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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum: Final Results of
Administrative Review of the Countervailing Duty Order on Low
Enriched Uranium from France

SUMMARY

We have analyzed the comments and rebuttal comments submitted by interested parties in the administrative review of the countervailing duty (“CVD”) order on low enriched uranium (“LEU”) from France for the period January 1, 2004, through December 31, 2004. After analyzing the comments, we have made no modifications to the Preliminary Results of Countervailing Duty Administrative Review: Low Enriched Uranium from France, 71 FR 7924 (February 15, 2006) (“LEU 2004 Preliminary Results”). The “Subsidies Valuation Information” and “Analysis of Programs” sections below describe the methodology followed in this review with respect to Eurodif S.A. (“Eurodif”)/Compagnie Generale Des Matieres Nucleaires (“COGEMA”), the producer/exporter of subject merchandise covered by this review. Also below is the “Analysis of Comments” section, which contains the Department of Commerce’s (“the Department’s”) response to the issues raised in the briefs. We recommend that you approve the positions, which we have developed in this memorandum.

We received comments on the following issues:

- Comment 1: Adequacy of Remuneration
- Comment 2: SWU Benchmark
- Comment 3: Rescission
- Comment 4: Draft Customs Instructions

METHODOLOGY AND BACKGROUND INFORMATION

I. SUBSIDIES VALUATION INFORMATION

A. Calculation of Ad Valorem Rates

Consistent with our approach in the LEU Final Results 2003,¹ we calculated the ad valorem program subsidy rates for 2004, using the following formula:

$$A = \frac{B * (C / D)}{E}$$

Where;

A	=	<u>Ad Valorem Rate</u>
B	=	Subsidy Benefit
C	=	Sales of Subject Merchandise to the United States during the Calendar Year
D	=	Total Sales during the Calendar Year (including COGEMA sales on behalf of Eurodif)
E	=	Sales that Entered U.S. customs territory during the Calendar Year

We received no comments on this calculation formula. Therefore, we continue to apply this formula to calculate the ad valorem program subsidy rates in these final results for the January 1, 2004, through December 31, 2004, period of review (“POR”).

II. ANALYSIS OF PROGRAMS

A. Programs Determined to Confer Subsidies

1. Purchases at Prices that Constitute “More than Adequate Remuneration”

Eurodif provides LEU to Electricite de France (“EdF”), a wholly owned French government agency that supplies, imports, and exports electricity. EdF is the major supplier of electricity in France, and is regulated by the Gas, Electricity, and Coal Department of the Ministry of Industry and the Budget and Treasury Departments of the Ministry of Finance. To date, EdF has entered into three long-term contracts with Eurodif to secure LEU. The first contract was negotiated in 1975, and Eurodif began enrichment at its Georges-Besse gaseous diffusion facility in 1979. Eurodif and EdF entered into a subsequent contract in 1995, under which the POR purchases were made.

In the Final Affirmative Countervailing Duty Determination: Low Enriched Uranium from France, 66 FR 65901 (December 21, 2001) (“LEU Final Determination”), and LEU Final Results 2003, we found this program to be countervailable. The facts on which this determination was made have not changed. EdF is still owned by the Government of France

¹ See Final Results of Countervailing Duty Administrative Review: Low Enriched Uranium from France, 70 FR 39998 (July 12, 2005) (“LEU Final Results 2003”).

(“GOF”), and because EdF is purchasing a good from Eurodif, a financial contribution is being provided under section 771(5)(D)(iv) of the Tariff Act of 1930, as amended (“the Act”). The program is specific under section 771(5A)(D)(i) of the Act because it is available only to Eurodif.

Under section 771(5)(E)(iv) of the Act, a countervailable benefit may be provided by a government’s purchase of a good for “more than adequate remuneration.” Pursuant to section 771(5)(E)(iv) of the Act, the adequacy of remuneration will be determined in relation to the prevailing market conditions for the good being purchased in the country, which is subject to the review. Therefore, in order to determine whether the prices paid by EdF constitute “more than adequate remuneration,” we compared the price that EdF paid to Eurodif to a market-determined benchmark price. The constructed benchmark price reflects the price that EdF paid to another supplier and the price that EdF was willing to pay for a separative work unit (“SWU”),² as contained in a contract that provided for contemporaneous purchases. We received comments regarding the per-SWU price benchmark. See Comments 1 and 2 below.

