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June 28, 2006

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum: Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom: Final Results of Countervailing Duty Administrative Reviews and Revocation of Countervailing Duty Orders

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Summary

We have analyzed the comments and rebuttal comments of interested parties in the administrative reviews of the countervailing duty (CVD) orders on low enriched uranium (LEU) from Germany, the Netherlands, and the United Kingdom (UK) for the period January 1, 2004, through December 31, 2004. We have not been persuaded by the parties' arguments to make modifications to the Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom: Preliminary Results of Countervailing Duty Administrative Reviews and Intent to Revoke the Countervailing Duty Orders, 71 FR 10062 (February 28, 2006) (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 UK, Urenco Ltd., Urenco Enrichment Company Ltd. (UEC), 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 (the Department's) response to the issues raised in the case and rebuttal briefs. We recommend that you approve the positions we have developed in this memorandum.

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

Comment 1: Net Countervailable Subsidy Rate
Comment 2: Revocation of the Orders
Comment 3: Draft Revocation and Liquidation Instructions
Comment 4: Enrichment Services
Comment 5: Allocation Period
Comment 6: Centrifuge Enrichment Capacity Subsidies by the Government of Germany

I. METHODOLOGY AND BACKGROUND INFORMATION

A. 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 determined 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, because no party contested this determination or offered any new evidence, 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 19 CFR 351.524(d)(2), 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 (CLADRS) tables, as updated by the United States 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 Final Decision Memo at Comment 3: Average Useful Life). The AUL issue is currently subject to litigation related to the original investigation. Parties to the instant reviews submitted comments on the AUL.

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. Therefore, for the purposes of these final results, we continue to apply the 10-year AUL that was calculated in the LEU Final. For further discussion, see Comment 5: Allocation Period, below.

B. Revocation of the Orders

On February 25, 2005, we received requests for revocation of the CVD orders on LEU from the GOG, the GON, and the UKG. Their requests were filed in accordance with 19 CFR 351.222(c). The Department may revoke, in whole or in part, a CVD order upon completion of one or more reviews under section 751 of the Act. Although Congress has not specified the procedures that the Department must follow in revoking an order, the Department has developed a procedure for revocation that is described in 19 CFR 351.222, which was amended on September 22, 1999. See Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders, 64 FR 51236 (September 22, 1999).

Pursuant to 19 CFR 351.222(e)(2)(i), during the third and subsequent annual anniversary months of the publication of the CVD order, the government of the affected country may request in writing that the Department revoke an order under 351.222(c)(1) if the government submits with the request its certification that it has satisfied, during the period of review, the requirements set out in 351.222(c)(1)(i) and that it will not reinstate for the subject merchandise those programs or substitute other countervailable subsidy programs. The GOG, the GON, and the UKG provided the certifications required by 19 CFR 351.222(e)(2)(i).

Upon receipt of such a request, the Department, pursuant to 19 CFR 351.222(c), will consider the following in determining whether to revoke the order: (1) whether the government of the affected country has eliminated all countervailable subsidies on the subject merchandise by abolishing for the subject merchandise, for a period of at least three consecutive years, all programs previously found countervailable; (2) whether exporters and producers of the subject merchandise are continuing to receive any net countervailable subsidy from an abolished program; and (3) whether the continued application of the CVD order is otherwise necessary to offset subsidization.

In our Preliminary Results, we preliminarily determined, in accordance with 19 CFR 351.222(c)(1)(i)(A), that all programs found by the Department to have provided countervailable subsidies on LEU from Germany, the Netherlands, and the UK have been abolished for at least three consecutive years. Moreover, we preliminarily determined that the net countervailable subsidy rate during the period of review (POR) of the instant reviews is zero, and, therefore, that the exporters and producers are no longer receiving any net countervailable subsidy from the abolished programs within the meaning of 19 CFR 351.222(c)(1)(i)(B). Additionally, we preliminarily determined that there is no evidence currently on the record of the instant reviews indicating that these CVD orders are necessary to offset subsidization. Therefore, we preliminarily determined, in accordance with 19 CFR 351.222(c)(1)(i)(C), that the continued application of these CVD orders is not necessary to offset subsidization.

