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New Shipper Review
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MEMORANDUM

DATE: April 21, 2003

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

FROM: Susan H. Kuhbach
Acting Deputy Assistant Secretary, Group I
Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results of the Countervailing Duty New Shipper Review of Alloy Magnesium from Canada

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SUMMARY

On January 28, 2003, the Department of Commerce ("the Department") published the preliminary results in this new shipper review.[1] The "Analysis of Program" and "Subsidies Valuation Information" sections below describe the subsidy programs and the calculation methodologies used to calculate the benefit from one program. We have analyzed the comments by the interested parties that submitted case briefs 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. Below is a complete list of the issues in this review for which we received comments from parties:

Comment 1- Whether the Emploi-Québec Manpower Training Measure program is an export subsidy

Comment 2- Whether the Emploi-Québec Manpower Training Measure program is

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[1] See Alloy Magnesium from Canada: Preliminary Results of Countervailing Duty New Shipper Review, 68 FR 4175 (January 28, 2003) ("Preliminary Results").

countervailable

Comment 3- Magnola Metallurgy's company specific Average Useful Life ("AUL")

Comment 4- Magnola Metallurgy's discount rate

Subsidies Valuation Information

Allocation Period

In the Preliminary Results, we used the 14-year AUL from the U.S. Internal Revenue Services 1977 Class Life Asset Depreciation Range System ("IRS Tables") to allocate Magnola Metallurgy, Inc.'s ("Magnola") non-recurring subsidies. For the final results, Magnola commented that we should allocate its subsidies over the 28-year company-specific AUL it calculated for this review. For the reasons stated in Comment 3, we do not agree with Magnola. Therefore, for the final results and for the same reasons stated in the Preliminary Results, we continue to allocate Magnola's benefits over a 14-year AUL from the IRS Tables.

For all non-recurring subsidies, we applied the "0.5 percent expense test" described in 19 CFR §351.524(b)(2). Under this test, we compare the amount of subsidies approved under a given program in a particular year to sales (total or export, as appropriate) in that year. If the amount of subsidies is less than 0.5 percent of sales in the year of approval, the benefits are expensed in full in the year of receipt rather than allocated over the AUL.

Discount Rates

In the Preliminary Results, we used the Canadian average rate of return on long-term commercial bonds as the discount rate, because Magnola did not have any commercial loans or debt obligations for the years 1998 and 2000. Magnola has argued that the Department should use its parent company's interest rate on long-term loans as the discount rate. For the reasons stated in Comment 4, we disagree with Magnola and for the final results we have continued to use the discount rate calculated in the Preliminary Results.

Analysis of Programs

Programs Determined To Be Countervailable

1. Emploi-Québec Manpower Training Measure Program

Emploi-Québec ("E-Q") is a labor-focused government unit created under the laws of Québec that administers the manpower and employment policies on behalf of Québec's Ministry of Employment and Solidarity (*Ministère de L'Emploi et de la Solidarité sociale*). The goal of the E-Q is to improve and develop the labor market in the region of Québec. To accomplish this goal, in 1998 the Emploi-

Québec Manpower Training Measure program ("MTM program") was established to provide financial support, in the form of grants, to companies with approved training programs.

The MTM program provides two funding levels under which companies may receive reimbursement of labor training expenses: small-scale economic projects and major economic projects. Before becoming eligible for reimbursement, projects at both funding levels must satisfy the E-Q's five policy objectives: job preparation, job integration, job management, job stabilization, and job creation. Once the five objectives are met, companies are eligible to receive reimbursement of 50 percent of their labor training expenses.

Small-scale project recipients are eligible to receive a maximum reimbursement of $100,000. However, the $100,000 reimbursement limit does not apply to major economic projects. Major economic projects are required to: 1) create either 50 jobs or 100 jobs in 24 months, depending on whether the company is a new company or an established company; 2) have the approval of the Ministry's *Commission des partenaires du marche du travail* ("CPMT"); and 3) agree to close monitoring by the E-Q. The Labor Market Development Fund ("LMDF") sets aside $40 million annually to finance major economic projects and, while all industries are eligible to receive funding, priority is given to manufacturing sectors where exporting is a priority and to projects from the service, commerce and accommodation sectors, if they have the potential to attract international clientele or foreign business to Québec.

In 1998, Magnola submitted a human resource development plan to the E-Q. Magnola met the criteria for eligibility as a major economic project. In 1998 and 2000, the E-Q approved grants to reimburse 50 percent of Magnola's training expenses.

In the Preliminary Results, we found that the MTM grants Magnola received in 1998 and 2000 constituted countervailable subsidies within the meaning of section 771(5) of the Tariff Act of 1930 ("the Act"). We found a financial contribution under section 771(5)(D)(I) of the Act because the grants were a direct transfer of funds from the Government of Québec ("GOQ") that conferred a financial benefit to Magnola in the amount of the grants. Further, we found that the MTM program was *de facto* specific according to section 771(5A)(D)(iii) of the Act, because Magnola and the metals industry received a disproportionately large amount of MTM benefits compared to other recipients. Magnola and the GOQ (collectively, "respondents") have argued that the benefits received by Magnola are not disproportionate and, therefore, not countervailable. For reasons stated in Comment 2, we disagree with the respondents and continue to find these benefits countervailable based on section 771(5A)(D)(iii) of the Act.

