Decisions of the United States Court of International Trade

SLIP OP. 05–06

BEFORE: RICHARD K. EATON, JUDGE

FUYAO GLASS INDUSTRY GROUP CO., GREENVILLE GLASS INDUSTRIES, INC., SHENZHEN BENXUN AUTOMOTIVE GLASS CO., TCG INTERNATIONAL, INC., CHANGCHUN PILKINGTON SAFETY GLASS CO., GUILIN PILKINGTON SAFETY GLASS CO., WUHAN YAOHUA PILKINGTON SAFETY GLASS CO., AND XINYI AUTOMOTIVE GLASS (SHENZHEN) CO., PLAINTIFFS, V. UNITED STATES, DEFENDANT, AND PPG INDUSTRIES, INC., SAFELITE GLASS CORP., AND VIRACON/CURVLITE, A SUBSIDIARY OF APOGEE ENTERPRISES, INC., DEF.-INTERVENORS.

CONSOL. COURT NO. 02–00282
PUBLIC VERSION

[Department of Commerce's Final Results of Redetermination sustained in part; remanded in part]

Dated: January 25, 2005

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OPINION AND ORDER

EATON, *Judge*: This consolidated antidumping action is before the court following remand to the United States Department of Commerce ("Commerce"). In *Fuyao Glass Industry Group Co. v. United States*, 27 CIT ___ , slip op. 03–169 (Dec. 18, 2003) (not reported in the Federal Supplement) ("*Fuyao I*"), the court sustained in part and remanded in part Commerce's final determination on windshields from the People's Republic of China ("P.R.C."). *See* Certain Automotive Replacement Glass Windshields From the P.R.C., 67 Fed. Reg. 6482 (ITA Feb. 12, 2002) (final determination) ("Final Determination"), *amended by* Certain Automotive Replacement Glass Windshields from the P.R.C., 67 Fed. Reg. 11,670 (ITA Mar. 15, 2002) ("Am. Final Determination").

BACKGROUND

Plaintiffs Fuyao Glass Industry Group Co., Greenville Glass Industries, Inc., Shenzhen Benxun Automotive Glass Co., TCG International, Inc., Changchun Pilkington Safety Glass Co., Guilin Pilkington Safety Glass Co., Wuhan Yaohua Pilkington Safety Glass Co., and Xinyi Automotive Glass (Shenzhen) Co. (collectively, "Plaintiffs") are exporters to the United States of automotive replacement glass windshields (the "Windshields") from the P.R.C., a nonmarket economy country ("NME").[1] This dispute involves (1) the price of float glass,[2] an input used in the manufacture of Windshields, that Plaintiffs purchased from suppliers in the market economy countries of Korea, Thailand, and Indonesia, and (2) the challenged treatment of other factors of production. In *Fuyao I*, familiarity with which is presumed, the court remanded to Commerce on several grounds. Pursuant to the court's order, Commerce issued its Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), and concluded that the record evidence supported its findings in the Final Determination with respect to four of the five remanded issues. Plaintiffs and Defendant-Intervenors PPG Industries, Inc., Safelite Glass Corp., and Viracon/Curvlite, a subsidiary of Apogee Enterprises, Inc. (collectively, "Defendant-Intervenors") timely responded to the Remand Results. The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). After reviewing the parties' submissions,

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

[2] For information regarding the float glass production process, see http://alzonca.tripod.com/glassprocess.html (last visited Jan. 25, 2005).

the administrative record, and all other papers and proceedings, the court remands this matter to Commerce for a second time.

STANDARD OF REVIEW

The court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i); *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i) (2000)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Id.* (citing *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). Furthermore, "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd* 810 F.2d 1137 (Fed. Cir. 1987) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Abbott v. Donovan*, 6 CIT 92, 97, 570 F. Supp. 41, 47 (1983)).

DISCUSSION

I. Reason to Believe or Suspect That Market Economy Purchases of Float Glass Are Subsidized

A. The "Reason to Believe or Suspect" Standard

On remand, the court instructed Commerce to "provide specific and objective evidence" to support its findings "that (1) all exports from Korea, Thailand, and Indonesia are subsidized, [and] (2) that, in particular, exports of float glass from these countries are subsidized." *Fuyao I*, 27 CIT at ____ , slip op. 03–169 at 24. In particular, the court noted that, with respect to the "reason to believe or suspect" standard, Commerce used the phrase "are subsidized," rather than "may be subsidized," and had thereby established a higher standard (i.e., that it should disregard prices it has reason to believe or suspect *are* subsidized) than that contemplated by the legislative history it consulted in constructing its methodology[3] (i.e., that Commerce should disregard prices it believes *may be* subsidized). *Id.* at ___ , slip op. 03–169 at 17 n.14, 20 n.16. With respect to its use of the word "are" rather than "may," Commerce states on remand:

> The "reason to believe or suspect" standard establishes a lower threshold than what is required to support a firm conclusion. Regardless of whether [Commerce] says "are" or "may," the "reason to believe or suspect" [standard] indicates that Commerce has not definitively determined that prices were in fact subsidized or dumped. It certainly was not Commerce's intent in its choice of language to alter a standard that it has applied many times, and that the CIT has affirmed on numerous occasions.

Remand Results at 8 (internal citation omitted). While Commerce seems to indicate that its decision to employ the word "are" rather than "may" has no effect on the "reason to believe or suspect" standard, it is worth noting that, with one exception, all of the cases on review in this Court have used a form of the word "are" in their discussions. *See, e.g., Luoyang Bearing Corp. v. United States*, 28 CIT ___ , ___ , slip op. 04–53 at 25 (May 18, 2004) ("The Court finds that when Commerce has reason to believe or suspect that a market-economy supplier's prices *are* subsidized, Commerce may reject market prices paid to the supplier in favor of surrogate prices for its calculation of [normal value].") (emphasis added); *see also Peer Bearing Co. v. United States*, 27 CIT ___ , ___ , 298 F. Supp. 2d 1328, 1336–37 (2003) ("Commerce's reason to believe or suspect that [Plaintiff's] supplier's prices *were* subsidized stemmed from a study, undertaken in connection with a previous investigation of steel products, in which Commerce discovered significant subsidies.") (emphasis added). The court has also examined several of Commerce's preliminary and final results of sales at less than fair value

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[3] The legislative history Commerce examined in developing its methodology for considering subsidization in an NME context pertains to 19 U.S.C. § 1677b(c)(4), which deals with valuation of factors of production in a market economy context. The statute states:

> The administering authority, in valuing factors of production under paragraph (1) [i.e., with respect to surrogate values], shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—
>
> (A) at a level of economic development comparable to that of the nonmarket economy country, and
>
> (B) significant producers of comparable merchandise.

The legislative history Commerce examined in developing its methodology for considering subsidization in an NME context deals with valuation of factors of production in a market economy context. That legislative history states: "In valuing such factors, Commerce shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices." Omnibus Trade and Competitiveness Act of 1988, H.R. Conf. Rep. No. 100–576, at 590 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1623.

investigations, all of which used the word "are." *See, e.g.*, Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the P.R.C., 68 Fed. Reg. 70,488, 70,489 (ITA Dec. 18, 2003) (final results) ("[W]e do not use the prices paid by PRC producers of [the subject merchandise] for inputs that we have a reason to believe or suspect *are* subsidized." (emphasis added); *see also* Certain Ball Bearings and Parts Thereof from the P.R.C., 67 Fed. Reg. 63,609, 63,614 (ITA Oct. 15, 2002) (prelim. determination) ("[C]onsistent with [Commerce's] practice concerning subsidized imports, we have not used the actual prices paid by PRC producers of material inputs which we have reason to believe or suspect *are* subsidized.") (emphasis added); Magnesium Metal From the P.R.C., 69 Fed. Reg. 59,187, 59,196 (ITA Oct. 4, 2004) (prelim. determination) ("We have found in other proceedings that these countries maintain broadly available, non-industry-specific export subsidies and, therefore, it is reasonable to infer that all exports to all markets from these countries *are* subsidized.") (emphasis added); Hand Trucks and Certain Parts Thereof From the P.R.C., 69 Fed. Reg. 29,509, 29,516 (ITA May 24, 2004) (prelim. determination). Having established this standard, Commerce may not abandon it without explaining why. *See Acciai Speciali Terni S.p.A. v. United States*, 25 CIT 245, 274–75, 142 F. Supp. 2d 969, 998 (2001) (noting that Commerce may change its position on an issue "providing that it explains the basis for its change and providing that the explanation is in accordance with law and supported by substantial evidence.") (internal quotation omitted). Thus, the court finds no reason to change its discussion found in *Fuyao I*.

