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

WT/DS212

ANSWERS OF THE UNITED STATES OF AMERICA

TO QUESTIONS FROM THE PANEL

March 4, 2002

Question 1 (EC, US)

Under the SCM Agreement, does the "benefit" need to be established only once? Should the benefit only be analyzed "at the time" that the financial contribution is conferred? When is the benefit extinguished? Please discuss this issue in light of paragraphs 59 and 60 of the Appellate Body report.

1. Article 1.1 of the SCM Agreement says that a subsidy is deemed to exist if there is a financial contribution and "a benefit is thereby conferred." A plain textual reading of "a benefit is thereby conferred" is that the benefit is conferred *by* the financial contribution *at the time* the financial contribution is provided. The existence of a benefit is established at that time. If a financial contribution is provided and a benefit is thereby (at that moment) conferred, then a subsidy has been bestowed, under Article 1 of the SCM Agreement. If the benefit conferred is specific, then the subsidy is in principle prohibited, actionable, or countervailable, under Article 2. If the subsidy is "upon the manufacture, production or export" of particular merchandise (footnote 36 to the SCM Agreement), it may (assuming injury) be offset through countervailing duties on imports of such merchandise unless the subsidies are withdrawn (Art. 19.1) or on imports from sources that have renounced the subsidies (or from which undertakings have been accepted) (Art. 19.3).

2. There is nothing whatsoever in the SCM Agreement to suggest that the benefit from a grant or debt forgiveness, which is created and fixed in value at the instant it is bestowed upon the recipient, should be re-valued based on subsequent events that impact the *competitive advantage* to be derived from that benefit. To imply such a requirement is to confuse the benefit with the effect of the benefit on the recipient's costs, output, or profit. If the SCM Agreement required investigating authorities to measure the *effect of the benefit* as a condition of imposing countervailing duties ("CVDs"), it surely would have furnished some mechanism by which such a complex estimate might be attempted.

3. Accordingly, a respondent in a CVD case could ask the U.S. Department of Commerce ("Commerce," "the Department," or "DOC") to reexamine, at any stage of the proceeding, whether the subsidy continued to exist. For example, the terms of the financial contribution might be changed, the subsidy might be withdrawn or renounced, or there could be a question as to whether the recipient of the subsidy was still manufacturing, producing, or exporting the subject merchandise.[1] The Department certainly would consider such questions, including in the context of privatization. But we must be clear about what such an inquiry would entail — the Department would investigate whether the benefit (the remaining unamortized amount of what originally was received from the government on terms inconsistent with commercial considerations), or even the entire financial contribution, had been taken out of the recipient (the legal person that had received it). Alternatively, the Department would investigate whether the recipient was no longer the producer of the subject merchandise. The Department would not investigate whether some intervening event had diminished or eliminated *the competitive advantage* to be derived from that benefit, just as the Department would not have investigated

[1] See footnote 36 to the SCM Agreement.

how great *a competitive advantage* the recipient could derive from that benefit the day after it had been received (and absent any privatization). While it is quite possible that a benefit could be repaid by a recipient company (or otherwise extinguished) in conjunction with privatization the change in ownership, *per se*, would not affect the benefit.

4. When a benefit is extinguished depends on the type of subsidy. A benefit provided under a recurring subsidy program is extinguished for CVD purposes at the end of the year of bestowal. An amortizable subsidy is extinguished for CVD purposes after its entire value has been amortized, i.e., allocated more or less smoothly over a reasonable number of years following bestowal, or after the unamortized amount has been paid back by the recipient. This approach is followed by CVD authorities around the world.

5. This is perfectly consistent with the report of the Appellate Body (AB) in *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). Paragraphs 59 and 60 of that report are concerned with the question of whether the benefit determination can and should be revisited in the context of an administrative review. The AB stated (at para. 60) that:

> Article 1.1 does not address the *time* at which the "financial contribution" and/or the "benefit" must be shown to exist. We therefore consider that Article 1.1 does not provide a basis for the argument made by the United States [that the United States must demonstrate the existence of a benefit only at the time the financial contribution was made].

6. As we have explained, the United States agrees with the Appellate Body that, in the context of an administrative review, it must demonstrate whether, on the basis of the information before it, there is a continuing need for the imposition of countervailing duties, and that it failed to do so in the *UK Lead Bar* proceeding (where it simply allocated subsidies to UES without addressing the question whether benefit had accrued to UES and BSplc/BSES).

7. In any event, in determining what the Appellate Body may have meant by paragraphs 59-60, those paragraphs must be read in context. The AB in the next two paragraphs "agree[d] with the Panel that ... an investigating authority may presume, in the context of an administrative review under Article 21.2, that a 'benefit' continues to flow from an untied, non-recurring 'financial contribution.'" By way of caveats, the AB simply added that "this presumption can never be 'irrebuttable'" and that "the investigating authority may be presented with 'positive information' that the 'financial contribution' has been repaid or withdrawn and/or that the 'benefit' no longer accrues." In other words, respondents may produce positive information showing the subsidy was repaid or withdrawn, or that or that the recipient of the subsidy is no longer the manufacturer, producer or exporter of the subject merchandise. This standard would be superfluous if the EC's position (that subsidies are automatically extinguished by a change in ownership) were adopted.

8. Applying this framework to the facts before it — based on the understanding that BSC and UES were two distinct persons — the AB concluded that "[i]n this case, given the changes in ownership leading to the creation of UES ..., the USDOC was required under Article 21.2 to examine, on the basis of the information before it relating to these changes, whether a 'benefit' accrued to UES...." AB Report at 61-62.

Question 2 (EC, US)

Article 14 refers to "benefit to the recipient." To whom should the investigating authority apply the "benefit to recipient" test of Articles 1, 10 and 14 of the SCM? Should the recipient of the benefit be the same as the recipient of the financial contribution?

9. The "benefit to the recipient" analysis should focus on the legal person that receives a financial contribution, and, thus, any benefit "thereby conferred."[2] In paragraphs 58 through 62 of its report in *UK Lead Bar*, the Appellate Body indicated that, consistent with its report in *Canada Aircraft*, the legal person that received the subsidy in question was British Steel (the legal person that received the financial contribution), so that UES (a different person) had not received a subsidy and so could not be countervailed. Because the benefit (if any) is conferred by the financial contribution, the recipient of both is the same.

10. There is no conceivable reason to focus such an analysis on the *owners* (shareholders) of that legal person. Those owners are different legal persons from the corporation and thus they are not the recipient of the financial contribution. In fact, in the privatization context, the owner at the time of initial subsidy bestowal is the subsidizing government itself. It makes no sense to say that the financial contribution and benefit accrue to the owners in that context, since that would mean that the government is subsidizing itself. If the legal person that received a financial contribution and benefit is later sold (but remains the same legal person) there is no conceivable reason to focus such an analysis on the *owners* (shareholders) of that legal person.[3]

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[2] Although the recipient of the benefit will generally be the recipient of the financial contribution, that requirement is not (as far as Article 1.1 is concerned) absolute. Article 1.1 is flexible in this regard, stating that "[f]or the purpose of this Agreement, a subsidy shall be deemed to exist if ... there is a financial contribution ... and ... a benefit is thereby conferred." Apparently, Article 1.1 would cover the situation where a financial contribution is provided to company A and a benefit is "thereby conferred" *indirectly* on the production, manufacture or export of goods by company B. The EC recognizes this in its oral statement (para. 24). But the United States is not using or depending on that flexibility here, as the recipients of the financial contributions at issue here (AST, et al.) were the recipients of benefits and are the same corporate persons later examined by Commerce as the producers of the merchandise under investigation. In the case of AST, the benefit was debt forgiveness. The debt, if not forgiven by the Italian Government, would have continued as a liability of AST; therefore, it is logical that the forgiveness of the debt created a benefit that also continued with AST.

[3] Articles 1 and 10 do not mention "benefit to the recipient" or contain the word "recipient." Article 10 does not even mention benefit, and Article 1 simply refers to a benefit being "thereby conferred." As for Article 14, it does not have a "benefit to the recipient" test; it simply states that any benefit to the recipient method used by an
(continued...)

Question 4 (US)

Can the United States elaborate on the implication of the fact that the Appellate Body in its decision in US - Lead & Bismuth II did not mention "payment of consideration" (as the panel did in para. 6.70) but limited its statement to "a change of ownership leading to the creation of ..." (para. 62 of the Appellate Body report)?