In accordance with 19 CFR 351.524(c)(1) and (2), we have treated these grants as non-recurring subsidies because separate, project specific government approval was required to receive benefits, and funding for all projects under the MTM program was generally limited to 24 months. To calculate the benefit, we performed the expense test, as explained in the *Allocation Period* section above, and

found that the benefits approved in each year were more than 0.5 percent of Magnola's total sales. Therefore, we allocated these benefits over time. We used the grant methodology described in 19 CFR 351.524(d) to calculate the amount of benefit allocable to the period of review ("POR"). We then divided the benefit in the POR by Magnola's sales in the POR.
On this basis, we find the net subsidy rate from the MTM program to be 7.00 percent *ad valorem* for Magnola.

Programs under which no benefit was received during the POR

1. Federal Funding for a Feasibility Study under the Canada-Quebec Subsidiary Agreement on Industrial Development

The Department examined this program in the original investigations of pure and alloy magnesium and found that the GOC-provided assistance conferred a countervailable benefit. See Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium From Canada, ("Magnesium Investigation") 57 FR 30946 (July 13, 1992). Magnola received contributions in 1996 and 1997, which were repaid to the GOC in 1998, with interest. Therefore, since Magnola repaid the benefits received prior to the POR, and no new funds were received during the POR, we find there is no benefit from this program during the POR.

Programs Found To Be Not Used

We examined the following programs and find that Magnola did not apply for or receive benefits under these programs during the POR:

1. St. Lawrence River Environment Technology Development Program
2. Program for Export Market Development
3. The Export Development Corporation
4. Canada-Québec Subsidiary Agreement on the Economic Development of the Regions of Québec
5. Opportunities to Stimulate Technology Programs
6. Development Assistance Program
7. Industrial Feasibility Study Assistance Program
8. Export Promotion Assistance Program
9. Creation of Scientific Jobs in Industries
10. Business Investment Assistance Program
11. Business Financing Program
12. Research and Innovation Activities Program
13. Export Assistance Program
14. Energy Technologies Development Program
15. Financial Assistance Program for Research Formation and for the Improvement of the Recycling Industry

16. Transportation Research and Development Assistance Program

Comment Analysis

Comment 1: Whether the Emploi-Québec Manpower Training Measure program is an export subsidy

Petitioner's Arguments

The petitioner argues that the Department erred in its Preliminary Results by not finding the MTM program export specific. The petitioner argues the MTM program is export specific because it meets the requirements outlined in 19 CFR 351.514(a) and the "expanded definition" in the Countervailing Duties; Final Rule, 63 FR 65348, 65381 (November 25, 1998) ("1998 CVD Regulations"). Specifically, the petitioner argues that the expanded definition of "export subsidy" includes programs where anticipated exportation is one of several criteria considered in approving benefits and that it is the respondents' burden to demonstrate that Magnola received benefits solely under non-export criteria. The petitioner argues that language found in the MTM program's regulations indicates that anticipated exportation is among the eligibility criteria considered by the GOQ before approving an applicant.

Furthermore, in support of the argument that the MTM program is an export subsidy, the petitioner states that the Department noted in the Preliminary Results that the GOQ considers anticipated exportation in determining whether to grant MTM benefits. See Preliminary Results, 68 FR at 4176. The petitioner further argues that the term "export," as used in MTM program regulations, means exports made outside Canada and not interprovincial exports. The petitioner notes that the respondents have failed to provide any factual evidence which indicates the "export" provision refers to interprovincial exports rather than international exports or that Magnola received benefits under non-export criteria.

Respondents' Arguments

The GOQ contends that the MTM program is neither *de jure* nor *de facto* export specific according to 771(5A)(B) of the Act and 19 CFR §351.514(a). Furthermore, the GOQ maintains that the Department has previously noted its agreement with note 4, Article 3.1(a) of the WTO Subsidies and Countervailing Duty Measures Agreement ("SCM Agreement") which provides that "the mere fact that a subsidy is granted to enterprises that export 'shall not for that reason alone be an export subsidy.'" See Preliminary Negative Countervailing Duty Determination: Certain Laminated Hardwood Trailer Flooring From Canada, ("Laminated Floors") 61 FR 59079, 59082 (November 20, 1996). The GOQ contends that the instant record indicates that the MTM Program's approval criteria are non-export related. The GOQ reiterates that before receiving 50 percent reimbursement of labor training expenses, applicants must meet the following five E-Q policy objectives: 1) job preparation; 2) job integration; 3) job management; 4) job stabilization; and 5) job creation. Because none of these criteria are export contingent, the GOQ argues that the MTM program is not *de jure* export specific.

Furthermore, the respondents maintain that there is no record evidence which indicates that Magnola's MTM grant was *de facto* export specific. The respondents argue that the "export" language cited by the petitioner to support its allegation that MTM approvals are partially based on "anticipated exportation" is derived from a non-binding internal handbook and that neither Magnola's agreement with the E-Q nor its reimbursement request "mentions exportation." The GOQ maintains that record evidence indicates that over 70 percent of program beneficiaries exported outside Québec but not outside Canada. Magnola notes that the GOQ supplied a sworn statement from an E-Q official stating that "export" means exports within Canada but outside the province of Québec. Thus, both respondents argue that the term "export" refers to exports outside the province of Québec and not to exports outside Canada." Moreover, the GOQ argues that the Department previously concluded a similar program was not an export subsidy "because anticipated destination...alone does not render the program a *de facto* export subsidy." See Laminated Floors, 61 FR at 59082. The respondents reiterate that Magnola received its grant after meeting the MTM program's non-export related objectives outlined by the Department in the Preliminary Results. See Preliminary Results, 68 FR at 4176

