

October 23, 2003

MEMORANDUM

TO: James J. Jochum
Assistant Secretary
for Import Administration

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

RE: Issues and Decision Memorandum for the Section 129 Determination: Corrosion-Resistant Carbon Steel Flat Products from France; Final Results of Expedited Sunset Review of Countervailing Duty Order

SUBJECT: Analysis of the Privatization of Usinor S.A.

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 findings in Certain Products, the Department of Commerce (“the Department”) changed its methodology for analyzing privatizations in the context of the 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 1995-1997 privatization of Usinor Sacilor (“Usinor”), the sole producer/exporter under review in the sunset review of the countervailing duty order on corrosion-resistant carbon steel flat products from France. See Corrosion-Resistant Carbon Steel Flat Products from France; Final Results of Expedited Sunset Review of Countervailing Duty Order, 65 FR 18063 (April 6, 2000) (“the Sunset Review”) and Countervailing Duty Order and Amendment to Final Affirmative Countervailing Duty Determination: Certain Steel Products from France, 58 FR 43759 (August

17, 1993) (“Certain Steel” and “Corrosion-Resistant”).¹ In Corrosion-Resistant, the Department determined that the Government of France (“GOF”) had provided allocable, non-recurring subsidies to Usinor during 1991, the period of investigation (“POI”), which was prior to the company’s privatization in 1995.

In the 2000 Sunset Review, pursuant to sections 751(c) and 752(b) of the Act, and consistent with sections III.A.3.a and III.B of the Department’s Policy Bulletin 98:3 – 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”), the Department determined that revocation of the 1993 countervailing duty order in Corrosion-Resistant would be likely to lead to a continuation or recurrence of the countervailable subsidy found in the investigation, and that the net countervailable subsidy rates likely to prevail were the rates determined in Corrosion-Resistant, as amended.² Specifically, the Department found no evidence that any of the subsidy programs had been terminated or subject to a program-wide change, and determined that all the programs found to be countervailable in Corrosion-Resistant continued to exist. See Sunset Review and accompanying “Issues and Decision Memorandum,” at Comment 1 (March 29, 2000) (“Decision Memo”). In addition, the Department expressed disagreement with the respondent’s contention that an arm’s-length, fair-market-value privatization automatically eliminates prior subsidies. See Decision Memo at Comment 2 fn.22. Thus, in the Sunset Review, the Department did not reanalyze the privatization of Usinor for the purposes of making its findings.

In the instant Section 129 determination, using the Department’s modified methodology for analyzing privatizations, the Department is examining (a) whether pre-privatization, allocable, non-recurring subsidies to Usinor which were found to be countervailable in Corrosion-Resistant were, for the purposes of a sunset review, eliminated as a result of the company’s privatization in 1995-1997, and (b) whether the findings in the Sunset Review should, therefore, be amended accordingly. Under the modified methodology, if a party demonstrates that the privatization was at arm’s length and for fair market value, then any allocable, non-recurring subsidies received prior to the privatization will be presumed to be extinguished and, therefore, non-countervailable; conversely, if a party does not demonstrate that the privatization was at arm’s length and for fair

¹ Following the final determination in Certain Steel, the International Trade Commission (“ITC”) found that the other steel products investigated did not cause injury to a domestic industry; hence, the order applied only to certain corrosion-resistant carbon steel flat products from France.

² Subsequent to the final determination in Corrosion-Resistant, the net countervailable subsidy rate was corrected for ministerial errors and later further amended pursuant to a Federal Circuit decision published prior to the Sunset Review. See July 23, 1993, memo from Susan H. Kuhbach to Barbara R. Stafford entitled, “Correction of Clerical/Ministerial Errors Made in the Final Determinations,” which is on file in the Central Records Unit (Room B-099 of the Main Commerce building); and Sunset Review, 65 FR at 18064, fn.2.

market value, then the unamortized amount of any allocable, non-recurring, pre-privatization subsidy benefit continues to be countervailable. See Modification Notice, 68 FR at 37127.