In any event, while Commerce states that the "reason to believe or suspect" standard establishes a lower threshold than what is required to support a firm conclusion, it nevertheless "relied on its [countervailing duty] determinations . . . as substantial evidence to assess whether there was specific and objective evidence to support a reason to believe or suspect that Fuyao's market economy purchase prices *were* distorted. . . ." Remand Results at 10 (emphasis added). This language echoes that found in *China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 27 CIT ___ , ___ , 264 F. Supp. 2d 1229, 1243 (2003) ("*CMC I*"), in which the court held that Commerce "must demonstrate particular, specific, and objective evidence to uphold its reason to believe or suspect that the prices [the plaintiff] paid the supplier for the inputs were subsidized," and *China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 27 CIT ___ , ___ , 293 F. Supp. 2d 1334, 1337–38 n.4 (2003) ("*CMC II*"), in which the court reiterated its "insistence on specific and objective evidence (even for a 'belief' or 'suspicion' [that prices were subsidized]) [a]s an integral part of the substantial evidence analysis."); *see also Peer Bearing*, 27 CIT at ___ , 298 F. Supp. 2d at 1336 (internal quotation omitted) (noting that in order for a reasonable belief or suspicion to exist, "there must be 'a particularized and objective basis for suspecting' the existence" of subsidies.); *see also* Issues and Decision Mem. for Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the P.R.C., 66 Fed. Reg. 57,420 (ITA Nov. 15, 2001) (final results), 2001 WL 1456781, at Comment 12 (in which Commerce concluded that "this particular and objective evidence (that all exporters from these countries can benefit from these broadly available subsidies) supports a reason to believe or suspect that prices of the inputs purchased from these countries are subsidized.") (internal quotation omitted); Remand Results at 10 ("[P]rior [countervailing duty] findings may provide the basis for [Commerce] to also consider that it has particular and objective evidence to support a reason to believe or suspect that prices of the inputs from that country are subsidized."). Based on the foregoing, the court will rest its conclusion on whether the "reason to believe or suspect" standard is satisfied by determining if Commerce has found "specific and objective evidence" to support its determination.

1. Countervailing Duty Determinations

This Court has held that evidence of existing countervailing duty determinations, absent some evidence that the supplier of the merchandise could have taken advantage of the subsidy, does not satisfy the "reason to believe or suspect" standard. *See Luoyang Bearing Factory v. United States*, 27 CIT ___ , 259 F. Supp. 2d 1357, 1364 (2003) ("[T]he various countervailing duty determinations relied upon by Commerce *do not* include the hot-rolled bearing quality steel bar, the steel product *at issue in this case*.") (emphasis added); *see also CMC II*, 27 CIT ___ , ___ , 293 F. Supp. 2d 1334, 1336 (" ") (noting that in the prior case, *CMC I*, the court found Commerce's evidence of a subsidy program "involving subject merchandise *other than* [the merchandise at issue here] and companies *other than* [Plaintiff's] supplier" to be insufficient, since "neither the subject merchandise in question, nor [China National's] supplier was ever specifically investigated in a countervailing duty investigation.") (emphases added); Tapered Roller Bearings, 66 Fed. Reg. at Comment 1 ("[W]e concluded that the 'believe or suspect' standard is met when the importing country has a dumping or subsidy finding *on the input in question*.") (emphasis added). In finding that Commerce had sufficiently demonstrated on remand that it had reason to believe or suspect that the Plaintiff's suppliers received subsidies, the court in *CMC II* explained:

> In the *Remand Results*, Commerce emphasizes that CMC's supplier is a "member of a subsidized industry" and "could have benefitted" from subsidies generally available in the exporting country for exporters of steel products, regardless of the type of product or company, and further emphasizes that such subsi-

> dies were specifically found to be utilized by several steel producers.

Id. at 1337 (internal citation and footnote omitted); *see also CMC I*, 264 F. Supp. 2d at 1233 (noting that during oral argument, Commerce stated: "[A]s a matter of commonsense, we can assume that no one is going to leave money on the table. [Companies] are going to take advantage of a program that's out there and exists.").

Thus, after having examined *Luoyang Bearing Factory*, *CMC I* and *II*, and Commerce's determination in Tapered Roller Bearings, the court finds that, to justify a finding with respect to subsidization, Commerce must demonstrate by specific and objective evidence that (1) subsidies of the industry in question existed in the supplier countries during the period of investigation ("POI"); (2) the supplier in question is a member of the subsidized industry or otherwise could have taken advantage of any available subsidies; and (3) it would have been unnatural for a supplier to not have taken advantage of such subsidies.

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

> First, none of the more than 80 countervailing duty determinations cited by Commerce concerning Korean subsidies involved float glass, the product at issue in this case, nor for that matter did any of the countervailing duty determinations involve glass of any kind. . . . In like manner, none of the more than 170 countervailing duty determinations cited by Commerce for Thailand concern any kind of glass. . . . As to Indonesia, one of the countervailing duty determinations cited by Commerce concerns extruded rubber thread, and all of the others concern apparel and textiles (luggage, handbags, gloves, and the like). Not one of the determinations concerned float glass.

Fuyao I, 27 CIT at ____ , slip op. 03–169 at 20–22. The court then instructed Commerce to revisit whether it had reason to believe or suspect that all exports from Korea, Thailand, and Indonesia are subsidized and, if so, to "provide specific and objective evidence to support these findings." *Fuyao I*, 27 CIT at ____ , slip op. 03–169 at 24. Had it chosen to do so, Commerce could have re-opened the record upon remand in order to obtain additional evidence to support its findings. *See Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT ____ , ____ , 318 F. Supp. 2d 1339, 1353 (2004) ("If necessary, Commerce should re-open the record to establish a market value to compare to the . . . price [relied upon by Commerce] or to obtain another source for valuing [the subject merchandise]."). For the most part, however, Commerce has chosen to present no new evidence, claiming that it "is limited to the record evidence, thus no new factual information may be presented. . . ." Remand Results at 33. Thus, Commerce again cites the U.S. countervailing duty ("CVD") determinations it cited in its Final Determination. With respect to these CVD determinations, Commerce states that

> where the facts developed in U.S. or third-country CVD findings include subsidies that appear to be used generally (in particular, broadly available, non-industry specific export subsidies), it is reasonable to infer that all exports to all markets from the investigated country are subsidized . . . [p]rior CVD findings may provide the basis for [Commerce] to also consider that it has particular and objective evidence to support a reason to believe or suspect that prices of the inputs from that country are subsidized.

Remand Results at 10 (internal citation omitted). In addition, with respect to these prior CVD findings, Commerce states that

> [e]ach of the U.S. CVD determinations found countervailable general, non-industry specific export subsidy programs available in Korea, Thailand, and Indonesia. It is the very fact that the subsidy programs are based on export performance, that [Commerce] reasonably infers that the float glass suppliers from Korea, Thailand, and Indonesia may[4] have benefitted from these subsidies programs. Export subsidies that are not bestowed to a specific company or industry, such as those found to exist by [Commerce's] own investigations, are presumed to benefit all exporters that engage in international trade, such as Fuyao's suppliers from these countries.

Id. at 11. Commerce cites no new evidence to bolster its findings; rather, it relies upon the holding in *CMC II*. In *CMC II*, the court found that it was reasonable for Commerce to infer that a market economy supplier benefitted from subsidies, given the competitive nature of the industry and the fact that the supplier had engaged in foreign trade.[5] *Id.* at 1339. In its Remand Results, Commerce argues that "[t]he court in [*CMC II*] made this determination after accepting [Commerce's] argument that based on its own CVD determinations, there was substantial evidence on the record that the factor input prices paid by the respondent may have been subsidized due to

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[4] It is worth noting that Commerce appears to have applied a lesser standard than is required by its past practice, in which the "are subsidized" standard was used. *See* discussion *supra* pp. 5–7.

