C-475-821
Section 129 Determination
POI: 1996
Public Document
Grp 1/Off 1

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 Wire Rod from Italy

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On January 8, 2003, the Dispute Settlement Body ("DSB") of the World Trade Organization ("WTO") adopted the report of the WTO Appellate Body in United States - Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R (December 9, 2002) ("Certain Products"). Pursuant to the DSB findings in Certain Products, the Department 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 wire rod from Italy. See Final Affirmative Countervailing Duty Determination: Certain Stainless Steel Wire Rod from Italy, 63 FR 40474 (July 29, 1998) ("SSWR from Italy").

In SSWR from Italy, the Department determined that the Government of Italy ("GOI") had provided countervailable subsidies to Cogne Acciai Speciali S.r.L. ("CAS") during the period of investigation (1996), 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 October 1, 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 October 8, 2003, and rebuttal comments by October 14, 2003. See "Issues and Decision Memorandum for the Determination under Section 129 of the Uruguay Round Agreements Act: Final Affirmative Countervailing Duty Determination: Certain Stainless Steel Wire Rod from Italy " from Jeffrey May, Deputy Assistant Secretary, Import Administration, to James J. Jochum, Assistant Secretary for Import Administration, dated October 1, 2003. On October 8, 2003, the petitioners[1] submitted comments. On October 14, 2003, CAS submitted rebuttal comments.

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

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

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

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

[1] The petitioners in the original investigation were: AL Tech Specialty Steel Corp.; Carpenter Technology Corp.; Republic Engineered Steels; Talley Metals Technology, Inc.; and United Steelworkers of America, AFL-CIO/CLC.

Comment 2: The Sale of CAS 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 CAS After the Privatization
Comment 5: The Department's Determination Must be Applied Prospectively Only
Comment 6: CAS Should Not be Excluded from the CVD Order

CAS Privatization

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 CAS" ("CAS Privatization Analysis Memo"), which is on file in the Central Records Unit in room B-099 of the main Department building. The following analysis relies on the public record.

In 1988, the Instituto per la Ricostruzione Industriale ("IRI") agency of the GOI created ILVA S.p.A. to act as both an operating company and a holding company for government-owned steel production operations. In December 1989, IRI reorganized its steel producing subsidiaries; after the reorganization, Cogne Acciai Speciali S.p.A. ("Cogne S.p.A.") functioned as a wholly-owned subsidiary of ILVA. This organization produced stainless steel wire rod at its Aosta facility.

In 1991, ILVA GP, a subsidiary of ILVA, acquired Robles S.r.l ("Robles"). Robles was structured as a real estate holding company for the ILVA group. In the ILVA group, ownership of plant and equipment (productive assets) and ownership of buildings and land (non-productive assets) were separated. This was done for financial reasons and was common in Italy during the relevant period. As such, the land and buildings owned by Cogne S.p.A. were transferred to Robles in 1991.

In 1992, as a consequence of continued losses, ILVA began to evaluate several options regarding Cogne S.p.A., including: 1) placing it into bankruptcy; 2) selling its assets and liquidating the rest; and 3) expanding the company's distribution system. Ultimately, ILVA decided that more value could be extracted from the company if it was sold as an ongoing concern.

In accordance with its privatization plan, Cogne S.p.A. purchased Robles from ILVA GP. Thereafter, Cogne S.p.A. renamed Robles "Cogne Acciai Speciali S.r.l." ("CAS"), and Cogne S.p.A. also contributed its operating assets and certain liabilities to CAS. In exchange, Cogne S.p.A. received shares in CAS equal to the net value of its capital contribution, 40 billion lire. Thus, Cogne S.p.A. became the sole owner of CAS and, as of January 1, 1993, CAS became the operating company.