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: Relevance of Prior Remand Redeterminations

Comment 2: Pass-Through Rate

Comment 3: Likelihood of Continuance or Recurrence of Subsidization

Comment 4: New Subsidy Allegations

ANALYSIS

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

Usinor's Privatization

Pursuant to a 1993 French privatization law, Usinor was privatized through the sale of government-held shares beginning in July 1995 and continuing through August 1998. At the time that the privatization began, Usinor was wholly owned by the French state, directly or indirectly, with the GOF and government-controlled Credit Lyonnais (and, later, its division, Clindus) holding 80 percent and 20 percent of Usinor's stock, respectively. By year-end 1995, private shareholders held over 75 percent of shares. The shares retained by the GOF and Clindus had fallen to 9.8 percent and 2.5 percent, respectively; another 15.8 percent were held by stable shareholders, of which 10.1 percent were held by three stable shareholders that were directly or indirectly government-controlled (the "public" stable shareholders), including Credit Lyonnais. Usinor employees held 3.55 percent.

As part of the privatization, a capital increase was effected through the issuance of new shares amounting to approximately 23 percent of the total. The proceeds from the sale of these shares did not go to the GOF but were instead put into Usinor to cover some of the company's debts.

In January 1997, the GOF additionally delivered approximately 1.2 percent of the company's shares in the form of free shares to French individual shareholders and employees who had held their shares for the 18 months since the privatization began. In October of the same year, the GOF further sold approximately 7.7 percent of the company's shares. By year-end 1997, over 85 percent of Usinor's shares were held by private shareholders. The GOF's direct ownership stake had fallen to 0.93 percent, while that of Clindus and the public stable shareholders remained unchanged at 2.5 percent and 10.1 percent, respectively. The portion held by Usinor employees increased to 5.16 percent. In August 1998, the GOF delivered its remaining stock in the form of free shares, after which it no longer retained any direct ownership stake in Usinor.

Incremental Privatization

As discussed above, the GOF sold its shares in Usinor over three years. The Modification Notice does not specify the Department's approach as to how (or whether) the new methodology should be applied to "gradual privatizations," and provides the public additional opportunity for further comment on this particular issue.³ As suggested in the Modification Notice, the impact of a gradual or similar type of privatization on the countervailability of pre-privatization subsidies may depend on the particular facts and circumstances of the privatization in question.

In this instance, we find that all of the allocable, non-recurring subsidies to Usinor which the Department examined in Corrosion-Resistant were received by Usinor in various years prior to the privatization, and no such subsidies were found in the Sunset Review to have been received in the years when Usinor underwent privatization. Consequently, it is not necessary in the instant determination to distinguish among the various stages or events leading up to the sale of all or nearly all of Usinor's shares, except to note that, by the end of 1995 during the first stage of privatization, the GOF's total ownership share in the company (including the shares held by the three public stable shareholders) fell from 100 percent to less than 25 percent, and that by the end of 1997, it had fallen further to less than 15 percent. Finally, by August 1998, as noted earlier, the GOF had distributed its remaining shares and no longer held any direct ownership stake in Usinor.

In this regard, we note the petitioners' claim that the GOF indirectly retained a controlling stake. Specifically, the petitioners contend that the voting rights of the public stable shareholders, who held a combined 10.1 percent, indirectly allowed the GOF to continue to exert control, since the combined stake of those shareholders was five times larger than that of the next biggest (private) stable shareholder. We disagree that the ownership interest retained by the GOF is sufficient to control the company in this context. While the number of shares held by the GOF may be considerably larger than the number held by the next shareholder, the GOF would still need to obtain the support of owners accounting for 40 percent of the shares to control the company, and there is no evidence on the record that the GOF could readily do so. Therefore, because the GOF sold "all or substantially all" of Usinor and did not retain control of the company, we determine that it is appropriate to apply the new methodology to the privatization of Usinor (see Modification Notice, 68 FR at 37127).

Arm's-Length Transaction

In determining whether allocable, non-recurring subsidies received by Usinor prior to its privatization continued to benefit post-privatization Usinor, the Department first considered whether the privatization of Usinor was conducted through an arm's-length transaction. For a definition of an "arm's-length transaction," we rely on guidance from the Statement of

³The Department did not receive any further comments on this issue, pursuant to this request for additional comments.

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) (SAA) at 928.

The record information in this determination indicates that the privatization of Usinor involved the 1995 and 1997 sales of company shares, rather than assets, and was effected by publicly announced offerings of outstanding shares held by the GOF, as well as newly issued shares. The GOF’s shares were sold to four different classes of purchasers: (1) French resident nationals, and European Community (“EC”) or European Economic Area nationals (referred to as the “French public offering”); (2) current and qualifying former employees of Usinor; (3) stable shareholders comprising various institutional investors; and (4) the general public in the French and international financial markets (referred to as the “international offering”).