Parties have commented on our intent to revoke these CVD orders. See Comment 2, below. However, we have not been persuaded by parties' arguments to deviate from our finding in the Preliminary Results. Therefore, we find, in accordance with 19 CFR 351.222(c)(1)(ii), that the continued application of these CVD orders is no longer warranted, and we are therefore revoking these CVD orders.

III. ANALYSIS OF PROGRAMS

A. Programs Determined Not to Confer a Benefit from the Government of Germany

1. Enrichment Technology Research and Development Program

In the LEU Final, we determined 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 Uranitisotopentrennungsgesellschaft GmbH (Uranit) (the privatelyheld 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)(D)(I) and 771(E) 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 19 CFR 351.524(c)(2) 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 Final Decision Memo at the "Enrichment Technology Research and Development Program" section.

In the first administrative reviews, we determined that grant disbursements made under this program prior to 1992, including the 1985 disbursement made under the "Financing Agreement," no longer provided a benefit during that POR, i.e., January 14, 2001, through December 31, 2002. We also determined that only the grant disbursements made in 1992 and 1993 continued to provide benefits during the 2001-2002 POR. See Final Results of Countervailing Duty Administrative Reviews: Low Enriched Uranium From Germany, the Netherlands, and the United Kingdom, 69 FR 40869 (July 7, 2004) (2001-2002 LEU), and the accompanying Issues and Decision Memorandum (2001-2002 LEU Decision Memo) at the "Analysis of Programs" section.

In 2001-2002 LEU, we determined that Urenco would not benefit from Enrichment Technology Research and Development Program subsidies from the GOG after 2002 because the grants were fully allocated by the end of 2002. See 2001-2002 LEU Decision Memo at Comment 3: Cash Deposit Rate for Future Urenco Imports.

Because the grant disbursements under this program were made between 1980 and 1993, the 10-year allocation period for each grant disbursement expired prior to the POR of the instant reviews. Therefore, for these final results, we determine, as we did in the Preliminary Results, that each of these grants was fully allocated prior to the POR, and, therefore, no benefit was received under this program during the instant POR.

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 Deutschmark (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.[1] 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 the 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 Final Decision Memo at the "Forgiveness of Centrifuge Enrichment Capacity Subsidies" section.

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. No new information or evidence of changed circumstances has been presented to warrant reconsideration of this determination.

In 2001-2002 LEU, we determined that the Urenco Group would not benefit from Forgiveness of Centrifuge Enrichment Capacity subsidies from the GOG after 2002 because the grants were fully allocated by the end of 2002. See 2001-2002 LEU Decision Memo at Comment 3: Cash Deposit Rate for Future Urenco Imports. No new information or evidence of changed circumstances has been presented to warrant reconsideration of this finding. Therefore, for these

[1] In March 1970, the GOG, the GON, and the UKG signed the Treaty of Almelo, 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 gas centrifuge process for producing enriched uranium. Prior to 1971, the centrifuge R&D programs in each country were independent.

final results, we determine, as we did in the Preliminary Results, that the grant was fully allocated prior to the POR, and, therefore, no benefit was received under this program during the instant POR.

B. Programs Determined Not to Be 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 these reviews.

IV. TOTAL *AD VALOREM* RATE

The total net subsidy rate for the Urenco Group in these reviews is 0.00 percent ad valorem for the POR.

V. ANALYSIS OF COMMENTS

Comment 1: Net Countervailable Subsidy Rate

In their case briefs, respondents state that, by employing the 10-year AUL established in the investigations and utilized in the first and second administrative reviews of these proceedings, the Department correctly determined in its Preliminary Results that the Urenco Group did not benefit from any previously investigated subsidy program during the POR of the instant reviews.

Moreover, respondents assert that the Department correctly found in its Preliminary Results that the Urenco Group received no new or additional subsidies during the POR, and no other finding would have been supported by the record of these administrative reviews.

