Decisions of the United States Court of International Trade

[PUBLIC VERSION]

(Slip Op. 01–148)

PRECISION SPECIALTY METALS, INC., PLAINTIFF *v.*
UNITED STATES OF AMERICA, DEFENDANT

Court No. 98–02–00291

[Plaintiff's motion for summary judgment GRANTED. Defendant's cross-motion for summary judgment DENIED]

(Decided December 14, 2001)

Collier Shannon Scott, PLLC, Washington, DC *(Mark Austrian, Laurence J. Lasoff, Robin H. Gilbert, John M. Herrmann); Howrey, Simon, Arnold & White,* Washington, DC *(Jeffrey W. Brennan),* for Plaintiff.

Stuart E. Schiffer, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office; *John J. Mahon,* Commercial Litigation Branch, Civil Division, Department of Justice, New York, New York; *Chi S. Choy,* Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, New York, New York, of counsel, for Defendant.

OPINION

I

PRELIMINARY STATEMENT

WALLACH, *Judge:* On September 20, 2000, this court in *Precision Specialty Metals, Inc. v. United States,* 116 F. Supp. 2d. 1350 (CIT 2000) *("Precision I"),* denied a motion by Plaintiff Precision Specialty Metals, Inc. ("Precision") for summary judgment, and ordered that the case be set for trial. Familiarity with that decision is presumed. The parties submitted pretrial memoranda during February 2001. After reviewing those memoranda, the court concluded that the issues presented were almost entirely legal, and thus susceptible to resolution or narrowing by motion, rendering trial premature or unnecessary. Transcript of Pretrial Conference dated February 20, 2001 ("Tr.") at 3–4. By order dated February 21, 2001, the court vacated its earlier order for a trial, and di-

rected the parties to submit the case for resolution on motion or motions for summary judgment. This case now comes before the court on Plaintiff's Motion for Summary Judgment Pursuant to United States Court of International Trade Rule 56 ("Plaintiff's Motion for Summary Judgment") and Defendant's Cross-Motion for Summary Judgment ("Defendant's Cross-Motion").

In its Motion for Summary Judgment, Plaintiff Precision contests Customs' denial of drawback on certain entries of stainless steel trim and scrap. Plaintiff argues that the facts stipulated by the parties require a finding that Customs violated 19 U.S.C. § 1625(c)(2), by failing to engage in a notice-and-comment process prior to issuing a ruling which reversed Customs' earlier treatment of 69 similar entries as eligible for drawback. Customs based its denial on a determination that the subject merchandise is "waste" or "valuable waste", and thus is not an "article manufactured or produced" within the meaning of the drawback statute, 19 U.S.C. § 1313(b) (1994). Plaintiff also contends that, as a matter of fact and of law, the merchandise at issue is not waste, and that Plaintiff is entitled to drawback thereon.

In its Cross-Motion, Defendant seeks summary judgment upholding the decision of the Customs Service that the substitution manufacturing drawback claims filed by Precision on entries of stainless steel scrap are not eligible for drawback, and dismissing Precision's action.

For the reasons stated below, the court grants summary judgment in favor of Precision, and denies Defendant's Cross-Motion.

II

BACKGROUND

This case involves 38 claims for substitution manufacturing drawback made pursuant to 19 U.S.C. § 1313(b), and Treasury Decision ("T.D.") 81–74. T.D. 81–74 is a general drawback contract for articles manufactured using steel, and provides, in pertinent part, for the allowance of drawback on imported "[s]teel of one general class, e.g. an ingot", where the "merchandise * * * which will be used in the manufacture of the exported products" is "[s]teel of the same general class, specification and grade as the [subject imported] steel[.]" The steel used in the manufacture of the exported products on which drawback is sought must be "used to manufacture new and different articles, having distinctive names, characters and uses." T.D. 81–74 further provides that "no drawback is payable on any waste which results from the manufacturing operation."

On October 23, 1991, Precision submitted a letter to Customs expressing its intention to adhere to and comply with the terms of T.D. 81–74. *See* Appendix Accompanying the Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment March 31, 2000 ("App.") A–1. In that letter, Precision described the various steel products on which it would claim drawback. Those products included "stainless steel coils, sheets and trim" of various chemistries identified by industry standards. *Id.* at 1. Customs granted Precision's request to

claim drawback under T.D. 81–74.[1] App. A–4 (Letter from Customs to Precision, dated January 10, 1991 [sic—1992]).

Precision filed 116 drawback entries under T.D. 81–74 between December 11, 1991 and May 13, 1996. Rule 56(i) Statement, ¶ 5. Customs liquidated 69 of these entries with full benefit of drawback, in which Precision had claimed exports of stainless steel trim, stainless steel strip, stainless steel scrap and stainless steel coils, [resulting in Precision's receipt of a significant sum of duty drawback.] *Id.* at ¶ 6. Over that period, Customs routinely requested clarifying information concerning Precision's drawback entries. *Id.* at ¶ 7. Prior to January 1996, Customs never questioned the eligibility of that merchandise for drawback. *Id.* at ¶ 7.

Documentation submitted in connection with the remaining entries, which contained the merchandise at issue, described the merchandise by various terms such as "stainless steel," "metal scrap," "scrap steel for remelting purposes only," "steel scrap sabot," "stainless steel scrap," and "desperdicio de acero inoxidable."[2] *Id.* at ¶ 18. *See* App. B at 2.

During 1992 and 1993, when conducting "pre-liquidation reviews" of three drawback claims that involved exports of "[s]tainless [s]teel coil ends and side trim (scrap)", Customs asked Precision for additional information and documentation on the exports involved. App. A–8 (Letter from Customs to Pat Revoir dated July 10, 1992); App. A–11 (Letter from Gary Appel to Customs dated July 22, 1992). In response, Precision furnished Customs with additional information and documentation, showing that the exported material was stainless steel scrap. Customs liquidated each of those three drawback entries for the full amount of drawback claimed. *See* App. A–14 (Notice of Liquidation); Rule 56(i) Statement, ¶¶ 8–10.

In January 1996, Customs first questioned the eligibility of Precision's claims involving stainless steel trim for drawback. *See* Rule 56(i) Statement, ¶ 7; App. A–7 (January 10, 1996 notice from Customs to Appel-Revoir). In June 1996, Precision received a Notice of Action informing it that 38 of its drawback entries were being liquidated without the benefit of drawback in full or part, on the basis that "scrap was shown on the export bill(s) of lading" and that "[d]rawback is not available upon exports of valuable waste."[3] App. A–20. The entries at issue were liquidated on June 14, 1996. Rule 56(i) Statement, ¶ 14.

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[1] On July 26, 1993, Precision notified Customs of a change in the terms of its authority to operate under T.D. 81–74 concerning the names of officers of the company who would sign drawback documents on the company's behalf. App. A–5 (Letter from Precision to Customs, dated July 26, 1993). Customs approved this amendment by letter of September 7, 1993 without prejudice to any existing drawback claims on file. App. A–6 (Letter from Customs to Precision, dated September 7, 1993).

[2] Customs translated this term as "stainless steel waste". App. B (Customs HQ Ruling 227373, dated Oct. 10, 1997) at 2. Plaintiff has not submitted any evidence to contradict this translation.

[3] When required to state the "complete factual basis supporting the U.S. Customs Service's determination that entries filed by or on behalf of the Plaintiff claiming drawback on the merchandise at issue are not eligible for drawback", Customs responded that "[t]he merchandise in issue is either waste or valuable waste. Neither waste nor valuable waste are manufactured or produced. Accordingly, the exportation of the merchandise in issue is not eligible for drawback." *See* App. C (Plaintiff's First Set of Interrogatories and First Request for Production of Documents (Interrogatory No. 15) and Defendant's Responses thereto (response to Interrogatory No. 15)).

III

ANALYSIS

A

STANDARD OF REVIEW

The court subjects this motion for summary judgment to the usual standard on summary judgment. "Summary judgment is warranted when, based upon the 'pleadings, depositions, answers to interrogatories, * * * admissions on file, * * * [and] affidavits, if any,' the court concludes that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Peg Bandage, Inc. v. United States,* 17 CIT 1337, 1339 (1993) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48 (1986) (citing Rule 56(d) Rules of the Court of International Trade (1993)).

On a motion for summary judgment, the movant bears the burden of demonstrating that there is no genuine issue of material fact. *United States v. F. H. Henderson, Inc.,* 10 CIT 758, 760 (1986) (citing *SRI Int'l v. Matsushita Elec. Corp. of America,* 775 F.2d 1107, 1116 (Fed. Cir. 1985)). If that burden is not met, there can be no grant of summary judgment.

In reviewing this motion, the court reviews Customs' denial of Plaintiff's protest *de novo. See Rheem Metalurgica S/A v. United States,* 20 CIT 1450, 1456, 951 F. Supp. 241, 246 (1996), *aff'd* 160 F.3d 1357 (Fed. Cir. 1998). Although the decision of the Customs Service is presumed correct and "[t]he burden of proving otherwise shall rest upon the party challenging such decision," the court's role in reviewing the decision is to reach the correct result. 28 U.S.C. § 2639(a)(1) (1994); *see also Jarvis Clark Co. v. United States,* 733 F.2d 873, 878 (Fed. Cir. 1984).

If the governing statute is clear on its face, the court must follow Congressional intent, regardless of the existence of an interpretation by Customs to the contrary. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–43 (1984). "[T]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *United States v. Mead,* 121 S.Ct. 2164, 2171 (2001) (footnotes omitted);[4] *see also Chevron,* 467 U.S. at 842–43. Agency interpretations which lack the force of law are "entitled to respect * * * but only to the extent that those interpretations have the 'power to persuade'." *Christensen v. Harris County,* 529 U.S. 576, 587 (2000) (citing *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)); *Mead,* 121 S.Ct. at 2168.

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[4] Where a statute is ambiguous or silent on a specific issue, and it is *apparent* from the agency's generally conferred authority and other statutory circumstances that Congress expects the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, a reviewing court "is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Mead,* 121 S.Ct. at 2172 The necessary corollary to this principle is that, where it is *not* apparent that Congress expects the agency to be able to speak with the force of law, the agency's position is not entitled to deference.

B

Customs' Denial of Plaintiff's Protest Did Not Conform to the Requirements of 19 U.S.C. § 1625(c)

In *Precision I,* the court considered Plaintiff's argument that Customs' determination that Precision's stainless steel scrap is not eligible for drawback can only be applied prospectively, under 19 U.S.C. § 1625(c)(2) (1994).[5] The court held that, to prevail on its § 1625(c)(2) claim, Plaintiff was required to show that Customs' October 10, 1997 denial of Precision's protest was a ruling, and that it changed a "treatment" previously accorded by Customs to substantially identical transactions, and that Customs failed to follow the notice-and-comment procedure outlined in § 1625(c)(2). *Precision I*, 116 F. Supp. 2d. at 1377. Based on these criteria, the court concluded in *Precision I* that Plaintiff had not presented the court with sufficient record evidence to conclude that all five elements of § 1625 are satisfied. *Id.* at 1377–78. The court found that the payment of drawback on 69 previous entries of stainless steel scrap was a "treatment" under § 1625(c) (contingent on a showing by Plaintiff that more than one of these entries was "substantially identical" to the merchandise at issue), because those prior entries constituted more than a single transaction. *Id.* at 1377. The court determined, however, that Plaintiff had failed to provide the court with evidence documenting its claim that Customs approved drawback on substantially identical transactions.[6] *Id.* at 1377–78. The court also found that Plaintiff had failed to present the court with any evidence to indicate whether or not Customs followed the notice-and-comment procedure prior to the issuing the October 10 decision. *Id.* at 1378. The court concluded that the absence of record evidence on these points barred summary judgment in Plaintiff's favor in *Precision I. Id.*

Plaintiff now claims that the facts stipulated by the parties since the issuance of *Precision I* establish that Customs approved drawback on substantially identical transactions, and that Customs failed to follow the notice-and-comment procedure prior to issuing its October 10th de-

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[5] This statute provides as follows:

§ 1625 Interpretive rulings and decisions; public information

(a) Publication.

Within 90 days after the date of issuance of any interpretive ruling (including any ruling letter, or internal advice memorandum) or protest review decision under this Act with respect to any customs transaction, the Secretary shall have such ruling or decision published in the Customs Bulletin or shall otherwise make such ruling or decision available for public inspection.

* * * * * * *

(c) Modification and revocation.

A proposed interpretive ruling or decision which would—

(1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or

(2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions; shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

19 U.S.C. § 1625 (Emphasis supplied indicates portions on which Plaintiff relies).

[6] Specifically, the court sought a detailed description of the merchandise on which drawback was denied, together with information regarding the dates, ports, and exact nature of each of the earlier transactions. *Precision I,* 116 F. Supp. 2d. at 1378.

cision. Plaintiff contends that these stipulations remove any issue of disputed fact, and entitle it to summary judgment as a matter of law. Specifically, the parties stipulated that "[t]he transactions described in the export bills of lading for the 69 drawback entries liquidated by Customs between October 15, 1993 and July 7, 1995 with the benefit of drawback were substantially identical to the transactions described in the export bills of lading for the 38 entries for [sic] which Customs liquidated without the benefit of drawback and which are at issue in this litigation." Annex Pursuant to USCIT R. 56(h): Plaintiff's Statement of Material Facts Not in Dispute ("Plaintiff's 56(h) Statement"), ¶ 71. The parties also stipulated that, prior to issuing the October 10th decision, "Customs did not publish this ruling in the *Customs Bulletin* as a proposed ruling or decision, nor did Customs give interested parties an opportunity to submit—during a period of at least 30 days afterward—comments on the correctness of that ruling. Nor did Customs consider any comments on that ruling, or subsequently publish a final ruling thereafter." Plaintiff's 56(h) Statement, ¶ 78. These facts are sufficient to resolve the factual issues which the court identified in *Precision I* as precluding summary judgment.

