

October 24, 2003

ISSUES AND DECISION MEMORANDUM

TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Melissa Skinner
Office Director
Office of AD/CVD Enforcement VI

SUBJECT: Section 129 Determination: Final Results of Full Sunset Review of Cut-to-Length Carbon Steel Plate from Germany

Background

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 methodology for analyzing a privatization in the context of countervailing duty (“CVD”) 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”).

The Department is now applying this modification pursuant to section 129(b)(2) of the Uruguay Round Agreements Act (“URAA”); we are conducting “Section 129 Determinations” with respect to twelve different CVD proceedings involving certain steel products originating in various member states of the European Communities. On September 24, 2003, the Department issued a draft Section 129 Determination in this case. AG der Dillinger Huttenwerke (“Dillinger” or “respondent”) filed comments on the draft Section 129 Determination on October 1, 2003. The Delegation of the European Commission (“EC”) also filed comments on October 1, 2003. This memorandum constitutes our Section 129 Determination regarding the affirmative likelihood determination in the final results of the full sunset review of the CVD order on cut-to-length carbon steel plate (“CTL Plate”) from Germany and addresses all comments submitted by the parties.

On July 9, 1993, the Department issued a final affirmative CVD duty determination, covering the period April 1, 1991, through March 31, 1992.¹ See Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Germany, 58 FR 37315, (July 9, 1993).² At the time of the sunset review, there had been no administrative reviews of this CVD order. On September 1, 1999, the Department initiated a sunset review of the CVD order (64 FR 47767), pursuant to section 751(c) of the Tariff Act of 1930, as amended (“the Act”). On August 2, 2000, the Department issued an affirmative sunset determination. See Certain Corrosion-Resistant Carbon Steel Flat Products; Cold-Rolled Carbon Steel Flat Products; and Cut-to-Length Carbon Steel Plate Products From Germany; Final Results of Full Sunset Reviews, 65 FR 47407 (August 2, 2000) (“Final Sunset Results”).

Section 129 of the 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 (the “SAA”) variously refers to such a determination by the Department as a “new,” “second,” and “different” determination. 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 U.S. Trade Representative 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,

¹ The following programs were found to be countervailable: (1) Capital Investment Grants, (2) Structural Improvement Aid, (3) Investment Premium Act, (4) Joint Scheme: Improvement of Regional Economic Structure - GA Investment and Other GA Subsidies, (5) Special Subsidies for Companies in the Zonal Border Area, (6) Ruhr district Action Program, (7) Aid for Closure fo Steel Operations, (8) Joint Program: Upswing East, (9) Treuhandanstalt Subsidies, (10) Subsidies Related to the Creation of Dillinger Hüttte Saarstahl AG (“SVK Grant”), (11) ECSC Redeployment Aid Under Article 56(2)(b), (12) ECSC Article 54 Long-Term Loans, and (13) Interest Rebate on ECSC Articiel 54 Loans. The Department published the countervailing duty orders on certain steel products from Germany, finding net countervailable subsidy rates, with respect to cut-to-length plate, of 0.80 percent for Ilsenburg, 1.72 percent for Preussag, .51 percent for Thyssen Stahl, and 14.84 percent *ad valorem* for “all other” German producers/exporters of the subject merchandise (Countervailing Duty Orders and Amendment to Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Germany, 58 FR 43756, August 17, 1993) (“Certain Steel”). The 14.84 percent rate was the rate applicable to Dillinger.

² The orders on certain steel products covered three separate classes or kinds of merchandise. Only cut-to-length plate is subject to this determination.

“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.

Privatization of Saarstahl and Merger with Dillinger

At the beginning of April 1989, Saarstahl Volkingen GmbH (“Saarshahl”) was owned 76 percent by the Government of Saarland (“GOS”) and 24 percent by Arbed, a Luxemburg company. On April 20, 1989, the GOS and Arbed reached an agreement with Usinor Sacilor (at the time owned by the French government) to merge Saarstahl with another German steel producer owned by Usinor Sacilor, AD der Dillinger Huttenwerke (“Dillinger”), under a holding company, DHS-Dillinger Hutte Saarstahl AG (“DHS”). The parties engaged two independent accounting firms to appraise the relative values that each party would contribute to the combined entity, in order to calculate each party’s percentage share of ownership in the newly-combined entity.

