TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL BACKGROUND: THE DEVELOPMENT OF DOC'S REVISED PRIVATIZATION METHODOLOGY 2

III. ARGUMENT 5
A. DOC's Revised Methodology Is Consistent with the SCM Agreement 5
1. The Standard of Review 5
2. DOC's Determination in GOES from Italy 6
3. DOC's New Methodology, as Applied in *GOES from Italy*, Satisfies All of the Conditions in the SCM Agreement for the Imposition of CVDs 6
4. Article 27.13 of the SCM Agreement Provides Contextual Support for the Proposition that Subsidies Remain Countervailable After the Recipient Has Been Privatized . . . 9
5. DOC's Revised Methodology Is Consistent With the Findings of the Appellate Body in *UK Lead Bar* 10
a. The Panel Decision 11
b. The Appellate Body Report 12
c. DOC's New Methodology Is Consistent With the Appellate Body Report 12
B. The EC's Arguments Are Without Merit 13
1. A Change in the Ownership of a Company Does Not Automatically Create a Distinct New Legal Person 14
2. The Fact that the Payment of Fair Market Value for a Company Prevents the New Owner from Personally Obtaining a Benefit Does Not Mean that Existing Subsidies Are Somehow Extracted from that Company 15
a. Economically, a Change in Ownership Does Not Remove or Offset Prior Subsidies 17
b. Questions for the EC 18
3. The EC's Additional Arguments Also Lack Merit 19
a. The Legal Distinction Between Companies and Their Owners Cannot Be Ignored 20
b. DOC's Previous Methodology Is Irrelevant 21
c. DOC's Current Methodology Is Consistent with the Decision of the U.S. Court of Appeals in *Delverde* 21
d. The EC Mischaracterizes DOC's Current Methodology as Automatically Leading

such a request and comments on the likelihood of continuation or recurrence of subsidization. In three of the four sunset reviews, DOC received no comments from the European steel companies involved. Accordingly, in those cases and pursuant to its procedures, DOC conducted expedited reviews. In the one case where the European company (Dillinger) did file comments, DOC conducted a full sunset review and thoroughly considered those comments. In all four cases, DOC determined that subsidization was likely to continue or recur – the only evidence, in each case, of what level of subsidies would likely exist, absent an order, coming from the original 1993 investigation.[105] Accordingly, DOC was under no obligation, pursuant to Article 21.3, to convert its sunset reviews into full-blown administrative reviews of the respective CVD orders.

4. The *GOES from Italy* Administrative Review Is in Accordance with the United States' Obligations Under the SCM Agreement.

90. For all of the reasons outlined above, the *GOES from Italy* (Case No. 12) administrative review, applying DOC's new change-in-ownership methodology, is fully in accordance with the United States' obligations under the SCM Agreement.

D. Section 771(5)(F) of the Tariff Act of 1930 – the "Change-in-Ownership" Provision – Is Not Inconsistent with United States' Obligations Under the SCM Agreement and the WTO Agreement

91. The EC contends that Section 771(5)(F) of the Act[106] – the "change-in-ownership" provision – is inconsistent with the United States' obligations under the SCM Agreement and the WTO Agreement. In fact, Section 771(5)(F) does not mandate an either/or approach to the question of whether pre-privatization subsidies benefit a post-privatization entity. Thus, as is shown below, the EC's attack on Section 771(5)(F) fails because of the statutory provision's discretionary nature.

1. Under the Mandatory/Discretionary Distinction, Only Legislation Mandating a Violation of WTO Obligations Can Be Challenged "As Such"

92. It is well established that, pursuant to the mandatory/discretionary distinction, only legislation which precludes authorities from complying with WTO obligations can be successfully challenged "as such." In *United States – Measures Treating Export Restraints as Subsidies*, the panel discussed the considerable dispute settlement practice under both GATT and the WTO which stands for the principle that "only legislation that *mandates* a violation of

[105] This is because, in all four of these sunset reviews, the European steel companies had, in each instance, declined to request administrative reviews to re-visit their original CVD rates. In other words, none of these companies had, over a period of five years, utilized DOC's administrative procedures to obtain a re-examination of their CVD rates.

