

October 24, 2003

**ISSUES AND DECISION MEMORANDUM**

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

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

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

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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 countervailing duty 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 the United Kingdom (“GOUK”) and the Corus Group plc (“Corus”) (together the “respondents”) filed comments on the draft Section 129 Determination on October 1, 2003. The Delegation of the European Commission (“EC”) filed comments 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 the United Kingdom and addresses all comments submitted by the parties.

On July 9, 1993, the Department issued a final affirmative CVD determination, covering the period April 1, 1991, through March 31, 1992.<sup>1</sup> See Final Affirmative Countervailing Duty Determination; Certain Steel Products from the United Kingdom, 58 FR 37393, (July 9, 1993). There have been no administrative reviews of this CVD order.<sup>2</sup> 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 the United Kingdom; Final Results of Expedited Sunset Review of Countervailing Duty Order, 65 FR 18309 (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 (the “SAA”) variously refers to such a determination by the Department as a “new,” “second,” and “different” determination. SAA at 1025, 1027. This determination is subject to judicial review separate and apart from judicial review of the Department’s original determination. 19 U.S.C. § 1516a(a)(2)(B)(vii).

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that a determination under section 129 applies only with respect to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the 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

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<sup>1</sup> The following programs were found to be countervailable: (1) Government Equity Infusions Into British Steel Corporation; (2) Canceled National Loan Fund Debt; (3) Regional Development Grants; (4) European Regional Development Fund Aid; and (5) European Coal and Steel Community Article 54 Loans/Interest Rebates. The Department published the countervailing duty order on certain steel products from the United Kingdom, finding a net subsidy of 0.73 percent *ad valorem* for Glynwed Steels Limited (“Glynwed”) and 12.00 percent *ad valorem* for “all other” British producers/exporters of the subject merchandise (58 FR 43748, August 17, 1993). The 12.00 percent rate was the rate applicable to BS plc.

<sup>2</sup> On September 17, 1995, the Department issued its Final Results of Redetermination Pursuant to Court Remand on General Issue of Privatization British Steel plc v. United States, slip op. 95-17 and Order (CIT Feb 9, 1995) (“Redetermination Final”) and determined the net subsidy for BS plc to be 21.30 percent *ad valorem*.

## Privatization of British Steel plc

In December 1987,<sup>3</sup> the UK Secretary of State for Trade and Industry announced that the GOUK intended to privatize the British Steel Corporation (“BSC”). In order to comply with corporate laws in the United Kingdom, BSC was reorganized as British Steel plc (“BS plc”). In November 1988, the GOUK sold two billion shares, at 125p per share, of BS plc to UK citizens and UK institutions. The GOUK also sold shares on equity markets in the United States, Canada, Japan, and Europe at the same price. The GOUK retained one special share which gave it the authority to prohibit any person or persons acting in concert from acquiring more than 15 percent of the shares. Employees of BS plc received a nominal amount of free shares and preferential treatment in obtaining shares. Pensioners of the company also received preferential treatment in obtaining shares.

### 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., the 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 BS plc 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). During the underlying CVD investigation, the

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<sup>3</sup> All factual statements contained in this section regarding the privatization of British Steel plc (“BS plc”) were derived from National Audit Report, Report by the Comptroller and Auditor General entitled “Department of Trade and Industry: Sale of Government Shareholding in British Steel plc,” February 8, 1990 (submitted July 28, 2003 as Exhibit 12 of the Response of the United Kingdom and Corus Group plc to the Department’s Questionnaire of July 2, 2003 in Cut-to-Length Carbon Steel Plate from the United Kingdom).

Department investigated another UK producer of subject merchandise, Glynwed, and determined a subsidy rate for Glynwed that was above *de minimis*. In the Final Sunset Results, the Department determined that countervailable subsidies would likely continue or recur in the event of revocation. See Final Sunset Results, 65 FR at 18309. Even if we were to determine, pursuant to an analysis under the privatization methodology set forth in the Modification Notice, that subsidies received by BS plc prior to the sale of shares would not continue through or after the POR of the sunset review, we would still make an affirmative likelihood determination based on the determination in the Final Sunset Results that programs previously determined to provide countervailable subsidies and/or benefit streams from such programs continue to benefit Glynwed, the other producer/exporter of the subject merchandise, for whom privatization is not an issue.

