Slip Op. 03–160

PEER BEARING COMPANY-CHANGSHAN, PLAINTIFF, v. UNITED STATES OF AMERICA, DEFENDANT, AND THE TIMKEN COMPANY, DEFENDANT-INTERVENOR.

Court No. 02–00241

Plaintiff, Peer Bearing Company-Changshan ("CPZ"), moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Final Results of New Shipper Reviews of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China* ("*Final Results*"), 67 Fed. Reg. 10,665 (Mar. 8, 2002).

Specifically, CPZ contends that Commerce improperly rejected the actual prices paid for steel inputs from its market-economy supplier. CPZ further contends that Commerce's determination that it has reason to believe or suspect that the supplier's prices were subsidized, because there are generally available export subsidies in the supplier's home country, are baseless.

Held: CPZ's 56.2 motion is denied. Commerce's final determination is affirmed.

Dated: December 12, 2003

Hume & Associates, PC (*Robert T. Hume*) for Peer Bearing Company-Changshan, plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David D'Alessandris*); of counsel: *Glenn R. Butterton*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States, defendant.

Stewart and Stewart (*Terence P. Stewart*, *Wesley K. Caine* and *Amy A. Karpel*) for The Timken Company, defendant-intervenor.

OPINION

TSOUCALAS, Senior Judge: Plaintiff, Peer Bearing Company-Changshan ("CPZ"), moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Final Results of New Shipper Reviews of Ta-*

pered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China ("*Final Results*"), 67 Fed. Reg. 10,665 (Mar. 8, 2002).

Specifically, CPZ contends that Commerce improperly rejected the actual prices paid for steel inputs from its market-economy supplier. CPZ further contends that Commerce's determination that it has reason to believe or suspect that the supplier's prices were subsidized, because there are generally available export subsidies in the supplier's home country, are baseless.

BACKGROUND

This case concerns the new shipper reviews of the antidumping duty order on tapered roller bearings ("TRBs") and parts thereof, finished and unfinished, from the People's Republic of China ("PRC") for the period of review covering June 1, 2000, through January 31, 2001. *See Final Results*, 67 Fed. Reg. at 10,666. On November 29, 2001, Commerce published the preliminary results of the subject review. *See Preliminary Results of New Shipper Reviews of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China*, 66 Fed. Reg. 59,569. Commerce published the *Final Results* on March 8, 2002. *See Final Results*, 67 Fed. Reg. 10,665.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (2000) and 28 U.S.C. § 1581(c) (2000).

STANDARD OF REVIEW

The Court will uphold Commerce's final determination in an antidumping administrative review 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)(i) (2000); *see NTN Bearing Corp. Oof Am. v. United States*, 24 CIT 385, 389–90, 104 F. Supp. 2d 110, 115–16 (2000) (detailing the Court's standard of review for antidumping proceedings).

DISCUSSION

I. Commerce's Determination to Reject Prices Paid by a Non-Market Producer for Steel Inputs from a Market-Economy Supplier

A. Statutory Background

In conducting a new shipper review, Commerce determines the antidumping margin by taking the difference between the normal value ("NV") and the United States price of the merchandise. When

merchandise is produced in a non-market economy country ("NME"), such as the People's Republic of China ("PRC"), there is a presumption that exports are under the control of the state. Section 1677b(c) of Title 19 of the United States Code provides that, "the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]." 19 U.S.C. § 1677b(c)(1) (2000). The statute, however, does not define the phrase "best available information," it only provides that, "[Commerce], in valuing factors of production . . . , shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). Consequently, Commerce is given broad discretion "to determine margins as accurately as possible, and to use the best information available to it in doing so." *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed Cir. 1994).

The antidumping duty statute authorizes, but does not mandate that Commerce use surrogate countries to estimate the value of the factors of production. In legislative history, Congress provided Commerce with guidance by stating that, "[i]n valuing such factors [of production], Commerce shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices." H.R. Conf. Rep. No. 100–576, at 590 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623 ("*House Report*"). The *House Report* further states that, "the conferees do not intend for Commerce to conduct a formal investigation to ensure that such prices are not dumped or subsidized, but rather intend that Commerce base its decision on information generally available to it at that time." H.R. Conf. Rep. No. 100–576, at 590–91, *reprinted in* 1988 U.S.C.C.A.N. at 1623–24. In addition, Commerce has promulgated regulations regarding the valuation of factors of production in the NME context. The relevant regulations state that "where a factor is purchased from a market economy supplier and paid for in a market economy currency, the Secretary normally will use the price paid to the market economy supplier." 19 C.F.R. § 351.408(c)(1) (2000).

In gathering factual information from interested parties in an antidumping duty proceeding, Commerce regulations set out time limits for the submission of such information. *See* 19 C.F.R. § 351.301(b)(4) (2000). The regulations state that any submissions of factual information are due no later than "100 days after the date of publication of notice of initiation of the review, except that factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed. . . ." *Id.*

B. Contentions of the Parties

1. CPZ's Contentions

CPZ complains that Commerce's interpretation of the *House Report* is contrary to its plain language and leads to a result contrary to law. *See* Pl.'s Mem. P. & A. ("CPZ's Mem.")at 15–20. CPZ maintains that the *House Report* solely concerns the use of surrogate values to determine NV in the NME context. *See* CPZ's Mem. at 16. CPZ further argues that the *House Report* does not address the use of market-economy prices. CPZ alleges that "Commerce has now stretched the Legislative History concerning surrogate values to apply to whether it should use market-economy prices as well." CPZ's Mem. at 16. Accordingly, CPZ asserts that Commerce erred in rejecting actual market-economy prices paid. CPZ contends that Commerce should have used these values instead of surrogate values for steel inputs in its final calculation of NV.

CPZ challenges Commerce's determination that it had "reason to believe or suspect" that CPZ's supplier's prices were subsidized. *See id.* at 21–22. CPZ argues that Commerce had no particularized evidence that "would call [CPZ's supplier's] prices into question." *Id.* at 22. CPZ contends that the existence of general and non- company specific subsidies in the supplier's country do not provide Commerce with reasonable grounds to believe or suspect the prices paid were subsidized. *See id.* at 21–22. While CPZ recognizes that the existence of generally available export subsidies may raise a suspicion of subsidized prices, CPZ argues that it overcame such suspicion. *See id.* at 21.

First, CPZ argues that Commerce's determination that the subsidies CPZ's supplier could have benefitted from were *de minimis* extinguished such a suspicion. *See id.* at 23. Second, CPZ contends that it submitted statements from its supplier, stating that the supplier did not benefit from any subsidies, which refuted Commerce's reason to believe or suspect subsidized prices. *See id.* at 26–27. Consequently, CPZ contends that Commerce had no basis to reject the market-economy prices paid to its supplier, and that Commerce has established an arbitrary and capricious standard to overcome any suspicion that its supplier's prices are subsidized. *See id.* at 24–26.

Finally, CPZ asserts that Commerce erred in rejecting its February 28, 2002, submission, which was meant to alert Commerce of its own previous decision in a different review prior to the issuance of the *Final Results*. *See* CPZ's Mem. at 28–29. CPZ maintains that it filed the submission the day after Commerce published a notice in the Federal Register extending the period to complete CPZ's review until March 5, 2002. *See id.* at 28. CPZ argues that the *House Report* "requires Commerce to make a determination as to reason to believe or suspect that prices may be subsidized based on evidence available to it at the time it reaches its decision." CPZ's Mem. at 28–29. CPZ

contends that the submission should have been considered, despite its untimeliness, because it constituted evidence available prior to the rendering of Commerce's final decision. *See id.* at 29.

2. Commerce's Contentions

Commerce responds that it had a reasonable basis to "believe or suspect" that CPZ's supplier's prices were subsidized. *See* Def.'s Mem. Opp'n CPZ Mot. J. Agency R. ("Def.'s Mem.") at 20. Commerce argues that it is not precluded from applying the "reason to believe or suspect" standard when general subsidies are used. *See id.* Rather, Commerce contends that a finding of significant, non-specific export subsidies generally available may serve as "particular and objective evidence" to support a "reason to believe or suspect" that CPZ's supplier's prices were subsidized. *Id.* at 22. Commerce relied on a study undertaken in conjunction with a previous review, which found significant generally available subsidies in the supplier's country, to infer that the steel inputs purchased by CPZ may have been subsidized. *See id.* Commerce contends that the existence of generally available subsidies in CPZ's supplier's country allows the inference that the supplier's prices were subsidized. *See id.* at 21–22. Consequently, Commerce asserts that its finding of significant, generally available subsidies in the exporting market-economy supports a "reason to believe or suspect" that prices of the input from CPZ's supplier were subsidized. *See id.* at 22.

Commerce further maintains that the antidumping duty statute and accompanying legislative history do not require it to conduct a formal investigation to support its decision to exclude dumped or subsidized prices. *See id.* at 23–24. Rather, to determine whether to exclude such prices, Commerce may use information generally available to it. *See id.* at 23. In addition, Commerce asserts that its finding of *de minimis* subsidies does not quash its "reason to believe or suspect" that CPZ's supplier's prices were subsidized. *See id.* at 25–26. Commerce maintains that the level of subsidization is irrelevant in situations where a general export subsidy has been found because a subsidy, regardless of how large, may benefit exports from that country. *See id.* at 26.

Moreover, Commerce contends that CPZ did not present sufficient evidence to negate its "reason to believe or suspect." *See id.* at 28. Commerce argues that the statements CPZ offered as evidence, that its supplier did not benefit from subsidies, were unsupported; that is, they did not contain sales, financial or other empirical economic data. *See id.* Furthermore, Commerce maintains that CPZ's evidence was less credible than its own study undertaken in conjunction with a previous review of TRBs from the PRC known as the Market Economy Steel Memo of November 7, 2001. *See id.*

Finally, citing 19 C.F.R. § 351.301(b)(4), Commerce alleges that it did not err in rejecting CPZ's February 28, 2002, submission as un-

timely. *See id.* at 31. Commerce asserts that under the regulations, "submission[s] of new factual information for the final results of a new shipper review must be made no later than 100 days after the date of publication of the notice of initiation of the review." *Id.* Consequently, Commerce maintains that the submission was properly rejected because it was made more than 100 days after the publication of notice of initiation of review. *See id.*

3. Timken's Contentions

Timken generally agrees with Commerce's departure from its normal practice of using market prices paid for inputs purchased from a market-economy supplier when there is "reason to believe or suspect" that the prices are subsidized. *See* Timken's Resp. Pl.'s Mot. J. Agency R. ("Timken's Resp.") at 12. Timken maintains that, according to the *House Report*, Commerce correctly applied "the reason to believe or suspect" standard. *See* Timken's Resp. at 16–17. In particular, Timken contends that Commerce reasonably limited the reach of its own regulation and "revert[ed] back to the statutory method of employing surrogate-country information." *Id.* at 18. Timken argues that, in doing so, Commerce "gave effect to Congressional intent and conformed to the statutory scheme." *Id.* at 19. Timken also asserts that, according to the *House Report* guidance, only minimal evidence is necessary to support Commerce's decision to reject prices paid by CPZ to its market-economy supplier. *See* Timken's Resp. at 19. Timken further contends that "Commerce needs only such evidence as is sufficient to form a belief or suspicion." *Id.* at 26. Timken argues that Commerce's reliance upon its own prior study, where it analyzed countervailing duty orders covering subsidy programs in CPZ's supplier's country, is sufficient evidence to support Commerce's rejection of actual prices paid by CPZ. *See id.* at 20. Timken maintains that Commerce reasonably drew the inference that CPZ's supplier may have benefitted from generally available subsidies. *See id.*

Timken additionally argues that, "it was clearly appropriate for Commerce to rely on express legislative history to construe and apply its own regulation." *Id.* at 22. Timken asserts that the statute does not direct Commerce to use actual price information to calculate NV. *See id.* Rather, Commerce developed and codified the practice of using actual prices into regulation as its normal NME methodology. *See id.* Timken disagrees with CPZ's interpretation of the *House Report* and maintains that Commerce "reasonably read the history as directing the agency to avoid *all* values that it believed or suspected were unfair, when calculating fair values of goods." Timken's Resp. at 22–23 (emphasis in original).

