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MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Holly Kuga
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum: Final Notice of Rescission of
Countervailing Duty Administrative Review of Certain Hot-Rolled
Carbon Steel Flat Products from Argentina

Summary

We have analyzed the comments of interested parties in the final results of the above-mentioned administrative review for the period of review January 1, 2001, through December 31, 2001, herein after referred to as the POR. As a result of our analysis, we have not made any modifications to the decision articulated in the Department's notice of intent to rescind, except for the scope description noted in the Scope of the Review section of the notice. See Notice of Intent to Rescind Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from Argentina, 68 FR 26572 (May 16, 2003) (Notice of Intent to Rescind). Siderar Sociedad Anonima Industrial & Commercial (Siderar) is the only producer and exporter of subject merchandise covered by this segment of the proceeding. Below is the "Analysis of Comments" section in which we discuss the issues raised by interested parties. We recommend that you approve the positions we have developed below in this memorandum.

I. Analysis of Comments

Comment 1: The Statute and Regulations Provide the Department with the Discretion to Conduct Countervailing Duty (CVD) Reviews in the Absence of Shipments

Siderar claims that section 751 of the Tariff Act, as amended (the Act) requires the Department to review and determine the amount of any net countervailable subsidy, if the Department receives a request for such a review. Siderar argues that although the Department initiated a review, it has not taken any steps necessary to conduct the review and to publish the estimated duties to be deposited.

Siderar further argues that unlike the case of an administrative review of an antidumping order, the statute does not require entries or shipments during the relevant POR for CVD reviews. Siderar asserts that section 351.213(d)(3) of the Department's regulations, which provides for rescission of reviews in the absence of exports, reflects the statute's requirement for exports in an antidumping review.

Siderar acknowledges that it made no shipments during the POR. Notwithstanding, Siderar asserts that the statute permits the Department to adjust a CVD deposit rate in a review without regard to shipments. According to Siderar, the Department can conduct a review and calculate a net countervailable subsidy without regard to specific sales, shipments or entries because a CVD review and determination require an examination of government programs, government disbursement of funds, company receipt of benefits, and, if applicable, a review of any new subsidy allegations.

Siderar contends that in CVD reviews, shipments are necessary to calculate countervailing duties for assessment purposes. However, in this case, the question of assessments is moot because there are no entries during the POR. Furthermore, Siderar claims that section 751(a)(1)(A) states that the administering authority shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed. Therefore, even if the Department is unable to calculate duties to be assessed in CVD reviews, the Department nevertheless can, and should, estimate duties to be deposited. Thus, Siderar argues that the Department should conduct a review of the subsidy programs identified in the final determination and determine whether there is any basis to continue collecting cash deposits in the amounts established by the order.

Siderar asserts that 19 C.F.R. §351.213(d)(3) of the Department's regulations confirms that the Department has discretion to conduct a CVD review in the absence of shipments during the POR. The Government of Argentina (GOA) and Siderar contend that the statement in the regulations that the Secretary "may" rescind an administrative review is an explicit recognition that the Department is not required to rescind, but that the Department could decide to conduct a review despite the lack of shipments.

In sum, the respondents contend that because section 751(a)(1)(B) and (a)(2) specifically require shipments for conducting administrative reviews of antidumping orders and not CVD reviews, the Department has the discretion to conduct CVD reviews in the absence of shipments.

Petitioners contend that the fact that, as a technical matter, subsidization (unlike dumping) can be calculated in the absence of entries has no significance in the current case. The Department's consistent practice of no shipment - no review reflects the rational exercise of discretion in the face of limited resources. If the Department agreed to conduct a review, it would invite an avalanche of requests from producers hoping to lower deposit rates without even a single entry at stake, which could lead to successive rounds of reviews to calculate rates that potentially would never be applied to

shipments.

Department's Position: We agree with Siderar that, unlike section 751(a)(1)(B) of the Act with respect to antidumping duty (AD) reviews, section 751(a)(1)(A) of the Act does not require entries in order to conduct a CVD administrative review. We note, however, that for cases involving export subsidy programs, in order to accurately measure any benefit from such programs, it would be necessary to have exports. Regardless, as discussed more fully below, although we agree that the Department has the authority to conduct a CVD administrative review in the absence of exports, we are not persuaded that we should conduct a review in this case in the absence of exports. Therefore, we continue to rescind this review.

