

ALZ N.V. v. UNITED STATES

Court No. 01-00834 (CIT)
Slip Op. 03-81 (July 11, 2003)

**FINAL RESULTS OF REDETERMINATION
PURSUANT TO COURT REMAND**

SUMMARY

The Department of Commerce (“the Department” or “Commerce”) has prepared these final results of redetermination pursuant to the remand order from the U.S. Court of International Trade (“CIT” or “the Court”) in ALZ N.V. v. United States, Slip Op. 03-81, Court No. 01-00834 (CIT July 11, 2003) (“ALZ v. United States”). In accordance with the CIT’s instructions, we applied the equityworthiness methodology in existence at the time the petition was filed and based upon our reconsideration, we determine that: (1) ALZ was equityworthy at the time of the 1985 investment and the Government of Belgium’s (“GOB”) purchase of ALZ N.V.’s (“ALZ”) common and preference shares in 1985 is not a countervailable subsidy; (2) Sidmar was equityworthy at the time of the 1984 investment and the GOB’s purchase of Sidmar’s¹ common and preference shares in 1984 is not a countervailable subsidy; and (3) Sidmar was equityworthy

¹ Sidmar owns either directly or indirectly 100% of ALZ’s voting shares. Because ALZ is a fully consolidated subsidiary of Sidmar, any untied subsidies provided to Sidmar are attributable to ALZ. See Stainless Steel Plate in Coils from Belgium: Preliminary Results of Countervailing Duty Administrative Review, 66 FR 20425, 20431 (April 23, 2001) (“Preliminary Results of Review”).

in 1985, but the conversion of Sidmar's debt to equity (OCPC-to-PB) is a countervailable subsidy because the price paid by the GOB exceeded the adjusted market value of Sidmar's common stock.

BACKGROUND

On July 11, 2003, the CIT remanded to the Department its determination in the first administrative review of stainless steel plate in coils from Belgium. See Stainless Steel Plate in Coils from Belgium: Final Results of Countervailing Duty Administrative Review, 66 FR 45007 (August 27, 2001) ("SS Plate from Belgium"). The countervailing duty ("CVD") order subject to this review was issued on May 11, 1999. See Notice of Amended Final Determinations: Stainless Steel Plate in Coils from Belgium and South Africa; and Notice of Countervailing Duty Orders: Stainless Steel Plate in Coils from Belgium, Italy and South Africa, 64 FR 25288 (May 11, 1999).

In SS Plate from Belgium, applying the Department's regulations as codified at 19 CFR Part 351 (2000), including the new substantive countervailing duty regulations published in the Federal Register on November 25, 1998 (66 FR 65348) (herein after "1999 Regulations" as they became effective on January 1, 1999), the Department found the following three equity programs to be countervailable: 1) the GOB's purchases of Sidmar's common and preference shares in 1984; 2) the GOB's purchases of ALZ's common and preference shares in 1985; and 3) the GOB's 1985 debt-to-equity conversion for Sidmar.

In its remand order, the CIT directed the Department to: (1) apply the equityworthiness methodology in existence at the time of the original petition to the 1984 and 1985 equity investments into Sidmar, and the 1985 equity investment into ALZ; and (2) (a) more closely scrutinize the terms of

the Memorandum of Understanding (“MOU”) regarding the purchase of Sidmar’s common and preference shares to determine whether such document indicates a binding decision to invest; (b) reexamine the record for any additional evidence regarding the date upon which the GOB decided to invest in Sidmar’s common shares; and (c) explain its reasoning for choosing the date it finds to be the date the GOB decided to invest.

On August 21, 2003, the Department issued a supplemental questionnaire to ALZ and the GOB. On September 22, 2003, ALZ and the GOB timely submitted their responses to this questionnaire.²

The Department released for comment its draft final results of redetermination pursuant to the CIT’s remand order (“Draft Results”) to ALZ and the GOB on November 21, 2003. The Department received no comments on the Draft Results.

Pursuant to the CIT’s remand instructions, we analyzed the information on the record as well as the information provided by ALZ and the GOB. For the reasons explained below, we made changes to the Department’s findings in SS Plate from Belgium in regard to the GOB’s 1984 and 1985 equity infusions in Sidmar and ALZ.

If the CIT approves these remand results, the countervailing duty rate for ALZ will be 1.36% for the period September 4, 1998 through December 31, 1998 and 0.97% for January 1, 1999 and for the period May 11, 1999 through December 31, 1999.

² The submission was timely as the Department was closed on September 18 and 19, 2003, due to hurricane Isabel.

DISCUSSION

The Regulatory Authority Governing Equity Infusions

In SS Plate from Belgium, we relied on the 1999 Regulations in our examination of the GOB's 1984 and 1985 equity infusions in Sidmar and its 1985 equity infusion in ALZ. See SS Plate from Belgium, 66 FR at 45008. We examined whether the respective companies were equityworthy or unequityworthy at the time of the GOB's subscriptions. Under the 1999 Regulations, if a firm is found to be unequityworthy, the Department will determine a government-provided equity infusion into that firm to be countervailable. See 1999 Regulations, 66 FR at 65373.

