UNITED STATES – COUNTERVAILING MEASURES CONCERNING CERTAIN PRODUCTS FROM THE EUROPEAN COMMUNITIES

Recourse by the European Communities to Article 21.5 of the DSU

(WT/DS212)

EXECUTIVE SUMMARY OF THE FIRST SUBMISSION OF THE UNITED STATES

December 15, 2004

I. Introduction

1. Pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the EC challenges three revised determinations issued by the U.S. Department of Commerce ("Commerce") to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in *United States – Countervailing Measures Concerning Certain Products From the European Communities* ("*Certain Products*"). The DSB found with respect to these reviews, that "the US Department of Commerce did not examine whether the privatizations . . . were at arm's-length and for fair market value." For the reasons explained below, the claims of the EC should be rejected.

II. Background

2. Commerce issued the three revised determinations that are the subject of this proceeding on October 23-24, 2003, along with nine other revised determinations required by the recommendations and rulings of the DSB. Six of the twelve determinations related to countervailing duty investigations; two related to countervailing duty assessment reviews; and four related to countervailing duty sunset reviews. Commerce revoked three countervailing duty orders in whole or in part (revoking in whole two countervailing duty orders on steel products from France), lowered the duty deposit rates for five countervailing duty orders, and reaffirmed its affirmative likelihood findings in the four sunset reviews. The twelve determinations represented the culmination of a two-stage WTO implementation process, the origins and development of which are described below.

3. On August 8, 2001, the EC requested the establishment of a panel at the WTO for the purpose of challenging twelve countervailing duty determinations by Commerce regarding various steel products from the EC. The EC maintained that the twelve determinations were deficient in that they were based on an incorrect analysis where "a financial contribution was granted to a previous owner of a company or its productive assets and there has been a change in ownership or privatization thereof at arm's-length for fair market value." The EC neither stated at that time, nor pursued subsequently, any other objections to the twelve determinations.

4. A panel was established and, on July 31, 2002, the panel issued a report finding that Commerce's privatization methodology was inconsistent with the SCM Agreement insofar as that methodology did not require the extinguishment of the benefit from allocable pre-privatization subsidies based on a demonstration that full privatization occurred in an arm's-length sale at a fair market value price. The United States appealed to the WTO Appellate Body, and, on December 9, 2002, the Appellate Body affirmed the panel in part, finding that Commerce's privatization methodology was inconsistent with the SCM Agreement insofar as it did not, at a minimum, erect a presumption of extinguishment based on an arm's length sale at fair market value. On January 8, 2003, the DSB adopted its recommendations and rulings.

5. In response to the DSB's adoption of the panel and Appellate Body decision, Commerce issued a proposed modification of its privatization methodology and requested comments from the interested public. Commerce received voluminous comments, reviewed and analyzed the comments, and then issued a final modification that, in most respects, was consistent with the proposed modification.

6. The general principle that non-recurring subsidies may be allocated over time is not contested in this proceeding. Under Commerce's new methodology, that general principle does not apply if a party demonstrates that (1) during the allocation period, a privatization occurred in which the government sold all or substantially all of its ownership interest in a company or its assets (retaining no control) and (2) the sale was at arm's length and for fair market value. Consistent with the Appellate Body's report – in which the Appellate Body found that an arm's length privatization for fair market value creates a rebuttable presumption that allocable, pre-privatization subsidies have been extinguished – if the arm's-length/fair market value standard is satisfied, the benefit from pre-sale subsidies is extinguished in its entirety, unless it is proven that, at the time of privatization, the broader market conditions necessary for the transaction price to reflect the subsidy benefit were not present, or were severely distorted by government action.

7. Commerce applied its new methodology and issued new determinations in the 12 challenged cases. In the revised sunset review concerning corrosion-resistant carbon steel flat products from France, Commerce did an extensive analysis of all aspects of the 1995-1997 privatization of Usinor Sacilor ("Usinor"). There were four classes of purchasers of the company's shares: French resident nationals and EC or European Economic Area nationals ("French offering"); current and former employees; "stable shareholders," comprising various institutional investors; and the general public in French and international markets ("international offering"). Commerce found that the majority of Usinor's shares, almost 95 percent, were sold in arm's-length transactions and for fair market value. Commerce also found, however, that a little over 5 percent of the shares was sold to current and former employees of Usinor in transactions that were not at arm's-length and not for fair market value.

