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FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

Nucor Corporation v. United States
Consol. Court No. 19-00042; Slip Op. 20-92 (CIT July 2, 2020)

I. SUMMARY

The Department of Commerce (Commerce) has prepared these final results of redetermination pursuant to the remand opinion and order of the U.S. Court of International Trade (the Court) in *Nucor Corporation v. United States*, Consol. Court No. 19-00042; Slip Op. 20-92 (CIT July 2, 2020) (*Remand Order*). These results of redetermination concern *Certain Corrosion-Resistant Steel Products from the Republic of Korea: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2015-2016*, 84 FR 11749 (March 28, 2019) (*Final Results*) and accompanying Issues and Decision Memorandum (IDM). The petitioners are AK Steel Corporation, California Steel Industries, Inc., Steel Dynamics Inc., ArcelorMittal USA LLC, Nucor Corporation, and United States Steel Corporation (the petitioners). The mandatory respondents selected for individual examination in the review are Hyundai Steel Company (Hyundai Steel) and Dongbu Steel Co., Ltd/Dongbu Incheon Steel Co., Ltd. (Dongbu).[1]

[1] *See Certain Corrosion-Resistant Steel Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review; and Rescission of Review, Rescission of Review, in Part, and Intent to Rescind, in Part; 2015-16* (August 10, 2018) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM), unchanged in *Final Results*.

On August 20, 2019, Nucor Corporation and Dongbu filed motions for judgment on the agency record, challenging certain aspects of Commerce's *Final Results*.[2] On July 2, 2020, the Court remanded aspects of the *Final Results* to Commerce for further consideration.[3] The Court ordered Commerce to: (1) reconsider its decision or identify substantial record evidence in support of its finding that Dongbu's loans from private creditors on the debt restructuring creditors committee could not be used as benchmarks for measuring benefits from the government loans; and (2) reconsider its decision or further explain Commerce's determination that Dongbu's loan restructuring program was specific, as the Court determined that Commerce did not respond to Dongbu's argument and did not provide substantial record evidence to support its determination. The Court sustained all other challenged aspects of the *Final Results*.[4]

As set forth in detail below, pursuant to the *Remand Order*, Commerce has reconsidered its decisions on whether Dongbu's private creditors' loans could be used as benchmarks and the specificity of Dongbu's loan restructuring program, and provided additional explanation in support of Commerce's determinations on the loan restructuring program. For the purpose of these final results, we have not made changes to our calculations for Dongbu's loan restructuring program and have not revised the applicable subsidy rates.

[2] *See* Motion of Consol. Pl. Dongbu for Judgment on the Agency Record, August 20, 2019, ECF No. 51; *see also* Pl. Nucor Corporation Motion for Judgment on the Agency Record, August 20, 2019, ECF No. 53.
[3] *See Remand Order* at 5-12.
[4] *Id.*

II. REMANDED ISSUES

1. Dongbu's Private Bank Loans as Benchmarks

Background

In the *Final Results*, Commerce found Dongbu to be uncreditworthy within the meaning of 19 CFR 351.505(a)(4).[5] Therefore, Commerce used the uncreditworthiness methodology mandated by 19 CFR 351.505(a)(3)(iii) to determine the benefit to Dongbu from government-provided loans during Dongbu's restructuring.[6] Notwithstanding the finding of uncreditworthiness, to which it conceded, Dongbu argued that Commerce should use the interest rates from alleged private bank loans to determine the amount of the benefit.[7] In the *Remand Order*, the Court held that Commerce needed to either identify substantial record evidence in support of its finding or to reconsider its determination.[8]

Analysis

In a creditworthiness analysis, Commerce determines whether a company could have obtained long-term loans from conventional commercial sources.[9] In making this determination, Commerce applies the factors set forth in 19 CFR 351.505(a)(4)(i)(A)-(D).[10] When it finds a company to be uncreditworthy, Commerce calculates the benefit associated with the extension of a government-provided long-term loan to that company by using a special uncreditworthiness formula.[11]

As a legal matter, 19 CFR 351.505(a)(3)(iii) provides:

> If the Secretary finds that a firm that received a government-provided long-term loan was uncreditworthy, as defined in paragraph (a)(4) of this section, the

[5] *See Final Results* IDM at 4.
[6] *See Preliminary Results* PDM at 11, unchanged in *Final Results*.
[7] *See Remand Order* at 7-8.
[8] *Id.* at 8.
[9] 19 CFR 351.505(a)(4)(i).
[10] *See Saarstahl AG v. United States*, 21 CIT 1158, 1163 (1997).
[11] 19 CFR 351.505(a)(3)(iii).

> Secretary normally will calculate the interest rate to be used in making the comparison called for by paragraph (a)(1) of this section according to the following formula …

The regulation then sets out that formula. Nowhere does it say that Commerce will calculate the benefit as it would for a creditworthy company, by using comparable commercial loans.

The structure of the regulations supports this interpretation. Specifically, 19 CFR 351.505(a)(1), (2) and (3) explain that Commerce will determine that a benefit exists to the extent that the amount a firm pays on a government-provided loan is less than the amount the firm would pay on a comparable commercial loan that the firm could actually obtain on the market. The regulations at 19 CFR 351.505(a)(2) define the terms "comparable" and "commercial" while 19 CFR 351.505(a)(3) describes the concept "could actually obtain on the market."

Then, 19 CFR 351.505(a)(3)(iii) is titled "Exception for uncreditworthy companies." This makes clear that the normal rules regarding "comparable commercial loans" that "could actually be obtained on the market" do not apply to uncreditworthy firms. Rather, in the exceptional situation of uncreditworthy firms, the rule quoted above in 19 CFR 351.505(a)(3)(iii) applies.

As the Court noted in its opinion, it is undisputed by the parties that Dongbu was uncreditworthy during the period of review.[12] Further, Dongbu has conceded that 19 CFR 351.505(a)(3)(iii) provides the method by which Commerce will calculate the benefit from a government-provided loan for an uncreditworthy company. Therefore, the only conclusion under the CVD regulations as set forth under 19 CFR 351.505(a)(3)(iii) is to apply the standard

[12] *See Remand Order* at 7-8.

uncreditworthy application that is set forth under that regulation if it has already been conceded that Dongbu was uncreditworthy during the period of review.[13] It is uncertain what Dongbu is alleging or claiming now.

Nevertheless, the Court did remand this issue for further consideration by Commerce. We find that the above explanation satisfies the requirement for further explanation and consideration. We also invited parties to comment on the above-described standard application of the CVD regulations. However, we also offer further explanation of the record evidence regarding the participation of the alleged private banks in Dongbu's restructuring and why the loans from these alleged private banks are unsuitable for benchmark purposes.