11. The main implication is that it was the change in the person, and not the payment of consideration, that was important for the Appellate Body. The Appellate Body was exercising its judgment and carefully limiting its findings to the facts before it. In the AB's view, the key fact was **not** that the new owners may have paid fair market value or failed to benefit personally; the key fact was that the company under investigation (UES) was a **different person** from British Steel and had never received any subsidy. This is precisely why the revised U.S. methodology, which (like the AB report) focuses carefully on whether the post-change-in-ownership producer is the same legal person who received the original subsidies, produces results that are consistent with the SCM Agreement.

12. In this regard, it is highly instructive to compare the key passages of the Panel and Appellate Body reports. In paragraph 6.70, the Panel stated:

> We, however, are in no doubt that, for the purpose of determining "benefit," a clear distinction should be drawn between BSC, and UES and BSplc/BSES respectively. This is because **the changes in ownership leading to the creation of UES and BSplc/BSES** involved the payment of consideration for the productive assets etc. acquired by those entities from BSC. Since the finding of "benefit" to BSC was effectively based on BSC acquiring those productive assets etc. for free, the fact that consideration is provided for those productive assets etc. by UES and Bsplc/BSES, or the owners thereof, must raise the possibility that the original "benefit" determination in respect of BSC is no longer valid for UES and BSplc/BSES respectively. . . .

Compare this with the key passage in the Appellate Body Report:

> In this case, given **the changes in ownership leading to the creation of UES and Bsplc/BSES,** the USDOC was *required* under Article 21.2 to examine, on the basis of the information before it relating to these changes, whether a "benefit" accrued to UES and Bsplc/BSES.

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[3](...continued)
administering authority in CVD cases must be provided in legislation or regulation, be transparently applied (and adequately explained), and be consistent with the guidelines on equity infusions, loans and provision of goods/services.)

13. The highlighted portions of the two passages are **identical**. Thus, the Appellate Body began the key passage of its report with a direct quote from the key paragraph of the Panel's report. The use of the identical phrase can hardly have been a coincidence. After starting with that quoted phrase, however, the Appellate Body diverged sharply from the Panel. Where the Panel emphasized that the changes in ownership leading to the creation of new legal persons had involved the payment of consideration, the Appellate Body simply stated that, given the creation of these new legal persons (who were, in fact the producers of the subject merchandise) USDOC was required to determine whether these new legal persons had received a benefit.

14. The notion that the Appellate Body simply forgot to cite the payment of fair market value as the reason that the prior subsidies did not transfer to the newly-created companies is further contradicted by the fact that the payment of fair market value was no minor issue — it was one of the EC's central arguments in the proceeding. This is established by the following passages from the EC's appellee submission to the Appellate Body:[4]

> The questions at the centre of this dispute are of the most fundamental importance under the WTO Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*"): . . .
>
>> Does **a purchaser that paid *fair market value*** for productive assets enjoy any "benefit" from prior subsidies to a seller, under the market-based measurement of "benefit" established in the *SCM Agreement*? The answer, as the Panel properly concluded, is clearly no." (***Italics* in original, bold added**) (para. 1).
>
> The panel's findings amount to a statement that, as a matter of law and economic reality, **a purchaser for fair market value enjoys no benefit** from subsidies previously granted to the formerly state-owned firm whose productive assets it now owns. This finding decides the fundamental issue before the Panel according to basic *SCM Agreement* precepts. The *SCM Agreement* requires that: countervailing duties may not be imposed where no subsidy exists; subsidy cannot be found in the absence of benefit; the existence of benefit is determined by market benchmarks; and by the market's own measurement**, to pay 'fair market value' is to pay fully for the productive assets at issue.**" (Emphasis added) (para. 121).
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> The European Communities respectfully requests the Appellate Body to uphold the Panel's conclusion that the United States violated Article 10 of the SCM Agreement (or alternatively Article 19.4 SCM Agreement) by refusing to examine

[4] The excerpts that follow are from Appellee Submission of the European Communities (21 February 2000) in *United States - Imposition of Countervailing Duties on Certain Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted June 7, 2000.

> whether the producers of the relevant products enjoyed any benefit from a financial contribution and by refusing to recognize that **the privatization at arm's length for fair market value prevents any benefit being passed on to a successor company.** (Emphasis added) (para. 139).

15. Thus, to conclude that the Appellate Body simply forgot to cite the payment of fair market value as the reason that prior subsidies were extinguished is to assume that the Appellate Body overlooked perhaps the key issue in the proceeding, despite directly quoting a passage from the Panel report in which that key issue played the central role, and despite the EC's repeated emphasis on this key issue. This simply is not plausible.

16. The question then arises: why did the Appellate Body not address this issue explicitly? The most logical answer to that question has been amply illustrated in this proceeding. The EC never explained exactly what about a change in ownership eliminated the prior subsidies — just as it has not yet explained that to this Panel. Thus, the Appellate Body understood that the issue had not been fully explored or explained. Having a narrower basis upon which to dispose of the appeal, the Appellate Body, therefore, did the sensible thing — it decided the case on the narrower basis, without reaching the more difficult and ill-defined issue.

17. With respect to the payment by the new owners, a company whose outstanding shares are purchased always remains responsible for its regulatory liabilities.

Question 5 (EC, US)

For the purpose of calculating subsidies under the SCM, do parties agree that the practice of amortization of non-recurring subsidies is an acceptable method? In doing so, is it reasonable to assume that this is done on the assumption that the benefit to the producer last for the duration of the amortization period? Please discuss this in the context of Article 1.1 and 14 of the SCM Agreement.

18. Yes, the United States agrees that this is an acceptable method. The EC follows it as well and has done so for many years, signing on to Amortization Guidelines under the Tokyo Round Subsidies Code and more recently providing for amortization in its CVD Calculation Rules and in particular determinations. See also the discussion of this issue in the First Written Submission of the United States.

19. It is entirely reasonable to assume that, generally speaking, a subsidy (consisting of a financial contribution that confers a benefit) to a recipient producer confers competitive advantages on that producer that last for the duration of the amortization period. (See the AB report in *UK Lead Bar* at paras. 61-62.) This does not mean that, in individual cases, an investigating authority is required either initially, or over the long term, to examine the effects of a subsidy and to determine whether the producer actually derives a competitive advantage from the subsidy. The SCM Agreement provides no such requirement, and no mechanism by which

such a determination might be attempted.

20. This issue is discussed in the context of Articles 1.1 and 14 of the SCM Agreement in response to questions 1 and 2 above.

Question 6 (EC, US)

In paragraphs 15 to 17 of its First Written Submission, the United States refers to US corporate law and EC state aid discipline in support of its argument to the effect that a change of "ownership does not necessarily transform a company into a distinct legal entity". Is there an international definition of change of ownership? Are there any international standards or rules regarding the creation of a new legal entity further to a change in ownership?

21. Corporate laws on successor liability (and on what kinds of ownership changes create a new legal entity) are applied in a generally consistent manner although they have not been harmonized internationally. Most jurisdictions uniformly treat assets and liabilities of a company as persisting under new ownership after a stock sale. This includes EC law, which, in addition to the SCA Holdings case already cited (Exhibit USA-2), includes additional precedent demonstrating that corporate liabilities persist after a transfer of ownership. The question is addressed in the context of liability for anti-competitive practices in Commission Decision (89/515/EEC) Relating to a proceeding under Article 85 of the EEC Treaty (Welded Steel Mesh), O.J.EUR.COMM. No. L 260/1 (Sept. 6, 1989) ("Welded Steel Mesh"), which states in relevant part that "where the infringing undertaking itself is absorbed by another producer, its responsibility may follow it and attach to the new or merged entity." The Commission made clear that "[i]t is not necessary that the acquirer be shown to have carried on or adopted the unlawful conduct as its own. The determining factor is whether there is a functional and economic continuity between the original infringer and the undertaking into which it was merged." Id. at para. 194.

22. Other nations maintain the same corporate concepts. For example, in Canada, the principle is stated as:

> A corporation is a distinct legal entity, a legal personality separate from its shareholders or members. ... Its assets are owned by it and not by its shareholders and its liabilities are its and not their responsibility. ... Its existence is in theory perpetual and is not legally affected by changes in its shareholders or managers which may occur by death or otherwise. ... [A shareholder] may at any time, if a market for them exists, dispose of his shares ... and such disposition does not affect the operations of the corporation. (Carswell Corporate Law Partner (Federal and Ontario) Release 2001-4) (Exhibit USA-10, attached.)

