WORLD TRADE ORGANIZATION

WT/DS212/AB/R
9 December 2002

(02-6715)

Original: English

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

AB-2002-5

Report of the Appellate Body

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377.
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591.
US – Countervailing Measures on Certain EC Products	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European*, WT/DS212/R, 31 July 2002.
US – Lead and Bismuth II	Appellate Body Report, *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, adopted 7 June 2000, DSR 2000:V, 2601. Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R and Corr.2, adopted 7 June 2000, as upheld by the Appellate Body Report, WT/DS138/AB/R, DSR 2000:VI, 2631.
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755.

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Countervailing Measures Concerning Certain Products from the European Communities

United States, *Appellant*
European Communities, *Appellee*

Brazil, *Third Participant*
India, *Third Participant*
Mexico, *Third Participant*

AB-2002-5

Present:

Lockhart, Presiding Member
Abi-Saab, Member
Bacchus, Member

I. Introduction

1. The United States appeals certain issues of law and legal interpretations in the Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities* (the "Panel Report").[1] The Panel was established to consider a complaint by the European Communities with respect to countervailing duties imposed or maintained by the United States on certain steel products originating in various Member States of the European Communities.

2. Countervailing duties were imposed or maintained by the United States Department of Commerce ("USDOC") in the course of 12 investigations: six original investigations, two

[1]WT/DS212/R, 31 July 2002.

administrative reviews, and four sunset reviews.[2] Certain analyses in these investigations were undertaken pursuant to a United States statute, 19 U.S.C. § 1677(5)(F) ("Section 1677(5)(F)")[3], which reads as follows:

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

The subject products in the 12 original investigations and reviews in issue were produced by formerly state-owned enterprises that had been privatized at the time of the 12 underlying administrative determinations. The European Communities alleges that the privatizations in all 12 cases took place at arm's length and for fair market value. The United States did not rebut these allegations.[4] Both participants agree that the changes in ownership relevant to this dispute concern only privatizations, that is, the change in ownership from government to private hands.[5] All the privatizations concerned in this dispute involved a full change in ownership in the sense that in all 12 cases, governments had

---

[2]The Panel adopted the following numbering system, which we will also use, to facilitate identification of the various administrative determinations at issue: *Stainless Sheet and Strip in Coils from France*, 64 Fed. Reg. 30774 (USDOC, 29 June 1999) (Case No. 1); *Certain Cut-to-Length Carbon Quality Steel from France*, 64 Fed. Reg. 73277 (USDOC, 29 Dec. 1999) (Case No. 2); *Certain Stainless Steel Wire Rod from Italy*, 63 Fed. Reg. 40474 (USDOC, 29 July 1998) (Case No. 3); *Stainless Steel Plate in Coils from Italy*, 64 Fed. Reg. 15508 (USDOC, 31 March 1999) (Case No. 4); *Stainless Steel Sheet and Strip in Coils from Italy*, 64 Fed. Reg. 30624 (8 June 1999) (Case No. 5); *Certain Cut-to-Length Carbon-Quality Steel Plate from Italy*, 64 Fed. Reg. 73244 (USDOC, 29 December 1999) (Case No. 6); *Cut-to-Length Carbon Steel Plate from Sweden*, 62 Fed. Reg. 16551 (USDOC, 7 April 1997) (Case No. 7); *Cut-to-Length Carbon Steel Plate from United Kingdom*, 65 Fed. Reg. 18309 (USDOC, 7 April 2000) (Case No. 8); *Certain Corrosion-Resistant Carbon Steel Flat Products from France*, 65 Fed. Reg. 18063 (USDOC, 7 April 2000) (Case No. 9); *Cut-to-Length Carbon Steel Plate from Germany*, 65 Fed. Reg. 47407 (USDOC, 2 August 2000) (Case No. 10); *Cut-to-Length Carbon Steel Plate from Spain*, 65 Fed. Reg. 18307 (USDOC, 7 April 2000) (Case No. 11); and *Grain-Oriented Electrical Steel from Italy*, 66 Fed. Reg. 2885 (USDOC, 12 January 2001) (Case No. 12). Case Nos. 1–6 correspond to original investigations, Case Nos. 7 and 12 to administrative reviews, and Case Nos. 8–11 to sunset reviews.

[3]Section 771(5)(F) of the United States Tariff Act of 1930, as amended, which, for purposes of the United States Code, is codified at 19 U.S.C. § 1677(5)(F), attached as Exhibit EC-4 to the European Communities' first submission to the Panel.

[4]The USDOC analyzed the sales conditions of the privatizations in two of the underlying sunset reviews (Case Nos. 8 and 10) and three of the original investigations (Case Nos. 1, 2, and 4), concluding that those five privatizations took place at arm's length and for fair market value. (See Panel Report, paras. 2.2, 2.39, and 2.45; Remand Redetermination in *Acciai Speciali Terni S.p.A. v. United States*, No. 99-06-00364, slip op. 02–10 (Court of International Trade, 1 February 2002), available at http://www.ia.ita.doc.gov/remands/02-10.htm; Remand Redetermination in *GTS Indus. S.A. v. United States*, No. 00-03-00118, slip op. 02-02 (Court of International Trade, 4 January 2002), (available at http://www.ia.ita.doc.gov/remands/02-2.htm; and Remand Redetermination in *Allegheny Ludlum Corp. v. United States*, No. 99–09–00566, slip op. 02-01 (Court of International Trade, 4 January 2002), available at http://www.ia.ita.doc.gov/remands/02-1.htm.)) The USDOC has made no admissions as to the conditions of sale surrounding the other privatizations at issue.

[5]Panel Report, para. 2.3.

sold all, or substantially all, their ownership interests and, clearly, no longer had any controlling interests in the privatized producers.[6]

3. The 12 investigations relate to the impact of privatization of the firms under investigation on the existence of a countervailable benefit. The imposition or maintenance of countervailing duties in the 12 determinations was based on the existence of subsidies for the privatized producers, specifically, on the continuing benefit conferred by non-recurring financial contributions bestowed by the governments on the producers prior to privatization.

4. The Panel found that the United States had acted inconsistently with Articles 10, 14, 19.1, 19.4, 21.1, 21.2, 21.3, and 32.5 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*")[7], and that it had nullified or impaired benefits accruing to the European Communities under these Agreements.[8] The Panel recommended that the Dispute Settlement Body (the "DSB") request the United States to bring its measures into conformity with its obligations under the *SCM Agreement* and the *WTO Agreement*.[9]

5. The United States notified the DSB on 9 September 2002 of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal[10] with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). The Notice of Appeal provides, in relevant part:

> The United States seeks review by the Appellate Body of the conclusions of the Panel set forth in paragraphs 8.1(a)-(d) and 8.2 of the Panel's report. These conclusions are in error, and are based upon erroneous findings on issues of law and on related legal interpretations.

6. The European Communities filed, on 10 September 2002, a Request for a Preliminary Ruling (the "Request"), pursuant to Rule 16.1 of the *Working Procedures*, to "order" the United States to file particulars "identifying the precise legal findings and legal interpretations that it is challenging."[11]

[6]Panel Report, para. 2.3.

[7]*Ibid*., para. 8.1.

[8]*Ibid*., para. 8.2.

[9]*Ibid*., para. 8.3.

[10]WT/DS212/7, attached as Annex I to this Report.

[11]Request, para. 6.

The United States responded to the Request on 12 September 2002, arguing that the Request should be denied because the Notice of Appeal stated the Panel's findings and legal interpretations under appeal with sufficient clarity.[12]

7. On 12 September 2002, after considering the submissions on this issue by the European Communities and the United States, the Appellate Body "invite[d] the United States to identify the precise findings and interpretations of the Panel which are alleged, in the Notice of Appeal filed 9 September 2002, to constitute errors."[13] Responding to the invitation, the United States filed, on 13 September 2002, a document specifying further the errors of law and legal interpretations for which appellate review was requested. This document quoted the "Conclusions and Recommendations" paragraphs from the Panel Report[14], to which it had merely referred in the original Notice of Appeal, and added descriptions of particular errors of the Panel, as claimed by the United States.[15] The issues of the sufficiency of the Notice of Appeal and the request of the European Communities for dismissal of certain grounds of appeal were dealt with by the Participants in their written submissions and submissions at the oral hearing, and are dealt with by us later, under the heading "Procedural Issues".

8. On 19 September 2002, the United States filed its appellant's submission. On 4 October 2002, the European Communities filed its appellee's submission. On the same day, Brazil and India each filed a third participant's submission. Mexico filed a letter that day, pursuant to Rule 24(2) of the *Working Procedures*, stating its intention to participate and make an oral presentation as a third participant at the oral hearing.[16]

9. The Appellate Body also received on 19 September 2002 an *amicus curiae* brief from an industry association.[17] The European Communities, on 27 September 2002, filed a letter contesting the relevance of the *amicus curiae* submission to the Appellate Body's review, contending that the "arguments do not differ in substance from and largely repeat the arguments of the United States

---

[12]Letter dated 12 September 2002, from the Senior Legal Advisor, Permanent Mission of the United States to the WTO, to the Presiding Member of the Division hearing this appeal, pp. 2–3.

[13]Letter dated 12 September 2002, from the Director of the Appellate Body Secretariat to the Senior Legal Advisor, Permanent Mission of the United States to the WTO.

[14]Panel Report, paras. 8.1(a)–8.1(d) and 8.2.

[15]See Attachment to letter dated 13 September 2002 from the Senior Legal Advisor, Permanent Mission of the United States to the WTO, to the Director of the Appellate Body Secretariat.

[16]Letter dated 4 October 2002, from H.E. Mr. Eduardo Pérez Motta, Ambassador, Permanent Mission of Mexico to the WTO, to the Director of the Appellate Body Secretariat.

[17]Submission attached to letter dated 19 September 2002, from Andrew G. Sharkey III, American Iron and Steel Institute President & CEO, to the Presiding Member of the Division hearing this appeal.

Government"[18], and requested the Appellate Body "to inform the parties whether it intends to accept and take account of the brief submitted [by the industry association.]"[19]

10. The Appellate Body responded to the request of the European Communities on 27 September 2002, stating that a decision on the admissibility or relevance of the *amicus* submission would not be made until the written and oral submissions of all the participants had been considered.[20] The Appellate Body therefore invited all the participants "to address the [*amicus curiae*] brief in the further course of this appeal."[21]

11. The oral hearing in the appeal was held on 22 October 2002. The participants and third participants presented oral arguments and responded to questions put to them by Members of the Division hearing the appeal.

II. Factual Background

A. *The* "Gamma" *Method*

12. The USDOC applied one of two different methods (referred to as the "*gamma*" and "same person" methods)[22] in conducting the 12 determinations to assess the impact of a change in ownership effected through privatization on the continued existence of the benefit of a countervailable subsidy. The *gamma* method was formerly used by the USDOC to determine the extent to which a non-recurring financial contribution provided to a state-owned enterprise should be amortized over time to arrive at a countervailable subsidy rate[23], particularly after sale of the subsidized entity to a private firm.[24] In applying this method, the USDOC employed an "irrebuttable presumption" that the benefits

[18]Letter dated 27 September 2002, from the Minister-Counsellor, Permanent Delegation of the European Communities to the WTO, to the Presiding Member of the Division hearing this appeal, p. 1.

[19]*Ibid*., p. 2.

[20]Letter dated 27 September 2002, from the Director of the Appellate Body Secretariat to the Minister-Counsellor, Permanent Delegation of the European Communities to the WTO.

[21]*Ibid*.

[22]We note that the Panel refers to the administrative practice challenged in this dispute as the "same person *methodology*". Article 14 of the *SCM Agreement* refers to the procedures used by investigating authorities to calculate the benefit as "method[s]", so we will use the term "method" rather than "methodology".

[23]Both participants agree that "it is a normal and accepted practice … for the importing Member to presume that a non-recurring subsidy will provide a benefit over a period of time, which is normally presumed to be the average useful life of assets in the relevant industry", (Panel Report, para. 7.75) a practice found permissible by the Appellate Body in *US – Lead and Bismuth II*, para. 62, so long as the presumption remained rebuttable.

[24]United States' first submission to the panel, para. 5, attached to the Panel Report in *US – Lead and Bismuth II*, Attachment 2.1, p. 164.

of that financial contribution would remain with the recipient over a standard period of time[25], such that "USDOC does not undertake an inquiry into whether and, if so, to what extent the subsidy continues to benefit production at any subsequent point in time. Rather, the USDOC simply will countervail the amount of the subsidy originally allocated to the year" under review.[26] When confronted with a change in ownership of the producer under investigation, the USDOC would devise a ratio so as to allocate the "irrebuttably presumed" benefit between the seller and purchaser.[27] This allocation "can result in the full pass through of benefits from prior subsidies, or absolutely no pass through of benefits, or anything in between, depending on the facts of a particular case."[28]

13. The application by the USDOC of the *gamma* method in previous determinations was reviewed by the panel in *US – Lead and Bismuth II*, whose decision was upheld by the Appellate Body. The Appellate Body determined that, rather than employing the *gamma* method's "irrebuttable" presumption that subsidization continues, the USDOC should have conducted a new determination as to the existence of a "benefit", as "*required*" by the *SCM Agreement*, "given the changes in ownership leading to the creation of" the newly-privatized entities in that case.[29] The Appellate Body further found that the "specific circumstances" of that case did not warrant a finding of the continued existence of a benefit after the privatization of the assets of the state-owned firm at arm's length and for fair market value.[30]

[25]United States' first submission to the panel, paras. 6 and 44–45, attached to the Panel Report in *US – Lead and Bismuth II*, Attachment 2.1, pp. 164 and 172.

[26]United States' first submission to the panel, para. 44, attached to the Panel Report in *US – Lead and Bismuth II*, Attachment 2.1, p. 172. See also *ibid*., para. 43, attached to the Panel Report in *US – Lead and Bismuth II*, Attachment 2.1, p. 171, which states:

> … the US countervailing duty statute contains "the irrebuttable presumption that nonrecurring subsidies benefit merchandise produced by the recipient over time," without requiring any re-evaluation of those subsidies based on the use or effect of those subsidies or subsequent events in the marketplace.

(Quoting *Certain Steel Products from Austria*, 58 Fed. Reg. 37217, 37263 (USDOC, 9 July 1993) (General Issues Appendix)).

[27]United States' first submission to the panel, para. 10, attached to the Panel Report in *US – Lead and Bismuth II*, Attachment 2.1, p. 165.

[28]United States' first submission to the panel, para. 53, attached to the Panel Report in *US – Lead and Bismuth II*, Attachment 2.1, p. 174.

[29]Appellate Body Report, *US – Lead and Bismuth II*, para. 62.

[30]*Ibid*., paras. 67–68 and 74.

B. *The "Same Person" Method*

14. The "same person" method was devised as a replacement for the *gamma* method.[31] This method provides for a two-step test. The first step consists of an analysis of whether the post-privatization entity is the same legal person that received the original subsidy before privatization. For this purpose, the USDOC examines the following non-exhaustive criteria: (i) continuity of general business operations; (ii) continuity of production facilities; (iii) continuity of assets and liabilities; and (iv) retention of personnel. If, as a result of the application of these criteria, the USDOC concludes that *no new legal person* was created, the analysis of whether a "benefit" exists stops there, and the USDOC will not assess whether the privatization was at arm's length and for fair market value. The subsidy is automatically found to continue to exist for the post-privatization firm.[32] By contrast, if, as a consequence of the application of these criteria, the USDOC concludes that the post-privatization entity is *a new legal person*, distinct from the entity that received the pre-privatization subsidy, the USDOC will not impose duties on goods produced after privatization on account of the pre-privatization subsidy.[33]

15. In 11 of the 12 determinations at issue in this case, the USDOC applied the *gamma* method. These 11 determinations included six original investigations (Case Nos. 1–6), one administrative review (Case No. 7), and four sunset reviews (Case Nos. 8–11). The United States conceded the inconsistency of seven of these determinations (Case Nos. 1–7) with its WTO obligations, based on its acknowledgement that it must re-examine the continued existence of a benefit in the light of the findings of the panel and Appellate Body in *US – Lead and Bismuth II*.[34] With respect to the remaining four *gamma* determinations (Case Nos. 8–11), all sunset reviews, the United States did not concede inconsistency; rather, the United States argued before the Panel that, where no administrative reviews have taken place, an investigating authority is not required to consider evidence subsequent to the original investigation in evaluating whether the expiry of the

[31] As noted above, in paragraph 13, the *gamma* method was found by the Appellate Body to be inconsistent with the United States' obligations under the *SCM Agreement*, because the method does not permit the investigating authority to re-examine its original benefit determination "given the changes in ownership leading to the creation of" the privatized firms. (Appellate Body Report, *US – Lead and Bismuth II*, para. 62) Before the decision of the Appellate Body in *US – Lead and Bismuth II*, the *gamma* method had similarly been rejected by a United States appellate court as inconsistent with the USDOC's governing statute (in particular, with Section 1677(5)(F)). (See *Delverde Srl v. United States*, 202 F.3d 1360 (Fed. Cir. 2000) ("*Delverde III*"))

[32] United States' response to questioning at the oral hearing.

[33] *Ibid*. The USDOC will, however, proceed to examine, in such an event, whether any *new* subsidy had been bestowed upon the post-privatization entity's new owners as a result of the change in ownership (e.g., by assessing whether the sale was for fair market value and at arm's length). (*Ibid*.)

[34] Panel Report, para. 7.84.

countervailing duty would be likely to lead to continuation or recurrence of subsidization causing injury.[35] The Panel found to the contrary.[36] The "same person" method was applied in only one of the determinations at issue on appeal, which was an administrative review (Case No. 12).

16. The Panel concluded, as the United States had conceded, that in the *gamma*-based original investigations and administrative review (Case Nos. 1–7), the USDOC had failed to determine the existence (or continued existence) of a benefit before the imposition or maintenance of countervailing duties.[37] The Panel also concluded, regarding the four sunset reviews applying the *gamma* method (Case Nos. 8–11), that the USDOC had similarly failed to examine the continued existence of a benefit, and therefore, had not properly determined the likelihood of continuing or recurring subsidization.[38] With regard to the "same person" method, the Panel found that it was "itself inconsistent with the SCM Agreement" [39], and therefore, also found its application in administrative review Case No. 12 to be WTO-inconsistent.[40] In sum, the Panel found all 12 determinations to be WTO-inconsistent.

C. *The Consequences of Privatization*

17. As regards the consequences of privatization for the purpose of determining the continued existence of a "benefit", the Panel found that privatization at arm's length and for fair market value "must [lead to] the conclusion that no benefit resulting from the prior financial contribution (or subsidization) continues to accrue to the privatized producer".[41] On this premise, the Panel concluded that Section 1677(5)(F) is inconsistent with the United States' WTO obligations because "Section 1677(5)(F), as interpreted by the US Court of Appeals for the Federal Circuit and the

[35]Panel Report, paras. 7.104–7.105. Such evidence would include, as in the cases here, changes in ownership occurring after the provision of the relevant financial contribution.

[36]*Ibid*., para. 7.114.

[37]Panel Report, paras. 7.86, 7.98, 8.1(a), and 8.1(b).

[38]*Ibid*., paras. 7.114–7.116 and 8.1(c).

[39]*Ibid*., para. 7.90.

[40]*Ibid*., paras. 7.81 and 8.1(b).

[41]*Ibid*., para. 8.1(d).