The record supports the finding that the loans from the alleged private banks to Dongbu cannot constitute "comparable commercial loans" under 19 CFR 351.505(a)(2) due to the substantial government influence and inclusion of government programs. The starting point of our analysis is that section 351.505(a)(2)(ii) states that "the Secretary will not consider a loan **provided under a government program**… to be a commercial loan for purposes of selecting a loan to compare with a government-provided loan." (emphasis added). The alleged private loans given to Dongbu were provided for under government programs, and thus are unsuitable for benchmark purposes.

First, Dongbu's debt restructuring agreement was made pursuant to the [ ] under the [ ]. In *DRAMs from Korea*, Commerce stated that under the [ ], all the creditor banks were obligated to participate

[13] *See Preliminary Results* PDM at 12. In litigation, Dongbu claimed that Commerce was presenting new arguments about the uncreditworthy formula. However, this is not the case. Commerce discussed its use of the formula for uncreditworthy companies in its *Preliminary Results*, stating that "we will continue to find Dongbu to be uncreditworthy during the POR and countervail its restructured loans provided by the government policy banks during the POR using an uncreditworthiness benchmark with an added risk premium."

in the workout system, which provided the dominant Government of Korea (GOK)-owned and controlled banks with the ability to establish the financial restructuring terms over many more creditors. This Act was introduced by the National Assembly "to make sure that the banks could not avoid participating in workouts."[14] In addition, the debt restructuring program, which was agreed upon pursuant to [ ], constituted a countervailable subsidy.[15]

Next, we examined Dongbu's debt restructurings under both the Voluntary Restructuring Program and the [ ]. When discussing the definition of "commercial," the *Preamble* states that "when a firm receives a financial package including loans **from both commercial banks and from the government**, we intend to examine the package closely to determine whether the commercial bank loans should in fact be viewed as "commercial" for benchmark purposes. In particular, we look to whether there any special features of the package that would lead to the commercial lender to offer lower, more favorable terms than would be offered absent the government/commercial package" (emphasis added).[16] The state-owned Korea Development Bank (KDB) exercised significant influence over the debt restructurings through financial packages. The loans by the private banks are part of financial package offered by the KDB under the Voluntary Restructuring program and the [ ] and, therefore, cannot be considered as "commercial" under Commerce's regulations.

The record further indicates that the private banks that loaned to Dongbu were under significant government influence, enough so that the private banks provided Dongbu with a low-interest loan when a reasonable, independent commercial bank would not do so. Because of this

[14] *See Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 FR 37122, (June 23, 2003), and accompanying IDM (*DRAMs from Korea*) at 54, n 19.
[15] *See DRAMs from Korea*.
[16] *See Countervailing Duties; Final Rule*, 63 FR 65348, 65364 (November 25, 1998) (*Preamble*).

government influence, as explained below, the loans by the private banks cannot be considered "commercial" under Commerce's regulations.

During the underlying investigation and the first administrative review, Commerce found the KDB to be a state-owned policy bank which was created to implement government industrial policies through the provision of financing to industries and enterprises.[17] The record shows that, prior to entering the debt restructurings with its creditors, the KDB and Dongbu entered into a refinancing agreement, the [ ], which allowed the KDB to dictate how Dongbu would use its assets and productions[18] to generate revenue. This agreement allowed the KDB to dictate how Dongbu would repay its creditors. The [ ] indicates that [

].[19] The [ ] further states that [

][20] [

][21] As a result of the refinancing agreement, while Dongbu had to repay 20 percent of the principal bond amount, the KDB and the Finance and Investor Associate took

[17] *See Preliminary Results* PDM at 14; *see also Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea: Final Affirmative Determination, and Final Affirmative Determination of Critical Circumstances, in Part*, 81 FR 35310 (June 2, 2016), and accompanying IDM (*CORE from Korea Investigation*) at Comment 4.
[18] *See* Dongbu's February 13, 2018 Initial Questionnaire Response at 18 and Exhibit Debt -3.
[19] *See* Dongbu's February 13, 2018 Initial Questionnaire Response at Exhibit Debt-3.
[20] *Id.*
[21] *Id.*

over the remaining 80 percent of the principal bond amount and the transfer for risk sharing as follows:

– Corporate Bond Stabilization Fund: 10 percent

– Dongbu's creditor banks: 30 percent

– Korea Credit Guarantee Fund: 60 percent (Primary CBO)

Record evidence further indicates that the KDB, as the main creditor, did not simply act as a creditor who lent to Dongbu. After the refinancing agreement was reached, the KDB tried to sell Dongbu Incheon and DDPT as a package deal to POSCO.[22] However, POSCO announced that it was withdrawing its purchase offer after analysis of its due diligence and valuation results. Because the deal was unsuccessful, Dongbu had no other option but to apply for debt restructuring programs, as discussed above.[23]

As Dongbu went through the Debt Restructuring programs, the KDB continued to dictate how Dongbu would use its assets and productions[24] to generate revenue, which allowed the KDB to dictate how Dongbu would repay its creditors. As indicated by the [

].[25] [

].[26] The [

[22] *See* Dongbu's February 13, 2018 Initial Questionnaire Response at 19.
[23] *Id.* at 20.
[24] *Id.* at 18 and Exhibit Debt-3.
[25] *See* GOK's February 12, 2018 Initial Questionnaire Response at Exhibit Debt Restructuring-4.
[26] *Id.* at Exhibit Debt Restructuring-6.

].[27] Under the [

][28] [

][29]

The GOK and Dongbu reported that among the nine creditor banks on the Creditor Bank Committee that participated in Dongbu's Debt restructuring, in addition to the KDB, Korea Financial Corporation (KoFC), KEXIM, Woori Bank (Woori) and Industrial Bank of Korea (IBK) were majority government-owned.[30] The record indicates that the majority GOK-controlled banks accounted for the largest share of financing provided through the Creditor Bank Committee, with the KDB accounting for the largest share of that financing. Conversely, the private commercial banks on the Creditor Bank Committee accounted for a small share of the financing.[31] Accordingly, the GOK-controlled banks, and the KDB in particular, held the highest number of votes on the Creditor Bank Committee in proportion to the amount of credit extended.[32] The record also shows that [ ].[33] This indicates that had Dongbu chosen bankruptcy, it is likely that the smaller private creditor banks would be able to recover very little payment, if any, from Dongbu. Thus, not only did the

[27] *Id.*
[28] *Id.* at 18.
[29] *Id.* at Exhibit Debt Restructuring-8.
[30] The Creditor Bank Committee consists of KDB; KoFC; KEXIM; Woori; IBK; Nonghyup Bank; Shihan Bank; Hana Bank; and Korea Exchange Bank. *See* GOK's Letter, "Second Supplemental Questionnaire Response," dated July 6, 2018 at 11-12; *see also* Dongbu's Letter, "Certain Corrosion-Resistant Steel Products from the Republic of Korea, Case No. C-580-879: Response to Initial Questionnaire," dated February 13, 2018 at 34-35.
[31] *Id.*
[32] *Id.*
[33] *See* GOK's February 12, 2018 Initial Questionnaire Response at Exhibit Debt Restructurng-9.

