

MEMORANDUM

DATE: August 6, 2002

TO: Faryar Shirzad
Assistant Secretary for Import Administration

FROM: Richard W. Moreland
Deputy Assistant Secretary
Group I, Import Administration

SUBJECT: Issues and Decision Memorandum: Final Results of the 2000
Countervailing Duty Administrative Review of Certain Pasta from
Italy

Summary

We have analyzed the brief submitted by Delverde S.p.A., a respondent in the administrative review of the countervailing duty order on certain pasta from Italy. The “Subsidies Valuation Methodology” and “Analysis of Programs” sections below describe the decisions made in this review. Also below is the “Analysis of Comments” section which contains the Department of Commerce’s response to the issues raised in the brief. We recommend that you approve the positions we have developed in this memorandum.

I. Subsidies Valuation Methodology

1. Change in Ownership

In 1991, a respondent, Delverde S.p.A. (“Delverde”), purchased a pasta factory from an unaffiliated party. The previous owner of the purchased factory had received non-recurring countervailable subsidies prior to the transfer of ownership. In Certain Pasta from Italy: Final Results of Third Administrative Review, 66 FR 11269, February 23, 2001 (“Third Review - Final Results”), the Department of Commerce (“the Department”) applied the methodology it developed to comply with the Court of Appeals for the Federal Circuit’s (“Federal Circuit” or “Court”) decision in Delverde, SrL v. United States, 202 F.3d 1360 (Fed. Cir. 2000), reh’g granted in part, (June 20, 2000) (“Delverde III”), to Delverde’s purchase of the pasta factory. In that review, we determined that the post-sale entity was, for all intents and purposes, the same “person” as the pre-sale entity. Consequently, all the elements of a subsidy are established with regard to the post-sale Delverde and it continues to benefit in full from all of the subsidies that

were provided to the previous owner prior to the sale of the pasta factory.

No new information has been submitted in this review to warrant reconsideration of our determination regarding the countervailability of these subsidies. Therefore, we have included these subsidies in the countervailing duty rate calculated for Delverde. See Comments 1, 2, 3, 4, and 5 of this memorandum.

2. Benchmarks for Long-term Loans and Discount Rates

In accordance with sections 351.505(a)(1) and 351.524(d)(3) of the regulations, we have used the amount the company actually paid on a comparable commercial loan as the benchmark/discount rate, when the company had a commercial loan in the same year as the government loan or grant. However, there were several instances where a company did not take out any loans which could be used as benchmarks/discount rates in the years in which the government grants or loans under review were received. In these instances, consistent with section 351.505(a)(3)(ii) of the regulations, we used a national average interest rate for a comparable commercial loan. Specifically, for years prior to 1995, we used the Bank of Italy reference rate, adjusted upward to reflect the mark-up an Italian commercial bank would charge a corporate customer, as the benchmark interest rate for long-term loans and as the discount rate. For subsidies received in 1995 and later, we used the Italian Bankers' Association ("ABI") interest rate, increased by the average spread charged by banks on loans to commercial customers plus an amount for bank charges.

3. Allocation Period

In Certain Pasta from Italy: Final Affirmative Countervailing Duty Determination, 61 FR 30288, June 14, 1996, ("Pasta Investigation"), the Department used as the allocation period for non-recurring subsidies the average useful life ("AUL") of renewable physical assets in the food-processing industry as recorded in the Internal Revenue Service's 1977 Class Life Asset Depreciation Range System ("the IRS tables"), *i.e.*, 12 years. However, the U.S. Court of International Trade ("CIT") ruled against this allocation methodology for non-recurring subsidies (see British Steel plc v. United States, 879 F.Supp. 1254, 1289 (CIT 1995) ("British Steel I")). In accordance with the CIT's remand order, the Department determined that the most reasonable method of deriving the allocation period for non-recurring subsidies was a company-specific AUL of renewable physical assets. This remand determination was affirmed by the CIT on June 4, 1996 (see British Steel plc v. United States, 929 F.Supp. 426, 439 (CIT 1996) ("British Steel II")).