Pursuant to that agreement, on June 14, 1989, the Government of Germany (“GOG”) and GOS forgave all of the outstanding debts owed to them by Saarstahl. Private creditors also forgave a portion of the debt owed to them by Saarstahl. In Certain Steel, the debt forgiveness by the two governments and the private creditors was found to constitute a countervailable subsidy. On June 15 1989, Saarstahl's name was changed to DHS, and its legal form was changed from GmbH (a limited liability corporation) to AG (a German stock company), so that DHS could issue stock. The events of June 15th had no effect on the assets and remaining liabilities of Saarstahl, i.e., all assets and liabilities of Saarstahl (including Saarstahl’s tax loss carryforward) continued to reside in DHS. On that same day, Usinor Sacilor contributed its shares of Dillinger to DHS, and the GOS contributed an additional DM 145.1 million in cash to DHS. In return, Usinor Sacilor received a 70 percent ownership interest in DHS via the distribution of DHS's shares, the GOS received 27.5 percent of DHS's shares, and Arbed received the remaining 2.5 percent of DHS's shares.

On June 30, 1989, DHS transferred the assets, with the exception of the tax loss carryforward, and liabilities of the former Saarstahl into a newly created subsidiary, Saarstahl AG (SAG). Thus, DHS became a holding company with two operating subsidiaries, SAG and Dillinger.

Analysis

As mentioned above, pursuant to the findings in Certain Products, the Department modified its methodology for analyzing a privatization in the context of the CVD law. The Department’s modified privatization analysis, under the Modification Notice, is predicated on a baseline presumption that allocable, non-recurring subsidies can benefit the recipient over a period of time (i.e., allocation period) normally corresponding to the average useful life of the recipient’s assets. A party may rebut this presumption by demonstrating that, during the allocation period, a privatization occurred in which the government sold its ownership of all or substantially all of a company or its assets and retained no control of the company or its assets. Additionally, the

party must demonstrate that the privatization was conducted through an arm's-length transaction for fair market value.

However, even assuming *arguendo*, that, pursuant to an analysis under section 129(b)(2) of the URAA, we were to find that the privatization of Sairstahl meets all of the criteria for rebutting the baseline presumption as set forth in our Modification Notice, such a finding would not affect the results of the instant determination that there would be a likelihood of continuation or recurrence of a countervailable subsidy if the order were revoked. Drawing on the guidance provided in the legislative history accompanying the URAA, specifically the SAA, H.R. Doc. No. 103-316, vol. 1 (1994), the House Report, H.R. Rep. No. 103-826, pt.1 (1994), and the Senate Report, S. Rep. No. 103-412 (1994), the Department issued its Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 FR 18871 (April 16, 1998) ("Sunset Policy Bulletin"), providing guidance on methodological and analytical issues, including the basis for likelihood determinations. The Department clarified that determinations of likelihood will be made on an order-wide basis (see section III.A.2 of the Sunset Policy Bulletin). During the underlying CVD investigation, the Department investigated other German producers of the subject merchandise, namely Ilsenburg, Preussag, and Thyssen Stahl AG, and calculated an above *de minimis* subsidy rate for each. In the Final Sunset Results, the Department determined that revocation of the order would be likely to lead to continuation or recurrence of a countervailable subsidy. See Final Sunset Results, 65 FR 47407. Even if we were to determine, pursuant to an analysis under the privatization methodology set forth in the Modification Notice, that subsidies received by Dillinger prior to the 1989 privatization would not continue through or after the period of review ("POR") of the sunset review, we would still make an affirmative likelihood determination. This is based on the determination in the Final Sunset Results that programs previously determined to provide countervailable subsidies and/or benefit streams from such programs continue to exist for Ilsenburg, Preussag, and Thyssen Stahl, the other producers/exporters of the subject merchandise, for whom privatization is not an issue.

