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Section 129 Proceeding
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October 24, 2003

MEMORANDUM

TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Jeffrey May
Deputy Assistant Secretary,
Import Administration, Group 1,

SUBJECT: Issues and Decision Memorandum for the Determination under Section 129 of the Uruguay Round Agreements: Certain Cut-to-Length Carbon-Quality Steel Plate from Italy

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On January 8, 2003, the Dispute Settlement Body ("DSB") of the World Trade Organization ("WTO") adopted the report of the WTO Appellate Body in United States - Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R (December 9, 2002) ("Certain Products"). Pursuant to the DSB findings in Certain Products, the Department changed its practice with respect to the methodology for analyzing privatizations in the context of countervailing duty law. See Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 FR 37125 (June 23, 2003) ("Modification Notice"). In accordance with section 129 of the Uruguay Round Agreements Act ("Section 129"), the Department is applying the new methodology to the privatization that was addressed in the countervailing duty investigation of certain cut-to-length carbon-quality steel plate from Italy, published on December 29, 1999. See Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Italy, 64 FR 73244 (December 29, 1999)("Italian Plate").

In Italian Plate, the Department determined that the Government of Italy ("GOI") had provided countervailable subsidies to ILVA Laminati Piani S.r.l. ("ILP") during the period of investigation (1998), including certain non-recurring subsidies conferred prior to the company's privatization in 1995. In this Section 129 proceeding, using the Department's modified methodology for analyzing privatization, the Department is examining whether the pre-privatization subsidies were eliminated as a result of the privatization.

On August 5, 2003, United States Steel Corporation filed information relevant to alleged market distortions affecting the sale of ILP. On September 15, 2003, the Department issued a draft section 129 determination to the GOI, the European Communities, and the parties to the section 129 determination, soliciting comments by September 25, 2003 and rebuttal comments by September 30, 2003. See "Issues and Decision Memorandum for the Determination under Section 129 of the Uruguay Round Agreements Act: Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Italy " from Jeffrey May, Deputy Assistant Secretary, Import Administration, to James J. Jochum, Assistant Secretary for Import Administration, dated September 15, 2003, ("Draft Determination"). On September 25, the International Steel Group, Inc. ("ISG") (a domestic interested party) and respondent (ILVA Lamiere e Tubi S.r.l and ILVA S.p.A., collectively "ILVA") submitted comments. On September 30, 2003, ILVA submitted rebuttal comments.

Section 129 of the Uruguay Round Agreements Act ("URAA") is the applicable provision governing the nature and effect of determinations issued by the Department to implement findings by WTO panels and the Appellate Body. Specifically, section 129(b)(2) provides that "{n}otwithstanding any provision of the Tariff Act of 1930 . . .," within 180 days of a written request from the U.S. Trade Representative ("USTR"), the Department shall issue a determination that would render its actions not inconsistent with an adverse finding of a WTO panel or the Appellate Body. 19 U.S.C. § 3538(b)(2). The Statement of Administrative Action for the URAA ("SAA") variously refers to such a determination by the Department as a "new," "second," and "different" determination. See SAA accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, Vol. 1 (1994) (SAA) at 1025, 1027. This determination is subject to judicial review separate and apart from judicial review of the Department's original determination. 19 U.S.C. § 1516a(a)(2)(B)(vii).

In addition, section 129(c)(1)(B) of the URAA expressly provides that a determination under section 129 applies only with respect to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the USTR directs the Department to implement that determination. In other words, as the SAA clearly provides, "such determinations have prospective effect only." SAA at 1026. Thus, "relief available under subsection 129(c)(1) is distinguishable from relief in an action brought before a court or a NAFTA binational panel, where . . . retroactive relief may be available." Id.

We recommend that you approve the positions we have developed in this memorandum. Below is a complete list of the issues in this review for which we received comments from the parties:

Comment 1: The Tariff Act of 1930 Prohibits The Department From Implementing a Privatization Methodology That Amounts To a Per Se Rule
Comment 2: The Department's Application of Its New Methodology Amounts to a Per Se Rule Because It Failed to Accord Special Treatment to Concurrent Subsidies That Would Rebut a Finding of Fair Market Value
Comment 3: The Department's New Methodology Regarding Concurrent Subsidies

	Fails to Distinguish Between Sales of On-Going Concerns Versus Sales of Assets
Comment 4:	The Department's Approach to Assessing Concurrent Subsidies Rests on False Presumptions
Comment 5:	Concurrent Subsidies are Evidence of Market Distortions That Should Rebut a Finding of Fair Market Value
Comment 6:	The Net Countervailable Subsidy Rate Fails to Take Into Account the Department's Recent Redetermination Pursuant to Court Remand

ILP's Privatization

On December 12, 1992, the Italian Council of Ministers gave its approval for the privatization of ILVA, the state-owned steel group. Pursuant to this, the GOI-owned holding company, Instituto per la Riconstruzione ("IRI"), moved to reorganize the ILVA Group to prepare it for sale. The ILVA Group consisted of the steel producer ILVA S.p.A. and a number of steel-related subsidiaries (service centers, trading companies, etc.). ILVA S.p.A. had four operating divisions including the specialty steel division.