Therefore, respondents maintain that the Department's finding in its Preliminary Results of a total net countervailable subsidy rate of zero percent for the Urenco Group is correct and should be upheld in these final results.

Petitioners[2] did not comment on the net countervailable subsidy rate.

The Department's Position:

We agree with respondents and will continue to apply our finding of a zero net countervailable subsidy rate in these final results.

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

Comment 2: Revocation of the Orders

In their case brief, respondents state that the Department, in its Preliminary Results correctly determinated that the applicable criteria, set forth in 19 CFR 351.222(c)(1)(i), for revocation of these CVD orders were met. Respondents maintain that the Department should affirm its conclusions regarding revocation and should revoke the three CVD orders.

Petitioners argue in their case brief that the Department erred in preliminarily determining to revoke these orders. Petitioners assert that such a determination is contrary to the Department's practice and must be reversed in the final results. Specifically, petitioners maintain that the Department interpreted the "abolition" requirement in 19 CFR 351.222(c)(1)(i)(A) to be satisfied by the fact that the program forgiving centrifuge enrichment capacity subsidies ended in September 1993. According to petitioners, the Department also determined that 19 CFR 351.222(c)(1)(i)(B) was satisfied because the net countervailable subsidy rate during the POR of the instant review is zero and, therefore, exporters and producers in the subject countries are no longer receiving any countervailable subsidy from the abolished program.

Petitioners argue, however, that the Department's practice requires a finding of a zero or de minimis net subsidy for three consecutive administrative reviews. Petitioners cite Lamb Meat from New Zealand; Final Results of Countervailing Duty Administrative Review and Revocation of Countervailing Duty Order, 60 FR 27082 (May 22, 1995) (Lamb Meat), in which the Department stated:

> Under 19 CFR 355.25(a)(1)(i), the Department must have also found that there was no net subsidy for the subject merchandise in the two consecutive administrative reviews prior to the year in which the government requests revocation, and in the third consecutive administrative review, the Department must also determine that there is no net subsidy. If the foregoing threshold requirements are met, and the Department determines in the review during which revocation has been requested that the government has eliminated all subsidies on the subject merchandise for the third consecutive year, and is not likely to substitute or replace formerly countervailable programs with new subsidies, then the Department will revoke the order. 60 FR at 27083.

Petitioners concede that Lamb Meat was decided under the Department's 1988 regulations, rather than the current regulations, but argue that there was no substantive change to this section:

> In proposed section 351.222(b) and (c), the Department retained the requirement of the former regulations that an order or suspended investigation may be revoked or terminated based on . . . the absence of countervailable subsidization for three (or in some cases five) consecutive years. Preamble, Antidumping Duties, Countervailing Duties; Final Rule, 62 FR 27295, 27325 (May 19, 1997) (Preamble).

Petitioners also point out that the language in 19 CFR 355.25(a)(1)(i) and 351.222(c)(1)(i)(A) is virtually identical. Therefore, petitioners argue, there is no reason for the Department to deviate from its practice in the instant reviews. Petitioners urge the Department not to ignore the fact that in the first administrative review, it calculated a net subsidy rate of 1.47 percent ad valorem for 2002 and that it was not until the second administrative review that the Department calculated a zero net subsidy rate for the Urenco Group. Therefore, argue petitioners, even if the Department calculates a zero net subsidy rate for these final results, it cannot conclude that the GOG, GON, and UKG have eliminated all countervailable subsidies for three consecutive years until the end of the fourth administrative review period, i.e., January 1, 2005, through December 31, 2005. For these reasons, petitioners argue that, for the purposes of these final results, the Department should not revoke the three CVD orders.

