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Administrative Review
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MEMORANDUM

DATE: September 7, 2005

TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results of the 2003
Administrative Reviews for the Countervailing Duty Orders of Pure Magnesium
and Alloy Magnesium from Canada

SUMMARY

On May 10, 2005, the Department of Commerce (“the Department”) published the preliminary results of these countervailing duty administrative reviews.¹ The “Analysis of Programs” and “Subsidies Valuation Information” sections below describe the subsidy programs and the calculation methodologies used to calculate the benefits from these programs. We have analyzed the comments by the interested parties in this review in the “Comment Analysis” section below, which also contains the Department’s responses to the issues raised in these briefs. We recommend that you approve the positions which we have developed in this memorandum.

¹ See Pure Magnesium and Alloy Magnesium from Canada: Preliminary Results of Countervailing Duty Administrative Reviews, 70 FR 24530 (May 10, 2005) (“Preliminary Results”).

Methodology and Background Information

Allocation Period

In the investigations and previous administrative reviews of the orders on pure magnesium and alloy magnesium,² the Department used as the allocation period for non-recurring subsidies the average useful life (“AUL”) of renewable physical assets in the magnesium industry, as recorded in the Internal Revenue Service’s 1977 Class Life Asset Depreciation Range System (“the IRS tables”), *i.e.*, 14 years. Pursuant to section 341.524(d)(2) of the Department’s regulations, we use the AUL in the IRS tables as the allocation period unless a party can show that the IRS tables do not reasonably reflect either the company-specific or country-wide AUL reported for the magnesium industry. During these reviews, none of the parties contested using the AUL reported for the magnesium industry in the IRS tables. Therefore, we continue to allocate the non-recurring benefits over 14 years.

Discount Rates

In accordance with 19 CFR 351.524(d)(3), it is the Department’s preference to use a company’s long-term, fixed-rate cost of borrowing in the same year a grant was approved as the discount rate. However, where a company does not have a loan that can be used as a discount rate, the Department’s preference is to use the average cost of long-term fixed-rate loans in the country in question.

In the investigation, in prior administrative reviews, and in the Preliminary Results, the Department found that Norsk Hydro Canada Inc. (“NHCI”) benefitted from countervailable subsidies from the Article 7 grant from the Québec Industrial Development Corporation (“SDI”). We used NHCI’s cost of long-term, fixed-rate debt in the year in which the SDI grants were approved as the discount rate for purposes of calculating the benefit pertaining to the period of review (“POR”). No new information has been presented in these reviews and neither the petitioner nor NHCI has argued against the use of this discount rate. Therefore, we have not made any changes to the discount rate.

Furthermore, in the Preliminary Results and in the Alloy Magnesium from Canada: Final Results of Countervailing Duty New Shipper Review (“Final New Shipper Review”), 68 FR 22359 (April 28, 2003), we found that Magnola Metallurgy Inc., (“Magnola”) received countervailable subsidies under the Emploi-Québec Manpower Training Measure Program (“MTM Program”). Magnola did not have any long-term fixed-rate debt during the years the grants were approved. As a result, the Department used an average of Canadian long-term commercial bond rates as the

² See e.g., Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada, 57 FR 30946 (July 13, 1992) (“Magnesium Investigation”); Pure Magnesium and Alloy Magnesium from Canada: Final Results of Countervailing Duty Administrative Reviews, 68 FR 53962 (Sept.15, 2003).

discount rate. No new information has been presented in these reviews. Therefore, we have not made any changes to the discount rate.

Analysis of Programs

Programs Determined To Be Countervailable

A. Article 7 grant from the Québec Industrial Development Corporation

As noted above, in the Preliminary Results we found that this program conferred a countervailable subsidy on pure magnesium and alloy magnesium produced and exported by NHCI. No new information, evidence of changed circumstances, or comments from interested parties were presented in these reviews to warrant any reconsideration of this finding. Accordingly, the net subsidy for this program (1.21 percent ad valorem) remains unchanged from the Preliminary Results.

B. Emploi-Québec Manpower Training Measure Program

As noted above, in the Preliminary Results we found that this program conferred a countervailable subsidy on alloy magnesium produced and exported by Magnola. No new information, evidence of changed circumstances, or comments from interested parties were presented in these reviews to warrant any reconsideration of this finding. Accordingly, the net subsidy for this program (5.40 percent ad valorem) remains unchanged from the Preliminary Results.