23. Likewise, the accepted position in Australia is that the continuing liabilities of

a corporation do not change with a change of shareholders. The principle of "perpetual succession" states that the company is a continuing entity in law with its own identity regardless of changes in its membership, and allows for obligations to be held in the company indefinitely. The point is so basic that, when corporate law experts are asked for legal authority, they invoke Sir William Blackstone in Commentaries on the Laws of England (1765) vol 1, 455:

> As all personal rights die with the person: and as the necessary forms of investing a series of individuals, one after another, with the same individual rights, would be very inconvenient if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality. These artificial persons are called bodies politic, bodies corporate (corpora corporata), or corporations.

See Exhibit USA-11, attached.

24. The EC's effort to distinguish potential CVD liability from other potential corporate liabilities (Oral Statement at paras. 76-77) is wholly unpersuasive. According to the EC, whereas

> regulatory liability and ... tortious liability [are] born at the time of the act [and] [l]iability for environmental damage arises as of the date the action causing the damage was taken," "[l]iability for countervailing duties does not arise on the day that the subsidy was granted. Such liability only arises at the time of importation .... Thus, a company may choose whether to export and thereby incur liability for countervailing duties ....

25. This argument reveals a thorough misunderstanding of the nature of potential liabilities, i.e., potential burdens on a company's earnings stream. Once a company pollutes, the *potential* for environmental liability exists. That potential liability may materialize if someone sues. Alternatively, the company can take steps to cure the harm by voluntarily undertaking a cleanup. Likewise, once a company receives an amortizable subsidy, the *potential* for CVDs exists. That potential liability may materialize if someone (an injured industry in an importing country) files a CVD petition. Alternatively, the company can take steps to cure the harm by voluntarily repaying the subsidy or stopping its injurious exports.

26. There is simply no basis for the EC's extraordinary suggestion that the normal rules of corporate law and successorship cease to apply when the liability in question involves exposure to countervailing duties. The EC's argument is particularly vacuous with regard to Usinor, which was actually subject to CVD orders at the time of its privatization.

Question 7 (US)

The United States claims that the Appellate Body's ruling in US - Lead and Bismuth II is based on the assumption that BSC-UES and BSplc/BSES are distinct legal persons. Could the United States explain to the Panel where in its ruling the Appellate Body explicitly addressed this issue?

27. The Appellate Body Report at para. 2 discusses the facts: UES was a joint venture created by the merger of BSC's special steels division and an unsubsidized private company, GKN. Each joint venture partner (BSC and GKN) received roughly half of UES' stock in return for what it contributed. There was never any allegation that UES received a subsidy after its creation. The "producer" of leaded bar at the time of the investigation, UES (and then BSES), was a different "person" from the original subsidy recipient.

28. As for the significance of the AB's understanding that UES was a different person from BSC, the AB Report at para. 62 states

> In this case, given the changes in ownership **leading to the creation of UES and ... BSES**, the USDOC was required under Article 21.2 to examine, on the basis of the information before it relating to these changes, whether a "benefit" **accrued to UES and ... BSES.** ... [T]he changes in **ownership leading to the creation of UES and ... BSES** should have caused the USDOC to examine whether the production of leaded bars **by UES and ... BSES respectively, and not BSC**, was subsidized. In particular, the USDOC should have examined the continued existence of "benefit" already deemed to have been conferred by the pre-1985/86 "financial contributions" **to BSC**, and it should have done so **from the perspective of UES and ... BSES respectively, and not BSC.**[5]

29. Again, the AB emphatically and repeatedly limited its findings to the facts before it.

Question 8 (US)

Under which circumstances would a change of ownership of a producer lead the United States to consider that there is no longer a benefit accruing to the producer after a change of ownership? E.g, what if the new owner would offer to repay the subsidy?

30. If the producer remained the same person before and after the change in ownership — something that would, of course, be the subject of a fact-intensive analysis — then that person would retain the benefit that had been bestowed upon it. If the producer did not remain the same person (e.g., if the change in ownership involved the dissolution of the enterprise or the transfer of its bare assets), the United States would consider that the new producer did not receive the prior subsidies. Likewise, the United States would consider that the producer that simply

[5] WT/DS138/AB/R, para. 62 (emphasis added).

acquired bare assets from a subsidized company was not the recipient of the prior subsidies. (This too is consistent with normal corporate law; consider the situation where a person buys a truck from a company that had previously used the truck to dump illegally toxic waste — the buyer is not liable for the illegal dumping of the toxic waste.)

31. The United States believes that subsidies are eliminated only to the extent that their remaining unamortized amount is repaid *by the subsidy recipient*.[6] An offer from a new owner to repay a subsidy on behalf of the company would present an interesting case which the United States has never had to confront. Presumably, this is because owners (who are, after all, distinct persons) are not inclined to repay subsidies for those persons. The only situation in which this would be economically rational would be where the owner and the company were, in substance, the same person. Such a circumstance (once confirmed by a detailed investigation) would change the Department's entire analysis, because (once the owner and company were treated as the same entity) a repayment nominally from the owner would, in substance, be coming from the company (the person that had received the subsidy).

Question 9 (EC, US)

Why does it matter whether the benefit accrued to the owners of the company instead of the company itself? If a clear distinction should always be drawn between a company and its owners, what is the basis for allocating non-recurring untied subsidies to a parent company to its subsidiaries?

32. The company, not its owners, produces subject merchandise. The company, not its owners, is the respondent in a countervailing duty investigation. It makes sense to require an investigating authority, before imposing countervailing duties, to find a subsidy to the producer of the subject merchandise, i.e., to the company. In this analysis, the owners' situation is not decisive, because an enterprise can remain pumped up by subsidies even after being transferred to new owners.

33. The distinction between companies and their owners — between producers and investors — is the cornerstone on which the company law of industrialized countries has been built. It is what limited liability form of organization (plc in the United Kingdom, SA in France, SpA in Italy, Corp. in the United States, etc.) is all about. That is what stock exchanges are all about. The pensioner who buys Usinor shares is not a producer of steel nor personally liable for Usinor's debts or regulatory violations. The question is how CVD analysis should take account of the undeniable company-owner distinction. The answer here is plain: the WTO Members, in negotiating the SCM Agreement, did *not* reach an extraordinary but silent agreement to jettison standard corporate successorship law. The SCM Agreement contains no hint of any such extraordinary agreement.

[6] We note that the EC takes exactly this approach taken under its EC state aid law.

34. This is not to say that a distinction should *always* be made between a company and its owners. There are situations where it would be appropriate to treat separately-incorporated members of a closely-integrated corporate group as, in essence, one entity, or where a "corporate veil" between a nominally-independent corporation and its owner may be "pierced" for some compelling reason. But these special situations do not establish that there is no rule. On the contrary, there is a clear distinction between a company and its owners that is respected under the corporate laws of developed nations unless there is some special reason to disregard that distinction, and there are carefully-prescribed rules and procedures to be followed in determining whether that distinction should be disregarded. There is no basis for routinely disregarding the distinction simply because the company in question is transferred to a new owner. If anything, the transfer of the company to a new owner emphasizes its status as an entity distinct from its original owner.

35. The allocation of subsidies across products requires a careful and fact-intensive analysis of which products are, *as of bestowal*, likely to benefit from a given subsidy.[7] When an investigating authority allocates subsidies bestowed upon a parent company to products produced by its subsidiaries, it is determining that those are the products likely to benefit (i.e., the products whose production is likely to be encouraged). None of this calls into question the distinction between companies and their owners. Moreover, a subsidy to an owner is not necessarily a subsidy to its subsidiary. If that were the case, any specific subsidies granted to Credit Lyonnais would have been countervailable on a pro rata basis against Usinor's production, simply on the basis of the bank's ownership stake in Usinor.

Question 10 (EC, US)

With regard to the distinction between the company and the owners, on page 275 of the US - Lead and Bismuth II Panel report, the United States reported that USDOC "ultimately took the position that it was reasonable to conclude that, to some extent, the payment made by the owner would be extracted from the company over time" and "whether the repayment emanates from the company or the owner is not relevant." The Panel understands that this is no longer the United States' position, what is the basis for the United States change in policy in this regard? Why does it matter whether the benefit accrues to the owner or to the company?

36. First, it is essential to note that it is Article 14 of the SCM Agreement that indicates that subsidies are received by a legal person and valued according to the benefit to the recipient. This conclusion is not affected by previous policy choices made by the U.S. Government.

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[7] "As of bestowal" because it is neither necessary nor realistically possible to trace the actual use of subsidies in order to assign them to particular products and impose CVDs.

37. Second, the "gamma" methodology to which this question refers was the result of a policy determination by the United States to encourage privatizations by limiting CVDs through a calculation device not mandated by the SCM Agreement. Today, the United States uses other means to encourage privatizations, believing that it is inappropriate to do so at the expense of U.S. industries injured by foreign subsidies. Prior statements by the United States concerning potential gradual extraction of benefits must be evaluated with that background in mind. In any event, they are simply not relevant to the question before the Panel — whether the methodology now being employed by the United States is inconsistent with the SCM Agreement.