8. Consequently, Commerce found that, although approximately 95 percent of the benefit from previously allocated subsidies was extinguished by the privatization of Usinor, the remaining 5 percent of the allocated subsidy continued to benefit the privatized entity. Based on the continuing subsidy benefit, Commerce found that a countervailable subsidy was likely to continue or recur if the order were revoked.

9. In the revised sunset reviews concerning cut-to-length carbon steel plate from the United Kingdom and cut-to-length carbon steel plate from Spain, Commerce assumed for purposes of its analysis that the privatizations of British Steel and Aceralia extinguished all pre-privatization, non-recurring subsidies. Therefore, Commerce's findings that there was a likelihood that subsidies would continue or recur if the orders were revoked did not rely in any way on the new (or the old) privatization methodology.

III. Claims Not Properly Before The Panel

10. In this proceeding, the EC challenges aspects of the sunset determinations for which there were no DSB recommendations and rulings and that are unchanged from the prior proceeding. In short, the EC seeks to challenge aspects of the determinations other than the "measure taken to comply," and the Panel should reject the EC's arguments in this regard. The EC has improperly advanced claims regarding both injury and subsidization.

A. Injury

11. The EC's injury argument consists of one paragraph that simply asserts the United States erred by not examining whether the expiry of the duty would be likely to lead to continuation or recurrence of injury in accordance with Article 21.3. The ITC *did* conduct this examination as part of the original sunset review, but the EC did not, in the original proceedings, challenge this examination, nor, consequently, did the DSB issue rulings relating to this determination. Therefore, there is no basis for the EC's claim, which is not properly brought in the context of this Article 21.5 proceeding.

12. The recommendations and rulings made by the DSB in the underlying proceeding do not pertain to the ITC determination. Thus, there can be no "measure taken to comply" with respect to the ITC determination. As the Appellate Body stated in *Bed Linen,* "we do not see why that part of a redetermination that merely incorporates elements of the original determination . . . would constitute an inseparable element of the measure taken to comply with the DSB rulings in the original dispute." Further, in that dispute,"India [sought] to challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings to make that measure consistent . . . . " Likewise, in this dispute, the ITC determination has not changed, nor did the United States have to change it in order to comply with the DSB recommendations and rulings. Therefore, the EC's claim regarding injury is not within the terms of reference of this Article 21.5 proceeding.

13. The United States notes that the panel and the Appellate Body made their findings in *Bed Linen* in response to arguments advanced by the EC. For example, the EC argued that "India did not challenge these aspects of the original determination in the original dispute, that the EC therefore had no implementation obligation with respect to those aspects of its original determination, and that the EC therefore did not modify them in the redetermination." Before the Appellate Body, the EC argued that "it was under no obligation to correct . . . its findings . . . because the original panel had not ruled that these findings were inconsistent with Article 3.5." The EC's logic as expressed in *Bed Linen* and adopted by the DSB is equally applicable in this dispute.

B. Subsidization

14. The EC has argued that Commerce's findings in the revised sunset reviews about Glynwed in the UK case and the recurring subsidy programs in the Spanish case are inconsistent with the SCM Agreement. The findings that subsidies continued to benefit Glynwed and that there were recurring subsidy programs in the Spanish case were made in the original sunset reviews. The EC did not challenge these aspects of the Commerce determinations during the proceedings before the original panel, and neither the original panel nor the Appellate Body made any findings concerning these programs, which did not involve use of the privatization methodology. As the Appellate Body in *Bed Linen* noted – and argued there by the EC – a "measure taken to comply" does not include unchanged findings from the original determination. Because the findings concerning Glynwed and the recurring subsidy program in Spain are

unchanged, and because the recommendations and rulings did not require them to be changed, the EC cannot use the Article 21.5 process to challenge them now.