1

THE DEFENDANT'S ARGUMENTS REGARDING 19 U.S.C. § 1625(c)(2) ARE COGNIZABLE AT THIS STAGE IN THE LITIGATION

Despite the government's stipulation of these facts, it interposes legal arguments that challenge the court's construction of § 1625(c)(2), as set forth in *Precision I.* These arguments represent, in essence, a request to reargue the issues raised in *Precision I,* in which the court struck the government's briefs.[7]

Although, on its face, USCIT R. 59 provides only for "[a] new trial or rehearing * * * in an action tried without a jury or in an action finally determined," it has been well-recognized that the concept of a new trial under [this Rule] is broad enough to include a rehearing of any matter decided by the Court[.]" *Nat'l Corn Growers Ass'n v. Baker,* 9 CIT 571, 584, 623 F. Supp. 1262, 1274 (1985), *rev'd on other grounds,* 840 F.2d 1547 (Fed. Cir. 1988) (quoting *Timken Co. v. United States,* 6 CIT 76, 76, 569 F. Supp. 65, 67 (1983), (quoting 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2804 at 35 (1973))). Accordingly, the court will consider Defendant's arguments in light of USCIT R. 59.

[7] Defendant points to the transcript of the February 20, 2001 pretrial conference, at which the court stated, "Does the fact that [Defendant's opposition to Precision's first summary judgment motion] was stricken prohibit the government from raising those arguments now?" Tr. at 7, "I'm not sure it *[Precision I]* still does [stand]." Tr. at 21. Defendant takes these statements as an invitation for it to relitigate the arguments contained in its stricken brief. Defendant's Memorandum of Law In Support of Its Cross Motion for Summary Judgment at 4. In the pretrial conference, counsel for Precision arguably conceded that it would be appropriate for the court to review the arguments in question: "[I]t would be my view that the Court ought to reach the correct result * * * such that from the practical point of view I am perfectly happy to have this Court take another look at its opinion and see if it changes anything." Tr. at 17–18.

Defendant also argues that it should not be precluded from raising, at this stage of the litigation, the same arguments contained in its stricken brief in *Precision I.* Defendant suggests, without citation to any authority, that the court's earlier decision to impose a sanction does not bar the court from considering arguments which could have been raised at that stage of the litigation but were stricken.

As this court has previously noted, the grant of a motion for reconsideration is within the sound discretion of the court. *Union Camp v. United States,* 963 F. Supp. 1212, 1213 (1997) (citing *Kerr-McGee Chem. Corp. v. United States,* 14 CIT 582, 583 (1990)). "The purpose of a rehearing is not to relitigate a case," but to rectify a significant flaw in the conduct of the original proceedings. *Kerr-McGee,* 14 CIT at 583 (citations omitted). Although specific grounds upon which a court may grant such a motion are not listed in the Rule, it is well established that the court will not disturb its decision unless it is "manifestly erroneous." *United States v. Gold Mountain Coffee, Ltd.,* 8 CIT 336, 337, 601 F. Supp. 212, 214 (1984) (quoting *Quigley & Mannard, Inc. v. United States,* 61 CCPA 65 (1974)).[8] As set forth below, Defendant has failed to demonstrate manifest error in the court's earlier ruling.

2

THERE ARE NO GROUNDS FOR A REMAND TO ALLOW CUSTOMS TO ADDRESS PLAINTIFF'S ARGUMENTS REGARDING 19 U.S.C. § 1625(c)(2)

Defendant argues[9] that remand is necessary, because Precision failed to raise its § 1625 argument before Customs.[10] Specifically, the government argues that Customs should be permitted to determine "if the granting of the 68 [sic] drawback claims involving stainless steel scrap constituted a 'treatment' for purposes of 19 U.S.C. § 1625(c)(2)." Defendant's Memorandum of Law in Support of Its Cross-Motion for Summary Judgment ("Defendant's Mem.") at 26. Defendant does not offer any legal theory or authority to support its remand request, nor does Plaintiff direct the court's attention to any authority supporting its position.

Implicit in Defendant's remand claim is reliance upon the doctrine of primary jurisdiction. The common law doctrine of primary jurisdiction is "designed to guide a court in determining whether and when it should refrain from or postpone the exercise of its own jurisdiction so that an agency may first answer some question presented." *Borlem S.A.—Em-*

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[8] Defendant implicitly asks the court to disregard the law of the case doctrine. "The law of the case doctrine holds that 'a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation.'" *Chung Ling Co., Ltd. v. United States,* 17 CIT 829, 836, 829 F. Supp. 1353, 1360 (1993) (citing 1b James W. Moore *et al.,* Moore's Federal Practice ¶¶ 0.404[1] (2d ed.1992)). In other words, it is "the practice of courts generally to 'refuse to reopen what has been decided.'" *Koyo Seiko Co., Ltd. v. United States,* 19 CIT 873, 880, 893 F. Supp. 52, 57 (1995) (quoting *Messenger v. Anderson,* 225 U.S. 436, 444 (1912)). "Under this doctrine, a court will generally not reopen an issue already decided unless (1) the evidence in a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of law applicable to such issues, or (3) the decision was clearly erroneous and would work a substantial injustice." *Id.,* 19 CIT at 880, 893 F. Supp. at 57 (citations omitted). Defendant has not presented the court with any of these three factors, nor any other factor, to persuade the court that it should disturb its previous decision. Nevertheless, as Defendant notes, this court is obligated under *Jarvis Clark Co.,* 733 F.2d 873 (Fed. Cir. 1984) to reach the correct decision.

[9] Defendant also argues that the matter should be remanded to Customs to allow it to determine the proper amount of drawback, if any, on the subject entries. Defendant's Mem. at 27 ("Since only a small portion of the imported merchandise resulted in the exported scrap, the amount of duties refundable as drawback for the exported scrap must be properly apportioned.") Plaintiff contests this assertion, noting that "[b]ecause Precision's drawback claims involving stainless steel scrap were filed on the basis of the amount of stainless steel 'appearing in' the exported scrap, there is no need or rationale for remanding the claims to Customs for a determination of whether Precision's claims apportioned drawback between stainless steel sheet and strip and stainless steel scrap." Plaintiff's Response in Opposition to Defendant's Cross-Motion for Summary Judgment and Reply in Support of Its Motion for Summary Judgment at 5. Precision correctly notes, however, that Defendant has failed to include a request for remand in its motion, although its briefs devote several pages to the issue.

[10] Precision does not dispute that it did not raise this argument before Customs. Defendant also argues that Precision failed to identify § 1625 in its summons or complaint as the basis of a claim, thus depriving Defendant of fair notice of the claim. Defendant argues, without citation, that the court should thus decline to consider the § 1625 claim. To the extent that Defendant seeks to dismiss this claim, the court declines to do so.

preedimentos Industriais v. United States, 13 CIT 231, 234, 710 F. Supp. 797, 800 (1989). The purpose of the doctrine is "to give effect to legislative intent underlying the established regulatory scheme by referring matters involving agency expertise back to the agency so that it may, in the first instance, pass upon the issue from its unique administrative perspective." *Id.* The central concern is the "promotion of uniformity in agency decisions and respect for the deference due the 'expert and specialized knowledge of the agencies.'" *Id.* (citing *United States v. W. Pac. R.R. Co.,* 352 U.S. 59, 64 (1956)). The "'doctrine requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.'" *Id.,* 13 CIT at 235, 710 F. Supp. at 800 (quoting *United States v. Philadelphia Nat. Bank,* 374 U.S. 321, 353 (1963)).

Two factors generally guide application of the doctrine: "'[I]n cases raising *issues of fact* not within the conventional experience of judges or cases requiring the exercise of *administrative discretion,* agencies created by Congress for regulating the subject matter should not be passed over.'" *Western Pacific,* 352 U.S. at 64 (emphasis added) (quoting *Far East Conference v. United States,* 342 U.S. 570, 574 –75 (1952)). "[W]here the question is simply one of construction the courts may pass on it as an issue 'solely of law.' But where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that 'the enquiry is essentially one of fact and of discretion in technical matters,' then the issue of tariff application must first go to the [agency]." *Id.* (quoting *Great N. Ry. Co. v. Merch. Elevator Co.,* 259 U.S. 285, 291 (1922)); *see also Borlem,* 13 CIT at 237, 710 F. Supp. at 802 (it is "inappropriate to invoke the doctrine of primary jurisdiction [where] the question before [the] Court [is] entirely one of statutory interpretation."). Here, the facts relating to Plaintiff's "treatment" claim have all been stipulated. The question presented is one of pure statutory interpretation, and the relevant statute does not involve the tariff provisions. The doctrine of primary jurisdiction does not support remand in this case.

3

19 U.S.C. § 1625(c)(2) GOVERNS THE FACTS OF THIS CASE

Defendant next argues that § 1625(c)(2) is not applicable to these facts, arguing that the court erred in its earlier construction of the term "treatment." After careful consideration, the court is unpersuaded by Defendant's argument.

a

THE ACTIONS OF CUSTOMS' OFFICERS GIVE RISE TO A "TREATMENT", WITHOUT A SHOWING OF KNOWLEDGE OR INTENT

Defendant contends that "in order to qualify as [a] 'treatment previously accorded to substantially similar transactions,' Customs must have customarily acted in a particular manner which [sic] respect to prior transactions to which it either agreed or determined to be suitable

and proper." Defendant's Mem. at 28. Defendant bases its argument on the use of the word "accord" in 19 U.S.C. § 1625(c)(2), which requires the use of the notice and comment procedure where a "proposed interpretive ruling or decision * * * would * * * have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions." Defendant cites the following definition of the term "accord": "1: to bring into agreement: RECONCILE 2a: to grant as suitable or proper b: to allow as concession * * *." *Webster's New Collegiate Dictionary* (1977). *See* Defendant's Mem. At 28. "Accord" is elsewhere defined as:

> **1:** to bring into agreement: RECONCILE, HARMONIZE <the scientists' conclusions seem contradictory but can be ~*ed* by calm reasoning> **2a:** to grant as suitable or proper: to render as due <parents have rights which are not ~*ed* to strangers or neighbors – A.I. Melden> <formerly, historians ~*ed* to "justice" less than its due place – J.G. Edwards> **b:** ALLOW, CONCEDE <the law ~*s* them favored status> <he decided to ~ himself the delight of breaking the news – P.B. Kyne> **c:** AWARD <the President ~*ed* him an honorary title> **d:** ALLOT <in spite of the injustices ~*ed* him> * * *.

Webster's Third New International Dictionary at 12 (1986). Defendant thus argues that, to constitute a treatment under § 1625(c)(2), Customs must have determined the predecessor transactions to be "suitable or proper". Defendant's Mem. at 28–29. Expanding on this theory, Defendant argues that Precision must establish, in addition to the elements identified by the court in *Precision I,* that Customs "knowingly" granted Precision's claims for drawback on the 69 entries, in order to prevail on its "treatment" theory. Defendant's Reply to Plaintiff's Response in Opposition to Defendant's Cross-Motion For Summary Judgment and Reply in Support of Its Motion for Summary Judgment ("Defendant's Reply Mem.") at 5. The question then arises as to *who* at Customs must deem the subject transactions "suitable or proper," or "knowingly" grant drawback.

On this issue, Defendant cites 19 C.F.R. § 191.10(a), arguing that there can be no "treatment" where Customs has not performed the verification authorized under this regulation. Notably absent from Defendant's brief is any quotation of the text of this regulation, a reading of which compels the rejection of Defendant's claim. Although subject to slight variants during the years 1991 through 1996, during which Customs granted drawback on the 69 entries claimed to constitute the predicate "treatment," the following iteration is typical in all material respects:

> **§ 191.10 Verification of drawback claims.**
>
> (a) *Claims*. A drawback claim filed under a drawback contract shall be **subject to** verification by the regional Regulatory Audit Division under the jurisdiction of the regional commissioner in

> whose region the claim is filed when the factory covered by the claim also is located in the same region.

19 C.F.R. § 191.10(a) (1992) (emphasis added). The emphasized term, "subject to", indicates that, while any drawback claim **may** be verified, such verification is not performed for every claim. This reading is reinforced by the following subsection, which states that "[i]f the claim **selected for verification** is filed in one region and one or more factories covered by the claim is located in another region, the regional commissioner **selecting the claim** for verification * * * may forward copies of the claim and the drawback contract, and request for verfication to the regional commissioners in whose regions the other factories are located." 19 C.F.R. § 191.10(b) (1992) (emphasis added). Claims are **selected** for verification; verification is not a necessary or inherent part of the drawback process. As with Precision's entries, drawback may be granted on entries made over a period of years, and never be subjected to any verification whatsoever.[11] This fact precludes the adoption of Defendant's argument. If the court were to hold that verification is an essential prerequisite for the creation of a "treatment" under § 1625(c)(2), the provisions of that section would be eviscerated; where there is no assurance that the entries are subject to verification, there is no assurance of "treatment."

The government also argues that Customs "never articulated a position that stainless steel scrap was eligible for drawback which could constitute a 'treatment' within the intended meaning of § 1625(c)(2)." Defendant's Mem. at 32 (citations omitted). This argument equates "position" with "treatment", a link that must be rejected, based on the face of § 1625(c)(2) and on its legislative history. As this court noted in *Precision I,* "the use of the word 'treatment', rather than 'position', represents a Congressional departure from the language of the apparent source text of [19 CFR] § 177.10. The court can only assume that this change was made in an effort to move away from the strict judicially-created definition of the term 'position'", *Precision I,* 116 F. Supp. 2d at 1377, particularly as the requirements of § 1625 "already appeared, in more detailed and discretionary form," *id.* at 1374, in § 177.10, and since "Congress * * * is presumed to know the existing law pertinent to legislation it enacts," *id.* at 1375.

