Decisions of the United States Court of International Trade

Slip Op. 06–19

NSK LTD., *et al.* Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN US CORPORATION, Defendant-Intervenor.

Before: WALLACH, Judge
Consol. Court No.: 04–00519

PUBLIC VERSION

[Plaintiff's Motion For Judgment Upon the Agency Record is Partially Denied and Partially Remanded to Commerce.]

DATED: January 31, 2006

Crowell & Moring, LLP, (*Matthew Philip Jaffe*, *Robert A. Lipstein*, *Alexander H. Schaefer* and *Sobia Haque*) for Plaintiffs NSK Ltd., NSK Corp., and NSK Precision America, Inc.

Barnes, Richardson & Colburn, (*Donald J. Unger*, *Kazumune V. Kano*, *Diane A. MacDonald*, *Louisa Vassileva Carney* and *Nikolay A. Ouzounov*) for Plaintiffs NTN Corp., NTN Bearing Corp. of America, American NTN Bearing Manufacturing Corp., NTN-Driveshaft, Inc., and NTN-BCA Corp.

Sidley Austin Brown & Wood LLP, (*Neil R. Ellis* and *Neil C. Pratt*) for Plaintiffs Koyo Seiko Co., Ltd., and Koyo Corp. of U.S.A.

Stewart and Stewart, (*Terence P. Stewart*, *William A. Fennell*, *Lane S. Hurewitz*, and *Geert De Prest*) for Defendant-Intervenor Timken U.S. Corp.

Stuart E. Schiffer, Deputy Assistant Attorney General; *David M. Cohen*, Director; *Patricia M. McCarthy*, Assistant Director; *Michael D. Panzera*, Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; and *Philip Curtin*, *Elizabeth Doyle*, *William J. Kovach, Jr.*, and *Carrie Owens*, Attorney-Advisors, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant United States.

OPINION

Wallach, Judge:

I
Introduction

Plaintiffs NSK Ltd., NSK Corp., and NSK Precision America, Inc. (collectively, "NSK"); NTN Corp., NTN Bearing Corp. of America, American NTN Bearing Manufacturing Corp., NTN Driveshaft, Inc., and NTN-BCA Corp. (collectively, "NTN"); Koyo Seiko Co. Ltd., and Koyo Seiko Corp. of U.S.A.; and Timken U.S. Corp. ("Timken") challenge the United States Department of Commerce's ("Commerce" or "the Department") findings in *Antifriction Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination To Revoke Order in Part*, 69 Fed. Reg. 55,574 (September 15, 2004) ("Final Results"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2004).

II
Background

On September 15, 2004, Commerce published in the Federal Register the Final Results of its review of the antidumping duty orders on antifriction bearings and parts thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom covering the period of review ("POR") of May 1, 2002, through April 30, 2003. *Final Results* at 55,574. The scope of this order covers antifriction balls, ball bearings with integral shafts, ball bearings (including radial ball bearings) and parts thereof, and housed or mounted ball bearing units and parts thereof.[1] *Id.* at 55,575. In the Final Results, Commerce found a 5.56% weighted-average dumping margin for Koyo, 2.74% for NTN, and 2.46% for NSK. *See id.* at 55,580.

On March 4, 2005, the Court consolidated all the cases challenging the Final Results of the thirteenth administrative review.[2] On August 23, 2005, this Court denied Plaintiff Koyo's Motion to Stay Count One of the Complaint concerning the zeroing issue pending appeals of *NSK Ltd. v. United States*, 358 F. Supp. 2d 1276 (CIT 2005); *NSK Ltd. v. United States*, 346 F. Supp. 2d 1312 (CIT 2004); and *SNR Roulements v. United States*, 341 F. Supp. 2d 1334 (CIT

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[1] Imports of these products are classified under the following Harmonized Tariff Schedules (HTSUS) subheadings:

> 3926.90.45, 4016.93.00, 4016.93.10, 4016.93.50, 6909.19.5010, 8431.20.00, 8431.39.0010, 8482.10.10, 8482.10.50, 8482.80.00, 8482.91.00, 8482.99.05, 8482.99.2580, 8482.99.35, 8482.99.6595, 8483.20.40, 8483.20.80, 8483.50.8040, 8483.50.90, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.60.80, 8708.70.6060, 8708.70.8050, 8708.93.30, 8708.93.5000, 8708.93.6000, 8708.93.75, 8708.99.06, 8708.99.31, 8708.99.4960, 8708.99.50, 8708.99.5800, 8708.99.8080, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90.

Final Results, 68 Fed. Reg at 35,623.

[2] *NSK Ltd., NSK Corporation, and NSK Precision America Inc. v. United States*, Court No. 04–00519; *NTN Corporation, NTN Bearing Corp. of America, American NTN Bearing Mfg. Corp., NTN Driveshaft, Inc., and NTN-BCA Corp. v. United States*, Court No. 04–00527; *Timken Co. v. United States*, Court No. 04–00528; and *Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. v. United States*, Court No. 04–00530.

2004); pending the resolution of certain dispute settlement proceedings at the World Trade Organization ("WTO"); as well as pending the determinations by the United States Trade Representative ("USTR") and Commerce on whether to implement changes to the U.S. antidumping law if there is an adverse WTO decision. *U.S. – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/8 (February 7, 2005). The request to stay consideration of this issue pending the aforementioned appeals was denied because WTO adjudicatory decisions, while possibly persuasive, are not binding on this Court or Commerce; thus, staying consideration of Commerce's zeroing practice pending resolution of WTO proceedings was not warranted. *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–826, at 1032 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040; *Timken v. United States*, 354 F.3d 1334, 1344 (Fed. Cir. 2004); *Corus Staal B.V. v. Department of Commerce*, 395 F.3d 1343, 1348 (Fed. Cir. 2005).

Oral argument was held on November 17, 2005.

III
Standard of Review

This court will sustain Commerce's determinations, findings, or conclusions 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) (2004); *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1368 (Fed. Cir. 1999). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed 126 (1938)). Although the courts have considered substantial evidence to be something less than the weight of the evidence, the possibility of drawing two inconsistent conclusions from the presented evidence does not necessarily prevent an administrative agency's finding from being supported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966) (citing *Labor Board v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106 (1942); *Keele Hair & Scalp Specialists Inc. v. FTC*, 275 F.2d 18, 21 (5th Cir. 1960)).

The court must use a two-step analysis when evaluating Commerce's statutory interpretation. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The court examines, first, whether "Congress has directly spoken to the precise question at issue," in which case courts, "must give effect to the unambiguously expressed intent of Congress." *See Household Credit Servs. v. Pfennig*, 541 U.S. 232, 239, 124 S. Ct. 1741, 15 L. Ed. 2d 450 (2004); *Id.* at 842–3. Whenever Congress has "explicitly left a gap for the agency to fill," the agency's regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843–44. "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the [agency's] application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' " *Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965) (quoting *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153, 67 S. Ct. 245, 91 L. Ed. 136 (1946)).

IV
ANALYSIS

A
Commerce's Practice of Zeroing Is Supported by Substantial Evidence and Is In Accordance With Law

Each Plaintiff argues in turn that Commerce's practice of assigning a zero margin to export price ("EP") or constructed export price ("CEP") sales made above normal value ("NV") is a violation of either U.S. antidumping law or a WTO dispute settlement decision. Memorandum of Points and Authorities in Support of NSK's Motion For Judgment On The Agency Record ("NSK's Brief") at 2; Memorandum of Points and Authorities in Support of Motion of Plaintiffs Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A for Judgment on the Agency Record ("Koyo's Brief") at 13; Rule 56.2 Motion and Memorandum for Judgment on the Agency Record Submitted on Behalf of Plaintiffs NTN, *et al.* ("NTN's Brief") at 2; 19 U.S.C. § 1673. Plaintiffs further argue that the court should reconsider its earlier decisions regarding zeroing because this case is distinguishable from the U.S. zeroing case before the WTO. *See U.S. – Measures Relating to Zeroing and Sunset Reviews*, DS322 (Request for Consultations filed by Japan on November 24, 2005); *see also* NTN's Brief at 5–6, 12–14.

The issue of zeroing has been affirmed and settled by the Federal Circuit in *Corus Staal*, 395 F.3d at 1348–49. There is thus no reason to overturn Commerce's zeroing practice based upon a ruling by the WTO "unless and until such ruling has been adopted pursuant to the specified statutory scheme." *Id.* No such ruling has been adopted in this case; consequently, there is no reason to re-examine the issue of zeroing at this juncture. Commerce's interpretation need only be a reasonable interpretation of the statute and that Commerce's interpretation has been upheld several times based on that standard. *See id.* at 1347; *Timken* 354 F.3d at 1342.

Simply because Plaintiffs wish to challenge a particular holding does not make it irrelevant or not controlling. As Defendant-Intervenor aptly states " 'to embrace the novel precept that a precedent is not controlling – no matter how clear it is – if counsel in a subsequent proceeding can advance a new argument on the point' " would enable Plaintiffs to avoid precedent absent proof of changed circumstances. Response of Timken US Corporation to the Rule 56.2 Motions of Koyo Seiko Co., Ltd., et al., NSK Ltd., et al., and NTN Corporation, et al. ("Timken's Response") at 6–7 (citing *Matter of Penn Central Transp. Co.*, 553 F.2d 12, 15 (3d Cir. 1977). In this case, none of the Plaintiffs offer a valid reason why the Court should disregard *stare decisis* and Commerce's interpretation concerning its zeroing methodology in administrative reviews. Commerce's practice continues to be a reasonable interpretation of the statute, it is supported by substantial evidence and is in accordance with law.

