(Slip Op. 02–92)

FORMER EMPLOYEES OF LEVI STRAUSS, PLAINTIFFS *v.*
UNITED STATES OF AMERICA, DEFENDANT

Court No. 00–11–00522

(Dated August 21, 2002)

JUDGMENT ORDER

CARMAN, *Chief Judge:* Upon consideration of the failure to prosecute this action with due diligence by Plaintiffs, appearing *pro se*, despite being provided notice by this Court of Plaintiffs' need to timely file a USCIT R. 56.1 Motion for Judgment on the Agency Record, it is hereby,

ORDERED that this case is dismissed pursuant to USCIT R. 41(b)(3).

(Slip Op. 02–93)

TUNG MUNG DEVELOPMENT CO., LTD., PLAINTIFF, AND YIEH UNITED STEEL CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND ALLEGHENY LUDLUM CORP. ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 99–07–00457

[Remand Determination affirmed]

(Decided August 22, 2002)

Akin, Gump, Strauss, Hauer & Feld, LLP. (Patrick F. J. Macrory, Thomas J. McCarthy), for Plaintiff.

White & Case (William J. Clinton, Adams Lee), for Plaintiff-Intervenor.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director; *Lucius B. Lau,* Assistant Director; *Scott D. McBride,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

Collier Shannon Scott, PLLC (David A. Hartquist, Jeffrey S. Beckington, Adam H. Gordon), for Defendant-Intervenors.

OPINION

I

PRELIMINARY STATEMENT

WALLACH, *Judge:* Allegheny Ludlum Corporation, Armco, Inc., Butler Armco Independent Union, J&L Specialty Steel Inc., The United Steelworkers of America, AFL-CIO/CLC, and Zanesville Armco Independent Organization ("Defendant-Intervenors" or "Petitioners") dispute the United States Department of Commerce International Trade Administration's ("Commerce" or "the Department") finding in Commerce's Final Results of Redetermination Pursuant to Court Remand, *Tung Mung Development Co. v. United States,* Slip op. 01–83 (July 3, 2001) ("Remand Determination") that the imposition of combination rates in a middleman dumping situation in which the producer has no knowledge of the middleman's dumping comports with the provisions of the antidumping statute. Defendant-Intervenors' challenge follows the remand of Commerce's decision in *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Taiwan,* 64 Fed. Reg. 30,592 (June 8, 1999) ("Final Determination").

The court finds that Commerce, by applying a combination rate consistent with its prior practice, has made its Remand Determination in accordance with the law.

II

BACKGROUND

On June 10, 1998, the domestic industry filed an antidumping petition alleging that imports from Taiwan of stainless steel sheet and strip in coils ("SSSS") were being injuriously dumped in the United States. The Department initiated an antidumping duty investigation on July 13, 1998. *See Initiation of Antidumping Duty Investigations: Stainless Steel Sheet and Strip in Coils from France, et al.,* 63 Fed. Reg. 37,521 (July 13, 1998).

Yieh United Steel Corp. ("YUSCO") and Tung Mung Development Co., Ltd. ("Tung Mung"), Taiwanese producers of the subject merchandise, were selected as respondents in the Taiwan investigation. During the period covered by the Department's investigation, April 1, 1997, through March 31, 1998, YUSCO and Tung Mung made United States sales of subject SSSS through middleman Ta Chen Stainless Pipe Co., Ltd. ("Ta Chen").[1]

On October 14, 1998, petitioners submitted allegations of middleman dumping by Ta Chen of subject merchandise produced by Tung Mung; on October 15, 1998, petitioners submitted allegations of middleman dumping by Ta Chen of subject merchandise produced by YUSCO. On December 3, 1998, the Department initiated a middleman dumping investigation with respect to sales by Ta Chen of YUSCO's and Tung

[1] Ta Chen was also investigated as part of this investigation. Ta Chen has not appealed Commerce's determination of dumping and assignment of a cash deposit rate, which was issued on the basis of adverse facts available.
Tung Mung also made direct sales to the United States, to an affiliate of Ta Chen.

Mung's subject merchandise. *Notice of Amended Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From Taiwan,* 63 Fed. Reg. 66,785 (Dec. 3, 1998). On January 4, 1999, Commerce published its preliminary determination. *Notice of Preliminary Determination of Sales at Less Than Fair Market Value and Postponement of Final Determination: Stainless Steel Sheet and Strip in Coils from Taiwan,* 64 Fed. Reg. 101 (Jan. 4, 1999) ("Preliminary Determination"). In the Preliminary Determination, Commerce calculated a weighted-average dumping margin of 2.94 percent for YUSCO and a weighted-average dumping margin of .07 percent for Tung Mung, in each instance exclusive of any dumping by the middleman. *Id.* at 108. Commerce made no preliminary determination with regard to the middleman dumping investigation, which was incomplete. The parties to the investigation submitted briefs on May 3, 1999.

On June 8, 1999, Commerce published the Final Determination, in which it assigned YUSCO a single weighted average rate of 34.95 percent, and Tung Mung a single weighted-average rate of 14.95, based largely on the rate assigned for the middleman Ta Chen. Final Determination, 64 Fed. Reg. at 30,624. This decision was subsequently challenged by Tung Mung and YUSCO in the parties' USCIT Rule 56.2 Motion For Judgment On The Agency Record, where both parties disputed Commerce's decision to assign a single, weighted-average cash deposit dumping rate to their merchandise, regardless of the channel of distribution through which that merchandise is sold. Tung Mung and YUSCO argued that imposition of a single rate is contrary to congressional intent, and would impose an excessive cash deposit rate on merchandise that is not "tainted" by the middleman dumping found by the Department.

In *Tung Mung Dev. Co. v. United States,* ____ CIT ____, Slip op. 01–83, 2001 Ct. Intl. Trade LEXIS 94, at *1 (July 3, 2001) *("Tung Mung I"),* this court remanded the Department's determination on the issue of the single, weighted-average rate, noting that Commerce's application of a single weighted-average rate constituted a significant departure from its usual practice. *Id.* at *54. In analyzing the appropriateness of this rate in a middleman dumping situation, the court examined the plain language of the dumping statute, *id.* at *15, as well as Commerce's relevant regulations, *id.* at *28, and concluded that none of the statutory and regulatory provisions cited by the parties either supported or explicitly foreclosed Commerce's use of the single, weighted-average cash de-

posit rate.[2] *Id.* at *49. In addition, the court examined Commerce's prior practice in the area of middleman dumping, noting that the present case was the first instance in which the Department was imposing a single weighted-average rate in a middleman dumping investigation.[3] The court further remarked that there were only three occasions on which the Department had rendered a final affirmative middleman dumping investigation: *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From Taiwan,* 64 Fed. Reg. 15,493 (March 31, 1999) ("SSPC From Taiwan"); *Antidumping; Fuel Ethanol from Brazil; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 5,572 (Feb. 14, 1986) ("Fuel Ethanol from Brazil"); and the instant case. The court therefore instructed Commerce to "either provide a reasonable explanation and substantial evidence for its change in practice, or * * * apply a combination rate, consistent with its prior practice." *Id.* at *59.

In its Remand Determination, Commerce determined "that it is appropriate in this instance to apply a middleman dumping computation using combination rates." Remand Determination at 2. Commerce first noted that "[f]indings of middleman dumping are rare" and that "Congress provided no statutory guidance for the means by which the Department would determine its methodology for capturing those sales." *Id.* at 2–3. After explaining the inherent difficulties associated with middleman dumping,[4] Commerce examined the various cash deposit methodologies available to it in such situations. Commerce could either apply the methodology offered by the Department in the Final Deter-

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[2] The court examined the dumping statute's definitions of "dumping margin," "export price," "normal value," "subject merchandise," and "foreign like product." *Tung Mung I,* 2001 Ct. Intl. Trade LEXIS 94, at *15–18; *see* 19 U.S.C §1677, 1677a, 1677b (1999). The court found that none of these definitions were dispositive on the issue. *Id.* In addition, the court examined 19 U.S.C. §1673d(c), for Commerce's authority to compute a dumping margin and impose a cash deposit rate, as well as 19 U.S.C. §1673b(a) and §1673d(a), together with the legislative history to 19 U.S.C. §1677a, for Commerce's authority to consider the full range of dumping. The court similarly found that none of these sections provided any guidance in the instant case and were therefore not dispositive of the issue. *Id.* At *18–30. The court did, however, note that 19 U.S.C. §1673d(c)(1)(B)(i), which requires Commerce to "determine the estimated weighted average dumping margin for each exporter and producer individually investigated", supports Tung Mung's position as it tends to indicate that a separate dumping rate must be computed for each respondent. *Id.* at *26. The court further added that "[t]his construction is supported by Commerce's own regulation, at 19 C.F.R. §351.204(c)(1) (1998), which states that 'in an investigation, the Secretary will attempt to determine an individual weighted-average dumping margin * * * for each known exporter or producer of the subject merchandise.' *Id.* Finally, the court examined Department's regulation at 19 C.F.R. §351.107 and the preamble thereto, and found that "the regulation * * * does not speak directly to the issue presented in this case." *Id.* at *29. Discussing the preamble to the regulation, the court noted that:

> [r]eview of the Preamble provides no support for the use of a single, weighted average rate, and certainly does not mandate such a method. It does not even contain a discussion of such a rate in this context. To the contrary a review of all of the preamble indicates that a combination rate may well be proper in the instant case, although the court defers to Commerce's authority to make the determination as to whether a combination rate or some other rate is appropriate."

Id. at *48–49. The court further emphasized that "this Preamble, and the associated regulation, do not constitute an agency construction of the statute at issue, on the issue of a single, weighted average rate, such as would trigger Chevron deference." *Id.* at *49.

[3] The court also noted that "[t]he court's research, and the responses of the parties at oral argument, reveal only two instances in which a dumping margin is based on the activities of parties other than the respondent at issue: in nonmarket economy cases, and in 'collapsing' cases, where Commerce has made findings to support a determination that affiliated companies should be treated as a single entity, and thus receive a single, weighted average dumping margin." *Id.* at *47.

[4] Commerce notes that "[t]he presumption built into the law and our practice is that the locus of the dumping will be found in the first sale of subject merchandise to an unaffiliated party where the seller knows the merchandise is destined for the United States." Remand Determination at 4. However, Commerce explains that "[i]n middleman dumping situations * * * this presumption does not hold true. Where there is middleman dumping, the producer may be dumping its goods in its sales to the unaffiliated exporter, that exporter may be dumping the goods in its sales to the unaffiliated purchaser in the United States, or *both* parties may be dumping the same merchandise." Remand Determination at 5 (emphasis in original).

mination, or resort to the application of a combination rate. Commerce explained that the latter was appropriate here since "as noted by the Court in its holding and during the hearing, use of combination rates may be appropriate when a producer uses a middleman for some of its commercial transactions and, while aware that the merchandise is destined for the United States, is unaware that the middleman is dumping that merchandise." *Id.* at 7. Consequently, Commerce concluded that "because the Department has no basis to believe or suspect that the producer was aware or should have been aware that the middleman would be likely to dump subject merchandise into the United States, the Department is inclined to calculate a combination rate for the producer and middleman." *Id.* at 8.[5]

III

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. 1581(c) (1999).

This court will sustain Commerce's Remand Determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. §1516a(b)(1)(B) (1999). Substantial evidence is something more than a "mere scintilla," and must be enough evidence to reasonably support a conclusion. *Primary Steel, Inc. v. United States,* 17 C.I.T. 1080, 1085, 834 F. Supp. 1374, 1380 (1993); *Ceramica Regiomontana, S.A. v. United States,* 10 C.I.T. 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987). A determination as to whether the agency's interpretation of the statute is in accordance with law requires of the court to "carefully investigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I. Inc. v. United States,* 157 F.3d 879, 881 (Fed. Cir. 1998). Congress's expressed will or intent on a specific issue is dispositive. *See Japan Whaling Ass'n v. American Cetacean Soc'y,* 478 U.S. 221, 233–237, 106 S.Ct. 2860, 92 L. Ed.2d 166 (1986). If the statute is silent or ambiguous, the court must determine whether the agency's construction of the statute is permissible. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L. Ed.2d 694 (1984). Deference is due "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claim-

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[5] To support this conclusion, Commerce cites to the Department's regulation at 19 C.F.R. §351.107. Remand Determination at 6–7. More specifically, Commerce cites to 19 C.F.R. §351.107(b), which provides as follows:

> b) Cash deposit rates for non-producing exporters—
>
> (1) Use of combination rates—
>
> In general. In the case of subject merchandise that is exported to the United States by a company that is not the producer of the merchandise, the Secretary may establish a "combination" cash deposit rate for each combination of the exporter and its supplying producer(s).

Commerce further cites to the preamble accompanying 19 C.F.R. §351.107(b), which states that the Department believes that, as a rule, "it is not appropriate to establish combination rates in an AD investigation or review of a producer; *i.e.*, where a producer sells to an exporter with knowledge of exportation to the United States." *Antidumping Duties; Countervailing Duties,* 62 Fed. Reg. 27,296, 27,303 (May 19, 1997)(Final rule). Commerce also adds that "the establishment of separate rates for a producer in combination with each of the exporters through which it sells to the United States could lead to manipulation by the producer." Remand Determination at 7. However, Commerce adds that combination rates may nevertheless be appropriate in situations where the "producer uses a middleman for some of its commercial transactions and, while aware that the merchandise is destined for the United States, is unaware that the middleman is dumping that merchandise." *Id.* at 7.

ing deference was promulgated in the exercise of that authority." *United States v. Mead Corp.,* 533 U.S. 218, 226–27, 121 S.Ct. 2164, 2171, 150 L.Ed.2d 292, 303 (2001). The delegation of this authority "may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent." *Id.* at 227. Consequently, statutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron. Pesquera Mares Australes Ltda. v. United States,* 266 F.3d 1372, 1382 (Fed. Cir. 2001). This court must therefore inquire into the reasonableness of Commerce's interpretation. *See Fujitsu Gen. Ltd. v. United States,* 88 F.3d 1034, 1038 (Fed. Cir. 1996).

IV

ANALYSIS

A

COMBINATION RATES COMPORT WITH THE ANTIDUMPING STATUTE'S CHARACTERIZATION OF DUMPING DUTIES AS A REMEDIAL INSTRUMENT

The antidumping statute requires Commerce to impose antidumping duties on imported merchandise that is being sold, or is likely to be sold, in the United States at less than fair value to the detriment of a domestic industry. *See* 19 U.S.C. §1673 (1999). "The purpose underlying the antidumping laws is to prevent foreign manufacturers from injuring domestic industries by selling their products in the United States at less than 'fair value,' i.e., at prices below the prices the foreign manufacturers charge for the same products in their home markets." *Torrington Co. v. United States,* 68 F.3d 1347, 1352 (Fed. Cir. 1995). The duty that is consequently imposed is the amount by which the price charged for the subject merchandise in the home market exceeds the price charged in the United States. *See* 19 U.S.C. §1673. In other words, the statute's function is remedial in that its purpose is reducing or eliminating discrepancies in pricing between the US and foreign markets. *U.S. Steel Group v. United States,* 177 F. Supp. 2d 1325, 1330 (CIT 2001); *See also C.J. Tower & Sons v. United States,* 21 C.C.P.A. 417, 427, 71 F.2d 438 (1934) (stating that the statute's object is "to impose not a penalty, but an amount of duty sufficient to equalize competitive conditions between the exporter and American industries affected"); *Micron Tech., Inc. v. United States,* 243 F.3d 1301, 1313 (Fed. Cir. 2001) ("The overarching purpose of the antidumping statute is to permit a fair, apples-to-apples comparison between foreign market value and United States price * * *") (internal quotations omitted); *NTB Bearing Corp. v. United States,* 74 F.3d 1204, 1208 (Fed. Cir. 1995) (stating the antidumping laws "are remedial not punitive"); 19 U.S.C. §1677b(a) (providing that "a fair comparison shall be made between the export price or constructed export price and normal value").