In determining equityworthiness pursuant to the 1999 Regulations, the Department may examine the following non-inclusive factors:

(A) Objective analyses of the future financial prospects of the recipient firm or the project as indicated by, *inter alia*, market studies, economic forecasts, and project or loan appraisals prepared prior to the government-provided equity infusion in question;

(B) Current and past indicators of the recipient firm's financial health calculated from the firm's statements and accounts, adjusted, if appropriate, to conform to generally accepted accounting principles;

(C) Rates of return on equity in the three years prior to the government equity infusion; and

(D) Equity investment in the firm by private investors.

19 CFR § 351.507(a)(4)(i). Additionally, under the 1999 Regulations, the Department places greater emphasis on the existence of pre-infusion objective analysis. In particular, the 1999 Regulations provide that

the Secretary will request and normally require from the respondents the information and

analysis computed prior to the infusion, upon which the government based its decision to provide the equity infusion. Absent the existence or provision of an objective analysis, containing information typically examined by potential private investors considering an equity investment, the Secretary will normally determine that the equity infusion received provides a countervailable benefit within the meaning of paragraph (a)(1) of this section.

19 CFR § 351.507(a)(4)(ii).

Accordingly, in our examination of the three equity programs under remand in SS Plate from Belgium, we placed specific emphasis on the objective analyses relied upon by the GOB in making its decision to invest. We found in our equityworthiness analysis that, when objective analyses were carried out prior to the decision by the GOB to invest in ALZ or Sidmar, these objective analyses did not contain information typically examined by potential investors, and, thus, that these programs provided a countervailable benefit to ALZ. In another instance, we found that no analysis was performed prior to the investment. These investments, also, were determined to provide a countervailable benefit to ALZ. (See the “Analysis” section below for further discussion of each of these programs and the Department’s original findings in SS Plate from Belgium.)

The Court’s Decision

In ALZ v. United States, the CIT found the Department’s application of the 1999 Regulations in SS Plate from Belgium was not in accordance with law because the Department’s application of the 1999 Regulations to equity infusions that occurred prior to those regulations took effect is tantamount to a retroactive remedy. The CIT stated that the “statutory authority governing countervailing duties does not speak directly to whether the Department can issue retroactive countervailing duty regulations.” See ALZ v. United States, at 12. According to the CIT, the provision in the 1999 Regulations that “explicitly addresses” when the 1999 Regulations should apply, 19 CFR § 351.702(a)(1), only pertains

to establishing the regulations' effective date. See ALZ v. United States, at 12. Specifically, the CIT states that 19 CFR § 351.702(a)(1) provides that the 1999 Regulations apply to all "CVD investigations initiated on the basis of petitions filed after December 28, 1998."³ See ALZ v. United States, at 12. However, the CIT also found that "{a} statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." See ALZ v. United States, at 12 (citing Landgraf v. USI Film Prods, 511 U.S. 244, 257 (1994); and Melex USA, Inc. v. United States, 19 CIT 1130, 1138 (1995)).

The CIT noted that in SS Plate from Belgium, the original petition was filed on March 31, 1998, before the effective date of the Department's 1999 Regulations. The CIT found that the plain language of 19 CFR § 351.702 "directly speaks to the temporal reach of the regulations and requires that they be applied prospectively to investigations initiated on the basis of petitions filed after December 28, 1998." See ALZ v. United States, at 13. The CIT stated that "because that section contains an express command regarding the temporal reach of the countervailing duty regulations, the court must follow such language." See ALZ v. United States, at 13.

The CIT further explained that the Department's regulations in effect at the time the petition in this case was filed, "did not place a special emphasis on the existence of a pre-infusion analysis, particularly one assessing the risk versus expected return on the investment." See ALZ v. United States, at 13. According to the CIT, "requiring such a study now in order to find the infusions non-

³ 19 CFR § 351.702 provides that "{n}otwithstanding § 351.701, the regulation in subpart E of this part apply to: (1) All CVD investigations initiated on the basis of petitions filed after December 28, 1998." See 19 CFR § 351.702.

countervailable is an impermissible retroactive application of Commerce’s regulations.” See ALZ v. United States, at 21. The CIT further noted that, prior to the 1999 Regulations, if a foreign government was considering making a non-countervailable equity infusion, it would focus on the past financial indicators of a company and probably would have discounted the importance of preparing objective analyses of future performance. See ALZ v. United States, at 14. Thus, the CIT found that the application of the 1999 Regulations’ equityworthiness methodology in SS Plate from Belgium to be “unfair” and “deprives parties of the opportunity to know what the rules are and conform their conduct accordingly.” See ALZ v. United States at 14.

Therefore, the CIT instructed the Department, on remand, to apply the equityworthiness methodology in existence at the time the original petition in the investigation of the 1984 and 1985 equity investments into Sidmar, and the 1985 equity investment into ALZ, was made.