Programs Determined To Be Not Used

In the Preliminary Results, we found that NHCI and Magnola did not use the following programs during the POR. No new information, evidence of changed circumstances, or comments from interested parties were presented in these reviews to warrant any reconsideration of these findings. Accordingly, we find that these programs did not confer countervailable benefits upon NHCI or Magnola during the POR.

- A. St. Lawrence River Environment Technology Development Program
- B. Program for Export Market Development
- C. The Export Development Corporation
- D. Canada-Québec Subsidiary Agreement on the Economic Development of the Regions of Québec
- E. Opportunities to Stimulate Technology Programs
- F. Development Assistance Program
- G. Industrial Feasibility Study Assistance Program
- H. Export Promotion Assistance Program
- I. Creation of Scientific Jobs in Industries

- J. Business Investment Assistance Program
- K. Business Financing Program
- L. Research and Innovation Activities Program
- M. Export Assistance Program
- N. Energy Technologies Development Program
- O. Transportation Research and Development Assistance Program

Programs Determined to be Terminated

- A. Exemption from Payment of Water Bills

Comment Analysis

Comment 1: Issuance of Liquidations Instructions at the Final Results for NHCI

NHCI's and Government of Quebec's Argument: NHCI contends that it has requested, and the Department has granted, a stay of liquidation pending the outcome of a NAFTA panel appeal of a previous sunset review of the instant order. See Magnesium From Canada (Injury) Full Sunset Review of Antidumping Duty and Countervailing Duty Orders, Secretariat File No. USA-CDA-00-1904-09 (July 16, 2002). In following with the final results of the 2001 and 2002 administrative reviews, the Department should express in the final results of the instant review that it will not order U.S. Customs and Border Protection ("CBP") to liquidate entries covered by this review pending the decision of the NAFTA panel.

Petitioner's Argument: The petitioner did not comment.

Department's Position: We agree with NHCI. The Department will not order CBP to liquidate NHCI's entries covered under the present review, pending final disposition of the binational panel appeal, File No. USA-CDA-00-1904-09, of the NAFTA panel review.

Comment 2: NHCI's Cash Deposit Rate

NHCI's and Government of Quebec's Argument: NHCI contends that, because the Department has confirmed that no countervailable subsidy exists for NHCI after 2004, the Department should direct CBP to release the suspension of liquidation for all entries made on or after January 1, 2005. At a minimum, a cash deposit rate of zero should be applied for any entries made on or after the date of publication in the Federal Register of the final results of the current administrative review. NHCI asserts that concerns by the Department and the petitioner of taking action in the middle of the administrative review process have been met. In particular, NHCI points to the Department's letter from Susan Kuhbach to Gregory McCue, of Steptoe & Johnson, dated December 14, 2004 ("Cash Deposit Letter"), to support its argument that the Department would consider the action of setting NHCI's cash deposit rate to zero at the end of the administrative review process. NHCI argues that the Department must recognize that the cash

deposits will only impact future entries (*i.e.*, entries made in the remainder of 2005 and in 2006). NHCI contends that, as confirmed in the Preliminary Results, the 2005-2006 period is subsequent to all alleged subsidies to NHCI. According to NHCI, there is no authority in the Tariff Act of 1930, as amended (“the Act”), to allow the Department to impose cash deposits against NHCI on shipments made during periods for which no subsidy has been alleged.

In other administrative reviews, the Department has set the cash deposit rate to zero because, due to the expiration of subsidies during the POR, the expected CVD rate for future entries was de minimis. See Stainless Steel Sheet and Strip in Coils from France: Final Results of Countervailing Duty Administrative Review, 68 FR 53963 (September 15, 2003), and accompanying Issues and Decision Memorandum (“SSSSC from France”) at Comment 3; see also Final Results of Countervailing Duty Administrative Reviews: Low Enriched Uranium From Germany, the Netherlands, and the United Kingdom, 69 FR 40869 (July 7, 2004), and accompanying Issues and Decision Memorandum (“Uranium”) at Comment 3. In both cases, the Department maintained that two factors supported its decision to adjust the cash deposit rate to zero. First, the information needed to make the adjustment was derived entirely from the POR being examined, and second, the future cash deposit rate without the subsidy was zero or de minimis. According to NHCI, the present situation satisfies both of the Department’s factors. First, the Department can determine, based solely on data on the record in this POR, that the Article 7 grant was fully amortized by the end of 2004 and conferred no benefit as of January 1, 2005. Second, the correct deposit rate without the benefit of the Article 7 grant will be zero.

