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Section 129 Determination  
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October 24, 2003

**MEMORANDUM**

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

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

**RE:** Issues and Decision Memorandum for the Section 129 Determination:  
Final Affirmative Countervailing Duty Determination: Stainless Steel  
Sheet and Strip in Coils from France

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

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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 of Commerce (“the Department”) changed its methodology for analyzing privatizations in the context of the countervailing duty law. See Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 FR 37125 (June 23, 2003) (“Modification Notice”). In accordance with Section 129 of the Uruguay Round Agreements Act (“Section 129”), the Department is applying the new methodology to the 1995-1997 privatization of Usinor Sacilor (“Usinor”), the sole producer/exporter under investigation in the countervailing duty determination of stainless steel sheet and strip in coils from France. See Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils from France, 64 FR 30774 (June 8, 1999) (“French Stainless”). In French Stainless, the Department determined that the Government of France (“GOF”) had provided countervailable

subsidies to Usinor during 1997, the period of investigation (“POI”), including certain allocable, non-recurring subsidies conferred prior to the company’s privatization beginning in 1995.

In the instant Section 129 determination, using the Department’s modified methodology for analyzing privatizations, the Department is examining whether the pre-privatization, allocable, non-recurring subsidies to Usinor which were found to be countervailable in French Stainless were eliminated as a result of the company’s privatization in 1995-1997. Under the modified methodology, if a party demonstrates that the privatization was at arm’s length and for fair market value, then any allocable, non-recurring subsidies received prior to the privatization will be presumed to be extinguished and, therefore, non-countervailable; conversely, if a party does not demonstrate that the privatization was at arm’s length and for fair market value, then the unamortized amount of any allocable, non-recurring, pre-privatization subsidy benefit continues to be countervailable. See Modification Notice, 68 FR at 37127.

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

- Comment 1: Scope of Section 129 Determination
- Comment 2: Objective Analysis
- Comment 3: Market-Clearing Price
- Comment 4: Issuance of New Shares
- Comment 5: Market Distortion
- Comment 6: Relevance of Prior Remand Redeterminations
- Comment 7: Prospective Effect of Section 129 Findings
- Comment 8: Pass-Through Rate

## **ANALYSIS**

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

### **Usinor’s Privatization**

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

indirectly government-controlled (the “public” stable shareholders), including Credit Lyonnais. Usinor employees held 3.55 percent.

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

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

#### *Incremental Privatization*

As discussed above, the GOF sold its shares in Usinor over three years. The Modification Notice does not specify the Department’s approach as to how (or whether) the new methodology should be applied to “gradual privatizations,” and provides the public additional opportunity for further comment on this particular issue.<sup>1</sup> As suggested in the Modification Notice, the impact of a gradual or similar type of privatization on the countervailability of pre-privatization subsidies may depend on the particular facts and circumstances of the privatization in question.

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

In this regard, we note the petitioners’ claim that the GOF indirectly retained a controlling stake. Specifically, the petitioners contend that the voting rights of the public stable shareholders, who held a combined 10.1 percent, indirectly allowed the GOF to continue to exert control, since the combined stake of those shareholders was five times larger than that of the next biggest (private)

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<sup>1</sup>The Department did not receive any further comments on this issue, pursuant to this request for additional comments.

stable shareholder. We disagree that the ownership interest retained by the GOF is sufficient to control the company in this context. While the number of shares held by the GOF may be considerably larger than the number held by the next shareholder, the GOF would still need to obtain the support of owners accounting for 40 percent of the shares to control the company, and there is no evidence on the record that the GOF could readily do so. Therefore, because the GOF sold “all or substantially all” of Usinor and did not retain control of the company, we determine that it is appropriate to apply the new methodology to the privatization of Usinor (see Modification Notice, 68 FR at 37127).

### *Arm’s-Length Transaction*

In determining whether allocable, non-recurring subsidies received by Usinor prior to its privatization continued to benefit post-privatization Usinor, the Department first considered whether the privatization of Usinor was conducted through an arm’s-length transaction. For a definition of an “arm’s-length transaction,” we rely on guidance from the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, Vol. 1 (1994) (“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, at 928.