We have analyzed these categories of sales individually. We have done this because the methods of selling to these groups differed, as did the prices they paid for their shares. Consistent with the SAA guidance, in determining whether these various purchases constituted arm’s-length transactions, we must assess (a) whether they were 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.

a. French and International Public Offerings

The great majority of Usinor stock shares (eventually comprising over 75 percent) were sold in the French public offering (at FF 86 per share) and the international offering (at FF 89 per share). Because the purchasers in these offerings (the general public) were not related to the seller, we determine that these sales constituted arm’s-length transactions.

b. Stable Shareholders

A minority of shares (eventually comprising less than 15 percent) were sold exclusively to the stable shareholders. Eight of the eleven stable shareholders were not related to the seller. Hence, we determine that those purchases constituted arm’s-length transactions.

The three remaining stable shareholders were directly or indirectly government-controlled and, hence, related to the seller. With regard to the sales of shares to the government-controlled stable shareholders, these purchasers paid the same purchase price and under the same terms of sale as the private stable shareholders. Thus, although those purchasers were related to the seller (the GOF), the sale was conducted such that “the terms of the transaction are those that would exist if negotiated between unrelated parties.” See Modification Notice, 68 FR at 37127. Consequently, we find that the sales to the public stable shareholders also constituted arm’s-length transactions.

c. *Employee Shares*

Finally, an even smaller number of shares (eventually comprising 5.16 percent) were sold exclusively to current and qualifying former Usinor employees. These purchasers had two options: (1) they could purchase shares at the French public offering price of FF 86 per share, or (2) they could pay a discounted price of FF 68.80, with an extended payment period, if they agreed to hold the shares for two years. Additionally, they were eligible to receive bonus shares if they held the shares for specified periods. Thus, the employee offering was clearly distinguishable from the public offerings and was openly characterized as “preferential” in Usinor’s *International Offering Prospectus* (“*Prospectus*”).

We determine that the employees of Usinor were related to Usinor and that the sales of shares to Usinor employees at the discounted price did not constitute an arm’s-length transaction.

Fair Market Value

Next, in determining whether the sale of Usinor 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 determination, we find no evidence in the record of any contemporaneous sales of companies comparable to Usinor, 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.

Objective Analysis

In evaluating the process used by the GOF to sell Usinor, 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).

The decision to privatize Usinor and the terms of privatization were executed through an order of the Ministry of Economic Affairs and Finance, based on an opinion by the Privatization Commission, both issued in June 1995. Share prices were set by the Ministry, based on the opinion of the Privatization Commission, in consultation with Banque S.G. Warburg (“Warburg”) and the other Global Coordinators of the share offerings, and in accordance with the privatization law. The Privatization Commission stated that it relied upon various valuation methodologies for Usinor including, *inter alia*, stock-exchange-based comparisons and net liquidity flows. Based on its analysis, the Commission recommended a minimum value for Usinor of FF 15,750 billion.

In preparation for the privatization, the GOF commissioned Warburg to provide a valuation analysis of the assets and equity shares of Usinor. As noted above, Warburg also acted as a principal member of the management syndicate for the international offering that constituted the essence of the privatization. The minimum value set by the Privatization Commission was consistent with the range of values established in the Warburg valuation.

Finally, the share prices set by the Ministry of Economic Affairs and Finance reflected the valuations. Given the number of shares the GOF expected to sell and the prices for those shares, the expected revenue was consistent with the various valuations.

Artificial Barriers to Entry

As examples of artificial barriers, the Modification Notice identifies “restrictions on foreign purchasers or purchasers from other industries, or overly burdensome or unreasonable bidder qualification requirements, or any other restrictions that artificially suppressed the demand for, or the purchase price of, the company.” See Modification Notice, 68 FR at 37127. As mentioned above, the company was not sold through a bidding process. The GOF’s plan for privatizing Usinor in 1995 divided potential purchasers of Usinor’s shares into four pools: the French public, the international public, Usinor employees and stable shareholders. A certain number of shares were set aside for each of these groups and, generally, different prices were charged for each group. The broadest group was covered by the international offering. Under this offering, shares were available for FF 89. These shares could be purchased by anyone from the banks and investment companies underwriting the share sale. Also, the sale of Usinor’s shares was publicized through announcements and the issuing of the *Prospectus*. Thus, we determine that there were no restrictions that served to limit purchasers or potential purchasers of these shares.