15. The EC has argued that the mandate of an Article 21.5 panel is to review the revised measure for its consistency with the agreement in question and that the panel is not limited to reviewing only the matters on which the DSB adopted recommendations and rulings. In support of this proposition, the EC refers to the Appellate Body report in the Article 21.5 proceedings in *Canada – Aircraft* and the panel report in the Article 21.5 proceedings in *EC – Bananas (Ecuador)*. However, the EC misunderstands the relevance of *Canada – Aircraft* and fails to take into account the Appellate Body's further clarifications in *Bed Linen*. In *Canada – Aircraft*, for example, the panel correctly evaluated whether the *measure taken to comply* was consistent with the Member's WTO obligations; however, as noted above, the measure taken to comply does not include unchanged aspects of a measure not covered by the recommendations and rulings of the DSB. Similarly, in *EC – Bananas (Ecuador)*, the panel also evaluated whether the measure taken to comply was consistent.

16. In this dispute, Commerce's findings regarding Glynwed and the recurring subsidy programs in Spain are unchanged and did not have to be changed in response to DSB rulings and recommendations. Therefore, they are not "measures taken to comply" and are not subject to Article 21.5.

17. The United States also notes that the EC's panel request states its claim under Article 21.5 as follows: "The United States failed to properly determine whether, in these cases, there was continuation or recurrence of subsidization and injury, because it did not examine the nature of the privatizations in question and their impact on the continuation of the alleged subsidization." Thus, the EC explicitly recognizes that the privatization analysis is the sole basis for its Article 21.5 challenge to the new sunset determination. The privatizations and their impact on the continuation of subsidization were *precisely* the matters that Commerce examined in the revised sunset determinations in response to the DSB's recommendations and rulings. The EC's claims in the present proceeding regarding Glynwed and the recurring subsidy programs in Spain do *not* involve Commerce's treatment of the British and Spanish privatizations, or their impact and thus are not within the scope of the EC's Article 21.5 panel request or this proceeding.

IV. The EC Bears the Burden of Proving Its Claims

18. It is now well-established that the complaining party in a WTO dispute bears the burden of coming forward with argument and evidence that establish a *prima facie* case of a violation. If the balance of evidence and argument is inconclusive with respect to a particular claim, the EC, as the complaining party, must be found to have failed to establish that claim. The EC has not met its burden, for the reasons described below.

19. With respect to the standard of review, Article 11 of the DSU sets forth the standard of review for this Panel. Article 11 calls for panels to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ... ."

20. With respect to disputes involving a determination made by a domestic authority based upon an administrative record, the Appellate Body, in *Cotton Yarn*, summarized the role of a panel under Article 11 as follows:

> [P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assess whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.

21. Thus, it is clear that the Panel's task is not to determine whether the privatization was at arm's-length or for fair market value, but rather whether Commerce properly established the facts and evaluated them in an unbiased and objective way. Put differently, the Panel's task is to determine whether a reasonable, unbiased person, looking at the same evidentiary record as the Commerce, could have – not would have – reached the same conclusions.

V. Commerce's Application Of Its New Privatization Methodology To The Revised Sunset Review For Corrosion-Resistant Carbon Steel Flat Products From France is Consistent with the SCM Agreement and the DSB's Recommendations and Rulings

22. As noted above, both parties accept the general principle that non-recurring subsidies may be allocated over time. The DSB found, however, that where the subsidy recipient is privatized in an arm's-length sale for fair market value, the benefit stream is presumed to be extinguished. The terms "arm's length" and "fair market value" are not used in the text of the SCM Agreement and are not to be interpreted as though they are treaty text.

23. As we demonstrate below, Commerce's revised determination in the corrosion-resistant steel from France case is entirely consistent with the DSB's recommendations and rulings, and is supported by the evidence on the record before Commerce. The EC's arguments to the contrary are premised on an approach to privatization at arm's-length and for fair market value that is not supported by the text of the SCM Agreement and is inconsistent with the reasoning of the Appellate Body. Furthermore, the EC's claims are unsupported by the evidence on the record before Commerce. This Panel should reject the EC's claims in their entirety.

A. Commerce's Analysis of the Usinor Privatization Is Entirely Consistent with the SCM Agreement and the DSB's Recommendations and Rulings

24. If the investigating authority finds that a privatization was at arm's length and for fair market value, then in making its subsidy determination, it must find, absent evidence to the contrary, that the pre-privatization subsidy benefits have been extinguished. Commerce's new privatization methodology implements these principles *verbatim.* Because the arm's-length/fair market value test is not found in the text of the SCM Agreement, that Agreement does not provide a methodology for analyzing whether a transaction is at arm's-length or for fair market

value. It is therefore within a Member's discretion to develop a reasonable methodology for addressing these issues. Moreover, because of the fact-intensive nature of the inquiry, the appropriate analytical approach may vary from case to case.

