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Investigation
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Group 1, Office 1

MEMORANDUM

DATE: September 18, 2002

TO: Faryar Shirzad
Assistant Secretary for
Import Administration

FROM: Richard W. Moreland
Deputy Assistant Secretary, Group I
Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Sulfanilic Acid from Hungary

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Background

On March 4, 2002, the Department of Commerce ("the Department") published the preliminary determination in this investigation. See Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Sulfanilic Acid from Hungary, 67 FR 9696 (March 4, 2002) ("Preliminary Determination"). The "Analysis of Programs" and "Subsidies Valuation Information" sections below describe the subsidy programs and the methodologies used to calculate the benefits from these programs. We have analyzed the comments submitted by the interested parties in their case and rebuttal briefs in the "Analysis of Comments" section below, which also contains the Department's responses to the issues raised in the briefs. We recommend that you approve the positions we have developed in this memorandum. Below is a complete list of the issues in this investigation for which we received comments and rebuttal comments from parties:

Comment 1: Restructuring Assistance
Comment 2: Forgiveness of Environmental Liabilities
Comment 3: Nitrokemia 2000 Rt. ("Nitrokemia 2000") Loan Guarantees

Corporate History

Creation of Nitrokemia 2000[1]

According to record information, in the summer of 1997, the Government of Hungary ("GOH"), by way of Government Decision No. 2236/1997, ordered Nitrokemia Rt., a 100 percent state-owned company in Hungary,[2] to reorganize itself in order to prepare for privatization. The first step in the reorganization was taken on November 29, 1997, when Nitrokemia 2000 was first established as a full subsidiary of Nitrokemia Rt. As part of the reorganization, responsibility for Nitrokemia Rt.'s chemical production facilities, including the sulfanilic acid production facilities, was transferred to Nitrokemia 2000. According to the reorganization agreement and pursuant to Hungarian law, Nitrokemia Rt. was required to provide Nitrokemia 2000 with a Hungarian forint ("HUF") 2.653 billion non-cash contribution in kind which consisted of certain of Nitrokemia Rt.'s existing assets. Additionally, Nitrokemia Rt. was also required to provide Nitrokemia 2000 with HUF 2 billion in cash contributions. The purpose of these contributions was to establish Nitrokemia 2000's registered capital as HUF 4.653 billion.

Due to the magnitude of the restructuring process, the final required contributions into Nitrokemia 2000 from Nitrokemia Rt. were not made until May 1998. (This topic is further discussed with respect to the "Restructuring Assistance" program in the "Analysis of Programs" and "Analysis of Comments" sections, below.) Thus, it was not until May 1998 that all terms related to the creation process of Nitrokemia 2000 were complete. In May 1998, after the final required contributions were made into Nitrokemia 2000 by Nitrokemia Rt., APV obtained Nitrokemia 2000's shares from Nitrokemia Rt. and became Nitrokemia 2000's 100 percent owner. Therefore, following the conclusion of the restructuring process, both Nitrokemia Rt. and Nitrokemia 2000 were fully owned by APV and, thus, the GOH.

Privatization of Nitrokemia 2000

In the summer of 2000, APV issued a call for tenders soliciting potential bidders for Nitrokemia 2000. APV's call for tenders specified that any prospective bidders must pay for the purchase of the company in cash only, and that bidders must agree to release APV from its role as the guarantor of HUF 2 billion in loans taken out by Nitrokemia 2000. (This topic is further

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[1]For more information on the creation and privatization of Nitrokemia 2000, see the Nitrokemia 2000 Verification Report and the Government of Hungary Verification Report, both of which are on file in the Department's Central Records Unit in Room B-099 of the main Department building ("CRU").

[2]At the time of the reorganization, Nitrokemia Rt. was owned by the Hungarian State Privatization and Holding Company ("APV"), which is the GOH entity in charge of privatizations. Nitrokemia Rt. continued to be owned by APV through the period of investigation ("POI"), which is calendar year 2000.

discussed with respect to the "Loan Guarantees" program in the "Analysis of Programs" and "Analysis of Comments" sections, below.) The call for tenders also required bidders to agree to not reduce employment at Nitrokemia 2000 by more than 10 percent within the first three years after purchasing the company. Additionally, the call for tenders required the buyer and Nitrokemia 2000 to "tolerate and facilitate, according to their ability, the continuation and earliest possible completion of the environmental clean-up work taking place on the Nitrokemia Industrial site, as well as the earliest possible determination of the normal environmental state of the industrial site." Finally, the call for tenders stipulated that, although 85 percent of Nitrokemia 2000 would be sold to the winning bidder in response to the call for tenders, 15 percent of the shares of Nitrokemia 2000 would be offered for sale to company workers with the contingency that, if the company workers did not want the shares, the remaining 15 percent would be purchased by the winning bidder.

In November 2000, Nitrokemia Invest Kft., a group of Nitrokemia 2000 managers and executives which had submitted a bid in response to the APV call for tenders, was notified by the GOH that it had been selected as the winning bidder for Nitrokemia 2000. The sales transaction was completed as of December 19, 2000, the date on which Nitrokemia 2000 officially complied with all of the sales requirements stipulated in the tender offer, noted above. Thus, as of December 2000, 85 percent of Nitrokemia 2000 was sold to Nitrokemia Invest Kft. The remaining portion of Nitrokemia 2000 was purchased by Nitrokemia Invest Kft. subsequent to the POI.