GOK-controlled banks hold the highest number of votes on the Creditor Bank Committee, there was incentive for the smaller private creditor banks to comply with the demand of the GOK-controlled banks to provide loans to Dongbu.

Last, the terms of restructurings suggest that the loans by the private banks cannot be "commercial."[34] During the POI, despite the fact that Dongbu was uncreditworthy, the [

].[35] As the Court noted in its opinion, it is undisputed by the parties that Dongbu was uncreditworthy during 2015 – 2016, the period of review (POR).[36] After [

].[37] [

].[38] A commercial private bank acting in its own interest would not consider it commercially reasonable to [ ] the interest rate, given Dongbu's uncreditworthy financial position.

In conclusion, for the reasons stated above, we find that the loans by the private banks in this instance cannot be determined to be "comparable commercial loans." We would also note that the benchmarks Commerce used in this review to calculate the benefit conferred under this debt restructuring program are comparable commercial loans with added default rate risk premium under our regulation.[39]

[34] *See CORE from Korea Investigation* IDM at 6.
[35] *See* GOK's February 12, 2018 Initial Questionnaire Response at 17.
[36] *See Remand Order* at 7-8.
[37] *Id* at 19; *see also* GOK's February 12, 2018 Initial Questionnaire Response at Exhibit Debt Restructuring-9.
[38] *Id.*
[39] *See Preliminary Results* PDM at 10.

2. Specificity of Dongbu's Loan Restructuring Program

Background

In the *Final Results*, Commerce relied upon its finding from the original investigation that Dongbu's loan restructuring program is specific within the meaning of section 771(5A)(D)(iii)(I) of Tariff Act of 1930 (the Act), as the actual recipients of financing pursuant to restructurings by the GOK-controlled creditors' councils are limited in number.[40] In this litigation, Dongbu argued that Commerce treated Dongbu's corporate restructuring improperly by treating restructuring differently than it would treat a bankruptcy proceeding, and further argued that it is Commerce's practice not to treat concessions made by creditors in the context of a formal bankruptcy as specific and countervailable.[41] The United States argued that Dongbu was one of a very limited number of companies that went through restructuring by a creditors bank committee, and referenced the original investigation and restatement of the relevant facts.[42] In the *Remand Order*, the Court found that Commerce's determination that Dongbu's loan restructuring was specific was unsupported by substantial evidence, and remanded this issue to Commerce to respond to Dongbu's argument and either support its determination with substantial record evidence or reconsider its determination.[43]

Analysis

As an initial matter, under *Magnola Metallurgy, Inc. v. United States*,[44] in an administrative review, Commerce does not revisit a specificity determination made in an earlier segment of the same proceeding for a subsidy program, absent new evidence being presented in

[40] *See Final Results* IDM at Comment 9.
[41] *See* Dongbu Case Brief at 13-22.
[42] *See Final Results* IDM at Comment 9.
[43] *See Remand Order* at 9.
[44] 508 F. 3d 1349 (Fed. Cir. 2007).

the current administrative review. As the Court of Appeals for the Federal Circuit (Federal Circuit) found, Commerce's practice of not revisiting specificity determinations absent new evidence stems from section 751(a)(1)(A) of the Act, which states that the purpose of a CVD administrative review is to "review and determine the amount of any net countervailable subsidy," not to determine whether there is a countervailable subsidy in the first place (which was already determined during the original investigation).[45] Commerce's longstanding practice is not to revisit affirmative (or negative) specificity determinations made in investigations in subsequent administrative reviews of the applicable CVD order.[46]

In this proceeding, in the original investigation, Commerce found that Dongbu's restructuring was *de facto* specific under section 771(5A)(D)(iii)(I) of the Act.[47] No new evidence was presented in this administrative review to cause us to revisit that finding. Thus, in the *Final Results*, we explained that because no new evidence was presented, we continued to find this program specific under section 771(5A)(D)(iii)(I) of the Act.[48]

This was a proper application of *Magnola* and of Commerce's practice. Dongbu has not presented new evidence regarding the specificity of its restructuring, but rather is simply recycling arguments made during the original investigation. This is insufficient under *Magnola*. Therefore, we continue to rely on our findings in the original investigation and continue to determine that Dongbu's restructuring was *de facto* specific within the meaning of section 771(5A)(D)(iii)(I) of the Act.

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[45] *See Magnola*, 508 F. 3d at 1354-55.
[46] *See, e.g., Citric Acid and Certain Salts: Final Results of Countervailing Duty Administrative Review; 2013*, 80 FR 77318 (December 14, 2015), and accompanying IDM; *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 80 FR 41003 (July 14, 2015), and accompanying IDM; and *Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Results of Countervailing Duty Administrative Review*, 74 FR 7395 (February 17, 2009), and accompanying IDM at Comment 1.
[47] *See CORE from Korea Investigation* IDM at Comment 4.
[48] *See Final Results* IDM at Comment 9.

Nevertheless, because the Court has instructed us to reconsider Dongbu's argument regarding the alleged similarity between its restructuring and bankruptcy proceedings, we have re-examined this issue.