SAA"[42], prevented the USDOC from automatically reaching the conclusion in every case that, following privatization at arm's length and for fair market value, "no benefit resulting from the prior financial contribution (or subsidization) continues to accrue to the privatized producer".[43]

III. Arguments of the Participants and Third Participants

A. *Claims of Error by the United States – Appellant*

1. Privatizations at Arm's Length and for Fair Market Value

18. The United States claims that the Panel erred in (i) ignoring the distinction between shareholders and firms when interpreting who is the "recipient" of a "benefit", in the light of Articles 1 and 14 of the *SCM Agreement* and Appellate Body jurisprudence, and (ii) consequently determining that, contrary to the text of the *SCM Agreement* and economic reason, an arm's-length privatization for fair market value necessarily extinguishes the benefit received from a previously-bestowed, non-recurring financial contribution.

19. The United States argues that the distinction between shareholders and firms, a "bedrock principle"[44] underlying the corporation laws of most advanced industrial jurisdictions, is recognized by the *SCM Agreement*, and that the Panel therefore impermissibly rejected this distinction when evaluating the determinations of the USDOC. Noting that a "benefit", as used in Article 1.1(b) of the *SCM Agreement*, must be conferred upon a "recipient", as provided for in Article 14 of that Agreement, the United States insists that the plain meaning of the term "recipient" cannot include both the benefiting foreign producer and a shareholder of that producer.[45] The United States finds contextual support for this reading in the forms of financial contribution identified in Article 1.1(a) and in the calculation guidelines of Article 14, arguing that these articles contemplate the recipient of

[42]Panel Report, para. 8.1(d). The Statement of Administrative Action ("SAA") was submitted by the President to the United States Congress with the Uruguay Round Agreements Act, the proposed statutory scheme enacting the WTO Agreements into United States domestic law. The SAA "represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements". (H.R. Rep. No. 103-316(I), at 656 (1994)) Congress further adopted the SAA:

> … as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.

(19 U.S.C. § 3512(d))

[43]Panel Report, para. 8.1(d).

[44]United States' appellant's submission, para. 60.

[45]*Ibid*., para. 56.

a benefit to be a "firm" rather than, as the Panel found, some amalgamation of a firm and its shareholders.[46]

20. It is therefore "not surprising", in the view of the United States, that the Appellate Body, in *Canada – Aircraft* and in *US – Lead and Bismuth II*, should have expressly identified "legal or natural persons" as the recipients addressed in the *SCM Agreement*.[47] The United States submits that "when the Appellate Body found that benefits are received by legal persons, it necessarily was referring to such legal persons as defined by 'the legal business structure established pursuant to national corporate law'".[48] The United States adduces that the Panel, in finding that "the concept of benefit is independent of the legal business structure established pursuant to national corporate law"[49], unduly ignored this "legal business structure".[50] The United States argues that "[g]overnments subsidize producers, not their shareholders"[51], and to conclude, as the Panel did, that no distinction should be made between a firm and its shareholders for purposes of the *SCM Agreement*, is to ignore the economics of investor behaviour and the "simple logic"[52] underlying the conferring of a benefit upon a foreign producer (not its shareholders) under the *SCM Agreement*.

21. The United States further contests the Panel's finding that privatization at arm's length and for fair market value necessarily extinguishes the benefit the privatized entity received from a non-recurring financial contribution when that entity was owned by the state.

22. The United States argues that the "essence … [of] the Panel's error was to consider the economic effects of a sale from the perspective of *the new shareholders*, rather than from the perspective of *the legal person producing the subject merchandise*, or the parties injured by the subsidized imports in question".[53] (original emphasis) Consequently, the Panel ignored the fact that "a change in the shareholders of a subsidy recipient does not remove the new equipment, extract knowledge from the workers, or increase the previously lowered debt load."[54] According to the United States, privatization, even if at arm's length and for fair market value, cannot extinguish the benefit of a financial contribution because of the economic reality that "subsidies shift the recipient's supply curve and, as a result, also change the point at which supply and demand for the products made

[46]United States' appellant's submission, paras. 58–59.

[47]*Ibid*., para. 65.

[48]*Ibid*., para. 66, quoting Panel Report, para. 7.50.

[49]United States' appellant's submission, para. 65, quoting Panel Report, para. 7.50.

[50]United States' appellant's submission, para. 66.

[51]*Ibid*., para. 76.

[52]*Ibid*.

[53]*Ibid.*, para. 46.

[54]*Ibid.*, para. 49.

by the recipient intersect in the marketplace."[55] To the extent that any purchase price paid by new shareholders fails to reduce the "artificially enhanced competitiveness generated by the subsidies"[56] and thereby return the market to its counterfactual position in the absence of previous subsidization, privatization *per se* has no impact on the continued existence of a benefit in the formerly state-owned firm. Accordingly, the United States submits that the Panel erred in finding that, despite the distinctions between the legal personalities of the enterprise (a corporation) and its owners (the shareholders), in an arm's-length privatization, the new owners (that is, the shareholders, *not* the legal person that was the original recipient of the subsidy) could extinguish the non-amortized part of the benefit by paying a fair market price for the state-owned enterprise.

2. <u>The "Same Person" Method</u>

23. The United States additionally challenges the Panel's finding that the "same person" method is inconsistent with the United States' WTO obligations, in particular, with the findings of the Appellate Body in *US – Lead and Bismuth II*. The United States alleges that this erroneous finding stems from the Panel's misunderstanding of the Appellate Body's rationale in *US – Lead and Bismuth II*. According to the United States, "[t]he reason why the Appellate Body concluded in *Lead and Bismuth II (AB)* that the original subsidies at issue did *not* continue to benefit the producer in question was precisely because that producer was not the same legal person that had received those subsidies".[57] (original emphasis) Therefore, in the United States' view, the critical factor weighing in the Appellate Body's decision in *US – Lead and Bismuth II* was the creation of a new legal person subsequent to the privatization transaction. This is the most logical reading of the decision, the United States argues, because the "legal or natural person" receiving the benefit is responsible for repaying the benefit so as to avoid countervailing duty liability.

24. Legal persons such as corporations, the United States reiterates, are separate "persons" from their shareholder-owners. It follows that if a legal person (say, a state-owned enterprise) receives a benefit and, following privatization, that legal person continues to exist, the benefit would also continue to exist (until fully amortized or repaid), irrespective of the price paid by its new private owners.[58] Because the "same person" method focuses on the "benefit" as received by the "legal person" existing before and after privatization, consistent with the emphasis of the Appellate Body in *Canada – Aircraft* and in *US – Lead and Bismuth II*, the United States urges reversal of the Panel's contrary finding.

---

[55]United States' appellant's submission, para. 50.

[56]*Ibid.*, para. 49.

[57]*Ibid.*, para. 4.

[58]*Ibid.*, para. 6.

3. Consistency of 19 U.S.C. § 1677(5)(F), as such, with WTO Obligations

25. The Panel further erred, according to the United States, in finding a United States statute, Section 1677(5)(F), inconsistent as such with the United States' WTO obligations. The United States contends that, although the Panel acknowledged the proper standard to apply in evaluating the WTO-consistency of Section 1677(5)(F) as such, it erred in the application of that standard to the facts of this case. The United States agrees with the Panel that "[o]nly legislation that 'requires' a violation of GATT/WTO rules can be found to be inconsistent with WTO rules," and that "legislation 'as such' is considered mandatory if it cannot be applied in a manner consistent with the SCM Agreement."[59] According to the United States, this standard is contradicted by the Panel's subsequent characterization that legislation may be WTO-inconsistent if it does not "systematically"[60] produce a WTO-mandated outcome.[61] The United States submits that the *SCM Agreement* does not require Members to enact legislation incorporating *per se* rules guaranteeing a WTO-consistent outcome in every case. For the Panel to conclude otherwise adds to the rights and obligations of Members, contrary to Articles 3.2 and 19.2 of the DSU.[62]

26. The European Communities failed to meet its burden, according to the United States, to show that the United States legislation prevented the USDOC from arriving at WTO-consistent determinations in countervailing duty cases. Section 1677(5)(F) itself provides the USDOC with the discretion to ensure that its countervailing duty investigations and reviews are conducted in a manner consistent with the United States' WTO obligations.[63] In the light of this discretion, the United States argues that the Panel, had it applied the correct standard, could not have concluded that Section 1677(5)(F) "mandates WTO-inconsistent action".[64]

27. The critical error of the Panel in arriving at its conclusion, according to the United States, was its flawed interpretation of Section 1677(5)(F), particularly based on a misreading of United States case law applying this statute. The United States notes that it repeatedly indicated to the Panel that if it were found that an arm's-length privatization extinguished the benefit from previous non-recurring financial contributions, the USDOC could make countervailing duty determinations consistent with

---

[59] United States' appellant's submission, para. 107, quoting Panel Report, paras. 7.120–7.121.

[60] The Panel uses the term "systematically" to describe a result that would follow "automatically", namely, occurring always as a necessary consequence. (European Communities' response to questioning at the oral hearing)

[61] United States' appellant's submission, para. 108, quoting Panel Report, paras. 7.132, 7.140, and 8.1(d).

[62] United States' appellant's submission, para. 109.

[63] *Ibid.*, para. 110.

[64] *Ibid.*, para. 112.

such a finding, without any change in legislation.[65] The Panel, however, found that, as interpreted in a United States court case referred to as *Delverde III*[66], the USDOC would be precluded from conducting countervailing duty investigations and reviews in a WTO-consistent manner, as those cases relate to the calculation of a benefit subsequent to a change in ownership.[67] The United States argues that *Delverde III*, at best, is ambiguous with respect to the specific facts of this case and to the relevance of a privatization at arm's length *and* for fair market value.[68] Although the United States raised this issue before the Panel during the interim review stage, the Panel did not respond to it.[69] Accordingly, the United States submits that the Panel failed to "perform an objective assessment of the matter" before it, as required by Article 11 of the DSU.[70]

B. *Arguments of the European Communities – Appellee*

1. Privatizations at Arm's Length and for Fair Market Value

28. The European Communities argues that privatization at arm's length and for fair market value necessarily extinguishes any benefit remaining from a previously-bestowed financial contribution by the government when the company was a state-owned enterprise. According to the European Communities, the Panel correctly rejected the distinction between firms and their owners for purposes of determining whether a benefit exists under the *SCM Agreement*. The European Communities submits that, according to Article 1.1(b) of the *SCM Agreement*, a "financial contribution need not be directly provided to its recipient" [71] and "the recipient of a financial contribution need not be the same as the recipient of the benefit conferred thereby, as long as the required causal relationship between the contribution and the benefit is established."[72]

29. The finding in *Canada – Aircraft* that the "recipient" of a "benefit" may include a "group of persons" establishes, in the view of the European Communities, that the "recipient" need not be limited to the single firm exporting subject merchandise, but may also include that firm's owners, that is, its shareholders.[73] The European Communities further submits that the Appellate Body, "by concluding [in paragraph 68 of the Appellate Body Report in *US – Lead and Bismuth II*] that no

---

[65] United States' appellant's submission, paras. 115–117.

[66] *Delverde III, supra,* footnote 31.

[67] United States' appellant's submission, para. 117.

[68] *Ibid.*, paras. 118–121.

[69] *Ibid.*, para. 122.

[70] *Ibid.*, para. 113.

[71] European Communities' appellee's submission, para. 38.

[72] *Ibid.*, para. 47.

[73] *Ibid.*, paras. 23 and 28.

'benefit' was conferred [on the privatized enterprise] as a result of the payment of fair market value in an arm's-length transaction limited to the sale of shares … implicitly accepted that the concept of a 'recipient,' as a 'natural or legal person,' is not limited to the company itself, but also includes its owner." [74]

30. The European Communities alleges that the United States does not itself regard the shareholder-firm distinction as absolute. In this regard, the European Communities notes that "the USDOC recognises that subsidies conferred on one part of an economic entity will liberate resources that can be applied to another part of the entity, and hence, for the purpose of countervailing duties, those subsidies are 'attributed' to the production and exports of the entire entity".[75] (footnote omitted) The European Communities also argues that the lack of consistency in the United States' position is further evidenced in the second step of its "same person" method, where "the United States considers that a benefit corresponding to the extent of the difference between the transaction value and fair market value is a benefit to the company as well as its owners." [76]

31. Because a clear line dividing firms from their owners is unsupported by the *SCM Agreement*, the European Communities rejects the United States' position that a benefit, and therefore a countervailable subsidy, can remain after private purchasers have purchased the shares of a state-owned enterprise for fair market value in an arm's length transaction. The European Communities recalls that the Appellate Body recognized in *Canada – Aircraft* that a "benefit" is conferred if "the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."[77] This is a "well-established market benchmark standard"[78] that the United States does not appear to respect in focusing its economic analysis on the market distortions caused by previous subsidies. The European Communities consequently regards such distortions as beyond the scope of the "benefit" defined in Article 1.1(b) of the *SCM Agreement*.[79]

32. The European Communities submits that the sale of a state-owned firm at arm's length and for fair market value necessarily satisfies the marketplace comparison contemplated in *Canada – Aircraft* so as to remove any "advantage"[80] that a firm may have held before as a result of a non-recurring

[74]European Communities' appellee's submission, para. 27.
[75]*Ibid*., para. 63.
[76]*Ibid*., para. 52.
[77]*Ibid*., para. 68, quoting Appellate Body Report, *Canada – Aircraft*, para. 157.
[78]European Communities' appellee's submission, para. 70.
[79]*Ibid*., paras. 76–78.
[80]*Ibid*., para. 57, quoting Appellate Body Report, *Canada – Aircraft*, para. 153.

financial contribution from the government.[81] According to the European Communities, because "benefit" is defined in relation to the marketplace, as established in *Canada – Aircraft*, a firm privatized at arm's length and for fair market value receives nothing on terms more favourable than what the market itself would have provided. The benefits derived from previous financial contributions are reflected in the firm's balance sheet and accordingly reflected in the price attributed to the firm by the market. In the argument of the European Communities, once the firm is privatized, "[t]he prior subsidies granted to the state-owned producer neither reduce costs nor enhance revenue as far as the privatised producer is concerned."[82] Therefore, the firm's products no longer benefit from previous financial contributions because those products would be competing in the marketplace on the same terms as those of its competitors. In this respect, the European Communities recalls that the USDOC, "[i]n the 'General Issues Appendix' attached to its 1993 determination in *Certain Steel Products from Austria*, … explained [the importance of privatization by stating] that … 'the privatized company now has an obligation to provide to its private owners a market return on the company's full value.'"[83] (footnote omitted)

33. Finally, if the market benchmark standard established by the Appellate Body in *Canada – Aircraft* for calculating the amount of a subsidy is satisfied, the European Communities argues that it is not additionally necessary to establish that subsidies have been repaid to the government, although the fair market value paid for a privatized entity could, as the Panel suggested, "be regarded as 'repayment' of prior subsidies".[84]

2. The "Same Person" Method

34. The European Communities argues that, contrary to the United States' understanding, the Appellate Body, in *US – Lead and Bismuth II*, clearly identified the obligation on the part of investigating authorities to re-examine the existence of a subsidy once they are notified of a privatization resulting in a change of control of the firm at issue.[85] In the view of the European Communities, the interpretation urged by the United States impermissibly inserts an intermediate step before the investigating authority would be required to determine whether a benefit continues to exist, that is, investigating authorities notified of a privatization would undertake a re-examination only if the privatized producer is not the "same person" as the pre-privatized producer.[86] According to the

---

[81]European Communities' appellee's submission.., paras. 57–59.

[82]*Ibid.*, para. 69.

[83]*Ibid.*, para. 65, quoting *Certain Steel Products from Austria*, 58 Fed. Reg. 37217, 37262 (USDOC, 9 July 1993) (General Issues Appendix).

[84]European Communities' appellee's submission, para. 72.

[85]*Ibid.*, para. 32.

[86]*Ibid.*

European Communities, no such intermediate step was contemplated by the Appellate Body in *US – Lead and Bismuth II*, as the obligation on the investigating authority flowed directly from the change in ownership.

35. The European Communities argues that the *SCM Agreement* does not permit imposition or maintenance of countervailing duties without a re-examination by the investigating authority of the elements of a subsidy. Accordingly, the European Communities submits that the "same person" method is inconsistent with the United States' WTO obligations because it expressly requires the countervailing of benefits presumed to continue to exist after such a privatization. In such an instance, the United States would effectively be imposing countervailing duties in excess of or in the absence of subsidization. Moreover, the European Communities submits that the "same person" method, "[b]y maintaining a focus on the continuity of the productive operations of the producer … is premised on the same assumption that underlay the 'gamma' methodology, [in respect of which] [t]he Appellate Body has already determined that bind[ing] the benefits of previous subsidies to the productive operations of a producer is inconsistent with the *SCM Agreement*."[87] (footnote omitted)

36. Consequently, according to the European Communities, the "same person" method prevents the USDOC from undertaking the task imposed by the *SCM Agreement* and the Appellate Body's decision in *US – Lead and Bismuth II*, namely, the re-evaluation of the existence of a benefit upon notice of a change in ownership. As a result, the European Communities requests the Appellate Body to uphold the Panel's conclusions in paragraphs 8.1(a), 8.1(b), and 8.1(c), as "the 'same-person' methodology leads to the imposition of countervailing duties in the absence of, or in excess of, subsidies, in violation of Articles 10, 14, 19.1, 19.4, 21.1, 21.2, and 21.3 of the *SCM Agreement*."[88]

3. Consistency of 19 U.S.C. § 1677(5)(F), as such, with WTO Obligations

37. The European Communities argues that the Panel correctly found that Section 1677(5)(F), as such, is inconsistent with the United States' WTO obligations under the *SCM Agreement*. As an initial matter, the European Communities argues that a measure is "mandatory" where "a Member's legislation prohibits the administrative authorities from doing something that is WTO-consistent, without leaving effective options".[89] The European Communities, disagreeing with the Panel in this regard, insists that the plain language of Section 1677(5)(F) sufficiently denotes the "mandatory" nature of the measure.[90] According to the European Communities, the Appellate Body, in *US – Lead*

---

[87]European Communities' appellee's submission, para. 7, referring to Appellate Body Report, *US – Lead and Bismuth II*, paras. 56–58.

[88]European Communities' appellee's submission, para. 86.

[89]*Ibid.*, para. 106.

[90]*Ibid.*, para. 108.

and Bismuth II, established that once a firm is privatized for fair market value, benefits from previously-bestowed financial contributions can no longer exist for the privatized firm.[91] Because Section 1677(5)(F) prevents the USDOC from arriving at such a WTO-mandated conclusion, the measure, which is mandatory, is, as such, inconsistent with the United States' obligations under the *SCM Agreement*.