The Department’s Determination

The equityworthiness methodology in effect at the time the petition was filed was provided in the Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments, 54 FR 23366 (May 31, 1989) (“1989 Proposed Regulations”) and in the General Issues Appendix (“GIA”) to the Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 FR 37217, 37225 (July 9, 1993) (collectively, “Provisional Regulations”).⁴

⁴ The 1989 Proposed Regulations were never finalized. However, the methodology contained in those regulations, as amended by the GIA, was generally followed until the adoption of the 1999 Regulations. See Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Stainless Steel Plate in Coils from Belgium, 63 FR 47239 (September 4, 1998) (“Preliminary Determination”).

Consistent with that methodology, the first question in analyzing an equity infusion is whether, at the time of the infusion, there is a market price for newly-issued equity. Where such a price exists, the Department will find the equity investment to be countervailable if the market price is less than the price paid by the government for the same form of equity purchased directly from the firm.⁵ Where no market price for the shares exists, the Department determines whether the company receiving the investment is “equityworthy.”⁶

The principal criterion of the equityworthiness analysis under the Provisional Regulations is whether a reasonable private investor could expect from the firm a reasonable rate of return within a reasonable period of time. See 1989 Proposed Regulations, 54 FR at 23371. To determine whether this is the case, we first evaluate the firm’s expected future financial performance, as reflected in its own past performance and forecasts. See the GIA, 58 FR at 37242. Then, we examine whether a reasonable investor, not every investor, would make the equity investment at the time of the infusion. See the GIA, 58 FR at 37242.

In making an equityworthiness determination pursuant to the Provisional Regulations, the Department will examine the following factors, among others: 1) current and past indicators of a firm’s

⁵ 19 CFR § 355.44(e)(1) of the 1989 Proposed Regulations states: “The provision of equity by a government to a firm confers a countervailable benefit to the extent the Secretary determines that: (i) The market-determined price for equity purchased directly from the firm is less than the price paid by the government for the same form of equity purchased directly from the firm; or (ii) In the event that there is no market-determined price, the firm is not equity worthy and there is a rate of return shortfall within the meaning of § 355.49(e).” The latter part of this proposed regulation, *i.e.*, the measurement of the benefit of an equity infusion in an unequityworthy firm, was changed by the GIA, 58 FR 37239 - 44.

⁶ The framework in place for analyzing a company’s equityworthiness at the time of the investigation in this proceeding is described in the GIA at 58 FR 37244 - 50.

financial condition calculated from that firm's financial statements and accounts; 2) future financial prospects of the firm including market studies, economic forecasts, and project or loan appraisals; 3) rates of return on equity in the three years prior to the government equity infusion; and 4) equity investment in the firm by private investors. See GIA, 58 FR at 37244.

Importantly, under the equityworthiness methodology of the Provisional Regulations, the Department does not place the same emphasis, as under the 1999 Regulations, on the existence of pre-infusion objective analysis relied upon by foreign governments in making decisions to invest. In the GIA, the Department stated that "we tend to place greater reliance on past indicators as they are known with certainty and provide a clear track record of the company's performance, unlike studies of future expected performance which necessarily involve assumptions and speculation." See GIA, 58 FR at 37244. Also, under the Provisional Regulations, the Department is not concerned with when governments decide to make an equity infusion, as under the 1999 Regulations, but rather with when the equity infusion is actually made. See GIA, 58 FR at 37244 (The Department analyzes a government's equity infusion from the perspective of a reasonable private investor at the time of the equity infusion).

ANALYSIS

As a threshold matter, the Department notes that 19 CFR § 351.702(a) provides that:

Notwithstanding § 351.701, the regulations in subpart E of this part apply to:

- (1) All CVD investigations initiated on the basis of petitions filed after December 28, 1998;
- (2) All CVD administrative reviews initiated on the basis of requests filed on or after the first day of January 1999.

19 CFR § 351.702(a) (2000). In ALZ v. United States, as mentioned above, the CIT found that 19

CFR § 351.702 “directly speaks to the temporal reach of the regulations and requires that they be applied prospectively to investigations initiated on the basis of petitions filed after December 28, 1998.” See ALZ v. United States, at 13. In this finding, however, the CIT did not address the language of 19 CFR § 351.702(a)(2) but rather made its determination solely based on its interpretation of 19 CFR § 351.702(a)(1). The Department notes that in SS Plate from Belgium, the request for administrative review was made after January 1999. Thus, pursuant to 19 CFR § 351.702(a)(2), the Department applied the 1999 Regulations in its administrative review of stainless steel plate in coils from Belgium. See SS Plate from Belgium.

We respectfully disagree with the Court’s analysis regarding Commerce’s inability to apply the 1999 Regulations. In our view, the plain language of 19 CFR § 351.702(a)(2) makes it clear that the regulations apply to *all* administrative reviews initiated on the basis of requests filed on or after the first day of January 1999. Moreover, the antidumping/CVD statute contemplates that Commerce can reconsider a previous determination if there is sufficient evidence of changed circumstances to warrant the Department’s reconsideration of its original determination. See e.g., 19 U.S.C. § 1675(d)(1); see also Borlem v. United States, 913 F.2d 933, 939 (Fed. Cir. 1990) (the Court remanded an issue to the agency for reconsideration where intervening events may have been determinative). In the involved matter, it is our view that we can revisit the 1984 and 1985 equity investments into Sidmar and the 1985 equity investment into ALZ because there was a new regulation which provided a different standard to be applied to the involved equityworthiness determination. As there was a new regulation, Commerce believes that it was correct as a matter of law in applying that regulation to the involved equity infusion.