Change in Ownership

On February 2, 2000, the U.S. Court of Appeals for the Federal Circuit ("CAFC") in Delverde Srl v. United States, 202 F.3d 1360, 1365 (CAFC 2000), reh'g granted in part (June 20, 2000) ("Delverde III"), rejected the Department's change-in-ownership methodology as explained in the General Issues Appendix ("GIA") of the Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 FR 37217, 37268-37269 (July 9, 1993). The CAFC held that "the {Tariff Act of 1930, as amended by the Uruguay Round Agreements Act effective January 1, 1995 ("the Act")} does not allow Commerce to presume conclusively that the subsidies granted to the former owner of Delverde's corporate assets automatically 'passed through' to Delverde following the sale. Rather, the Tariff Act requires that Commerce make such a determination by examining the particular facts and circumstances of the sale and determining whether Delverde directly or indirectly received both a financial contribution and benefit from a government." Delverde III, 202 F.3d at 1364.

Pursuant to the CAFC finding, the Department developed a new change-in-ownership methodology. This new methodology was first announced in a remand determination on December 4, 2000, and was also applied in Grain-Oriented Electrical Steel from Italy: Final Results of Countervailing Duty Administrative Review, 66 FR 2885 (January 12, 2001) (remanded on other grounds in Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States, 206 F.Supp. 2nd 1344 (Court of International Trade ("CIT") 2002), affd., Slip. Op.

2002-82 (CIT 2002)). We have applied this methodology in analyzing the change in ownership in this determination.

The first step under this methodology is to determine whether the legal person (entity) to which the subsidies were given is, in fact, distinct from the legal person that produced the subject merchandise exported to the United States. If we determine the two persons are distinct, we then analyze whether a subsidy has been provided to the purchasing entity as a result of the change-in-ownership transaction. If we find, however, that the original subsidy recipient and the current producer/exporter are the same person, then that person benefits from the original subsidies, and its exports are subject to countervailing duties to offset those subsidies. In other words, we will determine that a "financial contribution" and a "benefit" have been received by the "person" under investigation. Assuming that the original subsidy has not been fully amortized under the Department's normal allocation methodology as of the beginning of the POI, the Department would then continue to countervail the remaining benefits of that subsidy.

In making the "person" determination, where appropriate and applicable, we analyze factors such as (1) continuity of general business operations, including whether the successor holds itself out as the continuation of the previous enterprise, as may be indicated, for example, by use of the same name; (2) continuity of production facilities; (3) continuity of assets and liabilities; and (4) retention of personnel. No single factor will necessarily provide a dispositive indication of any change in the entity under analysis. Instead, the Department will generally consider the post-sale person to be the same person as the pre-sale person if, based on the totality of the factors considered, we determine that the entity in question can be considered a continuous business entity because it was operated in substantially the same manner before and after the change in ownership.

We have determined that no change-in-ownership analysis with respect to the creation of Nitrokemia 2000 is required. According to Department practice regarding privatizations, sales "must involve unrelated parties, one of which must be privately-owned." (See GIA, 58 FR at 37266, "Types of Restructuring 'Transactions' and the Allocation of Previously Received Subsidies.") Because all of the parties involved in this transaction were related in that they were all owned by the GOH, we conclude from the evidence on the record that we should not conduct a change-in-ownership analysis with respect to the creation of Nitrokemia 2000.

As for the privatization of Nitrokemia 2000 in December 2000, as noted above, in making the "person" determination, we analyze factors such as the continuity of general business operations, the continuity of production facilities, the continuity of assets and liabilities, and the retention of personnel. According to both the GOH and Nitrokemia 2000, the sale of Nitrokemia 2000 resulted in no changes in any of these aspects of Nitrokemia 2000. We have identified no information on the record indicating differently, nor has the petitioner argued any such change. Therefore, we are attributing subsidies received by Nitrokemia 2000 prior to its privatization to Nitrokemia 2000's sales during all of the POI.

Subsidies Valuation Information

Allocation Period

Pursuant to 19 CFR 351.524(b), non-recurring subsidies are allocated over a period corresponding to the average useful life ("AUL") of the renewable physical assets used to produce the subject merchandise. Section 351.524(d)(2) of the Department's regulations creates a rebuttable presumption that the AUL will be taken from the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System (the "IRS Tables"). For sulfanilic acid, the IRS Tables prescribe an AUL of 11 years. Neither Nitrokemia 2000 nor any other interested party disputed this allocation period. Therefore, we have used the 11-year allocation period to allocate non-recurring subsidies received by Nitrokemia 2000.

Creditworthiness

The examination of creditworthiness is an attempt to determine if the company in question could obtain long-term financing from conventional commercial sources. See 19 CFR 351.505(a)(4) (2002). According to 19 CFR 351.505(a)(4)(i), the Department will generally consider a firm to be uncreditworthy if, based on information available at the time of the government-provided loan, for example, the firm could not have obtained long-term loans from conventional commercial sources. In making this determination, according to 19 CFR 351.505(a)(4)(i), the Department normally examines the following four types of information: (1) the receipt by the firm of comparable commercial long-term loans; (2) present and past indicators of the firm's financial health; (3) present and past indicators of the firm's ability to meet its costs and fixed financial obligations with its cash flow; and (4) evidence of the firm's future financial position. With respect to item number one, above, it is the Department's practice not to consider the receipt of comparable commercial loans as being dispositive of a firm's likely ability to obtain long-term commercial credit if the recipient of the commercial loans is government owned. This is because, in the Department's view, in the case of a government-owned firm, a bank is likely to consider that the government will repay the loan in the event of a default. See Countervailing Duties; Final Rule, 63 FR 65348, 65367 (November 25, 1998).

In the December 14, 2001 memorandum to Richard W. Moreland entitled "New Subsidy Allegations" ("New Allegations Memorandum"), which is on file in the Department's CRU, we initiated a creditworthiness investigation for Nitrokemia 2000 for 1998 only. As discussed in the Preliminary Determination, neither the GOH nor Nitrokemia 2000 provided a response to the Department's questions related to Nitrokemia 2000's creditworthiness in 1998. Based on the evidence on the record of this proceeding, we determine that Nitrokemia 2000 was uncreditworthy in 1998. Thus, any non-recurring benefits received by Nitrokemia 2000 in 1998 have been allocated using an uncreditworthy discount rate. As discussed below, the benefit related to Nitrokemia 2000's 1998 guaranteed bonds has also been calculated using an uncreditworthy benchmark rate.

