1. Introduction

On 24 July 1992 the United States Department of Commerce ("DoC") initiated countervailing duty investigations against steel producers based in 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; on 7 December 1992 the DoC made preliminary affirmative countervailing duty determinations, and on 9 July 1993 the DoC made definitive affirmative countervailing duty determinations in respect of a number of the above-mentioned proceedings. On 10 August 1993, the US International Trade Commission made affirmative material injury findings regarding several of the above-mentioned products originating in several of the above-mentioned member States of the European Community.


At the request of the Community the Committee on Subsidies and Countervailing Measures held on 27 October 1993 and on 10 November 1993 conciliation meetings in respect of the above-mentioned United States determinations.

The Community considers that the imposition by the US of these countervailing duties (CVDs) constitutes in several respects an infringement of provisions of the Subsidies Code, in particular of Articles 1, 2:5 and 4:2.

Below the Community will identify the individual points of the final affirmative countervailing duty determinations by the US which, in the Community's view, violate US obligations under the Subsidies Code.

2. Privatization

2.1 Imposition of CVDs after privatization at full market value

2.1.1 Facts

The US has imposed countervailing duties on steel products produced and exported to the US by British Steel plc, whose principal place of business is the United Kingdom. British Steel plc was incorporated in July 1988 as a public limited company. All of its shares were initially owned by the Government of the United Kingdom. In September 1988 all of the property, rights and liabilities of the state-owned company British Steel Corporation ("BSC") were transferred to British Steel plc. In December 1988, the ownership of British Steel plc was privatized through a successful public offering on the stock markets of the United Kingdom and of several other countries. The shares were sold in the public offering for 125 pence per share, generating a total privatization price of £2.5 billion. The US DoC itself determined that this price represented the fair market value of the company at the time.

The alleged subsidization of BSC, as determined by the US DoC, took place between 1977 and 1986, i.e. some years before its privatization. The new and privatized company British Steel plc never received any subsidies.

The US DoC imposed countervailing duties on British Steel plc’s exports based on the finding that in the 1977-1986 period BSC had received capital from the UK Government on terms inconsistent with commercial considerations. In imposing countervailing duties on British Steel plc for the subsidies that had been provided to BSC, the US DoC made no finding that the production of British Steel plc actually benefitted from those subsidies. Indeed DoC concluded that:

"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 irrebuttable presumption that subsidies confer a countervailable benefit upon goods produced by their recipients"

(DoC General Issues Appendix to these Determinations ("Appendix"), p. 174-175, emphasis added), and

The Community takes as an example the privatization of British Steel, although the same methodology was applied to other Community steel producers.
"...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"

(Appendix, p. 175)

2.1.2 Claims of the European Community

The Community considers that the DOC, by imposing countervailing duties on products exported by British Steel plc, has acted in contravention of Article 4:2 of the Subsidies Code, as no subsidy could be found to exist in respect of these products. It follows from, inter alia, Article 4:2 that only if the United States proves that a subsidy exists and has been provided to the production in question of British Steel plc, this may justify the imposition of countervailing duties, provided of course, that such subsidization has also caused negative effects.

The Community considers that if a Signatory of the Code imposes countervailing duties on a product, it has an obligation to demonstrate that subsidies have indeed been granted to the producer of those products. The record in the proceeding before the DoC established that no subsidies were ever provided to British Steel plc and that the new private owners paid full market value to acquire the company and its productive facilities. The DoC nevertheless imposed countervailing duties on the production of British Steel plc without demonstrating how the products of British Steel plc realised financial (i.e. subsidy) benefits from the subsidies granted some years earlier to BSC.

The Community considers that it should have been demonstrated that the benefit of subsidies granted in the past to BSC, would remain in, or were in some way passed through to, the new and privatized company British Steel plc.

The US, however, has not made any efforts even to consider whether the products from British Steel plc would benefit from any subsidization of BSC. The US view is that it is irrelevant whether subsidies confer a competitive benefit upon a company on whose production the DoC has imposed countervailing duties, because the US statute "embodies the irrebuttable presumption that subsidies confer a countervailable benefit upon goods produced by their recipients". It is clear from the use of such an irrebuttable presumption that the US has declined to investigate whether the products of British Steel plc would continue to benefit from the subsidy capital provided in the past to BSC.