In accordance with the restructuring and privatization plan, in December 1993, ILVA was "demerged" into two new corporations: ILP and Acciai Speciali Terni ("AST"), with the remaining assets and a portion of debt placed in ILVA Residua. AST and ILP were separately incorporated on December 31, 1993. Both newly formed companies were entirely owned by IRI.

IRI announced its intention to sell ILP and solicited purchase offers through advertisements placed in the Italian and international press on December 14, 1993. This privatization was part of a general restructuring plan of the Italian steel industry; the sale of ILP was transacted in the context of an overall plan to reorganize and privatize ILVA by the end of 1994. To facilitate the sale, IRI employed the Istituto Mobiliare Italiano ("IMI") as its financial advisor. IMI prepared an "information memorandum" concerning ILP, which included a historical background and description of the company, its operations and holdings, financial statements, and projected profitability.

In its solicitation for purchase offers, IRI invited interested parties to provide certain information about themselves no later than January 7, 1994. The requested information included shareholder composition and financial statements. This was deemed necessary by ILP to quantify the prospective purchasers' manufacturing, commercial, organizational, and financial positions.

Eleven initial expressions of interest were received. IMI responded by forwarding the ILP information memorandum to those interested parties which properly submitted complete and conforming bid packages. At the same time, the interested parties were asked to submit preliminary, non-binding cash offers for 100 percent of ILP's shares and a proposed industrial plan[1] for ILP by February 11, 1994. Four companies submitted non-binding purchase offers.

IRI requested definitive offers by May 13, 1994. By that deadline, the original four bidders regrouped into two consolidated factions and submitted two separate offers. However, the offers were deemed unacceptable to IRI for various reasons. For example, one bid was incomplete and the other sought only a majority (not all) of ILP's shares. Accordingly, IRI concluded that private negotiation might lead to an offer that maximized the revenues from the sale of ILP and IRI employed the help of IMI to contact additional prospective purchasers.

A GOI compulsory directive on privatization adopted by the Interministerial Committee for Economic Planning ("CIPE") outlined procedures to follow in such cases. The CIPE Resolution allowed for a mixture of public auction and private negotiations in order to maximize sale price, and required the engagement of two specialized consulting firms for determining the value of ILP. Two reports analyzing the value of ILP were compiled: the first was completed in May 1994 (updated in February 1995), and the second was completed in February 1995. The analyses were conducted by Pasfin Servizi Finanziari S.p.A. ("Pasfin") and Samuel Montagu & Company ("Montagu"), respectively.

At the direction of IRI, IMI contacted both the parties that had initially expressed an interest in ILP, as well as other potential purchasers. In response, two offers were made. One bid was from a consortium headed by Riva Acciaio S.p.A ("RIVA"). Based on its evaluation of these offers, IRI decided to pursue exclusive negotiations with the RIVA consortium.

The sale of ILP was ultimately effectuated through a share purchase agreement between IRI and the RIVA consortium. A sales contract was signed on March 16, 1995, and all shares of ILP were transferred to the RIVA consortium on April 28, 1995. On January 1, 1997, the RIVA consortium changed the name of ILP to ILVA S.p.A. (thus creating "new" ILVA).

Analysis

We have analyzed the privatization of ILP consistent with the methodology put forth in the Modification Notice, 68 FR at 37127.

Arm's-Length Transaction

In determining whether subsidies received by ILP prior to its privatization continued to provide a benefit, the Department first considered whether the privatization of ILP was conducted through an arm's-length transaction.

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[1] The industrial plan was to provide the GOI with a basis for determining whether the bidder had a serious interest in running the company and to assess whether the new owner would satisfy the requirements imposed under the European Union restructuring directive on competition.

For a definition of an "arm's-length transaction," we rely on guidance from the Statement of Administrative Action ("SAA"), which states in relevant part that an arm's-length transaction is "a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties." See SAA accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, Vol. 1 (1994) at 928.

Consistent with the SAA, in determining whether the sale of ILP constituted an arm's-length transaction, we must assess (a) whether it was transacted between unrelated parties, each acting in its own interest, or, (b) if transacted between related parties, whether the terms of the transaction were those that would exist if negotiated between unrelated parties. In the instant proceeding, all the shares of ILP were sold to the consortium headed by RIVA. Because the purchasers in this transaction were not related to the seller, the IRI, or to ILP, we determine that the sale was at arm's-length.

Fair Market Value

Next, in determining whether the sale of ILP was for fair market value consistent with the methodology in the Modification Notice, 68 FR at 37127, we first considered whether there was any contemporaneous, benchmark price actually observed in the marketplace for a comparable company or assets. However, in the instant proceeding, we find no evidence in the record of any contemporaneous sales of companies comparable to ILP nor any appropriate market benchmark price. Consequently, we have relied on an examination of various "process factors" from among the non-exhaustive list in the Modification Notice.