38. Third, it is important to note that the United States has *never* agreed with the fundamental premise of the argument presented then and now by the EC — that a change in the ownership of a subsidized corporation (with or without the payment of fair market value) automatically eliminates the countervailability of prior subsidies. The EC has not demonstrated and cannot demonstrate that prior subsidies will *ever* be extracted by new owners after a privatization — not over a period of years and *certainly* not instantaneously.

39. The distinction between the owners and the company is important in the benefit determination, because the EC is claiming that an innocent party is being subject to duties. In fact, it is the company being sold, not the new owners, that is being subjected to duties.[8] On the other hand, in both *Delverde III* and *UK Lead Bar*, the purchaser itself was the person under investigation. In the cases now before the Panel, the parties whose production faces duties – AST, Usinor, etc. – are the precise persons that received the subsidies. That is what was required by *Delverde III* and by the Appellate Body in *UK Lead Bar*. No "innocent" party is being subjected to duties in the proceedings before this Panel.

Question 11 (EC, US)

From the perspective of the nature of the privatizations, are there factual elements or aspects of the privatizations at issue in the twelve determinations of the present dispute that differ from the privatization of BSC-UES in US – Lead and Bismuth II?

40. The privatizations at issue in the twelve determinations of the present dispute differ markedly from the transactions by which UES was created (and later became BSES). Moreover, in the case of AST, the Department of Commerce has made an administrative determination, based on the substantial record before it, that the producer of the subject merchandise (AST) is the same legal person that received the subsidies in question (also AST). Such a determination was lacking in the *UK Lead Bar* proceeding.

41. More specifically, UES was formed in 1986 as a joint venture between the government-owned British Steel Corporation (BSC) and the privately-owned Guest, Keen & Nettlefolds

[8] Usinor, for example, was subject to a CVD order when sold, and corporations always retain regulatory liabilities after their shares change hands. Purchasers are presumed to be informed about what they buy.

(GKN). Each company contributed assets to the new venture, with BSC contributing its Special Steels Business, the producer of subject merchandise in *UK Lead Bar*.) In exchange for these contributions, BSC and GKN each received 50 percent of UES' common stock. At this point, UES was only partially owned by the government. In 1988 BSC was privatized and renamed British Steel plc (BSplc). As a result of the privatization of BSplc, UES became 100 percent privately-owned. In 1995, BSplc purchased GKN's shares in UES, making the company a wholly-owned subsidiary of BSplc. After the acquisition, UES was renamed British Steel Engineering Steels (BSES). *See generally U.K. Lead Bar*, Report of the Appellate Body, para. 2.

42. Thus, the various changes in ownership in *UK Lead Bar* involved a complex fact pattern that included: (1) the formation of a 50-50 joint venture between two separate companies, one government-owned and one private, comprised of a collection of some of the productive assets of each, (2) a privatization of an only partially government-owned company, and (3) a "spin-in" to BSplc of a portion of a subsidiary of which it had previously owned 100 percent. The crucial point here is that, as the Appellate Body in *UK Lead Bar* found, as a result of this complex transaction UES (and later BSES) was a different person from the original subsidy recipient, BSC.

43. By contrast, the nature and facts of the privatizations in the cases currently before this panel are much more straightforward than those of *UK Lead Bar* and, in general, did not give rise to new legal persons.[9] For example, in the Italian *GOES, Stainless Plate* and *Stainless Sheet and Strip* cases, the government sold its 100 percent holding in AST to the private company KAI. As DOC determined in the *GOES* administrative review, it was clear that KAI, in buying AST, intended to perpetuate the operations of AST in their current basic form and, thus, to perpetuate the business entity benefitting from subsidies bestowed prior to the privatization. Also, and importantly, the largest single subsidy contributing to AST's countervailing duty rate is the 1993 debt forgiveness that was bestowed directly upon AST.[10] The privatization of ILVA's former carbon steel flat products division in *Italian Carbon Plate* occurred in a similar fashion under the same privatization plan of the Italian government. *See generally Final Results of CVD Administrative Review; Grain Oriented Electrical Steel from Italy*, 66 Fed. Reg. 2885 (12 January 2001), Issues and Decision Memorandum, "Corporate History of AST," pp. 1-2, Exhibit EC-7; and *Final Affirmative CVD Determination; Certain Cut-to-Length Carbon-Quality Steel Plate from Italy*, 64 Fed. Reg. 73244, 73245-246 (29 December 1999), "Corporate History of ILVA/ILT," Exhibit EC-16.

44. Along similar lines, the privatization of Usinor in the French *Carbon Plate, Corrosion-Resistant Steel,* and *Stainless Sheet and Strip* cases was effected through a sale of the shares of

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[9] We note that the Department has not applied its same person test in those cases at issue here where a remand redetermination or a recent administrative review has not been conducted.

[10] We note that in *UK Lead Bar* there was never any allegation that UES itself received a subsidy after its creation.

Usinor to a considerable number of private investors. The company was sold intact with all of its assets and liabilities to public shareholders who simply stepped into the shoes of the government. The company retained its name and continued to operate as the same business entity; it simply had new owners. In analyzing a variety of relevant factors under our new methodology, it is clear to the DOC that the privatized Usinor was, for all intents and purposes, the same person that existed prior to the privatization. *See generally Final Results of CVD Administrative Review; Stainless Steel Sheet & Strip in Coils from France*, 64 Fed. Reg. 30774, 30776 (8 June 1999), "Corporate History," Exhibit EC-10.

45. It is therefore clear that these factual distinctions between *UK Lead and Bismuth* and the 12 cases at issue here make all the more critical the Appellate Body's repeated efforts to limit its findings to the facts before it.

Question 13 (US)

Could the United States provide examples where the application of the same person methodology in the context of a given privatization has resulted in DOC finding that there was no benefit to the privatized entity?

46. It has not yet happened, in the limited time in which the methodology has been in use. But the fact that application of the same person methodology has not yet resulted in DOC finding that there was no benefit to a privatized entity does not mean that there is something wrong with the methodology. The United States has explained in response to Question 8 the circumstances in which it would find no subsidy to the producer. The most obvious example of a situation in which subsidies would be extinguished — bankruptcy — is becoming very common indeed, at least in the United States.

Question 14 (EC, US)

Assume that CVDs are imposed to offset the unfair competitive advantage enjoyed by the imported product resulting from government financial contributions. What is the unfair competitive advantage enjoyed by imported products produced by AST following privatization?

47. It is essential to note at the outset that the SCM Agreement does not require investigating authorities to investigate whether a subsidy recipient derives any competitive advantage from a subsidy, provide any mechanism for measuring any such a competitive advantage, or require that CVDs offset only that competitive advantage. Indeed, footnote 36 to the SCM Agreement states that the purpose of countervailing duties is to offset subsidies, not to offset unfair competitive advantages.

48. The SCM Agreement provides for the measurement of benefits received and the imposition of CVDs to offset those benefits, regardless of whether that benefit produces a competitive advantage of 10% of the benefit received or 1000% of the benefit received. Thus, the

SCM Agreement does not require an investigating authority to answer the question "What is the unfair competitive advantage enjoyed by imported products produced by AST (or any subsidy recipient) ***before*** privatization?" For the same reason, the SCM Agreement does not require investigating authorities to identify an "unfair competitive advantage enjoyed by imported products produced by AST (or any subsidy recipient) following privatization." The countervailable amount is the benefit received, regardless of the competitive advantage that is derived from that benefit.

49. Having noted this, it is fair to say that the SCM Agreement permits CVDs to be imposed because of a general (and quite reasonable) presumption that subsidies generally constitute competitive advantages to their recipients. But the fact that such a presumption underlies the SCM Agreement generally does not mean that the Agreement requires investigating authorities to identify and measure such competitive effects. To determine what competitive advantage AST derived from the benefits bestowed upon it would require knowing how AST actually used the subsidy proceeds — something that the SCM Agreement does not require an investigating authority to trace and something that (given the fungibility of money) an investigating authority realistically could never trace.

50. In any event, however AST's benefit was manifested the day before the change, it was **precisely** the same the day after. Otherwise unobtainable equipment purchased with subsidies before privatization remained in use. Workers with extra subsidy-enabled training remained on the job. Reduced debt loads made possible by subsidies remained the same.[11] None of these advantages was extracted by the arrival of new, private owners. Nothing happened that was relevant to the previously-bestowed artificial advantages. All that happened was a value-for-value transaction: cash was exchanged for shares of equal value.

