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MEMORANDUM TO:	Jeffrey May Acting Assistant Secretary for Import Administration
FROM:	Gary Taverman Acting Deputy Assistant Secretary for Import Administration, Group I
SUBJECT:	Issues and Decision Memorandum: Final Results of Countervailing Duty Administrative Reviews: Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom

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Summary

We have analyzed the comments and rebuttal comments of interested parties[1] in the administrative reviews of the countervailing duty (CVD) orders on low enriched uranium from Germany, the Netherlands, and the United Kingdom for the period May 14, 2001, through December 31, 2002. As a result of our analysis, we have made certain modifications to the Preliminary Results of Countervailing Duty Administrative Reviews: Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom, 69 FR 5498 (February 5, 2004) (Preliminary Results). The "Subsidies Valuation Information" and "Analysis of Programs" sections below describe the methodology followed in these reviews with respect to Urenco Deutschland GmbH of Germany (UD), Urenco Nederland B.V. of the Netherlands (UNL), Urenco (Capenhurst) Limited (UCL) of the United Kingdom, Urenco Ltd., and Urenco Inc. (collectively, the Urenco Group or respondents), the producers/exporters of subject merchandise covered by these reviews. Also below is the "Analysis of Comments" section, which contains the Department of Commerce's (Department's) response to the issues raised in the briefs. We recommend that you approve the positions we have developed in this memorandum.

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[1] The Ad Hoc Utilities Group (AHUG), although not an interested party within the meaning of section 771(9) of the Tariff Act of 1930, as amended (the Act), submitted comments in accordance with section 777(h) of the Act, which provides industrial users/consumers an opportunity to comment.

Below is a complete list of the issues in these reviews for which we received comments and rebuttal comments from parties:

Comment 1: Allocation Period
Comment 2: Redirected Deliveries
Comment 3: Cash Deposit Rate for Future Urenco Imports
Comment 4: Draft Cash Deposit and Liquidation Instructions
Comment 5: Errors in the Preliminary Results Calculations
Comment 6: Centrifuge Enrichment Capacity Subsidies by the Government of Germany
Comment 7: Sales Denominator
Comment 8: Enrichment Services
Comment 9: Industry Support

I. METHODOLOGY AND BACKGROUND INFORMATION

International Consortium

In our Notice of Final Affirmative Countervailing Duty Determinations: Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom, 66 FR 65903 (December 21, 2001) (LEU Final) and accompanying Issues and Decision Memorandum: Final Affirmative Countervailing Duty Determinations: Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom - Calendar Year 1999 (LEU Final Decision Memo) at Comment 2: International Consortium Provision, we found that the Urenco Group operates as an international consortium within the meaning of section 701(d) of the Tariff Act of 1930, as amended (the Act).

In the instant administrative reviews, we received no comments on this issue. Therefore, absent new evidence or arguments, and based upon the evidence in these administrative reviews, for the final results we continue to find that the Urenco Group constitutes an international consortium. Accordingly, we have continued to cumulate all countervailable subsidies received by the member companies from the government of Germany (GOG), the government of the Netherlands (GON), and the government of the United Kingdom (UKG), pursuant to section 701(d) of the Act.

II. SUBSIDIES VALUATION INFORMATION

A. Allocation Period

Under section 351.524(d)(2) of the Department's regulations, we will presume the allocation period for non-recurring subsidies to be the average useful life (AUL) of renewable physical assets for the industry concerned, as listed in the Internal Revenue Service's (IRS) 1977 Class Life Asset Depreciation Range System (IRS Tables), as updated by the Department of the Treasury. The presumption will apply unless a party claims and establishes that these tables do not reasonably reflect the AUL of the renewable physical assets for the company or industry under investigation, and the party can establish that the difference between the company-specific or country-wide AUL for the industry under investigation is significant. In this instance, however, the IRS Tables do not provide a specific asset guideline class for the uranium enrichment industry.

In the LEU Final, we derived an AUL of 10 years for the Urenco Group (see LEU Decision Memo at Comment 3: Average Useful Life). In our Preliminary Results, we continued to apply the 10-year AUL to calculate the amount of benefits received during the period of review (POR). The AUL issue is currently subject to litigation related to the investigation. Parties to these reviews submitted comments on the AUL. See Comment 1: Allocation Period, below.

We were not persuaded by the comments we received on this issue to change the AUL from the 10-year AUL calculated and applied in the original investigation. For further discussion, see Comment 1: Allocation Period, below. Therefore, for the purposes of these final results, we continue to apply the 10-year AUL that was calculated in the LEU Final.

B. Benchmarks for Long-term Loans and Discount Rates

In accordance with section 351.524(d)(3)(i)(A) of the Department's regulations, we used, where available, discount rates that were based on the cost of long-term, fixed-rate financing for commercial loans received by the Urenco Group companies. Where the Urenco Group companies had no comparable commercial loans, we used national average interest rates as provided by the companies' corresponding government as specified by section 351.505(a)(3)(ii) of the Department's regulations.

C. Calculation of Ad Valorem Rates

In the LEU Final and Preliminary Results, we calculated the ad valorem subsidy rates using the following formula:

$$A = \frac{B * (C / D)}{E}$$

Where;

A = Ad Valorem Program Rate
B = Subsidy Benefit (in U.S. Dollars)[2]
C = Urenco Group's Sales of Subject Merchandise to the United States during the Calendar Year (in Euros)

[2] The subsidy benefit allocable to the POR for each program originally is calculated in the currency in which it was provided. In calculating the program rate, we converted the value of the subsidy benefit from the original currency to U.S. dollars.

D	=	Urenco Group's Total Sales during the Calendar Year (in Euros)[3]
E	=	Urenco Group Sales that Entered the U.S. during the Calendar Year (in U.S. Dollars)

We received no comments on this calculation formula. Therefore, we continue to apply this formula to calculate the ad valorem subsidy rates in these final results.

III. ANALYSIS OF PROGRAMS

A. Programs Determined to Confer Subsidies from the Government of Germany

1. Enrichment Technology Research and Development Program

The Department previously determined in the LEU Final that, under this program, the GOG promoted the research and development (R&D) of uranium enrichment technologies. The Federal Ministry for Research and Technology provided Uranitisotopentrennungsgeselleschaft mbH (Uranit) (the privately-held German arm of the Urenco Group) a series of grant disbursements for the funding of R&D projects. The funds were provided to encourage continuous improvements of centrifuge technologies and to fund the research of lasers and other advanced technologies. The grant disbursements under this program were made during the years 1980 through 1993.

Assistance under this program was provided for in two agreements and two sets of guidelines: the "Financing Agreement," the "Operating Agreement," the "Terms and Conditions for Allocations on a Cost Basis to Companies in Industry for Research and Development Projects" (BKFT75), and the "Auxiliary Terms and Conditions for Grants on a Cost Basis from the Federal Ministry for Research and Development to Companies in Industry for Research and Development Projects" (NKFT88), respectively. According to Article 4, Section 6, of the "Financing Agreement," the funds provided to Uranit under this agreement had contingent repayment obligations. The funds were repayable within five years of disbursement, contingent upon the company's earnings. If the funds were not repaid within five years, then the repayment obligation lapsed. The funds provided under the "Operating Agreement" were not repayable. Uranit also received funds for laser R&D pursuant to the terms and conditions of the BKFT75 and NKFT88.

In the LEU Final, we determined that the assistance provided under this program constitutes countervailable subsidies within the meaning of section 771(5) of the Act. Specifically, we found that the grant disbursements constitute a financial contribution and confer a benefit, as described in sections 771(5)(B) and 771(5)(D)(i) of the Act. We further found that this program is specific under section 771(5A)(D)(i) of the Act because the provision of assistance under this program was limited to one company. In addition, we found that the program provided non-recurring benefits under section

[3] As discussed below, the total sales figure used in this equation has been adjusted depending on whether the subsidy was tied to R&D or capacity expansion sales.

351.524(c)(2) of the Department's regulations because the assistance was made pursuant to specific government agreements and was not provided under a program that would provide assistance on an ongoing basis from year to year. See LEU Decision Memo at the "Enrichment Technology Research and Development Program" section.

No new information or evidence of changed circumstances has been presented to cause us to revisit this determination. Thus, for the final results, we determine, as we did in the Preliminary Results, that this program constitutes a countervailable subsidy.

We also determined in the LEU Final that no portion of any of the disbursements received by Uranit was repaid. We determined that the disbursements provided under the "Financing Agreement" were countervailable under 19 CFR 351.505(d)(2) as grants because they constituted waivers of contingent liabilities. We determined that the disbursement made in 1985 conferred a benefit during the period of investigation (POI) because the year contingent payment obligation lapsed, 1990, fell within the ten-year allocation period. With regard to the subsidies provided for laser R&D, we determined that the disbursements made between 1990 and 1993 under the NKFT88 were countervailable under 19 CFR 351.504 beginning in the year of receipt because the repayment provisions of the NKFT88 were not applicable for the grants ATT 22279/1, ATT 2279 A/2, ATT 2279/2, and ATT 2281/3. Id. We also determined that, as a result of applying the 0.5 percent test, in accordance with 19 CFR 351.524(b)(2), laser grants ATT 2279 A/2 and ATT 2281/3 were expensed in the year of receipt. Id. No new information or evidence of changed circumstances has been presented to warrant reconsideration of these determinations.