First, whether a subsidy program operates in a similar manner to some other government program is not a statutory factor to examine in determining specificity. The Act does not direct Commerce to compare the subsidy program under examination to another similar program or proceeding. Rather, the Act sets out specific requirements under which Commerce can find "*de jure*" specificity and "*de facto*" specificity. A subsidy is *de jure* specific "{w}here the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry."[49] When the record does not support a finding of *de jure* specificity, under the Act, Commerce needs to consider whether *de facto* specificity exists. Section 771(5A)(D)(iii) of the Act sets out the standards for *de facto* specificity as follows:

> Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exist:
>
> (I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.
> (II) An enterprise or industry is a predominant user of the subsidy.
> (III) An enterprise or industry receives a disproportionately large amount of the subsidy.
> (IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

The Statement of Administrative Action (SAA) explains that the specificity test "is to function as an initial screening mechanism to winnow out only those foreign subsidies which

[49] *See* section 771(5A)(D)(i) of the Act.

truly are broadly available and widely used throughout an economy."[50] Further, "{t}he specificity test was intended to function as a rule of reason and to avoid the imposition of countervailing duties in situations where, because of the widespread availability *and use* of a subsidy, the benefit of the subsidy is spread throughout an economy."[51] Thus, the specificity test is designed to ensure that when a government provides assistance that widely benefits the society as a whole — such as roads, bridges, schools, police and fire protection — that assistance will not be countervailed. On the other hand, the SAA makes clear that "the specificity test was not intended to function as a loophole through which narrowly focused subsidies provided to or used by discreet segments of an economy could escape the purview of the CVD law."[52] Therefore, government assistance to limited numbers of enterprises satisfies the requirement under the Act.

The SAA also makes clear that when Commerce applies this test, "the weight accorded to particular factors will vary from case to case."[53] Commerce's regulations also provide that in *de facto* specificity analyses, Commerce "will examine the factors contained in section 771(5A)(D)(iii) of the Act sequentially in order of their appearance. If a single factor warrants a finding of specificity, {Commerce} will not undertake further analysis."[54]

The courts have long recognized that Commerce's *de facto* specificity analysis is fact-intensive and case-specific. Therefore, both the Act and the SAA make clear that Congress intended Commerce to have broad discretion in determining *de facto* specificity. Congress could have established a rigid formula or bright-line test to determine specificity, but it chose not to, given the fact-intensive nature of the inquiry, and the broad variety of circumstances under

[50] *See* SAA accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol 1. at 929 (1994).
[51] *See* SAA at 930 (emphasis added).
[52] *Id.*
[53] *Id.* at 931.
[54] *See* 19 CFR 351.502(a).

which subsidy programs operate. Instead, Congress set up an analytical framework that relies on case-by-case factual analysis and the exercise of reasoned discretion by Commerce. The Federal Circuit has recognized that Commerce possesses broad discretion in this regard, stating that the decisions of Commerce with respect to its interpretation of the specificity test must be upheld unless Commerce's interpretation "is effectively precluded by the statute."[55]

Based on statutory framework described above, Commerce seeks relevant information to determine whether the program is specific. Commerce's questionnaire asked the GOK to provide all laws and regulations governing the restructuring of Dongbu to examine whether this program was *de jure* specific.[56] Commerce also asked the GOK to provide usage information so that Commerce can examine whether the actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number. Specifically, we asked the GOK to provide:

> Please provide the following information, in table form, regarding the number of recipient companies and industries and the amount of assistance approved under this program for the year in which any respondent company was approved for assistance, as well as each of the preceding three years (*e.g.*, if a respondent was approved for assistance in 2013 and 2014, provide this information, by year, for 2010 through 2014). If this information is not available on the basis of year of approval, then provide the information based on the year of bestowal.
>
> (i) The amount of assistance approved for each respondent company, including all cross-owned companies and trading companies that sell the subject merchandise to the U.S.
> (ii) The total amount of assistance approved for all companies under the program.
> (iii) The total number of companies that were approved for assistance under the program.[57]

[55] *See PPGI v. United States*, 928 F.2d at 1573*; see also Geneva Steel v. United States*, 914 F. Supp at 599 (ruling on *de facto* specificity, the court noted that "Commerce enjoys considerable deference in erecting methodologies and procedures for implementing the CVD laws," and the courts may not overrule these methodologies "so long as the test as applied is reasonable and conforms to Congressional intent.").
[56] *See* GOK's February 12, 2018 Initial Questionnaire Response at 26.
[57] *Id.* at 36.

The GOK provided us with laws and regulations governing this program.[58] The laws and the regulations do not appear to expressly limit the debt restructuring program to an enterprise or industry. Thus, the program is not *de jure* specific. However, Commerce's specificity finding does not stop at *de jure* specificity. Under the Act, Commerce was also required to examine the actual usage data provided by the GOK to determine whether *de facto* specificity exists. According to the GOK, only 25 companies went through similar restructuring to Dongbu's Debt Restructuring from 2011 to 2016.[59]

Based on this record evidence, Commerce found the program to be *de facto* specific pursuant to section 771(5A)(D)(iii)(I) of the Act, because the actual recipients of the subsidy, whether considered on an enterprise basis, are limited in number.[60] Commerce's finding is also consistent the guidance set out in the SAA, which states the specificity test "is to function as an initial screening mechanism to winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy."

Second, the record does not support a finding that Dongbu's debt restructurings operated in a similar manner as a formal bankruptcy proceeding, which is presumed to be readily available to any company under distress. Dongbu did not go through a formal bankruptcy proceeding. Rather, Dongbu went through voluntary restructuring and corporate debt restructuring under [ ].[61] While the laws and regulations do not expressly limit the Dongbu's debt restructuring program to an industry or an enterprise[62] and Commerce had no basis to find *de jure* specificity, the GOK reported that, from 2011 to 2016, only 25 companies actually used the debt

[58] *Id.* at Exhibits Debt Restructuring-2 and Debt Restructuring-3.
[59] *Id.* at 3.
[60] *See Preliminary Results* PDM.
[61] *See* GOK's February 12, 2018 Initial Questionnaire Response at 13-14.
[62] *Id.* at Exhibit Debt Restructuring-3.

restructuring program.[63] A debt restructuring program that was only utilized by 25 companies over the period of four years cannot be equated to a proceeding that is similar to a normal bankruptcy proceeding, which is presumed to be readily available to, and used by, any company under distress. Unlike a bankruptcy proceeding, Dongbu's debt restructurings were also not administered by a bankruptcy court.[64] Instead, Dongbu's debt restructuring was supervised by Dongbu Steel Creditor Banks Committee. Among the nine creditor banks on the Creditor Bank Committee that participated in Dongbu's Debt restructuring, the KDB, KoFC, KEXIM, Woori and IBK were majority government-owned.[65] The record indicates that the majority GOK-controlled banks provided the largest share of financing provided through Dongbu's Creditor Bank Committee, with the KDB accounting for the largest share of that financing.[66] Accordingly, the GOK-controlled banks, and the KDB in particular, held the highest number of votes on the Creditor Bank Committee in proportion to the amount of credit extended. With respect to KDB and KEXIM, during the underlying investigation and first administrative review, Commerce found KDB and KEXIM to be state-owned policy banks which were created by a government in order to implement government industrial policies through the provision of financing to industries and enterprises.[67] Based on the above and the arguments made by the respondent, Commerce finds that the respondent has not demonstrated that this debt restructuring

