sunset reviews. Specifically, the EC alleged that Article 21.3 of the SCM Agreement had to be interpreted so as to require that authorities, when conducting sunset reviews, apply the 1 percent *de minimis* standard that is contained in Article 11.9 of the SCM Agreement and that is applicable to countervailing duty investigations.[8] Unfortunately for the EC, the text of Article 21.3 does not contain a *de minimis* standard, nor does the text mention Article 11.9, which does contain a *de minimis* standard.[9]

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[7] *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body adopted 6 November 1998 ("*US Shrimp*"), para. 114.

[8] Indeed, the EC went so far as to include in its panel request a claim that the United States violated Article 11.9 itself. WT/DS213/3 (10 August 2001), page 3.

[9] Article 21.3 provides as follows:

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

9. The Panel itself agreed that the ordinary meaning of the text of Article 21.3 contains *no* requirement to apply the Article 11.9 *de minimis* standard to sunset reviews.[10] The Panel found, however, that it was not limited to the words used in Article 21.3. Instead, invoking a statement made by the Appellate Body in *Canada Autos*, the Panel declared that "silence" was not dispositive of whether the Article 11.9 *de minimis* standard applicable to the investigation phase of a countervailing duty proceeding is also applicable to sunset reviews under Article 21.3.[11] The Panel's reliance on *Canada Autos* as justification for ignoring the plain language of Article 21.3 was misplaced.

10. In *Canada Autos*, the Appellate Body stated that silence, or omission, "must have some meaning".[12] The Appellate Body added that, "omissions in different contexts may have different

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

Article 11.9 provides as follows:

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

[10] *See* Panel Report, para. 8.58 ("[N]othing in the text of Article 21.3 specifically provides that the *de minimis* standard applicable to investigations [set forth in Article 11.9] is also applicable to sunset reviews.").

[11] Panel Report, para. 8.58, cross-referencing its analysis of "silence" contained in paras. 8.27-8.30. In those paragraphs, the Panel was considering the EC's claim that the evidentiary requirements of Article 11.6 of the SCM Agreement concerning the self-initiation of countervailing duty investigations applied to the self-initiation of sunset reviews under Article 21.3. The Panel unanimously rejected the EC claim.

[12] *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 (discussing how the "omission" in Article III:2 of GATT 1994 of the general principle in Article III:1 "must have some meaning").

meanings, and omission, in and of itself, is not necessarily dispositive."[13] Of course, just because silence is not *always* dispositive, does not mean that silence can *never* be dispositive or compelling. In fact, consideration of the facts of *Canada Autos* merely serves to undermine the Panel's analysis.

11. There is a fundamental difference between the interpretive issue in *Canada Autos* and the interpretive issue in this proceeding. In *Canada Autos*, there was a "prohibited contingency" requirement in both Articles 3.1(a) and 3.1(b) of the SCM Agreement. The difference between the two provisions was that Article 3.1(a) expressly referred to both *de jure* and *de facto* prohibited contingencies, whereas Article 3.1(b) was silent as to whether the contingency had to be *de jure*, *de facto*, or either one. However, the basic requirement of a prohibited contingency was present in both provisions, and the Appellate Body concluded that there was no reason why Article 3.1(b) would not cover both *de jure* and *de facto* contingencies.[14] This would have been a wholly rational conclusion had there been no Article 3.1(a) at all.

12. In the instant proceeding, however, the requirement in question – application of a *de minimis* standard – appears in one provision (Article 11.9) but not the other (Article 21.3). This is a dramatically different type of "silence" than the silence in *Canada Autos*. It is one thing to interpret a requirement appearing in two provisions consistently where one provision is specific and one provision is general. It is quite another thing to read a requirement from one provision into another provision when the requirement does not appear in the latter provision at all.

13. The fact that the text of Article 21.3 contains no reference to a *de minimis* standard for

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[13] *Canada Autos*, para. 138; *see also* Panel Report, para. 8.30, quoting *Canada Autos*.

[14] *Canada Autos*, paras. 139-143.

sunset reviews "must have some meaning". The ordinary meaning of the absence of such a reference is simply that there is no requirement to apply the Article 11.9 *de minimis* standard (or any other *de minimis* standard) in sunset reviews. The Panel erred by failing to give meaning to the absence of any textual reference to a *de minimis* requirement in Article 21.3.

2. There Is No Contextual Support, in Light of the Object and Purpose of the SCM Agreement, for the Notion that the Article 11.9 *De Minimis* Standard Applies in Sunset Reviews

14. Consistent with the Appellate Body's findings in *Canada Autos*, the meaning of the omission of any reference to a *de minimis* standard in Article 21.3, or the omission of any cross-reference between Article 11.9 and Article 21.3, can be considered in light of the context of Article 21.3 and in light of the object and purpose of the SCM Agreement.[15] The immediate context of Article 21.3 is Article 21.[16] Article 21 contains no reference to Article 11.9, yet does contain specific references to other provisions.

15. In particular, Article 21.4 expressly makes the evidentiary and procedural provisions of Article 12 applicable to Article 21.3 reviews, while Article 21.5 expressly makes the provisions of Article 21 applicable to Article 18 undertakings. The existence of these express cross-references under Article 21 demonstrates that where the drafters sought to have obligations set forth in one provision apply in another context, they did so expressly.

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[15] *See Canada Autos*, para. 138 (in considering the meaning of an omission, the Appellate Body found it appropriate to consider the immediate context of the provision in question (*i.e.*, other provisions within the same article), other contextual elements, and the object and purpose of the relevant agreement).

[16] Article 21.3 is a specific implementation of the general rule, found in Article 21.1 of the SCM Agreement, that a countervailing duty order shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury. *See 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 (discussing the relationship between Article 21.1 and Article 21.2).

16. This conclusion is reinforced by an examination of the broader context of the SCM Agreement. The SCM Agreement contains multiple instances where obligations set forth in one provision are made applicable in another context by means of express cross-references.[17] The SCM Agreement is also replete with explicit statements on the scope of application of particular provisions.[18] Considering then the immediate and broader context of Article 21.3, it is obvious that the drafters knew how to have obligations set forth in one provision apply in another context.

17. The Panel itself performed a similar contextual analysis and reached the same conclusion:

> [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.[19]

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[17] *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 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.").

[18] *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").