The GOI (through IRI and ILVA) offered CAS for sale through a bidding process. IRI began the bidding process by publishing notices of the proposed sale in Italian business and financial publications on April 9, 1993, and April 16, 1993. Interested parties were instructed to submit a written request for a "CAS dossier," which contained information necessary for parties to prepare a purchase offer. The dossier was prepared by the seller and contained a concise summary of information, including a description of the company put up for sale, a description of the manufacturing cycle, a description of the main plants, and production plans for the CAS facility.

In order to receive the CAS dossier, an interested party was required to submit its deed of incorporation and by-laws, information on the composition and members of the company's corporate capital, a list of the members of the company's board of directors and board of statutory auditors, and any other information which could be useful to IRI in evaluating the enterprise seeking to purchase CAS. The deadline for this stage of the bidding process was set as April 28, 1993.

Ten companies (six from Italy and four from abroad) submitted timely and complete requests for the CAS dossier. These inquiries were made primarily by other steel companies, although a few investment banks also expressed interest during this first stage. Five additional companies submitted incomplete requests which were rejected. Accordingly, the CAS dossier was sent to the ten companies which had complied with the submission requirements.

Four companies submitted bids, but these bids were not accepted by Cogne S.p.A. One bid was incomplete and the bidder did not show further interest in CAS. The remaining bidders were asked to improve their offers and submit new bids. Three companies submitted second bids. Once again, these bids were deemed unacceptable to Cogne S.p.A., which again asked the bidders to improve their proposals.

By the final stage of bidding, all three bids were similar. Each of the bidders agreed to pay the net worth of the company, calculated as share value minus losses, as of CAS's April 30, 1993, financial statements. The number of employees that each bidder promised to retain was similar. In addition, all three bidders required a restructuring fund in order to compensate for the accumulated bad will of the company.

After the submission of these bids, all but one of the bidders dropped out of the bidding process. The remaining bidder continued negotiations to purchase CAS. This bidder, GE. VAL., adjusted its offer in consideration of the losses suffered by CAS during 1993.

During the process leading up to the sale of CAS, Cogne S.p.A. was put into liquidation, becoming "Cogne S.p.A. in Liquidazione."[2] As a consequence of its liquidation, a "liquidator"

[2] At the time that CAS was formed, all of the productive assets and the liabilities related to industrial production were transferred to CAS, as described above. Cogne S.p.A. retained most of the long-term liabilities. The non-productive assets (i.e., land and buildings) were sold to the Autonomous Region of Valle d'Aosta. Ultimately, the regional government leased this property back to the purchaser of CAS, GE.VAL.

was appointed to ensure that the assets of Cogne S.p.A., including its shares in CAS, were sold to repay Cogne S.p.A.'s debts. Cogne S.p.A. in Liquidazione signed a purchase agreement with GE. VAL on December 27, 1993, effective on January 1, 1994. The shares were transferred to the new investors with a specific agreement signed on March 7, 1994. An integrative agreement was signed on March 17, 1994, providing for additional contingent payments.

Analysis

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

Arm's-Length Transaction

In determining whether subsidies received by CAS prior to its privatization continued to provide a benefit, the Department first considered whether the privatization of CAS 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 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.

Consistent with the SAA, in determining whether the sale of CAS constituted an arm's-length transaction, we must assess (a) whether it was transacted between unrelated parties, each acting in its own interest, or, (b) if transacted between related parties, whether the terms of the transaction were those that would exist if negotiated between unrelated parties. In the instant Section 129 determination, all the shares of CAS were sold to GE. VAL. The purchasers in this transaction were not related to the seller, or to CAS, and, therefore, we determine that the sale was an arm's-length transaction.[3]

Fair Market Value

Next, in determining whether the sale of CAS 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

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[3] We note that [Aldridge, a CAS subidiary, had Marzorati family members on its board of directors]. Regardless, there is no indication of [Marzorati family ownership in CAS prior to or during the privatization, or that they had any influence in the sale of CAS by virtue of their participation on the board of Aldridge].

any contemporaneous sales of companies comparable to CAS, 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 CAS, we first looked to see whether the government performed or obtained, and implemented the recommendations of, an objective analysis in determining the appropriate sales 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 noted above, Cogne S.p.A. contributed its operating assets to CAS at the end of 1992. Pursuant to Italian capital contribution procedures, an evaluation was made of the productive assets of Cogne S.p.A. at that time by a court-appointed appraiser. This independent valuation report was finished approximately one year prior to the completion of the privatization process.

