

**GENERAL AGREEMENT  
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Committee on Subsidies and Countervailing Measures

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UNITED STATES - COUNTERVAILING DUTIES ON  
CERTAIN CARBON STEEL FLAT PRODUCTS FROM  
SEVERAL MEMBER STATES OF THE EEC

Request for Conciliation under Article 17  
of the Agreement

The following communication, dated 8 October 1993, has been received from the European Community.

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Definitive affirmative countervailing duty and injury determinations against Belgium, France, Germany, Italy, Spain and the United Kingdom, concerning certain cut-to-length carbon steel plate products, certain hot-rolled carbon steel flat products, certain cold-rolled carbon steel flat products and certain corrosion-resistant carbon steel flat products (published on 21 June and in August 1993 respectively)

1. The European Community ("The Community") wishes to refer the above proceedings to the Committee on Subsidies and Countervailing Measures for conciliation in accordance with Article 17 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade ("the Subsidies Code").
2. This request is made following consultations on the preliminary determinations in these cases under Article 3 of the Subsidies Code, held in Geneva on 26 February 1993, in Washington on 29-30 March 1993 and in Geneva on 23 July 1993 and 30 September 1993, which failed to arrive at a mutually agreed solution of these cases.
3. The Community considers that the United States has infringed several provisions, in particular Articles 1, 4:2 and 6 of the Subsidies Code in these proceedings as set out below.
4. The Community recalls that certain of the issues it refers to the Committee have already been submitted for conciliation in connection with the definitive affirmative countervailing duty determinations by the United States against France, Germany and the United Kingdom concerning certain hot-rolled lead and bismuth carbon steel products and with the preliminary affirmative countervailing duty determinations by the United States concerning these flat-rolled cases.
5. Such issues are currently the subject of a panel proceeding (document SCM/167 of 16 April 1993 and document SCM/167/Add.1 of 2 June 1993). The Community's position in respect of them has already been set out in detail and is recalled only briefly in paragraph I of this document. Paragraph II deals at greater length with issues raised by the most recent determinations of the US, in respect of

which the Community's view has not yet been fully set out before the Committee. Paragraph III deals with issues following the injury determinations by the US International Trade Commission.

6. The Community reserves the right to raise other matters resulting from these determinations at an appropriate time. The Community also reserves the possibility to circulate to members of the Committee a more detailed written explanation of some or all of these points.

7. Paragraph I

(a) Non-recurring subsidies, which in the past may have been provided to Community steel companies, have been allocated by the US authorities over 15 years (amortization period).

The Community considers that this method of calculation is not compatible with Article 4:2 of the Subsidies Code and with the guidelines on amortization and depreciation as adopted by this Committee on 11 July 1985.

(b) Non-recurring subsidies have been recalculated in such a way that the total amount countervailed over time exceeds largely the amount of subsidy alleged to have been granted by the government. The Community considers that by this method countervailing duties have been levied in excess of the amount of the subsidy found to exist, in violation of Article 4:2 of the Subsidies Code.

(c) Untied subsidies granted to a steel company producing in several countries have been countervailed by allocating the complete subsidy amount found only over the domestic production of that company.

The Community considers that the United States has violated Article 4:2 of the Subsidies Code by levying a countervailing duty in excess of the subsidies benefiting the product concerned.

(d) The United States has developed a methodology which determines whether or not a company is creditworthy or equityworthy. The Community considers that this methodology has led on several occasions to an unjustified finding of subsidization in relation to equity infusions and loans made by public authorities.

The Community submits that this methodology is in many respects inconsistent with logic, with economic reality and with the facts of the cases investigated.

For these reasons this methodology is liable, in certain cases, to result in findings of subsidies where none existed, and in other cases in calculation leading to an overstating of the amount of the subsidy, thus violating Article 4:2 by imposing countervailing duties in excess of the amount of existing subsidization.

(e) The United States has countervailed debt forgiveness provided by private banks to a steel company.

The Community considers that there is no justification for countervailing such payments, taking into account that there has been no financial contribution at all from the granting authority. The Community also considers that the United States has thereby infringed Article 4:2 of the Subsidies Code.