[19] Panel Report, para. 8.26 (citation omitted; emphasis added). The cited conclusions of the Panel regarding the significance of cross-references was made in connection with the Panel's textual and contextual analysis in paragraphs 8.27-8.30 regarding the applicability of the evidentiary standards of Article 11.6 apply to Article 21.3 sunset reviews. By cross-reference in paragraph 8.58, the Panel made these conclusions expressly applicable to its analysis concerning whether the *de minimis* standards of Article 11.9 apply to Article 21.3 sunset reviews. Indeed, in discussing the EC's claim that requirements of Article 11.6 applied to Article 21.3, the Panel stated that "[t]he most obvious inference we can draw from the absence of a clear indication, therefore, is that the Members chose not to imply in Article 21.3 the evidentiary requirements of Article 11.6." *Id*., para. 8.26.

18. If the drafters had intended to make the Article 11.9 *de minimis* standard applicable in Article 21.3 sunset reviews, they could easily have done so. They did not. It would be inconsistent with effective treaty interpretation to simply ignore the lack of express cross-reference.[20] Nevertheless, that is what the Panel did in this proceeding.

19. The Panel reasoned that the most obvious inference it could draw from the absence of a clear indication was that the Members chose *not* to imply in Article 21.3 the *de minimis* standards of Article 11.9. That the Panel ignored the "obvious inference" of its own contextual analysis is reflected not only on the face of the Panel's finding, but also in the decision of one panelist who did not join it.[21] That panelist correctly recognized that, given the context of Article 21.3, the omission of any express link between Article 21.3 and Article 11.9 was dispositive on the issue of whether the Article 11.9 *de minimis* standard is applicable to sunset reviews.

20. The Appellate Body has recognized that the principle of effectiveness in the interpretation of treaties requires that a treaty interpreter:

> . . . give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses of paragraphs of a treaty to redundancy or inutility.[22]

In this case, the Panel failed to give meaning and effect to the explicit statements of cross-reference and scope of application of particular provisions in the SCM Agreement. In so doing,

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[20] *See United States - Tax Treatment for "Foreign Sales Corporations" - Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB, Decision of the Arbitrator circulated 30 August 2002, para. 5.48 ("[T]he drafters chose terms for [Article 4.10] in the *SCM Agreement* different from those found in Article 22.4 of the DSU. It would not be consistent with effective treaty interpretation to simply read away such differences in terminology.).

[21] Panel Report, paras. 10.1-10.5. In Part X of the Panel Report, one panelist dissented, finding that the *de minimis* standard of Article 11.9 does not apply to sunset reviews under Article 21.3.

[22] *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).

the Panel effectively rendered such statements redundant. On this basis alone, the Appellate Body can and should reverse the Panel's finding that the *de minimis* standard of Article 11.9 is "implied" in Article 21.3.

21. The Panel's analysis of Article 11.9, allegedly as context for Article 21.3, was also flawed. Article 11.9 provides as follows:

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

As the Panel conceded, "nothing in the text of the provision provides for its *de minimis* standard to be implied in Article 21.3."[23]

22. Indeed, the Panel concluded that the terms of Article 11.9 are "unequivocal".[24] According to the Panel: "Such mandatory ('shall') and strong ('immediate') language would suggest that the drafters had an important consideration in mind in drafting this provision, *reflected in the precise choice of words*."[25] Yet, astonishingly, the Panel failed to heed the "precise choice" of the word "investigation", which in the SCM Agreement has a particular meaning to be distinguished from a "review".

23. The last sentence of Article 11.9 states: "For the purpose of this paragraph, the amount of the subsidy shall be considered *de minimis* if the subsidy is less than 1 per cent *ad valorem*"

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[23] Panel Report, para. 8.59.

[24] Panel Report, para. 8.59.

[25] Panel Report, para. 8.59 (emphasis added).

(emphasis added). This language is precise and unequivocal. If, as the Panel correctly found, the drafters' consideration is "reflected in the precise choice of words", the Panel had no option but to conclude that the obligation to apply the 1 percent *de minimis* standard is limited to the investigation phase of a countervailing duty proceeding. If the *de minimis* standard was as important as claimed by the Panel, then the drafters either would have expressly repeated the requirement in Article 21.3 or included a cross-reference. The drafters did neither. Thus, the Panel claimed to emphasize the "precise choice of words", but immediately proceeded to ignore that choice.

24. As a justification for ignoring the drafters' "precise choice of words", the Panel tried to rationalize that the phrase "[f]or the purpose of this paragraph" exists only to differentiate the 1 percent standard in Article 11.9 from the 2 percent standard for developing country Members established in Article 27.10, and that this language in Article 11.9 does not preclude the 1 percent *de minimis* standard from being implied in Article 21.3.[26] On this basis, however, the Panel should have reached the opposite conclusion, for the reasons explained by the dissenting panelist:

> It is difficult to see why the drafters would intend the [1 percent] de minimis standard to apply in both investigations and sunset reviews, but provide special and differential treatment in this respect only in the context of investigations. In other words, the text of Article 27.10 suggests that no de minimis standard applies in sunset reviews.[27]

Additionally, there is no logic in the Panel's finding that this phrase only differentiates the Article 11.9 standard from the Article 27.10 standard and not from all other provisions.

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[26] Panel Report, para. 8.64.

[27] Panel Report, para. 10.7.

25. The Panel's analysis also is inconsistent with that of the panel in *Indonesia Autos*.[28] In that case, the United States and the EC had made claims of serious prejudice under Article 6.3(a) of the SCM Agreement, which deals with market displacement or impedance in the home market of the subsidizing Member. Both complainants sought to prove their case by invoking Article 6.4 of the SCM Agreement. The first clause of Article 6.4 states that the provision applies "[f]or the purpose of paragraph 3(b)", paragraph 3(b) dealing with market displacement or impedance in third country markets. The panel found that Article 6.4 was not relevant to a claim of serious prejudice under Article 6.3(a). According to the Panel: "The drafting of the provision is unambiguous, and the specific reference to Article 6.3(b) creates a strong inference that an Article 6.4 type of analysis is not appropriate in the case of Article 6.3(a) claims."[29]

26. Failing to find any support in the text of Article 11.9 for the notion that the Article 11.9 *de minimis* standard applies in sunset reviews, the Panel also conceded that there was no support for this notion in the context of Article 11.9. The Panel found that "Article 11 is entitled 'Initiation and Subsequent Investigation', and clearly deals with investigations, such as that term is distinguished from reviews by the Agreement."[30] In other words, there is nothing in the text of Article 11 that suggests that its provisions – including paragraph 9 – apply to anything other than the investigation phase of a countervailing duty proceeding. Indeed, as discussed above, the text of Article 11.9 expressly states that Article 11.9, like Article 11 in general, deals only with the investigation phase.

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[28] *Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Report of the Panel adopted 23 July 1998.

[29] *Id*., para. 14.210 (emphasis in original).