Defendant-Intervenors argue that *C.J. Tower* shows the remedial nature of the antidumping statute because it held the antidumping stat-

ute's objective is "to impose not a penalty, but an amount of duty sufficient to equalize competitive conditions between the exporter and American industries affected." *C.J. Tower,* 71 F.2d at 427. They argue that since the antidumping law is remedial, not punitive in nature, the Department's rationale "that a single, weighted-average cash deposit rate would penalize or unduly burden the foreign producer should fail." Defendant-Intervenors' Comments in Accordance with the Court's Order Dated July 3, 2001 ("Defendant-Intervenors' Brief") at 3. According to Defendant-Intervenors, antidumping duties are inherently non-punitive with regards to foreign producers, as "an importer's payment of antidumping duties does not constitute a penalty against, and does not unduly burden, the foreign producer that is not responsible for or subject to paying antidumping duties." *Id.* at 4. In other words, Defendant-Intervenors appear to be arguing that because antidumping duties are a tax, concerns for unduly punishing a foreign respondent should be disregarded, and in the present case, a single weighted-average rate should be applied.

As Defendant correctly points out, however, it is precisely because antidumping duties are a tax and not a penalty, that Commerce applied a combination rate. Defendant's Memorandum in Opposition to Defendant-Intervenors' Memorandum with Respect to the Final Results of Redetermination of the United States Department of Commerce ("Defendant's Memo") at 11–12. The remedial purpose of the statute is fulfilled because a combination rate adequately offsets the dumping margin for goods exported through the middleman, but does not impose duties on non-dumped goods exported directly from the producer.[6] In its Remand Determination, Commerce specifically explained that the application of combination rates in circumstances where there is "no basis to believe or suspect that the producer was aware or should have been aware that the middleman would be likely to dump subject merchandise into the United States * * * avoids penalizing the producer for dumping for which it is not responsible, and encourages the producer to find a middleman who will not engage in dumping." Remand Determination at 8. Since there is no evidence on the record that Tung Mung and YUSCO were aware or should have been aware that Ta Chen was dumping

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[6] Moreover, Defendant-Intervenors' reliance on *C.J. Tower* for the principle that antidumping duties are a tax and not a penalty ignores the passage of the Uruguay Round Agreement Act. The URAA specifically codified the remedial nature of the antidumping statute in 19 U.S.C. §1673d(b)(4)(A), which provides as follows:

§ 1673d. Final Determinations
(b) Final Determination by Commission
(4) Certain additional findings
(A) Commission standard for retroactive application
(i) In general. If the finding of the administering authority under subsection (a)(3) is affirmative, then the final determination of the Commission shall include a finding as to whether the imports subject to the affirmative determination under subsection (a)(3) of this section are likely to undermine seriously the remedial effect of the antidumping duty order to be issued under section 1673e of this title.
(ii) Factors to consider. In making the evaluation under clause (i), the Commission shall consider, among other factors it considers relevant—
(I) the timing and the volume of the imports,
(II) a rapid increase in inventories of the imports, and
(III) any other circumstances indicating that the remedial effect of the antidumping order will be seriously undermined.

See Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994); 19 U.S.C. §1673d.

their merchandise, Commerce's decision to apply combination rates counters neither any remedial purposes of the antidumping statute nor the holding in *C.J. Tower.*

Plaintiff also correctly points out that the holding in *C.J. Tower* actually supports the Department's results. Plaintiff's Response to Defendant-Intervenors' Comments Dated January 2, 2002 ("Plaintiff's Response") at 3. The Court in *C.J. Tower* specifically noted that the antidumping statute's purpose is to impose "an amount of duty sufficient *to equalize competitive conditions* between the exporter and American industries affected." *C.J. Tower,* 71 F.2d at 427 (emphasis added). Given that Tung Mung's direct sales to the United States were not dumped, "there is no basis or need for imposing antidumping duties to equalize competitive conditions." Plaintiff's Response at 3 (internal quotations omitted).

As the antidumping law is remedial, its consequent application must fulfill this remedial purpose. Accordingly, Commerce's determination that combination rates are applicable does not conflict with the overarching purpose of the antidumping statute; *C.J. Tower* further supports this conclusion.

B

APPLICATION OF A COMBINATION RATE ON FOREIGN PRODUCERS WHOSE MERCHANDISE IS DUMPED IN THE UNITED STATES DOES NOT VIOLATE ANY JURISDICTIONAL REQUIREMENTS

Defendant-Intervenors argue that "resort to combination rates when middleman dumping is present wrongly undermines the statute's remedy and jurisdictional base, that is, the imposition of antidumping duties on the subject merchandise that has been injuriously dumped in the United States." Defendant-Intervenors' Brief at 5. According to Defendant-Intervenors, "[n]owhere does there appear to be any legal authority for the proposition that the Department's jurisdiction is defined with reference to the foreign party or parties responsible for dumping." *Id.* at 5. This argument is an extension of Defendant-Intervenors' previous pre-remand argument that the dumping statute's emphasis on the term 'subject merchandise' encompasses all the subject merchandise produced by a given producer regardless of whether the dumping was done by the producer or a middleman. *See* Brief of Defendant-Intervenors in Response to Motion for Judgment on the Agency Record by Tung Mung Development Co., Ltd. at 5. This "subject merchandise" argument, however, was discarded in *Tung Mung I,* in which the court held that the term "subject merchandise" "does not provide any guidance in the instant case, and does not support Defendant-Intervenors' argument. Indeed, given that many investigations involve merchandise produced by several different respondents, Defendant-Intervenors' construction of

that term is untenable for use throughout the statute."[7] *Tung Mung I,* 2001 Ct. Intl. Trade LEXIS 94, at *21. Although these arguments are analytically similar, to the extent necessary they are discussed below.

A brief examination into the actual process of collecting duties is helpful in delineating the exact parameters of Commerce's activities, *i.e.*, its jurisdiction, when imposing the appropriate duty rate. As previously stated, U.S. law is designed to prevent a foreign firm from selling merchandise in the United States at prices lower than the prices it charges for a comparable product sold in its domestic market. *See supra* Part IV.A. Once an investigation of foreign respondents is undertaken, Commerce issues questionnaires to foreign producers and their affiliated importers requesting information on their commercial practices (questionnaires might inquire about, among other things, the investigated company's quantity and value of sales of the merchandise in all markets, its corporate structure and business practices, the merchandise under investigation or review that it sells). This information allows Commerce to make a price comparison between normal value and export price or constructed export price, as appropriate, given the definitions provided in 19 U.S.C. §1677a(a) and (b). *See* 19 U.S.C. §§1677a(a), (b). The dumping margins are therefore the differences in the two prices and a separate dumping margin is calculated for each manufacturer or exporter investigated. *See Queen's Flowers de Columbia v. United States*, 21 C.I.T. 968, 971, 981 F.Supp. 617, 622 (1997). Once the antidumping order is issued, Commerce instructs the U.S. Customs Service to collect cash deposits of antidumping duties on merchandise that enters the United States or is withdrawn from a bonded warehouse. Although the cash deposit represents an estimate of the actual duties owed by the importers of record, the final amount of the duties collected will be determined by the administrative review. In other words, all that the antidumping order requires of the importers of record is that they post a cash deposit in order to offset the dumping margin. The antidumping order only applies to the merchandise that is dumped in the United States and not to the exporters *per se*. *Jia Farn Mfg. Co. v. Secretary of the United States Dep't of Commerce,* 17 C.I.T. 187, 817 F. Supp. 969 (stating that less than fair value "determinations and antidumping duty orders are rendered upon the subject merchandise from a certain country under the investigation"). The amount of the actual dumping rate, however, will depend on each respondents' extent of dumping. This analysis is the foundation of Commerce's jurisdiction.

[7] During oral argument, counsel for Defendant-Intervenors also cited to the Preamble of 19 C.F.R. §351.107 for the principle that a single weighted-average rate is applicable in the present case. *See* 62 Fed. Reg. 27,296 (May 19, 1997). The court will similarly not entertain this argument as it was explicitly dismissed in this court's remand opinion. *See Tung Mung I,* 2001 Ct. Intl. Trade LEXIS at *48–49.

Commerce's determination in the present case was within those jurisdictional parameters.[8] Commerce examined the behavior of the foreign parties, determined a dumping margin for each respondent, and imposed a combination rate in order to adequately offset the parties' dumping. As stated by Defendant, "[a]ll that Commerce has done in this instance (as in all other investigations, reviews, and remands) is to examine the behavior of foreign entities for purposes of its antidumping analysis." Defendant's Memo at 13. This activity does not amount to an improper exercise of jurisdiction over foreign respondents. On the contrary, Commerce's foremost goal was to reach the most accurate and fair results. As it said in its Remand Determination:

> [The] use of combination rates may be appropriate when a producer uses a middleman for some of its commercial transactions and, while aware that the merchandise is destined for the United States, is unaware that the middleman is dumping that merchandise. Under such a scenario, if the Department uses the average-rate methodology described above, although all of the dumping is being offset by the imposition of the antidumping duties, the producer will, in effect, be held responsible for unfair pricing engaged in by a middleman over which it had no control. Such an effect appears to be contrary to the Department's objective of associating dumping with the party or parties responsible for it.

Remand Determination at 7–8.

In addition, this notion of applying combination rates in order to associate dumping with the foreign respondents dumping the subject merchandise is not a novel concept. As Plaintiff-Intervenors point out, there are a number of instances where the Department has acknowledged that pursuant to section 777A of the Antidumping Statute, "the Department calculates an individual weighted-average dumping margin for each known exporter or producer." Yieh United Steel Corp.'s Rebuttal Comments in Response to Defendant-Intervenors' Comments on DOC Remand Results at 5 (citing *Notice of Final Determination of Sales at Less than Fair Value: Brake Drums and Brake Rotors from the People's Republic of China,* 62 Fed. Reg. 9,160, (February 28, 1997), *Notice of Final Determination of Sales at Less than Fair Value: Certain Preserved Mushrooms from the People's Republic of China,* 63 Fed. Reg. 72,255, 72,257 (December 31, 1998)). Moreover, as Commerce noted in its Remand Determination, 19 C.F.R. §351.107(b) specifically provides that Commerce may apply a combination rate for each combination of an exporter and its supplying producer in the case of subject merchandise

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[8] Defendant-Intervenors, in any case, have no standing in raising this jurisdiction argument. As Defendant correctly points out in its brief, a party "cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L. Ed.2d 343 (1975); *Nordlinger v. Hahn,* 505 U.S. 1, 11, 112 S.Ct. 2326, 120 L. Ed.2d 1 (1992) ("'This Court's prudential standing principles impose a 'general prohibition on a litigant's raising another person's legal rights.'")(quoting *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L. Ed.2d 556 (1984)); *Flast v. Cohen,* 392 U.S. 83, 99 n.20, 88 S.Ct. 1942, 20 L. Ed.2d 947 (1968)("[A] general standing limitation imposed by federal courts is that a litigant will ordinarily not be permitted to assert the rights of absent third parties"). *See* Defendant's Memo at 13–14.

that is exported to the United States.[9] Remand Determination at 6–7. Associating the dumping with the appropriate foreign party is therefore a reasonable extension of this principle.

On this basis, this court finds that Commerce's decision to apply combination rates was directed at reaching exact results and was a proper exercise of its discretionary authority to determine the most appropriate dumping methodology. *See* 19 U.S.C. §1673d(c)(1)(B)(ii) (1999). Accordingly, the application of combination rates in the present case does not violate any of the antidumping statute's jurisdictional requirements.

C

DEPARTMENT FULFILLED ITS DUTY OF PREVENTING CIRCUMVENTION OF THE ANTIDUMPING STATUTE

As stated in the Remand Determination, Commerce has a duty to avoid the evasion of antidumping duties. Remand Determination at 3. "The ITA has been vested with authority to administer the antidumping laws in accordance with the legislative intent. To this end, the ITA has a certain amount of discretion [to act] * * * with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law." *Mitsubishi Elec. Corp. v. United States,* 12 C.I.T. 1025, 1046, 700 F. Supp. 538, 555 (1988), *aff'd* 898 F.2d 1577 (Fed. Cir. 1990).

Defendant-Intervenors claim that the Department has created a test which undermines this fundamental duty. More specifically, they take issue with Commerce's statement that combination rates are appropriate in the present case "because the Department has no basis to believe or suspect that the producer was aware or should have been aware that the middleman would be likely to dump subject merchandise into the United States." Remand Determination at 8. According to Defendant-Intervenors, this test is poorly defined because it fails to articulate "what factors other than actual or imputed knowledge of the producer would be relevant to the Department's test." Defendant-Intervenors' Brief at 8. Moreover, they emphasize the impracticable nature of this standard in that it would be extremely problematic to attach constructive knowledge of middleman dumping to a producer. *Id.* at 8–9.

Although Commerce did base its determination on a holding that it had no basis to attach knowledge or constructive knowledge upon the producer, nowhere in the Remand Determination does Commerce state that it has affirmatively established a universal test for deciding whether to apply a single, weighted-average cash deposit rate in middleman dumping cases. On the contrary, Commerce announced that in light of its limited experience with middleman dumping, it did "not intend by this decision to announce a settled practice." Remand Determination at

[9] 19 C.F.R. §351.107(b) contemplates situations where the Department is investigating or reviewing sales by a non-producing exporter and the exporter's supplier has no knowledge that the merchandise is exported to the United States. While the present case does not present a situation where the exporter's supplier had no knowledge of the merchandise's ultimate destination, it is nevertheless a similar situation; the suppliers in both situations either have a zero percent or de minimis dumping margin. Most importantly, in both situations, Commerce examines the provenance of the particular merchandise and associates it with the appropriate dumping rate. See 19 C.F.R. §351.107(b).

3. Commerce further emphasized that it was not establishing an "actual knowledge" or "reason to believe" test "for determining whether combination rates are appropriate when middleman dumping has been found to exist." *Id.* at 11. The appropriate methodology to apply in middleman dumping cases must rather be determined on a case-by-case basis. *Id.* "[T]he knowledge of the producer is one factor that the Department may take into consideration." *Id.* Commerce noted that the other instances where a single weighted-average rate would also be applicable is in nonmarket economy cases and in "collapsing" cases. *Id.* at 12. Because none of these situations are applicable in the present case, Commerce's decision to apply combination rates was therefore based on a factual record which provided no evidence of knowledge by the producer of middleman dumping. *Id.*

While it is true that establishing knowledge or constructive knowledge by the producer of middleman dumping might present some difficulties, it is no more problematical than establishing knowledge of exportation to the United States. *See* 19 U.S.C. §1677a(a), (b) (1999) (stating that knowledge of exportation to the United States by either the producer or the exporter forms the basis for calculating the export price of the subject merchandise). One requires knowledge of the middleman's prices, while the other requires knowledge of the ultimate destination of the subject merchandise. These are all facts that may be determined during verification of the producer and the middleman. "It is therefore not unreasonable to analyze the knowledge of the producer in middleman dumping transactions as an important factor in determining if the use of a weighted-average or combination rate is appropriate." Remand Determination at 11–12.

In addition, Defendant-Intervenors argue that middleman dumping is an inherently strange behavior that indicates evasion of antidumping duties. Defendant-Intervenors' Brief at 10. They maintain that "[u]nder no easily imaginable circumstances will a middleman such as Ta Chen on its own be inclined and able to continue reselling merchandise at substantially below cost in substantial quantities." *Id.* at 11. They also argue that "by not penalizing a producer considered not to be responsible for middleman dumping," the Department's selection of combination rates in the present case will further encourage this middleman dumping. *Id.* Defendant, however, argues that Defendant-Intervenors' arguments "suffer from speculation" and that "[m]ere speculation upon the part of [Defendant-Intervenors] does not detract from Commerce's finding that it has 'no basis to believe or suspect that the producer was aware or should have been aware that the middleman would be likely to dump subject merchandise into the United States.'" Defendant's Memo at 15 (citation omitted).