Nevertheless, in compliance with the CIT's instruction that the Department apply the equityworthiness methodology in existence at the time the original petition in this case was filed, we have relied upon the equityworthiness methodology as provided in the Provisional Regulations in our reexamination of the 1984 and 1985 equity investments into Sidmar and the 1985 equity investment into ALZ. In the following sections we address these equity infusions separately.

(A) The GOB's 1984 Purchases of Sidmar's Common and Preference Shares

In 1984, the GOB made two share subscriptions (one for preference shares and the other for common shares) in Sidmar. In SS Plate from Belgium, we determined that the GOB decided to make the common share subscription at the time it entered into the January 13, 1984 MOU.⁷ See Final Equity Infusion Memorandum,⁸ at 3-4. We also determined April 27, 1984, the date on which the Nationale Maatschappij voor de Herstructurering van de Nationale Sectoren, Sidmar, and the GOB signed an agreement with respect to both the common and preference share subscriptions, to be the point in time when the GOB decided to purchase Sidmar's preference shares. See Final Equity Infusion Memorandum, at 4.

Based on these determinations, the Department found that two studies were performed prior to the GOB's decision to invest in Sidmar. See Final Equity Infusion Memorandum, at 4. The Department further found that these studies were not sufficient to allow the GOB to evaluate the

⁷ On January 13, 1984, a Memorandum of Understanding ("MOU") was signed regarding the GOB's purchase of preference and common shares in Sidmar.

⁸ See Memorandum to Richard W. Moreland, Deputy Assistant Secretary for AD/CVD Enforcement entitled "Final Results Analysis of the Government of Belgium Equity Infusions: 1984 Infusion in Sidmar, 1985 Infusion in ALZ, and the Conversion of Sidmar's Debt to Equity (OCPC-to-PB) in 1985" (August 21, 2001) ("Final Equity Infusion Memorandum") at 4.

potential risk versus the expected return on its investment in Sidmar. Thus, the analyses did not contain information typically examined by potential private investors considering equity investments. See Final Equity Infusion Memorandum, at 4. Therefore, in SS Plate from Belgium the Department determined that the GOB's purchases of Sidmar's common and preference shares in 1984 constituted a countervailable subsidy within the meaning of section 771(5) of the Act. See Preliminary Results of Review, 66 FR at 20431.

Before the CIT, ALZ contested the Department's findings. ALZ argued that the date upon which the Department relied in determining when the GOB decided to invest in Sidmar was not supported by substantial evidence on the record and that the Department applied a standard not found in its regulations or its practice in order to determine that no adequate objective analyses existed. See ALZ v. United States, at 17.

In ALZ v. United States, the CIT found that the Department's reliance on a single word⁹ in the preamble of the MOU to determine the date on which the GOB decided to purchase Sidmar's common shares to not be "supported by substantial evidence on the record or otherwise in accordance with the law." See ALZ v. United States, at 17. The CIT stated that "on its face, the MOU does not commit the GOB to purchase Sidmar shares; neither does it commit Sidmar to issue new shares." See ALZ v. United States, at 18. Thus, the CIT instructed the Department to "more closely scrutinize the terms of the MOU to determine whether such document indicates a binding decision to invest . . . , to reexamine the record for any additional evidence regarding the date upon which the GOB decided to

⁹ The January 13, 1984 MOU stated that []
See Final Equity Infusion Memorandum, at 4.

invest in Sidmar's common shares . . . , and explain its reasoning for choosing the date it finds to be the date the GOB decided to invest.” See ALZ v. United States, at 19. In addition, for the reasons articulated above in “The Regulatory Authority Governing Equity Infusions” section, in the Department’s reexamination of the 1984 equity infusions in Sidmar, the CIT directed the Department to apply the equityworthiness methodology in existence at the time the original petition was filed in this case. See ALZ v. United States, at 21.

To comply with the CIT’s order, the Department first looked to the Final Determination¹⁰ with regard to the 1984 equity infusion into Sidmar to ascertain whether Sidmar had been found equityworthy or unequityworthy in that segment of the proceeding using the equityworthy methodology that was in place at the time the petition was filed. The Department did not investigate the 1984 investments in Sidmar during the investigation because the allegation regarding these investments was found to be untimely pursuant to 19 CFR § 351.301.¹¹ Moreover, the Department did not view these investments as a “countervailable subsidy practice discovered in the course of a proceeding” within the meaning of 19 U.S.C. §1677d (1994).¹²

¹⁰ Final Affirmative Countervailing Duty Determination; Stainless Steel Plate in Coils from Belgium, 64 FR 15567 (March 31, 1999) (“Final Determination”) and Notice of Amended Final Determinations: Stainless Steel Plate in Coils from Belgium and South Africa; and Notice of Countervailing Duty Orders: Stainless Steel Plate in Coils from Belgium, Italy and South Africa, 64 FR 25288 (May 11, 1999).