Due to the difference in the pricing structure between EdF and Eurodif, as compared with the pricing structure between EdF and its other suppliers, it is necessary to make certain adjustments for the price comparison. Unlike most other customers, EdF provides its own energy for Eurodif to use when producing LEU. Beginning in 2002, EdF started to pay Eurodif in energy for the energy that Eurodif uses to produce EdF’s LEU. Eurodif, however, charges EdF for the operational costs associated with the production of the LEU. As EdF does not supply electricity to its other LEU suppliers, these suppliers charge EdF a single price per SWU. Thus, we have used this single price per-SWU as our benchmark price. In order to make a proper comparison between the benchmark price and the actual price (*i.e.*, the price paid by EdF to Eurodif), we included both an operational and energy price paid by EdF to Eurodif.

As part of the arrangement for obtaining LEU, customers often provide an amount of natural uranium equal to that which theoretically went into the LEU they are purchasing. The record does not contain information on the value of the natural uranium provided by EdF or other customers to Eurodif. In the “Issues and Decision Memorandum from Bernard T. Carreau, Deputy Assistant Secretary for AD/CVD Enforcement II, to Faryar Shirzad, Assistant Secretary for Import Administration, concerning the Final Affirmative Countervailing Duty Determination: Low Enriched Uranium from France - Calendar Year 1999,” dated December 13, 2001, we assumed that the value of all natural uranium is the same (see discussion of “Purchases at Prices that Constitute ‘More Than Adequate Remuneration’” at the “Analysis of Programs” section). In making purchase comparisons in this review, we continue to assume that the value of all natural uranium is the same in instances where EdF supplied its own feed material for enrichment. Thus, we have not included a value for the natural uranium component of the LEU delivered to EdF by Eurodif.

In order to determine whether a benefit was provided to Eurodif during the POR, we calculated a per-SWU price for both the energy and operational components of the LEU purchased by EdF from Eurodif. See the February 8, 2006, Memorandum concerning the Calculations for the Preliminary Results of Administrative Review of Countervailing Duty Order

² The “separative work unit” is the unit of measure of effort required to carry out isotopic separation of the uranium from its natural state to the concentration or “assay” required for power plant use.

on Low Enriched Uranium from France.³ After adding these two components together, we compared the per-SWU price paid to Eurodif by EdF in 2004 with the market-determined per-SWU price. Based on our analysis, we determine that the prices paid by EdF to Eurodif were higher than the prices EdF paid to its other suppliers. Therefore, in accordance with section 771(5)(E)(iv) of the Act, we determine that this program conferred countervailable benefits to Eurodif in 2004. Because EdF's purchases from Eurodif are not exceptional but, rather, are made on an ongoing basis from year to year, we determine that the benefit conferred under this program is recurring under 19 CFR 351.524(c). Therefore, we have expensed the benefit in the year of receipt, *i.e.*, calendar year 2004.

To determine the program rate for the POR, we multiplied the benefit amount by the sales of subject merchandise to the United States divided by total sales, and then divided that result by sales that entered U.S. customs territory during 2004. Thus, we calculated the ad valorem rate for this program using the formula discussed in the "Subsidies Valuation Information" section, above. On this basis, we find the net countervailable subsidy rate to be 1.53 percent ad valorem.

2. Exoneration/Reimbursement of Corporate Income Taxes

Under a specific governmental agreement entered into upon Eurodif's creation, Eurodif is only liable to pay income taxes on the portion of its income relating to the percentage of its private ownership. Eurodif is fully exonerated from payment of corporate income taxes corresponding to the percentage of its foreign government ownership and is eligible for a reimbursement of the amount of corporate income taxes corresponding to the percentage of its French government ownership. In the LEU Final Determination and LEU Final Results 2003, we found this program to be countervailable. No new information has been provided in this review to warrant reconsideration of our determination.