(1) Objective Analysis

In evaluating the process used by the GOI to sell ILP, we first looked to see whether the government performed or obtained, and implemented the recommendations of, an objective analysis in determining the appropriate sales process and price. We considered whether the analysis was objective, timely (i.e., completed prior to agreement on the final transaction price), and complete (i.e., contained the information typically considered by private, commercial sellers contemplating such a sale).

In the instant case, IRI initially obtained a report from IMI in 1993 for the purpose of obtaining "...the description of the company and its reference market and its industrial perspective." See WTO 129 Questionnaire Response at 8. This report did not set forth any pricing recommendations. However, later during the privatization process, after IRI had moved from the open bidding procedures to the more focused negotiation approach, IRI engaged the services of two professional, specialized consulting firms, Pasfin and Montagu. The firms were asked to determine the price range that IRI could expect to receive for its shares of ILP. As discussed above, both of these reports were completed prior to agreement on the final sales price.

A review of each of the respective reports shows that the consulting firms relied on information submitted by ILP management regarding the company and several methodologies to estimate its value. The methodologies and conclusions of these reports are proprietary and are not susceptible to summarization. Accordingly, for a detailed description of these evaluations, please see Memorandum to James J. Jochum, Assistant Secretary for Import Administration, dated October 24, 2003, "Analysis of the Privatization of ILVA Laminati Piani S.r.l." ("ILP Privatization Analysis Memo").

We consider these studies timely as they were conducted prior to the agreement on the final transaction price. Further, the studies are objective and complete because they were conducted by independent parties and contained information typically considered by sellers contemplating such a sale.

(2) Artificial Barriers to Entry

The Department considered whether there were any restrictions or requirements that distorted the bidding process. Conditions that unduly restrict the number or identity of otherwise legitimate bidders (e.g., exclusion of foreign purchasers or purchasers from a different industry, minimum bid requirements, overly-burdensome or unreasonable bidder-qualification requirements) would be particularly suspect, in that they would tend to undermine competition and increase the likelihood that something less than full value was paid for the shares or assets.[2]

On the other hand, if potential purchasers of a company were able to place their bids or purchase shares without burdensome restrictions and there were no restrictions which served to narrowly define the pool of potential purchasers, this would support a finding that the purchasers paid fair market value for the company they purchased.

The record indicates that no restrictions on foreign purchasers were imposed by IRI. IRI announced its intention to sell ILP and solicited purchase offers through advertisements in the Italian and international press on December 14, 1993, and statements of interest were submitted by potential bidders from Italy, Germany, the United Kingdom, and the United States. Nor were the informational requirements imposed on interested parties (articles of incorporation and by-laws; a list of all members of the Board of Directors and Board of Auditors; financial data for the preceding three years; and for limited liability companies only, a listing of ten major shareholders and their respective proportion of equity ownership) overly burdensome. Accordingly, the demand for (or purchase price of) ILP was not artificially suppressed by these preliminary requirements.

Even after the bidding process failed to yield a purchaser, the GOI sought to enlist as many

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[2] This is an illustrative list only. There may be other pertinent aspects of the sales or bidding process in other privatizations that inhibit the market's ability to settle a transaction at full value.

bidders as possible. Specifically, it directed IMI to contact all the parties that had initially expressed an interest in purchasing ILP, as well as any other parties that might be interested.

As noted above, this search resulted in two offers, and the GOI subsequently entered into exclusive negotiations with RIVA. While exclusive negotiations could be seen as limiting competition for ILP, they appear to have been justified in this case as explained in the ILP Privatization Analysis Memorandum.

Certain commitments and obligations were undertaken by RIVA when it purchased ILP, as discussed in the "Committed Investment" section below. However, there is no information to indicate that proposed commitments or obligations caused any potential buyers to drop out of the process.

(3) Purchase Price

Another factor in determining whether the sale of ILP was for fair market value is whether the government accepted the highest bid and received payment in cash or close equivalent. The details of the price negotiations are proprietary and are reported in the ILP Privatization Analysis Memorandum.

As discussed above, in the initial bidding phase of the sales process, IRI received two definitive offers for ILP. Three of the four parties that had made non-binding offers joined together to present a single offer for ILP. According to the GOI, the other bidder submitted what amounted to a new declaration of interest rather than a definitive offer. Neither bid was acceptable to IRI. Further details of the bidding process are proprietary and are not amenable to summarization. Accordingly, for a detailed description of this process, please see the ILP Privatization Analysis Memorandum.

IRI's further solicitations resulted in two offers, including one from the eventual purchaser, RIVA. With the assistance of its advisors, IRI determined that of the two offers, RIVA's was superior. Subsequently, the GOI entered into exclusive negotiations with RIVA. See ILP Privatization Memorandum.

The GOI selected the highest bid when it decided to enter into negotiations for ILP. Further, there is no information on the record indicating that a higher final price could have been obtained. Accordingly, the record demonstrates that the GOI accepted the highest offer for ILP, and that this amount was received in cash.