A review of this report shows that the court-appointed appraiser relied on information submitted by ILVA management regarding the company and other data. The appraiser set the net value of CAS at 40 billion lire.

The petitioners have voiced certain concerns about the valuation report for CAS. These are addressed in our response to comment 2, below.

We determine that the valuation of CAS was objective and timely, as it was prepared shortly before the sales process was initiated. We further determine that the report was sufficiently complete in that it contained the information that would typically have been considered by a private, commercial seller contemplating this sale in these particular circumstances. We recognize that the report was perhaps not as comprehensive as we would normally expect under alternative, more typical privatization scenarios (e.g., that of AST or ILP). However, we find the circumstances surrounding the sale of CAS to be somewhat unique. Specifically, in light of the historical losses suffered by CAS (and its corporate predecessors) and the losses that continued after the sales process began, it is reasonable to believe that a market valuation of CAS's productive assets would be a primary basis for a commercial determination of a sales price. Additionally, the sale of CAS was part of a much larger effort by the GOI to privatize (or liquidate) all of its steel holdings. CAS was a very small part of those holdings.[4] Given CAS's

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[4] In late 1993, at the same time that CAS was being sold, the GOI was initiating the larger part of its privatization efforts by demerging ILVA into two main production companies, Acciai Speciali Terni ("AST") and ILVA Laminati Piani S.r.l. ("ILP"). These two companies were sold in 1994 and 1995, respectively. At the time of the demerger, the net worth of AST and ILP was 400 billion and (approximately) 1,311 billion lire, respectively. Thus, at a net worth of

relatively small size and considerable financial losses, we find, in this instance, that using the asset valuation report as a basis for negotiating a sales price was consistent with private, commercial sales practice.

(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.

The record indicates that no restrictions on foreign purchasers were imposed by the GOI. The GOI's intent to sell CAS was published in notifications in April 1993. These notifications did not contain restrictions on bidder origin or nationality. Furthermore, Cogne S.p.A. did not restrict the bidding to those companies involved in the steel producing business. In fact, during the first stage of bidding, investment banks expressed interest. As noted above, during the initial stage of bidding, Cogne S.p.A. imposed informational requirements on interested parties, including the bidder's deed of incorporation and by-laws, information on the composition and members of the company's corporate capital, and a list of the members of the company's board of directors and board of statutory auditors. None of these preliminary requirements was unreasonable, or served to limit the pool of interested bidders.

As the bidding process progressed, the GOI required that purchase offers contain the aggregate price offered for the entire corporate capital of CAS, as well as an industrial plan which the purchaser intended to implement in carrying on CAS's activity. After multiple rounds of bids, several interested parties dropped out of the competition. However, there is no indication that this was due to GOI actions that barred them from or impeded their efforts to buy CAS.

Finally, under the sales contract eventually negotiated between GE. VAL. and Cogne S.p.A., GE. VAL. undertook an obligation regarding future employment levels. (This obligation, which is proprietary, is discussed further in the CAS Privatization Analysis Memo) However, as noted above, all of the bidders made similar commitments. Therefore, to the extent that this obligation was imposed as a condition of sale, it does not appear to have served as a barrier to potential purchasers.

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40 billion lire, CAS was a relatively insignificant part of the privatization.

(3) Purchase Price

Another factor in determining whether the sale of CAS was for fair market value is whether the government accepted the highest bid and received payment in cash or close equivalent.