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[11] The government claims that the "preliquidation review" performed by Customs' agents was "cursory in nature and did not cover any interpretive aspect of drawback eligibility pursuant to either the statute or customs regulations." Defendant's Mem. at 30. Customs, however, was presented with numerous opportunities to review Precision's claim for drawback on scrap, starting with Precision's submission of its initial intention to adhere letter, which referenced "trim", another term for scrap. The first of the 69 drawback claims granted by Customs specifically stated that the exported goods included "scrap". *See, e.g.,* Plaintiff's Exs. 44, 44a, 45, 45a, 46, 46a, 47, 47a, 55, 55a, 57, 57a, 73 and 73a (drawback entry forms and liquidation notices thereon). Customs granted drawback on this, and 68 other entries similarly denominated. Indeed, there is nothing in the provisions of 19 C.F.R. § 191.10(a) which requires any greater scrutiny by Customs than that given by those officials who granted Precision's 69 claims.

Similarly, Customs' claims that "the nature of the merchandise which Precision manufactured and exported was far from clear," Defendant's Mem. at 30, is irrelevant under the "treatment" provisions. Even if it were relevant, the Court finds those claims disingenuous, in light of the consistent trail of correspondence and submissions in which Precision and its agents describe the entries on which drawback was granted as "scrap". *See, e.g.,* Plaintiff's Exs. 1a (letter dated July 22, 1992 from G. Appel to V. Golloday of Customs), 1j, 1k, 1l (including copies of "scrap tickets"), 71, 71a (letter dated Oct. 1, 1993 from G. Appel to R. Ficek of Customs).

Precision argues that Customs' reading would "completely eliminate the statute's clear bifurcation of Customs' treatment of 'substantially identical transactions' under § 1625(c)(2), in contrast to the consideration of Customs' 'policies' or 'positions' under § 1625(c)(1)." Plaintiff's Reply Mem. at 9. The government replies, correctly, that "the terms 'policy' and position' do not appear in either subsections (c)(1) or (c)(2)," and argues (without citation) that "[a]ll of § 1625 relates to Customs policies and positions," contending that "(c)(1) relates to Customs policies and positions as revealed in written form, *i.e.,* 'prior interpretive ruling or decision,' while subsection (c)(2) covers the situation where Customs policy was not written up but was manifested in Customs Service action." Defendant's Reply Mem. at 6. The government attempts to buttress its argument, arguing that the court erred in finding that the use of the term "treatment" constituted a departure from the use of the term "position" in the apparent source text of 19 CFR § 177.10. Rather, contends the government, the statutory language "treatment previously accorded by the Customs Service to substantially identical transactions" "was likely adopted from 19 CFR § 177.9, not § 177.10." Defendant's Reply Mem. at 6.

19 C.F.R. § 177.9, the subsection which uses the cited language, makes no mention of "positions," "policies" or "practices." This section (Customs' own regulation) is the apparent source text from which the term "treatment" was grafted onto § 177.10. A review of this section further reinforces the distinction drawn between the terms "treatment" and "position" in *Precision I.* 19 C.F.R. § 177.9 describes in detail the types of proof needed to establish a "treatment" under the regulatory scheme which Congress adopted in § 1625(c)(2):

> In applying to the Customs Service for a delay in the effective date of a ruling letter [which has the effect of modifying a treatment previously accorded by Customs to substantially identical transactions], an affected party must demonstrate * * * that the treatment previously accorded by Customs to the substantially identical transactions was sufficiently consistent and continuous that such party reasonably relied thereon in arranging for future transactions. The evidence of past treatment by the Customs Service shall cover the 2-year period immediately prior to the date of the ruling letter, listing all substantially identical transactions by entry number (or other Customs assigned number), the quantity and value of merchandise covered by each such transaction (where applicable), the ports of entry, and the dates of final action by the Customs Service. The evidence of reliance shall include contracts, purchase orders, or other materials tending to establish that the future transactions were arranged based on the treatment previously accorded by the Customs Service.

19 C.F.R. § 177.9(e)(2) (2000). The only proof needed to establish a treatment is a description of the transactions; the only intent referenced by the regulation is that of the **importer,** in arranging its affairs in reliance on the treatment.

This reading is further reinforced by a review of the notice proposing the amendments that added the relevant language to § 177.9. Defendant argues that this reflects Congress' intent in later enacting 19 U.S.C. § 1625(c)(2), and that this notice demonstrates that there was no "intent to broaden the scope of § 1625(c)(2) to actions that did not reflect the policies and positions of the Customs Service even though they had not been expressed in written rulings or decisions." Defendant's Reply Mem. at 7. While Customs' notice may or may not be probative of Congress' intent, the notice directly contradicts the government's assertion. It reads, in pertinent part, as follows:

> Uniformity of Customs Officers' Decisions
>
> Section 7361(c) of the Anti-Drug Abuse Amendments Act of 1988 (Title VI, Pub. L. 100–690) requires the Secretary of the Treasury to promulgate **regulations to provide for nationwide uniformity of certain decisions made by U.S. Customs Service officers** and to establish procedures by which certain parties affected by the lack of such uniformity may have the alleged inconsistencies resolved.
>
> **The number of Customs Service personnel charged with decision-making responsibilities affecting the importation of merchandise at the various ports of entry in the United States is substantial.** Notwithstanding the existence of a variety of programs and procedures designed to foster uniformity in the decisions it makes, Customs recognizes that inconsistent decisions occur and will inevitably continue to occur.
>
> * * * * * * *
>
> **Although nationwide inspection/examination guidelines are issued** from time to time, **the effective enforcement** by the Customs Service of the tariff and other laws it is charged with enforcing **requires that these guidelines be applied with local discretion** and be augmented by random examinations in order that no importation ever be assured beforehand that it will be exempt from physical examination. Nevertheless, the Customs Service realizes that the decision to examine merchandise at one port while entry of identical merchandise is permitted at another port without examination may be perceived as an inconsistency.
>
> The **Customs Service recognizes that even the small number of real or apparent inconsistencies that occur may pose immediate and grave consequences to the parties directly involved, as well as to the businesses and enterprises whose livelihood depends on the utilization of the particular import facilities and services at the port where the inconsistencies are alleged to exist.** Moreover, insofar as the assessment of Customs duties is concerned, uniformity is mandated by Article 1, Section 8 of the Constitution of the United States. The Customs Service therefore proposes to establish a procedure whereby alleged inconsistencies in decisionmaking may be brought directly to the attention of Customs Headquarters by affected parties for expedited resolution.
>
> * * * * * * *

> The petitioning party will be required to furnish information sufficient to document that apparent inconsistencies exist. In the case of entries of merchandise alleged to have been treated inconsistently, the competing entries must be identified as to port of entry, date, and entry number and the merchandise must be fully described (including brand names, when present and samples, if possible) * * *. In the case of other alleged inconsistencies, the competing entries or other transactions or events must be described in sufficient detail that the Customs Service may quickly verify with the Customs field officials involved that the facts are as alleged.
>
> * * * * * * *
>
> The **Customs Service also proposes to add a new paragraph, (e) to §§ 177.9,** Customs Regulations (19 CFR 177.9(e)), to provide for a similar delay **in the event the Customs Service issues a ruling which, although the matter is not covered by an earlier ruling, modifies the treatment previously accorded to substantially identical transactions by the Customs Service.** Affected parties must request that such a delay be granted and must include with that request information identifying the past transactions claimed to have been relied on as well as evidence of that reliance. As with the requests for a delayed effective date made under proposed §§ 177.9(d)(3), Customs Regulations (19 CFR 177.9(d)(3)), the Customs Service will respond to all such requests individually or by a general notice published in the Customs Bulletin.

Proposed Rules: Certain Administrative Procedures, 54 Fed. Reg. 8208, 8209–10 (Feb. 27, 1989) (emphasis added). The last quoted paragraph belies Defendant's assertion. Subsection 177.9(e) is designed to provide rights to importers aggrieved by a new ruling where "the matter is not covered by an earlier ruling" and the new ruling "modifies the treatment previously accorded substantially similar transactions." This notice recognizes the fact that individual Customs officers may formulate disparate "treatments". As noted in *Precision I,* this term is distinct from the officially formulated "ruling", "position" or "policy".

The government has failed to point to anything in the language or the legislative history of, or the regulatory scheme surrounding, § 1625(c)(2) which persuades the court that its earlier holding—that "[t]he term 'treatment' looks to the *actions* of Customs, rather than its 'position' or policy"—is erroneous. *Precision I,* 116 F. Supp. 2d at 1377 (emphasis in original). Accordingly, the court finds no legal basis for a review of Customs' factual arguments that "the nature of the merchandise which Precision manufactured and exported was far from clear." Defendant's Mem. at 30.

This reading of § 1625(c)(2) is consistent with, and furthers, the legislative history underlying the Customs Modernization Act, which was passed as part of the North American Free Trade Agreement Act, Pub. L. 103–182 § 623 (1993), and substantially amended 19 U.S.C. § 1625:

> The guiding principle in our discussions with the trade community is that of "shared responsibility". Customs must do a better job of

> informing the trade community of how Customs does business; and the trade community must do a better job to assure compliance with U.S. trade rules.
>
> * * * * * * *
>
> As a general statement, Customs supports the JIG concept of "informed compliance." Importers have the right to be informed about Customs rules and regulations, and its interpretive rulings and directives, and to expect certainty that the ground rules would not be unilaterally changed by Customs without the proper notice and an opportunity to respond.

Customs Modernization and Informed Compliance Act: Hearing on H.R. 3935 Before the House Comm. on Ways and Means, Subcomm. on Trade, 102d Cong. 91 (1992) (statement of Commissioner Carol Hallett, United States Customs Service). *See also* S. Rep. No. 103–189 at 64 (1993) ("Title VI also implements the concept of 'informed compliance,' which is premised on the belief that importers have a right to be informed about customs rules and regulations, as well as interpretive rulings, and to expect certainty that the Customs Service will not unilaterally change the rules without providing importers proper notice and opportunity for comment."). The government has failed to point to any contravening legislative history or other authority.

b

PRECISION COMPLIED WITH THE CONDITIONS FOR DRAWBACK

Defendant then argues that a finding that the 69 earlier entries constituted a "treatment", which requires a notice and comment process to change, "would impermissibly reward plaintiff's failure to comply with the statute, regulations and contract." Defendant's Mem. at 32, (citing *Guess?, Inc. v. United States,* 944 F.2d 855, 858 (1991) (Drawback involves an exemption from duty, and is thus "a statutory privilege due only when enumerated conditions are met."); 19 U.S.C. § 1313(l) ("Allowance of the privileges provided for in this section shall be subject to compliance with such rules and regulations as the Secretary of the Treasury shall prescribe * * *.")). Defendant claims that Precision failed to comply with the terms of the drawback statute because, according to Defendant,[12] Precision claimed drawback on waste, rather than articles that had been manufactured or produced. Defendant's Mem. at 34.

The court must reject this argument. Defendant asks the court to hold Precision to a standard that Customs itself did not follow, insofar as Customs accepted Precision's initial letter of intent to adhere, and approved 69 entries thereafter. Defendant has pointed to nothing in the regulations or Customs laws that Precision has contravened. In short, the eligibility of stainless steel scrap for drawback was a gray area. If the court finds the provisions of § 1625(c) inapplicable where Customs changes its

[12] Defendant claims that the court concluded in *Precision I* that Precision's scrap is not a manufactured or produced article under 19 U.S.C. § 1313(b). The court made no such finding in *Precision I.* Rather, it found that Precision had not met its burden on summary judgment, leaving the court with insufficient evidence to issue a finding as to whether or not scrap is waste. *Precision I,* 116 F. Supp. 2d. at 1371. Notably absent from *Precision I* is any finding that scrap is waste or valuable waste.

treatment in a gray area of the drawback law, then § 1625(c) will have no applicability in any situation. The court leaves for another day the question of whether § 1625(c) is vitiated when the alleged "treatment" by Customs is the approval of drawback against the explicit regulatory or statutory denial of drawback on the goods at issue.

c

§ 1625 IS NOT EQUITABLE ESTOPPEL

Defendant cites the long-established tenet that "a party cannot claim estoppel against the Government based upon the actions of an agency employee." *Id.* at 32. Defendant, however, abbreviates the oft-cited rule, which applies to **equitable** estoppel. "Estoppel is an equitable doctrine invoked to avoid injustice in particular cases * * *. [T]he party claiming the estoppel must have relied on its adversary's conduct in such a manner as to change his position for the worse." *Heckler v. Comm. Health Serv. of Crawford County, Inc.,* 467 U.S. 51, 58 (1984). Precision's claims rest not in equity but in the law, through which Congress has selectively and explicitly waived assertion of any rights it might otherwise have in this regard.

In any event, application of the rule set forth in § 1625(c)(2) does not estop the government; it merely requires the government to comply with a statutorily mandated notice-and-comment process before implementing a ruling or decision that changes an earlier treatment. So long as Customs chooses not to follow this process, it is bound by its earlier treatment; Customs may, however, at any time comply with the notice and comment procedure set forth in 19 U.S.C. § 1625, and thus impose a new ruling or decision, consistent with the statute, denying drawback on stainless steel scrap or trim. This process, as Congress and Customs alike evidently intended, provides importers with some predictability in structuring their business, while retaining for Customs flexibility in the exercise of its administrative authority.

In light of this holding, it is unnecessary for the court to reach the issue of whether stainless steel scrap is an article manufactured or produced, under 19 U.S.C. § 1313(b), or waste. Until Customs follows the notice-and-comment procedure set forth in 19 U.S.C. § 1625(c), it is bound by, and all entries in this case are subject to, its earlier treatment of stainless steel scrap as eligible for drawback.

IV

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is granted. Defendant's Cross-Motion for Summary Judgment is denied.

(Slip Op. 02–01)

ALLEGHENY LUDLUM CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND USINOR, UGINE S.A., AND UGINOX SALES CORP., ET. AL., DEFENDANT-INTERVENORS

Consolidated Court No. 99–09–00566

[Defendant-Intervenors' motion for Judgment Upon an Agency Record granted in part and remanded.]