While the possibility always exists that prices on the subject merchandise were lowered through concealed rebates, there is absolutely no evidence on the record that the present case involves such a situation. "Commerce is required to verify the information upon which it relied in

making its final determination." *Tatung Co. v. United States,* 18 C.I.T. 1137, 1140 (1994). This verification "is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness." *Bomont Indus. v. United States,* 14 C.I.T. 208, 209, 733 F. Supp. 1507 (1990). Although evasion is a common possibility, auditors will research further only when they discover facts indicating the actuality thereof. *Id.* The burden, however, rests on the parties to create an adequate record, *Tatung Co.,* 18 C.I.T. at 1140; *Chinsung Indus. Co. Ltd. v. United States,* 13 C.I.T. 103, 106, 705 F. Supp. 598, 601 (1989), and "[s]peculation is not support for a finding of failure to verify." *Asociacion Colombiana de Exportadores de Flores v. United States,* 13 C.I.T. 13, 15, 704 F. Supp. 1114, 1117 (1989) *aff'd*, 901 F.2d 1090 (Fed.Cir. 1990). Since no evidence of collusion surfaced during verification of the producer and the middleman, Defendant-Intervenors' argument amounts to pure speculation. As Defendant correctly points out, "[t]o the extent that [Defendant-Intervenors are] concerned about evasion of dumping duties * * * it suffices to note that Commerce is well-aware of the enforcement issues associated with the use of combination rates in middleman dumping cases *(Remand Determination* at 29) and has indicated that, given its limited experience with middleman dumping, it 'does not intend by this decision to announce a settled practice.' [Defendant-Intervenors'] concerns about evasion in future cases should be addressed and resolved when such cases arise." Defendant's Memo at 15–16 (internal citations omitted).

Accordingly, Commerce has fulfilled its duty of preventing the evasion of antidumping duties through the imposition of combination rates where there is no evidence on the record that the producer had knowledge of the middleman's dumping.

V

CONCLUSION

For the foregoing reasons, the court finds that Commerce's Remand Determination is supported by substantial evidence and in accordance with the law.

(Slip Op. 02–94)

XEROX CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 99–02–00086

[Defendant's motion for summary judgment granted in part and denied in part; Plaintiff's motion for summary judgment denied.]

(Decided August 22, 2002)

Neville Peterson LLP, John M Peterson, (Curtis W. Knauss), for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, United States Department of Justice; *John J. Mahon,* Acting Attorney in Charge, International Trade Field Office; *(Barbara M. Epstein, Amy M. Rubin),* Civil Division, United States Department of Justice, Commercial Litigation Branch; *Beth C. Brotman*, Attorney, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Services, of Counsel, for Defendant.

OPINION

I. INTRODUCTION

BARZILAY, *Judge:* This case is before the court on cross-motions for summary judgment. Plaintiff ("Xerox"), a domestic importer, challenges Defendant's ("Customs" or "Government") denial of its petition to reliquidate twelve entries of Xerox merchandise under 19 U.S.C. § 1520(c)(1)(1994).[1] Defendant moves for summary judgment, alleging that Plaintiff's incorrect entry of the merchandise was a "mistake of law," which is not remediable under § 1520(c)(1), as the entry-writer was mistaken as to the correct classification of the merchandise, but knew the nature and capabilities of the merchandise and, furthermore, that Plaintiff lacks evidence to prove that the classification was due to "mistake of fact," inadvertence, or clerical error. Plaintiff cross-moves claiming that the classification was a "mistake of fact," as the entry-writer was misled by the invoice accompanying the merchandise and was unaware of the actual physical nature and capabilities of the merchandise, and, alternatively, that the customs broker failed to protest misclassified entries due to reliance on a faulty database. The court grants Defendant's motion for summary judgment in part and denies it in part, and denies Plaintiff's motion for summary judgment, as it finds material facts at issue regarding the entry procedures used by Plaintiff's custom broker as discussed below.

II. BACKGROUND

From May through September 1995, Xerox imported multi-function printers consisting of "MajestiK" models 5760, 5760 ADF, and 5765 and

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[1] § 520(c)(1) of the Tariff Act, codified at 19 U.S.C.§ 1520(c)(1) allows reliquidation for entries incorrectly classified due to "mistake of fact," inadvertence, or clerical error. The text reads:

(c) Reliquidation of entry or reconciliation

Notwithstanding a valid protest was not filed, the Customs Service may, in accordance with regulations prescribed by the Secretary, reliquidate an entry or reconciliation to correct—

(1) a clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in electronic transmission, not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction.

"Regal"model 5790.[2] *Def.'s Statement of Material Facts Not in Issue,* at ¶ 7, 9 *("Def.'s Statement"); Pl.'s Resp. to Def.'s Statement of Material Facts Not in Issue,* at ¶ 7,9 *("Pl.'s Resp.").* The merchandise entered through the Port of Los Angeles, California. *Mem. In Supp. of Def. Mot. For Summ. J.* at 2. Xerox's designated customhouse broker at this port is A.J. Fritz Companies ("Fritz"), as Associated Customhouse Brokers, Inc. ("ACB" or "Associated"), Xerox's principal customhouse broker, does not have an office in Los Angeles. *Id.* at 5. Jared Hirata, entry writer at Fritz, classified the entry of the merchandise under subheading 9009.12.00 of the Harmonized Tariff Schedule of the United States ("HTSUS").[3] *Deposition of Nathan Reep ("Reep Dep.")* at 20. Between September 1995 and January 1996, Customs liquidated the merchandise under this heading at 3.7% *ad valorem. Pl.'s Mem. of P. & A. in Supp. of Pl.'s Cross-Mot. for Summ. J. ("Pl.'s Br."), at* 1–2. In December 1995 and February 1996, Xerox pursued a Customs' ruling on the correct classification of the "Regal" and "MajestiK" models, respectively. See *New York Customs Ruling 817475 of December 22, 1995 ("NY Customs' Ruling 817475"); New York Customs Ruling A80061 of February 14, 1996 ("NY Customs Ruling A80061").*

Prior to Customs' ruling, on July 17, 1995, Mr. Graham Cassano, Corporate Manager for Customs and Tariff administration at Xerox, issued a letter instructing Mr. Glenn Levitt of ACB to enter these models under subheading 8471.92.5400[4] with duty-free status and to protest any entries previously entered under 9009.12.00. *Letter from Cassano to Levitt of 7/17/95.* The twelve entries at issue were classified under subheading 9009.12.00; however, they were not protested within the 90 day time period after liquidation allowed by 19 U.S.C. § 1519. Plaintiff claims this was due to the reliance on a incomplete database by ACB. *Def.'s State-*

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[2] Xerox submitted the following entries for reliquidation:

Entry Number	*Entry Date*	*Liquidation Date*
110–0060152–4	5/17/95	9/8/95
110–0060198–7	5/25/95	9/15/95
110–0060292–8	6/12/95	10/6/95
110–0060359–5	6/21/95	10/6/95
110–0060362–9	6/22/95	10/20/95
110–0060534–3	7/19/95	12/1/95
110–0060611–9	8/3/95	12/1/95
110–0060765–3	8/30/95	12/15/95
110–0060704–2	8/16/95	12/1/95
110–0060778–6	8/29/95	12/15/95
110–0060808–1	9/6/95	12/22/95
110–0060865–1	9/21/95	1/19/96

Def.'s Statement at ¶ 7,9; *Pl.'s Resp.* at ¶ 7,9.

[3] The text of HTSUS 9009.12.00 reads:

9009	Photocopying apparatus incorporating an optical system or of the contact type and thermocopying apparatus; parts and accessories therof:	
	Electrostatic photocopying apparatus:	
*	* * * * * *	
9009.12.00	Operating by reproducing the original image via an intermediate onto the copy indirect process)	3.7%

[4] The text of the HTSUS 8471.92.5400 reads:

8471	Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included	
8471.92	Other	
*	* * * * * * *	
8471.92.5400	Other:	
	Laser:	
	Capable of producing more than 20 pages per minute	Free

ment, at ¶ 1; *Pl.'s Br.,* at 5. On December 22, 1995 and February 14, 1996, Customs ruled that the "Regal" and "MajestiK" models were to be classified under the duty free subheading of HTSUS 8471 for liquidation (The Regal model was classified under 8471.92–5400, the MajestiK model was classified under 8471.60.6100. *NY Customs Ruling 817475*; *NY Customs Ruling A80061).* Xerox provided Mr. Reep with written instructions to this effect on March 20, 1996 for the "MajestiK" model and on April 15, 1996 for the "Regal" model. *Def.'s Statement*, at ¶ 14; *Pl.'s Resp.,* at ¶ 14.

On September 10, 1996, Xerox petitioned for reliquidation of these twelve entries, within the year period allowed by § 520(c)(1).[5] Customs denied Xerox's petition and subsequent protest of the denial, concluding that the entry of the merchandise as 9009.12.00 instead of 8471.92, was a "mistake of law" not remediable under § 520(c)(1). Xerox filed a timely summons in this Court to challenge Customs' decision. Customs then filed its motion for summary judgment and Xerox subsequently filed its cross motion.

III. STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and the admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." USCIT R. 56(c). "This may be done by producing evidence showing the lack of any genuine issue of material fact or, where the non-moving party bears the burden of proof at trial, by demonstrating that the nonmovant has failed to make a sufficient showing to establish the existence of an element essential to its case." *Black and White Vegetable Co., v. United States*, 125 F. Supp 2d 531, 536, 24 CIT ____, ____ (2000) (citing *Avia Group Int'l. Inc., v. L.A. Gear California, Inc.,* 853 F. 2d 1557, 1560 (Fed. Cir. 1988); *Celotex Corp. v. Catrett,* 477 U.S. 317, 324–325. (1986)).

In determining if a party has met its burden the court does not "weigh the evidence and determine the truth of the matter, but * * * determine[s] whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). The court views all evidence in the light most favorable to the non-moving party, drawing inferences in the nonmovant's favor. *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962).

IV. DISCUSSION

Section 520(c) of the Tariff Act of 1930, as amended at 19 U.S.C. § 1520(c) provides that in certain cases, notwithstanding that a valid protest was not filed, an entry may be reliquidated to correct:

> a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record established by documentary evi-

[5] Parties agree that the request for reliquidation for entry 110–0060152–4 was not filed within the one year and should be severed and dismissed. *Def.'s Statement*, at ¶ 2; *Pl.'s Resp.*, at ¶ 2.

> dence, in any entry, liquidation, or other customs transaction, when the error, mistake, or other inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction.

Section 1520(c)(1). This section is not a remedy for every mistake, but offers relief in a limited number of circumstances. *See PPG Industries, Inc. v. United States*, 7 CIT 118, 123 (1984). "A 'mistake of fact exists where a person understands the facts to be other than they are, whereas a mistake of law exists where a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts.'" *Hambro Automotive Corp. v. United States,* 66 C.C.P.A., 113, 118, 603 F.2d 850, 854 (1979) (quoting 58 C.J.S. *Mistake* p. 832). An inadvertence is defined as an oversight or involuntary accident. *PPG*, 7 CIT at 124. Clerical errors are a mistake made by a subordinate, who does not have any duty to exercise judgment with regard to the classification. *See Ford Motor Co. v. United States*, 24 CIT ____, ____, 116 F. Supp. 2d 1214, 1241 (2000) (citing *S. Yamada v. United States*, 26 C.C.P.A. 89, 94 (1938)). Clerical mistakes are often mistakes in actual writing or entering of numbers. *See PPG,* 7 CIT at 124.

Xerox points to two mistakes evident in the record which it claims are correctable under § 520(c)(1). Xerox claims that the failure of ACB to protest the entries after they had been wrongly classified was an inadvertence and, therefore, correctable under § 520(c)(1). If the entries had been properly protested Customs would have granted relief through the protest. The second mistake is one of fact, that the person making the actual entries for Fritz mistakenly relied on the description given on the invoice to determine the proper classification. The invoice description was incomplete because it did not describe the actual contents of the entries. In this way a mistake as to the correct characteristics of the product led to the incorrect HTS number on the entry documents.

A. Failure to protest as a mistake or inadvertence correctable under Section 520(c).

Xerox seeks to expand the scope of Section 520(c) to allow a party to correct a failure to protest an improper classification. *Pl.'s Br.* at 19. Previous cases have held that despite failure to protest a mistake of fact can be corrected. However, no case on record holds a failure to protest can be mistake of fact in itself.

Prior to securing a Customs ruling confirming the status of the two printers as classifiable at the duty-free subheading, Xerox instructed its brokers to classify them under this subheading and protest any entries already entered. *Cassano Aff.* at ¶ 5; Cassano Letter to Levitt, July 17, 1995. According to Mr. Levitt of Associated Customhouse Brokers, he developed a database to track the entries. *Levitt Aff.* at ¶ 5. Based on this database, Associated filed several protests challenging the liquidation of the multifunction printers already entered under HTSUS 9009.12. This database, however, was not complete. It failed to include several entries,

including all those at issue in this case. *Id.* at ¶6. This mistake was discovered after the ninety day deadline to file protests had passed.

The government does not deny that had the protests been filed within ninety days they would have been granted. Xerox's failure to file a timely protest, however, means that § 520(c), which allows one year to correct a mistake not based on law, is its only avenue of relief. The government contends, in turn, that § 520(c) does not provide relief from failure to file a timely protest.

Xerox points to two cases to support its contention that § 520(c) can be used to correct a failure to protest. *Pl.'s Brief* at 14–15. *Executone Information Systems v. United States* involved duty-free imports under the Carribean Basin Economic Recovery Act. 96 F.3d 1383 (Fed. Cir. 1996). To qualify for duty-free treatment importers had to file "Form A Certificates of Origin." Executone mistakenly failed to file the Form A, and did not file a timely protest. The goods were liquidated at the non duty-free rate. Executone filed for relief under § 520(c), which was denied. On appeal to the Federal Circuit, the government asserted that liquidations are conclusions of law and therefore not correctable. Executone claimed that it mistakenly believed that the Form A had been filed, and, therefore, made a mistake of fact not law. The Court rejected the government's argument that all aspects of liquidation are conclusions of law beyond the remedial power of § 520(c). The Court held that merely because the "appeal does not present a typical challenge to a Customs classification where Customs evaluated merchandise and, based on its construction of the tariff schedule, determined into which of two categories the merchandise must be placed," does not mean relief cannot be granted. *Executone,* 96 F.3d at 1388. Although *Executone* rejected the exceedingly narrow reading of relief under § 520(c) advocated by the government in that case, its holding does not extend far enough to help Xerox here. *Executone* dealt with compliance with import procedures, a predicate to a classification. Xerox is attempting to extend § 520(c) to correct a failure to protest, which is subsequent to classification and liquidation. In addition, Xerox is not attempting to correct a defect in a protest, but the actual decision not to file a protest.

Xerox also seeks support for its position from *Aviall of Texas, Inc. v. United States*, 70 F.3d 1248 (Fed. Cir. 1995). As in *Executone*, the importer in *Aviall* failed to submit the proper documentation for a duty-free import. Aviall had a blanket certificate in place, which lapsed after one year. Aviall failed to renew the certificate, but entered the product believing it was still valid. The court of appeals held this was a mistake of fact, not law. It affirmed the position taken by this Court that "the failure to file a new yearly blanket certification was due to the fact that the broker 'forgot' to renew the blanket certification for the period encompassing these entries." 70 F.3d at 1251; *see also Aviall of Texas, Inc. v. United States*, 18 CIT 727, 734–735, 861 F. Supp. 100, 107(1994)). Mistakes of fact will often have legal consequences. This alone does not convert them into mistakes of law. Both *Executone* and *Aviall* support the

idea that § 520 is not restricted to decisions relating only to classification or liquidation, and that "Customs transaction" under the statute can encompass a broad spectrum of activities. They do not show, however, that one remedial process—reliquidation under § 520(c)—should be allowed to supplant a different remedial process—a proper protest.

Section 1514, which provides for protests, and § 1520(c)(1) which provides for reliquidation to correct mistakes not based on law, are two separate avenues of relief under the statute. There is some interaction between the two remedies. An untimely protest by an importer under § 1514 may provide notice to Customs of a claim for reliquidation under § 1520(c)(1), such that an importer may be entitled to relief because his protest is converted into a claim under § 1520(c)(1). *See George Weintraub & Sons v. United States*, 12 CIT 643, 691 F. Supp. 1449 (1988) *vacated as moot* 18 CIT 594, 855 F.Supp. 401 (1994). Once a protest is converted to a request for reliquidation under § 1520, if Customs fails to reliquidate, the importer must protest under § 1514(a)(7) or its claim will expire. *See Everflora Miami, Inc. v. United States,* 19 CIT 485, 188, 885 F. Supp. 243, 247 (1995).