Question 15 (EC, US)

What's the difference and relationship between "arm's length" and "fair market value"? Could you give an example where a transaction takes place at fair market value but not at arm's length and vice versa?

51. To date, under the current statute DOC has not faced a situation where it has had to make a specific determination regarding any relationship between these terms; consequently, it can only offer the following observations.

52. We recognize that these two terms often evoke a good deal of confusion. Some have argued that arm's length refers to the relationship between seller and buyer, *i.e*, whether or not

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[11] Subsidies gave British Steel, for example, one of the lowest debt-cost-per-ton-of-steel-output ratios of any steelmaker in the world — a benefit which clearly continued after the firm's 1989 privatization.

they are affiliated and whether any affiliation affects the transaction. Fair market value, on the other hand, may refer more to the resulting price paid. Conceivably, a transaction could be at arm's-length, but not at fair market value, or *vice versa*. In some instances, however, others have used these two terms as though they were interchangeable, or where one concept presupposes the other.

53. Thus, it appears that there is not a general consensus on what is meant by each term or how one term is related to the other. We are not in a position to offer a definitive view on the question.

Question 16 (EC, US)

Could both parties confirm that all transactions involved in the twelve determinations covered by this dispute were done at arm's length and for fair market value?

54. No. The United States cannot confirm that all transactions involved in the twelve determinations covered by this dispute were done at arm's length and for fair market value, because this question was not relevant under the DOC's methodology, and thus the evidence on the administrative records does not exist to support such findings. In fact, in one case – *Final Affirmative Countervailing Duty Determination, Stainless Steel Plate in Coil from Italy* (EC Case No. 4, Exhibit EC-13), 64 Fed. Reg. 15508, 15519, n. 4 — Commerce explained that the government of Italy's selection criteria for choosing a buyer were never made clear, such that it could be argued that the price received by the government was not at arm's length or did not reflect fair market value. With regard to two of the sunset reviews – *Cut-to-Length Carbon Steel Plate from the United Kingdom* (EC Case No. 8, Exhibit EC-18) and *Cut-to-Length Carbon Steel Plate from Germany* (EC Case No. 10, Exhibit EC-21) – the DOC did, in the context of a remand determination submitted to the U.S. Court of International Trade in 1995, make findings that the privatizations in these cases were at arm's length and for fair market value. *See Final Results of Redetermination pursuant to Court Remand on General Issues on Privatization* (July 17, 1995), Exhibit EC-19, pp. 18-20 and 22-34.

Question 17 (US)

In Section 1677(5)(F) the wording only refers to arm's length but not to fair market value, why is there no reference to fair market value? How does Section 1677(5)(F) permit an application of the US - Lead and Bismuth II Appellate Body findings? If the Panel were to make the suggestions identified by the European Communities at [the] last page of its oral statement, would Section 1677(5)(F) allow for it? When does the consideration of fair market value come into play in an examination under Section 1677(5)(F)?

> *(a) In Section 1677(5)(F) the wording only refers to arm's length but not to fair market value, why is there no reference to fair market value?*

55. Neither the statute nor the legislative history explains why there is only a reference to arm's length but not to fair market value in section 1677(5)(F).

> *(b) How does Section 1677(5)(F) permit an application of the US - Lead and Bismuth II Appellate Body findings?*

56. The Appellate Body in *UK Lead Bar* found that DOC could not countervail imports of goods produced by UES because DOC had failed to determine that UES was the same person as the recipient of the subsidies in question. Because DOC had failed to make such a determination, it could not presume that benefits to British Steel automatically accrued to UES (AB report, para. 62).

57. If DOC had determined that UES was, in fact, a different legal person than British Steel, then consistent with both section 1677(5)(F) and *UK Lead Bar*, DOC could have concluded that UES was not the recipient of the original subsidy, and evaluated whether UES had received a new subsidy as a result of the privatization. This would have involved determining whether the privatization had been the result of an arm's-length transaction for fair market value. If DOC had determined that such a transaction had occurred, section 1677(5)(F) would have permitted DOC to find that the privatized company had not received a benefit as a result of that transaction.

58. The reason that section 1677(5)(F) would have permitted DOC to make such a finding is that it makes clear that DOC has the discretion to determine whether an arm's-length, fair market value change in ownership does or does not result in a benefit to the post-privatized company. The provision states in relevant part that a

> change in ownership . . . *does not by itself require* a determination . . . that a past countervailable subsidy . . . no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction (emphasis added).

59. This means that, depending upon the circumstances of a particular case, DOC could find that a change in ownership *does* mean that the current producer was not the recipient of past subsidies. It also means that DOC could find that a change in ownership *did not* change the recipient of (and, hence, the liability for) for past subsidies. The statutory language, by itself, dictates no particular outcome one way or the other.

60. The SAA also supports the view that section 1677(5)(F) provides DOC with the discretion to apply the Appellate Body's findings in *UK Lead Bar*. The SAA states that the purpose of section 1677(5)(F) is to clarify that "the sale of a firm at arm's length does not automatically, and in all cases, extinguish any prior subsidies conferred." SAA at 928. The SAA goes on to clarify that it is the Administration's intent that "Commerce retains the *discretion* to determine whether, and to what extent . . . previously conferred countervailable subsidies" are eliminated. *Id.* (emphasis added). The SAA further emphasizes the scope of this discretion by stating that

"Commerce must exercise this *discretion* carefully through its consideration of the facts of each case and its determination of the appropriate methodology to be applied." *Id.* (emphasis added). Thus, the legislative history to this provision indicates that the legislative intent was to provide for administrative discretion and that the discretion is to be reasonably tailored to the facts of each case.

61. Further, the Preamble of DOC's countervailing duty regulations also supports this conclusion. *See* 63 Fed. Reg. 65348, 65354 (1998) (Exhibit USA-9). It states that "section 1677(5)(F) . . . purposely leaves much discretion to the Department with regard to the impact of a change in ownership on the countervailability of past subsidies. Specifically, a change in ownership neither requires nor prohibits a determination that prior subsidies are no longer countervailable. Rather, the Department is left with the discretion to determine, on a case-by-case basis, the impact of a change in ownership on the countervailability of past subsidies." *Id.*

62. Thus, assuming, *arguendo*, that DOC had found that UES and BSplc/BSES were a different legal person from BSC and that the privatization had been the result of an arm's length, fair market value transaction, then the discretionary nature of section 1677(5)(F) would have permitted DOC to conclude that the post-privatized company enjoyed no benefit from past subsidies.

> *(c) If the Panel were to make the suggestions identified by the European Communities at [the] last page of its oral statement, would Section 1677(5)(F) allow for it?*

63. On the last page of its opening oral statement, the EC suggests, *inter alia*, that the Panel suggest that the

> US abandon its 'same-person methodology' and replace it with another that . . . (2) provides that a sale of a State-owned company for fair market value and at arm's length means that the privatised company cannot be considered to benefit from any financial contribution to the State owned company.

64. In the first instance, we disagree that, even if the Panel finds against the United States on the substantive issue before it, the Panel should suggest what the United States should do to implement any findings or recommendations of the Panel. If the Panel finds any inconsistency with the SCM Agreement — and we submit there is none — it should be up to the United States to determine for itself the best way of implementing the Panel's findings. Further, we respectfully disagree with the basic premise of the EC's suggestion. The United States does not see anything in the SCM Agreement or in the Appellate Body's *UK Lead Bar* report that either explicitly or implicitly indicates such a rigid, *per se* rule. An example of the absurd results that could flow from the EC's proposed rule is that a new person would be created (and all past subsidies would be extinguished) even when a company's shares simply turn over through public trading on the stock market. *See* Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency's Record, *Acciai Speciali Terni, S.p.A. v. United States*, CIT

Court No. 01-00051 (5 October 2001) (Exhibit EC - 26) at 17, n.3.

65. Moreover, we respectfully submit that the correct legal question which this Panel must decide is not whether the SCM Agreement or Appellate Body's report in *UK Lead Bar* entails such a rigid, *per se* rule, but, rather, whether section 1677(5)(F) allows DOC to consider whether an arm's-length, fair market value privatization could, in some circumstances, result in a finding that there is no benefit to the post-privatized company from past subsidies. As we explained in our brief and during our oral presentation, the change-in-ownership provision provides DOC with the discretion to evaluate each change-in-ownership situation on its own merits. If an evaluation of all the facts and circumstances of a particular privatization or a change in ownership warrants a finding that as a result of an arm's length, fair market value privatization the post-sale company does not enjoy a benefit from past subsidies, then such a finding can be made. There is nothing in the language of the change-in-ownership provision, or in the legislative history of that provision which would prevent DOC from making such a finding. Accordingly, section 1677(5)(F) would permit DOC to make a finding that a sale of a State-owned company for fair market value and at arm's length would not result in a benefit to the privatized company.