Department's Position

We disagree with the petitioner's assertion that the MTM program is an export subsidy. Because eligibility for the MTM program is not contingent upon export performance, we find that this program is not an export subsidy. We have found no record evidence which persuades us that eligibility for the MTM program was tied to or contingent upon export performance, alone or as one of two or more conditions, in law or in fact, as is contemplated by section 771(5A)(B) of the Act or 19 CFR 351.514(a). We agree with the respondents that the language cited by petitioner in support of its position, i.e., "priority is given to projects from the manufacturing sector where production is mainly destined for export, but not to the exclusion of support for projects from all other industrial sectors," does not alone support a finding that Magnola's receipt of MTM benefits was contingent upon exportation outside Canada. We note that our interpretation of the petitioner's cited "export" language is consistent with our decision in Laminated Floors where we determined that the SDI PREP program was not an export subsidy because no record evidence demonstrated that eligibility was contingent upon exports made outside Canada. Rather, in Laminated Floors, we found that "export" could have referred to exports to another province in Canada. See Laminated Floors, 61 FR at 29082.

We further note that the respondents provided a sworn statement from an E-Q official stating that the term "export" as used by the GOQ means "export from Québec, including export from Québec to other provinces in Canada."[2] The petitioner has not presented persuasive evidence to make us doubt the veracity of this sworn statement. Rather, based on record evidence, we determine that eligibility for

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[2] GOQ rebuttal to supplemental questionnaire deficiencies letter, dated January 6, 2003, attachment.

the MTM program is not contingent upon exporting outside Canada. Although the GOQ may have been aware that Magnola might, in fact, export outside of Canada, we find that "the mere fact that a subsidy is accorded to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of the above provisions." See Laminated Floors, 61 FR at 29082. Relying on our finding that MTM program eligibility was based on companies satisfying the five E-Q policy directives, *i.e.*, 1) job preparation, 2) job integration, 3) job management, 4) job stabilization, and 5) job creation, and other non-export factors, we continue to find that the MTM program is not export specific.

Comment 2: Whether the Manpower Training Measure Program is Countervailable

Respondents' Arguments

The respondents argue that the MTM program is substantially similar to training programs that the Department has repeatedly found not countervailable. Like its predecessor, the Manpower Training program, the MTM program: 1) has no *de jure* or *de facto* limitations on which enterprises, industries, or workers may receive benefits; 2) is available to numerous industries; and 3) is available to companies within broad industrial ranges. Additionally, the respondents argue that, unlike countervailable training programs, the MTM program is not limited by region or industry. Finally, the respondents maintain that because all industries must meet identical eligibility criteria in order to receive the same benefit, i.e., 50 percent reimbursement of labor-training expenses regardless of geography or industry, the MTM cannot be *de jure* or *de facto* specific. See, e.g., Magnesium Investigation and Laminated Floors. See also, Certain Stainless Steel Wire Rod From Italy: Final Affirmative Countervailing Duty Determination, 63 FR 40474 (July 29, 1998); Stainless Steel Sheet, Strip and Plate from the United Kingdom: Final Affirmative Countervailing Duty Determination, 48 FR 19048 (April 27, 1983).

Regarding disproportionality, under section 771(5A)(D)(iii)(III) of the Act, the respondents make the following arguments. First, the respondents argue that the Department is precluded from making a finding of *de facto* specificity based on disproportionality merely because Magnola or its industry received a larger shares of benefits. See Bethlehem Steel Corp. v. United States, ("Bethlehem Steel") 140 F. Supp. 2d 1354, 1369 (Ct. Int'l Trade 2001) and AK Steel Corp. v, United States, ("AK Steel")192 F.3d 1367, 1384 (Fed. Cir. 1999). The respondents argue that in both Bethlehem Steel and AK Steel, the courts rejected such a "rigid" approach where the Department analyzed disproportionality by comparing the largest amount of benefits received by recipients instead of examining the percentage of the total benefit accruing to a particular company. See Bethlehem Steel, 140 F. Supp. at 1369. The GOQ argues that the Department erred in basing its disproportionality finding on the mere fact that a recipient received the largest amount of MTM benefits in terms of dollars. Instead, the respondents argue, the Department must consider whether Magnola and its industry received disproportionate benefits in relation to the industry's subsidized activity. See AK Steel, 192 F.3d at 1384.

Second, the respondents argue that the Department should find that the MTM program is not specific because all recipients were granted 50 percent of training costs after meeting certain objective criteria. The respondents argue that although a beneficiary of a program may receive a greater share of benefits because it spent more on training, this fact alone does not confer specificity where a program grants all eligible participants the same benefit percentage. Thus, the respondents argue that the Department cannot find that Magnola, or its industry, received a disproportionate share of MTM funding where all parties are treated uniformly under a program. Magnola reiterates that the Department concluded that applicants for both small-scale and major economic project funding receive the same 50 percent reimbursement as Magnola received and, therefore, are treated uniformly.