(Decided January 4, 2002)

Collier Shannon Scott, PLLC, Paul C. Rosenthal, Kathleen W. Cannon, Lynn Duffy Maloney, (John M. Herrmann), for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, United States Department of Justice; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Thomas B. Fatrouros); Michele D. Lynch,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for Defendant.

Weil, Gotshall & Manges LLP, (Stuart Rosen), Jonathan Bloom, Jennifer J. Rhodes, for Defendant-Intervenors.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

BARZILAY, *Judge:* In this case, the court is asked, yet again, to review the subsidy calculation methodology employed by the Department of Commerce ("Commerce") during countervailing duty investigations and reviews to determine under what circumstances a privatized company is the recipient of a benefit pursuant to United States law. This case comes before the court pursuant to Plaintiffs' and Defendant-Intervenors' USCIT R. 56.2 Motions for Judgment Upon an Agency Record. Plaintiffs and Defendant-Intervenors challenged certain aspects of the final determination of the Department of Commerce International Trade Administration's countervailing duty investigation of stainless steel sheet and strip from France.[1] *See Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils from France,* 64 Fed. Reg. 30,774 (1999) *("Final Determination").* While this case was pending before the court, the Federal Circuit issued its opinion in *Delverde SrL v. United States,* 202 F.3d 1360 (Fed. Cir. 2000) *reh'g denied*, Ct. No. 99–1186 (June 20, 2000) *("Delverde III").* On February 29, 2000, Usinor filed, and the court granted, a motion to amend its complaint to add a claim based upon the Federal Circuit's ruling in *Delverde III.* On July 13, 2000, the United States requested a remand to Commerce to consider the impact of the Federal Circuit's holding in *Delverde*

[1] When the case was initiated, Allegheny Ludlum Corp., ("Allegheny") *et al*, the domestic producers, were the Plaintiffs, the United States (Commerce) the Defendant, and Usinor, Ugine S.A. and Uginox Sales Corp. ("Usinor"), the foreign producers, the Defendant-Intervenors. As explained, *infra,* this case was remanded to Commerce before any decision was rendered on Allegheny's motion. After the remand determination, Allegheny supported the outcome of Commerce's redetermination and it was Usinor that objected to certain aspects of the remand results.

III to the facts of this case. The subsequent remand order instructed Commerce to "issue a determination consistent with United States law, interpreted pursuant to all relevant authority, including the decision of the Court of Appeals for the Federal Circuit in *Delverde SrL v. United States* 202 F.3d 1360 (Fed. Cir. 2000)." *Remand Order* (August 15, 2000). The court now reviews Commerce's *Final Results of Redetermination Pursuant to Court Remand: Allegheny-Ludlum Corp., et al v. United States, No. 99–09–00566* (December 20, 2000). *("Remand Determination").*[2] The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994) which provides for judicial review of a final determination by the Department of Commerce in accordance with the provisions of 19 U.S.C. § 1516a(a)(2)(B)(i) (1994).

II. BACKGROUND

On July 13, 1998, Commerce initiated countervailing duty investigations to determine whether manufacturers, producers or exporters of stainless steel sheet and strip from France, Italy and the Republic of Korea were receiving countervailable subsidies. *See Initiation of Countervailing Duty Investigations: Stainless Steel Sheet and Strip in Coils From France, Italy and the Republic of Korea,* 63 Fed. Reg. 37,539 (July 13, 1998). The period of investigation was calender year 1997. *Id.* Commerce issued its preliminary affirmative determination on November 17, 1998 and its final affirmative determination on June 8, 1999, finding that the total estimated net countervailable subsidy ("CVD") rate was 5.38% *ad valorem* for Usinor and all others. *See Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Stainless Steel Sheet and Strip in Coils from France,* 63 Fed. Reg. 63,876 (Nov. 17, 1998) *("Preliminary Determination"); Final Determination,* 64 Fed. Reg. 30,790. During the investigation, the Government of France ("France" or "French Government") identified a division of Usinor as the sole French producer of the subject merchandise that was exported to the United States during the period of investigation. The French Government was the majority owner of Usinor and Sacilor, another steel producer, until the mid-1980s. *Final Determination*, 64 Fed. Reg. at 30,776. After a capital restructuring in 1986, France was the sole owner of both companies. *Id*. In 1987, France placed Usinor and Sacilor under the ownership of a holding company, with the holding company retaining Usinor as its name. *Remand Determination* at 17. In 1991, Credit Lyonnais, a government-owned bank, purchased 20% of Usinor. *Final Determination*, 64 Fed. Reg. at 30,776. Beginning in the summer of 1995 and continuing through 1996 and 1997, the French Government privatized Usinor through a public stock offering. *Id.* By the end of 1997, approximately 82% of Usinor's shares were owned by

[2] This case is a companion case to *GTS Industries S.A. v. United States*, 26 CIT ___ (2002). GTS Industries, formerly a subsidiary of Usinor, produced and imported products into the United States that were also subject to a countervailing duty investigation. The same privatization transaction is at issue in both cases.

private shareholders, with the remaining shares owned by employees and "stable shareholders."[3] *Remand Determination* at *17.*

Despite the public stock offering that privatized Usinor, Commerce concluded in the *Remand Determination* that Usinor was the "same person" after the privatization and, since it had already determined that Usinor had previously received subsidies, it did not have to analyze whether the past subsidies were extinguished by the change in ownership transaction. In making its "same person" finding Commerce used principles of United States law "in the general corporate context." *Remand Determination* at 10. Additionally, Commerce used a 14-year average useful life (AUL) to allocate the benefits bestowed by nonrecurring subsidies.[4] Based upon its findings, Commerce recalculated Usinor's CVD rate to be 7.72% *ad valorem*.

III. Standard of Review

The court must evaluate whether the remand findings are supported by substantial evidence on the record or otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B). "Substantial evidence is more than a mere scintilla;" it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. of New York v. NLRB,* 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co., Ltd. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984). To determine if the agency's interpretation of the statute is in accordance with law "we must first carefully investigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I. v. United States,* 157 F.3d 879, 881 (Fed. Cir. 1998). The expressed will or intent of Congress on a specific issue is dispositive. *See Japan Whaling Association v. American Cetacean Society,* 478 U.S. 221, 233–237 (1986). If the court determines that the statute is silent or ambiguous, the question to be asked is whether the agency's construction of the statute is permissible. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984). This deference is due when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. *United States v. Mead Corp*. 121 S.Ct. 2164, 1271 (2001). This is not limited to notice and comment rulemaking but is given to those "statutory determinations that are articulated in any 'relatively formal administrative procedure.'" *Pesquera Mares Australes Ltda. v. United States,* 266 F.3d 1372, 1380 (Fed. Cir. 2001). Therefore,

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[3] Article 4 of the French privatization law establishes procedures for designating "Stable Shareholders" under guidance from the Privatization Commission. *Usinor Verification Report* at 7, Feb. 19, 1999. The purpose seems to be to provide a core group of investors who are restricted from selling during the privatization process, in order to promote stability and project confidence in the sale.

[4] "Commerce assumes that when a company sells 'productive assets' during 'the average useful life,' a pro rata portion of that subsidy 'passes through' to the purchaser at the time of sale. Commerce then quantifies the assumed 'pass through' amount, makes adjustments based on the purchase price, allocates an amount to the year of investigation, and calculates the *ad valorem* subsidy rate." *Delverde III,* 202 F.3d at 1363 (citing *Affirmative Countervailing Duty Determination: Certain Steel From Prod. From Aus.,* 58 Fed. Reg. 37,217, 37,268–69 (1993)) (citation omitted). The court reaches a decision in this case solely on the issue of the effect of privatization, and, therefore, will not discuss which AUL is correct.

statutory interpretations articulated by Commerce during antidumping proceedings are entitled to judicial deference under *Chevron*. *Id.* at 1382. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996).

IV. Discussion

A. History of the Issue

A brief history of the privatization subsidy issue is appropriate. The applicable law attempts to level the playing field by imposing a countervailing duty on subsidized imported goods sold in the United States which materially injure a domestic industry. A subsidy is a financial benefit conferred on a natural or legal person (usually the producing company) by a government entity or agent. *See* 19 U.S.C. § 1677(B)

In the past twenty years many countries have moved to privatize state-owned enterprises and thereby shift major manufacturing activity from public to private entities. Thus many plants formerly run entirely or mostly under government finance and control are now under the control of private shareholders. The question then becomes: if the plant received non-recurring financial benefits when it was government owned and operated, do those benefits survive the privatization and are the new owners, therefore, subject to countervailing duties on products they export to the United States?

Commerce first confronted this issue in 1989 when it decided that no benefits had passed to the recently privatized firm under review because the sale was for full market value and at arm's length. *See Lime from Mexico; Preliminary Results of Changed Circumstances Countervailing Duty Administrative Review,* 54 Fed. Reg. 1,753, 1,754–55 (Jan. 17, 1989). By 1993, however, Commerce had changed its views in the context of steel countervailing duty investigations. Commerce ignored the change of ownership at fair market value, which it had found significant in *Lime from Mexico*, and held that the previously bestowed subsidies survived such a sale and thus it assumed a continuing benefit to the new owners. *See Certain Hot Rolled Lead and Bismuth Carbon Steel Products from the U.K.,* 58 Fed. Reg. 6,237 (Jan. 27, 1993).[5] Commerce then issued a fuller explanation of its position on subsidies in the privatization context when it published the General Issue Appendix covering several different CVD investigations. *See Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, General Issues Appendix,* 58 Fed. Reg. 37,217, 37,225 (July 9, 1993). In this new privatization methodology Commerce essentially assumed that a portion of the previously bestowed subsidy passed through to the new owners from the state owned entity depending on when it had been initially granted. In this methodology the life of the subsidy in years (calculated

[5] The historical and political context of this decision is discussed in Julie Dunne, Note, Delverde *and the WTO's* British Steel Decision *Foreshadow More Conflict Where the WTO Subsidies Agreement, Privatization and the United States Countervailing Duty Law Intersect,* 17 Am. U. Int'l. L. Rev. 79, 89 n.38 (2001).

by a formula based on amortization of assets) was the critical component and whether the sale was for full market value had no significance.

Commerce's methodology of ignoring a sale at full market value was rejected by this court but reinstated by the Court of Appeals for the Federal Circuit. In *Saarstahl, AG v. United States,* 18 CIT 525, 858 F.Supp. 187 (CIT 1994) this court applied pre-URAA law[6] and held that subsidies are extinguished in a true arms-length sale for full market value because the value of the company includes the benefit of any previous subsidies which the buyer pays for at time of purchase, leaving no remaining competitive advantage.

The Federal Circuit disagreed, holding that Commerce's decision to countervail previously bestowed subsidies was reasonable absent an explicit mandate from Congress to the contrary and that the CIT should have deferred to Commerce's interpretation. *See Saarstahl AG v. United States,* 78 F.3d 1539, 1544 (Fed. Cir. 1996). The appeals court reasoned that the statute at issue did not require countervailable subsidies to confer a benefit and that once Commerce finds a governmental subsidy it can assess countervailing duties on the new entity if the private purchaser repaid none or only some of the subsidy received prior to privatization.

In December 1999, the World Trade Organization first addressed the issue in a case also originating in the steel industry. *See WTO Dispute Panel Report on United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,* No. WT/DS138/R (Dec. 23, 1999). The Panel examined Commerce's assessment of countervailing duties on steel after a complaint by the European Communities. Commerce had specifically determined that the privatization at issue was at arm's-length for fair market value and consistent with commercial considerations. *Panel Report,* ¶ 6.23. The Panel held that Commerce's decision to countervail was contrary to the definition of a subsidy contained in the *Agreement on Subsidies and Countervailing Measures*, Pt. I, Art. 1 (1994). Specifically the Panel stated, *inter alia*, that the existence of a benefit could only be found by comparing whether the recipient was better off than it would be without the contribution and that "the marketplace provides an appropriate basis for comparison * * * whether the recipient has re-

[6] In 19 U.S.C. § 1677(5)(A)(ii) (1988) a subsidy was defined as "provided or required by government action to a specific enterprise or industry * * * whether paid or bestowed directly or indirectly on the manufacture, production or export of any class or kind of merchandise." This provision was amended in 1994 as part of the Uruguay Round Agreement Act to read as follows:

> (B) Subsidy described
> A subsidy is described in this paragraph in the case in which an authority—
> (i) provides a financial contribution,
> * * * * * * *
> to a person and *a benefit is thereby conferred*.

(Emphasis added).

The URAA also included 19 U.S.C. §1677(5)(F) which stated:

> A change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction.

This provision was widely thought to have been added in reaction to this court's opinion in *Saarstahl* which at the time of URAA enactment had not been reversed by the Federal Circuit. *See Delverde III,* 202 F.3d at 1367 n.3.

ceived a 'financial contribution' on terms more favorable than those available to the recipient in the market." *Panel Report*, ¶ 6.65. The Panel found that the privatization of a government owned company in an arm's length, fair market value transaction eliminates any benefit from prior subsidization. The United States appealed to the WTO's Appellate Body which upheld the Panel's Report and recommended "the United States [to] bring its measures found in the Panel Report, as upheld by this Report, to be inconsistent with its obligations under the SCM agreement into conformity with its obligations under that agreement." *WTO Dispute Appellate Body Report on United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,* No. WT/DS138/R at ¶ 76 (May 10, 2000).

