Slip Op. 04–91

BEFORE: HONORABLE RICHARD W. GOLDBERG, SENIOR JUDGE

ROYAL THAI GOVERNMENT, ET AL., Plaintiffs, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORP., Defendant-Intervenor.

PUBLIC VERSION
Consol. Court No. 02–00026

[Court sustains in part and remands in part.]

Dated: July 27, 2004

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OPINION

GOLDBERG, Senior Judge: In this action, Plaintiffs the Royal Thai Government ("RTG") and Sahaviriya Steel Industries Public Company Limited ("SSI") (collectively "Plaintiffs") challenge the final affirmative countervailing duty determination reached by the U.S. Department of Commerce ("Commerce") in *Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 Fed. Reg. 50410 (Oct. 3, 2001) ("*Final Determination*"). Defendant-Intervenor United States Steel Corporation ("U.S. Steel") also challenges certain aspects of the *Final Determination*.[1] The period of investigation covers

[1] Defendant-Intervenors/Plaintiffs Bethlehem Steel Corporation, LTV Steel Company, Inc., and National Steel Corporation were dismissed from this action in an order entered by the Court on July 7, 2004.

January 1, 1999 through December 31, 1999. Pursuant to USCIT Rule 56.2, both Plaintiffs and Defendant-Intervenor move for judgment on the agency record.

For the reasons that follow, the Court sustains in part and reverses and remands in part the *Final Determination*. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c).

I. *STANDARD OF REVIEW*

The Court will sustain the *Final Determination* unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). To determine whether Commerce's construction of the statutes is in accordance with law, the Court looks to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The first step of the test set forth in *Chevron* requires the Court to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. It is only if the Court concludes that "Congress either had no intent on the matter, or that Congress's purpose and intent regarding the matter is ultimately unclear," that the Court will defer to Commerce's construction under step two of *Chevron*. *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). If the statute is ambiguous, then the second step requires the Court to defer to the agency's interpretation so long as it is "a permissible construction of the statute." *Chevron*, 467 U.S. at 842. In addition, "[s]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) (interpreting *United States v. Mead*, 533 U.S. 218 (2001)). Accordingly, the Court will not substitute "its own construction of a statutory provision for a reasonable interpretation made by [Commerce]." *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992).

II. *DISCUSSION*

A. Commerce's Determination that SSI's Debt Restructuring Was Not De Facto Specific Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

The Asian financial crisis struck Thailand by July 1997, resulting in an overall contraction of Thailand's economy and severe depreciation of its currency, the baht. *See* Issues and Decision Memorandum in the Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand (Sept. 21, 2001) ("Issues and Decision Memo") at 16. In an attempt to foster economic stability and protect against further bank failures, the

RTG began to implement economic programs, including the Corporate Debt Restructuring Advisory Committee ("CDRAC"), which was established in June 1998 by the Bank of Thailand. *Id*. at 16–17. CDRAC established a voluntary framework for independent debt restructuring negotiations between private corporations and financial institutions. *Id*. This framework involved the Debtor-Creditor Agreement and the Inter-Creditor Agreement, which included: (1) the requirement that a debtor negotiate with all creditors at once; (2) the designation of an independent financial advisor to report on a debtor's financial condition; (3) the establishment of a time-bound process with consequences for any party that did not adhere to the procedures; and (4) the requirement that creditors reach a consensus on the debt restructuring. *Id*. at 17.

In March 1999 CDRAC released a list of 351 companies ("351 list") it considered priority targets for debt restructuring; among those listed were SSI and its subsidiary, Prachuab Port Company ("PPC"). *Id*. at 17–18. CDRAC subsequently released a second list in April 1999 containing 316 companies, and a third Cons. Court No. 02-00026 Page 5 list in the second half of 1999 naming an additional 1,027 companies for potential CDRAC participation. *Id*. The selection criteria used in creating these lists were: (1) debtors with sizeable credit outstanding; (2) debtors proposed by the Thai Bankers' Association, the Foreign Bankers' Association, the Association of Finance Companies, the Federation of Thai Industries, and the Board of Trade of Thailand; (3) debtors that expressed their intention to participate in the restructuring process; and (4) debt restructurings involving multiple creditors. *Id*.

However, SSI's debt restructuring did not take place under the CDRAC guidelines. *Id*. at 18. In fact, neither SSI nor PPC even signed a Debtor-Creditor Agreement. *See* Memorandum In Support Of The Determination Of The U.S. Department Of Commerce And In Opposition To National Steel Corp, et al.'s Rule 56.2 Motion For Judgment On The Agency Record at 13. Rather, SSI's debt restructuring occurred in accordance with its Credit Facilities Agreement between itself and its private creditors, accommodating all forms of SSI's debt: both short- and long-term debt, from both secured and unsecured lenders, in baht and foreign currency denominations, providing feasible repayment terms. Issues and Decision Memo at 17–18. U.S. Steel claims that SSI received a countervailable benefit by being placed on the 351 list, and that Commerce erred in finding that any benefit conferred on SSI in Thailand's 1999 debt restructuring response to the Asian financial crisis was nonspecific and does not amount to a countervailable subsidy. *See* National Steel Corporation, et al.'s Memorandum of Law in Support of Judgment on the

Agency Record Pursuant to Rule 56.2 ("U.S. Steel Br.") at 10–11.[2] The Court finds U.S. Steel's argument unpersuasive.