The Department has received new subsidy allegations from the petitioner. It is in the interests of all interested parties, as well as the Department, not to invest scarce administrative and legal resources in an examination that will have no impact on the outcome of the Section 129 determination. As discussed above, the Department has continued to find that revocation of the order would be likely to lead to the continuation or recurrence of a countervailable subsidy. Thus, the Department has satisfied the requirements of sections 751(c) and 752(b)(2)(B) of the Act. See also section III.A.3.a of the Sunset Policy Bulletin. Consequently, an investigation of the new subsidy allegations would be superfluous and unnecessary for the purposes of this Section 129 determination. On this basis, the Department finds that there is no good cause to investigate these allegations.

In addition, the Department has received allegations that the privatization here was impacted by "market distortions" such that any arm's length/fair market value findings would not warrant a

determination that countervailable subsidies were extinguished by the privatization.³ We do not need to address the market distortion allegations here, because we have not -- for the reasons explained above -- addressed the arm's length/fair market value issue.

Summary of Comments

Comment 1: Department's Affirmative Likelihood Determination Without Reaching the Issue of Privatization

The EC argues the Department has not fulfilled its obligation to examine the privatization, pursuant to the instructions in the Panel Report. The EC states that the panel found the Department's sunset determination to be flawed because the Department did not examine whether the privatization was at arm's length and for fair market value. The EC contends that the Department has already accepted that the privatization was for fair market value and, therefore, there is no longer any benefit from pre-privatization subsidies. The EC argues that, the privatization "is a major factor in the determination of continuation or recurrence of subsidization that the DOC is required to make under Article 21.3 of the SCM Agreement."

Department's Position

The Appellate Body in Certain Products was asked to consider whether the Department's treatment of the privatization in the context of the sunset review was consistent with the SCM Agreement. No other aspects of the Department's sunset likelihood determination were placed before the panel or the Appellate Body by the EC. The Appellate Body, for this reason, did not consider whether the Department's sunset likelihood determination in its totality was consistent with the SCM Agreement.

With respect to the matter before it, the Appellate Body found that the Department's sunset likelihood determination was inconsistent with the SCM Agreement because it was premised, in part, on pre-privatization countervailable subsidies and that the Department did not determine, through an analysis of the privatization, whether the benefit of those countervailable subsidies continued to accrue post-privatization. The Appellate Body then requested that the United States bring its measure into conformity with the SCM Agreement. Pursuant to section 129(b)(2) of the URAA, the Department is reexamining the sunset review in order to render the Department's action not inconsistent with the Appellate Body's findings.

We find that the Department's sunset likelihood determination is warranted without any consideration of countervailable subsidies received by Dillinger. The Department notes that, in the Final Sunset Results, the Department found that programs previously determined to provide countervailable subsidies and/or benefit streams from such programs continued to exist for

³United States Steel Corporation filed these allegations on August 5, 2003.

Ilseburg, Preussag, and Thyssen Stahl, other producers/exporters of the subject merchandise, for which privatization is not an issue. Since sunset determinations are made on an order-wide rather than company-specific basis, examining the privatization is not necessary to arrive at the determination that there is a likelihood of continuation or recurrence of a countervailable subsidy. See Sunset Policy Bulletin, 63 FR 18874.

Comment 2: Department's Decision Not To Report a Rate of Likely Subsidization

The EC contends that by not analyzing the privatization, the Department will not be able to meet its obligation to report the relevant subsidy information to the International Trade Commission ("ITC") for use in determining continuation or recurrence of injury. The EC claims that this further demonstrates that the Department has not made the required determination of a subsidy under Article 21.3. The EC argues that the Department is required to submit a net countervailable subsidy rate to the ITC and that analysis of the privatization is essential in coming up with this new rate.