25. Nevertheless, the EC argues that Commerce was obligated to evaluate whether the *average* price for all of the French privatization transactions was at fair market value. In the EC's view, therefore, it was impermissible for Commerce, in examining the French privatization transactions, to take into account the evidence that these transactions were accomplished by means of four distinct groupings of purchasers. There is simply no basis for this view. To the contrary, Commerce analyzed the issue of whether Usinor was sold at arm's-length and for fair market value in a manner that is entirely consistent with those concepts as used by the panel and the Appellate Body.

26. If a privatization at arm's-length and for fair market value extinguishes the subsidy benefit, it follows logically that the benefit from a non-recurring financial contribution continues if a portion of the company was *not* sold at arm's length and for fair market value. This is precisely the approach Commerce took in the Usinor case.

27. The Usinor privatization was divided into four separate and distinct parts, each targeting a different group of investors and resulting in a different price. One of those groups was comprised of company employees. As discussed further below, Commerce found that the relationship between the company and its employees was not at arm's length. Moreover, Commerce found that the privatization processes were different for each of the four groups and that the 5.16 percent of Usinor's shares sold to its employees were sold for less than fair market value. Thus, Commerce determined that the 5.16 percent of the allocated pre-privatization benefit was not extinguished. The remaining 94.84 percent of the allocated benefit was found to be extinguished by the sale of the remaining portion of the company in arm's-length transactions for fair market value.

28. The analytical approach described above is entirely consistent with the panel's finding that pre-privatization subsidies are extinguished where the privatized producer, an amalgam of the company and its new owners, receives "nothing for free." Regardless of whether one purchaser acquires all the shares for less than fair market value or a particular group of purchasers pays less than fair market value for a portion of the shares, the fact remains that a portion of the company was purchased for less than fair market value. To the extent that a portion of the company was sold for less than fair market value, the privatized producer received something "for free." Commerce's analysis of the Usinor privatization established that the privatized Usinor did, in fact, receive something "for free" to the extent that some of the purchasers – Usinor employees – did not pay fair market value for the so-called "preferential" shares. It was therefore entirely reasonable for Commerce to determine that a corresponding portion of the pre-privatization benefit continues.

29. The EC has failed to provide any basis for its claim that Commerce was obligated to use an "average price" analysis. The EC's argument, in fact, ignores the fundamental importance of determining that the privatization was at arm's-length and for fair market value. There is simply no basis to conclude that Commerce was required to disregard, for purposes of the privatization

analysis, the non-arm's-length/non-fair-market-value sale of shares to the employees of Usinor. As demonstrated below, Commerce properly considered those transactions and its conclusions are supported by the evidence.

B. Commerce Properly Found That The Sale Of Shares To Usinor's Employees Was Not At Arm's Length

30. The evidence on record amply demonstrates that sales to Usinor's employees were not at arm's length. To the contrary, the sales were openly acknowledged to be preferential. Moreover, the evidence that the employees did not pay fair market value for the portion of the company they acquired is overwhelming. The EC's arguments to the contrary are premised on assumptions about what constitutes an arm's-length sale that have no basis in the SCM Agreement, or in the recommendations and rulings of the DSB.

31. The SCM Agreement does not refer to "arm's length," and neither the panel nor the Appellate Body provided any elaboration on this term. The "arm's-length" analysis applied by Commerce is, however, entirely consistent with the ordinary understanding of that term. As Commerce stated in the *Modification Notice*:

> In considering whether the evidence presented demonstrates that the transaction was conducted at arm's length, we will be guided by the SAA's definition of an arm's-length transaction, noted above, as a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties.

32. Consistent with this definition, to determine whether sales of Usinor's shares were at arm's-length, Commerce first considered the existence of relationships that would indicate the sales were not at arm's length. Commerce found such a relationship with respect to Usinor employees. Commerce's approach recognizes that the respective interests of employers and employees may not be distinguishable and that members of the "corporate family" often treat each other more favorably than they do others outside the family – a point borne out by the admittedly preferential nature of the employees stock purchases in this case.