We calculated the benefits received under this program during the POR, pursuant to 19 CFR 351.505(d)(2) (our contingent liability methodology) with regard to the 1985 disbursement made under the Financing Agreement, and, pursuant to 19 CFR 351.504 (our standard grant methodology) with regard to the laser R&D grant disbursements made under the NKFT88 in 1990 or later, and allocated both of them over ten years. See the allocation period discussion in the "Subsidies Valuation Information" section, above and Comment 1: Allocation Period, below. We used as our discount rates the long-term corporate bond rates in Germany because the grants were denominated in Deutschmarks.

We determine that grant disbursements made under this program prior to 1992, including the 1985 disbursement made under the "Financing Agreement," no longer provide a benefit during the POR. We also determine that only the grant disbursements made in 1992 and 1993 continue to provide benefits during the POR.

To calculate the benefit from this program, for each calendar year of the POR, we summed the benefits that remained as a result of the application of our allocation methodology. We then calculated an ad valorem rate for each calendar year of the POR using the methodology described in the "Calculation of Ad Valorem Rates" section, above. We note that because the benefits were provided for the promotion of R&D, we have used as the denominator the company's sales of subject merchandise as well as the sales of those products that were manufactured using the same technology that benefitted from the R&D subsidies. See LEU Decision Memo at Comment 14: Sales Denominator of the Urenco Group. On this basis, we determine the net countervailable subsidy to be 0.03 percent ad valorem for 2001 and 0.01 percent ad valorem for 2002.

2. Forgiveness of Centrifuge Enrichment Capacity Subsidies

In accordance with the "Risk Sharing Agreement" (RSA) and the "Profit Sharing Agreement" (PSA) signed between the GOG and Uranit, the GOG agreed to provide funds to UD to support the promotion of an uranium enrichment industry. These two agreements were signed on July 18, 1975, and the GOG provided a total of DM 338.3 million from 1975 to 1993 to Uranit in support of the Treaty of Almelo's goal of creating and promoting the enrichment industry.[4] Under the terms of the agreements, repayment of the funds was conditional and based upon the financial performance of the company. However, in no case was the amount of the total repayments to exceed twice the amount of the funds provided to UD by the GOG.

In 1987, Uranit signed a new agreement with the GOG. This "Adjustment Agreement" stipulated that Uranit would repay GOG for the DM 333.8 million in centrifuge capacity assistance and an additional agreed-upon DM 31.7 million which was not related to the centrifuge subsidies. Prior to the 1993 merger of the Urenco Group, the GOG and Uranit negotiated a basis to terminate the repayment obligations of the RSA and the PSA. Based upon these negotiations, a "Termination Agreement" was signed on July 13, 1993, and amended on October 27, 1993. Prior to the Termination Agreement, Uranit had made repayments totaling DM 5.6 million. Under the terms of the Termination Agreement, Uranit was to pay the GOG DM 101.1 million, thus terminating the repayment obligations stipulated in the Adjustment Agreement. Uranit made this DM 101.1 million payment on July 1, 1994.

In the LEU Final, we determined this program to be countervailable. We found that assistance provided under this program to Uranit was specific under section 771(5A)(D)(i) of the Act because the program was limited to one company. In addition, we determined that a financial contribution was provided under section 771(5)(D)(i) of the Act. We also determined that a benefit was provided to the company, within the meaning of section 771(5)(E) of the Act to the extent that the repayments made to the GOG were less than the amount of assistance provided to the company under this program. See LEU Decision Memo at the "Forgiveness of Centrifuge Enrichment Capacity Subsidies" section.

[4] In March 1970, the GOG, the GON, and the UKG signed the Treaty of Amelo, which became effective in July 1971. The purpose of the treaty was for the three governments to collaborate in the development and exploitation of the centrifuge process for producing enriched uranium. Prior to 1971, the centrifuge R&D programs in each country were independent.

Parties to these reviews submitted comments on this program. See Comment 6: Centrifuge Enrichment Capacity Subsidies by the Government of Germany, below. We were not persuaded, however, by the comments we received on this issue to find this program not countervailable or to alter our methodology for calculating the benefits received under this program. For further discussion, see Comment 6: Centrifuge Enrichment Capacity Subsidies by the Government of Germany, below. Therefore, for the final results, we determine, as we did in the Preliminary Results, that this program constitutes a countervailable subsidy.

In the LEU Final, we determined that this program provided a grant under 19 CFR 351.505(d)(2) because there was a waiver of a contingent liability. We determined the adjusted grant amount to be equal to the difference between the original amount of centrifuge subsidies (DM 338.3 million) and the total amount of repayment attributable to those centrifuge subsidies (DM 97.556 million), which we calculated to be DM 240.744 million. We also determined that the first year of allocation was 1993, the year in which the repayment obligation stipulated in the Adjustment Agreement was waived. Although we did receive comments on this methodology from interested parties, we were not persuaded by the comments we received on this issue to alter our methodology for calculating the benefit received under this program. For further discussion, see Comment 6: Centrifuge Enrichment Capacity Subsidies by the Government of Germany, below.

To determine the benefit conferred by this program during the POR, we applied the Department's standard grant methodology and allocated the adjusted grant amount of DM 240.744 million over ten years. See the allocation period discussion under the "Subsidies Valuation Information" section, above. We used as the discount rate the long-term corporate bond rate in Germany for 1993. We then calculated an ad valorem rate for each calendar year of the POR using the methodology described in the "Calculation of Ad Valorem Rates" section, above. We note that because this subsidy was provided for the promotion of uranium enrichment, we have used as the denominator sales from enrichment activities only. For further explanation, see LEU Decision Memo at Comment 14: Sales Denominator of the Urenco Group. On this basis, we determine the net countervailable subsidy to be 1.54 percent ad valorem for 2001 and 1.46 percent ad valorem for 2002.

B. Program Determined Not to Confer a Benefit from the Government of Germany

1. Investment Allowance Act

In the LEU Final, we determined that, from 1982 through 1990, the GOG provided countervailable grants to UD and Uranit under the Investment Allowance Act for the enrichment plant in Gronau and for the R&D facility in Julich. We found this program to be specific under section 771(5A)(D)(iv) of the Act because grants provided under this program are limited to companies located in designated regions within Germany. We determined that a financial contribution was provided by this program under section 771(5)(D)(i) of the Act and that a benefit was provided within the meaning of section 771(5)(E) of the Act in the amount of grant disbursements received under this program. We determined that this program provided non-recurring benefits under 19 CFR 351.524(c)(2) of the Department's regulations because the assistance was tied to the capital assets of the companies and was not provided on an ongoing basis from year to year. See LEU Decision Memo at the "Investment Allowance Act" section and Comment 15: Investment Allowance Act. No new information or evidence of changed circumstances has been presented to warrant reconsideration of this determination; therefore, for these final results, we continue to determine that this program is countervailable.

As explained above in the allocation period section of the "Subsidies Valuation Information," we are using ten years as the time period for allocating non-recurring benefits. Because the grant disbursements under this program were made between 1982 and 1990, the ten-year allocation period for each grant disbursement expired prior to the POR. Therefore, we determine that each of these grants has been fully allocated prior to the POR, and, therefore, no benefit was received under this program during the POR.

C. Programs Determined To Be Not Used from the Government of the Netherlands

1. Wet Investeringsrekening Law (WIR)
2. Regional Investment Premium

No new information, evidence of changed circumstances, or comments from interested parties were received regarding these programs. Therefore, we continue to determine that these programs were not used by the respondents in this review.

IV. TOTAL *AD VALOREM* RATE

The total net subsidy rate for the Urenco Group in these reviews is 1.57 percent ad valorem for 2001 and 1.47 percent ad valorem for 2002.

V. ANALYSIS OF COMMENTS

Comment 1: Allocation Period

Petitioners[5] state that during the underlying investigation, the Department calculated a company-specific AUL of ten years for the Urenco Group (see LEU Final). Petitioners point out that they have appealed the use of a 10-year AUL to the Court of International Trade (CIT).

[5] Petitioners are the United States Enrichment Corporation (USEC) and USEC Inc.

In the Preliminary Results the Department applied the 10-year AUL from the investigation to calculate the benefits received by Urenco during the POR from non-recurring grants conferred in previous years. Petitioners urge the Department to reconsider the allocation period for the purposes of its final results, despite the fact that the CIT has not ruled on this issue, because, petitioners argue, record evidence in the instant reviews confirms that the most appropriate allocation period is longer than ten years.

