

October 24, 2003

MEMORANDUM

TO: James J. Jochum
Assistant Secretary
for Import Administration

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

SUBJECT: Issues and Decision Memorandum for the Determination under
Section 129 of the Uruguay Round Agreements Act: Final
Affirmative Countervailing Duty Determination: Stainless Steel
Plate in Coils from Italy

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 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 privatization that was addressed in the countervailing duty investigation of stainless steel plate in coils from Italy. See Final Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils from Italy, 64 FR 15508 (March 31, 1999) (“SSPC from Italy”).

In SSPC from Italy, the Department determined that the Government of Italy (“GOP”) had

provided countervailable subsidies to Acciai Speciali Terni¹ (“AST”) during the period of investigation (1997), including certain allocable, non-recurring subsidies conferred prior to the company’s privatization in 1994. In this section 129 determination, using the Department’s modified methodology for analyzing privatizations, the Department is examining whether those pre-privatization subsidies were eliminated as a result of the privatization.

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: Stainless Steel Plate in Coils from Italy” from Jeffrey May, Deputy Assistant Secretary, Import Administration, to James J. Jochum, Assistant Secretary for Import Administration, dated September 15, 2003, (“Draft Section 129 Determination”). On September 25, 2003, both the petitioners² and TKAST submitted comments. On September 30, 2003, both the petitioners and TKAST 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

¹ AST has undergone a name change and is now ThyssenKrupp Acciai Speciali Terni S.p.A. (“TKAST”).

² The petitioners in the original investigation were Armco, Inc., J&L Specialty Steels, Inc., Lukens Inc., AFL-CIO/CLC (USWA), Butler Armco Independent Union and Zanesville Armco Independent Organization.

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 determination for which we received comments from the parties:

- Comment 1: The Department’s Determination Violates U.S. Law
- Comment 2: The Sale of AST was Not for Fair Market Value
- Comment 3: The Italian Market for Sales of Steel Companies and for Sales of Steel were Distorted by the Italian Government
- Comment 4: Concurrent Subsidies Continued to Benefit AST After the Privatization
- Comment 5: The Department’s Determination Must be Applied Prospectively Only

AST’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 action, the GOI-owned holding company, Istituto per la Ricostruzione Industriale (“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: AST³ and ILVA Laminati Piani S.r.l. (“ILP”), 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. At the same time, December 1993, IRI began the process of selling AST. It hired Barclays de Zoete Wedd Limited (“BZW”) as its financial advisor. IRI also announced its intention to sell the company and solicited purchase offers through advertisements in Italian and foreign newspapers.

In its solicitation for purchase offers, IRI invited limited liability companies or similar entities to notify BZW of their interest in purchasing AST and to provide certain information about themselves.⁴ The announcement explained that upon receipt of an expression of interest and the

³ AST was originally formed as a limited liability company with the designation “S.r.l.” In anticipation of its eventual sale the company was converted to a stock company with the designation “S.p.A.” in February 1994.

⁴ The requested information included: a copy of the party’s articles of incorporation and bylaws; a list of all members of the Board of Directors and the Board of Auditors; financial data for the last three years or, for parties established more recently, data for the available years. See July 25, 2003 Questionnaire Response of the Government of Italy and ThyssenKrupp Acciai

required information, the party would be asked to sign a confidentiality agreement and then could receive an information memorandum about AST prepared by BZW.

Expressions of interest were received from 19 private industrial and financial entities by the due date of January 7, 1994. When the qualifying parties received the information memorandum from BZW, they were also informed of the next step in the process: submission of preliminary, non-binding cash offers for 100 percent of AST's shares.

Four parties submitted non-binding purchase offers. They were: Ugine (a French stainless steel producer); Krupp (a German steel company); Marcegaglia (an Italian investment group); and a consortium of Italian steel producers (including Falck, Agarini, and Riva). These parties conducted due diligence meetings with AST during the period March 15 - May 13, 1994. Also during this period, the four remaining parties were informed of the process for submitting final offers.

By the May 13, 1994, deadline, only Ugine and KAI Italia S.r.L. ("KAI"), a consortium formed by Krupp and a consortium of Italian steel producers for purposes of purchasing AST, submitted final bids. Ugine's bid was determined to be non-conforming, *inter alia*, because Ugine proposed purchasing only 35 percent of AST's shares. Ugine attempted to amend its offer to purchase 100% of AST, but its bid was rejected by IRI as untimely. See GOI/TKAST 7/25/03 QR at 19.