[30] Panel Report, footnote 293.

27. Significantly, the panel in *Korea DRAMS* reached a similar conclusion in the context of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").[31] In that case, Korea argued that the *de minimis* standard in Article 5.8 of the AD Agreement (the parallel provision to Article 11.9 of the SCM Agreement) applied to reviews as well as to investigations. The panel rejected Korea's arguments, finding that "the term 'investigation' [as used in the context of Article 5] means the investigative phase leading up to the final determination of the investigating authority."[32] Thus, the *Korea DRAMS* panel found no textual or contextual support for Korea's claim that the *de minimis* standard applied beyond the investigative phase.

28. The Panel claimed that the analysis of the panel in *Korea DRAMS* was not relevant because that panel made findings only with respect to the application of the Article 5.8 *de minimis* standard to duty assessment procedures under Article 9.3 of the AD Agreement.[33] Here the Panel simply missed the point. *Korea DRAMS* is highly relevant because the panel in that case found no support for the proposition that the *de minimis* standard for investigations in Article 5.8 (the AD Agreement equivalent of Article 11.9 of the SCM Agreement) applies beyond the *investigative* phase.[34]

29. As the Appellate Body has stated,

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[31] *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.

[32] *Id.*, para. 6.87, footnote 519.

[33] Panel Report, para. 8.78.

[34] *See, e.g.*, First Written Submission of the United States to the Panel (15 January 2002), paras. 67-68, 73, discussing the relevance of *Korea DRAMS*.

> 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.[35]

The *Korea DRAMS* 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. The Panel in this dispute should similarly have done so. In other words, considering the ordinary meaning of the terms of Article 11.9 of the SCM Agreement, there is no support for the proposition that the Article 11.9 *de minimis* standard applies beyond the context of an initial investigation.[36]

30. The Appellate Body has stated that "[w]here the meaning imparted by the text itself is equivocal or inconclusive . . . light from the object and purpose of the treaty as a whole may usefully be sought."[37] As discussed above, the meaning imparted by the texts of Articles 11.9 and 21.3 is neither equivocal nor inconclusive. Article 11.9 states unequivocally that the 1 percent *de minimis* standard applies in investigations. There is not a shred of textual support for the notion that this standard *must* be applied in Article 21.3 sunset reviews as well.

31. Nevertheless, "where the confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."[38] The United States submits that the object and purpose of the SCM Agreement as a whole is to define

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[35] *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, para. 164 (citation omitted).

[36] The dissenting panelist came to the same conclusion. *See* Panel Report, paras. 10.4-10.5.

[37] *US Shrimp*, para. 114 (citation omitted).

[38] *US Shrimp*, para. 114.

certain trade-distorting practices – subsidies – and to establish a framework for addressing such practices. The SCM Agreement embodies a carefully negotiated balance of obligations and rights – obligations to, for example, eliminate certain types of subsidies, and rights to, for example, take countervailing measures against certain types of subsidies. The Panel appeared to make similar findings.[39]

32. The United States' reading of the text of Article 21.3 – that it contains no explicit requirements to apply the Article 11.9 *de minimis* standard when considering likelihood of continuation or recurrence of subsidization – is consistent with the notion that the SCM Agreement sets out an agreed-upon framework for addressing trade distorting practices. In other words, the SCM Agreement recognizes that it is appropriate to continue to apply countervailing measures where subsidization and injury are likely to continue or recur absent such countervailing measures.[40] Thus, a proper consideration of the object and purpose of the SCM Agreement confirms the correctness of the reading of the text.

33. In sum, the words contained in Articles 21.3 and 11.9, read in their context and in light of the object and purpose of the SCM Agreement, provide no support for the Panel's finding that the *de minimis* standard of Article 11.9 is implied in Article 21.3. Instead, the Panel should have found, consistently with the findings of the *Korea DRAMS* panel before it, that the *de minimis* standard of Article 11.9 does not apply outside of the investigation phase.

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[39] *See* Panel Report, paras. 8.58, 8.31-8.32.

[40] *See United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, Report of the Appellate Body adopted 8 March 2002, paras. 80-81 (finding that, unlike safeguard measures which are extraordinary remedies to be taken only in emergency situations, application of countervailing duties to counter subsidies are simply "measures taken in response to unfair trade practices").

3. The Panel's Reliance on a 1987 Note by the Secretariat to Establish the Object and Purpose of the Concept of *De Minimis* Was in Error

34. Ignoring the obvious ramification of its own textual and contextual analysis, the Panel abandoned any pretense of adhering to customary rules of treaty interpretation, and instead embarked on a tortured exercise aimed at rewriting the terms of Article 11.9.[41] Based solely upon a 1987 Note by the Secretariat,[42] the Panel concluded that the "sole or principal rationale for the de minimis standard set out in Article 11.9 is that a de minimis subsidy is considered to be non-injurious."[43] The Panel's reliance on the 1987 Note to establish the object and purpose of the concept of *de minimis*, and then to use that object and purpose to override the text of the SCM Agreement, constituted yet one more error in the Panel's analysis.

35. To begin with, the Panel erred in even considering the Note by failing to justify such consideration under customary rules of treaty interpretation, as reflected in Article 32 of the Vienna Convention. Pursuant to Article 32, recourse to supplementary means of interpretation is permitted:

> in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

36. The Panel in this case failed to explain how its invocation of supplementary means of interpretation was justified. As demonstrated above, and consistent with the findings of the panel in *Korea DRAMS*, the meaning of Article 11.9 "resulting from the application of Article 31" is

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[41] Panel Report, paras. 8.59-8.61.

[42] MTN.GNG/NG10/W/4 (28 April 1987), page 51.

[43] Panel Report, para. 8.61.

"unequivocal" – Article 11.9 obligates Members to apply a 1 percent *de minimis* standard in countervailing duty *investigations*. Neither Article 11.9 nor Article 21.3 obligates a Member to apply a *de minimis* standard in a sunset review.

37. Similarly, the meaning of Article 21.3 is not "ambiguous or obscure" within the meaning of Article 32(a) of the Vienna Convention. The Panel simply did not like the policy reflected in that meaning.

