

and address, and give reasons for any recommendation. Affirmative comments must be double-spaced and limited, in total, to twenty-five pages. Rebuttal comments must be double-spaced and limited, in total, to ten pages. All comments will be made available for public viewing in the Department's Central Records Unit, which is located in room B-099 of the main Department building.

FOR FURTHER INFORMATION CONTACT: Greg Campbell, Office of Policy, Import Administration, U.S. Department of Commerce, Room 3712, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482-2239.

SUPPLEMENTARY INFORMATION:

Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the Tariff Act of 1930, as amended (the Act). Citation to "section 123" refers to section 123 of the URAA.

Background

On February 2, 2000, the U.S. Court of Appeals for the Federal Circuit in *Delverde Srl v. United States*, 202 F.3d 1360, 1365 (Fed. Cir. 2000), reh'g granted in part (June 20, 2000) (Delverde III), rejected the Department's application of its change-in-ownership methodology, as explained in the General Issues Appendix, to the facts before it in that case.¹ The Federal Circuit held that the Act, as amended, did not allow the Department to presume conclusively that the subsidies granted to the former owner of Delverde's corporate assets automatically "passed through" to Delverde following the sale. Rather, where a subsidized company has sold assets to another company, the Court held that the Act requires the Department to examine the particular facts and circumstances of the sale and determine whether the purchasing company directly or indirectly received both a financial contribution and benefit from the government. *Delverde III*, 202 F.3d at 1364-1368.

Pursuant to the Federal Circuit's finding, the Department developed a new change-in-ownership methodology, first announced in a remand determination on December 4, 2000, following the Federal Circuit's decision in *Delverde III*, and also applied in Grain-Oriented Electrical Steel from Italy; Final Results of Countervailing Duty Administrative Review, 66 FR 2885 (January 12, 2001). The first step

under this methodology was to determine whether the legal person to which the subsidies were given was, in fact, distinct from the legal person that produced the subject merchandise exported to the United States. If we determined that the two persons were distinct, we then analyzed whether a subsidy was provided to the purchasing entity as a result of the change-in-ownership transaction. If we found, however, that the original subsidy recipient and the current producer/exporter were the same person, then we determined that the person continued to benefit from the original subsidies, and its exports were subject to countervailing duties to offset those subsidies.

This "same-person" privatization methodology is currently the subject of appeals to the Federal Circuit in three cases: *Acciai Speciali Terni S.p.A. v. United States*, Ct. No. 01-00051; *Allegheny Ludlum Corp. v. United States*, Ct. Nos. 03-1189 and 03-1248; and *GTS Industries, S.A. v. United States*, Ct. Nos. 03-1175 and 03-1191.

On August 8, 2001, the European Communities requested that the DSB establish a dispute settlement panel to examine the practice of the United States of imposing countervailing duties on certain products exported from the European Communities by privatized companies. A panel was established, the case was briefed and argued, and the Panel circulated its final report on July 31, 2002. United States—Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/R (July 31, 2002) (Panel Report). The United States appealed certain findings and conclusions in the Panel Report, and the Appellate Body circulated its report on December 9, 2002. United States—Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R (December 9, 2002) (AB Report). The AB Report, and the Panel Report as modified by the AB Report, were adopted by the DSB on January 8, 2003. On January 27, 2003, the United States informed the DSB that it would implement the recommendations and rulings of the DSB in a manner consistent with its WTO obligations.

Section 123 of the URAA is the applicable provision governing the actions of the Department when a WTO dispute settlement panel or the Appellate Body finds that a regulation or practice of the Department is inconsistent with any of the Uruguay Round agreements. Specifically, section 123(g)(1) provides that, "[i]n any case in which a dispute settlement panel or the Appellate Body finds in its report that

a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until * * * (C) the head of the relevant department or agency has provided an opportunity for public comment by publishing in the **Federal Register** the proposed modification and the explanation for the modification; * * *." Accordingly, consistent with section 123(g)(1)(C), we are publishing this proposed modification and the explanation for the proposed modification of the Department's privatization methodology, and are providing opportunity for public comment.

Legal Context

To provide a context for the discussion of changes to our new privatization methodology, we first review the statutory provisions governing the Department's analysis of changes in ownership in the countervailing duty context, as explained in the Statement of Administrative Action (SAA) and interpreted by the Court. The statute provides, at section 771(5)(F), that "[a] change in ownership of all or part of a foreign enterprise or the productive assets 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 SAA explains that "* * * the term 'arm's-length transaction' means 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." SAA, at 258. The SAA further explains that

[s]ection 771(5)(F) is being added to clarify that the sale of a firm at arm's length does not automatically, and in all cases, extinguish any prior subsidies conferred. * * * The issue of the privatization of a state-owned firm can be extremely complex and multifaceted. While it is the Administration's intent that Commerce retain the discretion to determine whether, and to what extent, the privatization of a government-owned firm eliminates any previously conferred countervailable subsidies, Commerce must exercise this discretion carefully through its consideration of the facts of each case and its determination

¹ Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 FR 37217, 37225 (July 9, 1993).