NHCI contends that, in this review, the Government of Canada (“GOC”) and the Government of Québec (“GOQ”) submitted information reporting that no new benefits were conferred on NHCI. Moreover, the petitioner has not alleged any new benefits conferred on NHCI. The Department’s Preliminary Results confirm that no new benefits exist, and therefore, the level of benefit since January 1, 2005, has been zero. NHCI contends that the Department’s regulations do not address the situation in which the expiration of a non-recurring benefit has been consistently recognized by the Department’s own calculations. NHCI argues that the cash deposits for 2005 could necessitate a request for a 2005 administrative review by NHCI, an unnecessary expenditure.

NHCI acknowledges that the Department has denied similar requests based on its program-wide change regulation (19 CFR 351.526). See Stainless Steel Plate in Coils From Belgium: Final Results of Countervailing Duty Administrative Review, 66 FR 45007 (August 27, 2001), and accompanying Issues and Decision Memorandum (“SSSPC from Belgium”); see also Final Affirmative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Canada, 67 FR 55813 (August 30, 2002), and accompanying Issues and Decision Memorandum (“Wire Rod from Canada”). NHCI argues that, in SSPC from Belgium and Wire Rod from Canada, the expiration of the allocated subsidy would have resulted in a lower, but not a de minimis rate. Similar to SSSSC from France, NHCI’s request adheres to the Department’s exception to its program-wide change regulation because NHCI cannot post estimated duties based on a rate of zero.

Because of the time to complete each review, NHCI contends that there is no reason for it to face the significant cash flow burden of making cash deposits on shipments from January 2005 to September 2006 when the expiry of any subsidy benefit at the end of 2004 is already known. In granting this request, NHCI states that the Department would be supported in its decision and the decision is unlikely to have broader application.

Government of Canada's Argument: The GOC contends that it, the GOQ, and NHCI have confirmed that there were no new subsidy benefits to NHCI. The GOC argues that, as of January 1, 2005, the Department should set the cash deposit rate to zero. According to the GOC, while neither the statute nor the regulations specifically address a situation in which a non-recurring benefit has been fully amortized while an order is still in place, there is no legal, regulatory or practical bar to declaring the rate to be zero. Because the Preliminary Results confirm that no countervailing benefits to NHCI exist after December 31, 2004, the GOC contends that the Department should refund any cash deposits collected after that date.

Petitioner's Argument: The petitioner rebuts by stating that NHCI cites no authority for refunding its cash deposits made in 2005. The petitioner contends that, even if its future cash deposit rate under this order was zero, NHCI's shipments remain subject to the order and subject to administrative review. NHCI must demonstrate that it is not being subsidized by participating in administrative reviews so long as its shipments are subject to the order. Accordingly, the petitioner argues that it would be premature to refund cash deposits made by NHCI on entries subsequent to the POR.

Department's Position: We agree with the petitioner that NHCI's request that we set its cash deposit rate to zero as of January 1, 2005, or the publication of these final results, should be rejected. NHCI's reference to the Cash Deposit Letter does not further its argument. In this letter, the Department merely stated that it would "consider NHCI's request in the context of the ongoing administrative review."

Moreover, we note that it is the Department's general practice to adjust cash deposit rates to reflect the expected discontinuation of future subsidy benefits only where it has been demonstrated that a program-wide change has occurred, pursuant to 19 CFR 351.526. In SSSSC from France and again in Uranium, the Department provided for a narrowly-circumscribed exception to this general practice in light of certain, specific conditions that existed in those cases. Specifically, the Department adjusted the cash deposit rate to zero in those cases because (1) the information needed to make the adjustment was derived entirely from the POR, and (2) expiry of the subsidy meant that the expected countervailing duty rate for entries subject to the deposit rate set in that review was de minimis (see SSSSC from France at Comment 3). As further stated in SSSS from France, ". . . it is only in those cases where the allocated benefit goes to zero in the POR that we can rely exclusively on POR data to calculate the future rate." (Id. Emphasis added.)

We find that the circumstances in the instant review are different in at least one key respect from those in SSSSC from France and Uranium. In both of those prior cases, the allocation periods for the subsidies in question ended during the POR (*i.e.*, the subsidy benefits were fully extinguished by the end of the POR). In the instant case, the allocation period does not end until the subsequent review period and, therefore, we cannot rely exclusively on POR data to calculate the future rate. Therefore, the rationale for the limited exception applied in those prior cases is not met in this review. Accordingly, we are not setting NHCI's cash deposit rate to zero for future entries as a result of this review.