(d) When does the consideration of fair market value come into play in an examination under Section 1677(5)(F)?

66. As explained above, the Appellate Body in *UK Lead Bar* found that the United States had failed to make a determination as to whether the initial subsidy recipient was the same person after privatization and, because it had failed to make such a determination, it could not presume that benefits to the pre-privatized company automatically accrued to the post-privatized company. (AB at para. 62). That, as we have explained in our brief, is the deficiency DOC's new "same-person" methodology has cured. Thus, when it is determined that the post-privatized company is a different legal person from the pre-privatized company, DOC will evaluate whether the sale was the result of an arm's-length, fair market value transaction.

Question 19 (EC, US)

In a sunset review under Article 21.3 of the SCM Agreement review investigation, does the investigating authority need to revisit ex officio its subsidy determination? Does Article 21.1 of the SCM Agreement contain a general rule while Article 21.3 is the application of that general rule in the specific case of sunset reviews?

(a) *In a sunset review under Article 21.3 of the SCM Agreement review investigation, does the investigating authority need to revisit ex officio its subsidy determination?*

67. No, an investigating authority need not revisit *ex officio* its subsidy determination, in a sunset review under Article 21.3 of the SCM Agreement.[12] Article 21.3 defines the point in time (*i.e.*, after five years) at which the authorities must do one of two things: automatically terminate the countervailing duty order or take stock of the situation, *i.e.*, conduct a review to determine whether continuation or recurrence of subsidization and injury would be likely to resume, absent the order. Thus, the determination in a sunset review under Article 21.3 concerns future behavior, *i.e.*, the likelihood of continuation or recurrence of subsidization – not whether or to what extent subsidization currently exists. Nothing in the SCM Agreement requires consideration of the magnitude of subsidization in determining the likelihood of continuation or recurrence of subsidization.

(b) *Does Article 21.1 of the SCM Agreement contain a general rule while Article 21.3 is the application of that general rule in the specific case of sunset reviews?*

68. Yes. 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 subsidisation which is causing injury." However, nothing in the general rule found in Article 21.1 suggests exactly how the sunset review should be conducted.

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[12] Article 21.3 provides:

> 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. The duty may remain in force pending the outcome of such a review. (Footnote omitted.)

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

WT/DS212

ANSWERS OF THE UNITED STATES OF AMERICA

TO QUESTIONS FROM THE EUROPEAN COMMUNITIES

March 4, 2002

A. Factual Background

Question 1:

> *Why did the United States repeal, with retroactive effect, the administrative reviews at issue in the United States – Leaded Bars dispute, after the issuance of the interim panel report but before the final panel report and the Appellate Body report when it could have maintained the measures in place, without having to refund duties previously paid, at least until the adoption of the panel and Appellate Body reports by the DSB ?*

1. This was the result of a settlement among the litigants in domestic court litigation, the terms of which are confidential. As a result of that settlement, the petitioners withdrew their petition for relief, with retroactive effect.

Question 2:

> *In view of the results of the Usinor and GTS opinions of the US Court of International Trade, does the US agree that its new methodology is inconsistent with its domestic law?*

2. No. Those court opinions are not yet final and, moreover, are subject to appeal to the United States Court of Appeals for the Federal Circuit. In addition, they represent the views of only one judge on the U.S. Court of International Trade. Other cases involving similar issues are pending before several other judges on the same court, who may reach different conclusions from those reflected in the cases cited by the EC. Thus, the cited decisions merely represent the initial views of a single judge sitting on a lower court and, as such, do not represent the final word on the status of methodology of the U.S. Department of Commerce ("DOC" or "Commerce") under domestic law.

Question 3:

> *Will the United States confirm that the DOC has not appealed judgments of the US Court of International Trade in the Usinor and GTS cases ? If this is the case, why has there been no appeal?*

3. The United States has not appealed those decisions because they are not yet final and no judgments have been issued by the U.S. Court of International Trade. U.S. law does not allow for interlocutory appeals, except in rare situations. Thus, the agency must complete the remand ordered by the court and await its final opinion and issuance of judgment before the United States may appeal. In addition, a motion for reconsideration and clarification is pending before the court.

Question 4:

When does DOC have to submit its remand redetermination to the US Court of International Trade in the Usinor and GTS cases. Will the United States develop a new methodology on privatisation in that remand redetermination ?

4. Those dates are currently April 8 for both remands. The United States is considering how to respond to the court's decisions and remand orders. It would be inappropriate for the United States to prejudge the outcome of these administrative redeterminations.

B. Questions arising from the first written submission of the United States

Question 5:

Concerning the argument in Para 77 of its submission (where the United States mentions that the respondent companies had every opportunity to request a review), does the US agree that some exporters may have been dissuaded from requesting a review because of the fact that their duty would almost certainly increase under the DOC's new methodology? Equally, does the United States agree that exporters might be discouraged from co-operating in a sunset review because any evidence submitted is not taken into consideration ?

5. No, the United States does not agree with the EC's assertion that some exporters may have been dissuaded from requesting administrative reviews because their countervailing duty rates might increase under DOC's new change-in-ownership methodology. This assertion is pure speculation. As we explained in our First Submission (para. 77, n. 83), a respondent company's decision whether to request an administrative review can depend upon many factors, all peculiar to its particular business situation.

6. For example, a respondent's CVD cash deposit rate may be small, such that it is not worth participating in the review, in relation to its pricing practices. Or, it may be concerned that a review might result in a higher rate, either because of new subsidies, changes in DOC methodology, or simply changes in the allocation of its non-recurring subsidies (in the numerator) to its sales (in the denominator). Moreover, the facts establish that some exporters were not dissuaded from requesting such reviews, as we also pointed out in our First Submission (para. 77, n. 82). *See GOES from Italy* (Case No. 12)(Exhibit EC-7), *supra*; *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 66 Fed. Reg. 54195 (Oct. 26, 2001) (initiating administrative review on stainless steel wire rod from Italy (C-475-821)(Case No. 3), for calendar year 2000, at request of Acciaierie Valbruna S.p.A.); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 66 Fed. Reg. 49924 (Oct. 1, 2001) (initiating administrative review on stainless steel sheet and strip from France (C-427-815)(Case No. 1), for calendar year 2000, at request of Ugine S.A.). *See also Stainless Steel*

Wire Rod from Italy: Rescission of Countervailing Duty Administrative Review, 65 Fed. Reg. 6171 (Feb. 8, 2000)(C-475-821) (rescinding, at request of Accaierie Valbruna S.r.l. and Accaierie di Bolzano SpA, requests made by these two respondents for administrative reviews of calendar year 1998 period). Finally, in one case, the CVD rate for the exporter decreased as a result of DOC's application of its new methodology. *See Final Affirmative Countervailing Duty Determination; Certain Cut-to-Length Carbon-Quality Steel Plate from France*, 64 Fed. Reg. 73227, 73298 (rate for GTS of 6.86%, *cf.* 6.10% in the final results of redetermination pursuant to court remand), Exhibit EC-11.

7. Likewise, the United States does not agree that exporters might be discouraged from co-operating in a sunset review because any evidence submitted is not taken into consideration. Again, the EC has offered no evidence to this effect with regard to the four sunset reviews at issue in this dispute. In addition, the reasons for an exporter choosing not to participate in a sunset review could be just as varied as those for which it might not participate in an administrative review. Furthermore, an exporter might choose to save its resources with regard to a sunset review by opting to participate actively before the U.S. International Trade Commission on the injury phase of the review, and declining to participate before Commerce on the subsidization side of the review. Finally, all evidence submitted by an interested party in any type of review before DOC is taken into consideration, although it may be rejected for reasons under DOC's regulations, such as untimeliness, or it may not be used in DOC's analysis because it does not pertain to the methodology employed in the review.

Question 6:

In Paragraph 89, the United States claims that in the Dillinger sunset review, the "only evidence" was the level of subsidies from the 1993 investigation.

(a) Does the United States agree that it is required to make a determination relating to subsidization in a sunset review?

8. No, as we explained in response to Panel Question No. 19, an investigating authority need not revisit its subsidy determination in a sunset review under Article 21.3 of the SCM Agreement. Article 21.3 defines the point in time (*i.e.*, after five years) at which the authorities must do one of two things: automatically terminate the countervailing duty order or take stock of the situation, *i.e.*, conduct a review to determine whether continuation or recurrence of subsidization and injury is likely. Thus, the determination in a sunset review under Article 21.3 concerns future behavior, *i.e.*, the likelihood of continuation or recurrence of subsidization – not whether or to what extent subsidization currently exists.