The next largest group was covered by the French offering. Purchasers falling in this category could obtain shares for FF 86 per share. Although this pool of potential purchasers was limited by virtue of nationality, we do not believe that this limitation presented a meaningful reduction in the competition for these shares. The pool of potential purchasers included French as well as other EC member state citizens. Finally, the French offering was publicized through announcements by the GOF. Therefore, we find that the sales process for shares covered by the French offering was generally open and unrestricted.

For the remaining pools, however, we find that the sales process was restricted and served to limit potential purchasers of Usinor’s stock. With respect to the employee pool, these shares could only be purchased by current and past employees of Usinor. Hence, by its very terms, numerous potential purchasers were excluded at the outset from purchasing these shares.

With respect to the stable shareholders, we note that a public announcement was made inviting investors to become stable shareholders. However, we find two aspects of the sales process that possibly served to limit the number of investors that might otherwise have come forward to purchase these shares. First, in its invitation, the GOF imposed a minimum investment

requirement of one million shares. At a price of FF 90.78 per share, this required a sizeable commitment and could have had the effect of excluding many potential investors.

Second, the process of advertising for and selecting stable shareholders happened very quickly. The announcement seeking stable shareholders was published on June 3, 1995. Applications, with financial references, had to be submitted no later than 6:00 p.m. on June 19, 1995. By June 26, 1995, the stable shareholders had already been selected. Thus, potential investors had only 16 days to obtain further information about the terms and conditions that would apply to stable shareholders; to decide whether to make an offer; and to pull together the necessary paperwork. Given that the stable shareholders were decided upon within one week of the deadline for filing the applications, it seems that there was very little opportunity to perfect any deficiencies that might have existed in the applications. Thus, it is reasonable to conclude that, like the minimum purchase requirement, the compacted nature of the sales process for stable shareholders may have reduced the number of potential participants in this pool. However, we note that all parties who did apply to participate as stable shareholders were approved.

Purchase Price

Since the privatization was not effected through a bidding process, our analysis has focused on the sales process and whether the GOF received a price which maximized its return. The sales process is examined above. In regard to the price, we have sought to determine whether the GOF charged a market-clearing price for its shares of Usinor. A market-clearing price is one that equates the supply of shares with the demand for shares. If the GOF had set the prices for Usinor's shares too low, the offering would have been over-subscribed and many people seeking shares would not have been able to purchase them in the initial offering. Conversely, if the prices were set too high, the offering would have been under-subscribed and the GOF would not have been able to sell as many shares as it had planned.

As noted above, the prices in the French and international public offerings were FF 86 and FF 89, respectively. The evidence on the record shows that because of the high level of demand, the number of shares made available in the French offering had to be increased.⁴ First, shares were moved from the international offering to the French offering. Additional shares subsequently were made available under the provision allowing the bank syndicate responsible for the sale to obtain more shares from the GOF. Regarding the international offering, shares were originally moved from there to the French offering but, subsequently, the number of shares sold under the international offering was increased. At the conclusion of the initial offering, nearly 50 million shares had been sold under the French offering for a price of FF 86 per share and nearly 199 million shares had been sold under the international offering at a price of FF 89 per share.

⁴ See Memorandum to Susan H. Kuhbach from Rosa Jeong and Marian Wells entitled "Usinor Verification Report," dated February 19, 1999, at pp. 8 - 9, which was submitted as Appendix 7 to the respondents' September 2, 2003, submission.

Given the over-subscription at the FF 86 price, the fact that shares were moved from the international offering to the French offering, and the number of shares sold at each of the two prices, it appears that the market clearing price for Usinor's shares was between FF 86 and 89. Therefore, we determine that the GOF maximized its return on the shares sold in the French and international public offerings.

The prices charged to the other two groups of purchasers differed from the market clearing price of FF 86-89. The stable shareholders paid more, FF 90.78 per share, and Usinor's employees were offered shares for a lower price, FF 68.

Committed Investment

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 transaction price. See Modification Notice, 68 FR at 37133.

In the instant determination, the restrictions or conditions imposed on the sales of Usinor's shares were aimed at encouraging the purchasers to hold onto their shares for a period of time. The stable shareholders signed an agreement that restricted their ability to resell their shares. (These restrictions are described at pp.23-24 of the *Prospectus*.) Purchasers in the French public offering were eligible to receive free shares from the GOF if they held onto their shares for 18 months. (This is described at p.22 of the *Prospectus*.) Similarly, as noted above, employees paid a discounted price or were eligible for free shares from the GOF if they held onto their shares. (The employee offering is described at p.23 of the *Prospectus*.) Thus, three categories of share purchasers were required or encouraged not to sell their shares for some period after the offerings.