In this case, Plaintiff is not seeking to remedy a single protestable mistake. Xerox is attempting to use one mistake (failure to file a protest) to bootstrap another mistake (failure to properly classify entries) which it failed to assert under § 1514, into one correctable under § 1520. In addition, Xerox, with its "failure to protest" claim, argues that the subsequent mistake obviates the need to prove the initial mistake of fact in classification. It is evident that even if the court were to recognize a remedial link between sections § 1514 and § 1520, it would not alleviate the need for Xerox to establish a viable § 1520(c)(1) claim on its initial mistake of classification. *See ITT v. United States*, 24 F.3d 1384, 1387 n.4 (Fed. Cir. 1994) ("We emphasize that under no circumstances may the provisions of § 1520(c)(1) be employed to excuse the failure to satisfy the requirements of § 1514.") If Xerox claimed the initial mistake was one of misapprehension of the law, not correctable under § 1520, it could not rely on a subsequent mistake of fact (failure to protest) to cover its mistake of law. If the initial mistake was a mistake of fact, then the failure to protest is irrelevant, because Xerox has one year to request reliquidation under § 1520(c)(1) to correct the mistake of fact, "notwithstanding its failure to protest." § 1520(c). The court refuses Xerox's invitation to extend § 1520(c)(1) beyond what logic and precedent will support, and, consequently, Xerox cannot prevail on its argument that failure to protest by itself is a mistake of fact under § 520(c). Therefore, Defendant is entitled to summary judgment on this claim. To defeat Defendant's motion for summary judgment in its entirety Xerox must establish a viable "mistake of fact" claim based on the initial mistake of classification at entry.

B. Mistake of Fact by Fritz Due to Inaccurate Invoices.

Plaintiff's second claim of mistake of fact that entitles it to relief under § 1520(c)(1) is that the broker in Long Beach, Fritz, responsible for

the entries mistakenly relied upon the invoice description of the product resulting in a misclassification. *Pl.'s Br.* at 13. As discussed above, in order to show a mistake of fact eligible for reliquidation under § 1520, the mistake must be distinguished from a mistake of law.

> A mistake of fact is any mistake except a mistake of law. * * * It has been defined as a mistake which takes place when some fact which indeed exists is unknown, or a fact which is thought to exist, in reality does not exist. A mistake of fact exists where a person understands the facts to be other than they are, whereas a mistake of law exists where a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts.

Hambro, 603 F.2d at 853–54 (internal quotations and citations omitted). Xerox's invoices described the products as copiers, when for purposes of classification they were, in fact, printers entitled to the duty-free rate. The mistake is, therefore, one of fact, because the invoices' description, relied upon by the customs broker, misinformed the broker as the actual contents of the entries.

Defendant, rightly, asserts that Plaintiff bears the burden of coming forward with some evidence to support its claim. The government contends, "that the evidence Xerox submitted was insufficient to demonstrate that any misclassification was caused by a mistake of fact not constituting an error in the construction of a law, remediable under 19 U.S.C. § 1520(c)(1)." *Def.s' Sur-Reply to Pl.'s Reply to Def.'s Resp. to Pl.'s Opp. to Def.'s Mot. for Summ. J. ("Def.'s Sur-Reply")* at 2 (internal quotations omitted).

There are three essential facts that Xerox needs to establish to defeat the government's motion for summary judgment on this ground: first, that the invoices for the Regal and MajestiK models described them as "copiers" instead of "printers;" second, that for purposes of classification this description could result in a improper classification under the HTSUS; and third, that it is likely the entry writer at Fritz wrongly relied on the invoice description in making the classification decision. The parties do not dispute that the invoices describe the entries as "copiers," or that the 3.7% duty rate under HTSUS 9009.12 applies to copiers, while the duty-free rate under 8471 applies to printers. To support its assertion that the entry writer improperly classified the entries as a result of the inaccurate description of the models the Plaintiff submitted an affidavit of Nathan Reep ("Reep Affidavit."). It is the value of this affidavit that determines the outcome of the cross-motions before the court.

Mr. Reep was a supervisor at Fritz. In his affidavit he states that he oversaw thousands of entries at Fritz in 1995, including the entries at issue in this case. Reep claimed that he worked on the Xerox account for Fritz for several years, and that most of the products he dealt with were copiers classified under HTSUS 9009. *Reep Aff.* at ¶ 2. He stated he was aware that Customs had issued rulings in 1994 that multifunction printers were to be classified under HTSUS 8471. *Id.* at ¶ 3. He stated

that had he known the true nature of the products, based on his understanding of the Harmonized Tariff Schedule he would have properly classified the products under HTSUS 8471. *Id.* at ¶ 6. However, because he "was not advised of and did not know the facts concerning the subject entries, outside of the commercial invoices to [him, he] entered the printers under HTSUS subheading 9009.12." *Id.* at ¶ 7.

Subsequent to the submission of Mr. Reep's Affidavit he was deposed by counsel for the government. During that deposition several gaps in his story were revealed, and he retracted or amended several statements in his affidavit. Defendant attacks the Reep Affidavit as being "wholly without foundation," because "Mr. Reep may not even have been involved in entering the merchandise at issue." *Def.'s Sur-Reply* at 3. Defendant asks that the court disregard the affidavit in its entirety. *Id.* Problems with Mr. Reep's Affidavit include that it is not clear whether he held the position of supervisor at Fritz during the time the specific entries were filed, and, therefore, was not "responsible for the preparation of the entries that are the subject of this case." *Id.* at 4; *Reep Aff.* at ¶ 2. Mr. Reep also conceded that he was not familiar with the Customs rulings regarding multi-function printers, which means that he could not establish that there was no confusion as to the tariff schedule. *See Def.'s Sur-Reply* at 5. Based on the responses provided by Mr. Reep at his deposition, Defendant has shown that Mr. Reep was not familiar with all aspects of the tariff schedule, and therefore, had he been responsible for the entries he could have made a mistake of law. Defendant has also cast doubt on whether Mr. Reep in his oversight role made any decision about the proper classification of the models in question. Finally, Defendant has cast doubt on whether Mr. Reep was in fact working on the Xerox account at the time of the entries.[6]

Despite these deficiencies in Mr. Reep's testimony, and, consequently, in Xerox's case, Mr. Reep was able to provide two pieces of evidence to support Plaintiff's cross-motion for summary judgment. First, as a supervisor on the Xerox account during or immediately after the entries at issue were made, Mr. Reep was familiar with the internal practices of Fritz for handling the entries and making classifications. *See Reep Dep.* at 20–30. Second, his testimony established that it was the general practice of Fritz to rely on the "airway bill, the packing slip and the invoice" to determine how to enter the merchandise, including its classification. *Reep Dep* at 23.

Given this quantum of information in support of Plaintiff's motion for summary judgment, to dispose of the pending motions it is necessary to return to the requirements for summary judgment. The court has before it two motions. Defendant contends,

> Xerox has failed to submit legally sufficient evidence establishing, or at the very least, demonstrating the existence of genuine triable

[6] Reep's resume, submitted with his deposition, states he worked at Fritz the year after (1996) the entries at issue. During his deposition he explained that he prepared the resume from memory and that the dates may not have been accurate. *See Reep Dep.* at 43.

> issues of fact, that its broker or Customs officials made a "mistake of fact" in entering or liquidating the merchandise under subheading 9009.12.00 HTSUS, and has acknowledged that it has no information regarding the actual basis for such classification.

Def.'s Resp. to Pl.'s Opp. to Def.'s Mot. for Summ. J. and Cross-Mot. for Summ. J. at 15. Defendant made this claim prior to the submission of the Reep Affidavit and subsequent deposition. However, the government claims that the Reep Affidavit does not change its contention that Xerox has failed to meet its burden. *See Def.'s Sur-Reply* at 2.

Normally, the "movant bears the burden of demonstrating absence of all genuine issues of material fact." *Cooper v. Ford Motor Co.* 748 F.2d 677, 679 (Fed. Cir. 1984). However, where the nonmovant party bears the burden of proof at trial, the moving party can succeed by "demonstrating that the nonmovant has failed to make a sufficient showing to establish the existence of an element essential to its case." *Black and White Veg. Co.*, 125 F. Supp. at 536 (citations omitted). Xerox is a nonmoving party who bears the burden of proof at trial. The essential element to its case that it needs to show by a preponderance of the evidence at trial is that the entry writer at Fritz mistakenly relied on the inaccurate description provided on the invoice for the Regal and MajestiK printers. As discussed above, Xerox relies on the Reep Affidavit to support this claim. Defendant asks that the court disregard the whole of the Reep Affidavit because it "does not accurately represent either Mr. Reep's involvement with the merchandise in issue here or Mr. Reep's memory. * * *" *Def.'s Sur-Reply* at 3.

Under USCIT Rule 56(e) the court requires that "affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." If some statements contained in the affidavit do not meet the requirements of the rule, it does not foreclose the use of other statements which do qualify. *See U.S. v. Alessi*, 599 F.2d 513, 514–15 (2d Cir. 1979). Therefore the court does not have to disregard the whole of the Reep Affidavit, only those parts which do not comport with Rule 56(e). Examining the affidavit, in light of the deposition, Mr. Reep's Affidavit provides facts, based on personal knowledge, of the two essential points Xerox needs to establish. Mr. Reep worked at Fritz on the Xerox account the year of, or the year after, the entries at issue. *Reep Dep*. at 79. Mr. Reep was familiar with the practice at Fritz that primarily relied on the invoice description for filing of entries on the Xerox account. *Id.* at 71. This description of the procedures in place, along with the actual invoices describing the products as copiers, provides some evidence that the classification was due to a mistake of fact as to the actual product being entered. If all inferences are granted to Xerox's statement of facts, it is possible to find that the misclassification was a result of a mistake of fact. Therefore, it would not be proper to grant Defendant's motion for summary judgment.

The government, by not putting forward any evidence to challenge the Plaintiff's version of events has left itself open to the granting of summary judgment in favor of the Plaintiff, on the grounds that no material facts are in dispute. Plaintiff has made out a prima facie case, rebutting the presumption held by the government. Defendant has, however, raised a significant issue regarding the credibility of the Reep Affidavit. Credibility issues are properly left for trial, not to be weighed by the court at the summary judgment phase. *See Glaxo-Wellcome v. United States,* 24 CIT ____, ____, 126 F. Supp. 2d 581, 585 (2000). Despite producing a modicum of evidence to establish each of the elements of its case, Xerox has not shown that it would necessarily prevail at trial.[7] In consideration of the eleventh hour discovery of Mr. Reep and the surrounding inconsistencies in his affidavit, it would not be proper to grant Xerox's motion for summary judgment on such meager supporting documents.[8] *See e.g. Hanover Ins. Co. v. United States,* 26 CIT ____, ____, Slip Op. 02–71 at 1 (2002) ("The court determined to require the individuals who subscribed to those submissions to appear at a trial and undergo crossexamination upon the long-held belief that that kind of interrogation is the surest test of truth and a better security than the oath.") (citations omitted).

In addition, during the deposition of Mr. Reep, specific procedures regarding how Fritz handled the Xerox account were fleshed out. Apparently, Mr. Reep supervised the work of the entry writers, but did not review all the entries, relying instead on spot checks. *Reep Dep*. at 33. The entries at issue in this case were done by Jared Hirata. *Id.* at 32. Mr. Reep reported that if he or Mr. Hirata had any questions about how to classify an entry, or if the invoice, air waybill or packing list description was not sufficient they would contact Ms. Reina Cavatana at Xerox. *Id.* at 23–24. In this case, there is no record of anyone at Fritz contacting Ms. Cavatana or anyone else to clarify the nature of the Regal and MajestiK models. Mr. Reep also reported that work done at Fritz was reviewed in monthly meetings, based on a report done by Mr. Reep. *Id*. at 26.

Given these sources of information, there is a possibility that trial may produce enough evidence to reach a supportable conclusion that the misclassifications were caused by a mistake of fact. The record currently before the court is sufficient to defeat Defendant's motion for summary judgment. However, it is not enough to support granting Plaintiff's cross-motion for summary judgment.

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[7] Mr. Reep did not contradict himself with regard to the two facts necessary to support summary judgment. Denying summary judgment for the purpose of setting an issue for trial to evaluate credibility of a witness is distinct from those cases where a party contradicts its own evidence to attempt to create a dispute of material fact. This opinion, therefore, is consistent with those cases holding that a "party may not * * * defeat the motion merely by submitting [statements] containing * * * contradictions of previously admitted facts." *United States v. Modes, Inc.,* 16 CIT 879, 883, 804 F. Supp. 360, 365 (1992) (citing *Lovejoy Electronics, Inc. v. O'Berto,* 873 F.2d 1001, 1005 (7th Cir. 1989); *Van T. Junkins and Associates v. U.S. Industries*, 736 F.2d 656, 657 (11th Cir. 1984); *Radobenko v. Animated Equipment Corporation*, 520 F.2d 540, 544 (9th Cir. 1975); *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)).

[8] Plaintiff initially claimed it was unable to locate Mr. Reep, and it was only after the initial round of briefings that his affidavit was produced. *See Pl.'s Resp. to Def.'s Motion to Strike Untimely Aff.* at 2.

V. CONCLUSION

For the foregoing reasons Defendant's Motion for Summary Judgment is denied in part and granted in part, and Plaintiff's Motion for Summary Judgment is denied. The parties are to confer and contact chambers within thirty days to report on timing for a trial in this matter. Judgment will be entered accordingly.

(Slip Op. 02–95)

GEUM POONG CORP. AND SAM YOUNG SYNTHETICS CO., LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT *v.* E.I. DUPONT DE NEMOURS, INC., ARTEVA SPECIALTIES S.A.R.L., D/B/A KOSA, AND WELLMAN, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 00–06–00298

[ITA's antidumping duty remand determination affirmed.]

(Dated August 22, 2002)

Sandler, Travis & Rosenberg, P.A. (Philip S. Gallas, Gregory S. Menegaz and *Mark R. Ludwikowski)* for plaintiffs.

Robert D. McCallum, Jr., Acting Assistant Attorney General, *David M. Cohen,* Director, *Lucius B. Lau,* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Jonathan Sills), Scott D. McBride,* Office of the General Counsel, United States Department of Commerce, of counsel, for defendant.

Collier Shannon Scott, PLLC (Paul C. Rosenthal and *David C. Smith, Jr.)* for defendant-intervenors.

OPINION

RESTANI, *Judge:* This matter comes before the court as a result of the court's decision in *Geum Poong Corp. v. United States,* 193 F. Supp. 2d 1363 (Ct. Int'l Trade 2002) [hereinafter, *"Geum Poong II"].* There, the court had remanded the Department of Commerce's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand,* (October 5, 2001) [hereinafter "First Redetermination"], which failed to address the court's concerns in *Geum Poong Corp. and Sam Young Synthetics Co., Ltd., v. United States,* 163 F. Supp. 2d 669 (Ct. Int'l Trade 2001) [hereinafter *"Geum Poong I"]* regarding the calculation of Geum Poong's Constructed Value ("CV") profit in the investigation *Certain Polyester Staple Fiber from the Republic of Korea and Taiwan,* 65 Fed. Reg. 16,880 (2000), *amd'd,* 65 Fed. Reg. 33,807 (Dep't Comm. 2000) (final determ.) [hereinafter "Final Determination"]. The court now reviews Commerce's *Final Results of Redetermination Pursuant to Court*

Remand Order, (May 1, 2002) [hereinafter, "Second Redetermination"].[1]

JURISDICTION

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000), which provides for judicial review of a final determination by the Department of Commerce in accordance with the provisions of 19 U.S.C. § 1516a(a)(2)(B)(i) (1994).