38. The European Communities also alleges that the "mandatory" nature of this statute is reinforced by the fact that the statute, about which guidance is found in the SAA[92] and as interpreted by United States courts, denies the USDOC the authority to act as required under the *SCM Agreement*, namely, to conclude that no benefit exists as a direct result of an arm's-length privatization.[93] Because the Panel thoroughly investigated the application of Section 1677(5)(F) by reviewing its application in the light of other domestic legal tools, and because the Panel provided the United States sufficient opportunity to present alternative interpretations before the Panel, the European Communities argues that the Panel acted in accordance with DSU Article 11.[94]

39. Even if the measure were found to be discretionary, the European Communities submits that such discretion is incompatible with the nature of the WTO obligations at issue. The European Communities notes that the *SCM Agreement* prohibits absolutely the imposition or maintenance of countervailing duties in the absence of a subsidy. Section 1677(5)(F) expressly preserves the USDOC's discretion to levy countervailing duties notwithstanding the fact that a benefit (and hence, a subsidy) cannot exist for a firm privatized at arm's length and for fair market value. Such discretion to do what is so clearly prohibited by the *SCM Agreement* "is nothing more than a license for nuisance."[95] In this regard, given the centrality of security and predictability to the multilateral trading system, the European Communities argues that the maintenance of the discretion to act in a manner prohibited by WTO obligations undermines such predictability and renders even the discretionary elements of Section 1677(5)(F) WTO-inconsistent, as such.[96]

40. The European Communities observes, however, that the Appellate Body may be able to resolve this issue without reviewing the Panel's decision. The European Communities submits that the Panel's finding in paragraph 8.1(d) of the Panel Report may be regarded as "moot" if the United States is correct and can confirm that Section 1677(5)(F) contains discretion to ensure compliance

---

[91]European Communities' appellee's submission, para. 109.

[92]See *supra*, footnote 42.

[93]European Communities' appellee's submission, paras. 111–119.

[94]*Ibid.*, paras. 110–111, 118, and 120.

[95]*Ibid*., para. 125.

[96]*Ibid*., paras. 126–127.

with WTO obligations regarding the extinguishing of a benefit after an arm's-length privatization.[97] In the view of the European Communities, such confirmation could be presented in the form of:

> … good faith assurances from the United States that the USDOC would determine, systematically, that no benefit passes through to the privatised producer wherever the facts establish that a change of ownership transaction has taken place at arm's length and for fair market value …[98]

The European Communities submits that, although the United States failed to offer such assurances to the Panel, the United States' willingness to do so before the Appellate Body would be sufficient to render Section 1677(5)(F), as such, not inconsistent with the obligations of the *SCM Agreement*, as understood by the Appellate Body in *US – Lead and Bismuth II*.[99]

C. *Arguments of the Third Participants*[100]

1. Brazil

(a) Privatizations at Arm's Length and for Fair Market Value

41. Brazil observes that "[t]he relevant question … is whether [the] benefit survived privatization"[101] (footnote omitted) and contends that the United States, without foundation, "believes that once equity is provided on terms inconsistent with normal considerations of private investors, it remains on such terms regardless of whether that equity is subsequently sold on terms that are consistent with normal considerations of private investors."[102] Brazil argues that the United States, in emphasizing the shift in the firm's supply curve caused by subsidization, and requiring a readjustment of the supply curve before finding no remaining benefit from a financial contribution, confuses the existence of a countervailable subsidy with the effects of such a subsidy. Brazil submits that, whereas such market distortion may result from a subsidy, it is irrelevant for purposes of identifying a subsidy under Article 1.1 of the *SCM Agreement*.

42. Brazil contends that the obligation to determine a benefit under Article 1.1 of the *SCM Agreement* requires a comparison with the marketplace, as the Appellate Body held in *Canada –*

---

[97]European Communities' appellee's submission, paras. 102–104.

[98]*Ibid.*, para. 102.

[99]*Ibid.*, paras. 102–103.

[100]Pursuant to Rule 24(2) of the Working Procedures, Mexico did not file a written submission, but it did make a statement and respond to questioning at the oral hearing.

[101]Brazil's third participant's submission, para. 23.

[102]*Ibid.*, para. 29.

Aircraft and in *US – Lead and Bismuth II*. Such a comparison, in Brazil's view, necessarily entails an examination of the conditions surrounding the sales transaction to assess whether a recipient continued to be advantaged vis-à-vis its competitors, particularly so in the case of equity infusions, as supported by Article 14(a) of the *SCM Agreement*. A fair market purchase price removes the benefit of an equity infusion otherwise in the firm because, when compared with the provision of equity in the marketplace, the shareholders of the new firm will have paid the amount mandated by the market for all the corporation's assets, goodwill, etc. The former beneficiary firm will thus no longer be receiving any advantage because what had previously been a "benefit" (that is, an equity infusion presumably inconsistent with considerations of private investors) has effectively been paid for, and consequently, "[t]he company's costs are in fact altered because they now include the necessity of generating a return to the owners"[103] for the full value of their investment.

(b) "Same Person" Method

43. Brazil argues that the United States mischaracterizes the decisions of the panel and the Appellate Body in *US – Lead and Bismuth II*. Contrary to the reading proffered by the United States, Brazil understands that in that case, the panel found that investigating authorities were obliged under the *SCM Agreement* to determine whether a benefit continues to exist upon a change in ownership of the investigated firm, regardless of whether such a transaction resulted in the creation of a new legal entity. This emphasis on the change in ownership was affirmed by the decision of the Appellate Body, which, under Brazil's reading, also accepted the panel's conclusion that a benefit does not remain in a post-privatization entity after an arm's-length, fair market value privatization. Accordingly, Brazil finds no support for the United States' position that the change in legal personality was central to the decisions in *US – Lead and Bismuth II*, thereby justifying the shareholder-firm distinction underlying the "same person" method.

44. Brazil further submits that, pursuant to the obligations under Article 1.1 of the *SCM Agreement*, and the precondition in footnote 36 of Article 10 that countervailing duties are only to offset subsidies, the elements of a subsidy (as identified in Article 1.1) must be established in every investigation. The "same person" method is inconsistent with the obligations in the *SCM Agreement*, according to Brazil, because it irrebuttably presumes that the pre-privatization benefit received by a state-owned firm accrues to the post-privatization entity when the two companies are the same legal person. The "same person" method thus permits the imposition of countervailing duties without requiring the investigating authority initially to establish the existence of a "benefit" upon a change in ownership in every case.

[103] Brazil's third participant's submission, para. 52.

(c) Consistency of 19 U.S.C. § 1677(5)(F), as such, with WTO Obligations

45. Brazil argues that the Panel correctly found that Section 1677(5)(F), as interpreted by the United States Court of Appeals for the Federal Circuit and the SAA[104], is inconsistent, as such, with United States' obligations under the *SCM Agreement*. The Panel properly recognized that only legislation compelling a violation of a WTO obligation (that is, "mandatory" legislation) may be found to be inconsistent, as such, with a Member's WTO commitments.[105] As the Panel found the plain text of Section 1677(5)(F) to vest the USDOC with discretion, Brazil submits that the Panel correctly looked to the domestic context of Section 1677(5)(F), including its application in practice and binding legislative history, to determine whether such discretion was "imaginary or ineffective".[106] Brazil argues that, based particularly on a review of the legislative history and case law relating to Section 1677(5)(F), the Panel made numerous findings to substantiate its conclusion that the USDOC is, in effect, prevented from arriving automatically at the conclusion that, following an arm's-length, fair market value privatization, a benefit from a previously-bestowed financial contribution is necessarily extinguished.[107]

46. Brazil contests the United States' charge that the Panel effectively employed an erroneous standard when evaluating the nature of Section 1677(5)(F) as mandatory or discretionary. Brazil finds the United States' claim of error to be based on "semantics".[108] In the submission of Brazil, the Panel's conclusion that "Section 1677(5)(F) is WTO-inconsistent because it does not 'systematically' allow for a result consistent with *Lead and Bismuth II* … [is] no different than stating that Section 1677(5)(F) requires a WTO-inconsistent result."[109] (footnote omitted)

47. Brazil further argues that the United States' claim that the Panel ignored the ambiguity created by the United States Court of Appeals for the Federal Circuit in the interpretation of Section 1677(5)(F) in *Delverde III* is not persuasive. In this respect, Brazil notes that, in any event, the *Delverde III* court clearly found that Section 1677(5)(F) prevents the USDOC from concluding that a benefit could be extinguished solely through an arm's-length privatization.[110] Brazil says that this reasonable interpretation underlay the Panel's finding of a violation as such because, although the USDOC is empowered to find no benefit after a change in ownership, it would be precluded from

---

[104]See *supra*, footnote 42.

[105]Brazil's third participant's submission, para. 34.

[106]*Ibid.*

[107]*Ibid.*, para. 36.

[108]*Ibid.*, para. 39.

[109]*Ibid*.

[110]*Ibid.*, paras. 41–43.

making such a finding on the basis of an arm's-length privatization for fair market value "in and of itself"[111], which it is required to do under the *SCM Agreement*.

2. India

48. India argues that, when evaluating whether a benefit continues to exist, no distinction should be made between the benefit conferred as a result of a financial contribution to the shareholders or to their firms.[112] Accordingly, the Panel correctly focused its analysis on the "recipient," determined to be the company and shareholders "together" under the *SCM Agreement*.[113] India notes that the benefit in such evaluations must be measured against the marketplace, as the Appellate Body recognized in *Canada – Aircraft*.[114] India agrees that when a company is sold for fair market value, its purchase price, as determined by the market, necessarily includes the value of the benefit conferred by the previous financial contribution. India says that it therefore considers "fair" the conclusion that privatization at arm's length and for fair market value requires the investigating authority to conclude that a benefit from the prior financial contribution no longer remains with the privatized firm.[115]

IV. Issues Raised in this Appeal

49. The following issues are raised in this appeal:

– One is whether the Panel erred in finding that privatization, at arm's length and for fair market value, "*systematically*"[116] extinguishes the "benefit" from previously-bestowed non-recurring financial contributions.

– Another is whether the Panel erred in finding that the United States failed to comply with its obligations under Articles 10, 14, 19.1, 19.4, 21.1, 21.2, and 21.3 of the *SCM Agreement*, in using a method of calculating the "benefit" to the "recipient" that presumes conclusively that if the state-owned enterprise and the post-privatization firm are the same "legal person", the "benefit" received by the state-owned enterprise *automatically* continues to exist with the newly-privatized firm.

[111] Brazil's third participant's submission, para. 38.
[112] *Ibid.*, p. 5.
[113] *Ibid.*, quoting Panel Report, para. 7.54.
[114] Brazil's third participant's submission, p. 5 and footnote 9.
[115] *Ibid.*, p. 5.
[116] As to the term "systematically", see *supra*, footnote 60.

– A third is whether the Panel erred in finding that 19 U.S.C. § 1677(5)(F) is, *per se*, inconsistent with Articles 10, 14, 19, and 21 of the *SCM Agreement*, because it prevents the USDOC from *automatically* concluding that, following privatization at arm's length and for fair market value, the "benefit" of a prior non-recurring financial contribution bestowed on the state-owned enterprise no longer "accrue[s]"[117] to the privatized producers; and, consequently, that the "United States has failed to ensure conformity with Article 32.5 of the *SCM Agreement* and Article XVI.4 of the *WTO Agreement*".[118]

V. Procedural Issues

50. We turn first to the procedural issues raised in this appeal. The first procedural issue is the European Communities' challenge to the sufficiency of the United States' Notice of Appeal. The European Communities requests that we dismiss the United States' appeal with respect to three alleged errors by the Panel on the ground that they were not included in the Notice of Appeal. The second procedural issue relates to the *amicus curiae* brief submitted by an industry association. We will deal with each of these procedural issues in turn.

A. *Sufficiency of the Notice of Appeal and Request for Dismissal of Certain Aspects of the Appeal*

51. The United States filed a Notice of Appeal on 9 September 2002, which provides:

> Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the panel report on *United States – Countervailing Measures Concerning Certain Products from the European Communities* (WT/DS212/R) and certain legal interpretations developed by the Panel.
>
> The United States seeks review by the Appellate Body of the conclusions of the Panel set forth in paragraphs 8.1(a)-(d) and 8.2 of the Panel's report. These conclusions are in error, and are based upon erroneous findings on issues of law and on related legal interpretations.[119]

---

[117]Panel Report, para. 8.1(d).

[118]*Ibid*.

[119]WT/DS212/7, attached as Annex I to this Report.

52. On 10 September 2002, the European Communities the filed a Request for a Preliminary Ruling (the "Request"), alleging that the United States' Notice of Appeal "is manifestly not in conformity with Rule 20(2)(d) of the *Working Procedures for Appellate Review*"[120] because it "fails to identify the findings or the legal interpretations that it considers to be erroneous."[121] The European Communities argued that "[a]s a consequence, the European Communities is unable to prepare its response to the appeal."[122] The European Communities asked us to "order the United States, pursuant to Rule 16(1) of the Working Procedures, immediately to file further and better particulars to its notice of appeal identifying the precise legal findings and legal interpretations that it is challenging."[123]

53. By letter of 12 September 2002, the United States responded that the Request of the European Communities was unfounded, arguing that the Notice of Appeal meets the requirements of Rule 20(2)(d) of the *Working Procedures* because "[i]t identifies, by reference to the paragraphs of the Panel Report concerned, the findings and legal interpretations of the Panel that the United States is appealing as erroneous. As interpreted by the Appellate Body, Rule 20(2)(d) requires no more."[124] The United States, relying on our ruling in *US – Shrimp*, asserted that it did not have to include arguments in support of the allegations of error in the Notice of Appeal, as those arguments need only be set out in the appellant's submission.

54. The United States rejected the European Communities' argument that a Notice of Appeal serves to inform the appellee and third parties of the issues to be raised on appeal. The United States argued that providing notice of the subject-matter of the appeal cannot be the objective of a Notice of Appeal, because there is no requirement to file a Notice of Appeal with respect to a cross-appeal. The United States concluded that "it is clear that the notice of appeal serves a limited purpose: rather than providing a preview of argumentation (of which the cross-appellee (the initial appellant) receives none at all), the notice of appeal is simply a formal trigger for initiating the appeal."[125] The United

[120] Request, para. 1.

[121] *Ibid.*, para. 4.

[122] *Ibid.*, para. 5.

[123] *Ibid.*, para. 6.

[124] Letter dated 12 September 2002 from the Senior Legal Advisor, Permanent Mission of the United States to the WTO, to the Presiding Member of the Division hearing this appeal, p. 2.

[125] *Ibid.*

States found support for its position in Articles 16.4[126] and 17.5[127] of the DSU. Both refer to notifying a decision to appeal; and neither refers to requirements to notify the grounds of appeal.

55. On 12 September 2002, we invited the United States "to identify the precise findings and interpretations of the Panel which are alleged, in the Notice of Appeal filed on 9 September 2002, to constitute errors."[128] The United States responded by letter dated 13 September 2002.[129] In an attachment to that letter, the United States quoted in full the paragraphs of the Panel Report to which it had merely referred by number in the Notice of Appeal. The United States also provided information as to legal errors allegedly committed by the Panel.[130]

56. In its appellee's submission, the European Communities alleges that certain issues argued in the United States' appellant's submission were not included in the United States' Notice of Appeal (or in the attachment to the letter of 13 September 2002). In particular, the European Communities identifies the following issues as those on which the United States failed to claim error by the Panel in the Notice of Appeal:

---

[126]Article 16.4 of the DSU provides as follows:

> Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report. (footnote omitted)

[127]Article 17.5 of the DSU provides as follows:

> As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

[128]Letter dated 12 September 2002 from the Director of the Appellate Body Secretariat, to the Senior Legal Advisor, Permanent Mission of the United States to the WTO.

[129]Letter dated 13 September 2002, from the Senior Legal Advisor, Permanent Mission of the United States to the WTO, to the Director of the Appellate Body Secretariat.

[130]Attachment to letter dated 13 September 2002, from the Senior Legal Advisor, Permanent Mission of the United States to the WTO, to the Director of the Appellate Body Secretariat.

> – "The United States did not allege error in the Panel's finding that administering authorities are required, following notification of a privatisation, to re-examine whether any 'benefit' accrues to the privatised producer";
>
> – "the United States [did not] allege any error in the interpretation of the 'mandatory-discretionary' standard adopted by the Panel to find that Section 1677(5)(F) is inconsistent as such with the *SCM Agreement*"; and
>
> – "the United States [did not] raise any claim of error in the application of Article 11 of the [DSU]."[131] (footnotes omitted)

The European Communities alleges that these issues are therefore not properly before the Appellate Body and should be dismissed.[132]

57. The United States responded to these contentions at the oral hearing, arguing that it is sufficient in a Notice of Appeal to identify the findings of a panel that are being appealed, and that there is no requirement to identify in it why a particular finding is in error. Nor is there any requirement, according to the United States, to include arguments in the Notice of Appeal, such as an argument that a panel failed to act consistently with Article 11 of the DSU. The United States submits that arguments are to be elaborated in the appellant's submission. The United States consequently rejects the contention that the three issues identified by the European Communities are outside the scope of the appeal.

58. On this first procedural issue, we begin our analysis by recalling Rule 20 of the *Working Procedures*, which, as its title attests, establishes guidelines for the commencement of an appeal. Paragraph 1 of Rule 20 states that:

> *Commencement of Appeal*
>
> 20. (1) An appeal shall be commenced by notification in writing to the DSB in accordance with paragraph 4 of Article 16 of the DSU and simultaneous filing of a Notice of Appeal with the Secretariat.

Paragraph 2 of Rule 20 prescribes the "information" that must be included in the Notice of Appeal. In addition to the title of the panel report being appealed, the name of the appellant, and the service

---

[131] European Communities' appellee's submission, para. 17.

[132] *Ibid.*, para. 19. India concurs with the European Communities that the United States' Notice of Appeal is inadequate, arguing that it is "too brief that the [appellee] and the third parties could not make out as to what legal issues were in appeal." (India's third participant's submission, p. 2.) India, however, does not expressly seek the dismissal of certain issues argued by the United States in its appellant's submission.

address and contact coordinates, subparagraph 20(2)(d) states that the Notice of Appeal "shall include" the following information:

> d) a brief statement of the nature of the appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel.

59. The requirements in Rule 20(2)(d) for the Notice of Appeal should be contrasted with those in Rule 21(2)(b) of the *Working Procedures*, where we have stated what "shall [be] set out" in the appellant's submission. Those requirements are:

> (i) a precise statement of the grounds for the appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof;
> (ii) a precise statement of the provisions of the covered agreements and other legal sources relied on; and
> (iii) the nature of the decision or ruling sought.

Thus, both the Notice of Appeal and the appellant's submission must set out the allegations of errors; but, the appellant's submission must be more specific in this regard. The appellant's submission must be precise as to the grounds of appeal, the legal arguments which support it, and the provisions of the covered agreements and other legal sources upon which the appellant relies.

60. As we have said previously, "the right of a party to appeal from legal findings and legal interpretations reached by a panel in a dispute settlement proceeding is an important new right established in the DSU".[133] Furthermore, we have affirmed that "the provisions of Rule 20(2) and other Rules of the *Working Procedures for Appellate Review* are most appropriately read as to give full meaning and effect to the right of appeal".[134] In *US – Shrimp*, where the Joint Appellees sought dismissal of the entire appeal on the ground of insufficiency of the Notice of Appeal, we discussed the elements required for a Notice of Appeal. We said there:

[133]Appellate Body Report, *US – Shrimp*, para. 97.

[134]*Ibid*.