Comment 2: Department Practice and the Unique Circumstances of this Case Warrant
Conducting a Review and Adjusting the Deposit Rate

Siderar argues that the two cases the Department cites in its Notice of Intent to Rescind, at 26573, as evidence of its practice do not resolve the issue presented in this case. Siderar claims that the situations in Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from Germany: Notice of Termination of Countervailing Duty Administrative Review, 64 FR 44489 (August 16, 1999) (Lead & Bismuth from Germany) and in Final Results and Partial Rescission of Countervailing Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from the Republic of Korea, 68 FR 13267 (March 19, 2003) (Sheet and Strip from Korea) are not similar to the situation facing the Department in the instant review. In Lead & Bismuth from Germany, the respondent mistakenly reported that it had shipments, which was later shown to be incorrect. In Sheet and Strip from Korea, the decision whether to rescind appeared to be affected by the affiliation between the two respondents, and the fact that the issue could be reviewed in another on-going review. Thus, according to Siderar, the cases cited by the Department do not address the core issue in the instant case of whether the Department should conduct a review and modify the deposit rate when it has information that the deposit rate no longer reflects the level of subsidization affecting the company's exports. Siderar states that the Department previously determined in the Final Negative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products from Argentina, 67 FR 62106, (October 3, 2002) (Cold-Rolled from Argentina), which covered approximately the same time period covered by this review, that Siderar received only a *de minimis* level of subsidy.

On the other hand, Siderar contends that the issue in this case is similar to those cases in which the Department has conducted CVD reviews for the purpose of adjusting the deposit rate to reflect program-wide changes. Like those cases, the change in this case - - a finding that the company does not receive more than a *de minimis* level of subsidies - - removes the basis for the deposit rate and warrants a change.

The GOA argues that the Department has exercised its discretion in the past and conducted no shipment CVD reviews where there have been program-wide changes. Likewise, in this case, based on several factors, the Department should exercise its discretion and conduct a review. First, in

conformance with Article VI of GATT 1994 and Article 21.1 of the WTO Agreement on Subsidies and Countervailing Measures (SCM), countervailing duties should reflect as accurately as possible the estimated rate of subsidization. This principle requires a measurement of the extent of subsidization, and the adjustment of the countervailing duty to that level. According to the GOA, this principle was the basis of the Department's decision to adjust the deposit rate based on reviews without shipments in Carbon Steel Wire Rod from New Zealand: Final Results of Countervailing Duty Administrative Review, 56 FR 28863 (June 25, 1991) (Steel Wire Rod from New Zealand), Certain Electrical Conductor Aluminum Redraw Rod from Venezuela: Final Results of Countervailing Duty Administrative Review, 56 FR 14232 (April 8, 1991) (Redraw Rod from Venezuela), and Brass Sheet and Strip from Brazil: Preliminary Results of Countervailing Duty Administrative Review, 56 FR 33252 (July 19, 1991) (Brass Sheet and Strip from Brazil).

Additionally, the GOA claims that in Cold-Rolled from Argentina, the Department determined that Siderar did not benefit from the pre-privatization subsidies that were found to be countervailable in the Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From Argentina, 66 FR 37007 (July 16, 2001) (Hot-Rolled from Argentina) on the basis of facts available. The effect of the Cold-Rolled from Argentina decision on the Hot-Rolled from Argentina, covering the same producer for the same period is identical to that of a program-wide change. Therefore, the GOA argues that there is no basis for collection of countervailing duty deposits at the current rate.

The GOA suggests that a review of the Hot-Rolled from Argentina case using information from the recently concluded investigation of Cold-Rolled from Argentina offers an effective, efficient vehicle to perform the type of review necessary to accurately adjust the deposit rate to the level of subsidization.