¹¹ See Final Determination, 64 FR 15575. The Department’s determination that the allegation was untimely was sustained by the Court in Allegheny Ludlum Corp., v. United States, 2001 Ct. Intl. Trade LEXIS 129 (July 18, 2001) (“Allegheny”).

¹² This issue was addressed in Final Results of Redetermination Pursuant to Court Remand in Allegheny Ludlum Corp. et al. v. United States Court No. 99-06-00362 (CIT June 7, 2000). The Department’s redetermination on remand was sustained by the Court in Allegheny.

As the Department did not investigate this program in the Final Determination, to collect the required information the Department issued a supplemental questionnaire to ALZ and to the GOB on August 21, 2003. Our analysis of this information within the framework of the Provisional Regulations is explained below.

Under the Provisional Regulations, in analyzing whether the two 1984 GOB share subscriptions conferred a benefit on Sidmar, and hence upon ALZ, we must determine whether the GOB investment was inconsistent with the usual investment practice of private investors in Belgium. As neither of Sidmar's common or preference shares were publicly traded, we analyzed whether Sidmar was equityworthy.

We first examined current and past indicators of the firm's financial condition. Specifically, we reviewed financial and related business circumstances of Sidmar for the years leading up to the 1984 investments by examining the company's financial statements for 1981 to 1983 and its financial ratios for the same period as provided by ALZ in its September 18, 2003 submission. This information indicates that: 1) Sidmar's operating income grew throughout the period 1981 to 1983;¹³ 2) the company's financial results turned around from unprofitability in 1981 to profitability in 1982 and 1983;

¹³ In 1981, the European steel market was subject to regulations issued by the European Commission. These regulations imposed production quotas on the steel industry aimed at restoring, by means of restrictions in supply, the right balance in the market to achieve a rise in prices. The rise in prices materialized at the conclusion of the 1981 financial year and continued in place through most of 1982 (P-4 1982 financial statements) and 1983 (P-4 1983 financial statements). As of January 1, 1984, the European Commission introduced minimum prices for most finished products sold by the company. The company's sales revenue reflected growth during the time period 1981 to 1984. See ALZ's September 18, 2003 submission.

3) the company was able to cover interest expense for the years 1982 and 1983; and 4) the company had positive and improving equity capital throughout this period. Moreover, although Sidmar's debt levels remained high compared to the company's

total assets, this high debt structure under the circumstances of the Belgium restructuring did not present a problem for the company to earn a rate of return on equity.¹⁴

In addition, we examined two studies regarding the value of Sidmar. The first study was “[]].”¹⁵ See Final Equity Infusion Memorandum, at

4. This study, conducted by a private accounting firm, [] and dated [], was a “substantial” evaluation of Sidmar. The second study, conducted by [] and dated [], was also to []. This study, inter alia, projected future profitability and earnings for Sidmar. See Final Equity Infusion Memorandum, at 4.

¹⁴ During the years 1981 to 1983, pursuant to the Belgian plan for restructuring, the Belgian government assumed certain interest payments for the company and such financial expenses were not reflected on the financial statements. In the Final Affirmative Countervailing Duty Determination: Certain Steel Products from Belgium, 58 FR 37273 (July 9, 1993), the Department found the assumption by the Belgian government of these interest payments to be countervailable. The Department's long-standing policy is to not adjust the financial results of a company for the effects of previously received countervailable government programs (See §355.44(e)(4) of the 1989 Proposed Regulations). The financial statements as presented for 1981 to 1983 were relied upon for the equityworthy analysis for the year 1984.

¹⁵ According to the report, this study was conducted to []. See Final Equity Infusion Memorandum, at 4.

ALZ states in its September 18, 2003 submission to the Department that the price at which the GOB purchased shares in Sidmar in 1984 was determined by taking the average of the two “current values” as calculated in the two independent studies discussed above. See ALZ’s September 18, 2003 submission, at 6. In April 1984 and September 1984, the statutory auditor appointed for this purpose certified that this share price was properly valued. In addition, ALZ states that the European Commission found these share subscriptions to satisfy the European Commission’s private investment standard. See ALZ’s September 18, 2003 submission, at 2-5.

Based on the current and past indicators of Sidmar’s financial health, as well as the firm’s future financial prospects, we determine that Sidmar was equityworthy at the time of the GOB’s share purchases in 1984.

As a result of the CIT’s rulings in AIMCOR v. United States, 871 F.Supp. 447 (CIT 1994) (“AIMCOR”) and Alabama Silicon, Inc. v. United States, 912 F.Supp. 549 (CIT 1995), a finding of equityworthiness means that the Department need not inquire further regarding the commercial soundness of a government’s purchases of common shares. However, in regard to shares such as preference shares, the CIT ruled in AIMCOR that the Department is required to further analyze those investments where the shares (i.e., shares other than common shares) being purchased had special conditions or restrictions attached. Thus, the Department’s finding that Sidmar was equityworthy in 1984 means that the GOB’s purchase of Sidmar’s common shares did not confer a benefit. However, with respect to the GOB’s purchase of ALZ’s preference shares in 1984, additional analysis is needed for the Department to make its determination.

