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10th Admin Review
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MEMORANDUM

DATE: September 9, 2003

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

FROM: Jeffrey May
Deputy Assistant Secretary, Group I
Import Administration

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

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SUMMARY

On May 12, 2003, 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 benefit from the one countervailable program. 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 issue raised in these briefs. We recommend that you approve the positions which we have developed in this memorandum.

Methodology and Background Information

Allocation Period

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[1] See Pure Magnesium and Alloy Magnesium from Canada: Preliminary Results of Countervailing Duty Administrative Reviews, 68 FR 25339 (May 12, 2003) ("Preliminary Results").

In the Preliminary Results of these administrative reviews, the Department calculated the benefit from a non-recurring grant, an Article 7 grant from the Québec Industrial Development Corporation ("SDI"), received by the only respondent in these reviews, Norsk Hydro Canada, Inc. ("NHCI"). This grant was determined to be countervailable in the Pure and Alloy Magnesium From Canada: Final Results of the Countervailing Duty Determination, 57 FR 30946 (July 13, 1992). We have consistently allocated the benefits over the average useful life ("AUL") of renewable physical assets in the magnesium industry,14-years, as recorded in the Internal Revenue Service's 1977 Class Life Asset Depreciation Range System ("the IRS tables").

In these reviews, no party has claimed that the AUL listed in the IRS tables does not reasonably reflect the AUL of the renewable physical assets of the firm or industry under review. Therefore, we have continued to allocate NHCI's non-recurring grant over 14 years.

Discount Rates

As in the investigations and previous administrative reviews of this case, we have used NHCI's cost of long-term, fixed-rate debt in the year in which the non-recurring grant was 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 the respondent have argued against the use of this discount rate. We have, therefore, 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 ("SDI")

As noted above, in the Preliminary Results we found that this program conferred a countervailable subsidy on the subject merchandise. 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 (1.68 percent ad valorem) remains unchanged from the Preliminary Results.

Programs Determined To Be Not Used

In the Preliminary Results, we found that NHCI 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 determine that these programs did not confer countervailable benefits upon NHCI 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
IX. 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: Adjusting Current Assessment Rates to Compensate for Over-assessment on Prior Entries

Respondent's Arguments

NHCI argues that the Department must adjust the assessment rate in this review to account for the excess duties imposed on NHCI's 1997 entries. Specifically, NHCI asserts that although the Department properly calculated the 2.02 percent final countervailing duty rate for 1997 entries of the subject merchandise and timely issued liquidation instructions to the U.S. Bureau of Customs and Border Protection ("BCBP"), the BCBP failed to liquidate NHCI's 1997 entries pursuant to the Department's instructions. As a result, NHCI asserts that its 1997 entries were liquidated under 19 U.S.C. §1504(d) by operation of law at the higher cash deposit rate in effect at the time of entry, rather than the 2.02 percent assessment rate calculated by the Department.

NHCI argues that the Department was legally incorrect in its statement at the Preliminary Results that it has no authority to address this issue and this is an issue appropriately directed to the BCBP. According to NHCI, the Department failed to recognize the important distinction between entries liquidated by act of the BCBP (where the BCBP takes an affirmative step to liquidate an entry, pursuant to 19 U.S.C. §1500) and liquidation by operation of law (where an entry is "deemed liquidated" by operation of law

at the cash deposit rate if the BCBP takes no action on an entry within six months of receipt of notice that the Department has ended the suspension of liquidation on that entry). NHCI asserts that while parties have the right to protest entries liquidated by an affirmative action on the part of the BCBP, the BCBP has consistently held that a protest cannot reverse a liquidation by operation of law, even when such liquidation was in error and the fault of the BCBP. Accordingly, NHCI contends that its only remedy is to raise the issue in the context of the CVD reviews.

NHCI argues the Department is required to adjust NHCI's assessment rate in this review for the following reasons. First, NHCI contends that failure to make the adjustment would violate Section 701(a) of the Tariff Act of 1930 ("the Act") which states that the duties imposed must equal the amount of the net countervailable subsidies determined to exist and the United States' international obligations. See Article 19:4 of the WTO Subsidies and Countervailing Duty Measures Agreement (SCM Agreement) and Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Carbon and Certain Alloy Steel Wire Rod from Germany, 67 FR 55808 (August 30, 2002) and accompanying Issues and Decision Memorandum at Comment 1 ("Germany Wire Rod") (discussing British Steel plc. v. United States, 929 F.Supp. 426, 433-35 (CIT 1996)). NHCI argues that the CAFC has confirmed that the amount of the countervailing duties imposed must be equal to the amount of the net countervailable subsidy received (see Kajaria Iron Castings v. United States,156 F. 3d 1163, 1116 (Fed. Cir. 1998)). NHCI argues that the statute and Department practice make it clear that the Department is authorized to impose (i.e., collect or assess) countervailing duties only in the amount of the subsidy received by the foreign manufacturer. According to NHCI, the Department cannot calculate a CVD assessment rate for a non-recurring subsidy without regard to the amount of countervailing duties that have actually been collected by the BCBP because failure to do so could result in the imposition of countervailing duties in excess of the amount of the subsidy received.