(4) *Committed Investments*

The term "committed investment" encompasses a range of possible restrictions or requirements that the government, as the seller, imposes on the future operation of, or investment in, the company or its assets. In analyzing the possible impact of committed investment on a privatization, we will consider, inter alia, whether: (1) the precise details of the committed investment were fully transparent to all potential bidders, and, therefore, reflected in the final bid values of the potential bidders, (2) there is no implicit or explicit understanding or expectation that the buyer will be relieved of the requirement or commitment after the sale, and (3) there is no evidence otherwise on the record indicating that the committed investment was not fully reflected in the sale price. See Modification Notice, 68 FR at 37133.

The record indicates that the new owner would be required to reduce capacity. This obligation is reported in a European Commission decision dated April 12, 1994, which describes the GOI's privatization program. Specifically, one part of this program imposed "on the acquirer of the Taranto plant, the requirement that within a period of six months of the date of the contract of sale, a capacity of 0.5 million tonnes per year of hot-rolled production would be shut down." Additional commitments that were likely sought by the GOI are described in the proprietary ILP Privazation Analysis Memorandum.

The evidence indicates that committed investments were fully reflected in the sale price of ILP because the details of the commitments being sought were fully transparent to all potential bidders. Specifically, the requirement to reduce capacity was a matter of public record and, it appears that this requirement was presented to all potential purchasers by IRI. Thus, the record evidence indicates that the final bids submitted for ILP reflected the value of these commitments. Further, there is no evidence on the record that the buyer would be relieved of the requirements after the sale, and that the committed investment was not fully reflected in the sale price. Therefore, in the instant proceeding, the presence of post sale restrictions/commitments did not result in less than fair market value being paid for ILP.

Concurrent Subsidies

"Concurrent Subsidies" are subsidies given to facilitate, encourage, or that are otherwise bestowed concurrent with a privatization. Modification Notice, 68 FR at 37136. These subsidies often include debt forgiveness and rescheduling, subsidized loans, and worker-related benefits.

The Department will normally determine that the value of a concurrent subsidy is fully reflected in the fair-market-value price of an arm's-length privatization and, therefore, is fully extinguished, if: 1) the nature and value of the concurrent subsidies were fully transparent to all potential bidders and, therefore, reflected in the final bid values of the potential bidders, 2) the concurrent subsidies were bestowed prior to the sale, and 3) there is no evidence otherwise on the record demonstrating that the concurrent subsidies were not fully reflected in the sale price. See Modification Notice, 68 FR at 37137.

Prior to the sale of ILP, in December 1993, when the majority of ILVA's viable manufacturing activities were demerged into either ILP or AST, the bulk of ILVA's debt was placed in ILVA Residua (a shell company with liabilities far exceeding assets), rather than being proportionately allocated to ILP and AST. The amount of debt that should have been attributable to ILP but was instead placed with ILVA Residua was equivalent to debt forgiveness for ILP at the time of its demerger. Since this subsidy was given after the GOI's decision to privatize ILP, it is considered a concurrent subsidy. See Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Plate from Italy, 64 FR 73244 (December 29, 1999). Parties interested in bidding on ILP received the IMI report prepared in 1993, which included economic information on the company.

There is no evidence indicating that this concurrent subsidy was not fully reflected in the sale price of ILP because, as described above, all the potential bidders were aware of the concurrent subsidy and it was bestowed prior to the privatization. Moreover, there is no evidence otherwise on the record demonstrating that the concurrent subsidies were not fully reflected in the sale price.

Fair Market Value - Conclusion

Based on our review of the factors discussed above, we determine that the GOI received fair market value for ILP. Although we would expect a bidding process to yield the highest price for ILP, the bidding process failed in this case and, consequently, the GOI resorted to a negotiating process. Despite this, our review of the evidence shows that the GOI sought to receive as many offers as possible and that it negotiated the final price based on the best offer. Moreover, commitments sought by the GOI and concurrent subsidies provided by the GOI were known to the parties and, therefore, reflected in the negotiated price.

Market Distortions

Under the Department's new privatization methodology, if it is demonstrated that the privatization was at arm's length for fair market value, any pre-privatization subsidies will be presumed to be extinguished in their entirety and, therefore, non-countervailable. However, a party can obviate this presumption of extinguishment by demonstrating that, at the time of the privatization, the broader market conditions necessary for the transaction price to reflect fairly and accurately the subsidy benefit were not present, or were severely distorted by government action or inaction. See Modification Notice, 68 FR at 37127.

In the instant proceeding, United States Steel Corp. ("USSC") submitted for the record copies of two documents: an undated report entitled "Request for the Inclusion of Steel in the National Trade Estimate Report on Foreign Trade Barriers in the European Union" and a July 2000 Department report entitled "Report to the President: Global Steel Trade: Structural Problems and Future Solutions."