[106] Exhibit EC-4.

GATT/WTO obligations can be found as such to be inconsistent with those obligations."[107] If a law provides for even the possibility of WTO consistent action, whether by allowing for discretion in compliance or the possibility of future WTO consistent action that might be taken, then the law is deemed discretionary. Thus, in *Export Restraints*, the panel found that the United States' statute did not mandate the treatment of export restraints as financial contributions, and hence did not violate the SCM Agreement.[108]

93. In *Canada Aircraft*, the panel applied the mandatory/discretionary distinction and rejected claims of prohibited subsidies under the SCM Agreement.[109] In *United States – Sections 301-310 of the Trade Act of 1974*, the panel also applied the mandatory/discretionary distinction and found that there may be certain WTO provisions that prohibit a certain type of legislative discretion, in which case such discretion might be WTO inconsistent. Nevertheless the panel emphasized that its decision "does not imply a reversal of the classical test . . . that only legislation mandating a WTO inconsistency or precluding WTO consistency, could, as such, violate WTO provisions. Indeed, that is the very test we shall apply in our analysis."[110] From the substantial number of panel and Appellate Body cases which have applied the mandatory/discretionary distinction, it is clear that this doctrine enjoys continued support and validity.

2. The Change-in-Ownership Provision Is Discretionary

94. The plain language of Section 771(5)(F) demonstrates its discretionary nature:

> 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. (Emphasis added).

---

[107] *United States – Measures Treating Export Restraints as Subsidies* ("*Export Restraints*"), WT/DS194/R, Report of the Panel, adopted 23 August 2001, para. 8.4 (emphasis in original).

[108] *Id.*, para. 8.131. In so finding, the panel examined, in addition to the statute, the Statement of Administrative Action, the preamble to the DOC regulations, and DOC administrative practice.

[109] *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, Report of the Panel, as modified by the Appellate Body, adopted 20 August 1999, para. 9.305. The panel cited *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*, DS44/R, BISD 42S/131, Report of the Panel adopted 4 October 1994, in which the panel found that, because the term "comparable", as used in legislation requiring inspection fees, was "susceptible of a range of meanings," such legislation did not mandate non-compliance with GATT obligations. If legislation permits the possibility of compliant interpretations, then it is not mandatory.

[110] *United States – Section 301-310 of the Trade Act of 1974*, WT/DS152/R, Report of the Panel adopted 20 January 2000, para. 91. *See also United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, Report of the Appellate Body adopted 18 August 2000 (upholding the panel's application of the mandatory/discretionary distinction).

95. As the text of Section 771(5)(F) clearly provides, a change in ownership *does not by itself* mean that a past countervailable subsidy is no longer countervailable. Nor does it mean that it *is* countervailable. The statute leaves the investigating authority discretion to make its decision. The EC's contention that the United States could not implement a finding of the Panel that rejected the "same person" methodology is incorrect.[111] If the facts justified a finding that the producer of the merchandise under investigation did not receive subsidies, DOC could simply apply the Panel's finding to the particular measure in question and modify its determination accordingly, based on the facts and circumstances of that particular case.

96. The Statement of Administrative Action ("SAA") also supports the view that Section 771(5)(F) is discretionary and not mandatory. The SAA is an authoritative expression of the United States' interpretation of the Uruguay Round Agreements Act, which added Section 771(5)(F) to the Act.[112] The SAA states that the purpose of Section 771(5)(F) is to clarify that "the sale of a firm at arm's length does not automatically, and in all cases, extinguish any prior subsidies conferred."[113] The SAA goes on to clarify that it is the Administration's intent that "Commerce retains the **discretion** to determine whether, and to what extent . . . previously conferred countervailable subsidies" are eliminated (emphasis added). The SAA further emphasizes the scope of this discretion by stating that "Commerce must exercise this **discretion** carefully through its consideration of the facts of each case and its determination of the appropriate methodology to be applied" (emphasis added). It is clear from the language of the SAA that the legislative intent was to provide for administrative discretion and that the discretion is to be reasonably tailored to the facts of each case. Under this interpretation, Section 771(5)(F) is far from legislation that mandates WTO-inconsistent action.