Regarding the stable shareholders, the announcement inviting investors to become stable shareholders did not include any reference to the limitations on resale of the shares. However, as the name "stable shareholders" indicates, it is reasonable to assume that these investors would have anticipated such restrictions. Regarding other investors, the terms of restrictions and inducements were published.

The petitioners contend that the issuance of new shares was similar to a committed investment in that the proceeds were allowed to return to the company, and that this limited the GOF's return on the privatization. However, we disagree with the petitioners. As an initial point, we have not found that Usinor was unequityworthy during 1995 when the capital increase occurred. None of

the funds for the capital increase came from the government; rather, they were provided by the new (private) shareholders who purchased the newly issued shares. Since the increase in capital was accompanied by a corresponding increase in the number of shares outstanding, and the shares were sold at the same price as the rest of the public offering, we find that the transaction did not result in extra value that was owed to the government.⁵

Moreover, to the extent that the capital increase in Usinor can be considered as “committed investment,” the fact of the increase and the terms of the increase were publicized and known to the purchasers. (See, e.g., p. 24 of the *Prospectus*.)

Therefore, as regards both the resale restrictions (inducements) and the capital increase, we find no evidence that these committed investments were not fully reflected in the offer to purchase Usinor’s shares. As described above, the commitments were known to the purchasers prior to their purchases. Further, there is no evidence indicating that these commitments distorted the amount that share purchasers were willing to pay. Accordingly, we determine that any committed investments were fully reflected in the share prices.

Concurrent Subsidies

“Concurrent subsidies” are subsidies given to facilitate or encourage a privatization, 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. In the instant determination, according to the respondents, no concurrent subsidies accompanied the privatization.

Fair Market Value - Conclusion

Based on our review of the factors relevant to fair market value, the privatization of Usinor presents a somewhat mixed picture. On the one hand, there were some barriers in the bidding process that might have limited the number of potential purchasers. On the other hand, there is substantial record evidence that the privatization of Usinor was accomplished through a fair-market-value transaction, with the exception of the employee offering. First, the GOF commissioned and followed the recommendations of objective analyses of the value of Usinor. Second, the value/cost of any committed investment was known to bidders and reflected in the prices offered. Third, the GOF set and received a market-clearing price for Usinor’s shares, except in the employee offering which constituted only 5.16 percent of the sale; in the stable

⁵ The issue of the capital increase was addressed in Results of Redetermination Pursuant to Court Remand: Allegheny Ludlum Corp. et al. v. United States, Court No. 99-09-00566, Remand Order (CIT January 4, 2002), at Comment 7, and Results of Redetermination Pursuant to Court Remand: GTS Industries S.A. v. United States, Court No. 00-03-00118, Remand Order (CIT January 4, 2002), at Comment 2. Both documents are on the record as Appendix 1 to the respondents’ July 28, 2003, submission.

shareholder offering, the GOF set and received an above market-clearing price. After weighing these various factors, we determine that, with the exception of the employee offering, fair market value was paid for Usinor.

Market Distortions

Under the Department's new privatization methodology, a party can obviate the arm's-length and fair-market-value rebuttal to the baseline presumption by demonstrating (a) that the action or inaction of the government – in its capacities as regulator and policymaker – had severely distorted the broader market conditions at the time of the privatization and (b) that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action or inaction.⁶ See Modification Notice, 68 FR at 37127. The Modification Notice states that, where the evidence clearly shows this to be the case, the baseline presumption will not be rebutted and pre-sale subsidy benefits continue to be countervailable. According to the Modification Notice, in examining the evidence, the Department may consider various factors pertaining to (1) the basic market conditions (e.g., the interplay of supply and demand, access to information, safeguards against collusive behavior, rule of law, enforcement of contracts and property rights), and (2) the government's use of its legal and fiscal prerogatives as the regulatory and policymaking authority (e.g., special duties and taxes, regulatory exemptions, subsidization or support).