[5] The court in *CMC II* also considered that CMC's supplier, an exporter of steel products, could have benefitted from subsidies generally available in the exporting country for steel exporters, and that such subsidies were specifically found to be utilized by several steel producers. *CMC II*, 27 CIT at _____ , 293 F. Supp. 2d at 1337.

'generally available, non-company specific export subsidies." Remand Results at 9.

Plaintiffs dispute Commerce's use of prior CVD findings to support its reason to believe or suspect that the prices Fuyao paid to its float glass suppliers may have been subsidized. Plaintiffs maintain that

> *none* of the countervailing duty determinations cited by Commerce concerning Korea, Thailand or Indonesia involve float glass producers or similar industries, and there is no record evidence to suggest that the subsidy programs are even available to float glass producers. . . . In light of the above, Commerce's heavy reliance on [*CMC II*] is misplaced. *China National* involved market economy purchases of steel products as opposed to float glass. In that case, there was substantial record evidence of subsidy programs specifically benefitting the steel industry, and Commerce emphasized in its remand that any member of the steel industry " 'could have benefitted' from subsidies generally available in the exporting country for exporters of steel products, regardless of the type of product or company, and further emphasize[d] that such subsidies were specifically found to be utilized by several steel producers."

Fuyao's Comments Regarding Remand Results ("Fuyao's Comments") at 3–4 (emphasis in original; internal citation and footnote omitted). Thus, Plaintiffs claim that Commerce's reliance on *CMC II* is misplaced because of the differences in the evidence produced by Commerce.

2. Other Evidence

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

> The WTO Report for Korea indicates only that "Korea has aggressively promoted exports through a variety of policy tools," but does not indicate which exporters benefit from such tools. . . . Likewise, the WTO Report for Thailand lists several financing schemes for exporters, but does not provide information as to restrictions on or qualifications for receiving such assistance. . . . Finally, the WTO Report for Indonesia, which reviews exports subsidies and other promotion policies in that country, was completed in 1999, one year before the period of review for this investigation.

Fuyao I, 27 CIT at ___ , slip op. 03–169 at 20, 21, 22 (internal citation omitted). In addition, Commerce again cites the U.S. Trade Representative's 2001 National Trade Estimate Report on Foreign Trade Barriers ("NTE Report") concerning Korea's and Indonesia's export subsidy practices. As to these reports, the court in *Fuyao I* stated:

> [T]he NTE Report [for Korea] discusses several export loan and credit programs, but does not indicate which sectors, producers, or products are eligible for such aid. . . . [For Thailand,] the NTE Report indicates only that "Thailand's programs to support trade in certain manufactured products . . . may constitute export subsidies." . . . The NTE Report for Indonesia indicates that the export subsidies for "special exporters" (a term which is not defined) lapsed in 1999.

Id. Thus it is evident that, in large measure, Commerce has chosen to present nothing new with respect to these matters; therefore, the observations contained in *Fuyao I* remain valid.

Only one of the reports Commerce cites has been sufficiently explained in the Remand Results so as to provide a reason to believe or suspect that the prices Plaintiffs paid to their suppliers were subsidized. With respect to reports downloaded from the Thailand Board of Investment ("BOI") Web site concerning incentives that are provided to certain companies in Thailand, the court in *Fuyao I* found that "they are available for several 'priority areas' such as agriculture and public utilities, as well as for 'targeted industries.' However, none of the targeted industries listed appear to include the manufacture of float glass." *Fuyao I*, 27 CIT at ____ , slip op. 03–169 at 21. In the Remand Results, however, Commerce explained:

> Chapter 4 of the BOI Guide provides a list of "Activities Eligible for Investment Promotion." Section 2, number 2.5, on page 26 of Chapter 4 of the BOI Guide, specifically lists [ ] the "manufacture of glass or glass products" as an activity eligible for investment promotion with the only condition being that the producer must be located in either "zone 2 or 3." Page 8 of the BOI Guide defines "Zone 2" as including the province of [[ ]]. [In] the "BOI Promoted Company Database," which lists the companies who have been approved to receive BOI incentives. [[
>]], one of Xinyi's market economy float glass suppliers is listed as a company which has been approved for BOI incentives because it is located in the [[ ]] province.

Remand Results at 34.

Based on the new information and explanation, the court finds that Commerce has shown by specific and objective evidence that there is "reason to believe or suspect" that one of Plaintiffs' suppliers received subsidies. First, it is clear that subsidies of the industry in question, i.e., the manufacture of float glass, existed in the supplier countries during the POI, and that the supplier in question, [[ ]], is a member of that industry and could have taken advantage of any available subsidies. Moreover, the court finds that it would have been unnatural for [[ ]] not to have taken advantage of any available subsidies, given "the competitive nature of market economy countries." *Id.* at 14. For these reasons, the court finds that Commerce has shown that subsidies of the industry in question existed in the supplier country, Thailand, during the period of investigation; that the supplier in question is a member of the subsidized industry, and could have taken advantage of any available subsidies; and that it would have been unnatural for that supplier to not have taken advantage of any available subsidies.

With respect to other suppliers in other market economy countries, however, Commerce has not provided specific and objective evidence to support a reason to believe or suspect that the prices Fuyao paid to these suppliers were subsidized. On remand, Commerce may concur with the court's conclusion or, if it continues to find that it has reason to believe or suspect that these prices were subsidized, it must re-open the record to provide, if possible, additional evidence to support its conclusion that the prices Fuyao paid to its suppliers were subsidized. Provided, however, that because Congress did not intend that Commerce conduct a formal investigation to determine a company's particular subsidy level in a market economy country, it is not required to do so here. *See* Omnibus Trade and Competitiveness Act of 1988, H.R. Conf. Rep. No. 100–576, at 590, *reprinted in* 1988 U.S.C.C.A.N. 1623.

B. *De Minimis* Subsidization Levels

Next, the court in *Fuyao I* addressed Commerce's claim that "the level of subsidization in a CVD finding on a certain product and on certain exporters, whether de minimis or not, is irrelevant." *Fuyao I*, 27 CIT at ____ , slip op. 03–169 at 24 (internal citation omitted). With respect to this finding, the court instructed Commerce to

> fully and completely explain why it would be reasonable to resort to surrogate values, rather than actual amounts paid, where any subsidization—even *de minimis* subsidization—is present. In particular, Commerce shall explain how, if a subsidy is found to be *de minimis*, that subsidy would nevertheless rise to the level of a distortion in prices that would justify Commerce's decision to depart from actual input prices.

Fuyao I, 27 CIT at ____ , slip op. 03–169 at 24–25 (internal citation and footnote omitted). In its Remand Results, Commerce states:

> [T]he fact that one particular program confers a "de minimis" level of subsidy has no relevance to the issue of whether or not [Commerce] may disregard a market economy price it has reason to believe or suspect is subsidized. What is relevant to

> [Commerce's] determination of whether it has a reason to believe or suspect that prices may[6] be subsidized, is the existence of a subsidy program. A subsidy is, in itself, a market distortion. Further, as [Commerce] discussed in the *Draft Results* as well as above, Congress does not require an actual finding of subsidization, nor does it require a formal investigation.

Remand Results at 37–38.

Plaintiffs question Commerce's reliance on multiple findings of *de minimis* subsidization, since elsewhere in the antidumping laws, *de minimis* subsidization levels are treated as zero. *See Fuyao I*, 27 CIT at ___ , slip op. 03–169 at 24 n.17 ("[C]ompanies with *de minimis* dumping margins are considered to have a dumping margin of zero."); *see also* Xinyi Automotive Glass (Shenzhen) Co.'s Comments on Remand Determination ("Xinyi's Comments") at 8 ("If the level of subsidization falls below the *de minimis* threshold,[7] [in the context of market economy countries, Commerce] 'shall disregard [the] de minimis countervailable subsidy.' "); *Carlisle Tire and Rubber Co. v. United States*, 1 CIT 352, 354, 517 F. Supp. 704, 706 (1981) ("[T]here is clear precedent for applying the *de minimis* rule to 'mandatory' statutes and the countervailing duty statute in particular. Considering that a *de minimis* benefit is, by definition, of no significance whatever. . . . The court therefore holds that the *de minimis* doctrine is applicable to cases arising under the countervailing duty statute.").