Consistent with the ruling in British Steel II, we developed company-specific AULs in the first and second administrative reviews of this order (see Certain Pasta from Italy: Final Results of Countervailing Duty Administrative Review, 63 FR 43905, 43906, August 17, 1998 ("First Review - Final Results") and Certain Pasta from Italy: Final Results of the Second Countervailing Duty Administrative Review, 64 FR 44489, 44490-91, August 16, 1999 ("Second Review - Final Results"). We used these company-specific AULs to allocate any non-recurring

subsidies that were not countervailed in the investigation. However, for non-recurring subsidies which had already been countervailed in the investigation, the Department used the original allocation period, *i.e.*, 12 years, because it was deemed neither reasonable nor practicable to reallocate those subsidies over a different time period. This methodology was consistent with our approach in Certain Carbon Steel Products from Sweden: Final Results of Countervailing Duty Administrative Review, 62 FR 16549 (April 7, 1997).

The third review of this order was subject to section 351.524(d)(2) of the regulations. Under this regulation, the Department used the AUL in the IRS tables as the allocation period unless a party could show that the IRS tables did not reasonably reflect the company-specific AUL or the country-wide AUL for the industry. If a party could show that either of these time periods differed from the AUL in the IRS tables by one year or more, the Department would use the company-specific AUL or the country-wide AUL for the industry as the allocation period. In Third Review - Final Results, all subsidies received in the period of review (“POR”) were assigned a 12-year allocation period consistent with the IRS tables.

In the current review, no respondent has contested the 12-year AUL in the IRS tables. Therefore, we are assigning a 12-year allocation period to non-recurring subsidies received in the POR, as well as any non-recurring subsidies received in prior years by companies that were not included in previous reviews.

No interested party has objected to this allocation methodology or commented on this issue.

4. Attribution

De Cecco: De Cecco has responded on behalf of two members of the De Cecco Group: F.lli De Cecco di Filippo Fara San Martino S.p.A. (“Pastificio”) and Molino e Pastificio F.lli De Cecco S.p.A. (“Pescara”). Pastificio and Pescara manufacture pasta for sale in Italy and the United States. Pastificio and Pescara are directly or indirectly 100 percent-owned by members of the De Cecco family. Effective January 1, 1999, Molino F.lli De Cecco di Filippo S.p.A. (“Molino”), a third member of the De Cecco Group on whose behalf De Cecco responded in the fourth administrative review, was merged with Pastificio and ceased to be a separate entity. The Department will continue to consider countervailable any benefits received by Molino in past administrative reviews and allocated over a period that extends into or beyond the current POR. In accordance with section 351.525(b)(6)(i) and (ii) of the regulations, we are attributing subsidies received by Pastificio and Pescara to the combined sales of both.

Delverde: Consistent with section 351.525(b)(6)(ii) of the regulations and the most recent administrative review of this order, we have continued to treat the two affiliated companies, Delverde and Tamma, as separate respondents (see, Certain Pasta from Italy: Final Results of Fourth Administrative Review, 66 FR 64214, December 12, 2001 (“Fourth Review - Final Results”). Thus, subsidies received by Delverde have been assigned solely to that company. Tamma is not being reviewed, and no subsidies received by Tamma have been attributed to Delverde.

Labor: Labor has responded on behalf of itself and Pastificio Balzano s.r.l. (“Balzano”), which was established by Labor on March 31, 2000. During the POR, Balzano had no sales, assets, employees, or operational activities, and received no benefits from the Government of Italy. Labor had no other affiliates during the POR.

IAPC: IAPC has no affiliated companies located in Italy and has, therefore, responded only on its own behalf.

No interested party has objected to our attribution methodology or commented on this issue.

II. Analysis of Programs

A. Programs Previously Determined to Confer Subsidies

1. Law 64/86 Industrial Development Grants

In Certain Pasta from Italy: Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review, 67 FR 16722 (April 8, 2002) (“Preliminary Results”), we determined that De Cecco and Delverde received countervailable subsidies during the POR from industrial development grants given under Law 64/86. No new information, evidence of changed circumstances, or comments from interested parties were received on this program.

We continue to find these grants to be countervailable. Thus, the net subsidies for this program are 0.82 percent *ad valorem* for De Cecco and 1.23 percent *ad valorem* for Delverde.

2. Law 488/92 Industrial Development Grants

In the Preliminary Results, we determined that De Cecco and Delverde received countervailable subsidies during the POR from industrial development grants given under Law 488/92. No new information, evidence of changed circumstances, or comments from interested parties were received on this program.