In the instant determination, the petitioners 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, the petitioners have not articulated an allegation regarding market distortion for the purposes of this determination. Consequently, the petitioners have not sufficiently demonstrated, as called for in the Modification Notice, that (a) the action or inaction of the government – in its capacities as regulator and policymaker – had severely distorted the broader market conditions at the time of the privatization and that (b) the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action or inaction. See Modification Notice, 68 FR at 37127. In sum, we find that the petitioners have not overcome the presumption that a privatization at arm's length and for fair market value extinguishes the benefits from pre-privatization subsidies.

The EC and the GOF claim that France is a market economy in which the interplay of supply and demand is unfettered and the value of privatized companies is dictated by the market. The respondents contend, moreover, that the historical government-ownership of companies does not

⁶ The Modification Notice characterizes broader market conditions as the economic, fiscal, legal and regulatory regimes necessary for the transaction price to reflect the subsidy benefit fairly & accurately. See Modification Notice, 68 FR at 37127 and at fn. 4.

automatically distort the market and that overcapacity is irrelevant to the market distortion analysis. The respondents further argue that the petitioners' allegations are unsubstantiated and fail to overcome their burden on the issue of market distortion for the purposes of this determination.

We agree with respondents that the petitioners have not provided sufficient evidence that the action (or inaction) of the GOF had severely distorted the broader market conditions at the time of the privatization. Additionally, other than making an assertion regarding the effect of these alleged conditions on the purchase price, the petitioners have not sufficiently demonstrated that the transaction price was "meaningfully different" from what it would otherwise have been, as required by the Modification Notice. See Modification Notice, 68 FR at 37127. Consequently, the petitioners have not sufficiently demonstrated that French or European market conditions at the time of Usinor's privatization were distorted such that the relevant transaction price did not reflect fairly and accurately the subsidy benefits.

CONCLUSION

The evidence presented on the record of this determination demonstrates that, with the exception of the employee offering, which constituted 5.16 percent of the sale, the privatization of Usinor was at arm's length and for fair market value. While certain aspects of the sales process for stable shareholders made the process less open, the price paid by the stable shareholders was an arm's-length price and it exceeded our measure of fair market value, FF 86 - 89. Regarding the shares sold to Usinor's employees, we determine that these sales were not at arm's length. Nor can the sales at FF 68 be considered transactions at fair market value.

Likelihood of Continuation or Recurrence of Countervailable Subsidization

In accordance with our findings regarding the privatization of Usinor, the Department is reaffirming the affirmative likelihood determination in the Sunset Review. The sale of shares to Usinor employees at prices below fair market value did not extinguish certain allocable, non-recurring, pre-privatization subsidies that continue at an above de minimis rate beyond the original sunset review. Under these circumstances, the Department finds that countervailable subsidies are likely to continue or recur in the event of revocation. Section III.A.4 of the Sunset Policy Bulletin states that "the Department normally will determine that a countervailable subsidy will continue to exist where the benefit stream, as defined by the Department, will continue beyond the end of the sunset review, without regard to whether the program that gave rise to the long-term benefit continues to exist." See Sunset Policy Bulletin, 63 FR at 18875. We find no basis on the record of this redetermination to deviate from that policy. Therefore, we continue to determine that revocation of the order on Corrosion-Resistant would be likely to lead to continuation or recurrence of a countervailable subsidy.

New Subsidy Allegations

Section 752(b)(2)(B) of the Act provides that if the Department determines that good cause is shown, in determining the likelihood of continuation or recurrence of a countervailable subsidy, the Department will consider programs newly alleged to provide countervailable subsidies, but only to the extent that the Department makes an affirmative countervailing duty determination with respect to such programs and with respect to the exporters or producers subject to the sunset review. See also, 19 CFR 351.218(e)(2)(iii). On July 2, 2003, the Department sent respondents a new set of questionnaires specifically designed to apply the Department's modified privatization analysis to the Sunset Review, and also notified petitioners that, with regard to sunset proceedings only, the Department would consider properly filed new subsidy allegations. On July 8, 2003, U.S. Steel Corporation, the petitioner in this determination, timely submitted new subsidy allegations.

It is in the interest 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 determination. As shown above, the Department has found 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.

ANALYSIS OF COMMENTS

Comment 1: Relevance of Prior Remand Redeterminations

Respondent's Argument: Usinor claims that no factual or legal distinction exists between this Section 129 determination and prior remand redeterminations involving the privatization of Usinor that would call for a different outcome.⁷ In CTL Remand and Stainless Remand, the respondent notes, the Department concluded that the privatization of Usinor was accomplished through an arm's-length, fair-market-value transaction, and found a zero countervailable subsidy rate. Usinor further notes that these findings were reviewed and upheld by the Court of International Trade.