As discussed in the Notice of Initiation of Countervailing Duty Investigation: Sulfanilic Acid from Hungary, 66 FR 54229 (October 26, 2001) ("Initiation Notice"), the petitioner also made an uncreditworthiness allegation with respect to Nitrokemia 2000 for 1999 and 2000. At the time of the initiation, as well as in the Preliminary Determination, we did not examine Nitrokemia 2000's creditworthiness in 1999 and 2000 because there were no programs allegedly bestowing benefits on Nitrokemia 2000 in those years. We continue to find that there are no programs that allegedly bestow subsidies on Nitrokemia 2000 for 1999. However, we are now investigating alleged subsidies to Nitrokemia 2000 in 2000 (i.e., the "Loan Guarantees" program). Thus, we are now addressing the merits of the petitioner's uncreditworthiness allegation for 2000.

As noted in the Initiation Notice, the petitioner must establish a reasonable basis to believe or suspect that a company was uncreditworthy in each year alleged in order for the Department to investigate the company's creditworthiness. Pursuant to 19 CFR 351.505(a)(4)(i), and as discussed in further detail above, the Department will generally consider a firm to be uncreditworthy if, based on information available at the time of the government-provided loan, the firm could not have obtained long-term loans from conventional commercial sources.

In this instance, record evidence does not establish that Nitrokemia 2000 was uncreditworthy in 2000. Specifically, a Dun and Bradstreet report for Nitrokemia 2000 that was provided by the petitioner which concludes that Nitrokemia 2000 is in overall good condition and is a good credit risk does not indicate that Nitrokemia 2000 was uncreditworthy in 2000. Moreover, while Nitrokemia 2000 did suffer a loss in 2000, as we noted in the Initiation Notice, while a loss in a particular year may provide some information about a company's financial position, the Department looks not only to present indicators but also to past indicators of financial health (see 19 CFR 351.505(a)(4)(i)(B)) and to present and past indicators of the firm's ability to meet its costs and fixed financial obligations (see 19 CFR 351.505(a)(4)(i)(C)). While an examination of Nitrokemia 2000's financial ratios does show weakness in some areas (e.g., rate of return on equity and assets), overall, the financial ratios do not indicate that Nitrokemia 2000 would be considered to be uncreditworthy in 2000.[3]

Therefore, because record evidence indicates that Nitrokemia 2000 was creditworthy in 2000, we are not calculating the amount of the POI benefits attributable to Nitrokemia 2000 from 2000

[3]As discussed above, according to 19 CFR 351.505(a)(4)(i), the Department normally examines the four types of information listed above in examining the creditworthiness of a company. In this case, because Nitrokemia 2000 was government-owned at the time the loan guarantees were provided, the Department does not consider the receipt of comparable commercial loans to be dispositive of the firm's likely ability to obtain long-term commercial credit. Moreover, we have no information on record that would have been available in 2000 with respect to Nitrokemia 2000's future financial position. Thus, in this situation, the Department must focus its analysis on items two and three, which entails an examination of relevant financial ratios.

programs using an uncreditworthy benchmark rate.

Discount Rates and Benchmarks for Loans

As discussed in detail below, Nitrokemia 2000 received countervailable restructuring assistance in 1998. This assistance was approved in 1997. According to 19 CFR 351.524(d)(3), the Department will select a discount rate based upon data for the year in which the government agreed to provide the subsidy. However, in this instance, as discussed in the "Analysis of Programs" section and Comment 1, Hungary was considered by the Department to be a nonmarket economy ("NME") until January 1, 1998. The same concerns as discussed in Comment 1 about our ability to identify and measure subsidies in NME countries, e.g., the absence of meaningful prices, lead us to conclude that we cannot use 1997 data to develop our discount rate. Thus, we have used instead information from 1998, the year in which the funds were provided, to formulate the discount rate used to allocate the 1998 non-recurring benefits received by Nitrokemia 2000.

Because we found Nitrokemia 2000 to be uncreditworthy in 1998, we have calculated a long-term uncreditworthy discount rate for 1998. In accordance with 19 CFR 351.524(d)(3)(ii), the discount rate for companies considered uncreditworthy is the rate described in 19 CFR 351.505(a)(3)(iii). To calculate that rate, the Department must specify values for four variables: (1) the probability of default by an uncreditworthy company; (2) the probability of default by a creditworthy company; (3) the long-term interest rate for creditworthy borrowers; and (4) the term of the debt. For the probability of default by an uncreditworthy company, we have used the average cumulative default rates reported for the Caa- to C- rated category of companies as published in Moody's Investors Service, "Historical Default Rates of Corporate Bond Issuers, 1920-1997" (February 1998). For the probability of default by creditworthy companies, we used the cumulative default rates for investment grade bonds as published in Moody's Investor Services: "Statistical Tables of Default Rates and Recovery Rates" (February 1998). For the commercial interest rate charged to creditworthy borrowers, we used the weighted-average rate on long-term loans to the enterprise sector in Hungary as reported by the National Bank of Hungary ("NBH"). For the term of the debt, we used the average cumulative default rates for both uncreditworthy and creditworthy companies based on an 11-year term, since the AUL in this investigation is 11 years.

