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MEMORANDUM

DATE: September 23, 2002

TO: Faryar Shirzad
Assistant Secretary for
Import Administration

FROM: Susan H. Kuhbach
Senior Office Director, Office 1
Import Administration

SUBJECT: **Issues and Decision Memorandum: Stainless Steel Sheet and Strip in Coils from France: Final Results of Countervailing Duty Administrative Review**

BACKGROUND

On May 10, 2002, the Department of Commerce ("the Department") published the preliminary results of this review. See Stainless Steel Sheet and Strip in Coils from France: Preliminary Results of Countervailing Duty Administrative Review, 67 FR 31774 (May 10, 2002) ("Preliminary Results"). The "Analysis of Programs"and "Subsidies Valuation Information" sections below describe the subsidy programs and the methodologies used to calculate the benefits from these programs. We have analyzed the comments submitted by the interested parties in their case and rebuttal briefs in the "Analysis of Comments" section below, which also contains the Department's responses to the issues raised in the briefs. We recommend that you approve the positions we have developed in this memorandum. Below is a complete list of the issues in this review for which we received comments and rebuttal comments from parties:

Comment 1: 1995 Capital Increase for Usinor
Comment 2: Characterization of Programs Providing No Benefit During the POR
Comment 3: Post-Privatization Treatment of Usinor's Pre-Privatization Benefits
Comment 4: Appropriate AUL for Usinor
Comment 5: ECSC Article 55 Benefits

METHODOLOGY AND BACKGROUND INFORMATION

I. Change in Ownership

In the Preliminary Results, we outlined our "same person" change-in-ownership methodology and analyzed each of the factors under this methodology for Usinor. As a result of this analysis, we determined that pre-privatization Usinor was the same person as respondent Usinor. Usinor commented that its pre-privatization benefits should not be attributed to post-privatization Usinor, consistent with our recent redetermination pursuant to court remand in Allegheny Ludlum Corp. v. United States, 182 F. Supp. 2d 1357 (CIT 2002) ("Allegheny Ludlum"). For the reasons stated in Comment 3 below, we do not agree with Usinor, and, for the same reasons as stated in the Preliminary Results, continue to attribute Usinor's pre-privatization benefits to respondent Usinor.

II. Use of Facts Available

In the Preliminary Results, because the Government of France ("GOF") did not provide the distribution of benefits for the investment/operating subsidies, we used adverse facts available to find that these subsidies were de facto specific. No new information, evidence of changed circumstances, or comments from interested parties were received on this issue to warrant a reconsideration of this finding. Therefore, for the final results, and for the same reasons as in the Preliminary Results, we continue to find these subsidies de facto specific. Usinor commented that Article 55 benefits were previously found not countervailable and, therefore, should be excluded from the total investment/operating subsidies amount. For the reasons stated in Comment 5 below, we agree with Usinor and have excluded the Article 55 benefits in the final results calculation.

III. Subsidies Valuation Information

A. Allocation Period

In the Preliminary Results, we used a 14-year, company-specific average useful life ("AUL") to allocate Usinor's non-recurring subsidy benefits. For the final results, Usinor commented that we should allocate all such benefits over the 12-year AUL it calculated for this review or, in the alternative, the 11-year AUL calculated in the original investigation. For the reasons stated in Comment 4 below, we do not agree with the use of either of the AULs suggested by Usinor. Therefore, for the final results, we have continued to allocate Usinor's benefits over the 14-year AUL.

As in the Preliminary Results, for 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, the benefits are allocated to

the year of receipt rather than being allocated over the AUL.

B. Equityworthiness and Creditworthiness

In the Preliminary Results, we found Usinor to be unequityworthy and uncreditworthy from 1987 through 1988, the years relevant to this review. No new information or comments from interested parties were received on this issue to warrant a reconsideration of this finding. Therefore, for these final results and for the same reasons as in the Preliminary Results, we continue to find Usinor unequityworthy and uncreditworthy from 1987 through 1988.

C. Benchmarks for Loans and Discount Rates

In the Preliminary Results, we explained our calculation of an uncreditworthy rate for 1988, the only year in which Usinor received an allocable, countervailable subsidy. No new information or comments from interested parties were received on this issue to warrant a reconsideration of this calculation. Therefore, for the final results, we use the same uncreditworthy rate as calculated in the Preliminary Results.

Similarly, no new information, evidence of changed circumstances, or comments from interested parties were received regarding the interest rate used in the Preliminary Results for the reimbursable advances received by Usinor. Therefore, for the final results, we continue to rely on an average long-term interest rate developed in Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils From France, 64 FR 30774 (June 8, 1999) ("French Stainless") for 1989, and on Usinor's company-specific borrowing rate for 1995.