[63] *Id.* at 37.
[64] *Id* at 27.
[65] The Creditor Bank Committee consists of KDB; KoFC; KEXIM; Woori; IBK; Nonghyup Bank; Shihan Bank; Hana Bank; and Korea Exchange Bank. *See* GOK's Letter, "Second Supplemental Questionnaire Response," dated July 6, 2018 at 11-12; *see also* Dongbu's Letter, "Certain Corrosion-Resistant Steel Products from the Republic of Korea, Case No. C-580-879: Response to Initial Questionnaire," dated February 13, 2018 at 34-35.
[66] *Id.*
[67] *See Preliminary Results* PDM at 14; *see also Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea: Preliminary Affirmative Determination*, 80 FR 68842 (November 6, 2015) at 11; and *CORE from Korea Investigation* at Comment 4.

program that was supervised by Creditor Banks Committees dominated by the state-owned policy banks operates in the same way as a bankruptcy proceeding.

Commerce has a longstanding practice of treating Korean debt restructurings done through creditors' committees as different from normal bankruptcy proceedings. Commerce regularly finds such restructurings to result in specific subsidies to the companies at issue.[68] In *DRAMs from Korea,* Commerce countervailed the debt restructuring programs, and Dongbu has offered no reason or evidence as to why Commerce should deviate from this longstanding practice.

Last, Dongbu argued that "Commerce's interpretation of section 771(5A)(D)(iii)(I) of the Act is too broad and results in any voluntary restructuring being found to be specific because the number of distressed companies that would be availing themselves of any of the three types of corporate restructurings available in Korea is necessarily going to be limited in number. That is, absent a complete collapse of a country's economy that sends a large and diverse number of companies into distress, Commerce's interpretation of section 771(5A)(D)(iii)(I) of the Act as applied in the restructuring context will always result in a finding of *de facto* specificity."[69] We disagree. As we explained above, the courts have long recognized that Commerce's *de facto* specificity analysis is fact-intensive and case-specific. Commerce did not make a finding that any voluntary restructuring is specific and will be deemed specific in future cases. Rather, Commerce's *de facto* specificity finding was based on the information placed by the GOK on

[68] *See e.g., Non-Oriented Electrical Steel from the Republic of Korea: Final Negative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 79 FR 61605 (October 14, 2014), and accompanying IDM at 23; *Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 17410 (March 26, 2012), and accompanying IDM at 10-11; and *Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 FR 37122 (June 23, 2003), and accompanying IDM at Comment 2.
[69] *See* Dongbu Case Brief at 17.

this record. If in the future, Commerce is to examine voluntary restructuring again, Commerce's finding will be based on the record of that future case.

Dongbu also cited to prior CVD cases and stated that "it is well-established that when examining concessionary measures given by creditors in the context of a formal bankruptcy Commerce does not treat these measures as specific and countervailable."[70] In each of the cases cited by Dongbu, Commerce evaluated the specific bankruptcy procedure that was applicable to the mandatory respondent in that case and made a specific finding about the bankruptcy procedure in each case. Dongbu did not go through a formal bankruptcy proceeding in this case. As Dongbu itself acknowledged in its case brief, its creditors chose voluntary restructuring and corporate debt workout over bankruptcy proceeding.[71] Further, as described above, Dongbu's debt restructurings did not operate in a similar manner as a bankruptcy proceeding. Thus, the prior CVD cases cited by Dongbu are inapplicable to this case.

For these reasons, we continue to find the debt restructuring program to be *de facto* specific to Dongbu, pursuant to section 771(5A)(D)(iii)(I) of the Act.

III. DRAFT REMAND COMMENTS

On September 3, 2020, Commerce issued its draft remand redetermination and invited interested parties to comment.[72] On September 10, 2020, Nucor and Dongbu each timely filed comments on the draft remand redetermination.[73]

[70] *See* Dongbu Case Brief at 20.
[71] *See* Dongbu Case Brief at 15-16.
[72] *See* Draft Results of Redetermination Pursuant to Court Remand: *Nucor Corporation v. United States* Consol. Court No.19-00042; Slip Op. 20-92 (CIT July 2, 2020), issued on September 3, 2020.
[73] *See* Nucor's Letter, "Corrosion-Resistant Steel Products from the Republic of Korea: Comments on Draft Remand Results," dated September 10, 2010 (Nucor Comments); *see* Dongbu's Letter, "Corrosion-Resistant Steel Products from Korea, Case No.C-580-879: Dongbu's Comments on Draft Remand Redetermination," dated September 10, 2020 (Dongbu Comments).

1. **Dongbu's Private Bank Loans as Benchmarks**

Nucor's Draft Comments

- Nucor generally agrees with Commerce's draft remand results as they properly address the Court's concerns, and therefore limits its comments to Commerce's application of the benchmarking regulation for uncreditworthy companies.[74]
- Once a company has been found to be uncreditworthy, Commerce must proceed to calculate an appropriate benchmark pursuant to the formula set forth in 19 CFR 351.505(a)(3)(iii), and there is no discretion under the rules to use "comparable commercial loan," pursuant to 19 CFR 351.505(a)(2), or any other benchmarking methodology for a government loan provided to an uncreditworthy company. This is clear for two reasons.[75]
- First, the receipt of comparable commercial long-term loans is dispositive of creditworthiness. The rules provide that for firms not owned by the government, the receipt of comparable long-term commercial loans, unaccompanied by a government-provided guarantee, will normally constitute dispositive evidence that the firm is not uncreditworthy.[76] Thus, by definition, there are no comparable commercial loans to an uncreditworthy company that can be used as a benchmark. Dongbu/Dongbu Incheon have conceded that they were not creditworthy and there were no comparable commercial loans that could be used as a benchmark.[77]
- The rules also provide the methodology Commerce should use to calculate a benchmark for uncreditworthy companies, where comparable commercial loans cannot be used

[74] *See* Nucor Comments at 2.
[75] *Id.*
[76] 19 CFR 351.505(a)(4)(ii).
[77] *See* Nucor Comments at 2.

because they do not exist as a legal matter. In such cases, Commerce will calculate the interest rate to be used, according to the formula in 19 CFR 351.505(a)(3)(iii).[78]

