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11th Admin Review
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MEMORANDUM

DATE: September 8, 2004

TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Jeffrey May
Deputy Assistant Secretary
for Import Administration

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

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SUMMARY

On May 11, 2004, 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 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, 69 FR 26069 (May 11, 2004) ("Preliminary Results").

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 Quebec 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.

Similarly, in the Preliminary Results and in the Alloy Magnesium from Canada: Final Results of Countervailing Duty New Shipper Review ("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 the long-term commercial bond rates as the discount rate. No new information has been presented in these reviews and neither the petitioner nor Magnola has argued against the use of this discount rate. Therefore, we have not made any changes to the discount rate.

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

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 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 (1.07 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 (1.84 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 determine that these programs did not confer countervailable benefits upon NHCI nor 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
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 NHCI'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. Customs and Border Protection ("CBP"), CBP 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's statement in the Preliminary Results, that this is a CBP protest issue, is incorrect. According to NHCI, the Department failed to recognize the important distinction between entries liquidated by an act of CBP (where CBP 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 CBP 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 CBP, CBP has consistently held that a protest cannot correct a liquidation by operation of law, even when such liquidation was in error and the fault of CBP. NHCI argues that its only other legal remedy was to obtain a declaratory judgment from the Court of International Trade ("CIT") confirming that duties had been overimposed. NHCI argues that this remedy falls short in addressing NHCI's needs. Accordingly, NHCI contends that its only remedy is to raise the issue in the context of the CVD reviews.

NHCI argues that 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); 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)). According to NHCI, under sections 704(a)(2)(B)(i) and 705(a)(i) of the Act, the Department cannot simply calculate a CVD assessment rate for a non-recurring subsidy without regard to the amount of countervailing duties that has actually been collected by CBP, because failure to consider the actual amount of duties collected could result in the imposition of countervailing duties in excess of the amount of the subsidy received. See 19 U.S.C. §1675(a)(1)(A), (a)(2)(C). See also Serampore Industries v. United States, 675 F. Supp.1354 (CIT 1987). 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.

NHCI further asserts the Department is authorized to make the rate adjustment because of the Department's position on the repayment of benefits that were received from a previously countervailed subsidy. NHCI cites 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 notes that this statement does not bar the Department from reducing benefits received from a non-recurring subsidy countervailed in a previous review. Therefore, NHCI argues the Department is not barred from reducing duties collected from a non-recurring subsidy countervailed in a previous review.

NHCI notes that in the final results, the Department should request that CBP continue to suspend liquidation of NHCI's 2002 entries, as a result of the ongoing NAFTA panel review (NAFTA Appeal No. USA/CDA-00-1904-09).

Government of Québec's Argument

The Government of Québec asserts that NHCI's position is "within the letter and spirit" of the Act, and urges the Department to grant the relief requested by NHCI.

Petitioner's Arguments

The petitioner argues that the Department should reject NHCI's request as it did in the Preliminary Results and in the 2001 administrative reviews. The petitioner contends that the Department has no authority to correct alleged errors by CBP and that the Department's findings in the Preliminary Results were correct. The petitioner argues that the statute delineates each agency's duties, with the Department

having the responsibility for determining the countervailing duties and CBP 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 further 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 2002 review to account for an already completed review. Furthermore, the petitioner notes the issue in Certain Pasta from Italy, calculating countervailable subsidies, was an issue appropriately before the Department, unlike the adjustments requested by NHCI. 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 CIT 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 CBP, the petitioner asserts that Congress has explicitly provided remedies to parties aggrieved by CBP's 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

As stated in the 2001 administrative review and in the Preliminary Results, the Department has no statutory authority to correct alleged errors by CBP. While we recognize that NHCI's options to address this issue with CBP are limited by the laws governing actions of CBP, 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 CBP. See 19 U.S.C. §1675(a)(3)(B). Furthermore, NHCI conceded that 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 CBP. CBP'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 2002 period of review.

We disagree with NHCI's assertion that the Department is in violation of section 701(a) of the Act if it fails to make the adjustment proposed by NHCI. While the Department 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 2002 review period.

NHCI's reliance on Certain Pasta from Italy is inapposite. The matter at issue in Certain Pasta from Italy was the calculation of current benefits for a recurring subsidy that was countervailed in a previous review,[3] not the adjustment of current assessment rates to reflect overcollection of duties by CBP. 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*, this was not a permissible offset within the meaning of section 771(6) of the Act and 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, 40992 (August 6, 2001) ("Pasta Preliminary Results")(emphasis added). This line of reasoning directly contradicts NHCI's interpretation of Certain Pasta from Italy. 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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James J. Jochum
Assistant Secretary
for Import Administration

_____
(Date)

[3] 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.