The Community, for its part, considers that if the price paid to the government for a privatized company is a full market price, that company thereafter operates with capital provided on terms consistent with commercial considerations, the products produced by the privatized company do not enjoy any competitive advantage and, consequently, no distortion of the market can take place. The company under investigation (British Steel plc) never received any subsidies, never realised any financial benefits from the subsidies provided to BSC, and, like any other unsubsidized company, is producing merchandise without the benefit of government-supplied subsidy capital.

The Community submits, in this respect, that the privatization at full market value of a state-owned company, with its transformation into a private company acting according to market-oriented principles, changes fundamentally the nature and identity of the company that received the subsidy. The privatized company is not the same enterprise that received the subsidy. This has also been acknowledged by the DoC:

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6This is also supported by Article 2:12, 4:1, 4:4 and 4:9 of the Subsidies Code.
"Unlike the former company, which did not need to earn a return on capital when owned and controlled by the government (..) the privatised firm now faces the same capital market as its competitors. (..) Put another way, the privatised company now has an obligation to provide its private owners a market return on the company's full value"

(Appendix, p. 181)

The DoC therefore admits that the privatization at full market value results in a fundamental change in the source of financing of the company, but then fails to draw the only possible conclusion, which is that the capital funds put at the disposal of the company have not been provided on terms inconsistent with commercial considerations. Capital equal to the full market value of the company has been provided by the private market on terms inconsistent with commercial considerations and this capital has completely replaced the subsidy capital. Under these circumstances not only is there a failure to demonstrate any legal justification but there is also a lack of any economic rationale for imposing countervailing duties, even if one accepts the premises on which the US countervailing duty law is based.

2.2 DoC's partial repayment methodology

2.2.1 Facts

The DoC in its final determinations also adopts a new approach in deciding that a portion of the price paid in a privatization represents a 'partial repayment of subsidies', since some part of the company's net worth was represented by subsidies. The DoC applies, in order to calculate the "subsidy credit", an abstract and arbitrary calculation methodology. The DoC remarks on this issue that:

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

(Appendix, p. 185)

2.2.2 Claims of the European Community

The general view of the Community on this issue has already been set out above. A privatization at full market value necessarily eliminates benefits from previous subsidization to a state-owned company. Thus, the DoC's abstract methodology of (partial) repayment of previous subsidies is contrary to Article 4:2 of the Subsidies Code.

In any event, the Community considers that the manner in which the US DoC has adopted its "repayment method" demonstrates serious procedural defects, which are contrary to Article 2:5 of the Subsidies Code. Article 2:5 provides, in relevant part, that:

"Each signatory shall ensure that the investigating authorities afford all interested parties a reasonable opportunity (..) to present in writing (..) their views to the investigating authorities."

This provision reflects the fundamental legal principle that all parties to a dispute should be heard. It therefore precludes an investigating authority from basing its determination on an approach relating
to a fundamental issue in the proceedings that was adopted at the last moment of the proceedings and never disclosed to the interested parties and in respect of which the interested parties could not present their views.

3. Social programme

The US DoC has countervailed social aid in the form of worker assistance programmes or prepension programmes in, inter alia, the following situations.

3.1 According to the DoC a company is under a 'social or political' obligations not to lay-off workers

3.1.1 Facts

The US DoC determined that:

"The first type of benefit arises when companies are given the opportunity to reduce their labour force in a manner otherwise unavailable to them. (...) These types of programs are countervailable to the extent that the companies were under an obligation to retain or replace the workers who were retired early. There are two instances in which we have determined a company to be under an obligation to retain or replace workers who were retired early. The first instance is when there are legal requirements that workers must be replaced or cannot be laid-off. The second arises where social or political conditions are such that, although no legal or contractual obligation exists, as a practical matter workers cannot simply be fired;" (Appendix p. 150-151, emphasis added)

3.1.2 Claims of the European Community

The Community considers the US DoC determination of the countervailability of social subsidies, in particular on the basis the "the social or political conditions are such that as a practical matter workers cannot simply be fired", to be contrary to several provisions of the Subsidies Code, notably Article 4:2. The US itself determined that if no legal or contractual obligations exist to retain or to replace the workers the company was laying off, social aid would not relieve the companies of any obligations - legal or contractual - it may have towards its workers. The US nevertheless imposes countervailing duties on these companies in respect of social aid from which workers previously employed by them are benefitting.