The Department has received allegations that the privatization here was affected 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 respondents argue that the Department disregarded its obligation in the Panel Report in United States – Countervailing Measures Concerning Certain Products from the European Communities (WT/DS212/R) (“Panel Report”) to review the privatization of BS plc to determine whether it was at arm's length and for fair market value.

On the matter of whether the privatization of BS plc was at arm's length and for fair market value, the respondents contend that the focus of this proceeding has been on BS plc and whether it benefits from pre-privatization subsidies provided to BSC. The respondents argue that the evidence compels the conclusion that pre-privatization subsidies did not continue to benefit BS plc after the arm's length market privatization in 1988.

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 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. ISG states that since the Department's prior determination is a sunset review, the Department need only determine whether subsidies will likely continue or recur if an order is revoked, citing to 19 U.S.C. § 1675a(b). Therefore, ISG concludes, the Department is not obligated to examine the privatization of BS plc when it makes an affirmative likelihood determination on the basis of continuation or recurrence of subsidies for Glynwed.

### Department's Position

The Appellate Body in Certain Products was asked to consider whether the Department's treatment of the privatization of BS plc 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 BSC, 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 reconsidering aspects of the sunset review in order to render the Department's action not inconsistent with the Appellate Body's findings.

We find that the Department's sunset likelihood determination is warranted without any consideration of countervailable subsidies received by BSC. The Department notes that, in the Final Sunset Results, the Department found that programs previously determined to provide countervailable subsidies and/or benefit streams from such programs continued to exist for Glynwed, another producer/exporter of the subject merchandise, for whom privatization is not an issue. This is a sufficient basis for concluding that there is an affirmative likelihood of continuation or recurrence of a countervailable subsidy if the order were revoked. Since sunset determinations are made on an order-wide rather than a company-specific basis, examining the privatization of BS plc is not necessary for the Department to arrive at an affirmative sunset likelihood determination for the order as a whole. See Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 FR 18871, 18874 (April 16, 1998).

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

The respondents argue that 19 U.S.C. § 1675a(b)(1)(B) obligates the Department to report a rate of likely subsidization to the International Trade Commission (“ITC”). According to respondents, “the Department is obligated to determine whether ‘any change in the program which gave rise to the net countervailable subsidy . . . has occurred that is likely to affect the net countervailable subsidy,’ and the rate that it must provide to the ITC under 19 U.S.C. § 1675a(b)(3) as the ‘net countervailable subsidy that is likely to prevail if the order is revoked.’”

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 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 determining this new rate.

### Department's Position

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

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

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

The EC argues that, even if the Department is entitled to ignore the privatization, the Department cannot ignore record information submitted in the course of the sunset review. Specifically, the EC argues that the Department ignored record evidence which shows that the subsidization of 0.73 percent for Glynwed cannot possibly have continued or recurred at the time of the sunset review. The EC contends that it made clear in its submission to the Department in the sunset

review that the kinds of subsidies found in the original investigation (regional development grants and transportation assistance) were no longer available to EC steel producers for several years before the POR of the sunset review.

#### Department's Position

The Department's duty, in reaching a determination under section 129(b)(2) of the URAA for this case, is not to reconduct the original sunset review in its totality, but to render it not inconsistent with the findings of the Appellate Body. The Department has done this by determining that, based on the conclusions in the sunset review regarding Glynwed, the Department's sunset likelihood determination was proper.

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

#### Comment 4: Department's Determination of Continuation or Recurrence of Subsidies on an Order-Wide Basis

Respondents argue that the Department should revoke the CVD order with respect to Corus because there is no evidence that revocation of the order would lead to continuation or recurrence of subsidies for Corus. The respondents argue that the Department was wrong to conclude that the order should not be revoked with respect to Corus because of a likelihood of subsidization of Glynwed if the order were revoked.