NHCI further asserts the Department is authorized to make the rate adjustment based on repayments made on subsidies received in a prior review. NHCI cites to Certain Pasta from Italy: Final Results of the Fourth Countervailing Duty Administrative Review, 66 FR 64214 (Dec. 12, 2001) (and accompanying Issues and Decision Memorandum at Comment 7) ("Certain Pasta from Italy"), where the Department stated that if a respondent were "repaying a non-recurring grant that it received prior to the POR, we would agree that any portion of that grant that had not already been countervailed should be reduced by the amount repaid." NHCI argues the "repayments" the Department recognized it would have to consider in Certain Pasta from Italy are "analytically identical" to the BCBP's overcollection of countervailing duties on NHCI's 1997 entries.

Petitioner's Arguments

The petitioner contends that the Department has no authority to correct alleged errors by the BCBP and that the Department's findings in the Preliminary Results were correct. The petitioner asserts that the statute delineates each agency's duties, with the Department having the responsibility for determining the countervailing duties and the BCBP having the responsibility for liquidating entries and assessing duties in

accordance with instructions issued by the Department. The petitioner contends that the Department has complied with its statutory obligations and to make the adjustment suggested by NHCI would result in the Department exceeding its statutory authority.

The petitioner contends that NHCI is seeking a remedy that has no basis in U.S. antidumping and countervailing duty law. According to the petitioner, NHCI's reliance on Certain Pasta from Italy is misplaced. First, in Certain Pasta from Italy, the Department was considering an issue for purposes of issuing its final results, while in this case, NHCI is asking that the Department make an adjustment in the 2001 review to account for an already completed review. According to the petitioner, in Certain Pasta from Italy the Department recognized that it would be inappropriate to make adjustments in a current review for subsidies affecting prior reviews (at Comment 7). Furthermore, the petitioner maintains that the Court of International Trade in Royal Business Machines, Inc. V. United States, 1 C.I.T. 80, 87 (1980) has ruled that, once a review is complete and a final determination is issued, agencies may not review or modify prior decisions without express statutory authority.

Finally, concerning NHCI's claim that it is precluded from seeking remedies from the BCBP, the petitioner asserts that Congress has explicitly provided remedies to parties aggrieved by Customs' liquidation of entries (see United States v. Cherry Hill Textiles, Inc., 112 F.3d 1550 (Fed. Cir. 1997). Even if the statute does not provide a remedy where a deemed liquidation is involved, the petitioner asserts that NHCI cannot "create its own remedy" by asking the Department to act beyond the scope of its authority.

Department's Position

We agree with the petitioner that the Department has no statutory authority to correct alleged errors by the BCBP. While we recognize that NHCI's options to address this issue with the BCBP may be limited by the laws governing actions of the BCBP, the Department does not have the authority to create additional remedies for NHCI. As noted by the petitioner, Congress has delegated the authority for determining antidumping and countervailing duties to the Department; the authority for liquidating and assessing entries rests with the BCBP. As noted by NHCI, the Department met its statutory obligations in properly calculating the final countervailing duty rate for 1997 entries of the subject merchandise and in issuing liquidation instructions to the BCBP. BCBP's failure to liquidate NHCI's 1997 entries pursuant to the Department's instructions does not fall within the purview of the Department's analysis of the 2001 period of review.

We disagree with NHCI's assertion that the Department is in violation of section 701(a) of the Act, the SCM Agreement, and its international obligations if it fails to make the adjustment proposed by NHCI. While Commerce may not calculate an assessment greater than the actual benefits received by NHCI, in this case the Department calculated the duties commensurate with the subsidies NHCI received from the Article 7 Grants as allocated to the 2001 time period.

NHCI's reliance on Certain Pasta from Italy is inapposite. The matter at issue in Certain Pasta from Italy dealt with the calculation of current benefits for a recurring subsidy that was countervailed in a previous review,[2] not the adjustment of current assessment rates to reflect overcollection of duties by the BCBP. Furthermore, in Certain Pasta from Italy, the Department found that, because the repayments related to recurring benefits previously countervailed and because *countervailing duties had already been assessed on the relevant pasta imports*, no credits could be issued for the repayments of past benefits against current benefits. Certain Pasta from Italy: Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review, 66 FR 40987, 40922 (Aug.6, 2001) ("Pasta Preliminary Results")(emphasis added). The Department's refusal in Pasta Preliminary Results to grant Delverde an offset or a credit against the current benefits because duties had already been assessed demonstrates that the Department recognizes the finality of assessed duties. See Pasta Preliminary Results, 66 FR at 49087.

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 ____

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Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

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(Date)

[2] The subsidy included a variety of exemptions and reductions ("sgravi") of payroll contributions made to the Italian social security system for health care, benefits, pensions, etc.