BACKGROUND

In *Geum Poong II,* the court rejected as unreasonable and unsupported Commerce's calculation on remand of Geum Poong's CV profit under 19 U.S.C. § 1677b(e)(2)(B) (2000). The court found that Commerce had failed to determine whether an appropriate profit cap could be applied, and had not presented sufficient grounds for dispensing with the profit cap altogether. *See Geum Poong II,* 193 F. Supp. 2d at 1366–67. The profit cap is mandated by statute for the method of profit rate calculation chosen by Commerce. *See* 19 U.S.C. § 1677b(e)(2)(B)(iii).[2] The court also rejected Commerce's explanation of the reasonableness of its chosen methodology. *See Geum Poong II,* 193 F. Supp. 2d at 1367. Specifically, the court found that Commerce in its First Redetermination: (1) did not provide a valid reason why the profit experience of three other Korean producers of PSF—Samyang, Saehan, and SK Chemicals—would be unrepresentative of Geum Poong's home market sales experience; and (2) failed to account for certain deficiencies and inconsistencies in its method that likely would skew the calculations. *Id.*

The court therefore instructed Commerce to redetermine Geum Poong's CV profit rate by applying a capped profit rate, unless available data would render the cap unrepresentative or inaccurate and specifically if available data to calculate a cap were "significantly undermined" by non-home market data. *Id.* at 1367, 1372 & n.11. The court also ordered Commerce to reevaluate the available data sources for calculating a CV profit rate, drawing attention to the factors Commerce identified and weighed in *Pure Magnesium from Israel,* 66 Fed. Reg. 49,349, (Dep't Comm. Sept. 27, 2001) (final determ.), namely: (1) the similarity of the potential surrogate companies' business operations and products to the respondent's; (2) the extent to which the financial data of the surrogate company reflects sales in the United States as well as the home market; and (3) the contemporaneity of the surrogate data to the period of investigation ("POI"). *See Geum Poong II,* 193 F. Supp. 2d at 1368 n.6. The court specified that on remand Commerce must calculate a profit rate derived from the financial statements of the three other Korean PSF

[1] Familiarity with the earlier decisions is presumed. Commerce's decisions on non-profit rate issues were sustained in *Geum Poong I.*

[2] Under Alternative Three, Commerce may calculate CV profit by "any * * * reasonable method, *except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise* [.]" 19 U.S.C. § 1677b(e)(2)(B)(iii) (emphasis added). The emphasized portion of Alternative Three is referred to as the "profit cap." *See Floral Trade Council v. United States,* 41 F. Supp. 2d 319, 326–27 (Ct. Int'l Trade 1999).

producers, or from the industry-wide Bank of Korea ("BOK") profit data, or some other method that would avoid the deficiencies identified by the court. *See id.* at 1372.

DISCUSSION

In calculating a profit cap in the Second Redetermination, Commerce preliminarily rejected the use of the financial statements of Samyang, reasoning that because "50.6% of the company's sales are to export markets * * * Samyang's sales are predominantly non-home market sales and, under the Court's standard, Samyang's profit should not be used to calculate a facts available profit cap." Second Redetermination at 4. Commerce then assessed the relative validity of the remaining sources—i.e., the BOK data, and the financial statements for Saehan and SK Chemicals. Commerce evaluated the data according to two factors used in *Pure Magnesium from Israel*—(1) the similarity of the merchandise to the subject merchandise; (2) the contemporaneity of the data source with the POI—as well as an additional factor, the "extent of detail provided," for the purpose of accounting for the change in value of currency. Commerce rejected the use of the BOK data principally on the grounds that the BOK data corresponded to the "manmade fibers" industry, which it considered as likely to cover more products than just the subject merchandise. As a result, Commerce calculated a facts available profit rate based on a simple average of the profit rates of Saehan and SK Chemicals, which satisfies the cap language of the statute.[3] Applying this profit rate, Commerce calculated a *de minimis* anti-dumping duty rate of 0.12 percent for Geum Poong, and revoked the antidumping duty order for that company. Second Redetermination at 10.

The Domestic Industry ("Petitioners") protests Commerce's reliance on the Saehan/SK data and requests that the court direct Commerce to apply the actual, weighted average profit rate for Samyang and Sam Young as the surrogate facts available profit rate for Geum Poong. For its part, Geum Poong requests that the court order Commerce to publish written notice of the lifting of suspension of entries and revised anti-

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[3] Although attempting to comply with the court's instructions to calculate "facts available profit cap," Commerce characterizes the instruction as imposing an "extra step," that was "not articulated in either the statute, or the [Statement of Administrative Action]" created by the court through a misinterpretation of its analysis in *Pure Magnesium From Israel* 66 Fed. Reg. 49,349, (Dep't Comm. Sept. 27, 2001) (final determ.) ("Facts available profit cap" was a shorthand description of a profit cap which may contain some non-home market sales but that Commerce may still find probative.). *See Statement of Administrative Action,* accompanying H.R. Rep. No. 103–826(I) (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040 (1994) [hereinafter "SAA"]). In *Geum Poong I,* the court explained that "the SAA, while approving Commerce's 'no profit cap' methodology for cases where no cap data is available at all, provides no guidance in the case of a technically deficient cap. * * * Because the statute mandates the application of a profit cap, Commerce cannot sidestep the requirement without giving adequate explanation even in a facts available scenario." *Geum Poong I,* 163 F. Supp. 2d at 679 (footnote omitted). The court further specified that "Although the statute indicates that the profit cap is to based on home-market sales, the SAA contemplates only that Commerce will dispense with the profit cap when profit data are unavailable with respect to other companies on sales of the same general category of products. The SAA says nothing about dispensing with the profit cap when segregated data on solely home market sales are unavailable." *Geum Poong II,* 193 F. Supp. 2d at 1366–67 n.5. Rather than lacking any usable data whatsoever, Commerce in this case possessed various sets of data that were each deficient in some way, although the significance of the deficiency was not made clear. Consequently, the court instructed Commerce that it must assess the relative merits of existing data sets in calculating a profit cap before dispensing with the profit cap altogether, given Commerce's obligation in applying facts available to comply with statutory provisions "to the extent possible." *Geum Poong I,* 163 F. Supp. 2d at 675 n.8. The court cited *Pure Magnesium from Israel* as an illustration of the factors Commerce has evaluated in the past. Commerce's contention that the court has imposed an additional burden on the agency is therefore wholly without merit.

dumping margins within ten days of the date upon which the court's decision becomes final.

I. Petitioners' Claims: Calculation of Constructed Value

Petitioners claim that Commerce erred in relying on the Saehan/SK data on the ground that the record is devoid of any specific information about these companies, such as what products they produced and to which markets they sell. Petitioners maintain that although the data relied upon by Commerce "might be reasonable under other circumstances," they are "unequivocally not reasonable where Commerce possesses more accurate, more reliable, and more probative surrogate profit data that reflects the 'home market profit experience' of Korean polyester staple fiber ("PSF") producers," namely the weighted average profit rate for Samyang and Sam Young. Dom. Objections, at 2–3. Second, Petitioners argue that because Commerce relied on the Samyang/Sam Young data for surrogate selling calculation, it is required to rely on the same set of data for calculating surrogate profit data, or otherwise explain the choice of a new data set.

A. Commerce's Discretion to Choose among Reasonable Methods

Petitioners claim that Commerce's use of a particular data set in this case, although "otherwise reasonable," is necessarily unreasonable where another data set is allegedly "more accurate, more reliable, and more probative." Petitioners' argument misrepresents the agency's burden and misconstrues the court's role in reviewing Commerce's choice of methodology. "If relevant information is missing from the record, "Commerce * * * must make [its] determinations based on all evidence of record, weighing the record evidence to determine that which is most probative of the issue under consideration." SAA at 869. Nevertheless, Commerce need not show that its methodology was the only way or even the best way to calculate Geum Poong's CV profit rate. "When Commerce's method is challenged, the Court's proper role is to determine whether the methodology is in accordance with law and supported by substantial evidence. Assuming both criteria are satisfied, the Court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Shandong Huarong General Corp. v. United States,* 159 F. Supp 2d 714, 720–21 (Ct. Int'l Trade 2001) ("Commerce need not prove that its methodology was the only way or even the best way to calculate surrogate values for factors of production as long as it was reasonable.").

Thus, the court must review whether Commerce's choice of methodology is reasonable *of itself* and in accordance with the law, and whether its application thereof is supported by substantial evidence, not whether there existed a more accurate way of calculating Geum Poong's CV profit rate. "In seeking the appropriate facts upon which the agency intends to rely, Commerce enjoys broad discretion," which "'is subject to a rational relationship between data chosen and the matter to which they are to apply.'" *Allied Tube and Conduit Corp. v. United States,* 132 F. Supp. 2d 1087, 1095 (Ct. Int'l Trade 2001) (citing *Mannesmannrohren-Werke*

AG v. United States, 120 F. Supp. 2d 1075, 1088–89 (Ct. Int'l Trade 2000), and *Manifattura Emmepi S.p.A. v. United States,* 16 CIT 619, 624, 799 F. Supp. 110, 115 (1992)).

It is extremely difficult to decide which substitute information is "more accurate" or "most probative." By definition, when surrogates or substitutes are used, there is a built-in inaccuracy.[4] Precision is not a standard which the court may search for in such circumstances. Nonetheless, some choices may represent an abuse of discretion, which is not the case here, as there is no better selection which has been shown to be usable.

B. Framework for Assessing Relative Merits of Surrogate Companies' Data

Commerce appears to read the court's instructions in *Geum Poong II* as mandating a particular framework for analysis in constructing a profit cap, pursuant to which the agency is to determine first whether the potential surrogate's sales are "predominantly * * * non-home market sales," and then to assess the relative validity among the remaining sources in light of their deficiencies. Second Redetermination at 4. Commerce states that "[t]he test for rejection of a company's profit in Commerce's calculations of a 'profit cap,' as expressed by the court, was whether the 'sales of th[o]se companies [were] 'predominantly or 'exclusively' to the United States or to third country markets.'" DOC Response at 8.

The court in *Geum Poong II* stated:

> In calculating a 'facts available profit cap' * * * Commerce must determine whether the sales outside Korea, *or any other identified deficiency in the data*, are of such extent that using the data would render the profit cap calculated therefrom unreasonable or inaccurate. In this case Commerce did not determine that any of the data sources were predominantly or exclusively non-home market sales. Nor did Commerce assess the relative validity among the sources in light of their deficiencies. Therefore, Commerce did not fulfil its obligation to determine whether a reasonable 'facts available profit cap' could be applied, and has not presented sufficient grounds for dispensing with the profit cap altogether."

193 F. Supp. 2d at 1367 (emphasis added). Thus, rather than separate out the existence of nonhome market sales as a threshold inquiry, the court merely summarized Commerce's failure to make any findings that would support its decision to dispense with calculating a profit cap. *Id.* Nevertheless, Petitioners do not dispute Commerce's analytical framework or its reading of the court's directive in *Geum Poong II.* Given the overarching statutory goal of approximating a respondent's home market experience, Commerce's emphasis on geographical distribution of sales is warranted here. *See* 19 U.S.C. § 1677b(e)(2)(B)(iii) (2000) (profit is that realized in connection with sales for consumption in foreign

[4] Geum Poong lacked home market sales of the subject merchandise. Therefore, its own profit data could not be used to calculate a home market profit rate.

country).[5] The court therefore does not reject Commerce's methodological framework for calculating a profit cap in this case or its decision to reject data based on evidence of predominant or exclusive non-home market sales.

C. Reasonableness of Commerce's Ranking and Selection of Surrogate Profit Data

Petitioners claim that under Commerce's factors for evaluating surrogate profit data, the use of Saehan/SK data is unreasonable on the grounds that: (1) the lack of information regarding these companies compels their rejection; and (2) Commerce lacked appropriate grounds for rejecting the Samyang/SamYoung profit data as a potential data source. Petitioners maintain that only the Samyang/Sam Young profit data satisfy all the criteria identified in *Geum Poong II*.

1. Lack of Information

Petitioners contend that the limited record evidence about Saehan/SK profit data reveals that they (a) include sales of a general, unknown category of merchandise of "manmade fibers"; (b) very likely include profit on non-home market sales, including profit on U.S. sales; and (c) correspond to a period prior to the POI.[6] Dom. Ind. Objections, at 2. Commerce responds that it properly analyzed each factor and, acknowledging deficiencies in the data, complied with the court's directive to calculate a facts available profit rate which complies with the statute, to the extent possible.[7]

a. Similarity of Business Operations & Merchandise

Petitioners contends that Commerce: (1) conceded that Saehan and SK Chemicals produce "manmade fibers" which "appears to encompass more than just the subject merchandise"; and (2) does not know the percentage of Saehan's or SK Chemicals' business operation accounted for by subject merchandise, if any. Dom. Ind. Objections at 3.

Commerce found—and Petitioners do not contest—that "[b]oth Saehan and SK Chemicals are producers of the subject merchandise," and noted that "[b]oth companies were named as exporters of subject merchandise in the petition." Second Redetermination at 4 & n.3. That the companies were respondents in the investigation of PSF strongly indi-

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[5] Under § 1677b(e)(2)(B), "foreign country" means "the country in which the merchandise is produced." 19 CFR § 351.405(b)(2).

[6] In calculating a "facts available profit cap" pursuant to the Second Redetermination, Commerce chose to assess in addition to the factors in *Pure Magnesium from Israel* the "extent of detail provided" In its analysis, Commerce considered the sustained appreciation in value of the won during a portion of the period of investigation. Commerce found that as a result of this sustained appreciation, "it is appropriate to account for the effects of that appreciation in determining a facts available profit cap. The detail provided in the financial statements of Saehan and SK Chemicals permits [Commerce] to do this. The lack of detail in the BOK data precludes such adjustments." Second Redetermination at 5. Neither party contests Commerce's analysis in this regard.

[7] In the Second Redetermination, Commerce conceded that there are deficiencies in the Saehan/SK data, but found that:

> the record does not provide the Department with a better alternative: the BOK data supplies even less information on the record, Samyang's financial statement shows a predominance of export sales, and all other options have been rejected or addressed by the Court. Nevertheless, despite the lack of information, we do not believe the deficiencies force us to reject the data in light of the Court's analysis [and its expectation] that there may be 'deficiencies in the data' when it ordered the Department to calculate a 'facts available profit cap.'

Second Redetermination at 8–9.

cates that their production of PSF is in substantial quantities such that use of their profit rate to approximate Geum Poong's profit rate is reasonable. Furthermore, there is no requirement that, in calculating a substitute profit rate, Commerce must identify the exact percentage of subject merchandise produced by the potential surrogate. Saehan and SK Chemicals may produce products in addition to the subject merchandise, but Petitioners apparently conflate Commerce's description of Saehan and SK Chemicals' products with that of the BOK data, which specifically referred to the general category "manmade fibers." *See id.* Selections from the translation of the Bank of Korea data submitted by Geum Poong indicate that the category "Man-made Fibers" includes "nylon, vinyl, polyester, etc.—all regenerated fibers." *Letter from Geum Poong to Department* (Feb. 8, 2000), P.R. Doc. 348, Geum Poong App. Tab 9, at Exh. A. There is no indication that Saehan or SK produce a range of products as broad as that described in the BOK data.