The necessary link between the action of the government and the benefit to the production of the company could only be established if the government had relieved the company of a legal obligation towards the workers. The Community considers that countervailing duties may only be imposed where it is demonstrated that the production of a company benefitted from subsidies. The US did not provide such demonstration in this instance. Indeed it could not do so because, as it determined itself, the company had not been relieved of any legal or legally enforceable obligation towards its workers. In the Community's view the alleged benefit in this instance went to the workers and not to the company.

In addition, the US has resorted to the presumption and assumption that social and political conditions in a particular country would have made it impossible for a company to lay-off its workers and that the company was able to achieve this lay-off only because of social subsidies.
In this respect, the Community considers that the subsidy findings of the DoC are not based on positive evidence but on a completely arbitrary judgement on the domestic social and political situation of a country. The Community submits that imposition of countervailing duties can not be based on such a completely subjective and uncontrollable judgement by the DoC of the impact that the social and political situation in a country may have on the behaviour of a company, but only on a positive determination that the producers of the products under investigation were relieved from their legally enforceable obligations by the social aid in question. The US decision is, in these circumstances, a violation of the Subsidies Code, and notably of Article 4:2, which requires that a subsidy must be found to exist.

3.2 A company may be aware of the possibility of government assistance for its employees when it negotiates its contractual obligations with its employees

3.2.1 Facts

The DoC has identified a second countervailable situation where a government assumes part or all of a company's obligations to employees who are laid off or retired. The DoC introduces a sliding scale, divided in three different steps:

(i) "In order for this type of program to be found countervailable, the Department must determine, on a case by case basis, exactly what the companies' obligations to severed employees are. In situations where there is legislation pertaining to a company's obligations to its severed employees, a program which relieves a company of its legal obligations is clearly countervailable."

The DoC also takes into consideration, the contractual obligations between companies and their employees:

(ii) In many instances, companies' obligations to their terminated employees are not outlined under the law, but under contracts negotiated with the workers. When these contracts are already in place and the government subsequently steps in to assume a portion of the amount of the company is obliged to provide, we have determined that government assistance is countervailable. Thus, we are treating certain contractual obligations as legal obligations.

(iii) However, 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".

In the latter situation, the DoC tries to predict:

"what obligations the company would have faced if the Government contribution were not known to the parties. (..) We assume that the difference would have been split by the parties, with the result that one-half of the government payment goes to relieving the company of an obligation that would otherwise exists."

(Appendix p. 151-153, emphasis and numbering added).
3.2.2 **Claims of the European Community**

In the last situation, described under (iii), the DoC admits that it assumes that knowledge of the government’s willingness to provide social measures for workers that become unemployed would also benefit the company, because it is "likely to have an effect on the outcome of the negotiations".

Once again, the Community is of the opinion that a Signatory to the Subsidies Code may only impose countervailing duties if it proves that a subsidy has been granted towards a company and benefits its production and this causes injury to a domestic industry. The US has even not attempted to deliver such evidence but has resorted directly to the arbitrary assumption that the possible availability of social aid trust have had an impact on the contractual negotiations between a company and workers. The Community submits that in the absence of any clear evidence of the existence of a subsidy benefiting a company, or that the company has been relieved of its legal or contractual obligations (as explained in more detail above) the countervailing duties imposed by the US are, in this respect, in violation of Article 4:2 of the Subsidies Code.

Furthermore, the Community submits that this approach by the US DoC constitutes an infringement of Article 2:5 of the Subsidies Code, as it has not been disclosed during the proceedings to the interested parties, thereby depriving them of the opportunity to present their views on this issue.