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

We have analyzed these categories of sales individually. We have done this because the methods of selling to these groups differed, as did the prices they paid for their shares. Consistent with the SAA guidance, in determining whether these various purchases constituted arm’s-length transactions, we must assess (a) whether they were transacted between unrelated parties, each acting in its own interest, or, (b) if transacted between related parties, whether the terms of the transaction were those that would exist if negotiated between unrelated parties.

#### *a. French and International Public Offerings*

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

*b. Stable Shareholders*

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

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

*c. Employee Shares*

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

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

*Fair Market Value*

Next, in determining whether the sale of Usinor was for fair market value, consistent with the methodology in the Modification Notice, 68 FR at 37127, we first considered whether there was any contemporaneous, benchmark price actually observed in the marketplace for a comparable company or assets. However, in the instant determination, we find no evidence in the record of any contemporaneous sales of companies comparable to Usinor, nor any appropriate market benchmark price. Consequently, we have relied on an examination of various "process factors" from among the non-exhaustive list in the Modification Notice.

*Objective Analysis*

In evaluating the process used by the GOF to sell Usinor, we first looked to see whether the government performed or obtained, and implemented the recommendations of, an objective analysis in determining the appropriate sales process and price. We considered whether the

analysis was objective, timely (i.e., completed prior to agreement on the final transaction price), and complete (i.e., contained the information typically considered by private, commercial sellers contemplating such a sale).

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

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

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

#### *Artificial Barriers to Entry*

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

The next largest group was covered by the French offering. Purchasers falling in this category could obtain shares for FF 86 per share. Although this pool of potential purchasers was limited by virtue of nationality, we do not believe that this limitation presented a meaningful reduction in

the competition for these shares. The pool of potential purchasers included French as well as other EC member state citizens. Finally, the French offering was publicized through announcements by the GOF. Therefore, we find that the sales process for shares covered by the French offering was generally open and unrestricted.

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

With respect to the stable shareholders, we note that a public announcement was made inviting investors to become stable shareholders. However, we find two aspects of the sales process that possibly served to limit the number of investors that might otherwise have come forward to purchase these shares. First, in its invitation, the GOF imposed a minimum investment requirement of one million shares. At a price of FF 90.78 per share, this required a sizeable commitment and could have had the effect of excluding many potential investors.

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

#### *Purchase Price*

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

As noted above, the prices in the French and international public offerings were FF 86 and FF 89, respectively. The evidence on the record shows that because of the high level of demand, the number of shares made available in the French offering had to be increased.<sup>2</sup> First, shares were moved from the international offering to the French offering. Additional shares subsequently were made available under the provision allowing the bank syndicate responsible for the sale to obtain more shares from the GOF. Regarding the international offering, shares were originally moved from there to the French offering but, subsequently, the number of shares sold under the international offering was increased. At the conclusion of the initial offering, nearly 50 million shares had been sold under the French offering for a price of FF 86 per share and nearly 199 million shares had been sold under the international offering at a price of FF 89 per share.

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

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

#### *Committed Investment*

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

In the instant determination, the restrictions or conditions imposed on the sales of Usinor's shares were aimed at encouraging the purchasers to hold onto their shares for a period of time. The stable shareholders signed an agreement that restricted their ability to resell their shares. (These restrictions are described at pp.23-24 of the *Prospectus*.) Purchasers in the French public offering were eligible to receive free shares from the GOF if they held onto their shares for 18 months. (This is described at p.22 of the *Prospectus*.) Similarly, as noted above, employees paid

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

a discounted price or were eligible for free shares from the GOF if they held onto their shares. (The employee offering is described at p.23 of the *Prospectus*.) Thus, three categories of share purchasers were required or encouraged not to sell their shares for some period after the offerings.