During the POR, (*i.e.*, calendar year 2004), Eurodif filed its 2003 corporate income tax return. Based on the governmental tax agreement, Eurodif was exonerated from a portion of its 2003 income taxes filed during the POR. Eurodif was also reimbursed that portion of its 2003 income taxes attributable to its percentage of French government ownership. This tax exemption and reimbursement constitute a financial contribution within the meaning of section 771(5)(D)(ii) of the Act. Further, because the tax exemption and reimbursement is limited to Eurodif, the benefit is specific in accordance with section 771(5A)(D)(i) of the Act.

In accordance with 19 CFR 351.509(b), we calculated the benefit under this program by determining the amount of corporate income taxes that Eurodif would have otherwise paid, absent the program, on the tax return it filed during the POR. Specifically, we added the amount of exonerated taxes and the amount of reimbursable taxes. We then divided the total benefit amount by Eurodif's total sales for calendar year 2004. We adjusted Eurodif's sales denominator using the methodology described in the "Subsidies Valuation Information" section,

³ Because we have made no modifications to the preliminary results calculations for these final results, we refer interested parties to the February 8, 2006, calculations memorandum. A public version of the memorandum is available on the public record in the Central Records Unit ("CRU") located in room B-099 of the Commerce Building.

above. This methodology is consistent with our approach in the LEU Final Results 2003. On this basis, we find the net countervailable subsidy rate to be 3.53 percent ad valorem.

III. TOTAL AD VALOREM RATE

The total net subsidy rate for Eurodif/COGEMA is 5.06 percent ad valorem for the period January 1, 2004, through December 31, 2004.

IV. ANALYSIS OF COMMENTS

Comment 1: Adequacy of Remuneration

Respondents disagree with the Department's benchmark for its adequacy of remuneration analysis under the program on "Purchases at Prices that Constitute 'More than Adequate Remuneration.'" They state the statute requires "that the adequacy of remuneration shall be determined in relation to prevailing market conditions for ... the goods being purchased in the country which is subject to the investigation or review." See Section 771(5)(E) of the Act. They add the statute further provides that "{p}revailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale." See Id. They submit that the regulation pertaining to government provision of goods and services provides that the Department "will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question." See 19 CFR 351.511(a)(2)(i). However, they argue that the Department, in the Preliminary Results, compared different and incomparable transactions that were not contemporaneous. Respondents make further arguments pertaining to this issue; however, their comments are proprietary and cannot be summarized in this document. See the August 14, 2006, Memorandum to the File regarding Proprietary Comments on "Purchases at Prices that Constitute 'More than Adequate Remuneration'" ("Proprietary Comments Memorandum") at 1-2.

In their rebuttal brief, petitioners argue that the price the Department used serves as a reasonable benchmark because it reflects prevailing market conditions for price and availability. Petitioners also argue that respondents, in making their argument that the Department must use "actual transactions," are relying on language in 19 CFR 351.511(a)(2)(i), which addresses sales at "less" than adequate remuneration and not sales at "more" than adequate remuneration. They further argue that even if that regulation were applicable, it only provides that the Department will "normally" seek to use "actual transactions." Petitioners also rebut respondents' "contemporaneous comparison" argument, stating that the Department has looked at the prices paid by EdF to Eurodif and its other suppliers in the year under review, even though the contracts providing for those prices may have been entered into in a prior year. They make further arguments pertaining to this issue; however, their comments are proprietary and cannot be summarized in this document. See Id. at 2-3.

While the Department has not codified a regulation for the purchase of goods for more than adequate remuneration, the Preamble to the regulations states that “our intended approach toward the measurement of the adequacy of remuneration is outlined in detail in section 351.511 (government provision of goods or services).” See Countervailing Duties, Final Rule, 63 FR 65348, 65379 (November 25, 1998) (“Preamble”). It also states that “we expect that any analysis of the adequacy of remuneration will follow the same basic principle, *i.e.*, will focus on what a market-determined price for the good in question would be.” See Id. In order to determine whether a benefit was provided to Eurodif from EdF, through the latter’s purchases, we must compare the per-SWU price in effect between EdF and Eurodif with the market-determined price.

Therefore, based on the information that EdF submitted to the Department, we computed the market-determined per-SWU benchmark price for 2004. Based on our consideration of the arguments made on this issue and the information on the record, we continue to use the SWU benchmark constructed at the preliminary results to determine the benefit from the program “Purchases at Prices that Constitute ‘More than Adequate Remuneration,’” for these final results. The facts on which the Department’s reasoning is based are proprietary and cannot be further discussed in this document. See Proprietary Comments Memorandum at 3-4.