4. **Duty in excess of the amount of subsidy found to exist**

4.1 **Facts**

The US DoC determined, in its investigation concerning imports of cut-to-length plate steel produced by a certain Belgian steel company, that the products of this Belgian producer had been subsidized by an ad valorem margin of 1.05 per cent. The DoC, however, imposed a duty on exports of this product from this company to the US of 5.85 per cent ad valorem.

Apparently, the US DoC arrived at this figure (which is much higher than the individual subsidy margin) by applying a rule of administrative convenience. The DoC appears to apply individual countervailing duty rates only if such rates are at least 5 percentages points higher or lower than the weighted average net subsidy calculated on a countrywide basis for the product under investigation. In the case of this Belgian steel company, the company rate of 1.05 per cent was less than 5 percentage points lower than the countrywide average subsidy margin of 5.85 per cent. In consequence, the DoC imposed on the US exports by this company of cut-to-length steel plate, a countervailing duty of 5.85 per cent.

4.2 **Claims of the European Community**

The Community submits that imposition of a countervailing duty which is higher than the actual amount of the subsidy found to exist infringes Article 4:2 of the Subsidies Code and that administrative convenience can not provide a justification for such a blatant infringement of the Subsidies Code.
5. Allocation period of 15 years

5.1 Facts

The US DoC has allocated "non-recurring" subsidies which it determined to have been provided in the past to the Community steel producers under investigation, over a period of 15 years (the so-called amortization period).

5.2 Claims of the European Community

The Community considers that the US method of allocation of subsidies over time rest upon an arbitrarily chosen period which is not compatible with Article 4:2 of the Subsidies Code and is, in addition, at odds with the Guidelines on Amortization and Depreciation ("the Guidelines"), adopted by the Subsidies Committee on 11 July 1985, and that under this US method countervailing duties are levied in respect of subsidies that do not, or no longer, exist, or whose effects have ceased. Moreover, contrary to what the US claims in its determinations, this period is not reasonable since it is not linked to the circumstances of the firms under investigation, and is therefore contrary to the Guidelines.

6. Appropriate sales "denominator": allocation over production

6.1 Facts

The US DoC has countervailed products produced by a French steel company with several subsidiaries in other countries by treating capital infusions, which inherently benefit worldwide operations of the company, as "tied" to the domestic production, and by allocating the benefit of such alleged subsidies solely over the domestic production of that company.

The US arguments are as follows:

"We believe that it is reasonable to presume that the government of a country normally provides subsidies for the general purpose of promoting the economic and social health of that country and its people, and for the specific purposes of supporting, assisting or encouraging manufacturing or production and related activities (..) Thus, under the Departments's refined "tied" analysis, the Department will begin by presuming that a subsidy provided by the government of the country under investigation is tied to domestic production. (..)" (Appendix p. 33-34)

6.2 Claims of the European Community

The Community considers that the US has the obligation to make a determination as to whether and to what extent a subsidy has been provided to an exported product, based on positive evidence, and to set forth a reasoned basis for its determinations. The Community submits that - by resorting to presumptions - the US in this respect has violated its obligations under the Subsidies Code, notably Article 4:2 by levying a countervailing duty in excess of any subsidies which could actually benefit the exported product. Moreover, the US DoC's "presumption" that the benefit were "tied" to domestic production was both inherently impossible to rebut and, based on the US DoC's treatment of the evidence before it, in fact irrebuttable in this case. The Community submits that the US DoC determination relied on a irrebuttable presumption instead of on positive evidence.
7. **Conclusion**

It has not been possible to resolve any of the matters relating to the imposition of these definitive countervailing duties and to develop a mutually acceptable solution through bilateral consultations or through conciliation under Article 17:2 of the Subsidies Code.

The Community therefore requests pursuant to Article 17:3 of the Subsidies Code, that the Committee establish a Panel in order to have the facts of the matter (as explained in this request) reviewed to clarify the rights and obligations of the Community and the United States, and, if appropriate, to request the US to bring, or apply, its legislation in conformity with the Subsidies Code, and to withdraw the measures concerned which are found to be inconsistent with the provisions of the Subsidies Code.