ANALYSIS OF PROGRAMS

I. Programs Determined To Be Countervailable

A. FIS Bonds

In the Preliminary Results, we determined that Usinor received a countervailable subsidy from the conversion of these FIS bonds from debt to equity. Usinor argues that the Department should use a different AUL for the final results and, therefore, not countervail these subsidies because any benefit would have expired prior to the period of review ("POR"). Because we have continued to use the same AUL as in the Preliminary Results, we continue to find that this debt-to-equity conversion confers a countervailable subsidy (see Comment 4 below). Consequently, the net subsidy rate for this program has not changed from the Preliminary Results and is 1.13 percent ad valorem for Usinor.

B. Investment/Operating Subsidies

In the Preliminary Results, we found countervailable a variety of small investment and operating

subsidies which Usinor received during the POR from various GOF agencies and from the European Coal and Steel Community ("ECSC"). Usinor commented that ECSC Article 55 benefits should not be countervailed. For the reasons stated in Comment 5 below, we agree with Usinor on this issue and will not countervail these benefits. Because of the exclusion of Article 55 benefits, the net subsidy rate for this program changed from the Preliminary Determination and is now 0.14 percent ad valorem for Usinor.

II. Programs Determined To Be Not Countervailable

For the final results, for the same reasons as stated in the Preliminary Results, we continue to find the following programs to be not countervailable. The petitioners request that all of these programs should be categorized as "Countervailable Subsidies That Do Not Confer a Benefit During the POR." For reasons discussed in Comment 2 below, we do not agree and continue to find these programs not countervailable.

A. Loans With Special Characteristics (PACS)
B. Shareholders' Advances
C. Electric Arc Furnace
D. Funding for Myosotis Project
E. Conditional Advances

III. Programs Determined To Be Not Used

In the Preliminary Results, we determined that neither Usinor nor its affiliated companies that produce subject merchandise received benefits under the following programs during the POR. No new information, evidence of changed circumstances, or comments from interested parties were received to warrant a reconsideration of these findings for the final results. Therefore, for the final results, we continue to find these programs to be not used.

A. ESF Grants
B. DATAR Regional Development Grants (PATs)
C. DATAR 50 Percent Taxing Scheme
D. DATAR Tax Exemption for Industrial Expansion
E. DATAR Tax Credit for Companies Located in Special Investment Zone
F. DATAR Tax Credits for Research
G. GOF Guarantees
H. Long-term Loans from CFDI
I. Resider I and II Programs
J. Youthstart
K. ECSC Article 54 Loans
L. ECSC Article 56(2)(b) Redeployment/Readaptation Aid
M. ERDF Grants

ANALYSIS OF COMMENTS

Comment 1: 1995 Capital Increase for Usinor

Petitioners' Argument: The petitioners argue that the Department refused to gather additional information concerning the capital increase and, thus, abdicated its statutory obligation to investigate potentially countervailable subsidies. The petitioners claim that this refusal to gather additional information places them in a "Catch 22" situation (i.e., that the Department will not recognize the share increase as a countervailable event absent new factual information, but is refusing to gather the very information that would allow the petitioners to make such a showing).

The petitioners state that the Department must: 1) avoid imposing burdensome informational requirements on the petitioners; 2) assess information in light of the particular circumstances of each petitioner; and 3) proceed with an investigation even if the "reasonably available" standard is not satisfied (referring to the Senate debates accompanying the 1979 Trade Act 125 Cong. Rec. S10,318 (daily ed. July 23 1979) (statements of Sen. Danforth, Sen. Ribicoff)). According to the petitioners, this legislative history makes clear that the Department is to zealously investigate potentially countervailable subsidy practices and that it must do so even where the information presented is minimal.

Moreover, the petitioners argue, the statute reinforces this point by instructing the Department to investigate practices discovered during the course of an investigation that appear to constitute countervailable subsidies. Citing to Allegheny Ludlum Corp. v. United States, 112 F. Supp. 2d 1141,1151 (CIT 2000) ("Allegheny Ludlum Corp."), the petitioners claim that the Court of International Trade ("CIT") reviewed this statutory provision and found that Congress clearly intended that all potentially countervailable programs be investigated and catalogued, regardless of when evidence on these programs becomes reasonably available. In addition, citing to AG der Dillinger Huttenwerke v. United States, 193 F. Supp 2d 1339, 1348-49 (CIT 2002) ("AG der Dilliner Huttenwerke"), the petitioners state that the CIT faulted the Department for its failure to not only consider evidence on the record regarding the likelihood of future subsidization, but also for declining to seek additional evidence necessary to make its determination.

The petitioners claim that the information necessary to assess the countervailability of the share increase is highly proprietary and cannot be gathered by the petitioners independent of the agency. Considering the importance of this issue and the manageable scope of this review, the petitioners argue that the Department should have sought more information on this issue.