In their rebuttal brief, respondents argue that in the Preliminary Results, the Department correctly interpreted 19 CFR 351.222(c)(1). Respondents point out that currently, and since it was last amended in 1999, that regulation provides, in relevant part, as follows:

> (i) In determining whether to revoke a countervailing duty order … , the Secretary will consider:
>
> > (A) Whether the government of the affected country has eliminated all countervailable subsidies on the subject merchandise by abolishing for the subject merchandise, for a period of at least three consecutive years, all programs that the Secretary has found countervailable;
> >
> > (B) Whether exporters and producers of the subject merchandise are continuing to receive any net countervailable subsidy from an abolished program referred to in paragraph … (A) … ; and
> >
> > (C) Whether the continued application of the countervailing duty order … is otherwise necessary to offset subsidization.
>
> (ii) If the Secretary determines, based upon the criteria in paragraphs (c)(1)(i)(A) through (C) of this section that the countervailing duty order … is no longer warranted, the Secretary will revoke the order.…

Respondents argue that the plain meaning of 19 CFR 351.222(c)(1) precludes any inquiry into whether subsidies were received in years prior to the POR. They maintain that the Department's current regulations governing revocation based on the abolition of subsidies by the government contains a three-pronged test for revocation. Of those three prongs, argue respondents, only the first prong, mandating abolition of the countervailable subsidy programs, contains a three-year look back requirement.

Specifically, respondents argue, paragraph A of the applicable rule requires the abolition for three consecutive years of all programs found countervailable by the Secretary. However, they state, it makes no mention of any additional requirement that no subsidies (or benefits from subsidies) be received for that entire three-year period. Respondents maintain that paragraph A of the regulation does not mandate that the government of the affected country must have "eliminated all countervailable subsidies on the subject merchandise for a period of at least three consecutive years." Instead, they argue, elimination of the countervailable subsidies themselves is now covered exclusively by paragraph B. Respondents assert that paragraph A, by its express terms, addresses only the abolition of countervailable subsidy programs. They conclude that, as it is not uncommon for subsidies under a program to continue to be provided for some period of time after the program itself has been abolished, it is entirely logical that the Department would have two separate revocation criteria, with different time requirements, for the abolition of the program itself and the cessation of receipt of subsidies from the program.

Respondents affirm that in the instant cases, the Department has determined that both of the programs it found countervailable were abolished in 1993, and petitioners have not challenged that determination. Respondents argue, because neither paragraph B nor paragraph C of the regulation requires the Department to look back for three years, the facts in these proceedings afford no basis for the Department to reject revocation based on subsidy programs long since abolished, under which neither subsidies, nor the benefit stream, extend into the POR. Accordingly, respondents assert that the Department should reject petitioners' additional, unstated requirement – that no countervailable subsidies or benefits have been received during the two years prior to the POR – for revocation under 19 CFR 351.222(c)(1)(i), and should revoke the subject CVD orders as part of its final results in these reviews.

Respondents further argue that petitioners' reliance on Lamb Meat is misplaced. Respondents state that the 1988 regulation concerning revocation (19 CFR 355.25), which was still applicable when Lamb Meat was decided in 1995, differs significantly from the Department's current regulations governing revocation. Specifically, they argue that in the 1988 regulation, in addition to discretionary language ("the Secretary may revoke") not found in the present regulation, the former section 355.25(a)(1) differed most notably from the current rule in that it lacked any analogue to Paragraph B, which makes it a requirement for revocation that "exporters and producers of the subject merchandise are {not} continuing to receive any net countervailable subsidy from an abolished program." Respondents maintain that because this Paragraph B requirement is written in the present tense, it unmistakably indicates that it is meant to apply only to the receipt of subsidies in the POR.

Respondents argue that the Departmental practice expressed in Lamb Meat was that "the Department must have also found that there was no net subsidy for the subject merchandise in the two consecutive administrative reviews prior to the year in which the government requests revocation, and in the third consecutive administrative review, the Department must also determine that there is no net subsidy." Clearly, such a practice could not coexist with Paragraph B of the current revocation regulations, argue respondents. Rather, they maintain, such a practice would make Paragraph B a nullity because it would require that no countervailable subsidies be received for the three-year period ending with the POR, instead of during only the one-year POR itself. Accordingly, they conclude, because continuation of the practice described in Lamb Meat would make Paragraph B meaningless, by adopting Paragraph B, the Department abandoned that practice. Moreover, respondents state, it is not credible that the Department would have promulgated a present-tense Paragraph B and at the same time maintained, under Paragraph A, not only the express three-year requirement for program abolition, but also some inconsistent, "silent requirement" that no net subsidies have been received for the past three years.