B
NSK's Challenge of Commerce's Model Matching Methodology is Not Ripe for Adjudication

NSK challenges Commerce's decision to discontinue the use of its model matching methodology in the Fourteenth (Period of Review ("POR") 2002–2003) and Fifteenth (POR 2003–2004) administrative reviews of ball bearings. NSK's Brief at 3–4. NSK argues that Commerce made a final determination to "abandon its long-established practice of matching models using the 'family' approach" without support of empirical evidence and on that basis the Court should reinstate the family approach. *Id.* at 7–8. At oral argument, NSK further argued that it was "effectively hamstrung from being able to comply with the laws" as a result of Commerce's departure from the family approach, without adopting a new approach.

Defendant counters that Commerce's model matching methodology is not ripe for review because Commerce has not rendered a final determination to change its methodology. Defendant's Response to Plaintiffs' Motion For Judgment Upon the Administrative Record ("Defendant's Response") at 18. Defendant further argues that Plaintiff was not negatively affected because Commerce had not yet adopted a new methodology in the Fourteenth review. *Id.* at 20.

Timken argues that NSK has misstated the facts, saying Commerce did not make any changes to its methodology in the 2002–2003 review at issue before this court. Timken's Response at 10. In the instant review, Commerce stated that "we have determined that it is appropriate to change the methodology only after the parties have had a meaningful opportunity to comment on the proposed changes." Ball Bearings (and Parts Thereof) from France, Germany, Italy, Japan, Singapore, and the United Kingdom – Model Match Methodology, dated December 3, 2003 ("Commerce Model Match Memorandum") at 5–6; Timken's Response at 16. Therefore, Timken says, Commerce's decision to change its methodology in the next 2003–2004 review is not yet ripe for adjudication. *Id.* at 18.

A matter is not ripe for judicial review "where administrative proceedings are in process, and the agency has not adopted a final decision." *U.S. Ass'n of Imps. of Textiles & Apparel v. United States*, 366 F. Supp. 2d 1280, 1283 (CIT 2005) (quoting *Special Commodity Group on Non-Rubber Footwear v. Baldrige*, 6 CIT 264, 269, 575 F. Supp. 1288, 1293 (1983)). The Supreme Court has stated that "[t]wo conditions must be satisfied for agency action to be 'final.' " *Bennett v. Spear*, 520 U.S. 154, 177, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997).

> First, the action must mark the consummation of the agency's decisionmaking process . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

Id. at 177–78 (internal quotation marks & citations omitted). Therefore, an agency action is final if, as the Supreme Court has said, it is " 'definitive' " and has a " 'direct and immediate . . . effect on the day-to-day business' " of the party challenging it. *Nat'l Ass'n of Home Builders v. United States Army Corps of Eng'rs*, 417 F.3d 1272, 1278 (2005) (citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 239, 66 L. Ed. 2d 416, 101 S. Ct. 488 (1980) (quoting & citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 152, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977)); *see also Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 355 U.S. App. D.C. 346, 324 F.3d 726, 731 (D.C. Cir. 2003).

Addressing the tentativeness prong, Commerce's statement giving reasons for possibly utilizing a new methodology in the next review is not reflective of Commerce's "consummation of [its] decisionmaking process." *Bennett*, 520 U.S. at 178. A final change would be issued as a Federal Register notice or incorporated in the preliminary results of the review. In the context of the review before this court, the only evidence in the record concerning a change in Commerce's methodology is tentative; there is no definitive statement or action that demonstrates the existence of a final decision. There has been no action by Commerce concerning a change in the model-matching methodology in the Fourteenth review that affects NSK's ability to conform to subsequent administrative reviews; any change or resulting negative effect regarding the model match methodology in the next review is purely speculative. The absence of a replacement methodology also reveals the tentativeness of this issue. Since there is, at most, a tentative decision, it is unnecessary to address the consequences prong of the test.

Although Commerce invited comments and may revise its methodology in the next review, it did not change its methodology in the review at issue before the court. Defendant's Response at 19–20. The administrative record shows that Commerce did not make a "final" determination concerning its future use of the family method methodology in this review. *Id.* at 27. Commerce explained that a new methodology in the Fourteenth administrative review was necessary on account of:

> the staggering rate of technological change since we first devised the family-averaging methodology and the broad availability of powerful computing tools . . . [which] will enable us to make comparisons more precisely than the current methodology allows.

Commerce Model Match Memorandum at 4. However, the 2003–2004 administrative review is not before this court for review at this juncture. A statement by Commerce that it plans to review its methodology in the future is not enough for this court to exert jurisdiction over this claim. Any changes to Commerce's methodology in the future can only be challenged in the context of that review. *See Sharp Electronics Corp. v. United States*, 720 F. Supp. 1014, 1016 (CIT 1989); *see also United States Ass'n of Importers of Textiles and Apparel v. United States*, 413 F.3d 1344, 1349 (Fed. Cir. 2005). Commerce has not definitively stated whether it will discontinue using the family approach or whether it will make a final determination to alter its model match methodology. In the absence of a final agency determination, and because the 2003–2004 review is not before this court, this claim is not ripe for adjudication.

C
Koyo's Negative Billing Adjustments Were Unreasonably Disallowed By Commerce

Koyo argues that Commerce's denial of its lump-sum negative billing adjustments in the Fourteenth administrative review was unsupported by substantial evidence. Koyo's Brief at 20. Additionally, Koyo asserts that if Commerce considers Koyo's billing adjustments distortive, it should deny all, and not only the negative adjustments.[3] *Id.* Koyo argues that its reporting methodology was unchanged from prior reviews which was well-established and accepted by the Department in the past. *Id.* at 22. Koyo also says that it was not notified of Commerce's decision in time for Koyo to respond and provide proof that its reported billing adjustments were not distortive. *Id.* at 26. Koyo further argues that Commerce failed to follow

[3] Commerce denied Koyo's negative adjustments for its BILADJ2Hs (sales in which EP exceeded NV), but allowed all of Koyo's positive adjustments. Defendant's Response at 28. BILADJ2Hs "are made up of those adjustments that Koyo allocates on a customer-specific basis . . . consisting primarily of [tapered roller bearings], cylindrical roller bearings, and spherical plain bearings, [which] are similar to ball bearings in value, physical characteristics, and the manner in which they are sold]." Koyo's Section B Questionnaire Response at B–16 to –20 (October 6, 2003), C. Doc. 25/P. Doc. 148; Koyo's Brief at 10.

the necessary steps mandated by the statute prior to using "facts otherwise available" and thereby denying Koyo its negative billing adjustments. *Id.* at 29.

Commerce says it disallowed Koyo's negative billing adjustments because Koyo's allocation methodology caused "unreasonable distortions." Defendant's Response at 28. Defendant further argues that even though it accepted Koyo's allocation methodology and found it non-distortive in prior reviews, Koyo is not relieved from demonstrating that its allocation continues to be non-distortive in the current review. *Id.* at 38. Because Koyo did not meet its burden of demonstrating that its billing adjustment was accurate, Defendant contends that Commerce's denial of the adjustments was supported by substantial evidence. *Id.*

At oral argument, both Koyo and Defendant clarified their arguments on this issue. Koyo argues that because it used the same methodology for allocating billing adjustments which was upheld in all previous reviews, its methodology cannot suddenly be labeled distortive. In contrast, Commerce argues that Koyo's billing adjustments are distortive based on the evidentiary finding made during home market sales verification, and it is not Koyo's methodology itself that is problematic. Therefore, says Defendant, Koyo's argument that it should have been given the opportunity to submit more information fails because no more information is necessary for Commerce to make its determination. It is the facts themselves that are distortive.

In determining whether or not Commerce's methodology is reasonable, the Court must examine the facts as presented to Commerce. *See generally*, *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). In this instance, Commerce found Koyo's allocation to be "unreasonably distortive" because the billing adjustments "'were incurred during time periods that did not correspond to the POR'" and because Koyo reported adjustments on all models, even when not incurred on all of them. *See* Defendant's Supplemental Brief ("Defendant's Supp. Br.") at 1–2; *see also* Defendant's Response at 33 (citing *Koyo Final Results Analysis Memorandum*, at 2–3).

Commerce looked at the magnitude and the frequency of the distortions in making its ultimate determination. *Id.* These adjustments, according to Commerce, were "not insignificant," and sometimes represented over [a percentage] of the gross unit price, "the regulatory standard of insignificant adjustments." *Id.* at 3 (quoting Commerce's Final Results Analysis Memo for the Fourteenth Administrative Review ("Final Results Memo") at 3, ¶ 2; *see* 19 C.F.R. § 351.413). Defendant argues these "not insignificant" distortions occurred with many customers and in [a percentage] of sales. *Id.*

Defendant argues that its determination to allow only Koyo's positive billing adjustments, while disallowing its negative adjustments, is supported by *SKF v. United States*, in which the Court stated this practice was acceptable because Commerce needs to give certain incentives for companies to report in an efficient manner. *SKF v. United States*, 23 CIT 905, 77 F. Supp. 2d 1335, 1340 (1999); *see also INA Walzlager Schaeffler KG v. United States*, 21 CIT 110, 957 F. Supp. 251, 265–68 (1997). In *INA*, the Court established that both positive and negative adjustments are similar in nature, in that both are direct adjustments to fair market value (FMV) and must be reported similarly. *See INA*, 957 F. Supp. 251 at 257. The Court's remand order in *INA*, however, instructed Commerce to deny only the negative adjustments. *Id.* at 276. Commerce interprets this action to mean that separate treatment is possible and all adjustments need not be treated equally, in light of a finding that Commerce properly denied negative adjustments because the company failed to tie the expenses to specific transactions or products. *See id.*; *see also Torrington Co. v. United States*, 82 F.3d 1039, 1050–51 (Fed. Cir. 1996). *INA*, however, is distinguishable because the foreign producer was not forthcoming in disclosing its reporting methodology, and Commerce denied its negative billing adjustments to create an incentive for the company to accurately report its adjustments. Here, Koyo has repeatedly stated that it is reporting its adjustments to the best of its ability, so Commerce's "incentive" is actually punitive in this case, absent a specific determination why Koyo needs that incentive to do a better job of reporting.