> The *Working Procedures for Appellate Review* enjoin the appellant to be *brief* in its notice of appeal in setting out "the nature of the appeal, including the allegations of errors". We believe that, in principle, the "nature of the appeal" and "the allegations of errors" are sufficiently set out where the notice of appeal adequately identifies the findings or legal interpretations of the Panel which are being appealed as erroneous. The notice of appeal is not expected to contain the reasons why the appellant regards those findings or interpretations as erroneous. The notice of appeal is not designed to be a summary or outline of the arguments to be made by the appellant. The legal arguments in support of the allegations of error are, of course, to be set out and developed in the appellant's submission.[135] (underlining added)

In that appeal, we upheld the Notice of Appeal against claims that it was "vague and cursory"[136], finding that, although it did not cite the numbered paragraphs of the Panel Report containing the findings that were the subject of that complaint, and although the references in it to the panel's findings were "terse, … there [was] no mistaking which findings or interpretations of the Panel the Appellate Body [was] asked to review."[137] (footnote omitted)

61. At the same time, we confirmed in *US – Shrimp* that "an appellee is, of course, always entitled to its full measure of due process."[138] In another appeal, *EC – Bananas III*, we explained that the Notice of Appeal serves to give notice to the appellee of the findings being appealed.[139] In that appeal, we excluded from the scope of appeal a finding that had not been "covered" in the allegations of error set out in the Notice of Appeal because the appellee "had no notice that the European Communities was appealing this finding."[140]

62. In sum, our previous rulings have underscored the important balance that must be maintained between the right of Members to exercise the right of appeal meaningfully and effectively, and the right of appellees to receive notice through the Notice of Appeal of the findings under appeal, so that they may exercise their right of defence effectively. Hence, we disagree with the contention of the United States here that the Notice of Appeal "serves a limited purpose" as "simply a formal trigger for initiating the appeal."[141] Indeed, if this were the only objective of the notice, our *Working Procedures* would have included only the first paragraph of Rule 20, which refers to commencement

[135]Appellate Body Report, *US – Shrimp*, para. 95.

[136]*Ibid.*, para. 92.

[137]*Ibid.*, para. 96.

[138]*Ibid.*, para. 97.

[139]Appellate Body Report, *EC – Bananas III*, para. 152.

[140]*Ibid*.

[141]Letter dated 12 September 2002 from the Senior Legal Advisor, Permanent Mission of the United States to the WTO, to the Presiding Member of the Division hearing this appeal, p. 2.

of an appeal through written notification to the Dispute Settlement Body and Appellate Body Secretariat. However, Rule 20 also prescribes additional requirements for commencing an appeal; it provides that the Notice of Appeal must include "a brief statement of the nature of the appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel." [142] The notification under Rule 20(1) serves as the "trigger" to which the United States refers. The additional requirements under Rule 20(2) serve to ensure that the appellee also receives notice, albeit brief, of the "nature of the appeal" and the "allegations of errors" by the panel.

63. We turn now to the question whether the United States' Notice of Appeal in this case met the requirements for a Notice of Appeal set out in Rule 20(2)(d). We must determine whether the Notice of Appeal was sufficient to give notice to the European Communities that the three alleged claims of error by the Panel, which the European Communities argues were not included in the Notice, were in fact being appealed.

64. In conducting our analysis, we will examine both the Notice of Appeal and the letter of 13 September 2002 supplementing the Notice of Appeal. Although the *Working Procedures* do not expressly provide for the filing of clarifications or further particulars or supplementary or amended Notices of Appeal, we consider it appropriate, in the particular circumstances of this case, to examine both documents with a view to giving "full meaning and effect to the right of appeal."[143] We note in particular that the additional document was filed by the United States in response to our invitation to do so, based in part on a request for additional particulars filed by the European Communities. Moreover, the additional document was filed shortly after the filing of the Notice of Appeal (three days). Finally, we note that the European Communities referred to both the Notice of Appeal and the letter of 13 September 2002 in its arguments on this issue.[144]

---

[142] The United States' comparison to the lack of notice provided to a cross-appellee is not appropriate because the *Working Procedures* do not impose any notification requirements under such circumstances.

[143] Appellate Body Report, *US – Shrimp*, para. 97.

[144] European Communities' appellee's submission, paras. 13 and 16; European Communities' statement at the oral hearing as well as responses to questioning at the hearing.

65. The Notice of Appeal referred only to the paragraph numbers of the Panel Report where the Panel set out its "Conclusions and Recommendations" (namely paragraphs 8.1(a)-8.1(d) and 8.2). The attachment to the letter of 13 September 2002 quotes the cited paragraphs of the Panel Report in full, and provides the following additional information about the appeal:

> In particular, the Panel erred in finding that:
>
> – subsidies are received by hybrid entities consisting of the company producing subject merchandise and its shareholders (*see, e.g.,* para. 7.54 of the Panel Report), so that a sale of the company to the new shareholders automatically creates a "new" producer for which a new determination of the existence of a benefit is required;
>
> – the payment of fair market value for a company's shares negates previous subsidies provided to that company (*see, e.g.*, para. 7.72 of the Panel Report);
>
> – the so-called "same person methodology" is inconsistent with the SCM Agreement.

66. The first issue identified by the European Communities as not being included in the Notice of Appeal or in the letter of 13 September 2002 is the finding by the Panel that "administering authorities are required, following notification of a privatisation, to re-examine whether any 'benefit' accrues to the privatised producer." A plain reading of the "Conclusions and Recommendations" from the Panel Report, referred to in the Notice of Appeal and quoted in full in the attachment to the letter of 13 September 2002, makes clear that the obligation to conduct a new determination of whether a benefit continues to exist, following notice of a firm's privatization, was a critical component of the appeal. Paragraphs 8.1(a), 8.1(b) and 8.1(c) of the "Conclusions and Recommendations" state:

> (a) The six determinations in the original investigations, based on the gamma methodology, are inconsistent with the SCM Agreement, since the US Department of Commerce did not examine whether the privatizations were at arm's-length and for fair market value; thus *the United States failed to determine whether the new privatized producer received any benefit from prior financial contributions previously bestowed to state-owned producers*.
>
> …

> (b) The two determinations made in the context of administrative reviews and based on the gamma methodology (Case No. 7) and on the same person methodology (Case No. 12), are inconsistent with the SCM Agreement since the US Department of Commerce did not examine whether the privatization that occurred after the original imposition of countervailing duties, was at arm's-length and for fair market value; thus *the United States failed to determine whether the privatized producers received any benefit from the financial contributions previously bestowed to the state-owned producers*.
>
> …
>
> (c) The four determinations made in the context of sunset reviews and based on the gamma methodology are inconsistent with the SCM Agreement, since the US Department of Commerce did not examine whether the privatizations, that occurred after the original imposition of countervailing duties, were at arm's-length and for fair market value. Thus *the United States failed to determine whether the privatized producers received any benefit from the financial contributions previously bestowed to the state-owned producers ...*[145] (emphasis added)

67. Each of these paragraphs refers explicitly to the failure of the USDOC to determine if the privatized producer received a benefit as a result of the financial contribution bestowed prior to the privatization. Inherent in these findings is the Panel's view that authorities are required, upon being notified of a privatization, to determine if a privatized producer continues to receive a benefit from a financial contribution bestowed prior to the privatization. Moreover, the attachment to the letter of 13 September 2002 refers to the Panel having erred in finding that "a sale of the company to the new shareholders automatically creates a '*new*' *producer for which a new determination of the existence of a benefit is required*." (emphasis added) In the light of these explicit references to the obligation to determine whether a "benefit" continues to exist after being informed of a privatization, we find that the United States provided adequate notice to the European Communities that the United States was appealing the Panel's finding that the United States acted inconsistently with its WTO obligations because it did not conduct such a determination following notice of a privatization. Thus, with respect to the first issue identified by the European Communities, we consider that the Notice of Appeal meets the requirements of Rule 20(2)(d) and that the first issue is properly before us in this appeal.

68. The second deficiency claimed by the European Communities is that "[T]he United States [did not] allege any error in the interpretation of the 'mandatory-discretionary' standard adopted by the Panel to find that Section 1677(5)(F) is inconsistent as such with the *SCM Agreement*".[146] In this

[145] Panel Report, paras. 8.1(a)–8.1(c).

[146] European Communities' appellee's submission, para. 17.

regard, we note that paragraph 8.1(d) of the "Conclusions and Recommendations" section of the Panel Report, to which the United States referred in the Notice of Appeal, and quoted in full in the attachment to the letter of 13 September 2002, states:

> Once an importing Member has determined that a privatization has taken place at arm's-length and for fair market value, it must reach the conclusion that no benefit resulting from the prior financial contribution (or subsidization) continues to accrue to the privatized producer. To the extent that Section 1677(5)(F), as interpreted by the US Court of Appeals for the Federal Circuit and the SAA, requires the US Department of Commerce to apply a methodology where the benefit from a prior financial contribution is not systematically found to no longer accrue to the privatized producer solely by virtue of an arm's-length for fair market value privatization, is preventing the United States from exercising a WTO-compatible discretion. Therefore, Section 1677(5)(F) is inconsistent with Articles 10, 14, 19 and 21 of the SCM, as interpreted by the Panel and the Appellate Body Reports in *US – Lead and Bismuth II* and this Panel. As Section 1677(5)(F) is found to be inconsistent with the *SCM Agreement*, the United States has failed to ensure conformity with Article 32.5 of the *SCM Agreement* and Article XVI.4 of the WTO Agreement respectively. (original emphasis; underlining added)

69. In our view, the reference in this paragraph to the Panel's interpretation of Section 1677(5)(F) as *preventing USDOC from exercising discretion* in a WTO-compatible manner was sufficient to alert the European Communities to the fact that the United States was appealing the Panel's characterization and application of the mandatory-discretionary standard in interpreting Section 1677(5)(F) as being, as such, inconsistent with the United States' WTO obligations. Therefore, with respect to the second issue identified by the European Communities, we consider that the Notice of Appeal meets the requirements of Rule 20(2)(d) and that the second issue is properly before us in this appeal.

70. We observe that, in coming to these conclusions, we have before us a rather unusual example of the "Conclusions and Recommendations" section of a panel report. In most panel reports, the "Conclusions and Recommendations" section is relatively brief, setting out findings in summary fashion. Detailed legal interpretations and reasoning upon which panels rely are usually found only in the "Findings" sections of panel reports. In this case, however, the Panel's "Conclusions and Recommendations" are more detailed than usual. Paragraphs 8.1(a)–8.1(d) of the Panel Report include, not only the Panel's findings, but also certain of the reasons leading to those findings. Hence, in this case, it is possible, by reading the "Conclusions and Recommendations" section from the Panel Report, to discern alleged errors of law appealed by the United States. We emphasize, however, that generally, a Notice of Appeal that refers simply to the paragraph numbers found in the "Conclusions and Recommendations" section of a panel report, or that quotes them in full, will be insufficient to

provide adequate notice of the allegations of error on appeal, and, hence, will fall short of the requirements set out in Rule 20(2)(d) of the *Working Procedures*.

71. The third issue that the European Communities alleges was not properly notified is that "[T]he United States [did not] raise any claim of error in the application of Article 11 of the [DSU]"[147], which provides:

> *Function of Panels*
>
> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should 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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. (emphasis added)

72. We do not find any explicit reference to Article 11 of the DSU, or to the language of Article 11 in the Notice of Appeal, or in the attachment to the letter of 13 September 2002. Nor can we discern in either of them any suggestion that the United States was alleging that the Panel failed to make an objective assessment of the matter before it, or an objective assessment of the facts of the case.

73. The United States acknowledged during the oral hearing that it is not possible to discern from the Notice of Appeal and attachment to the letter of 13 September 2002 that the United States was alleging a *claim* of error under Article 11 of the DSU.[148] However, as mentioned earlier[149], the United States contended that it was not necessary to refer to this in the Notice of Appeal because this was merely an *argument* in support of its allegations of error, and *arguments* need not be included in a Notice of Appeal. In addition, the United States posited that it was not appropriate to refer to "claims" in the context of a Notice of Appeal, as claims are more appropriately referred to in the context of requests for establishment of a panel.[150]

74. We disagree with the United States. A *claim* of error by a panel under Article 11 of the DSU is possible only in the context of an appeal. By definition, this *claim* will not be found in requests for establishment of a panel, and panels therefore will not have referred to it in panel reports.

---

[147]European Communities' appellee's submission, para. 17.

[148]United States' response to questioning at the oral hearing.

[149]See *supra*, para. 57.

[150]United States' response to questioning at the oral hearing.

Accordingly, if appellants intend to argue that issue on appeal, they must refer to it in Notices of Appeal in a way that will enable appellees to discern it and know the case they have to meet.

75. Accordingly, we do not believe that the European Communities can be said to have been notified that the United States intended to argue on appeal that the Panel failed to act consistently with Article 11 of the DSU, and, consequently, we consider that the issue of the Panel's compliance with Article 11 of the DSU is not properly before us in this appeal.

B. *The* Amicus Curiae *Brief*

76. We turn next to the issue of the *amicus curiae* brief that we received from an industry association[151] in the course of this appeal. Both the United States and the European Communities agreed that we have the authority to accept the brief.[152] The United States confirmed that the brief was not a part of the official submission of the United States, but that the United States agreed with much, although not all, of the brief.[153] The European Communities said that it disagreed with a number of aspects of the brief, and argued that there was no reason for the Appellate Body to take the brief into account in this appeal.[154] We have considered the arguments of the participants and the third participants. The brief has not been taken into account by us as we do not find it to be of assistance in this appeal.

VI. Introduction to the Substantive Issues

77. Having dealt with the procedural issues, we turn now to the substantive issues in this appeal. Before doing so, it is useful to recall briefly the relevant law, the particular facts and circumstances[155], and the precise measures relevant to the appeal.

78. Article VI:3 of GATT 1994 permits Members of the WTO to impose a "countervailing duty" on products imported from other Members of the WTO "for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise."[156] Article 10 of the *SCM Agreement* provides that "Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any

[151] American Iron and Steel Institute.

[152] United States' and European Communities' responses to questioning at the oral hearing. The third participants disagreed.

[153] United States' responses to questioning at the oral hearing.

[154] European Communities' responses to questioning at the oral hearing.

[155] These are set out in more detail in paras. 1–17 of this Report and in paras. 2.1–2.61 of the Panel Report.

[156] Article VI:3 of the GATT 1994.

Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement."[157] (footnote omitted)

79. Article 1 of the *SCM Agreement* sets out when a "subsidy" that may be "offset[]"[158] by "countervailing dut[ies]"[159] "shall be deemed *to exist*" for the purpose of the *SCM Agreement*.[160] (emphasis added) To satisfy the definition of a "subsidy", a "benefit"[161] must be "conferred"[162] on a "recipient".[163] Only a "subsidy" that "exist[s]" and that "confer[s]" a "benefit" on a "recipient" may be "offset" by "countervailing duties".

80. Article 19 of the *SCM Agreement* deals with the "Imposition and Collection of Countervailing Duties". Article 19.1 provides that, after, *inter alia*, "a final determination of the *existence* and *amount* of the subsidy", a Member may impose a countervailing duty "in accordance with the provisions" of that Article.[164] (emphasis added) Among those provisions is Article 19.4, which provides that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to *exist*, calculated in terms of subsidization per unit of the subsidized and exported product."[165] (emphasis added, footnote omitted)

81. Article 21 of the *SCM Agreement* deals with the "Duration and Review of Countervailing Duties and Undertakings". Article 21.1 provides, "A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury."[166] Article 21.2 imposes certain obligations relating to "reviews" of countervailing duties, including the administrative reviews before us on appeal, and Article 21.3 imposes certain obligations relating to "sunset reviews" of countervailing duties.

---

[157] Article 10 of the *SCM Agreement.*

[158] Article VI of the GATT 1994.

[159] Article VI:3 of the GATT 1994.

[160] Article 1.1 of the *SCM Agreement*.

[161] Article 1.1(b) of the *SCM Agreement*.

[162] *Ibid*.

[163] Article 14 of the *SCM Agreement*. Although the term "recipient" appears in Article 14 and not in Article 1 of the *SCM Agreement*, we recognized in *Canada – Aircraft* that the ordinary meaning of Article 1.1(b), in conjunction with the structure of Article 1.1 and the context provided by the reference to "benefit to the recipient" in Article 14, reveal that "the word 'benefit', *as used in Article 1.1*, is concerned with the 'benefit *to the recipient*'". (Appellate Body Report, *Canada – Aircraft*, para. 155 (original emphasis))

[164] Article 19.1 of the *SCM Agreement.*

[165] Article 19.4 of the *SCM Agreement.*

[166] Article 21.1 of the *SCM Agreement.*

82. Article 14 of the *SCM Agreement* requires that "any method used by the investigating authority" of a WTO Member "to calculate the benefit to the recipient … shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained."[167]

83. Article 32.5 of the *SCM Agreement* provides, "Each Member shall take all necessary steps, of a general or particular character, to ensure … the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement".[168] Similarly, Article XVI:4 of the *WTO Agreement* provides, "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements", which include the *SCM Agreement*.[169]

84. Having set out the provisions of the covered agreements relevant to this dispute, we now clarify which issues *are* before us, and which issues *are not* before us. The issues that *are* before us on appeal arise from the determinations of the USDOC in 12 countervailing duty cases involving imports of steel products from the European Communities. The firms under investigation in those cases were all formerly state-owned enterprises that had been privatized at the time of the United States administrative determinations. The European Communities acknowledges that non-recurring financial contributions were provided to these formerly state-owned enterprises.[170] Therefore, that is not in dispute in this appeal. The United States does not contest that, in all 12 cases, the relevant governments privatized the state-owned enterprises by selling "all, or substantially all, [their] ownership interest and clearly no longer [retained] any controlling interest in the privatized producer"[171], and that the sales were at arm's length and for fair market value.[172] Consequently, that, too, is not in dispute. Both parties also concur that "it is a normal and accepted practice … for the importing Member to presume that a non-recurring subsidy will provide a benefit over a period of time, which is normally presumed to be the average useful life of assets in the relevant industry."[173] In *US – Lead and Bismuth II*, we found this practice permissible under the *SCM Agreement*, so long as the presumption was not irrebuttable.[174] Hence, that issue, likewise, is not before us in this appeal.

[167]Article 14 of the *SCM Agreement*.

[168]Article 32.5 of the *SCM Agreement*.

[169]Article XVI:4 of the *WTO Agreement*.

[170]Panel Report, footnote 313 to para. 7.40.

[171]*Ibid*., para. 7.62.

[172]See *supra*, para. 2 and footnote 4.

[173]Panel Report, para. 7.75.

[174]Appellate Body Report, *US – Lead and Bismuth II*, para. 62.

85. The issues in this appeal relate solely to the impact of the privatization of the firms under investigation in these 12 countervailing duty cases on the continued existence of the benefit derived from a financial contribution. As the Panel stated[175], the "core legal question" before it was to determine whether a "benefit" within the meaning of the *SCM Agreement*, which benefit is derived from a non-recurring financial contribution, continues to exist following a transfer of ownership of a state-owned enterprise to a new private owner at arm's length and for fair market value, where the government retains no "controlling interest in the privatized producer"[176] and transfers all or substantially all the property.[177]

86. The European Communities challenges the administrative practice followed by the USDOC when examining whether a "benefit" continues to exist following a change in ownership. This administrative practice is called the "same person" method.[178] Before the Panel, the European Communities challenged this practice *as such* and *as applied* in the administrative review entitled *Grain-Oriented Electrical Steel from Italy* (Case No. 12).[179] In addition, before the Panel, the European Communities challenged the consistency with the WTO obligations of the United States, of Section 1677(5)(F) of Title 19 of the United States Code, as such. The Panel found in favour of the European Communities, and concluded that the United States had acted inconsistently with its

---

[175]Panel Report, para. 7.40.

[176]*Ibid*., para. 7.62.

[177]We observe, in particular, that the Panel has not examined whether a "benefit", within the meaning of the *SCM Agreement*, would be extinguished following a change in ownership under circumstances different from those in the 12 cases under consideration. (*Ibid*.) Hence, our analysis will be circumscribed to determine whether, in the light of the circumstances of this case, the findings and conclusions of the Panel are in conformity with the *SCM Agreement*.