Because much of the information relating to the bidding process and the terms of sale is proprietary, we have prepared a separate proprietary analysis providing greater detail about the privatization transaction. See Memorandum to James J. Jochum, Assistant Secretary for Import Administration, dated October 24, 2003, "Analysis of the Privatization of Acciai Speciali Terni" ("AST Privatization Analysis Memo"), which is on file in the Central Records Unit in room B-099 of the main Department building.

Analysis

We have analyzed the privatization of AST consistent with the methodology put forth in the Modification Notice. See Modification Notice, 68 FR at 37125-37138.

Arm's-Length Transaction

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

Speciali Terni ("GOI/TKAST 7/25/03 QR") at Exhibit 7.

transaction are those that would exist if the transaction had been negotiated between unrelated parties.” See SAA at 928.

In the instant proceeding, all 400 million shares of AST were sold to KAI, a consortium formed by Krupp and FAR Acciai S.r.l., an Italian holding company owned by Tadfin S.p.A. of the Agarini Group, FIRE. Finanziaria S.p.A. of the Riva Group, and Acciaierie e Ferriere Lombarde Falck S.p.A. of the Falck Group for purposes of purchasing AST. Because the purchasers in this transaction were not related to the seller, the IRI, or to AST, we determine that the sale was at arm’s length.

Fair Market Value

Next, in determining whether the sale of AST 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 AST 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 AST, 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).

As part of the reorganization leading up to the privatization of AST, IRI and ILVA appointed the Istituto Mobiliare Italiano (“IMI”) to conduct a valuation study in August 1993 of what was to become AST. In January 1994, when the bidding process was under way, IRI commissioned a study by Pasfin Servizi Finanziari, an Italian investment firm. The purpose of this study was to determine the price range the GOI could expect to receive for AST.

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 since they were conducted by independent parties and contained information typically considered by sellers contemplating such a sale.

Neither of the studies made any recommendations pertaining to the sales process. However, as described above, IRI solicited purchase offers through a public bidding process and intended to obtain the best available price for AST.

(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.

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.

In the instant proceeding, IRI sought at the outset of the privatization process to bring in many bidders for AST. The announcement of its intent to sell AST and its solicitation of expressions of interest in the company were widely publicized. Although certain informational requirements were imposed on interested parties, these were not onerous and would not appear to have discouraged potential buyers. Similarly, the requirements imposed on parties wishing to submit preliminary, non-binding bids were not overly burdensome. They appear to have been a first step in establishing whether these parties could be considered bona fide bidders.

By the time of the final offers, however, the procedures became more restrictive. The most limiting factor appears to have been the short amount of time available for conducting the due diligence meetings and drawing up of the final offers, from March 15 to May 13. This and a second possible limiting factor are described in the proprietary AST Privatization Analysis Memo.

With respect to the bidding process, we note one further consideration. At verification in the original investigation, AST officials stated that Krupp's perception during the privatization process had been that IRI placed importance on the presence of Italian investors and this led Krupp to combine with the Italian steel producers in making its bid. If Krupp's perception was correct, i.e., that IRI would favor a bid including Italian investors, this would be an additional restriction on or obstacle to potential bidders and would limit competition for AST's shares reducing the likelihood that the GOI would receive full value for the company.

We cannot know whether these bidding requirements drove away bidders or, perhaps, forced them to combine (as Krupp and a consortium of Italian steel producers did). Nevertheless, these restrictions potentially served to limit the number of competitors for AST in the final days of the process.

(3) Purchase Price

Another factor in determining whether the sale of AST was for fair market value is whether the government accepted the highest bid and received payment in cash or close equivalent. Please see the proprietary AST Privatization Analysis Memo for a detailed analysis of the price paid for AST.

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

During the bidding process for AST, a draft sale and purchase agreement was provided to the four potential bidders who submitted preliminary offers. The draft agreement which contained various commitments was provided during the due diligence review period, between March 15 and May 13, 1994. Both KAI and Uginie submitted final bids. Subsequent to being selected as the winning bidder, KAI negotiated a final sale and purchase agreement with IRI which was signed on July 14, 1994. The final agreement contained substantially the same commitments mentioned above. See GOI/TKAST 7/25/03 QR at Exhibit 14.

For a description of the various commitments, please see the proprietary AST Privatization Analysis Memo.