As discussed above, during the bidding process, Cogne S.p.A. initially received four formal bids. After evaluating the merits of each bid and the qualifications of the bidders, Cogne S.p.A. found one bid, to be incomplete. Cogne S.p.A. found the other bids to be inadequate and asked those bidders to improve their offers. Thereafter, a second round of bids was submitted. Again, these bids were found to be inadequate and, moreover, they were not submitted in the standardized format requested by Cogne S.p.A. to facilitate the comparison of the bids. Cogne S.p.A. asked these bidders to improve their bids once more. On July 28, 1993, these bidders submitted new offers.

We note that each of the three final bidders offered similarly structured bids. (The details of these bids are proprietary and are included in the <u>CAS Privatization Analysis Memo</u>) Subsequent to the submission of these offers in late July 1993, one bidder decided that it no longer wished to negotiate for CAS. Another bidder also dropped out, leaving GE.VAL. as the sole bidder. In subsequent negotiations, GE.VAL. adjusted its bid in consideration of further losses suffered by CAS during 1993.

Cogne S.p.A. accepted this remaining re-adjusted bid. The total price to be paid in cash for CAS was established at the time of the sales contract execution. The total amounts eventually paid reflected certain adjustments stipulated in the sales agreements.

As discussed above, the value of CAS's shares was set at 40 billion lire in December 1992. This amount was the starting figure in the calculation of the final price. Importantly, it was reduced to reflect CAS's performance between December 1992 and the time of the sale, December 1993. Thus, the cash price for CAS was the value of the shares, as of December 1992, less the loss incurred by CAS in 1993.

Although bidders dropped out over time, and only one bidder remained at the end, there is no evidence on the record to indicate that the GOI could have received a higher price for CAS. As discussed above, the GOI twice dismissed bids and pushed the bidders to submit better offers. Moreover, there is no indication that the GOI reduced competition by discouraging bidders from participating in the sale. Therefore, we determine that the GOI received the highest price for CAS and that it was paid in cash.

Committed Investments

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

As discussed above, under the terms of the sales agreement, the purchaser of CAS undertook a commitment regarding employment at CAS. Based on the fact that employment commitments were made by all of the bidders, we presume that such commitments were sought by the GOI. Further, this presumption is supported by the requirement that the bidders submit an industrial plan for CAS. Based on this, we determine that the requested commitment was known to potential bidders and that it was reflected in the sales price for CAS. Moreover, there is no evidence on the record that the buyer would be relieved of this obligation after the sale.

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 and, therefore, is fully extinguished, if: 1) the nature and value of the concurrent subsidies were fully transparent to all potential bidders and, therefore, reflected in the final bid values of the potential bidders, 2) the concurrent subsidies were bestowed prior to the sale, and 3) there is no evidence otherwise on the record demonstrating that the concurrent subsidies were not fully reflected in the sale price. See Modification Notice, 68 FR at 37137.

CAS received subsidies concurrent with its privatization in the amount of 253 billion lire. These are described under the heading "Pre-Privatization Assistance and Debt Forgiveness" in SSWR from Italy (See 63 FR at 40477). This amount includes the long-term debt that was left in Cogne S.p.A. when that company's productive assets were placed in CAS. It also includes the restructuring fund and other provisions made in connection with CAS's privatization.

These subsidies were known to the parties bidding on CAS. The debt that was left in Cogne S.p.A. was evident because it did not appear on CAS's balance sheet. The restructuring fund and the other provisions were part of the sales negotiation process. Therefore, there is no evidence on the record that the concurrent subsidies were not fully reflected in the sales price for CAS.

Fair Market Value - Conclusion

In determining whether the privatization of CAS occurred at fair market value, the record presents a mixed picture. In particular, as noted above, the valuation of CAS's assets, among other things, did not estimate a price for CAS as a going concern, as would typically be required by a private, commercial seller. However, for the reasons we have cited above, we find the circumstances of CAS's privatization to be somewhat unique, and that the asset valuation contained sufficient information typically considered by a private, commercial seller contemplating this sale in these particular circumstances.