With respect to Nitrokemia 2000's guaranteed bonds that were secured in 1998 and outstanding during part of the POI, we have used the 1998 uncreditworthy rate described above as our benchmark rate in accordance with 19 CFR 351.505(a)(2)(iii). Also, for reasons explained in Comment 3, below, we have also used the 1998 uncreditworthy discount rate discussed above to allocate benefits related to these 1998 bonds. There is no information on the record indicating that Nitrokemia 2000 paid any fees to the GOH for these guarantees (i.e., the guarantee fee was zero). Therefore, to calculate the benefit from the GOH guarantees, we have compared the amounts that would have been paid under the benchmark interest rate to what the company actually paid on these bonds.

Finally, with respect to Nitrokemia 2000's loans that were taken out in 2000, because we have found that Nitrokemia 2000 was creditworthy in 2000, we have used a creditworthy benchmark interest rate to measure the benefits from these government guarantees. These loans were long-term, had variable interest rates, and were procured in Hungarian currency. Nitrokemia 2000 did not report that it had received any company-specific, comparable commercial loans in 2000. Thus, pursuant to 19 CFR 351.506(a)(1) and 19 CFR 351.505(a)(3)(ii), we attempted to locate a national average variable interest rate for similar comparable commercial loans. However, we were unable to locate a national average interest rate that was specifically a long-term, variable rate. Therefore, for these guarantees, we have used as a benchmark the same NBH weighted-average rate on long-term loans to the enterprise sector in Hungary as utilized in calculating the uncreditworthy discount rate. Again, because there is no evidence that Nitrokemia 2000 paid a guarantee fee, we compared the amounts that would have been paid under the benchmark interest rate to what the company actually paid on these loans.

Analysis of Programs

I. Programs Determined To Be Countervailable

A. Restructuring Assistance

In the Preliminary Determination, we found that the 1998 increase in Nitrokemia 2000's invested capital was not countervailable pursuant to section 771(5) of the Act because there was no evidence of a financial contribution from the GOH as described in section 771(5)(D) of the Act. Specifically, information on the record at the time of the Preliminary Determination indicated that the increase in Nitrokemia 2000's invested capital in 1998 was a result of cash received through a bond offering at its inception, and not a cash infusion by the GOH as alleged by the petitioner.

Subsequent to the Preliminary Determination, however, we discovered that this capital increase was not related to a bond offering as had been previously reported by the respondents (the GOH and Nitrokemia 2000). Specifically, at verification, as discussed above in the "Change In Ownership" section, we found that, in creating Nitrokemia 2000, Nitrokemia Rt. was required to provide Nitrokemia 2000 with a HUF 2.653 billion non-cash contribution in kind (consisting of certain of Nitrokemia Rt.'s existing assets), as well as HUF 2 billion in cash contributions, which would together establish Nitrokemia 2000's registered capital as HUF 4.653 billion. (For a more detailed discussion of this issue, see the Nitrokemia 2000 Verification Report.)

At verification, we found that the cash contributions in Nitrokemia 2000 consisted of two parts: (1) the first part of the required HUF 2 billion cash contribution, HUF 1.54 billion, was made on November 28, 1997; (2) the remaining cash contribution of HUF 460 million was made in May 1998. Moreover, according to information obtained at verification, these cash contributions into Nitrokemia 2000 were actually provided by the GOH. Specifically, the GOH made a HUF 2

billion infusion into Nitrokemia Rt., which was subsequently passed along to Nitrokemia 2000 in order for Nitrokemia Rt. to complete its required cash contributions into Nitrokemia 2000. The reorganization agreement approved by the GOH as Government Decision No. 2236/1997 authorized this HUF 2 billion infusion by APV, and the APV Founder's Resolution No. 302/1997 confirmed that this amount, along with non-cash contributions, was to be passed along to Nitrokemia 2000. The cash contributions from the GOH were passed from Nitrokemia Rt. to Nitrokemia 2000 in two stages, as discussed above.

As discussed below in Comment 1, we find that the HUF 1.54 billion grant from the GOH into Nitrokemia 2000 through Nitrokemia Rt. that was made in November 1997 is not countervailable because the grant was made while Hungary was still considered to be an NME country.

However, with respect to the remaining 460 million that was provided to Nitrokemia 2000 by the GOH via Nitrokemia Rt. in May 1998 after Hungary's designation by the Department as a market economy country (see Comment 1, below, for a further discussion of this topic), we find that this grant is specific within the meaning of section 771(5A)(D)(i) of the Act because it was limited to Nitrokemia 2000. Furthermore, this grant constitutes a financial contribution within the meaning of section 771(5)(D)(i) of the Act. Finally, with respect to benefit, pursuant to section 771(5)(E) of the Act and 19 CFR 351.504(a), we find that a benefit exists in the amount of the grant. Accordingly, we find that this grant confers a countervailable subsidy within the meaning of section 771(5) of the Act.

To calculate the benefit to Nitrokemia 2000 from the 1998 grant, we used an uncreditworthy discount rate from 1998 to allocate the benefits attributable to the POI. We then divided this POI amount by Nitrokemia 2000's total sales during the POI. On this basis, we determine that a countervailable benefit of 1.11 percent ad valorem exists for Nitrokemia 2000.

B. Nitrokemia 2000 Loan Guarantees

At the time of the Preliminary Determination, record information indicated that Nitrokemia 2000 received a government guarantee on a loan that was outstanding during the POI. According to Nitrokemia 2000's financial statements and annual reports, Nitrokemia 2000 received a government guarantee for an HUF 2 billion loan that it took out in January 2000. This loan was repaid in December 2000 when the company was privatized pursuant to the requirements put forth in the APV tender. Because we did not have sufficient information on the record to further analyze this loan guarantee for the Preliminary Determination, we did not make a preliminary finding with respect to this program. However, we stated that we would request additional information on the nature of the loan guarantee from the GOH and Nitrokemia 2000 prior to the final determination.