We find no evidence on the record that these committed investments were not fully reflected in the bid prices for AST. As described above, the details of the commitments were fully transparent to all potential bidders prior to their final bids. Further, there is no evidence on the record that the buyer could expect to be relieved of the requirements after the sale. Moreover, there is no conclusive evidence of requirements or inducements that would distort the value that bidders were willing to pay for what was being sold. See Modification Notice, 68 FR at 37127. Accordingly, we conclude that any committed investments were fully reflected in the sale price.

Concurrent Subsidies

“Concurrent subsidies” are subsidies given to facilitate, encourage, or that are otherwise bestowed concurrent with a privatization. See 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 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 AST, in December 1993, when the majority of ILVA's viable manufacturing activities were demerged into either AST or ILP, 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 AST and ILP. The amount of debt that should have been attributable to AST but was instead placed with ILVA Residua was equivalent to debt forgiveness for AST at the time of its demerger. See Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils from Italy, 64 FR 30624, 30628 (June 8, 1999). Since this subsidy was given after the GOI's decision to privatize AST, it is considered a concurrent subsidy.

As part of the bidding process, all parties submitting expressions of interest and meeting the bidding requirements were provided with confidential copies of an information memorandum regarding AST, including AST's financial information. See GOI/TKAST 7/25/03 QR at Exhibit 9.

There is no evidence indicating that this concurrent subsidy was not fully reflected in the sale price of AST 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 relevant to fair market value, the privatization of AST presents a somewhat mixed picture. On the one hand, there were some real and perceived 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 AST was accomplished through a fair-market-value transaction. First, the GOI commissioned and followed the recommendations of objective analyses of the value of AST. Second, the value/cost of any committed investments and concurrent subsidies were known to bidders and reflected in the prices offered. Third, the GOI received the best available price for AST. After weighing these various factors, we determine that fair market value was paid for AST.

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, the petitioners allege that the basic market conditions in the Italian steel industry were extremely distorted for many years before and during the sale of AST. Specifically, the petitioners claim that the repeated bailouts of ILVA distorted the free interplay of supply and demand for both steel companies and steel products in Italy. Further, the petitioners contend that the Italian government provided massive subsidies to prepare AST for sale which caused overcapacity and undermined market supply and demand conditions in the Italian steel sector. See Petitioners' August 4, 2003, submission at 11-15.

Petitioners also allege that the evidence indicates (1) a desire on the part of the GOI that the purchasing consortium include Italian investors and (2) that knowledge of this fact served to distort the market for the sale of AST. Finally, the petitioners claimed that the committed investments and certain bidding requirements also served to distort the market. See Id.

We determine that the petitioners have 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 AST 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 that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action. For the reasons explained in our response to Comment 3 below, we find that the information and argument petitioners provided regarding the impact of subsidization on the transaction price does not sufficiently support a finding of market distortions.

With respect to the petitioners' allegation of distortion based on the committed investments and certain bidding requirements, we have addressed these concerns under our fair-market-value analysis.

Conclusion

The evidence presented on the record of this proceeding demonstrates that the privatization of AST was at arm's length and for fair market value. The baseline presumption that allocable, non-recurring subsidies pass through to AST 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 1.62 percent for AST. We plan to amend the duty deposit requirements for entries from AST and all others to reflect this rate. This change in the duty deposit rate will take effect on the date that the USTR directs us to implement our findings.

COMMENTS

Comment 1: The Department's Determination Violates U.S. Law

Petitioners' Argument: The petitioners argue that the Department's determination is inconsistent with the statute, the SAA, and the decision of the Court of Appeals for the Federal Circuit ("the Court") in Delverde. See Delverde Srl v. United States, 202 F.3d 1360 (Fed. Cir. 2000), reh'g granted in part (June 20, 2000) ("Delverde"). Specifically, the petitioners contend that the Department's determination that pre-privatization subsidies to AST have been extinguished "solely by virtue of an arm's-length sale at fair market value" is inconsistent with the change in ownership provision in section 771(5)(F) of the Tariff Act of 1930, as amended.⁵ The SAA explains that this provision was added to the statute to clarify that "the sale of a firm at arm's-length does not automatically, and in all cases, extinguish any prior subsidies conferred." See SAA at 928. The petitioners further contend that the Court's decision in Delverde reiterates that "a subsidy cannot be concluded to have been extinguished solely by an arm's-length change in ownership." See Delverde, 202 F.3d at 1366.