38. This leaves the alternative justification for invocation of Article 32: "to determine the meaning when the interpretation according to Article 31 . . . leads to a result which is manifestly absurd or unreasonable." The Panel seemed to suggest that an interpretation of Article 21.3 that does not include application of the 1 percent *de minimis* standard is manifestly absurd or unreasonable, thereby, in the Panel's view, triggering a consideration of supplementary means.[44] However, the Panel reached this conclusion only after first considering supplementary means. The sequence of the Panel's analysis was to consult the Secretariat Note, conclude from the Note that the rationale for a *de minimis* concept was one of injurious subsidization, and then conclude that it was unreasonable not to apply that rationale to Article 21.3 and sunset reviews. In other words, the Panel's justification for even considering supplementary means was hopelessly circular.[45]

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[44] *See* Panel Report, paras. 8.66-8.68. In this regard, in light of the fact that the dissenting panelist agreed with the United States on this issue, it seems difficult to argue that the United States' interpretation is "manifestly" absurd or unreasonable.

[45] The Panel also stated that what it called a "literal reading" of Article 21.3 would limit Article 15.3 and Article 19 of the SCM Agreement in ways that would "negatively affect the operation of the Agreement, particularly with respect to sunset reviews ... ." Panel Report, para. 8.70; *see also* Panel Report, para. 8.28. The only specific explanation or example of this ostensible "negative effect" is that, according to the Panel, certain provisions of Article 15 (covering "Determination of Injury") cannot be given meaning in an assessment of likelihood of continuation or recurrence of subsidization and injury "without assessment of a likely rate of subsidization." Panel

39. In addition to the fact that the Panel's consideration of supplementary means was not justified, the Panel's analysis of supplementary means was in error. The Panel's conclusions regarding the intent of the drafters hinged completely on a Note prepared by the Secretariat in 1987 as a reference paper. The document reproduced existing GATT rules on countervailing measures and subsidies and summarized the existing status of the discussions concerning possible modifications to those rules. The Note obviously was prepared at a very early stage of the negotiations. As such, it provides little evidence of the thinking of the negotiators later on when the negotiating and drafting began in earnest.[46]

40. The Note also reveals not one, but two theoretical justifications for the *de minimis* concept.[47] One justification related to administrative concerns, while the other seemed to be based on the notion that subsidies of a certain magnitude were incapable of causing injury. The Panel conceded that "it is not known which of the two rationales . . . served as a basis for Article 11.9".[48] In fact, it would be more accurate to say that it is not known whether either rationale served as a basis for Article 11.9. Negotiations being what they are, the most likely scenario is that the negotiators agreed on a result without agreeing on any sort of grand

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Report, para. 8.73. The United States respectfully disagrees. Whether and how a rate of subsidization is used in a sunset review injury analysis is not an issue in this proceeding because the EC did not challenge the United States International Trade Commission's likelihood of injury determination. *See* EC First Submission (13 December 2001), para. 30, footnote 28. Without further explanation or relevant examples from the Panel, one can only speculate as to what the Panel had in mind. In any event, the Panel's speculation should not suffice to override the clear text of Article 21.3.

[46] *See* Michael Lennard, *Navigating by the Stars: Interpreting the WTO Agreements*, 5(1) J. Int'l Econ. L. (JIEL) 17, 53 (2002) (cautioning that "[not] every negotiating record, much less every summation of such records by a treaty secretariat, should be considered and treated as authoritative during the interpretation of a WTO provision, for the same reason that not *every* purported record of WTO negotiations may have relevance and weight in interpreting a WTO provision. It may not be sufficiently clear that such a record reflects or illuminates the objectively ascertained intent of those negotiating the [relevant Agreement]") (emphasis added).

[47] *See* Panel Report, para.8.60.

[48] Panel Report, para. 8.60.

underlying rationale or theory.

41. Thus, what the Note tells us is that: (1) the Secretariat, (2) identified two possible rationales for a *de minimis* standard, (3) very early in the negotiating process, and (4) the records of the negotiations that followed do not reveal which, if either, rationale was relied upon by the drafters. Notwithstanding this very uncertain and ambiguous record, the Panel chose one rationale – injurious subsidization – as the rationale upon which the drafters relied. The flaw in the Panel's analysis is obvious – whether the Panel concluded that one rationale was superior to another is irrelevant in light of the fact that the purpose of interpretation is to discern what the drafters thought.

42. The Panel stated that it saw "no particular distinction between the two rationales that would suggest that, depending on which one served as the basis for Article 11.9, a de minimis standard might not apply to sunset reviews."[49] For the Panel, this seemed to be enough to justify reading the *de minimis* standard of Article 11.9 into Article 21.3. Needless to say, a finding that neither rationale suggests that a *de minimis* standard "might not" apply to sunset reviews is not the same thing as finding that there is an *obligation* to apply a *de minimis* standard in sunset reviews.

43. In addition to arbitrarily deciding that one of the described rationales represented the intent of the drafters, the Panel ignored the fact that the language of the Note makes clear that the *de minimis* concept was being addressed only in the context of the *imposition of measures*.[50] The passages quoted by the Panel do not even refer to sunset reviews. There is nothing at all in those

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[49] Panel Report, para. 8.62 (emphasis in original).

[50] *See* Secretariat Note, quoted in the Panel Report, para. 8.60

passages to suggest that Members were either for or against application of a *de minimis* standard in sunset reviews. Indeed the only reference to a debate about a *de minimis* standard relates to investigations. As noted by the dissenting panelist:

> while the negotiating history of the SCM Agreement does not specifically address the question of whether a de minimis standard should apply to reviews, the questions of definition of subsidy, investigation, imposition of measures, and review of need for measures were negotiated as separate items. De minimis as a concept was addressed in the context of the question of imposition of measures; it does not seem to have been addressed at all in the context of the discussion of the need for a sunset clause or review mechanism.[51]

44. Therefore, the Panel should not have drawn any conclusion from the Secretariat Note about the obligation to apply the 1 percent *de minimis* standard set forth in Article 11.9 in sunset reviews.[52] The only thing the negotiating history arguably demonstrates is that there was *no* consensus or single reason why the drafters established a *de minimis* standard for *investigations*, not *reviews*.

45. Finally, it is difficult to reconcile the Panel's finding that the *de minimis* standard relates to the question of whether there is injury with the fact that the SCM Agreement has not one, but three different, *de minimis* standards.[53] Not only are there three standards, but the choice of which *de minimis* standard to apply depends on the level of economic development *of the exporting country*. It is difficult to see how a determination of injury to an industry in the importing Member from subsidized imports would or should depend upon the level of economic

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[51] Panel Report, para. 10.11 (dissent).

[52] *See, e.g.*, *United States - Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, Report of the Appellate Body adopted 1 February 2002, paras.339-340 (finding that the Panel's reliance on negotiating history misplaced and reversing the Panel's interpretation of certain provisions of the TRIPS Agreement because it was contrary to the ordinary meaning of the terms of those provisions).

[53] *See* SCM Agreement, Articles 11.9, 27.10(a), and 27.11.

development in the exporting Member.