Finally, Timken agrees with Commerce that CPZ's February 28, 2002, submission was untimely under Commerce's regulations. Alternatively, Timken argues that the rejection of the submission was

harmless because the information provided would not have altered Commerce's "reason to believe or suspect" that CPZ's supplier's prices were subsidized. *See id.* at 32. Timken maintains that "the controlling fact is the mere existence of subsidy programs in the country in question." *Id.* Consequently, even the receipt of *de minimis* subsidies by a particular producer would not have changed Commerce's position, because the "basis for believing or suspecting remains." *Id.*

C. Analysis

1. Commerce Properly Applied the Reason to Believe or Suspect Standard

A preliminary issue the Court must decide is whether Commerce correctly applied the "reason to believe or suspect" standard to support its decision to reject market prices CPZ paid to its market-economy supplier. The Court recognizes that the *House Report* concerns the selection of surrogate values to determine NV in the NME context. Neither the statute nor the *House Report* address the use of market value in the calculation of NV.[1] The Court has established, however, that "nothing in the antidumping duty statute directs Commerce to employ actual prices paid to a market economy supplier by an NME producer in NV calculations." *China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 27 CIT ___ , ___ , 264 F. Supp. 2d 1229, 1236 (2003). Furthermore, in *Lasko*, the CAFC recognized that the purpose of the statute "is to prevent dumping, an activity defined in terms of the marketplace." 43 F.3d at 1446. Therefore, the use of suspect prices to calculate NV, even when paid to a market-economy supplier, would be contrary to Congress' intent.

The Court finds that when Commerce has reason to believe or suspect that a market-economy supplier's prices are subsidized, Commerce may reject market prices paid to the supplier in favor of surrogate prices for its calculation of NV.[2] The Court is unconvinced by CPZ's argument that Commerce's regulations require Commerce to

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[1] CPZ contends that Commerce's construction of the *House Report* is contrary to its plain language and leads to a result Congress cannot have intended. CPZ's Mem. at 16. The Court notes,however, that legislative history is merely extrinsic evidence to be used by a court in determining Congress' intent when a statute is silent or ambiguous. If a statute is silent or ambiguous, the court's role is to determine whether Commerce's construction of the statute is reasonable. Commerce is required to reasonably interpret the statute and not the legislative history.

[2] The Court notes that the use of surrogate values by Commerce has been determined to be contrary to the intent of the law " 'where we can determine that a NME producer's input prices are *market determined*, accuracy, fairness, and predictability are enhanced by using those prices.' " *Lasko*, 43 F.3d at 1446 (quoting *Oscillating Fans and Ceiling Fans from the People's Republic of China*, 56 Fed. Reg. 55271, 55275 (Dep't Comm. 1991) (final determination)(emphasis added)). If the prices paid are not market determined, however, Commerce in pursuit of the law's intent may reject actual prices paid.

use actual prices paid whenever available. The Court finds that the applicable regulations do not require Commerce to use the market value over a surrogate value. The regulations state that Commerce "normally will value the factor using the price paid to the market economy supplier." 19 C.F.R. § 351.408 (c)(1). The regulation merely advises Commerce to use actual market values to calculate NV for an NME supplier in certain circumstances. As the Court stated, "while Commerce will use market values under normal circumstances, under certain circumstances Commerce may choose not to do so." *China Nat'l*, 27 CIT at ___ , 264 F. Supp. 2d at 1237, (noting that the regulation "merely indicates a preference for market prices"); *see also Anshan Iron & Steel Co., Ltd. v. United States*, 27 CIT ___ , ___ , 2003 Ct. Intl. Trade LEXIS 109, at *40 (CIT 2003) (stating that the language "merely suggests a particular methodology, but does not impose upon Commerce the requirement of selecting the market-economy price of a respondent's purchases to the exclusion of more appropriate values").

While the Court recognizes that surrogate country values are only an estimation of what the product's NV would have been if the NME were a market-economy country, *see Rhodia, Inc. v. United States*, 25 CIT ___ , ___ , 185 F. Supp. 2d 1343, 1351 (2001), Commerce's decision to use actual prices paid or surrogate values is predicated on which values provide a more accurate NV. *See Lasko*, 43 F.3d at 1446, (noting that the purpose of the statute is to prevent dumping and that it "sets forth procedures in an effort to determine margins 'as accurately as possible' ") (quoting *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)). When Commerce has substantial evidence that prices paid to a market-economy supplier are not market determined, then the "use of such prices would undermine 'accuracy, fairness, and predictability,' in the calculation of margins and contravene the antidumping and countervailing duty statute. . . ." *China Nat'l*, 27 CIT at ___ , 264 F. Supp. 2d at 1237 (quoting *Lasko*, 43 F.3d at 1446). The overarching principle of the statute prevents the Court from concluding "that Congress would condone the use of any value where there is 'reason to believe or suspect' that it reflects dumping or subsidies." *China Nat'l*, 27 CIT at ___ , 264 F. Supp. 2d at 1238.

Section 1677b(c)(1) of Title 19 of the United States Code directs Commerce to use "the best available information" concerning the values for factors of production from a market-economy when calculating the NV for a product exported from an NME country, such as the PRC. *See China Nat'l*, 27 CIT at ___ , 264 F. Supp. 2d at 1234. The CAFC has reasoned that "there is much in the statute [19 U.S.C. § 1677b(c)(1) and (4)] that supports the notion that it is Commerce's duty to determine margins as accurately as possible, and to use the best information available to it in doing so." *Lasko*, 43 F.3d at

1443; *see also Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001).

The Court's role in this case is not to evaluate whether the information Commerce used was the best available, but rather whether Commerce's choice of information is reasonable.[3] *See China Nat'l*, 27 CIT at ____, 264 F. Supp. 2d at 1236. Commerce's discretion in choosing its information is limited by the statute's ultimate goal "to construct the product's normal value as it would have been if the NME country were a market economy country." *Rhodia*, 25 CIT at ____, 185 F. Supp. 2d at 1351. While Commerce enjoys broad discretion in determining what constitutes the best information available to calculate NV, Commerce may not act arbitrarily in reaching its decision. If Commerce's determination of what constitutes the best available information is reasonable, then the Court must defer to Commerce. If Commerce reasonably believed or suspected that CPZ's supplier's prices were subsidized, then Commerce could decide that surrogate prices were the best information available. Based upon this determination, Commerce has authority under the antidumping duty statute to use such values instead of the actual prices paid by CPZ in calculating NV.

2. Commerce Had Reason to Believe or Suspect that CPZ's Supplier's Prices Were Subsidized

The Court must determine whether Commerce had "reason to believe or suspect" that CPZ's supplier's prices were distorted by subsidies. In *China Nat'l*, 27 CIT at ____, 264 F. Supp. 2d at 1239, the Court recognized that the applicable standard has no statutory definition. The Court noted, however, that "in order for reasonable suspicion to exist there must be 'a particularized and objective basis for suspecting' the existence of certain proscribed behavior, taking into account the totality of the circumstances, the whole picture." *Id.* (quoting *Al Tech Specialty Steel Corp. v. United States*, 6 CIT 245, 247, 575 F. Supp. 1277, 1280 (1983)). While Commerce must support its determinations with "substantial, specific and objective evidence," *China Nat'l*, 27 CIT at ____, 264 F. Supp. 2d at 1240, the Court agrees with Commerce that the antidumping duty statute does not require a formal investigation. Congress did not intend for Commerce to undertake an investigation to determine whether prices were in fact subsidized. Rather, the statute and *House Report* merely require Commerce to have a "reason to believe or suspect"

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[3] The statute's silence regarding the definition of "best available information" provides Commerce with "broad discretion to determine the 'best available information' in a reasonable manner on a case-by-case basis." *Timken Co. v. United States*, 25 CIT ____, ____, 166 F. Supp. 2d 608, 616 (2001). Furthermore, in evaluating the data, the statute does not require Commerce to follow any single approach. *See Luoyang Bearing Factory v. United States*, 26 CIT ____, ____, 240 F. Supp. 2d 1268, 1284 (2002).

that prices are being subsidized. Consequently, to determine whether there is a "reason to believe or suspect" that prices are subsidized, Commerce may rely on information generally available to it to support its determination. To conclude that it has reason to believe or suspect that prices are subsidized, Commerce must rely on information generally available to it that adequately supports the reasons given for such a determination.

The Court finds that Commerce based its determination to reject the prices CPZ paid its supplier on evidence that adequately supports its decision. Commerce's reason to believe or suspect that CPZ's supplier's prices were subsidized stemmed from a study, undertaken in connection with a previous investigation of steel products, in which Commerce discovered significant subsidies. These subsidies were not company specific, but were generally available in the exporting market-economy country. CPZ contends that these subsidies are *de minimus* and, therefore, do not support Commerce's decision to reject the actual prices paid. The level of subsidization does not prevent Commerce from determining that it has "reason to believe or suspect" that prices paid are subsidized.

Any level of subsidization found in the exporting country is enough evidence to support a determination that Commerce has "reason to believe or suspect" that prices are distorted. The Court finds that Commerce made a logical inference that CPZ's supplier may have benefitted from the generally available subsidies.[4] Without conducting a formal investigation, Commerce used information available to it to adequately support its decision to exclude actual prices paid by CPZ.

Once Commerce presents adequate evidence to support its "reason to believe or suspect" that prices are subsidized, a rebuttable presumption is established that the prices paid are distorted. *See Luoyang Bearing Factory v. United States*, 27 CIT ___, ___, 2003 Ct. Intl. Trade LEXIS 142 at *10 (CIT 2003). The presumption is that the market-economy supplier benefitted from subsidies. Based on this presumption, Commerce may choose to discard the prices paid and use surrogate values to calculate NV. The presumption, however, is not conclusive. The presumption shifts the burden to the party challenging Commerce's determination to present evidence demonstrating that its supplier did not benefit from such subsidies.[5]

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[4] CPZ asserts that Commerce did not investigate whether its supplier received any subsidies and that the supplier has never been a respondent in any countervailing or antidumping duty investigation or reviews Commerce relies upon to support its determination. The Court notes that contrary to CPZ's assertion, the statute does not require Commerce to conduct a formal investigation. Rather, Commerce is merely required to base its determination upon information generally available.

[5] Sufficient evidence that the prices paid were market- determined, for example, would satisfy the manufacturer's burden. Additionally, credible evidence that the supplier did not participate in any subsidies programs would satisfy the burden.

The Court finds that CPZ did not present enough evidence to rebut this presumption. CPZ contends that it "attempted to overcome Commerce's suspicion with a statement from its supplier that it did not benefit from any subsidies." CPZ's Mem. at 26–27. The Court, however, agrees with Commerce that the statements placed on the record by CPZ do not controvert Commerce's "reason to believe or suspect" that its supplier benefitted from generally available subsidies.[6] The statements did not contain financial data or any other information indicating that the supplier's prices were not subsidized. The Court recognizes that manufacturers, such as CPZ, may present evidence other than financial data and empirical economic information to rebut the presumption of benefitting from subsidies. However, if there was conclusive evidence to support the statements that its supplier did not benefit from subsidies, CPZ would certainly have placed such evidence on the record.[7] CPZ did not effectively rebut the presumption that CPZ's supplier benefitted from subsidies. Consequently, Commerce's determination that there was a "reason to believe or suspect" that the prices paid were subsidized was reasonable and in accordance with law.

3. Commerce Appropriately Rejected CPZ's Submission as Untimely

Commerce's regulations clearly set out the deadlines for submissions of factual information for new shipper reviews. *See* 19 C.F.R. § 351.301(b)(4). The regulations state that a submission of factual information must be made no more than 100 days after the date of publication of notice of initiation of the review. While CPZ maintains that Commerce should not have rejected its submission, the Court does not agree. The date of the notice was January 31, 2001, and the submission was made more than one year later, on February 28, 2002. The regulation is clear and CPZ failed to adhere to the procedural deadline imposed by the regulations.

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[6] One of the statements presented to Commerce by CPZ was a letter from the General Manager of CPZ's supplier's overseas sales department stating that the company did not benefit from subsidies. The other was a signed declaration by another employee of CPZ's supplier stating that the supplier does not produce the type of steel Commerce had found to benefit from subsidies in its study.

[7] To overcome the suspicion, CPZ argues that "respondents are now in the untenable position of having to ask that their suppliers be investigated in order to *rule out* the possibility that their supplier's prices are subsidized," and that "it may be impossible for respondents like CPZ to overcome any suspicion that their supplier's prices are subsidized." *See* CPZ's Mem. at 26 (emphasis in original). The Court notes, however, that CPZ could have submited other evidence, such as economic data, to overcome the presumption established against the actual prices paid. The Court is unconvinced that the statements made by the employees of CPZ's supplier are the best available evidence that the supplier did not benefit from the generally available subsidies.

The Court has considered other arguments raised by CPZ regarding Commerce's failure to consider CPZ's arguments and finds that they are without merit.

CONCLUSION

The Court affirms Commerce's final results and finds that the rejection of actual prices paid by CPZ for steel inputs from its market-economy supplier was in accordance with law.

Slip Op. 03–161

INTERNATIONAL UNION UNITED AEROSPACE, AUTOMOTIVE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW LOCAL 402, AND UAW LOCAL 658, PLAINTIFFS, v. UNITED STATES SECRETARY OF LABOR, DEFENDANT.