Subsequent to the Preliminary Determination, we learned that Nitrokemia 2000 actually had two types of guaranteed financing outstanding during the POI: (1) guaranteed bonds of HUF 2 billion that had been issued in January 1998; and (2) three guaranteed loans for a total of HUF 2 billion that were taken out in January 2000.[4] Both types of guaranteed financing are discussed below:

1998 Guaranteed Bonds

In January 1998, Nitrokemia 2000 issued HUF 2 billion in bonds that were guaranteed by the GOH. Nitrokemia 2000 issued these bonds to replace outstanding Nitrokemia Rt. bonds that were due to mature at that time. As discussed in detail in the Nitrokemia 2000 Verification Report, Nitrokemia 2000 agreed to replace Nitrokemia Rt.'s maturing bonds with its own newly-issued bonds to ensure that Nitrokemia Rt. had sufficient cash on hand to make its required cash contributions to Nitrokemia 2000 (as discussed above). The GOH agreed to transfer the guarantees it had provided for the Nitrokemia Rt. bonds to the new Nitrokemia 2000 bonds.

These new Nitrokemia 2000 bonds, which were issued in January 1998, had a maturity date of January 31, 2000, with interest to be paid twice per year. The interest rate for the bonds was a variable rate based on the weighted-average yield of the Hungarian state treasury's issues. A pre-determined portion of the interest payment that was due every six months was deferred until the bonds matured according to the terms of the plan of issue. According to record information, Nitrokemia 2000's bonds matured in January 2000, the first month of the POI. The remaining interest, deferred interest, and principal outstanding on these bonds was paid off by Nitrokemia 2000 at this time.

We find that the guarantees provided by the GOH and the related deferral of interest on the bonds conferred a countervailable subsidy upon Nitrokemia 2000 within the meaning of section 771(5) of the Act during the POI. First, the guarantees and deferred interest are specific within the meaning of section 771(5A)(D)(iii)(I) of the Act because they were provided only to Nitrokemia 2000. Furthermore, the guarantees and deferred interest constitute a financial contribution within the meaning of section 771(5)(D)(i) of the Act.

Finally, with respect to the benefit conferred by these 1998 guarantees and the related deferred interest, 19 CFR 351.506(a)(1) stipulates that "a benefit exists to the extent that the total amount a firm pays for the loan with the government-provided guarantee is less than the total amount the firm would pay for a comparable commercial loan that the firm could actually obtain on the market absent the government-provided guarantee, including any difference in guarantee fees." As noted in the "Subsidies Valuation Information" section, above, we compared the interest rates for these bonds to the benchmark rate. We found that the amount paid by Nitrokemia 2000 on these bonds was less than the Nitrokemia 2000 would have paid under the benchmark rate.

[4]For a more detailed discussion of this issue, see the Nitrokemia 2000 Verification Report.

Section 351.506(a)(2) of the Department's regulations further states that, "(i)n situations where a government, acting as the owner of a firm, provides a loan guarantee to that firm, the guarantee does not confer a benefit if the respondent provides evidence demonstrating that it is normal commercial practice in the country in question for shareholders to provide guarantees to their firms under similar circumstances and on comparable terms." There is no evidence on the record demonstrating that it is normal commercial practice in Hungary for shareholders to provide guarantees to their firms under similar circumstances and on comparable terms. Therefore, because the government guaranteed bond rates were preferential when compared with the uncreditworthy benchmark rate for 1998, we determine that a benefit was conferred through these 1998 guarantees pursuant to section 771(5)(E)(iii) of the Act and 19 CFR 351.506(a)(1).

To calculate the benefit from government-provided guarantees and the deferred interest, according to 19 CFR 351.506(c), the Department will use the methods set forth in 19 CFR 351.505(c) regarding loans. We have determined that the appropriate method for calculating the benefit from the 1998 guarantees and the deferred interest is the methodology set forth in 19 CFR 351.505(c)(3). Although 19 CFR 351.505(c)(3) relates to long-term, fixed-rate loans, and the 1998 guaranteed bonds were long-term, variable-rate loans, the shapes of the repayment schedules for the 1998 guaranteed bonds were such that minimal payments were made while the bonds were outstanding, with larger payments made at maturity due to the deferral of a portion of the interest due. Therefore, to capture the benefit from the partially deferred interest payments, we first calculated the present value in 1998 of the difference between what should have been paid on the loans, without the interest deferred, and what was actually paid pursuant to 19 CFR 351.505(c)(3)(i). We were able to use this calculation methodology, despite the fact that the guaranteed bonds had variable interest rates, because these bonds were paid off in the POI, and, consequently, we knew the different rates that were paid and the life of the bonds.

We then determined the portion of the benefit attributable to the POI utilizing the formula and parameters set forth in 19 CFR 351.505(c)(3)(ii) and 19 CFR 351.524(d)(1). Finally, we divided the total POI benefit from the guarantees on the 1998 bonds by Nitrokemia 2000's total sales during the POI. On this basis, we determine that a benefit of 1.49 percent ad valorem exists.

2000 Guaranteed Loans

As discussed in detail in the Nitrokemia 2000 Verification Report, in order to repay the 1998 bonds upon their maturity in January 2000, Nitrokemia 2000 took out three loans, each of which continued to be guaranteed by APV. The first loan was for HUF 800 million and carried an interest rate of the Budapest Intrabank Forint Loan Rate of Interest ("BUBOR")[5] plus a spread of 0.2 percent. This loan was a three-year loan that was to be repaid in January 2003. Payments were due approximately every three months. The second HUF 900 million loan was similar to

[5]The BUBOR is a variable rate that is revised every three months.

the first in terms of maturity, payment terms, and interest rates, with the exception that the spread for this loan was 0.1 percent. The third loan for HUF 300 million was identical to the first two with an interest rate of BUBOR plus 0.2 percent.