4. Summary: The Appellate Body Should Reverse the Panel's Finding that the Article 11.9 *De Minimis* Standard Is Implied in Article 21.3

46. As demonstrated above, an analysis of the text and context of Article 21.3 in light of the object and purpose of the SCM Agreement leads to the conclusion that the Article 11.9 *de minimis* standard does not apply to sunset reviews under Article 21.3. In this case, the Panel based its conclusions solely on a purported policy rationale for the Article 11.9 *de minimis* standard at the expense of the words actually used in the SCM Agreement and the relevant contextual elements in light of the object and purpose of that Agreement. The Panel failed to correctly apply customary rules of treaty interpretation. With respect to the SCM Agreement, the Panel imputed "words that are not there" and imported "concepts that were not intended."[54]

47. The flaws in the interpretive approach adopted by the Panel are apparent in its findings. The Panel simply formulated a broad rationale for a *de minimis* standard and then used that rationale as the sole basis for its conclusion that the *de minimis* standard of Article 11.9 is "implied" in Article 21.3. This pure policy-driven approach does not comport with customary rules of treaty interpretation.[55] Accordingly, the Appellate Body should find that the Panel erred as a matter of law in finding that the Article 11.9 *de minimis* standard is implied in Article 21.3 sunset reviews, and should reverse the Panel's findings in paragraph 9.1(b) and (c) of the Panel Report.

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[54] *India Patent Protection*, paras. 45-46.

[55] The dissenting panelist came to the same conclusion. *See* Panel Report, paras. 10.9-10.12 ("Policy arguments alone are not sufficient for me to find that [the de minimis standard applicable to investigations must be applied to sunset reviews]").

B. The Panel Erred in Refusing to Dismiss the EC's Claims Regarding the Consistency of U.S. Law, As Such, With the Obligation to Determine Likelihood of Continuation or Recurrence of Subsidization

48. The other finding which the United States appeals is procedural, and involves the Panel's refusal to dismiss the EC's claim regarding the consistency of U.S. law, as such, with the "obligation to determine" the likelihood of continuation or recurrence of subsidization in a sunset review. Because the Panel found that U.S. law, as such, is not inconsistent with this obligation,[56] the Appellate Body will need to address this issue only if the EC appeals, and the Appellate Body reverses, the Panel's substantive finding.

49. The specific procedural finding which the United States appeals is the Panel's refusal to dismiss the EC's claim regarding the "obligation to determine" due to the EC's failure to comply with the requirements of Article 6.2 of the DSU.

1. The United States Promptly Objected to the EC's Post-Panel Request Inclusion of a New Claim

50. It is necessary at the outset to describe the chronology of events concerning the Panel's procedural finding. 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;

[56] Panel Report, paras. 8.97-8.107.

(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.

51. It was not until the second panel meeting that the United States learned that the EC was purporting to have included an additional challenge to U.S. law, as such, in its panel request. In Question 51 of the Panel's questions to the parties following the second meeting, the Panel quoted a statement made by the EC at the first panel meeting to the effect that the EC considered that U.S. law "as such" established a standard of investigation that was inconsistent with the SCM Agreements' "obligation to determine" the likelihood of continuation or recurrence of subsidization. The Panel then asked the EC the following:

> Is the Panel to understand that the European Communities is making a claim that US law as such violates the SCM Agreement in respect of the obligation to "'determine' the likelihood of continuation or recurrence of subsidisation" contained in Article 21.3?

The EC replied "Yes".[57]

52. This was the first time that the EC had asserted that it was making such a claim. Accordingly, the United States promptly registered its objections with the Panel, asserting that

[57] *EC Replies to Second Set of Questions from the Panel following the Second Substantive Meeting* (2 April 2002), page 11.

the new EC claim was not properly before the Panel.[58]

53. The Panel, however, ignored the U.S. objection entirely, issuing an interim report that rejected the EC claim on the merits without even 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 dismissed the claim under either Article 7.1 or Article 6.2.[59]

54. In its final report, the Panel refused to dismiss the EC claim, although it continued to find in favor of the United States with respect to the substance of the claim. According to the Panel, the United States should have objected no later than its first written submission because "[i]t was clear enough, in our view, from the first written submission of the European Communities that it was making a claim in respect of the obligation to determine, for the United States to be able to do so."[60] The Panel then proceeded to contradict itself by stating that "the European Communities could certainly have been more forthcoming in its request for establishment ... ."[61] The Panel then essentially decided that the EC's claim was included in its panel request because the EC had cited all of the provisions of U.S. law that deal with sunset reviews and the relevant provisions of the SCM Agreement.[62]

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[58] *U.S. Comments on the EC's Answers to the Second Set of Questions from the Panel* (9 April 2002), paras. 13-14. The EC's claim regarding the "obligation to determine" was only one of several new claims that the EC tried to introduce at the last minute.

[59] *Request by the United States for Interim Review* (23 May 2002), paras. 7-16.

[60] Panel Report, para. 7.21.

[61] Panel Report, para. 7.23.

[62] Panel Report, para. 7.23.

2. The Panel Erred in Finding that the EC's Claim Regarding the Consistency of U.S. Law "As Such" with the "Obligation to Determine" Conformed to the Requirements of Article 6.2 of the DSU

55. Article 6.2 of the DSU provides, in part, that 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 ... ." Article 6.2, therefore, imposes the following two requirements: (1) the request must identify the specific measure at issue; and (2) the request must provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[63] With respect to the second requirement, 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 not enough ... that 'the legal basis of the complaint' is summarily identified; *the identification must 'present the problem clearly*'."[64]

56. 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 the third parties of the legal basis of the complaint*.[65]

57. As noted above, the first written submission of the United States reflected the view that the EC was not making any claim regarding the consistency of U.S. law, as such, with the

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[63] Article 6.2 of the DSU also requires that the request be in writing and that the request indicate whether consultations were held.

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

[65] *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.

"obligation to determine." 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.

58. Indeed, neither the phrase "obligation to determine" nor any similar words appear in the panel request. Although the Panel characterizes paragraph 6 of the EC's panel request as containing "*a reference to* the 'obligation to determine'",[66] that paragraph, particularly when read in the context of the paragraphs immediately preceding and immediately following, cannot be interpreted as referring to anything other than the U.S. failure to apply a 1 percent *de minimis* standard in a sunset review under U.S. law.[67] In fact, in paragraph 8.8 of the Panel Report, the Panel itself found that paragraphs 4-7 of the EC's panel request "set out the European Communities' claim in respect of the de minimis standard applied in [the sunset review in carbon steel] ... ." This discussion of the application of the 1 percent *de minimis* standard was not sufficient to put the United States or other Members on notice that the consistency of U.S. law, as such, with the "obligation to determine" was also under challenge.