8. Paragraph II

(a) Subsidies granted prior to privatization

The Facts

The factual background to the US Department of Commerce's (DoC's) decision to countervail steel products produced by British Steel Plc ('British Steel') is straightforward. In 1988 British Steel Corporation (BSC), a state-owned company, was privatized by a public sale of the stock of a newly created company, British Steel Plc, to which all of the assets and liabilities of BSC had been transferred. This sale took place at full and fair market value.

The alleged subsidization took place between 1977 and 1986, i.e. before the privatization of BSC in 1988. The new and privatized company British Steel never received any subsidies.

The DoC found that the government funds provided to BSC constituted "capital provided on terms inconsistent with commercial considerations" and are hence a subsidy.

The fundamental question therefore is whether such subsidies (i.e. capital provided to a state-owned company on terms inconsistent with commercial considerations) continue to provide subsidy benefits to the production of the company after it has been completely privatized for its full market value. Phrased another way, do the competitive benefits that justify countervailing the production of the state-owned company that has received such capital continue after the company has been fully privatized at market value?

9. Position of US DoC

The DoC sets out its views on this question in a General Issues Appendix to these cases and in summary its conclusion is that:

- (i) There is no obligation on DoC, as the US investigating authority, to analyze the use and effect of subsidies and in particular to determine whether the production in question continues to benefit from the subsidy. This is reflected in the following extracts from the DoC's determination:

"Whether subsidies confer a demonstrable competitive benefit upon their recipients, in the year of receipt or any subsequent year, is irrelevant - the statute embodies the irrefutable presumption that subsidies confer a countervailable benefit upon goods produced by their recipients" (DoC Appendix p. 174-175), and

"... the Department's practice is to countervail the value of subsidies at the time they are provided to a company (...) without regard to their actual use by that same company or their effect on its subsequent performance" (DoC Appendix p. 175)

The DoC summarises its approach (Appendix p. 187) by stating:

"In sum, the countervailable subsidy (and the amount of the subsidy to be allocated over time) is fixed at the time the government provides the subsidy. The privatization of a government-owned company, *per se*, does not and cannot eliminate this countervailability. As explained above, the statute does not permit the amount of the subsidy, including the subsidy stream to be re-evaluated based upon subsequent event in the market place".

- (ii) That the price paid for the company at privatization may be considered a partial payment of the remaining subsidies. The relevant part of the determination reads as follows:

"... a private party purchasing all or part of a government-owned company (e.g., a productive unit) can repay prior subsidies on behalf of the company as part or all of the sales price. Therefore, to the extent that a portion of the price paid for a privatized company can reasonably be attributed to prior subsidies, that portion of those subsidies will be extinguished". [DoC Appendix p. 184-185].

10. Views of the Community in respect of a privatization at full market value

The privatization of British Steel was an at arms-length transaction in which the privatized company was valued at a real market price. There was a 100 per cent change in ownership and control of the privatized company.<sup>1</sup>

The DoC admits that the distinction between a company and its owners is "a distinction without a difference in the context of privatization" (Appendix p. 180). It concludes that "we cannot accept petitioners' argument that only the privatized company, and not its new owners, can repay prior subsidies (.)".

The DoC therefore accepts that a company which is privatized and owned by private shareholders has changed its identity and has become a different entity from that which what is was before the privatization.

The Community concludes that in those circumstances, since it is accepted that the price paid to the Government for the privatized company is a market price, no distortion of the market takes place and hence the products produced by the privatized company do not enjoy any advantage.

The fact that the company was privatized in an arm's length transaction at fair market value removes any basis for imposing countervailing duties on the production of British Steel.

Under such a transaction the significance of fair market value is that the price paid includes the residual value of any remaining countervailable benefits received. The private company British Steel that has acquired at market value the assets from the subsidized state-owned company BSC has no advantage over any other competitor.

A full privatization at market value results in a fundamental change in the source of financing that supports the company's continued operations and investments. After privatization, the company no longer operates and invests with funds that have been provided on terms inconsistent with commercial considerations because capital equal to the full market value of the company has been provided by the private market on terms consistent with commercial considerations and has completely replaced the subsidy capital. In contrast to the preprivatization situation, where the company had no real obligation to provide a market-oriented return on the full market value of the company.

11. Nature of countervailable benefits

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<sup>1</sup>These facts have been clearly established by the US DoC and are not in dispute. For the record it should be noted that although the Community uses as an example the privatization of British Steel, its arguments apply equally to the privatization of Saarstahl which was treated in the same manner by DoC.