Petitioners assert that in addition to record evidence from the investigation suggesting that the AUL of a centrifuge is at least twenty years, documents submitted during the instant reviews cast doubt on the validity of the investigation AUL. Petitioners point to Urenco Ltd.'s financial statements for 2001 and 2002, which included comments indicating that centrifuge failure rates remained low. Petitioners maintain that these statements imply that the life of a centrifuge was longer during the POR than previously expected. Moreover, petitioners assert that the Department confirmed at verification that UCL was allocating benefits for bookkeeping purposes from the Regional Development Grants (RDGs), which were received in the 1980s, as late as 2001 (see Memorandum from Darla Brown and Margaret Ward to Melissa Skinner, "Verification of the Questionnaire Responses Submitted by the Urenco Group Limited (Urenco Ltd.) and Urenco Capenhurst Limited (UCL)" (January 5, 2004) (UCL Verification Report) at 13). Petitioners argue that UCL's depreciation policy is to allocate subsides over the expected useful life of assets to which they relate, and, given that the RDGs were still being released as late as 2001, the expected useful life of centrifuges under UCL's accounting policies is at least fourteen years. Petitioners conclude that the fact that UCL allocates subsidies over the expected useful life of centrifuges, and that this period is at least fourteen years, demonstrates that a 10-year AUL for the entire Urenco Group does not reasonably approximate the duration of the commercial benefit of subsidies received by any of the Urenco Group companies.

Petitioners assert that the 10-year AUL is not based on an estimate of the actual useful lives of the assets at issue, in contradiction to section 351.524(d)(2)(iii) of the Department's regulations, and the Department's standard methodology for calculating a company-specific AUL does not produce a reasonable approximation of the actual useful life of Urenco's physical assets. Petitioners emphasize that the recipient of the subsidy, UCL, is allocating the benefit of that subsidy over a longer period than the AUL applied by the Department in the investigation. Petitioners point out that in past cases, such as Certain Cut-to-Length Carbon Steel Plate from Mexico: Preliminary Results of Countervailing Duty Administrative Review, 64 FR 48796, 48797-98 (September 8, 1999) (CTL Plate from Mexico), the Department has stated that it will not rely on company-specific AUL data that are distorted or otherwise unuseable.

Therefore, petitioners urge the Department to find that extraordinary circumstances exist to the extent that an allocation period other than a company-specific AUL is appropriate, pursuant to section 351.524(d)(2)(iv) of the Department's regulations. Petitioners assert that the Department should recalculate the allocation period for the Urenco Group. Petitioners maintain that this approach would be fully consistent with the Department's recognition in the Preamble that for certain types of industries or certain types of subsidies, the AUL of assets may not represent the best reflection of the duration of a benefit (see "Explanation of the Final Rules" of Countervailing Duties, Final Rule, 63 FR 65348, 65396 (November 25, 1998) (Preamble)).

Petitioners argue that although the Department typically does not revise the AUL in a subsequent segment of the same proceeding, such a change is appropriate in this case and would not result in prejudice or inaccurate countervailing of subsidies. Petitioners point to precedent where the Department stated that where there was evidence that it had miscalculated the AUL it would correct the error, without regard to the segment of the proceeding in which the error was discovered (see Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Carbon and Certain Alloy Steel Wire Rod from Germany, 67 FR 55808, 55810 (August 30, 2002) (Wire Rod). Moreover, petitioners argue that the idea that the data used in the investigation to develop the AUL are more contemporaneous with the subsidy at issue does not support the use of that data as the basis for the allocation period in the instant reviews. Petitioners assert that the amortization of the grant in UCL's financial records suggests that its policy with respect to the useful life of the assets at issue dates to the time of the grant, and therefore predates even Urenco's 1994 financial statements, the earliest relied upon by the Department in the underlying investigation.

Furthermore, petitioners argue that the revision of the allocation period would not result in over- or under-countervailing a subsidy, since no duties have been assessed. Finally, petitioners assert that if the Department refuses to change the allocation period in the first administrative review, where, as in the instant case, evidence clearly indicates that the AUL applied in the investigation was not accurate, it would violate its statutory obligation to countervail the full amount of the subsidy.

Petitioners further argue that if the Department corrects the allocation period, it should countervail programs found in the investigation to be specific and to provide a financial contribution but to confer no benefit during the POI because they fell outside of the 10-year AUL. Petitioners assert that these programs include: 1) the provision of an industrial site to UD by a regional German government; 2) the provision of grants to UD under regional development programs; 3) the Centrifuge Enrichment Technology Research and Development program in the Netherlands; and 4) a regional development program in the UK. If the Department corrects the allocation period, petitioners urge the Department to countervail benefits received under these programs that fall within the revised allocation period.

Respondents argue that the allocation period should be less than ten years. Specifically, respondents state that, solely for the purpose of preserving the issues raised in Urenco's pending appeals to the CIT, and in light of the requirements for exhaustion of administrative remedies, they once again contend that the allocation period should have been based on the 9.5-year period applicable to chemical manufacturing plants under the Class Life Asset Depreciation Range System ("CLADRS") table of the U.S. Internal Revenue Service, and (alternatively) that the Department erred in rounding the calculated company-specific AUL from the calculated 9.27 years up to 10 years.

Respondents maintain that the record before the Department establishes that Urenco's renewable physical assets are covered by CLADRS category 28.0 – assets used in the "Manufacture of Chemicals and Allied Products" – for which the class life is 9.5 years. Moreover, respondents point out that the presumption for application of the CLADRS table is rebutted only if a party claims and establishes that the IRS tables do not reasonably reflect the company-specific AUL or the country-wide AUL for the industry under investigation, subject to the requirement that the difference between the company-specific AUL for the industry under investigation and the AUL in the IRS tables is significant, i.e., differing by one year or more. Respondents conclude that because the difference between the CLADRS-based AUL and the AUL as determined by the Department is not significant (9.5 years and 9.27 years, respectively), the CLADRS-based presumption was not overcome, and the Department should therefore adopt an AUL of 9.5 years.

Respondents assert that if the Department continues to employ the company-specific methodology to determine the allocation period, the calculated AUL of 9.27 years should not be increased to ten years. Respondents argue that there is no authority or requirement that the Department round up the calculated AUL to ten, the next highest whole number. Respondents maintain that a fractional number could be used in the Department's allocation formula with no further burden on the Department, and the resulting allocation period would in fact provide a more accurate period of the commercial and competitive benefit to the recipient. Moreover, respondents argue, the presumptively favored CLADRS class lives are not always whole numbers. Respondents conclude that because the Department's regulations are specific about how the AUL is to be calculated, but do not provide for consistent rounding upward to enable the use of complete fiscal years in the allocation period, such a rounding by the Department is unauthorized. Finally, respondents put forward that even if it can be shown that there is a reasoned basis for imposing a requirement that whole fiscal years are necessary for the Department's allocation calculation, the Department should not disregard mathematical norms by rounding upward to the next highest whole number; instead the Department should round the AUL to the nearest whole number, which in this case would be nine years.

Petitioners, in their rebuttal briefs, argue that this issue is currently the subject of pending appeals, and respondents have not offered any new evidence or arguments with respect to this issue. Petitioners maintain that absent new facts, new argumentation, or the adoption of a new Department policy, it is the Department's practice to not reconsider its position on an appealed issue in a subsequent proceeding, pending the final results of the appeals. Instead, argue petitioners, the Department has awaited a final and conclusive decision regarding the legality of its methodologies before changing its position. Therefore, petitioners assert that the Department should not revisit in these administrative reviews legal arguments raised by respondents that are subject to ongoing appeal. In contrast, petitioners state, they have presented arguments for an expanded allocation period that are not based on facts considered by the Department in the investigation.

Respondents argue, in their rebuttal briefs, that as the Department found after reviewing equivalent evidence in the investigations, the practice of one Urenco enrichment subsidiary to release to its profit and loss (P&L) account amounts reflecting RDGs in accordance with its predecessor's original depreciation schedule for the equipment benefitted by those grants is not inconsistent with the Department's finding of a ten-year allocation period for Urenco as a whole. Respondents state that far from constituting new evidence, the evidence highlighted by petitioners is nothing but more of the same evidence considered by the Department in its allocation period determination in the investigations.

Specifically, respondents assert that the Department's consistent practice has been to apply in administrative reviews the allocation period adopted in the investigation. Respondents assert that neither of petitioners' arguments, i.e., statements in Urenco Ltd.'s 2001 and 2002 financial reports that the Group's centrifuge failure rates remained low in those years and that RDG amounts were being released over a period greater than ten years, provides any basis for the Department to reject its precedents and revisit the allocation period in these administrative reviews. Respondents argue that, contrary to petitioners' claim, continuing low failure rates after the POI do not indicate longer-than-expected centrifuge lifetimes. In any event, argue respondents, under the Department's allocation period methodology, post-POI changes to the AUL calculations may be applied only to new subsidies, not to pre-POR subsides.