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

The petitioners contend that the issuance of new shares was similar to a committed investment in that the proceeds were allowed to return to the company, and that this limited the GOF’s return on the privatization. However, we disagree with the petitioners. As an initial point, we have not found that Usinor was unequityworthy during 1995 when the capital increase occurred. None of the funds for the capital increase came from the government; rather, they were provided by the new (private) shareholders who purchased the newly issued shares. Since the increase in capital was accompanied by a corresponding increase in the number of shares outstanding, and the shares were sold at the same price as the rest of the public offering, we find that the transaction did not result in extra value that was owed to the government.<sup>3</sup>

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

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

#### *Concurrent Subsidies*

“Concurrent subsidies” are subsidies given to facilitate or encourage a privatization, or that are otherwise bestowed concurrent with a privatization. Modification Notice, 68 FR at 37136. These subsidies often include debt forgiveness and rescheduling, subsidized loans, and worker-

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<sup>3</sup> The issue of the capital increase was addressed in French Stainless, at Comment 6, and in the remand redetermination of French Stainless. See Results of Redetermination Pursuant to Court Remand: Allegheny Ludlum Corp. et al. v. United States, Court No. 99-09-00566, Remand Order (CIT January 4, 2002) (“Stainless Remand”), at Comment 7, which has been submitted on the record as Appendix 1 to the respondents’ July 28, 2003, submission.

related benefits. In the instant determination, according to the respondents, no concurrent subsidies accompanied the privatization.

#### *Fair Market Value - Conclusion*

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

#### *Market Distortions*

Under the Department's new privatization methodology, a party can obviate the arm's-length and fair-market-value rebuttal to the baseline presumption by demonstrating (a) that the action or inaction of the government – in its capacities as regulator and policymaker – had severely distorted the broader market conditions at the time of the privatization and (b) that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action or inaction.<sup>4</sup> 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 allege that, at the time of Usinor's privatization, the French steel market was characterized by a history of intervention and subsidization by the GOF, which prevented true restructuring of the steel sector. Additionally, the petitioners contend that the European steel market was suffering from overcapacity. According to the petitioners, these

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<sup>4</sup> 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 distorted the free interplay of supply and demand and, consequently, even if the GOF maximized its return on the privatization of Usinor, the purchase price for Usinor did not accurately reflect the true fair market value of the company. In support of their first contention, the petitioners cite to the Department's prior findings in French Stainless and CTL Plate. They cite to a published EU report (but did not submit a copy for the record) in support of their contention regarding overcapacity.

The EC and the GOF claim that France is a market economy in which the interplay of supply and demand is unfettered and the value of privatized companies is dictated by the market. The respondents contend, moreover, that the historical government-ownership of companies does not automatically distort the market and that overcapacity is irrelevant to the market distortion analysis. The respondents further argue that the petitioners' allegations are unsubstantiated and fail to overcome their burden on the issue of market distortion for the purposes of this determination.

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

## CONCLUSION

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

Consequently, the Department is amending the countervailable subsidy rate calculated for Usinor in French Stainless by excluding from consideration the pre-privatization subsidies found to be non-countervailable in this determination. As a result, we determine that the total estimated net countervailable subsidy rate for Usinor is 0.37 percent ad valorem.

Under section 705(a)(3) of the Act, the Department is directed to disregard a de minimis subsidy, in this case less than 1 percent. Therefore, we determine that Usinor did not receive

countervailable subsidies. Upon direction from the U.S. Trade Representative (“USTR”) to implement this Section 129 determination, we intend to revoke the CVD order on French Stainless.

## ANALYSIS OF COMMENTS

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

*Petitioners’ Argument:* The petitioners argue that the Department’s determination is inconsistent with the statute, the SAA, and the decision of the Court of Appeals for the Federal Circuit (“the Court”) in Delverde. See Delverde Srl v. United States, 202 F.3d 1360 (Fed. Cir. 2000), reh’g granted in part (June 20, 2000) (“Delverde”). Specifically, the petitioners contend that the Department’s determination that pre-privatization subsidies to AST have been extinguished “solely by virtue of an arm’s-length sale at fair market value” is inconsistent with the change in ownership provision in Section 771(5)(F) of the Tariff Act of 1930, as amended.<sup>5</sup> 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 accompanying the Uruguay Round Agreements Act, H. Doc. 103-316, Vol. 1. (1994) (SAA) at 928. The petitioners further contend that the Court’s decision in Delverde reiterates that “a subsidy cannot be concluded to have been extinguished solely by an arm’s-length change in ownership.”