- The *CVD Preamble*[79] allows Commerce to make certain adjustments to the formula, but does not allow Commerce to identify a benchmark through other means. Commerce is allowed to consider and use default rate information from the country under consideration instead of U.S. default rate information, where such information is available in sufficient detail.[80]
- Thus, there is no discretion to use comparable commercial loans as the benchmark for uncreditworthy firms, first because they do not exist as a legal matter, and second because the regulations provide the methodology Commerce *will use*. Therefore, Commerce's decision to continue using the uncreditworthy methodology was proper and should not be modified in the Final Results.[81]

Dongbu's Draft Comments

- Commerce is mistaken that Dongbu's private loans cannot serve as a benchmark. The formula set out in the regulation is unrelated to actual interest rates on commercial loans and does not mean that those commercial loans cannot be used as a benchmark.[82]
- The Court was well aware of Commerce's position that because Dongbu was found uncreditworthy the private loans could not be used as benchmarks, yet the Court recited Dongbu's argument "and that if a private loan otherwise meets the criteria for use as a benchmark, it could still be used as a benchmark."[83] Importantly, the Court found that

[78] *Id.* at 3.
[79] *Countervailing Duties, 63 FR 65348, 364-365 (CVD Preamble*).
[80] *See* Nucor Comments at 3.
[81] *See* Nucor Comments at 4.
[82] *See* Dongbu Comments at 3.
[83] *Id*.

"{Commerce's} finding that the private loans cannot be used a benchmark is unsupported by substantial evidence."[84]

- Also noteworthy is Commerce's omission of critical language in summarizing Dongbu's position on the impact of the creditworthiness regulation on its argument, that Dongbu has conceded the regulation provides the method by which Commerce will calculate the benefit from a government-provided loan for an uncreditworthy company. Dongbu absolutely did not concede, but rather the only thing Dongbu conceded to was that "normally" Commerce will calculate the interest rate for an uncreditworthy company using a formula not tied to actual private loans.[85]
- Commerce must reconsider its creditworthiness determination in light of the existence of Dongbu's private loans. The statute explains that, in the case of a loan, there is a benefit "if there is a difference between the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market." In turn, 19 CFR 351.505(a)(4)(i)(D)(ii) instructs that "the receipt by the firm of comparable long-term commercial loans, unaccompanied by a government-provided guarantee, will normally constitute dispositive evidence that the firm is not uncreditworthy."[86] Thus, these private loans constitute comparable commercial loans directly relevant to whether Dongbu is uncreditworthy, and Commerce cannot simply declare uncreditworthiness a predetermined issue and move on.[87]
- Dongbu's loans from private banks are not insignificant, accounting for over [ ] percent of all new financing. Commerce must rebut this evidence, and it is incumbent on

[84] *Id.* at 3-4.
[85] *Id.* at 4-5.
[86] *Id.* at 5.
[87] *Id.*

Commerce to reconsider its creditworthiness determination in light of these private loan or it must at least provide some analysis why these loans are unsuitable.[88]

- Commerce's argument that these commercial loans cannot serve as a benchmark because they were provided under a government program is illogical and conclusory. Just because Dongbu's restructuring was set forth in law, does not make it a government program, as otherwise all proceedings such as bankruptcies that are set forth in law would also be *prima facie* government programs. In reality, the law is a legal framework that is available to all companies and creditors that simply provides the structure to try to work things out and maximize recovery.[89]
- Commerce next argues that these private loans are not commercial because of the "significant government influence" that the Korea Development Bank (KDB) had on the other lenders, and characterizes each step of the restructuring as actions taken by the KDB rather than actions taken by the Creditor Banks Committee (the Committee), comprised of both public and private creditors. That the KDB dictated all terms and could unilaterally direct the actions of the Committee is demonstrably false and contrary to Commerce's findings in the investigation and in this review.[90]
- In the investigation Commerce recognized that the private banks accepted the terms voluntarily based on their own risk assessments and commercial analyses, and found that the dominant voting position of the GOK-controlled banks did not indicate the private lenders on the Committee were entrusted or directed to accept the terms of the

[88] *Id.* at 6.
[89] *Id.* at 7.
[90] *Id.*

restructuring package. Therefore, Commerce continued to find that the restructuring loans from private banks were not financial contributions under the Act.[91]

- Commerce is now reversing its position. Whereas in the *Final Results* Commerce "recognized that those private banks accepted {the restructuring} terms voluntarily based on their own risk assessments and commercial analyses," now Commerce claims that "the private banks that loaned Dongbu were under significant government influence, enough so that the private banks provided Dongbu with a low-interest loan when a reasonable, independent commercial bank would not do so." Commerce cannot now reverse its position on remand claiming that the alleged private banks were required to do KDB's bidding when it has previously determined that they acted voluntarily.[92]
- Commerce recounts a number of facts claiming it supports the conclusion that the KDB controlled the Committee and that this control renders the private loans unsuitable as comparable commercial loans. The first item discussed, the [

] is not relevant to the issue at hand as it merely sets out terms for refinancing Dongbu's corporate bonds that occurred prior to Dongbu entering the debt restructuring program and during a period that Dongbu was creditworthy. It has no bearing on the private loans or their terms *after* Dongbu entered the workout program.[93]
- For the same reasons, the fact that the KDB was involved in Dongbu's unsuccessful efforts to sell Dongbu Incheon and DDPT is not relevant to the issue of whether the private loans can be treated as comparable commercial loans for benchmark purposes, as

[91] *Id.* at 7-8.
[92] *Id.* at 8.
[93] *Id.* at 9.

these efforts occurred prior to Dongbu entering the workout proceedings and are unrelated to the actions of the private creditors or the KDB's alleged influence over them.[94]

- Regarding Commerce's assertion that the KDB dictated how Dongbu would use its assets and productions to generate revenue which allowed KDB to dictate how Dongbu would repay its creditors, those activities were handled by the KDB because it was the designated main creditor and it had the most outstanding debt with Dongbu. Commerce consistently disregards the fact that these decisions were made through discussion among the creditors of the Committee, and the KDB undertook activities as the main creditor bank, and do not indicate any undue influence or control over the Committee.[95]
- Commerce points to the fact that the GOK-controlled banks held the highest number of votes on the Committee in proportion to the amount of credit extended; but this fact does not demonstrate that the actions of the private banks were not commercial in nature. The restructuring decisions were based on recommendations of PWC, and the private creditors could opt out if they did not agree. Therefore, the GOK creditors' dominant voting position on the Committee does not support Commerce's conclusion that the loans provided by the private creditors were not comparable commercial loans for benchmark purposes.[96]
- Claims regarding alleged low interest rates provided by the creditors are misplaced, as Commerce ignores a typical feature of bankruptcy/debt restructuring where in order to provide time for the workout plan to take effect, the creditors normally provide new operational funds which have seniority. In Dongbu's case, the creditors approved new