Court No. 03–00642

ORDER

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

Upon consideration of defendant's consent motion for voluntary remand, it is hereby

ORDERED that the consent motion is granted; and it is further

ORDERED that this action is remanded to the United States Department of Labor to conduct a further investigation and to make a redetermination as to whether petitioners are eligible for certification for worker adjustment assistance benefits; and it is further

ORDERED that the remand results shall be filed no later than 90 days after the date of this order; and it is further

ORDERED that plaintiffs shall file comments with the Court indicating whether they are satisfied or dissatisfied with the remand results no later than 30 days after the remand results are filed with the Court; and it is further

ORDERED that the deadline for the filing of the motion for judgment on the agency record shall be extended to 60 days after plaintiffs indicate whether they are satisfied or dissatisfied with the remand results.

Slip Op. 03–162

SLATER STEELS CORP., FORT WAYNE SPECIALITY ALLOYS DIVISION; CARPENTER TECHNOLOGY CORP., CRUCIBLE SPECIALTY METALS DIVISION, CRUCIBLE MATERIALS CORP.; ELECTRALLOY CORP.; UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC; ACCIAIERIE VALBRUNA S.P.A., PLAINTIFFS, v. UNITED STATES, DEFENDANT, AND TRAFILERIE BEDINI, SRL, DEFENDANT- INTERVENOR.

Consolidated Court No. 02–00189

[Judgment for defendant in part and remanded to Commerce to clarify why it disallowed the proposed inventory adjustment.]

Date: December 16, 2003

Mary T. Staley (*Collier, Shannon & Scott, PLCC*) for plaintiffs Slater Steels Corp., Fort Wayne Specialty Alloys Division; Carpenter Technology Corp., Crucible Specialty Metals Division; Crucible Materials Corp.; Electralloy Corp.; United States Steel Workers of America, AFL-CIO/CLC.

Frank H. Morgan, *Gregory J. Spak*, and *Richard J. Burke* (*White & Case LLP*) for plaintiff Acciaierie Valbruna S.p.A. *Peter D. Keisler*, Assistant Attorney General, *David M. Cohen*, Director, *Patricia McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*James H. Holl, III* and *Stephen Tosini*) for defendant United States.

Thomas Bernard Wilner (*Shearman & Sterling*) for defendant-intervenor Ugine-Savoie Imphy, S.A.

GOLDBERG, Senior Judge: Plaintiffs challenge the United States Department of Commerce's ("Commerce") determination of antidumping duties in its *Notice of Final Determination of Sales at Less Than Fair Value; Stainless Steel Bar from Italy*, 67 Fed. Reg. 3155 (Jan. 23, 2002) ("*Final Determination*"). Originally three separate actions challenging Commerce's *Final Determination* were filed, and the cases were consolidated by the Court.

I. *BACKGROUND*

In the first original action, plaintiffs Slater Steels Corporation, Fort Wayne Specialty Alloys Division; Carpenter Technology Corporation; Crucible Specialty Metals Division, Crucible Materials Corporation; Electralloy Corporation; and United States Steel Workers of America, AFL-CIO/CLC (collectively, "plaintiffs"), appeal from Commerce's determination that the Italian producer and its French parent, also a producer of stainless steel rod, would not be treated as a single entity. Plaintiffs also complain that Commerce erred by allowing the Italian producer Trafilerie Bedini, SrL ("Bedini") to allocate certain United States selling and movement expenses rather than reporting these expenses on a transaction-specific basis.

In the second original action, pre-consolidation Court number 02–00295, Plaintiffs contend that Commerce erred in treating credit expenses for goods on consignment as indirect rather than direct expenses for the Italian producer Acciaierie Valbruna S.p.A. ("Valbruna"). Plaintiffs also claim that Commerce erred by not distinguishing between Valbruna's two levels of trade, retail and wholesale, in the home market.

In the third original action, pre-consolidation Court number 02–00288, Italian stainless steel producer and exporter Valbruna challenges Commerce's determination to impose a 2.5 percent antidumping duty on its imports. Plaintiff Valbruna claims that Commerce erred by "zeroing" the negative dumping margins. Valbruna further claims that Commerce erred in its method of handling depreciation expenses and in disallowing an inventory adjustment.

II. *STANDARD OF REVIEW*

The Court will sustain Commerce's determinations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). To determine whether Commerce's construction of the statutes is in accordance with law, the Court looks to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, it is only if the Court concludes that "Congress either had no intent on the matter, or that Congress's purpose and intent regarding the matter is ultimately unclear," that the Court will defer to Commerce's construction. *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). In addition, "[s]tatutory 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) (interpreting *United States v. Mead*, 533 U.S. 218 (2001)). Accordingly, the Court is not to substitute "its own construction of a statutory provision for a reasonable interpretation made by [Commerce]." *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992).

III. *DISCUSSION*

A. *Commerce did not Err in Treating Bedini and its Parent Ugine as a Single Entity*

Plaintiffs argue that Commerce's refusal to consolidate the data from defendant-intervenor Ugine-Savoie Imphy, S.A. ("Ugine") and its Italian subsidiary Bedini when determining "normal value" for calculating Ugine's dumping margin is contrary to law. Plaintiffs claim that not consolidating the data across country lines allowed

Ugine and Bedini to manipulate the results of the antidumping investigation. Plaintiffs cite *Tune Mung Dev. Co. v. United States*, 26 CIT ___ , Slip Op. 02–93 (Aug. 22, 2002) to support their position, which stated that "Commerce has a duty to avoid the evasion of antidumping duties."

Commerce and Ugine correctly argue that consolidating Ugine and Bedini's data across country lines is forbidden in antidumping duty investigations by statute. Except for specific enumerated exceptions to the rule, consolidating investigations and data across country lines for antidumping duty investigations is prohibited.

The dumping margin is the amount that the normal value of the foreign like product subject to the antidumping proceeding exceeds the export price of the subject merchandise. 19 U.S.C. § 1673. The foreign like product is restricted, under any of its definitions in 19 U.S.C. § 1677(16), to identical or similar merchandise that is produced in the *same country* as the subject merchandise. Congress reinforces its restriction on combining data across country lines in its definition of normal value. "Normal value" is defined in 19 U.S.C. § 1677b(a)(1)(B) as home market sales of the foreign like product, third country sales of the foreign like product, or constructed value of the subject merchandise. Under any of these definitions, both the "foreign like product" and the "subject merchandise" must be in the same country as the merchandise that is the subject of the investigation.

Congress has further defined a country in antidumping duty proceedings to be "a foreign country, a political subdivision, dependent territory, or possession of a foreign country." This definition does not allow for more than two foreign countries to be counted as one, especially in the instance of antidumping duty proceedings. 19 U.S.C. § 1677(3). In fact, the statute that defines "country" allows that the term "country" may "include an association of 2 or more foreign countries, political subdivisions, dependent territories, or possessions of countries into a customs union outside the United States," "*except for the purposes of antidumping proceedings*." *Id.* Congress intended to preclude collapsing data and conducting investigations across country lines in antidumping duty proceedings. Therefore, Commerce did not err in refusing to collapse the data of Ugine and Bedini across country lines. Because the statute prohibits collapsing the data or the proceedings, Commerce was not unreasonable in its decision not to collapse the data even though there was a risk of price or production manipulation by the affiliated French and Italian companies. *See* 19 CFR § 351.401(f) (two or more affiliated producers shall be treated as one entity "where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and . . . there is a significant potential for the manipulation of price or production").

B. *Commerce's Determination that Bedini Was Allowed to Report Certain Sales and Transaction Expenses as Allocated Averages Is Supported by Substantial Evidence and in Accordance with Law*

Plaintiffs allege that Commerce allowed Bedini to report certain sales and transaction expenses as allocated averages rather than providing data on a transaction-specific basis. Commerce is directed to find that expense allocation is reasonable when (1) the respondent demonstrates to Commerce's satisfaction that transaction-specific calculations were not feasible under the circumstances; and (2) Commerce determines that the allocation methodologies were not inaccurate or distortive. 19 C.F.R. §§ 351.401(g)(2), (3).

In light of the facts in this case, Commerce reasonably agreed with Bedini that it was not feasible to report transaction-specific calculations. First, Commerce found it too burdensome for Bedini to compile data on a per-transaction basis because Bedini had two fewer weeks to compile data than the other respondents. Second, Bedini was operating on a different computer system that prevented it from reporting data on a per-transaction basis without considerable expense in money and time. Therefore, Commerce was reasonable in finding that section 351.401(g)(2) was satisfied.

Commerce reasonably found that the second element of the regulations (section 351.401(g)(3)), requiring a determination that the allocation methodologies were not inaccurate or distortive, was satisfied. Commerce sampled several individual transactions and found that Bedini's estimates were not distortive, and concluded that Bedini's allocation method was appropriate. To counter this conclusion, plaintiffs present examples of individual transaction expenses that differed greatly from the averages Commerce allowed Bedini to use in calculating normal value. Plaintiffs do not present evidence to show that the method Bedini used was inappropriate; rather, they point to certain instances where individual transactions are very different from the average. For example, plaintiffs point to one transaction where the packing expense per kilogram for an order was roughly 95 times the average packing expense per kilogram. However, as both Bedini and Commerce point out, the packing expense per kilogram for the individual transaction involved the sale of one kilogram of stainless steel bar, so that the marginal costs for packing were at an extremely high value. Plaintiffs erroneously rely on aberrations that appear in any data set rather than pointing out any flaws in Bedini's method. Therefore, Commerce reasonably found that Bedini's allocation method was neither inaccurate nor distortive. Commerce's determination that the expense allocation was reasonable is thus supported by substantial evidence and in accordance with law.

C. *Commerce's Determination that Imputed Interest Expenses Are Indirect Inventory Carrying Costs Seeks No Meaningful Relief and Is Therefore Moot*

Commerce determined that the imputed interest expenses associated with Valbruna's consignment sales were indirect inventory carrying costs and not direct selling expenses. Whether the expenses were indirect or direct depends upon the consignment merchandise's date of shipment. Commerce determined that the date of shipment was the date that the merchandise was removed from the consignee's inventory, reasoning that Valbruna maintained the risks and rewards of ownership during that period, even though the inventory was stored at the consignee's place of business. Plaintiffs argue that the date of shipment should have been the date that the merchandise left Valbruna's factory to go to the consignee. If plaintiffs are correct, then the expenses incurred by Valbruna while the merchandise was stored in the consignee's place of business were direct selling expenses rather than indirect inventory carrying costs.

As Commerce correctly points out, it is unclear what relief plaintiffs are seeking in this claim. Commerce already took into account the imputed interest expenses when it calculated the constructed export price ("CEP"). 19 U.S.C. § 1677a(b). Double-counting adjustments is prohibited by Commerce's own regulation. 19 C.F.R. § 351.401(b)(2). Perhaps plaintiffs are asking Commerce to adjust the normal value ("NV") upward to account for circumstances-of-sale adjustments, which include direct expenses. If plaintiffs are asking Commerce to adjust NV for the imputed interest expense as a direct selling expense, they are asking the impossible. In this case, adjusting NV for the imputed interest expense would amount to double-counting that expense. A circumstances-of-sale adjustment cannot be made to the NV because any difference in the circumstances cannot be due to an expense that has already been accounted for in the CEP. Under either suggested adjustment, plaintiffs are proposing double- or triple-counting of the imputed interest expense. The double-counting would result in a higher dumping margin because the expense would be counted twice, increasing the NV and decreasing the CEP.

Thus, it is irrelevant to the result of the *Final Determination* whether the imputed interest expenses are direct selling expenses or indirect inventory carrying costs. Because plaintiffs are not seeking any meaningful relief, the appeal on this issue is moot. Therefore, without directly approving or disapproving of Commerce's categorization of imputed interest expense, the Court upholds Commerce's determination on this issue.[1]

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[1] Although the issue of whether the imputed interest expenses are indirect or direct is moot because the result is the same, it is worth noting that Commerce's determination is

D. *Commerce did not Err by Treating Valbruna's Home-Market Sales Through Different Channels as the Same Level of Trade*

Plaintiffs appeal Commerce's determination to treat home-market sales through different channels as the same level of trade. Under 19 U.S.C. § 1677b(a)(1)(B)(i), Commerce must calculate the normal value "to the extent practicable, at the same level of trade as the export price or constructed export price[.]" Accordingly, "sales are made at different levels of trade if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing." 19 C.F.R. § 351.412(c)(2). If Commerce finds that there are two levels of trade, then there will be a level of trade adjustment at some level determined by Commerce.

Valbruna sold its merchandise in Italy through service centers and factories. Plaintiffs argue that if Commerce had relied upon the empirical data, rather than the self-serving assertions of Valbruna, Commerce would have concluded that there were two levels of trade in the home market. Plaintiffs produced, both before Commerce and on appeal, empirical evidence demonstrating the different levels of various selling activities between the factories and the service centers.