A subsidy is de facto specific if it meets any one of the four criteria set forth in 19 U.S.C. § 1677(5A)(D)(iii):

> (I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.
>
> (II) An enterprise or industry is a predominant user of the subsidy.
>
> (III) An enterprise or industry receives a disproportionately large amount of the subsidy.
>
> (IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

19 U.S.C. § 1677(5A)(D)(iii). 19 C.F.R. § 351.502 requires a sequential analysis of the foregoing factors. If any one factor warrants a finding of specificity, no further analysis is required. 19 C.F.R. § 351.502(a).

1. The Actual Recipients of the Subsidy Were Not Limited in Number.

"The specificity test [of 19 U.S.C. § 1677(5A)(D)(iii)] was intended to function as a rule of reason and to avoid the imposition of countervailing duties in situations where, because of the widespread availability and use of a subsidy, the benefit of the subsidy is spread throughout an economy." Uruguay Round Agreements Act, Statement of Administrative Action ("SAA"), H.R. Doc. No. 316, vol. 1, 103d Cong., 2d Sess. (1994) at 261. Expert opinions analyzed by Commerce concluded that the financial crisis was a systematic meltdown of the entire Thai economy, resulting in a fifty percent rate of non-performing loans. *See* Issues and Decision Memo at 21. As a result, the companies named on the 351 list as priorities for debt restructuring represented a wide spectrum of companies and industries, containing [ ] distinct industries, as classified by their International Standard of Industrial Classification Code. *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Agency Record at 20; *see also* Memorandum for the File Through Barbara E. Tillman, Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Analysis of the List of 351 Firms ("351 List Memo") at 2. Further, only 32 of the 351 companies on the list are in

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[2] The record is not clear as to whether the banks restructuring SSI's loans were government-owned, private, or a combination of both. However, the Court finds this fact irrelevant because the specificity issue is dispositive.

the primary metal production sector. *See* Issues and Decision Memo at 19. Given the numerous and diverse industries represented on the 351 list, the Court finds that Commerce did not err in its finding that the 351 list was not limited in number based on industry or enterprise.

2. Neither SSI Nor the Steel Industry Were Predominant Users of the Subsidy, and They Did Not Receive a Disproportionately Large Amount of the Subsidy.

In its brief, U.S. Steel addresses the third prong of 19 U.S.C. § 1677(5A)(D)(iii), disproportion of benefits, as aseparate "level of benefits analysis" discussion. *See* U.S. Steel Br. at 11–18. However, the Court finds that this analysis falls within the predominant user and proportion of benefits prongs of 19 U.S.C. § 1677(5A)(D)(iii)(III)–(IV) and addresses it as such. U.S. Steel alleges that Commerce failed to analyze properly thebenefits conferred by being placed on the 351 list. *See id.* at 16. However, the Federal Circuit has held that "[d]eterminations of disproportionality and dominant use are not subject to rigid rules, but rather must be determined on a case-by-case basis taking into account all the facts and circumstances of a particular case." *AK Steel v. United States*, 192 F.3d 1367, 1385 (Fed. Cir. 1999). In *AK Steel*, the Court found that Commerce did not err in demonstrating that there was no disproportionality based on calculations of the relative percentage benefit rather than the absolute benefit conferred. *See id.*

In the case at hand, Commerce's evaluation of the amount of the debt restructuring identified for each company and industry on the 351 list concluded that SSI's debt was less than that of some companies on the list, but not significantly greater than that of many others on the list. *See* Issues and Decision Memo at 19–20. With [ ] percent of the total debt on the 351 list, the primary metal industry did not represent an overwhelming or disproportionate amount of the overall debt restructuring when compared to other industries on the list.[3] *See id.* at 20; *see also* 351 List Memo at 2. Moreover, SSI's portion of the total debt on the 351 list was a mere [ ] percent, accounting for [ ] baht out of a total of [ ] baht of debt on the 351 list. *See* 351 List Memo at 2. In addition, the 351 list names companies in over 34 different industries, thus lending further support to Commerce's finding that SSI and the steel industry were not the predominant or disproportionate users of the subsidy's benefit as an industry or enterprise. *See id.*

[3] All figures are based solely on the companies and industries named on the 351 list, since U.S. Steel's allegation is limited to this list. However, as added support for Commerce's determination and the Court's finding, the Court notes that SSI and the steel industry represent an even lower proportion of the total CDRAC-promoted debt for restructuring when all lists created during the period of investigation are considered.

3. The Manner in which the RTG Exercised Discretion in Granting the Subsidy Does Not Indicate that SSI or the Steel Industry Were Favored Over Others.

In accordance with 19 U.S.C. § 1677(5A)(D)(iii)(IV), the RTG exercised proper discretion in creating the 351 list, showing no favor to any particular enterprise or industry. The RTG created the 351 list based on the four criteria mentioned above. In its analysis, Commerce found that these criteria were consistently applied. *See* Issues and Decision Memo at 20. Further, expert opinion found that the CDRAC process was not tailored to any specific industry group or sector, but rather, that the 351 list was comprised of large debtors with many creditors in an attempt to stabilize the Thai banking system. *Id.* at 21.

Accordingly, Commerce's determination that SSI's debt restructuring was not de facto specific is sustained.