Other than stating that the information contained in the documents relates to cartel arrangements and related practices, USSC have not articulated an allegation regarding market distortion for purposes of this proceeding. Consequently, we determine that USSC has not sufficiently demonstrated that the broader market conditions necessary for the transaction price to reflect fairly and accurately the subsidy benefits were severely distorted by the repeated bailouts of

ILVA and the massive subsidies provided to prepare ILP for sale. Consistent with the Modification Notice, 68 FR at 37127, in order to obviate the presumption that pre-sale subsidies are extinguished because of an arm's-length and fair-market-value privatization, the parties have to demonstrate that the broader market conditions were severely distorted by the government, and the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action. Even though USSC has made allegations regarding the distortion of the broader market conditions by government action, it has not demonstrated, among other things, that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action.

ISG also filed comments regarding market distortion. These are addressed in response to comment 5, below.

Conclusion

The evidence presented on the record of this proceeding demonstrates that the privatization of ILP was at arm's-length and for fair-market-value. The baseline presumption that allocable, non-recurring subsidies pass through to ILP has been rebutted and any pre-sale, allocable, non-recurring subsidies are extinguished in their entirety and, therefore, non-countervailable. As a result, we determine that the total estimated net countervailable subsidy rate is 3.44 percent for ILP. We plan to amend the duty deposit requirements for entries from ILP to reflect this rate and for entries from all others to reflect the rate of 3.44 percent. This change in the duty deposit rates will take effect on the date that the USTR directs us to implement our findings.

Analysis of Comments

Comment 1: The Tariff Act of 1930 Prohibits the Department From Implementing a Privatization Methodology That Amounts to a Per Se Rule

ISG's Argument: According to ISG, neither the Tariff Act of 1930 ("Act") nor the SAA accompanying the URAA permits the Department to employ a per se rule that would extinguish subsidies following an arm's-length transaction. ISG also notes that the Department's prior "gamma" and "same person" methodologies have been rejected by the WTO Appellate Body because they were effectively per se rules.

According to ISG, the Department's current methodology creates an insurmountable barrier to disproving or rebutting a finding of fair market value. In particular, ISG objects to the Department's presumption that if concurrent subsidies are transparent, the resulting price will reflect fair market value. Consequently, ISG claims, the new methodology impermissibly results in a per se rule that extinguishes countervailable subsidies following a privatization.

ILVA's Argument: ILVA claims that ISG has failed to establish that the Department has created a per se rule. Specifically, ILVA counters that even if the Department had not established guidelines for the treatment of concurrent subsidies, but instead declared that all concurrent subsidies would be treated like other pre-privatization subsidies, this would not render the Department's overall methodology a per se rule in violation of the Act. According to ILVA, the Department has complied with the prohibition of a per se arm's-length rule by adding two tests to the "arm's-length" transaction requirement, i.e., the "fair market value" and "broader market distortions" considerations. These tests, ILVA argues, independently ensure that the Department does not extinguish subsidies solely on the basis that the sale of the government-owned assets or "going concern" is made to an unrelated party.

Department Position: We disagree with ISG that we have adopted a per se rule. In the Modification Notice, we have already explained why our new methodology does not constitute a per se rule that is contrary to the statute. As the above analysis indicates, we have carefully considered the details of the sale of ILP to determine that the sale was at arm's-length and for fair market value. The analysis included subsidies bestowed concurrent with the privatization, as discussed more fully below. Had the details of the sales process shown that the sale of ILP was not at arm's length, not for fair market value, or that broader market distortions existed, and had a significant impact on the price of the company, we would not have found prior subsidies to be extinguished.

Comment 2: The Department's Application of its New Methodology Amounts to a Per Se Rule Because It Failed to Accord Special Treatment to Concurrent Subsidies That Would Rebut a Finding of Fair Market Value

ISG's Argument: According to ISG, the Department's application of its new methodology fails to fully scrutinize and realistically account for the impact that concurrent subsidies have on the "privatization process." ISG argues that although the presumption of no surviving subsidies is theoretically "rebuttable," the Department's failure to appropriately account for the actual influence of concurrent subsidies negates any effort to rebut the presumption.

ISG notes that concurrent subsidies are intended to benefit the new, privatized company by "cleaning up" the old company and making it more attractive for sale, such as by the removal or reduction of the company's outstanding debt obligations. The Department, argues ISG, in contrast to its expressed intent, has failed to carefully scrutinize an instance where a subsidy was given to facilitate or induce a privatization. According to ISG, the Department has not treated concurrent subsidies with special scrutiny, but rather has treated them in much the same way as prior subsidies, thereby obviating the ability of the domestic industry to rebut the Department's presumption of fair market value.

ISG cites the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), noting that the Agreement carves out a special exemption for "...developing countries that receive concurrent subsidies such as debt forgiveness as part of a privatization program." Thus, the ISG argues, the SCM Agreement's special treatment of concurrent subsidies in the context of a privatization in a developing country implicitly indicates that in a developed country, concurrent subsides should be countervailable.