⁷ See Results of Redetermination Pursuant to Court Remand: GTS Industries S.A. v. United States, Court No. 00-03-00118, Remand Order (CIT January 4, 2002) ("CTL Remand"), and Results of Redetermination Pursuant to Court Remand: Allegheny Ludlum Corp. et al. v. United States, Court No. 99-09-00566, Remand Order (CIT January 4, 2002) ("Stainless Remand").

Petitioner's Argument: U.S. Steel notes that the Department did not even address the issue of likely continuation or recurrence of subsidization in CTL Remand and Stainless Remand. The petitioner adds that the Department's conclusions in those redeterminations were reached under duress imposed by errant CIT decisions and are now on appeal at the Court of Appeals for the Federal Circuit.

Department's Position: We disagree with the respondent's contentions regarding the relevance of Stainless Remand and CTL Remand. The Modification Notice states that those redeterminations "may or may not reflect the full extent of the analysis of the transaction appropriate under this new methodology..." and that "...our position with regard to those redeterminations is unaffected by this notice." See Comment 12 of Modification Notice, 68 FR at 37138. In those redeterminations, for example, the Department did not consider whether the sale was at arm's length or the broader market conditions were distorted. Moreover, as U.S. Steel has noted, both Stainless Remand and CTL Remand are currently under review by the Court of Appeals for the Federal Circuit;⁸ hence, those findings do not constitute a final and conclusive decision regarding the legality of the change-in-ownership methodology used by the Department in those cases. In sum, the findings in Stainless Remand and CTL Remand are inapplicable to the instant determination.

Comment 2: Pass-Through Rate

Respondent's Argument: Usinor claims that no factual or legal distinction exists between this Section 129 determination and the redeterminations in Stainless Remand and CTL Remand. In those redeterminations, the respondent notes, the Department concluded that the privatization of Usinor was accomplished through an arm's-length, fair-market-value transaction, and the agency found a zero countervailable subsidy rate. Hence, the respondent argues, that same rate should prevail in the Section 129 determination.

However, Usinor argues that, if the Department continues to find that the employee share offering resulted in a benefit pass-through, the Department should correct its calculation of the pass-through to accurately reflect the extent to which the Department actually found the employee shares to be below fair market value. In support of its position, the respondent cites to Viraj Group, Ltd., v. United States, 162 F.Supp. 2d 656, 662-63 (CIT 2001), in which the court stated that the court "must not only assess the reasonableness of Commerce's actions in light of its statutory requirements but also whether the agency's actions further the antidumping statute's

⁸ See, respectively, Allegheny Ludlum Corp. v. United States, 182 F. Supp. 2d 1357 (CIT 2002), appeal filed, Fed.Cir.Ct. Nos. 01-03-1189 and 03-1248, and GTS Industries S.A. v. United States, 182 F. Supp. 2d 1369 (CIT 2002), appeal filed, Fed.Cir.Ct. Nos. 03-01175 and 03-1191.

underlying goal of accuracy.”⁹ According to the respondent, by using a pass-through rate of 5.16 percent (*i.e.*, equivalent to the total employee stake), the Department has assumed that the employee shares were purchased at a price of zero. The respondent contends that, to calculate the benefit pass-through accurately, the Department must account for the price discount, *i.e.*, the difference between the fair market value of the shares and the price paid. Based on the rate found in the original investigation, this results in a countervailing duty rates of 0.30 percent for Usinor which, the respondent notes, is *de minimis*.

Petitioners’ Argument: U.S. Steel contends that the respondent misunderstands the Department’s methodology and findings, stating that Usinor’s argument to have the employee share price credited in calculating the pass-through rate incorrectly assumes the Department is countervailing a new subsidy to the employees rather than a portion of the original subsidies to Usinor.

Department’s Position: As discussed above, we disagree with Usinor’s contention that the findings in the prior remand redeterminations are applicable to the instant determination. See Comment 1.

We further disagree with the respondent that we should measure the benefit pass-through as a function of the ratio of the price discount to the fair-market-value price. We have already addressed this argument in the Modification Notice, 68 FR at 37137. In this determination, we have applied the approach laid out in our Modification Notice, which states that, where we find that the baseline presumption is not rebutted because a transaction was not made at arm’s length and for fair market value, or because of severe market distortions, “we will find that the company continues to benefit from the prior subsidies in the full amount of the remaining unallocated balance of the subsidy benefit.” See Modification Notice, 68 FR at 37138.