"It is well-established that [C]ommerce is granted tremendous deference in selecting the appropriate methodology. As long as [its] decision is reasonable, then Commerce has acted within its authority even if another alternative is more reasonable." *Koyo Seiko Co. v. United States*, 16 CIT 539, 541–42, 796 F. Supp. 517, 523 (1992). Here, "the statute [19 U.S.C. § 1677bb(c)(1)] does not specify a particular level of subsidization at which actual market prices may be discarded. In fact, the statute does not mention market prices."[8] *CMC II*, 27 CIT at ___ , 293 F. Supp. 2d at 1339. Therefore, as the Court in *Peer Bearing* explained:

> The level of subsidization does not prevent Commerce from determining that it has "reason to believe or suspect" that prices paid are subsidized. Any level of subsidization found in the ex-

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[6] Here again, Commerce appears to have applied a lesser standard than is required by its past practice. *See* discussion *supra* pp. 5–7.

[7] The *de minimis* threshold is 3% for Korea, Thailand, and Indonesia. *See* Developing and Least-Developed Country Designations under the Countervailing Duty Law, 63 Fed. Reg. 29,945, 29,948 (ITA June 2, 1998).

[8] The court notes that the statutory definition of *de minimis* is used only in the context of the industry under investigation, not individual suppliers. *See* 19 C.F.R. § 351.106 (2004). There is no legislation requiring that this definition be carried over into other contexts, nor does any legislative history so indicate.

> porting country is enough evidence to support a determination that Commerce has "reason to believe or suspect" that prices are distorted.

Peer Bearing, 298 F. Supp. 2d at 1337. This conclusion is particularly appropriate in light of the legislative history of the market economy statute Commerce consulted when constructing its NME methodology. This legislative history indicates that, in a market economy, Congress did not intend that Commerce should conduct a formal investigation to determine a company's particular subsidy level. *See* Omnibus Trade and Competitiveness Act of 1988, H.R. Conf. Rep. No. 100–576, at 590, *reprinted in* 1988 U.S.C.C.A.N. 1623. Since a formal investigation would be required to determine exactly what level of subsidization a supplier received, it is reasonable for Commerce to conclude that the level of subsidization should not be a factor in its determination in either a market economy or NME context. *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1379 (Fed. Cir. 2001) ("We conclude that *Chevron* deference is afforded to Commerce's statutory interpretations as to the appropriate methodology. . . ."). Thus, the court finds that Commerce has sufficiently explained its decision to resort to surrogate values here, and affirms its conclusion.

II. Water as a Separate Factor of Production

In its Final Determination, Commerce found that "[i]t is clear from the production process for windshields that water usage is significant. . . ." Issues and Decision Mem. for the Final Determination, 2002 WL 243660, at Comment 25. Commerce then valued water as a separate factor of production, rather than as a part of factory overhead. Commerce stated that this treatment would not result in an impermissible double counting of water as an input "because it 'valued the overhead using only the line-items 'depreciation', 'stores and spare parts consumed', and 'repairs and maintenance' from [Indian surrogate company] St. Gobain's annual report. None of these line items would include the input water." *Fuyao I*, 27 CIT at ___ , slip op. 03–169 at 26 (internal citation omitted). Its its calculations, Commerce relied on the financial statements of the Indian float glass manufacturer, St. Gobain. Because the St. Gobain financials could reasonably be assumed to encompass all of the factors of production for Windshields, the court questioned whether double counting would not result from Commerce's treatment and challenged its conclusion that water could not reasonably be included under "stores and spare parts," stating:

> First, the amount allocated to "stores and spare parts" is sufficiently large to accommodate a significant input such as water. Second, only "stores and spare parts" could arguably include water, since it is improbable that water would be included un-

> der "depreciation" or "repairs" as those line items have been defined.

Id. at 27. The court instructed Commerce "to demonstrate that its decision to value water as a separate factor of production, rather than as part of factory overhead, does not result in impermissible double counting." *Id.* at 27–28.

In its Remand Results, Commerce was unable to identify where water was accounted for in St. Gobain's financial statement, even though the statement apparently accounted for all of the production costs for its windshields. Rather, Commerce found that, "based on [our] experience and observations, where a producer uses water for incidental purposes, it will be included in factory overhead, but where it is used in significant quantities, that company will treat water as a separate factor of production." Remand Results at 43. Commerce further explained that "our experience in conducting antidumping reviews leads us to find that the 'stores and spare parts' line item consists of 'equipment and machinery used in the production process,' such as 'tools, grinding wheels, and spare parts' for the equipment and machinery." *Id.*

Commerce also addressed the court's concern that, since "stores and spare parts" comprised 26% of the total factory overhead, that amount "is sufficiently large to accommodate a significant input such as water." *Fuyao I*, 27 CIT at ____ , slip op. 03–169 at 27. Commerce explained:

> Our examination of Saint Gobain's financial statements indicates that the amount allocated to "stores and spare parts" that could reasonably be determined to include water is, in fact, only 9% of factory overhead. We made this determination based on the fact that in Saint Gobain's financial statement the line item "stores and spare parts" is subdivided into "imported" and "indigenous" "stores and spare parts." We find that the water, used as described in the production process, would not be imported, but rather is indigenous. The "indigenous" subcategory of "stores and spare parts" accounts for only 36.42% of the total of "stores and spare parts," while "imported" "stores and spare parts" make up the other 63.58% of the total of "stores and spare parts." Thus, while the whole line item of "stores and spare parts" comprises 26% of factory overhead, the amount allocated to "stores and spare parts" that could reasonably be determined to hold water (*i.e.*, "indigenous stores and spare parts") is only 36.42% of that 26%, or 9% of factory overhead. There would be no room in this 9% figure to accommodate both the normal tools, equipment, spare parts and other indirect materials that a company such as the producer must keep on hand, and to accommodate such a significant input of water.

Remand Results at 44–45.

Next, Commerce maintained that water is a "direct input" in the production of automotive replacement glass. In reaching this conclusion, Commerce outlined three criteria for determining when water should be valued separately: "Normally, when water is used for more than incidental purposes, is required for a particular segment of the production process, or appears to be a significant input in the production process, it is [Commerce's] practice to value water directly, and not in factory overhead." *Id.* at 40.

Finally, Commerce cited its "unique ability" and "experience" in conducting antidumping investigations to support its decision to value water as a separate factor of production. *Id.* at 45. Commerce stated:

> In this investigation, [Commerce] based its determination on its experience and expertise in conducting antidumping investigations and administrative reviews, its longstanding practice of determining the manner in which water is treated for purposes of assigning a surrogate value, its verification of Respondents' production and accounting processes, and its analysis of the surrogate financial statements, to determine that water is valued separately in the production of [the subject merchandise], and not in factory overhead.

Id.

Plaintiffs assert two principal arguments. First, they argue that Commerce cannot rely merely on its "ability" and "experience" for its decision to value water separately. "To the contrary, Commerce has the obligation to demonstrate that its decision was based on substantial evidence in this case, regardless of its experience in other cases." Xinyi's Comments at 29; *see also* Fuyao's Comments at 8 ("Commerce['s] finding is supported by nothing more than assumptions and speculations about the Saint Gobain financial statement, which is wholly inadequate."). Second, Plaintiffs argue that Commerce's own determinations, several of which are cited by both parties, actually support Plaintiffs' position, not Commerce's.

After surveying a number of Commerce's determinations, the court has discerned several criteria that Commerce uses in determining whether a given material should be included as a part of factory overhead. First, Commerce must consider whether the material is physically incorporated into the final product, since materials that are not physically incorporated into a final product are considered to be "indirect" materials that are valued as part of factory overhead. In Brake Drums and Brake Rotors From the P.R.C., 62 Fed. Reg. 9160 (ITA Feb. 28, 1997) (final determination), Commerce stated:

> According to the [Indian] Compendium of Statements and Standards, in order for a material to be considered as part of factory overhead, it must "assist the manufacturing process, but . . . not enter physically into the composition of the finished

> product." We agree that dextrin, steel shot, antirust, cutting oil, cleaning agent and dehydrating oil are indirect materials and *should be treated as part of factory overhead, because the function of these materials is to "assist" in the manufacturing process and [they] do not enter physically into the composition of the finished product.*

Id. at 9,169 (emphasis added). Commerce repeated this policy in the Issues and Decision Mem. for Certain Malleable Iron Pipe Fittings From the P.R.C., 68 Fed. Reg. 61,395 (ITA Oct. 28, 2003) (final results):

> Therefore, because [Commerce] has recognized in other PRC antidumping cases that these inputs are not physically incorporated into the final product and that Indian accounting practices treat molding materials (sands, molding clays, bentonite and coal powder) as overhead items, we agree with respondents that we should not treat these items as direct material inputs.