There has been no factual showing that Koyo is able to produce more specific data on the particular allocation of its billing adjustments, and Commerce has presented no legal or factual basis to deny only the negative adjustments as an "incentive." Only allowing Koyo's positive adjustments, in effect, raises Koyo's dumping margin. *See SKF*, 77 F. Supp. 2d at 267. In the absence of evidence in the record showing that Koyo had been recalcitrant in providing information to the Department, Commerce does not have a reasonable justification for its differential treatment of the billing adjustments. Based upon Commerce's reasoning and the evidence before it at the time of issuing the *Final Results*, Defendant's determination is not in accordance with law.

D
Commerce's Decision Not to Exclude NTN's High Profit Sales Is Not Supported By Substantial Evidence and Is Not in Accordance With Law

NTN argues that its high profit sales should be excluded as sales outside the ordinary course of trade from both the home market database as well as from constructed value. NTN's Brief at 18, 23. NTN states that the "ordinary course of trade" statute provides for the exclusion of sales that are not in the ordinary course of trade to "prevent dumping margins from being based on sales which are not representative." *Id.* (quoting *Monsanto Co. v. United States*, 12 CIT 937, 940, 698 F. Supp. 275, 278 (1988)); 19 U.S.C. § 1677(15). NTN claims that its high profit sales were just that, extraordinary sales in small quantities and profits that were abnormally high when compared to the majority of its other home market sales. NTN's Brief at 19. At oral argument, NTN explained these sales were made "in the general course of business . . . infrequently but on a fairly regular basis over a period of time . . . [for] a sampling or a particular part for a particular need." As a result, NTN argues that these sales should have been excluded so as to not distort the calculated dumping margin. NTN claims that the exclusion of these sales is consistent with the statute and in accordance with law. NTN's Brief at 22; 19 U.S.C § 1677(15).

In NTN's Section B Questionnaire Responses, it explained that its high profit sales were "aberrational" because the quantity involved is minute compared with sales of the same model number in the ordinary course of trade, and provided a chart with illustrative examples. NTN's Brief at 21 (citing NTN's Section B Response at B–48, B–49 (September 25, 2003)). Commerce requested that NTN provide additional evidence demonstrating that its sales with higher profits were outside the ordinary course of trade, and NTN submitted a numerical chart comparing its "high profit" sales to its "ordinary course" sales. *Id.* at 22 (citing Supplemental Questionnaire Response at 18–19, and Att. B–10 (Dec. 10, 2003), C.R. Doc. 60, P.R. Doc. 210). Commerce denied NTN's proposed adjustment, explaining that "high profits by themselves are not sufficient for us to determine that sales are outside the ordinary course of trade" and that "extraordinary characteristics" must be present which would make them unrepresentative of the home market. *Id.* at Appendix 2, Issues and Decision Memorandum for the Antidumping Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom for the Period of Review May 1, 2002, through April 30, 2003, dated September 8, 2004, at 73.

Defendant counters that Commerce's determination not to exclude NTN's high profit sales is supported by substantial evidence and is in accordance with law because they are sales within the ordinary course of trade pursuant to 19 U.S.C. § 1677b(a)(1)(B)(i). Defendant's Response at 44–45. Commerce argues that NTN did not prove that the sales in question had abnormally high profits as well as other extraordinary characteristics that would make them unrepresentative of home market sales. *Id* at 46–47.

The party requesting a price adjustment bears the evidentiary burden "of proving whether sales used in commerce's calculations are outside the ordinary course of trade. . . ." *Nachi-Fujikoshi Corp. v. United States*, 16 CIT 606, 608, 798 F. Supp. 716, 718 (1992) ("*Nachi-Fujikoshi*"); *see also Koyo Seiko Co. v. United States*, 16 CIT 539, 543, 796 F. Supp. 1526 (1992) ("*Koyo*"). Absent adequate evidence to the contrary, Commerce will treat sales as within the ordinary course of trade. *See, e.g.*, *Torrington Co. v. United States*, 127 F.3d 1077, 1081 (Fed. Cir. 1997).

This court has held that Commerce has the discretion to determine which sales are within the ordinary course of trade in the absence of evidence establishing "unique and unusual circumstances." *See NTN Bearing Corp, et al., v. United States*, 306 F. Supp. 2d 1319, 1346 (CIT 2004) ("*NTN*") (according to Commerce *Chevron* deference is not warranted because of the "lack of guidance of both the statutory language and the legislative history regarding what is considered to be outside the 'ordinary course of trade' ") (citing *Chevron*, 467 U.S. at 842); *see also NTN Bearing Corp., et al., v. United States*, 24 CIT 385, 104 F. Supp. 2d 110, 147 (2000); *see also* 19 U.S.C. § 1677b(a)(1)(B). When determining whether a sale is outside the ordinary course of trade, Commerce considers not just "one factor in isolation but rather . . . all the circumstances particular to the sales in question." *CEMEX, S.A. v. United States*, 133 F.3d 897, 900 (Fed. Cir. 1998) (quoting *Murata Mfg. Co. v. United States*, 820 F. Supp. 603, 607 (CIT 1993)).

The court in *NTN* did not allow NTN's high-profit sales as sales outside the ordinary course of trade. *See NTN*, 306 F. Supp. 2d at 1344. However, NTN's position in this case is distinguishable because it is arguing not only that its sales were high profit, but also that they were limited and not in the usual commercial quantities, in addition to special circumstances. Some of the extraordinary circumstances that NTN name include "sales for maintenance and repair, sales to research and development facilities for testing or evaluation and other sales outside the usual channels of trade." *See* Questionnaire Response B at B–48, B–49. These descriptions of various sales are sufficient evidence for Commerce to assess the characteristics of NTN's purported sales outside the ordinary course of trade.

In its brief, the Government states that NTN relies upon "the high profit and *low volume* of these sales to 'show the distinct 'unique and unusual' characteristics of NTN's high profit sales.' " Defendant's Response at 46 (emphasis added). As support for its argument, Defendant relies upon Commerce's statement from the December 3, 2003 Issues and Decision Memo, where Commerce explained that "high profits are not enough by themselves" to show sales outside the ordinary course of trade." *See* Issues and Decision Memo, at cmt. 33; Defendant's Response at 46. However, low volume sales are not mentioned in the Decision Memo. The Department also overlooks the fact that the Court has looked to sales "not sold in usual commercial quantities" as probative of sales outside the ordinary course of trade. *See Nachi-Fujikoshi*, 16 CIT at 608; *see also Koyo*, 16 CIT at 543.

Defendant claims that NTN did not submit "*any evidence* suggesting that these sales have *any characteristics* that would make them extraordinary for the home market. " *See Issues and Decision Memo* at 74 (emphasis added). A review of the administrative record reveals that NTN has submitted evidence relating to this issue. *See* NTN's Brief at 19–24 (citing NTN's Questionnaire Response, Exhibit B–10; NTN's Supplemental Response (December 10, 2003). Commerce has failed to provide adequate reasoning why it denied NTN's adjustment in light of the evidence and precedent supporting NTN's position, and why NTN's high profit sales, sold in minute quantities in comparison with NTN's usual commercial quantities, were not outside the ordinary course of trade.

The administrative record contains substantial evidence lending credence to NTN's argument that its sales were not sold in the ordinary commercial quantities in comparison to its ordinary sales with the same control number. *See Nachi-Fujikoshi*, 16 CIT at 608; *see also Koyo*, 16 CIT at 543. Commerce seeks to explain its reasoning for denying NTN's high profit sales by relying on its Issues and Decision Memo, which does not support Defendant's position here. *See* Issues and Decision Memo, at cmt. 33. As a result, Commerce's determination that NTN's sales were outside the ordinary course of trade is not supported by substantial evidence and is not in accordance with law. This issue is remanded to Commerce to further explain its reasoning why the evidence submitted by NTN was insufficient under governing law.

E
Commerce Properly Excluded Certain Inventory Costs from NCBA's Indirect Selling Expenses

Timken argues that Commerce should treat NTN's scrap inventory write-off expenses as an indirect expense incurred by NTN Bearing Corporation of America ("NBCA") to make U.S. sales of its imports from Japan. Timken's Brief at 2. Timken claims that these expenses are associated with doing business in the United States and as a result should be treated as such and not as a cost of production associated with manufacturing the product in Japan. *Id.* at 6. Timken further argues that since NBCA is a sales company all expenses associated with its operations are selling expenses and not costs associated with producing the merchandise. *Id.* at 6. Additionally, Timken argues that the write off is a selling expense simply because NCBA lists it as an "expense" in its books. *Id.* at 7–8. Accordingly, scrap inventory write-offs should be treated as a selling expense to NBCA. *Id.*

NTN argues that Commerce correctly concluded that expenses related to the write-off of scrap inventory are not selling expenses and should not be included in NTN's indirect selling expenses. Reponse Brief Submitted on Behalf of Plaintiffs NTN Corp., *et al.*, In Opposition To Timken's Motion for Judgment Upon The Agency Record ("NTN's Response") at 3. According to NTN, the scrap inventory is inventory that did not sell, therefore it cannot be reported as a selling expense related to the sale of merchandise to an unaffiliated customer. *Id.* at 4.

Commerce argues that it properly excluded the scrap inventory write-off from NBCA's indirect selling expenses. Defendant's Response at 55. According to Commerce, the Department's regulations specifically state that Commerce " 'will not make an adjustment for any expense that is related solely to the sale to an affiliated importer in the United States.' " *Id.* at 56 (citing 19 C.F.R. § 351.402(b)). Because the inventory at issue was not sold, there was no sale to an affiliated or unaffiliated importer within the meaning of the statute. *Id.* Section 1677a(d)(1) states that U.S. selling expenses must be directly related to or the result of an actual sale. *See* 19 U.S.C. § 1677a(d)(1). As Defendant correctly points out, scrap inventory write-offs are by definition not associated with an actual sale. Defendant's Response at 57. Therefore, Commerce conducted its analysis of NTN's costs and expenses on this basis.