Moreover, other aspects of the sales transaction support a conclusion that the sale was for fair market value. The GOI appears to have encouraged a vigorous bidding process for CAS and, although only one bidder remained at the end, there is no indication that the GOI failed to maximize the return on what it sold. Accordingly, we find the privatization of CAS to have been for fair market value.

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.[5] 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 argue that the GOI's historical ownership of major steel operations in the country, and repeated injections of capital into these companies as they suffered operating losses prevented the consolidation and true restructuring in the sector. According to the petitioners, the free interplay of supply and demand was therefore distorted, severely inhibiting the ability of the CAS transaction price to reflect fairly and accurately the subsidy benefit.

We determine that the petitioners have not sufficiently demonstrated that the broader market

[5] 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.

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 CAS 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 must demonstrate that the broader market conditions were severely distorted by the government, and the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action. 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.

Conclusion

The evidence presented on the record of this determination demonstrates that the privatization of CAS was at arm's-length and for fair-market-value. The baseline presumption that allocable, non-recurring, pre-sale subsidies continue to benefit the privatized CAS has thus been rebutted. We find that any pre-sale, allocable, non-recurring subsidies are extinguished in their entirety and, therefore, are non-countervailable.

As a result, we determine that the total estimated subsidy for CAS is 0.46 percent ad valorem. Under sections 703(b)(4) and 705(a)(3) of the Tariff Act of 1930, as amended, this rate is de minimis. Accordingly, upon direction from USTR to implement our findings, we will exclude CAS from the countervailing duty order on certain stainless steel wire rod from Italy.

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 CAS 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[6] ("the Act"). 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

[6] Section 771(5)(F) of the Act 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."

that "a subsidy cannot be concluded to have been extinguished solely by an arm's-length change in ownership."

CAS's Argument: CAS argues that the petitioners have mischaracterized the statute, the SAA, and the CAFC's holding in Delverde. CAS claims that these authorities do not state, or even suggest, that an arm's length privatization at fair market value is insufficient to extinguish prior subsidies (emphasis in original). CAS urges the Department to dismiss the petitioners' attempt to blur the distinction between an arm's length transaction and a fair market value transaction.

Department's Position: We agree with CAS that there is a distinction between arm's length and fair market value. As we stated in the Modification Notice: "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 analyzed the privatization of CAS consistent with this new methodology. In applying this new methodology, we determined that the sale of CAS 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 CAS are extinguished.

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

Petitioners' Argument: The petitioners argue that the Department's preliminary finding that CAS was sold at fair market value was not supported by the record. First, according to the petitioners, the Department focused on special, unique circumstances surrounding the sale of CAS and disregarded specific limitations in the objective valuation of CAS. The petitioners claim that this contradicts the Department's methodology, as outlined in the Modification Notice, which states that the Department will scrutinize such valuation studies carefully and that the lack of an adequate study would be "highly probative" in finding that the transaction was not at fair market value. The petitioners also object to the Department's characterization of the AST and ILP privatizations as "typical." Additionally, the petitioners contend that the size of the transaction should not be a basis for deviating from the Department's standard practice.

Second, the petitioners point out that under the Modification Notice, the Department will closely scrutinize transactions where there is only one bidder. Because of employment commitments imposed by the GOI, the petitioners contend that potential bidders may have been driven from the process.

Third, the petitioners argue that the Department missed the point on concurrent subsidies. In providing concurrent subsidies (including the restructuring fund), the petitioners argue that the GOI and the Government of the Valle d'Aosta demonstrated that they were continuing to focus on social and political considerations, and were not acting as normal commercial actors seeking to maximize profits.

CAS's Argument: CAS argues that IRI did obtain an objective analysis of CAS's assets before the sale of CAS, and that the Department's conclusions regarding the valuation were consistent with the Modification Notice. Thus, in CAS's view, the petitioners are arguing that the Department should ignore the study on the grounds that it was not "typical." However, CAS contends that the Department was correct in differentiating between CAS and the other Italian companies on the basis of CAS's small size. Moreover, CAS points out, CAS was sold prior to AST and ILP.