Comment 3: Adjustment of NHCI's CVD Rate

NHCI's and Government of Quebec's Argument: NHCI contends that the Department is required to follow the Court of International Trade ("CIT") precedent, specifically, the CIT's analysis in Norsk Hydro Canada Inc. v. United States, 350 F. Supp. 2d 1172 (CIT 2004) ("NHCI I") and its order in Norsk Hydro Canada Inc. v. United States, 374 F. Supp. 2d 1275 (CIT 2005) ("NHCI II"). See Cabot Corp. v. United States, 694 F. Supp. 949, 954 (CIT 1998) ("Cabot"). NHCI claims that the Act makes clear that the Department is to impose countervailing duties ("CVDs") in an amount "equal to" the subsidy received. Under 19 USC § 1671(a), the amount of CVDs actually assessed must be taken into account. The CIT refers to 19 USC § 1671(a) as a "mandate to properly calculate CVDs so as to equal the net countervailable subsidy." See NHCI I, 350 F. Supp. 2d at 1184. In response to the Department's position in the 2001 and 2002 administrative reviews that it lacked the statutory authority to take into account events outside the POR in calculating a CVD rate, the CIT ruled against the Department. *Id.* at 1185.

Further, NHCI argues that the CIT stated that "{t}itle 19 USC § 1675(a) and 19 USC § 1671 thereby complement one another, reinforcing the notion that Commerce must take into account an overpayment from a previous year in further years' recalculations of the 'net countervailable subsidy.'" *Id.* at 1183. NHCI asserts that the CIT referred to Certain Pasta From Italy: Final Results of the Fourth Countervailing Duty Administrative Review, 66 FR 64214, 64215 (December 12, 2001), in supporting its decision.

NHCI argues that when a statutory term is ambiguous, as the CIT has found for the word "imposed," the statute must be interpreted in a manner consistent with the United States' international obligations, such as Article 19:4 of the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). See Dupont Teijin Films USA v. United States, 297 F. Supp. 2d 1367, 1372 (CIT 2003). NHCI asserts that in this review, the term "imposed" in section 701(a) of the Act must be interpreted to mean "collected," consistent with the SCM Agreement, and therefore, the Department must take into account CVDs actually collected in calculating its administrative review results.

NHCI points out that "the Court notes that Commerce recently elected to change its interpretation of 'imposed,' so that countervailing duties are 'imposed' not when Customs actually assesses the duties, but when Commerce publishes the results of an administrative review in the Federal

Register.” See NHCI I at 1181, n.19. NHCI contends that this statement by the CIT appears to be referencing the Final Results of Redetermination Pursuant to Court Remand. See Dupont Teijin Films USA, LP, Mitsubishi Polyester Film of America, LLC and Toray Plastics (America), Inc. v. United States and Polyplex Corporation Limited, Court No. 02-00463 at 7 (August 11, 2003) (“Dupont Teijin Redetermination”). Accordingly, NHCI argues that this statement is not relevant to the final results in the instant review. The CIT’s statement was not necessary for the resolution of issues before the agency, and did not result from briefing by the parties. NHCI asserts that the Dupont Teijin Redetermination dealt specifically with the definition of the term “imposed” within the context of section 1677a(c)(1)(C) of the Act, a section requiring the Department to adjust U.S. price in an antidumping duty proceeding when export subsidies are discovered in a concurrent CVD proceeding. According to NHCI, the instant review does not involve the interpretation of section 1677a(c)(1)(C) of the Act, but rather section 1671(a) of the Act. NHCI argues that the latter prescribes a limit on the amount of CVDs that can be lawfully collected by the United States. In Certain Polyethylene Terephthalate Film, Sheet and Strip from India: Final Results of Antidumping Duty Administrative Review, 70 FR 8072 (February 17, 2005) and accompanying Issues and Decision Memorandum (“PET Film”) at Comment 10, NHCI notes that the Department rejected the respondent’s view and concluded that the respondent’s U.S. price could only be increased by the amount of CVDs actually collected. According to NHCI, this most recent precedent demonstrates that in the administrative review context, the Department clearly has the authority and inclination to interpret the term “imposed” in section 1677a(c)(1)(C) to mean duties actually assessed and collected. NHCI contends that had the CIT been fully aware of these arguments, it is likely, if not certain, that the CIT would have recognized that the definition of “imposed” developed by the Department in the Dupont Teijin Redetermination was unique to section 1677a(c)(1)(C) in the context of antidumping investigations.