Third, the respondents argue that the Department's aggregation of three unrelated industries into a "metals industry" was inappropriate and inconsistent, because in past cases the Department has refused to expand industries to encompass merchandise not under investigation in performing its disproportionality analysis. See, e.g., Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From Singapore, 60 FR 52377, 52378-79 (October 6, 1995). The respondents also contend that the Department cannot reasonably analyze whether Magnola received a disproportionate share of benefits, by examining the share of benefits received by the aluminum and ferrous metals industries, which include mining and metal fabrication. The GOQ argues that the issue in any disproportionality finding must be whether the producer involved in the case "received disproportionate benefits, not whether the aggregated benefits to companies not involved somehow total a disproportionate figure."

Furthermore, the respondents maintain that the Department's aggregation of industries contradicts the North American Industry Classification System ("NAICS"). The GOQ interprets the definition of "industry" in section 771(4)(A) of the Act as precluding the Department from creating the "metals industry" because magnesium, ferrous metals and aluminum are not "like" products, according to this definition. The GOQ also argues that the "like" product in this proceeding is "pure and alloy magnesium," which the petitioner proposed in Magnesium Investigation and has not sought to change in this review. Therefore, the GOQ argues that the Department's adoption of a different "industry" definition for its disproportionality analysis contradicts the industry definition established in the Department's and the U.S. International Trade Commission's investigations and administrative reviews.

Fourth, the respondents assert that the Department ignored its statutory obligation in the Preliminary Results when it failed to take into "account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy has been in operation." See section 771(5A)(D)(iii). The respondents argue that the Department must analyze whether Magnola or its industry received disproportionate funding under section 771(5A)(D)(iii)(III) of the Act by comparing the share of benefits to the industry's share of the Québec economy. The respondents argue that the Department is required under the *Uruguay Round Agreements Act* to take into consideration the diversification and economic activities within the jurisdiction of the authority granting the benefit. See *Uruguay Round Agreements Act, Statement of Administrative Action,* H.R. Doc. No. 103-106, Vol I, at 261; and Issues and Decisions Memorandum incorporated in Certain Hot-Rolled Steel Flat Products from South Africa: Final Affirmative Countervailing Duty Determination, 66 FR 50412 (October 3, 2001), and accompanying decision memorandum ("Hot-Rolled Steel from South Africa") at Comment 2. Further, the GOQ asserts that MTM funds promote economic diversification, as is contemplated in section 771(5A)(D)(iii) of the Act, and that when a jurisdiction provides funding for a major economic project, the Department must consider the diversification clause in performing its disproportionality assessment. The GOQ also argues that the MTM program and its predecessor programs have been in effect for many years and in fact, in Magnesium Investigation, the MTM program's predecessor was found not countervailable. Magnola argues that in determining whether a program is *de facto* specific, the Department must consider the short time period during which the MTM program has existed. Magnola argues that as the MTM program continues, new beneficiaries will dilute both Magnola's and the magnesium industry's share of benefits.

Next, the GOQ argues that, when disproportionality is alleged, the Department must investigate, as it did in Final Affirmative Countervailing Duty Determination: Certain Cut-To-Length Carbon-Quality Steel Plate from the Republic of Korea, ("Carbon Plate from Korea") 64 FR 73176 (December 29, 1999), whether other factors explain or contribute to what may otherwise appear to be a disparity in the use of a government program. By not analyzing such factors, the GOQ alleges that the Department has acted contrary to the statute and AK Steel. The GOQ further argues that the Department's disproportionality finding in the Preliminary Results, is not the type of "objectionable favoritism" or "special treatment" that the disproportionality rule guards against. Rather, the GOQ argues that if all the factual circumstances before the Department are taken into account (particularly the innovative technology employed by Magnola, the burdens of the start-up phase, and the resulting training needs), then a disproportionality finding would be contrary to the statute and AK Steel.

Magnola further argues that by basing Magnola's specificity on recipients of major economic projects, rather than all MTM recipients, regardless of project scale, the Department contradicts its finding of integral linkage. Moreover, Magnola argues that its share of benefits is reduced to a level which is clearly not disproportionate when all MTM beneficiaries are combined.

Finally, Magnola argues that the Department incorrectly compared Magnola's gross benefit to other recipients' gross benefits in conducting its section 771(5A)(D)(iii)(III) disproportionality analysis. Instead, Magnola argues, the Department should have made a comparison based on amortized benefits attributable to the POR. Because the Department calculated Magnola's preliminary CVD rate on the amortized portion of POR benefits, Magnola argues that the amortized amount alone must be analyzed and found disproportionate before specificity is conferred.

Regarding whether the GOQ exercises discretion as is contemplated under section 771(5A)(D)(iii)(IV) of the Act, Magnola argues that the Department's finding that all MTM participants are uniformly treated precludes a specificity finding on this basis.

Petitioner's Arguments

In reply, the petitioner argues that the MTM program is *de facto* specific and that the Department should affirm its preliminary finding in the final results. The petitioner argues that the Department analyzed the grants appropriately on both an industry and company-specific basis within the most appropriate time frame. However, the petitioner disputes integrally-linking small-scale programs and major economic projects because, among other reasons, the small-scale programs are domestic subsidies and major economic projects are export subsidies. Therefore, the petitioner argues that the Department should limit its disproportionality analysis to major economic project recipients only.

Regarding the Department's industry-specific disproportionality analysis, the petitioner argues that the Department appropriately defined the "metals industry" and had the discretion to do so given the limited information placed on the record by the GOQ. See Laminated Floors, 61 FR at 5208. The petitioner argues that the industry-specific analysis shows that the metals industry received a disproportionate and "predominant" share of MTM benefits, which clearly surpasses the 30 percent threshold defined in Magnola's case brief. In addition, the petitioner states that, following Laminated Floors, the Department should conduct its specificity analysis on a case-by-case basis. See Laminated Floors, 61 FR at 5209. Regarding the company-specific disproportionality analysis, the petitioner makes certain proprietary arguments which conclude that the Department's finding Magnola's benefits under the MTM program *de facto* specific was reasonable.