As discussed above in the "Change In Ownership Section," the call for tenders for Nitrokemia 2000 that was issued by APV required that any potential bidder would have to release APV from its status as a guarantor for the above HUF 2 billion in loans. Thus, as required to complete the privatization of Nitrokemia 2000, the new owners of Nitrokemia 2000 repaid the outstanding loans in December 2000 and the loan guarantees were terminated.

We find that these guarantees for the loans taken out in 2000 conferred a countervailable subsidy upon Nitrokemia 2000 during the POI within the meaning of section 771(5) of the Act. First, these guarantees are specific within the meaning of section 771(5A)(D)(iii)(I) of the Act because they were provided only to Nitrokemia 2000. Furthermore, these loan guarantees constitute a financial contribution within the meaning of section 771(5)(D)(i) of the Act.

Finally, with respect to the benefit conferred by these guarantees, as noted in the "Subsidies Valuation Information" section, above, we have no information indicating that guarantee fees were paid with respect to the 2000 loans. Thus, we compared the interest rates for these loans to the benchmark rate. We found that the amount paid by Nitrokemia 2000 on these loans was less than the Nitrokemia 2000 would have paid under the benchmark rate. Furthermore, there is no evidence on the record demonstrating that it is normal commercial practice in Hungary for shareholders to provide guarantees to their firms under similar circumstances and on comparable terms. Therefore, we determine that these guarantees also confer a benefit pursuant to section 771(5)(E)(iii) of the Act.

Pursuant to section 771(E)(iii) of the Act, 19 CFR 351.506(c), and 19 CFR 351.505(c)(4), for each loan guaranteed by APV in 2000, we determined the amount of the benefit by calculating the difference between the amount of interest actually paid on the outstanding loans during the POI and the amount of interest the firms would have paid during the POI on a comparable commercial loan. We then divided the total POI benefit by Nitrokemia 2000's total sales during the POI. On this basis, we determine that a total countervailable benefit of 0.27 percent ad valorem exists.

II. Program Determined To Be Not Countervailable

Forgiveness of Environmental Liabilities

On July 29, 1997, prior to Nitrokemia 2000's creation (as described in the "Change in Ownership" section, above), the GOH, pursuant to Government Decision No. 2236/1997, assumed responsibility for all of the past environmental liabilities generated by the former Nitrokemia Rt.'s production. Such liabilities included the clean-up of hazardous waste, the treatment of waste-water generated sludge, and the dismantling and removal of nonoperational

machinery and other assets from plant facilities. According to record information, Nitrokemia Rt. was tasked by the GOH to be administratively responsible for overseeing the clean-up of these environmental liabilities; however, the GOH was financially responsible for the clean-up.

In the Preliminary Determination, as adverse facts available, we found that Nitrokemia 2000 was discharged of responsibility for environmental liabilities generated by the former Nitrokemia Rt., and that this constituted a countervailable subsidy. We determined that the forgiveness of these liabilities was a financial contribution within the meaning of section 771(5)(D)(i) of the Act, with the benefit being the portion of the forgiveness that was attributable to Nitrokemia 2000. We also found this transaction to be specific within the meaning of section 771(5A) because it was limited to Nitrokemia 2000. In reaching these conclusions, we used adverse facts available pursuant to sections 776(a)(2) and 776(b) of the Act because both the GOH and Nitrokemia 2000 failed to respond satisfactorily to the Department's questions relating to the alleged forgiveness of environmental liabilities, and because the respondents failed to cooperate to the best of their abilities.

For the reasons detailed in our response to Comment 2, below, based upon information obtained by the Department at verification, we now determine that this program did not confer a countervailable subsidy on Nitrokemia 2000 during the POI.

Analysis of Comments

Comment 1: Restructuring Assistance

Petitioner's Argument: According to the petitioner, the Department should reverse its Preliminary Determination finding with respect to the restructuring assistance provided at the time of Nitrokemia 2000's creation. The petitioner contends that the Department found at verification that the HUF 2 billion that was thought to be related to a bond offering was instead a cash infusion made in two installments, the first in November 1997 for HUF 1.54 billion, and the second in May 1998 for HUF 460 million. The petitioner argues that the Department should find this cash infusion to be a countervailable subsidy, and that the POI benefit amount should be calculated using the uncreditworthy discount rate. Moreover, the petitioner argues that, because the HUF 2 billion was included as part of Nitrokemia 2000's registered capital at the time of its creation in May 1998, and because the final steps in creating Nitrokemia 2000 were not taken until that time, 1998 should be considered by the Department as the year of receipt regardless of when the funds were physically transferred.

Respondent's Argument: Nitrokemia 2000 argues that Nitrokemia 2000 never received a HUF 2 billion cash infusion from the GOH.

Department's Position: We agree, in part, with the petitioner. As discussed above in the "Analysis of Programs" section, we found at verification that, in order for Nitrokemia Rt. to meet its commitment to provide HUF 2 billion to Nitrokemia 2000 to complete Nitrokemia 2000's creation, the GOH provided Nitrokemia Rt. with a HUF 2 billion grant. That money was subsequently passed along by Nitrokemia Rt. to Nitrokemia 2000 to complete its required HUF 2 billion in cash contributions to Nitrokemia 2000.

However, while 460 million of this HUF 2 billion in cash contributions was provided to Nitrokemia 2000 in May 1998, HUF 1.54 billion was provided to Nitrokemia 2000 in November 1997. As noted in the New Allegations Memorandum, Hungary was considered by the Department to be a NME country prior to January 1, 1998.[6] According to the Department's practice and legal precedent, the countervailing duty ("CVD") provisions of the Act do not apply to NME countries. The Preamble to the Department's regulations states that

> . . .it is important to note here our practice of not applying the CVD law to non-market economies. The CAFC upheld this practice in Georgetown Steel Corp. v. United States, 801 F.2d 1308 ({CAFC} 1986) {"Georgetown Steel"}. See also GIA at 37261. We intend to continue to follow this practice. Where the Department determines that a change in status from non-market to market is warranted, subsidies bestowed by that country after the change in status would become subject to the CVD law.