Turning more specifically to the first of the central aspects of the DoC's determinations, the Community considers that there is a need to demonstrate that the new company was subsidized. As it is clear that no new subsidies were being granted to British Steel, it must be demonstrated that old subsidies and benefits deriving from them continue in, or were passed through to, the new entity.

The US has made no effort whatsoever to demonstrate that such was the case. On the contrary, it simply created an irrefutable assumption that this is so and it refuses to re-evaluate its findings which relate to a situation before the privatization took place.

The Community considers that the approach of the United States in this respect infringes in several respects provisions of the Subsidies Code.

The Community submits that a signatory is not permitted to resort to irrefutable presumptions in order to avoid having to consider the fundamental changes effected in a company's operations when all of its capital is privatized at market value.

12. The Community's view is that the US approach is contrary to Article 4:2 and to the objectives and aim of the Subsidies Code for the following reasons:

Article 4:2, which provides that no countervailing duty be levied in excess of the amount of the subsidy found to exist, is founded on the premise that no countervailing duty may be levied unless the company under investigation is found to be subsidized. Basic tenets of logic, and the findings made in the Pork Panel case, dictate that this finding be based on consideration of all relevant facts. The use of irrefutable presumptions is clearly contrary to this fundamental principle.

The purpose for which countervailing duties are permitted under the Subsidies Code is to offset trade distorting effects of subsidies resulting in material injury to domestic producers within the framework of the Subsidies Code. In other words, the objective of countervailing duties is to counteract the unfair advantage enjoyed by a company benefitting from a subsidy. For this reason the fact that a privatized company makes use of assets once owned by a government owned company which received subsidies is irrelevant, unless it is shown that the privatized company continues to benefit from the subsidy.

Similarly, the fact that the production of the predecessor company benefitted from capital provided by the government on terms inconsistent with commercial considerations is irrelevant where the entire capital of the privatized company has been supplanted by funds from private sources provided on market terms.

13. Repayment of subsidies

The second central aspect of the DoC's determination is the issue of (partial) repayment of subsidies by payment of the purchase price during the privatization.

It concludes that a portion of the price paid in a privatization represents a 'repayment of subsidies' since some part of the company's net worth was represented by subsidies. The DoC then attempts to determine the percentage of the privatization price that reflects the subsidy component of the company. This percentage is calculated as the mathematical average of what might be referred to as the "subsidy ratios" for British Steel for each year from 1977 to 1988. The "subsidy ratio" for any year is determined by dividing (a) the amount of subsidies received in that year, by (b) the net worth of the shareholder's equity in the company at the end of that year. This percentage is then applied to the privatization price to determine the amount of the subsidy repayment credit. DoC then applies this credit against the unamortized value of all the past subsidies as of the privatization date.

It is also noteworthy that in applying this methodology the DoC states that:

"There is no further guidance in the statute, legislative history, or case law as to what proportion of the purchase price of a privatized company should be attributed to prior subsidies. Nor have the parties to the investigation had an opportunity to submit comments on this particular issue." (p. 185 Appendix, emphasis added).

14. The Community's position has been set out above: privatization at full market value necessarily eliminates benefits from previous subsidization to a state-owned company. It is also of the view that in these kind of circumstances economic logic and the judgement of the market as to the real value of a company should prevail over valuations based on arbitrary assumptions or abstract and theoretical methodology.

15. The Community further considers that by denying the parties involved any opportunity to comment on the issue of calculation, the DoC has violated the requirement of the Code that parties be given a reasonable opportunity to submit their views to investigating authorities. Article 2:5 of the Subsidies Code provides in relevant part that:

Each signatory shall ensure that the investigating authorities afford all interested signatories and all interested parties a reasonable opportunity (...) to present in writing, and upon justification orally, their views to the investigating authorities.

The purpose of this provision is to ensure that those parties most directly affected by the proceedings are able to present their views to the investigating authorities throughout the proceedings. As such, the provision reflects the fundamental legal principle that all parties to a dispute should be heard (*audi et alteram partem*). If the provision is to serve its purpose, it must preclude an investigating authority from basing its determination on an approach that was never disclosed to the interested parties and on which the interested parties were never allowed to present their views.