*Respondent’s Argument:* In rebuttal, Usinor contends that the petitioners misread the statute and mischaracterize the Department’s finding. The respondent argues that, contrary to the petitioners’ assertion, section 771(5)(F) of the Act provides the Department with discretion and does not preclude the Department from finding that an arm’s-length transaction for fair market value extinguishes prior subsidy benefits. According to the respondent, the statute says nothing to compel the Department’s determination in the present case, in which the Department conducted a detailed examination of the facts surrounding the privatization of Usinor and found that the change in ownership was an arm’s-length transaction for a fair-market-value price that reflected the subsidy benefits fairly and accurately. Similarly, the respondent claims that the SAA emphasizes that the statute does not automatically and in all cases compel the outcome of the Department’s inquiry into an arm’s-length change in ownership. Additionally, according to the respondent, the Delverde decision simply prohibits a per se ruling and states that the Department must examine the facts and circumstances of a change in ownership to determine if subsidy benefits continue. Finally, the respondent notes that the Department did, in fact, consider

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

the petitioners' evidence regarding market distortions, but found, nevertheless, that the record supported the conclusion that the transaction price fairly and accurately reflected the subsidy benefits.

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

In the instant section 129 determination, as described in the "Analysis" section above, we have analyzed the privatization of Usinor consistent with this new methodology. In applying this new methodology, we determined that the sale of Usinor, with the exception of the employee offering, was at arm's length, for fair market value, and that there were no broader market distortions. On this basis, we find that all pre-privatization subsidies to Usinor are extinguished, except for the subsidies not extinguished by the employee offering.

## **Comment 2: Objective Analysis**

*Petitioners' Argument:* The petitioners contend that the Warburg study is not an objective analysis because Warburg as a principal member of the management syndicate for the international offering. Consequently, the petitioners state, Warburg stood to gain financially from the sale and had an "overarching, strategic perspective," and this served to skew its analysis. The petitioners claim that the Department has previously found that the actions and decisions of a financial advisor that stands to benefit directly from a stock sale may not be treated as equivalent to an objective analysis that would be conducted by a normal commercial investor (citing to Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea, 68 FR 37122 (June 23, 2003), accompanying "Issues and Decision Memorandum" (June 16, 2003), at 10 ("Korean DRAMS")).

According to the petitioners, an analysis of translated portions of the Warburg study provided by Usinor on October 14, 2003, confirms the petitioner's contention that the GOF was not concerned with maximizing its return on the privatization of Usinor and, therefore, received less than fair market value in the transaction. (Because the petitioners' substantive comments regarding the Warburg valuation analysis involve business proprietary information, we have prepared a separate supplemental memorandum. See Memorandum to James J. Jochum, Assistant Secretary for Import Administration, dated October 24, 2003, "Substantive Commentary Regarding the Warburg Valuation Analysis" ("Warburg Analysis Memo"), incorporated herein by reference, which is on file in the Central Records Unit in room B-099 of the main Department building.) The petitioners add that, although Usinor shares ultimately

received higher prices, the fact that the shares were oversubscribed demonstrates that the GOF undervalued the company.