TKAST's Argument: TKAST argues that the Department's determination clearly is consistent with both U.S. law, as interpreted in Delverde, and the Appellate Body's ruling in Certain Products. TKAST claims that in the Modification Notice, the Department has already rejected petitioners' arguments and, thus, there is neither any need nor any basis to consider them again.

Department's Position: As noted by TKAST, we have addressed these arguments in the Modification Notice. We state there: "Under our new methodology, we will not treat an arm's-length privatization as an exclusively dispositive indicator of subsidy extinguishment, but will require other evidence indicating that the post-sale company no longer benefits from such subsidies. Specifically, in addition to analyzing whether the sale was between unrelated parties, we will examine any evidence presented on whether the sale was for fair market value and/or whether there were broader market distortions that would be relevant to a finding of subsidy extinguishment." See Modification Notice, 68 FR at 37128.

In the instant section 129 determination, as described in the Analysis section above, we have

⁵ Section 771(5)(F) of the Tariff Act of 1930, as amended, states that "{a} change in ownership of all or part of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction."

analyzed the privatization of AST consistent with this new methodology. In applying this new methodology, we determined that the sale of AST was at arm's length, for fair market value, and that there were no broader market distortions. On this basis, we find that all allocable, non-recurring, pre-privatization subsidies to AST are extinguished.

Comment 2: The Sale of AST Was Not for Fair Market Value

Petitioners' Argument: The petitioners argue that numerous barriers imposed by the GOI restricted the number of potential bidders competing in the bidding process for AST with the result that the sale of AST was not at fair market value. The petitioners object to the Department's conclusion in the Draft Section 129 Determination that the number of potential bidders *might* have been limited. See Draft Section 129 Determination at 10. The petitioners contend that the barriers in the bidding process were real and that the effectiveness of the barriers was evidenced by the fact that only one purchaser qualified to submit a final bid. Although the Department found that this bidder paid fair market value for AST based on valuation studies of the company, the price paid by the winning bidder, KAI, "remains unvalidated by a true market-driven bidding process involving at least two interested buyers bidding against one another to purchase the company," in the petitioners' view. Finally, by limiting the number of bidders, the petitioners contend that the GOI demonstrated that it was not concerned with obtaining fair market value for AST.

In their rebuttal of TKAST's comments, the petitioners claim that TKAST implicitly admits that there were defects in the bidding process because TKAST only addresses the early steps of the process and omits the later stages where 19 interested parties were winnowed to one and Ugene was excluded despite its continued interest.

TKAST's Argument: TKAST argues that the Department correctly found that KAI paid fair market value for AST based on the market valuations prepared by three independent investment firms. Further, TKAST disagrees with the Department's conclusions that there were some perceived and real barriers in the bidding process. Specifically, TKAST contends that the time for potential bidders to prepare their final offers was not short given the circumstances. TKAST maintains that potential bidders had two full months to conduct due diligence meetings and prepare their final bids. Further, TKAST claims that the potential bidders had notice of the procedures that would be followed in the bidding process and a background report on AST several months prior to the final bids' deadline. TKAST argues that there is no evidence that bidders were deterred or constrained by the deadline.

TKAST also disputes that certain requirements in the final stages of the bidding process might have limited the number of bidders. According to TKAST, the requirement in question (which is proprietary) was reasonable and modest in relation to AST's estimated net worth. TKAST contends that the bidding requirements would not unreasonably constrain any bidder interested in purchasing AST.

TKAST further asserts that any perception that IRI would favor a bid with Italian investors was completely unfounded. This is because there was a specific requirement that the bidding be open to all nationalities and, according to TKAST, a requirement for Italian bidders would have violated European Union and Italian law, the terms of the privatization plan, and IRI's intent to sell to the highest bidder. Moreover, TKAST argues, the Department's assertion that Krupp "perceived" that IRI would favor Italian bidders is unfounded.

TKAST argues that in contesting the Department's determination that the sale of AST was for fair market value, the petitioners totally ignore the fact that KAI paid the best price. TKAST also challenges the petitioners' assertion that "because KAI was the only qualifying bidder and no market bidding process or auction occurred for the sale of AST, KAI knew that it had no competition in purchasing AST in the only critical portion of the sales process." TKAST contends that at the time KAI submitted its final offer, KAI had no reason to believe that it had no competition in bidding for AST since a number of parties submitted non-binding purchase offers.