Commerce argues that it appropriately found there to be one level of trade in the home market after analyzing various categories of selling activities: sales process and marketing support, freight and delivery, inventory and warehousing, and quality assurance/ warranty services. While Commerce noted differences in the inventory and warehousing activities between the channels of distribution, Commerce determined that the sales process, freight and delivery services, and quality assurance/warranty services activities were similar between the channels of distribution. Commerce then looked at factors beyond the selling services and found that the sales did not depend on the channel of distribution. Rather, the differences in sales were due to the geographic location of the customer. The customers tended to purchase from the supplier that was closest in distance, rather than purchasing products based on the channel of distribution. Commerce concluded that the two channels of distribution represented the same marketing stages.

Commerce considered the differences in selling activities between the channels of distribution to determine whether there were two

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supported by substantial evidence. The facts were uncontested that Valbruna bore the risk of ownership of the merchandise in consignment inventory by retaining title to the merchandise. Therefore, Commerce's determination that the date of shipment was not until the merchandise was used by the customer and was no longer in consignment inventory was in accordance with law.

levels of trade in the home market, as required by regulation. *See* 19 C.F.R. § 351.412(c)(2). Commerce also considered further empirical and narrative evidence, such as the geographic relationships between the customers and the service centers and factories, in its determination. Based upon the foregoing, Commerce's determination that there is one level of trade in the home market is supported by substantial evidence and is in accordance with law.

E. *Commerce did not Err by Zeroing the Negative Dumping Margins*

To calculate the weighted-average dumping margins, Commerce compared the normal value and export value of the stainless steel rod exported by Valbruna. When the normal value exceeded the export value, there was a positive dumping margin. When the export value exceeded the normal value, instead of retaining the resultant negative dumping margin, Commerce assigned a value of "zero" to the dumping margin. This practice is referred to as "zeroing" and has been challenged before in federal court. By zeroing the dumping margin, what Valbruna contends would have been a negative dumping margin became the positive 2.5 percent dumping margin. Valbruna contends that Commerce erred in zeroing the negative dumping margins for three reasons: (1) because zeroing violates the Uruguay Round Agreements Act's requirement of a "fair comparison" of weighted averages; (2) because zeroing violates the World Trade Organization Appellate Body's determination in *European Communities — Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) ("*Bed Linen*"); and (3) because zeroing is unreasonable.

1. Commerce's determination to zero the negative dumping margins does not violate the Uruguay Round Agreements Act

Prior to the Uruguay Round Agreements Act (the "URAA"), 19 U.S.C. § 1677b(a) was silent on the issue of how to compare home market and United States prices. The 1994 passage of the URAA amended the statute to require that "a fair comparison shall be made between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a). According to the statute, a fair comparison is made "(i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise, or (ii) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise." 19 U.S.C. § 1677f–1(d)(1)(A). Although prior caselaw has permitted Commerce to zero negative dumping margins, Valbruna argues that under these amendments a "fair com-

parison" plainly forbids zeroing as both unfair and because the resulting statistic is not a "weighted average."

Valbruna fails to draw the relevant line between the "fair comparison" language of 19 U.S.C. § 1677b(a) and the adjustments to normal value. "Fair comparison" refers to adjustments made to normal value to "adjust for differences between sales that affect price comparability[,]" and is not a separate requirement. Statement of Administrative Action, Pub. L. No. 103–465, 1995 U.S.C.C.A.N. 3773, 4161. The controlling statute is 19 U.S.C. § 1677(35)(B), which directs Commerce to calculate the weighted average dumping margin by considering "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The dumping margin is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise."[2] 19 U.S.C. § 1677(35)(A). As found in *Corus Staal BV v. United States Dep't of Commerce*, 27 CIT ___ , 259 F. Supp. 2d 1253 (2003), and *Corus Engineering Steels Ltd. v. United States*, 27 CIT ___ , Slip Op. 03–110 (Aug. 27, 2003), the Court finds that Commerce's zeroing methodology is reasonable.

2. Commerce is not bound by the determination of the WTO Appellate Body

Valbruna argues next that the *Bed Linen* decision by the WTO's Appellate Body prohibits zeroing. This argument is irrelevant. Not only do the WTO's own rules prevent cases from having *stare decisis* effect, but the United States was not a party to *Bed Linen* and therefore the decision is not binding upon the United States. *See also Corus Staal*, 27 CIT at ___ , 259 F. Supp. 2d at 1264 (recognizing that *Bed Linen* has no binding authority over Commerce).

3. Commerce's determination to zero the negative dumping margins is in accordance with law

Valbruna's final argument is that it is unreasonable for Commerce to zero negative dumping margins in this particular case because the zeroing changed the dumping margin from a negative dumping margin to a positive dumping margin that barely exceeds the *de minimis* level. It is an unpersuasive argument that the magnitude of change in the dumping margin necessarily makes the *method* of zeroing unreasonable. Commerce provided a reasonable basis for zeroing — namely, concerns about masked dumping. *See also Corus Engineering*, 27 CIT at ___ , Slip Op. 03–110 at 29–30. The Court finds that

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[2] Contrary to Commerce's assertion, § 1677(35)(A) does not require Commerce to zero negative dumping margins because it defines the dumping margin as the amount by which the normal value *exceeds* the export price. *See Corus Staal BV v. United States Dep't of Commerce*, 27 CIT ____ , 259 F. Supp. 2d 1253 (2003).

Commerce's determination to zero the negative dumping margin was reasonable. Therefore, the Court sustains Commerce's zeroing methodology as applied in this investigation.

F. *Commerce did not Err in Using Revalued Asset Amounts to Calcuate Valbruna's Depreciation Expenses*

Valbruna argues that Commerce erred because it used the revalued asset amounts rather than the historic net asset values to calculate depreciation expenses for the cost of production. The statute requires that the cost of production "shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A).

To support its claim, Valbruna argues that Commerce should have used the historic net asset value because that was used by Valbruna in its consolidated financial statements and its cost accounting system, and that using the revalued asset amount was distortive and unreasonable. Valbruna also had an unconsolidated financial statement prepared in anticipation of a merger to obtain Italian tax advantages.

Commerce calculated that the depreciation expenses based on the revalued asset amounts because Valbruna's revaluation of its assets were in accordance with Italian GAAP and also because the revalued asset amounts were closer to the assets' appraised values than were the historic net asset values. As noted by Commerce at the administrative level, this practice has been upheld by the Court of International Trade in prior decisions. *See Laclede Steel Co. v. United States*, 18 CIT 965 (1994); *Cinsa S.A. de C.V. v. United States*, 21 CIT 341, 966 F. Supp. 1230 (1997). The Court agrees with Commerce that the facts in the instant case are sufficiently similar to those in the above-cited cases. Valbruna fails to demonstrate that Commerce's practice is unreasonable or that it distorts the depreciation expenses incurred during the period of investigation.

Accordingly, the Court finds that Commerce's use of revalued depreciation expenses is supported by substantial evidence and otherwise in accordance with law.

G. *Commerce Must Clarify its Decision Not to Make an Inventory Adjustment*

In calculating Valbruna's cost of production, Commerce disallowed an inventory adjustment requested by Valbruna. Although the sales period of investigation encompassed October 1999 through September 2000, Valbruna requested that Commerce allow it to report cost information for calendar year 2000. Commerce granted Valbruna's request. Because Valbruna's cost accounting system calculated

product-specific, per-unit costs using the actual quantity of raw materials consumed valued at future, estimated costs, Valbruna had to make adjustments to its cost data in its questionnaire responses. Valbruna did so by reporting its raw materials costs in the following manner: (1) it removed the forward, estimated raw materials costs; (2) it replaced them with the cost of actual purchases of raw materials during 2000; and (3) it proposed an inventory adjustment in order to take into account the raw materials in inventory at the beginning of the investigation period.

Valbruna asserts that the inventory adjustment is necessary because, when raw materials are in inventory at the beginning of the period of investigation and are consumed during the period of investigation, a respondent's cost of production must account for the value of the materials that are in inventory at the beginning of the period of investigation. For instance, Commerce stated in *Certain Welded Stainless Steel Pipe From the Republic of Korea* that "[v]aluing materials based on [the respondent's] purchase price during the POI does not take into account the cost of materials in inventory at the beginning and end of the POI. Therefore, the Department adjusted [the respondent's] submitted material costs to reflect its monthly weighted average value of materials requisitioned from inventory during the POI." 57 Fed. Reg. 53,693, 53,704 (Nov. 12, 1992). Valbruna contends that Commerce should have taken into account the cost of raw materials in inventory at the beginning of the period of investigation in this case, as well.

Commerce responds that, according to the antidumping statute, "[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). Because Valbruna's financial statements were kept in accordance with Italian GAAP and Valbruna did not show that its normal inventory valuation method distorted its costs, Commerce relied upon Valbruna's reported costs to calculate the cost of production.

Commerce further argues that Valbruna was required to show "elements not present in most antidumping determinations" in order to merit a deviation from Commerce's standard costing methodology. *Thai Pineapple Canning Co. v. United States*, 273 F.3d 1077, 1084 (Fed. Cir. 2001). Here, Valbruna did not even cite *Thai Pineapple*, let alone attempt to show how the present situation is unlike most antidumping determinations.

While Commerce alleges in its brief that its standard costing methodology is to calculate costs based upon purchases of materials made during the period of investigation, Valbruna has pointed to five administrative determinations in which Commerce found that it was

appropriate to make an inventory adjustment. *See, e.g., Certain Welded Stainless Steel Pipe From the Republic of Korea*, Fed. Reg. 53,693, 53,704 (Nov. 12, 1992) (observing that "[v]aluing materials based on [the respondent's] purchase price during the POI does not take into account the cost of materials in inventory at the beginning and end of the POI. Therefore, the Department adjusted [the respondent's] submitted material costs to reflect its monthly weighted average value of materials requisitioned from inventory during the POI."); *Furfuryl Alcohol From Thailand*, 60 Fed. Reg. 22,557, 22,560 (May 8, 1995) (stating that "we have recalculated [the] corn cob cost based on the weighted-average cost of corn cob inventories at the beginning of the POI, plus all purchases of the input made during the POI").[3] Commerce failed even to mention, let alone discuss, these five administrative determinations in both its Issues and Decision Memo and its brief. Particularly in light of the Federal Circuit's observation in *Thai Pineapple* that although 19 U.S.C. § 1677b(b)(3) "leaves room for some discretion by Commercein determining the cost period, the standard methodology may not be permissible in all scenarios because Commerce has recognized that certain circumstances warrant exceptions[,]" the Court remands this issue to Commerce to clarify why it decided not to apply an inventory adjustment to Valbruna's cost of production data akin to the inventory adjustments it made in the five administrative determinations cited above. *Thai Pineapple*, 273 F.3d at 1084–85. If Commerce determines, on remand, that it should have made an inventory adjustment to Valbruna's cost of production data, then Commerce should recalculate Valbruna's dumping margin on the basis of Valbruna's newly-adjusted cost of production data.

IV. *CONCLUSION*

For the aforementioned reasons, the Court finds that all challenged aspects of Commerce's *Final Determination* are supported by substantial evidence and are otherwise in accordance with law, except for Commerce's disallowance of an inventory adjustment. Accordingly, the Court remands the *Final Determination* and instructs Commerce to clarify why it decided not to apply an inventory adjustment to Valbruna's cost of production data akin to the inventory adjustments it made in *Certain Welded Stainless Steel Pipe From the Republic of Korea*, Fed. Reg. 53,693 (Nov. 12, 1992); *Furfuryl Alcohol From Thailand*, 60 Fed. Reg. 22,557 (May 8, 1995); *Titanium Sponge From Japan*, 55 Fed. Reg. 42,227 (Oct. 18, 1990); *Certain Preserved Mushrooms from Indonesia*, 63 Fed. Reg. 72,268 (Dec. 31, 1998); and

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[3] *See also Titanium Sponge From Japan*, 55 Fed. Reg. 42,227 (Oct. 18, 1990); *Certain Preserved Mushrooms from Indonesia*, 63 Fed. Reg. 72,268 (Dec. 31, 1998); *Certain Polyester Staple Fiber From the Republic of Korea*, 65 Fed. Reg. 16,880 (Mar. 30, 2000).

Certain Polyester Staple Fiber From the Republic of Korea, 65 Fed. Reg. 16,880 (Mar. 30, 2000). If Commerce determines that it should have made an inventory adjustment to Valbruna's cost of production data, then Commerce should recalculate Valbruna's dumping margin on the basis of Valbruna's newly-adjusted cost of production data. All other aspects of the *Final Determination* are sustained.

Commerce is instructed to issue its findings on remand within 90 days of the date of the Order accompanying this Opinion.

SO ORDERED.