B. Commerce's Decision Not to Investigate U.S. Steel's Equity Infusion Allegations Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

The Investment Promotion Act of 1977 ("IPA"), administered by the Thailand Board of Investment ("BOI"), is designed to provide investors with tax and duty exemptions and reductions. *Id.* at 3. To receive IPA benefits, a company must apply to the BOI for a Certificate of Promotion, which specifies the goods to be produced, production and export expectations, and the benefits requested. *Id.* at 4. The BOI grants Certificates of Promotion at its own discretion after evaluating and approving companies. *Id.* In addition, the BOI may actively promote projects in particular industry sectors, as it did in offering promotion privileges to the hot-rolled steel industry in Thailand. *Id.*

Thailand had considered establishing a private domestic steel industry since the 1960s, but the lack of natural resources and limited domestic demand made the creation of such an industry unviable. *Id.* By the late 1980s, however, developing market factors in Thailand (namely, increased domestic demand) made a flat-rolled steel industry feasible. *Id.* Thus, on August 2, 1988, the BOI formally announced its promotion of domestic steel sheet production and requested applications from investors interested in developing a steel facility in Thailand. *Id.*

SSI applied and was selected. *Id.* The BOI then approved a package of benefits for SSI, including (1) cost reduction measures, such as exemptions in import duties and corporate taxes; (2) straight investment incentives, such as tax-free dividends and foreign remittance; and (3) protection from competition. Memorandum for the File Through Barbara E. Tillman, Countervailing Duty Investigation of Certain Hot-Rolled Carbon Steel Flat Products from Thailand: New Subsidy Allegation ("New Subsidy Allegation Memo") at 2. U.S. Steel

claims that these promotion privileges, which the BOI allegedly used to induce private entities to invest in SSI from 1990 through 1994, constitute countervailable subsidies. *See* U.S. Steel Br. at 3. Commerce, however, refused to initiate an investigation into U.S. Steel's equity infusion allegations. *See* Issues and Decision Memo at 34.

Commerce's refusal to investigate the alleged equity infusions is proper for two reasons. First, the allegations did not reasonably appear to be countervailable. Second, they were not discovered within a reasonable time prior to the completion of the investigation. The Court will address each rationale in turn.

1. The Allegations Did Not Reasonably Appear to Be Countervailable.

"This Court has consistently held that Commerce must investigate only those allegations that reasonably appear to be countervailable. . . ." *Bethlehem Steel Corp. v. United States*, 25 CIT 930, 932, 162 F. Supp. 2d 639, 642 (2001) (internal quotation omitted). To meet this initiation standard, an equity infusion allegation must be "supported by information establishing a reasonable basis to believe or suspect that the firm received an equity infusion that provides a countervailable benefit[.]" 19 C.F.R. § 351.507(a)(7). "[A] benefit exists to the extent that the investment decision is inconsistent with the usual investment practice of private investors . . . in the country in which the equity infusion is made." *Id.* § 351.507(a)(1).

U.S. Steel claims that SSI was not equityworthy at the timeof its founding and that it would not have received equity investment without government inducement of private investors. *See* U.S. Steel Br. at 36. Thus, according to U.S. Steel, any equity investment in SSI was inconsistent with the usual investment practice of private investors. *See id.* However, an objective examination of SSI's equityworthiness demonstrates that SSI was indeed equityworthy at the time the equity infusions were made. As a result, U.S. Steel's equity infusion allegations do not satisfy the initiation standard, and Commerce's refusal to initiate a formal countervailing duty investigation is supported by substantial evidence.

19 C.F.R. § 351.507(a)(4)(i) sets forth a list of factors Commerce may examine in making an equityworthiness determination, including objective analyses of the future financial prospects of a firm, market studies, and economic forecasts. *See* 19 C.F.R. § 351.507(a)(4)(i)(A). Moreover, in determining whether there appears to be a countervailable subsidy, "Commerce [has] sufficient latitude to weigh and analyze both negative evidence and positive evidence." *Allegheny Ludlum Corp. v. United States*, 25 CIT 816, 824 (2001) (citing *Am. Lamb Co. v. United States*, 785 F.2d 994, 997 (Fed. Cir. 1986)).

U.S. Steel points to the fact that BOI incentives wereinitially offered for SSI, resulting in no investor response. *See* U.S. Steel Br. at

38. Only after the BOI increased the incentives it was offering did investors come forward. *See id*. According to U.S. Steel, this fact proves that SSI was not equityworthy at the time of its founding since SSI was not able to attract investors without increased incentives. *See id*.

However, in conducting its equityworthiness analysis, Commerce found as follows:

> Evidence on the record indicates that at the time of SSI's founding, economic conditions were right for the development of a Thai hot-rolled steel industry: the economy was growing rapidly and domestic demand for hot-rolled steel was increasing and was being met exclusively by imports. Indeed, the record shows that the BOI promoted a hot-rolled steel industry to meet this increasing domestic demand for hot-rolled steel products.

New Subsidy Allegation Memo at 5. This is precisely the type of market data that Commerce is allowed to consider under 19 C.F.R. § 351.507(a)(4)(i)(A). Thus, in light of Commerce's findings that the economy was growing rapidly and there was increasing domestic demand for steel being met exclusively by imports, the Court is satisfied that "from the perspective of a reasonable private investor," SSI "showed an ability to generate a reasonable rate of return within a reasonable period of time." *See* 19 C.F.R. § 351.507(a)(4)(i).

Commerce is also allowed to examine current and past indicators of the firm's financial health in making its equityworthiness determination. *Id*. § 351.507(a)(4)(i)(B). U.S. Steel directs the Court's attention to the fact that SSI had annual operating losses from 1994 through 1999. *See* U.S. Steel Br. at 37. However, as Commerce correctly found, any financial data reflecting SSI's operations after 1994 is irrelevant to an analysis of SSI's equityworthiness in 1990. *See* New Subsidy Allegation Memo at 4.