#### 11.2 Excessive duty

17. The DoC in its investigation of the Belgian Steel Company Fafer determined that the cut-to-length plate steel produced by Fafer has been subsidized at a margin of 1.05 per cent. The duty imposed on Fafer is however not 1.05 per cent but 5.85 per cent.

This results from application of section 355.20(d) of the DoC regulations. Under that section, DoC will apply an individual countervailing duty rate to a company only if that rate is at least 5 percentage points higher or lower than the weighted average net subsidy calculated on a countrywide basis. In the case of Fafer, 1.05 per cent, the company rate, was less than 5 percentage points lower than 5.85 per cent, the countrywide rate.

It is abundantly clear that the imposition of this duty is a violation of Article 4:2 of the Subsidies Code. In the Community's view, any methodology meant to simplify administration of the domestic CVD legislation cannot justify such a flagrant infringement of Article 4:2. Moreover, there would appear to be no reason for the US to calculate company specific subsidy margins if at the stage of imposition of a duty the application of a gross domestic rule leads - by multiplying more than five times the actual subsidy margin - to a completely excessive countervailing duty.

#### 11.3 Prepension programmes

18. The DoC has countervailed several benefits resulting from prepension or workers assistance programmes (described on p. 150-154 DoC general issues appendix). One type of benefit identified

by DoC is that which derives from a Government assuming a part or all of a company's obligations to employees who are laid off or retired.

The DoC considers that if a company is relieved by the Government of its legal obligations towards its employees, such a relief is countervailable.

In many instances the companies' obligations are not outlined in law but result from contracts negotiated with the workers. If subsequently the Government assumes a portion of the amount the company is contractually obliged to provide, DoC determines as well that Government's assistance to be countervailable.

The DoC goes even one step further: "when the Government's willingness to provide assistance is known at the time the contract is negotiated, a different situation exists. This is because the Government's contribution is likely to have an effect on the outcome of the negotiations" (p. 152 Appendix).

The DoC then tries to predict "what obligation the company would have faced if the Government contribution were not known to the parties" (p. 153 Appendix).

The DoC adopts the following method: it assumes that the difference would have been split by the parties, with the result that one half of the Government payment is considered as relieving a company of its obligations and hence is countervailable.

#### Position of the Community

19. As stated above, a countervailing duty may only be imposed if the investigating authority has proven on the basis of all relevant facts that a government did specifically confer a subsidy on its industry and if this subsidy did bring about a competitive benefit to that industry.

The DoC has not made any attempt to justify its assertion that the Government would provide some kind of assistance, and would in fact result in lowering the costs for the company. This seems to be based merely on speculation and arbitrary prejudice towards Governments' social policy goals. Speculative assumptions cannot be a justification to impose countervailing duties. The above-mentioned Pork Panel findings and Article 4:2 of the Subsidies Code clearly require that a countervailing duty can only be levied if it is demonstrated that a subsidy exists, not on assumptions.

The Community concludes that the United States has failed to fulfil the requirement to demonstrate that a subsidy exists and has based findings on assumptions, rather than a clear factual basis and has thereby infringed Article 4:2 of the Subsidies Code.

#### 20. Paragraph III

The injury determinations in these proceedings by the US International Trade Commission (ITC), published in August 1993, raise several questions of compatibility with provisions of the Subsidies Code.

- (i) The way the USITC has cumulated countries for the purpose of injury findings appears to ignore the fact that some countries have very small, insignificant market shares;
- (ii) The finding of a threat of injury against products from Germany and the Netherlands in the cold-rolled steel case does not appear to be based on positive evidence;

- (iii) The USITC appears not to have analyzed 'other factors' in its causality analysis, on the basis of all relevant facts;
- (iv) In general, the determinations and views expressed in support of such determinations appear to be based on standards, which are lower than those set out in the Code. This is true, in particular in respect of the standard of negligibility, cumulation, material injury, and causality, as well as for threat.

Moreover, there remains doubt about the standard applied for initiation in terms of injury and on the lack of causality in the provisional findings.

Finally, motivation regarding certain crucial points is insufficient or unclear and in most cases difficult to follow in view of the diverging opinions expressed in the ITC's determinations.

Following the failure of the bilateral consultations to arrive at a mutually agreed solution on these issues, the Community requests the Committee on Subsidies and Countervailing Measures to undertake conciliation under Article 17 of the Subsidies Code and to review immediately the facts involved and through its good offices encourage the development of a mutually acceptable solution.