We continue to find these grants to be countervailable. Thus, the net subsidies for this program are 0.34 percent *ad valorem* for De Cecco and 0.60 percent *ad valorem* for Delverde.

3. Industrial Development Loans Under Law 64/86

In the Preliminary Results, we determined that De Cecco and Delverde received countervailable subsidies during the POR from industrial development loans given under Law 64/86. No new information, evidence of changed circumstances, or comments from interested parties were received on this program.

We continue to find these loans to be countervailable. Thus, the net subsidies for this program are 0.52 percent *ad valorem* for De Cecco and 0.25 percent *ad valorem* for Delverde.

4. Law 341/95 Interest Contributions on Debt Consolidation Loans

In the Preliminary Results, we determined that De Cecco received countervailable subsidies during the POR from interest contributions given under Law 341/95. No new information, evidence of changed circumstances, or comments from interested parties were received on this program.

We continue to find these interest contributions to be countervailable. Thus, the net subsidy for this program is 0.02 percent *ad valorem* for De Cecco.

5. Social Security Reductions and Exemptions—Sgravi

In the Preliminary Results, we determined that all the responding companies, except IAPC, received countervailable subsidies during the POR from social security reductions and exemptions. No new information, evidence of changed circumstances, or comments from interested parties were received on this program.

We continue to find these social security reductions and exemptions to be countervailable. Thus, the net subsidies for this program are 0.08 percent *ad valorem* for De Cecco, 0.17 percent *ad valorem* for Delverde, and 1.57 percent *ad valorem* for Labor.

6. IRAP Exemptions

In the Preliminary Results, we determined that De Cecco and Delverde received countervailable subsidies during the POR from IRAP tax exemptions. No new information, evidence of changed circumstances, or comments from interested parties were received on this program.

We continue to find these tax exemptions to be countervailable. Thus, the net subsidies for this program are 0.10 percent *ad valorem* for De Cecco and 0.02 percent *ad valorem* for Delverde.

7. Law 304/90 Export Marketing Grants

In the Preliminary Results, we determined that Delverde received countervailable subsidies during the POR from export marketing grants provided under Law 304/90. No new information, evidence of changed circumstances, or comments from interested parties were received on this program.

We continue to find these grants to be countervailable. Thus, the net subsidy for this program has not changed and is 0.37 percent *ad valorem* for Delverde.

8. Export Restitution Payments

In the Preliminary Results, we determined that De Cecco and Delverde received countervailable subsidies during the POR from export restitution payments. No new information, evidence of changed circumstances, or comments from interested parties were received on this program.

We continue to find these restitution payments to be countervailable. Thus, the net subsidies for this program are 0.02 percent *ad valorem* for De Cecco and 0.19 percent *ad valorem* for Delverde.

9. IRPEG Exemptions

In the Preliminary Results, we determined that De Cecco applied partial exemptions it received under Law 449/97 to estimated IRPEG payments it made during the POR. No new information, evidence of changed circumstances, or comments from interested parties were received on this program.

We continue to find the IRPEG partial exemptions to be countervailable. However, the net subsidy for this program is 0.00 percent *ad valorem* for De Cecco.

B. Programs Determined to Be Not Used

1. Law 64/86 VAT Reductions
2. Export Credits under Law 227/77
3. Capital Grants under Law 675/77
4. Retraining Grants under Law 675/77
5. Interest Contributions on Bank Loans under Law 675/77
6. Interest Grants Financed by IRI Bonds
7. Preferential Financing for Export Promotion under Law 394/81
8. Urban Redevelopment under Law 181
9. Grant Received Pursuant to the Community Initiative Concerning the Preparation of Enterprises for the Single Market (“PRISMA”)
10. Law 183/76 Industrial Development Grants
11. Law 598/94 Interest Subsidies
12. Law 236/93 Training Grants
13. European Regional Development Fund (“ERDF”)
14. Duty-Free Import Rights
15. Remission of Taxes on Export Credit Insurance Under Article 33 of Law 227/77
16. Law 1329/65 Interest Contributions (“Sabatini Law”)
17. European Social Fund (“ESF”)

No new information, evidence of changed circumstances, or comments from interested parties were received on these programs. Therefore, we continue to determine that these programs were not used by the respondents in this review.