Because the Court finds that there is substantial evidence on the record indicating that SSI was equityworthy at the time the equity infusions were made, Commerce did not err in refusing to initiate a formal investigation.

2. The Allegations Were Not Discovered Within a Reasonable Time Prior to the Completion of the Investigation.

19 C.F.R. § 351.301(d)(4)(i)(A) states that new subsidy allegations should be made at least forty days before the scheduled date of the preliminary determination to ensure that the agency has sufficient time to investigate the allegation. 19 C.F.R. § 351.301(d)(4)(i)(A); *see also Bethlehem Steel*, 25 CIT at 932, 162 F. Supp. 2d at 642. Here, U.S. Steel's subsidy allegation was not made until fourteen days before the scheduled date of the *Preliminary Determination*, clearly violating 19 C.F.R. § 351.301(d)(4)(i)(A). *See* Petitioners' April 6 Sub-

mission ("Subsequent Subsidy Allegation") at 1, Public Record ("P.R.") 64, Confidential Record ("C.R.") 18.

However, even where an allegation is untimely under 19 C.F.R. § 351.301(d)(4)(i)(A), a petitioner may "correct for itslapse in diligence by presenting the issue to Commerce at a reasonable time prior to the issuance of its final determination." *Bethlehem Steel Corp. v. United States*, 25 CIT 307, 313, 140 F. Supp. 2d 1354, 1361 (2001). U.S. Steel presented its equity infusion allegations to Commerce five months before the scheduled date for the *Final Determination*. *See Final Determination*, 66 Fed. Reg. at 50410; Subsequent Subsidy Allegation at 1.

In *Bethlehem Steel*, the Court held that Commerce erred in failing to investigate a "straightforward subsidy allegation" made eighteen days before the preliminary determination (in violation of 19 C.F.R. § 351.301(d)(4)(i)(A)), but four months prior to the scheduled final determination. *Bethlehem Steel*, 25 CIT at 309, 313, 140 F. Supp. 2d at 1358, 1361. However, the Court expressly "recognize[d] that when Commerce is faced with . . . extraordinarily complex subsidy allegations it may lack the resources or the time necessary to investigate the new allegations[.]" *Id.* at 313, 140 F. Supp. 2d at 1361 (internal quotation omitted). The present case implicates precisely that concern. Indeed, "equityworthiness investigations are governed by a higher initiation standard to compensate for their laborious and difficult nature." *Allegheny Ludlum*, 25 CIT at 828. Thus, although four months may have been sufficient time in *Bethlehem Steel* where a straightforward subsidy allegation was at issue, the five months Commerce had in this case was not sufficient time to investigate U.S. Steel's complex equity infusion allegations.

3. Commerce Did Not Deny U.S. Steel's Basic Procedural Rights.

U.S. Steel also argues that the *Final Determination* must be remanded on procedural fairness grounds, since Commerce erred by waiting until the *Final Determination* to notify the parties of its decision not to initiate a formal investigation into the equity infusion allegations. U.S. Steel Br. at 41–42. U.S. Steel contends that Commerce should have issued an "initiation memorandum" instead, detailing its reasons for refusing to initiate an investigation. *Id.* at 42.

The Court is not persuaded by U.S. Steel's meager argument on this point. Indeed, U.S. Steel cites no authority to support its contention. Moreover, no statute or regulation requires Commerce to issue initiation memoranda or to notify the parties within a certain amount of time that it is refusing to initiate a formal investigation. Although U.S. Steel may have preferred to be notified immediately of Commerce's refusal to investigate so it could "tak[e] steps to correct any evidentiary deficiencies[,]" U.S. Steel overlooks the fact that there should not have been any "evidentiary deficiencies" to correct.

Id. 19 C.F.R. § 351.507(a)(7) explicitly requires a petitioner, in thefirst instance, to support its equity infusion allegations with "information establishing a reasonable basis to believe or suspect that the firm received an equity infusion[.]" 19 C.F.R. § 351.507(a)(7). Here, U.S. Steel failed to provide Commerce with sufficient information to believe that SSI received a countervailable equity infusion, and Commerce did not deny U.S. Steel any procedural rights by waiting until the *Final Determination* to notify U.S. Steel that its allegations were insufficient.

Accordingly, Commerce's refusal to initiate a formal investigation into U.S. Steel's equity infusion allegations is sustained.

C. Commerce's Decision to Countervail the Entire IPA Section 36(1) Drawback Program Is Not Supported by Substantial Evidence and Is Not in Accordance with Law.

IPA Section 36(1) exempts companies from paying duties on imports of raw and essential materials that are incorporated into goods for export. Issues and Decision Memo at 8. SSI received a duty exemption under Section 36(1) for its imports of steel slab, which is the only raw material used to manufacture hot-rolled steel coil subsequently exported by SSI. Memorandum in Support of Motion for Judgment on the Agency Record Under Rule 56.2 Filed by Plaintiffs the Royal Thai Government and Sahaviriya Steel Industries Public Company Limited at 7. Manufacturing the steel slab into hot-rolled coil consumes the slab and generates waste. *Id*. Cognizant of this, the BOI approved a waste rate of [ ] percent for SSI. *Id*. Commerce, however, found this approved waste rate to be excessive by [ ] percentage points, and then decided to countervail the entire amount of the exemption, rather than just the excessive amount of waste. *Id*. Plaintiffs contest Commerce's decision to countervail the IPA Section 36(1) drawback program in its entirety, *see id*. at 9–12, as well as Commerce's finding that Section 36(1) does not provide for a normal allowance for waste. *See id*. at 12–18.