The petitioners next contend that in a recently issued redetermination on remand in the original investigation, the Department admitted that it did not examine the source documents underlying the prices and terms of the share offerings. Accordingly, the petitioners argue, the Department's conclusion that the capital increase does not constitute a countervailable subsidy cannot be considered to be based on record evidence. Instead, the petitioners claim that the Department's analysis is pure speculation (citing to the Department's statement in the redetermination that

Usinor's value as a result of the new capital "would be offset by the addition of the new shares," and the fact that in French Stainless the Department relied on the Privatization Commission's interpretation of the experts' reports, and not the Department's own interpretation).

According to the petitioners, in no instance has the Department examined the underlying calculations and analysis supporting its conclusion that the share increase did not alter the value of the existing shares. Moreover, the petitioners contend that the Department does not know the amount by which the share increase was expected to alter the value of Usinor's shares, how the relative share values were derived, why Usinor's capital was increased, or if such a capital increase is a common commercial practice in France. To remedy these omissions, the petitioners request that additional evidence should be gathered regarding the 1995 capital increase.

Additionally, the petitioners argue that, despite the fact that the Department has not gathered additional information, enough information is nonetheless on the record of this review to find the 1995 capital increase countervailable. Specifically, the petitioners claim that the objective of the share increase was an action by the GOF to strengthen Usinor. According to the petitioners, a financial contribution exists when the government has put into motion the event that leads to the subsidy. Here, the petitioners claim, the GOF authorized the capital increase and, thereby made a financial contribution that Usinor would not have enjoyed absent government action. The petitioners liken this situation to the situation in Final Affirmative Countervailing Duty Determination: Steel Wire Rod From German, 62 FR 54990, 54992-93 (October 22, 1997) ("German Wire Rod"). In German Wire Rod, according to the petitioners, the Department found that the government, in assuring the future liquidity of the respondent, provided the company with a financial contribution. In this case, the petitioners claim that the GOF provided a similar financial contribution by authorizing the capital increase and, as a result, strengthening Usinor.

Finally, the petitioners argue that Usinor received a benefit from this financial contribution in the form of debt forgiveness because it used the proceeds of the capital increase to eliminate its debt.

Respondent's Argument: Usinor responds that reconsideration of the capital increase would be an improper deviation from the Department's practice of not reinvestigating a program already determined not to be countervailable unless the petitioner presents new evidence justifying a reconsideration of the prior finding. According to Usinor, the petitioners have presented no new information or evidence of changed circumstances regarding the capital increase and, instead, merely rehash already-rejected arguments. Usinor claims that the petitioners' arguments that the Department did not adequately investigate the capital increase is a belated attack on the original investigation, in which the petitioners fully participated (the results of which as to this issue the petitioners did not appeal), rather than a legally valid basis for reconsideration.

Moreover, Usinor argues that the petitioners' specific arguments regarding countervailability of the capital increase are meritless. According to Usinor, the Department properly concluded in French Stainless that the capital increase constituted a private investment and, as such, was not countervailable because the sale of newly issued shares did not constitute revenue forgone by the

government. Usinor claims the Department found that the resulting increase in the value of the company did not result from an infusion of GOF funds but instead came from the purchasers of the new shares.

Usinor argues that the non-countervailability of the capital increase did not turn on the offset, as the petitioners suggest. Instead, according to Usinor, the Department's determination that the increase in the value of the company would offset the diluting effect of the capital increase on the GOF's holding merely supported the conclusion that no value was foregone by the GOF in authorizing the capital increase. Thus, Usinor claims, the GOF, as a shareholder, participated in the increase in the value of the company. Moreover, Usinor contends that the Department's unwillingness to second-guess the objective conclusion of the Privatization Commission that the capital increase would not substantially alter the value of the shares is not pure speculation, as the petitioners suggest. Usinor notes that since French Stainless, the Department has twice reaffirmed its conclusion that the capital increase is not countervailable (citing to Certain Cut-to-Length Carbon-Quality Plate from France, 64 FR 73277, 73280 (December 29, 1999) and Preliminary Affirmative Countervailing Duty Determination and Preliminary Negative Critical Circumstances Determination: Carbon and Certain Alloy Steel Wire Rod from Germany, 67 FR 5991 (February 8, 2002)).

Usinor also argues that, independent of our previous findings, the capital increase did not provide a financial contribution or a benefit. Usinor contends that the petitioners' attempt to redefine financial contribution and benefit so that they embrace private investment in Usinor does not withstand scrutiny. Usinor notes that the statute provides a specific definition of financial contribution, which is much less expansive than the petitioners' definition. According to Usinor, the fact that the capital increase was a component of Usinor's privatization approved by the Privatization Commission (a government action which does not fit within any of the enumerated forms of financial contribution in the statute) does not convert the purchase of shares by private investors into a financial contribution.

Finally, Usinor claims that the Department has already rejected in French Stainless the petitioners' argument that private investors were a vehicle for a financial contribution. In any event, according to Usinor, the petitioners' argument would convert all private investment in government-owned companies into government action.