See 63 FR at 65360.

In Georgetown Steel, the CAFC held that the CVD provisions of the Act do not apply to subsidies granted by NME countries. In making its determination, the CAFC relied on the legislative history of the Act and substantially adopted the reasoning of the Department's determinations in Carbon Steel Wire Rod from Czechoslovakia; Final Negative Countervailing Duty Determination, 49 FR 19370 (May 7, 1984) ("Czechoslovakia Wire Rod") and Potassium Chloride From the German Democratic Republic; Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition, 49 FR 23428 (June 6, 1984). Specifically, the CAFC found that NME countries did not exist when the first general CVD statute was enacted by Congress in 1897. The CAFC determined that, in enacting that and subsequent revisions to the original tariff legislation, Congress did not intend for the CVD provisions of the Act to be applicable under circumstances such as those present in NME countries. According to the CAFC, this is because there is a fundamental distinction between free market economies and nonmarket economies. The CAFC stated that, as noted by the Department in Czechoslovakia Wire Rod, "{i}t is a fundamental distinction that in an NME system the government does not

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[6]See, also, February 23, 2000 memorandum "Antidumping Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Hungary - Market vs. Non-Market Economy ("NME") Analysis Memorandum" and Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Hungary: Rescission of Antidumping Duty Administrative Review, 65 FR 35610 (June 5, 2000).

interfere in the market process, but supplants it. . .” and, therefore, the concept of subsidization has “no meaning outside of the context of a market economy.” See 49 FR at 19371.

The Department cited to this Georgetown Steel finding in the GIA with respect to its discussion relating to the nature of countervailable benefits. Specifically, the Department stated

> {t}hat the CVD law is not concerned with the subsequent use or effect (i.e., competitive benefit) of a subsidy is in no way undermined by the Department’s arguments and the appellate court’s reasoning in {Georgetown Steel}. In Georgetown Steel, the court simply concluded as a matter of law that the CVD statute is not applicable to nonmarket economies because the concept that the receipt of a subsidy constitutes a distortion in the normal allocation of resources has no meaning in such an economy. This is because resources in nonmarket economies are allocated by government fiat, rather than by market forces. . .Georgetown Steel stands simply for the proposition that, in a nonmarket economy, it is impossible to say that a producer has received a subsidy in the first place.

See GIA at 58 FR 37261.

Therefore, pursuant to the Preamble of the Department’s regulations and case precedent, we find that the HUF 1.54 billion infusion from the GOH into Nitrokemia 2000 through Nitrokemia Rt. that was made in November 1997 is not countervailable because the infusion was made while Hungary was still considered to be an NME country. We disagree with the petitioner that 1998 should be considered by the Department as the year of receipt regardless of when the funds were physically transferred. Although it is true that the creation of Nitrokemia 2000 was not completed until May 1998, as discussed above, record evidence shows that HUF 1.54 billion of the cash contributions used to do so were made in November 1997. According to 19 CFR 351.504, in the case of a grant (i.e., cash infusion), the time of receipt of the benefit is the date on which the firm received the grant. Thus, pursuant to our regulations, we must consider the benefit to have been provided on the date of its receipt, regardless of the final creation date of the company.

However, with respect to the remaining 460 million that was provided to Nitrokemia 2000 by the GOH via Nitrokemia Rt., record information shows that this portion of the cash infusion was provided to Nitrokemia 2000 in May 1998 when Hungary was considered to be a market economy country by the Department. As discussed in the “Analysis of Programs” section, above, we agree with the petitioner and find that this infusion is a countervailable subsidy pursuant to section 771(5) of the Act.

Comment 2: Forgiveness of Environmental Liabilities

Petitioner’s Argument: The petitioner contends that the Department found at verification that Nitrokemia 2000 was not assigned its fair share of Nitrokemia Rt.’s environmental liabilities at the time of its creation. Thus, the petitioner argues that, consistent with the Final Affirmative

Countervailing Duty Determination: Stainless Steel Plate in Coils from Italy, 64 FR 15508, 15513 (March 31, 1999) ("SSPC Italy") and the Preliminary Determination, the Department should treat the portion of Nitrokemia Rt.'s liabilities attributable to Nitrokemia 2000 as a countervailable subsidy. However, the petitioner argues that (1) the total liabilities forgiven should be higher than that used in the Preliminary Determination and (2) the portion of the total amount attributed to Nitrokemia 2000 should be calculated using a different methodology.

With respect to the amount of the forgiveness, the petitioner argues that the simple average of the estimated HUF 5 to 10 billion in environmental liabilities used by the Department in the Preliminary Determination was insufficient and rewards the failure of Nitrokemia 2000 and the GOH to provide a more accurate and factually supported value. Instead, the petitioner argues that the Department should use HUF 10 billion as adverse facts available to estimate the total value of the environmental liabilities. The petitioner contends that throughout the case, including at verification, neither the GOH nor Nitrokemia 2000 was cooperative or forthcoming in providing an estimate of the environmental liabilities. Citing to the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 (1994) ("SAA"), the petitioner states that, although the Department was justified in its use of adverse facts available, the Department must employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See the SAA at 870. The petitioner argues that the respondents failed to respond to the Department's many questionnaires on this issue and refused to provide requested information at verification. Thus, consistent with Static Random Access Memory Semiconductors from Taiwan; Final Determination of Sales at Less Than Fair Value, 63 FR 8909, 8932 (February 23, 1998), the petitioner contends that the Department should ensure that the effect of the selected adverse facts available information is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner."