Slip Op. 03–163

SLATER STEELS CORP., FORT WAYNE SPECIALITY ALLOYS DIVISION; CARPENTER TECHNOLOGY CORP., CRUCIBLE SPECIALTY METALS DIVISION, CRUCIBLE MATERIALS CORP.; ELECTRALLOY CORP.; AND UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC, PLAINTIFFS, v. UNITED STATES, DEFENDANT, AND UGINE-SAVOIE IMPHY, S.A., DEFENDANT- INTERVENOR

Court No. 02–00289

[Judgment for defendant.]

Date: December 16, 2003

Mary T. Staley (*Collier, Shannon & Scott, PLCC*) for plaintiffs Slater Steels Corp., Fort Wayne Specialty Alloys Division; Carpenter Technology Corp., Crucible Specialty Metals Division; Crucible Materials Corp.; Electralloy Corp.; United States Steel Workers of America, AFL-CIO/CLC.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*James H. Holl, III* and *Stephen Tosini*) for defendant United States.

Thomas Bernard Wilner (*Shearman & Sterling*) for defendant-intervenor Ugine-Savoie Imphy, S.A.

GOLDBERG, Senior Judge: Plaintiffs challenge certain aspects of the final determination of the U.S. Department of Commerce ("Commerce") in an antidumping investigation covering stainless steel bar from France. *Notice of Final Determination of Sales at Less Than Fair Value; Stainless Steel Bar from France*, 67 Fed. Reg. 3143 (Jan. 23, 2002) ("*Final Determination*").

For the reasons that follow, the Court affirms the *Final Determination*. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i).

I. *BACKGROUND*

On December 28, 2000, domestic producers Slater Steels Corp., Fort Wayne Specialty Alloys Division; Carpenter Technology Corp., Crucible Specialty Metals Division; Crucible Materials Corp.; Electralloy Corp.; United States Steel Workers of America, AFL-CIO/CLC (collectively, "plaintiffs") filed a petition with Commerce requesting that antidumping duties be imposed on stainless steel bar imports from France and Italy, among other countries. Commerce commenced an investigation against importers from France and Italy on January 24, 2001.

On January 23, 2002, Commerce issued the *Final Determination* in which it found that stainless steel bar was being sold in the United States at less-than-fair value.

II. *STANDARD OF REVIEW*

The Court will sustain Commerce's determinations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). To determine whether Commerce's construction of the statutes is in accordance with law, the Court looks to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, it is only if the Court concludes that "Congress either had no intent on the matter, or that Congress's purpose and intent regarding the matter is ultimately unclear," that the Court will defer to Commerce's construction under *Chevron*. *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). In addition, "[s]tatutory 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) (interpreting *United States v. Mead*, 533 U.S. 218 (2001)). Accordingly, the Court is not to substitute "its own construction of a statutory provision for a reasonable interpretation made by [Commerce]." *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992).

III. *DISCUSSION*

A. *Commerce did not Err in Treating Ugine and its Italian subsidiary as a Single Entity*

Plaintiffs argue that Commerce's refusal to consolidate the data from defendant-intervenor Ugine-Savoie Imphy, S.A. ("Ugine") and its Italian subsidiary Trafilerie Bedini, Srl ("Bedini") when determining "normal value" for calculating Ugine's dumping margin is contrary to law. Plaintiffs claim that not consolidating the data across country lines allowed Ugine and Bedini to manipulate the results of the antidumping investigation. Plaintiffs cite *Tune Mung*

Dev. Co. v. United States, 26 CIT ___, Slip Op. 02–93 (Aug. 22, 2002) to support their position, which stated that "Commerce has a duty to avoid the evasion of antidumping duties."

Commerce and Ugine correctly argue that consolidating Ugine and Bedini's data across country lines is forbidden in antidumping duty investigations by statute. Except for specific enumerated exceptions to the rule, consolidating investigations and data across country lines for antidumping duty investigations is prohibited.

The dumping margin is the amount that the normal value of the foreign like product subject to the antidumping proceeding exceeds the export price of the subject merchandise. 19 U.S.C. § 1673. The foreign like product is restricted, under any of its definitions in 19 U.S.C. § 1677(16), to identical or similar merchandise that is produced in the *same country* as the subject merchandise. Congress reinforces its restriction on combining data across country lines in its definition of normal value. "Normal value" is defined in 19 U.S.C. § 1677b(a)(1)(B) as home market sales of the foreign like product, third country sales of the foreign like product, or constructed value of the subject merchandise. Under any of these definitions, both the "foreign like product" and the "subject merchandise" must be in the same country as the merchandise that is the subject of the investigation.

Congress has further defined a country in antidumping duty proceedings to be "a foreign country, a political subdivision, dependent territory, or possession of a foreign country." This definition does not allow for more than two foreign countries to be counted as one, especially in the instance of antidumping duty proceedings. 19 U.S.C. § 1677(3). In fact, the statute that defines "country" allows that the term "country" may "include an association of 2 or more foreign countries, political subdivisions, dependent territories, or possessions of countries into a customs union outside the United States," "*except for the purposes of antidumping proceedings*." *Id*. Congress intended to preclude collapsing data and conducting investigations across country lines in antidumping duty proceedings. Therefore, Commerce did not err in refusing to collapse the data of Ugine and Bedini across country lines. Because the statute prohibits collapsing the data or the proceedings, Commerce was not unreasonable in its decision not to collapse the data even though there was a risk of price or production manipulation by the affiliated French and Italian companies. *See* 19 CFR § 351.401(f) (two or more affiliated producers shall be treated as one entity "where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and . . . there is a significant potential for the manipulation of price or production").

B. *Commerce's decision to accept Ugine's revised data was reasonable.*

Commerce issued questionnaires to two French stainless steel bar producers, including Ugine. Ugine submitted its responses to questionnaires and responses to supplemental questionnaires. After issuing its preliminary determination, which found that Ugine was selling at less-than-fair value, Commerce conducted verification of Ugine's questionnaire responses. At the start of verification, Ugine provided Commerce with a list of errors to its previously-submitted home market sales data. At verification, Commerce found that: (1) prior home market sales databases failed to include home market sales of two finish codes; (2) prior home market sales databases failed to report certain resales made by Ugine's service centers; (3) prior home market sales databases incorrectly includes stainless steel bar produced in another country; and (4) prior home market sales databases had failed to provide the proper grade code for a number of the service center's sales. Upon request by Commerce, Ugine submitted revised home market sales reflecting the aforementioned corrections. Subsequently, Commerce conducted a public hearing, where Ugine's revised submissions were discussed.

Plaintiffs argue that Ugine's revised data, submitted after the submission deadline, was necessary for verification and constituted a "substantial change" to the original data provided. Commerce thereby acted in violation of 19 U.S.C. § 1677e(a) by not calculating the antidumping margin using facts available.[1] Plaintiffs do not argue for the application of adverse facts available under 19 U.S.C. § 1677e(b).

Commerce responds that its decision not to apply facts available is supported by substantial evidence and is otherwise in accordance with law. Commerce claims that Ugine acted to the best of its ability to comply with all of the agency's requests for information before and after verification. Additionally, Commerce claims Ugine's revisions were minor and verifiable, and produced usable data. Thus, Commerce was within its discretion to use the data provided by Ugine.

In order to be in accordance with law, Commerce's actions must be reasonable under the terms of the relevant statute. *Maui Pineapple Co., Ltd. v. United States*, 27 CIT ___ , ___ , 264 F. Supp. 2d 1244, 1256 (Apr. 16, 2003) (internal citation omitted). In *Maui Pineapple*, the court affirmed Commerce's acceptance of untimely information

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[1] Section 1677e(a) provides that:

> [I]n general, Commerce may make its determinations on the basis of facts available if:
> (1) necessary information is not available on the record, or
> (2) an interested party or any other person—
> (B) fails to provide such information by the deadlines
>
> 19 U.S.C. § 1677e(a)

supplied by the respondent instead of applying facts available. The court stated that:

> Commerce enjoys very broad, although not unlimited discretion with regard to the propriety of its use of facts available. Commerce also has broad discretion to fashion its own rules of administrative procedure, including the authority to establish and enforce time limits concerning the submission of written information and data. Further, Commerce's determination as to whether a respondent has complied with its request for information is discretionary. 27 CIT ___, ___, 264 F. Supp. 2d 1244, 1257 (internal citations omitted).

Likewise, in the instant case, Commerce determined that Ugine acted to the best of its ability to comply with all of the agency's requests for information. In addition, Commerce found that Ugine promptly notified Commerce of errors in its reported home market database, that these errors were minor, and that the revisions were verifiable and produced usable data. *See Tung Mung Dev. Co. v. United States*, 25 CIT ___, Slip Op. 01–83 (July 3, 2001) (finding that Commerce's application of combination rates in light of the respondents' apparent lack of cooperation was a proper exercise of its discretionary authority to find the appropriate measures to execute the antidumping laws). Section 1677(e)(a) does not require Commerce to reject data submissions that are untimely, but rather provides that timeliness may serve as a criterion that Commerce may consider when deciding whether to apply facts available. *See* 19 U.S.C. § 1677e(a)(2)(B). The statute also allows Commerce to consider the respondent's level of cooperation in making the determination whether to apply facts available. *See* 19 U.S.C. § 1677e(a)(2)(C). Commerce, not the Court, is in the best position to assess these criteria and to make the appropriate determinations. Here, Commerce was in the best position to determine whether Ugine's data submissions were verifiable and whether the submissions produced usable data. Likewise, Commerce was in the best position to assess the respondent's level of cooperation and the effect of the respondent's timeliness or lack thereof. The Court will affirm Commerce's determination "if it finds that a reasonable mind could extract the same conclusion from all of the evidence represented in the record." *Persico Pizzamiglio, S.A. v. United States*, 18 CIT 299, 303 (1994) (citing *Negev Phosphates, Ltd. v. United States*, 12 CIT 1074, 1077, 699 F. Supp. 938, 942 (1988)). Commerce's determination that Ugine acted to the best of its ability and produced usable data is reasonable. Accordingly, the Court affirms Commerce's decision to use the revised data submitted by Ugine instead of applying facts available.

IV. *CONCLUSION*

For the aforementioned reasons, the Court finds that Commerce's *Final Determination* is supported by substantial evidence and is in accordance with law and accordingly the *Final Determination* is sustained.

Judgment will be entered accordingly.

Slip Op. 03–165

AMMEX, INC., PLAINTIFF, v. UNITED STATES, DEFENDANT.

Court No. 02–00361

MEMORANDUM DECISION AND ORDER

Before: Judge Judith M. Barzilay

Before the court is a Motion for Discovery from Plaintiff Ammex, Inc. ("Ammex") dated March 7, 2003. Specifically, Ammex asks this court to grant its request for production of a number of documents relating to the November 21, 2001 Revocation Ruling by the Bureau of Customs and Border Protection (formerly United States Customs Service) ("Defendant" or "Customs"). In addition, Ammex asks this court to grant leave for it to depose the Customs official(s) responsible for the Revocation Ruling. Defendant opposes the motion.

The factual and procedural posture of this case is outlined in this court's opinion in *Ammex, Inc. v. United States*, Slip Op. 03–145 (Oct. 30, 2003). A decision on Ammex's Motion for Discovery was postponed pending the disposition of *Ammex*, wherein the court granted Defendant's Motion to Dismiss Plaintiff's Amended Complaint and thereby declined to allow the case to go forward under 28 U.S.C. § 1581(a). The court, however, took jurisdiction of the case under 28 U.S.C. § 1581(i). The court also ordered the parties to submit a scheduling order within thirty days of the date of the *Ammex* opinion. Accordingly, parties filed a scheduling order with the court on December 4, 2003, but made the scheduled dates for submission of documents conditional upon a ruling on the Motion for Discovery.

The scope of judicial review in a section 1581(i) case is statutorily provided. In particular, section 2640 of title 28 of the United States Code dictates that in any action not specified in that section (a category that includes section 1581(i) cases), "the Court of International Trade shall review the matter as provided in section 706 of title 5." 28 U.S.C. § 2640(e). Section 706 of title 5 provides that in making its determination "the court shall review the whole record or those parts of it cited by a party. . . ." This mandate has been interpreted

by the courts to mean that, except in very limited circumstances, the reviewing court shall not develop its own record of the case, but must instead rely on the record developed before the agency. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993); *Public Power Council v. Johnson*, 674 F.2d 791, 793–94 (9th Cir. 1982); *Amfac Resorts v. United States*, 143 F. Supp. 2d 7, 11 (D.C. 2001). As can be gathered from the aforementioned cases, policy reasons behind such a mandate are to prevent the court from substituting its judgment for that of the agency and also to prevent the agency from advancing post hoc rationalizations of its initial determination. Because a motion for discovery is essentially a motion to supplement the administrative record, the granting of such motions is rare in section 1581(i) cases.