Comment 11. In Bicycles From the P.R.C., 61 Fed. Reg. 19,026 (ITA Apr. 30, 1996) (final results), Commerce further distinguished between materials incorporated into the finished product and those that are "consumables":

> [T]he chemicals in question are essential for producing the finished product and are incorporated into the product (i.e., in pretreating the components, *the chemicals permeate the components and are not completely washed off*). These chemicals appear to be significant inputs into the manufacturing process rather than miscellaneous or occasionally used materials, i.e., cleaning supplies which might normally be included in consumables.

Id. at 19,040.

Second, in the past, Commerce has included water in factory overhead unless it is specially treated and required for a particular segment of the production process. In Saccharin from the P.R.C., 59 Fed. Reg. 58,818 (ITA Nov. 15, 1994) (final determination), Commerce explained:

> We agree with respondents that water . . . should be included in factory overhead. Because it is normal practice to include such cost in factory overhead, we find it reasonable to presume that water . . . [is] included in the Indian overhead value we used. Therefore, if we were to assign separate values to water . . . we would be double-counting the cost. However, with respect to the distilled water . . . we are not persuaded that the input would normally be included in factory overhead. Unlike other forms of water used in production facilities, distilled water is specially processed, packaged, and shipped to customers. Further, it is

> required for a particular segment of the production process for which the standard water will not suffice.

Id. at 58,824; *see also* Issues and Decision Mem. for Sebacic Acid from the P.R.C., 65 Fed. Reg. 49,537 (ITA Aug. 14, 2000), (final results), 2000 WL 1139088, at Issue 3 ("Because the respondents in this proceeding have not indicated the use of a special type of water in their sebacic acid production . . . we have not separately valued water in accordance with our practice.").

Finally, where Commerce does not know whether the cost of water is included in the surrogate value for factory overhead, as here, Commerce will determine on a case-by-case basis whether it will value water separately or not. *See id.* ('[Commerce] . . . could not separate the cost of water from the factory overhead expense. . . . Consequently, because normal accounting practice includes the cost of water in factory overhead expense, [Commerce] presumed that the cost of water was included in the [factory] overhead data in order to avoid 'double-counting' water costs."); *cf.* Issues and Decision Mem. for Freshwater Crawfish Tail Meat from the P.R.C., 66 Fed. Reg. 20,634 (ITA Apr. 24, 2001) (final results), 2001 WL 416758, at Comment 7 (valuing water as a separate factor of production on the grounds that "the process of cleaning . . . requires large quantities of water. . . .").

Based on the foregoing survey of Commerce's determinations, it appears that Commerce's "experience" does not demand the findings reached here. As a result, the court finds that Commerce has not justified its conclusion that water should be included as part of factory overhead, and not valued as a separate factor of production. First, the water at issue here is used solely for cleaning the Windshields, and is not physically incorporated into the finished product. As Commerce stated in its Remand Results: "Water is vital to the production process to wash the glass after cutting to ensure that it is free of debris, and to clean the glass prior to the 'sandwiching' of the PVB between the panes of glass." Remand Results at 41. Thus, under the reasoning of Brake Drums and Malleable Iron Pipe Fittings, water that is not physically incorporated into the finished product is typically accounted for in factory overhead, in accordance with standard Indian accounting practices.

Second, the determinations in Saccharin and Sebacic Acid confirm that Commerce has differentiated between standard water use and specialized water use. In Saccharin, Commerce found that standard water should be included in factory overhead. Only distilled water, "for which the standard water will not suffice," was to be valued as a separate factor of production. Here, Commerce makes no claim that specialized water was used for cleaning the Windshields.

Third, the determination in Sebacic Acid instructs that, where Commerce is unable to determine where water is accounted for in the surrogate financial statement, normal accounting practices dictate that the cost of water is treated as a factory overhead expense and not valued as a separate factor of production.

Finally, Commerce has provided no evidence tending to justify its conclusion that "[t]here would be no room in this 9% [indigenous stores and spare parts] figure to accommodate . . . such a significant input of water." Remand Results at 44–45.

Although the court is mindful of the deference owed to Commerce's "specialized role as administrator of antidumping investigations," *Union Camp Corp. v. United States*, 23 CIT 264, 283, 53 F.Supp.2d 1310, 1328 (1999), Commerce's determinations must nevertheless be supported by substantial evidence. Here, Commerce has failed to adequately explain why water should be valued as a separate factor of production, when the St. Gobain financial statement appears to contain all of the costs associated with production of the Windshields. In addition, Commerce's own determinations, when considered in the aggregate, tend to show that Commerce typically values material inputs as a separate factor of production only when that input is physically incorporated into the finished product. Because the water at issue is used for cleaning purposes, and is not incorporated into the finished product or specially treated, to include it as a separate factor of production would violate Commerce's own past practice. Thus, on remand, Commerce shall value water as a part of factory overhead or, if it continues to find that water should be valued as a separate factor of production, explain, with specificity, why doing so does not contravene its determinations in Brake Drums and Brake Rotors, Certain Malleable Iron Pipe Fittings, Bicycles, Saccharin, and Sebacic Acid.

III. "Stores and Spare Parts"

In its Final Determination, Commerce included the line item "stores and spare parts" from St. Gobain's financial statement in factory overhead when calculating the surrogate factory overhead ratio. Commerce found that this line item "is included as a miscellaneous part of overhead, and generally includes indirect materials, and not direct materials consumed in the production process." *Fuyao I*, 27 CIT at ___ , slip op. 03–169 at 29 (internal citation omitted). Fuyao argued that "since the St. Gobain financial statement's line item 'Cost of Materials Consumed' accounted only for the two main raw materials, float glass and PVB, 'it is obvious from the St. Gobain financial statements that other raw materials [such as mirror buttons, antenna wires, nails, and screws] are included in 'stores and spare parts.' " *Id.* at ___ , slip op. 03–169 at 28 (internal citation omitted). Thus, Fuyao argued, Commerce's factory overhead ratio was skewed, since it included these other raw materials in factory overhead, while it simultaneously excluded them from the cost of materials consumed. Fuyao explained:

> When calculating the factory overhead ratio, the Department divided Saint Gobain's overhead costs (Depreciation + Stores and Spare Parts + Repairs and Maintenance) by Total Material Costs (Materials + Energy + Labor). . . . However, . . . the overhead costs included the other raw materials while the cost of materials only included the cots [sic] for PVB and float glass. Accordingly, the Department divided an *inflated* total overhead cost(inclusive of other raw materials) by an *understated* total cost of materials (exclusive of the other raw materials), resulting in an artificially higher factory overhead ratio.[9]

Id.

The court agreed with Fuyao, saying that "[i]t is not sufficient for Commerce to conclude, without more, that since the stores and spare parts line item generally includes indirect materials, it may not *also* include the additional direct materials at issue here." *Id.* at 31 (emphasis in original). On remand, the court instructed Commerce "to provide an explanation as to where these additional materials are valued in St. Gobain's financial statement, if they are not part of stores and spare parts." *Id.*

In its Remand Results, Commerce explained that its

> best understanding is that stores and spare parts cannot contain direct materials because stores and spares is a component of factory overhead and Indian accounting principles do not permit the valuation of direct materials in factory overhead. . . . Thus, any material that physically enters into the composition of the finished product cannot be a part of factory overhead.

