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2nd Admin Review
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MEMORANDUM

DATE: September 8, 2003

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

FROM: Jeffrey A. May
Deputy Assistant Secretary
for 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 9, 2003, 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 Second Countervailing Duty Administrative Review, 68 FR 24921 (May 9, 2003) ("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. Usinor submitted a case brief on June 9, 2003, and a rebuttal brief from the petitioners was submitted on June 16, 2003. We have analyzed the parties' comments 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 from the parties:

Comment 1: Treatment of Usinor's Pre-Privatization Benefits
Comment 2: Appropriate AUL for the 1988 FIS Bonds Conversion
Comment 3: Cash Deposit Rate Adjustment

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), appeal filed, Fed.Cir.Ct. Nos. 01-03-1189 and 03-1248 ("Allegheny Ludlum") and in accordance with the Department's intention to modify its methodology following the World Trade Organization's ("WTO") Appellate Body decision in United States – Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R (December 9, 2002) ("WTO Decision"). For the reasons stated in Comment 1 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 data regarding the distribution of benefits for the investment/operating subsidies, we used adverse facts available, in accordance with section 776(b) of the Act. 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 apply adverse facts available, consistent with the Act, and find these subsidies to be de facto specific. See Section 771(5A)(D)(ii) of the Act.

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. For the reasons stated in Comment 2 below, we do not agree with the use of the AUL suggested by Usinor. Therefore, 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 in 1988. No new information or comments from interested parties were received on this issue to warrant a reconsideration of this finding. Therefore, for the final results, for the same reasons as in the Preliminary Results, we continue to find Usinor unequityworthy and uncreditworthy in 1988.

C. Benchmarks for Loans and Discount Rates

In the Preliminary Results, we explained our calculation of an uncreditworthy rate for 1988. 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, for the same reasons as in the Preliminary 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, for the same reasons as in the Preliminary Results, we continue to rely on an average long-term interest rate developed for 1989 in Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils From France, 64 FR 30774 (June 8, 1999) ("French Stainless"), and on Usinor's company-specific borrowing rate for 1995.

ANALYSIS OF PROGRAMS

I. Programs Determined To Be Countervailable

A. 1988 FIS Bonds Conversion

In the Preliminary Results, we determined that Usinor received a countervailable subsidy from the conversion of *Fonds d'Intervention Sidérurgique* ("FIS") bonds from debt to equity. Usinor argues that, in allocating any continuing benefit from the FIS bonds converted in 1988, the Department should use the 12-year AUL, based on the information on the record. (See, generally, the discussion above and Comment 2 regarding the allocation period in this proceeding.) 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. Consequently, the net subsidy rate for this program has not changed from the Preliminary Results and is 1.06 percent ad valorem for Usinor. However, in a change from the Preliminary Results, we have adjusted the deposit rate to reflect the expiry of this subsidy at the end of the POR. See, Comment 3, below.

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"). Relying on our prior findings regarding this program in French Stainless and in the first administrative review, we excluded from our calculation of the benefit certain subsidies provided outside France, subsidies by water boards or for worker training, and subsidies provided under ECSC Article 55. 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, the net subsidy rate for this program has not changed from the Preliminary Results and is 0.04 percent ad valorem for Usinor.

C. Funding for the Myosotis Project

In prior proceedings, we found that advances and grants provided under this program conferred no countervailable subsidies because, where the benefits were treated as grants, they amounted to less than 0.5 percent of relevant sales and, thus, were expensed to the years prior to the POI or POR, or, where the benefits were measured in terms of the difference in the payments Usinor made on the loans and the payments Usinor should have paid on comparable commercial loans, they amounted to less than 0.01 percent of relevant sales in the POI or POR. Additionally, the respondents reported in the prior proceedings that (1) this program had authorized specific amounts for Usinor, (2) Usinor already received all the authorized funding prior to the POI or POR and (3) Usinor could not receive further funding under these programs in future years.

In the instant proceeding, we found that a 1999 advance was converted to a grant during the POR. We treated this conversion as a bestowal of a new subsidy that conferred a countervailable benefit in the amount converted to a grant. Because this benefit amounted to less than 0.5 percent of POR sales, it is allocable entirely to the POR. 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, the net subsidy rate for this program has not changed from the Preliminary Results and is 0.01 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.