Here, this court must decide whether Plaintiff has made a sufficient showing that its case fits into one of the narrow exceptions permitting discovery. *See Amfac Resorts*, 143 F. Supp. 2d at 12 (requiring a "strong," "substantial," or "prima facie" showing). In other words, the issue is whether Plaintiff has made sufficient showing that the administrative record in the case is incomplete so as to frustrate judicial review or that explanation or clarification is needed regarding technical terms in the record. *See Pl.'s Mot. for Discovery* at 2 (citing *Ammex, Inc. v. United States*, 23 CIT 549, 556–57, 62 F. Supp. 2d 1148, 1156–57 (1999)). Here, Plaintiff has failed to make any showing that the record is incomplete so as to frustrate a meaningful review or that an explanation or clarification is needed on any technical terms, interpretation of which is sought by the parties.

The substantive dispute in this case centers on the respective meanings of the terms "assessment" or "imposition" as they relate to federal taxes, and Customs' interpretation of these terms. In particular, Plaintiff alleges that, if there were no federal taxes "assessed" on Plaintiff's merchandise, such merchandise would qualify as duty-free under 19 U.S.C. § 1555(b)(8)(E). Plaintiff further alleges that Customs' Revocation Ruling is based on faulty reasoning in that Customs made no determination regarding whether Plaintiff's merchandise was "assessed" any federal tax, and instead based its decision to revoke Plaintiff's duty-free status on an Internal Revenue Service ("IRS") letter, which informed Customs that taxes would be "imposed" on Plaintiff's merchandise pursuant to section 4081 of the Internal Revenue Code, 26 U.S.C. § 4081. To that end, Plaintiff argues that the court should require further explanation from Customs about how the agency reached its decision regarding the refusal to allow entry of Plaintiff's merchandise into a Class 9 bonded warehouse.

The court disagrees. First, information relating to whether any federal taxes were assessed on Ammex's merchandise or whether Ammex "paid" any tax on its merchandise is presumably within Plaintiff's knowledge, and discovery is accordingly not necessary to

answer these questions. Plaintiff may simply provide the court in subsequent briefing with any facts relevant to the case. Second, at this point in the proceeding the court needs no further explanation from Customs regarding its decision-making process. The record in the case indicates that Customs based its decision to revoke the duty-free status of the merchandise solely on the IRS letter and did not seek to ascertain whether Plaintiff's merchandise was assessed any taxes. In fact, Customs specifically stated that "[r]evocation of the ruling does not prevent Ammex from showing that no tax was assessed and therefore, it would not be covered by the revocation." *Notice of Revocation of Ruling Letter,* A.R. Doc. No. 22 at 3. Third, underlying legal questions in the case are not so complex as to require further clarification of any terms implicated. "Assessment" and "imposition" are terms, the definition of which are readily available in any dictionary or other source, as well as the statutes themselves, should the court require. Fourth, any internal agency memorandum is ordinarily privileged and accordingly falls outside the scope of discovery. *See Amfac Resorts*, 143 F. Supp. 2d at 13. Fifth, generally "there must be a strong showing of bad faith or improper behavior before the court may inquire into the thought processes of administrative decisionmakers." *Public Power*, 674 F.2d at 795 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)). Here, where bad faith on the part of government officials is not even alleged, depositions of Customs officials are accordingly not warranted. Finally, a "court assumes [that] the agency properly designated the [a]dministrative [r]ecord absent clear evidence to the contrary." *Bar MK Ranches*, 994 F.2d at 740 (citation omitted). As Plaintiff here failed to overcome this "presumption of administrative regularity," *id.*, the court will not allow the discovery requested by Plaintiff. That is, the agency need not supplement the record with further memoranda or documents beyond what is contained in the administrative record, whether such memoranda are internal or relate to the communications between the IRS and Customs. The court, however, reserves the option to remand to the agency for further explanation or information after the briefing on substantive issues is complete and after such issues are thereby fine-tuned and prepared for final review. For all the foregoing reasons, it is hereby

ORDERED that Plaintiff's Motion for Discovery is denied; it is further

ORDERED that parties confer and resubmit to this court a scheduling order within ten (10) days of this order; and it is further

ORDERED that such scheduling order will be in conformance with this Court's rules and this chambers' guidelines outlined on the Court's webpage.

Slip Op. 03–166

FORMER EMPLOYEES OF MOTOROLA, INC. PLAINTIFFS, v. THE UNITED STATES DEPARTMENT OF LABOR DEFENDANT.

Court No. 02–00820

[Plaintiffs brought this action challenging the Department of Labor's decision denying the former employees of Motorola, Inc.'s Arlington Heights, IL facility certification for Trade Adjustment Assistance benefits. The Department of Labor moved to dismiss this action on the ground that it was filed 21 days after the 60 day period provided by 19 U.S.C. § 2395(a) and 28 U.S.C. § 2636(d) to bring such an action had expired. **HELD**: As Plaintiffs' suit was untimely and Plaintiffs have not demonstrated a basis for equitable tolling of the statute of limitations, the Department of Labor's Motion to Dismiss is granted.]

Decided: December 17, 2003

Sonnenberg & Anderson (*Paul S. Anderson* and *M. Jason Cunningham*) for plaintiffs.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*John H. Williamson*), and Employment and Training Legal Services Division, Office of the Solicitor, U.S. Department of Labor (*Jayant Reddy*), of counsel, for defendant.

OPINION

Before: MUSGRAVE, JUDGE

Plaintiffs, former employees of Motorola Inc.'s Global Telecommunications Solution Sector, Engineering Computing Level 2 Group located in Arlington Heights, Illinois, brought this action on December 30, 2002 seeking judicial review of the negative determination by Defendant, the United States Department of Labor ("Labor"), regarding their eligibility for trade adjustment assistance benefits. Presently before the Court is a motion by Labor to dismiss this action for lack of jurisdiction on the ground that Plaintiffs filed their summons and complaint with the Court outside the 60 day time limit prescribed by 19 U.S.C. § 2395(a) and 28 U.S.C. § 2636(d). For the reasons which follow, Labor's motion is granted.

Background

Plaintiffs, acting *pro se*,[1] submitted a petition for trade adjustment assistance to Labor via certified mail on December 14, 2001. On March 7, 2002 Plaintiff's were notified via a form letter that they were denied eligibility for trade adjustment assistance because they failed to meet one of the eligibility requirements. Attached to the

[1] Present counsel for Plaintiffs was appointed by the Court on March 4, 2003.

form letter was a copy of Labor's negative determination dated December 12, 2001, which was based on an investigation of an earlier petition submitted by engineering and administrative employees of Motorola's Arlington Heights, Illinois facility.

On May 2, 2002 Labor approved a petition for trade adjustment assistance submitted by former employees of Motorola's Global Telecommunications Solution Sector and Commercial, Government, Industrial Solutions Sector in Schaumburg, Illinois. Plaintiffs subsequently contacted a trade adjustment assistance representative with the Illinois Department of Employment Security ("IDES"), who advised them to petition Labor to amend the certification for the Schaumburg facility to include the Arlington Heights facility. On June 25, 2002 Plaintiffs submitted a formal request for such an amendment. Labor treated this request for amendment as a request for reconsideration of another negative determination of the Arlington Heights employees eligibility for trade adjustment assistance dated June 27, 2002. In a decision dated October 1, 2002 Labor once again determined that Plaintiffs were ineligible for trade adjustment assistance. The cover letter to this decision, dated October 2, 2002, stated that "interested parties have 60 days from the date this decision is published in the *Federal Register* to file for judicial review." The decision was published in the Federal Register on October 10, 2002, and the 60 day period during which Plaintiffs were permitted to file an action in this Court ended December 9, 2002. Plaintiffs' letter, constituting their summons and complaint, was filed with the Court on December 30, 2002.

Discussion

Plaintiffs acknowledge that they commenced this action after the 60 day period had expired, but argue that the doctrine of equitable tolling should apply in this case since they exercised "the requisite due diligence in pursuing their claim." Mem. in Supp. of Pl.s' Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Br.") at 6. *In Former Empl. of Siemens Info. Comm. Networks, Inc. v. Herman*, 24 CIT 1201, 120 F. Supp. 2d 1107 (2000) the court explained:

> Equitable tolling is generally limited to situations where a claimant has actively pursued judicial relief by filing a defective pleading within the statutory time period, or where a claimant has been "induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Equitable tolling is not available where the plaintiff failed to exercise due diligence. Whether a plaintiff has acted with due diligence is a fact-specific inquiry, guided by reference to the hypothetical reasonable person.

24 CIT at 1208, 120 F. Supp. 2d at 1114 (citations omitted).

In support of their argument, Plaintiffs note that when they were preparing their petitions for trade adjustment assistance they sought guidance from other workers who had experience filing such petitions. After filing their petition, Plaintiffs' *pro se* representative avers that he regularly checked the status of their petition on Labor's website and contacted a representative with IDES for further assistance. Moreover Plaintiffs allege that they were confused by the March 7, 2002 denial of their eligibility for trade adjustment assistance since the determination attached to the letter denying their eligibility pertained to an earlier petition filed by other former employees at the Arlington Heights facility. Plaintiffs' representative once again contacted a representative with IDES and at that person's recommendation filed a petition for Labor to amend the certification for the Schaumburg facility to include the Arlington Heights facility. Finally, when Plaintiffs' received the denial of their petition to amend the certification, they allege that they were further confused by the fact that this was treated as a request for administrative reconsideration of a different decision than the one attached to the denial of eligibility they received on March 7. Plaintiffs state that their representative "had little or no idea what Labor had actually received from him, what they had actually decided, and when he was expected to file a petition with this court based on the inconsistent notices from Labor." Pl.s' Br. at 8.

Although it is clear from the facts that Labor made an already complicated process even harder for Plaintiffs, despite its "obligat[ion] to conduct its investigations with the utmost regard for the interests of the petitioning workers," *Stidham v. U.S. Dep't of Labor*, 11 CIT 548, 551, 669 F. Supp. 432, 435 (1987), there is no evidence that Labor's actions prevented Plaintiffs from filing their summons and complaint within the 60 day period. The cover letter dated October 2, 2002, which accompanied the Notice of Negative Determination Regarding Application for Reconsideration, plainly stated that the Notice would be published in the Federal Register and that interested parties would have 60 days from the date of publication to file with this court for judicial review. Plaintiffs' *pro se* representative "contacted the Court of International Trade in late October 2002 regarding his options for judicial review." Pl.s' Br. at 3. Although Plaintiffs' representative was unable to access forms the Office of the Clerk of the Court sent to him electronically, printed forms were subsequently sent to him via the U.S. Postal Service and Plaintiffs do not allege that this delay caused them to miss the filing deadline. Plaintiffs assert that their representative was unaware that the documents would be deemed filed when they were received unless they were sent via certified mail. Nevertheless, the documents were mailed eight days after the 60 day period expired. Thus, the Court concludes that while Plaintiffs may have been reasonably diligent in pursuing their claim for trade adjustment assistance prior to Octo-

ber 2002, the fact that they did not file their summons and complaint by the December 9, 2002 deadline was at best an instance of simple neglect, which does not provide grounds for equitable tolling. *See Bonneville Assoc. Ltd. v. Barram*, 165 F.3d 1360, 1365 (Fed. Cir. 1999) ("[T]he principals of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect." (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990))) .

Plaintiffs also argue that Labor never "properly considered [their] petition of December 12, 2001" and thus "substantial justice requires that they be allowed to proceed before this court and plead their case on the merits, or alternatively that the matter be remanded to Labor for further review." Pl.s' Br. at 11. While the degree of consideration Labor afforded Plaintiffs' petition is uncertain, the October 2, 2002 cover letter clearly notified Plaintiffs that they had 60 days to seek redress in this court. Because Plaintiffs did not satisfy this jurisdictional requirement, the substantive merits of their claim are not properly before the Court for review.

Conclusion

For the foregoing reasons, Labor's Motion to Dismiss is granted.

Slip Op. 03–167

DUPONT TEIJIN FILMS USA, LP, MITSUBISHI POLYESTER FILM OF AMERICA, LLC, AND TORAY PLASTICS (AMERICA), INC., PLAINTIFFS, v. UNITED STATES, DEFENDANT, AND POLYPLEX CORPORATION LIMITED, DEFENDANT-INTERVENOR.

Consol. Court No. 02–00463

[ITA's antidumping duty determination sustained in part, remanded in part; Defendant-Intervenor's motion to supplement the record and amend memorandum of law denied.]

Dated: December 17, 2003

Wilmer, Cutler & Pickering (*John D. Greenwald*, *Ronald I. Meltzer*, and *Lynn M. Fischer*) for plaintiffs.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Paul D. Kovac*), *Scott D. McBride*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Coudert Brothers LLP (*Kay C. Georgi* and *Mark P. Lunn*) for defendant-intervenor.