[178]For an explanation of the "same person" method, see paragraph 14 of this Report. At the oral hearing, the United States argued that the "same person" method, as such, was not at issue before the Panel. The European Communities recalled that "the practice" of the USDOC was included in its request for the establishment of the Panel (WT/DS212/4) and noted that the Panel accordingly found, in paragraph 7.90 of the Panel Report, that "the same person methodology is itself inconsistent with the SCM Agreement". We note that the United States has not claimed before us that the Panel, in so finding, exceeded its mandate. We also note that the United States claimed, in clarifying its Notice of Appeal, that "the Panel erred in finding that … the so-called 'same person methodology' is inconsistent with the SCM Agreement." (Attachment to letter dated 13 September 2002, from the Senior Legal Advisor, Permanent Mission of the United States to the WTO, to the Director of the Appellate Body Secretariat, p.2)

[179]The 12 cases are listed in footnote 2 to this Report. Case No. 12, *Grain-Oriented Electrical Steel from Italy*, 66 Fed. Reg. 2885 (USDOC, 12 January 2001) ("*GOES from Italy*"), attached as Exhibit EC–7 to the European Communities' first submission to the Panel, is an administrative review and the only underlying administrative determination in which the USDOC applied the "same person" method in the first instance. The method has been applied by the USDOC in certain other countervailing duty determinations upon remand from the United States Court of International Trade (that is, where the Court has ordered the USDOC to reconduct those determinations). The United States claimed before the Panel, however, with apparently no rebuttal from the European Communities, that the determinations upon remand, which had applied the "same person" method, were not challenged by the European Communities. (Panel Report, footnote 81 to para. 2.55 (quoting United States' first submission to the Panel, para. 85)) Thus, in the course of making the twelve *initial* determinations (that is, not subsequent to a United States court appeal) in dispute, USDOC applied the "same person" method only once, namely, during the administrative review identified as Case No. 12.

obligations under Articles 10, 14, 19.1, 19.4, 21.1, 21.2, 21.3, and 32.5 of the *SCM Agreement*, and Article XVI:4 of the *WTO Agreement*. The United States appeals these findings.

VII. Privatizations at Arm's Length and for Fair Market Value

A. *The Panel's Finding*

87. Critical to each of the Panel's conclusions is the Panel's central finding that:

> [o]nce an importing Member has determined that a privatization has taken place at arm's-length and for fair market value, it *must* reach the conclusion that no benefit resulting from the prior financial contribution (or subsidization) continues to accrue to the privatized producer.[180] (emphasis added)

88. The United States submits that the Panel erred in making this fundamental finding because the Panel considered the economic effects of privatization from the perspective of the new owner, and not from that of the "*legal person producing the subject merchandise*".[181] (original emphasis) The United States alleges that, in doing so, the Panel ignored the distinction between firms and their shareholders. According to the United States, as legal persons are distinct from their shareholders, a "benefit" received by a legal person cannot be redeemed by its shareholders. The United States argues that, regardless of the price paid by the new private owner for the privatized firm[182], "[a] subsequent privatization does not move the [privatized enterprise's] supply curve back to where it had been" [183] before the government's provision of the previous financial contribution. The United States concludes that the economic analysis made by the Panel is therefore flawed.

89. According to the United States, the term "recipient" cannot include both a legal person and a shareholder of that legal person.[184] The United States contends that we acknowledged this distinction in *Canada – Aircraft* and in *US – Lead and Bismuth II* by expressly identifying "legal or natural persons" as the recipients addressed in the *SCM Agreement*.[185] Further, the United States argues that, if a state-owned enterprise (a legal person) receives a benefit and that same legal person continues to exist following privatization, then the benefit also continues to exist (until fully amortized or repaid),

---

[180]Panel Report, para. 8.1(d). This finding is also at the core of the Panel's conclusions in para. 8.1(a)–8.1(c).

[181]United States' appellant's submission, para. 46.

[182]"[F]or fair market value (or otherwise)". *Ibid*., paras. 2 and 6. See also United States' second submission to the Panel, para. 10; United States' response to questioning at the oral hearing.

[183]United States' appellant's submission, para. 50.

[184]*Ibid.*, para. 56.

[185]*Ibid.*, para. 65.

irrespective of the price paid by its new private owners.[186] The United States concludes, consequently, that such privatization, even if at arm's length and for fair market value, cannot extinguish the benefit of a financial contribution previously made to the recipient (that is, to the state-owned firm) because the recipient is the same legal person.

90. In reply, the European Communities argues that, because a "benefit", as we established in *Canada – Aircraft*, is defined under the *SCM Agreement* in relation to the marketplace, a firm privatized at arm's length and for fair market value receives nothing on terms more favourable than what the market itself would have provided. Consequently, according to the European Communities, the sale of a firm at arm's length and for fair market value necessarily satisfies the marketplace comparison contemplated in *Canada – Aircraft*, so as to remove any "advantage"[187] that a firm may have held previously as a result of a non-recurring financial contribution from the government.[188]

91. The European Communities argues that the Panel correctly rejected the distinction between owners and firms for purposes of determining whether a "benefit" exists under the *SCM Agreement*. The European Communities points to our finding in *Canada – Aircraft*, that the "recipient" of a "benefit" could include a "group of persons". The European Communities maintains that this finding establishes that the "recipient" need not be limited to the firm exporting subject merchandise, but may also include that firm's owners.[189]

92. The European Communities also submits that, under Article 1.1(b) of the *SCM Agreement*, a "financial contribution need not be directly provided to its recipient"[190], and, further, that "the recipient of a financial contribution need not be the same as the recipient of the benefit conferred thereby, as long as the required causal relationship between the contribution and the benefit is established."[191] Moreover, the European Communities contends that, in practice, the United States does not regard the shareholder-firm distinction as absolute because the "the USDOC recognises that subsidies conferred on one part of an economic entity will liberate resources that can be applied to another part of the entity, and hence, for the purpose of countervailing duties, those subsidies are 'attributed' to the production and exports of the entire entity."[192] (footnote omitted)

[186]United States' appellant's submission, para. 6.

[187]Appellate Body Report, *Canada – Aircraft*, para. 153.

[188]European Communities' appellee's submission, paras. 57–59.

[189]*Ibid.*, paras. 23 and 28.

[190]*Ibid.*, para. 38.

[191]*Ibid.*, para. 47.

[192]*Ibid.*, para. 63.

93. In considering these arguments, we begin by noting the similarities of the issues in this case to the issues we examined in *US – Lead and Bismuth II*. In that case, the United States, as appellant, contended that the panel there had "'exceeded its authority' by, *in effect*, dictating a methodology that a privatization at fair market value *automatically* precludes any benefit from pre-privatization subsidies from being attributed to the successor, privatized company."[193] (emphasis added) In that appeal, we found that the panel had acted within the scope of its mandate, and we upheld the panel's conclusions.[194] However, contrary to that panel, we restricted our ruling to "the particular circumstances of [that] case" and to "the facts of [that] case".[195]

94. In the present case, the Panel made explicit what had merely been implicit in the report of the panel in *US – Lead and Bismuth II:*

> Privatizations at arm's-length and for fair market value *must* lead to the conclusion that the privatized producer paid for what he got and thus did not get any benefit or advantage from the prior financial contribution bestowed upon the state-owned producer. While Members may maintain a rebuttable presumption that the benefit from prior financial contributions (or subsidization) continues to accrue to the privatized producer, privatization[] at arm's-length and for fair market value is sufficient to rebut such a presumption.[196] (emphasis added)

95. Thus, the Panel found that privatization at arm's length and for fair market value will *always* necessarily extinguish the remaining part of a benefit previously existing with the state-owned enterprise. By contrast, the United States argues, on appeal, that a change in ownership, irrespective of the price paid for the transaction, will *never* extinguish the benefit when the state-owned

[193] Appellate Body Report, *US – Lead and Bismuth II*, para. 18.

[194] *Ibid.*, para. 73.

[195] *Ibid.*, para. 74.

[196] Panel Report, para. 7.82. Compare Panel Report, *US – Lead and Bismuth II*, para. 6.81:

> Assuming "financial contributions" bestowed directly on BSC could be deemed to have been bestowed indirectly on UES and BSplc/BSES, this fact alone would not mean that pre-1985/86, untied, non-recurring "financial contributions" bestowed on BSC necessarily confer any "benefit" on UES or BSplc/BSES. This would only be the case if those "financial contributions" were found to have been bestowed indirectly (*i.e.*, through the relevant change-in-ownership transactions) on UES and BSplc/BSES respectively on terms more favourable than UES and BSplc/BSES respectively could have obtained in the market. We consider that such a finding would <u>only be possible if fair market value was not paid</u> for all productive assets etc. acquired by UES and BSplc/BSES respectively from BSC. <u>Since fair market value was paid for all such productive assets etc., we do not consider that any untied, non-recurring "financial contribution" bestowed indirectly on UES and BSplc/BSES could be deemed to confer a "benefit" on those entities</u>. (footnote omitted; underlining added)

enterprise and the new privatized firm are the *same* legal person. The United States supports this position by submitting legal and economic arguments seeking to demonstrate that a change in ownership, where the state-owned enterprise and the new firm remain the *same* legal person, *cannot* remove the benefit[197], irrespective of the price paid for acquiring the state-owned enterprise.[198] The United States does state, however, that if the two firms are *different* legal persons, the "USDOC would conclude that the new producer never received [the previous] subsidy and could not be subject to [countervailing duties] on its account."[199]

B. *Interpretation of* "Benefit"

96. We turn first to the interpretation of the term "benefit" under the *SCM Agreement*. The Panel reasoned that where privatization occurs following a financial contribution that provides a "benefit", "since the fair market value paid to the state-owned producer is deemed to include (*de facto*) the value of the advantage or benefit already received, … the privatization transaction for fair market value includes the repayment to the government of the subsidy *as valued by the market* at the time of privatization."[200] (emphasis added, footnote omitted) As a consequence, the Panel found that, in such a case, the "benefit" is "extinguish[ed]"[201], and, therefore, it no longer "accrue[s] to the privatized producer."[202]

97. The term "benefit" is not defined in the *SCM Agreement*. However, it is referred to explicitly in the definition of "subsidy" set out in Article 1.1, which provides:

---

[197]"[A] change in the shareholders of a subsidy recipient does not remove the new equipment, extract knowledge from the workers, or increase the previously lowered debt load." United States' appellant's submission, para. 49.

[198]See *supra*, footnote 182.

[199]United States' appellant's submission, para. 18. If the two enterprises are found to be *different* legal persons, the USDOC will continue to examine the terms of the sale to determine whether the purchaser(s) of the privatized entity received a *new* subsidy as a result. (United States' responses to questioning at the oral hearing)

[200]Panel Report, para. 7.72.

[201]*Ibid.*, para. 7.77.

[202]*Ibid.*, para. 7.81.

Definition of a Subsidy

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member …
>
> and
>
> (b) a *benefit* is thereby conferred. (emphasis added)

98. In *Canada – Aircraft*, we found that:

> … the word 'benefit', as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution. In our view, *the marketplace provides an appropriate basis for comparison* in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market.[203] (emphasis added)

99. The United States argues, on appeal, that the Panel's finding that the benefit must always necessarily be extinguished upon privatization suffers from a "basic economic misconception"[204] because "subsidies shift the recipient's supply curve and … subsequent privatization does not move the supply curve back to where it had been, and thus, … does not affect the continued existence of the subsidy."[205] The United States contends that the fact that the private owner pays full market price for the enterprise indicates only that the private *owner* is not receiving a *new* subsidy. It does not indicate, in the view of the United States, that "from the perspective of *the legal person producing the subject merchandise*"[206] (original emphasis), the effect of the subsidy has been eliminated. The United States supports this argument by noting that a change in ownership[207] "of a subsidy recipient does not *remove* the new equipment, extract knowledge from the workers, or increase the previously lowered debt load."[208] (emphasis added)

[203]Appellate Body Report, *Canada – Aircraft*, para. 157.

[204]United States' appellant's submission, para. 44.

[205]*Ibid.*, para. 50.

[206]*Ibid.*, para. 46.

[207]The United States assumes that ownership is held by means of shares.

[208]United States' appellant's submission, para. 49.

100. The United States advanced similar arguments before the Panel.[209] In considering these arguments, the Panel found that "[t]he United States seems to be 'attaching' the benefit to the production activity"[210], and noted that "countervailing duties are <u>not</u> designed to counteract all market distortions or resource misallocations which might have been caused by subsidization."[211] (underlining in original)

101. In contesting this finding before us, the United States argues that the Panel erred in characterizing the United States' position as suggesting that countervailing duties are "designed to counteract all market distortions".[212] The United States informs us that it has, in the light of our decision in *US – Lead and Bismuth II*[213], abandoned the position it held in that case, and that it no longer insists that benefits are conferred upon "production activity".[214] Furthermore, in response to questioning at the oral hearing, the United States confirmed[215] that it continues to stand by the following principle articulated by the USDOC in the context of an earlier domestic countervailing duty case:

> The [countervailing duty] law is designed to provide remedial relief as a result of subsidies; *it is not intended to recreate the* ex ante *conditions that existed prior to the bestowal of such subsidies* ... [T]he CVD law is concerned with the identification, measurement, and allocation of subsidies *at the time of receipt*.[216] (emphasis added)

---

[209]See United States' first submission to the Panel, paras. 56–61.

[210]Panel Report, para. 7.80.

[211]*Ibid.*

[212]*Ibid.*

[213]In *US – Lead and Bismuth II*, para. 56, we stated:

> It is true, as the United States emphasizes, that footnote 36 to Article 10 of the *SCM Agreement* and Article VI:3 of the GATT 1994 both refer to subsidies bestowed or granted directly or indirectly "upon the manufacture, production or export of any merchandise". In our view, however, it does not necessarily follow from this wording that the "benefit" referred to in Article 1.1(b) of the *SCM Agreement* is a benefit to *productive operations*. (original emphasis)

[214]United States' appellant's submission, para. 41.

[215]United States' response to questioning at the oral hearing, discussing *Certain Steel Products from Austria*, 58 Fed. Reg. 37217, 37264 (USDOC, 9 July 1993) (General Issues Appendix).

[216]*Certain Steel Products from Austria*, 58 Fed. Reg. 37217, 37264 (USDOC, 9 July 1993) (General Issues Appendix).

102. We agree with the United States that, irrespective of the price paid by the new private owner[217], privatization does not *remove* the equipment that a state-owned enterprise may have acquired (or received) with a financial contribution and that, consequently, the same firm may "continue[] to make the same products on the same equipment".[218] However, this observation serves only to illustrate that, following privatization, the *utility value* of equipment acquired as a result of a financial contribution is not extinguished, because it is transferred to the newly-privatized firm. But, the *utility value* of such equipment to the newly-privatized firm is legally irrelevant for purposes of determining the continued existence of a "benefit" under the *SCM Agreement*. As we found in *Canada – Aircraft*, the value of the "benefit" under the *SCM Agreement* is to be assessed using the *marketplace* as the basis for comparison.[219] It follows, therefore, that once a fair market price is paid for the equipment, its *market value* is redeemed, regardless of the utility the firm may derive from the equipment. Accordingly, it is the *market value* of the equipment that is the focal point of analysis, and not the equipment's *utility value* to the privatized firm.

103. The United States also argues that, irrespective of the price at which the new owners acquire the state-owned enterprise, "the artificially enhanced competitiveness generated by the subsidies" will not be eliminated, as the firm will continue to produce "at the same costs and in the same volumes".[220] We fail to see the basis for the assumption by the United States that, regardless of the sale price of the firm[221], its costs and volume of production will remain the same, since these costs include, as a necessary component, the cost of capital. Indeed, the Panel noted that private investors are "profit-maximizers"[222], who will seek to "recoup[] through the privatized company … a market return on the full amount of their investment."[223] For example, if a government makes a "financial contribution" that "benefit[s]" a state-owned enterprise, and then sells that enterprise for *less* than its fair market price, would this not normally result in a "better off"[224] return for the private capital newly invested in that enterprise? Would that not suggest, as a consequence, that the under-priced enterprise may then attract more investment than it would have attracted otherwise, if the government had sold it for fair market price? Why would this government-induced additional investment not then reduce the enterprise's cost of raising capital (either by borrowing it from the bank or from, say, shareholders)

---

[217]See *supra*, footnote 182.

[218]*Ibid.*, para. 49.

[219]Appellate Body Report, *Canada – Aircraft*, para. 157.

[220]United States' appellant's submission, para 49.

[221]See *supra*, footnote 182.

[222]Panel Report, para. 7.60. The Panel noted that the USDOC agrees with this characterization of private investors. (*Ibid.*, para. 7.61)

[223]*Ibid.*, para. 7.60.

[224]Appellate Body Report, *Canada – Aircraft*, para. 157.

and, ultimately, reduce the firm's overall costs of production? The United States' argument fails to address such questions and advances no additional reasons why we should disturb the Panel's finding on this point. Hence, we fail to see why *a firm's* cost and volume of production will necessarily remain the same "[o]n the day before and the day after the sale of some or all of a steel producer's shares", irrespective of the price paid for the property and of whether it adequately reflects "fair market value" or not.[225]

104. Although they are not phrased in terms of productive operations or activities, these arguments by the United States here are not unlike those advanced by the United States before the panel in *US – Lead and Bismuth II*.[226] We therefore do not agree that the Panel has mischaracterized the United States' position by stating that "[t]he United States seems to be 'attaching' the benefit to the production activity"[227], and by suggesting that the United States unduly views countervailing duties as "designed to counteract all market distortions".[228]

105. In sum, we do not agree with the United States' interpretation of "benefit" as used in the *SCM Agreement*.

C. *Interpretation of the* "Recipient" *of the Financial Contribution*

106. We turn now to the term "recipient" as used in the *SCM Agreement*. The term "recipient" is found in Article 14 of the *SCM Agreement*, which, as we have noted[229], concerns the methods used by investigating authorities of WTO Members "to calculate the benefit to the recipient" for the purposes of imposing countervailing duties. As we held in *Canada – Aircraft*, the "benefit" of a

---

[225] United States' appellant's submission, para. 49.

[226] "The basic principle underlying USDOC's methodology is that … a subsidy benefits the production of merchandise and [USDOC] does not envision ever re-visiting the original determination of the existence of a subsidy benefit". (United States' first submission to the panel, para. 9, attached to the Panel Report in *US – Lead and Bismuth II*, Attachment 2.1, p. 165) This similarity is seen also in the examples used by the United States in its appellant's submission. In one instance (United States' appellant's submission, paras. 47–48), an "uncle" forms for his "nephew" a company ("Nephew, Inc.") and provides that company with a "subsidy" in the form of a newly-constructed apartment building. The consequence of this new building is the depressing of rents in the local real estate market. The United States argues that the new apartment building continues to depress rents in the town even after the transfer of "Nephew, Inc." for fair market value. The "only" way to negate the effects of "uncle's subsidy", according to the United States, would be to return rents in town to their previous levels. From the United States' perspective, therefore, the "benefit" persists so long as the distortions of the financial contribution are detectable in the market, and a transfer in ownership, at fair market price or otherwise, would be immaterial to the determination of whether a "benefit" continues to exist.

[227] Panel Report, para. 7.80.

[228] *Ibid.*

[229] See *supra*, para. 82.