59. The Panel's assertion that it was "clear enough" from the first EC submission that the EC was making a claim in respect of the obligation to determine is disingenuous.[68] Indeed, the Panel never explains why it was "clear enough". If it was "clear enough", why, in its second set of

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[66] Panel Report, para. 7.22 (emphasis added).

[67] *See Request for Establishment of a Panel by the European Communities*, WT/DS213/3 (10 August 2001), paras. 4-7.

[68] Panel Report, para. 7.21.

questions to the parties, did the Panel feel compelled to ask the EC whether it was making such a claim? If it was "clear enough", why did the Panel note that the EC "could certainly have been more forthcoming in its request for establishment ... ."?[69]

60. The answer to these questions is that notwithstanding the Panel's assertion to the contrary, the EC panel request was not "clear enough." Insofar as the EC's belated claim concerning the consistency of U.S. law, as such, with the "obligation to determine" is concerned, the EC panel requested failed to "present the problem clearly" as it was required to do by Article 6.2 of the DSU. The Panel's finding to the contrary was in error.

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

61. Having erroneously found that the United States objected too late to the EC's claim regarding the "obligation to determine", the Panel did not consider whether the United States had been prejudiced by the EC's failure to comply with Article 6.2 of the DSU. The Appellate Body previously has found that a failure to comply with Article 6.2 can be excused if the responding Member is not prejudiced thereby.[70] In this case, the United States was prejudiced by the EC's failure to comply with Article 6.2.

62. If the Appellate Body examines the U.S. submissions to the Panel, it will find that they do not contain any arguments regarding the consistency of U.S. law, as such, with the "obligation to determine." 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-

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[69] Panel Report, para. 7.23.

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

application of the Article 11.9 *de minimis* standard to sunset reviews.[71] The reason for this is that it was not until the EC's 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 already had come and gone.

63. Indeed, there was little argumentation with respect to this claim by either party, a fact noted by the United States in its comments on the EC's request for review of the interim report. As noted by the United States:

> [T]he first reference to what the Panel refers to as the criterion of "extraordinary circumstances" appears to be in the interim report itself. None of the submissions of the parties appear to discuss this criterion. This 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.[72]

64. The prejudice to the United States was not mitigated by the fact that the Panel ruled in favor of the United States on the merits with respect to this particular EC claim. The right protected by Article 6.2 is the right of a Member to defend its interests, not the right of a Member to have its interests defended by the Panel. While the United States appreciates the fact that the Panel correctly rejected this particular EC claim, that fact does not excuse the improper denial of the United States' right to defend itself.

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[71] *See, e.g.,* U.S. Oral Statement at the Panel's Second Meeting (19 March 2002), para. 2.

[72] Letter from the United States to the Chairman of the Panel (30 May 2002), page 2.

III. CONCLUSION

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

(1) Reverse the Panel's finding that the U.S. countervailing duty law and the accompanying regulations are inconsistent with Article 21.3 of the SCM Agreement in respect of the application of a 0.5 percent *de minimis* standard to sunset reviews, and the corollary finding that this inconsistency constitutes a violation of Article 32.5 of the SCM Agreement and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization*.

(2) Reverse the Panel's finding that the United States, in applying a 0.5 percent *de minimis* standard to the sunset review of the CVD order on corrosion-resistant carbon steel flat products from Germany, acted in violation of Article 21.3 of the SCM Agreement.

(3) Reverse the Panel's refusal to dismiss the EC's claim regarding the consistency of U.S. law, as such, with the "obligation to determine" the likelihood of continuation or recurrence of subsidization.

EXECUTIVE SUMMARY

1. The United States appeals three findings, two of which are substantive and one of which is procedural. The two substantive findings are the Panel's findings that U.S. law, as such, and the U.S. sunset determination in corrosion-resistant carbon steel flat products from Germany are inconsistent with U.S. WTO obligations to the extent that they employ a *de minimis* standard of 0.5 percent. These two different findings, however, flow from a single error; namely, the Panel's erroneous conclusion that the *de minimis* standard applicable to countervailing duty investigations in Article 11.9 of the SCM Agreement is "implied" in Article 21.3 of that same Agreement and, thus, is applicable to sunset reviews. In essence, the Panel relied on a broad rationale for a *de minimis* standard of its own devising, which it then used to form the basis for its conclusion that the *de minimis* standard of Article 11.9 is implied in Article 21.3. This pure policy-based approach does not comport with customary rules of treaty interpretation, is inconsistent with prior panel reports, and resulted in the Panel impermissibly reading into Article 21.3 "words that are not there."

2. The EC alleged that Article 21.3 of the SCM Agreement had to be interpreted so as to require that authorities, when conducting sunset reviews, apply the 1 percent *de minimis* standard that is contained in Article 11.9 of the SCM Agreement and that is applicable to countervailing duty investigations. However, the text of Article 21.3 does not contain a *de minimis* standard, nor does the text mention Article 11.9.

3. The Panel improperly relied on the Appellate Body's decision in *Canada Autos* as a basis for ignoring the text of Article 21.3, declaring that Article 21.3 was "silent" on the question of *de minimis*. There is a fundamental difference between the interpretive issue in *Canada Autos* and

the interpretive issue in this proceeding. In *Canada Autos*, there was a "prohibited contingency" requirement in both Articles 3.1(a) and 3.1(b) of the SCM Agreement. In the instant proceeding, however, the requirement in question – application of a *de minimis* standard – appears in one provision (Article 11.9) but not the other (Article 21.3). This is a dramatically different type of "silence" than the silence in *Canada Autos*, where the basic requirement appeared in both of the provisions in question. It is one thing to interpret a requirement appearing in two provisions consistently where one provision is specific and one provision is general. It is quite another thing to read a requirement from one provision into another provision when the requirement does not appear in the latter provision at all.

4. The fact that the text of Article 21.3 contains no reference to a *de minimis* standard for sunset reviews "must have some meaning". The Panel erred by failing to give meaning to the absence of any textual reference to a *de minimis* requirement in Article 21.3.

5. With respect to context, the immediate context of Article 21.3 is Article 21. Article 21 contains no reference to Article 11.9, yet does contain specific references to other provisions. In particular, Article 21.4 expressly makes the evidentiary and procedural provisions of Article 12 applicable to Article 21.3 reviews, while Article 21.5 expressly makes the provisions of Article 21 applicable to Article 18 undertakings. The existence of these express cross-references under Article 21 demonstrates that where the drafters sought to have obligations set forth in one provision apply in another context, they did so expressly.