33. Commerce then proceeded to examine the terms of the transaction between Usinor and its employees to determine whether those terms would have existed had the transaction been between unrelated parties. As Commerce explained:

> These purchasers [employees] had two options: (1) they could purchase shares at the French public offering price of FF 86 per share, or (2) they could pay a discounted price of FF 68.80, with an extended payment period, if they agreed to hold the shares for two years. Additionally, they were eligible to receive bonus shares if they held the shares for specified periods. Thus, the employee offering was clearly distinguishable from the public offerings and was openly characterized as "preferential" in Usinor's *International Offering Prospectus*....

Because there was a preferential option available to employees that was not available to unrelated parties, Commerce concluded that the terms of the transaction were different as a result of the relatedness of the parties and, hence, that the transactions were not at arm's length.

34. The EC maintains that Commerce's arm's-length analysis was in error because Commerce confused the company (Usinor) and its owner (the Government of France), finding only that Usinor's employees were related to Usinor, not to the Government of France. The facts, however, indicate that the Government of France offered preferential share prices to the employees of a company that it entirely owned, demonstrating that it did not deal with those employees at arm's length for purposes of the privatization. Moreover, the DSB's rationale for finding that a benefit may be extinguished by an arm's length, fair market value privatization hinges on the assumption that there is little distinction between the company and its new owners. Ironically, the EC now appears to argue that, for purposes of determining whether a privatization transaction is at arm's length, there is a significant distinction between a company and its owners.

C. Commerce Properly Found That The Sale Of Shares To Usinor's Employees Was Not For Fair Market Value

35. Commerce's finding that the sale of shares to Usinor's employees was not for fair market value was reasonable and overwhelmingly supported by the evidence on the record. Once again, the SCM Agreement does not contain this term. In its determination, Commerce considered whether the "full amount that the company or its assets (including the value of any subsidy benefits) were actually worth under the prevailing market conditions was paid, and paid through monetary or equivalent compensation." One means of performing that analysis might be to find market benchmarks in the form of actual sales of comparable companies. In many instances, however, there are no contemporaneous, benchmark prices. In those circumstances, Commerce bases its examination of fair market value on various aspects of the transaction process. Specifically, Commerce examines the "process factors" set forth in the *Modification Notice*: objective analysis, artificial barriers to entry, acceptance of the highest bid, and committed investment.

36. Commerce's approach to the fair market value analysis is supported by Article 14 of the SCM Agreement, which defines the benefit from government equity infusions in terms of whether the government action is consistent with "the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member [the Member that is bestowing the benefit]." Similarly, absent a market benchmark transaction, Commerce's approach to fair market value for purposes of the privatization analysis focuses on whether the privatization of a state-owned company is consistent with the usual private practice as to the sale of companies.

37. In the present case, there was no contemporaneous, benchmark price for comparable assets that could be used to determine the fair market value of Usinor. Commerce therefore examined the "process factors" – objective analysis, artificial barriers to entry, acceptance of the highest bid, and committed investment. Because the Usinor privatization was not accomplished through a bidding process, however, Commerce did not consider whether the Government of France accepted the highest bid. Rather, Commerce considered the sales process and whether the

Government of France received a price that maximized its return. Further, regarding the committed investment factor, *i.e.*, whether buyers of Usinor's shares were required to undertake certain post-sale investments, or observe certain post-sale restrictions, Commerce found that there was no evidence to indicate that any of the committed investments distorted the amount that the buyers were willing to pay. Consequently, this factor did not affect the outcome of Commerce's fair market value analysis.

38. Commerce found that the Government of France had conducted an objective analysis that it used in structuring the Usinor privatization. That analysis indicated a minimum value of FF 15,750 billion for Usinor. Minimum value and fair market value are, however, distinctly different concepts. Fair market value is based on the results of a market process, not merely on a pre-sale appraisal. Commerce therefore never considered the minimum value to be the fair market value of the company.

39. Regarding artificial barriers to entry for the employee sales, Commerce found that the employee shares could be purchased only by current and past employees of Usinor. Hence, by the very terms defining the employee pool, numerous potential purchasers were excluded from purchasing these shares. Unlike the terms defining the employee pool, the international offering and the French offering did not involve meaningful limitations on the competition for shares.