TKAST also refutes petitioners' assertion that because KAI was the only qualified purchaser to submit a final bid, the entire sales process is necessarily tainted. TKAST claims that the Modification Notice, 68 FR at 37131, provides that "the fundamental consideration ... is not necessarily the number of bidders, but rather whether the market is contestable, *i.e.*, anyone who wants to buy the company or its assets has a fair and open opportunity to do so." TKAST asserts that the record in the instant determination clearly demonstrates that the market was contestable.

Department's Position: Under the Modification Notice, the Department will scrutinize closely privatizations where there is only one final bidder (or a few). We have done so in this case. Specifically, we have reviewed the announcements for the privatization of AST, the bids and the accompanying correspondence. As described in the AST's Privatization section above, the GOI received two final bids, from KAI and UGINE. We agree with TKAST that KAI would not have known at the time the final bids were due that there would be only one other bid and that the other would ultimately fail. We note that UGINE's bid was deemed non-conforming because UGINE did not bid for 100 percent of AST. From the outset of the process, the GOI had been clear that it intended to sell 100% of the shares and that bids should be submitted on that basis. Given this, the GOI's rejection of UGINE's bid for only a portion of the shares should not be seen as an action to limit competition in the bidding process.

However, as discussed in the Analysis section above, we continue to find that certain other aspects of the bidding process might have served to limit the number of bidders. Nevertheless, the three independent valuations of AST show that the GOI received fair market value for AST.

Finally, we disagree with the petitioners' implication that the valuations of AST should effectively be ignored because of the limited number of bidders. The valuations provide relevant evidence that the real or perceived restrictions did not result in a non-competitive, skewed process.

Comment 3: The Italian Market for Sales of Steel Companies and for Sales of Steel Were Distorted by the Italian Government

Petitioners' Argument: The petitioners claim that the Department's determination "significantly exceeds" the ruling of the Appellate Body in Certain Products. Specifically, the petitioners argue that the Appellate Body rejected the WTO Dispute Settlement Panel's decision that an arm's-length, fair market value sale extinguishes prior subsidies in all cases, because this decision "overlooks the ability of governments to obtain certain results from markets by shaping the circumstances and conditions in which the markets operate." See Certain Products at para. 124. The petitioners claim that although the Department's new privatization methodology states that the presumption of extinguishment of pre-privatization subsidies based on an arm's length sale will be rebutted by evidence of market distortions, the Department has not recognized this exception in practice.

In the case of AST, the petitioners contend that despite evidence of severe market distortions resulting from the GOI's bestowal of massive subsidies year after year on steel companies that would have gone out of business under normal market conditions, the Department has found no market distortions in Italy's steel sector. Specifically, the petitioners claim that the Department failed to acknowledge that the GOI actively manipulated the transaction price for AST through massive countervailable subsidies in the form of debt forgiveness and asset write-downs to prepare AST for privatization. Citing the Appellate Body's report, the petitioners argue that these massive subsidies are a prime example of a government acting "to influence the circumstances and the conditions of the sale so as to obtain a certain market valuation of the enterprise." See Certain Products at para. 124.

The petitioners support their argument by reference to a constructed valuation of the company - price paid plus assumed debt - which was suggested by TKAST. Based on this construction, the petitioners point to changes in the value of AST's assets and liabilities between 1993 and 1994, and contend that through the debt assumptions and asset write downs, the GOI allowed KAI to purchase AST at a considerably lower value. The petitioners further allege that this lower sales valuation demonstrates that the transaction was not at fair value. Specifically, the petitioners claim that the lower sales price relieved KAI from incurring considerable additional costs in the form of liabilities attributable to the assets it purchased. Thus, the petitioners conclude, KAI benefitted because it received additional value by not being burdened with the liabilities and the GOI was not compensated for this value.

TKAST's Argument: TKAST claims that the Department correctly determined that the petitioners had not sufficiently demonstrated "that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action." TKAST contends that the petitioners' only argument that the Italian market was distorted was their claim that the GOI bestowed massive subsidies on AST prior to AST's privatization. Thus, according to TKAST, based on the petitioners' argument, the presumption of extinguishment of subsidies will be rebutted by evidence of past subsidies. TKAST argues that if the Department

were to accept this argument, then, the Department would have to find market distortion in every case, which would be inconsistent with the Appellate Body's ruling in Certain Products, the Court's decision in Delverde, and the Modification Notice.