Department's Position: The petitioners initially made the allegation regarding the 1995 capital increase in French Stainless. In French Stainless, we found the capital increase was not countervailable because the GOF did not 1) forego revenue or 2) "entrust" private investors to make equity investments into an unequityworthy company. 64 FR at 30787-88. That proceeding involved the same petitioners as in this proceeding, and our determination with respect to this issue in that proceeding was not challenged in post-determination litigation by the petitioners.

In this proceeding, the Department did not request information on the capital increase in the original questionnaire because this capital increase was already determined to be not

countervailable in French Stainless. In a February 25, 2002, submission commenting on Usinor's original questionnaire response in this proceeding, the petitioners requested the Department to ask Usinor to provide further clarification and detail surrounding, inter alia, the 1995 capital increase. The petitioners essentially argue that the Department was obligated to request such information by relying on the Senate debates accompanying the 1979 Trade Act, the statute, and certain CIT decisions.

However, we find that, while the petitioners have laid out the standard for investigating allegations, the standard for *investigating* an allegation is different from the standard for *reinvestigating* an allegation. See, e.g., PPG Indus. Inc. v. United States, 978 F.2d 1232, 1242 (Fed. Cir. 1992) ("[T]he ITA has a longstanding administrative practice of not reinvestigating a program determined not to be countervailable unless the petitioner presents new evidence justifying reconsideration of a prior finding... ITA has been given great discretion in administering the countervailing duty laws. This discretionary authority certainly extends to deciding whether to reinvestigate a program previously found not to be countervailable in a final agency determination"); see also Oil Country Tubular Goods from Argentina; Final Results of Countervailing Duty Administrative Reviews, 56 FR 38116, 38120 (August 12, 1991) ("it is the Department's practice not to reinvestigate a program absent specific information indicating that there were changes in the program sufficient to warrant reinvestigation").

Because the petitioners' request for additional information contained absolutely no new information or evidence of changed circumstances as to why we should request such information or reconsider our previous finding regarding the capital increase, we had no basis to request information on the 1995 capital increase.

Moreover, regarding the cases cited by the petitioners (Allegheny Ludlum Corp. and AG der Dilliner Huttenwerke), the situations in those cases are not the same as in this case. Specifically, as Usinor notes, in those cases the CIT found that the Department ignored record evidence relating to potentially countervailable programs. In this case, the evidence regarding this capital increase was analyzed in French Stainless and the Department found the capital increase did not confer a subsidy on Usinor. There is no evidence that this has not been analyzed. Instead, the petitioners seemingly requested the Department to gather additional facts on the off-chance that this information would bolster their already-rejected arguments from the original investigation.

The petitioners refer to certain of the Department's statements in our remand redetermination in the original investigation and conclude that the determination in the original investigation was based on speculation and was not supported by evidence. In French Stainless, we discussed the increase in the value of Usinor (as a consequence of the capital increase) and the increase in the number of shares, and reasoned that the two offset each other so that the value per share would not be affected. We cited the French Privatization Commission Report ("Commission Report") as evidence to support our conclusion. We disagree with the petitioners' claim that the Department must independently interpret the experts' opinions relied upon by the Privatization Commission. The Commission Report was not a document prepared for the Department in

response to our questionnaire. We note, moreover, that in the redetermination on remand cited by the petitioners, the Department was required to analyze Usinor's 1995 sale of shares and that analysis, with the Privatization Commission's report, supports the Department's conclusion that no value was forgone by the GOF in authorizing the capital increase for Usinor through the sale of new shares. Finally, the petitioners chose not to litigate the determination in the original investigation and cannot now argue the merits of a determination in an investigation in a subsequent administrative review.

Accordingly, notwithstanding the petitioners' repeated claims that the Department failed to investigate this allegation, based on the above, we find that we have already investigated this allegation in French Stainless. Our obligation in this review is simply to evaluate whether new information or evidence of changed circumstances was provided to revisit our previous determination. Because we find that no new information or evidence of changed circumstances has been provided, we find no need to gather additional information.

Regarding the petitioners' claim that the record evidence in this review is nonetheless sufficient to find the 1995 capital increase countervailable, we do not agree. The petitioners essentially argue that the capital increase was a financial contribution because it was an action by the GOF to strengthen Usinor, the type of action we have found countervailable in other cases. However, contrary to their arguments, German Wire Rod does not support the proposition that the GOF's action is a countervailable event. That case involved a situation where the government assured the liquidity of the respondent. We found that by providing such assurances, the government granted a "potential direct transfer of funds" and, as a result, received partial debt forgiveness, the amount of which was countervailed. German Wire Rod, 62 FR at 54992. In this case, there is no potential direct transfer of funds. Moreover, while it is true that the GOF authorized the capital increase for Usinor, regardless of whether the proceeds were used to strengthen Usinor, we determined in French Stainless that the GOF did not forego any revenue as a result of this capital increase. With no revenue forgone there is no financial contribution and, thus, nothing to countervail.

Finally, because we find no financial contribution, we do need to address the petitioners' arguments that a benefit resulted because Usinor used the proceeds from the share sale to pay down debt.