III. Analysis of Comments

Comment 1: Application of the Department's privatization methodology to Delverde (Delverde)

Delverde argues that the Department's "same person" methodology adopted in response to the remand ordered by the Federal Circuit in Delverde III, and followed in the preliminary determination of this review and in the Third Review - Final Results, contravenes the Court's decision in Delverde III. In addition, Delverde asserts that the "same person" approach has expressly been held unlawful by the CIT in at least four separate decisions.

Specifically, Delverde contends that the Federal Circuit invalidated the change-in-ownership methodology that had been articulated by the Department in the 1993 General Issues Appendix, Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 FR 37217 (July 9, 1993) ("GIA") and ordered the Department to examine the "facts and circumstances" of the sale, and to determine whether Delverde received a "financial contribution and a benefit" as a result of this change-in-ownership transaction. Delverde states that the Department failed to comply with these explicit instructions of the Court, and instead developed and applied a methodology in which the Department did "not reach the question of whether a subsidy {had} been provided to Delverde as a result of the change-in-ownership transaction." Delverde explains that the Department, instead of following the Court's instructions, analyzed whether the "person" that received the pertinent subsidies prior to sale of the pasta operation was the same "person" subject to the instant review. Delverde claims that this approach is outside the scope of the Court's Delverde III-specific instructions, and that the Department misconstrued the Court's decision as permitting such an analysis.

Delverde further argues that the "same person" approach is inconsistent with recent CIT decisions as the CIT has on four separate occasions held the approach to be unlawful. Delverde maintains that the CIT has rejected the Department's argument that the "same person" approach is permissible because it is not expressly barred by the Court's decision in Delverde III. Delverde claims that in the recent decisions, the CIT advances the criteria laid out in the Court's decision in Delverde III that Commerce cannot rely on any *per se* rule and that Commerce must look at the facts and circumstances of the transaction to determine if the purchaser received a subsidy, directly or indirectly, for which it did not pay adequate compensation.

Department's Position: We disagree with Delverde that the Department's "same person" change-in-ownership methodology is not in accordance with law or in conformance with the Federal Circuit's decision in Delverde III. In several recent cases, various judges of the CIT have ruled on the Department's "same person" test. Some found that this methodology was not in accordance with law and the cases were remanded to the Department for further proceedings: see Allegheny Ludlum v. United States, 182 F. Supp. 2d 1357 (CIT 2002); GTS Industries S.A. v. United States, 182 F.Supp. 2d 1369 (CIT 2002); Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States, Slip Op. 2002-10 (CIT 2002); ILVA Lamiere E Tubi S.R.L. and ILVA S.p.A v. United States, Slip Op. 2002-32 (CIT 2002). In another case, Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States, Slip Op. 2002-51 (CIT

2002), the judge affirmed the Department's "same person" methodology, although it too was remanded for a further factual determination.

All of these cases, however, are subject to further appeal. Therefore, notwithstanding Delverde's arguments regarding the inappropriateness of our "same person" methodology, until there is a final and conclusive decision regarding the legality of the Department's change-in-ownership methodology in these cases, we will continue to apply it (as we did in the Preliminary Results) for purposes of the final determination.

We also disagree with Delverde's suggestion that the Department did not undertake a case-specific analysis of the Delverde change in ownership. The Department did so, although it necessarily had to decide first on a change-in-ownership methodology to apply before addressing the particular facts of the Delverde change in ownership.

In accordance with the Court's holding in Delverde III, the Department developed a two-step inquiry into changes of ownership. See Grain-Oriented Electrical Steel From Italy: Final Results of Countervailing Duty Administrative Review, 66 FR 2885, January 12, 2001 ("GOES from Italy"). The first requirement is to determine whether the person to which the subsidies were given is, in fact, distinct from the person that produced the pasta exported to the United States. If the two persons are distinct, the original subsidies may not be attributed to the new producer/exporter. The Department would, however, consider whether any subsidy had been bestowed upon that producer/exporter as a result of the change-in-ownership transaction.