A. Loans With Special Characteristics (PACS)
B. Shareholders' Advances
C. Electric Arc Furnace
D. 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. Export Financing under Natexis Banque Programs
C. DATAR Regional Development Grants (PATs)
D. DATAR 50 Percent Taxing Scheme
E. DATAR Tax Exemption for Industrial Expansion
F. DATAR Tax Credit for Companies Located in Special Investment Zone
G. DATAR Tax Credits for Research
H. GOF Guarantees
I. Long-term Loans from CFDI
J. Resider I and II Programs
K. Youthstart
L. ECSC Article 54 Loans
M. ECSC Article 56(2)(b) Redeployment/Readaptation Aid
N. ERDF Grants

ANALYSIS OF COMMENTS

Comment 1: 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 overturned in Allegheny Ludlum and rejected in the WTO Decision. In its redetermination pursuant to court remand in Allegheny Ludlum, Usinor notes, the Department followed the CIT's instructions and found that the privatization occurred through an arm's-length transaction for fair market value and, therefore, extinguished the benefits of any pre-privatization subsidies (citing to Results of Redetermination Pursuant to Court Remand: *Allegheny Ludlum Corp., et al. v. United States* (June 3, 2002)). The respondent also notes, however, that the Department has appealed the CIT decision in Allegheny Ludlum to the Court of Appeals for the Federal Circuit.

The respondent claims that in the WTO Decision, the Appellate Body found that the "same person" test was contrary to the requirements of the WTO Agreement on Subsidies and Countervailing Measures, and that privatization at arm's length and for fair market value created a rebuttable presumption that a

benefit ceases to exist after such privatization. Usinor notes that, pursuant to the United States' intention to implement the decision, the Department has announced a modified privatization analysis methodology that establishes a rebuttable presumption that privatization at arm's length and for fair market value extinguishes the benefits of pre-privatization subsidies. Additionally, Usinor notes that the Department has indicated that the Allegheny Ludlum redetermination provides a useful framework for the modified privatization analysis. Therefore, the respondent argues that the Department's continued reliance on the "same person" test in this case is plainly inappropriate, and urges the Department to implement the requirements of U.S. law and the WTO agreements by finding that the privatization of Usinor, at arm's length and for fair market value, extinguished the benefit of any pre-privatization subsidies.

Petitioners' Argument: The petitioners reject Usinor's contention that the Department's "same person" test is inapplicable, noting that Allegheny Ludlum is on appeal before the Federal Circuit and the WTO Decision has yet to be implemented. Citing to Timken Co. v. United States, 893 F.2d 337, 339 (Fed.Cir. 1990), the petitioners note that decisions are not deemed final until the appeals process has been completed. In any case, they argue that the decision in Allegheny Ludlum was wrong, because the court failed to recognize the fundamental difference between a sale of assets, which was the case in Delverde SRL v. United States, 202 F.3d 1360 (Fed. Cir. 2000), and a sale of shares, as is the case in the instant proceeding. The petitioners contend that the Chief Judge of the CIT made this distinction in Acciai Speciali Terni S.P.A. v. United States, 206 F.Supp.2d 1344 (CIT 2002) and 217 F.Supp.2d 1345 (CIT 2002).

With regard to the WTO Decision, the petitioners argue that application of the change in practice will be prospective from the announced implementation date, consistent with the statute (citing to 19 USC 3533(g)(2) and 3538(c)). Hence, they believe the Department should continue to apply the "same person" methodology in this proceeding. In any case, the petitioners argue that the new methodology will not only analyze whether the privatization was made at arm's length for fair market value, but will also examine market distortions. Thus, the petitioners claim, Usinor's pre-privatization subsidies may remain countervailable even under the new methodology.

Department's Position: We disagree with Usinor that the Department's "same person" change-in-ownership methodology is inappropriate and not in accordance with U.S. law. In several recent cases, various judges of the CIT have ruled on the Department's "same person" test. In Acciai Speciali Terni S.p.A. v. United States, 206 F.Supp.2d 1344 (CIT), recon. denied, 217 F.Supp.2d 1345 (CIT 2002), appeal filed, Fed.Cir.Ct. No. 01-00051 ("AST II"), the court affirmed the Department's "same person" methodology. In Allegheny Ludlum and other cases, the court held that this methodology was not in accordance with law and those cases were remanded to the Department for further proceedings. See GTS Industries S.A. v. United States, 182 F. Supp. 2d 1369 (CIT 2002), appeal filed, Fed.Cir.Ct. Nos. 03-01175 and 03-1191 ("GTS"); Acciai Speciali Terni S.p.A. v. United States, Slip Op. 02-10 (CIT Feb. 1, 2002) ("AST I"); ILVA Lamiere E Tubi S.R.L. v. United States, 196 F. Supp. 2d 1347 (CIT 2002), further proceeding, Slip Op. 2003-97 (CIT July 29, 2003). Along with

Allegheny Ludlum, AST II and GTS are currently being appealed. As the petitioners noted, 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.