Commerce also properly concluded that the cost of producing the finished inventory was captured during the current period of review and therefore any write-offs associated with finished goods inventory should be adjusted to the captured and reported costs. *Id.* at 58. Timken's argument that Commerce should have made its calculations based on the period during which NCBA's goods were sold, rather than during the period of review is incorrect. Timken's Reply at 5. Commerce explains in its Brief that "all costs incurred during a period to produce subject merchandise are generally allocated to all finished product during that period [regardless of whether the output was actually sold or inventories on the company's financial statements.]." Defendant's Response at 58. It would be inaccurate for Commerce to double count from a previous review. *Id.* Accordingly, Commerce's decision to not treat NBCA's scrap inventory write off as an indirect selling expense in the context of the period of review is supported by substantial evidence and in accordance with law.

V
Conclusion

For the above stated reasons, Commerce's determination is partially sustained and partially remanded for action consistent with this opinion.

Slip Op. 06–20

MITTAL CANADA INC., Plaintiff, v. UNITED STATES, Defendant, and GERDAU AMERISTEEL CORP., and KEYSTONE CONSOLIDATED INDUSTRIES, INC., Defendant-Intervenors.

Before: Richard W. Goldberg,
Senior Judge

Court No. 05–00689

OPINION

[Defendant's motion to dismiss is denied, and plaintiff's motion for preliminary injunction is denied.]

Date: February 10, 2006

Cameron & Hornbostel, LLP (*Dennis James, Jr.*) for Plaintiff Mittal Canada, Inc.

Peter D. Keisler, Assistant Attorney General; *David D. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director; CommercialLitigation Branch, Civil Division, U.S. Department of Justice, (*Michael D. Panzera*), for Defendant United States.

Collier, Shannon, Scott, PLLC (*Mary T. Staley, Paul C. Rosenthal*, and *Robin H. Gilbert*) for Defendant-Intervenors Gerdau Ameristeel Corp. and Keystone Consolidated Industries, Inc.

GOLDBERG, Senior Judge: Before the Court is the motion of Plaintiff Mittal Canada, Inc. ("**Plaintiff**") for a preliminary injunction under USCIT R. 65(a) to prevent U.S. Customs and Border Protection ("**Customs**") from liquidating Plaintiff's entries of steel wire rod entered from October 1, 2004 through September 30, 2005 ("**the Entries**"). On December 30, 2005, the Court granted a temporary restraining order ("**TRO**") to enjoin the liquidations pending the disposition of the preliminary injunction motion. Underlying the preliminary injunction request is Plaintiff's claim that the U.S. Department of Commerce ("**Commerce**") issued liquidation instructions that were at odds with the final results of a changed circumstances review initiated by Plaintiff.

Since entry of the TRO, substantial briefing has occurred. Customs has responded to Plaintiff's motion for a preliminary injunction and filed its own motion to dismiss. Plaintiff has filed a motion in reply to Customs' response, and in response to Customs' motion to dismiss. Customs filed a reply to Plaintiff's response to its motion to dismiss. Lastly, Gerdau Ameristeel Corp. and Keystone Consolidated Industries, Inc. (collectively, "**Defendant-Intervenors**") filed a joint consent motion to intervene, which the Court granted. Defendant-Intervenors also filed a reply to Plaintiff's response to the motion to dismiss. For the reasons that follow, the Court denies Customs' motion to dismiss, and denies Plaintiff's motion for a preliminary injunction.

I. *BACKGROUND*

On October 29, 2002, Commerce issued an antidumping duty order that applied to certain Canadian steel imports including the Entries. *See Carbon and Certain Alloy Steel Wire Rod from Canada*, 67 Fed. Reg. 65944 (Oct. 29, 2002) (amended final determination and antidumping duty order) ("**the Order**"). The Order contemplated a default weighted-average dumping margin of 8.11 percent that applied to all manufacturers/exporters subject to investigation that were not explicitly assessed a lower rate. Specifically, the Order provided that all unliquidated entries that entered on or after April 10, 2002, and before October 7, 2002, be assessed a duty rate of 8.11 percent. *See id.* at 65945. For all entries occurring "[o]n or after that date of publication of [the Order] in the Federal Register, the Customs service [was instructed to] require . . . a cash deposit equal to the estimated weighted-average antidumping duty margins as noted [in the Order]."[1] *Id.* Ispat Sidbec Inc. ("**Ispat**") was one of the Canadian steel manufacturers/exporters entitled to lower duty assessment and cash deposit rates. *See id.* Ispat was subject to a 3.86 percent assessment rate, as well as a 3.86 percent cash deposit rate. *Id.* In late 2004, Ispat changed its name to Mittal Canada Inc. *Carbon and Certain Alloy Steel Wire Rod from Canada*, 70 Fed. Reg. 22845 (May 3, 2005) (preliminary results of changed circumstances review) ("**Preliminary Results**"). On January 15, 2005, after noticing that Customs was subjecting its entries to the higher default rate of 8.11 percent, Plaintiff requested a changed circumstances review to take account of the name change.

On May 3, 2005, Commerce issued its preliminary review of Plaintiff's changed circumstance review request. The *Preliminary Results* stated that "Mittal is the successor-in-interest to Ispat." *Id.* Commerce also described to Plaintiff what consequences of a final results affirmance would be:

> If the above preliminary results are affirmed in [Commerce's] final results, the cash deposit rate most recently calculated for Ispat will apply to all entries of subject merchandise by Mittal entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this changed circumstances review.

Id.

Commerce's final determination affirmed the *Preliminary Results*. *See Carbon and Certain Alloy Steel Wire Rod from Canada*, 70 Fed. Reg. 39484 (July 8, 2005) (final results of changed circumstances re-

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[1] Entries made between October 7, 2002 and October 29, 2002 (the publication date of the Order) were "not liable for the assessment of antidumping duties due to [Commerce's] termination of . . . the suspension of liquidation." Order, 67 Fed. Reg. at 65945.

view) ("**Final Results**"). Specifically, Commerce determined that "Mittal is the successor-in-interest to Ispat for antidumping duty cash deposit purposes." *Id.* at 39485. The *Final Results* contained a section entitled "Instructions to the U.S. Customs and Border Protection" that appeared immediately after its finding as to the successor-in-interest issue. In that section, Commerce stated its intention to follow the course indicated by the *Preliminary Results:* "[Commerce] will instruct [Customs] to suspend liquidation of all shipments of the subject merchandise produced and exported by Mittal entered, or withdrawn from warehouse, for consumption, on or after the publication date of this notice at 3.86 percent (*i.e.*, Ispat's cash deposit rate)." *Id.*

On July 25, 2005, Customs published Commerce's instructions to notify its directors of field operations and port directors. *See* Def.'s Corrected Mot. to Dismiss and Resp. in Opp. to Mot. for Prelim. Inj., Attach. A (Message No. 5206202 dated July 25, 2005). Those instructions provided that "as a result of [the changed circumstances] review, [Commerce] find[s] that Mittal Canada Inc. is the successor in interest to Ispat Sidbec Inc." *Id.* The instructions provided further that "shipments by Mittal Canada Inc. of carbon alloy and certain steel wire rod from Canada shall receive the same cash deposit rate as Ispat Sidbec Inc., for all shipments entered or withdrawn from warehouse, for consumption on or after July 8, 2005." *Id.* Therefore, these cash deposit instructions did not apply to the Entries, which had already entered and for which cash deposits had already been collected.

On December 15, 2005, Customs issued the instructions to its port directors that constitute the nub of this dispute. The port officials were "to assess antidumping duties on merchandise entered, or withdrawn from warehouse, for consumption at the cash deposit or bonding rate in effect on the date of entry." Mem. in Supp. of Pl.'s Mot. for a TRO and Prelim. Inj. Enjoining Liquidation of Entries, Ex. A (Message No. 5349202 dated Dec. 15, 2005) at 1. For the Entries, "the cash deposit . . . rate in effect on the date of entry," *id.*, was the higher 8.11 percent rate. On December 27, 2005, Plaintiff sent a letter to the Commerce's Assistant Secretary for Import Administration requesting that Commerce instruct Customs to assess antidumping duties at no greater than 3.86 percent, the rate to which Ispat imports were formerly entitled, and, according to Plaintiff, to which Plaintiff's imports were entitled as well. *See id.*, Ex. B (Letter to Ass. Sec. of Imp. Admin. Re: Request for Correction of Instructions to Customs/Mittal Canada, Inc. dated Dec. 27, 2005).

Plaintiff then commenced this case on December 30, 2005, petitioning the Court for a TRO and preliminary injunction to stop Customs from liquidating the Entries. In its accompanying memorandum, Plaintiff cited *Mukand Int'l, Ltd. v. United States*, 29 CIT ___ , ___ , Slip Op. 05–164, at 15 (Dec. 22, 2005) to support its position that a TRO was necessary to prevent the imminent liquidations, because liquidation would strip the Court's jurisdiction under 28 U.S.C. § 1581(i) to hear Plaintiff's challenge to the instructions. The Court entered the TRO on the same day as a precaution, and ordered a hearing on the maintenance of the TRO and imposition of the preliminary injunction on January 4, 2006.

Customs filed a motion to dismiss for lack of jurisdiction as well as its response to Plaintiff's motion for preliminary injunction on January 3, 2006. The Court held the hearing as scheduled, after which the parties agreed to an expedited briefing schedule.