On the other hand, if the original subsidy recipient and the current producer/exporter are demonstrated to be the same person, that person benefits from the original subsidies, and its exports are subject to countervailing duties to offset those subsidies. In other words, if the firm under investigation is the same person as the one that received the subsidies, nothing material has changed since the original bestowal of the subsidy, so that the statutory requirements for finding a subsidy are satisfied with regard to that person. In the change-in-ownership context, the existence of a "financial contribution" and a "benefit" (conferred prior to the change in ownership) depends on the "person" requirement and, specifically, whether the firm under investigation is the same person as the original, pre-change-in-ownership subsidy recipient. Where it is demonstrated that those two entities are the same "person," the Department will determine that all of the elements of a subsidy are established, *i.e.*, the Department will determine that a "financial contribution" and a "benefit" have been received by the "person" that is the firm under investigation.

As to Delverde's more specific argument that the Department did not follow the Federal Circuit's mandate to determine whether Delverde indirectly received a financial contribution and a benefit as a result of its purchase of the Fara San Martino ("FSM") pasta operation, we disagree. To find that a countervailable subsidy had been provided to the "manufacture, production, or export" of the imported merchandise, the Delverde III court found that the person who produced or exported that merchandise must have received a financial contribution and enjoyed a benefit from that financial contribution. Delverde III, 202 F.3d at 1365, 1366. In the

Delverde III court's words, a subsidy exists when "an authority provides a financial contribution, . . . to a person and a benefit is thereby conferred." Id., quoting 19 U.S.C. § 1677(5)(B) (emphasis in original). After faulting the Department for conclusively presuming that the benefits of the pre-change in ownership subsidies automatically passed through to Delverde, the Federal Circuit instructed the Department to "examine the facts and circumstances, including the terms of the transaction," and then determine "whether Delverde indirectly received a subsidy" by virtue of its purchase of the FSM pasta operation. Id., at 1369-70. Again, that is what the Department has done with regard to Delverde's change in ownership. The Department examined the facts and circumstances, including the terms of the transaction, first to determine whether Delverde, the firm under review, was the same person as the original subsidy recipient. See the February 5, 2001, Issues and Decision Memorandum, Certain Pasta from Italy: Final Results of the 1998 Countervailing Duty Administrative Review to Bernard T. Carreau, fulfilling the duties of Assistant Secretary for Import Administration, (Third Review - Decision Memo). On finding that they were the same person, the Department determined that all of the elements of a subsidy were established with regard to Delverde, and its analysis of the transaction necessarily ended. See Id.

Delverde is arguing that the Department should have skipped this first step in its analysis of the change-in-ownership transaction and should have examined only whether or not a subsidy was provided to Delverde by virtue of too low a purchase price (i.e., less than adequate remuneration). We disagree with Delverde that the Federal Circuit's instructions were so limited. It does appear that the Federal Circuit was under the impression that Delverde was a different person from the original subsidy recipient. Nevertheless, the Federal Circuit did not render a holding to that effect. For that reason, as more fully explained in the Third Review - Decision Memo, we do not interpret the Federal Circuit's instructions as precluding an examination of the facts and circumstances, including the terms of the transaction, for the purpose of determining whether Delverde, the firm under review, was the same person as the original subsidy recipient.

Comment 2: Presumption that subsidies continue after a change in ownership (Delverde)

Delverde argues that the new change-in-ownership methodology perpetuates the Department's long-standing presumption that subsidies benefit production and, therefore, "travel" from seller to buyer when an entity is sold. Delverde contends that this is the exact presumption that the Court deemed unlawful. According to Delverde, the Department's new methodology "perpetuates this presumption by equating the term 'person,' as used in the 19 U.S.C. § 1677(5)(B) subsidy definition, to 'productive operation.'" According to Delverde, this focus on productive operations guarantees that subsidies will travel in every change of ownership. Delverde argues that while the statute itself does not define "person" for purposes of this subsidy definition, the Statement of Administrative Action, accompanying H.R. Rep. No. 103-826-(I), at 841 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4176 (1994) ("SAA") shows that the Department cannot properly equate the two. Specifically, citing the SAA at 925, Delverde states that "person" in this context means "the commercial entity, such as a firm or industry, to which the government . . . provides a financial contribution," and that the SAA indicates that the

term is intended to be used to distinguish a subsidy recipient from a group of enterprises in determining whether a subsidy is specific, rather than to find that a new owner is liable for subsidies granted to a prior owner after a change in ownership.