Respondents also rebut petitioners' reliance on the Preamble. Respondents argue that, with respect to the section of the Preamble cited by petitioners, subsections (b) and (c) of 19 CFR 351.222, when promulgated in 1997, covered seven separate antidumping and CVD revocation regimes, each with its own set of timelines and other requirements. Therefore, they conclude, it is not surprising that, in constructing a single sentence to cover all of those revocation regimes, the Department spoke in general rather than specific terms.

Furthermore, respondents assert that independent of the plain meaning of the current revocation rule, the practice described in Lamb Meat, by its own terms, would not preclude revocation of the subject CVD orders. They argue that the practice described in Lamb Meat proscribed revocation only in those instances where a net subsidy was received in any of the three years ending with the POR. However, respondents point out, in these cases, the Department has found that no subsidies were received in 2002, 2003, or 2004 by the companies subject to these CVD orders. Rather, they state, the Department found that countervailable subsidies were last received by the Urenco Group in 1993, and, pursuant to 19 CFR 351.524, it allocated the benefit stream from those subsidies to the ten-year period ending in 2002. Accordingly, argue respondents, even if the "look back" practice described in Lamb Meat remained in force today (which, for the reasons described above, is not the case), that practice would not provide a basis to defer revocation.

Moreover, respondents maintain that both the CVD statute and the Department's regulations implementing that statute draw a clear distinction between a countervailable subsidy and the benefit conferred by that subsidy. They state that this distinction is reflected throughout the Department's CVD regulations, which repeatedly refer to both the receipt and the allocation of a benefit, separate from a subsidy. For that reason, they rebut petitioners' argument that respondents' receipt of a benefit stream in 2002 precludes revocation in the instant reviews.

The Department's Position:

As explained above and in our Preliminary Results, the Department, pursuant to 19 CFR 351.222(c), will consider the following in determining whether to revoke an order: (1) whether the government of the affected country has eliminated all countervailable subsidies on the subject merchandise by abolishing for the subject merchandise, for a period of at least three consecutive years, all programs previously found countervailable; (2) whether exporters and producers of the subject merchandise are continuing to receive any net countervailable subsidy from an abolished program; and (3) whether the continued application of the CVD order is otherwise necessary to offset subsidization.

In the instant cases, the first condition, abolition for three years of all programs previously found countervailable, and the third condition, whether the continuation of the order is necessary to offset subsidization, for revocation have been met and no party to these reviews disputes that fact. The only condition that is in dispute is whether our regulation requires the Department to find that exporters and producers of the subject merchandise did not receive any countervailable subsidy from an abolished program for a period of at least three consecutive years.

Under the current regulations, a determination to revoke an order is based in part on whether the government has abolished all countervailable subsidy programs for at least three consecutive years. This requirement does not include an additional requirement that an existing benefit stream must also have been extinguished for three consecutive years. See 19 CFR 351.222(c)(1)(i)(A). With regard to exporters and producers, a determination is based simply on whether the exporters or producers continue to receive any net countervailable subsidy from an abolished program; there is no mention of a time period. See 19 CFR 351.222(c)(1)(i)(B). Hence, as long as all countervailable subsidy programs have been abolished for at least three consecutive years, the order may be revoked if none of the exporters or producers continues to receive any benefits from those programs and the Department finds no evidence that continuing the order is otherwise necessary. See 19 CFR 351.222(c)(1)(i)(C). This interpretation is further supported by the certification requirements in 19 CFR 351.222(e)(2)

Although a three-year period is appropriate to determine whether a government has actually abolished a subsidy program and is abiding by that commitment, conversely, there is no comparable rationale provided under the current regulation to apply to a benefit stream. It is not necessary to wait three years after the cessation of the benefit stream to determine whether there are additional benefits to be amortized. That determination would be based solely on the existence of a new subsidy program.