These preference shares conferred different rights on the shareholders than Sidmar's common shares. Specifically, the preference shareholders were entitled to a preferred dividend of two percent of the nominal value of the shares before dividends could be distributed to other shareholders and/or to holders of profit-sharing bonds. The preference shareholders also had priority redemption/reimbursement status, in that their shares would be redeemed before others and for at least the amount paid for them. Finally, the preference shares did not carry voting rights except in limited circumstances.¹⁶

The different rights conferred by the preference shares made them in certain respects more valuable than the common shares. The priority status of these shares in terms of dividend distribution and redemption made them superior instruments to the common shares. On the other hand, the voting rights on the preference shares were severely restricted, making them inferior instruments. The picture on dividends is mixed: dividends on the preference shares were capped at two percent while other shareholders could receive more than two percent, but only after the preferred dividend had been paid.

In the Final Determination, the Department examined the 1985 purchase of Sidmar's *parts beneficiaires* ("PBs") by the GOB (see Final Determination, at 15572). Like the preference shares purchased in 1984, the PBs did not carry voting rights. Relying on a prior analysis of the 1985 transaction,¹⁷ the Department discounted the price of Sidmar's common shares by 3 percent to reflect

¹⁶ The preference shares issued to the GOB in 1984 are referred to as "preferential shares B." The terms of these shares are described in the "Minutes from the October 16, 1984 Shareholders' Meeting," submitted in Appendix 12 of ALZ's September 22, 2003 questionnaire response.

¹⁷ See Amended Final Affirmative Countervailing Duty Determinations: Certain Carbon Steel Products from Belgium, 62 FR 37880 (July 15, 1997).

the lack of voting rights. Applying that same analytical framework to the 1984 purchase of preference shares, we determine that the one clearly restrictive condition on the 1984 preference shares, i.e., the limited voting rights, would yield an adjusted share price of Belgian Franc (“BF”) [].¹⁸ Since the price paid by the GOB for the preference shares (BF []/per share) was significantly less than the adjusted common share price, we determine that Sidmar did not receive a benefit from the GOB’s purchase of preference shares in 1984.¹⁹

Since the CIT directed that the Department apply the equityworthiness methodology in effect at the time the petition was filed, we do not believe that we need to address the Court’s additional instructions that the Department: (1) determine whether the terms of the MOU regarding the purchase of Sidmar’s common and preference shares indicates a binding decision to invest; (2) reexamine the record for further evidence on the date when the {GOB} decided to invest in Sidmar’s common shares; and (3) explain the Department’s reasoning for choosing the date it found to be the date the GOB decided to invest. As explained above, under the equityworthiness methodology of the Provisional Regulations, the Department does not place the same emphasis, as required under the 1999 Regulations, on the existence of pre-infusion objective analysis. See GIA, 58 FR at 37244. The Department is also not concerned with when governments decide to make an equity infusion, as under

¹⁸ The price paid for Sidmar’s common shares in 1984 was BF []/share. The prices for the common and preference shares purchased in 1984 are found in Appendix 11 of ALZ’s September 22, 2003 questionnaire response.

¹⁹ A benefit would occur only if the GOB had paid a premium for Sidmar’s preference shares. See 19 CFR § 355.44(e)(1)(i) of the 1989 Proposed Regulations.

the 1999 Regulations, but rather with when the equity infusion is actually made. See GIA, at 37244 and see also, page 8 of this remand redetermination.

Therefore, based on our analysis described above (see pages 14-18 of the remand redetermination), pursuant to the Provisional Regulations, we determine that Sidmar was equityworthy in 1984. Furthermore, we determine that the GOB did not pay a premium for the preference shares it purchased in 1984. Consequently, the GOB's 1984 purchases of common and preference shares in Sidmar were consistent with the usual investment practice of private investors in Belgium and these equity infusions are not countervailable subsidies.

(B) Conversion of Sidmar's Debt to Equity (OCPC-to-PB) in 1985

Between 1979 and 1983, the GOB assumed the interest costs associated with medium- and long-term loans for certain steel producers, including Sidmar. In exchange for the GOB's assumption of financing costs, Sidmar agreed to the conditional issuance of convertible profit sharing bonds ("OCPCs") to the GOB. In 1985, Sidmar and the GOB agreed to substitute *parts bénéficiaires* ("PBs") for the OCPCs.

In SS Plate from Belgium, the Department reexamined this debt-to-equity conversion using the 1999 Regulations rather than the regulations previously in effect at the time of the investigation (i.e., the Provisional Regulations). Accordingly, the Department's analysis focused on the objective studies on the record that were performed before the GOB's decision to accept the debt-to-equity conversion. The Department determined that these studies either did not contain the type of information a private investor would rely upon in making a decision to invest or did not adequately address the 1985

investment (specifically, these studies did not address the terms of the PBs, the likelihood that returns would materialize, or other investments having similar level of risk).