Delverde states that Old Delverde,¹ not the FSM pasta operation, was the legal entity that received the grants at issue and, importantly, the FSM pasta operation was not a legal entity at all. Delverde argues that by focusing on the FSM pasta operation as the link between Old Delverde (the legal entity who received the grants) and Delverde, the Department imputes to Delverde the financial contribution received by Old Delverde. Delverde maintains that the Department's consideration of the pasta operation as a "person" is inconsistent with the narrow meaning attributed to this term by the SAA.

Delverde further argues that the factors considered by the Department in its person analysis as well as the focus of the analysis (*i.e.*, the productive assets that change hands) makes clear that this new methodology continues the Department's pre-Delverde III presumption that subsidies benefit and travel with productive operations. Therefore, Delverde concludes that the Department's methodology "ensures that whatever changed ownership will be the 'same person' before and after the change of ownership." According to Delverde, rather than comparing Old Delverde with Delverde, the Department's results-oriented methodology compared Old Delverde's FSM pasta operation to Delverde to ensure that the FSM pasta operation was the same person before and after the sale. Delverde argues that this "benefit to production" presumption is also evident in the four other remand redeterminations issued by the Department since Delverde III. In each of these instances, the Department compared the pre- and post-change in ownership productive operation rather than the pre-change subsidy recipient and the post-change company under investigation.

Department's Position: We disagree with Delverde's assertion of the existence of a presumption with respect to the Department's approach for determining whether the firm under investigation is the same person as the original subsidy recipient in the change-in-ownership context. The Department has developed a fact-based approach that takes into account a number of factors, including continuity of general business operations, continuity of production facilities, continuity of assets and liabilities and retention of personnel. The degree of continuity evidenced by a consideration of these factors will vary from transaction to transaction, depending on the facts, and therefore the Department's approach on its face gives rise to no type of presumption, but rather a consideration of the underlying facts and circumstances of each case, as directed by the Federal Circuit.

Meanwhile, Delverde's specific contention that the Department's approach on its face equates

¹ We refer to Delverde, SrL as it existed prior to the change-in-ownership transaction as "Old Delverde" to avoid confusion. Later, as a result of the change-in-ownership transaction, the name "Delverde, SrL" was changed to "Nuovo Delverde, SrL" and then back to its original name of "Delverde, SrL." Subsequent to the change-in-ownership transactions, the operations of Old Delverde that were not sold changed their name to MI.BA.

“person” and “production” is contradicted by a review of the factors analyzed by the Department. As the Department’s analysis in this case shows, the Department’s consideration of the factors relating to general business operations and production facilities goes beyond a mere analysis of production. In addition to these factors, the Department also examined the continuity of assets and liabilities and the retention of personnel. The Department also has expressly stated that no one of these factors is dispositive for the “person” determination. Thus, we see no basis for Delverde’s argument that the Department’s approach equates “person” and “production” and, therefore, is no different from the Department’s old methodology.

For similar reasons, we disagree with Delverde’s argument that the Department’s approach is biased and will result in a determination that the firm under review is the same person as the original subsidy recipient whenever assets of any significance are sold. In supporting its argument on this point, Delverde insists that the Department’s approach equates “person” and “production facility” and, therefore, always will result in a finding of the same person whenever significant assets change hands. In our view, however, the Department’s approach does not equate “person” and “production facility,” just as it does not equate “person” and “production,” as we have explained above.

Regarding the Department’s application of its approach in this case, it is true that the Department found Delverde to be the same person as the original subsidy recipient. However, that is the result dictated by the facts and circumstances in this case, not by the Department’s approach.

Moreover, as discussed above, we disagree with Delverde’s specific contention that the only proper comparison for the required “person” inquiry in this case is between MI.BA in its entirety (the seller of the FSM pasta operation) and Sangralamenti (the purchaser of the FSM pasta operation). Most importantly, even if this comparison were assumed to be permissible under the countervailing duty statute, we do not interpret the countervailing duty statute as requiring Delverde’s suggested approach.