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. The petitioners have not pointed to any such actions by the GOI. Instead, they identify asset write downs and debt assumptions, actions taken by the GOI as seller. The issues the GOI faced in preparing AST 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 petitioners allege as market distortions represent concurrent subsidies that were bestowed in preparing AST 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 and below in our response to Comment 4, we have determined that these concurrent subsidies were reflected in the price paid for AST and, hence, did not result in a sale for other than fair market value.

We further disagree that the petitioners' calculation shows that the GOI did not receive fair market value for AST. The petitioners essentially argue that the purchaser of AST got "something" (less debt than would have existed absent the GOI's debt assumption) and that the GOI did not receive additional compensation for this. However, the less debt a company has, the higher the company's value (assets less debt). Thus, when KAI agreed to purchase AST (including those liabilities that did transfer with ownership), the price would have reflected the fact that many liabilities did not transfer.

Comment 4: Concurrent Subsidies Continued to Benefit AST After the Privatization

Petitioners' Argument: The petitioners argue that the Department exceeded the Appellate Body's ruling in Certain Products and the language of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") in its treatment of concurrent subsidies. According to the petitioners, the Appellate Body's decision in Certain Products did not address concurrent subsidies, nor did it preclude the Department from countervailing these types of subsidies. Instead, according to the petitioners, the Appellate Body's decision in Certain Products relied heavily on the language of the SCM Agreement which recognizes debt forgiveness as a type of concurrent subsidy that is countervailable. Specifically, the petitioners argue that Article 27.13 of the SCM Agreement provides an exception for concurrent subsidies such as debt forgiveness to developing countries. By implication, this means that debt forgiveness concurrent with a

privatization by a *developed* country should be countervailable, according to the petitioners.

The petitioners further contend that by failing to countervail concurrent subsidies the Department is giving countries a green light to bestow massive subsidies in order to privatize their companies. The petitioners claim that this is a poor policy in light of the United States's efforts in the Organization for Economic Cooperation and Development to curtail subsidies to the steel industry.

Beyond these broad arguments, the petitioners contend that potential bidders for AST were not aware of the nature and value of the concurrent subsidies bestowed on AST, nor were the subsidies reflected in the sales price. Specifically, the petitioners argue that the value of the GOI subsidies was not known to potential bidders because the various valuation studies that were prepared during the privatization process did not identify the value of the AST liabilities that remained in ILVA Residua. Further, the petitioners contend that in the underlying investigation, the Department had to resort to complex and detailed calculations in order to attribute a portion of ILVA's debt to AST. Regarding their claim that the value of the subsidies was not reflected in the price paid for AST, the petitioners restate their earlier argument that the GOI failed to receive any compensation from the purchaser for the debt forgiveness.

The petitioners refute TKAST's suggestion that the Department look to its remand determination in the underlying investigation. Instead, they urge the Department to review its brief, submitted to the Court on September 11, 2003, in the consolidated appeal of the French stainless steel sheet and strip case and Chief Judge Carman's opinion in Acciai Speciali Terni S.p.A. v. United States, 206 F. Supp. 1344 (CIT 2002), appeal filed, Fed. Cir. Ct. No. 03-1058 ("AST v. United States"). According to the petitioners, the brief and the Court's opinion "demonstrate that the Department's same person approach to privatization is eminently defensible and solidly based on the language of the statute and the SAA."

Finally, the petitioners dispute TKAST's claim that AST's debt forgiveness should be treated as a pre-privatization subsidy. The petitioners contend that the Department was inconsistent in characterizing the debt forgiveness as a concurrent subsidy while at the same time saying that it was bestowed prior to the privatization (and, hence, was known to all potential bidders).

TKAST's Argument: TKAST argues that the Department's treatment of the GOI's forgiveness of AST's debt as a concurrent subsidy is inconsistent with the Department's prior treatment of this debt forgiveness. In the remand determination in the underlying investigation, the Department characterized this debt forgiveness as a non-countervailable pre-privatization subsidy, according to TKAST. See Results of Redetermination Pursuant to Court Remand, Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States, Court No. 99-06-00364, Remand Order (CIT Feb. 1, 2001) (June 3, 2002). TKAST also points to Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils from Italy, 64 FR 30624 (June 8, 1999), where the Department determined that the GOI's forgiveness of AST's debt constituted a countervailable event in 1993, while the privatization of AST occurred a year later. TKAST

argues that the one year gap between the two events makes it very difficult for the Department to find that the debt forgiveness was concurrent with the privatization.