Regarding the calculations utilized in the Department's disproportionality analysis, the petitioner makes the following arguments. First, the petitioner notes that the calculations in Magnola's case brief using the small-scale projects data as reported by the GOQ contains recipients that received benefits from E-Q programs other than the MTM program. The petitioner asserts that from 1998-1999, approximately 67 percent of the total number of reported grants could be for other E-Q programs. In addition, the petitioner argues that the respondents have failed to identify which companies within the small-scale programs are in the metals industry. Therefore, the petitioner argues that the Department's disproportionality analysis must exclude small-scale program data. Second, the petitioner argues that in its calculations, Magnola should not have focused on the percentage of the total grants Magnola received but instead should have focused on the fact that small-scale company average grants were significantly smaller than the MTM grant received by Magnola. Third, the petitioner maintains that grants awarded to companies in 2001 are not relevant to the Department's specificity analysis. The petitioner argues that benefits received in 2001 should be excluded from the pool of major economic project recipients because they are not contemporaneous with the provision of Magnola's benefits. The petitioner cites to Pure and Alloy Magnesium From Canada; Final Results of the Fifth (1996)

Countervailing Duty Administrative Reviews, 63 FR 45045, 45047 (1988) ("Magnesium Fifth Review") for the proposition that "{t}he time of bestowal or approval is the appropriate basis for the specificity determination because it most directly demonstrates whether a government has limited the benefits bestowed upon an enterprise or industry or group thereof." The petitioner also maintains that the GOQ failed to respond to the Department's multiple requests to provide data on an annual basis and that the Department should adjust the provided aggregated data to remove certain grants from its disproportionality analysis.

The petitioner further argues that the Department should reject the respondents' arguments that the holdings in AK Steel and Bethlehem Steel preclude the Department from finding disproportionality and predominant share based on "an enterprise's or industry's relatively large share of the benefits." The petitioner argues that both cases are not applicable to the labor subsidy at issue in this proceeding and that the cases are distinguishable on their facts. The petitioner argues that none of the facts in AK Steel, which involved the revaluation of assets, are present here.[3] Similarly, the petitioner argues that Bethlehem Steel is not applicable to the instant proceeding because it involved the Department's long-standing analysis of electricity discounts which is not applicable to labor subsidies.[4] The petitioner argues that these cases emphasize that disproportionality and predominant use analyses are not subject to rigid rules, but rather must be determined on a case-by-case basis taking into account all the facts and circumstances of a particular case. See AK Steel, 192 F. 3d at 1384. Furthermore, the petitioner argues that the Department can make an affirmative finding of disproportionality where all beneficiaries receive the same percentage rate of benefits. In addition, the petitioner argues that "special treatment," as suggested by the GOQ, is not required to support a finding of disproportionality. See SAA at 262.

The petitioner asserts that the Department must reject Magnola's argument that it should consider whether the industry's share of total benefits is comparable to the industry's share of gross domestic product of the economy as a whole. The petitioner argues that the Department has previously rejected this argument in Laminated Floors, and Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Belgium, ("Belgium Final") 58 FR 37273 (July 9, 1993), where the Department made clear that its disporportionality analysis would be based on the steel industry's benefits amongst other users of the program and not on a comparison of the steel industry's share of Belgium's gross domestic product ("GDP").

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[3] In AK Steel, the court affirmed the Department's finding in Carbon Plate from Korea, where the Department found there was no disproportionality between benefits derived from asset revaluations between Korean steel producers and Phang Iron and Steel Company.

[4] In Bethlehem Steel, the U.S. Court of International Trade affirmed the Department's finding in Carbon Plate from Korea, where the Department determined that electricity discounts under the Korean Voluntary Curtailment Adjustment program were not specific to the steel industry and, therefore were not countervailable.

The petitioner also rejects Magnola's argument to use the amortized amount of benefits when measuring disproportionality. The petitioner notes that the Department has previously rejected this practice in Magnesium Fifth Review, and considered the entire value of the grant. See Magnesium Fifth Review, 63 FR at 45046-45047.

Department's Position

We continue to find the MTM program countervailable according to section 771(5) of the Act. In the Preliminary Results, we found that the MTM program was *de facto* specific according to section 771(5A)(D)(iii) of the Act because Magnola and the metals industry received a disproportionately large amount of MTM benefits compared to other recipients, i.e., Magnola's benefits were company- and industry-specific. Although the respondents have argued that the MTM program is "substantially similar" to non-countervailable programs and that the benefits received by Magnola are not disproportionate and therefore, not countervailable, we disagree. However, we have limited our *de facto* specificity finding to a company basis.

Although the respondents argue that the Department has found training programs similar to the MTM program non-countervailable in the past, these holdings are not persuasive in the instant proceeding. In the cases cited by the respondents, the characteristics and provisions of the salient training programs differ from those of the MTM program. For example, funding levels, sources and funding requirements differed among the labor programs in the cases cited by the respondents. (See Laminated Floors, 61 FR at 5206, Magnesium Investigation, 57 FR at 4177, and Stainless Steel Sheet and Strip in Coils from France: Final Affirmative Countervailing Duty Determination, 64 FR 30774, 30782 (June 8, 1999)). On *de jure* and *de facto* bases, the similarity of the MTM program to previously investigated programs is not necessarily relevant because legally and factually distinct programs merit distinct analysis. Therefore, the results of one case may not have application in another and findings of countervailability or non-countervailability do not necessarily transfer between programs or countries.