II. *THE COURT HAS JURISDICTION UNDER 28 U.S.C. § 1581(i)*

Absent jurisdiction, a court may not proceed in any cause, and must dismiss the case before it. "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.' " *Steel Co. v. Citizens for a Better Envm't*, 523 U.S. 83, 94–95 (1988) (*quoting Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 384 (1884)); *see also* USCIT R. 12(h)(3) ("Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

Moreover, the fact that Plaintiff desires preliminary and equitable relief does not mean a court can sidestep the jurisdictional question. In circumstances when the jurisdictional inquiry is inextricably intertwined with consideration of the merits, it may be appropriate for a court to postpone adjudication of the jurisdictional question pending a thorough examination of the merits. *See, e.g., PPG Indus., Inc. v. United States*, 84 Cust. Ct. 256, C.R.D. 80–5 (1980) (merger of jurisdictional and merits inquiries is appropriate where "the evidentiary facts necessary to controvert the jurisdiction challenged by the defendant concurrently are necessary in the submission and ultimate determination of the . . . action on the merits"). In this case, however, subject matter jurisdiction is not inextricably tied to a proper test of the strength of Plaintiff's claim, and merger of the jurisdictional and merits questions is inappropriate. Instead, jurisdiction is properly treated as a threshold issue, to be examined separately and antecedently.

Plaintiff invokes the residual jurisdiction of the U.S. Court of International Trade ("**CIT**") under 28 U.S.C. § 1581(i). By its terms, 28 U.S.C. § 1581(i) is an expansive grant of exclusive jurisdiction over certain causes of action against the government:

> [The CIT] shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for–
>
> (1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i) (1999).

A lodestar of the CIT's jurisdictional jurisprudence is that a plaintiff may not pursue an action under 28 U.S.C. § 1581(i) if any other subsection of 28 U.S.C. § 1581 "is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988). Thus, if Plaintiff could have obtained its relief under any other subsection of 28 U.S.C. § 1581, then the Court must immediately dismiss the case for lack of subject matter jurisdiction.

Before the Court may assert jurisdiction over the subject matter, it must identify the claim on which Plaintiff seeks relief. In most cases, this exercise is routine; however, this case requires a more searching examination because the parties disagree as to the characterization of Plaintiff's claim. Plaintiff contends it is challenging Commerce's liquidation instructions as arbitrary and capricious or otherwise not in accordance with law. Customs paints Plaintiff's request in a different light, arguing that Plaintiff is really seeking a substantive review of the changed circumstances review.

Plaintiff believes that Commerce's liquidation instructions, because they instructed Customs to liquidate the Entries at the cash deposit rate, failed to take into account the legal fact that "Mittal is the successor-in-interest to Ispat for antidumping duty cash deposit purposes." *Final Results*, 70 Fed. Reg. at 39485. Plaintiff insists that, despite the *Final Results*' expressly limited application to "antidumping duty cash deposit purposes[,]" *id.*, the determination of successor-in-interest status required Commerce to assess the lower 3.86 percent rate to all of Plaintiff's unliquidated entries, including those for which the 8.11 percent duty cash deposit had been required. In Plaintiff's view, then, the *Final Results* articulated a broad legal principle that has collateral effects beyond the express limitation of its language, and when Commerce does not recognize those effects and instruct Customs accordingly, it acts in contravention of law.

Customs, on the other hand, urges the Court to construe Plaintiff's complaint as a belated attempt to obtain the judicial review of the changed circumstances review that would have been available under 28 U.S.C. § 1581(c). In other words, Customs argues that Plaintiff is attempting to dress up a routine § 1581(c) claim in such a way as to avoid § 1581(i)'s jurisdictional bar in cases where 28 U.S.C. § 1581(c) was available, but not invoked.

The language of 28 U.S.C. § 1581(i) fits Plaintiff's version of the case like a glove. After all, 28 U.S.C. § 1581(i)(4) includes civil actions against the United States relating to the "administration and enforcement" of "duties." 28 U.S.C. § 1581(i)(4) (1999). Moreover, several decisions of the U.S. Court of Appeals for the Federal Circuit ("**Federal Circuit**") establish that a plaintiff may invoke 28 U.S.C. § 1581(i) to test the legality of instructions that are alleged to contravene determinations made in an administrative review. *See, e.g.*, *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1305 (Fed. Cir. 2004); *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003); *cf. Mitsubishi Elecs. Am. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994) (suggesting that CIT had jurisdiction to hear plaintiff's claim that liquidation instructions conflicted with final antidumping order). In those cases, the Federal Circuit has affirmed that the CIT possesses residual jurisdiction to hold Commerce accountable for the execution of its determinations arising from administrative reviews.[2] Residual jurisdiction is appropriate in those cases because a challenge to liquidation instructions as not in accordance with an administrative review determination is not enumerated among the "reviewable determinations" of 19 U.S.C. § 1516a that form the basis for the CIT's 28 U.S.C. § 1581(c) jurisdiction. *See* 19 U.S.C. § 1516a(a)(2)(B) (1999).

On the other hand, it is equally straightforward that should the Court construe Plaintiff's claim as a belated request for judicial review of the *Final Results*, the case must be dismissed. 28 U.S.C. § 1581(c) grants the CIT "exclusive jurisdiction of any civil action commenced under [19 U.S.C. § 1516a]." 28 U.S.C. § 1581(c) (1999). 19 U.S.C. § 1516a, in turn, permits plaintiffs to seek review of "[a] final determination . . . under [19 U.S.C. § 1675]." 19 U.S.C. § 1516a(a)(2)(B)(iii) (1999). One of the "final determinations" that Commerce makes under 19 U.S.C. § 1675 is a review "based on changed circumstances." *Id*. § 1675(b). Therefore, because Plaintiff could have brought the matter before the Court under 28 U.S.C. § 1581(c), the Court would have no residual jurisdiction over such a claim.

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[2] The cited cases dealt with non-compliance with administrative reviews, which violated explicit regulatory and statutory provisions requiring the results of administrative reviews to be "the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties." 19 U.S.C. § 1675(a)(2)(C) (1999); *see also* 19 C.F.R. § 351.212(b)(1) (2005). Under 19 C.F.R. § 351.221, the general regulation governing review procedures, the same principle applies to changed circumstances reviews. That regulation directs Commerce to "promptly after publication of the notice of final results instruct the Customs Service to assess antidumping duties . . . on the subject merchandise covered by the review. . . ." *Id*. § 351.221(b)(6). If Commerce fails to instruct Customs accordingly, it withholds or delays the execution of its administrative duty, and the CIT must compel the issuance of correct instructions, *see* 5 U.S.C. § 706(1) (1999).

A thorough examination of Plaintiff's motion for preliminary injunction and accompanying papers reveals that Plaintiff is challenging the liquidation instructions as violative of the legal conclusion, embodied in the *Final Results*, that Plaintiff is the a successor-in-interest to Ispat. Because the Court has 28 U.S.C. § 1581(i) jurisdiction over civil actions that challenge Commerce's issuance of liquidation instructions at odds with its own determinations, *see Consol. Bearings*, 348 F.3d at 1002, the Court must deny Customs' motion to dismiss for lack of subject matter jurisdiction. In short, Plaintiff is not challenging the *Final Results*, so there can not be, nor could there ever have been, jurisdiction under 28 U.S.C. § 1581(c). Instead, this suit is about the " 'administration and enforcement' of those final results." *Id.* (*quoting* 28 U.S.C. § 1581(i)).

The only puzzling aspect of the jurisdictional question is Plaintiff's prior decision not to contest the *Final Results* before such an appeal became time-barred.[3] Instead of timely contesting the *Final Results* in the CIT so as to obtain clear language that would have mandated assessment of the 3.86 percent duty rate, Plaintiffs are now alleging Commerce's liquidation instructions contravene the *Final Results* determination. That argument in effect maintains that the uncontested and unambiguous *Final Results* mean something different than what they say. Clearly, the Court possesses residual jurisdiction over such a novel argument, but Plaintiff's victory on the jurisdictional issue is pyrrhic.

Since 28 U.S.C. § 1581(c) relief was time-barred, Plaintiff has chosen to pursue another remedial method designed to obtain the identical substantive result (i.e., assessment of duties at 3.86 percent) by different means. By fashioning its dispute as a challenge to defective liquidation instructions, Plaintiff has defined its claim such that the Court has jurisdiction. In the process, however, it has presented a tenuous argument that, for the following reasons, would make preliminary injunctive relief inappropriate.

III. *PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION IS DENIED*

A preliminary injunction is "extraordinary relief," *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993), that should be granted sparingly. However, there are circumstances that can, and

[3] A plaintiff has thirty days after the date of publication of a Commerce determination in the *Federal Register* within which to contest that determination in the CIT. *See* 19 U.S.C. § 1516a(b) (1999). As such, Plaintiff had until August 8, 2005 to commence a case under 28 U.S.C. § 1581(c). Furthermore, Plaintiff slept on its rights by not filing a case brief, *see* 19 C.F.R. § 351.309(c)(ii), within thirty days after publication of the *Preliminary Results* on May 3, 2005. The *Preliminary Results* were clear: the changed circumstances review looked only to the cash deposit rate, and not the assessment rate. At both those points, Plaintiff could have brought to Commerce's attention that it was seeking a more robust form of retroactive relief.

often do, justify injunctive relief before trial. A court may enter a preliminary injunction when the movant has established (1) that it will suffer irreparable harm if relief is not granted; (2) that the public interest would be better served by the relief requested; (3) that the balance of the hardships tips in the movant's favor; and (4) that the movant is likely to succeed on the merits at trial. *See id.* (*citing Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983)).