The Federal Circuit noted the Panel decision in *Delverde III* when it reviewed a decision by this court in a CVD case involving pasta from Italy.[7] *See Delverde SrL v. United States*, 22 CIT 947, 24 F. Supp. 2d 314 (1998) *("Delverde II").* Delverde, the foreign producer, had asked this court to review the imposition of CVD by Commerce when the department, using its General Issues Appendix methodology, held Delverde responsible for a pro-rata portion of nonrecurring subsidies that had been granted to the former owner. Initially, this court had agreed with Delverde's argument that Commerce could not assume the pro-rata portion survived the sale and remanded to Commerce to examine the sale itself to determine whether Delverde received a subsidy through its purchase of plant assets from an owner that had previously received subsidies. *Delverde Sr.L v. United States*, 21 CIT 1294, 989 F. Supp. 218 (1997)[8] *("Delverde I").*

On remand, however, after Commerce had further explained its position, the result was different. This court found permissible Commerce's presumption of pass through of subsidies when it assessed benefit only at the time the subsidization occurred. *Delverde II,* 24 F. Supp. 2d at 317. The Federal Circuit disagreed, holding that the statutory language required Commerce to determine whether the purchaser received both a financial contribution and a benefit from a government before concluding that the purchaser was subsidized. *See Delverde III*, 202 F.3d at 1367. The court went on to instruct that Commerce examine the issue "based on the facts and circumstances, including the terms of the transaction. * * *" *Id*. at 1369–70. It specifically stated that its decision was not inconsistent with that of the WTO Dispute Panel. *Id*. at 1369.

B. What does Delverde require?

The court views the *Delverde* decision as central to the resolution of this case. The parties have sharply divergent views on the meaning of that decision and its application to the administrative action now before the court. Commerce asserts that, in accordance with the Federal Cir-

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[7] The *Delverde* case will be discussed at length *infra* in this opinion.

[8] Both this court and the Federal Circuit assumed the sale in *Delverde* was between private entities. *Delverde III*, at 202 F.3d 1362.

cuit's holding in *Delverde III,* it formulated a new two-step inquiry to determine if prior subsidies passed through to the new privatized entity.

> Consistent with the Federal Circuit's analysis in *Delverde III*, Commerce announced a *two-step* inquiry. As the *Remand Determination* shows, Commerce first analyzes whether the pre-sale and post-sale entities are for all intents and purposes the same person. If they are, Commerce's analysis stops, as all of the elements of a subsidy will have been established with regard to the producer under investigation, *i.e.*, the post-sale entity. If, however, the two entities are not the same person, Commerce will proceed to the second step in its inquiry and will examine whether a subsidy has been provided to the post-sale entity through the change-in-ownership transaction itself.

Defendant's Mem. in Opp'n to Pls.' and Def.-Intervenors' Mot. for J. upon the Agency R. at 16–17 *("Def.'s Br.").* After applying the two-step analysis to Usinor, Commerce concluded it did not have a duty to analyze whether the subsidies passed to Usinor because Usinor was the same "person" before and after the privatization. *Id*. at 18.

> After a lengthy review and analysis of the remand record, Commerce determined that government-owned Usinor and privatized Usinor were for all intents and purposes the same person. As a result, the prior subsidies remained attributable to privatized Usinor, as all of the elements of a subsidy were established with regard to privatized Usinor.
>
> With this outcome it became unnecessary for Commerce to proceed to the second step in its privatization analysis, which would have involved an inquiry into whether a subsidy had nevertheless been provided to the privatized entity through the privatization transaction itself. *Commerce, therefore, did not address the issue whether the transaction's purchase price had been fair market value.*

Id. at 18 (emphasis added). Therefore, since Commerce had previously determined that Usinor was the recipient of subsidies, it imputed the subsidies to Usinor after the privatization.

Usinor asserts the *Remand Determination* is contrary to *Delverde III* because Commerce "deems wholly irrelevant" the fact that Usinor was privatized through an arm's-length global public stock offering and failed to analyze the terms of the change in ownership transaction to determine if the subsidies passed through to the privatized entity . *Def.-Intervenors' Supplemental Mem. In Supp. of Mot. for J. Upon the Agency Record* at 3–4 *("Def.-Intervenors' Supp. Mem.").* Usinor claims "Commerce's 'same person approach' * * * ignores the terms of the transaction and instead focuses exclusively on whether the newly-purchased entity is 'substantially the same business' as the company that received the subsidies. *Id.* at 3. Additionally, Usinor claims that the *Remand Determination* is contrary to Agreement on Subsidies and Countervailing Measures and inconsistent with the WTO decision in *Appellate Body Report on United States—Imposition of Countervailing Duties on Certain*

Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, No. WT/DS138/R at ¶ 76 (May 10, 2000). In the alternative, Usinor argues that "even if some type of 'same person' analysis were appropriate, the record facts relating to [Usinor's] privatization show that it was not the 'same person' following the privatization and thus should not be saddled with prior subsidies" *Def.-Intervenors' Supp. Mem.* at 4.

The central question is whether Commerce's application of its method complies with congressional intent embodied in the statutory language of 19 U.S.C. § 1677(5)(F), as interpreted by the Federal Circuit in *Delverde*. Consistent with the court of appeals' decision in *Delverde*, this court finds the statute's meaning to be clear, and, therefore, does not reach the issue of deference to Commerce's interpretation under the *Chevron* doctrine. *See Delverde III*, 202 F.3d at 1367. "[W]e need only determine whether Commerce's methodology is in accordance with the statute." *Id.* As noted above, the *Delverde* decision assumed the sale of assets from one private company to another. The question directly before the court was whether Commerce's methodology for determining a subsidy was permitted under the new statutory direction by Congress. Commerce assumed that when a company sells "productive assets" previously subsidized during their "average usual life" a pro rata portion of the subsidy "passes through." *Id.* at 1363.

The Federal Circuit struck down this methodology as not in accordance with 19 U.S.C. § 1677(5). The court characterized the method used in *Delverde* as a *per se* rule which avoided looking at the "facts and circumstances of the sale." *Delverde III*, 202 F.3d at 1364. The Federal Circuit stated:

> [W]e have come to the conclusion that the Tariff Act as amended does not allow Commerce to presume conclusively that the subsidies granted to the former owner of Delverde's corporate assets automatically "passed through" to Delverde following the sale. Rather, the Tariff Act requires that Commerce make such a determination by examining the particular facts and circumstances of the sale and determining whether Delverde directly or indirectly received both a financial contribution and benefit from a government.

Id. at 1364. The court of appeals, therefore, interpreted section 1677(5) to prohibit Commerce from adopted any *per se* rule that a subsidy passes through, or is eliminated, with a change of ownership. *Id.* at 1366.

Commerce, the court granted, did have some flexibility to establish a methodology for calculating the financial contribution and benefit conferred on a person. *Id.* However, contrary to Commerce's assertion in the case now before the court, the *Delverde* court expressed no doubt that the new statute required two actions from Commerce: one, that the terms of the sale must be examined, and must include analysis of the entire transaction to determine if the subsidy (not the corporate identity) passed through to a person now under investigation. *Id.* at 1365–66. In addition, such examination must focus on the new owner. According to

the *Delverde* decision, the term "person" is not open to interpretation. The court said that "person" means the purchaser of the asset.

> [W]e conclude that the statute does not contemplate any exception to the requirement that Commerce determine that a government provided both a financial contribution and benefit to a person, either directly or indirectly, by one of the acts enumerated, before charging it with receipt of a subsidy, *even when that person bought corporate assets from another person* who was previously subsidized.

Id. at 1366 (emphasis added). In *Delverde* the purchaser was a private company, buying some portion of a subsidized company's assets. In the instant case, the purchasers are the shareholders of the newly privatized company buying all the assets of the company in an initial public offering from the Government of France. In either case, the Federal Circuit's teachings are clear that in order to countervail the imported product, "Commerce must find that the purchaser *indirectly* received subsidies from a government." *Id.* at 1367 (emphasis in original).

The Federal Circuit emphasizes that the legislative history supports a reading of the statute, "as plainly requiring Commerce to make a determination that a purchaser of corporate assets received both a financial contribution and a benefit from a government. * * *" *Id.* The court was even more specific and found the methodology contrary to law because,

> [i]t did not consider *any* of the facts or circumstances of the sale relevant. Commerce produced no evidence that Delverde received goods for less than "adequate remuneration."

Id. (emphasis in original).

The court in *Delverde* did not have Commerce's novel "personhood" methodology before it, but was explicit enough in its description of when a rule can be considered *per se* that the decision provides clear guidance. A methodology is *per se,* and therefore contrary to the statute, when it determines that a subsidy continues to be countervailable to a new owner following a change in ownership without looking at the transaction itself. *Id.* The Federal Circuit directed that any methodology must examine the facts of the sale to determine if the new owner, "paid full value for the asset and thus received no benefit from the prior owner's subsidies. * * *" *Id.* at 1368. Such an analysis must focus on the new owner, since that entity is the producer of the goods at issue during the period of investigation under review.

The *Delverde III* court did note that there are differences between the sale of a single asset and a wholesale privatization. A private seller will presumably always seek the highest price for its assets, while a government may have other goals. *Id.* at 1369. Similarly, there are differences between the elements of the transaction which must be evaluated when the sale is of a single asset or is a privatization of an entire company through the sale of stock. These differences, however, do not alter the statutory requirements for determining if a financial contribution and benefit was conferred on the new owner. Variations in the structure of a

transaction and the motives of the parties involved do not relieve Commerce of its responsibility to look at the facts and circumstances of the sale to determine if the new owner received directly or indirectly a subsidy for which it did not pay "adequate remuneration." *Id.* at 1368.

Finally, the Federal Circuit, to re-enforce its underlying reasoning and amplify the analysis required of Commerce, referred to the WTO decision in *British Steel*. There, as noted above, when looking at the facts of government privatization of a steel company, where the terms were at arms-length and for fair market value, the WTO determined no subsidy passed through to the new owners. The Federal Circuit emphasized that its reasoning in *Delverde* is not inconsistent with the WTO's reasoning in *British Steel*. *Id.* at 1369. The court reads this portion of the *Delverde* opinion to mean that any methodology adopted Commerce must recognize the possibility that a subsidy can be extinguished by a privatization, even the privatization of an entire company, if a thorough analysis of the transaction supports that conclusion.

The Federal Circuit in *Delverde* laid out certain criteria that at a minimum any new methodology must include. First, Commerce cannot rely on any *per se* rule. Second, it must look at the facts and circumstances of the TRANSACTION, to determine if the PURCHASER, received a subsidy, directly or indirectly, for which it did not PAY ADEQUATE COMPENSATION. In this instance, Commerce avoids examining the terms of the sale by arguing that under the four-part test it developed, if the pre- and post-corporation is the same person, it is not required to determine if the subsidy it found to exist pre-privatization continues post-privatization. This argument contravenes the Federal Circuit's holding in *Delverde III*.

From *Delverde III*, it is evident that the court interpreted section 1677(5)(F) as *requiring* Commerce to determine if the subsidy continued to benefit the post-privatized corporation. In this instance, Commerce has developed a methodology that circumvents its statutorily mandated duty to determine if a benefit was conferred on the privatized corporation. To determine if Usinor was the same "person" Commerce used a four-factor test based on general corporate law principles.

> [W]here appropriate and applicable we would analyze such factors as (1) continuity of general business operations, including whether the successor holds itself out as the continuation of the previous enterprise, as may be indicated, for example, by the use of the same name, (2) continuity of production, (3) continuity of assets and liabilities, and (4) retention of personnel. * * * [T]he Department will generally consider the post-sale entity to be the same person as the pre-sale entity if, based on the totality of the factors considered, we determine that the entity sold in the change-in-ownership transaction can be considered a continuous business entity because it operated in substantially the same manner before and after the change in ownership.

Remand Determination at 14–15.[9] Commerce has erroneously read *Delverde III* as leaving the analysis of the privatization transaction to its discretion. It is clear the method used to analyze the privatization transaction is left to the discretion of Commerce. *See Delverde III* 202 F.3d at 1367, citing H.R. Rep. No. 103–826(I), at 110 (1994). However, Commerce is required to examine the transaction to determine if a financial contribution and benefit "passed through" to the privatized corporation. *See* 19 U.S.C. § 1677(5)(B).

Although Commerce's "person" analysis is not an explicit *per se* rule, it still fails to meet the requirements of the statute because it concludes that a purchaser received a subsidy without making "specific findings of financial contribution and benefit * * * that are required by §§ 1677(5)(D) and (E)." *Delverde III*, 202 F.3d at 1367. An initial public offering of a formerly government controlled corporation will often involve the same entity pre- and post-sale using Commerce's criteria. Indeed, in nearly every circumstance that a state-run enterprise is privatized as a whole entity, Commerce would be able to find that the same "person" exists. Commerce's use of a methodology that eliminated the need to determine if the subsidies passed through to the privatized entity in this situation was specifically rejected by the Federal Circuit in *Delverde III*.

> Commerce's methodology conclusively presumed that Delverde received a subsidy from the Italian government—*i.e.*, a financial contribution and a benefit, simply because it bought assets from another person who earlier received subsidies. Commerce deemed the fact that Delverde bought the assets, as agreed to by both parties, at fair market value to be *irrelevant* to the determination whether it received a subsidy. It did not consider *any* of the facts and circumstances of the sale relevant. Commerce produced no evidence that Delverde received goods at less than "adequate remuneration."

Id. (citations omitted). As the holding in *Delverde III* mandates, the change in ownership triggers Commerce's duty under 19 U.S.C. § 1677(5)(D) and (E) to determine if privatized Usinor received a financial contribution and benefit from the French Government. Therefore, the court finds that Commerce's failure to analyze the privatization transaction to determine if Usinor received a subsidy after it was privatized is contrary to *Delverde III* and the statutory intent of section 1677(5)(F).

The court recognizes that the Usinor privatization is a complex transaction. This, however, only heightens the need for in-depth and focused analysis. A short review of the privatization reveals several facts ignored

[9] Commerce does not cite to any precedents or other supporting sources for using this test, other than a Corporation Practice Guide and to say it is "how this type of issue has been handled under U[nited] S[tates] law in the general corporate context." *Remand Determination* at 10. It appears to be similar to one used by courts to determine if successor corporations are still liable to third parties, who are not parties to the merger, for the actions of the original corporation. *See e.g. Fehr Bros., Inc. v. Scheinman,* 121 A.D.2d 13, 17, 509 N.Y.S.2d 304, 307 (N.Y. App. Div. 1986). The court is not persuaded that this test applies here. In this case there is no reason for Commerce to default to a corporate law analysis because the facts of the sale will disclose whether the new owners compensated the government for previous subsidies.

by Commerce in its *Remand Determination*, which may prove significant to the required inquiry. In 1995 the French Government moved to privatize Usinor. *Final Determination*, 64 Fed. Reg. at 30,776. France publically announced the decision to privatize on May 31, 1995. An invitation to bid on shares published in the Official Gazette in June 1, 1995. *Usinor Verification Report* at 7 (Feb. 19, 1999). The price of those shares was determined by the French Privatization Commission, based on a valuation report by outside financial banking firms, Paribas and SBC Warburg. *Id.* at 8.