Remand Results at 59, 60. In addition, Commerce further explained that, while these direct materials cannot be part of factory overhead, Commerce cannot precisely locate them in St. Gobain's financial statement because "[i]t is impossible for [Commerce] to further dissect the financial statement of a surrogate company as if the surrogate company were an actual party. . . ." *Id.* at 58. In other words, Commerce cannot state with certainty where these additional direct materials are accounted for in St. Gobain's financial statement, or if they are even used by St. Gobain at all:

> Because Saint Gobain is a surrogate company, [Commerce] does not have the precise information required to determine definitively whether the other direct materials are valued in the

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[9] The factory overhead ratio is determined by dividing the total factory overhead expenses by the total material, energy, and labor costs used to produce the subject merchandise in the surrogate country. The resulting surrogate ratio is multiplied by Commerce's calculated factors of production for the surrogate in order to best approximate the overhead expenses that would be incurred by the comparable NME producer. *See* Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the P.R.C., 63 Fed. Reg. 63,842, 63,850 (ITA Nov. 17, 1998) (final results).

> stores and spare parts line item or elsewhere in Saint Gobain's financial statement. Therefore, by its nature . . . [Commerce's] determination cannot be exact. For example, in this case [Commerce] cannot be certain that the other direct materials at issue are even used by Saint Gobain for the production of . . . windshields.

Id. at 59.

Having excluded factory overhead as a possible location for the valuation of these direct materials, Commerce offers two possible alternatives to explain where these materials might be accounted for in St. Gobain's financial statement. First, Commerce examined the financial statement of another Indian producer, Atul Glass Industries Limited ("Atul"), and inferred from its examination that "Atul decided to only report . . . one consumption value for numerous direct materials, because the other direct materials are so small compared to float glass and PVB that they do not need to be listed individually for the purposes of preparing public financial statements." *Id.* at 61. By likening Atul's financial statement to St. Gobain's, then, Commerce concludes that

> [t]he value of the other direct materials relative to the value of glass and PVB is so small that it is reasonable to presume that the other direct material values are captured in Saint Gobain's raw materials consumed, but that Saint Gobain simply decided not to list the other direct materials separately.

Id. at 62. Thus, Commerce concluded that these materials are probably accounted for under "raw materials consumed," but, like Atul, St. Gobain decided not to list these other direct materials separately. Alternatively, Commerce found it possible that St. Gobain did not use these direct materials at all in its production of its windshields, given the lack of record evidence showing otherwise. *See* Def.'s Resp. to Pls.' Comments at 23–24.

Plaintiffs first argue that, by showing where the additional materials are *not* included, Commerce has failed to follow the court's remand instruction to "provide an explanation as to where these additional materials are valued in St. Gobain's financial statement. . . ." *Fuyao I*, 27 CIT at ____ , slip op. 03–169 at 31. Plaintiffs further argue that Commerce's assumption that the St. Gobain financial statement, like Atul's, likely does not list *all* raw materials, even though it includes them in the cost of materials consumed, is not supported by substantial evidence since

> how Atul Glass reported certain direct materials is not demonstrative of how Saint Gobain might record similar inputs. More important, how Atul Glass recorded certain direct materials is unresponsive to the Court's instruction to Commerce to explain why Saint Gobain's stores and spare parts category, in addition

> to indirect materials, might not *also* include the additional direct materials at issue here.

Xinyi's Comments at 34 (emphasis in original).

The court finds that Commerce's determination that "stores and spare parts" does not contain the additional raw materials at issue here is reasonable, given that, in accordance with Indian accounting practices, factory overhead contains indirect materials, not direct materials. *See* Brake Drums, 62 Fed. Reg. at 9,169 ("According to the [Indian] Compendium of Statements and Standards, in order for a material to be considered as part of factory overhead, it must "assist the manufacturing process, but . . . not enter physically into the composition of the finished product."). As Commerce has explained, "[O]ur experience in conducting antidumping reviews leads us to find that the 'stores and spare parts' line item consists of 'equipment and machinery used in the production process,' such as 'tools, grinding wheels, and spare parts' for the equipment and machinery." Remand Results at 43 (quoting Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the P.R.C., 62 Fed. Reg. 6,173, 6182 (ITA Feb. 11, 1997) (final results). In other words, "stores and spare parts" typically contains indirect materials such as the tools and machinery used to produce the subject merchandise, not materials that are incorporated into the merchandise. As a result, the court finds it reasonable for Commerce to conclude that St. Gobain, like Atul, accounted for these raw materials at issue elsewhere, under "raw materials consumed."[10] Thus, the court finds no necessity to exclude stores and spare parts from the numerator in calculating the factory overhead ratio. "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd* 810 F.2d 1137 (Fed. Cir. 1987) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Abbott v. Donovan*, 6 CIT 92, 97, 570 F. Supp. 41, 47 (1983)).

IV. Commerce's Profit Methodology

In *Fuyao I*, the court determined that, in its calculation of normal value, Commerce reasonably included only positive profit amounts. *See Fuyao I*, 27 CIT at ___ , slip op. 03–169 at 34. The court, how-

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[10] The court finds, however, that Commerce's alternative possibility—that St. Gobain did not use these additional materials at all—to be unreasonable, as it contravenes Commerce's own conclusion in its Final Determination. *See* Issues and Decision Mem. for the Final Determination, 2002 WL 243660, at Comment 10 ("Direct inputs other than float glass and PVB are almost always included in . . . windshields (ink, mirror buttons, etc).").

ever, questioned whether Commerce had fully considered the directive in 19 U.S.C. § 1677b(e)(2)(B)(iii), which states that the constructed value of imported merchandise "shall be an amount equal to . . . the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, *except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers*. . . ." *Id.* (emphasis added). In its Final Determination, Commerce examined three Indian surrogate companies: St. Gobain, Asahi India Safety Glass Ltd. ("Asahi"), and Atul Glass. However, when calculating normal value, Commerce used the financial statement of only one of those companies, Asahi, because it was the only one with a positive profit. *See* Issues and Decision Mem. for the Final Determination, 2002 WL 243660, at Comment 21 (internal citations omitted).

On remand, the court instructed Commerce to "explain why, given that the Asahi profit amount was the highest profit amount of any Indian company on the record, the use of the Asahi profit figure alone complies with the statute's provisions." *Fuyao I*, 27 CIT at ____ , slip op. 03–169 at 38. In other words, because, in a market economy country, the statute prevents Commerce from using a profit amount that exceeds that "normally realized" by exporters or producers, Commerce was required to explain why, in constructing its NME methodology, it was proper for it to use the profit figure of the only company on the record with a positive profit.

In its Remand Results, Commerce explained that:

> [I]t is section 1677b(c) of the statute that controls how [Commerce] calculates profit. Section 1677b(e) only applies for purposes of calculating constructed value market economy cases. Therefore, [Commerce's] decision to use only positive profits to calculate a surrogate profit ratio in an NME context does not conflict with section 1677b(e)(2)(B)(iii), as this section does not control [Commerce's] NME methodology.

Remand Results at 69. Commerce further explained that, "[i]n developing its method for valuing profit in NME cases, [Commerce] borrowed a logic contained in section 1677b(e) that 'profit' necessitates a profit figure. However, section 1677b(e) has never controlled the valuation of profit in NME cases." *Id.* at 70.

Plaintiffs argue that "Commerce believes that it can choose to borrow logic when it wants and choose to disregard logic when it is so inclined." Xinyi's Comments at 38. While recognizing that Commerce is not bound to follow its market economy methodology in the NME context, the court agrees that Commerce has failed to explain why it is reasonable for it to ignore a clear instruction from Congress with respect to constructed value in market economy countries when developing its methodology in NME cases. In its Final Determination, Commerce "borrowed the logic" from 19 U.S.C. § 1677b(e)(2)(A), which deals with market economy countries, to support its finding that the term "profit" should include only positive amounts. In *Fuyao I*, the court found that Commerce's reliance on this statute in an NME context was reasonable. Pursuant to the same statute, however, in a market economy context the profit amount "may not exceed the amount normally realized by exporters or producers. . . ." 19 U.S.C. § 1677b(e)(2)(B)(iii).

In choosing to rely on section 1677b(e) to support its argument with respect to calculating profits, Commerce must comply with the court's directive to take section 1677b(e)(2)(A) "*fully* into consideration." *Fuyao I*, 27 CIT at ____ , slip op. 03–169 at 37 (emphasis added). On remand, should Commerce continue to rely on section 1677b(e) only for its definition of profit, while disregarding the statute's other directives concerning profit, it may not merely rely upon the notion that it is not required to conform to the market economy statute; rather, it must explain why that methodology is reasonable in an NME context. *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1379 (Fed. Cir. 2001) ("*Chevron* deference is afforded to Commerce's statutory interpretations as to the appropriate methodology. . . .").