In fact, the record clearly shows that sales by Saehan and SK Chemicals are apparently concentrated in the polyester fiber and textile market. The General Note to the financial statements for Saehan Industries, Inc. as of December 31, 1998 and 1997 states that the company is "currently engaged in the manufacture and sale of polyester staple fiber, polyester filament, polyester films, resins, sportswear and engineered plastics." *Id.* at Exhibit C. The 1998 Annual Report for SK Chemicals contains a "Message from the Management," which indicates that it is in the polyester fiber and textile market, and that the company intends to develop high value added and high margin products in this area, and *eventually* diversify and concentrate in new lines of business (such as "health-care and high-tech chemical products"). *Id.* at Exhibit D (emphasis added). Therefore, Commerce properly found that Saehan and SK Chemicals data produce merchandise similar to that of Geum Poong, and its rejection of the BOK data on the ground that the product scope thereof was too broad is supported.

b. Contemporaneity

Petitioners argue that Commerce erred in relying on the Saehan/SK data where the financial statements cover a time period—calendar year 1998—that is not contemporaneous with that of the POI (April of 1998 to March of 1999). Petitioners' argument is disingenuous, as there is a substantial overlap in the coverage dates with the POI. Considering the difficulties Commerce faces in calculating any profit rate in this case, this deficiency appears minor, if it is even a deficiency.

c. Geographical Distribution of Sales

Commerce conceded that "[l]acking information about the geographical distribution of Saehan's and SK Chemicals' sales, we cannot determine that their sales are predominantly non-home market sales." Second Redetermination at 4. Petitioners claim that because there is no geographic information about these companies' sales, Commerce is unable to judge whether these data include profit from non-home market sales, including sales in the United States. Although this is a serious is-

sue, simply because data is lacking on geographical distribution of sales does not necessarily require their rejection as substitute data.[8] The court in *Geum Poong II* instructed that it may not "reject financial statements of a potential surrogate simply because that company made some non-home market sales." 193 F. Supp. 2d at 1368 & n.6 (discussing *Shop Towels from Bangladesh,* 61 Fed. Reg. 55,957, 55,961 (Dep't Comm. 1996) (final admin. rev.)). Rather, Commerce is to weigh the lack of such information in light of other factors and relative to other available sets of data to determine if a usable profit cap could be constructed before dispensing with it entirely.[9] Clearly, Commerce considered the similarity of product lines and the extent of detail of the financial statements to outweigh the lack of information as to the geographical distribution of their sales.

Further, Petitioners have not suggested an approach which renders Commerce's choice an abuse of discretion. The choices Petitioners presented to Commerce were not tenable, as is demonstrated in the following section. As it recognized in its second remand determination, Commerce clearly was permitted by the court to dispense with the profit cap if available data would render the profit cap "unreasonable or inaccurate." *Geum Poong II,* at 1367. In its conclusion, the court reemphasized that the cap may be dispensed with entirely "if available data are significantly undermined by non-home market data."[10] *Id.* at 1372 n.11. Commerce appears to have weighed its other options in the context of this standard.

In sum, in the absence of any indication that the data for Saehan or SK Chemicals were "overly compromised" by non-home market sales or other problems, in light of evidence that both companies produced products similar to the subject merchandise in the reasonably contemporaneous period, and in the absence of better choices, Commerce's determination to use data from these companies as "facts available" is reasonable and supported by substantial evidence.

2. Rejection of Weighted Average of Samyang and Sam Young Profit Data

Petitioners contend that Commerce failed to comply with the statutory provisions "to the extent possible" in rejecting the weighted average of the actual profit figures for Samyang and Sam Young where (1) profit data was available for both Samyang and Sam Young that excluded U.S. sales; (2) Samyang, Sam Young and Geum Poong all have very similar business operations by virtue of their production of the subject merchandise," as Samyang produced "virgin" PSF and Sam Young produced exclusively "regenerated" PSF, both of which are within the scope

[8] Petitioners do not argue that these companies may have no home market sales; they argue that such sales may be very low. This places them in a different category than Sam Young's sales.

[9] The SAA explains that in using facts available, "[s]ection 776(a) generally will require Commerce to reach a determination by filling gaps in the record due to deficient submissions or other causes. Therefore, * * * Commerce * * * [need not] prove that the facts available are the best alternative information. Rather the facts available are information or inferences which are reasonable to use under the circumstances." SAA at 869

[10] Thus, Petitioners' argument that use of Alternative Three, without a profit cap, as envisioned by the SAA at 841, is impossible under the court's view of the statute is untenable.

of the subject merchandise; and (3) data for Sam Young and Samyang are contemporaneous with the POI.

Commerce responds that, irrespective of the merits of the data cited by Petitioners, it could not calculate a facts available profit cap using a weighted average of profit data for Sam Young and Samyang. Commerce maintains that the court in *Geum Poong I* sustained its decision to reject this method, where: (1) the profit data for Sam Young was derived from all non-home market sales, and therefore inappropriate; (2) "the only number that Commerce could have used in such weighted average would have been Samyang's calculated profit data * * * [which] would have violated the administrative protective order." DOC Response at 11. approve.

The court in *Geum Poong I* sustained Commerce's decision to reject using a weighted average of the Samyang and Sam Young data for the purpose of calculating Geum Poong's CV profit rate under Alternative Two, rather than Alternative Three which was used in the Second Redetermination.[11] Nevertheless, the reason for rejecting the methodology under Alternative Two applies to Alternative Three, as well. A calculation of the profit rate or the profit cap under Alternative Three using facts available lacks Alternative Two's prohibition on use of non-home market profit data, yet the geographical distribution of sales is still a factor in analyzing whether to use a particular data source. In this case, Sam Young's known lack of home market sales would be sufficient grounds for rejecting its profit data under Alternative Three, regardless of the similarity of its products to Geum Poong's, and the resulting use of Samyang's profit data alone would violate the administrative protective order. The court in *Geum Poong I* did *not* hold, as Petitioners assert, that the use of non-home market profit data is "not a concern" in a facts available situation. Rather, the court instructed that the existence of some non-home market sales is not grounds to categorically reject data and resort to applying Alternative Three without the profit cap required by statute. In this case, Commerce knew for a fact that Sam Young lacked any home-market sales, and thus rejection of its data was warranted in calculating CV profit under any Alternative.[12]

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[11] *See Geum Poong I,* at Section I.A for a discussion of the interrelationship among the three Alternatives provided for under § 1677b(e)(2)(B) in determining CV profit where actual data are not available under § 1677b(e)(2)(A).

[12] This is not to say, however, that the court has concluded that Commerce's rejection of *Samyang's* profit data *as an individual source* to be used in combination, apart from Sam Young, was appropriate. Commerce, for the purpose of calculating a facts available capped profit rate, rejected Samyang's financial statement as a data source because of "the predominance of Samyang's export sales" and the inability to "rule out the possibility that its U.S. sales exceeded its home market sales," and that "in any case, home market sales are less than export sales." Second Redetermination at 9. Commerce does not address Petitioners' contention that the record contains profit data corresponding to Samyang's *home market* sales alone. Pet. Br at 5 (citing *Memo to Case File from Suresh Maniam regarding "Calculations for the Preliminary Determination of Samyang Corporation"* (October 29, 1999), Domestic Industry's App. Tab 12 (calculating Samyang's weighted-average dumping margin based on a comparison of its POI export price sales with its POI average normal value, "which is based on Samyang's comparable sales in the home market")). The separate CV calculation, however, attached to the memo does not indicate it is based on the home market profit rates. Further, because neither party argues that Commerce could have or should have calculated Geum Poong's CV profit rate by combining profit rates for Samyang, Saehan and SK Chemicals, as the court suggested in *Geum Poong II,* the court does not reach this issue. The court notes that Geum Poong has stated that, in terms of size and dominance in the Korean PSF industry, Samyang is an equivalent of a "Microsoft" and therefore it opposes using its profit rate for any purpose. *See* Geum Poong's Objections to Remand Determination (October 22, 2001).

D. Alleged Inconsistency with Calculation of CV Selling Expense Ratio

In the original Final Determination, Commerce calculated a surrogate selling expense ratio for Geum Poong under Alternative Three that was equal to the "weighted average amounts for selling expenses * * * by Samyang and Sam Young in their respective comparison markets on sales in the ordinary course of trade." The court in *Geum Poong I* sustained Commerce's use of facts available in calculating Geum Poong's CV selling expenses. 164 F. Supp. 2d at 676–77.

Petitioners argue that Commerce's selection of the Samyang/Sam Young data as "facts available" for CV selling expense data requires Commerce to rely on the same sources in calculating Geum Poong's CV profit. Pet. Br. at 8. Petitioners reason that it must rely on the Samyang/Sam Young data because they stand as a "benchmark" of the reasonableness of surrogate "facts available" financial data. While Petitioners concede there are situations in which Commerce may rely on different sources of data to determine selling expenses and profits, they maintain that Commerce acted arbitrarily because it failed to state its reasons for using different data sources even though it invoked its "facts available" authority for both determining both surrogate profit and surrogate selling expenses. Pet. Br. at 9 (citing *SKF USA Inc. et al. v. United States,* 263 F.3d 1369, 1382 (Fed Cir. 2001) (citing *Transactive Corp v. United States,* 91 F. 3d 232, 237 (D.C. Cir. 1996)).

The court in *Geum Poong I* held that there is no statutory requirement or preference that profit and SG&A expenses be drawn from the same source, noting that "[t]he parties point to nothing in the statute or applicable regulation that requires Commerce to use the same set of data sources for calculating selling expenses and profit." 163 F. Supp. 2d at 677 & n.11. The court also noted Commerce's past practice of basing selling expenses on respondent's actual amounts incurred and realized by the respondents in selling in the home market, while calculating CV profit rate based on financial statements from a producer of the same general category of goods. *See Certain Fresh Cut Flowers from Colombia,* 63 Fed. Reg. 31,724, 31,731 (Dep't Comm. 1998) (final admin. rev.).

Petitioners' reliance on *SKF USA Inc.* is misplaced. There, the court rejected Commerce's assigning two interpretations of a statutorily defined term for two different purposes without giving any explanation for doing so. 263 F.3d at 1382 ("Commerce is required to explain why it uses different definitions of "foreign like product" for price purposes and when calculating constructed value, and that explanation must be reasonable.") In contrast, Commerce in this case did not interpret one term differently in two different calculations, but merely calculated two separate items according to different methodologies.

Accordingly, Commerce's calculation of Geum Poong's CV profit rate is supported and is in accordance with the statute.

II. Geum Poong's Motion for Timely Publication of Notice

Geum Poong requests that the court order that Commerce, pursuant to 19 U.S.C. § 1516a(e),[13] publish written notice of the lifting of suspension of entries and revised antidumping margins within ten days of the date upon which the court's decision becomes final.[14] Commerce responds that the Federal Circuit in *Fujitsu General America* held that "there is no language in § 1516a(e) that attaches a consequence to a failure by Commerce to meet the ten-day publication requirement." 283 F. 3d at 1379. Under this standard, Commerce argues, an order compelling timely publication would be a violation of the ruling because: (1) it should be presumed that public officials will comply with the law; and (2) the court does not have the power to rule on this issue, as no case or controversy currently exists.

The court addressed this issue in *Thai Pineapple Canning Indus. Corp. v. United States,* Court No. 98–03–00487, Slip Op. 00–47 (April 27, 2000). There, the court rejected the plaintiffs' request that the court order Commerce to instruct Customs to use the correct importer-specific assessment rates to liquidate entries during one time period, and to apply the recalculated weighted-average rate to liquidate entries during another time period. The court reasoned as follows:

> Because the entries have yet to be liquidated, there is no "actual injury" for the court to address, and the court is only empowered to decide live cases or controversies. *See Verson, a Div. of Allied Prods. Corp. v. United States,* 5 F. Supp. 2d 963, 966 (Ct. Int'l Trade 1998) (court does not have power "to render an advisory opinion on a question simply because [it] may have to face the same question in the future") (citation omitted). The court will not presume that Commerce will fail to comply with this court's orders, but rather *presumes that the entries will be liquidated in accordance with 19 U.S.C. § 1516a(e).* Therefore the court need not issue an order as requested by plaintiffs at this time.

Id. at 4 (emphasis added). Geum Poong has not given the court any substantial basis for rebutting the presumption of regularity in administrative action, merely stating in general that "the Department has waited in some cases as long as a year after the final decision of the court and in other cases *never* published notice of such decisions." Geum Poong's Comments at 5. The court declines Geum Poong's invitation to speculate as to whether Commerce will fail to comply with its statutory man-

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[13] Section 1516a(e) reads as follows:

> Liquidation in accordance with final decision. If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit—
>
> (1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and
>
> (2) entries, the liquidation of which was enjoined under subsection (c)(2), shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

[14] The Federal Circuit in *Fujitsu General v. United States,* 283 F.3d 1364, 1379 (Fed. Cir. 2002) held that "there is not a 'final court decision' in an action that originates in the Court of International Trade and in which there is an appeal to the Federal Circuit until, following the decision of the Federal Circuit, the time for petitioning the Supreme Court for *certiorari* expires without the filing of a petition."

date for publishing the results of its redetermination in this case. If Commerce does not perform its duties timely, Geum Poong may pursue its remedies at that time.

CONCLUSION

Accordingly, Commerce's *Final Results of Redetermination Pursuant to Court Remand Order in Geum Poong II* is AFFIRMED. Geum Poong's motion for an order instructing Commerce to publish its decision and notify Customs of the lifting of the suspension of liquidation is DENIED.

(Slip Op. 02–96)

KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK LTD., NSK CORP., NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., AND NTN CORP., AND TIMKEN CO., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 98–06–02274

(Dated August 22, 2002)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court, having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce"), *Final Results of Redetermination Pursuant to Court Remand* on *Koyo Seiko Co. v. United States,* 26 CIT ____, 186 F. Supp. 2d 1332 (2002) *("Remand Results"),* comments to preliminary version of the *Remand Results* by Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. and NSK Ltd. and NSK Corporation, holds that Commerce duly complied with the Court's remand order, and it is hereby

ORDERED that the *Remand Results* filed by Commerce on July 1, 2002, are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 02–97)

BETHLEHEM STEEL CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND POHANG IRON AND STEEL CO., LTD., DEFENDANT-INTERVENOR

Court No. 00–03–00116

[Remand Redetermination Pursuant to Bethlehem Steel Corporation et al. v. United States, December 6, 2001 is sustained.]

(Dated August 27, 2002)

Dewey Ballantine LLP (John A. Ragosta, Jennifer Danner Riccardi, Navin Joneja), Washington, D.C., for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *A. David Lafer,* Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice; *William L. Olsen*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Michele D. Lynch*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, Washington, D.C., for Defendant.

Kaye Scholer LLP (Donald B. Cameron, Julie C. Mendoza, Brady W. Mills), Washington, D.C., for Defendant-Intervenor.

OPINION

CARMAN, *Chief Judge:* Bethlehem Steel Corporation and U.S. Steel Group, a Unit of USX Corporation ("Plaintiffs") and Pohang Iron and Steel Co., Ltd. ("POSCO" or "Defendant-Intervenor") challenge the Department of Commerce's ("Commerce") determination in *Remand Determination Pursuant to Bethlehem Steel Corporation, et al. v. United States,* Slip-Op. 01–95 (August 8, 2001) *("Remand Redetermination").* This Court has jurisdiction to hear this case pursuant to 28 U.S.C. 1581(c) (2000). For the reasons that follow, this Court sustains Commerce's *Remand Redetermination* in its entirety.

BACKGROUND

On August 8, 2001, this Court remanded this case for Commerce to further investigate and explain whether two programs by the Government of Korea ("GOK") provided countervailable subsidies to POSCO: 1) the direct provision of infrastructure at Asan Bay and 2) the reduction of import duties on steel slab by the GOK. *See Bethlehem Steel Corp. v. United States,* 162 F. Supp. 2d 639, 645, 648 (Ct. Int'l Trade 2001). In the *Remand Redetermination,* Commerce determined that the infrastructure at Asan Bay does not provide a countervailable benefit to POSCO and that although the import duty reduction program is countervailable, POSCO received no measurable benefit from it. *See Remand Redetermination* at 4–5, 9.