"financial contribution" is "thereby conferred" on a "recipient". With respect to the identity of a "recipient" of a "benefit", the Panel found that:

> … for the purpose of the benefit determination under the SCM Agreement, no distinction should be made between a company and its shareholders, as together they constitute a producer, a natural or legal person that may be the "recipient" of the benefit to be assessed. Any artificial distinction between owners (shareholders) and company ignores the relationship between a company and its owners, and it is this relationship that changes upon privatization. When the SCM Agreement refers to the recipient of a benefit it means the company and its shareholders together, being the producer of the exported goods subject to the countervailing investigation (order).[230]

107. The United States challenges this finding on various grounds. First, the United States contends that "the SCM Agreement regards subsidies as bestowed upon legal *or* natural persons"[231] (emphasis added), and argues that this finding of the Panel contradicts our findings in *Canada – Aircraft* and in *US – Lead and Bismuth II.* The United States contends that, in those two appeals, we established that the recipient of the subsidy cannot be "both [the legal person] *and also* its shareholder (or shareholders)".[232] (original emphasis) According to the interpretation by the United States of our rulings in those two appeals, when the recipient of the benefit is the "legal person who is the producer and [the] subsidy recipient"[233] (that is, the state-owned enterprise), the benefit cannot be extinguished by the recipient's sale, irrespective of the price paid by the new owner[234], because the producer and the owner are *two different persons*. The United States argues that a subsidy can be received only by one recipient at a time, namely the legal person, and that, consequently, a subsidy can be repaid only by the recipient, and not by its owners, regardless of the price the owners paid for the property. In sum, the United States argues that, in *Canada – Aircraft* and in *US – Lead and Bismuth II*, we drew a clear line separating a legal person (a firm) from its owners (shareholders).

108. The United States has misconstrued our findings in those two appeals. In *Canada – Aircraft,* we were asked whether the "cost to government" was relevant to the interpretation of "benefit" within the meaning of Article 1.1(b) of the *SCM Agreement.* In finding the "cost to government" not to be the relevant benchmark for identifying the "benefit", we said that Article 14 of the *SCM Agreement* prescribes the guidelines required to "calculate the benefit *to the recipient* conferred pursuant to

---

[230] Panel Report, para. 7.54.

[231] United States' appellant's submission, para. 55.

[232] *Ibid.*, paras. 56, 65–67.

[233] *Ibid.*, para. 58.

[234] See *supra*, footnote 182.

paragraph 1 of Article 1". (emphasis added) We concluded that this phrase in Article 14 necessarily provides relevant context for interpreting Article 1.1, and we found that:

> [a] "benefit" does not exist in the abstract, but must be *received and enjoyed* by a beneficiary or a recipient. Logically, a "benefit" can be said to arise only if a person, natural or legal, or *a group of persons*, has in fact received something. The term "benefit", therefore, implies that there must be a recipient.[235] (emphasis added)

Contrary to what has been argued here by the United States, when referring to "a recipient" in *Canada – Aircraft*, we did not exclude the possibility that "a recipient" could include both a firm[236] and its owner.[237] A "group of persons" could include a group of "natural persons", or a group of "natural and legal persons", or a group exclusively of "legal persons".

109. In *US – Lead and Bismuth II*, we affirmed our interpretation of the term "recipient" in *Canada – Aircraft* in the following terms:

> The United States argues … that the relevant "benefit" is a benefit to a company's *productive operations*, rather than, as the Panel held, a benefit to *legal or natural persons*.
>
> We … agree with the Panel's findings that benefit as used in Article 1.1(b) is concerned with the "benefit to the recipient", that such recipient must be a natural or legal person, and that in the present case:
>
>> … in order to determine whether any subsidy was bestowed on the production by UES and BSplc/BSES respectively of leaded bars imported into the United States in 1994, 1995 and 1996, it is necessary to determine whether there was any "benefit" to UES and BSplc respectively (*i.e.*, the producers of the imported leaded bars at issue). (original emphasis, footnotes omitted)[238]

110. Contrary to the reading that has been suggested by the United States, when we referred, in *US – Lead and Bismuth II*, to "legal or natural persons", we were *not* seeking to distinguish between a firm and its owners. We were only responding to the arguments by the United States there about linking a benefit to "productive operations". In our reasoning, we simply explained that the focus of

[235] Appellate Body Report, *Canada – Aircraft*, para. 154.

[236] We use the term "firm" in this Report to include corporate associations, partnerships, limited liability partnerships, unincorporated entities, and other forms of business organization.

[237] We use the term "owner" in this Report to include shareholders, members, proprietors, partners, and all other holders of an equity interest in the relevant business organization.

[238] Appellate Body Report, *US –Lead and Bismuth II*, paras. 56 and 58.

any analysis of whether a "benefit" exists should be on "legal or natural persons" *instead of* on productive operations; we did not rely in our reasoning on what the United States describes as "normal corporate law principles".[239] Moreover, there is nothing in these findings indicating that the "benefit" of a financial contribution, as contemplated in Article 1.1(b) of the *SCM Agreement*, should necessarily be "received and enjoyed"[240] by the *same* person or, put differently, there is nothing indicating that the "benefit" cannot be "received and enjoyed" by two or more distinct persons.

111. The United States also submits that the Panel improperly rejected "the normal distinction between shareholders and companies"[241] in finding that, "[f]or the purpose of benefit determination based on market criteria … there should be no distinction between the advantage or benefit conferred by the financial contribution to the company or to the shareholders, i.e. the owners of the company."[242] The United States finds support for this argument in the list of "financial contributions" included in Article 1.1(a)(1) of the *SCM Agreement*[243], as "[e]ach of these listed items indicates a contribution from a government to a legal person who is the producer and subsidy recipient."[244]

112. The *SCM Agreement* does not include a specific definition of the "recipient" of a "benefit". However, several terms are used to refer to the "recipient" of a "benefit" in the Agreement. Article 2 refers to "an enterprise or industry or group of enterprises or industries"; Article 6.1(b) refers to "an industry"; footnote 36 to Article 10 refers to subsidies "bestowed directly or indirectly upon the manufacture, production or export of any merchandise"; Article 14 refers to "the firm";

---

[239] United States' appellant's submission, para. 64.

[240] Appellate Body Report, *Canada – Aircraft*, para. 154.

[241] United States' appellant's submission, para. 60.

[242] Panel Report, para. 7.51.

[243] Article 1.1(a)(1) of the *SCM Agreement* provides:

> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; … (footnote omitted)

[244] United States' appellant's submission, para. 58.

Article 11.2(ii) refers to "exporter or foreign producer"; Article 19.3 refers to "sources found to be subsidized"; Annex I refers to "a firm or an industry"; and Annex IV refers to the "recipient firm". This is not an exhaustive list, but it certainly indicates that the *SCM Agreement* does not identify the "recipient" of a "benefit" by using any particular legal term of art. Rather, the *SCM Agreement* uses several terms to describe the economic entity that receives a "benefit". Thus, the reliance by the United States on the list of financial contributions in Article 1.1(a)(1) is not persuasive, because, when viewed in the context of the *SCM Agreement* as a whole, that list cannot be read to imply that the "recipient" is necessarily defined as a "legal person".

113. In addition, we observe that a transfer of funds could be provided directly from the government to the legal person that is the producer of the subsidized product, or it could be provided indirectly, say, through an income tax concession to the natural persons that own the firm (inasmuch as they invest in the legal person's productive activities). In both cases, the cost of raising capital for the legal person that is the producer would be reduced. Hence, contrary to the contention of the United States, it is possible to confer a "benefit" on a firm by providing a financial contribution to its owners, whether natural or legal persons, possibly holding property by means of shares. Moreover, we note that Article VI:3 of the GATT 1994[245] and footnote 36 of Article 10 of the *SCM Agreement*[246] contemplate this possibility by providing that a subsidy may be bestowed "*indirectly*" upon the manufacture, production or export of merchandise. (emphasis added)

114. Moreover, despite insisting on the distinction between firms and their owners, the United States recognized, in its appellant's submission, that a "benefit" can trespass the frontier between the firm and its owners. According to the United States, a financial contribution bestowed by a government on the *owners* of a firm can be attributed to the firm in "some instances"[247]; for

[245]Article VI:3 of the GATT 1994 provides:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, *directly or indirectly*, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise. (emphasis added, footnote omitted)

[246]Footnote 36 to Article 10 of the *SCM Agreement* provides:

> The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed *directly or indirectly* upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994. (emphasis added)

[247]United States' appellant's submission, footnote 77 to para. 76.

example, the United States asserts that if the financial contribution were provided to a "holding company", the consequent benefit could be attributed to the "subsidiary that is actually engaged in production", provided that it is "wholly-owned" by the holding company.[248]

115. For these reasons, the United States is mistaken in its interpretation of our findings in *Canada – Aircraft* and *US – Lead and Bismuth II*. Furthermore, the approach advocated by the United States could potentially undermine the *SCM Agreement* by opening wide a door enabling subsidizing governments to circumvent that Agreement's provisions by bestowing benefits directly on the firm's owners rather than on the firms themselves. In sum, the legal distinction between firms and their owners that may be recognized in a domestic legal context is not necessarily relevant, and certainly not conclusive, for the purpose of determining whether a "benefit" exists under the *SCM Agreement,* because a financial contribution bestowed on those investing in a firm may confer a benefit "upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994."[249]

116. However, while we disagree with the United States' construction of our findings in *Canada – Aircraft* and in *US – Lead and Bismuth II* as establishing a clear dividing line between a firm and its owners, we are of the view that the Panel went too far in stating, in paragraph 7.54 of the Panel Report, that, "for the purpose of the benefit determination under the SCM Agreement, *no distinction* should be made [because] … [w]hen the SCM Agreement refers to the recipient of a benefit it means the company and its shareholders together".[250] (emphasis added) In so finding, the Panel adopted too sweeping an interpretation of the *SCM Agreement*.

117. As we explained[251], the "core legal question"[252] before the Panel was to determine whether a "benefit", within the meaning of the *SCM Agreement*, continues to exist following privatization at arm's length and for fair market value. In considering this core legal question, the Panel examined a very precise set of facts and circumstances, namely, a benefit resulting from a prior non-recurring financial contribution bestowed on a state-owned enterprise where, following a privatization at arm's length and for fair market value, the government transfers all or substantially all the property and retains no "controlling interest in the privatized producer."[253] The Panel did not examine other

[248]United States' appellant's submission, footnote 77 to para. 76.

[249]Footnote 36 to Article 10 of the *SCM Agreement*.

[250]Panel Report, para. 7.54.

[251]See *supra*, paras. 84–85.

[252]Panel Report, para. 7.40.

[253]*Ibid*., para. 7.62.

situations[254], for instance, situations where a "benefit" is conferred through recurring financial contributions, or where the seller retains a controlling interest in the firm following its change in ownership. The Panel had to consider only one kind of change in ownership (that is, a privatization at arm's length and for fair market value where the government transfers all or substantially all the property and retains no controlling interest in the firm) and only one kind of benefit (that is, a benefit originating from a non-recurring financial contribution bestowed to the state-owned enterprise before privatization). The Panel should have confined its findings to those specific circumstances.

118. Moreover, we note that the Panel's overly broad finding that a firm and its owners are, for *all* purposes of the *SCM Agreement*, virtually the same, could be interpreted as entitling investigating authorities to assume, in *all* cases, that, for the purpose of calculating the benefit, and irrespective of the means and conditions imposed by a government for the provision of a financial contribution to owners of the firm, that firm will receive a benefit equivalent to the full financial contribution. This may or may not be so in all cases. We do not express an opinion on this question, but we caution that this finding of the Panel must not be interpreted as entitling authorities to overlook the possibility that some of the financial contribution provided to owners may not flow into the firm. In sum, it does not seem to us that the very narrow set of facts and circumstances analyzed by the Panel provides sufficient support to conclude that, in *all* cases, "for the purpose of the benefit determination under the SCM Agreement, no distinction should be made [because] … [w]hen the SCM Agreement refers to the recipient of a benefit it means the company and its shareholders together".[255]

119. Therefore, although we agree with the Panel's conclusion in paragraph 7.54 as it relates to the facts of this case, we disagree with the Panel's overreaching conclusion that "for the purpose of the benefit determination under the SCM Agreement, [investigating authorities should make] no distinction … between a company and its shareholders [because] … [w]hen the SCM Agreement refers to the recipient of a benefit it means the company and its shareholders", because, in so concluding, the Panel went beyond the factual circumstances examined in this case.[256]

D. *Privatizations at Arm's Length and for Fair Market Value: Can the "Benefit" Continue to Exist?*

120. Having examined the term "benefit" as used in the *SCM Agreement*, and having examined also the term "recipient" as used in that Agreement, we examine next whether, under the *SCM*

[254] Panel Report, para. 7.62.

[255] *Ibid.*, para. 7.54.

[256] *Ibid.*

Agreement, a "benefit" conferred on a "recipient" is necessarily extinguished following privatization at arm's length and for fair market value. The Panel found that:

> [p]rivatizations at arm's-length and for fair market value *must* lead to the conclusion that the privatized producer paid for what he got and thus did not get any benefit or advantage from the prior financial contribution bestowed upon the state-owned producer.[257] (emphasis added)

Further, in its "Conclusions and Recommendations", the Panel said:

> [o]nce an importing Member has determined that a privatization has taken place at arm's-length and for fair market value, it *must* reach the conclusion that no benefit resulting from the prior financial contribution (or subsidization) continues to accrue to the privatized producer.[258] (emphasis added)

121. In effect, the Panel interpreted the *SCM Agreement* as containing an *irrebuttable presumption* that would compel investigating authorities to conclude that the remaining part of a benefit resulting from a prior financial contribution necessarily has been extinguished in all cases where there is privatization at arm's length and for fair market value. In other words, according to the Panel, a benefit can *never* continue to exist for the new owner after privatization at arm's length and for fair market value. We do not agree.

122. Markets are mechanisms for exchange. Under certain conditions (e.g., unfettered interplay of supply and demand, broad-based access to information on equal terms, decentralization of economic power, an effective legal system guaranteeing the existence of private property and the enforcement of contracts), prices will reflect the relative scarcity of goods and services in the market. Hence, the actual exchange value of the continuing benefit of past non-recurring financial contributions bestowed on the state-owned enterprise will be fairly reflected in the market price. However, such market conditions are not necessarily always present and they are often dependent on government action.

123. Of course, every process of privatizing public-owned productive assets takes place within the concrete circumstances prevailing in the market in which the sale occurs. Consequently, the outcome of such a privatization process, namely the price that the market establishes for the state-owned enterprise, will reflect those circumstances. However, governments may choose to impose economic or other policies that, albeit respectful of the market's inherent functioning, are intended to induce certain results from the market. In such circumstances, the market's valuation of the state-owned

[257] Panel Report, para. 7.82.

[258] *Ibid.*, para. 8.1(d).

property may ultimately be severely affected by those government policies, as well as by the conditions in which buyers will subsequently be allowed to enjoy property.

124. The Panel's absolute rule of "no benefit" may be defensible in the context of transactions between two private parties taking place in reasonably competitive markets; however, it overlooks the ability of governments to obtain certain results from markets by shaping the circumstances and conditions in which markets operate. Privatizations involve complex and long-term investments in which the seller—namely the government—is not necessarily always a passive price taker and, consequently, the "fair market price" of a state-owned enterprise is not necessarily always unrelated to government action. In privatizations, governments have the ability, by designing economic and other policies, to influence the circumstances and the conditions of the sale so as to obtain a certain market valuation of the enterprise.

125. In this respect, we note that, before arriving at its conclusion that privatization at arm's length and for fair market value "must" necessarily extinguish a benefit bestowed by a prior financial contribution, the Panel found, in apparent contradiction to its ultimate conclusion, that the investigating authority was *not* obliged to discontinue its investigation after determining that the privatization was made at arm's length and for fair market value.[259] The Panel acknowledged that the investigating authority could find reasons to continue scrutinizing the circumstances of the privatization with a view to determining whether a benefit still existed. The Panel found also that if, following a privatization at arm's length and for fair market value, "[the investigating authority] wants (to continue) to apply countervailing duties, the importing Member must demonstrate, based on its examination of the conditions of the privatization, that the privatized producer (still) benefits from the prior financial contribution (subsidization)."[260]

126. We understand the Panel to be stating that privatization at arm's length and for fair market value privatization *presumptively* extinguishes any benefit received from the non-recurring financial contribution bestowed upon a state-owned firm. The effect of such a privatization is to shift to the investigating authority the burden of identifying evidence which establishes that the benefit from the previous financial contribution does indeed continue beyond privatization. In the absence of such proof, the fact of the arm's-length, fair market value privatization is sufficient to compel a conclusion that the "benefit" no longer exists for the privatized firm, and, therefore, that countervailing duties should not be levied. This is an accurate characterization of a Member's obligations under the *SCM Agreement*.

[259]Panel Report, para. 7.76.

[260]*Ibid.*

127. Therefore, we find that the Panel erred in concluding that "[p]rivatizations at arm's length and for fair market value *must* lead to the conclusion that the privatized producer paid for what he got and thus did not get any benefit or advantage from the prior financial contribution bestowed upon the state-owned producer."[261] (emphasis added) Privatization at arm's length and for fair market value *may* result in extinguishing the benefit. Indeed, we find that there is a rebuttable presumption that a benefit ceases to exist after such a privatization. Nevertheless, it does not *necessarily* do so. There is no inflexible rule *requiring* that investigating authorities, in future cases, *automatically* determine that a "benefit" derived from pre-privatization financial contributions expires following privatization at arm's length and for fair market value. It depends on the facts of each case. Therefore, we reverse the Panel's conclusion that:

> [o]nce an importing Member has determined that a privatization has taken place at arm's-length and for fair market value, it *must* reach the conclusion that no benefit resulting from the prior financial contribution (or subsidization) continues to accrue to the privatized producer.[262] (emphasis added)

VIII. The "Same Person" Method

128. With all this in mind, we now turn to the administrative practice of the USDOC that is the source and subject of this dispute. The Members of the WTO have anticipated in Article 14 of the *SCM Agreement* that the investigating authorities of WTO Members will use different "method[s]" to "calculate the benefit to the recipient" when determining the amount of countervailing duties that are imposed on an imported product to offset a subsidy. One such method used by the USDOC for the purpose of determining whether a "benefit" continues to exist following a change in ownership—the *gamma* method—was the subject of a previous dispute and a previous appeal.[263] Another method is the "same person" method, which gives rise to this dispute and this appeal.

129. The United States stated during the hearing that the "same person" method is prescribed neither by United States statute nor by USDOC regulations.[264] Rather, the USDOC developed this method as an administrative practice in the course of responding to orders of the United States Court of International Trade in the appeals of certain countervailing duty cases.[265] This administrative practice was applied for the first time in an initial countervailing duty determination[266] in *GOES from*

---

[261] Panel Report, para. 7.82.

[262] *Ibid*., para. 8.1(d).

[263] See Appellate Body Report, *US – Lead and Bismuth II*.

[264] United States' response to questioning at oral hearing.

[265] *Ibid*. See also *supra*, footnote 179.

[266] See *supra*, footnote 179.