OPINION

RESTANI, Chief Judge:

This matter is before the court following remand in *Dupont Teijin Films USA, LP v. United States*, 273 F. Supp. 2d 1347 (Ct. Int'l Trade 2003) ("*Dupont Teijin I*"). In its *Final Results of Redetermination Pursuant to Court Remand* [hereinafter *Remand Determination*], the Department of Commerce ("Commerce" or "the Department") determined to include Defendant-Intervenor Polyplex Corporation Limited ("Polyplex") in the antidumping duty order on polyethylene terephthalate film, sheet, and strip ("PET film") from India because its weighted-average dumping margin was greater than *de minimis*. Polyplex and Dupont Teijin Films USA, LP, Mitsubishi Polyester Film of America, LLC, and Toray Plastics (America), Inc. ("Plaintiffs"), domestic producers of PET film and petitioners in the underlying investigation, now raise various challenges to the *Remand Determination*. Polyplex has also filed a motion to supplement the record and to amend its memorandum of law in this matter in light of Commerce's recent request for comments on Section 201 duties.

Jurisdiction & Standard of Review

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). The court will uphold Commerce's determination in an antidumping duty investigation 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)(I) (2000).

Factual & Procedural Background

In *Dupont Teijin I*, the court reviewed Commerce's final determination in the antidumping duty investigation, which found that PET film from India is being sold, or is likely to be sold, in the United States at less than fair value ("LTFV"). 273 F. Supp. 2d at 1350; *see Polyethylene Terephthalate Film, Sheet, and Strip From India*, 67 Fed. Reg. 34,899 (Dep't Commerce May 16, 2002) [hereinafter *Final Determination*]. Commerce calculated Polyplex's weighted-average dumping margin at 10.34 percent, but the Department "adjusted the antidumping duty cash deposits for the export subsidies found in the companion countervailing investigation rather than adjusting net U.S. price." *Final Determ.*, 67 Fed. Reg. at 34,900–01 & n.2 (citation omitted). Based on its zero cash deposit rate, Commerce excluded Polyplex from its affirmative dumping determination on PET film from India and the resulting antidumping duty order. *Id*. at 34,901; Notice of Amended Final Determination of Sales at Less Than Fair Value [hereinafter Amended Final Determination].

In reviewing this action, the court held that Commerce's *Final Determination* was not in accordance with law, because an exporter

with a dumping margin greater than two percent must be included in an affirmative final determination of sales at LTFV regardless of its cash deposit rate. Dupont Teijin I, 273 F. Supp. 2d at 1352. The court remanded the case to Commerce with instructions that its exclusion of Polyplex could only be based on a *de minimis* dumping margin as a result of adjustments to Polyplex's U.S. price pursuant to 19 U.S.C. § 1677a(c)(1)(C) (2000). *See id.* & n.11. The court noted that the real issue here is whether Commerce could reasonably interpret the statute, which requires Commerce to increase Polyplex's export price by "the amount of any *countervailing duty imposed* on the *subject merchandise* . . . to offset an export subsidy," to apply in situations like the present where *countervailable* export subsidies are found in a companion countervailing duty investigation, but where duties have not yet been assessed after an administrative review.[1] *Id.* n.11 (quoting 19 U.S.C. § 1677a(c)(1)(C) (emphasis added)). Because the Department failed to make any adjustments to Polyplex's U.S. price in the *Final Determination*, but rather based its exclusion of Polyplex on its zero cash deposit rate despite a dumping margin above *de minimis* levels, the court ordered Commerce to "calculate Polyplex's dumping margin after making the adjustments to export price required by 19 U.S.C. § 1677a and Commerce's reasonable interpretations thereof." *Id.* at 1352. The court instructed that, "[i]f Commerce continues to calculate a dumping margin of 10.34 percent for Polyplex, Polyplex must be subject to the antidumping duty order, whether or not it is given a cash deposit rate of zero because of *expected* offsetting countervailing duties." Id. at 1352–53.

In its *Remand Determination*, after providing notice and an opportunity for comment, Commerce set forth its interpretation of the disputed phrase "countervailing duty imposed" in the context of companion antidumping and countervailing duty investigations. Although the Department normally interprets the term "imposed" to require an adjustment to export price only following the actual assessment of countervailing duties following an administrative review, in parallel antidumping and countervailing duty investigations, "Commerce considers countervailing duties to be imposed upon the issuance of a countervailing duty order." *Remand Determ.* at 3–4. Such an order "directs customs officers to assess a countervailing duty." *Id.* at 7 (quoting 19 U.S.C. § 1671e(a)). Com-

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[1] The court explained the basic economic theory behind the adjustments mandated by § 1677a(c)(1)(C) in *Dupont Teijin I*, 273 F. Supp. 2d at 1349 n.4. Essentially, this provision presumes that export subsidies contribute to the lower-priced sales of subject merchandise in the U.S. market. *Final Determ.*, 67 Fed. Reg. at 34,900–01. In this case, the countervailing duty investigation resulted in a margin of 18.66 percent for Polyplex, which is greater than its 10.34 percent dumping margin. *Id.* at 34,901. Thus, the issue in *Dupont Teijin I* was whether Commerce's exclusion of Polyplex based on its extension of § 1677a(c)(1)(C)'s basic economic theory to the calculation of antidumping duty cash deposits, without adjusting the producer/exporter's U.S. price, was appropriate.

merce explains that, if a countervailing duty order has not issued prior to its final determination in an antidumping duty investigation, Commerce will adjust the producer's cash deposits on future entries "to prevent assessment of both antidumping and countervailing duties to compensate for the same cause of unfairly priced imports." Id. at 8.

In applying its statutory interpretation to the facts of this case, Commerce explained that, because Polyplex's exports were not subject to a countervailing duty order at the time Commerce issued its *Final Determination*, countervailing duties had not been "imposed" on the subject merchandise, and, therefore, an increase in Polyplex's U.S. price was not permitted. *Id.* at 4. Accordingly, Commerce determined to include Polyplex in the antidumping duty order, but chose to account for the countervailable export subsidies in its cash deposit instructions to customs officials in order to prevent the double assessment of duties. *See id.* at 8. This action followed.

Discussion

The parties raise several challenges to the Department's *Remand Determination*. While Plaintiffs support Commerce's decision to include Polyplex in the antidumping duty order, they claim that the Department's new interpretation of § 1677a(c)(1)(C) is inconsistent with the plain language of the statute and the court's decision in *Serampore Industries v. United States*, 11 CIT 866, 871–73, 675 F. Supp. 1354, 1359–60 (1987), which upheld as "sufficiently reasonable" Commerce's interpretation of "imposed" to include countervailing duties only when they are "actually imposed" or "assessed."[2] Plaintiffs argue, however, that the court should affirm the *Remand Determination* without reviewing the Department's new statutory interpretation because, in Plaintiffs' view, Commerce did not apply it in calculating Polyplex's dumping margin. In response to Plaintiffs' claims, both Polyplex and Commerce argue that Commerce's interpretation of the statute is ripe for review and not precluded by *Serampore*.

Nevertheless, Polyplex claims that the Department's new interpretation of § 1677a(c)(1)(C) is not in accordance with the court's re-

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[2] Plaintiffs also challenge the Department's refusal to conduct an administrative review of Polyplex's sales that were erroneously excluded from the July 1, 2002 antidumping duty order. Because Commerce's *Remand Determination* will apply retroactively to include Polyplex in the original order, Plaintiffs argue that their request for an administrative review on July 31, 2003, was timely and should have been granted. *See* 19 C.F.R. § 351.213(b)(1) (2003) (providing that interested parties may request an administrative review of individual exporters or producers *covered by an antidumping duty order* each year during the anniversary month of the order's publication). The court is without jurisdiction to hear this claim, because the Department's decision not to conduct an administrative review is not one of the determinations under review in this action.

mand order[3] and is unreasonable in light of the statute's underlying purpose.[4] Polyplex offers what it argues is a better interpretation of the statute that is consistent with both the legislative purpose and the U.S.'s international obligations.[5] In the alternative, Polyplex argues that, even if the court upholds the Department's interpretation of the statute, an adjustment to its dumping margin was required here because the countervailing duty order was issued on the same day as the amended final dumping determination.[6]

In reviewing Plaintiffs' claims, the court finds that the Department's new interpretation is ripe for review because Commerce did

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[3] Polyplex urges that Commerce has not followed the instructions of the court in *Dupont Teijin I* in refusing to adjust Polyplex's U.S. price. The court rejects Polyplex's suggestion that the court in *Dupont Teijin I* "had a reasonable expectation that Commerce [would] reiterate the interpretation it had carefully explained in its Additional Brief." Polyplex Br. at 8. To the contrary, the court stated that, on remand, Commerce was free to set forth a new interpretation of the statute, after providing notice and an opportunity to comment to the parties, so long as the interpretation is reasonable in light of the statute's express terms. *Dupont Teijin I*, 273 F. Supp. 2d at 1352 & n.11; *see infra* n.7 (rejecting the notion that the Department is bound by previous interpretations of the statute as set forth in prior antidumping duty determinations and previous briefs to the court in this action).

[4] On September 5, 2003, Polyplex filed a motion to supplement the record and amend its memorandum of law in objection to the *Remand Determination* in light of Commerce's unrelated request for comments on the treatment of Section 201 duties and countervailing duties in antidumping proceedings. *See Treatment of Section 201 Duties and Countervailing Duties*, 68 Fed. Reg. 53,104 (Dep't Commerce Sept. 9, 2003). The motion is denied. Polyplex has failed to justify the court's consideration of matters outside the administrative record on incompleteness or any other ground. *See F.lli De Cecco di Filippo Fara San Marino S.p.A. v. United States*, 21 CIT 1124, 1126, 980 F. Supp. 485, 487 (1997) ("A court will only consider matters outside of the administrative record when there has been a '*strong showing* of bad faith or improper behavior on the part of the officials who made the determination' or when a party demonstrates that there is a '*reasonable basis* to believe the administrative record is incomplete.' "). Further, the Federal Register notice was not considered by the agency in making its *Remand Determination* and has no bearing on the court's resolution of the present dispute.

[5] "A better reading of the provision . . . would require an upward adjustment to export price and constructed export price in an antidumping investigation (or subsequent review) for CVD duties imposed during a companion CVD investigation or in a prior CVD investigation (as assessed in a subsequent review)." Polyplex Br. at 20. The court finds that, because Commerce prevents the assessment of double duties by adjusting Polyplex's cash deposit on future entries, the Department's new interpretation does not run afoul of the U.S.'s international obligations, despite Polyplex's arguments to the contrary. Article VI.5 of the General Agreement on Tariffs and Trade specifically prohibits only the *assessment* of both antidumping and countervailing duties to compensate for the same cause of unfairly priced imports. The court also notes that Polyplex's proffered reading still does not resolve the ambiguity as to what "imposed" means in the context of an investigation, although Polyplex's position seems to be that, in the context of an investigation, countervailing duties are "imposed" simply by virtue of the Department's affirmative finding of countervailable subsidies.

[6] Polyplex also argues, for the first time, that the Department erred as a matter of law in aligning the final countervailing duty determination with the final antidumping duty determination under 19 C.F.R. § 351.210 (2003), because Plaintiffs' request for realignment was untimely filed under Commerce regulations. The court declines to consider this issue. Polyplex did not challenge this decision before Commerce and thus did not exhaust its administrative remedies.

in fact employ it in declining to make an adjustment to Polyplex's U.S. price and subjecting Polyplex to the antidumping duty order. Similarly, the court rejects Plaintiffs' argument that the agency is bound by the previous interpretation of "imposed" that was upheld in *Serampore*. "[I]t is well settled that an agency may change its interpretation of an underlying statutory provision even absent any alteration in that provision, so long as the reason for the change is explained and the change does not conflict with the underlying statute." *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1353 (Fed. Cir. 2003). In its *Remand Determination*, Commerce explained that, prior to this court's decision in *Dupont Teijin I*, its practice was to reduce the percentage antidumping margin by the export subsidy rate calculated in a concurrent countervailing duty investigation in its cash deposit instructions sent to Customs, rather than increasing U.S. price under § 1677a. Applying this methodology in its *Final Determination*, the Department excluded Polyplex from the antidumping order on PET film from India based on its zero cash deposit rate, despite a dumping margin of 10.34 percent. The court struck down this action in *Dupont Teijin I* and instructed the Department to "calculate Polyplex's dumping margin after making the adjustments to export price required by 19 U.S.C. § 1677a and Commerce's reasonable interpretations thereof." 273 F. Supp. 2d at 1352. The court stated that Commerce was free to arrive at a new interpretation of that statutory provision in the light of the unique circumstances of this case—the first in which the Department has found that a respondent received a larger amount of countervailable export subsidies than the amount of dumping calculated in the antidumping investigation—so long as the interpretation was supported by a "reasoned analysis." *Id.* at 1353 n.11. Commerce's *Remand Determination* does provide a reasoned analysis for its new interpretation of the statute and, accordingly, the court concludes that Commerce has adequately explained the rationale for its definitional change. As such, the court rejects Plaintiffs' assertion that the Department is precluded from making adjustments to producers' U.S. price as a result of parallel antidumping and countervailing duty investigations.[7]

As discussed in *Dupont Teijin I*, the court affords *Chevron* deference to Commerce's reasonable interpretation of ambiguous statutory terms articulated in the course of an antidumping determina-

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[7] Similarly, the court rejects Polyplex's claim that the Department is bound by previous interpretations of the statute that it has expressed at various stages of these proceedings. Although Commerce has indeed changed course several times on the meaning of "countervailing duty imposed" in the context of concurrent antidumping and countervailing duty investigations, the Department is free to do so as explained above. This is particularly true where, as here, Commerce has had to develop and shift its interpretation in response to this court's decision in *Dupont Teijin I* and the parties' comments on the preliminary remand determination.

tion. Id. at 1351 (citing *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1379–80 (Fed. Cir. 2001)); *see Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). The statute at issue instructs Commerce to increase the price used to establish a foreign producer's export price or constructed export price by "the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an export subsidy." 19 U.S.C. § 1677a(c)(1)(C). Because the statute is silent or ambiguous with respect to the meaning of "imposed," *see Serampore*, 11 CIT at 871, 675 F. Supp. at 1358, the court must decide whether the Department's interpretation of the statute allowing an upward adjustment to U.S. price upon the issuance of a countervailing duty order, but before any duties are actually assessed after an administrative review,[8] is permissible. The court concludes that it is.

