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

Report of the Appellate Body
WT/DS212/AB/R

Adopted by the Dispute Settlement Body
on 8 January 2003

United States, *Appellant*
European Communities, *Appellee*
Brazil, *Third Participant*
India, *Third Participant*
Mexico, *Third Participant*

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

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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.

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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 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

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

[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.

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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 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

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[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.

[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.

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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] 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

[11] Request, para. 6.
[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.

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not differ in substance from and largely repeat the arguments of the United States 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 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,

[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.
[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.

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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]

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

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[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.

[31] As noted above, in para. 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*"))

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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 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

[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.
[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).

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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 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.

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[39] Panel Report, para. 7.90.
[40] *Ibid.*, paras. 7.81 and 8.1(b).
[41] *Ibid.*, para. 8.1(d).
[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).

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