NHCI argues that, in fiscal year 2001 under the Continue Dumping and Subsidy Offset Act (19 USC § 1675c (“CDSOA”)), CBP distributed \$2,750,864.51 to Magcorp (now U.S. Magnesium, LLC) from cash deposits collected on entries liquidated during that time. It appears that a significant part of this disbursement included CVDs incorrectly assessed on NHCI’s 1997 Port Huron entries. NHCI asserts that, if the Department continues to impose CVDs on NHCI at the rate set forth in the amortization table without taking into account NHCI’s overpayment, U.S. Magnesium, LLC will receive an unreasonable and unwarranted windfall of distributed duties.

Petitioner’s Argument: The petitioner disagrees by asserting that the Department’s prior determinations are currently under appeal (i.e., at the CIT and at the NAFTA panel). Accordingly, the CIT has issued a decision in a previous administrative review on this issue, but the Department is not required to follow the CIT’s decision because it is incorrect and not controlling. The instant review will be subject to an independent appeal and the reviewing court will not be bound by the NHCI I and NHCI II decisions, but will be free to reach its own conclusions and issue a different judgement order. See Algoma Steel Corp. v. United States, 865 F.2d 240, 243 (Fed. Cir. 1989), cert. denied, 492 U.S. 919 (1989). The petitioner contends that NHCI’s citation to Cabot is out of place because (a) the law of the Federal Circuit is that CIT judges are not bound

by one another's decisions and (b) estoppel does not apply to this situation because NHCI II was not a final judgement.

The petitioner contends that errors in CBP's liquidation of entries or the implementation of an order is remedied by a customs protest or reliquidation. See Shinyei v. United States, 355 F.3d 1297, 1302, n.2 (Fed. Cir. 2004). The petitioner asserts that 19 USC § 1514(a) defines Customs "decisions" that are subject to review solely through Customs procedures such as protest and appeal. In Xerox Corp. v. United States, 289 F.3d 792, 795 (Fed. Cir. 2002), the petitioner notes that "where the scope of the antidumping duty order is unambiguous and undisputed, and the goods clearly do not fall within the scope of the order, misapplication of the order by Customs is properly the subject of a protest under 19 USC § 1514(a)(2)." Citing to International Trading Co. v. United States, 24 CIT 596, 610, 110 F. Supp. 2d 977, 989 (CIT 2000), *aff'd*, 281 F.3d 1268 (Fed. Cir. 2002), the petitioner argues that liquidation of a CBP entry is conclusive unless a timely protest is filed under 19 USC § 1514(a)(2) within 90 days of the date of liquidation. Further, according to the petitioner, claims under 28 USC § 1581(i) must be brought no later than two years after the cause of action first accrues, a requisite not met by NHCI. The petitioner asserts that NHCI has no remedy against the Department for CBP's liquidation decisions.

The petitioner contends that the CIT correctly notes that, although the Department equated the terms "imposed" and "assessed" for purposes of interpreting a different section of the CVD law, the CIT was wrong to conclude that "imposed" must mean "assessed" for purposes of section 1671(a). According to the petitioner, the CIT's decision employs the rule of statutory construction that disfavors distinguishing the Department's determinations and CBP's decisions. Under this rule of statutory construction, a term is presumed to carry the same meaning throughout, but this presumption "is not rigid, and the meaning {of the same words} well may vary to meet the purposes of the law." See United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 213 (2001). Citing to Mitsubishi Elec. Am. v. United States, 18 CIT 167, 173, 848 F. Supp. 193, 198 (1994), *aff'd*, 44 F.3d. 973 (Fed Cir. 1994), the petitioner argues that the CIT has noted, "{i}n adopting § 1581, Congress clearly intended to distinguish between claims that were subject to protest under 19 USC § 1514 and judicial review under 28 USC § 1581(a) on the one hand and claims that were subject to § 751 administrative reviews and/or judicial review under 19 USC § 1516a and 28 USC § 1581(c) on the other." The petitioner contends that the CIT's interpretation in NHCI I of the term "imposed" as equivalent to "assessed" undermines the well understood avenues for administrative and judicial review.

According to the petitioner, the CIT's decision appears to have been informed by the possibility that, under the Department's interpretation of the statutory scheme, CBP's liquidations mistakes would escape correction. As noted above, the petitioner reasserts that mistakes can be corrected through the CBP protest and appeal procedure. Lastly, the petitioner notes that the Department is not involved in the disbursement of funds under the CDSOA, and therefore, should not take this argument into account for the final results.

Department's Position: We agree with the petitioner that it is not appropriate to offset the duties assessed for 2003 by NHCI's overpayments from the 1997 administrative review. Although the CIT affirmed our remand, the decision is not conclusive. See Norsk Hydro Canada Inc. v. United States, Court No. 03-00828, Slip. Op. 05-102 (CIT 2005); see also 28 USC § 2645(c). Moreover, our position in that litigation remains unchanged – namely that it is not appropriate to offset the countervailable subsidies by NHCI's overpayments related to 1997 entries.