Regarding petitioners' other argument, respondents counter that the Department fully reviewed and verified UCL's accounting policy for the RDGs in the investigations. Respondents point to the verification report from the original investigation, where respondents explained that all sums received under the RDG program were treated as deferred government grants in the balance sheet and released to the P&L account in accordance with BNFL/E's depreciation policy at the time, which for centrifuges ranged up to fifteen years (see the October 17, 2001, Memorandum from Eric B. Greynolds and Darla Brown to Melissa G. Skinner re: Verification of the Questionnaire Responses Submitted by the Urenco Group Limited (Urenco Ltd.) and Urenco Capenhurst Limited (2001 UCL Verification Report) at 17. The 2001 UCL Verification Report is on the record of these administrative reviews, submitted in UCL's May 28, 2003, Questionnaire Response at Tab 7). Respondents maintain that implementing this policy, unreleased amounts reflecting RDGs remained on the books of UCL until 2002, when the last such amount was released, and in accordance with UK GAAP, this balance resulted from matching the release of RDGs applicable to each plant to the depreciation period of the affected assets, determined by BNFL/E based on the then-expected useful life of the assets.

Respondents assert that the Department was aware during the investigation that the RDGs were still being released during the POI (1999), and would continue to be released until 2002, and it still found that the RDG program did not confer a benefit during the POI. Respondents insist that the depreciation data for the centrifuges assisted by the RDGs were included in the Urenco Ltd. database used by the Department in its AUL calculations at the investigation. Therefore, respondents note, the information petitioners cite as new was in fact considered by the Department when it determined the allocation period to be ten years.

Respondents also rebut petitioners' assertion that the Department should apply the extraordinary circumstances exception and recalculate the AUL. Respondents note that this is not the first time in this proceeding that USEC has urged the Department to invoke the extraordinary circumstances exception, although the Department had never applied that provision in this case or any other. Respondents point to two instances in the investigation stage where petitioners argued that "extraordinary circumstances" merited both (1) ignoring the Department's normal practice under section 351.524(d)(2)(iii) for setting records-based allocation periods, and (2) establishing a deferred start date for the allocation period. In both cases, respondents state, the Department rejected application of subparagraph (d)(2)(iv) in favor of its practice under subparagraph (d)(2)(iii), and should do so again now.

Respondents also state that the Department specifically distinguished Urenco's records from the distorted accounting system, cited by petitioners in their case brief, which the Department found unreliable in CTL Plate from Mexico. Respondents state that the Department recognized that the distortions from high inflation and inconsistencies due to the absence of straight-line depreciation data which led the Department to use the IRS depreciation tables rather than a company-specific AUL in CTL Plate from Mexico are not present in Urenco's accounting regime.

Moreover, respondents assert that even if the Department's regulations or precedent permitted a recalculation of the allocation period in a later segment of the same proceeding, which they do not, petitioners' arguments that such a recalculation would not result in prejudice or inaccurate countervailing of subsidies are without merit. Furthermore, respondents argue that petitioners' citation of Wire Rod does not support the position that petitioners are attempting to make. Respondents argue that Wire Rod states that in the context of different proceedings involving the same subsidy and the same respondent, once a particular subsidy has been allocated over a particular AUL, the Department need not revisit the AUL determination even in subsequent proceedings, unless there is evidence that the Department miscalculated the initial AUL. Respondents maintain that Wire Rod makes clear that the Department limits such recalculation of the allocation period to different proceedings involving the same respondent and the same subsidy, as opposed to different segments of the same proceeding.

Respondents also rebut petitioners' suggestion that revision of the AUL is appropriate because no duties have been assessed against Urenco. Respondents state that the fact remains that the Department's well-established practice is to use the previously calculated AUL in all subsequent segments of the same proceeding, including, specifically, first administrative reviews.

For all these reasons, respondents urge the Department to reject petitioners' arguments that a recalculation of the AUL in these reviews is appropriate because it would not result in prejudice or inaccurate countervailing of duties.

Respondents also assert that there is no factual or legal basis on the record of these reviews to countervail additional past subsidies. Respondents maintain that in the investigations the Department reviewed, but declined to find a countervailable benefit in the POI from, all four of the programs listed by petitioners in their case brief. In all four instances, respondents state, this was due, at least in large part, to the ten-year AUL. However, respondents argue, even if the AUL were extended to fourteen years as petitioners propose, there would be no change in the result for the POR. Respondents state that the last date of any financial contribution allegedly received under either of the German programs identified in petitioners' case brief was 1987. Likewise, respondents state, it is clear from the record that the last date any financial contribution was received under the Dutch Centrifuge Enrichment Technology Research and Development Program was in 1981 and the last of the RDGs were received in 1985-1986. Thus, respondents maintain, using petitioners' proposed fourteen-year allocation period would still not result in any benefit from these programs being enjoyed during the POR.

The Department's Position:

We disagree with petitioners that evidence on the record of these administrative reviews demonstrates that the AUL should be increased from the 10-year AUL we applied in the LEU Final and in our Preliminary Results. The evidence referred to by petitioners is not new and was considered during the investigations. Specifically, in the underlying investigations we verified UCL's depreciation methodology and its release of the RDGs to its profit and loss accounts (see 2001 UCL Verification Report at page 17), and this information was considered in the LEU Final. We stated in the LEU Final that we have determined that Urenco Ltd.'s consolidated depreciation data accurately reflect the average useful lives of its assets.

In the LEU Final, we chose to calculate a company-specific AUL using data from the Urenco Group because, in the absence of a CLADRS table that corresponds to subject merchandise, 19 CFR 351.524(d)(2)(iii) instructs the Department to use a company-specific AUL or the country-wide AUL for the industry under investigation. We also stated that we found that the use of company-specific data is the most appropriate method of calculating the Urenco Ltd. AUL. See LEU Final Decision Memo at Comment 3: Average Useful Life.

In the LEU Final, we determined that calculating an AUL for the Urenco Group based on Urenco Ltd.'s consolidated financial statements for years 1994 through 1999 was the most accurate methodology because, among other reasons, it took into account the fact that all three companies of the consortium had to conform to a common methodology when submitting their asset and depreciation figures. Moreover, we stated that our decision to apply the international consortium provision affects the manner in which we must calculate the AUL. In the LEU Final, we stated that if the Department finds that the Urenco Group constitutes an international consortium, the Department cannot calculate and apply separate AULs to each of the Urenco Group companies. See LEU Final Decision Memo at Comment 3: Average Useful Life.

In the LEU Final Decision Memo we stated that pursuant to 19 CFR 351.524(d)(2)(iii), the Department will calculate a company-specific AUL by "dividing the aggregate of the annual average gross book value of the firm's depreciable productive fixed assets by the firm's aggregated annual charge to accumulated depreciation . . . ." Thus, we stated, the regulations direct the Department to use AUL information as reported on the firm's balance sheet. The regulation also states that the Department will not accept such information from the firm's balance sheet if the firm's depreciation figures are not reflective of the actual useful lives of the firm's assets.

As we stated in the LEU Final Decision Memo, petitioners' reliance on CTL Plate from Mexico is not compelling. In CTL Plate from Mexico, the Department found that AHMSA's company-specific AUL calculations were not based on straight-line depreciation data. See 64 FR at 48797. In contrast, and as noted in the LEU Final, the depreciation data in Urenco Ltd.'s consolidated financial statements utilized a straight-line deprecation method, and are therefore different than the company-specific data in CTL Plate from Mexico. In addition, the Department found in CTL Plate from Mexico that the use of AHMSA's company-specific data produced aberrant results which were possibly related to the intermittent periods of high inflation that Mexico experienced during the POI. Id. We note that the Urenco Group has never experienced periods of high inflation, and, therefore, aberrant results related to episodes of high inflation are not present in this case.

Regarding petitioners' citation to Wire Rod, we note that in that case, we stated that we do not believe we can change the AUL used for allocating a particular subsidy in different segments of the same proceeding (see Wire Rod Decision Memo at Comment 1: Appropriate AUL for Saarstahl). It is our practice, as stated in Wire Rod, not to reallocate subsidies in different segments of the same proceedings. We disagree with petitioners that recalculating the AUL in the first administrative review, before duties have been collected, would not result in prejudice or the inaccurate countervailing of subsidies. As we stated in Wire Rod, 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. See Wire Rod Decision Memo at Comment 1.

We also disagree with respondents that the AUL should be less than ten years. Respondents have presented no new factual information or evidence of changed circumstances since the LEU Final to warrant reconsideration of the allocation period. As we did in the LEU Final, we continue to disagree with respondents' contention regarding the applicability of the CLADRS tables. As we stated in the LEU Final, the CLADRS tables do not provide a specific asset guideline class for the uranium enrichment industry. Though respondents claim that section 28.0 of the CLADRS is appropriate for use as the AUL because uranium enrichment is a chemical process and section 28.0 provides for "chemical products to be used in further manufacture," we note that the complete citation from section 28.0 indicates otherwise. The complete phrase cited in section 28.0 of the CLARDS is "chemical products to be used in further manufacture, such as synthetic fibers and plastic materials." The product produced by the uranium enrichment industry is not related to synthetic fibers and plastic materials and, thus, we find that section 28.0 of CLARDS is not appropriate for use as the AUL. See LEU Final Decision Memo at Comment 3: Average Useful Life.