According to ISG, the Department's application of its privatization methodology erroneously extinguishes all subsidies by failing to take proper regard of the fact that the concurrent subsidies are specifically targeted at privatization, thereby conferring a benefit to the new company. ISG further argues that it is unlikely that any buyer would have been willing to purchase ILP had the GOI not essentially forgiven its debts. But for the debt relief, ISG contends, no rational buyer would have purchased the company.

ILVA's Argument: ILVA argues that ISG's position is incorrect because the Department establishes several criteria for extinguishment of pre-privatization subsidies. Additionally, ILVA maintains that ISG had ample opportunity to rebut the presumption of fair market value, but could not because the facts of the case did not support an argument that the "concurrent subsidies" were opaque to potential bidders.

Furthermore, ILVA argues that the logic of ISG's argument is itself a per se rule. Specifically, ILVA counters that ISG is arguing that all concurrent subsidies provide a countervailable benefit to the new company, which amounts to a per se rule. Therefore, ILVA argues that the Department should reject such an approach, because it would ignore the criteria that the Department itself established for evaluating concurrent subsidies, and would violate the requirement under United States law that the question of whether an arm's-length privatization extinguishes subsidies must not be decided by a per se rule.

Department Position: We disagree with ISG's argument that the policy described in the Modification Notice regarding concurrent subsidies obviates the ability of domestic parties to show that a privatization is not at fair market value. As the Modification Notice makes clear, we will look to whether: "(1) the nature and value of the concurrent subsidies were fully transparent to all potential bidders and, therefore, reflected in the final bid values of the potential bidders, (2) the concurrent subsidies were bestowed prior to the sale, and (3) there is no evidence otherwise on the record demonstrating that the concurrent subsidies were not fully reflected in the transaction price." Modification Notice 68 FR at 37137. If these criteria are not met we may find that the privatization was not a fair market value.

However, where the criteria are met, it is correct to find that concurrent and prior subsidies are extinguished by privatization. Our approach is consistent with analyzing a privatization from the point of view of the purchaser. Most concurrent subsidies are given in an effort to increase the attractiveness of the company or assets as an investment. In other words, normally these subsidies increase the value and, therefore, in a normally functioning market, increase the price the purchaser pays over what he or she would otherwise pay. In this case, there is no reason to believe that concurrent subsidies led RIVA to pay less than fair market value for ILP. Finally, with regard to ISG's argument concerning the language of the SCM Agreement, we note that the SCM Agreement does not govern this determination under U.S. law and practice, although we note that U.S. law is, in fact, fully consistent with WTO requirements. See SAA at 669 and

1032.

Comment 3: The Department's New Methodology Regarding Concurrent Subsidies Fails to Distinguish Between Sales Of On-Going Concerns Versus Sales of Assets

ISG's Argument: ISG argues that since the buyer made a bid for and purchased ILP as an on-going concern, the transaction would necessarily have included both the assets and liabilities of ILP. According to ISG, the Department's privatization methodology focuses exclusively on whether fair market value was paid in the context of the sale of assets, not the sale of an on-going concern, which should take into account the liabilities of the "operating entity" being sold. As such, ISG argues, the sale of a going-concern should reflect the value of any concurrent subsidies conferred because the concurrent subsidies may be the reason that the company was able to remain in existence and become available for sale. In the instant case, ISG maintains that the GOI relieved ILP of a massive amount of debt prior to the privatization, thereby allowing the purchaser to purchase the operating entity virtually free of liabilities. According to ISG, the Department's determination of the "fair market value" of ILP reflected only the value of the assets of ILP and a modest debt load, rather than what the actual value of the company would have been without GOI intervention, i.e., less than zero. Therefore, according to ISG, the Department's presumption of fair market value for ILP is not supported by the record.

ILVA's Argument: ILVA maintains that ISG's arguments concerning the sale of assets versus an ongoing concern make no sense when the Department analyzes the transaction from the perspective of the buyer rather than the seller. In support of this argument, ILVA notes that the Department's analysis in this context is based on a benefit-to-recipient standard, where the key question is whether, in purchasing the company or its assets, the buyer received something of value for which it did not pay. Thus, according to ILVA, it is irrelevant whether (old) ILVA as a whole was worth less than zero at the time of privatization. According to ILVA, RIVA received nothing in the transaction that was unknown to the other bidders.

Next, ILVA notes that IRI could have sold off individual assets instead of restructuring ILVA and selling each of the individual restructured companies within the group as a whole. However, ILVA argues that IRI intended to maximize the net value for (old) ILVA, and made a decision similar to a receiver in bankruptcy proceedings by restructuring the subsidiaries in order to make them more attractive for sale. According to ILVA, such restructuring in the context of bankruptcy proceedings often results in debt being shifted away from a company prior to sale. Furthermore, ILVA maintains that ISG should "understand this concept" because ISG itself purchased profitable portions of other steel producing companies, leaving "...either the creditors, or the Pension Benefit Guarantee Corporation, holding the bag with respect to undesirable liabilities." ILVA argues that IRI was in a better position than most receivers in bankruptcy proceedings to select a strategy to maximize value because IRI had considerable experience with break-ups, mixed public offers, and private sales.