V. Purchase of Traded Goods

In *Fuyao I*, the court noted that both Commerce and Plaintiffs "acknowledge that there is insufficient evidence to determine where expenses associated with the purchase of traded goods[11] are accounted for in St. Gobain's financial statement." *Fuyao I*, 27 CIT at ____ , slip op. 03–169 at 41. Therefore, on remand, the court instructed Commerce to correct the calculation of the selling, general, and administrative ("SG&A") ratio[12] by either "(1) eliminating expenses relating to the purchase of traded goods from the numerator, (2) including costs relating to the purchase of traded goods in the denominator, or (3) developing some other reasonable method for taking traded goods into account." *Id*.

In its Remand Results, Commerce reexamined the record and determined that the line item "purchase of traded goods" should be included in the denominator of the SG&A ratio. In doing so, Commerce explained that its

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[11] "Traded goods" are products that are purchased and then resold by a company. *See Timken Co. v. United States*, 23 CIT 509, 518, 59 F. Supp. 2d 1371, 1379 (1999).

[12] SG&A are the general expenses related to the cost of manufacturing. *Magnesium Corp. of Am. v. United States*, 20 CIT 1092, 1104, 938 F. Supp. 885, 898 (1996). SG&A includes labor, materials, factory overhead, and energy costs. *See FMC Corp. v. United States*, 27 CIT _____ , _____ , slip. op. 03–15 at 4 (Feb. 11, 2003). The SG&A ratio is multiplied by the cost of manufacture in order to obtain the amount of SG&A expenses. *See* Titanium Sponge From the Russian Federation, 64 Fed. Reg. 1599, 1601 (ITA Jan. 11, 1999) (final results).

> regulations direct that, in allocating costs, we "take into account production quantities, relative sales values, and other qualitative and quantitative factors associated with the manufacture and sale of the subject merchandise. . . ." We interpret this regulation to mean making an "apples to apples" comparison (*i.e.*, a comparison of like entities) of the numerator and denominator in the SG&A ratio. Since the surrogate (*i.e.*, Saint Gobain) has selling, general, and administrative expenses for both the cost of manufacturing and the purchase of traded goods in its SG&A, which comprises the numerator of the SG&A ratio, in order to achieve a symmetrical ratio for purposes of this allocation, we have included the purchase of traded goods in the denominator of the SG&A ratio. Therefore, because the surrogate company's expenses associated with the purchase of traded goods cannot be excluded from the numerator of the SG&A ratio . . . we have included the purchase of traded goods in the denominator of the SG&A ratio (*i.e.*, in the cost of goods sold).

Remand Results at 78. The court agrees that Commerce's "apples to apples" comparison is proper in this instance, and infers from Plaintiffs' silence with respect to this issue that they do not dispute Commerce's methodology.

CONCLUSION

Based on the foregoing, the court finds that Commerce's determinations concerning subsidization, valuation of water, and profit methodology are not supported by substantial evidence. On remand, Commerce shall fully comply with the court's instructions herein with respect to these determinations.

Remand results are due within ninety days of the date of this opinion, comments are due thirty days thereafter, and replies to such comments eleven days from their filing. Neither comments nor replies thereto shall exceed thirty pages in length.

Slip Op. 05–15

SERGIO U. RETAMAL, Plaintiff, v. U.S. CUSTOMS AND BORDER PROTECTION DEPARTMENT OF HOMELAND SECURITY, Defendant.

Court No. 03–00613

[Upon motion in the name of the plaintiff for rehearing, counsel admonished to adhere to the rules of proper practice.]

Dated: February 3, 2005

John J. Galvin (*Galvin & Mlawski*) relator *pro bono et malo.*

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jack S. Rockafellow*); and Office of Associate Chief Counsel, Customs and Border Protection, U.S. Department of Homeland Security (*Marc K. Matthews*), of counsel, for the defendant.

Memorandum & Order

AQUILINO, Senior Judge: From the beginning, the Court of International Trade has had the benefit of able advocacy by the members of its especial Bar, some of whom, more recently, have appeared in certain cases *pro bono publico*. That kind of participation, however, does not entail any exemption from the well-established rules of proper practice.

I

This action for judicial review of the revocation of the license of a customs broker pursuant to 19 U.S.C. §1641(g)(2) was commenced and prosecuted by the plaintiff *pro se*. Upon defendant's motion, it was dismissed as time-barred per the court's slip opinion 04–149, 28 CIT ___ (Nov. 24, 2004), familiarity with which is presumed.

Subsequent to the entry of that final judgment, the office of the Clerk of Court received and docketed a notice of appearance by the above-named relator, John J. Galvin, Esq., a Plaintiff's Motion for Rehearing, and, following the filing by the defendant of papers in opposition thereto, a Plaintiff's Reply to Defendant's Response in Opposition to Plaintiff's Motion for Rehearing. Since each submission signed by him appeared on its face to violate a rule of CIT practice, namely, 75, 11, and 7, respectively, the undersigned was constrained *sua sponte* to order the relator to show cause why he should not be sanctioned for violation of the rules. A hearing was held thereon in open court on January 28, 2005.

A

Of course, the initial questions every court must consider are the standing of a named party plaintiff to invoke jurisdiction and, when asserted through an attorney, the authority of that individual to so represent. *See, e.g., Ross ex rel. Smyth v. Lantz*, No. 05–CV–116(RNC) (D.Conn. Jan. 25, 2005)(stay of execution granted), *motion to vacate stay denied*, No. 05–8900 (2d Cir. Jan. 25, 2005), *application to vacate stay granted sub nom. Lantz v. Ross*, No. 04A656, 543 U.S. ___ (Jan. 27, 2005).

Here, the first answer is and was in the affirmative: Sergio U. Retamal had (and has) standing to attempt to obtain judicial relief, and he therefore had at the least his first day in court, to the extent permitted by the facts and governing law of his predicament, which were held to warrant final judgment in favor of the defendant.

The answer to the second question was not clear at all after entry of that dismissal (and prior to issuance of the order to show cause), and the hearing held thereon did not completely clarify the matter either. The motion for rehearing submitted by the relator prays, in the alternative, that decision thereof

> be stayed pending a final resolution of the identical issue presently pending . . . in *Butler v. United States*, Court No. 04–00584, which case appears to involve facts and issues which are the same in all material respects to those at bar herein.

That matter, *Butler v. United States*, was docketed just before the entry of the judgment of dismissal herein, which, as reported at the hearing, led Massachusetts counsel therein to contact the relator for advice with regard to the judgment's impact:

> . . . [T]he decision of this court [o]n November 24 would seem to be a difficult obstacle to his prevailing. He felt that he . . . certainly couldn't represent Mr. Retamal . . . but he asked me . . . if we would be willing to. . . . I said, well I doubt it . . . from what I understand he's a young fella, I doubt he can afford it.[1]

This then sounds like the instigation of whatever contact may have come to be between the relator and the plaintiff, who has yet to notify this court of any desire that Mr. Galvin represent him any further before the undersigned. Such notice is the expectation of USCIT Rule 75(c) *viz.*:

> A party who desires to substitute an attorney may do so by serving a notice . . . substantially . . . as set forth in Form 12 of the Appendix of Forms. . . .

B

USCIT Rule 7(d) provides that a party making a dispositive motion shall have 10 days after service of a response thereto to serve a reply. Subsection (g) of that rule defines such motions to include those

> for judgment on the pleadings; . . . for summary judgment; . . . for judgment upon an agency record; . . . to dismiss an action; and any other motion for a final determination of an action.

On its face, the motion at bar in the name of the plaintiff for rehearing, praying as it does either for vacation of the judgment of dis-

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[1] As deciphered from the recording of the hearing that has yet to be transcribed officially.

missal or for a stay pending resolution of a subsequently-commenced, other action, is not one for a final determination. *See, e.g., Belfont Sales Corp. v. United States*, 12 CIT 916, 919 and 698 F.Supp. 916, 919 n. 7 (1988) ("a motion for rehearing . . . , depending on its content, can be either dispositive within the foregoing definition or not"); *Volkswagen of America, Inc. v. United States*, 22 CIT 280, 282 and 4 F.Supp.2d 1259, 1261 n. 1 (1998). Hence, the filing of Plaintiff's Reply to Defendant's Response in Opposition to Plaintiff's Motion for Rehearing was not in order, and, as stated by the court at the hearing, its contents therefore will not be taken into account.