The GOA also contends that because Siderar had no shipments during 2001 and 2002, if the Department does not conduct a CVD review absent shipments, the GOA and Siderar would have to wait until September 2004 to request a review based on shipments made in 2003. The GOA argues that this would be the first opportunity for the Department to adjust the deposit rate for hot-rolled products that was established in that investigation, although the Department has subsequently determined in Cold-Rolled from Argentina that Siderar did not benefit from any countervailable subsidies.

The GOA argues that it is not aware of any policy reason that would argue against the Department exercising its discretion to conduct the review. The GOA states that to the extent that the Department is concerned that it would be rewarding a "non-cooperative" company and Government by lowering the deposit rate, the GOA claims that this is not an accurate characterization, and that the risk of this case setting a precedent is non-existent. According to the GOA, the same allegations that formed the basis of the hot-rolled petition were investigated fully by the Department in the 1991, 1992 and 1993 reviews of the previous order on cold-rolled steel. See Cold-Rolled Carbon Steel Flat-

Rolled Products From Argentina: Final Results of Countervailing Duty Administrative Review, 62 FR 52974 (October 10, 1997). The GOA states

that the government and Siderar made a business decision not to participate in the Hot-Rolled from Argentina investigation.

Finally, the GOA contends that it is an inappropriate precedent for the Department to continue a trade-paralyzing deposit rate when the current verified facts already established by the Department in Cold-Rolled from Argentina warrant a zero rate in this case. Therefore, the GOA urges the Department to reconsider its preliminary decision not to conduct a review for the purpose of adjusting the deposit rate.

Petitioners counter that in accordance with 19 C.F.R. §351.213(d)(3), it has been the Department's practice to rescind a review based on lack of shipments during the POR. Petitioners contend that there is no reason for the Department to depart from its consistent post-URAA practice.

Petitioners counter that the case precedents the Department cites in the Notice of Intent to Rescind advise against an exception to the Department's consistent policy. In Lead & Bismuth from Germany, the Department rescinded an ongoing CVD review, in which the company erred in reporting a shipment made during the POI; the error concerning shipments was not discovered until verification in the review. In the current case, the Department is aware that there are no shipments therefore, contrary to respondents' contention, it is not efficient to continue with a review.

Petitioners contend that in Sheet and Strip from Korea, the reasons for the Department to review Sammi were much more persuasive than the reasons to review Siderar, yet the Department refused. Petitioners state that in Sheet and Strip from Korea, although Sammi made no shipments during the POR, the company sought a review. However, the Department adhered to its no shipment - no review policy and rescinded the review with respect to Sammi even though the Department had collected a considerable amount of company-specific information, and there was an indication that the deposit rate would have changed significantly if recalculated.

Petitioners counter that the respondents' claim that the situation in the current case is tantamount to a program-wide change is faulty. The program-wide doctrine applies when a foreign government alters a program shortly after the close of the period of investigation or review. However, in the current case, no subsidy program is alleged to have been modified or terminated by the GOA. The alleged change has nothing to do with the modification of a CVD program, but rather involves a determination by the Department in a wholly separate CVD proceeding. Petitioners point out that courts have upheld the Department's past decisions not to apply program-wide change to situations in which the company renounced benefits. See PPG Industries, 746 F. Supp. at 132.

Petitioners contend that respondents gloss over key issues in their argument that the

Department should apply the decision in Cold-Rolled from Argentina to this case. In Cold-Rolled from Argentina, the Department found that Siderar was not the “same person” that received non-recurring subsidies, and therefore, those subsidies were not attributable to Siderar’s production. Petitioners argue that this “same person” methodology, which is currently before the Court of International Trade on appeal, has been abandoned by the Department.

Petitioners state that respondents’ assertion that Siderar will have to wait several years for a cash deposit rate adjustment if the Department does not conduct a CVD review absent shipments implies that the Department’s policy bars shipments until the deposit rate can be adjusted in future years. However, petitioners point out that respondents made a business decision not to participate in the original investigation. As a result, consistent with the Department’s policy, a cash deposit rate, using “facts available” was established. Petitioners also point out that Siderar can ship at any time and then request a review based on those shipments to obtain a cash deposit adjustment.