Comment 2: Characterization of Programs Providing No Benefit During the POR

Petitioners' Argument: The petitioners suggest that several programs categorized as "not countervailable" in the Preliminary Result should instead be categorized as "countervailable subsidies that do not confer a benefit during the POR." These programs, the petitioners claim, either had benefits that expired prior to the POR (e.g., PACS and Shareholders' Advances) or were expensed prior to the POI (e.g., Electric Arc Furnace, Myosotis, conditional advances). According to the petitioners, the Department created a separate category for these types of subsidies in Notice of Final Negative Countervailing Duty Determination: IQF Red Raspberries

from Chile, 67 FR 35961 (May 22, 2002) and Accompanying Issues and Decision Memorandum at "Program Determined Not to Confer a Subsidy During the POI" ("IQF Raspberries"). The petitioners argue that, in IQF Raspberries, the Department concluded that there was no countervailable subsidy to the subject merchandise because all of the benefits received under the program were expensed prior to the period of investigation in that case. By doing so, the petitioners claim, the Department recognized the distinction between countervailing subsidy programs that do not result in a benefit for reasons of timing or magnitude and those that are not countervailable per se because they do not satisfy the statutory definition. Finally, the petitioners argue that in the original investigation the Department expressly identified PACS and Shareholder' Advances as countervailable subsidies. The Department has not changed its position, according to the petitioners, but simply is precluded from countervailing these subsidies in the current proceeding because of the governing allocation period. The petitioners state that accurately labeling these programs is in keeping with the Court of Appeals for the Federal Circuit's ("CAFC") pronouncement that the aim of the statute is to state accurately the measure of dumping and subsidization (citing to e.g., Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990)).

Respondent's Argument: The respondents did not comment on this issue.

Department's Position: In IQF Raspberries, the programs categorized as "countervailable subsidies that do not confer a benefit during the POI" were programs that were still in existence during the POI, but were simply not used by the respondents during the POI. Therefore, the programs could be used in future years by the respondent. As such, the classification in that case, as suggested by the petitioners, was not made because of the timing or magnitude of the benefits.

In this case, the situation is different for certain programs. For PACS and Shareholders' Advances, these programs are no longer in existence. Thus, once the benefit is fully allocated, Usinor can no longer receive benefits from these programs in future years. In addition, as stated in the Preliminary Results, the Electric Arc Furnace program was phased out in 1999 and 2000. Thus, because all benefits have been expensed in prior years, Usinor can no longer receive benefits under this program in future years. Finally, the Electric Arc Furnace program, Myosotis program, and conditional advances, were all programs authorizing a specific amount for Usinor. Usinor received all of the authorized funding prior to the POR. Thus, Usinor cannot receive further funding under these programs in future years. Moreover, as stated in the Preliminary Results, regardless of how we view these benefits (grants or conditional advances), we find no benefit in the POR.

Accordingly, absent evidence of the re-institution of these programs and/or authorization of new funding, we continue to find them not countervailable.

Comment 3: Post-Privatization Treatment of Usinor's Pre-Privatization Benefits

Respondent's Argument: Usinor contends that in the Preliminary Results, the Department used a

"same person" change-in-ownership methodology that was rejected by the CIT in Allegheny Ludlum. Usinor claims the redetermination in that case makes clear that the Department has no basis for maintaining its preliminary finding in this review that the 1988 FIS bond conversion continued to benefit Usinor in 2000, after its arm's-length, fair-market-value privatization in 1995. According to Usinor, the CIT in Allegheny Ludlum (in referring to Delverde Srl v. United States, 202 F.3d 1360, 1365 (Fed. Cir. 2000), reh'g granted in part (June 20, 2000) ("Delverde III")), held that the Department's use of the "same person" analysis violated the Act and directed the Department to look at the facts and circumstances of the transaction to determine if the purchaser received a subsidy directly or indirectly for which it did not pay adequate compensation.

In its redetermination pursuant to court remand in Allegheny Ludlum, Usinor argues, the Department followed the CIT's instructions and found that the non-recurring benefits received prior to the privatization were fully extinguished by the company's full, fair-market-value privatization. Usinor urges the Department to reach the same result here.

Petitioners' Argument: The petitioners reply by referring to several cases noting that the Department would not implement results of a redetermination until a final conclusive court decision. See Timken Co. v. United States, 893 F.2d 337, 339 (Fed. Cir. 1990); Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Germany; Amended Results of Antidumping Duty Administrative Review, 67 FR 8520 (February, 25, 2002); Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Amended Final Results of Antidumping Administrative Review, 66 FR 60196, (December 3, 2001); Certain Welded Carbon Steel Pipes and Tubes From Thailand: Notice of Court Decision and Suspension of Liquidation, 66 FR 23004, (May 7, 2001). According to the petitioners, the dispute in Allegheny Ludlum is not final, and will likely not be final for some time. The petitioners also argue that Usinor misstates the Department's finding in Allegheny Ludlum. The Department examined, the petitioners contend, whether the purchaser received any subsidies as a result of the privatization and not whether payment of full market value extinguished past subsidies.