Department's Position

The EC is correct that under section 752(b)(3) of the Act the Department is required in a sunset review to report to the ITC the net countervailable subsidy that is likely to prevail if the order is revoked. That information *may* be considered by the ITC for the purpose of the ITC's sunset injury determination – pursuant to section 752(a)(6) of the Act – but it plays no role whatsoever in the Department's determination under section 752(b)(1) of the Act of the likelihood of continuation or recurrence of a countervailable subsidy.

The present determination is governed by section 129(b)(2) of the URAA. Under that provision, the Department is required to issue a determination to render its action "not inconsistent with the findings of the panel or the Appellate Body." In Certain Products, the WTO dispute that gave rise to this Section 129 Determination, the EC did not raise a claim that the ITC's sunset injury determination was inconsistent with the United States' obligations under the SCM Agreement. As such, the ITC's determination concerning likelihood of continuation or recurrence of injury and the role, if any, the rate the Department reported to the ITC played in that determination, were not addressed by the panel or the Appellate Body. Therefore, in order to render the Department's determination not inconsistent with the findings of the Appellate Body, it is unnecessary to provide the Commission with a new net countervailable subsidy rate that is likely to prevail if the order is revoked.

Comment 3: Department's Use of Information Submitted in the Sunset Review

The EC argues that, even if the Department is entitled to ignore the privatization, the Department cannot ignore record information submitted in the course of the sunset review. Specifically, the EC argues that, because the Department found that the subsidy rates for all producers of cut-to-

length carbon steel plate to be de-minimis in Dillinger vs. United States (Slip op. 02-108, CIT 5 Sept. 2002), it cannot now claim that there is continuation or recurrence of subsidization for the same companies.

Department's Position

The Department's duty, in reaching a determination under section 129(b)(2) of the URAA for this case, is not to reconduct the original sunset review in its totality, but to render it not inconsistent with the findings of the Appellate Body. The Department has done this by determining that, based on the conclusions in the sunset review regarding Ilseburg, Preussag, and Thyssen Stahl, an affirmative sunset likelihood determination continues to be appropriate.

The Department is not reopening issues in this determination that were resolved in the sunset review and were not found by the Appellate Body to be inconsistent with the SCM Agreement. The result, as explained above, is that we find on an order-wide basis that revocation of the order would likely lead to the continuation or recurrence of a countervailable subsidy.

Comment 4: Inconsistency with the July 14, 2003 Remand Determination

Dillinger argues that the Department erred in basing its draft decision memorandum upon the final results of the 2000 sunset review "because those final results have been found to be unlawful by both the WTO Dispute Settlement Body and the U.S. Court of International Trade (CIT)." Dillinger states that WTO found that the Department's final results of the sunset review to lack a "sufficient factual basis" and argues that the CIT found that Department's final results were not based on substantial evidence and were not consistent with law. Dillinger argues that "the Department cannot disregard its July 14, 2003 remand determination or ignore the plethora of evidence collected since the 2000 final results." Dillinger argues that this evidence conclusively demonstrates that there is no likelihood of continuation or recurrence of subsidization if the countervailing duty order were revoked.

Department's Position

The Department recognizes that on July 14, 2003, it filed a remand with the CIT in which it made a negative likelihood determination with respect to this same order. Final Results of Redetermination Pursuant to Court Remand Order in AG Dillinger Huttenwerke v. United States Court No. 00-00437 (July 14, 2003). We note, however, that the Department's findings were pursuant to the Court's remand instruction. This remand is pending before the Court and is subject to appeal. Until such time as the remand is affirmed by a final and conclusive court ruling, the Department will continue to base this Section 129 Determination on the Final Sunset Results.

Conclusion

For the above reasons, we continue to find likelihood of continuation or recurrence of a countervailable subsidy with respect the order on CTL plate from Germany. 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.

James J. Jochum
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for Import Administration

Date