19 C.F.R. § 351.519 governs the drawback of import charges upon export. The relevant portions are as follows:

> (a)(1)(i) *Remission or drawback of import charges.* In the case of the remission or drawback of import charges upon export, a benefit exists to the extent that the Secretary determines that the amount of the remission or drawback exceeds the amount of import charges on imported inputs that are consumed in the production of the exported product, making normal allowances for waste.
>
> (a)(3) *Amount of the benefit*–(i) *Remission or drawback of import charges.* If the Secretary determines that the remission or drawback . . . of import charges confers a benefit under paragraph (a)(1) . . . of this section, the Secretary normally will con-

> sider the amount of the benefit to be the difference between the amount of import charges remitted or drawn back and the amount paid on imported inputs consumed in production for which remission or drawback was claimed.
>
> (a)(4) *Exception*. Notwithstanding paragraph (a)(3) of this section, the Secretary will consider the entire amount of . . . remission or drawback to confer a benefit, unless the Secretary determines that:
>
> (i) The government in question has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported products and in what amounts, and the system or procedure is reasonable, effective for the purposes intended, and is based on generally accepted commercial practices in the country of export[.]

19 C.F.R. § 351.519(a)(1)(i), (a)(3)(i), (a)(4)(i).

Commerce determined that "the RTG does in fact have a system in place to monitor and track the consumption and/or re-export of goods imported under Section 36(1)[,]" as required by § 351.519(a)(4)(i). Issues and Decision Memo at 26. However, Commerce asserts that IPA Section 36(1) does not make a normal allowance for waste under § 351.519(a)(1)(i) for two reasons: (1) the BOI did not isolate and examine the amount of inputs consumed in the production of the exported products; and (2) the BOI did not consider whether any of the scrap was recoverable and saleable. *Id.* at 28. As a result, Commerce determined that the RTG's system for ascertaining which inputs are consumed in the exported product, and in what amounts, is not reasonable or effective for the purposes intended. *Id*. Consequently, consistent with § 351.519(a)(4), Commerce decided to countervail the entire amount of SSI's import duty exemptions under IPA Section 36(1). *Id*.

The Court finds Commerce's logic to be circular. The main thrust of § 351.519 is to allow Commerce to countervail only that portion of a duty exemption corresponding to an excessive allowance for waste, as long as the drawback program is otherwise reasonable. However, under Commerce's interpretation of § 351.519, the *entire* duty exemption is countervailable whenever the exporting country's § 351.519(a)(4)(i) system allows for an excessive amount of waste (no matter how small), since such waste necessarily makes the system unreasonable. The problem with this logic is that it renders § 351.519(a)(3)(i) meaningless, because there could never be a situation where only the excessive portion of the exemption would be countervailed.

It is a basic tenet of statutory construction that effect must be given to every clause and word of a statute. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Len-Ron Mfg. Co. v. United States*, 24 CIT 948, 964, 118 F. Supp. 2d 1266, 1281 (2000). Because Commerce's ap-

plication of § 351.519(a)(4)(i) essentially reads § 351.519(a)(3)(i) out of the regulations, the Court finds that Commerce's reasoning is not in accordance with law. As a result, the Court cannot sustain Commerce's decision to countervail the entire Section 36(1) drawback program.[4]

The question remains, however, whether IPA Section 36(1) permits an excessive allowance for waste, since any such excessive amount clearly is countervailable under § 351.519(a)(3)(i). Commerce's determination that Section 36(1) permits an excessive allowance for waste is largely based not on the *quantity* of waste at issue, but rather on the *end use* to which the waste is put. *See* Issues and Decision Memo at 27. Commerce reasons that because the waste was resold domestically as scrap (and, by definition, waste is something that "a company is unable to recover and use"), there was an excessive allowance for waste. *Id.* at 10; *see also* Defendants' Memorandum in Opposition to Defendant-Intervenors' Motion for Judgment Upon the Administrative Record at 19–21.

Commerce's argument is without merit. Section 351.519 does not draw a distinction between waste that can be resold as scrap and waste that cannot be resold as scrap. Rather, § 351.519(a)(1)(i) directs that "a benefit exists to the extent that . . . the amount of . . . drawback exceeds the amount of import charges on imported inputs that are consumed in the production of the exported product, *making normal allowances for waste*." 19 C.F.R. § 351.519(a)(1)(i) (emphasis added). Under the regulation, it does not matter what ultimately happens to the waste, as long as there is a normal allowance for waste.

Record evidence shows that IPA Section 36(1) makes a normal allowance for waste. The RTG has specific procedures for determining what constitutes waste,[5] and Commerce verified that the BOI actually applied these procedures when it approved SSI's waste rate un-

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[4] Moreover, Commerce's decision to countervail the entire drawback program is inconsistent with Commerce's prior interpretation of § 351.519. In *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From India*, 66 Fed. Reg. 49635 (Sept. 28, 2001), Commerce concluded that the government of India applied a reasonable and effective system to confirm which inputs were consumed in the production of the exported products and in what amounts, thereby satisfying § 351.519(a)(4)(i). *See* Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation: Certain Hot-Rolled Carbon Steel Flat Products from India at Cmt. 5. However, Commerce noted that India's system allowed for duty drawback on certain items that, although used in the production of the subject merchandise, were not consumed in the production process. *Id.* Significantly, Commerce found that only the excess duty drawback (*i.e.*, the "over-rebate") — as opposed to the entire duty drawback program – was countervailable. *Id.*