In discussing the 1999 revisions, the preamble states "that the Secretary must make an affirmative finding of necessity in order to retain an antidumping or countervailing duty order." See Preamble. Under the revised standard, "the Secretary can only retain an antidumping or countervailing duty order if there is positive evidence on the record indicating the continued necessity of such order to offset dumping or subsidization." Id. No argument has been advanced that a long-abolished subsidy program that provided non-recurring subsidies, the benefit stream(s) of which has ended, necessitates the continuation of the CVD order in order to offset subsidies.

Although petitioners argue that a 1995 determination in Lamb Meat constitutes agency practice of making revocation contingent upon three consecutive years of no subsidy benefits, petitioners' reliance on Lamb Meat is misplaced. The Lamb Meat determination was made under the predecessor regulation that was amended in 1997 and 1999, and thus Lamb Meat does not constitute the Department's practice under the amended regulation. As discussed above, the amended regulation conflicts with petitioners' suggestion that we should require revocation contingent upon three consecutive years of no subsidies. The Department's practice cannot trump the requirements of its regulations. See Torrington Co. v. United States, 82 F.3d 1039, 1049 (Fed. Cir. 1996) ("Commerce, like other agencies, must follow its own regulations"). Accordingly, as we did in our Preliminary Results, we will continue to follow our regulation in these cases.

In the instant cases, the programs that were found countervailable have been abolished for a period of at least three consecutive years, and the exporters/producers are no longer receiving any benefit from the abolished programs. The benefit streams were fully allocated during 2002, prior to the current POR. Moreover, we find no positive evidence that it is otherwise necessary to maintain the orders. For these reasons, we continue to uphold our findings in our Preliminary Results and are revoking the three CVD orders on LEU in these final results.

Comment 3: Draft Revocation and Liquidation Instructions

Respondents state that the draft revocation instructions are fully consistent with the Department's findings in the Preliminary Results and require no amendment if those findings are retained in the final results. Respondents point out that the effective date of the revocation must be added to the instructions and that the effective date of revocation is January 1, 2005, pursuant to 19 CFR 351.222(f)(3).

With respect to the draft liquidation instructions, respondents assert that, with the exception of paragraphs 4 and 9, the liquidation instructions are fully consistent with the Department's Preliminary Results. Respondents argue that paragraph 4 should be revised to include Urenco Enrichment Company as a member of the Urenco Group. Moreover, respondents point out that the effective date of revocation, i.e., January 1, 2005, should be inserted in the second blank in paragraph 9.

Respondents also argue that LEU imports subject to the CVD orders should be limited to circumstances in which the Urenco Group has sold LEU to its customers rather than having provided only enrichment services.

Petitioners did not comment on the draft customs instructions.

The Department's Position:

We agree with respondents that the effective date of revocation is January 1, 2005. We also agree that paragraph 4 of the liquidation instructions should be revised to include UEC as a member of the Urenco Group. We have modified the revocation and liquidation instructions accordingly.

With respect to respondents' argument that imports subject to the CVD orders should be limited to sales of LEU, see Comment 4: Enrichment Services, below.

Comment 4: Enrichment Services

Respondents argue that the Department's application of the CVD law to the subsidization of enrichment services ignores both the meaning of the CVD law itself, which permits the countervailing only of the subsidization of the manufacture or production of a good, and the key differences between the supply of enrichment services and the production of LEU. Respondents note that these differences were recently recognized and found dispositive by the United States Court of Appeals for the Federal Circuit (CAFC) in appeals considering the application of U.S. trade law to imports of LEU (see Eurodif S.A. v. United States, 411 F.3d 1355 (Fed. Cir.), aff'd on reh., 423 F.3d 1275 (Fed. Cir. 2005) (Eurodif)).