Department's Position: We disagree with Usinor that the Departmen''s "same person" change-in-ownership methodology is not in accordance with law or in conformance with the CAFC's decision in Delverde III. In several recent cases, various judges of the CIT have ruled on the Department's "same person" test. Some decisions held that this methodology was not in accordance with law and those cases were remanded to the Department for further proceedings: see Allegheny Ludlum; GTS Industries S.A. v. United States, 182 F. Supp. 2d 1369 (CIT 2002); Acciai Speciali Terni S.p.A. v. United States, Slip Op. 2002-10 (CIT 2002); ILVA Lamiere E Tubi S.R.L. v. United States, 196 F. Supp. 2d 1347 (CIT 2002). In another case, Acciai Speciali Terni S.p.A. v. United States, 206 F. Supp. 2d 1344 (CIT 2002), affd., Slip Op. 2002-82 (CIT 2002), the court affirmed the Department's "same person" methodology.

All of these cases, however, once final, are subject to further appeal. Therefore, notwithstanding

Usinor's arguments regarding the inappropriateness of our "same person" methodology, until there is a final and conclusive decision regarding the legality of the Department's change-in-ownership methodology in these cases, we will continue to apply that methodology (as we did in the Preliminary Results) for purposes of the final results.

Consequently, for the final results, we continue to find that the 1988 FIS Bonds conversion provided a benefit to Usinor in the POR.

Comment 4: Appropriate AUL for Usinor

Respondent's Argument: Usinor contends that the Department should use its company-specific, 12-year AUL calculated in this review instead of a 14-year AUL that was determined in another proceeding. Usinor argues that, while it is aware of the Department's practice not to recalculate during a review period the AUL assigned to non-recurring subsidies, nothing in 19 CFR 351.524 provides an exception for administrative reviews from its procedures for calculating a company-specific AUL in accordance with record evidence. In the alternative, if the Department is concerned with maintaining consistency, Usinor requests the Department apply the 11-year AUL established on the record of French Stainless. Usinor contends that the Department erred in not using the 11-year AUL established in French Stainless. Moreover, Usinor states that it argued to the CIT (in Allegheny Ludlum) that treating allocation periods as immutable determinations that cannot be revisited in subsequent investigations involving different producers, different subject merchandise, and different time periods fails to reflect the commercial and competitive benefit to the company during the period of investigation and undermines the integrity of the later investigation by failing to allocate all subsidies found in accordance with the record evidence of that proceeding.

This conclusion, according to Usinor, follows from the CIT's decision in British Steel plc v. United States, 879 F. Supp. 1254 (CIT 1995) ("British Steel") rejecting the Department's reliance on the IRS Tables rather than on record evidence. Usinor states that the CIT held that the Department failed to point to substantial evidence on the record to justify its methodology and that the Department must utilize information of record in applying its chosen methodology. As a result, Usinor argues that the Department, in this case, must utilize information from this review or on the record of the investigation, rather than on the AUL determination in another investigation.

Petitioners' Argument: The petitioners reply that Usinor would have the Department abandon its well-established practice of retaining the same allocation period for previously allocated subsidies and allocate benefits using a new allocation period calculated just for this POR. Usinor's argument is in error because, according to the petitioners, first, the Department has consistently retained the same allocation period across proceedings when the same company and same subsidy are involved (citing to e.g., Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy, 67 FR 3166, 3165 (January 23, 2002); Stainless Steel Plate in Coils from Belgium: Final Results of Countervailing Duty Administrative Review, 66 FR 45007,

45009 (August 27, 2001); Certain Pasta From Italy: Final Results of Countervailing Duty Administrative Review, 63 FR 43905, 43906 (August 17, 1998)). Second, the petitioners contend that there has been no change in the Department's practice since Usinor first raised this argument in the original investigation. The CIT, the petitioners note, has not yet ruled on Usinor's AUL arguments, so the Department's current practice remains in place. This practice, the petitioners state, was also recently affirmed in Stainless Steel Wire Rod from Italy: Notice of Preliminary Results of Countervailing Duty Administrative Review, 67 FR 39357, 39358 (June 7, 2002). Moreover, according to the petitioners, because the agency's practice is reflected in case law rather than in regulations, the absence of an exception for administrative reviews in the regulation governing the AUL calculation methodology is not relevant.

As for Usinor's argument that the Department failed to allocate subsidies in accordance with record evidence, the petitioners argue that Usinor fails to acknowledge that the 14-year AUL used in this review was based on record evidence, albeit evidence from an earlier proceeding. Usinor, the petitioners note, does not argue that this 14-year AUL is flawed and, indeed, appealed to the CIT to use the 14-year AUL in British Steel plc v. United States, 929 F. Supp. 426, 438 (CIT 1996) ("British Steel II"). The petitioners claim that Usinor is backing away from this figure without offering any factual or legal basis for the Department to contravene its practice and reallocate the benefit stream.