I. Commerce's determination as to infrastructure benefits

This Court remanded the issue of whether POSCO received infrastructure subsidies at Asan Bay due to Commerce's failure to properly address this issue, focusing instead upon whether POSCO's lease terms

constituted a countervailable subsidy. *See Bethlehem Steel*, 162 F. Supp. 2d at 644. Commerce was instructed to investigate Plaintiffs' subsidy allegations as to roads, industrial water facilities, distribution depots and electric power stations at Asan Bay. *See Bethlehem Steel,* 162 F. Supp. 2d at 645. Commerce accordingly solicited and verified additional information on this issue. *See Remand Redetermination* at 2. With regard to POSCO's presence in Asan Bay, Commerce had previously discovered that POSCO leased a port berth and maintained a warehouse at Asan Bay. *See id.* Commerce verified that 1) the port berth "is not part of the Poseung Industrial Complex, which is one of five industrial sites within Asan Bay"; and 2) the Inchon Port Authority, rather than the government agencies responsible for construction in the industrial site, was responsible for the port berths at Asan Bay. *Id.* at 3 (citing *Remand Verification Report for the Government of Korea (GOK) in the Court of International Trade (CIT) Remand of the Countervailing Duty Investigation of Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea* (Nov. 26, 2001) at 5–6, Pub. Doc. 258, POSCO's Jan. 22, 2002 Pub. Attach. 4 at 4–5 *("GOK Verification Report")).*

As part of its investigation of roads at Asan Bay, Commerce verified that the bridge and major highway at Asan Bay are part of the West Coast Highway system connecting two cities, thus constituting part of Korea's general highway and road system. *Remand Redetermination* at 3. The government agency Ministry of Construction and Transportation ("MOCAT") is responsible for the road system. *See id.* (quoting *GOK Verification Report* at 4, POSCO's Jan. 22, 2002 Pub. Attach. 4 at 3). With respect to the roads within the industrial complex, Commerce verified they are public roads used by the general public. Furthermore, Commerce verified that "POSCO does not use most of the roads within the complex; rather, it uses the country's general road system." *Remand Redetermination* at 4. Commerce concluded POSCO did not receive a financial contribution from the GOK with regard to the highway and bridge at Asan Bay and did not receive a countervailable benefit as to the roads within the industrial complex. *See id.*

With regard to the electric power stations, Commerce verified that the electricity is supplied by the national utility company KEPCO and the power plant is located near Kia in Asan Bay. *See GOK Verification Report* at 6, POSCO's Jan. 22, 2002 Pub. Attach. 4 at 5. It found that POSCO pays for electricity services based upon the applicable general tariff schedule charged to all electricity customers. *See Remand Redetermination* at 5. The same is true as to telephone and water services, even though POSCO receives water from a treatment center within the industrial estate. *See id.* It also verified that there are no distribution depots constructed by the GOK at Asan Bay that could provide a benefit to POSCO. *See Remand Redetermination* at 5. Commerce therefore concluded POSCO did not receive a financial contribution or countervailable benefit from water facilities, distribution depots, and electric power stations at Asan Bay. *See id.*

II. Commerce's determination as to reduction of import duties on slab

The import duty reduction program at issue in this case works as follows: Interested parties request reductions in import duties generally in response to market conditions. If they meet the criteria established in Korea's statutes and regulations, the government may approve a tariff reduction upon import. *See* CTL Plate Remand Questionnaire Response of the Government of Korea (Sept. 7, 2001), at 11–13, Pub. Doc. 250, Def.'s Pub. Ex. 6 ("GOK Questionnaire Response"). In the case of slab, "the Korean government monitors the domestic supply of slab. When either the domestic supply drops below a certain threshold or the domestic industry so requests, the Korean government reduces the tariff rate on steel slab. This reduced tariff rate is available to the entire steel industry, irrespective of the manner in which the individual companies ultimately use the slab[.]" *Bethlehem Steel*, 162 F. Supp. 2d at 647 (footnote omitted). Commerce had found in the final results and first remand redetermination that the program is not countervailable, but this Court remanded the issue a second time because Commerce had failed to investigate the program. *See id.* at 641, 646.

Upon solicitation and verification of additional information, Commerce found that the program could not be classified as an export subsidy because the applicability of the reduced rate was not conditioned upon the use of the slab in a product to be exported. *See Remand Redetermination* at 6. However, Commerce concluded that the program is specific under section 771(5A) of the Tariff Act of 1930. *See id.* at 7. It verified that the reduced rate of one percent had been applied to imports during the first part of 1998 but that the general tariff rate of three percent had been applied during the second half of 1998. *See id.* at 8. POSCO had imported slab during the first half of 1998 at the one percent tariff rate. *See id.* Based on this information, Commerce found POSCO received a financial contribution and countervailable benefit for the first half of 1998. *See id.* at 8–9. However, Commerce found "POSCO did not receive a measurable benefit from this program as the calculated benefit under this program was less than 0.005 percent and therefore had "no impact on the *ad valorem* subsidy rate calculated in the final determination." *Id.* at 9.

STANDARD OF REVIEW

This Court will sustain a final determination of Commerce unless it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). The same standard of review applies to the review of a remand determination as to the review of the original determination. *See Laclede Steel Co. v. United States,* 125 F. Supp. 2d 525, 530 (Ct. Int'l Trade 2000); *see also Viraj Group, Ltd. v. United States,* 193 F. Supp. 2d 1331, 1335 (Ct. Int'l Trade 2002) (applying the substantial evidence standard to review a remand determination). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. * * * Moreover, [t]he

court may not substitute its judgment for that of the [agency] when the choice is between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Transcom, Inc. v. United States,* 121 F. Supp. 2d 690, 693 (Ct. Int'l Trade 2000) (internal quotations and citations omitted). In examining statutes, the Court applies the two-part analysis of *Chevron U.S.A. Inc. v. National Res. Def. Council, Inc.,* 467 U.S. 837 (1984). *See Fabrique de Fer de Charleroi, SA v. United States,* 166 F. Supp. 2d 593, 598 (Ct. Int'l Trade 2001). Under *Chevron,* the Court examines whether the relevant statute addresses the specific question at issue, and if not, whether the agency's statutory interpretation is reasonable in light of the overall statutory scheme. *See Chevron U.S.A., Inc.,* 467 U.S. 842–43.

DISCUSSION

I. Contentions as to Countervailability of Infrastructure Benefits

A. Plaintiffs' Contentions

Plaintiffs argue Commerce's decision as to the countervailability of infrastructure subsidies should be reversed and remanded. (Pl.'s Dec. 17, 2001 Br. at 2.) They present three contentions in support of their argument.

First, Plaintiffs argue Commerce based its conclusion upon irrelevant factors. (*Id.* at 8.) They assert that the fact "that POSCO's facilities * * * are not located within a specific location within the Asan Bay site is irrelevant to the inquiry of whether POSCO received infrastructure subsidy benefits at Asan Bay." (*Id.* at 9.) Plaintiffs also assert it is irrelevant whether the Inchon Port Authority or some other government agency is responsible for the port berths; in either case POSCO is being provided a benefit from the GOK. (*Id.*) In addition, Plaintiffs state Inchon Port Authority is a division of the Ministry of Maritime Affairs and Fisheries, which does play a role in the development of the Poseung Industrial Complex, but Commerce did not investigate its involvement. (*Id.* at 9–10.)

Second, Plaintiffs assert faulty reasoning led to Commerce's determination that POSCO did not receive a benefit from the provision of roads at Asan Bay. (*Id.* at 10.) They contend that Commerce only referred to a MOCAT report to support its finding that the highway and bridge at Asan Bay are part of the general infrastructure, and Commerce did not address the issue of the use of other roads "in and around" Asan Bay. (*Id.*) Plaintiffs state, "The mere fact that these secondary roads, intended to benefit only a few, appear on a national roads plan does not demonstrate that they were in fact intended to benefit society as a whole. * * * That the roads appear on a national roads plan also has no implications for whether or not their provision was *de facto* specific." (*Id.* at 11 (citing 19 U.S.C. § 1677(5A)(D)(1995)).) Plaintiffs maintain that while Commerce found the GOK recovers the cost of constructing the roads by including it in the price of the land sold in the industrial estate, POSCO does not own land there and therefore benefitted from use of the roads without payment. (*Id.* at 11–12.) Plaintiffs maintain

that Commerce improperly relied upon the rationale that the public could, in theory, use the roads while they allege the public does not, in fact, use the roads. (*Id.* at 12.) They maintain the roads were not constructed for the public welfare but rather to develop industrial sites for sale to individual companies. (*Id.* at 13.)

Third, Plaintiffs argue that this Court previously rejected Commerce's reasoning as to the countervailability of provisions of industrial water facilities, distribution depots, and electric power stations. Plaintiffs note that in reviewing the first remand, this Court stated the fact that POSCO paid comparable leasing fees was not dispositive of whether there was a countervailable subsidy. (*Id.* at 14 (citing *Bethlehem Steel*, 162 F. Supp. 2d at 644).) Plaintiffs maintain Commerce is again mistakenly focusing upon the fact that POSCO paid market rates for water, electric, and telephone services. (*Id.*) Plaintiffs argue instead that the salient issue is whether the particular infrastructure was built for the public welfare. (*Id.* at 15.) Plaintiffs distinguish discounts on services from infrastructure benefits by noting "an infrastructure subsidy benefit inquiry relates to the benefit received from the construction of the infrastructure. * * *" (*Id.* at 17.) Plaintiffs reason that whether the facilities in question were specifically built for POSCO is irrelevant because for there to be a financial contribution, all that is required is that the infrastructure not be for the public welfare. (*Id.* at 15.)

In light of these three arguments, Plaintiffs request a remand directing Commerce to apply a .74 percent countervailing duty rate, the rate Commerce calculated as to the infrastructure benefits received by POSCO at Kwangyang Bay. (*Id.* at 18.)

B. Defendant's and Defendant-Intervenor's Contentions

Defendant and Defendant-Intervenor support Commerce's determination as to non-countervailability of infrastructure subsidies with four contentions. First, to demonstrate that Commerce made its decision after a detailed investigation, Defendant-Intervenor points to the remand questionnaires issued to the GOK and POSCO that address this Court's concerns and Commerce's four-day "exhaustive" verification. (POSCO's Jan. 22, 2002 Pub. Br. at 9–11.)

Second, Defendant-Intervenor posits Commerce addressed whether POSCO received a benefit from use of the roads in and around Asan Bay. (*Id.* at 13.) It cites Commerce's verification that POSCO did not use most of the roads in the industrial complex and that the roads within the industrial estate are public roads. (*Id.* (citing *Remand Redetermination* at 4).) As to the secondary roads, Defendant and POSCO assert Commerce found those roads to be part of the country's national highway system and that they were built prior to the development of the industrial estates at Asan Bay. (POSCO's Jan. 22, 2002 Pub. Br. at 13; Def.'s Br. at 7.) The bridge and highway used to access Asan Bay were found to be part of the general highway and road system as well and are therefore exempt from the definition of a financial contribution. (Def.'s Br. 5–6.)

POSCO states Commerce found that the public did in fact use the roads. (POSCO's Jan. 22, 2002 Pub. Br. at 14.)

Third, Defendant and Defendant-Intervenor argue Commerce's decision that POSCO did not benefit from industrial water facilities, distribution deports, and electric power stations at Asan Bay is supported by substantial evidence. Commerce verified that the water lines servicing Asan Bay also service the populations to the west and northeast of Asan Bay and that the water is being provided in the region between the towns of Daesan and DanJim. (*Id.* at 15–16.) Defendant and Defendant-Intervenor argue the water facilities clearly were not specifically built to service POSCO or the steel industry. (*Id.* at 16; Def.'s Br. at 10.) As to the electric power stations, Commerce verified that the electric power plant is not located at Asan Bay and that the plant was built many years before the industrial estates at Asan Bay were developed. Therefore, Defendant and Defendant-Intervenor argue the plant was not built to service only POSCO. (POSCO's Jan. 22, 2002 Pub. Br. at 16–17; Def's. Br. at 9.) In addition, because POSCO paid market rate fees for water and electricity, they argue Commerce correctly concluded that POSCO received no benefit. (POSCO's Jan. 22, 2002 Pub. Br. at 16, 17; Def.'s Br. at 9–10.)

Fourth, Defendant-Intervenor argues Plaintiffs' request for a directed remand to apply the subsidy rate of .74 percent is unsupported by record evidence and is contrary to law. Defendant-Intervenor considers this a "facts available" rate for which Plaintiffs have not offered any evidence to justify its application. (*Id.* at 18–19.)

II. Commerce's determination that POSCO did not receive a financial contribution and countervailable benefit from infrastructure subsidies is supported by substantial evidence or otherwise in accordance with law.

In order for Commerce to assess countervailing duties upon investigation of a subsidy, it must find that the subsidy is one in which an authority 1) provides a financial contribution to a person, 2) a benefit is thereby conferred, and 3) the subsidy is specific. *See* 19 U.S.C. § 1677(5)(A)–(B). In the present case, Commerce found that POSCO did not receive a financial contribution from the highway and bridge over Asan Bay or from the industrial water facilities, distribution depots, and electric power stations, and it did not receive a benefit from the roads within Asan Bay. *See Remand Redetermination* at 3–5. Therefore, Commerce concluded that the provision of infrastructure at Asan Bay was not a countervailable subsidy. This Court finds Commerce's determination to be supported by substantial evidence or otherwise in accordance with law.

The definition of a "financial contribution" includes "providing goods or services, *other than general infrastructure.*" 19 U.S.C. § 1677(5)(D)(iii) (emphasis added). Commerce's regulations define "general infrastructure" as "infrastructure that is created for the broad societal welfare of a country, region, state or municipality." 19 C.F.R. § 351.511(d)(1999). The definition of a "benefit" includes a "case where

goods or services are provided, if such goods or services are provided for less than adequate remuneration. * * *" 19 U.S.C. § 1677(5)(E)(iv); *see also* 19 C.F.R. § 351.511(a)(1).

Commerce properly determined that POSCO did not receive a countervailable benefit from the roads within Asan Bay. As noted earlier, Commerce has verified that POSCO is not located within the industrial estates at Asan Bay. *See Remand Redetermination* at 4 (citing *Remand Verification Report for Pohang Iron and Steel Co., Ltd. (POSCO) in the CIT Remand of the Countervailing Duty Investigation of Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea* (Nov. 26, 2001), at 2, 3, Prop. Doc. 257, available at Def.'s Conf. Ex. 3 at 2–3). In response to Commerce's questionnaire, the GOK explained, "Up through 1998, the GOK's major expenditures in and around the Asan Bay area were for the development of land for industrial sites that would be sold to individual companies, but it also constructed *basic infrastructure* such as roads, industrial water conduits and sewage disposal facilities. * * * The infrastructure provided by the GOK * * * was constructed for the use of all companies located in the Asan Bay area. * * * [T]he roads and industrial water supply systems * * * were constructed to cover all companies *as well as the population located in Asan Bay area*." CTL Plate Remand Questionnaire Response of the Government of Korea (Sept. 7, 2001) at 2, Prop. Doc. 249, POSCO's Jan. 22, 2002 Pub. Attach. 1 at 4 (emphasis added) ("GOK Questionnaire Response").

With regard to the roads in Asan Bay, the GOK informed Commerce that the Korean Land Development Corporation ("Koland"), a government investment company, is responsible for the land in the industrial estates and that the cost of roads constructed by Koland within the industrial estates is included in the sales price of land sold within the estate. *See id.* at 4, 8–9, POSCO's Jan. 22, 2002 Pub. Attach. 1 at 6, 10–11. Where the GOK has constructed roads outside the industrial estates but still within the Asan Bay area, the cost is either recovered through tolls or, in some cases, the road is toll free. *See id.* at 9, POSCO's Jan. 22, 2002 Pub. Attach. 1 at 11. The GOK indicated that in addition to any harbor usage fees and leasing fees, "POSCO paid fees or charges for the usage of facilities such as electricity, water, roads, etc." *Id.* at 8, POSCO's Jan. 22, 2002 Pub. Attach. 1 at 10. The GOK emphasized that "all roads are part of the country's road and highway system." *Id.* at 10, POSCO's Jan. 22, 2002 Pub. Attach. 1 at 12. Commerce "verified that POSCO does not use most of the roads within the complex; rather, it uses the country's general road system" and that "the roads within the industrial estate are public roads[.] * * * These roads are publicly traveled roads and are used by the public and not just by POSCO." *Remand Redetermination* at 4 (citing *GOK Verification Report* at 6, available at POSCO's Jan. 22, 2002 Pub. Attach. 4 at 5). It further verified that the "secondary roads" in Asan Bay are part of the national road and highways system. *See Remand Redetermination* at 11–12 (citing *GOK Verification Report* at Ex. GOK Remand 5, available at POSCO's Jan. 22, 2002 Pub. Attach. 5 at

5–11). Based on this information, this Court holds Commerce's decision that infrastructure subsidies from use of roads at Asan Bay are not countervailable is supported by substantial evidence or otherwise in accordance with law.