In the absence of a CLADRS table that corresponds to subject merchandise, 19 CFR 351.524(d)(2)(iii) directs the Department to use a company-specific AUL or the country-wide AUL for the industry under investigation. Based on the information submitted by the UKG, GOG, and GON in the underlying investigations, we found that the government depreciation tables do no not reasonably reflect the useful life of enrichment assets. Therefore, the Department determined that company-specific data were suitable for purposes of calculating an AUL for the Urenco Group. After reviewing the AUL data of UCL, UD, and UCN at verification, we found that the use of company-specific data was the most appropriate method of calculating the Urenco Ltd. AUL. Absent new evidence, we continue to find that the use of company-specific data represents the most appropriate method of calculating the AUL for the Urenco Group.

In accordance with our decision in the LEU Final and with Department practice, we are not recalculating the AUL in these administrative reviews. Consequently, we have not countervailed subsidy programs found in the investigation to be specific but not to confer a benefit because they fell outside of the allocation period.

Comment 2: Redirected Deliveries

Petitioners state that in calculating Urenco's sales of subject merchandise to the United States for 2002, the Department subtracted "redirected deliveries" from the sales value. Petitioners argue that if the Department considers these sales to be redirected sales, it should ignore them, rather than subtract them from Urenco's total sales figure and sales to the United States.

Respondents also point out that in the preliminary calculations, when calculating the "Sales of Subject Merchandise to the United States," the Department subtracted "redirected deliveries" in 2002 from Urenco's "Sales of Subject Merchandise to the United States." Respondents maintain that the Department is correct in its conclusion that the redirected deliveries should not be included in the total of Urenco SWU sales to the United States. However, respondents assert, the Department erred in subtracting the value of these redirected deliveries from value of sales of subject merchandise because the values of the redirected deliveries were never included in that figure, as reported by Urenco. Respondents assert that to correct this error, the Department should not subtract redirected deliveries from the 2002 U.S. subject merchandise sales value provided by Urenco.

In their rebuttal briefs, respondents assert that the redirected deliveries cannot properly be characterized or counted as Urenco SWU sales to the United States. Respondents agree with petitioners that these sales should be ignored, rather than subtracted from Urenco's total sales figure and sales to the United States. Moreover, respondents state that petitioners neglect to note that if the Department should decide to add the redirected deliveries to the total of Urenco SWU sales used in the numerator of its calculations, it would also be required to make a corresponding addition to the "Urenco Sales that Entered the U.S." figure used in the denominator thereof. Respondents reiterate that it would not be correct for the Department to include these redirected deliveries in its calculations, either as U.S. sales or U.S. entries, because these were not part of Urenco's sales or shipments to its U.S. customers.

The Department's Position:

We agree with petitioners and respondents that the Department inadvertently subtracted the value of Urenco's redirected deliveries from the 2002 value for sales of subject merchandise to the United States. We have corrected this error in the final results, and are now using the sales value provided by Urenco in their original questionnaire response for the 2002 value of sales of subject merchandise to the United States, without subtracting the value of the redirected deliveries from that figure.

Comment 3: Cash Deposit Rate for Future Urenco Imports

Respondents explain that in the Preliminary Results, the Department determined a net countervailable subsidy rate of 1.40 percent ad valorem for 2002, all of which was attributed to the German "Forgiveness of Centrifuge Enrichment Capacity Subsidies" (CEC Program). Thus, respondents contend that the deposit rate for future entries without this non-recurring subsidy (and the similarly expiring benefit stream from the R&D Program) would be zero.

Respondents point out that in the LEU Final, the Department determined that certain disbursements made between 1990 and 1993 under the R&D Program were countervailable under section 351.504 of the Department's regulations beginning in the year of receipt (see LEU Final Decision Memo at 9). The Department also found in the LEU Final that the CEC Program provided a grant under section 351.505(d)(2) that was countervailable beginning in 1993 (see LEU Final Decision Memo at 10-11). Respondents state that the benefits from both programs were allocated over the ten-year AUL and, therefore, expired at the end of 2002. Thus, because Urenco will not benefit from these non-recurring subsidies after 2002, and the future cash deposit rate for the POR would be de minimis without these subsidies, respondents argue that the Department should establish the cash deposit rate for future Urenco imports at zero.

Respondents concede that generally, the Department will not change the cash deposit rate when the allocated benefit of the non-recurring subsidies after the POR will be any positive amount, even if the rate likely will be lower than the rate established for the POR, because if any future benefit is assigned to the subsidy, then the Department cannot calculate a countervailing duty rate for the next year without gathering non-POR data. However, respondents maintain, the Department can establish a zero cash deposit rate for future entries when the benefit becomes zero by the end of the POR. As an example, respondents point to Pure Magnesium and Alloy Magnesium from Canada: Final Results of Countervailing Duty Administrative Reviews, 64 FR 48,805, 48,806 (September 8, 1999), in which they claim that the Department stated that because a particular program was terminated during the POR, the Department does not intend to examine it in the future and the cash deposit rate will be zero for this program. Respondents argue that because no future benefit is assigned to a fully allocated subsidy, the Department can rely exclusively on POR data to calculate the future rate. Respondents urge the Department to find, without considering any information from outside the POR, that the benefit after 2002 of the allocated subsidies from the R&D and CEC programs is zero.

Respondents argue that in Stainless Steel Sheet and Strip in Coils from France: Final Results of Countervailing Duty Administrative Review, 68 FR 53963 (September 15, 2003) (Sheet and Strip from France) and the accompanying Issues and Decision Memorandum (Sheet and Strip from France Decision Memo) at Comment 3), the Department established a zero cash deposit rate for future imports where the allocated non-recurring benefits were zero at the end of the POR and where the deposit rate without the allocated subsidies was de minimis. Respondents maintain that the facts concerning the cash deposit rate in the instant reviews are indistinguishable from those in Sheet and Strip from France. Thus, respondents argue that the Department should establish the cash deposit rate of zero for future Urenco LEU imports.

Petitioners rebut respondents' argument that the Department should set the cash deposit rate to zero. Petitioners insist that respondents' claim that Urenco will not benefit from these non-recurring subsidies after 2002 is erroneous and respondents' reliance on Sheet and Strip from France is misplaced.

Petitioners state that, as respondents acknowledge in their case brief, the allocation of benefits from the subsidies countervailed in these reviews is currently the subject of an appeal before the CIT by both respondents and petitioners. Thus, petitioners argue that unlike the Sheet and Strip from France case, where the allocation period at issue was not subject to litigation, the Department in these instant reviews does not know that the future benefit from the allocated subsidies at issue is in fact zero. Petitioners assert that until the litigation is resolved, the Department cannot know with certainty what the proper allocation period should be and therefore should not revise the cash deposit rate until a final court ruling has been issued. Moreover, petitioners submit that both parties have already requested a second administrative review of these cases, and, therefore, the Department's rationale in Sheet and Strip from France – the reduction of the rate to zero reduces the likelihood that respondent will request a review and that the Department will expend resources to conduct one – is not applicable here.

Moreover, petitioners argue that unlike the situation in the Sheet and Strip from France case, where the only evidence on the record with respect to the AUL was intended to demonstrate a shorter AUL, evidence on the records of these administrative reviews establishes that Urenco's allocation period is longer than ten years. As petitioners submitted in their case briefs, and as summarized in Comment 1: Allocation Period, above, they hold that the expected AUL of centrifuges under UCL's own accounting rules is at least 14 years, which demonstrates that Urenco will continue to benefit from past subsidies into the next period of review. Therefore, in light of these facts, petitioners assert that were the

Department to set the cash deposit rate to zero, it would fail to establish a cash deposit rate that is the most accurate estimate of duties on future entries, as required by section 751(a)(1)(C) of the Act.

Petitioners further argue that absent a clear demonstration by respondents that a program-wide change satisfying the requirements of section 351.526(b) of the Department's regulations has occurred, such that cash deposits are no longer necessary, the Department should follow its established practice and use the assessment rate from the most recently completed calendar year as the cash deposit rate for future entries. Petitioners emphasize that cash deposits, not duties, are at issue here, and the importer will be repaid with interest, as appropriate, if the assessed duty turns out to be less than the deposited amount. Petitioners conclude that the application of the principle laid out in Sheet and Strip from France is acceptable only where there is certainty that the subsequent review period will contain no countervailable subsidies. Petitioners stress that such certainty does not exist in the instant reviews.

The Department's Position:

We agree with respondents that because Urenco will not benefit from the two non-recurring subsidies from the GOG after 2002, and the future cash deposit rate for the POR would be de minimis without these subsidies, the cash deposit rate for future Urenco imports should be set at zero. It is the Department's practice, as stated in Sheet and Strip from France, to adjust the cash deposit rate to reflect the fact that the allocated benefits have all expired at the end of the POR. In that review, we stated that we have adjusted the cash deposit rate to reflect the fact that the allocated benefits of the subsidy programs expired at the end of the POR 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 (see Sheet and Strip from France Decision Memo at Comment 3). As was the case in Sheet and Strip from France, in the instant reviews, the information needed to make this adjustment is derived entirely from the POR and the expiry of the subsidies means that the expected countervailing duty rate for entries subject to the deposit rate set in these reviews is zero.