The petitioners provide the following example: if Usinor received a subsidy of $1400 in 1998 which was being allocated over 11-years, that subsidy would be fully allocated by 1999. In a later proceeding, the petitioners continue, if Usinor reported an AUL of 14 years, that subsidy that was already fully allocated in one proceeding would be allocated for an additional three years in another proceeding. This, according to the petitioners, would be an unfair result.

Department's Position: We disagree with Usinor's position that we should use the 12-year AUL it calculated for this administrative review or the 11-year AUL it calculated in the original investigation.

Prior to 1995, the Department allocated non-recurring subsidies over the AUL from the IRS Tables as an irrebuttable presumption. In 1995, in British Steel, the CIT found that the Department's use of an AUL from the IRS Tables conflicted with Congress' intent because it did not reflect the actual commercial and competitive benefit of the subsidies to the recipient of the subsidy. In the redetermination pursuant to the remand in British Steel, the Department abandoned the use of an AUL from the IRS Tables altogether in favor of allowing companies to calculate company-specific AULs. See British Steel II, 929 F. Supp. at 433-35. This company-specific allocation methodology was affirmed by the CIT. Id. at 439.

In applying this new methodology in cases following British Steel II, the Department found that a company-specific AUL allocation methodology, by itself, was more burdensome than envisioned in some cases. See Countervailing Duties; Final Rule, 63 FR 65348, 65396 (November 25, 1998) ("1998 CVD Regulations"). As a result, in the 1998 CVD Regulations, we again

incorporated the IRS Tables into our allocation methodology because of their consistency, predictability, and simplicity. Id. Our regulations require that 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). 19 CFR 351.524(d)(2)(i) and (ii). Where the presumption is rebutted, we will use the company's own AUL or the country-wide AUL as the allocation period. Id.

Parallel with the adoption of this regulation, we developed a practice of relying on previously calculated AULs, i.e., once a subsidy had been allocated over a particular AUL, we used the same AUL for that subsidy in later segments of the same proceeding and in other proceedings involving the same company (absent evidence of changed circumstances regarding the initial AUL calculation). See, e.g., Certain Carbon Steel Products from Sweden: Final Results of Countervailing Duty Administrative Review, 62 FR 16549, 16549-50 (April 7, 1997) ("Swedish Certain Steel") (using the same AUL for the same subsidy in later segments of the same proceeding); French Stainless, 64 FR at 30778 (using the same AUL across proceedings involving the same subsidy and company).

However, we have subsequently revisited our practice and have refined our methodology regarding the selection of AULs. In Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Carbon and Certain Alloy Steel Wire Rod from Germany, 67 FR 55808 and accompanying Issues and Decision Memorandum at Comment 1 (August 30, 2002),we stated our refined practice of relying on previously calculated AULs in light of several considerations. *First*, our regulation is clear in requiring that the Department give parties in each investigation the opportunity to rebut the presumption in favor of the IRS Tables. This is true even if parties previously have not attempted to rebut, were unsuccessful in rebutting, or never had the opportunity to rebut the presumption. *Second*, once the AUL from the IRS Tables has been rebutted and a particular subsidy has been allocated using a company-specific or country-wide AUL, we need not revisit the AUL determination even in subsequent proceedings (unless there is evidence that we miscalculated the initial AUL). This is because the previously calculated, company-specific AUL would be based on data more contemporaneous with the bestowal of the subsidy and, hence, would provide a more accurate measure of the benefit than newer data. See Certain Cut-to-Length Carbon-Quality Plate from France, 64 FR 73277, 73293 (December 29, 1999).

Third, we do not believe we can change the AUL used for allocating a particular subsidy in different segments of the same proceeding. This is because the Department amortizes a subsidy equally to each year of the allocation period using the AUL set in the investigation. If we were to decrease the AUL in a later segment of the same proceeding, we would find that not enough had been countervailed in preceding years (under-countervailing). Similarly, if we increased the AUL in a later segment of the same proceeding, we would find that too much was countervailed in preceding years (over-countervailing). Either outcome would violate our statutory obligation to impose countervailing duties in the amount of the net subsidy. Also, the Department has

stated that it would be unreasonable and impractical to reamortize subsidies in different segments of the same proceeding. See, e.g., Industrial Phosphoric Acid from Israel: Final Results of Countervailing Duty Administrative Review, 63 FR 13626, 13627 (March 20, 1998).

The reasons for not changing an AUL within a proceeding do not, however, apply across proceedings, i.e., when the Department is investigating the same subsidy to the same company, but in a different proceeding. In these situations, because our regulation requires that we allow the presumption in favor of the IRS Tables to be rebutted in each investigation, and because a different AUL in a different proceeding does not lead to over- or under-countervailing, we will not rely on the previously-calculated AUL, unless that AUL was a company-specific or country-wide AUL which differed significantly from the AUL in the IRS Tables and was calculated closer in time to the bestowal of the subsidy.