CAS argues further that it is not important whether the analysis of CAS was different from those prepared for AST and ILP because "typicality" is not one of the factors set forth in the Modification Notice. Instead, CAS states, the Modification Notice requires that the analysis be objective, timely and complete, and that the valuation of CAS meet all these criteria.

Regarding the employment commitments, CAS argues that the Department presumed such commitments were required by the GOI. CAS disagrees with this presumption. As indicated in its response, no such commitments were required by the GOI and the offering documents on the record show that no such restriction was imposed on bidders. CAS further disagrees with the petitioners' arguments on this point. While petitioners state that employment commitments may have limited the number of bidders, CAS contends that the petitioners do not explain how the commitments might have had this effect. Moreover, CAS claims, the Modification Notice is very clear in stating that the mere presence of committed investment does not mean that the sale was not at fair market value.

Finally, with regard to the alleged concurrent subsidies, CAS again contends that the petitioners' position diverges from the policy articulated in the Modification Notice. Specifically, the Department makes clear there that its determination of whether a transaction was at fair market value will not be based primarily on the selling government's motives or intent. CAS notes in this connection that the petitioners' references to the intent of the GOI and Government of Valle d'Aosta are unsubstantiated. Moreover, contrary to the petitioners' argument, CAS claims that the restructuring fund was not given to the purchasers. Instead, according to CAS, the fund was established prior the privatization and was fully disclosed to all bidders.

Department's Position: We continue to find that the GOI relied on an objective, timely and complete analysis of CAS in selling the company. As explained in the *Analysis* section, given the circumstances of CAS at the time it was sold, we believe that the value of the company's assets would serve as starting point in any sales process. This was because of the historic and ongoing losses suffered by CAS, and because in the move to privatize the Italian steel industry, CAS was a relatively small part. While we agree with the petitioners that the size of the entity being sold, in and of itself, should not determine the standards for a valuation analysis, we believe it is important to look at the facts of each privatization. Here, CAS was a small part of a larger privatization. In contrast, AST and ILP represented a large share of the operations being privatized. Thus, given CAS's relatively small size and considerable financial losses, we expect that a commercial seller would typically not obtain valuations (beyond the value of the assets) to assist in evaluating the offers being made.

Regarding the petitioners' additional arguments, we agree with CAS that the petitioners are essentially objecting to the methodology adopted in the Modification Notice. Although there was only one final bidder for CAS, we have carefully reviewed the record information about the sales process and there is no evidence on the record that any action taken by the GOI (including any committed investment) discouraged other bidders or otherwise caused interested companies to withdraw from the bidding process. Similarly, the concurrent subsidies identified by the petitioners were transparent and there is no evidence that they were not reflected in the sales price paid for CAS.

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 CAS through the various distortive fiscal incentives that were used to prepare CAS 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.

CAS's Argument: CAS claims that the petitioners are asking the Department to reconsider arguments which it already rejected in the Modification Notice. As stated there, the Department must find: (i) severe distortion of the broader market conditions present during a privatization and (ii) that the distortions resulted in a meaningfully different sales price. According to CAS, the petitioners have made general, unsupported allegations regarding the first part of this test and conclusory claims regarding the second.

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 cite to "various distortive fiscal measures," actions taken by the GOI as seller. The issues the GOI faced in preparing CAS 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 CAS 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 CAS and, hence, did not result in a sale for other than fair market value.

Comment 4: Concurrent Subsidies Continued to Benefit CAS 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. In addition, according to the petitioners, the SCM Agreement recognizes most concurrent subsidies as being countervailable. The petitioners further contend that potential bidders for CAS were not aware of the nature and value of the concurrent subsidies bestowed on CAS, nor were the subsidies reflected in the sales price.