Italy, an administrative review determination that is before us on appeal and has been identified as Case No. 12. Generally, the USDOC applies the "same person" method to countervailing duty determinations following a change in ownership.[267]

130. In evaluating the continued existence of a "benefit", the "same person" method provides for a two-step test. The first step consists of an analysis of whether the post-privatization entity is the same legal person that received the original subsidy before privatization. For this purpose, the USDOC examines the following non-exhaustive criteria: (i) continuity of general business operations; (ii) continuity of production facilities; (iii) continuity of assets and liabilities; and (iv) retention of personnel. If, as a result of the application of these criteria, the USDOC concludes that *no new legal person* was created, the analysis of whether a "benefit" exists stops there, and the USDOC will not assess whether the privatization was at arm's length and for fair market value. The subsidy is automatically found to continue to exist for the post-privatization firm.[268] By contrast, if, as a consequence of the application of these criteria, the USDOC concludes that the post-privatization entity is a *new legal person*, distinct from the entity that received the prior subsidy, the USDOC will not impose duties on goods produced after privatization on account of the pre-privatization subsidy.[269] The USDOC will, however, proceed to examine, in such an event, whether any *new* subsidy had been bestowed upon the post-privatization entity's new owners as a result of the change in ownership (for example, by assessing whether the sale was for fair market value and at arm's length).[270]

131. The question before us is whether the "same person" method—as such, and also as applied by the United States—is inconsistent with the *SCM Agreement*. In the underlying determinations in these 12 countervailing duty cases, the USDOC used both the *gamma* method and the "same person" method to determine whether a benefit continued to exist following privatization. Of the 12 determinations at issue in this dispute, 11 were based on the application of the *gamma* method (Case Nos. 1–11), and one was based on the application of the "same person" method (Case No. 12).

132. The Panel found that the countervailing duty analyses undertaken by the USDOC in determinations that used the *gamma* method—Case Nos. 1–7—are inconsistent with the obligations of the United States under the *SCM Agreement*.[271] On the basis of our finding in *US – Lead and*

[267]United States' response to questioning at the oral hearing.

[268]*Ibid*.

[269]*Ibid*.

[270]*Ibid*.

[271]Panel Report, paras. 8.1(a) and 8.1(b). In this respect, we note that the United States proposes to reconduct the determinations made in the course of original investigations (Case Nos. 1–6) and the administrative review (Case No. 7) on the basis of the "same person" method. (*Ibid*., para. 7.90)

Bismuth II that the "irrebuttable"[272] presumption established by the *gamma* method prevented the USDOC from undertaking the necessary determination of whether a "benefit" continues to exist, the United States conceded before the Panel that the determinations in Case Nos. 1–7, which employed the *gamma* method, are inconsistent with the *SCM Agreement*.[273]

133. The Panel also found that the determinations by the USDOC that employed the *gamma* method in sunset reviews—Case Nos. 8–11—are likewise inconsistent with the obligations of the United States under the *SCM Agreement*.[274] Specifically, the Panel found that, despite having been informed that the privatizations took place at arm's length and for fair market value, the USDOC, in using the *gamma* method, "failed to examine the conditions of such privatizations and to determine whether the privatized producers received any benefit from the prior subsidization to the state-owned producers".[275] The United States has not conceded that the use of the *gamma* method in these sunset reviews (Case Nos. 8–11) is inconsistent with the *SCM Agreement*.

134. As the United States explains, because "[t]he [first] eleven determinations involved applications of the now discarded '*gamma*' methodology"[276], "the proceedings before the Panel necessarily centered on *GOES from Italy* [Case No. 12], the only one of the twelve determinations before the Panel in which USDOC had applied its new ["same person"] methodology."[277] In reviewing the application of the "same person" method to Case No. 12—an administrative review—the Panel found that "privatization calls for a (re)determination of the existence of a benefit to the privatized producer".[278] Based on this finding, the Panel concluded that the "same person" method, "is itself inconsistent with [the United States' obligations under] the *SCM Agreement*"[279] because it "prohibits the examination of the conditions of the privatization-transaction when the privatized producer is not a distinct legal person based on criteria relating mainly to the industrial activities of

[272]Appellate Body Report, *US – Lead and Bismuth II*, para. 62.

[273]Panel Report, paras. 2.29–2.30. For Case Nos. 1-6, the United States acknowledged the WTO-inconsistency "to the extent that they were based on the gamma methodology and that the underlying determinations did not fully examine whether the pre- and post-change in ownership entities involved were the same legal persons." (*Ibid.*, para. 2.29) For Case No. 7, the WTO-inconsistency was admitted by the United States "to the extent that the review was based on the gamma methodology and that, therefore, the underlying determination did not fully examine whether the pre- and post-change in ownership entity was the same legal person." (*Ibid.*, para. 2.30)

[274]*Ibid.*, para. 8.1(c).

[275]*Ibid.*, para. 7.116.

[276]United States' appellant's submission, footnote 28 to para. 26.

[277]*Ibid.*, para. 26.

[278]Panel Report, para. 7.77.

[279]*Ibid.*, para. 7.90.

the producers concerned."[280] On appeal, the United States asks us[281] to reverse the Panel's conclusion that "the so-called 'same person methodology' is inconsistent with the SCM Agreement."[282]

135. Because the 12 determinations challenged in this dispute and on appeal include six original investigations, two administrative reviews and four sunset reviews,[283] we must, in considering whether "the so-called 'same person methodology' [*as such*] is inconsistent with the SCM Agreement"[284], examine this matter in the light of the provisions of the *SCM Agreement* covering each of these three types of countervailing duty determinations. We must also consider whether the *application* of this "same person" method, which occurred only in Case No. 12, was undertaken in a manner consistent with the *SCM Agreement*.

136. The Panel observed that, with the "same person" method, "when the new privatized producer is not a distinct legal person (based on the activities, productive assets, management, staff) from the previous state-owned producer, [the USDOC] considers that the benefit attributed to the state-owned producer can be *automatically* attributed to the privatized producer without any examination of the condition[s] of the transaction."[285] (emphasis added) The Panel reasoned that this method impedes the calculation of a "benefit" to a "recipient" according to Article 14 of the *SCM Agreement*[286] because it prevents the USDOC from focusing its analysis on "the relevant issues … [that is, the determination of] whether subsidization (and in particular benefit) exists for the privatized producer under investigation."[287] Therefore, the Panel concluded that the "same person" method does not permit the examination of the conditions of the privatization, which may reveal that no benefit exists for the privatized producer "above what market conditions dictate". Consequently, the Panel found the "same person" method "is itself inconsistent [with the obligations of the United States under] the *SCM Agreement*".[288] The Panel then considered also the *application* of the "same person" method in

---

[280] Panel Report, para. 7.77.

[281] See *supra*, footnote 178.

[282] Attachment to letter dated 13 September 2002 from the Senior Legal Advisor, Permanent Mission of the United States to the WTO, to the Director of the Appellate Body Secretariat, p. 2.

[283] See *supra*, para. 15.

[284] Attachment to letter dated 13 September 2002 from the Senior Legal Advisor, Permanent Mission of the United States to the WTO, to the Director of the Appellate Body Secretariat, p. 2.

[285] Panel Report, para. 7.78.

[286] Article 14 of the *SCM Agreement*, in relevant part, provides that:

> any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be … transparent and adequately explained.

[287] Panel Report, para. 7.78.

[288] *Ibid*., para. 7.90.

GOES from Italy (Case No. 12), and concluded that the "same person" method, *as applied* in Case No. 12, is also inconsistent with Articles 10, 14, 19.4, 21.1, and 21.2 of the *SCM Agreement*.[289]

137. The United States challenges the Panel's finding that the "same person" method is inconsistent with the obligations of the United States under the *SCM Agreement* – both as such and as applied in Case No. 12. In particular, the United States claims that the method cannot be inconsistent with the *SCM Agreement* because of the way the United States interprets our decision in *US – Lead and Bismuth II*. The United States reads our ruling in *US – Lead and Bismuth II* as saying that an investigating authority is required to re-examine a determination as to the existence of a "benefit" *only* when a *new legal person*—distinct from the entity that received the original benefit—is created.[290]

138. The European Communities argues that the United States relies on an erroneous interpretation of our decision in *US – Lead and Bismuth II* to justify the "same person" method. Our decision in *US – Lead and Bismuth II*, according to the European Communities, *compels* a finding that the "same person" method *as such* is inconsistent with the obligation of the *SCM Agreement* that an investigating authority conduct a new determination of whether a benefit exists when notified of a privatization that results in a change in control. The European Communities argues that, because the "same person" method, like the *gamma* method, establishes an irrebuttable presumption that the benefit of a previously-bestowed financial contribution remains in the post-privatization enterprise *unless a new legal person is created*, the "same person" method is inconsistent with the obligations of the United States under the *SCM Agreement*, as those obligations have been interpreted in *US – Lead and Bismuth II*.[291]

139. In considering these arguments, we begin by recalling that, under Article 1.1 of the *SCM Agreement*, a "subsidy" is "deemed to exist" only if a "financial contribution" confers a "benefit". Also, under Article VI:3 of the GATT 1994[292], investigating authorities, before imposing countervailing duties, must ascertain the precise amount of a subsidy attributed to the imported

---

[289]Panel Report, para. 8.1(b).

[290]United States' appellant's submission, paras. 86–90.

[291]European Communities' appellee's submission, paras. 2 and 7.

[292]Article VI:3 of the GATT 1994 provides as follows:

> *No countervailing duty* shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party *in excess of an amount equal to the estimated bounty or subsidy* determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. (emphasis added)

products under investigation. In furtherance of this obligation, Article 10 of the *SCM Agreement*[293] provides that Members must "ensure" that duties levied for the purpose of offsetting a subsidy are imposed only "in accordance with" the provisions of Article VI:3 of the GATT 1994 and the *SCM Agreement.* Moreover, Article 19.4 of the *SCM Agreement*, consistent with the language of Article VI:3 of the GATT 1994, requires that "[*n*]*o countervailing duty* shall be levied on any imported product in excess of the amount of the *subsidy found to exist*". (emphasis added) Finally, Article 21.1 of the *SCM Agreement* provides that "[a] countervailing duty shall remain in force *only as long as and to the extent necessary* to counteract subsidization which is causing injury." (emphasis added) In sum, these provisions set out the obligation of Members to limit countervailing duties to the amount and duration of the subsidy found to exist by the investigating authority. These obligations apply to original investigations as well as to administrative and sunset reviews covered under Article 21 of the *SCM Agreement*.

140. As we have mentioned, of the 12 USDOC determinations that are relevant in this dispute, the "same person" method was *applied* only in the *GOES from Italy* case (Case No. 12), an administrative review conducted under Article 21.2 of the *SCM Agreement*, which provides:

> *Article 21*
>
> *Duration and Review of Countervailing Duties and Undertakings*
>
> …
>
> 21.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

---

[293] Article 10 of the *SCM Agreement* provides as follows:

> Members shall take all necessary steps to *ensure* that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture. (emphasis added, footnotes omitted)

141. We considered Article 21.2 for the first time in *US – Lead and Bismuth II*, where we found that:

> [i]n an administrative review pursuant to Article 21.2, 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. *On the basis of its assessment of the information presented to it* by interested parties, as well as of other evidence before it relating to the period of review, the investigating authority *must determine whether there is a continuing need for the application of countervailing duties. The investigating authority is not free to ignore such information*. If it were free to ignore this information, the review mechanism under Article 21.2 would have no purpose.[294] (emphasis added)

This finding makes it clear that an investigating authority undertaking an administrative review has an obligation under Article 21.2 of the *SCM Agreement* to determine whether a "benefit" continues to exist when information suggesting that a benefit no longer exists is presented to that authority. According to the United States, our finding in *US – Lead and Bismuth II* was limited to the specific circumstances of that case, which, in the interpretation of the United States, were that the state-owned enterprise and the newly privatized enterprise were two different legal persons. The United States seeks justification for this view in the references in our Report in *US – Lead and Bismuth II* to the "circumstances" of that case[295], and also in our reasoning in paragraph 62 of that Report, in which, according to the United States, "[t]he Appellate Body … accepted the panel's conclusion that UES was a distinct new legal person that could not be held accountable for subsidies bestowed upon BSC [the privatized state-owned enterprise]."[296] (footnote omitted)

142. With respect to the references we made in *US – Lead and Bismuth II* to the "circumstances" of that case[297], we observe that, in those references, we were simply limiting the scope of our findings in that appeal to the particular circumstances of that dispute. We were addressing the conditions under which that particular privatization took place (that is, "fair market value paid for all productive assets, goodwill, etc." [298]); we were not referring at all to a distinction between legal personalities. This is clear when the phrase "in the specific circumstances of this case" is viewed in its context:

---

[294] Appellate Body Report, *US – Lead and Bismuth II*, para. 61.

[295] *Ibid.*, paras. 68 and 74.

[296] United States' appellant's submission, para. 16.

[297] Appellate Body Report, *US – Lead and Bismuth II*, paras. 68 and 74.

[298] *Ibid.*, para. 68.

> The question whether a "financial contribution" confers a "benefit" depends, therefore, on whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market. In the present case, the Panel made factual findings that UES and BSplc/BSES *paid fair market value for all the productive assets, goodwill, etc.*, they acquired from BSC and subsequently used in the production of leaded bars imported into the United States in 1994, 1995 and 1996. We, *therefore*, see no error in the Panel's conclusion that, *in the specific circumstances of this case*, the "financial contributions" bestowed on BSC between 1977 and 1986 could not be deemed to confer a "benefit" on UES and BSplc/BSES.[299] (emphasis added)

Moreover, in this dispute, the United States explicitly acknowledged this reading of our Report in *US – Lead and Bismuth II* in its first submission to the Panel. The United States asserted that "*because UES's owners had paid fair market value* for UES, the Appellate Body found no error in the panel's conclusion that the financial contributions bestowed upon BSC [that is, the state-owned enterprise] could not be deemed to confer a benefit upon UES."[300] (emphasis added)

143. The interpretation of paragraph 62 that is suggested by the United States in this appeal is equally unfounded. Paragraph 62 of our Report in *US – Lead and Bismuth II* reads as follows:

> Therefore, we agree with the Panel that while 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", this presumption can never be "irrebuttable". 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. We thus agree with the Panel's finding that:
>
>> … the *changes in ownership* leading to the creation of UES and BSplc/BSES should have caused the USDOC to examine whether the production of leaded bars by UES and BSplc/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 BSplc/BSES respectively, and not BSC. (emphasis added, footnote omitted)

[299] Appellate Body Report, *US – Lead and Bismuth I*, para. 68..

[300] United States' first submission to the Panel, para. 37.

Contrary to the assertions of the United States, there is nothing in this finding to indicate that, in this paragraph of our Report in *US – Lead and Bismuth II*, we "accepted the panel's conclusion that UES was a distinct new legal person that could not be held accountable for subsidies bestowed upon BSC [the state-owned enterprise]."[301] (footnote omitted)

144. In sum, we reject the characterization made by the United States of our rationale in *US – Lead and Bismuth II*, and we reaffirm our finding in that case[302] that an investigating authority, in an administrative review, when presented with information directed at proving that a "benefit" no longer exists following a privatization, *must* determine whether the continued imposition of countervailing duties is warranted in the light of that information. This obligation is premised, *not* on the creation of a new legal person, as the United States insists, but on the possibility that such a change in ownership has affected the continued existence of a benefit.

145. The Panel stated, and the United States agreed before the Panel and on appeal, that the "same person" method *requires* the USDOC to "consider[] that the benefit attributed to the state-owned producer can be automatically attributed to the privatized producer without any examination of the condition of the transaction" when the agency determines the post-privatization entity is not a new legal person.[303] It is only if the USDOC finds that a new legal person has been created that the agency will make a determination of whether a benefit exists, and, in such cases, the inquiry will be limited to the subject of whether a *new* subsidy has been provided to the new owners.[304]

---

[301]United States' appellant's submission, para. 16. We also note, as does the European Communities (in the European Communities' appellee's submission, paras. 24–27 and footnote 23 to para. 26; and also in the European Communities' response to questioning at the oral hearing), that the creation of a new legal person could not have been the basis for our requirement of a new benefit determination to be conducted by USDOC because the other privatized company at issue in *US – Lead and Bismuth II*, British Steel plc, became a separate legal entity *before* the privatization took place, rather than establishing a new legal identity as a result of the privatization transaction. (See Appellate Body Report, *US – Lead and Bismuth II*, para. 2) In finding that a benefit could have been extinguished under such circumstances and that the USDOC accordingly should have conducted a new benefit determination, we thus focused necessarily on the change in ownership of the companies at issue, and not on their legal personalities.

[302]Appellate Body Report, *US – Lead and Bismuth II*, para. 62.

[303]Panel Report, para. 7.78. See also *ibid.*, para. 7.77:

> In the Panel's view, the United States' same person methodology, as such, prohibits the examination of the conditions of the privatization-transaction when the privatized producer is not a distinct legal person based on criteria relating mainly to the industrial activities of the producers concerned. In applying its methodology the US Department of Commerce does not assess whether the privatized producer has received any benefit from prior financial contributions.

This requirement of the "same person" method was confirmed by the United States in its responses to questioning at the oral hearing.

[304]United States' responses to questioning at oral hearing.

146. Thus, under the "same person" method, when the USDOC determines that no new legal person is created as a result of privatization, the USDOC will conclude from this determination, *without any further analysis*, and irrespective of the price paid by the new owners for the newly-privatized enterprise[305], that the newly-privatized enterprise continues to receive the benefit of a previous financial contribution. This approach is contrary to the obligation in Article 21.2 of the *SCM Agreement* that the investigating authority must take into account in an administrative review "positive information substantiating the need for a review." Such information could relate to developments with respect to the subsidy, privatization at arm's length and for fair market value, or some other information. The "same person" method impedes the USDOC from complying with its obligation to examine whether a countervailable "benefit" continues to exist in a firm subsequent to that firm's change in ownership. Therefore, we find that the "same person" method, *as such*, is inconsistent with the obligations relating to administrative reviews under Article 21.2 of the *SCM Agreement*.

147. In our view, this finding, relating to administrative reviews, leads inevitably to the conclusion that the "same person" method, as such, is also inconsistent with the obligations of the *SCM Agreement* relating to original investigations. In an original investigation, an investigating authority must establish all conditions set out in the *SCM Agreement* for the imposition of countervailing duties.[306] Those obligations, identified in Article 19.1 of the *SCM Agreement*, read in conjunction with Article 1, include a determination of the existence of a "benefit".[307] As in the administrative reviews, the "same person" method necessarily precludes a proper determination as to the existence of a "benefit" in original investigations where the pre- and post-privatization entity are the same legal person. Instead, in such cases, the "same person" method establishes an irrebuttable presumption that the pre-privatization "benefit" continues to exist after the change in ownership. Because it does not permit the investigating authority to satisfy all the prerequisites stated in the *SCM Agreement* before the imposition of countervailing duties, particularly the identification of a "benefit", we find that the "same person" method, as such, is inconsistent with the WTO obligations that apply to the conduct of original investigations.

---

[305]See *supra*, footnote 182.

[306]Appellate Body Report, *US – Lead and Bismuth II*, para. 63.

[307]Article 19.1 permits the imposition of a countervailing duty only after the investigating authority has found a subsidy (as defined in Article 1), injury, and a causal link between the two.