[5] BOI Announcement No. Por. 6/1997 defines "waste" as:

> 3.1 raw materials prior to, during, or after the production process which are flawed, not conforming to standards or are not usable for the original purpose to which they were designed;
>
> 3.2 leftovers of raw materials or by-products;

der Section 36(1).[6] *See, e.g.*, RTG Verification Report at 8–11, P.R. 117, C.R. 33; SSI Verification Report at 7–10, P.R. 116, C.R. 32. In determining SSI's approved waste rate, BOI engineers visited SSI's mill to examine SSI's production capacity, processes, and efficiencies. *See* RTG Verification Report at 8, P.R. 117, C.R. 33. Moreover, as Commerce concedes, the BOI requires SSI to provide yield information annually, and BOI officials visit SSI's mill regularly to monitor SSI's compliance with its IPA Section 36(1) conditions. *See* Issues and Decision Memo at 9.

In light of the substantial steps taken by the RTG to ensure that IPA Section 36(1) makes a normal allowance for waste, Commerce erred in relying on two extraneous sources of information[7] to support its finding that the waste rate is excessive. *See id.* at 9–10. Rather, Commerce should have limited its review to whether, based on generally accepted commercial practices in Thailand, IPA Section 36(1) makes a normal allowance for waste. *See* 19 C.F.R. § 351.519(a)(4)(i) (stating that the system to confirm which inputs are consumed in the production of the exported products must be "based on generally accepted commercial practices in the country of export"). Because the Court finds that Section 36(1) does make a normal allowance for waste, there is no excessive waste to be countervailed, and the benchmark issue raised by U.S. Steel is therefore moot.

III. *CONCLUSION*

For the aforementioned reasons, the Court finds Commerce's determination that any benefit conferred on SSI in the 1999 debt restructuring was nonspecific to be supported by substantial evidence and otherwise in accordance with law. In addition, Commerce's refusal to initiate a formal investigation into U.S. Steel's equity infu-

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3.3 products, or parts of products or things produced from raw materials which are flawed, not conforming to standards or are not usable for the original purpose to which they were designed.

Royal Thai Government's Supplemental Questionnaire Response at Exhibit 4 (May 31, 2001), P.R. 87.

[6] The approved waste rate under Section 36(1) aligns closely with that of the RTG Customs Service under the RTG's regular duty drawback provision, *see* SSI Verification Report at Exhibit 24, P.R. 116, C.R. 32, which has been ruled acceptable by both Commerce and the Court. *See Allied Tube & Conduit Corp. v. United States*, 25 CIT 23, 29–30, 132 F. Supp. 2d 1087, 1093–94 (2001).

[7] The extraneous sources on which Commerce relied are "an independent financial review" and "yield and waste information reported in the companion antidumping investigation." Issues and Decision Memo at 9. While these two sources show yield factors slightly below that approved for SSI by the BOI, Commerce failed to assess the reasonableness of these alternative waste rates. As a result, the Court finds Commerce's reliance on them to be misplaced.

sion allegations is supported by substantial evidence and otherwise in accordance with law. However, Commerce's decision to countervail the entire IPA Section 36(1) drawback program is not supported by substantial evidence and is not in accordance with law. Because of the Court's disposition of the drawback issue, Plaintiffs' challenge to Commerce's determination that SSI and PPC received a countervailable regional subsidy through the provision of electricity at less than adequate remuneration is moot.

Commerce determined the total estimated countervailable subsidy rate for SSI to be 2.38 percent ad valorem. *Final Determination*, 66 Fed. Reg. at 50411. The portion of the total rate corresponding to Commerce's decision to countervail the Section 36(1) drawback program is 0.58 percent ad valorem. Issues and Decision Memo at 10. Thus, since the Court holds that the drawback program is not countervailable, the revised subsidy rate is 1.80 percent ad valorem. However, the *de minimis* countervailing duty rate for Thailand is less than two percent because of Thailand's status as a developing country for purposes of United States countervailing duty law. *See* 19 U.S.C. § 1671b(b)(4)(B); *Developing and Least-Developed Country Designations under the Countervailing Duty Law*, 63 Fed. Reg. 29945, 29948 (June 2, 1998). Accordingly, the Court remands the drawback issue to Commerce with instructions to find that the total estimated net countervailing subsidy rate is *de minimis*. As a result, Commerce is instructed to find that no countervailable subsidies are being provided to the production or exportation of certain hot-rolled carbon steel flat products from Thailand.

A separate order will be issued accordingly.

Slip Op. 04–92

Before: Judge Judith M. Barzilay

UNITED STATES, Plaintiff, v. OPTREX AMERICA, INC., Defendant.

Court No. 02–00646

MEMORANDUM OPINION AND ORDER

This is the third opinion issued in this discovery dispute. *See United States v. Optrex Am., Inc.*, Slip Op. 04–80 (CIT July 1, 2004) (memorandum opinion and order granting Defendant's Motion to Compel Discovery); *United States v. Optrex Am., Inc.*, Slip Op. 04–79 (CIT July 1, 2004) (memorandum opinion and order partially grant-

ing and partially denying Plaintiff's Motion to Compel Discovery). Following the court's order dated July 1, 2004, Plaintiff United States has now submitted for *in camera* review a revised Privilege Log and documents relating to Defendant Optrex's proposed deposition of government counsel, Mr. Jeffrey Reim, as requested. On July 14, 2004, the court held oral argument in the action "in reference to Defendant's Motion to Depose Mr. Reim and to allow Plaintiff's counsel to explain why the court should not sanction the government for its discovery actions which violate court rules and case law teachings." *Optrex*, Slip Op. 04–80 at 10.