Finally, ILVA argues that it does not matter whether any buyer would have bid on ILP if, during the pre-privatization restructuring stage, all of the debts and liabilities associated with old ILVA's flat-rolled steel operations had been apportioned to ILP instead of ILVA Residua. According to ILVA, presumably nobody would have bid on ILP if it were worth less than zero, and, if anybody did, they would have received less, not more, than fair market value. ILVA notes that the Department acknowledges that most concurrent subsidies are given in an effort to increase the attractiveness of the company or assets as an investment, increasing value and thus increasing the price.

Department Position: We disagree with ISG. As described in the Modification Notice, 68 FR at 37133, the key question in determining whether fair market value is paid is "...whether, in purchasing the company or its assets, the buyer got something of value for which the buyer did not pay." In our analysis, we have followed the methodology described in the Modification Notice for addressing concurrent subsidies, i.e., we have examined whether: (1) the nature and value of the concurrent subsidies were fully transparent to all potential bidders and, therefore, reflected in the final bid values of the of the potential bidders; (2) the concurrent subsidies were bestowed prior to the sale, and (3) there is no evidence otherwise on the record demonstrating that the concurrent subsidies were not fully reflected in the transaction price. Our analysis showed that the concurrent subsidies in this instance did not affect the payment of fair market value for the company (see Modification Notice at 68 FR 37137). With concurrent subsidies, it is the Department's position that even if subsidies increase the value of the company, as ISG alleges here, it is reasonable to assume that those subsidies are reflected in the price paid for the company if the criteria listed above are met.

Comment 4: The Department's Approach to Assessing Concurrent Subsidies Rests on False Presumptions

ISG's Argument: According to ISG, the Department reasons that in a normally functioning market, potential investors would increase the value of their offers for a company to reflect the additional value bestowed upon the company by concurrent subsidies. ISG argues that the Department's approach rests on two unproven presumptions. First, ISG claims that it is unproven that a bidder's awareness of concurrent subsidies will always result in a corresponding increase in the value of the bidder's offer. Second, ISG questions whether bidders would always be aware of the amount of the concurrent subsidy in order to accommodate any benefit from that subsidy in their offer. ISG argues that in the present case, there is no evidence on the record that suggests that the final price paid reflects the value of the concurrent subsidies. Specifically, ISG notes that as of December 31, 1993, the consolidated liabilities of ILVA in liquidation exceeded 10,000 billion lire, but that the purchase price paid by RIVA after the GOI's restructuring and after the debt forgiveness was only 2,223 billion lire. Therefore, according to ISG, even if RIVA was aware of the concurrent subsidies and their value, the ultimate price paid does not repay the subsidy.

ISG maintains that the Department's application of its new methodology is inherently flawed to the extent that there is no viable way to accurately assess the extent of the bidder's knowledge, and whether the bidder used such knowledge to increase the value of the bidder's offer to reflect a fair market value. The standard employed by the Department, ISG argues, rests upon presumptions that will be difficult or impossible to test, resulting in the inevitable extinguishment of all pre-sale subsidies where such a finding is not warranted.

ISG argues that the Department should employ a more objective approach by examining what correlation, if any, exists between the amount of the concurrent subsidies and the ultimate price paid for the company. Specifically, ISG proposes that the Department pay particular attention to whether the objective analysis performed reflects the value of the company "pre" versus "post" debt forgiveness.

The remainder of ISG's arguments concern business proprietary information which is not susceptible to summarization. Accordingly, please see the ILP Privatization Analysis Memo.

ILVA's Argument: ILVA counters that there is no way to assess with certainty that which is in the mind of a bidder in any privatization bid process, and it is unreasonable to expect any winning bidder in a privatization to compel all of the rival bidders to submit any and all documents that might reveal the bidders' actual knowledge regarding the value of the company with all pre-privatization and concurrent subsidies included. According to ILVA, the Department may realistically look to the objective evidence within the control of the company being sold, which, in this case, ILVA was thoroughly publicized. As such, ILVA argues that each of the bidders understood what was being sold. Furthermore, ILVA claims that if the "concurrent subsidies" turned out to be worthless to the bidders, then the lack of worth would be reflected in the bid prices.

Department's Position: As noted above, we have applied our new privatization methodology in analyzing whether and how any concurrent subsidies impacted the sale of the company for fair market value. ISG essentially objects to our approach to analyzing concurrent subsidies, as put forth in the Modification Notice. Our reasons for adopting the approach we have are explained in the Modification Notice at 68 FR 37136-37137.