The Privatization Commission is an independent body. Members serve five year terms and cannot be removed other than in extreme circumstances. *Government of France Verification Report* at 2 (Feb. 21, 1999). Generally, the Commission, relying on the analysis of the outside banks, sets a market value to price the stock for a privatization. In this case Usinor's value was compared to other steel companies in Europe. *Usinor Verification Report* at 7. The Commission will allow a privatization to go forward only if the stock can be sold above the minimum price set by the Commission. So, in theory, no company will be sold at less than fair market value under the French law. *Government of France Verification Report* at 3.

The privatization of the controlling interest here involved two public offerings. 64 Fed. Reg. 30,776. The French public offering was set at FF 86 per share. The international public offering was set at FF 89. *Usinor Verification Report at 7.* In addition an employee offering was done with the price ranging from FF 68.8 to FF 86, and a sale of certain stock at FF 90.78, was placed with so-called "Stable Shareholders." *Id.* At the end of 1995, the French Government retained a 9.8% interest in Usinor. *Mem. in Supp. of Mot. for J. on the Agency Record*, June 16, 2000, at 6. *("Def.-Intervenors' Initial Br.")* International or French public investors held 82% of the stock. *Def.'s Br. at 5.* The remaining stock was held by stable shareholders and employees of Usinor. 64 Fed. Reg. 30,776.

In 1997, France distributed most of its remaining stock, so that it held less than 1%. *Def.-Intervenors' Initial Br.* at 6. The Government of France turned over this stock, without compensation, to stable shareholders and employees who held their initial purchase of stock for a required time. 64 Fed. Reg. 30,776. By 1998 the government had completely divested itself of Usinor. *Id.* Even this cursory examination of the record raises several questions. Some facts point to the probability that the stock offering represented a true arms-length transaction for fair market value, which may include "adequate remuneration" to the government by the new owners for any previous subsidies bestowed. Other facts point to possible mechanisms, such as the use of "stable shareholders," that could provide a vehicle for subsidy pass-through. On remand it is imperative, and required by 19 U.S.C. § 1677(5), as interpreted by the court in *Delverde III*, that Commerce examine the details of the transaction to determine if goods imported by Usinor during the POI of 1997 were subsidized.

V. CONCLUSION

For the foregoing reasons, the court holds that the Department's *Final Results of Redetermination Pursuant to Court Remand: Allegheny-Ludlum Corp., et al v. United States,* No. 99–09–00566 (December 20, 2000) is not in accordance with law and therefore will be remanded to the agency for review and action consistent with this opinion.

So Ordered.

(Slip Op. 02–02)

GTS INDUSTRIES S.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND U.S. STEEL GROUP, A UNIT OF USX CORP., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 00–03–00118

[Plaintiff's Motion for Judgment Upon an Agency Record granted in part and remanded.]

(Decided January 4, 2002)

deKieffer & Horgan, (Donald E. deKieffer, J Kevin Horgan, Marc E. Montalbine), for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, United States Department of Justice; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division United States Department of Justice, *(David D'Allessandris); Terrence J. McCartin, Boguslawa B. Thoemmes,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for Defendant.

Dewey Ballantine LLP, (John A. Ragosta, John R. Magnus), Hui Yu, for Defendant-Intervenors.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

BARZILAY, *Judge:* In this case, the court is asked, yet again, to review the subsidy calculation methodology employed by the Department of Commerce ("Commerce") during countervailing duty investigations and reviews to determine under what circumstances a privatized company is the recipient of a benefit pursuant to United States law. This case comes before the court pursuant to Plaintiff's and Defendant Intervenors' USCIT R. 56.2 Motions for Judgment Upon an Agency Record. Plaintiff and Defendant-Intervenors challenged certain aspects of the final determination of the Department of Commerce International Trade Administration's countervailing duty investigation of carbon-quality steel plate from France. *See Final Affirmative Countervailing Duty Determination: Certain Cut-to-length Carbon-Quality Steel Plate from France,* 64 Fed. Reg. 73,277 (Dec 29, 1999) *("Final Determination").* While this case was pending before the court, the Federal Circuit issued its opinion in *Delverde SrL v. United States,* 202 F.3d 1360 (Fed.

Cir. 2000) *reh'g denied* Ct. No. 99–1186 (June 20, 2000) *("Delverde III").* On July 31, 2000, defendant United States requested a remand to Commerce to consider the impact of the Federal Circuit's holding in *Delverde III* to the facts of this case. The subsequent remand order instructed Commerce "(1) to determine the applicability, if any, of the decision by the Court of Appeals for the Federal Circuit in *Delverde SrL v. United States* 202 F.3d 1360 (Fed. Cir. 2000) *reh'g denied* (June 20, 2000) to this proceeding, and (2) embark upon further fact finding if appropriate * * *." *Remand Order* (August 9, 2000). The court now reviews Commerce's *Final Results of Redetermination Pursuant to Court Remand in GTS Industries S.A. v. United States,* Court No. 00–03–00118 (December 22, 2000) *("Remand Determination").*[1] The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c)) (1994) which provides for judicial review of a final determination by the Department of Commerce in accordance with the provisions of 19 U.S.C. § 1516a(a)(2)(B)(I) (1994).

II. BACKGROUND

On March 16, 1999, Commerce sought to investigate whether subsidies were given by the French Government to certain elements of the French steel industry. *See Initiation of Countervailing Duty Investigations: Certain Cut-to-Length Carbon-Quality Steel Plate From France, Indonesia, Italy, and the Republic of Korea,* 64 Fed. Reg. 12,996 (March 16, 1999). The period of investigation was calender year 1998. In its final affirmative determination, Commerce determined that GTS' total estimated CVD rate was 6.86%. *Final Determination,* 64 Fed. Reg. at 73,298.

> GTS' *ad valorem* rate is based entirely upon subsidies granted to Usinor prior to Usinor's 1995 privatization, and attributed to GTS in part when GTS was still a consolidated, majority-owned subsidiary of Usinor. Therefore, the main change in ownership transaction in this investigation is Usinor's 1995 privatization and, accordingly, we have analyzed this transaction. * * *

Remand Determination at 15.

The French Government was the majority owner of Usinor and Sacilor, another steel producer, until the mid-1980s. *See Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils from France,* 64 Fed. Reg. 30,774, 30,776 (1999) ("*Usinor Final Determination*"). After a capital restructuring in 1986, France was the sole owner of both companies. *Id*. In 1987, France placed Usinor and Sacilor under the ownership of a holding company, with the holding company retaining the Usinor name. *Id.* In 1991, Credit Lyonnais, a government-owned bank, purchased 20% of Usinor. *Id.* Beginning in the summer of 1995 and continuing through 1996 and 1997, the French Government privatized Usinor through a public stock offering. *Id.* By the end of 1997, the vast majority of Usinor's shares were owned by pri-

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[1] This case is a companion case to *Allegheny Ludlum Corp.*, et al., *v. United States*, 26 CIT ___ (2002). *Allegheny* involved imports from GTS' parent company Usinor and the same privatization transaction is at issue.

vate shareholders, with the remaining shares owned by employees and "stable shareholders."[2] *Id.*

Prior to 1992, Usinor owned approximately 90% of GTS. *Final Determination,* 64 Fed. Reg. at 73,278. From 1992 to1995, Usinor reduced its holding in GTS. *Id.* Through two separate transactions, one occurring in 1992 and the other in 1996, Usinor transferred a majority of interest in GTS to AG der Dillinger Huttenwerks ("Dillinger"). *Id.* However, Usinor retained a 48.75% interest in the holding company Dillinger which in turn, owed 99% of GTS. *Id.* Despite the public stock offering that privatized Usinor, Commerce concluded in the *Remand Determination* that Usinor was the "same person" after the privatization and, since it had already determined that Usinor had previously received subsidies, it did not have to analyze whether the past subsidies were extinguished by the change in ownership transaction. *Remand Determination*

at 14. Therefore, Commerce used a 14-year average useful life ("AUL") to allocate the benefits bestowed by the nonrecurring subsidies.[3] Similarly, Commerce determined that GTS, since it had been a majority-owned subsidiary of Usinor, had also received countervailable subsidies that had not been extinguished by the privatization transaction. *Id*. at 16. Based upon its findings, Commerce recalculated GTS' CVD rate to be 6.10% *ad valorem*. *Id*. at 43. GTS disputes this finding on several grounds but the issue of subsidy pass through is central.[4]

III. Standard of Review

The court must evaluate whether the remand findings are supported by substantial evidence on the record or otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B). "Substantial evidence is more than a mere scintilla;" it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. of New York v. NLRB,* 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co., Ltd. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984). To determine if the agency's interpretation of the statute is in accordance with law "we must first carefully investigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I. v. United States,* 157 F.3d 879, 881 (Fed. Cir. 1998). The expressed will or intent of Congress on a specific issue is dis-

[2] The French privatization law establishes procedures for designating "Stable Shareholders." *GTS Questionnaire Response* at 15 (Sept. 19, 2000). The purpose seems to be to provide a core group of investors who are restricted from selling during the privatization process, in order to promote stability and project confidence in the sale.

[3] "Commerce assumes that when a company sells 'productive assets' during 'the average useful life,' a pro rata portion of that subsidy 'passes through' to the purchaser at the time of sale. Commerce then quantifies the assumed 'pass through' amount, makes adjustments based on the purchase price, allocates an amount to the year of investigation, and calculates the *ad valorem* subsidy rate." *Delverde III,* 202 F.3d at 1363 (citing *Affirmative Countervailing Duty Determination: Certain Steel From Prod. From Aus.,* 58 Fed. Reg. 37,217, 37,268–69 (1993)) (citation omitted).

[4] GTS also challenges Commerce's use of (1) a 14-year AUL to allocate the benefits bestowed by nonrecurring subsidies, (2) sales values instead of total asset values to calculate the amount of subsidies allocable to GTS which increased the margin significantly from the preliminary to the final determination, (3) an allocation method that failed to allocate subsidies based upon Usinor's retained ownership interest in GTS, and (4) the use of "facts available" in analyzing the change in ownership transactions in 1992 and1996. Defendant-Intervenors challenge the methodology used by Commerce to allocate non-recurring subsidies. In the interest of judicial economy the court reaches a decision in this phase of the case solely on the issue of the effect of Usinor's privatization. Once Commerce properly analyzes the privatization transaction, it may not be necessary to reach the other issues.

positive. *See Japan Whaling Association v. American Cetacean Society,* 478 U.S. 221, 233–237 (1986). If the court determines that the statute is silent or ambiguous, the question to be asked is whether the agency's construction of the statute is permissible. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984). This deference is due when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. *United States v. Mead Corp*. 121 S.Ct. 2164, 1271 (2001). This is not limited to notice and comment rulemaking but are given to those "statutory determinations that are articulated in any 'relatively formal administrative procedure'" *Pesquera Mares Australes Ltda. v. United States,* 266 F.3d 1372, 1380 (Fed. Cir. 2001). Therefore, statutory interpretations articulated by Commerce during antidumping proceedings are entitled to judicial deference under *Chevron*. *Id.* at 1382. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996).

IV. DISCUSSION

A. History of the Issue

A brief history of the privatization subsidy issue is appropriate. The applicable law attempts to level the playing field by imposing a countervailing duty on subsidized imported goods sold in the United States which materially injure a domestic industry. A subsidy is a financial benefit conferred on a natural or legal person (usually the producing company) by a government entity or agent. *See* 19 U.S.C. § 1677(B).

In the past twenty years many countries have moved to privatize state-owned enterprises and thereby shift major manufacturing activity from public to private entities. Thus many plants formerly run entirely or mostly under government finance and control are now under the control of private shareholders. The question then becomes: if the plant received non-recurring financial benefits when it was government owned and operated, do those benefits survive the privatization and are the new owners, therefore, subject to countervailing duties on products they export to the United States?

Commerce first confronted this issue in 1989 when it decided that no benefits had passed to the recently privatized firm under review because the sale was for full market value and at arm's length. *See Lime from Mexico; Preliminary Results of Changed Circumstances Countervailing Duty Administrative Review,* 54 Fed. Reg. 1,753, 1,754–55 (Jan. 17, 1989). By 1993, however, Commerce had changed its views in the context of steel countervailing duty investigations. Commerce ignored the change of ownership at fair market value, which it had found significant in *Lime from Mexico*, and held that the previously bestowed subsidies survived such a sale and thus it assumed a continuing benefit to the new owners. *See Certain Hot Rolled Lead and Bismuth Carbon Steel Prod-*

ucts from the U.K., 58 Fed. Reg. 6,237 (Jan. 27, 1993).[5] Commerce then issued a fuller explanation of its position on subsidies in the privatization context when it published the General Issue Appendix covering several different CVD investigations. *See Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, General Issues Appendix,* 58 Fed. Reg. 37,217, 37,225 (July 9, 1993). In this new privatization methodology Commerce essentially assumed that a portion of the previously bestowed subsidy passed through to the new owners from the state owned entity depending on when it had been initially granted. In this methodology the life of the subsidy in years (calculated by a formula based on amortization of assets) was the critical component and whether the sale was for full market value had no significance.

Commerce's methodology of ignoring a sale at full market value was rejected by this court but reinstated by the Court of Appeals for the Federal Circuit. In *Saarstahl, AG v. United* States, 18 CIT 525, 858 F. Supp.187 (1994) this court applied pre-URAA law[6] and held that subsidies are extinguished in a true arms-length sale for full market value because the value of the company includes the benefit of any previous subsidies which the buyer pays for at time of purchase, leaving no remaining competitive advantage.