We note that administrative reviews are limited to entries made during a fixed period of review and that duties can only be assessed upon entries made during that period. See 19 CFR 351.213(e)(1)(ii). NHCI's 1997 entries are not within the scope of the periodic review of duties for NHCI's 2003 entries, and thus the 1997 entries are not covered by the instant administrative review.

As the Department has argued before the courts, NHCI's complaint should have been raised with CBP. We note that, pursuant to 19 USC § 1520(c), CBP may “reliquidate an entry or reconciliation to correct - (1) a clerical error, mistake of fact, or other inadvertence, ... not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation.” Following the Federal Circuit's decision in Omni U.S.A., Inc. v. United States, 840 F.2d 912 (Fed. Cir. 1988) (“Omni”), we note that NHCI failed to seek reliquidation pursuant to 19 USC § 1520(c) within one year. In both Omni and the instant review, the incorrect liquidation arises from “customs officers ... liquidat{ing} entries ‘as entered’ when they should not have done so,” as a result of apparent clerical errors. Id. Accordingly, there was an appropriate avenue available to NHCI through CBP; having apparently missed the statutory deadline, it cannot circumvent the appropriate process by raising the matter with the Department.

Also, in calculating the “net countervailable subsidy,” the statute provides for three discrete “subtractions” that Commerce may make to the gross countervailable subsidy determined pursuant to 19 USC § 1677(6). See Kajaria Iron Castings Pvt. Ltd. v. United States, 156 F.3d 1163, 1174 (Fed. Cir. 1998). The permissible offsets do not include amounts allegedly overpaid by affiliated importers due to CBP's errors. Moreover, NHCI does not possess any protected right to any rate of duty beyond that provided for by statute. See Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 318 (1933). Lastly, we acknowledge NHCI's arguments concerning the meanings of “imposed” and “assessed,” but we do not find this relevant to our analysis of offsetting duties collected in a prior POR.

Comment 4: MTM Program Benefits for Magnola

Magnola's and Government of Quebec's Argument: Citing to Alloy Magnesium from Canada: Preliminary Results of Countervailing Duty New Shipper Review, 68 FR 4175 (January 28, 2003) (“Preliminary New Shipper Review”), Magnola contends that the Department had no rational or

evidentiary basis for a finding that Magnola's share of Manpower Training Measure ("MTM") Program benefits was "disproportionately large." Magnola contends that all qualified applicants of the MTM Program receive the same percentage reimbursement of eligible training expenses across a wide range of industries. Also, applicants for benefits received under the MTM Program included enterprises in every sector of the economy and in every region of Québec. Magnola contends that, in the Magnesium Investigation, the Department concluded that the Manpower Training Program (the predecessor program) was not countervailable because 1) the funds were generally available to all applicants who met the criteria; 2) there were no *de jure* or *de facto* limitations pertaining to the enterprise or industrial sector employing the workers; and 3) the program was offered and provided to enterprises and workers in a "large number and broad range" of industries. See 57 FR 30950.

Magnola argues that the Department's specificity analysis in the Magnesium Investigation followed several investigations into manpower training programs, all of which resulted in determinations that the relevant training program was neither specific nor countervailable. The Department, according to Magnola, has found manpower training programs countervailable when expressly limited to particular regions or industries. See Final Affirmative Countervailing Duty Determination: Certain Pasta from Italy, 61 FR 30288, 30294 (June 14, 1996); see also Stainless Steel Sheet, Strip, and Plate from the United Kingdom: Final Affirmative Countervailing Duty Determination, 48 FR 19048, 19051 (April 27, 1983). Magnola disagrees with the Department's position that the previous manpower training programs' "characteristics and provisions ... differed" from those of the MTM Program, and that "the similarity of the MTM program to previously investigated programs is not necessarily relevant because legally and factually distinct programs merit distinct analysis." See Final New Shipper Review. Magnola argues that, like the other programs, the MTM Program attracted participants from different industries and enterprises and the participant being examined by the Department was among the largest recipients of training program funds. See AK Steel Corp. v. United States, 192 F.3d 1367 (Fed. Cir. 1999) ("AK Steel").

Magnola asserts that it, like all MTM applicants, was permitted reimbursement of no more than fifty percent of its approved manpower training costs. According to Magnola, the Department's use of the simplistic analysis that 99 percent of program participants received a smaller size of the benefit than Magnola is inconsistent with the language and purpose of the SCM and section 1677(5A)(D) of the Act.