[94] *Id.*
[95] *Id.* at 10.
[96] *Id.* at 11.

general loans and usance loans, for which the creditors were given preferential repayment rights. The reduction in interest rates on these loans were in consideration of the decrease in current market rates, and given the seniority of these loans, they were excluded from the funds available for conversion to equity.[97]

- Commerce already decided that the private banks were *de facto* independent entities and not government owned or controlled. Further, Commerce has already held that the private banks acted of their own accord in offering loans based on their own assessment and commercial analyses. These are commercial decisions and Commerce seems to acknowledge this when reasoning that had Dongbu gone bankrupt, the private creditor banks would not have been able to recover as much money. Commerce has not however explained how this obviously commercial decision makes these loans non-commercial.[98]
- Also, in other cases, Commerce has treated loans from private banks as benchmarks when the terms were the same as other government banks.[99] Thus, Commerce cannot simply claim that a GOK supermajority on the Committee results in government control and the loans from private banks are unsuitable for benchmark purposes; nor can it claim that its decision to treat bankruptcy and voluntary workouts is part of its "longstanding practice."[100]

Commerce's Position:

Commerce agrees with Nucor that the draft remand results comply with the Court's order and that the loans received by Dongbu from the private banks within the debt restructuring

[97] *Id.*
[98] *Id.* at 12.
[99] *Id.* at 12 (citing *Coated Free Sheet Paper from the Republic of Korea: Notice of Final Affirmative Countervailing Duty Determination*, 72 FR 60639 (October 25, 2007), and accompanying IDM at 42-43).
[100] *Id.* at 13.

program cannot be determined to be "comparable commercial loans" and used as the loan benchmarks. Commerce further agrees with Nucor that when a company has been found uncreditworthy, Commerce calculates a benchmark pursuant to the formula found in 19 CFR 351.505(a)(3)(iii). The formula set out in the regulation is directly related to actual interest rates on commercial loans on non-government terms. Commerce's regulation does not say that Commerce will calculate the benefit for an uncreditworthy company by using comparable commercial loans. Although Commerce agrees that the benchmark calculation pursuant to 19 CFR 351.505(a)(3)(iii) should be used for uncreditworthy companies, because Commerce discussed whether the private loans could be used as benchmarks in the *Final Results* and this analysis was discussed in the Court's *Remand Order*, Commerce further explained its analysis in this remand proceeding. Thus, although Commerce has further explained in this *Final Redetermination* its analysis of Dongbu's private loans as benchmarks, Commerce has used the uncreditworthy methodology as discussed above in its final calculations.

In further explaining its analysis regarding Dongbu's loans from private banks, Commerce found that the loans were provided for under the government's debt restructuring program, and thus unsuitable for benchmark purposes. These loans from the alleged private banks to Dongbu cannot constitute "comparable commercial loans" under 19 CFR 351.505(a)(2) due to the substantial government influence and the fact that they were part of a government program. As discussed above, because of the substantial government influence and inclusion of these loans in a government program, the loans by the private banks cannot be considered "commercial" under the Act.

Contrary to Dongbu's argument, Commerce did not reverse its position on this issue. Dongbu's arguments comingle financial contribution and benefit. Financial contribution and

benefit, as well as specificity, constitute separate and distinct types of analysis. In determining whether a financial contribution has been provided under sections 771(5)(B) and 771(5)(D) of the Act, Commerce cannot comingle that determination with the analysis of whether that financial contribution has provided a benefit.[101] Commerce's finding that the actions by the GOK and the private banks under the debt restructuring programs did not raise to the level of entrustment and direction by the GOK under the Act is only limited to finding financial contribution, not benefit.[102] With respect to benefit, the *Preamble* states that "when a firm receives a financial package including loans **from both commercial banks and from the government**, we intend to examine the package closely to determine whether the commercial bank loans should in fact be viewed as "commercial" for benchmark purposes. In particular, we look to whether there any special features of the package that would lead to the commercial lender to offer lower, more favorable terms than would be offered absent the government/commercial package" (emphasis added).[103]

Thus, following our regulation and the *Preamble,* Commerce examined the record evidence concerning the debt restructuring.

Commerce's discussion of the [

], and KDB's involvement in Dongbu's unsuccessful efforts to sell Dongbu Incheon and DDPT, as well as the discussion that the KDB, as the dominant shareholder of Dongbu's loans, could exert its control of Dongbu and dictate how Dongbu would use its assets and productions to generate revenue and how it would repay its creditors, were all part of Commerce's examination of the financial package. As part of the examination, Commerce also found that the GOK-

[101] *See Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination*, 80 FR 63535 (October 20, 2015) (*Supercalendered Paper*), and accompanying IDM at 32.
[102] *See Final Results* IDM at Comment 8.
[103] *See Countervailing Duties; Final Rule*, 63 FR 65348, 65364 (November 25, 1998) (*Preamble*).

controlled banks, and the KDB in particular, held the highest number of votes on the Creditor Bank Committee in proportion to the amount of credit extended. Commerce also took into consideration the low interest rates offered by the private creditors, despite the fact that Dongbu was uncreditworthy. Based on the analysis of the record evidence about the debt restructuring, Commerce concluded that the loans by the private banks are part of financial package offered by the KDB under the loan restructuring program and, therefore, cannot be found to be "commercial" under the Act and regulations.