The Federal Circuit disagreed, holding that Commerce's decision to countervail previously bestowed subsidies was reasonable absent an explicit mandate from Congress to the contrary and that the CIT should have deferred to Commerce's interpretation. *See Saarstahl AG v. United States,* 78 F.3d 1539, 1544 (Fed. Cir. 1996). The appeals court reasoned that the statute at issue did not require countervailable subsidies to confer a benefit and that once Commerce finds a governmental subsidy it can assess countervailing duties on the new entity if the private purchaser repaid none or only some of the subsidy received prior to privatization.

In December 1999, the World Trade Organization first addressed the issue in a case also originating in the steel industry. *See WTO Dispute Panel Report on United States—Imposition of Countervailing Duties on*

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[5] The historical and political context of this decision is discussed in Julie Dunne, Note, Delverde *and the WTO's* British Steel Decision *Foreshadow More Conflict Where the WTO Subsidies Agreement, Privatization and the United States Countervailing Duty Law Intersect,* 17 Am. U. Int'l L. Rev. 79, 89 n.38 (2001).

[6] In 19 U.S.C. § 1677(5)(A)(2) (1988) a subsidy was defined as "provided or required by government action to a specific enterprise or industry * * * whether paid or bestowed directly or indirectly on the manufacture, production or export of any class or kind of merchandise." This provision was amended in 1994 as part of the Uruguay Round Agreement Act to read as follows:

> (B) Subsidy described
> A subsidy is described in this paragraph in the case in which an authority
> (I) provides a financial contribution,
>
> * * * * * * *
>
> to a person and *a benefit is thereby conferred*.

(Emphasis added).

The URAA also included 19 U.S.C. §1677(5)(F) which stated:

> A change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction.

This provision was widely thought to have been added in reaction to this court's opinion in *Saarstahl* which at the time of URAA enactment had not been reversed by the Federal Circuit. *See Delverde III,* 202 F.3d at 1367 n.3.

Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, No. WT/DS138/R (Dec. 23, 1999). The Panel examined Commerce's assessment of countervailing duties on steel after a complaint by the European Communities. Commerce had specifically determined that the privatization at issue was at arm's-length for fair market value and consistent with commercial considerations. *Panel Report,* ¶ 6.23. The Panel held that Commerce's decision to countervail was contrary to the definition of a subsidy contained in the *Agreement on Subsidies and Countervailing Measures*, Pt. I, Art. 1 (1994). Specifically the Panel stated, *inter alia*, that the existence of a benefit could only be found by comparing whether the recipient was better off than it would be without the contribution and that "the marketplace provides an appropriate basis for comparison * * * whether the recipient has received a 'financial contribution' on terms more favorable than those available to the recipient in the market." *Panel Report*, ¶ 6.65. The Panel found that the privatization of a government owned company in an arm's length, fair market value transaction eliminates any benefit from prior subsidization. The United States appealed to the WTO's Appellate Body which upheld the Panel's Report and recommended "the United States [to] bring its measures found in the Panel Report, as upheld by this Report, to be inconsistent with its obligations under the SCM agreement into conformity with its obligations under that agreement." *WTO Dispute Appellate Body Report on United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,* No. WT/DS138/R at ¶ 76 (May 10, 2000).

The Federal Circuit noted the Panel decision in *Delverde III* when it reviewed a decision by this court in a CVD case involving pasta from Italy.[7] *See Delverde SrL v. United States*, 22 CIT 947, 24 F. Supp. 2d 314 (1998) ("*Delverde II*"). Delverde, the foreign producer, had asked this court to review the imposition of CVD by Commerce when the department, using its General Issues Appendix methodology, held Delverde responsible for a pro-rata portion of nonrecurring subsidies that had been granted to the former owner. Initially, this court had agreed with Delverde's argument that Commerce could not assume the pro-rata portion survived the sale and remanded to Commerce to examine the sale itself to determine whether Delverde received a subsidy through its purchase of plant assets from an owner that had previously received subsidies. *Delverde Sr.L v. United States*, 21 CIT 1294, 989 F. Supp. 218 (1997)[8] *("Delverde I").*

On remand, however, after Commerce had further explained its position, the result was different. This court found permissible Commerce's presumption of pass through of subsidies when it assessed benefit only at the time the subsidization occurred. *Delverde II,* 24 F. Supp. 2d at 317.

[7] The *Delverde* case will be discussed at length *infra* in this opinion.

[8] Both this court and the Federal Circuit assumed the sale in *Delverde* was between private entities. *Delverde III*, at 202 F.3d 1362.

The Federal Circuit disagreed, holding that the statutory language required Commerce to determine whether the purchaser received both a financial contribution and a benefit from a government before concluding that the purchaser was subsidized. 202 F.3d at 1367. The court went on to instruct that Commerce examine the issue "based on the facts and circumstances, including the terms of the transaction * * *" *Id.* at 1369–70. It specifically stated that its decision was not inconsistent with that of the WTO Dispute Panel. *Id*. at 1369.

B. What does Delverde require?

The court views the *Delverde* decision as central to the resolution of this case. The parties have sharply divergent views on the meaning of that decision and its application to the administrative action now before the court. Commerce asserts that, in accordance with the Federal Circuit's holding in *Delverde III,* it formulated a new two-step inquiry to determine if prior subsidies passed through to the new privatized entity.

> Consistent with the Federal Circuit's analysis in *Delverde III*, Commerce announced a two-step inquiry. Commerce first analyzes whether the pre-sale and post-sale entities are for all intents and purposes the same person. If they are, Commerce's analysis stops, as all of the elements of a subsidy will have been established with regard to the producer under investigation, *i.e.*, the post-sale entity. However, if the two entities are not the same person, Commerce will proceed to the second step in its inquiry and will examine whether a subsidy has been provided to the post-sale entity through the change-in-ownership transaction itself.

Def.'s Mem. In Opp'n to Pl.'s and Def.-Intervenors' Mot. for J. Upon Agency R. at 15. *("Def.'s Br.").* After applying the two-step analysis to Usinor, Commerce concluded it did not have a duty to analyze whether the subsidies passed to Usinor because Usinor was the same "person" before and after the privatization. *Id* at 16.

> After a lengthy review and analysis of the remand record, Commerce determined that government-owned Usinor and privatized Usinor were for all intents and purposes the same person. As a result, the prior subsidies remained attributable to privatized Usinor, as all of the elements of a subsidy were established with regard to privatized Usinor. Thus, it was unnecessary for Commerce to proceed to the second step in its privatization analysis, which would have involved an inquiry into whether a subsidy had nevertheless been provided to the privatized entity through the privatization transaction itself.

Id. Therefore, since Commerce had previously determined that Usinor was the recipient of subsidies, it imputed the subsidies to Usinor and, therefore, GTS after the privatization.

GTS asserts the *Remand Determination* is contrary to *Delverde III* because Commerce "simply applied an irrebuttable presumption that, because post-privatized Usinor 'continued to operate, for all intents and purposes, as the same 'person' that existed prior to the privatization,'

the pre-privatization subsidies are presumed to provide a continuing benefit to GTS." *Pl.'s Mem. in Supp. of Mot. for J. Upon the Agency Record* at 14 *("Pl.'s Br.")* (quoting *Remand Determination* at 19). GTS claims "[b]ecause the owners of the newly privatized Usinor paid full market value for the company in an arm's length transaction based upon commercial considerations, the newly privatized company received no benefit from the subsidies bestowed before privatization." *Pl.'s Br.* at 21. Additionally, GTS claims that the *Remand Determination* is contrary to the Agreement on Subsidies and Countervailing Measures and inconsistent with the WTO decision in *Appellate Body Report on United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,* No. WT/DS138/R at ¶ 76 (May 10, 2000). *See Pl.'s Br.* at 11–13.

The central question is whether Commerce's application of its method complies with congressional intent embodied in the statutory language of 19 U.S.C. § 1677(5)(F), as interpreted by the Federal Circuit in *Delverde*. Consistent with the court of appeals' decision in *Delverde*, this court finds the statute's meaning to be clear, and, therefore, does not reach the issue of deference to Commerce's interpretation under the *Chevron* doctrine. *See Delverde III*, 202 F.3d at 1367. "We need only determine whether Commerce's methodology is in accordance with the statute." *Id.* As noted above, the *Delverde* decision assumed the sale of assets from one private company to another. The question directly before the court was whether Commerce's methodology for determining a subsidy was permitted under the new statutory direction by Congress. Commerce assumed that when a company sells "productive assets" previously subsidized during their "average usual life" a pro rata portion of the subsidy "passes through." *Id.* at 1363.

The Federal Circuit struck down this methodology as not in accordance with 19 U.S.C. § 1677(5). The court characterized the method used in *Delverde* as a *per se* rule which avoided looking at the "facts and circumstances of the sale." *Delverde III*, 202 F.3d at 1364. The Federal Circuit stated:

> [W]e have come to the conclusion that the Tariff Act as amended does not allow Commerce to presume conclusively that the subsidies granted to the former owner of Delverde's corporate assets automatically "passed through" to Delverde following the sale. Rather, the Tariff Act requires that Commerce make such a determination by examining the particular facts and circumstances of the sale and determining whether Delverde directly or indirectly received both a financial contribution and benefit from a government.

Id. at 1364. The court of appeals, therefore, interpreted section 1677(5) to prohibit Commerce from adopted any *per se* rule that a subsidy passes through, or is eliminated, with a change of ownership. *Id.* at 1366.

Commerce, the court granted, did have some flexibility to establish a methodology for calculating the financial contribution and benefit con-

ferred on a person. *Id.* However, contrary to Commerce's assertion in the case now before the court, the *Delverde* court expressed no doubt that the new statute required two actions from Commerce: one, that the terms of the sale must be examined, and must include analysis of the entire transaction to determine if the subsidy (not the corporate identity) passed through to a person now under investigation. *Id.* at 1365–66. In addition, such examination must focus on the new owner. According to the *Delverde* decision, the term "person" is not open to interpretation. The court said that "person" means the purchaser of the asset.

> [W]e conclude that the statute does not contemplate any exception to the requirement that Commerce determine that a government provided both a financial contribution and benefit to a person, either directly or indirectly, by one of the acts enumerated, before charging it with receipt of a subsidy, *even when that person bought corporate assets from another person* who was previously subsidized.

Id. at 1366 (emphasis added). In *Delverde* the purchaser was a private company, buying some portion of a subsidized company's assets. In the instant case, the purchasers are the shareholders of the newly privatized company buying all the assets of the company in an initial public offering from the Government of France. In either case, the Federal Circuit's teachings are clear that in order to countervail the imported product, "Commerce must find that the purchaser *indirectly* received subsidies from a government." *Id.* at 1367 (emphasis in original).

The Federal Circuit emphasizes that the legislative history supports a reading of the statute, "as plainly requiring Commerce to make a determination that a purchaser of corporate assets received both a financial contribution and a benefit from a government. * * *" *Id.* The court was even more specific and found the methodology contrary to law because,

> [i]t did not consider *any* of the facts or circumstances of the sale relevant. Commerce produced no evidence that Delverde received goods for less than "adequate remuneration."

Id. (emphasis in original).

The court in *Delverde* did not have Commerce's novel "personhood" methodology before it, but was explicit enough in its description of when a rule can be considered *per se* that the decision provides clear guidance. A methodology is *per se,* and therefore contrary to the statute, when it determines that a subsidy continues to be countervailable to a new owner following a change in ownership without looking at the transaction itself. *Id.* The Federal Circuit directed that any methodology must examine the facts of the sale to determine if the new owner, "paid full value for the asset and thus received no benefit from the prior owner's subsidies. * * *" *Id.* at 1368. Such an analysis must focus on the new owner, since that entity is the producer of the goods at issue during the period of investigation under review.

The *Delverde III* court did note that there are differences between the sale of a single asset and a wholesale privatization. A private seller will

presumably always seek the highest price for its assets, while a government may have other goals. *Id.* at 1369. Similarly, there are differences between the elements of the transaction which must be evaluated when the sale is of a single asset or is a privatization of an entire company through the sale of stock. These differences, however, do not alter the statutory requirements for determining if a financial contribution and benefit was conferred on the new owner. Variations in the structure of a transaction and the motives of the parties involved do not relieve Commerce of its responsibility to look at the facts and circumstances of the sale to determine if the new owner received directly or indirectly a subsidy for which it did not pay "adequate remuneration." *Id.* at 1368.

Finally, the Federal Circuit, to re-enforce its underlying reasoning and amplify the analysis required of Commerce, referred to the WTO decision in *British Steel*. There, as noted above, when looking at the facts of government privatization of a steel company, where the terms were at arms-length and for fair market value, the WTO determined no subsidy passed through to the new owners. The Federal Circuit emphasized that its reasoning in *Delverde* is not inconsistent with the WTO's reasoning in *British Steel*. *Id.* at 1369. The court reads this portion of the *Delverde* opinion to mean that any methodology adopted Commerce must recognize the possibility that a subsidy can be extinguished by a privatization, even the privatization of an entire company, if a thorough analysis of the transaction supports that conclusion.

The Federal Circuit in *Delverde* laid out certain criteria that at a minimum any new methodology must include. First, Commerce cannot rely on any *per se* rule. Second, it must look at the facts and circumstances of the TRANSACTION, to determine if the PURCHASER, received a subsidy, directly or indirectly, for which it did not PAY ADEQUATE COMPENSATION. In this instance, Commerce avoids examining the terms of the sale by arguing that under the four-part test it developed, if the pre- and post-corporation is the same person, it is not required to determine if the subsidy it found to exist pre-privatization continues post-privatization. This argument contravenes the Federal Circuit's holding in *Delverde III*.