In light of the above considerations, we refined our AUL selection methodology to follow these steps:

(1) Establish the AUL from the IRS Tables for the industry under investigation in each investigation;
(2) If the presumption to use the AUL from the IRS Tables has not previously been rebutted for a subsidy, with a *significantly-different, company-specific or country-wide AUL*, we will evaluate in each investigation any evidence that a company-specific AUL varies significantly from the AUL in the IRS Tables. This is true even if parties previously have not attempted to rebut, were unsuccessful in rebutting, or never had the opportunity to rebut. If the difference is significant (i.e., different by one year or more), we will allocate the subsidy over the company-specific or country-wide AUL. If not, we will allocate the subsidy over the presumed AUL from the IRS Tables.
(3) Once the presumption to use the AUL from the IRS Tables has been rebutted, and an untied subsidy is allocated over a *significantly-different, company-specific or country-wide AUL*, we will continue to allocate that subsidy over the same AUL in future proceedings for the same respondent (unless there is evidence that we miscalculated the initial AUL).
(4) In later segments of the same proceeding, *regardless of how that previous AUL was determined*, we will continue our longstanding practice of allocating the subsidy over the previous AUL.

In the remand redetermination pursuant to court remand in British Steel, we calculated a company-specific AUL for Usinor of 14 years (an AUL that is significantly different from the AUL in the IRS Tables). See British Steel II, 929 F. Supp at 434. In French Stainless, we continued to use this 14-year AUL for all of Usinor's non-recurring subsidies found countervailable in that investigation. We are now conducting an administrative review of French Stainless, and, thus, are in a later segment of that proceeding. Therefore, because we have

already begun allocating certain of Usinor's non-recurring benefits over 14 years in an earlier segment of this proceeding, consistent with the AUL selection methodology outlined above, we have continued to use the same 14-year AUL in this administrative review.

Moreover, Usinor did not receive any new non-recurring benefits that are not already being allocated in an earlier segment of this proceeding. Therefore, because there is nothing new to allocate in this administrative review, we do not need to address whether Usinor appropriately calculated its AUL for this review.

Comment 5: ECSC Article 55 Benefits

Respondent's Argument: Usinor claims that the Department previously determined that ECSC Article 55 research grants were not countervailable (citing to Final Affirmative Countervailing Duty Determination: Certain Steel Products from France, 58 FR 37304, 37312 (July 9, 1993) ("French Certain Steel"). Accordingly, Usinor requests that the Department exclude the amount of ECSC Article 55 research grants from the total countervailable amount of the investment/operating subsidy.

Petitioners' Argument: The petitioners argue that Article 55 funding is countervailable notwithstanding the Department's determination in French Certain Steel. This is because, according to the petitioners, at the time of that case, Department policy was to find research and development funding not countervailable if such R&D results were made publicly available. The petitioners claim that the Department's current regulations have dispensed with this policy and, thus, the Department is no longer bound by the finding in French Certain Steel.

In addition, the petitioners note that the GOF has provided no information on the record of this proceeding establishing that Article 55 aid is not specific. The petitioners argue that, because the Department's prior finding of public availability no longer governs the specificity analysis, the lack of specificity information in this investigation requires a finding that this program is countervailable.

Department's Position: We agree with Usinor. The finding in French Certain Steel that Article 55 benefits are not countervailable was because 1) the results of the research and development funded by the program were made public and 2) this program, since 1986, has been funded solely through levies on steel producing companies. 58 FR at 37312.

The "publicly available test" was described in 19 CFR 355.44(l) of the Department's 1989 Proposed Regulations. However, as we state in the 1998 CVD Regulations, we did not retain this publicly available test in the current regulations because we found it to be inconsistent with the concept of benefit which underlies the Act. See 63 FR at 65388. Accordingly, the first reason for finding the program not countervailable in French Certain Steel (i.e., the fact that the results were made publicly available) is no longer a valid basis for finding this program not countervailable.

However, the second reason for finding this program not countervailable (i.e., that this program is solely funded by steel companies) remains valid. While the funds under this program are provided by the EC, because the funding for the program originally comes solely from coal and steel companies, we find that the provision of these funds by the EC confers no benefit on the recipient. French Certain Steel, 58 FR at 37312. No new information or evidence of changed circumstances has been received to warrant a reconsideration of our finding in French Certain Steel. Therefore, because steel companies do not receive a benefit, this program is not countervailable. Accordingly, we have deducted the amount of Article 55 benefits from the total amount of investment/operating subsidies in calculating the subsidy rate.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related subsidy calculations accordingly. If these recommendations are accepted, we will publish the final results in the Federal Register.

AGREE _____ DISAGREE _____

_____
Faryar Shirzad
Assistant Secretary for
Import Administration

_____
Date