

October 24, 2003

## ISSUES AND DECISION MEMORANDUM

**TO:** James J. Jochum  
Assistant Secretary  
for Import Administration

**FROM:** Joseph A. Spetrini  
Deputy Assistant Secretary  
Import Administration, Group III

**SUBJECT:** Section 129 Determination: Final Results of Expedited Sunset Review of Cut-to-Length Carbon Steel Plate from Spain

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### Background

On January 8, 2003, the Dispute Settlement Body (“DSB”) of the World Trade Organization (“WTO”) adopted the report of the WTO Appellate Body in United States - Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R (December 9, 2002) (“Certain Products”). Pursuant to the DSB findings in Certain Products, the Department changed its methodology for analyzing a privatization in the context of the countervailing duty (“CVD”) law. See Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 FR 37125 (June 23, 2003) (“Modification Notice”).

The Department is now applying this modification pursuant to Section 129(b)(2) of the Uruguay Round Agreements Act (“URAA”); we are conducting “Section 129 Determinations” with respect to twelve different CVD proceedings involving certain steel products originating in various member states of the European Communities. On September 24, 2003, the Department issued a draft Section 129 Determination in this case. The government of Spain (“GOS”) and the Delegation of the European Commission (“EC”) filed comments on the draft Section 129 Determination on October 1, 2003. International Steel Group (“ISG”) filed rebuttal comments on October 6, 2003. This memorandum constitutes our Section 129 Determination regarding the affirmative likelihood determination in the final results of the expedited sunset review of the order on cut-to-length carbon steel plate (“CTL Plate”) from Spain and addresses all comments submitted by the parties.

On July 9, 1993, the Department issued a final affirmative CVD determination, covering the period January 1, 1991 through December 31, 1991. See Final Affirmative Countervailing Duty

Determinations: Certain Steel Products From Spain, 58 FR 37374 (July 9, 1993) (“Investigation Determination”). There have been no administrative reviews of this CVD order. On September 1, 1999, the Department initiated a sunset review of the CVD order (64 FR 47767), pursuant to section 751(c) of the Tariff Act of 1930, as amended (“the Act”). On April 7, 2000 the Department issued an affirmative sunset determination. See Cut-to-Length Carbon Steel Plate From Spain; Final Results of Expedited Sunset Review of Countervailing Duty Order, 65 FR 18307 (April 7, 2000) (“Final Sunset Results”).

Section 129 of the URAA is the applicable provision governing the nature and effect of determinations issued by the Department to implement findings by WTO panels and the Appellate Body. Specifically, section 129(b)(2) provides that “{n}otwithstanding any provision of the Tariff Act of 1930 . . .,” within 180 days of a written request from the U.S. Trade Representative (“USTR”), the Department shall issue a determination that would render its actions not inconsistent with an adverse finding of a WTO panel or the Appellate Body. 19 U.S.C. § 3538(b)(2). The Statement of Administrative Action for the URAA (“SAA”) variously refers to such a determination by the Department as a “new,” “second,” and “different” determination. SAA at 1025, 1027. This determination is subject to judicial review separate and apart from judicial review of the Department’s original determination. 19 U.S.C. § 1516a(a)(2)(B)(vii).

In addition, section 129(c)(1)(B) of the URAA expressly provides that a determination under section 129 applies only with respect to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the 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.*

### **Privatization of ACERALIA**

The CVD order on cut-to-length steel plate from Spain provided a rate for ENSIDESA because it represented more than 85 percent of the exports of each class of merchandise to the United States. Prior to the sunset review, the GOS restructured ENSIDESA, conveying some of its assets and liabilities to CSA Planos, which was subsequently renamed ACERALIA. The GOS reported in its responses to the Department’s questionnaire for this Section 129 Determination that in the beginning of July 1997, ACERALIA was owned 100 percent by Sociedad Estatal de Participaciones Industriales (“SEPI”). The GOS has also reported that SEPI is the government agency responsible for completing the privatization process of ACERALIA. The GOS reported that the privatization of ACERALIA took place in three phases; 1) Arbed, a Luxembourg steel company, was selected as the technology partner of ACERALIA and acquired a 35 percent interest in ACERALIA on September 23, 1997 through a capital increase; 2) Corporation JM Aristrain and Corporation Gestamp, S.L., were selected to be accompanying industrial partners of ACERALIA, and were sold 11.2 percent of ACERALIA’s existing shares on March 18, 1998 and one percent on October 18, 1997 of ACERALIA, respectively; and 3) a public offering of 52.8

percent of ACERALIA's shares was executed on December 10, 1997. See Embassy of Spain's July 28, 2003 Questionnaire Response.<sup>1</sup>

## **Analysis**

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

However, even assuming *arguendo*, that, pursuant to an analysis under Section 129(b)(2) of the URAA, the Department were to find that the privatization of ACERALIA met all the criteria for rebutting the baseline presumption set forth in the Department's Modification Notice, such a finding would not affect the results in the instant determination that there would be a likelihood of continuation or recurrence of a countervailable subsidy if the order were revoked. Drawing on the guidance provided in the legislative history accompanying the URAA, specifically the SAA, H.R. Doc. No. 103-316, vol. 1 (1994), the House Report, H.R. Rep. No. 103-826, pt.1 (1994), and the Senate Report, S. Rep. No. 103-412 (1994), the Department issued its Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 FR 18871 (April 16, 1998) ("Sunset Policy Bulletin"), providing guidance on methodological and analytical issues, including the basis for likelihood determinations. The Department clarified that determinations of likelihood will be made on an order-wide basis (see section III.A.2 of the Sunset Policy Bulletin).