(b) *In particular, does the United States agree that such reviews require a determination of whether or not there is subsidization at the time of the review?*

9. No, as we explained above and in response to Panel Question No. 19, an investigating authority need not revisit its subsidy determination in a sunset review under Article 21.3 of the SCM Agreement. Nothing in the SCM Agreement requires consideration of the magnitude of current subsidization in determining the likelihood that, absent the order, subsidization would be likely to continue or recur.

(c) *If so, does such a determination require a finding of whether or not there is a benefit to the producer of the imported product at the time of the review, where the producer has claimed that it no longer benefits?*

10. This question does not apply to three of the four sunset reviews at issue in this dispute (EC Case Nos. 8, 9, and 11 (Exhibits EC 18, 20, and 22) concerning the UK, France, and Spain), because the producers in those reviews declined to participate. With regard to Germany (EC Case No. 10, Exhibit EC-21), one of the producers, Dillinger, did participate and claimed that certain countervailable subsidy programs had either been terminated or were no longer countervailable. However, since Dillinger had not requested any administrative reviews in which to establish this information, DOC properly did not consider its claims, for the reasons we have explained in response to questions 6(a) and (b) above. *See Issues and Decision Memorandum*, Department's Position on Comments 5, 7, and14, *Final Results of Full Sunset Review, Cut-to-Length Carbon Steel Plate from Germany*, EC Case No. 10, Exhibit EC 21. Note also in this review that DOC rejected the domestic interested parties' claims that DOC should investigate their allegations of new German subsidies in the context of the sunset review. The German producers themselves opposed this request, on the grounds that the domestic parties should have requested administrative reviews to establish these facts. Commerce agreed with the German producers that such claims should normally be made in the context of administrative reviews. *Id.*, Department's Response to Comment 11.

(d) *If the only subsidies were non-recurring and have been eliminated, is it possible for the DOC, in the absence of new subsidies, to find that subsidization is likely to continue or recur?*

11. There are two ways to read the EC's question, so the United States will address them both. First, if non-recurring subsidies have been eliminated, *e.g.*, paid back, but the program still exists, Commerce could find likelihood of recurrence of subsidization. Footnote 52 to Article 21.3 specifically provides for this possibility. It states that "[w]hen 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." Therefore, the mere continued existence of a subsidy program could warrant maintaining the duty beyond the five-year period, even if the amount of the subsidy was currently zero, because subsidization may be likely to recur absent the discipline of the order.

12. Second, even if the program providing non-recurring subsidies has been eliminated, Commerce could find likelihood of continuation of subsidization if the benefits from the non-recurring subsidy would continue to flow beyond the five-year mark. As the Appellate Body in *UK Lead Bar* recognized (para. 62), the benefit from a non-recurring subsidy continues to flow.

> *(e) Did the evidence provided by Dillinger and the German government in the sunset correspond to the above situation?*

13. Yes. *See* response to question 6(d) above.

> *(f) The DOC's Sunset Policy Bulletin (63 Fed. Reg. 18871 (16 April 1998)) states that adjustments to the subsidy rate will normally not be made where no administrative review has been carried out. Why should the lack of an administrative review affect the DOC's ability to make such adjustments in a sunset review?*

14. *See* answer to Panel Question No. 19 and EC Question No. 6(a).

C. Questions concerning the same person methodology and the *GOES* case

Question 7:

Assuming the United States was free to decide the British Steel PLC/ British Steel Corp. case it the same person methodology to the privatisation at issue.

15. It is impossible (and would be highly inappropriate) for the United States to give a definitive answer to this question because that would pre-judge the outcome of an administrative proceeding in which evidence might be presented of which the Department of Commerce is not now aware.

Question 8:

In the United States – Leaded Bars dispute, the panel (Paragraph 6.69 of its report) and the Appellate Body (Paragraph 58 of its report), found that, for a countervailing duty to be imposed, a benefit to the producer of the imported goods during the investigation period had to be established. In the GOES administrative review ("the GOES case"), how did the DOC, using its new methodology, establish the existence of such a benefit during the investigation period?

16. DOC determined that: (1) the predecessor companies of the producer under investigation, AST (i.e., ILVA and TAS), received countervailable subsidies from entities of the Italian government, which were attributable to AST; (2) AST also received such subsidies directly; (3) these subsidies were non-recurring, and therefore allocable over time; (4) post-privatization AST was the same person as pre-privatization AST; and (5) during the investigation period, benefits from those subsidies continued to be attributable to AST.

Question 9:

In cases where a party to the investigation alleged that a change of ownership had taken place for fair market value, as in the GOES case, to what extent did the DOC, using its new methodology, examine this issue when determining whether such a benefit to the producer of the imported goods existed in the investigation period ? If this issue was not examined, why was this not done?

17. If during a period of review a party alleged that a change in ownership had taken place, under its new methodology, DOC would examine whether the post-privatized company was or was not a different legal person from the pre-privatized company that initially received subsidies. If DOC were to determine that the two companies were, in fact, different legal persons, then DOC would examine whether the privatization had been the result of a fair market value transaction. In the case of AST, DOC determined, using its WTO-consistent methodology, that pre-privatized AST was the same as post-privatized AST. Therefore, all of the criteria continued to be met for finding a benefit to post-privatized AST.

Question 10:

Does the United States treat a sale of assets differently from a sale of shares when examining transactions under its "same person methodology".

18. A sale of bare assets is treated differently from a stock sale. Assuming that the assets are sold to a different person from the person that originally received subsidies, the DOC will not find that the producer that operates the purchased assets is subject to countervailing duties.

19. A sale of shares is at the opposite end of the spectrum; if the shares of a producer that previously received a countervailable subsidy are simply sold to another party, and the producer remains essentially the same person after the change-in-ownership, the producer will normally continue to be subject to countervailing duties in the absence of evidence that the change-in-ownership actually repaid the prior subsidies.

20. In between these poles is a class of difficult cases which must be decided based on their precise facts. An asset sale that preserves intact the enterprise that earlier received subsidies may result in that enterprise continuing to face countervailing duties, even if its name has changed.

Question 11:

Under the new methodology, it would appear that, even in the event of a privatization at fair market value, the DOC will conclude that prior subsidies pass through in full to the privatized company. In what circumstances could this not be the case? Please list the criteria which would have to be satisfied for the DOC to conclude that there is no "pass through".

21. As stated in response to the preceding question, if a privatization at fair market value involves a sale of bare assets to a person different from the producer that initially received the subsidy, DOC will not find that the new producer is subject to countervailing duties. Likewise with a privatization that dissolves the subsidized enterprise, such as liquidation in bankruptcy — an increasingly common situation, at least in the United States — there would be no subsidy.

Question 12:

Suppose a US$1 million non-recurring untied subsidy is granted to a near bankrupt steel group. The holding company (A), that receives the subsidy has two active subsidiaries each producing different kind of steel products, but with equal turnover (B and C). [This question was referred to as question 23 in the panel proceedings]

(a) *The European Communities assumes that the USDOC would consider that the subsidy benefits both the producing subsidiaries and could impose countervailing duties on the exports of these companies to the US if the other conditions of the SCM Agreement are met. Is this correct?*

22. Yes, assuming (as seems reasonable in this simplified case) that the products made by those two subsidiaries are the products that appear likely, as of the moment of bestowal, to benefit from the subsidy. This has to do with attribution of subsidies across products and not with allocation of subsidies over time or privatization. In such a situation, DOC would, in essence, be finding that the subsidiaries themselves are the persons that received the subsidy. A key fact here is that a "holding company" has no production. The subsidy cannot be allocated over nothing. The United States applies its attribution rules on the premise that governments seek to subsidize productive activity, for example, to promote employment in their territory. Therefore, it is reasonable to presume that when the government provides the financial contribution to the holding company (A) in this example, it is for the purpose of subsidizing the productive operations of (B) and (C).

(b) *Now suppose that after countervailing duties are imposed, the holding company sells one of its subsidiaries (B) for fair market value and at arm's length to a different, non-subsidised, steel company (D). The holding company remains unchanged, while the subsidiary would remain the same, other than ownership*

would have changed. How would the United States treat such a situation under its "same person methodology" ?

23. The CVDs already being imposed on (B)'s output would be reconsidered if (B) requested an administrative review. Assuming that (B) remained the respondent in the review (and did not turn into a new legal person), then (B)'s output would continue to face CVDs, based on the original subsidy to (B), until the amortization of those subsidies was complete.