The comparison advocated by Delverde focuses solely on the old and new owners of the FSM pasta operation, as MI.BA in its entirety was the old owner of the FSM pasta operation and Sangralamenti is the new owner of the FSM pasta operation that is now called Delverde and is the firm under investigation. As should be evident, this type of comparison would result in a per se rule that a new “person” is created whenever a sale occurs between two unrelated parties, or in other words, whenever there is a change in ownership. At the very least, we do not interpret the countervailing duty statute as requiring the Department to base its “person” determination solely and dispositively on this criterion. In the context of the countervailing duty statute, with court approval, the Department has routinely treated a subsidy, in appropriate circumstances, as benefitting less than the entire company. For example, the Department has attributed a pro rata portion of a subsidy benefit to divisions or assets of a company when internal corporate restructurings have occurred. See GIA, 58 FR at 37266-68. The Department has also applied a “tying” analysis, which attributes a subsidy benefit to products produced by a division of a company making a particular product or to products produced by particular facilities of a

company. See Id., 58 FR at 37231-36.

We also consider such an approach (i.e., a per se rule) to be ill-advised. It would mean, for example, that a new “person” is created even when a company’s shares simply turn over through public trading on a stock market. Although we have not adopted the test used under general corporate successorship law, we note that a mere change in owners in that context is not dispositive of whether a new person exists for liability purposes. In addition, in the countervailing duty context, as a policy matter, we view the analysis that we have developed in this case to be more consistent with the remedial goals of the countervailing duty statute, namely, to “level the playing field” by offsetting the benefit conferred by a subsidy.

Comment 3: Privatization and the U.K. Lead Bar Panel (Delverde)

Delverde argues that the principle underlying the “same person” approach used by the Department in the preliminary results has been found by a WTO dispute settlement panel to contravene U.S. obligations under the SCM agreement. According to Delverde, in United States – Imposition of Countervailing Duties on Certain Hot Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS/138/R (December 23, 1999) (“U.K. Lead Bar”), the WTO panel found that the Department's presumption that financial contributions pass through to a new owner in a change of ownership is rebutted by the circumstances of the change in ownership. Instead, according to Delverde, the WTO panel found that the continued existence of a benefit to the new owners must be demonstrated. Delverde interprets the WTO panel decision as stating that the pertinent issue is whether the respondent company received a benefit, not whether the company is the “same person” as the previously subsidized company. Delverde points out that the WTO appellate body later rejected the arguments made by the United States that the proper course of action was to examine if the respondent carried on substantially the same business as the original recipient of the benefit, and then stated that the Department was required to examine if a benefit accrued to the respondent. Delverde claims that since the preliminary results did not conform to the decisions of the WTO panel and the WTO Appellate Body, the Department disregarded the international obligations of the United States under the SCM agreement.

Department’s Position: As previously explained in detail in the January 3, 2001, Issues and Decision Memorandum, Grain-Oriented Electrical Steel from Italy: Final Results of Countervailing Duty Administrative Review, detailing the Department’s findings in GOES from Italy, we believe that our change-in-ownership methodology is consistent with U.K. Lead Bar and the WTO Appellate Body decisions. See also, Third Review - Decision Memo at 4-5 and notes 4 and 5.

Comment 4: Sale of shares vs. assets (Delverde)

Delverde argues that the Department’s preliminary results, which rely upon the analysis in the February 5, 2001, memorandum to File regarding Delverde Change-in-Ownership Analysis (“Third Review - CIO Memo”), are based on bits and pieces from the record, frequently taken

out of context, to support conclusions that have no factual basis, thus ignoring the record as a whole. On that basis, Delverde contends that the Department's preliminary results are unsupported by substantial evidence. Delverde states that the facts do not support the Department's "critical" characterization of the sale of the FSM pasta operation as "in the nature of a sale of shares." Specifically, Delverde contests the Department's finding in the Third Review - CIO Memo, that the actual sale of the FSM pasta operation took place in May 1991 when the so-called "buyout device" was implemented, but rather in March 1991 when the "Preliminary Private Agreement" was reached. Delverde argues that Preliminary Private Agreement ("PPA") demonstrates that the change in ownership was an asset sale and control of the FSM pasta operation passed to Delverde when that agreement was reached. Specifically, Delverde states that the PPA listed the categories of assets that were and were not being sold, the schedule upon which Delverde would pay MI.BA, and that control of the operation would transfer to Delverde immediately. Additionally, according to Delverde, if the sale had been a sale of shares, the legally-required asset appraisal would not have been necessary.