*Respondent's Argument:* The respondent argues that the petitioners offer no rationale as to why Warburg would benefit from an undervaluation of the company. The respondent claims that the fact that Warburg received fees for its services provides no incentive for Warburg to have undervalued Usinor. The respondent contends that the record shows the share prices were based on independent objective analyses of Usinor's market value, and notes that, at the verification in the underlying investigation, the Department examined the use of valuation analyses by both Warburg and Paribas. Specifically, the respondent notes that GOF officials explained at verification that the minimum values set by the Privatization Commission, through the guidance of the Warburg and Paribas valuation analyses, were based on a detailed examination of Usinor, trends in the world steel market, and three valuation methods: (1) comparison to the stock market values of other European steel producers, (2) evaluation of net liquidity flows, and (3) the estimated value of the company's net reevaluated assets. The respondent concludes that the share prices actually paid for Usinor shares reflected these objective valuations of the company. (See Warburg Analysis Memo for a summary of Usinor's rebuttal to the petitioners' specific substantive comments regarding the Warburg analysis.)

*Department's Position:* We disagree with the petitioners' contention that Warburg's role as one of the lead managers of the international offering undermines the objectivity of its valuation study. The petitioners have provided no evidence to support this claim. Nor have they explained why this role would lead Warburg to skew the valuation. Further, we find the petitioners' reference to Korean DRAMS to be inapposite. In that case, the Department was examining whether Citibank's dual roles as a lender to Hynix and as an advisor in Hynix's restructuring efforts meant that Citibank's actions should not be used as a benchmark for other commercial lenders. See Korean DRAMS, at 9. Here, however, we do not see how or why Warburg's role as a manager of the international offering might lead it to prepare a different valuation than would have been prepared by another advisor not involved in the offering. (See Warburg Analysis Memo for further discussion of the Department's position on the petitioners' and Usinor's specific substantive comments regarding the Warburg analysis.)

### **Comment 3: Market-Clearing Price**

*Petitioners' Argument:* The petitioners dispute the Department's conclusion that a market-clearing price was set for Usinor's shares. Noting that the French and international public offerings were over-subscribed, the petitioners argue that Usinor's share price was set too low. Therefore, the petitioners conclude, the GOF did not act as a normal commercial actor seeking to maximize profits.

*Respondent's Argument:* Since a market-clearing price is one that equates supply with demand, the respondent argues that the offering of additional shares to meet the demand (i.e., to clear the

market) demonstrated that, ultimately, the Usinor shares were sold at a market-clearing price. Thus, the respondent concludes, the GOF maximized its return on the sale.

*Department's Position:* In examining whether the GOF had set a market-clearing price for the shares of Usinor, the Department looked at both the prices set for the shares and the supply of shares. Although more shares were demanded than were initially supplied by the GOF at the prices set for the French and international public offerings, this situation had been planned for by the GOF prior to the privatization. Specifically, the *Prospectus* makes clear that a specified number of additional shares would be made available in both offerings to meet demand. Therefore, while there was excess demand (oversubscription) for the initial supply of shares, the supply was adjusted according to pre-established procedures to meet the demand and clear the market. Essentially, the GOF sold more shares at a lower price instead of selling fewer shares at a higher price.

#### **Comment 4: Issuance of New Shares**

*Petitioners' Argument:* The petitioners dispute the Department's finding that the issuance of new shares was not similar to a "committed investment" and contend that the Department erred in supporting its decision by reference to prior findings that the issuance of new shares was not a subsidy. The proper analytical framework, the petitioners argue, is whether the GOF acted as a normal commercial actor. Thus, it is irrelevant that Usinor was equityworthy in 1995 or that the GOF did not provide the funds. The petitioners suggest that the GOF authorized the new issuance, with proceeds accruing to Usinor, to address what the GOF saw as Usinor's significant indebtedness and need for substantial investment, instead of seeking to maximize the GOF's returns.

*Respondent's Argument:* The respondent agrees with the Department's conclusion that the issuance of new shares did not constitute profits foregone by the GOF. According to the respondent, there is no evidence that the new issuance was inconsistent with normal commercial practice, or that it was not fully reflected in the fair-market-value price of the Usinor shares, or that it distorted the price that the purchasers were willing to pay.