ISG contends that Department practice supports the Department's determination that even if it had applied the privatization methodology and determined that some or all of the countervailable subsidy programs no longer benefitted BS plc, the Department makes such determinations on an "order-wide" basis. Therefore, since at least one other company, Glynwed, continued to benefit from countervailable subsidies above *de minimis* levels, the Department would still have made an affirmative likelihood determination with respect to the Order. ISG cites to Welded Carbon Steel Pipes and Tubes from Turkey; Final Results of Full Sunset Review, 65 F.R. 17486 (April 3, 2003) and Stainless Steel Wire Rod from Spain; Final Results of Expedited Sunset Review, 56 F.R. 6166 (Feb. 8, 2000) to support its contention that the Department properly made its determination on an order-wide basis. Moreover, ISG argues that there is no provision in either U.S. law or in the WTO Agreement on Subsidies and Countervailing Measures that requires the Department to assess a likelihood of continuation of subsidization in the context of individual companies.

#### Department's Position

U.S. law requires that the determination of the likelihood of continuation or recurrence of a countervailable subsidy be made on an order-wide basis. See section 751(c)(1) of the Act

("[T]he administering authority and the Commission shall conduct a review to determine . . . whether revocation of the countervailing or antidumping duty order . . . would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy..."); See also SAA at 879 "Commerce and the Commission will make their sunset determinations on an order-wide, rather than a company-specific basis." As discussed above, the Department continues to find that an affirmative likelihood determination is appropriate based on the Department's findings that programs previously determined to provide countervailable subsidies and/or benefit streams from such programs continued to exist for Glynwed, another producer/exporter of the subject merchandise, for whom privatization is not an issue.

#### Comment 5: Department's Use of Information Submitted in the Comments

The respondents submitted new factual information in their comments, which they request that the Department consider. Respondents suggest three reasons for concluding that the Department was wrong to determine that subsidies would continue or recur with respect to Glynwed if the order were revoked. These are: (1) Glynwed is no longer the producer of the subject merchandise, because Niagara LaSalle purchased this aspect of their business in 1999; (2) there is no evidence in the original investigation that Glynwed was benefitting from subsidies in 1993; and (3) the subsidy programs which were the basis for the best information available CVD rate against Glynwed either no longer exist or are not available to the UK steel industry. They argue the information is both timely and appropriate for three reasons: (1) the Department did not give any notice that it intended to rely on factors relevant to Glynwed in its Section 129 Determination and thus it would be unfair of the Department to decide those issues without affording the respondents an opportunity to address these factual issues by submitting new information; (2) the submission of new factual information is timely pursuant to § 351.301(b)(3) of the regulations which provides that the record is closed 140 days after the date of publication of the notice of initiation; and, (3) the submission of new information is also timely because, pursuant to § 351.218(f)(1) of the regulations, the parties will have 30 days after the preliminary determination to file relevant factual information.

The EC does not discuss the propriety or timeliness of submitting new information on the record, but does submit information regarding the purchase of Glynwed's universal wide flats by Niagara LaSalle.

ISG argues that respondents waived their opportunity to raise their arguments that the subsidy programs no longer exist by failing to appear and file substantive comments in the Department's sunset review. ISG notes that § 351.218(d)(2)(iii) of the regulations provides that failure to submit a substantive response to a notice of initiation constitutes a waiver of participation. ISG contends that it would be unreasonable of the Department to now turn back the clock and afford the respondents an opportunity to make arguments they should have made from the outset.



### Department's Position

The Department's duty, in rendering a determination in this case under section 129(b)(2) of the URAA, is not to reconduct the original sunset review in its totality, but to render it not inconsistent with the findings of the Appellate Body. The Department has done this by determining that, based on the conclusions in the sunset review regarding Glynwed, 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 find on an order-wide basis that revocation of the order would likely lead to the continuation or recurrence of a countervailable subsidy.

### **Conclusion**

For the above reasons, we continue to find likelihood of continuation or recurrence of a countervailable subsidy with respect to the order on CTL Plate from the United Kingdom. Based on our analysis, we are adopting the findings noted above. 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