In deciding whether to grant a preliminary injunction the CIT has a good deal of discretion. *See id.* (*citing Chrysler Motors Corp. v. Auto Body Panels, Inc.*, 908 F.2d 951, 953 (Fed. Cir. 1990)); *Asociación Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1578 (Fed. Cir. 1990). Courts have adopted a flexible approach in dealing with motions for preliminary injunctions. In some instances, the weakness of a showing of one factor may be overborne by the strength of others. *See FMC Corp.*, 3 F.3d at 427. In other circumstances, the weakness of a showing of one factor may justify denial of the preliminary injunction motion. *Id.*

In particular, the likelihood of success and the irreparable harm prongs "are viewed as a 'continuum in which the required showing of harm varies inversely with the required showing of meritoriousness.' " *U.S. Ass'n of Imp.'s of Textiles and Apparel v. U.S. Dep't of Commerce*, 413 F.3d 1344, 1347 (Fed. Cir. 2005) (*quoting Mikohn Gaming Corp. v. Acres Gaming, Inc.*, 165 F.3d 891, 895 (Fed. Cir. 1998)). Thus, a convincing demonstration of irreparable harm will diminish the required burden of showing a likelihood of success on the merits. When irreparable harm is shown, a party need not show a likelihood of success; a showing of "a fair chance" of prevailing on the merits may entitle the moving party to preliminary injunctive relief.[4] *See Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1577 (Fed. Cir. 1990).

Diminishing the burden of proof required does not, however, obviate the movant's burden to show *some real possibility* of success on the merits. *See FMC Corp.*, 3 F.3d at 427. A court may not enter a preliminary injunction, even where the irreparable harm is conspicuous and serious,[5] if the court is convinced that the movant

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[4] The *U.S. Association of Importers* decision adverts the CIT to an ambiguity in the preliminary injunction jurisprudence. *See U.S. Ass'n of Imp.'s*, 413 F.3d at 1347–48. In particular, it is unclear what precedential weight the *Mikohn* and *Atari Games* decisions, which were patent cases applying Ninth Circuit law, have in the context of CIT cases. As a result, it is unclear whether the "fair chance" standard should apply to customs and trade plaintiffs seeking preliminary injunctions against the government. Because the Court concludes that Plaintiff has failed to meet its burden even under the liberal "fair chance" standard, this ambiguity does not affect the disposition of Plaintiff's motion.

[5] The Court ultimately denies the motion for preliminary injunction because Plaintiff stands little, if any, chance on the merits of its underlying claim, so its decision would be the same even if irreparable harm were present. However, it bears mention that irreparable

stands no chance of success on its underlying claim. *See AM Gen. Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 804 (7th Cir. 2002) ("A party with no chance of success on the merits cannot attain a preliminary injunction."); *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 417 (4th Cir. 1999).

In this case, the Court is unable to grant a preliminary injunction because Plaintiff has failed to meet its burden to show either a "likelihood of success on the merits," *U.S. Ass'n of Imp.'s*, 413 F.3d at 1346, or even a "fair chance" that its underlying claim will succeed, *id.* at 1347. Even after extensive briefing, Plaintiff has provided no support for its novel contention that a final changed circumstances determination finding that one producer is the successor-in-interest to another producer "for antidumping duty cash deposit purposes," *Final Results*, 70 Fed. Reg. at 39485, articulates a broader commitment by Commerce to treat that producer as such for duty *assessment* purposes as well. "[M]ere novelty is [not] sufficient to demonstrate a fair chance of success" on the merits of a claim. *U.S. Ass'n of Imp.'s*, 413 F.3d at 1347.

A close look at the U.S. antidumping duty assessment regulations and procedures demonstrates why the *Final Results* limited the application of the successor-in-interest determination to cash deposits, and why therefore Plaintiff's argument that Commerce was obliged to include assessment instructions is untenable. The United States utilizes a "retrospective" duty assessment system under which importers' final liabilities are determined after the actual importation of the merchandise. *See* 19 C.F.R. § 351.212 (2005). Importers entering merchandise subject to an antidumping duty order are required to make a cash deposit of estimated antidumping duties at the rates included in the final results determination of an antidumping investigation. *See id.* § 351.211(b)(2). Unless the importer files a request for an administrative review,[6] those entries will be liquidated (and those duties will be assessed) at the deposit rate that applied at the time the merchandise was entered. *See id.* § 351.212(a). Commerce processes these entries by issuing "clean-up" instructions, *see*

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harm is not present in this case either. Plaintiff's alleged harm – its losing a statutory right to obtain judicial review of the liquidation instructions upon liquidation – is illusory. The Federal Circuit has held that in cases where a plaintiff brings a suit challenging liquidation instructions' compliance with Commerce determinations, the CIT has 28 U.S.C. § 1581(i) jurisdiction to evaluate such a claim, even where the relevant entries are liquidated during the pendency of the case. *See Shinyei*, 355 F.3d at 1297–1303. Plaintiff's reliance on *Zenith Radio* is misplaced because in that case, the denial of preliminary injunctive relief would have foreclosed relief to which the plaintiff was otherwise entitled: namely, its right to have a favorable CIT decision apply to its already-entered merchandise. In this case, as in *Shinyei*, Plaintiff has already preserved its 28 U.S.C. § 1581(i) challenge to the liquidation instructions. As such, denial of the preliminary injunction should not disturb Plaintiff's ability to challenge the instructions after liquidation, and Plaintiff is not threatened with serious harm.

[6] Two other exceptions exist for new shipper reviews, *see* 19 C.F.R. § 351.214, and expedited antidumping reviews, *see id.* § 351.215. Neither procedure is relevant to this case.

Shinyei, 355 F.3d at 1303, directing Customs to liquidate all unliquidated entries "as entered." This process is referred to as "automatic liquidation," *see Okaya (USA), Inc. v. United States*, 27 CIT ___ , ___ , Slip Op. 03–130 at 3 (Oct. 3, 2003), and ensures the smooth functioning of the "retrospective" system. Notably, there is no analogous exception to automatic liquidation for changed circumstance reviews. *See* 19 C.F.R. § 351.212(b).

An importer may request an administrative review when it believes the cash deposit rate collected at entry should not be the assessment rate. The administrative review typically looks backward twelve months, *see id*. § 351.213(e), and permits an importer to recoup the excess duties deposited by halting the automatic liquidation process and allowing Commerce to take account of specific information provided by the importers requesting the review. The duty collection system is imprecise and relies on efficient transfer of information from interested parties to Commerce to achieve an accurate final result; to this end, the administrative review process is "the most frequently used procedure" for apprising Commerce of relevant facts needed to "determin[e] final duty liability[.]" *Id*. § 351.213(a). The regulations also provide guidance for Commerce in computing new assessment rates and instruct Customs to liquidate at those rates the merchandise subject to administrative review. *See id*. § 351.212(b).

The changed circumstances review similarly allows interested parties to petition Commerce for review of a final determination. *See* 19 U.S.C. § 1675(b)(1) (1999). The party seeking a revocation or modification of an antidumping order bears the burden of persuasion with respect to whether changed circumstances warrant such revocation or modification. *See id*. § 1675(b)(3)(A). Most important for the purposes of this case, however, is the fact that unlike an administrative review, a changed circumstances review does not halt the automatic liquidation process by causing Commerce to recalculate assessment rates in the case of an affirmative determination. In the past, Commerce has modified assessment orders during changed circumstances reviews. *See, e.g., Leather from Argentina, Wool from Argentina, Oil Country Tubular Goods from Argentina, and Carbon Steel Cold-Rolled Flat Products from Argentina*, 62 Fed. Reg. 41361 (Dep't Commerce Aug. 1, 1997) (final results of changed circumstances reviews) (providing retroactive relief by ordering all unliquidated merchandise entered within six years of publication date to be liquidated without regard to the countervailing duty orders then in place). However, such modification of assessment rates does not arise automatically as a result of a changed circumstances review; an interested party must make *a specific demand* that Commerce instruct Customs to assess different rates for entries as to which estimated duties have already been deposited.

In this case, Plaintiff made no such demand. Plaintiff "requested that [Commerce] determine that it had become the successor-in-interest of Ispat[.]" *Preliminary Results*, 70 Fed. Reg. at 22845. Commerce, in its *Preliminary Results*, unambiguously limited the scope of the changed circumstances review to *cash deposit rates*, and never addressed the possibility that merchandise entered before the changed circumstances review was entitled to the lower Ispat assessment rate: "If the above preliminary results are affirmed in the Department's final results, *the cash deposit rate* most recently calculated for Ispat will apply to all entries of subject merchandise by Mittal entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this changed circumstances review." *Id*. (emphasis added).

The *Final Results* also focused exclusively on the narrow issue of cash deposit rates: "Based on the information provided by Mittal, and the fact that the Department did not receive any comments during the comment period following the preliminary results of this review, the Department hereby determines Mittal is the successor-in-interest to Ispat for antidumping duty *cash deposit purposes*." 70 Fed. Reg. at 39485 (emphasis added). Commerce then indicated its intention to

> instruct [Customs] to suspend liquidation of all shipments of the subject merchandise produced and exported by Mittal entered, or withdrawn from warehouse, for consumption, on or after the publication date of this notice at 3.86 percent (*i.e.*, Ispat's cash deposit rate). This deposit rate shall remain in effect until publication of the final results of the ongoing administrative review. . . .

Id. Both the *Preliminary Results* and *Final Results* plainly address the treatment of Plaintiff's *cash deposit rate*, and not its assessment rate.

There are no broader conclusions to be divined out of the pellucid *Final Results*. The changed circumstances review addressed the cash deposit rate treatment of Plaintiff's merchandise. It seems Plaintiff came to an idiosyncratic interpretation of the *Final Results*, did nothing to convince Commerce of the correctness of such an interpretation, and assumed that Commerce would do something equally idiosyncratic by adopting Plaintiff's interpretation. Plaintiff could have petitioned Commerce for a more explicit form of retroactive duty assessment for already-entered merchandise; instead, it acquiesced to the *Final Results*' implicit refusal to grant any such relief. Of course, the automatic liquidation instructions eventually arrived for the Entries, and now Plaintiff is seeking to vindicate its erroneous interpretation before the Court.