Comment 2: SWU Benchmark

Petitioners argue that there is another way for the Department to determine the per-SWU price, with which to construct the SWU benchmark. Specifically, petitioners suggest that with known values (*i.e.*, product and tails assay, volume of kilogram of LEU, price per-kilogram, and total price), the Department can calculate a per-SWU price using standard formulas and natural uranium pricing data.

In their rebuttal brief, respondents argue that petitioners are attempting to artificially inflate the benchmark comparison by extrapolating general and non-contemporaneous figures, which are not related to EdF’s transactions. They further argue that information used by petitioners to construct their per-SWU price is erroneous and the formulation, which backs into a per-SWU price, is flawed.

Department’s Position

The per-SWU price, calculated by petitioners using the SWUCalc formula, is effectively determined by uranium feed price data, which are not available on the record of this review. The deadline for the submission of new factual information passed prior to the submission of case briefs. Therefore, we are not addressing the comments raised by petitioners and respondents on the per-SWU price calculated with the SWUCalc formula. As discussed above in Comment 1, we continue to use the SWU benchmark that we constructed in the preliminary results to determine whether a benefit was provided to Eurodif through EdF’s purchases of LEU.

Comment 3: Rescission

Respondents discuss that the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) concluded that SWU contracts are contracts for services and not goods in the appeal of the CVD order on LEU from France. See Eurodif S.A. v. United States, 423, F.3d 1275, 1278 (Fed. Cir. 2005) (“Eurodif II”), affirming Eurodif S.A. v. United States, 411 F.3d 1355 (Fed. Cir. 2005) (“Eurodif I”). They add that in accordance with those decisions and the U.S. Court of International Trade’s (“CIT’s”) remand instructions, the Department issued its final results of redetermination on remand with respect to the underlying investigation on March 3, 2006. See Final Results of Redetermination on Remand Pursuant to Eurodif S.A., Compagnie Generale Des Matieres Nucleaires, and COGEMA Inc., et al. v. United States, Slip Op. 06-03 (CIT, January 5, 2006) (“Remand Results”). Respondents discuss that in the Remand Results, the Department determined that there is no benefit or program rate for the program “Purchases at Prices that Constitute ‘More Than Adequate Remuneration.’” See Remand Results at 7. They submit that, because the elimination of that program leaves a de minimis tax program subsidy rate, there is insufficient support to continue the CVD order against LEU from France. Respondents, therefore, argue that because the Remand Results indicate that the CVD order is not valid, there is no basis for the instant review, which the Department should rescind.

Petitioners disagree arguing that a rescission of this review would be premature absent a final and conclusive decision revoking the CVD order. They add that the Department indicated in its Remand Results that it will review the possibility of seeking certiorari after final judgement has been rendered in this matter. See Remand Results at 3.

Department’s Position

The litigation concerning the Federal Circuit’s decisions in Eurodif I and Eurodif II is not yet complete. On July 17, 2006, petitioners filed a notice of appeal to the Federal Circuit of the CIT’s May 18, 2006, decision to sustain the Department’s March 2, 2006, Remand Results. Until all litigation is final, Eurodif I and Eurodif II have no legal binding on the Department. Therefore, in this review, the Department is maintaining its position that SWU contracts are contracts for goods and not contracts for services. See LEU Final Determination.

Comment 4: Draft Customs Instructions

Respondents urge the Department to adhere to its statement in the LEU 2004 Preliminary Results, and not issue customs instructions in light of the injunctions against liquidation (see 71 FR 7926). They also argue that if the Department does issue liquidation instructions, then the draft liquidation instructions should be amended to include an admonition against liquidation.

Petitioners did not submit a rebuttal comment to respondents’ argument.

Department’s Position

As we stated in LEU 2004 Preliminary Results, while the countervailing duty deposit rate for Eurodif/COGEMA may change as a result of this administrative review, we have been enjoined from liquidating any entries of the subject merchandise. See Id. Consequently, we will not issue liquidation instructions until such time as the injunctions are lifted.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If these recommendations are accepted, we will publish the final results of the review in the Federal Register.

Agree

Disagree

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

Date