We agree with respondents that the fact pattern in the instant reviews is similar to that in Sheet and Strip from France. In the instant reviews, we are able to determine, using data from the current POR, that the allocated non-recurring benefits are zero at the end of the POR and the deposit rate without the allocated subsidies would be de minimis, or, in these cases, zero.

We are not persuaded by petitioners' argument that because the allocation period is currently subject to litigation, we do not know that the future benefit from allocated subsidies is zero. Based on the facts in the record of the instant reviews, we do know that the allocated non-recurring benefits are zero at the end of the POR. Although the LEU Final is currently being appealed, until there is a final and conclusive decision regarding the legality of the Department's AUL methodology in this case, we will continue to apply that methodology (as we did in the Preliminary Results) for the purposes of these final results. See, e.g., Sheet and Strip from France, 68 FR at 53965.

Therefore, we will instruct U.S. Customs and Border Protection (CBP) not to collect cash deposits on all shipments of the subject merchandise from the producers/exporters subject to these reviews, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of these administrative reviews.

Comment 4: Draft Cash Deposit and Liquidation Instructions

Respondents argue that, with respect to the draft cash deposit instructions, because all of the Urenco Group entities, and not just Urenco Ltd. and the respective national enrichment company (e.g., UD in Germany, UCL in the UK), have been found to be an international consortium and all five Urenco entities joined in the requests for these administrative reviews, paragraph 3 of the draft cash deposit instructions should not be limited to Urenco Ltd. and its respective national enrichment companies, but should cover all Urenco Group members.

Furthermore, respondents emphasize that, with respect to the draft liquidation instructions, LEU produced, manufactured, exported, or imported by any of the members of the Urenco Group should be covered by the rates established by the Department for the POR.

Moreover, respondents point out that paragraph 4 of the draft liquidation instructions directs CBP to assess countervailing duties on LEU entered for consumption on or after February 13, 2002, which was exported on or before December 31, 2002. Respondents state that because certain LEU shipments exported before the end of 2002 might not have entered the United States for consumption until after the beginning of 2003, the effect of this language is to extend the POR beyond the end of 2002. Respondents concede that the Department's applicable regulation, section 351.213(e)(2)(ii), states that the administrative review will cover entries or exports, as appropriate, during the POR. However, respondents argue that the Department cannot apply differing approaches when measuring the beginning and end points of the POR, i.e., entries in the former instance and exports in the latter.

Respondents assert that paragraph 4 of the draft liquidation instructions extends the POR beyond the end of 2002 without statutory or other legal authority. Accordingly, respondents request that the Department amend paragraph 4 of its liquidation instructions by replacing the word "exported" with the word "and," so that it conforms with the parallel provision in paragraph 5. Alternatively, if the Department concludes that measuring the 2002 POR by exports is appropriate, respondents request that the Department amend paragraph 4 of its draft liquidation instructions to provide for the application of the countervailing duty rate determined for 2002 to "all shipments of this merchandise exported on or after 2/13/2002 and on or before 12/31/2002" and extend the "gap" period in which duties are disregarded. Respondents maintain that although the Act requires that the administrative review rates apply only to entries during the POR, at least this alternative export-based approach is internally consistent and does not effectively lengthen the POR's coverage.

Petitioners did not comment on the draft customs instructions.

The Department's Position:

We agree with respondents that because all of the Urenco Group entities have been found to be an international consortium and all five Urenco entities joined in the requests for these administrative reviews, paragraph 3 of the draft cash deposit instructions should cover all Urenco Group members. We have changed the language of the cash deposit instructions to include all five Urenco entities.

We also agree with respondents that the word "exported" should be replaced with the word "and" in paragraph 4 of the liquidation instructions, so that it conforms with the parallel provision in paragraph 5. We have changed the liquidation instructions to correct this error.

Comment 5: Errors in the Preliminary Results Calculations

Respondents argue that the Department made several errors in its preliminary calculations. First, respondents assert that the Department used incorrect data for the "value of material that entered U.S. customs (entered value)" in the calculation of the rate from the CEC program, which they allege resulted in an overstatement of the ad valorem rates. To correct this error, respondents state that the Department should substitute the "Value of Material That Entered U.S. Customs" figures, as calculated on the "Sales Data for the Urenco Group" worksheet (page 27 of the Preliminary Calculations Memo), for those used in calculating the ad valorem rate applicable to the "Forgiveness of Centrifuge Enrichment Capacity Subsidies" benefit.

Respondents also assert that "provisions" were already factored out of the SWU sales figures values provided by Urenco to the Department, and should not have been subtracted from the SWU sales. In order to correct the error regarding adjustment of SWU sales values to account for provisions, respondents state that the Department should use the SWU sales figure provided by Urenco.

Moreover, respondents argue that "back-to-back" feed sales are properly a part of the Urenco Group's total sales and should not have been subtracted from that figure. Respondents assert that the Department's subtraction of back-to-back feed sales from the SWU sales figure is in error and that back-to-back sales are real sales to customers for which Urenco issues invoices and collects revenue. Therefore, respondents maintain, the revenue from such sales should be included in Urenco's total sales. Respondents emphasize that back-to-back feed sales should not have been subtracted from "Total 'R&D' Related Sales" and "Total 'Enrichment Capacity' Related Sales" when calculating the benefit for those programs.

Respondents point out that as shown at page 27 of the Preliminary Calculations Memo, in calculating the "Total 'R&D' Related Sales" for 2002, the Department incorrectly transcribed an F.O.B. adjustment figure reported by Urenco and verified by the Department. Respondents postulate that this error likely resulted from misreading the "7" (which was written in the typical European style) as a "9." Respondents urge the Department to correct this error.

Petitioners did not comment on this issue.

The Department's Position:

We agree with respondents that we inadvertently made calculation errors in the Preliminary Results. Specifically, we agree that we used incorrect data for the "value of material that entered U.S. customs (entered value)" in the calculation of the rate from the CEC program. We also agree that "provisions" were already factored out of the SWU sales figures values provided by Urenco to the Department, and should not have been subtracted from the SWU sales in our calculations. Moreover, we agree with respondents that "back-to-back" feed sales should not have been subtracted from the Urenco Group's total sales. Finally, we agree with respondents that at page 27 of the Preliminary Calculations Memo, in calculating the "Total 'R&D' Related Sales" for 2002, the Department incorrectly transcribed an F.O.B. adjustment figure reported by Urenco and verified by the Department.

We have corrected these errors in the final results.

Comment 6: Centrifuge Enrichment Capacity Subsidies by the Government of Germany

Respondents argue that in the LEU Final, the Department found that the contingent liability associated with funding provided by the GOG to Uranit, the parent company of UD's predecessor, under the CEC program from 1975 to 1983 resulted in a countervailable benefit to Urenco during the POI, 1999 (see LEU Final Decision Memo at 10-11). The Department based that finding on the 1993 Termination Agreement between Uranit and the GOG, which released Uranit from its contingent liability to make payments to the GOG in respect of the CEC grants in exchange for Uranit's agreement to pay the GOG 101.1 million Deutschmarks (MDM). Respondents explain that the Department determined that, in 1993, the GOG waived Uranit's contingent repayment obligations under the 1987 Adjustment Agreement, deeming Uranit's contingent liability to constitute an interest-free loan, and its waiver to constitute a grant in the full amount of the unpaid portion of that loan. Because the Department had determined the Urenco Group to be an international consortium under section 701(d) of the Act, the Department then attributed to the entire Urenco Group the maximum net value of Uranit's unpaid contingent grant repayment liability and allocated the benefits over the ten-year AUL period, commencing in 1993. In the Preliminary Results, respondents observe, the Department found that no new information or evidence of changed circumstances has been presented to warrant reconsideration of the CEC program.

However, respondents disagree with the Department's Preliminary Results, stating that the Department's finding that the Termination Agreement conferred a countervailable benefit on either Uranit or Urenco was not supported by substantial evidence in the record and was otherwise not in accordance with law. Respondents assert that the necessary elements for finding a countervailable subsidy, i.e., a financial contribution and a benefit, were absent, and that Uranit plainly received no countervailable benefit from the GOG in 1993 or thereafter by virtue of the Termination Agreement, because in 1993 Uranit actually paid the GOG more than the present value of the GOG's claim to settle the contingent claim for repayment.

Respondents further argue that the Department erred by treating a contingently repayable grant as a loan. Respondents explain that the Department's determination that the Termination Agreement resulted in a countervailable benefit to Urenco was based on its reasoning that the Termination Agreement provided a "deemed grant" in the form of debt forgiveness relief to Uranit under section 351.505(d) of the Department's regulations (see LEU Final Decision Memo at 59, 62-64). Respondents argue that section 351.505(d), on its face, applies only to "contingent liability interest-free loans," the outstanding balance of which are treated as grants received in the year in which the obligation of repayment becomes non-viable. Respondents maintain, however, that there was never any debt to forgive, and that the record is clear that the CEC funds were provided in the form of grants, not loans.