6. This conclusion is reinforced by an examination of the broader context of the SCM Agreement. The SCM Agreement contains multiple instances where obligations set forth in one provision are made applicable in another context by means of express cross-references. The

SCM Agreement is also replete with explicit statements on the scope of application of particular provisions. Considering then the immediate and broader context of Article 21.3, it is obvious that the drafters knew how to have obligations set forth in one provision apply in another context.

7. The Panel itself performed a similar contextual analysis and reached the same conclusion:

> [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.[73]

8. If the drafters had intended to make the Article 11.9 *de minimis* standard applicable in Article 21.3 sunset reviews, they could easily have done so. They did not. It was inconsistent with effective treaty interpretation for the Panel to simply ignore the lack of express cross-reference.

9. The Panel reasoned that the most obvious inference it could draw from the absence of a clear indication was that the Members chose *not* to imply in Article 21.3 the *de minimis* standards of Article 11.9. That the Panel ignored the "obvious inference" of its own contextual analysis is reflected not only on the face of the Panel's finding, but also in the decision of one panelist who did not join it. That panelist correctly recognized that, given the context of Article 21.3, the omission of any express link between Article 21.3 and Article 11.9 was dispositive on the issue of whether the Article 11.9 *de minimis* standard is applicable to sunset review.

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[73] Panel Report, para. 8.26 (citation omitted; emphasis added). The cited conclusions of the Panel regarding the significance of cross-references was made in connection with the Panel's textual and contextual analysis in paragraphs 8.27-8.30 regarding the applicability of the evidentiary standards of Article 11.6 apply to Article 21.3 sunset reviews. By cross-reference in paragraph 8.58, the Panel made these conclusions expressly applicable to its analysis concerning whether the *de minimis* standards of Article 11.9 apply to Article 21.3 sunset reviews. Indeed, in discussing the EC's claim that requirements of Article 11.6 applied to Article 21.3, the Panel stated that "[t]he most obvious inference we can draw from the absence of a clear indication, therefore, is that the Members chose not to imply in Article 21.3 the evidentiary requirements of Article 11.6." *Id*., para. 8.26.

10. The Panel's analysis of Article 11.9, allegedly as context for Article 21.3, was also flawed. As the Panel conceded, "nothing in the text of the provision provides for its *de minimis* standard to be implied in Article 21.3."

11. Indeed, the Panel concluded that the terms of Article 11.9 are "unequivocal". According to the Panel: "Such mandatory ('shall') and strong ('immediate') language would suggest that the drafters had an important consideration in mind in drafting this provision, *reflected in the precise choice of words*." Yet, astonishingly, the Panel failed to heed the "precise choice" of the word "investigation", which in the SCM Agreement has a particular meaning to be distinguished from a "review".

12. The last sentence of Article 11.9 states: "For the purpose of this paragraph, the amount of the subsidy shall be considered *de minimis* if the subsidy is less than 1 per cent *ad valorem*" (emphasis added). If the *de minimis* standard was as important as claimed by the Panel, then the drafters either would have expressly repeated the requirement in Article 21.3 or included a cross-reference. The drafters did neither. Thus, the Panel claimed to emphasize the "precise choice of words", but immediately proceeded to ignore that choice.

13. As a justification for ignoring the drafters' "precise choice of words", the Panel tried to rationalize that the phrase "[f]or the purpose of this paragraph" exists only to differentiate the 1 percent standard in Article 11.9 from the 2 percent standard for developing country Members established in Article 27.10, and that this language in Article 11.9 does not preclude the 1 percent *de minimis* standard from being implied in Article 21.3. On this basis, however, the Panel should have reached the opposite conclusion, for the reasons explained by the dissenting panelist:

> It is difficult to see why the drafters would intend the [1 percent] de minimis

> standard to apply in both investigations and sunset reviews, but provide special and differential treatment in this respect only in the context of investigations. In other words, the text of Article 27.10 suggests that no de minimis standard applies in sunset reviews.

Additionally, there is no logic in the Panel's finding that this phrase only differentiates the Article 11.9 standard from the Article 27.10 standard and not from all other provisions.

14. The Panel's analysis also is inconsistent with that of the panel in *Indonesia Autos*. That panel found that Article 6.4 was not relevant to a claim of serious prejudice under Article 6.3(a). According to the panel: "The drafting of the provision is unambiguous, and the specific reference to Article 6.3(b) creates a strong inference that an Article 6.4 type of analysis is not appropriate in the case of Article 6.3(a) claims."

15. Failing to find any support in the text of Article 11.9 for the notion that the Article 11.9 *de minimis* standard applies in sunset reviews, the Panel also conceded that there was no support for this notion in the context of Article 11.9. The Panel found that "Article 11 is entitled 'Initiation and Subsequent Investigation', and clearly deals with investigations, such as that term is distinguished from reviews by the Agreement."

16. Significantly, the panel in *Korea DRAMS* reached a similar conclusion in the context of the AD Agreement. In that case, Korea argued that the *de minimis* standard in Article 5.8 of the AD Agreement (the parallel provision to Article 11.9 of the SCM Agreement) applied to reviews as well as to investigations. The panel rejected Korea's arguments, finding that "the term 'investigation' [as used in the context of Article 5] means the investigative phase leading up to the final determination of the investigating authority."

17. The *Korea DRAMS* 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. The Panel in this dispute should similarly have done so. In other words, considering the ordinary meaning of the terms of Article 11.9 of the SCM Agreement, there is no support for the proposition that the Article 11.9 *de minimis* standard applies beyond the context of an initial investigation.

18. The meaning imparted by the texts of Articles 11.9 and 21.3 is neither equivocal nor inconclusive. Article 11.9 states unequivocally that the 1 percent *de minimis* standard applies in investigations. There is not a shred of textual support for the notion that this standard *must* be applied in Article 21.3 sunset reviews as well.

19. Moreover, the object and purpose of the SCM Agreement as a whole is to define certain trade-distorting practices – subsidies – and to establish a framework for addressing such practices. The SCM Agreement embodies a carefully negotiated balance of obligations and rights – obligations to, for example, eliminate certain types of subsidies, and rights to, for example, take countervailing measures against certain types of subsidies. The United States' reading of the text of Article 21.3 is consistent with the notion that the SCM Agreement sets out an agreed upon framework for addressing trade distorting practices.