The petitioner secondly argues that the Department should revise its Preliminary Determination methodology for allocating the total amount of the environmental liabilities between Nitrokemia 2000 and Nitrokemia Rt. The petitioner contends that the 1998 asset values used in the Preliminary Determination are not representative of the true assets of the two companies. The petitioner argues that the failure of the GOH to attribute any of Nitrokemia Rt.'s liabilities to Nitrokemia 2000 at the time of Nitrokemia 2000's creation understates the 1998 asset total for Nitrokemia 2000. According to the petitioner, while Nitrokemia 2000 incurred a small amount of its own liabilities in 1998, the fact that none of Nitrokemia Rt.'s 1997 total liabilities were ever assigned to Nitrokemia 2000 means that Nitrokemia 2000's 1998 assets are flawed. Thus, the petitioner argues that the methodology utilized in SSPC Italy is not applicable in this instance. Instead, the petitioner argues that the Department should compare the relative sales values of Nitrokemia 2000 and Nitrokemia Rt. in 1999, the first year in which the two companies were operating in a fully independent manner.

Respondent's Argument: Nitrokemia 2000 contends that there was no forgiveness of environmental liabilities because none of the former Nitrokemia Rt.'s environmental liabilities were passed along to Nitrokemia 2000 subsequent to its creation.

Department's Position: We agree, in principle, with Nitrokemia 2000, and find that Nitrokemia 2000 received no countervailable subsidy during the POI with respect to the former Nitrokemia Rt.'s environmental liabilities.

According to information received at verification, the GOH, as the owner of Nitrokemia Rt., took over all responsibility for any past environmental liabilities generated by Nitrokemia Rt. in July 1997. Specifically, Decision No. 2236/1997 states that "{t}he reconstruction of the environmental damages on the territory of Nitrokemia Rt. shall be implemented with the responsibility of the state. . .and {shall be} under the proprietary control of the state." As this decision was dated July 29, 1997, prior to the reorganization of Nitrokemia Rt. and the creation of Nitrokemia 2000, this decision related to all of Nitrokemia Rt.'s production, including that which was subsequently transferred to Nitrokemia 2000. This fact is evidenced by Nitrokemia 2000's sales contract, included as Verification Exhibit 3 of the Nitrokemia 2000 Verification Report, which states that any environmental liabilities generated by Nitrokemia 2000 subsequent to its creation are the responsibility of Nitrokemia 2000, but that any environmental liabilities generated by the former Nitrokemia Rt.'s production prior to that time are the responsibility of the GOH. This GOH decision was consistent with the intent of sections 8.2 and 9 of Act No. 53 of 1995 on the General Regulations Concerning Environmental Protection, which indicate that, since 1995, Hungary has adhered to a "polluter pays" principle, meaning that polluters remain responsible for the environmental damage which they create.

As noted above, the GOH decision to take over responsibility for the former Nitrokemia Rt.'s environmental liabilities was dated July 29, 1997. According to 19 CFR 351.508(b), the Department will normally consider the benefit from debt forgiveness as having been received as of the date on which the debt was assumed or forgiven. Although these environmental liabilities were not debt, we believe that, for purposes of assigning a date of receipt, we can view the assumption of the liabilities as analogous to the assumption of debt. As with a debt assumption, the assumption of the environmental liabilities relieved the company of any potential responsibility of claims. Accordingly, any benefit would have been received on July 29, 1997, the date of Government Decision No. 2236/1997.

As discussed above in Comment 1, prior to January 1, 1998, Hungary was classified by the Department as an NME country, and the Department does not apply countervailing duties to actions that occurred while a country is considered to be an NME country. Therefore, pursuant to the Preamble of the Department's regulations and case precedent, because any financial contribution or benefit from the alleged forgiveness of Nitrokemia Rt.'s former environmental liabilities would have occurred while Hungary was considered by the Department to be an NME country, there is no countervailable benefit from this transaction to Nitrokemia 2000 during the POI.

Comment 3: Nitrokemia 2000 Loan Guarantees

Petitioner's Argument: The petitioner argues the Department now has sufficient information on the record to determine that the government loan guarantees provided to Nitrokemia 2000 in January 2000 provide a countervailable subsidy. The petitioner contends that the three loans that were guaranteed by the GOH in January 2000 have preferential interest rates. Moreover, the petitioner contends that the respondents have provided no evidence that it is normal commercial practice in Hungary for shareholders to provide guarantees to their firms under similar circumstances and on comparable terms as the government guarantee to the government-owned company pursuant to 19 CFR 351.506(a)(2). Finally, the petitioner argues that the Department should calculate the benefit from these guaranteed loans using Hungarian interest rate information that is already on the record and should use an uncreditworthy interest rate based on the same reasoning that led the Department to treat Nitrokemia 2000 as uncreditworthy in 1998.

Respondent's Argument: According to Nitrokemia 2000, the loan guarantees provided to Nitrokemia 2000 by the GOH were never utilized. Therefore, there was never any benefit to Nitrokemia 2000 from the loan guarantees.

Department's Position: We agree, in part, with the petitioner. As discussed above in the "Analysis of Programs" section, we have determined that the guarantees provided by APV on the 1998 bonds and the 2000 loans conferred a countervailable subsidy on Nitrokemia 2000.

However, we disagree with the petitioner that Nitrokemia 2000 was uncreditworthy in 2000. Therefore, we have not calculated the POI benefit from the countervailable guaranteed loans for Nitrokemia 2000 using an uncreditworthy interest rate as argued by the petitioner. However, as discussed above, because we found Nitrokemia 2000 to be uncreditworthy in 1998, any POI benefits attributable to Nitrokemia 2000 from its 1998 guaranteed bonds were calculated using an uncreditworthy benchmark rate.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related margin calculations accordingly. If these recommendations are accepted, we will publish the final determination in the Federal Register.

AGREE ____ DISAGREE ____

_____
Faryar Shirzad
Assistant Secretary for
Import Administration

_____
(Date)