Magnola argues that the Federal Circuit rejected any methodology that concluded that a "benefit conferred on a large company might be disproportionate merely because of the size of the company" because it will produce "an untenable result." Id. at 1385. The Federal Circuit rejected the Department's arguments and contended that POSCO was not a disproportionate beneficiary because its proportional share was no greater than the proportional shares of smaller companies. Magnola further contends that its actual share of program reimbursements examined in the Final New Shipper Review was nothing like the 86 percent received by POSCO in AK Steel. Magnola points to Bethlehem Steel Corp. v. United States, 140 F. Supp. 2d. 1354, 1369-1370 (CIT 2001)

(“Bethlehem Steel”), where the CIT stated that the use of large quantities of electricity by steel companies “reflects the commercial realities of the industry in question.” Magnola contends that the Department has ignored Bethlehem Steel by failing to recognize that Magnola received the same 50 percent reimbursement of eligible expenses as did all other participants in the MTM Program.

Magnola maintains that the Department has never found an industry or enterprise share of total funding less than 25 percent to be disproportionate. See Carbon and Certain Alloy Steel Wire Rod from Brazil: Preliminary Negative Countervailing Duty Determination, 67 FR 5967, 5975 (February 8, 2002). Conversely, Magnola contends that where the Department has found disproportionality, the recipient’s share consistently has been at least 25 percent of the total program benefit. See Final Negative Countervailing Duty Determination: Live Cattle from Canada, 64 FR 57040, 57060-57061 (October 22, 1999). Magnola asserts that in the Final New Shipper Review, the Department makes no reference to the fact that Magnola’s share of overall MTM reimbursements was so small.

Magnola states that Quebec has limited economic diversification, due to a variety of geographic, resources, climactic, and other factors. The Department in its decision, according to Magnola, ignored this evidence as well as section 1677(5A)(D)(iii)(III) of the Act. Instead, Magnola contends that the Department has used the Statement of Administrative Action for the Uruguay Round Agreements Act (“SAA”) to “trump the plain meaning of a statute” and ignore section 1677(5A)(D)(iii)(III) of the Act.

Magnola asserts the Department conducted no analysis to determine whether the MTM reimbursements provided a disproportionate benefit to Magnola during the POR. Instead, according to Magnola, the Department’s reliance on its analysis in the Preliminary New Shipper Review and Final New Shipper Review is flawed for two reasons. First, Magnola contends that the Department must make an assessment as to whether the amount attributed to the POR is disproportionate in view of all of the program reimbursements attributed to the POR. Second, Magnola argues that the Department has failed to consider the continued operation of the MTM Program as required by 19 USC § 1677(5A)(D)(iii). Magnola points out that it never received MTM reimbursements after a certain date, but the program continued in operation after this date, and other companies have continued to receive reimbursements of training expenses well after that date.

Petitioner’s Argument: The petitioner counters that, in AK Steel, the Federal Circuit recognized that disproportionality determinations must be made “on a case-by-case basis.” Citing to Bethlehem Steel, the petitioner notes that “because neither ‘dominant’ or ‘disproportionate’ are defined in the relevant statute, this Court is obligated to defer to Commerce’s reasonable interpretation thereof.” The petitioner contends that the Department used facts and comparisons based on substantial evidence in concluding that Magnola received a “disproportionately large amount” of the MTM subsidy. See Final New Shipper Review, at Comment 2.

According to the petitioner, in AK Steel, the Department found that the average increase in asset value for all companies that participated in the program was greater than POSCO's, and that a large percentage of companies revalued their assets by a greater percentage than POSCO. The petitioner argues that the facts in AK Steel are not present here.

The petitioner contends that Bethlehem Steel discusses the Department's long-standing practice for analyzing electricity subsidies which is not applicable to a labor subsidy and therefore not relevant to this case. The petitioner argues that, unlike Bethlehem Steel, the level of MTM benefits received by Magnola is not what "would be expected," nor does it "reflect commercial realities." Accordingly, the petitioner argues that neither AK Steel nor Bethlehem Steel undermines the Department's examination of the facts and circumstances to make a *de facto* specificity determination.