"Part I" of the statute is entitled "IMPOSITION OF COUNTERVAILING DUTIES" and governs, among other things, the procedures for initiating and conducting countervailing duty investigations and the issuance of countervailing duty orders following affirmative determinations by the Department and the U.S. International Trade Commission ("ITC"). *See* 19 U.S.C. §§ 1671–1671h (2000). Section 1671 states the general rule that, after such affirmative determinations by both agencies, "there shall be imposed upon such merchandise a countervailing duty." *Id.* § 1671(a). The section does not explain how such a duty is to be "imposed." Section 1671d, which governs "Final determinations," sheds some light on this issue, stating that Commerce "shall issue a countervailing duty order" upon its affirmative finding of countervailable subsidies and the ITC's affirmative material injury determination. *Id.* § 1671d(c)(2). The next statutory provision, which is entitled "Assessment of duty," begins with a subsection entitled "Publication of countervailing duty order." *Id.* § 1671e(a). The countervailing duty order "directs customs officers to assess a countervailing duty equal to the amount of the net countervailable subsidy," describes the subject merchandise, and "requires the deposit of estimated countervailing duties pending liquidation of entries." *Id.* The following subsection of the "Assessment of duty" provision, entitled "Imposition of duties," brings us full circle to where Part I began, stating the general rule that entries of "merchandise *subject to the countervailing duty order* . . . shall be subject to the imposition of countervailing duties under section 1671(a)." *Id.*

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[8] In the light of the Department's recent interpretation of the statute, Polyplex questions Commerce's ability in the future to increase an exporter's U.S. price following the actual assessment of duties pursuant to an administrative review. Although the Department's prior practice does not seem to be affected by the new interpretation, because the actual assessment of countervailing duties following an administrative review necessarily flows from, and is a direct result of, an affirmative countervailing duty determination and the issuance of a countervailing duty order under Part I of the statute, this issue is not ripe for the court's review.

subsection (b)(1) (emphasis added). The actual assessment of countervailing duties is addressed in Part III of the statute, which governs administrative reviews of both antidumping and countervailing duty determinations. *See id.* §§ 1675–1676a (2000).

Based on this review of the statutory language and framework, Commerce's interpretation that a countervailing duty is "imposed on the subject merchandise under Part I" upon the issuance of a countervailing duty order is reasonable. Part I makes clear that an affirmative finding of countervailable subsidies alone does not constitute the imposition of countervailing duties because the ITC must then determine whether imports benefitting by those subsidies cause or threaten material injury to the domestic industry. *See id.* § 1671d(b)(1). Instead, the final result of affirmative determinations by both agencies under Part I is the Department's issuance of a countervailing duty order, which instructs customs to assess a countervailing duty. A countervailing duty order instructing customs to assess countervailing duties remains in effect until it is expressly revoked, and countervailing duties will be automatically assessed at the original cash deposit rate if an administrative review is not requested. 19 C.F.R. §§ 351.211–.212 (2003). In light of this statutory and regulatory scheme, it is reasonable for the Department to consider a countervailing duty to be "imposed" upon the issuance of the countervailing duty order.

The court must next determine whether, based on its reasonable interpretation of the statute, the Department correctly determined that Polyplex must be subject to the antidumping duty order because it dumped PET film in the United States at a margin of 10.34 percent. Polyplex's main argument on this point[9] is that, because the revised final determination and antidumping duty order were issued on the same day as the affirmative countervailing duty determination, the Department should have increased Polyplex's U.S. price by the amount of countervailable subsidies found in the countervailing duty order. This would have resulted in a *de minimis* dumping margin and the exclusion of Polyplex from the order.

Polyplex's argument has weight. Notice of Commerce's determination that PET film from India is being sold, or is likely to be sold, in the United States at less than fair value was published in the Federal Register on May 16, 2002. *Final Determ.*, 67 Fed. Reg. at 34,899.

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[9] Polyplex now argues that the Department erred as a matter of law in imposing an antidumping duty order on its entries when its cash deposit rate is zero. The court declines to revisit this issue. In its remand order, the court held that Commerce's exclusion of Polyplex from the antidumping order on PET film based on a zero cash deposit rate was not in accordance with law. *Dupont Teijin I*, 273 F. Supp. 2d at 1352. Accordingly, the court instructed the Department that, "[i]f Commerce continues to calculate a dumping margin of 10.34 percent, Polyplex must be subject to the antidumping duty order, whether or not it is given a cash deposit rate of zero because of *expected* offsetting countervailing duties." *Id.* at 1352–53.

The *Final Determination* revealed that Polyplex's weighted-average dumping margin was 10.34 percent. Id. at 34,901 n.2. Commerce published notice of its final determination in the countervailing duty investigation on the same day. *Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India*, 67 Fed. Reg. 34,905 (Dep't Commerce May 16, 2002) (final). As discussed above, however, an affirmative final determination in a countervailing duty investigation does not constitute the imposition of countervailing duties. The Department reasonably considers a countervailing duty to be imposed in the context of an investigation upon the issuance of a countervailing duty order. Thus, at the time of Commerce's *Final Determination* in the antidumping duty investigation, no countervailing duties had been imposed according to the Department's new interpretation, and Commerce therefore argues that it properly refused to adjust Polyplex's U.S. price in the *Remand Determination*.

This does not end the matter here because Commerce issued an amended final determination in the antidumping investigation on the same day that the countervailing duty order issued. Amended Final Determ., 67 Fed. Reg. at 44,176; *Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India*, 67 Fed. Reg. 44,179 (Dep't Commerce July 1, 2002) (countervailing duty order). In this procedural posture, Commerce's cursory explanation that there were no countervailing duties imposed at the time of the *Final Determination* is inadequate. The dumping margin calculations can and do change after the issuance of a final determination. *See Amended Final Determ.*, 67 Fed. Reg. at 44,176 (amending a respondent's dumping margin to correct for "ministerial errors"). Given Commerce's fairly routine procedure of amending final antidumping duty determinations, it is not a sufficient answer to say that the margin calculated in the *Final Determination* was binding. Here, the purported final determination was not truly final until the amendment issued approximately six weeks later.

Accordingly, upon remand, Commerce must explain how it will fairly and consistently apply its interpretation of "imposed" when a final determination or an amended final determination issues on the same day as a countervailing duty order on the subject merchandise due to a petitioner's alignment request.[10] Commerce's second remand determination should also analyze how the extension of pro-

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[10] Absent Plaintiffs' request to align the final countervailing duty determination with the final antidumping determination here, the countervailing duty order would have issued several months before the final antidumping duty determination. Accordingly, countervailing duties would have been imposed on the subject merchandise at the time of the final LTFV determination under Commerce's interpretation of the statute, and Polyplex would have been excluded from the antidumping duty order. If, upon remand, the Department continues to stand by Polyplex's dumping margin as calculated in the original *Final Determination*, Commerce must provide a reasonable explanation for its failure to take the countervailable subsidies into consideration when it re-promulgated all of the dumping

ceedings on the grounds of extraordinary complication affects the application of this new interpretation. As Polyplex points out, only petitioners and Commerce have the power to extend a countervailing duty determination on the grounds that it is extraordinarily complicated under 19 U.S.C. § 1671b(c)(1), and only petitioners have the power to request an alignment of the antidumping and countervailing duty proceedings, *see* 19 C.F.R. § 351.210(b)(4)(I). Thus, upon remand, the Department must fully address Polyplex's concern that petitioners could unfairly control the respondents' fate in an antidumping determination and resulting antidumping duty order by filing an extension and/or alignment request in the countervailing duty investigation, and how simultaneously-issued antidumping duty determinations and countervailing duty orders are to be treated.

Conclusion

For all of the foregoing reasons, the *Remand Determination* is sustained in part and remanded in part. Commerce is to seek to restore the parties, as far as is possible, to the position they would have been had they been able to act on the Department's new interpretation of "imposed," and the court's determination in this matter, prior to the issuance of the *Amended Final Determination*. Commerce must file its redetermination within 45 days of the entry of this opinion, and Plaintiffs and Polyplex shall have fourteen days thereafter to file their objections. Commerce may reply within eleven days thereafter. SO ORDERED.

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margins, including that of Polyplex, in the *Amended Final Determination* and antidumping duty order that issued on the same day as the countervailing duty order.

Notice of Amendments to the Rules

On September 30, 2003, the Court approved certain amendments to the Rules of the United States Court of International Trade that will become effective on January 1, 2004. The Rules affected by these changes are: **USCIT Rules Judges Page; USCIT Rules (amended)** 3, 3.1, 4, 4.1, 5, 7, 16, 22, 24, 26, 27, 36, 40, 54, 58, 63, 67.1, 68, 70, 71, 72, 73, 74, 77; 78, 79, 81, 82, 82.1 and 89; **USCIT Forms (amended)** 1, 1B, 2, 3, 4, 9, 10, 15, 16, 17, 18 and 19; **Specific Instructions (amended)** for Forms 15, 16, 17 and 18; **Appendix on Access to BPI (amended); Appendix of Forms (amended); USCIT Rules (new)** 16.1, 26.1, 54.1, 73.1, 73.2, 73.3, 86.1 and 86.2; **USCIT Forms (new)** 16–1, 16–2, 16–3, 16–4, 16–5, 20, M–1 and M–2; **USCIT Specific Instructions (new)** for Form 19; **USCIT Guidelines for Court-Annexed Mediation (new);** and **Standard Chambers Procedures (new).**

Language deleted from each rule appears in brackets with strikeovers. New language is indicated by redline type.

A copy of the amendments may be obtained from the Court's web site:

www.cit.uscourts.gov

October 31, 2003

LEO M. GORDON,
Clerk of the Court.

NOTICE OF ERRATA TO AMENDMENTS TO THE RULES OF THE UNITED STATES COURT OF INTERNATIONAL TRADE

On October 31, 2003, the Office of the Clerk issued a Notice Regarding Approved Amendments (approved by the Court on September 30, 2003) to the Rules of the United States Court of International Trade. A review of those amendments has revealed some inadvertent errors.

The corrections are as follows:

Form 20, in the original Notice, the PDF for the subpoena form was corrupted. It has been recreated, and the hyperlink to this form on the October Notice has been replaced. The current posting within the Notice is correct.

Rule 73.2, in the original Notice, at the end of paragraph (c)(2) there is a reference to Rule 71(c). That reference should have been omitted. The phrase, "pursuant to Rule 71(c)" now has been omitted from the PDF. The current posting within the Notice is correct.

Form 24, in the original Notice, no amendment was included for R. 24. The current language in R. 24(a) makes reference to "Rule 71(c)." An amendment should have been included which changed that reference to Rule 73.2. The amendment now has been added, and the current posting within the Notice is correct.

A corrected version of the original Notice now appears on the home page of the USCIT Web Site under "Notice Regarding Approved Amendments (10/31/03)."

Notice of this Errata and the original Notice (10/31/03) has been transmitted to the following sources for publication:

Bureau of National Affairs, Inc.
Gould Publications, Inc.
KPMG Customs Info
International Business Reports
Matthew Bender & Company/LEXIS Publishing
Oceana Publications, Inc.
Rules Service Company
U.S. Government Printing Office
West Group

December 5, 2003

LEO M. GORDON
Clerk of Court.