The CIT instructed, for the reasons articulated above in “The Regulatory Authority Governing Equity Infusions” section, that the Department reexamine the GOB’s 1985 equity infusion in Sidmar, applying the equityworthiness methodology in existence at the time that the original petition was filed. Furthermore, the CIT found that the Department’s requirement in SS Plate from Belgium that the objective studies conducted (1) be prepared for the particular transaction at issue, and (2) provide an analysis of other investment options, not to be in accordance with the Department’s past practice as articulated in Wire Rod from Trinidad and Tobago.²⁰

According to the CIT, Wire Rod from Trinidad and Tobago makes two relevant points. First, if no new evidence is provided that would cause the Department to change its previous determination, the Department will rely on its past determinations. Second, studies conducted prior to an equity infusion do not have to contain analysis of other investment options nor be contemporaneously conducted.²¹ According to the CIT, the Department’s treatment of Sidmar’s studies as inadequate represents a departure from the Department’s prior practice as articulated in Wire Rod from Trinidad and Tobago.

²⁰ Preliminary Affirmative Countervailing Duty Determination and Preliminary Negative Critical Circumstances Determination: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, 67 FR 6001 (February 8, 2002) (“Wire Rod from Trinidad and Tobago”) and Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Trinidad and Tobago, 62 FR 55003 (October 22, 1997) (“1997 Wire Rod from Trinidad and Tobago”).

²¹ In Wire Rod from Trinidad and Tobago, the Department’s determination of equityworthiness relied on studies that were not conducted for the purpose of the equity infusion at issue and were conducted five years earlier. See Wire Rod from Trinidad and Tobago, 67 FR at 6006.

Therefore, the CIT instructed the Department to provide “a more persuasive explanation” than the one provided in SS Plate from Belgium. See ALZ v. United States, at 26.

In the Final Determination, we determined that the GOB’s initial assumption of interest costs was specific under section 771(5A) of the Tariff Act of 1930, as amended (“the Act”). Furthermore, we determined that the OCPCs were properly classifiable as debt and that the conversion of OCPCs to PBs constituted a debt-to-equity conversion. Comparing the price paid for the PBs to an adjusted market value of Sidmar’s common stock, we determined that the debt to equity conversion provided a benefit to Sidmar as the share transactions were on terms inconsistent with the usual practice of a private investor. See Final Determination, 64 FR at 15572. Therefore, in the investigation the Department found this program to constitute a countervailable subsidy.

In ALZ v. United States, the CIT ordered the Department to apply the equityworthiness methodology in existence at the time of the original petition in the investigation. See Judgement Order of ALZ v. United States. The CIT noted that in Wire Rod from Trinidad and Tobago, the Department stated that it will rely on its past determinations if no new evidence is submitted that would change its earlier determination. See ALZ v. United States, at 26 and Wire Rod from Trinidad and Tobago, 62 FR at 6006.

Regarding the 1985 equity investment, the Department has never made a finding that Sidmar was equityworthy or unequityworthy in that year. In Final Affirmative Countervailing Duty Determination: Certain Steel Products from Belgium, 58 FR 37273, 37277 (July 9, 1993) (1993 Certain Steel Products), the Department found that this equity purchase was not countervailable because:

As stated previously, we did not initiate an equityworthiness investigation with respect to Sidmar. Therefore, we have determined that the GOB's conversion of its debt to equity does not provide a countervailable benefit to that company.

The Department's determination in 1993 Certain Steel Products was challenged in the CIT and on remand the Department found that the GOB had paid a premium for the PBs, following the methodology from the above-cited AIMCOR decision.²² However, while a benefit was found, there was no investigation of whether Sidmar was equityworthy in 1985. Similarly, in the Final Determination (regarding stainless steel plate in coils) the Department did not make a finding regarding Sidmar's equityworthiness in 1985. Instead, the Department adopted the analysis performed in the earlier redetermination on remand. Consequently, the equityworthiness analysis the Court has requested is being conducted here for the first time.

As discussed above in connection with the 1984 equity investments in Sidmar (see Section A of this remand redetermination), the company performed well in 1982 and 1983, and that continued into 1984. Specifically, in 1984 Sidmar continued to see growth, remained profitable, showed an ability to cover its interest expenses, and had positive and improving equity capital. As also discussed above (see Section A of this remand redetermination), there are two outside studies on the record ([]) that were conducted to determine Sidmar's value along with two reports from the statutory auditor that certified that these studies properly valued Sidmar's shares. We examined these studies, as explained in Section A of this remand redetermination, and

²² See Geneva Steel, et. al. v. United States, 914 F. Supp. 563 (CIT 1996). As a result of these rulings by the CIT, the Department amended its final determination (see Amended Final Affirmative Countervailing Duty Determinations: Certain Carbon Steel Products from Belgium, 62 FR 37880 (July 15, 1997)).

found that the first study was a “substantial” evaluation of Sidmar and that the second study, which provided an evaluation of Sidmar as well, also projected the future profitability and earnings for Sidmar.

Based on the current and past indicators of Sidmar’s financial health, as well as the firm’s future financial prospects, we determine that Sidmar was equityworthy at the time of the GOB’s share purchases in 1985.