CAS's Argument: CAS argues that the Department was correct in its analysis of the subsidies granted in preparing CAS for sale. Specifically, although overlooked by the petitioners, CAS points out that these subsidies were given prior to the privatization. Moreover, CAS claims that the Department analyzed these "concurrent" subsidies by applying the methodology described in the Modification Notice for concurrent subsidies.

Department's Position: We disagree with the petitioners' contentions. 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 it is true that the Appellate Body report does not explicitly address concurrent subsidies, this does not, in our view, mean that we can 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.

As explained above in the *Analysis* section, we have examined the concurrent subsidies bestowed on CAS and concluded that they were transparent and bestowed prior to the sale. Additionally, we found no evidence that the value of these subsidies was not reflected in the price paid for CAS, nor have the petitioners pointed to any evidence to support their claim in this regard.

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. Where a final section 129 determination results in a zero duty rate, the petitioners claim that this should be treated as equivalent to an administrative review with a zero rate.

In addition, the petitioners argue that the Department should refrain from issuing a final determination in this section 129 determination 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.

CAS's Argument: CAS contends that there is no indication that the Department intends to implement its section 129 determination retroactively. Moreover, CAS claims, the petitioners overlook the fact that a determination by the Department that CAS's subsidies were extinguished in the privatization would result in revocation of the countervailing duty order. Thus, CAS argues, the section 129 determination is not equivalent to a zero rate in an administrative review.

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 the results of the section 129 determination will become effective on the date that the USTR directs us to implement our findings (instead of the date of publication of this determination).

We disagree with the petitioners, however, about the action to be taken. We intend to exclude CAS from the countervailing duty order on certain stainless steel wire rod from Italy because the countervailable subsidies during the period of investigation were *de minimis.* (However, we do not intend to revoke the countervailing duty order as it continues to apply to Valbruna/Bolzano and "all others.") We do not agree with the petitioners that the results as they apply to CAS can be–or should be--effected through an administrative review. In particular, we note that negative investigative determinations are not among those that can be addressed in an administrative review.

Comment 6: CAS Should Not be Excluded from the CVD Order

Petitioners' Argument: The petitioners contend that although the Department found that CAS benefitted from *de minimis* subsidies during the period of investigation, the agency has also found that CAS benefitted from above *de minimis* subsidies. Specifically, in Stainless Steel Bar from Italy (67 FR 3163, January 23, 2002), the Department found that benefits provided by Valle d'Aosta amounted to an *ad valorem* rate of 1.18 percent. Thus, even without the pre-privatization subsidies, the petitioners contend that CAS continues to benefit from subsidies and should not be excluded from the countervailing duty order on SSWR.

CAS's Argument: CAS argues that it should be excluded from the order on SSWR because the Department has found that the countervailable subsidy rate in the original investigation would have been *de minimis* if the Department had followed its current privatization policy. CAS claims that the petitioners have attempted to complicate the issue by pointing to subsidies found in the original investigation through the lease of the Cogne industrial site and loans after the sale of the facility. However, the Department has continued to find those subsidies countervailable with the result that the subsidy rate during the POI was 0.46 percent. The petitioners have further raised benefits associated with the waste treatment plant, which CAS claims are irrelevant.

During the period of investigation for the SSWR case, the Department found that CAS received no benefits under this program. Thus, according to CAS, the Department should reject the petitioners' theory that CAS should not be excluded from the countervailing duty order on SSWR.

Department's Position: We agree with CAS that we should revise our final determination in the underlying investigation, *i.e.*, the countervailing duty investigation of SSWR. Based on our inquiry, we determine the subsidy rate for CAS during that period of investigation (1996) to be *de minimis*, and we will therefore exclude CAS from the order (on a prospective basis) if ordered to implement this section 129 determination. Subsidy rates calculated in other investigations covering other periods of investigation are not relevant to this determination.

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 in the Federal Register our implementation of this section 129 determination and exclude CAS from the countervailing duty order on certain stainless steel wire rod from Italy.

AGREE _________ DISAGREE _________

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James J. Jochum
Assistant Secretary
for Import Administration

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Date