Respondents maintain that all parties to the RSA/PSA and the Adjustment Agreement recognized that there was no expectation of repayment, and the GOG recognized that the CEC program was a grant program, not a loan program. In addition, respondents argue that Uranit's audited financial statements for the years 1988 through 1993, the years in which the Adjustment Agreement was in effect, show that Uranit did not treat the CEC contingently repayable grants as loans.

Moreover, respondents state that even if a countervailable benefit had been conferred on Uranit in 1993, there was no basis for finding that any portion of that benefit was passed along by Uranit to UD or any of the other companies in the Urenco Group. Respondents argue that whatever benefit may be said to have flowed from the termination of the contingent liability of repayment of the CEC grants, that benefit aided only Uranit and, indirectly, its shareholders, because they alone were relieved of the repayment contingency. Respondents assert that there is no evidence demonstrating that this benefit passed through to Urenco. Respondents further argue that the international consortium provision of the Act provides no basis for finding a benefit to Urenco from the Termination Agreement. Respondents argue that the international consortium provision authorizes the Department to cumulate only those countervailable subsidies either 1) provided directly to the international consortium, or 2) received by members of an international consortium from their respective home countries to assist, permit, or otherwise enable their participation in that consortium through production or manufacturing operations in their respective home countries. Respondents maintain that neither of those conditions exist in this case. Respondents emphasize that the CEC grants were provided directly to, and the Termination Agreement was entered into by, Uranit, not the Urenco consortium; moreover, the Termination Agreement, signed seven weeks before the 1993 restructuring, had nothing to do with assisting, permitting, or otherwise enabling Uranit or UD to participate in Urenco through producing or manufacturing LEU in Germany. Therefore, even if Urenco were a consortium and Uranit were a member thereof, no benefit from the Termination Agreement can be cumulated with respect to the Urenco consortium, argue respondents.

Petitioners did not comment on this issue.

The Department's Position:

We disagree with respondents' argument that no financial contribution or benefit existed under the CEC program during the POR. The benefit in the form of a grant received by Uranit was allocated over time using our standard grant methodology. The grant was not, as respondents suggest, extinguished when Uranit entered into the consortium (see LEU Final Decision Memo at footnote 3). This grant benefitted Uranit's production and thus benefitted those same assets when they were included as part of the consortium.

As we stated in the Preliminary Results, no new information or evidence of changed circumstances has been presented to warrant reconsideration of the countervailability of the CEC program. We also disagree with respondents that the international consortium provision does not authorize the Department to apply the countervailable benefits from this program to all the members of the Urenco Group.

As we explained in Comment 17: Centrifuge Enrichment Capacity Subsidies, of the LEU Final Decision Memo, we did not apply the debt forgiveness provisions of 19 CFR 351.508 because the facts of these cases warrant the application of 19 CFR 351.505(d)(2), the provision for treating a liability as a grant if the Department determines that the event upon which repayment depends is not a viable contingency. No new factual information or evidence of changed circumstances has been provided to the Department since the LEU Final with respect to the CEC Program. Therefore, we continue to find that 19 CFR 351.505(d)(2) is applicable with regard to those disbursements provided to Uranit by the GOG which had repayment obligations that we determined were waived by the GOG. Furthermore, we continue to determine that, for allocation purposes, the year in which the repayment obligation was waived (via an agreement between Uranit and the GOG for a partial cash payment) is the year of receipt of the subsidy and that, for purposes of the 0.5 percent test, it is also the year of approval.

Comment 7: Sales Denominator

Respondents argue that it is the well-established practice of the Department to consider debt forgiveness as an "untied subsidy" and, accordingly, to include in the sales denominator for a subsidy in the form of debt forgiveness the total sales of the beneficiary. Respondents argue that notwithstanding this past practice, the Department has excluded a substantial number of sales from its sales denominator calculations with respect to Urenco. Specifically, respondents allege that the Department has incorrectly treated debt forgiveness, which it found to have occurred in 1993 (with respect to CEC grants actually made prior to 1984), as if the benefits were tied to certain products, rather than spread over the totality of Urenco sales.

Respondents point out that in the Preliminary Results, the Department stated that because the debt forgiveness relating to the CEC grants was provided for the promotion of uranium enrichment, it used as the denominator sales from the enrichment activities only. Respondents maintain that thus, the Department refused to treat these debt forgiveness benefits as such for benefit attribution purposes, and instead, the Department countervailed these benefits as if provided as a tied grant in 1993. Respondents assert that although the regulation applied by the Department, section 351.505(d)(2), instructs the Secretary to treat covered loan forgiveness as a grant, it does not permit the tying of that grant to the activities for which the loan's proceeds had been used more than a decade before. Respondents argue that to the contrary, the Department's practice is that the forgiveness of even an earmarked loan is untied for sales denominator purposes. Respondents assert that, consistent with its regulations and past practice, the Department should use a sales denominator that includes all Urenco sales, not just sales tied to the purposes of the original CEC grants.

Petitioners argue that this issue is currently the subject of pending appeals, and respondents have not offered any new evidence or arguments with respect to this issue. Petitioners maintain that absent new facts, new argumentation, or the adoption of a new Department policy, it is the Department's practice to not reconsider its position on an appealed issue in a subsequent proceeding, pending the final results of the appeals. Instead, argue petitioners, the Department has awaited a final and conclusive decision regarding the legality of its methodologies before changing its position. Therefore, petitioners assert that the Department should not revisit in these administrative reviews legal arguments that are subject to ongoing appeal.

The Department's Position:

As stated above in Comment 6: Centrifuge Enrichment Capacity Subsidies by the Government of Germany, we are not treating the CEC program as debt forgiveness, but as a grant. Respondents have provided no new factual information or evidence of changed circumstances since the LEU Final with respect to the CEC Program to warrant a change from the methodology employed in the LEU Final. Therefore, as we did in the LEU Final, we continue to find that the CEC Program subsidies are tied to only those products that are produced using the centrifuge enrichment process. See LEU Final Decision Memo at Comment 14: Sales Denominator of the Urenco Group, where we explained that regarding the countervailable enrichment capacity subsidies as well as subsidies that were provided for uranium enrichment in general, the expansion and/or improvement of an existing production line does not benefit other products outside of that production line. Therefore, we find that these subsidies are tied to only those products that are produced using the centrifuge enrichment process.

Accordingly, we are attributing such subsidies to sales from enrichment activities (i.e., SWU sales and the implied feed value, SWU and feed in joint SWU/feed sales, enriched uranium product sales, and feed sales). However, we are not including in this denominator ancillary enrichment services, which relate to cylinders used for transport, non-enrichment sales of diversified products (i.e., aerospace and print roller sales), and intragroup sales.

Moreover, as petitioners correctly note, this issue is currently subject to appeal. Therefore, until there is a final and conclusive decision regarding the legality of the Department's sales denominator in this case, we will continue to apply that methodology (as we did in the Preliminary Results) for the purposes of these final results.

Comment 8: Enrichment Services

Respondents point out that the courts are currently considering the Department's inclusion of subsidies of enrichment services within the scope of the orders. Respondents emphasize that in enrichment transactions (which constitute the vast majority of its sales), Urenco provides only the enrichment service to the customer. Respondents argue that the Department has ignored the language of the countervailing duty statute, which offsets the subsidization of the manufacture or production of a good. However, note respondents, none of the subsidies found by the Department to have been bestowed on Urenco can properly be treated as having been bestowed solely with respect to the manufacture or production of LEU rather than the rendering of enrichment services. Moreover, argue respondents, the Department's application of the countervailing duty law ignores the key differences between the sale of enrichment services and the sale of LEU. Specifically, respondents assert that the Department improperly equated the provision of enrichment services, where the customer owns and provides the feed uranium to be enriched, with the sale of LEU, where the enricher acquires feed uranium and sells the enriched product.

Respondents point out that the CIT has previously ruled that the antidumping duty law provisions are not applicable to SWU transactions (see USEC Inc. v. United States, 281 F.Supp.2d at 1350). Respondents maintain that because the antidumping and countervailing duty laws must be interpreted in tandem, the Department should likewise find the countervailing duty laws inapplicable to SWU transactions. Respondents argue that the structure of the statute and the Department's consistent practice affirm that the countervailing duty law and the antidumping law have the same purview.

Moreover, respondents argue that the Department's treatment of the subsidization of enrichment services as equivalent to the subsidization of LEU production is contrary to the position taken by the Congress, Executive Agencies, and federal courts. Respondents assert that federal courts have concluded, consistent with the structure established by Congress, that enrichment contracts are contracts for the sale of enrichment services. Respondents argue that in Barseback Kraft AB v. United States, the U.S. government maintained on behalf of USEC that the Uniform Commercial Code (U.C.C.) was inapplicable to enrichment contracts because the U.C.C. applies only to the sale of goods and USEC was selling services (see 36 Fed. Cl. 691 (Fed. Cl. 1996), *aff'd* 121 F.3d 1475 (Fed. Cir. 1997)). Respondents note that the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit (CAFC) upheld the U.S. government's position.