*Department's Position:* The petitioners argue that in authorizing the share increase (with the proceeds to accrue to Usinor) the GOF did not maximize its revenue from the sale of Usinor and, hence, did not act like a commercial seller. However, in order to conclude that the GOF did not maximize its revenue, we would need to find that the GOF could have earned more from the sale of its shares if it had not authorized the share increase. There is no evidence to support such a finding. To the contrary, as the Department has consistently found, the GOF did not forego any value in this transaction.

Moreover, even if the Department analyzed the share increase as committed investment, the terms of the share increase were publicized in the *Prospectus*. There was no understanding or

expectation that the buyers would be relieved of the commitment. Finally, there is no evidence indicating that the committed investment was not fully reflected in the transaction price.

#### **Comment 5: Market Distortion**

*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.

With respect to Usinor, the petitioners urge the Department to take notice of a public report by the European Commission, which notes "serious difficulties" in the EU steel industry due to a "sharp deterioration" in the EU steel market since the mid-1990s.<sup>6</sup> The petitioners contend that repeated interventions by the GOF in support of Usinor maintained the French steel sector capacity in the face of operating losses and the need for restructuring (citing to French Stainless, 64 FR at 30774). The oversupply, according to the petitioners, depressed steel prices in Europe and lowered the value of Usinor's future revenue, and this distortion in the market prevented the price of Usinor stock from reflecting the subsidy benefit accurately.

*Respondent's Argument:* The respondent contends that the petitioners' generalized claims of overcapacity in the European steel market are insufficient to demonstrate that broader market conditions were so severely distorted by GOF action that the price was "meaningfully different" from what it otherwise would have been. Fair market value, according to the respondent, does not require a perfect market untouched by the hand of government, as the Department has recognized in past proceedings (citing to Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Non-Frozen Apple Juice Concentrate From the People's Republic of China, 64 FR 65675 (November 23, 1999)). The respondent adds that nothing in the record demonstrates that the GOF intentionally manipulated the share price of Usinor stock, which received market-clearing prices.

*Department's Position:* As the petitioners suggest, we have taken note of the EU's statements about the deterioration of the European steel market. We continue to determine that the

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<sup>6</sup> The petitioners cite to a European Commission decision, of which an online copy is available at <http://europa.eu.int>, entitled, "94/259/ECSC: Commission Decision of 12 April 1994 concerning aid to be granted by Italy to the public steel sector (ILVA group)," Official Journal L 112 , 03/05/1994 p. 0064-0070.

petitioners have not demonstrated that the broader market conditions were severely distorted by the government and that the transaction price was meaningfully different than it would have been absent the allegedly distortive government action.

#### **Comment 6: Relevance of Prior Remand Redeterminations**

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

*Petitioners' Argument:* The petitioners did not comment on this point.

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

#### **Comment 7: Prospective Effect of Section 129 Findings**

*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.

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

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

Thus, the petitioners state that unliquidated entries made prior to the USTR's directive to the Department to implement its determination are governed by prior duty deposit rates and any duty rate set in the Section 129 determination could only be prospective. Similarly, the petitioners request that the Department refrain from revoking the countervailing duty order, arguing that no retroactive revocation of the original order is permitted by this proceeding; a Section 129 determination with a zero duty rate, according to the petitioners, is equivalent to an administrative review with a zero rate.

*Respondent's Argument:* Usinor notes that, based on similar findings of an arm's-length and fair-market-value privatization, the Department has already determined in Stainless Remand and CTL Remand that benefits were extinguished. The respondent contends that, under section 705(a)(3) of the Act, a countervailing duty order cannot be sustained on the basis of a finding of de minimis countervailable subsidies. Thus, the respondent argues, failure to revoke the order on French Stainless would be directly contrary to the statute, and also contrary to the Department's obligation under Section 129 to make a determination that is not inconsistent with the WTO Appellate Body's findings in Certain Products. Accordingly, the respondent claims that the Department should declare its intent to implement the Stainless Remand determination and revoke the order on French Stainless *ab initio*.