With regard to the Department's intention to modify its privatization analysis methodology pursuant to the WTO Decision, the Department set forth the parameters of its modified practice in the Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 FR 37125 (June 23, 2003) ("Modification Notice"). In the Modification Notice, consistent with the requirements of the Uruguay Round Agreements Act, we stated that the new methodology will be applied in all investigations and reviews initiated on or after June 30, 2003. Consequently, the Department is not applying the new methodology in the instant proceeding, which was initiated prior to that date. Therefore, for the final results, we continue to find that pre-privatization subsidies (i.e., the 1988 FIS bonds conversion) provided a benefit to Usinor in the POR.

Comment 2: Appropriate AUL for the 1988 FIS Bonds Conversion

Respondent's Argument: Usinor argues that it is unreasonable for the Department to use an AUL based on data submitted in another case, rather than on the record information in the instant proceeding. Specifically, Usinor claims that the record evidence supports its company-specific 12-year AUL, not the 14-year AUL that the Department adopted from a remand determination in a 1993 investigation of carbon steel products from France (on the grounds that the 1993 data were closer in time to the 1988 FIS conversion). Usinor contends that the 14-year AUL is contrary to both the Act and the Department's own regulations, saying that the Act requires the Department to make a determination based on the record information and directs the reviewing courts to overturn any decisions not supported by substantial evidence on the record (citing to section 516A(b)(1) of the Act). According to the respondent, the regulations do not establish any preference for contemporaneous AULs and do not require the Department to calculate different AULs for subsidies received in different years. Thus, the respondent claims, the regulations envision the use of a non-contemporaneous AUL in cases involving multiple non-recurring subsidies. The respondent further contends that, if Usinor had not been part of the 1993 investigation, the Department would have had to use the 12-year AUL supported by the record information in this review or the 11-year AUL supported by the record information in the original investigation. Moreover, the respondent claims that, if Usinor had not joined the challenge to the Department's use of the IRS tables in the 1993 case, there would have been no company-specific AUL calculation in that case for the Department to adopt in French Stainless.

Petitioners' Argument: The petitioners rebut Usinor's contention that the use of the 14-year AUL is contrary to the statute, stating that the Department has a well-established practice of applying the AUL already determined in an earlier segment of a proceeding to a later segment of the proceeding, and noting that the Department rejected Usinor's argument in the earlier administrative review and in the underlying investigation. Additionally, they note that the CIT did not address the issue in Allegheny

Ludlum. The petitioners cite to, *inter alia*, Certain Carbon Steel Products from Sweden, 62 FR 16549 (April 7, 1997), in which the Department reasoned that applying different AULs to two segments of a proceeding could result in over- or under-countervailing the actual benefit. The same principle, they argue, applies in the instant proceeding, and the Department should continue to use the 14-year AUL to amortize previously countervailed subsidies.

Department's Position: We disagree with Usinor about using a 12-year AUL and agree with the petitioners that we should continue to use the 14-year AUL already calculated in the earlier segments of this proceeding. 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. In 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 ("German Wire Rod"), we further clarified our practice regarding the use of previously calculated AULs.

In the 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. Because we already allocated certain of Usinor's non-recurring benefits over 14 years in an earlier segment of this proceeding, consistent with the AUL selection methodology detailed in our regulations, and as furthered clarified in German Wire Rod, we have continued to use the same 14-year AUL in this administrative review.

Finally, we note that the Department's regulations allow us to recalculate a new AUL in an administrative review if updated information indicates that a new non-recurring subsidy was conferred after the period of investigation. See Preamble, 63 FR at 65398. In light of this, we further note that, as explained above in the discussion of the Myosotis program, a new non-recurring subsidy was received by the respondent in the POR. However, there is no need to address whether the AUL should be recalculated on this basis, because the benefit from the new subsidy was small and entirely allocable to the POR.