Department's Position: We disagree with Delverde's argument. As is clear from our business proprietary description and analysis of the record evidence as detailed in the Third Review - CIO Memo, the Department examined the record carefully and thoroughly, finding that the final sale took place when the new owners obtained the controlling ownership stake in the FSM pasta operation. The fact that the soon-to-be new owners may have acquired control over the FSM pasta operation in March 1991, prior to their acquisition of the controlling ownership stake in the operation in May 1991, does not invalidate the Department's characterization that the May 1991 transaction was "in the nature of a sale of shares."

In any event, we disagree with Delverde's assertion that the Department's determination that the sale was a share sale, rather than an asset sale, was "critical" to its finding that the FSM pasta operation was the same "person" as Delverde. We would like to reiterate, as should be clear from our analysis of the Delverde change in ownership in the Third Review - Decision Memo and Third Review - CIO Memo, the distinction between a sale of shares and a sale of assets is not crucial to the "person" determination, despite Delverde's focus and comments on it. Rather, it becomes relevant principally to the extent that it helps to clarify the analysis of one of those factors, namely, the continuity of assets and liabilities.

Comment 5: Continuity of Business Operations (Delverde)

With regard to the continuity of general business operations, Delverde questions the Department's findings, stating that the fact that Delverde maintained the same plant and headquarters before and after the sale only shows that these were among the assets purchased, and that the offices no longer housed the administrative functions supporting Old Delverde's other business lines. Delverde also disputes that the Department's conclusion that the change in semolina suppliers was an inevitable result of Old Delverde's on-going disputes with its supplier rather than as a result of the ownership change. Delverde further argues that the Department's conclusion that there was a continuity of production facilities, assets and liabilities is an inevitable result of defining "person" in terms of the production facilities being sold, and

had the Department instead compared Old Delverde with Delverde there would be no continuity of production operations, assets or liabilities. Lastly, Delverde criticizes the Department's findings with regard to retention of personnel, stating the Department ignored substantial organizational and personnel changes resulting from the ownership change.

Department's Position: We disagree with Delverde that there is not a continuity of business operations between the FSM pasta operation and Delverde. While Delverde disputes the Department's conclusions with regard to several of the issues the Department addressed in its Third Review - CIO Memo, Delverde does not dispute the majority of the information relied upon by the Department in concluding that there was continuity of business operations. Specifically, Delverde does not dispute the fact that there were no major changes in the productive operations of the newly created company, which used the same production facilities to manufacture and sell the same products, using the same brand name and trademarks, and which added no additional facilities nor closed any existing facilities.

As explained in our response to Comment 2, above, we disagree with Delverde's assertion that it is inappropriate to analyze whether the FSM pasta operation (as opposed to Old Delverde) is the same "person" as Delverde. We also disagree with Delverde's argument that the result of the Department's analysis of the continuity of production facilities, assets and liabilities, is preordained by its methodology. As we stated in the Third Review - CIO Memo, the FSM pasta operation had been operating as its own business entity for several decades prior to its sale to Delverde. As noted in the Third Review - CIO Memo, and not disputed by Delverde, the assets and liabilities that were transferred in the sale were those directly associated with this FSM pasta operation. It is notable that MI.BA did not retain production facilities, assets or liabilities that had been associated with the FSM pasta operation, Delverde did not take on any production facilities, assets or liabilities that were associated with Old Delverde's other productive units, nor did the purchasers integrate the FSM pasta operation with other pasta operations or business lines in establishing Delverde. Had any of these hypothetical scenarios actually occurred, then the information regarding such scenarios would have led the Department to reexamine whether there was a continuity of production facilities, assets and liabilities (or continuity of business operations).

With regard to Delverde's argument regarding personnel changes, as explained in the Third Review - CIO Memo, while we do not dispute that certain personnel changes did occur, we based our finding of a continuity of personnel on the undisputed fact that a significant number of managers and employees were transferred from Old Delverde to Delverde as part of the sale.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of review and the final net subsidy rates for the reviewed producers/exporters of the subject merchandise in the Federal Register.

Agree

Disagree

Faryar Shirzad
Assistant Secretary
for Import Administration

Date