*Department's Position:* We agree with the petitioners that our Section 129 determination has prospective effect. This was discussed in the Modification Notice in relation to the setting of new cash deposit rates: "these section 129 determinations will establish new cash deposit rates for all producers for whom the rates from the relevant segments of the proceedings are still applicable and will apply with respect to unliquidated entries of the subject merchandise which are entered, or withdrawn from warehouse, for consumption on or after the date on which the United States Trade Representative directs the Department to implement that determination." See Modification Notice, 68 FR at 37138 (Comment 13). However, we disagree with the petitioners that revocation is not appropriate. Because the subsidy rate for the period of investigation in the underlying investigation is de minimis, there is no basis to sustain the order after the USTR directs us to implement our finding.

At the same time, as explained in Comment 6, we disagree with the respondent's contentions regarding the relevance of prior remand redeterminations. More importantly, we disagree with the respondent's argument that we should revoke the countervailing duty order *ab initio*. Section 129(c)(1)(B) of the URAA clearly states that a Section 129 determination by the Department applies to entries after the date of the USTR's direction to implement. Thus, the statute precludes the course suggested by the respondent. Therefore, entries of merchandise prior to the USTR's direction to implement are unaffected by this Section 129 determination.

#### **Comment 8: Pass-Through Rate**

*Respondent's Argument:* Usinor claims that no factual or legal distinction exists between this Section 129 determination and the redeterminations in Stainless Remand and CTL Remand. In

those redeterminations, the respondent notes, the Department concluded that the privatization of Usinor was accomplished through an arm's-length, fair-market-value transaction, and the agency found a zero countervailable subsidy rate. Hence, the respondent argues, that same rate should prevail in the Section 129 determination.

However, Usinor argues that, if the Department continues to find that the employee share offering resulted in a benefit pass-through, the Department should correct its calculation of the pass-through to accurately reflect the extent to which the Department actually found the employee shares to be below fair market value. In support of its position, the respondent cites to Viraj Group, Ltd., v. United States, 162 F.Supp. 2d 656, 662-63 (CIT 2001), in which the court stated that the court “must not only assess the reasonableness of Commerce’s actions in light of its statutory requirements but also whether the agency’s actions further the antidumping statute’s underlying goal of accuracy.”<sup>9</sup> According to the respondent, by using a pass-through rate of 5.16 percent (i.e., equivalent to the total employee stake), the Department has assumed that the employee shares were purchased at a price of zero. The respondent contends that, to calculate the benefit pass-through accurately, the Department must account for the price discount, i.e., the difference between the fair market value of the shares and the price paid. This results in a countervailing duty rate of 0.20 percent which, the respondent notes, continues to be de minimis.

*Petitioners’ Argument:* The petitioners contend that the respondent is confused about the Department’s new methodology. Under the new methodology, according to the petitioners, if the Department finds that a sale was not at arm’s length and for fair market value, then the Department will find that allocable, non-recurring subsidies are not extinguished. The petitioners note that the Department is not calculating a new benefit from the privatization, but instead whether pre-privatization subsidies continue to benefit the company. Since the sale of shares to the employees did not constitute an arm’s-length transaction and the price paid was below fair market value, the employee offering did not meet the conditions for extinguishment.

As to the respondent’s claim that the pass-through rate should be adjusted to reflect the discount, the petitioners liken the Department’s pass-through calculation to its treatment of equity infusions that are inconsistent with normal commercial considerations (i.e., treating the entire amount as a grant). Hence, the petitioner contends that the draft determination correctly calculated the pass-through benefit.

*Department’s Position:* As discussed above, we disagree with the respondent’s contention that the findings in the prior remand redeterminations are applicable to the instant determination. See Comment 6.

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

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

## RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related countervailing duty calculations accordingly. If these recommendations are accepted, and upon direction from the USTR to implement our findings, we will publish our implementation of this section 129 determination in the Federal Register.

AGREE \_\_\_\_\_ DISAGREE \_\_\_\_\_

\_\_\_\_\_  
James J. Jochum  
Assistant Secretary  
for Import Administration

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Date