Respondents also point to Florida Power & Light Co. v. United States, 307 F.3d 1364, 1372-73 (Fed. Cir. 2002), where the CAFC held that the nature of the contractual pricing scheme for enrichment services contracts in particular persuades us that the transaction is properly characterized as a service rather than a sale of goods.

Respondents conclude that Department's scope determinations are contrary to the meaning of the countervailing duty statute and the facts of this case, and respondents urge the Department to correct its determinations to exclude subsidization of enrichment services from the scope of these reviews.

Petitioners argue that this issue is currently the subject of pending appeals, and respondents have not offered any new evidence or arguments with respect to this issue. Petitioners maintain that absent new facts, new argumentation, or the adoption of a new Department policy, it is the Department's practice to not reconsider its position on an appealed issue in a subsequent proceeding, pending the final results of the appeals. Instead, argue petitioners, the Department has awaited a final and conclusive decision regarding the legality of its methodologies before changing its position. Therefore, petitioners assert that the Department should not revisit in these administrative reviews legal arguments that are subject to ongoing appeal.

AHUG states in their rebuttal brief that it is concerned with the Department's application of the countervailing duty law to sales of enrichment services. AHUG declares that, to the extent that the Department defers examination of the goods versus services issue based on the pending appeals, it reserves the right to challenge the Department's rulings on those issues.

<u>The Department's Position</u>:

We note that this is an issue common to the antidumping and countervailing duty investigations and administrative reviews. As we explained in the <u>Notice of Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium From France</u>, 66 FR 65877, 65879 (December 21, 2001) (<u>LEU from France</u>), in conducting countervailing duty investigations, section 701(a)(1) of the Act requires the Department to impose duties if, inter alia, "the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, in the United States." We believe the statute is clear that, where merchandise from an investigated country enters the commerce of the United States, the law is applicable to such imports.

In these investigations and administrative reviews, no party disputes that the LEU entering the United States constitutes merchandise. As the product yield of a manufacturing operation, the Department continues to find that LEU is a tangible product. Second, it is well established, and no party disputes, that the enrichment process is a major manufacturing operation for the production of LEU, and that enrichment is a required operation in order to produce LEU. Thus, we find that the enrichment process constitutes substantial transformation of the uranium feedstock. We continue to find, therefore, that the

LEU enriched in and exported from Germany, the Netherlands, the United Kingdom and France is a product of those respective countries.

Finally, we find, and no party disputes, that the LEU at issue enters into the commerce of the United States. Thus, the question of whether enrichers sell enrichment processing, as compared to LEU, is not relevant to the issue of whether the CVD law is applicable. Rather, it is only relevant in these investigations (and now, in these administrative reviews) for purposes of determining how to calculate the CVD rate and how to determine who is the producer/seller of subject merchandise.

Moreover, as we explained in LEU from France, we do not view the determinations cited by respondents as relevant to the issue of whether LEU that enters the commerce of the United States is subject to the CVD laws. The respondents and AHUG are mixing two entirely different statutory regimes, which play different roles and have different purposes. Other legal or regulatory regimes are not determinative of how the Department is to treat such transactions under the CVD laws. For example, the court's finding in Florida Power & Light Co. v. United States that the transfer of title of uranium feedstock "does not rise to the level of 'procurement' or 'disposal' of property" was made in the specific context of determining the applicability of the Contract Disputes Act to government contracts and is not relevant, much less binding, for purposes of the application of the CVD laws.

In Barseback Kraft AB, the court ruled that the UCC did not apply to the contracts at issue because the UCC does not apply to government contracts. Moreover, the UCC addresses the rights and obligations of the parties to a specific contract, and is therefore not determinative of whether the overall trade is one involving goods or services. As a general principle, different terms can have different meanings under different statutes, and parties are entitled to make their claims pursuant to the case law and precedent of the particular relevant statute, even where those claims appear to be at odds with other claims made pursuant to the case law and precedent of another statute that has an entirely different purpose (see LEU from France, 66 FR at 65880).

Moreover, the CIT has upheld the Department's determination that the CVD law applies to imports of LEU under either LEU purchase contracts or SWU enrichment contracts. See USEC v. United States, slip op. 03-121 (CIT Sep't 16, 2003, at 27-30).

Parties have presented no new factual information or evidence of changed circumstances since the LEU Final. Therefore, we continue to find, as we did in the LEU Final, that the enrichment companies are the only producers and exporters of the subject merchandise in these cases (see LEU from France, 66 FR at 65883).

Although the LEU Final is currently being appealed, until there is a final and conclusive decision regarding the legality of this issue in this case, we will continue to apply that methodology (as we did in the Preliminary Results) for the purposes of these final results.

Comment 9: Industry Support

Respondents remark that pursuant to the Act, a countervailing duty investigation initiated by petition must be supported by domestic producers or workers that account for: (i) at least twenty-five percent of the total domestic production of the domestic like product; and (ii) more than fifty percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition.

Respondents state that over the objections of Urenco and members of the Ad-hoc Utilities Group (AHUG), which is comprised of twenty-two United States utilities that operate nuclear power plants, the Department found that support for the petitions from USEC and PACE[6]. Respondents argue that the Department's finding was erroneous because it treats USEC as the producer of the domestic like product not only when USEC sells LEU, but also when it acts solely as a service provider. Respondents comment that because USEC predominantly sells enrichment services rather than LEU, the petitions were deficient on their face, and there has been no evidence presented in these administrative reviews to correct this deficiency.

Respondents assert that USEC cannot be considered the producer of LEU for purposes of the industry support determination in transactions when USEC merely renders enrichment services to a utility. Respondents maintain that pursuant to the Department's tolling regulation, 19 C.F.R. section 351.401(h), a toll service provider like USEC is not the producer if it does not acquire ownership of, and does not control the sale of, the subject merchandise. Respondents assert that because USEC does not acquire ownership or control the sale of the domestic like product when feed uranium is supplied by utilities to USEC, USEC cannot be considered the producer of LEU for purposes of the industry support determination. Respondents contend that the Department's tolling regulation supports the conclusion that the utilities are the principal producers of the domestic LEU for industry support purposes because, in the majority of transactions, the utilities, not USEC, control every step of the nuclear fuel production cycle, including the acquisition of the uranium, conversion services and enrichment services.

Respondents conclude that USEC and PACE do not account for a sufficient percentage of domestic LEU production to have warranted the Department's initiation of its investigations. Respondents state that it is also evident that USEC is a producer of LEU only to the extent it enriches its own uranium for sale, which occurs in an amount insufficient to render USEC an adequate representative of the domestic industry. Moreover, respondents contend that the petitions were opposed by the utility members of AHUG, who account for more than half of the production of LEU in the domestic market, and more than half of the industry expressing an opinion on the petitions. Accordingly, respondents urge the

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[6] Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC, and Local 5-550 and Local 5-689 (collectively known as PACE).

Department to reexamine its conclusion underlying the original investigations that USEC had the capacity to file the petitions on behalf of the industry, and dismiss USEC's petitions and revoke the countervailing duty orders.

Petitioners argue that this issue is currently the subject of pending appeals, and respondents have not offered any new evidence or arguments with respect to this issue. Petitioners maintain that absent new facts, new argumentation, or the adoption of a new Department policy, it is the Department's practice to not reconsider its position on an appealed issue in a subsequent proceeding, pending the final results of the appeals. Instead, argue petitioners, the Department has awaited a final and conclusive decision regarding the legality of its methodologies before changing its position. Therefore, petitioners assert that the Department should not revisit in these administrative reviews legal arguments that are subject to ongoing appeal.

<u>The Department's Position</u>:

The CIT has affirmed the Department's industry support determination for the purposes of initiating the original investigation. <u>See</u> <u>USEC v. United States</u>, slip op. 03-121 (CIT Sep't 16, 2003, at 23-26). The issue of industry support is currently the subject of litigation before the CAFC. Although the <u>LEU Final</u> is currently being appealed, until there is a final and conclusive decision regarding the legality of industry support in this case, we will continue to apply that methodology (as we did in the <u>Preliminary Results</u>) for the purposes of these final results.

In making their argument, respondents raise an issue that cannot be revisited in the context of these reviews. We draw parties' attention to section 702(c)(4)(E) of the Act, which states that "after the administering authority makes a determination with respect to initiating an investigation, the determination regarding industry support shall not be reconsidered." Therefore, we are not reconsidering the issue of industry support in these administrative reviews.

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 of reviews and the final net subsidy rates for the reviewed producers/exporters of the subject merchandise in the Federal Register.

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Agree Disagree

Jeffrey May
Acting Assistant Secretary
for Import Administration

Date