Moreover, respondents argue that just as the CAFC held with respect to the antidumping duty law, the CVD statute cannot alter the essential nature of separative work unit (SWU) contracts as being for the provision of a service, as the Court found in Florida Power & Light Co. v. United States, 307 F.3d 1364, 1372-73 (Fed. Cir. 2002). Respondents conclude that there is no evidence on the record of this or any previous segment of these proceedings to suggest that any of the subsidies found countervailable by the Department were bestowed solely, or even predominately, with respect to the manufacture or production of LEU, rather than the rendering of enrichment services. Therefore, respondents argue that the Department's affirmative determinations throughout these proceedings reach beyond the range of the CVD law.

Petitioners argue that the CIT rejected respondents' argument in USEC Inc. v. United States, 281 F. Supp. 2d 1334 (CIT 2003) (USEC), where the court concluded that the Department's interpretation that the CVD provisions of the statute are applicable to imports of LEU under both enriched uranium product (EUP) purchase contracts and SWU enrichment contracts was reasonable. Petitioners assert that this finding by the CIT has not been appealed by respondents or any other party. Therefore, petitioners argue that the Department should continue to find that imports of LEU under enrichment contracts are subject to the CVD law.

The Department's Position:

As we explained in the Notice of Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium From France, 66 FR 65877, 65879 (December 21, 2001) (LEU from France), in conducting CVD 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 is imported into 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, and the United Kingdom is a product of those respective countries.

Regarding respondents' citation to Eurodif, the CAFC's ruling in that case is not pertinent. First, although we agree with petitioners that the CAFC ruling in Eurodif is not final and conclusive, in fact, 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, and no party has appealed the CIT decision on this issue. Second, the CVD statutory provisions at issue in Eurodif pertained solely to the purchase of goods for more than adequate remuneration, not the imports of merchandise into the United States. In these instant reviews, there are no such subsidies at issue. See USEC, 281 F. Supp. 2d at 1346-1348.

Comment 5: Allocation Period

Respondents argue 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, the allocation period should have been based on the 9.5-year period applicable to chemical manufacturing plants under category 28.0 of the CLADRS tables of the U.S. Internal Revenue Service.

Petitioners, in their rebuttal brief, 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 not to reconsider its position on an appealed issue in a subsequent proceeding, pending the final results of the appeals. Instead, argue petitioners, the Department's practice is to await 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.

The Department's Position:

In the LEU Final, we calculated 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 AULs of the firm's assets.

We 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 CLADRS 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 CLADRS 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 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 the allocation period.

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

Respondents argue that the Department's finding in the investigation, and maintained throughout these proceedings, that the forgiveness of the CEC grants provided a countervailable benefit to the Urenco Group beginning in 1993 is erroneous. Respondents assert that UD's former parent company, Uranit, received no countervailable benefit in 1993 or thereafter by virtue of the Termination Agreement between Uranit and the GOG because Uranit actually paid the GOG more than the present value in 1993 of the GOG's claim to settle the contingent claim for repayment of grants made in 1975-1983.

Respondents further argue that the Department erred by treating a contingently repayable grant as a loan. Respondents state that the Department's determination that the Termination Agreement resulted in a countervailable benefit to the Urenco Group was based on its reasoning that the Termination Agreement provided a "deemed grant" in the form of debt forgiveness relief to Uranit under 19 CFR 351.505(d) (see LEU Final Decision Memo at 59, 62-64). Respondents argue that 19 CFR 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. Therefore, they argue, the allocation period began no later than 1983, when the last of the CED grants were received, not in 1993 when the Termination Agreement was signed, and the allocation period properly ended in 1992, not 2002.

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 for use in the production of LEU. 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.

Petitioners, in their rebuttal brief, 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 not to reconsider its position on an issue on appeal in a subsequent proceeding, pending the final results of the appeals. Instead, argue petitioners, the Department's practice is to await 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.

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

As we stated in the <u>Preliminary Results</u>, 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 there was no basis to apply the countervailable benefits from this program to UD and 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 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 <u>LEU Final</u> 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.

<u>Recommendation</u>

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 rate for the reviewed producers/exporters of the subject merchandise, along with the revocation of these orders, in the <u>Federal Register</u>.

________ Agree ________ Disagree

____
David M. Spooner
Assistant Secretary
for Import Administration

____
Date