The court here must determine if this revised Privilege Log meets the standards articulated in the court's previous opinions for asserting the privilege claimed with respect to each listed document. The court must also decide whether any documents concerning Mr. Reim's deposition should remain privileged and whether to grant Defendant's request to depose Mr. Reim. Finally, the court considers whether to sanction Plaintiff's counsel for obstructing the discovery process.

Plaintiff's Revised Privilege Log

Plaintiff's revised Privilege Log finally presents detailed explanations of the contents of the documents in question and why Plaintiff believes they deserve privilege. *See Pl.'s Revised General Privilege Log* at 1–9 (submitted to the court). As discussed before, USCIT R. 26(b)(5) establishes the standard for granting privilege claims.

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

USCIT R. 26(b)(5). Finding guidance in the cases that interpret the federal rule, the court observes that, to effectively assert privileged status, a privilege log must

> contain a brief description or summary of the contents of the document, the date the document was prepared, the person or persons who prepared the document, the person to whom the document was directed, or for whom the document was prepared, the purpose in preparing the document, the privilege or privileges asserted with respect to the document, and how each element of the privilege is met as to that document.

Burns v. Imagine Films Entm't, Inc., 164 F.R.D. 589, 594 (W.D.N.Y. 1996) (quoting the federal discovery rule, FED. R. CIV. P. 26(b)(5), Advisory Committee Notes, 1993 Amendments).[1]

Plaintiff's revised Privilege Log meets these criteria in nearly every instance.[2] Each document citation assigns the given document a number and lists its date of creation, its author, a description of its contents, the privilege claimed, and the basis for claiming the privilege. From information provided in the Privilege Log, and occasionally from other documents the Log cites, the court can reasonably determine that the documents for which Plaintiff asserts attorney-client privilege and/or deliberative process privilege warrant protection. *See Pl.'s Revised General Privilege Log* at 1–9; *Pl.'s Exs. in Supp. of Pl.'s Opp'n to Def.'s Mot. to Compel Disc. & Pl.'s Cross-Mot. for a Protective Order*, Ex. E (*Decl. Asserting Privilege*, Robert C. Bonner, Comm'r, U.S. Customs and Border Protection), Ex. F (*Decl. Asserting Privilege*, John P. Clark, Director, Office of Investigations, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security).[3]

On the other hand, eight (8) documents within the Log do not meet standards for privilege protection. With respect to these documents denoted E 49–109, E 303–305, H 396–456, K 2–4, L 15–23, L 405–410, L558–564, and L 581–88, the Log lists the explanation "Already

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[1] Reliance on other courts' decisions is warranted as USCIT R. 26 closely tracks FED. R. CIV. P. 26.

[2] In fact, considering the tight one-week schedule counsel had to produce this document, the court commends counsel on its helpful, meticulous efforts.

[3] The court notes that even though the documents within the Log appear to warrant privileged status, Plaintiff's counsel often invokes the wrong privilege. Plaintiff desires to protect these documents primarily under the investigatory files privilege perhaps because the administrative proceeding which gave birth to these documents is denominated a Customs investigation. However, the description of the documents themselves suggests that the documents fall under the deliberative process privilege. *Compare R.C.O. Reforesting v. United States*, 42 Fed. Cl. 405, 408–409 (1998) (detailing requirements for asserting investigative files privilege) *with Abramson v. United States*, 39 Fed. Cl. 290, 293–95 (1997) (delineating the requirements for asserting deliberative process privilege), *and Asahi Chem. Indus. Co. v. United States*, 1 CIT 21, 23 (1980). The deliberative process privilege aims to protect the government's "decision-making process" from public exposure. *Abramson*, 39 Fed. Cl. at 293 (citation and internal quotation omitted). "Communications are not within the purview of the privilege unless they are both (1) 'predecisional' in that they have been generated prior to an agency's adoption of a policy or decision and (2) 'deliberative' in that they reflect the give-and-take of a deliberative decision-making process." *Seafirst Corp. v. Jenkins*, 644 F. Supp. 1160, 1163 (W.D. Wash. 1986) (citations omitted). Case law throughout the federal system reveals–and often laments–the often blurred lines between recognized privileges, and courts frequently give the same privilege different names. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149–50 (1975) (elucidating multiple names given to similar privileges); *Abramson*, 39 Fed. Cl. at 293–95; *Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1580 (Fed. Cir. 1985) (noting analogous characteristics of different privileges). In any event, choice of privilege-name aside, judging by these documents' descriptions within the Log, they fall under the deliberative process privilege and should therefore be granted that status.

Provided in Classification Case" as the claim and basis of privilege.[4] *Pl.'s Revised General Privilege Log* at 1, 3, 6–7. A party cannot claim privileged status for a document on the grounds that it has already provided the document to the opposing party in another case. Moreover, the rules do not permit a party to withhold discoverable information merely because it is repetitive or redundant; the request must also be "unreasonable." *See* USCIT R. 26(b)(2); *cf. Redland Soccer Club, Inc. v. Dep't of the Army of the United States*, 55 F.3d 827, 856 (3d Cir. 1995) (noting that parties resisting discovery must demonstrate the "burdensome or oppressive" nature of the request) (quotations omitted), *cert. denied*, 516 U.S. 1071 (1996). Here, the court determines that Optrex's repeated request for documents provided in another case before another judge is not unreasonable. Thus, the court orders the government to provide these documents to Optrex in this proceeding.