(c) *In the same example, the holding company (A), after selling one subsidiary to an unrelated purchaser, proceeds to sell the other subsidiary (C) also to another unrelated purchaser ? How would the United States evaluate such a situation under the same person methodology ?*

24. As this transaction appears to be functionally identical to the first transaction, DOC's treatment would be the same.

(d) *If the US continues to countervail the exports of the two subsidiaries, even though in different hands, please explain why it should make a difference that the subsidiaries were sold just before or just after the grant of the subsidy to the holding company?*

25. The subsidies to (A), a holding company with no production of its own, were attributed to the components of (A)'s corporate group with production reasonably presumed to enjoy those benefits — (B) and (C). If one of those subsidiaries had been sold before the subsidy was received by (A) on behalf of the group that subsidy could not reasonably be attributed to that subsidiary, any more than it could to a company that had never been a member of (A)s group.

(e) *Please also explain how the US would treat the case where the subsidised holding company (A) does not sell either of its subsidiaries after the grant of the subsidy but purchases a third (E), producing a different steel product to subsidiaries (B) and (C) but with equal turnover. Could the USDOC impose countervailing duties on the exports of (E)?*

26. Assuming that the subsidy was not clearly tied to only the operations of (B) and (C), upon the purchase of the new subsidiary (E), the original subsidy generally would be attributable to the consolidated sales of the entire corporate group, which would include the sales of (E). If (E) were an exporter of goods to the United States on which there were countervailing duties, duties would be applied to imports from (E) as well. This particular fact pattern is fairly complex, however, and may differ depending on the particular fact pattern of a given case.

D. The meaning of "fair market value" and "arm's length"

Question 13:

Can the DOC explain what criteria are involved in determining whether the sale of a company is at fair market value?

27. See answer to next question.

Question 14:

In this respect, we refer to the DOC domestic action British Steel plc v. United States (slip op. 95-17, 9 February 1995). In the context of this case, the CIT requested the DOC "to determine and report" in a number of cases included British Steel "whether each transaction was at arm's length (...)". DOC responded to the CIT on 17 July 1995 (no further reference available). Concerning British Steel, DOC stated that :

> *the UK Government sale of BS plc was at arm's length, for fair market value and consistent with commercial considerations because BS plc shares were offered to private investors world-wide, the offering price was based on valuations by independent consultants, and private investors purchased nearly the entire share offering.*

During the United States – Leaded Bars panel, the United States conceded that this privatization was made for fair market value. Therefore, on the basis of this case, DOC appears to consider a privatisation to be for fair market value when it is carried out through an open bidding procedure or an open offer of shares to private investors and the offering price is based on valuations by independent consultants. Does DOC still consider these criteria appropriate for determining whether a privatization is for fair market value? If not, please explain why.

28. These criteria are among those that could be relevant in determining whether a privatization is at fair market value. Obviously, all of these particular criteria might not be relevant in a different case, and other criteria might also be relevant in a different case. Given the essentially infinite number of ways in which a privatization might be structured, it is not possible to identify here all such other potentially relevant criteria.

E. § 1677(5)(F) the "change-in-ownership" provision

Question 15:

Why was § 1677(5)(F) adopted ?

29. Neither the statute nor the legislative history explains why section 1677(5)(F) was adopted.

Question 16:

What does § 1677(5)(F) require of the DOC ?

30. Section 1677(5)(F) requires DOC to analyze thoroughly the facts and circumstances of each change in ownership or privatization on a case-by-case basis before determining whether past subsidies continue to be countervailable. This is reflected in the Statement of Administrative Action (Exhibit EC- 25), which states in relevant part: "While it is the Administration's intent that Commerce retain the *discretion* to determine *whether*, and to *what extent*, the privatization of a government-owned firm eliminates any previously conferred countervailable subsidies, Commerce must exercise this *discretion* carefully through its consideration of the facts of each case and its determination of the appropriate methodology to be applied. SAA at 928.

Question 17:

Does it allow the DOC to adopt a rule that a privatisation, at arm's length and fair market value, automatically means that the post-privatisation exporting producer does not benefit from pre-privatisation subsidies and thus that countervailing duties cannot be levied in respect of such subsidisation ? Would the United States be able to implement the suggestion which the European Communities proposed (at the end of its oral statement) that the Panel adopt, that is "that a sale of a State-owned company for fair market value and at arm's length means that the privatised company cannot be considered to benefit from any prior financial contribution to the State owned company" ?

31. In the first instance, even if the Panel were to disagree with the United States' position in this proceeding, the Panel should not indicate how the United States should implement any findings or recommendations. Moreover, the United States respectfully disagrees with the basic premise of the EC's suggestion. The United States does not see anything in the SCM Agreement or in the Appellate Body's *UK Lead Bar* report that either explicitly or implicitly indicates such an extreme and rigid rule.

32. Moreover, we respectfully submit that the correct legal question which the Panel must decide is not whether the SCM Agreement or Appellate Body's decision in *UK Lead Bar* requires such an extreme *per se* rule, but, rather, whether section 1677(5)(F) allows DOC to consider whether an arm's length, fair market value privatization could result in a finding that there is no benefit to the post-privatized company from past subsidies. As we explained in our first submission and during our oral presentation, section 1677(5)(F) provides DOC with the discretion to evaluate each change-in-ownership situation on its own merits. If an evaluation of all the facts and circumstances of a particular privatization or a change in ownership warrants a finding that as a result of an arm's length, fair market value privatization the post-sale company does not enjoy a benefit from past subsidies, then such a finding can be made. There is nothing in the language of the change-in-ownership provision, or in the legislative history of that provision which would prevent DOC from making such a finding. Accordingly, section 1677(5)(F) would permit DOC to make a finding that a sale of a State-owned company for fair market value and at arm's length would not result in a benefit to the privatized company.

Question 18:

> *Would the United States explain why it argued that such a rule would not be consistent with § 1677(5)(F) in the AST court case where it said;*
>
> > *However, the Federal Circuit in Delverde III was quite clear that 19 U.S.C. § 1677(5)(F) precludes per se rules, including one that would automatically treat the change in ownership as extinguishing prior subsidies. (Quoted in para. 150 of the European Communities first written submission)*

33. The Department of Commerce did argue to the US Court of International Trade that the Federal Circuit in *Delverde III* explained that section 1677(5)(F) did not permit a *per se* rule that a change in ownership always extinguished past subsidies or never extinguished past subsidies. *See* Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency's Record, *Acciai Speciali Terni, S.p.A. v. United States*, CIT Court No. 01-00051 (5 October 2001) (Exhibit EC - 26) at 17, *citing Delverde III*, 202 F.3d 1360, 1366 (Fed. Cir. 2000). In so doing, DOC also pointed out the absurd results that could flow from the EC's proposed rule. For example, a new person would be created (and all past subsidies would be extinguished) even when a company's shares simply turn over through public trading on the stock market. Defendant's Memorandum at 17, n.13.

34. Notwithstanding the *Delverde III* court's discussion of the change-in-ownership provision as precluding *per se* rules, section 1677(5)(F) nonetheless allows DOC to consider whether an arm's-length, fair market value privatization could result in a finding that there was no benefit to the post-privatized company from past subsidies. If an evaluation of all the facts and circumstances of a particular privatization or a change in ownership warrants a finding that as a result of an arm's length, fair market value privatization the post-sale company does not

enjoy a benefit from past subsidies, then such a finding can be made. There is nothing in the language of the change-in-ownership provision, or in the legislative history of that provision which would prevent DOC from making such a finding.

Question 19:

> *Why does the DOC need discretion to decide whether a privatisation at arm's length and fair market value does or does not result in a benefit passing through to the post-privatisation exporting producer ? Is [it] not simply a case of either the privatisation was at arm's length and fair market value and the post-privatisation exporting producer obtains no benefit, or the privatisation was not at arm's length and fair market value and thus the exporting producer might have obtained a benefit ?*

35. Privatizations or changes in ownership are generally complex and multifaceted in nature. They are rarely, if ever, simple. This is readily apparent from even a cursory examination of AST's privatization. Rather than look a just a single factor, as the EC suggests, DOC's "same-person" methodology relies upon several neutral criteria being applied to a variety of facts and circumstances specific to a particular privatization or change in ownership. This methodology is consistent with the Appellate Body's decision in *UK Lead Bar* regarding the need to properly evaluate the pre- and post-privatized company and also with the requirements of the SCM Agreement. We would also note that the EC does not appear to know (or at least will not say) what role it believes the payment of fair market value plays in the elimination of prior subsidies.