40. As to purchase price, Commerce's general approach was to look to see whether the Government of France charged a market-clearing price for its shares of Usinor. A market-clearing price is one that equates the supply of shares to the demand for shares. If the Government of France set the offering price for Usinor's shares too low, the offering would have been oversubscribed and many people seeking shares would have been unable to obtain them. Conversely, if the Government of France set the offering price too high, the offering would have been undersubscribed. The evidence on the record showed that, because of the high level of demand, the number of shares made available in the French and international offerings had to be increased (first, shares were moved from the international offering to the French offering, but later more shares were made available in both offerings). At the conclusion of the initial offering, nearly 50 million shares had been sold under the French offering for a price of FF 86 per share and nearly 199 million shares had been sold under the international offering at a price of FF 89 per share. Given the oversubscription at the FF 86 price, the fact that shares were moved from the international offering to the French offering, and the number of shares sold at each of the two prices, Commerce found that the market-clearing price for Usinor's shares was between FF 86 and 89. Usinor's employees, on the other hand, had the option of purchasing shares for FF 68 per share – well below the market-clearing price.

41. Based on these uncontested facts, Commerce concluded that the sale of shares to Usinor employees was not for fair market value, both because of the limitations in the purchaser pool and the failure of Usinor to set the share price for employees at anything close to a market-clearing level.

42. The EC maintains that Commerce's fair market value analysis was in error because "[t]he discount offered to employees and former employees of Usinor reflects the risk assumed by the buyers for the resale restrictions on the shares purchased." Resale restrictions *per se* provide no

explanation for the substantial discount afforded Usinor's employees. To the contrary, resale restrictions in the Usinor privatization were not limited to company employees. Purchasers in the French offering as well as the stable shareholders were subject to similar restrictions. Nevertheless, the share prices for the latter two groups were well above the preferential price for the employees. Moreover, if the EC's argument were correct, one would expect the EC to be able to provide evidence that employees were equally (or virtually equally) likely to participate in the French public offering as they were to participate in the employee offering. The EC has offered no such evidence. Nor has the EC offered any demonstration of *how* the discount offered to employees was supposed to reflect the risk assumed by the buyers for the resale restrictions.

43. In sum, Commerce reasonably concluded that the sale of shares to Usinor's employees was not at arm's length or for fair market value. These conclusions should therefore be affirmed by the Panel.

VI. In the Revised Sunset Reviews for Cut-To-Length Carbon Steel Plate from the United Kingdom and Cut-to-Length Carbon Steel Plate from Spain, Commerce Assumed That All Allocable Pre-privatization Subsidies Had Been Extinguished by the Privatizations in Question and Thereby Implemented the DSB's Recommendations

44. In the revised sunset review determinations on cut-to-length carbon steel plate from the United Kingdom and Spain, Commerce assumed for purposes of its analysis that the pertinent privatizations had extinguished all allocable pre-privatization subsidies. Commerce nevertheless concluded that, in both of those cases, there remained an affirmative likelihood of continuation or recurrence of a countervailable subsidy. Those determinations were based on evidence wholly unrelated to pre-privatization subsidies. For example, in the UK case, one company (Glynwed) was never owned by the UK government. Glynwed therefore continued to benefit from all subsidies that had been bestowed upon it. In the Spanish case, there were also *recurring* (nonallocable) subsidies to the privatized company (Aceralia) that continued after privatization.

45. Despite the fact that Commerce did not rely on pre-privatization subsidies to these companies in determining that they would continue to benefit from subsidies if the countervailing duty orders were revoked, the EC challenges the revised determinations on the grounds that Commerce failed to examine whether the UK and Spanish privatizations were at arm's length and for fair market value. The EC's argument elevates form over substance. Commerce *assumed* that the privatizations in the UK and Spain were at arm's-length and for fair market value. Because Commerce did not rely on pre-privatization subsidies, its revised determination simply cannot be inconsistent with the DSB recommendations.

VII. Conclusion

46. For the reasons stated above, the EC's claims against U.S. implementation of the DSB's recommendations and rulings are not meritorious. This Panel should find that the United States properly implemented those recommendations and rulings.