20. Ignoring the obvious ramification of its own textual and contextual analysis, the Panel abandoned any pretense of adhering to customary rules of treaty interpretation, and instead embarked on a tortured exercise aimed at rewriting the terms of Article 11.9. Based solely upon a 1987 Note by the Secretariat, the Panel concluded that the "sole or principal rationale for the de minimis standard set out in Article 11.9 is that a de minimis subsidy is considered to be non-injurious." The Panel's reliance on the 1987 Note to establish the object and purpose of the

concept of *de minimis*, and then to use that object and purpose to override the text of the SCM Agreement, constituted yet one more error in the Panel's analysis.

21. The Panel failed to justify a consideration of the Note under customary rules of treaty interpretation, as reflected in Article 32 of the Vienna Convention. Neither Article 11.9 nor Article 21.3 obligate a Member to apply a *de minimis* standard in a sunset review. The Panel in this case, therefore, obviously was not seeking "to confirm" this meaning under Article 32.

22. Similarly, the meaning of Article 21.3 is not "ambiguous or obscure" within the meaning of Article 32(a) of the Vienna Convention. The Panel simply did not like the policy reflected in that meaning.

23. This leaves the alternative justification for invocation of Article 32: "to determine the meaning when the interpretation according to Article 31 . . . leads to a result which is manifestly absurd or unreasonable." The Panel seemed to suggest that an interpretation of Article 21.3 that does not include application of the 1 percent *de minimis* standard is manifestly absurd or unreasonable, thereby, in the Panel's view, triggering a consideration of supplementary means.[74] However, the Panel reached this conclusion only after first considering supplementary means of interpretation. In other words, the Panel's justification for even considering supplementary means was hopelessly circular.

24. In addition to the fact that the Panel's consideration of supplementary means of interpretation was not justified, the Panel's analysis of supplementary means was in error. As mentioned before, the Panel's conclusions regarding the intent of the drafters hinged completely

[74] *See* Panel Report, paras. 8.66-8.68. In this regard, in light of the fact that the dissenting panelist agreed with the United States on this issue, it seems difficult to argue that the United States' interpretation is "manifestly" absurd or unreasonable.

on a Note prepared by the Secretariat in 1987 as a reference paper. The Note obviously was prepared at a very early stage of the negotiations. As such, it provides little evidence of the thinking of the negotiators later on when the negotiating and drafting began in earnest.

25. The Note also reveals not one, but two theoretical justifications for the *de minimis* concept. One justification related to administrative concerns, while the other seemed to be based on the notion that subsidies of a certain magnitude were incapable of causing injury. The Panel conceded that "it is not known which of the two rationales . . . served as a basis for Article 11.9". In fact, it would be more accurate to say that it is not known whether either rationale served as a basis for Article 11.9.

26. Thus, what the Note tells us is that: (1) the Secretariat, (2) identified two possible rationales for a *de minimis* standard, (3) very early in the negotiating process, and (4) the records of the negotiations that followed do not reveal which, if either, rationale was relied upon by the drafters. Notwithstanding this very uncertain and ambiguous record, the Panel chose one rationale – injurious subsidization – as the rationale upon which the drafters relied.

27. In addition to arbitrarily deciding that one of the described rationales represented the intent of the drafters, the Panel ignored the fact that the language of the Note makes clear that the *de minimis* concept was being addressed only in the context of the *imposition of measures*. The passages quoted by the Panel do not even refer to sunset reviews, as noted by the dissenting panelist.

28. The only thing the negotiating history arguably demonstrates is that there was *no* consensus or single reason why the drafters established a *de minimis* standard for *investigations*.

29. Finally, it is difficult to reconcile the Panel's finding that the *de minimis* standard relates

to the question of whether there is injury with the fact that the SCM Agreement has not one, but three different, *de minimis* standards, the use of which depends on the level of economic development *of the exporting country*. It is difficult to see how a determination of injury to an industry in the importing Member from subsidized imports would or should depend upon the level of economic development in the exporting Member.

30. The procedural finding appealed by the United States concerns the Panel's refusal to dismiss the EC's claim regarding the consistency of U.S. law, as such, with the "obligation to determine" the likelihood of continuation or recurrence of subsidization in a sunset review. Because the Panel found that U.S. law, as such, is not inconsistent with this obligation, the Appellate Body will need to address this issue only if the EC appeals, and the Appellate Body reverses, the Panel's substantive finding.

31. The specific procedural finding which the United States appeals is the Panel's refusal to dismiss the EC's claim regarding the "obligation to determine" due to the EC's failure to comply with the requirements of Article 6.2 of the DSU.

32. As demonstrated by its written submissions, insofar as U.S. law "as such" was 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.

33. It was not until the second panel meeting that the United States learned that the EC was purporting to have included an additional challenge to U.S. law, as such, in its panel request.

The United States promptly registered its objections with the Panel, asserting that the new EC claim was not properly before the Panel. The Panel initially ignored the U.S. objection, forcing the United States to raise the objection again in its comments on the Panel's interim report.

34. In its final report, the Panel refused to dismiss the EC claim, although it continued to find in favor of the United States with respect to the substance of the claim. According to the Panel, the United States should have objected no later than its first written submission because "[i]t was clear enough, in our view, from the first written submission of the European Communities that it was making a claim in respect of the obligation to determine, for the United States to be able to do so." The Panel then proceeded to contradict itself by stating that "the European Communities could certainly have been more forthcoming in its request for establishment ... ."

35. Article 6.2 of the DSU provides, in part, that 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 ... ." As the Appellate Body has cautioned, "[i]t is not enough ... that 'the legal basis of the complaint' is summarily identified; *the identification must 'present the problem clearly*'."[75]

36. 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.

37. The Panel's assertion that it was "clear enough" from the first EC submission that the EC

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

was making a claim in respect of the obligation to determine is disingenuous. Indeed, the Panel never explains why it was "clear enough". If it was "clear enough", why, in its second set of questions to the parties, did the Panel feel compelled to ask the EC whether it was making such a claim? If it was "clear enough", why did the Panel note that the EC "could certainly have been more forthcoming in its request for establishment ... ."?

38. The United States was prejudiced by the EC's failure to comply with Article 6.2. The U.S. submissions to the Panel do not contain any arguments regarding the consistency of U.S. law, as such, with the "obligation to determine." The reason for this is that it was not until the EC's 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 already had come and gone.

39. The prejudice to the United States was not mitigated by the fact that the Panel ruled in favor of the United States on the merits with respect to this particular EC claim. The right protected by Article 6.2 is the right of a Member to defend its interests, not the right of a Member to have its interests defended by the Panel. While the United States appreciates the fact that the Panel correctly rejected this particular EC claim, that fact does not excuse the improper denial of the United States' right to defend itself.