Because the changed circumstances review did not address the treatment of the Entries at the time of duty assessment, the automatic liquidation system *required* that duties be assessed at "the cash deposit rate applicable at the time merchandise was entered[,]" 19 C.F.R. § 351.212(a), which was 8.11 percent. These liquidation instructions were in harmony with the statutory and regulatory requirements regarding the assessment of antidumping duties. Because Plaintiff stands little, if any, chance of prevailing on its underlying claim, the Court must deny Plaintiff's motion for a preliminary injunction.

IV. *CONCLUSIONS*

In light of the foregoing considerations, Customs' motion to dismiss for lack of subject matter jurisdiction is denied. Plaintiff's motion for a preliminary injunction is also denied. A separate order will issue in accordance with these conclusions.

Slip Op. 06–21

FUYAO GLASS INDUSTRY GROUP CO., GREENVILLE GLASS INDUSTRIES, INC., SHENZHEN BENXUN AUTOMOTIVE GLASS CO., TCG INTERNATIONAL, INC., CHANGCHUN PILKINGTON SAFETY GLASS CO., GUILIN PILKINGTON SAFETY GLASS CO., WUHAN YAOHUA PILKINGTON SAFETY GLASS CO., and XINYI AUTOMOTIVE GLASS (SHENZHEN) CO., Plaintiffs, v. UNITED STATES, Defendant, and PPG INDUSTRIES, INC., SAFELITE GLASS CORP., and VIRACON/CURVLITE, a subsidiary of APOGEE ENTERPRISES, INC., Def.-Intervenors.

Before: Richard K. Eaton, Judge
Consol. Court No. 02–00282

OPINION AND ORDER

[United States Department of Commerce's Remand Results on float glass remanded]

Dated: February 15, 2006

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Mark E. Pardo, Paul G. Figueroa, Adam M. Dambrov*, and *Bruce M. Mitchell*), for plaintiffs Fuyao Glass Industry Group Co. and Greenville Glass Industries, Inc.

Garvey, Schubert & Barer (*William E. Perry*), for plaintiffs Shenzhen Benxun Automotive Glass Co. and TCG International, Inc.

Pepper Hamilton, LLP (*Gregory C. Dorris*), for plaintiffs Changchun Pilkington Safety Glass Co., Guilin Pilkington Safety Glass Co., and Wuhan Yaohua Pilkington Safety Glass Co.

White & Case (*Adams C. Lee* and *Frank H. Morgan*), for plaintiff Xinyi Automotive Glass (Shenzhen) Co.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*), for defendant United States.

Stewart & Stewart (*Terence P. Stewart, Eric P. Salonen*, and *Sarah V. Stewart*), for defendant-intervenors PPG Industries, Inc., Safelite Glass Corp., and Viracon/Curvlite, a subsidiary of Apogee Enterprises, Inc.

Eaton, Judge: This consolidated antidumping action is before the court on the motions for judgment upon the agency record filed by plaintiffs Fuyao Glass Industry Group Co., Greenville Glass Industries, Inc., Shenzhen Benxun Automotive Glass Co., TCG International, Inc., Changchun Pilkington Safety Glass Co., Guilin Pilkington Safety Glass Co., Wuhan Yaohua Pilkington Safety Glass Co., and Xinyi Automotive Glass (Shenzhen) Co. (collectively, "plaintiffs") following two remands to the United States Department of Commerce ("Commerce" or the "Department"). *See Fuyao Glass Industry Group Co. v. United States*, 27 CIT ____ , slip op. 03–169 (Dec. 18, 2003) (not reported in the Federal Supplement) ("*Fuyao I*") and *Fuyao Glass Industry Group Co. v. United States*, 29 CIT ____ , slip op. 05–6 (Jan. 25, 2005) (not reported in the Federal Supplement) ("*Fuyao II*"). The Department has now filed its second remand results. *See* Final Results of Redetermination Pursuant to Court Remand (June 9, 2005) ("Remand Results"). For the reasons set forth below, the court remands this matter for a third time.

BACKGROUND

Plaintiffs are exporters to the United States of automotive replacement glass windshields (the "Windshields") from the People's Republic of China, a nonmarket economy country ("NME").[1] The primary issue in this matter is the price plaintiffs paid for float glass[2] purchased from suppliers in the market economy countries of Korea, Thailand, and Indonesia. Float glass is used in the manufacture of the Windshields. In addition, plaintiffs have challenged the treatment of certain other factors of production.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000).

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[1] A nonmarket economy country is defined as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A)(2000). "Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority." 19 U.S.C. § 1677(18)(C)(i)(2000).

[2] For information regarding the float glass production process, see http://alzonca.tripod.com/glassprocess.html (last visited Feb. 14, 2006).

STANDARD OF REVIEW

The court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i); *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Id.* (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). Furthermore, "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Abbott v. Donovan*, 6 CIT 92, 97, 570 F. Supp. 41, 47 (1983)).

DISCUSSION

I. Reasons for Third Remand

In its Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields From The People's Republic of China, 67 Fed. Reg. 6482 (ITA Feb. 12, 2002), Commerce found that the prices paid by plaintiffs for purchases of float glass from the market economy countries of Korea, Indonesia, and Thailand should be disregarded because it had a reason to believe or suspect that they were subsidized. In *Fuyao II*, the court found that, with respect to float glass exported from Korea and Indonesia,[3] Commerce had not provided substantial evidence to support its conclusion. *See Fuyao II*, 29 CIT at ____ , slip op. 05–6 at 16. As a result, the court directed:

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[3] In *Fuyao II*, the court affirmed Commerce's finding that there was reason to believe or suspect that prices from Thailand were subsidized. The court stated:

> Commerce has shown that subsidies of the industry in question existed in the supplier country, Thailand, during the period of investigation; that the supplier in question is a member of the subsidized industry, and could have taken advantage of any available subsidies; and that it would have been unnatural for that supplier to not have taken advantage of any available subsidies.

Fuyao II, 29 CIT at ____ , slip op. 05–6 at 15–16.

> On remand, Commerce may concur with the court's conclusion or, if it continues to find that it has reason to believe or suspect that these prices were subsidized, it must re-open the record to provide, if possible, additional evidence to support its conclusion that the prices Fuyao paid to its suppliers were subsidized.

Id.

In the Remand Results, Commerce states that it "has complied with the Court's instructions and has recalculated the Plaintiffs' normal value using the purchase prices paid by Plaintiffs to the market-economy suppliers. . . . [H]owever, the Department has respectfully done so under protest." Remand Results at 4 (footnote omitted). In other words, given the choice of re-opening the record and conducting a further literature review,[4] or concurring with the court's finding that its conclusions as to subsidization were not supported by substantial evidence, Commerce has instead chosen a third approach, i.e., it concurs with the court's substantial evidence conclusions, but does so "under protest." *Id.* By stating that it is issuing its Remand Results under protest, Commerce appears to be signaling that it may appeal this court's judgment should the Remand Results be sustained. *See, e.g., Former Employees of S. Triangle Oil Co. v. United States*, 15 CIT 150, 150 (1991) (not reported in the Federal Supplement) ("The Department complied under protest and thereafter filed an appeal with the Court of Appeals for the Federal Circuit.").

While Commerce's decision to recalculate normal value using the actual prices paid is no doubt a good faith effort to bring this matter to a more speedy conclusion, the court cannot sustain the Remand Results for three reasons. First, Commerce has not complied with the court's remand instructions. These instructions directed Commerce to take one of two courses of action: either (1) concur with the court's conclusions with respect to substantial evidence; or (2) re-open the record to provide, if possible, additional evidence to support its conclusion that the prices Fuyao paid to its suppliers were subsidized. *Fuyao II*, 29 CIT at ___ , slip op. 05–6 at 16. Neither of these choices on remand permit Commerce to affect to adopt the court's conclusions as to substantial evidence without actually doing so. That is, Commerce's choices were to actually concur in the court's substantial evidence conclusions or re-open the record. Having done neither, on remand, it must make its choice between the court's two prescribed courses of action.

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[4] In seeking evidence with respect to subsidization, Commerce reviews available publications. For example, with respect to Thailand, Commerce reviewed the World Trade Organization Trade Policy Review for Thailand; the U.S. Trade Representative's 2001 National Trade Estimate Report on Foreign Trade Barriers for Thailand; reports downloaded from the Thailand Board of Investment Web site; and various news articles concerning glass supply in Thailand. *See Fuyao I*, 27 CIT at ____ , slip op. 03–169 at 18–19, 21.

The second basis for directing a remand is related to the first. Although it has recalculated plaintiffs' normal value using the prices paid to market economy suppliers, Commerce has failed to adequately explain its reasons for deciding to do so. *See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner. . . ."); *Touros Records, Inc. v. DEA*, 259 F.3d 731, 737 (Fed Cir. 2001) ("A fundamental requirement of administrative law is that an agency set forth its reasons for decision.") (internal quotations omitted); *Int'l Imaging Materials, Inc. v. United States*, 29 CIT ___ , ___ , slip op. 06–11 at 13 (Jan. 23, 2006) (not published in the Federal Supplement) ("An agency must explain its rationale . . . such that a court may follow and review its line of analysis, its reasonable assumptions, and other relevant considerations. Explanation is necessary . . . for this court to perform its statutory review function.") (internal quotations omitted). The "under protest" language is simply not a sufficient explanation of Commerce's reasons for recalculating plaintiffs' normal value. On remand, Commerce must explicitly state its reasons for reaching the decision to engage in the recalculation.

Finally, as discussed in greater detail *infra*, it is apparent that the Department has not conducted its analysis in accordance with the court's finding with respect to the use of the word "are" rather than "may be" when applying its subsidized price methodology. On remand, Commerce must explicitly state that it is doing so.