In the Final Sunset Results, our affirmative likelihood determination was based, in part, on our determination that there are countervailable recurring, non-allocable subsidies provided pursuant to programs that to the best of our knowledge continue to exist, including, for example, the 1987 Government Delegated Commission on Economic Affairs: Fund For Employment Promotion and Early Retirement. Even if we were to determine, pursuant to an analysis under the privatization methodology set forth in the Modification Notice, that non-recurring, allocable subsidies received by ACERALIA prior to the 1997 privatization would not continue through or after the period of review ("POR") of the sunset review, we would still make an affirmative likelihood determination based on the fact that subsidy programs that have provided recurring, non-allocable subsidies at above *de minimis* rates continue to exist.

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<sup>1</sup>We note the the GOS has submitted comments disputing the Department's characterization of the privatization. We will address this issue in the summary of comments.

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

In addition, the Department has received allegations that the privatization here was effected by "market distortions" such that any arm's length/fair market value findings would not warrant a determination that countervailable subsidies were extinguished by the privatization. We do not need to address the market distortion allegations, because we have not—for the reasons explained above—addressed the arm's length/fair market value issue.

### **Summary of Comments**

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

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

ISG argues that the Department has satisfied its obligations in this Section 129 Determination. ISG contends that the Department's obligation under a section 129 proceeding is to reconsider its prior determinations in light of its modified privatization methodology. Since the Department's prior determination is a sunset review, ISG continues, citing to 19 U.S.C. section 1675a(b), that the Department need only determine whether subsidies will likely continue or recur if an order is revoked. With respect to Spain, it is unnecessary to reach the privatization issue due to the Department's conclusion that recurring, non-allocable subsidies continue to exist at above *de minimis* levels. Since the Department's new privatization methodology only applies to non-recurring subsidies, a finding that such non-recurring subsidies did not pass through to the privatized company would not change the Department's affirmative likelihood determination with respect to recurring subsidies.

## Department's Position

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

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

We find that the Department's sunset likelihood determination is warranted with or without any consideration of the privatization of ACERALIA. The Department notes that in the Final Sunset Results, our affirmative likelihood determination was based, in part, on our determination that there are countervailable recurring, non-allocable subsidies provided pursuant to programs that to the best of our knowledge continue to exist. Even if we were to determine, pursuant to an analysis under the privatization methodology set forth in the Modification Notice, that non-recurring, allocable subsidies received by ACERALIA prior to the 1997 privatization would not continue through or after the POR of the sunset review, we would still make an affirmative likelihood determination based on the fact that subsidy programs that have provided recurring, non-allocable subsidies at above *de minimis* rates continue to exist.

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

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

## Department's Position

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

in the Department's determination under section 752(b)(1) of the Act of the likelihood of continuation or recurrence of a countervailable subsidy.

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

Therefore, in order to render the Department's determination not inconsistent with the findings of the Appellate Body, it is unnecessary to provide the Commission with a new net countervailable subsidy rate that is likely to prevail if the order is revoked.

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

The EC and Spain argue that, even if the Department is entitled to ignore the privatization, the Department cannot ignore record information submitted in the course of the sunset review. Specifically, the EC states that the record evidence submitted by the EC and Spain at the time of the sunset review demonstrates that the recurring subsidies found by the Department at the time of the original investigation were no longer granted.

### Department's Position

The Department's duty under section 129(b)(2) of the URAA, in this determination, is not to reconduct the original sunset review, but to render it not inconsistent with the findings of the WTO. The Department has done this by determining that, based on the conclusions in the sunset review, an affirmative likelihood determination continues to be appropriate.

The Department is not reopening issues in this determination that were resolved in the sunset review and were not found by the Appellate Body to be inconsistent with the SCM Agreement. The result, as explained above, is that we continue to make an affirmative likelihood determination based on the fact that certain subsidy programs continue to provide recurring, non-allocable countervailable subsidies at above *de minimis* rates beyond the sunset review.

### Comment 4: The Privatization of ACERALIA

The GOS argues that the Department's characterization of the restructuring process of ENSIDESA and the subsequent privatization of ACERALIA are factually incorrect. The GOS summarizes the restructuring process as follows:

- ENSIDESA transferred a series of its assets and liabilities to newly created entities named CSI PLANOS, S.A. (which would be renamed as ACERALIA in 1997) and CSI

PRODUCTOS LARGOS, S.A. (which would be absorbed in 1997 by the former). The transfer was made by means of a contribution in kind, in the context of a capital increase on the latter companies.