However, we agree with the respondents that the MTM program is not *de jure* specific. Section 771(5A)(D)(i) of the Act provides that if the law enacting a domestic subsidy program expressly limits the program to an enterprise or industry, the program is *de jure* specific. Based on the record evidence, we find the MTM program is available to all industries and all enterprises in Québec that met the five objective criteria. There is no indication that the E-Q regulations expressly limit benefits to a specific industry or enterprise, or to a specific group of industries or enterprises. Furthermore, section 771(5A)(D)(ii) of the Act provides that if the authority providing the subsidy establishes objective criteria governing the eligibility for and the amount of a subsidy where: 1) eligibility is automatic; 2) the eligibility criteria are strictly followed and 3) the criteria are clearly stated in a verifiable official document, then the subsidy is not *de jure* specific. Thus, based on record evidence, we also find that the MTM program meets the objective criteria under section 771(5A)(D)(ii) of the Act. Therefore, we continue to find the MTM program is not *de jure* specific under sections 771(5A)(D)(i) and (ii) of the Act.

Our finding that the MTM program is not *de jure* specific, however, does not preclude us from determining whether the program is *de facto* specific under section 771(5A)(D)(iii) of the Act. Section 771(5A)(D)(iii) of the Act provides that:

> Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exists:
>
>> (I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.
>> (II) An enterprise or industry is a predominant user of the subsidy.
>> (III) An enterprise or industry receives a disproportionately large amount of the subsidy.
>> (IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

In the Preliminary Results, we found that Magnola's benefits were *de facto* specific on a company and industry basis under section 771(5A)(D)(iii)(III) of the Act. Although we agree with the petitioner that we have the discretion to define the metals industry for purposes of a specificity analysis, as we did in the Preliminary Results, we find it unnecessary to base our final results on both Magnola and its industry (regardless of how "industry" is defined) receiving a disproportionately large amount of the subsidy. Under section 771(5A)(D)(iii)(III) of the Act, a disproportionality analysis may be conducted on a company (i.e., enterprise), industry, or group of companies or industries basis, but it need not be conducted on all of these. Therefore, we did not respond extensively to either the respondents' or the petitioner's comments on industry-specific disproportionality analysis given the company-specific basis of our final results.

Because the grants Magnola received were disproportionately large when compared to other companies, we continue to find them *de facto* specific on a company basis under section 771(5A)(D)(iii)(III) of the Act. In conducting our disproportionality analysis, for the years in which Magnola received grants, we calculated Magnola's share of total MTM grants on a percentage basis and compared Magnola's share to the percentage shares of all other MTM beneficiaries. In so doing, we found that Magnola received a disproportionate percentage of MTM benefits because, as the second largest recipient overall, its percentage share was nearly three times higher than the next highest recipient. Furthermore, Magnola's grant was greater than the grants received by 99 percent of all the beneficiaries and over ninety times larger than the typical grant amount. Magnola's grant was vastly larger than the typical grant, regardless of whether we included or excluded small-scale recipients from our analysis. In other words, were we to exclude small-scale recipients, Magnola still received a disproportionately large amount of subsidy.

Furthermore, we disagree with the respondents' interpretation of AK Steel and Bethlehem Steel and find that those decisions are consistent with our analysis in the instant proceeding. In AK Steel, a party argued that the Department erred when it determined predominant use or disproportionality based on a percentage basis rather than on an absolute basis. See AK Steel 192 F. 3d at 1383-1384. In that case, the court upheld the Department's examination of disproportionality and its finding of no *de facto* specificity. Furthermore, the AK Steel court held that a disproportionality finding should not be based on "rigid rules," but rather on a factual, case-by-case analysis. Id. We determined that Magnola's benefits from the MTM program were disproportionate to the benefits received by other companies on a percentage basis after reviewing the factual evidence contained on this proceeding's record. Therefore, consistent with AK Steel, Laminated Floor, and Magnesium Investigation, the Department has approached the issue of whether Magnola's MTM grants are disproportionate on a factual, case-by-case basis without the application of rigid rules.

Additionally, we agree with the petitioner that the facts of both AK Steel and Bethlehem Steel are distinguishable from the facts of the instant proceeding. Moreover, in Bethlehem Steel the court noted that it is obligated to defer to "Commerce's reasonable interpretation" of "dominant" and "disproportionate" because neither term is statutorily defined. Id. On the facts of the instant proceeding, there is no standard pricing mechanism, as is present in electricity tariffs, to which Magnola's MTM benefits can be compared. The comparison that can be made on this record is whether Magnola's MTM benefits, on a percentage basis, are disproportionate to those of all other recipients. As articulated above, we find that Magnola's benefits, on a company-specific basis, are disproportionately large given the comparisons available on this record.

In addition, we agree with the respondents that all recipients who met certain objectives were treated uniformly and received 50 percent reimbursement of their training costs. However, the objective nature of the MTM program's eligibility criteria simply indicates that this program is not *de jure* specific, as addressed above. A program's lack of *de jure* specificity does not mean that it cannot be *de facto* specific, as the respondents suggest. Rather, because our specificity analysis is performed sequentially, we may examine *de facto* specificity when we fail to find *de jure* specificity. See 19 CFR 351.502.