II. The Second Remand Results

While Commerce has not explained its reasons for recalculating normal value, the Remand Results do contain considerable explanation as to why such recalculation is not required. Thus, a discussion of the Remand Results is in order.

In *Fuyao I*, this court found that Commerce had justified the use of a methodology it developed for valuing the factors of production in an NME context. *Fuyao I*, 27 CIT at ___ , slip op. 03–169 at 14. Part of that methodology was based on the legislative history for 19 U.S.C. § 1677b(c)(4) which states: "[I]n valuing such factors [of production for merchandise under investigation], Commerce shall avoid using any prices [paid by the NME exporters to suppliers of inputs from market economy countries] which it has reason to believe or suspect may be dumped or subsidized prices." Omnibus Trade and Competitiveness Act of 1988, H.R. Conf. Rep. No. 100–576, at 590 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1623. In other words, under this methodology, where it has reason to suspect subsidization of sales prices, Commerce does not use the actual prices paid to market economy suppliers to value factors of production. In that situation, Commerce looks to surrogate prices.

Although Commerce's methodology was found to be in accordance with law, the court was also explicit as to its understanding of what the methodology required.

> In developing its methodology for selecting values for factors of production in NME situations, Commerce appears to have established a higher standard than would necessarily be required. "The legislative history and recent Department determinations support the principal [sic] that we should disregard prices we have reason to believe or suspect are distorted by subsidies." Issues and Decision Mem. at 10 (emphasis added). When reaching its findings with respect to subsidization, Commerce stated that the evidence supports the conclusion: (1) that "it is reasonable to infer that all exports to all countries are subsidized," *Id.* at 11, and (2) that there is "particular and objective evidence to support a reason to believe or suspect that prices of the inputs from that country are subsidized." *Id.* The legislative history relied upon to establish the reasonableness of its methodology, however, instructs Commerce to avoid prices "which it has reason to believe or suspect *may* . . . be subsidized." Conf. Rep. at 590 (emphasis added). Commerce apparently has concluded it should be held to this higher standard, and there is nothing to indicate that this decision is unreasonable. That being the case, the court's analysis will be in accordance with the standard evident in Commerce's selected methodology.

Fuyao I, 27 CIT at ____ , slip op. 03–169 at 17 n.14. In the text of its Remand Results, however, Commerce continues to take issue with the court's finding in *Fuyao I* as to the standard it must support with substantial evidence. Remand Results at 5. In doing so, Commerce insists that it is not required to support with substantial evidence, the conclusion that it has a reason to believe or suspect that float glass inputs are subsidized. *Id.* Instead, the Department maintains that the use of "are" rather than "may be" was "inadvertent." *Id.* In addition, the Department claims, in effect, that whether the word "are" or the words "may be" follow the words "reason to believe or suspect," the standard is the same. *Id.* at 7. Neither of Commerce's arguments is convincing. While it may be that its choice of words was "inadvertent," words are the only guide available to the parties and the court. That being the case, Commerce cannot now be heard to claim that it did not mean what it said. With respect to the argument that its use of "are" did not change the standard, it is simply not the case that to say that a set of facts "are true" is the same as saying that those facts "may be true." Even so, in the Remand Results, and for that matter in defendant-intervenors' brief, "may be" is regularly substituted for "are."

Next, Commerce states that although it "does not necessarily agree that it needs to meet th[e] three-prong test" for subsidies set forth in *Fuyao II*, it has nevertheless provided record evidence to satisfy that test. *Id.* at 10. The court's test requires Commerce to show by "specific and objective evidence"[5] that: (1) subsidies of the industry in question existed in the supplier countries during the period of investigation; (2) the supplier in question is a member of the subsidized industry or otherwise could have taken advantage of any available subsidies; and (3) it would have been unnatural for a supplier not to have taken advantage of such subsidies. *See Fuyao II*, 29 CIT at ___ , slip op. 05–6 at 15. In the Remand Results, without offering any new evidence, Commerce reiterates its position from the first remand results, Final Results of Redetermination Pursuant to Court Remand (Mar. 18, 2004) ("First Remand Results") that

> the record evidence of the numerous CVD [countervailing duty] determinations, [World Trade Organization] notifications, and USTR [United States Trade Representative] Reports supports the Department's basis for its reason to believe or suspect the Korean and Indonesian float glass producers may[6] have been subsidized because this information was contemporaneous and generally available at the time of the investigation.

Remand Results at 22.

In *Fuyao I*, the court found that "none of the record evidence for Korea . . . or Indonesia indicates whether the subsidy programs cited by Commerce are available to all exporters, or to float glass producers in particular, in the supplier countries." *Fuyao I*, 27 CIT at ___ , slip op. 03–169 at 22. The court explained:

> First, none of the more than 80 countervailing duty determinations cited by Commerce concerning Korean subsidies involved float glass, the product at issue in this case, nor for that matter did any of the countervailing duty determinations involve glass of any kind. . . . As to Indonesia, one of the countervailing duty determinations cited by Commerce concerns extruded rubber thread, and all of the others concern apparel and textiles (lug-

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[5] *See China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 27 CIT ____ , ____ , 264 F. Supp. 2d 1229, 1239 (2003) ("[T]he 'reason to believe or suspect' standard . . . must be predicated on particular, specific, and objective evidence."). Commerce does not dispute this criteria, noting in the Remand Results that it

> relied on the particular and objective evidence of previous countervailing duty ("CVD") investigations and reviews, in addition to numerous other sources of information, that were generally available at the time to support its conclusion that the market-economy purchase prices in this case were likely to be distorted by broadly available, non-industry-specific export subsidies.

Remand Results at 5.

[6] As has been noted, Commerce now regularly uses "may" where it previously used "are."

> gage, handbags, gloves, and the like). Not one of the determinations concerned float glass.

Id. at ____ , slip op. 03–169 at 20, 21–22. In addition to its CVD determinations, Commerce cited World Trade Organization ("WTO") Reports for Korea and Indonesia as "particular and objective evidence which supports [its] reason to believe or suspect that the market economy purchase prices of float glass in this case may be subsidized." First Remand Results at 33. With respect to these reports, the court in *Fuyao I* stated:

> The WTO report for Korea indicates only that "Korea has aggressively promoted exports through a variety of policy tools," but does not indicate which exporters benefit from such tools . . . [and] the WTO Report for Indonesia, which reviews exports subsidies and other promotion policies in that country, was completed in 1999, one year before the period of review for this investigation.

Fuyao I, 27 CIT at ____ , slip op. 03–169 at 20, 22 (internal citation omitted). Commerce also cited the U.S. Trade Representative's 2001 National Trade Estimate Report on Foreign Trade Barriers ("NTE Report") concerning Korea's and Indonesia's export subsidy practices. As to this report, the court in *Fuyao I* stated: "[T]he NTE Report [for Korea] discusses several export loan and credit programs, but does not indicate which sectors, producers, or products are eligible for such aid. . . . The NTE Report for Indonesia indicates that the export subsidies for 'special exporters' (a term which is not defined) lapsed in 1999." *Id.* The court restated its holding in *Fuyao II*, explaining that "it is evident that, in large measure, Commerce has chosen to present nothing new with respect to these matters; therefore, the observations contained in *Fuyao I* remain valid." *Fuyao II*, 29 CIT at ____ , slip op. 05–6 at 14.

Finally, Commerce and defendant-intervenors seem to be under the impression that the court is demanding that there be a demonstration that the float glass industry in particular be found to be subsidized in order to meet the standard. This is simply not the case. Rather, the court's finding was that Commerce had failed to demonstrate that either: (1) the Korean and Indonesian float glass industries were subsidized; or (2) that there were generally available subsidies of which the float glass industry could take advantage. With respect to industry specific subsidies, Commerce has not attempted to show that these existed in either country during the period of investigation. As to generally available subsidies, the Department's efforts have simply fallen short. That is, while Commerce has provided evidence that some exports from Indonesia would satisfy the reason to believe or suspect test, for example, rubber thread, apparel, and textiles, and that there are subsidies for "special exporters," this evidence is not sufficient to demonstrate the existence of generally available subsidies. Similarly, the more than 80 countervailing duty determinations concerning Korea deal almost exclusively with products made of steel; none concern glass. Thus, while defendant-intervenors insist that a broad range of industries and producers of twenty-four product categories[7] were found to have benefitted from the same subsidy programs, these categories are sufficiently restrictive as not to provide substantial evidence showing that generalized subsidies were available.

As the court stated in its remand instructions, "Congress did not intend that Commerce conduct a formal investigation to determine a company's particular subsidy level. . . ." *Fuyao II*, 29 CIT at ____ , slip op. 05–6 at 16. Commerce has chosen, however, not to re-open the record and examine the literature for evidence to support its determination. As a result, the court continues to find, as it did in both *Fuyao I* and *Fuyao II*, that the defendant has failed to provide specific and objective evidence to support its conclusion that it had a reason to believe or suspect that prices from Korea and Indonesia were subsidized.

III. Commerce's Other Findings

Because plaintiff's comments with respect to Commerce's other findings may be influenced by the Department's third remand results, the court defers consideration of those findings pending the remand results ordered here.

CONCLUSION

For the foregoing reasons, the court remands this matter to Commerce for further action in accordance with this opinion.

Remand results are due on May 16, 2006, comments are due on June 15, 2006, and replies to such comments are due on June 26, 2006.

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[7] It appears to the court that only thirteen product categories are, in fact, represented. Those categories are: certain steel products; industrial belts; stainless steel cooking ware; carbon steel plate; stainless sheet and strip in coils; steel sheet and strip in coils; steel plate in coils; structural steel beams; oil country tubular goods; platform jackets and piles; bicycle tires and tubes; steel flat-rolled products; and cold-rolled and corrosion-resistant flat products. *See* Conf. R. Doc. 92, Ex. 1.