Comment 3: Likelihood of Continuation or Recurrence of Subsidization

Respondent’s Argument: Usinor argues there is substantial evidence that countervailable subsidization of Usinor will not continue or recur if the order is revoked because the fair-market-value privatization extinguished all but a *de minimis* amount of benefit. Additionally, the respondent contends that the privatization also fundamentally changed Usinor to a private commercial enterprise, which demonstrates an end to reliance on subsidies.

The EC notes that the instant determination, and the Section 129 determinations of CTL Plate and French Stainless, all involve the same company and the same subsidies, and that the underlying investigations in CTL Plate and French Stainless occurred before the conclusion of the Sunset Review. Given this, the EC contends that it defies logic to find likelihood of

⁹ The Federal Circuit disagreed with the lower court’s reasoning: “While ... accuracy is a goal when determining dumping margins ... {This} statement is properly understood as expressing a goal within the confines of the statutes, not in derogation of a statutory provision.” Viraj Group, Ltd. v. United States, Slip Op. 03-1061, at 8-9 (Fed. Cir. 2003).

continuance or recurrence of subsidization in the instant determination when the Department is finding de minimis countervailable subsidy rates, and revoking the underlying orders, in the other two Section 129 determinations.

Petitioners' Argument: U.S. Steel disputes Usinor's contentions that the privatization fundamentally changed the company, and that this change demonstrates an end to reliance on subsidies, thereby justifying a finding of no likelihood of continuance or recurrence of subsidization. U.S. Steel claims that Usinor has provided no explanation or record support as to how or why private ownership would make a company less likely to apply for or receive subsidies. The notion is purely speculative, according to the petitioner, and the Department should focus on the facts, including the GOF's history of intervention into Usinor's finances, the GOF's conferral of recurring programs that provide annual disbursements continuing to the present, and the fact that the reduction in subsidization since 1993 merely reflects the discipline imposed by the CVD regime.

Department's Position: As described in the "Conclusion" section above, we have determined that the sale of shares to Usinor employees permitted the continuation of certain allocable, non-recurring, pre-privatization subsidies at an above de minimis rate beyond the original sunset review. On this basis, we reaffirm our original likelihood determination that a countervailable subsidy is likely to continue or recur in the event of revocation of the order. The likelihood analysis performed by the Department in a sunset review is different from an analysis performed by the Department in an investigation or administrative review. Therefore, it is not incongruous that our findings in this Section 129 determination of the Sunset Review are different from our findings in the Section 129 determinations of CTL Plate and French Stainless.

Comment 4: New Subsidy Allegations

Respondent's Argument: Usinor argues that the new subsidy allegations are entirely extraneous to the WTO Appellate Body findings and, therefore, irrelevant to the Department's obligation to make a determination that conforms the results of the underlying sunset review to those findings. Additionally, the respondent contends that, in the context of sunset reviews, the petitioners must show that good cause exists for the Department to consider such allegations, and that the petitioners must demonstrate that they had no prior opportunity to raise the allegations. According to the respondent, the petitioners have not shown that they could not have raised the new subsidy allegations during the underlying sunset review. In any event, Usinor claims, the Department investigated the newly alleged subsidies in other proceedings and found that they provided Usinor with no more than de minimis countervailable benefits.

Petitioner's Argument: U.S. Steel argues that, given the decision to disregard Usinor's pre-privatization subsidies, the Department cannot avoid considering other flows of aid to Usinor. The petitioner contends that making a sunset determination based solely on a portion of the known and likely subsidization would be irresponsible and yield results that cannot survive judicial review. Additionally, the petitioner disputes Usinor's claim that the allegations were not

raised earlier, claiming that they were raised during the underlying sunset review. In any case, the petitioner contends that even allegations not raised earlier can be raised appropriately in the context of a Section 129 determination to the extent that the WTO-dictated results on pre-privatization subsidies makes relevant any new facts that did not need to be considered earlier.

Department's Position: We agree with the petitioner that it could be appropriate to consider new subsidy allegations in the context of this Section 129 determination of a sunset review. Section 752(b)(2)(B) of the Act provides the Department the discretion to consider such allegations. Nevertheless, as mentioned in the "Conclusion" section, since the Department has made a likelihood determination based on the privatization analysis, it was unnecessary to investigate the new allegations.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. 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