97. The Preamble of DOC's CVD regulations also supports this conclusion.[114] It states that "section 771(5)(F) . . . purposely leaves much **discretion** to the Department with regard to the impact of a change in ownership on the countervailability of past subsidies. Specifically, a change in ownership neither requires nor prohibits a determination that prior subsidies are no

---

[111] First EC Submission, para. 158. In this regard, In *Allegheny Ludlum Corp. v. United States*, slip op. 02-01 (Ct. Int'l Trade Jan. 4, 2002); and *GTS Industries S.A. v. United States*, slip op. 02-02 (Ct. Int'l Trade Jan. 4, 2002), the issue of DOC's new change-in-ownership methodology and its consistency with Section 771(5)(F) was before the U.S. Court of International Trade. In each opinion, the court stated that "any methodology adopted by Commerce must recognize *the possibility that a subsidy can be extinguished by a privatization*, even the privatization of an entire company, if a thorough analysis of the transaction supports that conclusion." Slip op. 02-01 at 16, slip op. 02-02 at 16 (emphasis added). Thus, there is no question that Section 771(5)(F) gives DOC the *discretion* to find that subsidies can be extinguished in the context of a change in ownership.

[112] 19 U.S.C. 3512 (Exhibit USA-8); SAA at 656. *See also Export Restraints*, paras. 8.93-8.100.

[113] SAA at 928 (Exhibit EC-25); EC First Submission, para. 145.

[114] *See* Preamble to the U.S. Department of Commerce's *Notice of Final Rule*, 63 Fed. Reg. 65348, 65354 (1998)(Exhibit USA-9). In this case, DOC declined to promulgate a regulation regarding change in ownership, but instead stated its intent to continue to carefully examine each case and consider modifications to its methodology as appropriate. 63 Fed. Reg. at 65355. *See also Export Restraints*, paras. 8.107-8.119, for a discussion of the Preamble and DOC's CVD regulations.

longer countervailable. Rather, the Department is left with the discretion to determine, on a case-by-case basis, the impact of a change in ownership on the countervailability of past subsidies."[115]

98. In sum, the plain language of the statute, supported by the SAA as well as the Preamble, demonstrates that Section 771(5)(F) is discretionary legislation. In this case, the Panel's findings with regard to any of the twelve measures in dispute can be applied by DOC to the facts of each of those determinations. Accordingly, because Section 771(5)(F) is discretionary legislation, within the meaning of the mandatory/discretionary distinction, Section 771(5)(F) cannot be found to be inconsistent with United States' WTO obligations. For this reason, the Panel should reject the EC's claims that Section 771(5)(F) is inconsistent with U.S. obligations under Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

IV. CONCLUSION

99. For the reasons set forth in this submission, the United States respectfully requests that the Panel make the following findings:

(1) By not self-initiating reviews to reconsider change in ownership situations in light of the Appellate Body's report in *UK Lead Bar*, the United States has not acted inconsistently with its obligations under the SCM Agreement;

(2) The seven DOC determinations (six investigations and one administrative review (Case Nos. 1-7)) are inconsistent with the United States' obligations under the SCM Agreement only to the extent that DOC did not fully examine whether the pre- and post-change-in-ownership entities involved were the same legal persons;

(3) The four DOC sunset determinations (Case Nos. 8-11) are not inconsistent with the United States' obligations under the SCM Agreement;

(4) The *GOES from Italy* administrative review (Case No. 12) is not inconsistent with the United States' obligations under the SCM Agreement;

(5) The U.S. change-in-ownership provision, section 771(5)(F) of the Tariff Act of 1930 (19 U.S.C. 1677(5)(F)), is not inconsistent with the United States' obligations under the SCM Agreement and the WTO Agreement; and

(6) The EC's claims regarding the expedited sunset review of the CVD order on cut-to-length plate from Sweden are not within the Panel's terms of reference.

[115] Preamble, 63 Fed. Reg. at 65354 (emphasis added).