Moreover, we agree with ISG that we cannot know with certainty that every dollar of subsidy put into a company will increase the price paid for the company by exactly the amount of the subsidy. However, we find that increasing the value of a company by infusing cash or by assuming the company's debt will lead normally to a higher price being paid for the company. Moreover, the more rigorous and competitive the bidding process, the more likely that the price will reflect the value of any concurrent subsidies. Thus, when we find an open, competitive bidding process this supports a conclusion that the value of any concurrent subsidies are reflected in the price.

ISG is also concerned that the potential purchasers might not know the value of the concurrent subsidies. In this case, the concurrent subsidies took the form of debt assumption. The assignment of this debt to ILVA Residua (and not to ILP) was obvious from the financial information provided to potential bidders, which showed ILP's indebtedness.

ISG's reference to "repayment" of the subsidy reveals a fundamental misunderstanding of our methodology. The Department does not require subsidies to be repaid through privatization in order for those subsidies to be extinguished, nor does it require that the government recoup its costs of investing in the privatized company. Instead, as explained in response to comment 2, the Department analyzes the transaction from the perspective of the buyer and, therefore, examines whether the buyer paid fair market value for what was being sold.

Comment 5: Concurrent Subsidies are Evidence of Market Distortions That Should Rebut a Finding of Fair Market Value

ISG's Argument: ISG argues that the Department should consider concurrent subsidies to be either "evidence" or a "cause" of severe market distortions sufficient to rebut a finding of fair market value. Specifically, ISG insists that concurrent subsidies, especially those in the nature of debt forgiveness, are exactly the type of severe distortion that would have a meaningful impact on the transaction.

ISG maintains that when a government expends its resources to facilitate the sale and privatization of a heavily indebted company by forgiving debt to entice potential investors, the government has effectively distorted the market in a way that a private commercial seller normally would not. Thus, according to ISG, the resulting "fair market value" is not an adequate assessment of the value of the subsidized corporation. Further, ISG avers that productive capacity that would have otherwise become obsolete was preserved through the GOI's provision of concurrent subsidies (debt forgiveness), making ILP a marketable entity. Lastly, ISG argues that the concurrent subsidies in this case resulted in misallocated resources and inefficient production.

ILVA's Argument: ILVA claims that ISG has not articulated whether it believes that concurrent subsidies are "evidence" or a "cause" of severe market distortion. In any event, ILVA maintains that no party submitted any evidence of "cause" of market distortion. Next, ILVA avers that if concurrent subsidies constitute "evidence" of market distortion, ISG does not explain how. According to ILVA, it is illogical for ISG to assume that the Department must "bootstrap" the current subsidy analysis in the context of considering whether severe market distortions should render an otherwise arm's-length, fair market value privatization to be insufficient to extinguish pre-privatization or concurrent subsidies.

Department's Position: As explained in the Modification Notice, in examining whether broader market distortions exist we focus on the action of the government in its role as the government, not in its role as seller. Thus, we assess whether the GOI used its governmental prerogatives "in a special or targeted way that makes possible or otherwise significantly distorts the terms of a sale in a way that a private seller could not," looking for such actions as special tax or duty rates, or regulatory exemptions particular to the privatization. See Modification Notice, 68 FR at

37127. ISG has not pointed to any such actions by the GOI. Instead, ISG identifies debt assumptions, actions taken by the GOI as seller. The issues that the GOI faced in preparing ILP for sale, i.e., which assets and liabilities to place in the company that was being offered for sale, are similar to those faced by private sellers.

Moreover, the actions that the petitioner alleges as market distortions represent concurrent subsidies that were bestowed in preparing ILP for sale. Under the framework explained in the Modification Notice, concurrent subsidies are considered in determining whether the privatization was a fair market value transaction. As discussed in our fair market value analysis, we have determined that these concurrent subsidies were reflected in the price paid for ILP and, hence, did not result in a sale for other than fair market value.

Comment 6: The Net Countervailable Subsidy Rate Fails to Take Into Account the Department's Recent Redetermination Pursuant to Court Remand

ILVA's Position: ILVA argues that the total net countervailable subsidy rate calculated by the Department fails to take into account the Department's recent redetermination pursuant to court remand. ILVA claims that the correct net countervailable subsidy rate should be 2.45 percent as a result of a redetermination concerning early retirement benefits under Law 451/94.

Department's Position: We disagree with ILVA. In the third redetermination of the original countervailing duty determination in this investigation, the Department removed subsidies related to Law 451/94 from the benefit calculation. Final Results of Redetermination Pursuant to Court Remand in ILVA Lamiere Tubi S.p.A. v. United States, Court No. 00-03-00127, Remand Order (CIT July 29, 2003)(August 28, 2003)("Third Redetermination"). However, in doing so, the Department altered its methodology to comply with a court order under protest. Those proceedings are subject to continuing litigation and, therefore, we do not view the redetermination as controlling precedent as regards the instant case.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related countervailing duty calculations accordingly. If these recommendations are accepted and upon direction from the USTR to implement our findings, we will publish our implementation of this section 129 determination in the Federal Register.

AGREE ____ DISAGREE ____

____
James J. Jochum
Assistant Secretary
for Import Administration

____
Date