148. This brings us to the third kind of determination at issue, namely sunset reviews. The Panel found that, under Article 21.3 of the *SCM Agreement* [308], and regardless of whether administrative reviews under Article 21.2 had been requested since the original investigation, the importing Member is obliged to consider evidence before it relating to subsidization, and to *determine* whether a "benefit" continues to exist following privatization of the investigated firm, before concluding "whether subsidization exists and is likely to continue or recur".[309] This finding is inherent in the Panel's conclusion that "[t]he four determinations made in the context of sunset reviews and based on the gamma methodology are inconsistent with the SCM Agreement, since the US Department of Commerce did not examine whether the privatizations, that occurred after the original imposition of countervailing duties, were at arm's-length and for fair market value."[310]

149. The United States appealed this finding[311], but did not advance any supporting arguments. We have already determined, in *US – Lead and Bismuth II*, that the *gamma* method is inconsistent with the obligation under Article 21.2 of the *SCM Agreement*. That obligation requires an investigating authority in an *administrative* review, upon receiving information of a privatization resulting in a change in ownership, to determine whether a "benefit" continues to exist. In our view, the *SCM Agreement*, by virtue of Articles 10, 19.4, and 21.1, also imposes an obligation to conduct such a determination on an investigating authority conducting a *sunset* review. As we observed earlier[312], the interplay of GATT Article VI:3 and Articles 10, 19.4 and 21.1 of the *SCM Agreement* prescribes an obligation applicable to original investigations as well as to reviews covered under

---

[308] Article 21.3 of the *SCM Agreement* provides that:

> 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 (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), 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)

[309] Panel Report, paras. 7.114–7.116. The Panel found this conclusion consistent with that reached by the United States Court of International Trade when it found that the USDOC's practices in sunset reviews are inconsistent with the United States legislation, as "[b]y its nature, then, a sunset review is designed to account for changes in law that have a bearing on whether countervailable subsidies will continue or recur." (Panel Report, footnote 359 to para. 7.114, quoting *AG der Dillinger Hüttenwerke v. United States*, Court No. 00–09–00437, slip op. 02–25, at 32 (Court of International Trade, 28 February 2002)) Furthermore, the Panel also noted "that the [United States] Court rejected the [USDOC's] arguments that it was not appropriate to reach the privatization issue in a sunset review or that an interested party participating in a sunset review must have first requested and completed an administrative review." (*Ibid*.)

[310] Panel Report, para. 8.1(c).

[311] As we observed earlier, *supra*, paras. 65–66, the United States quoted paragraph 8.1(c) in full in the document filed subsequent to its Notice of Appeal. That paragraph includes this finding.

[312] See *supra*, para. 139.

Article 21 of the *SCM Agreement* to limit countervailing duties to the amount and duration of the subsidy found to exist by the investigating authority. Consequently, we see no error in the Panel's finding that, in sunset reviews, the investigating authority, before deciding to continue to countervail pre-privatization, non-recurring subsidies, is obliged to "examine the conditions of such privatizations and to determine whether the privatized producers received any benefit from the prior subsidization to the state-owned producers".[313] Therefore, we agree with the Panel that the "four determinations made in the context of sunset reviews and based on the *gamma* methodology are inconsistent with the SCM Agreement [because] the United States failed to determine whether the privatized producers received any benefit from the financial contributions previously bestowed to the state-owned producers."[314]

150. We now turn to the question whether the "same person" method is inconsistent with Article 21.3 of the *SCM Agreement*, which applies to sunset reviews. We have already found that the "same person" method fails to ensure that a determination of whether a "benefit" continues to exist occurs when the USDOC concludes that no new legal person has been created as a result of privatization. We have found also that investigating authorities have an obligation to make such a determination when conducting a sunset review. Therefore, we also find that the "same person" method, as such, is inconsistent with Article 21.3 of the *SCM Agreement*.

151. In the light of these reasons, as they apply to original investigations, administrative reviews, and sunset reviews, we uphold the Panel's conclusion that "the same person methodology *is itself* inconsistent with the SCM Agreement".[315] (emphasis added) We find that the same person method *as such* is inconsistent with the *SCM Agreement*.

152. We have also been asked to review the consistency with the *SCM Agreement* of the *application* of the "same person" method in only one instance, the administrative review entitled *GOES from Italy* (Case No. 12). As we have already concluded that the "same person" method, *as such*, is inconsistent with the obligation that the USDOC determine whether a "benefit" exists when informed of a change in ownership during an administrative review, it follows that the application of

[313] Panel Report, para. 7.116.

[314] *Ibid.*, para. 8.1(c).

[315] *Ibid.*, para. 7.90.

the method by the USDOC in *GOES from Italy*[316] was also inconsistent with the *SCM Agreement*. Consequently, we also uphold the Panel's conclusion, in paragraph 8.1(b) of the Panel Report, that the *application* of the "same person" method in Case No. 12 is inconsistent with the *SCM Agreement*.

153. Finally, we recall that, before the Panel, the United States conceded[317] that, as the investigations and review in Case Nos. 1-7 were carried out using the *gamma* method, the determinations in those cases were inconsistent with the *SCM Agreement*. Accordingly, the Panel found that the countervailing duty determinations in Cases Nos. 1–7 are inconsistent with the obligations of the United States under the *SCM Agreement*.[318] The Panel also found, and we have upheld the finding that, in the sunset reviews (Cases Nos. 8–11), the United States was obliged to "examine whether the privatizations, that occurred after the original imposition of countervailing duties, were at arm's-length and for fair market value" and, accordingly, in using the *gamma* method, it had failed to satisfy this obligation in accordance with the *SCM Agreement*.[319] In *US – Lead and Bismuth II*, we found that the *gamma* method's "irrebuttable"[320] presumption prevented the USDOC from undertaking the requisite determination as to the continued existence of a "benefit". And, in the previous section of this Report, we found that, following privatization at arm's length and for fair market value, a "benefit" no longer exists for the private firm unless the investigating authority finds other evidence to the contrary. Consistent with these findings, we therefore uphold the Panel's conclusions in paragraphs 8.1(a), 8.1(b) and 8.1(c) of the Panel Report.

---

[316]In *GOES from Italy*, the USDOC found the pre- and post-privatization firms to be the same legal person. Accordingly, the USDOC, as required under the "same person" method, irrebuttably presumed that the "benefit" from the financial contribution received by the firm when owned by the state, continued to exist. See Issues & Decision Memorandum to *GOES from Italy*, 66 Fed. Reg. 2885 (USDOC, 12 January 2001), at comment 1, attached as Exhibit EC–7 to the European Communities' first submission to the Panel:

> [The USDOC] seeks to determine whether the privatized [respondent] is the same person that received the pre-privatization financial contributions and benefits at issue in this review … [W]e would *only* reach [the respondent's] fair-market-value claim in the event that we first find the privatized [respondent] to be a *different* person from the original recipient … [W]e find that the privatized [respondent] is for all intents and purposes the same person that existed prior to the privatization, *and accordingly*, it received the pre-privatization financial contributions and benefits at issue in this review. (emphasis added)

[317]See *supra*, footnote 273.

[318]Panel Report, paras. 8.1(a)–8.1(b).

[319]*Ibid*., para. 8.1(c).

[320]Appellate Body Report, *US – Lead and Bismuth II*, para. 62.

IX. Consistency of 19 U.S.C. § 1677(5)(F), as such, with WTO Obligations

154. Having upheld the Panel's conclusions in paragraphs 8.1(a) through (c) of the Panel Report, we now turn to evaluate the Panel's conclusion, in paragraph 8.1(d), regarding the relevant United States statute.

155. The Panel concluded, in paragraph 8.1(d) of the Panel Report, that:

> To the extent that Section 1677(5)(F), as interpreted by the US Court of Appeals for the Federal Circuit and the SAA, requires the US Department of Commerce to apply a methodology where the benefit from a prior financial contribution is not systematically found to no longer accrue to the privatized producer solely by virtue of an arm's-length for fair market value privatization, is preventing the United States from exercising a WTO-compatible discretion. Therefore, Section 1677(5)(F) is inconsistent with Articles 10, 14, 19 and 21 of the SCM, as interpreted by the Panel and the Appellate Body Reports in *US – Lead and Bismuth II* and this Panel. As Section 1677(5)(F) is found to be inconsistent with the *SCM Agreement*, the United States has failed to ensure conformity with Article 32.5 of the *SCM Agreement* and Article XVI.4 of the WTO Agreement respectively.[321]

156. Section 1677(5)(F), the so-called "change in ownership" provision, provides:

> [a] change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's-length transaction.[322]

The Panel acknowledged that this "statutory language alone indicates that the competent authority could have the discretion to implement Section 1677(5)(F) consistently with WTO law."[323] However, in looking at the statute in the light of "other domestic interpretive tools such as the legislative history, the SAA, and relevant judicial interpretations"[324], the Panel found that it "prohibit[ed] the United States from exercising its executive discretion so that it can systematically conclude that in cases of

---

[321]Panel Report, para. 8.1(d).

[322]19 U.S.C. § 1677(5)(F), attached as Exhibit EC–4 to the European Communities' first submission to the Panel.

[323]Panel Report, para. 7.138.

[324]*Ibid*., para. 7.139.

[a]rm's-length privatization for fair market value, no benefit accrues to the privatized producer from [a] prior financial contribution bestowed to the state-owned producers".[325]

157. In short, the Panel found that Section 1677(5)(F) prevents the USDOC from determining automatically and in every case that, pursuant to a "*per se*" rule[326], upon privatization at arm's length and for fair market value, the remaining part of a benefit conferred by a prior financial contribution on the formerly state-owned enterprise does not "accrue"[327] to the private owner. In the Panel's view, Section 1677(5)(F), as described in the SAA[328] and as interpreted by the United States Court of Appeals for the Federal Circuit, "bound [the USDOC] to a non-compliant application of Section 1677(5)(F)."[329] The Panel reached this conclusion because it saw the statute as *compelling* the USDOC to make its determinations in a way that prevents it from applying the irrebuttable presumption that the Panel erroneously saw as required by the *SCM Agreement*. On this basis, the Panel found that Section 1677(5)(F) mandates the United States to act inconsistently with the *SCM Agreement* and with Article XVI:4 of the *WTO Agreement*[330], and, *as such*, is inconsistent with United States' WTO obligations.

158. As stated earlier, we agree with the Panel that privatization at arm's length and at fair market price will *usually* extinguish the remaining part of a benefit bestowed by a prior, non-recurring financial contribution.[331] However, we disagree with the Panel that this result will *necessarily* and

---

[325]Panel Report, para. 7.140. We note that the United States contests this interpretation, particularly the Panel's reading of "judicial interpretation" (namely of *Delverde III*), in its argument under Article 11 of the DSU. However, we found earlier that this issue was not properly raised in the United States' Notice of Appeal and is not before us. (See *supra*, paras. 71–75)

[326]In the words of the United States Court of Appeals for the Federal Circuit:

> [Section 1677(5)(F)] clearly states that a subsidy cannot be concluded to have been extinguished solely by an arm's length change of ownership. However, it is also clear that Congress did not intend the opposite, that a change in ownership always requires a determination that a past countervailable subsidy continues to be countervailable, regardless whether the change of ownership is accomplished through an arm's length transaction or not. If that had been Congress's intent, the statute would have so stated. Rather, the Change of Ownership provision simply prohibits a *per se* rule either way.

Delverde III, *supra*, footnote 31, at 1366.

The Panel interpreted a "*per se*" rule as a "systematic" rule. (Panel Report, para. 7.147)

[327]Panel Report, para. 8.1(d).

[328]See *supra*, footnote 42.

[329]Panel Report, para. 7.156.

[330]Article XVI:4 of the *WTO Agreement* provides:

> Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

[331]See *supra*, paras. 126–127.

always follow from every privatization at arm's length and for fair market value.[332] For this reason, we reversed the Panel's conclusion that, under the *SCM Agreement*, investigating *authorities* "must" determine, *automatically*, that the remaining part of a benefit bestowed by a prior financial contribution does not continue to exist for a privatized firm following a transaction at arm's length and for fair market value. Accordingly, we have also found that, contrary to the Panel's understanding, the *SCM Agreement* permits an investigating authority to evaluate evidence directed at proving that, regardless of privatization at arm's length and for fair market value, the new private owner may nevertheless enjoy a benefit from a prior financial contribution bestowed on the state-owned enterprise.[333] In the light of these earlier conclusions, we disagree with the Panel that Section 1677(5)(F) is inconsistent *per se* with the WTO obligations of the United States. The Panel's basis for this finding is incorrect.

159. There remains the question whether Section 1677(5)(F) is inconsistent *per se* with the WTO obligations of the United States because it mandates[334] a particular method of determining the existence of a "benefit" that is contrary to the *SCM Agreement*. We agree with both the appellant and appellee that "Section 1677(5)(F) does not … prescribe any specific methodology", and, consequently, does not mandate the USDOC to apply the "same person" method.[335] Hence, Section 1677(5)(F), as such, does not prevent the USDOC from determining whether a "benefit" continues to exist, as required by the *SCM Agreement*. Moreover, we also see nothing in the interpretation of Section 1677(5)(F) made by the United States Court of Appeals for the Federal

---

[332]See *supra*, paras. 121–124.

[333]See *supra*, para. 126.

[334]We are not, by implication, precluding the possibility that a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its WTO obligation. We make no finding in this respect.

[335]Panel Report, para. 7.134; United States' and European Communities' responses to questioning at the oral hearing.

The fact that the "same person" method is not mandated by Section 1677(5)(F) appears also to be the view of the United States Court of International Trade. In several recent decisions the Court has held the "same person" method inconsistent with Section 1677(5)(F), as interpreted in *Delverde III*. See *Ilva Lamiere E Tubi S.r.L. v. United States*, 196 F. Supp. 2d 1347 (Court of International Trade, 29 March 2002); *Acciai Speciali Terni S.p.A. v. United States*, No. 99–06–00364, slip op. 02-10 (Court of International Trade, 1 February 2002); *GTS Indus. v. United States*, 182 F. Supp. 2d 1369 (Court of International Trade, 4 January 2002); *Allegheny Ludlum Corp. v. United States*, 182 F. Supp. 2d 1357 (Court of International Trade, 4 January 2002).

We also note one decision of the United States Court of International Trade that has upheld the "same person" method as consistent with *Delverde III* and therefore a permissible exercise of the USDOC's discretion under the statute. *Acciai Speciali Terni S.p.A. v. United States*, 206 F. Supp. 2d 1344 (Court of International Trade, 4 June 2002). This decision, however, explicitly recognizes that Section 1677(5)(F) does not prevent the USDOC from devising any methodology to determine the post-privatization subsidization of a foreign firm under investigation, provided that a *per se* rule is not applied. (*Ibid*., at 1349–50, 1354–55) These cases were brought to our attention by the participants and third participants.

Circuit[336] that would prevent the USDOC from complying with its obligations under the *SCM Agreement*.

160. For all these reasons, we reverse the Panel's conclusion that:

> To the extent that Section 1677(5)(F), as interpreted by the US Court of Appeals for the Federal Circuit and the SAA, requires the US Department of Commerce to apply a methodology where the benefit from a prior financial contribution is not systematically found to no longer accrue to the privatized producer solely by virtue of an arm's-length for fair market value privatization, is preventing the United States from exercising a WTO-compatible discretion. Therefore, Section 1677(5)(F) is inconsistent with Articles 10, 14, 19 and 21 of the SCM, as interpreted by the Panel and the Appellate Body Reports in *US – Lead and Bismuth II* and this Panel. As Section 1677(5)(F) is found to be inconsistent with the *SCM Agreement*, the United States has failed to ensure conformity with Article 32.5 of the *SCM Agreement* and Article XVI.4 of the WTO Agreement respectively.[337]

X. Findings and Conclusions

161. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's findings, in paragraphs 8.1 (a), (b) and (c) of the Panel Report, that the United States has acted inconsistently with Articles 10, 14, 19.1, 19.4, 21.1, 21.2 and 21.3 of the *SCM Agreement*, by imposing and maintaining countervailing duties without determining whether a "benefit" continues to exist in the following countervailing duty determinations:

– *Stainless Sheet and Strip in Coils from France* (C–427–815) (Case No. 1);

– *Certain Cut-to-Length Carbon Quality Steel from France* (C–427–817) (Case No. 2);

– *Certain Stainless Steel Wire Rod from Italy* (C–475–821) (Case No. 3);

– *Stainless Steel Plate in Coils from Italy* (C–475–823) (Case No. 4);

– *Stainless Steel Sheet and Strip in Coils from Italy* (C–475–825) (Case No. 5);

– *Certain Cut-to-Length Carbon-Quality Steel Plate from Italy* (C-475–827) (Case No.6);

[336]See *supra*, footnote 326.

[337]Panel Report, para. 8.1(d).

– *Cut-to-Length Carbon Steel Plate from Sweden* (C-401–804) (Case No. 7);

– *Cut-to-Length Carbon Steel Plate from United Kingdom* (C–412–815) (Case No. 8);

– *Certain Corrosion-Resistant Carbon Steel Flat Products from France* (C-427-810) (Case No. 9);

– *Cut-to-Length Carbon Steel Plate from Germany* (C-428–817) (Case No. 10);

– *Cut-to-Length Carbon Steel Plate from Spain* (C–469–804) (Case No. 11); and

– *Grain-Oriented Electrical Steel from Italy* (C–475–812) (Case No. 12).

(b) reverses the Panel's finding, in paragraph 8.1(d), first sentence, of the Panel Report, that "[o]nce an importing Member has determined that a privatization has taken place at arm's-length and for fair market value, it must reach the conclusion that no "benefit" resulting from the prior financial contribution (or subsidization) continues to accrue to the privatized producer"; and

(c) reverses the Panel's conclusion, in paragraph 8.1(d), second sentence, of the Panel Report, that Section 771(5)(F) of the Tariff Act 1930, as amended, 19 U.S.C. § 1677(5)(F), is inconsistent with the *SCM Agreement* and that, therefore, "the United States has failed to ensure conformity with Article 32.5 of the *SCM Agreement* and Article XVI.4 of the *WTO Agreement* respectively."

(d) upholds the Panel's conclusion, in paragraph 8.2 of the Panel Report, that, insofar as the United States has infringed its obligations under the *SCM Agreement*, as set out in paragraphs 8.1(a), (b), and (c) of the Panel Report, these actions of the United States constitute *prima facie* nullification or impairment of benefits accruing to the European Communities, pursuant to Article 3.8 of the DSU; and, because the United States has failed to rebut this presumption, the United States has in fact nullified or impaired benefits accruing to the European Communities under the *SCM Agreement*.

162. The Appellate Body recommends that the Dispute Settlement Body request the United States to bring its measures and administrative practice (the "same person" method), as found in this Report and in the Panel Report as modified by this Report, to be inconsistent with the *SCM Agreement*, into conformity with its obligations under that Agreement.

Signed in the original at Geneva this 22nd day of November 2002 by:

John Lockhart
Presiding Member

Georges Abi-Saab	James Bacchus
Member	Member

WORLD TRADE ORGANIZATION

WT/DS212/7
11 September 2002

(02-4760)

Original: English

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

Notification of an Appeal by the United States
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU)

The following notification, dated 9 September 2002, sent by the United States to the Dispute Settlement Body (DSB), is circulated to Members. This notification also constitutes the Notice of Appeal, filed on the same day with the Appellate Body, pursuant to the *Working Procedures for Appellate Review*.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the panel report on *United States – Countervailing Measures Concerning Certain Products from the European Communities* (WT/DS212/R) and certain legal interpretations developed by the Panel.

The United States seeks review by the Appellate Body of the conclusions of the Panel set forth in paragraphs 8.1(a)-(d) and 8.2 of the Panel's report. These conclusions are in error, and are based upon erroneous findings on issues of law and on related legal interpretations.