2. Specificity of Dongbu's Loan Restructuring Program

Dongbu's Draft Comments

- Commerce's reliance on *Magnola Metallurgy, Inc. v. United States*, 508 F. 3d. 1349 (Fed. Cir. 2007) is misplaced and contrary to the Court's instruction. The issue here is whether debt restructuring can be treated differently from bankruptcy. Instead of explaining why it treats similar situations differently, Commerce simply referenced its finding that the program was countervailable in the investigation. The Court did not instruct Commerce to explain why its reliance on the investigation, in which it did not address this issue, was justified.[104]
- *Magnola* did not stand for the proposition that Commerce is permitted to treat circumstances in which it does not find a countervailable subsidy differently than similar circumstances in which it does. Instead, *Magnola* concerned whether Commerce was required to revisit in an administrative review its new shipper review determination that a non-recurring subsidy was specific. That situation is not analogous to the instant case in

[104] *Id.* at 14.

which the debt restructuring was still occurring during the POR and in which Commerce was presented with new legal arguments.[105]

- Instead of addressing the legal argument, Commerce claims that Dongbu made the same argument in the investigation. However, Dongbu's argument in the investigation was against the *de facto* specificity determination being overly broad. Here the issue is whether Commerce should treat similar situations the same or provide a reasoned basis for the different treatment.[106]
- Commerce continues to explain the statutory framework for specificity determinations before ultimately conceding that the debt restructuring program is not *de jure* specific, which illuminates a flaw in its analysis: in the bankruptcy context, it does not conduct a seriatim specificity analysis so long as bankruptcy is generally available and no preferences are provided.[107] In determining that the debt restructuring program is not *de jure* specific, Commerce does not note any differences that would distinguish it from bankruptcy programs.[108]
- Commerce's finding of *de facto* specificity merely because a simple numerical count of the number of companies that participated in corporate restructurings in Korea shows that they were limited in number leads to an absurd result. Thus, the Court remanded this issue for further explanation. Nonetheless, Commerce has simply repeated the same

[105] *Id.* at 15.
[106] *Id*.
[107] *Id.* at 15 (citing *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of the Countervailing Duty Administrative Review; 2010*, 78 FR 19210 (March 29, 2013), and accompanying IDM at 21).
[108] *Id.* at 16-17.

interpretation in the Draft Remand Redetermination, contrary to the Court's instructions.[109]

- Interpreting section 771(5A)(D)(iii)(I) of the Act as permitting a finding of *de facto* specificity in any case in which the recipients of the subsidy are limited in number is overly broad and undercuts the very purpose of the statutory specificity requirement. Commerce's interpretation would result in all corporate restructuring programs satisfying the statutory specificity requirements because, absent a complete collapse of a country's economy, there would only be a limited number of companies that participate in corporate restructurings.[110]
- Commerce does not point to any evidence or reasoning that it has not already proffered, and none of the distinctions it makes supports the different treatment of concessions made in bankruptcy and voluntary debt restructurings.[111]
- Among the three distinctions Commerce presents: First, the debt restructuring pursuant to a program passed into law by the General Assembly is irrelevant and unpersuasive.[112] Second, that 25 companies used the program is not new information or reasoning. Importantly, this fails to address the differences between voluntary workout proceedings and bankruptcy proceedings. Commerce does not explain why a program not limited to an enterprise or industry is more specific than a program available to companies under distress.[113] Third, Dongbu has acknowledged the difference that bankruptcy proceedings are before a judge rather than pursuant to committee votes. However, this does not

[109] *Id.* at 17-18.
[110] *Id.* at 18.
[111] *Id*.
[112] *Id.*
[113] *Id.* at 19.

explain or justify why Commerce treats concessions provided in bankruptcy as not specific and not countervailable but treats the same concessions in debt restructuring as specific and countervailable.[114]

- Moreover, the fact that a court is supervising a bankruptcy says nothing about whether bankruptcy is generally available or otherwise specific to certain enterprises or industries.[115]
- Furthermore, Commerce's *de facto* analysis to find Dongbu's voluntary restructuring specific would also result in a specificity finding in the bankruptcy context because in both cases the number of companies would be limited. The additional available legal option in debt restructuring is for companies and creditors to rehabilitate and maximize creditor recovery.[116]
- Commerce should therefore comply with the Court's remand instructions on these issues in the Final Remand Redetermination.[117]

Commerce's Position:

Commerce explained its position in detail and continues to find that Dongbu's debt restructuring program is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act, as Commerce found in the original investigation. Commerce's citing of *Magnola Metallurgy, Inc. v. United States*,[118] was to point out that Commerce does not revisit a specificity determination made in an earlier segment of the same proceeding for a subsidy program, absent new evidence being presented in the current administrative review, and thus is not misplaced nor contrary to

[114] *Id*.
[115] *Id.* at 20.
[116] *Id.*
[117] *Id.*
[118] 508 F. 3d 1349 (Fed. Cir. 2007).

the Court's instructions. No new evidence was presented in this administrative review to cause Commerce to revisit the specificity finding. Thus, in the *Final Results*, Commerce explained that because no new evidence was presented, Commerce continued to find Dongbu's restructuring was *de facto* specific within the meaning of section 771(5A)(D)(iii)(I) of the Act.[119]

Commerce cited to *Magnola* to explain its specificity finding, not to address the difference between bankruptcy proceedings and debt restructuring. The fact that Dongbu may be raising new legal arguments in an administrative review is irrelevant under *Magnola*. Rather, the question is whether Dongbu has presented new evidence to disturb the original specificity finding. It had not done so. Accordingly, the final determination of specificity cannot be disturbed; the only question in this administrative review is the existence and amount of any benefit.

Commerce's analysis in the draft remand has addressed Dongbu's comments on this issue. In particular, we explained that Dongbu's debt restructurings could not be compared to a bankruptcy proceeding, as Dongbu did not operate in a similar manner as a bankruptcy proceeding, nor did Dongbu go through a formal bankruptcy proceeding over the debt restructuring and corporate debt workout. Dongbu now also argues that Commerce treats debt restructurings such as Dongbu's different than bankruptcy proceedings because, according to Dongbu, Commerce stops its specificity analysis in the bankruptcy context at an analysis of availability and preference. However, as explained above, Commerce considers the facts on each unique record in assessing specificity. If a limited number of enterprises or industries used a bankruptcy proceeding, then there may be *de facto* specificity under section 771(5A)(D)(iii)(I) of the Act. Again, it will depend upon the facts of the case. In any event, it is undisputed that in

[119] *See Final Results* IDM at Comment 9.

this case, there was a limited number of enterprises that used corporate restructurings under the [ ].

For these reasons, we continue to find the debt restructuring program to be *de facto* specific to Dongbu, pursuant to section 771(5A)(D)(iii)(I) of the Act.

III. FINAL RESULTS OF REDETERMINATION

In accordance with the *Remand Order*, Commerce has reconsidered whether Dongbu's alleged private loans could be used as benchmarks and also reconsidered the specificity of Dongbu's loan restructure program. For purposes of these final results, Commerce continues to find that Dongbu's debt restructuring creditors committee private bank loans could not be used as a benchmark to measure the benefits for the loan restructuring program, and that Dongbu's loan restructuring program is specific. Therefore, Dongbu's CVD rates from the *Final Results*, 7.63 percent for the period of November 6, 2015 through December 31, 2015 and 8.47 percent for the period of January 1, 2016 through December 31, 2016, will remain unchanged.

9/30/2020

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
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