The petitioner states that, of the cases cited by Magnola to support a finding of no specificity, all but one of the administrative determinations involved subsidies evaluated on an industry-specific, not an enterprise-specific basis. The petitioner argues that these types of determinations are not comparable with the Department's analysis of Magnola's case. According to the petitioner, the percentage of subsidy received by one industry as opposed to another typically will be greater than the percentage share of one enterprise as opposed to another. The petitioner argues that because the MTM subsidy was bestowed upon more than 3,900 small-scale and major enterprises, it would be highly unlikely that a single enterprise would receive more than 25 percent of the total MTM subsidy available. Moreover, the petitioner maintains that the Department determined that the MTM subsidy was disproportionately large on an industry-specific basis by finding that the metal industry projects received a disproportionate amount of the total subsidies. See Preliminary New Shipper Review. The petitioner asserts that even if the Department has determined "disproportionately large" subsidies are those that exceed 25 percent of the total subsidy available, it has the ability to alter that practice provided the Department explains its departure from past practice. See British Steel Plc. v. United States, 127 F.3d 1471, 1475 (Fed. Cir. 1997).

Citing to the SAA at 931, the petitioner contends that economic diversification is not determinative of specificity. As a result, the petitioner notes that the Department considered "the extent of diversification of economic activities ..." (19 USC § 1677(5A)(D)(iii)(III)), but rejected this "diversification" as immaterial. See Final New Shipper Review at Comment 2, p. 15-16. The petitioner adds that the SAA "is more than mere legislative history" (see Micron Tech., Inc. v. United States, 243 F.3d 1301, 1309 (Fed Cir. 2001)), and "there is no question that the SAA is the authoritative guide in interpreting the URAA" (see Usinor Industeel S.A. v. United States, 215 F. Supp. 2d 1356, 1357 (CIT 2002)). Therefore, according to the petitioner, the Department was correct in considering the extent of diversification of economic activities and stating that this comparison is not required under the *de facto* specificity analysis.

The petitioner contends that the Department does not make a determination on the disproportionate benefits received by Magnola during the POR. Rather, according to the petitioner, the Department has fulfilled its obligation to calculate benefits attributable to this POR.

Department's Position: It is the Department's policy not to revisit specificity determinations absent the presentation of new facts or evidence (see, e.g., Pure and Alloy Magnesium From Canada: Final Results of the First (1992) Countervailing Duty Administrative Reviews, 62 FR 13857 (March 24, 1997); Carbon Steel Wire Rod From Saudi Arabia; Final Results of Countervailing Duty Administrative Review and Revocation of Countervailing Duty Order, 59 FR 58814 (November 15, 1994)). In this review, no new facts or evidence has been presented which would lead us to question that determination.

In proposing that the Department base a POR-specific *de facto* specificity finding on the amounts of benefits from non-recurring grants allocated to the POR, the respondent appears to be confusing the initial specificity determination based on the action of the granting authority and other circumstances at the time of bestowal with the allocation of the benefit over time. These are two separate issues. We agree with the petitioner that once a determination has been made regarding whether a non-recurring subsidy was specific (or not) at the time of bestowal, then that finding holds for the duration of the subsidy benefit barring any new facts or evidence pertaining to the circumstances of the subsidy's bestowal. In the original determination, we considered each of the claims raised by Magnola; the bases of the original specificity determination are still valid. Since no new evidence has been presented which would cause us to revisit the original specificity determination, we continue to find assistance under the MTM Program to be specific and, therefore, countervailable.

Comment 5: Magnola's Discount Rate

Magnola's and Government of Quebec's Argument: Magnola contends that 19 CFR 351.524(d)(3)(A) expresses a preference for the use of "the long-term, fixed-rate loans of the firm in question." Magnola argues that the Department improperly applied the Canadian average rate of return on long-term commercial bonds as the discount rate rather than Noranda's interest rates on long-term loans. According to Magnola, it used funds borrowed by the parent company, Noranda Inc., and therefore, this is Magnola's cost of capital.

Petitioner's Argument: The petitioner asserts that the cost on long-term loans to Noranda would not reflect actual rates charged to Magnola. According to the petitioner, the Department noted that Magnola "is a separately incorporated company and is the recipient of the subsidy benefits under review." See Final New Shipper Review at Comment 4, p. 20.

Department's Position: In this review, no new facts or evidence have been presented which would lead us to revisit our previous decision regarding the appropriate discount rate for Magnola. Therefore, we find that the bases of our decision in the Final New Shipper Review are still valid. Accordingly, for the final results, we continue to apply the Canadian average rate of return on long-term commercial bonds as Magnola's discount rate.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions and making no adjustments to the related rate calculations. If these recommendations are accepted, we will publish the final results of this administrative review and the final rates for all firms reviewed in the Federal Register.

AGREE _____

DISAGREE _____

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

Date