The respondents also argue that the Department failed to meet its statutory responsibility under section 771(5A)(D)(iii)(IV) of the Act by not considering the economic diversity of Québec and the longevity of the MTM program. In evaluating whether a subsidy is *de facto* specific, section 771(5A)(D)(iii)(IV) of the Act states that "the administering authority shall take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation." According to the Statement of Administrative Action ("SAA") at section B.2.c.(3), page 22, "{t}he Administration intends that these additional criteria serve to inform the application of, rather than supersede or substitute for, the enumerated specificity factors. (That is, while they are not additional indicators of whether specificity exists, these criteria may provide a clearer context within which the *de facto* factors would be analyzed). Thus, for example, with respect to economic diversification, in determining whether the number of industries using a subsidy is small or large, Commerce could take account of the number of industries in the economy in question." Therefore, the SAA indicates that the consideration of these additional criteria may be instructive on certain facts, but are not in themselves determinative of specificity or the lack thereof. Because we have conducted our disproportionality analysis for the final results on a company-specific basis, we do not find that an analysis between Québec's GDP and the shares received by the "metals industry," as proposed by Magnola, is instructive nor is such a comparison to GDP required under *de facto* specificity analysis. See AK Steel at 1384. Finally, the Department has previously questioned and rejected the usefulness of such analysis. See South African Decision Memoranda at Comment 2, Laminated Floors, 61 FR at 5210; Belgium Final, 58 FR at 37290.

Furthermore, both Magnola and the petitioner argue that we should adjust our analysis regarding the integral linkage of the small-scale and major-project benefits. Magnola correctly notes that for the Preliminary Results, we based our specificity analysis on the grants received by major project beneficiaries alone even though we found that the small-scale and major economic project benefits were integrally linked. Magnola further argues that were we to conduct our disproportionality analysis on the combined payments, then Magnola's share of such benefits clearly would not be disproportional. For the final results, we did in fact combine small-scale and major economic project benefits and still find that Magnola's share is disproportionately large. The petitioner, however, argues that we should revise our disproportionality analysis and find that the small-scale and major economic project benefits are not integrally linked. We continue to find that the small-scale and major economic projects meet the requirements for integral linkage contained in 19 CFR 351.502(c), and performed the company-specific analysis using both the small-scale and major economic programs. We emphasize, however, that the analysis of benefits where the programs are integrally linked and where they are not support the same conclusion–that Magnola's benefits were disproportionately large.

The petitioner also argues that we should exclude from our analysis those companies that received benefits in 2001 because they are not contemporaneous with the provision of Magnola's benefits. The question of whether a nonrecurring grant is disproportionately large is based on an examination of the entire amount of the grant at the time of bestowal. See Magnesium Fifth Review, 63 FR at 45047. However, because we do not have data on the benefit amounts of each recipient during the contemporaneous period of Magnola's receipt, we cannot apportion the benefits on an annual basis. Finally, in addressing Magnola's argument that the specificity analysis should be conducted on the amortized benefit amounts, even if this were the appropriate approach (which we do not concede), we would be unable to conduct this analysis because, after repeated requests, the GOQ failed to provide company-specific information on an annual basis for all recipients.[5] Therefore, we have included all MTM recipients in our disproportionality analysis, on an aggregate basis, as reported by the GOQ.

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[5] Department of Commerce Questionnaire to Government Of Québec, July 10, 2002, Appendix 1, number 6; Department of Commerce Supplemental Questionnaire, November 25, 2003, number 10.

Comment 3: Magnola's Company Specific AUL

Magnola's Arguments

Magnola argues that in the Preliminary Results, the Department improperly used the 14-year AUL from the IRS Tables instead of its company-specific 28-year AUL.

Magnola makes three arguments to support its position that the Department is required to use it's company-specific 28-year AUL. Magnola states that 19 CFR 321.524(d)(2)(ii), requires a party to show that its proposed company-specific AUL differs significantly from the AUL in the IRS Tables. Magnola maintains that it has fulfilled this requirement as shown in its response to the Department's supplemental questionnaire, demonstrating that its 28-year company-specific AUL differs significantly from the 14-year AUL from the IRS Tables.[6]

Magnola further argues that the Court of International Trade has held that a company specific AUL must be used when available because the IRS Tables would not "reflect the commercial and competitive advantage enjoyed by the firms receiving nonrecurring subsidies." See British Steel PLC v. United States, 879 F. Supp. 1254, 1289 (CIT 1995) ("British Steel"); and Ipsco Inc. V. United States, 687 F. Supp. 614 (CIT 1988) ("Ipsco Inc."). Magnola argues that its advance technology and production processes would not be reflected in the 1977 IRS Tables and, therefore, the AUL from these tables would not reflect its commercial advantage.

Finally, Magnola asserts that there is no rebuttable rule requiring ten years of financial data for adopting a company-specific AUL because the 1998 CVD Regulations state that ten years of data is neither necessary nor appropriate in all cases. See 1998 CVD Regulations, 63 FR at 65396. Furthermore, Magnola argues that appropriate accounting procedures were used in calculating Magnola's 28 year AUL, as shown in the amortization chapter of Magnola's policy directive. Therefore, Magnola argues that its company-specific AUL, which was calculated by applying the straight-line method of depreciation used by Magnola's parent, is reliable regardless of whether ten years of historical data is present.