- Immediately after the above mentioned contributions, ENSIDESA sold 100 percent of the shares of CSI PLANOS, S.A. and CSI PRODUCTOS LARGOS, S.A. to the GOS.
- ENSIDESA did not disappear as a result of that restructuring process. It remained as the owner of the rest of the assets and liabilities not transferred to the new entities and it still exists as a legal entity owned by the Spanish state agency SEPI.

### Department's Position

The GOS states in its comments that it was the sole shareholder of both ACERALIA and ENSIDESA from 1995 through 1997. Assuming, *arguendo*, that the GOS's claim is true and ENSIDESA remains a state-owned non-privatized company, the Department determined in the original investigation that it would "not consider internal corporate restructurings that transfer or shuffle assets among related parties to constitute a 'sale' for purposes of evaluating the extent to which subsidies pass through from one party to another." See "General Issues Appendix" annexed to Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria 58 FR 37217, 58 FR 37264 (July 9, 1993) ("GIA"). In such restructurings, the Department noted that "the purchaser and owner of the entity are ultimately the same...{}." *Id.* Based on the GIA, the Department does not consider the transaction of assets between ENSIDESA and ACERALIA to be a sale since this transaction occurred at the time when both companies were owned by the GOS, and the GOS acted as both seller and purchaser. Therefore, for the reasons discussed above, regardless of the description of the sequence of events leading up to the privatization, it would have no impact on the Department's sunset likelihood determination.

### Comment 5: ACERALIA is Not the Recipient of any Subsidies nor is it the Legal Successor of ENSIDESA

The GOS argues that ACERALIA has always been a totally independent entity from ENSIDESA and it has not benefitted from any subsidies whether recurring or non-recurring, allocable or non-allocable. The GOS states that ACERALIA has never been appointed as the beneficiary of any subsidies or financial aids whatsoever. In addition, the GOS asserts that there has never existed any flow of hypothetical subsidies from ENSIDESA to ACERALIA. However, the GOS admits that the GOS was the sole shareholder of both ENSIDESA and ACERALIA from 1995 to 1997. The GOS further argues that even if the Department maintained its view that subsidies have been benefitting ENSIDESA on a recurrent basis, it would have to explain why ACERALIA also benefitted from these subsidies.

## Department's Position

In the original investigation of this case, as noted above in Comment 4, the Department determined that it would "not consider internal corporate restructurings that transfer or shuffle assets among related parties to constitute a "sale" for purposes of evaluating the extent to which subsidies pass through from one party to another." See GIA, 58 FR 37264. Based on the GIA, the Department does not consider the transfer of assets between ENSIDESA and ACERALIA to be a sale. Therefore, the GOS argument that these benefits are ENSIDESA's and not ACERALIA's has no impact on the Department's determination.

Given that the GOS challenged the Department's application of its change-in-ownership methodology to ACERALIA, the Department believes that ACERALIA is the legal successor in interest to ENSIDESA and, as such, received benefits from the countervailable subsidies provided to ENSIDESA. To the extent that these subsidies were recurring, non-allocable countervailable subsidies, the Department finds that ACERALIA continued to benefit from them after the 1997 privatization. The change in methodology articulated in the Modification Notice does not apply to recurring, non-allocable subsidies. See Modification Notice, 68 FR at 37127.

Assuming, in the alternative, that the GOS is correct that ENSIDESA, which continues to exist as a state-owned non-privatized company, is the sole beneficiary of both the recurring and non-recurring countervailable subsidies in question, then an analysis of the privatization of ACERALIA would have no bearing on the Department's Section 129 Determination. If the recipient of the countervailable subsidies remains state-owned, as the GOS asserts, then no intervening event has occurred requiring a redetermination of the benefit, pursuant to the Modification Notice. *Id.*

In either case, the Department's sunset likelihood determination would be affirmative and not inconsistent with the Appellate Body's findings.

The GOS also argues that if an affirmative sunset likelihood determination were made for ENSIDESA the Department would still have to explain why ACERALIA also benefitted from these subsidies. However, under U.S. law, sunset likelihood determinations are made on an order-wide basis. See section 751(c)(1) of the Act; see also SAA at 879 ("Commerce and the Commission will make their sunset determinations on an order-wide, rather than a company-specific basis.").

## Comment 6: The Date of the ARBED Purchase of ACERALIA Shares

The GOS argues that the Department incorrectly identified the date that ARBED purchased shares in ACERALIA as September 23, 1997. The GOS states that while the Framework Agreement for this transaction was signed on September 23, 1997, the actual purchase itself was not implemented until November 1997.



### Department's Position

Based on the evidence on the record, the Department finds that the date that the Framework Agreement was signed is the appropriate date of sale. The Department also notes that even if it were to accept the date proposed by the GOS, it would have no material impact in this determination.

### Conclusion

For the above reasons, we continue to find likelihood of continuation or recurrence of a countervailable subsidy with respect to the order on cut-to-length carbon steel plate from Spain. Based on our analysis, we are adopting the findings noted above and upon direction from the USTR to implement our findings, we will publish our implementation of this Section 129 Determination in the Federal Register.

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James J. Jochum  
Assistant Secretary  
for Import Administration

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Date