Moreover, petitioners counter that pursuant to 19 C.F.R. §351.212(e), if the Department calculates an assessment rate that is less than the deposit rate, importers receive a refund with interest. Therefore, if Siderar makes a shipment, it could request a review and receive a refund with interest. Petitioners state that given this retrospective assessment structure, there is no reason for the Department to conduct a review simply to consider changes to the deposit rate.

Finally, petitioners contend that contrary to the GOA’s contention that if the Department were to conduct a review in this case where there are no shipments in the POR and the respondents’ did not participate in the original investigation, there would be a risk of setting a case precedent. In conclusion, the petitioners argue that this review should not have been requested and should be rescinded. Petitioners point out that it has been the Department’s policy not to conduct administrative reviews absent entries requiring assessment. Therefore, the Department should maintain its position and rescind the review.

Department’s Position: We agree with the GOA and Siderar, in part, that the Department previously conducted CVD administrative reviews for the purpose of adjusting the cash deposit rate in the absence of shipments. However, in those cases cited, the cash deposit rate was adjusted because there were program-wide changes. Under the Department’s regulations, a program-wide change is a change that is: 1) not limited to an individual firm or firms; and 2) effectuated by an official act, such as the enactment of a statute, regulation or decree. See 19 C.F.R. §351.526(b)(1) and (b)(2). The program-wide provision recognizes that the level of subsidization during the period under examination may not always be the best predictor of the level of subsidization going forward, and that allowing the Department to adjust the calculated subsidy rate is desirable because it promotes the elimination or

curtailment of subsidies.¹ In the current case, neither the GOA nor Siderar has provided any evidence of effectuation of an official act that constitutes a program-wide change under 19 C.F.R. §351.526(b)(2). Therefore, we do not agree with respondents' contention that the Department should exercise its discretion to conduct a review for the purpose of adjusting the cash deposit rate in this case because we do not consider that the events in Cold-Rolled from Argentina constitute a program-wide change.

We agree with petitioners that the cases cited in the Notice of Intent to Rescind are pertinent to the current case. The Department's practice, as set forth in 19 C.F.R. §351.213(e)(2)(i), is to conduct an administrative review in a countervailing duty proceeding covering entries or exports of the subject merchandise during the most recently completed calendar year. Furthermore, the Department has an established practice of refusing to conduct or rescinding CVD reviews when it is determined that there were no exports. See e.g., Sheet and Strip from Korea; Industrial Phosphoric Acid from Israel: Preliminary Results and Final Partial Rescission of Countervailing Duty Administrative Review, 65 FR 53984 (September 6, 2000); Certain Iron-Metal Castings from India: Final Results and Partial Rescission of Countervailing Duty Administrative Review, 63 FR 64050 (November 18, 1998); Certain Welded Carbon Steel Pipe and Tube and Welded Carbon Steel Line Pipe from Turkey: Final Results and Partial Rescission of Countervailing Duty Administrative Reviews, 63 FR 18885 (April 16, 1998). As petitioners correctly pointed out, the Department's practice of "no shipment - no review" reflects the Department's rational exercise of discretion in the face of limited resources. In the current case, Siderar did not have any shipments or entries during the POR. Furthermore, they have not provided any compelling reason to deviate from our normal practice not to conduct an administrative review in the absence of exports. Therefore, we followed the Department's practice of "no shipment - no review" and determine not to conduct a CVD review.

We disagree with the GOA that there is no policy reason that would argue against the Department exercising its discretion to conduct a review in a case where 1) there are no shipments or entries, 2) the company did not fully participate in the investigation, and 3) the Department would be required to use information from another proceeding. Rather, we agree with petitioners that conducting a review in this case would set a precedent of parties attempting to benefit from selected participation in our proceedings.

Finally, with regard to the applicability of the "same person" methodology used in Cold-Rolled from Argentina, we disagree with petitioners' assertion that the Department's publication of the Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 FR 37125 (June 23, 2003) constitutes abandonment of that methodology. However, in the context of this rescinded review, an analysis of the applicability of that methodology is not necessary for the disposition of this case.

¹Final Results Countervailing Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube Products from Turkey, 51 FR 1268, 1269 (January 10, 1986).

Recommendation:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the notice of the rescission.

Agree

Disagree

James J. Jochum
Assistant Secretary
for Import Administration

Date