Petitioner's Arguments

The petitioner argues that the Department cannot use Magnola's 28-year company-specific AUL to allocate subsidies because Magnola has failed to show that "the IRS Tables do not reasonably reflect the company's actual AUL." See 19 CFR 351.524(d)(2). Furthermore, the petitioner argues that Magnola's data offered in support of its company-specific AUL lacks ten years of historical asset and depreciation figures which are required for a company-specific calculation. In addition, the petitioner

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[6] See Magnola Supplemental Questionnaire Response (Jan. 9. 2003) at 1-3.

argues that the amortization chapter supplied by Magnola is too general to be instructive to the Department's analysis.

Department's Position

In the Preliminary Results, we rejected Magnola's company-specific AUL because we found it did not meet the requirements of 19 CFR 351.524(d)(2)(iii). Magnola has provided no additional information to warrant a change in the Department's position. Therefore, for the final results we are continuing to allocate subsidies over the 14-year AUL from the IRS Tables for the reasons stated below.

Pursuant to 19 CFR 351.524(b), non-recurring subsidies are allocated over a period corresponding to the AUL of the renewable physical assets used to produce the subject merchandise. Pursuant to 19 CFR 351.524(d)(2)(i) and (ii), we presumptively use the AUL listed in the IRS Tables, unless a party claims *and establishes* that (1) the IRS Tables do not reasonably reflect the recipient company's AUL or the country-wide AUL for the industry under investigation and (2) the difference between the two AULs is significant (i.e., different by one year or more). Where the presumption is rebutted, we will use the company's own AUL or the country-wide AUL as the allocation period if it is calculated according to 19 CFR 351.524(d)(2)(iii). Id. 19 CFR 351.524(d)(2)(iii) sets forth that in calculating a company-specific AUL, the company must, inter alia, base its depreciation on an estimate of the actual useful lives of its assets, and the AUL is calculated by dividing the actual annual average gross book values of the firm's depreciable productive fixed assets by the company's aggregated annual charge to accumulated depreciation, *for a period considered appropriate by the Secretary*. (Emphasis added.) As indicated in the Preamble to the 1998 CVD Regulations, 63 FR at 65397, the Department has generally considered the "appropriate period" to be 10 years of actual historical data (i.e., data for the POR and the preceding nine years).

Magnola argues that the 14-year AUL for magnesium from the IRS tables does not provide a fair approximation of Magnola's AUL and has calculated a 28-year company-specific AUL based on future estimated depreciation expenses and asset values. Magnola argues that because it fulfilled the requirements of 19 CFR 351.524(d)(2)(i)-(iii), by demonstrating that the company-specific AUL differs significantly from the IRS Tables AUL, and that the straight-line depreciation method was used to calculate the AUL, the Department is required to use the company-specific AUL. However, we do not find that Magnola's company-specific AUL is calculated in a manner consistent with the requirements under our regulations for rebutting the use of the presumptive IRS AUL.

While it is true that the Department does not require, in all cases, that a company-specific AUL be based on 10 years of actual historical data, in this instance, Magnola's company specific AUL is not based on *any* actual historical data (including any data for the POR). Rather, Magnola has calculated its company-specific AUL using *future estimated* depreciation expenses and asset values. This prospective, theoretical calculation clearly does not meet the regulatory requirements for rebutting the presumptive IRS AUL. Accordingly, we are continuing to use the 14-year AUL for magnesium from the IRS tables.

Comment 4: <u>Magnola Metallugy's Discount Rate</u>

Magnola's Arguments

Magnola contends that it financed its operations with capital from its parent company, Noranda Inc., ("Noranda") and therefore, Noranda's cost on long-term loans should be used as the discount rate in the final results. Magnola claims that using Noranda's cost on long-term loans is consistent with the Department's preference for using, "the costs of long-term fixed rate loans of the firm in question." <u>See</u> 19 CFR 351.524(d)(3)(A).

Petitioner's Arguments

The petitioner asserts that the Department should continue to use the Canadian long-term commercial bond rate as the discount rate in the final results. The petitioner contends that the Department cannot use Noranda's cost on long-term loans because the rates of Magnola's owners, Noranda and the *Societe Generale du Financement*, do not reflect the actual rates charged to Magnola.

Department's Position

We agree with Magnola that 19 CFR 351.524(d)(3) provides that, in selecting the discount rate used to allocate non-recurring benefits over time, the Department's preference is to use the cost of long-term fixed-rate loans of the "firm in question." Magnola, not Noranda, is the "firm in question" subject to the instant proceeding. Magnola, among other things, is a separately incorporated company and is the recipient of the subsidy benefits under review. Accordingly, only Magnola's commercial debt obligations would fall within the purview of 19 CFR 351.524(d)(3)(i)(A). We note that Magnola did not report any commercial debt obligations of its own, but rather it reported the rate at which its parent company, Noranda, borrowed funds. Because Magnola is the "firm in question" within the meaning of 19 CFR 351.524(d)(3)(i)(A) and because it did not have any commercial debt obligations during the years the MTM grants were approved, we continue to find that the Canadian long-term commercial bond rate is the most appropriate discount rate available in this proceeding. <u>See</u> 19 CFR 351.524(d)(3)(i)(C).

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results in the Federal Register.

AGREE ____ DISAGREE ____

____
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

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(Date)