The Deposition of Mr. Reim

In its Motion to Compel Discovery, Defendant Optrex sought to depose Customs Assistant Chief Counsel Jeffrey Reim because it believed that he "may have acted outside of the scope of his duties as an attorney when he assumed the role of special agent during the underlying investigation." *Def.'s Mot. to Compel* at 13. The court previously noted that it could not "determine the nature of the information Mr. Reim may have provided the government, let alone whether it deserves privileged status." *Optrex*, Slip Op. 04–80 at 8. Consequently, the court instructed Plaintiff to submit to chambers for *in camera* review those documents regarding Mr. Reim for which Plaintiff desires to assert privilege. *See id.* at 10. After careful review of the submitted documents, the court finds no indication that Mr. Reim acted outside his role as attorney or acted as a special agent on behalf of the government during the course of this investigation.[5] Furthermore, even if the information Mr. Reim acquired were not to fall under the scope of attorney-client privilege, such information would receive protection on grounds of deliberative process privilege. *See supra* note 3.

The question is then whether Defendant can sufficiently demonstrate that it needs access to this privileged material to be able to

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[4] The "Classification Case" referred to is Court No. 00–382 currently before Judge Wallach.

[5] To further support its request that it depose Mr. Reim as a special agent of the government, Optrex submitted to the court deposition testimony allegedly showing that Mr. Reim played such a role. However, as the government correctly points out, this testimony shows that the case was handled by two other special agents and (even further) that Mr. Reim was merely the "counsel involved." *Def.'s Supplemental Submission pursuant to Oral Argument of July 14, 2004, Dep. of Nicholas Candela* at 26:20–24; *see also Pl.'s Response* at 2. There is no indication that Mr. Reim acted outside his role as counsel. Indeed, by virtue of lacking any analysis on this point Optrex's submission does not in any way help its case.

present a proper defense. When examining the merits of a party's motion to access normally privileged government documents and information, one of the methods courts apply is a balancing test that weighs the need for secrecy against the need for discovery. *See Zenith Radio Corp.*, 764 F.2d at 1580–81. That is, if Defendant can show that its efforts to defend against the government's suit would be significantly hampered if the privilege is not waived, the court will allow the waiver. Defendant made no such showing.

During oral argument, Defendant Optrex's counsel suggested that Mr. Reim appeared to have something to conceal and further implied that Mr. Reim gained access to former Optrex employees to gather information to be used against Optrex. After careful deliberation the court remains unconvinced by such arguments. First, if the government decides to call these former employees to testify in court, Defendant will know their identity in advance and will have ample opportunity to depose them and cross-examine them at trial. Moreover, Defendant should know the whereabouts of its past and current employees and what kind of information they would reveal about the company. Defendant's claim that it must be permitted to depose Mr. Reim because of his allegedly superior knowledge on these matters therefore carries no merit. Likewise, because this penalty case turns on the finding of a negligent act or omission as outlined in 19 U.S.C. § 1592, the government need not provide Defendant with evidence that Defendant did not behave negligently. That burden falls squarely upon Defendant. *See* 19 U.S.C. § 1592(e)(4).[6]

For all these reasons, the court finds that Defendant Optrex has not demonstrated why it should be allowed to depose Mr. Reim or gain access to any documents he wrote or received that relate to this case. Thus, the court denies Defendant's request to depose Mr. Reim and also grants the related documents privileged status.

Sanctioning Government's Counsel

In this court's Memorandum Opinion and Order on Defendant's Motion to Compel Discovery, the court considered sanctioning Plaintiff's counsel for obstructing the discovery process. *See Optrex*, Slip Op. 04–80 at 10. The court observed that counsel's objections to Defendant's interrogatories were "improper" and that counsel for-

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[6] The pertinent parts of 19 U.S.C. § 1592(e) reads:

Notwithstanding any other provision of law, in any other proceeding commenced by the United States in the Court of International Trade for the recovery of any monetary penalty claimed under this section—

. . .

(4) if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence.

warded to Defendant's counsel voluminous quantities of unorganized documents that appeared to have little bearing on the case. *Id.* at 3, 9. However, since then, Plaintiff's counsel indicated that the documents were in the order Customs arranged them during the course of the investigation. *Aff. (public version) of Jay V. Ratermann, Special Agent with U.S. Immigration and Customs Enforcement* at 2. Rule 34 of this Court acknowledges that a "party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." USCIT R. 34(b). Customs may benefit from a better organizational system for its files, yet such poor organization itself does not warrant sanctions under USCIT R. 37. On the other hand, the court reiterates to government's counsel that "General Objections are not allowed" in any court in the federal system. *Optrex*, Slip Op. 04–80 at 3. The court will look with extreme disfavor upon further government use of such improper objections.

For all the foregoing reasons and after due deliberation, it is hereby

ORDERED that Plaintiff's privilege requests for documents denoted as E 49–109, E 303305, H 396–456, K 2–4, L 15–23, L 405–410, L558–564, and L 581–88 in its revised Privilege Log are DENIED, and that Plaintiff provide these documents to Defendant's counsel within one week from the date of this opinion; it is further

ORDERED that all documents listed in Plaintiff's revised Privilege Log, excepting those mentioned in the paragraph directly above, receive privileged status and are protected; it is further

ORDERED that Defendant's motion to depose Mr. Reim is DENIED, and that all related documents maintain their privileged status; and it is further

ORDERED that Plaintiff's Motion for Leave to File the Declaration of Jay V. Ratermann is GRANTED and accordingly relied on in this opinion.