TKAST refutes the petitioners' claim that the value of the debt forgiveness was not known to potential bidders for AST. TKAST asserts that in determining whether fair market value was paid, the examination should focus on what debt was actually attributed to AST and not what debt could have been attributed to AST. TKAST contends that all potential bidders were clearly aware of the debt that was actually attributed to AST.

Department's Position: First, notwithstanding previous characterizations of certain subsidies, we note that, for the purposes of the Modification Notice, the Department is using the term "concurrent subsidies" to refer to subsidies which are given to facilitate or encourage privatization, or subsidies that are otherwise bestowed concurrent with a privatization. See Modification Notice, 68 FR at 37136. The concurrent subsidy we have examined in the case of AST is the debt assumed by ILVA Residua when AST was demerged from ILVA to prepare AST for privatization. At the time of the demerger, a portion of the debt that was attributable to AST remained in ILVA Residua. Thus, while this debt assumption occurred prior to AST's privatization, it now clearly falls within the definition of concurrent subsidies in the Modification Notice. Moreover, we do not believe that the Department's identification of concurrent subsidies exhibits the inconsistency alleged by the petitioners. A subsidy that is given in advance of the sale in order to prepare the company for sale is considered a concurrent subsidy and can be fully known to potential bidders.

Second, we disagree with the petitioners' contentions regarding the treatment of concurrent subsidies in the Appellate Body's ruling and the SCM Agreement. Neither the Appellate Body's ruling nor the SCM Agreement governs 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. Moreover, while the Appellate Body report does not explicitly address concurrent subsidies, this does not, in our view, mean that we should countervail such subsidies under the Modification Notice without first considering whether they are reflected in the price paid for the company. If these types of subsidies are reflected in the price paid for the privatized company, then under our new methodology, their mere existence does not automatically lead to the conclusion that fair market value was not received.

Third, the petitioners have urged us to follow the position taken by the Court of International Trade in AST v. United States and currently being advanced by the Department in appeals to the Court in other privatization cases. While we agree that the so-called "same person analysis" is a permissible interpretation of U.S. law, we believe that the methodology adopted in the Modification Notice and applied in this section 129 proceeding is equally permissible, as well as being consistent with the WTO's ruling in Certain Products.

Finally, we disagree with the line of argument advanced by the petitioners about bidders' knowledge of concurrent subsidies. Specifically, we do not agree that the bidders had to be

informed of the amount of debt attributable to AST that was assigned to ILVA Residua in order for the debt assumption to be reflected in the price for AST. This is because the result of the debt assumption by ILVA Residua was reflected in AST's balance sheet when it demerged from ILVA and before the company was put up for sale. Therefore, potential bidders were able to see the result of the concurrent subsidy and could value it in making their bids.

Comment 5: The Department's Determination Must be Applied Prospectively Only

Petitioners' Argument: The petitioners argue that the statute, the SAA and the Department's practice require that the results of the section 129 determination be applied only prospectively. Thus, the petitioners state that unliquidated entries made prior to the USTR's directive to the Department to implement its determination are governed by prior duty deposit rates and any duty rate set in the section 129 determination could only be prospective.

In addition, the petitioners argue that the Department should refrain from issuing a final determination in this section 129 proceeding and instead implement its new privatization methodology in an administrative review of this order. According to the petitioners, the SAA directs this course of action when an order is not being revoked and only the countervailing duty rate is affected. See SAA at 1025.

TKAST's Argument: TKAST argues that the Department should implement its section 129 determination as soon as possible and not wait to implement the determination in an administrative review in order to meet the deadline for compliance with the WTO determination. Further, TKAST notes that the Department has already addressed arguments regarding the timetable for implementation of the section 129 determinations in the Modification Notice.

Department's Position: We agree with the petitioners that the relief provided by this section 129 determination is prospective. We are therefore clarifying, in this determination, that changes in the deposit rate will become effective on the date that the USTR directs us to implement our findings (instead of the date of publication of this determination, as stated in the Draft Section 129 Determination).

However, we do not agree with the petitioners that we should wait until an administrative review is completed to effect the lower deposit rate resulting from our findings in this section 129 determination. The language from the SAA cited by the petitioners states that it "may" be possible to implement the WTO report recommendations in a future administrative review. In this instance, we believe that earlier implementation is necessary in order to comply with the WTO ruling and we have indicated that we intend to implement the section 129 results upon receiving the USTR's direction to implement (see Modification Notice, 68 FR at 37138).

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