Comment 3: Cash Deposit Rate

Respondent's Argument: Usinor claims that both the statute and the regulations oblige the Department

to establish the estimated duty to be deposited on future entries and determine this estimate as accurately as possible (citing to section 751(a)(1) of the Act and section 351.221(b)(7) of the regulations). Hence, Usinor argues that in setting the cash deposit rate, the Department should exclude from consideration non-recurring subsidies for which the amortization period expired during the POR. Specifically, the respondent claims that, based on the 14-year AUL, the allocation of the benefit under the 1988 FIS bonds conversion ended in 2001; consequently, no benefit will be conferred in subsequent years, and the deposit rate should exclude the benefit to be accurate. Otherwise, the respondent contends, Usinor will have to request future administrative reviews to recover the excess deposits, forcing both it and the Department to devote substantial resources to complete such reviews. The respondent acknowledges that the Department's regulations only address the situation where a recurring subsidy program is terminated by the relevant foreign government, and do not address the situation where the allocation of non-recurring subsidies merely expires during the POR (citing to 19 CFR 351.526(a)). The respondent argues that the same principle behind the Department's action in the former situation should extend to the latter. Therefore, the respondent concludes, the Department should exclude this program from its calculation of the deposit rate for future entries.

Petitioners' Argument: The petitioners argue that Usinor is essentially claiming that the expiration of the allocation period on a non-recurring subsidy constitutes a program-wide change, and that this is contrary to the Department's regulations and practice. Citing to section 351.526(b) of the regulations, the petitioners contend that the expiration of the allocation period for the 1988 FIS bonds conversion does not meet the criteria for a program-wide change, because it is limited to Usinor and not effected by an official act. Additionally, the petitioners claim that the Department has addressed similar circumstances in the past and left the cash deposit rate unchanged (citing to Comment 11 of the "Issues and Decision Memorandum" in Final Affirmative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Canada, 67 FR 55813 (Aug. 30, 2002) ("Canada Wire Rod"); Comment 4 of the "Issues and Decision Memorandum" in Stainless Steel Plate in Coils From Belgium: Final Results of Countervailing Duty Administrative Review, 66 FR 45007 (Aug. 27, 2001); and Comment 2 of the "Issues and Decision Memorandum" in Final Results and Partial Rescission of Countervailing Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From the Republic of Korea, 67 FR 1964 (January 15, 2002)). According to the petitioners, the Department should affirm the Preliminary Results and base the cash deposit rate on past subsidies.

Department's Position: For purposes of the final results in this review, we have adjusted the cash deposit rate to reflect the fact that the allocated benefits of the 1988 FIS Bonds expired at the end of the POR. We have done this because the information needed to make this adjustment is derived entirely from the POR and because the expiry of this subsidy means that the expected countervailing duty rate for entries subject to the deposit rate set in this review is de minimis. Regarding the first point, we know - without considering any information from outside the POR -that the benefit of this allocated subsidy after 2001 is zero. Thus, this situation can be distinguished from other proceedings where we are examining allocated subsidies and, although we know what benefit will be assigned to the next year, that benefit is a positive amount. Where the benefit is a positive amount, we cannot calculate a

countervailing duty rate without gathering non-POR data, i.e., information about sales (the denominator) in the next year. Instead, it is only in those cases where the allocated benefit goes to zero in the POR that we can rely exclusively on POR data to calculate the future rate.

The second consideration that led us to reflect the expiry of this subsidy in setting the countervailing duty deposit requirement is that the deposit rate without this subsidy is de minimis. See 19 CFR 351.106(c). We believe this is important because when the rate is de minimis, importers are not required to deposit estimated duties. In contrast, had we set the deposit rate to include the expired subsidy, duty deposits would be required and Usinor would have to request a review of these entries in order to have the duties attributable to the expired subsidy refunded (with interest). Given the fact that we can determine that the likely duty level on these entries is de minimis, based solely on information from the POR, we see no point in creating a situation which virtually guarantees that Usinor will request a review, thereby requiring the Department to expend resources completing that review.[1]

The petitioners have pointed to cases where the Department has refused to adjust the deposit rates to reflect the expiry of allocated subsidies. In those cases, the Department relied on its program-wide change regulation (19 CFR 351.526) to deny the adjustment. However, we also note that in those cases, unlike the instant proceeding, the expiry of the allocated subsidy would have resulted in a lower, but not a de minimis rate. Hence, importers would still have been required to post estimated duties. The estimated duties may have been higher than the amounts that we would expect to eventually collect but the expected amounts were still positive. Given this, the administrative review process (which allows for refunds of excessive duty deposits plus interest) is the appropriate mechanism for addressing the difference.

[1] Of course, the petitioners are entitled to request an administrative review.

RECOMMENDATION

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

AGREE _____ DISAGREE _____

/ s /
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

/9.8.2003/
Date