Commerce's decision as to benefits from industrial facilities, distribution depots, and electric power stations is also supported by substantial evidence. As noted, the GOK informed Commerce that the industrial water supply system was constructed for use by all companies as well as the general population in the Asan Bay area. *See* GOK Questionnaire Response at 2, POSCO's Jan. 22, 2002 Pub. Attach. 1 at 4. It submitted a map of the Asan Industrial Water Supply System which Commerce verified. *See* GOK Questionaire Response Ex. G–1 at 5–6, available at POSCO's Jan. 22, 2002 Pub. Attach. 1 at 18–19 ("Water System Map"); *GOK Verification Report* at 6, POSCO's Jan. 22, 2002 Pub. Attach. 4 at 5. The map shows that the system provides water in the region between the towns of Daesan and DangJim. *See* Water System Map, POSCO's Jan. 22, 2002 Pub. Attach. 1 at 18–19; *GOK Verification Report* at 6, POSCO's Jan. 22, 2002 Pub. Attach. 4 at 5. The Korea Water Resource Corporation, which services the water, is under the administration of MOCAT, which is also responsible for construction of the water lines. *See GOK Verification Report* at 6, POSCO's Jan. 22, 2002 Pub. Attach. 4 at 5. Based on the evidence submitted, it was reasonable for Commerce to conclude that the water system was not built specifically for POSCO and served to benefit all entities in the industrial estates as well as the population in the surrounding area. Therefore Commerce properly found there was no financial contribution by provision of the water facilities. Commerce's determination that there was also no countervailable benefit to POSCO because it paid usage fees at the market rate, thus providing adequate remuneration for the benefit received, was also supported by substantial evidence. *See POSCO Verification Report* at 4, POSCO's Jan. 22, 2002 Pub. Attach. 3 at 5; CTL Plate Remand Questionnaire Response of Pohang Iron & Steel Co., Ltd. (POSCO) (Sept. 7, 2001) at 3, Prop. Doc 249, POSCO's Jan. 22, 2002 Pub. Attach. 2 at 5 (POSCO Questionnaire Response).

Commerce also found that to receive electricity service from KEPCO, all companies must make arrangements with KEPCO. *See GOK Verification Report* at 6, POSCO's Jan. 22, 2002 Pub. Attach. 4 at 5. During verification Commerce found "[t]here is a power plant that is located up near Kia. It was not recently built." *Id.* POSCO pays market rate usage fees for electric services. *Remand Redetermination* at 5; *POSCO Verification Report* at 4, POSCO's Jan. 22, 2002 Pub. Attach. 3 at 5. Commerce's determination that there was no financial contribution or countervailable benefit from infrastructure subsidies from electric power stations is therefore supported by substantial evidence or otherwise in accordance with law.

III. Contentions as to Countervailability of Import Duty Reduction Program

For convenience, the Court first discusses the contentions of the Defendant-Intervenor as to the import duty reduction program, followed by the contentions of the Plainitffs and Defendant.

A. Defendant-Intervenor's Contentions

Defendant-Intervenor contends this Court should reverse and remand Commerce's decision that the import duty reduction program is countervailable for three reasons. (POSCO's Jan. 7, 2002 Pub. Br. at 1.) First, it argues the reduced tariff rate "does not constitute a 'financial contribution' on exports of subject merchandise." (*Id.* at 8.) POSCO argues that regardless of the duty rate on slab, there is no benefit from the program due to the existence of duty drawback. (*Id.* at 9.) Defendant-Intervenor insists Commerce failed to provide this Court with additional factual findings to support its decision that this program is countervailable and asserts the only effect of the program was to reduce the amount of duty paid at import and consequently to reduce the amount of duty drawback claimed upon exportation. (*Id.* at 9–10.)

Second, Defendant-Intervenor points to duty drawback received by DSM, another steel company under review, to show there was no "financial contribution." (*Id.* at 10–12.) It asserts Commerce incorrectly ignored the fact that duty drawback was received and found the existence of a financial contribution and benefit despite the full refund of the duties. (*Id.* at 12–13.) It maintains there was no financial contribution because "the GOK has no expectation of the ultimate payment of import duties under either the general tariff rate or the reduced tariff rate." (*Id.* at 13.) Defendant-Intervenor therefore argues the GOK did not forego revenue that was otherwise due. (*Id.*)

Third, Defendant-Intervenor posits the only benefit received from the import duty reduction program was as to merchandise sold in the domestic market and that there was no countervailable benefit upon the export of the subject merchandise. (*Id.* at 14.) Companies that imported at the reduced duty rate and used the subject merchandise in products sold domestically did not receive duty drawback and therefore benefitted from the lower rate, but the companies that exported the product containing the subject merchandise gained no benefit because they received a refund of the duties they had paid upon import. (*Id.* at 14–15.) Thus Defendant-Intervenor claims the benefit from the import duty reduction program is tied to the domestic market of Korea. (*Id.* at 15–16.) It maintains that this Court's opinion in *Bethlehem Steel* did not instruct Commerce to find that the benefit from the program was not tied to a particular market or industry and that Commerce erred in failing to find tying in light of the evidence on the record. (*Id.* at 17.)

POSCO acknowledges this Court's statement that where a benefit associated with a domestic subsidy is not tied to a particular industry or market, Commerce will attribute the benefit to all products produced by a company. (*Id.* at 13–14.) At the same time, POSCO argues Commerce's

reliance upon the statement was mistaken in that the Court specifically stated it was not drawing any conclusion about the countervailability of the program and that further investigation upon remand demonstrated that duty drawback was actually received. (*Id.* at 14.)

B. Plaintiffs' and Defendant's Contentions

Plaintiffs and Defendant advance three arguments to demonstrate that Commerce properly countervailed the import duty reduction program. First, Plaintiffs assert this Court previously rejected POSCO's claim and that the reduction of import duties on slab does constitute a financial contribution. (Pls.' Jan. 22, 2002 Br. at 3.) Defendant states this Court provided explicit instructions concerning analysis of the program at issue and Commerce followed those instructions. (Def.'s Br. at 12.) Plaintiffs note under 19 U.S.C. § 1677(5)(D), a financial contribution includes "foregoing or not collecting revenue that is otherwise due," and they argue under the program at issue the GOK foregoes revenue that is otherwise due. (Pls.' Jan. 22, 2002 Br. at 4 (citing 19 U.S.C. § 1677(5A).)

Second, Plaintiffs counter this Court previously rejected POSCO's argument that duty drawback obviates the existence of a benefit. Plaintiffs cite this Court's statement that the countervailability of the program depends upon whether it conferred a specific benefit on a particular company or industry rather than upon whether the steel slab was used in the production of subject merchandise. (*Id.* at 5 (citing *Bethlehem Steel*, 162 F. Supp. 2d at 647).)

Third, Plaintiffs maintain POSCO and DSM received a countervailable benefit from the import duty reduction program. (*Id.* at 5.) Plaintiffs explain that absent a showing of tying, the benefit from a domestic subsidy is attributable to all production, including exports and therefore there was a countervailable benefit in the present case regardless of the availability of duty drawback. (*Id.* at 6.) Plaintiffs provide "[d]omestic subsidies are countervailable because, even though their availability is not contingent on export and they apply to products that may not be exported, producers of the subject merchandise are given trade-distorting competitive advantages that affect their entire operations." (*Id.*) In addressing POSCO's assertion that the benefits of the import duty reduction program are tied to a particular market, *i.e.* the domestic market, Plaintiffs contend "[t]ying * * * is an exception to the rule of fungibility and requires very particular findings." (*Id.* at 7.) Commerce did not find that such facts exist in this case. (*Id.*) Plaintiffs also assert that "a countervailable benefit is conferred despite the availability of duty drawback on exported products." (*Id.* at 8.) Plaintiffs argue that rather than being concerned with the existence of duty drawback, the issue of the second remand was the link between the exemption of import duties and exportation. (*Id.* at 9.) They maintain the link does not exist in this case. (*Id.*)

IV. Commerce's determination that the reduction of duty rates on the importation of slab is countervailable is supported by substantial evidence or is otherwise supported by law.

Commerce found that 1) the import duty reduction program administered by the GOK is specific within the meaning of 19 U.S.C. § 1677(5A)(D)(iii), 2) POSCO received a financial contribution through the program, and 3) POSCO received a benefit but the benefit is not measurable. *See Remand Redetermination* at 7, 9. This Court affirms Commerce's determination as to the program's countervailability.

Under Korea's tariff system, a foreign government, domestic industry or importer may request a change in the general tariff rate. *See GOK Verification Report* at 2, Def.'s Pub. Ex. 12 at 2. For a reduction of a tariff rate to be approved, the requesting party must show that the reduction meets at least one of the system's three criteria of 1) stabilizing inflation, 2) stabilizing supply and demand, and 3) adjusting imbalances in tariff rates among similar items. *See id.* at 3, Def.'s Pub. Ex. 12 at 3. The application for reduction was granted for the first half of 1998 but was rejected for the second half. *See id.* The GOK indicated to Commerce that as long as the criteria of the system are met, "any imported product may be eligible for an import duty reduction for a particular period of time." GOK Questionnaire Response at 12, Def.'s Pub. Ex. 6 at 20. Additionally, Commerce verified "[t]here are no restrictions on items which are eligible for the quota reduction." *GOK Verification Report* at 3, Def.'s Pub. Ex. 12 at 3. The availability of the duty reduction was not based upon whether the slab was to be used in products that were intended for export; rather, the reduced rate was applicable to all imports of slab. *Remand Redetermination* at 6. Based upon this information, Commerce properly determined that the program could not be considered an export subsidy. *See Remand Redetermination* at 6; *see also* 19 U.S.C. § 1677(5A)(B) ("An export subsidy is a subsidy that is, in law or in fact, contingent upon export performance, alone or as 1 of 2 or more conditions.").[1]

However, Commerce properly determined that the program at issue provides a "financial contribution" to POSCO in that the GOK received a lower tariff payment upon the importation of slab than it would have received if the program were not in effect. *See Remand Redetermination* at 8–9; *see also* 19 U.S.C. § 1677(5)(D)(ii) (providing that "financial contribution" includes "foregoing or not collecting revenue that is otherwise due"). While POSCO claims there is no financial contribution because the GOK has not foregone revenue due to the eligibility for duty drawback (POSCO's Jan. 7, 2002 Pub. Br. at 9), POSCO itself indicated in its responses to Commerce's questionnaires that "POSCO did not claim duty drawback." POSCO Questionnaire Response at 5, Def.'s

[1] The program is also not an import substitution subsidy, which is defined as " a subsidy that is contingent upon the use of domestic goods over imported goods, alone or as 1 of 2 or more conditions." 19 U.S.C. § 1677(5A)(C).

Pub. Ex. 6.[2] As previously noted by this Court, "[t]he mere availability of drawback * * * does not resolve the issue of whether the import duty reduction program is countervailable." *Bethlehem Steel*, 162 F. Supp . 2d at 647. Commerce was reasonable in finding that the GOK did forego the receipt of tariff duties at the three percent general rate which it would otherwise have been entitled to, thus providing a financial contribution to POSCO.

Commerce also properly found that POSCO received a benefit from this program. Under 19 C.F.R. § 351.510(a)(1), "[i]n the case of a program, *other than an export program*, that provides for the full or partial exemption or remission of an indirect tax or an import charge, a benefit exists to the extent that the taxes or import charges paid by a firm as a result of the program are less than the taxes the firm would have paid in the absence of the program." 19 C.F.R. § 351.510(a)(1) (emphasis added). As to this regulation, this Court has already stated that "when a government foregoes otherwise lawful taxes or import charges it is providing a countervailable benefit. The only exception contained in the regulation applies to export programs—i.e., programs that establish exportation of a finished product as a prerequisite to receiving an exemption of indirect taxes or import charges." *Bethlehem Steel,* 162 F. Supp. 2d at 648. POSCO had the burden to present evidence demonstrating a link between eligibility for the import duty reduction and exportation of the product in which the slab was used. *See RHP Bearings v. United States,* 875 F. Supp. 854, 857 (Ct. Int'l Trade 1995) (stating respondents bear the burden of providing accurate information in a timely manner). It presented no such evidence, and based upon the information it did present, Commerce found that the reduction applied to all imports of slab regardless of whether the slab was used in an exported finished product. *Remand Redetermination* at 6.

Commerce determined that the import duty reduction program is a domestic subsidy and is specific pursuant to 19 U.S.C. § 1677(5A)(D)(iii). *See Remand Redetermination* at 7–8. The statute provides 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 the 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.

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[2] In its brief, POSCO refers only to the duty drawback received by DSM as evidence that drawback was in fact received. (POSCO's Jan. 7, 2002 Pub. Br. at 10–12.)

19 U.S.C. § 1699(5A)(D)(iii)(I)–(IV). In the present case, Commerce verified that 68 of the 105 requests for tariff reductions in the first half of 1998, and 51 of the 107 requests in the second half of 1998, were approved by the GOK. *Remand Redetermination* at 7 (citing *GOK Verification Report* at 3, Def.'s Pub. Ex. 12 at 3). Commerce reasonably interpreted this rate of approval to show that the recipients of tariff reductions are limited in number. It also reviewed lists of items receiving tariff reductions between 1996 and 1998 and found the reductions to be "limited to certain industries, including the steel industry." *Id.*; *see also* GOK Questionnaire Response Ex. G–11, Def.'s Pub. Ex. 6. These findings, coupled with Commerce's finding that the steel industry is one of the few industries consistently granted tariff reductions, justify Commerce's determination that the import duty reduction program is specific. *See Remand Redetermination* at 7.

POSCO argues that the only benefit from the import subsidy program comes from sales in the domestic market that did not obtain duty drawback. (POSCO's Jan. 7, 2002 Pub. Br. at 14–17.) Therefore POSCO maintains the benefit in this case is tied only to a particular market—Korea. (*Id.* at 16.) Despite POSCO's argument, Commerce found, "the tariff reduction on slab is applied to *all* imports *regardless of whether the slab is used in the production of products sold in the domestic or export markets.*" *Remand Redetermination* at 6 (emphasis added). Thus receipt of the subsidy is not conditioned or "tied" to the sale of the product in any particular market. The link between eligibility and sale in the domestic market is absent in this case. When there is a domestic subsidy which is not tied to a particular market, the subsidy is attributed to all products sold by a firm. *See* 19 C.F.R. § 351.525(b)(3). This Court holds that the determination of Commerce that the subsidy is countervailable is supported by substantial evidence or otherwise in accordance with law.

CONCLUSION

This Court finds Commerce properly determined that 1) the provision of infrastructure benefits at Asan Bay by the GOK is not a countervailable subsidy and 2) the import duty reduction program administered by the GOK is a countervailable subsidy. The *Remand Redetermination* is affirmed in its entirety.

(Slip Op. 02–98)

ORLEANS INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 01–00576

(Dated August 27, 2002)

ORDER

CARMAN, *Chief Judge:* Upon consideration of plaintiff's motion for rehearing, defendant's response thereto, a conference with the parties, and all other papers and proceedings had herein, it is hereby:

ORDERED that plaintiff's motion for rehearing with regard to subject matter jurisdiction is DENIED;

ORDERED that the Court's decision in Slip Op. 02–49 and its Order, dated June 3, 2002, holding that the United States Court of International Trade does not possess subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i) over this case is AFFIRMED;

ORDERED that the Court's decision in Slip Op. 02–49 and its Order, dated June 3, 2002, is VACATED to the extent it denies plaintiff's motion to transfer this action to the district court and dismisses this action;

ORDERED that this Court, on the consent of the parties, RESERVES judgment at this time on plaintiff's motion to transfer this action to the district court; and it is further

ORDERED that this Court, on the consent of the parties, CERTIFIES pursuant to 28 U.S.C. § 1292(d)(1) the following:

> This order includes a controlling question of law with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation. That question is:
>
> > Whether the Court was correct in determining that the United States Court of International Trade does not possess subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i) over plaintiff's constitutional challenge to the beef assessments applied to plaintiff's imports of beef and beef products pursuant to the Beef Promotion and Research Act of 1985, 7 U.S.C. §§ 2901–11.