Having made this determination, it is necessary to continue the analysis under the AIMCOR framework described above. This is precisely the methodology employed by the Department in Amended Final Affirmative Countervailing Duty Determinations; Certain Carbon Steel Products from Belgium, 62 FR 37880 (July 15, 1997) and the Final Determination. Therefore, to measure the benefit from the debt-to-equity conversion, we calculated the premium paid by the government as the difference between the price paid by the government for the PBs and the adjusted market price of the common shares. We then applied the Department’s standard grant methodology²³ and divided the benefit attributable to the period of review (“POR”) by Sidmar’s total consolidated sales during the POR. On this basis, we determine the countervailable subsidy to be 0.47 percent *ad valorem*.

(C) The GOB 1985 Purchase of ALZ’s Common and Preference Shares

In 1985, the GOB made three share subscriptions in ALZ: one for common shares and two for preference shares. In SS Plate from Belgium, the Department re-initiated an investigation of these 1985 share subscriptions based on the change in equity methodology in the 1999 Regulations. See Preliminary Results of Review, 66 FR at 20428. Based on our review of the information on the record,

²³ See 19 CFR § 355.49(b) of the 1989 Proposed Regulations.

we determined in SS Plate from Belgium that there was no objective study performed of ALZ prior to the GOB's investment decision. Therefore, we determined that the GOB's purchases of ALZ's ordinary and preferred shares in 1985 constituted a countervailable subsidy. See page 4 of this remand redetermination.

ALZ argued that the Department may not retroactively apply a changed rule to facts that occurred prior to the rule's promulgation. See ALZ v. United States, at 10-11. The CIT agreed with ALZ. For the reasons articulated above in "The Regulatory Authority Governing Equity Infusions" section, the CIT directed the Department to apply the equityworthiness methodology in existence at the time of the original petition in its investigation of the 1985 equity investments in ALZ.

In the Final Determination, we analyzed the circumstances of these investments in accordance with the equityworthiness methodology as provided in the Provisional Regulations because we found that neither of ALZ's common or preference shares were publicly traded. We found that the value at which the GOB purchased shares in ALZ was determined by two separate studies as discussed in ALZ's shareholders' meeting of September 26, 1985. See Preliminary Determination, 63 FR at 47242. These studies were performed by an independent accounting firm and a group of experts selected by ALZ.²⁴ In addition, during the investigation the Department performed its own examination of ALZ's financial health at the time of the stock purchases. Based on the Department's review of the record and its analysis of ALZ's financial health, we found that ALZ was equityworthy in 1985 in the

²⁴ In the Final Determination, we found that factors that would provide a commercial rationale for investment were considered in the study conducted by the independent accounting firm. See ALZ Preference Shares Memo, at 4.

Final Determination. See Memorandum from Team to Richard Moreland, “ALZ Preference Shares,” public version, dated March 19, 1999 (“ALZ Preference Shares Memo”).

As the Department explained in the Final Determination, consistent with the standard established in AIMCOR, this finding of equityworthiness meant that the Department need not inquire further regarding the commercial soundness of the GOB’s purchase of Sidmar’s common shares. See Preliminary Determination, 63 FR at 47242. Therefore, in the Final Determination, we determined that the GOB’s 1985 purchase of common shares was consistent with the usual investment practice of private investors in Belgium.

With respect to ALZ’s preference shares, although the record evidence was “mixed,” on balance, we determined in the Final Determination that the terms at which the GOB ultimately purchased the preference shares was consistent with the usual investment practice of private investors in Belgium (see ALZ Preference Shares Memo). See Final Determination, 64 FR at 15570.

As the Department applied the Provisional Regulations instead of the 1999 Regulations for these final results pursuant to remand, and as no new information was placed on the record in SS Plate from Belgium, there is no new information or evidence of changed circumstances to warrant a reconsideration of the Department’s determination from the Final Determination. See Wire Rod from Trinidad and Tobago, 62 FR at 6006. Therefore, in accordance with the CIT’s instruction that the Department apply the equityworthiness methodology in effect at the time the petition was filed, for these final results pursuant to remand, we determine that the GOB’s 1985 purchase of common and preference shares was consistent with the usual investment practice of private investors in Belgium.

Accordingly, we find that ALZ was equityworthy in 1985 and that these equity infusions are not countervailable subsidies.

FINAL RESULTS OF REDETERMINATION PURSUANT TO REMAND

As a result of this remand, we have recalculated the company-specific margin for ALZ. For the period September 4, 1998 through December 31, 1998, we determine the recalculated net subsidy rate for ALZ to be 1.36%; for January 1, 1999 and for the period May 11, 1999 through December 31, 1999, we determine the recalculated net subsidy rate for ALZ to be 0.97%. (In accordance with section 703(d) of the Act, countervailing duties will not be assessed on entries made during the period of January 2, 1999 through May 10, 1999. See SS Plate from Belgium, 66 FR at 45009.)

These final results pursuant to remand are being issued in accordance with the order of the CIT in ALZ N.V. v. United States, Slip Op. 03-81 (CIT July 11, 2003).

James J. Jochum
Assistant Secretary
for Import Administration

Date