From *Delverde III*, it is evident that the court interpreted section 1677(5)(F) as *requiring* Commerce to determine if the subsidy continued to benefit the post-privatized corporation. In this instance, Commerce has developed a methodology that circumvents its statutorily mandated duty to determine if a benefit was conferred on the privatized corporation. To determine if Usinor was the same "person" Commerce used a four-factor test based on general corporate law principles.

> [W]here appropriate and applicable, we would analyze such factors as (1) continuity of general business operations, including whether the successor holds itself out as the continuation of the previous enterprise, as may be indicated, for example, by the use of the same name, (2) continuity of production, (3) continuity of assets and liabilities, and (4) retention of personnel. * * * [T]he Department will generally consider the post-sale entity to be the same person as the

> pre-sale entity if, based on the totality of the factors considered, we determine that the entity sold in the change-in-ownership transaction can be considered a continuous business entity because it operated in substantially the same manner before and after the change in ownership.

Remand Determination at 13.[9] Commerce has erroneously read *Delverde III* as leaving the analysis of the privatization transaction to its discretion. It is clear the method used to analyze the privatization transaction is left to the discretion of Commerce. *See Delverde III* 202 F.3d at 1367, *citing* H.R. Rep. No. 103–826(I), at 110 (1994). However, Commerce is *required* to examine the transaction to determine if a financial contribution and benefit "passed through" to the privatized corporation. *See* 19 U.S.C. § 1677(5)(B).

Although Commerce's "person" analysis is not an explicit *per se* rule, it still fails to meet the requirements of the statute because it concludes that a purchaser received a subsidy without making "specific findings of financial contribution and benefit * * * that are required by §§ 1677(5)(D) and (E)." *Delverde III*, 202 F.3d at 1367. An initial public offering of a formerly government controlled corporation will often involve the same entity pre- and post-sale using Commerce's criteria. Indeed, in nearly every circumstance that a state-run enterprise is privatized as a whole entity, Commerce would be able to find that the same "person" exists. Commerce's use of a methodology that eliminated the need to determine if the subsidies passed through to the privatized entity in this situation was specifically rejected by the Federal Circuit in *Delverde III*.

> Commerce's methodology conclusively presumed that Delverde received a subsidy from the Italian government—*i.e.*, a financial contribution and a benefit, simply because it bought assets from another person who earlier received subsidies. Commerce deemed the fact that Delverde bought the assets, as agreed to by both parties, at fair market value to be *irrelevant* to the determination whether it received a subsidy. It did not consider *any* of the facts and circumstances of the sale relevant. Commerce produced no evidence that Delverde received goods at less than "adequate remuneration."

Id. at 1367. (citations omitted). As the holding in *Delverde III* mandates, the change in ownership triggers Commerce's duty under 19 U.S.C. § 1677(5)(D) and (E) to determine if privatized Usinor received a financial contribution and benefit from the French Government. Therefore, the court finds that Commerce's failure to analyze the privatization transaction to determine if Usinor and, therefore, GTS received a subsi-

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[9] Commerce does not cite to any precedents or other supporting sources for using this test, other than a Corporation Practice Guide. It appears to be similar to one used by courts to determine if successor corporations are still liable to third parties, who are not parties to the merger, for the actions of the original corporation. *See e.g. Fehr Bros., Inc. v. Scheinman*, 121 A.D.2d 13, 17, 509 N.Y.S.2d 304, 307 (N.Y. App. Div.1986). The court is not persuaded that this test applies here. In this case there is no reason for Commerce to default to a corporate law analysis because the facts of the sale will disclose whether the new owners compensated the government for previous subsidies.

dy after it was privatized is contrary to *Delverde III* and the statutory intent of section 1677(5)(F).

The court recognizes that the Usinor privatization is a complex transaction. This, however, only heightens the need for in-depth and focused analysis. A short review of the privatization reveals several facts ignored by Commerce in its *Remand Determination*, which may prove significant to the required inquiry. In 1995 the French Government moved to privatize Usinor. *Usinor Final Determination*, 64 Fed. Reg. at 30,776. The privatization of the controlling interest here involved two public offerings. *Id.* The French public offering was set at FF 86 per share. *GTS Questionnaire Response* at 9 (Sept. 19, 2000) The international public offering was set at FF 89. *Id.* In addition, there was an employee offering and a sale of certain stock at a 2% premium over the international offering was placed with so-called "Stable Shareholders." *Id.*

In 1997, France distributed most of its remaining stock, so that it held less than 1%. *Usinor Final Determination,* 64 Fed. Reg at 30,776. The Government of France turned over this stock, without compensation, to stable shareholders and employees who held their initial purchase of stock for a required time. *Id.* By 1998, the government had completely divested itself of Usinor. *Id.* Even this cursory examination of the record raises several questions. Some facts point to the probability that the stock offering represented a true arms-length transaction for fair market value, which may include "adequate remuneration" to the government by the new owners for any previous subsidies bestowed. Other facts point to possible mechanisms, such as the use of "stable shareholders," that could provide a vehicle for subsidy pass-through. On remand it is imperative, and required by 19 U.S.C. § 1677(5), as interpreted by the court in *Delverde III,* that Commerce examine the details of the Usinor privatization transaction to determine if goods imported by GTS during the POI of 1998 were subsidized.

V. CONCLUSION

For the foregoing reasons, the court holds that the Department's *Final Results of Redetermination Pursuant to Court Remand in GTS Industries S.A. v. United States,* Ct. No. 00–03–00118 (December 22, 2000) is not in accordance with law and therefore will be remanded to the agency for review and action consistent with this opinion.

(Slip Op. 02–03)

CONSOLIDATED BEARINGS CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 98–09–02799

(Dated January 8, 2002)

ORDER

TSOUCALAS, *Senior Judge:* The case at bar comes before this Court as a result of the Court's decision in *Consolidated Bearings Co. v. United States ("Consolidated Bearings"),* 25 CIT ____, 166 F. Supp. 2d 580 (2001), and concerns the events that followed the issuance of *Final Results of Antidumping Duty Administrative Review of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany,* 56 Fed. Reg. 31,692 (July 11, 1991), as amended by *Amended Final Results of Antidumping Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Germany,* 62 Fed. Reg. 32,755 (June 17, 1997), by the United States Department of Commerce, International Trade Administration ("Commerce").

Specifically, on September 9, 1997, Commerce instructed the United States Customs Service ("Customs") to liquidate, at a certain "manufacturer's" rate, entries of the merchandise produced by FAG Kugelfischer Georg Schaefer KGaA ("FAG Kugelfischer") and imported by certain importers, the list of which did not include Consolidated Bearings Company ("Consolidated Bearings"), an entity that imported the merchandise manufactured by FAG Kugelfischer as well as other merchandise. Almost a year later, on August 4, 1998, Commerce sent liquidation instructions ("Liquidation Instructions") to Customs requiring Customs to liquidate the merchandise that was: (1) produced in Germany; (2) imported by any importer; and (3) still remained unliquidated after the application of prior liquidation instructions including that of September 9, 1997, at the deposit rate required at the time of entry of the merchandise. Under the Liquidation Instructions, Customs had to assess Consolidated Bearings' entries at the rate much higher than the "manufacturer's" rate determined by Commerce for FAG Kugelfischer.

Consequently, Consolidated Bearings moved pursuant to USCIT R. 56.1 for judgment upon the agency record challenging the Liquidation Instructions issued by Commerce and alleging that the Liquidation Instructions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Court granted Consolidated Bearings' motion and remanded this case to Commerce to: (a) annul the Liquidation Instructions issued by Commerce on August 4, 1998; and (b) take further actions not inconsistent with this opinion. *See Consolidated Bearings,* 25 CIT at ____, 166 F. Supp. 2d at 593. The Court particularly explained that the remand was caused by: (1) the insufficiency of Commerce's explanation about Commerce's reasons for the issuance of

the Liquidation Instructions, *see id.* 25 CIT at ____, 166 F. Supp. 2d at 590–92; and (2) the deficiencies of the Liquidation Instructions evincing Commerce's acknowledgment that Consolidated Bearings' imports of FAG Kugelfischer's merchandise could have been liquidated previously and legitimately under the rates given in the instructions of September 9, 1997.

On November 6, 2001, Commerce filed *Final Results of Redetermination Pursuant to Ct. Remand ("Remand Results")* for *Consolidated Bearings,* 25 CIT ____, 166 F. Supp. 2d 580. In the *Remand Results,* Commerce explains that Commerce: (1) possesses no information on whether Consolidated Bearings' purchases of FAG Kugelfischer's merchandise were direct, *see Remand Results* at 3; (2) "surmise[s] * * * that Consolidated [Bearings] purchased the [merchandise] from an intermediate party," *id.* at 4; (3) "find[s] it inappropriate to instruct" Customs to liquidate Consolidated Bearings' merchandise at FAG Kugelfischer's rates, *id.* at 5; and (4) devises two alternative approaches (one of which provides for "three alternative rates" for different types of Consolidated Bearings' merchandise) to be used instead of the approach given in the September 9, 1997, liquidation instructions because "the Court did not specify any alternative rates [Commerce] should consider." *Id.* at 3, 6–8.

While the Court appreciates the care and consideration and recognizes the creativity Commerce put into creation of alternative approaches and alternative rates, it is obvious that Commerce misreads the purpose and the scope of the remand.

The gist of *Consolidated Bearings,* 25 CIT ____, 166 F. Supp. 2d 580, is that, within parameters of each administrative determination, Commerce is bound to each election Commerce makes. *Cf. SKF USA Inc. v. United States,* 263 F.3d 1369, 1382 (Fed. Cir. 2001). If Commerce issues liquidation instructions that Commerce contemplates to be applicable to a particular merchandise, Commerce cannot change its mind and enter "corrections" a year later or, as Consolidated Bearings correctly points out, three years later. *Accord* Pl.'s Comments Concerning Final Results of Redetermination Pursuant Ct. Remand at 3. If Commerce does not review a particular respondent but knowingly allows the imports of such respondent to be liquidated at a particular rate, Commerce is equally bound to such election. In this case, Commerce is bound by the September 9, 1997, liquidation instructions. If Commerce is unsatisfied with a potential application of those instructions, Commerce should have issued said instructions in a clearer manner. Indeed, it would be anomalous to suggest that Commerce could "fine tune" its determinations any time Commerce is displeased with the outcome of the application of a document Commerce issued or any time Commerce starts having doubts about the evidence Commerce possesses. Under such a scheme the whole administrative process would not only lose any time frame and due process constrains but would effectively become a carte blanche in the hands of an agency.

The Court presumes that the reason for Commerce's misreading of the scope of the remand is the Court's instruction to "take further actions not inconsistent with [the Court's] opinion." *Consolidated Bearings,* 25 CIT at ___, 166 F. Supp. 2d at 593. It seems that Commerce read this language as a requirement to devise alternative approaches (or rates) for Consolidated Bearings' import of FAG Kugelfischer's merchandise. *See Remand Results* at 3, 6.

Commerce is in error. Under the language of the September 9, 1997, liquidation instructions and Commerce's actions within a year after the issuance of these instructions, all Consolidated Bearings' imports of FAG Kugelfischer's merchandise during the period of review should be liquidated in accordance with the September 9, 1997, liquidation instructions only. Courts omit spelling out the particular technical actions to be taken by an agency because courts are in privy with only a limited amount of evidence and, thus, are unfamiliar with particularities of the transactions under review.

For example, if the language of the September 9, 1997, liquidation instructions allows: (1) different modes of liquidation; and (2) such different modes were actually utilized by Customs right after Customs' receipt of the September 9, 1997, liquidation instructions with regard to parties other than Consolidated Bearings, Commerce could have instructed Customs to choose among these modes of liquidation.[1] Alternatively, because "Consolidated[] [Bearings'] entries were not reviewed" during the review at issue, and Commerce "do[es] not have any information about the kinds of [merchandise] Consolidated [Bearings] entered during the period," *Remand Results* at 5, Commerce could instruct Customs to liquidate Consolidated Bearings' import of FAG Kugelfischer's merchandise in accordance with the September 9, 1997, liquidation instructions, while ordering the liquidation of all other Consolidated Bearings' merchandise under another applicable determination which Commerce believes is applicable (provided such other determination was duly rendered[2] and it was feasible for Commerce to devise a methodology of separating Consolidated Bearings' imports of FAG Kugelfischer's merchandise and other Consolidated Bearings' imports during the period of review). If in such a case, as unlikely as it may be, the identity of the merchandise manufacturer would become an issue, the Court could entertain Commerce's reasonable methodology determining which Consolidated Bearings' imports are of FAG Kugelfischer's merchandise and which are not. Bearing in mind that it was Commerce and not the Court that was charged with a duty to familiarize itself with all the particular circumstances of the transaction and apply

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[1] Indeed, such a supposition seems unlikely. Commerce, however, stated that alternative readings of the September 9, 1997, liquidation instructions were plausible. *See Consolidated Bearings,* 25 CIT at ___, 166 F. Supp. 2d at 592. While the possibility of alternative readings could serve as a basis for a vagueness attack by Consolidated Bearings', no such claim was entered by the plaintiff.

[2] Any liquidation of Consolidated Bearings' merchandise without prior proper determination by Commerce would be a violation of administrative process and Consolidated Bearings' procedural due process rights.

the law, the Court issued Commerce a legal, rather than technical, mandate in *Consolidated Bearings,* 25 CIT ____, 166 F. Supp. 2d 580.

However, because Commerce neither took nor suggested taking any further actions with regard to Consolidated Bearings' imports of FAG Kugelfischer's merchandise that would abide with Commerce's September 9, 1997, liquidation instructions, it is hereby

ORDERED that the *Remand Results* filed by Commerce on November 6, 2001, are vacated; and it is further

ORDERED that this case is remanded to Commerce to liquidate all Consolidated Bearings' imports of FAG Kugelfischer's merchandise imported during the period of review in accordance with the September 9, 1997, liquidation instructions; and it is further

ORDERED that the remand results are due within ninety (90) days of the date that this order is entered. Any responses or comments are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date the responses or comments are due.