C

It can be assumed that each and every lawyer who practices in federal court is aware, perhaps even painfully-aware, of Rule 11. *See generally* Vairo, Rule 11 Sanctions: Case Law, Perspectives and Preventive Measures (3d ed. 2004 American Bar Ass'n). USCIT Rule 11(b) provides that, by

> presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after any inquiry reasonable under the circumstances,
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

The gist of Plaintiff's Motion for Rehearing filed herein by the relator is that it was "manifestly erroneous" for the court to dismiss this action. Presumably, the relator selected this compound adjective in recognition of a cited standard that, when considering a motion for rehearing, a court will not disturb a prior decision unless it is in fact "manifestly erroneous". *E.g., United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 336, 337, 601 F.Supp. 212, 214 (1984), quoting *Quigley & Manard, Inc. v. United States*, 61 CCPA 65, C.A.D. 1121, 496 F.2d 1214 (1974). But that approach was enunciated by the court of appeals in *Quigley* as the standard for **its** review of the Customs Court's denial of a motion for rehearing. *See* 61 CCPA at 67, 496 F.2d at 1214, quoting *Commonwealth Oil Refining Co. v. United States*, 60 CCPA 162, 166, C.A.D. 1105, 480 F.2d 1352, 1355 (1973).

Be that as it may, this court continues to consider a motion for rehearing governed by a broader purpose, to wit, as "a means to correct a miscarriage of justice"[2]. Or stated, another way, the

> purpose of a petition for rehearing under the Rules . . . is to direct the Court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result.

NLRB v. Brown & Root, Inc., 206 F.2d 73, 74 (8th Cir. 1953). *See also Exxon Chemical Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1479 (Fed.Cir.), *cert. denied*, 525 U.S. 877 (1998); *New York v. Sokol*, No. 94 Civ. 7392 (HB), 1996 WL 428381, at *4 (S.D.N.Y. July 31, 1996), *aff'd sub nom. In re Sokol*, 108 F.3d 1370 (2d Cir. 1997); *In re Anderson*, 308 B.R. 25, 27 (8th Cir. BAP 2004).

As the facts underlying the instant action and set forth at page 4 of slip opinion 04–149 show, there is no injustice to correct, and, perhaps not surprisingly, the relator does not argue otherwise. Rather, he refers to the opinion's conclusory citation of 19 U.S.C. §1641(e)(1) and 28 U.S.C. §2636(g) as the error, but correction thereof [3] cannot lead to vacation of the judgment of dismissal. Quite simply, the plaintiff failed to timely file his report that is required by 19 U.S.C. §1641(g)(1) on the first of February every third year and then failed to submit that triennial report within the grace periods afforded by subsection (g)(2) *viz*:

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[2] *Starkey Laboratories, Inc. v. United States*, 24 CIT 504, 510, 110 F.Supp.2d 945, 950 (2000), quoting *Nat'l Corn Growers Ass'n v. Baker*, 9 CIT 571, 585, 623 F.Supp. 1262, 1274 (1985). *Compare Bomont Industries v. United States*, 13 CIT 708, 711, 720 F.Supp. 186, 188 (1989) ("a rehearing is a 'method of rectifying a significant flaw in the conduct o[f] the original proceeding' "), quoting *RSI (India) Pvt., Ltd. v. United States*, 12 CIT 594, 595, 688 F.Supp. 646, 647 (1988), quoting the "exceptional circumstances for granting a motion for rehearing" set forth in *North American Foreign Trading Corp. v. United States*, 9 CIT 80, 607 F.Supp. 1471 (1985), *aff'd*, 783 F.2d 1031 (Fed.Cir. 1986), and in *W.J. Byrnes & Co. v. United States*, 68 Cust.Ct. 358, C.R.D. 72–5 (1972). *See also* USCIT Rule 61:

> No error . . . or defect in any ruling or order or in anything done or omitted by the court . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

[3] The language, but not the essence, of slip opinion 04–149 will be amended.

> If a person licensed under subsection (b) of this section fails to file the required report by March 1 of the reporting year, the license is suspended, and may be thereafter revoked subject to the following procedures:
>
> (A) [Customs] shall transmit written notice of suspension to the licensee no later than March 31 of the reporting year.
>
> (B) If the licensee files the required report within 60 days of receipt of the [Customs] notice, the license shall be reinstated.
>
> (C) In the event the required report is not filed within the 60-day period, the license shall be revoked without prejudice to the filing of an application for a new license.

As pointed out at page 2 of slip opinion 04–149, plaintiff's report was received by Customs on May 28, 2003, some three weeks after his license had been revoked "by operation of law on May 6, 2003".

Clearly, the plaintiff acted too late to forego that mandatory statutory revocation, albeit "without prejudice to the filing of an application for a new license." Moreover, as Plaintiff's Motion for Rehearing itself indicates, the statutes[4] "do not address [ ]or confer jurisdiction in cases involving revocation of a broker's license by operation of 19 U.S.C. §1641(g)(2)[C)". Indeed, the fact that Congress has provided in 19 U.S.C. §1641(e) for judicial appeal from license revocations pursuant to preceeding subsections of 1641 is the best evidence of the legislative determination not to permit such review of matters arising out of succeeding subsection (g), nor does the history of those statutes (or the relator herein) show otherwise.

II

In view of the foregoing, Plaintiff's Motion for Rehearing must be, and it hereby is, denied; and its relator *pro bono et malo* must be, and he hereby is, admonished to adhere to the rules of proper practice.

So ordered.

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[4] *E.g.*, Tariff Act of 1930, ch. 497, Title IV, §641, 46 Stat. 590, 759–60 (June 17, 1930), as amended; Customs Courts Act of 1980, Pub. L. No. 96–417, Title VI, §611, 94 Stat. 1727, 1746 (Oct. 10, 1980); Trade and Tariff Act of 1984, Pub. L. No. 98–573, Title II, §212, 98 Stat. 2948, 2978–84 (Oct. 30, 1984).

Slip Op. 05–16

FORMER EMPLOYEES OF FEDERATED MERCHANDISING GROUP, A PART OF FEDERATED DEPARTMENT STORES, Plaintiffs, v. **UNITED STATES,** Defendant.

Court No. 03–00689
Before: Judge Timothy C. Stanceu

[Plaintiffs' motion for judgment upon the agency record granted; case remanded]

Decided: February 7, 2005

David Abrams, Attorney at Law, for plaintiffs.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, Jeanne E. Davidson, Deputy Director, *Steven Mager*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Peter Nessen*, Office of the Solicitor, United States Department of Labor, of Counsel, for defendant.

OPINION AND ORDER

STANCEU, Judge:

Plaintiffs, former employees of Federated Merchandising Group, a part of Federated Department Stores ("Federated"), appeal from a final decision by the United States Department of Labor ("Labor" or the "Department") denying them eligibility for trade adjustment assistance benefits under Title II of the Trade Act of 1974, as amended 19 U.S.C. § 2272 (West Supp. 2004) (the "Act"). Labor concluded that the employees did not meet the requirements of the Act, basing its conclusion on its findings of fact that plaintiffs' separations from employment at Federated's operation in New York, New York were attributable neither to increases in imports of like products nor to a shift in production to a foreign country but, instead, were attributable to the employer's substituting a computer design program for the employees' manual labor, which consisted of sewing garment samples and making garment patterns. Before the court is plaintiffs' Motion for Judgment Upon the Agency Record under USCIT Rule 56.1. Because a finding of fact pivotal to the Department's final decision is not supported by substantial evidence in the administrative record, the court determines that Labor's decision denying plaintiffs' eligibility cannot be sustained upon judicial review. Accordingly, the court grants plaintiffs' motion and remands this matter to the Department for further proceedings.

I. BACKGROUND

The Act authorizes an array of adjustment assistance benefits to workers who have lost their jobs as a result of increased imports or shifts of production out of the United States. These specific "trade adjustment assistance" benefits, provided under Federal and related state programs, include training, re-employment services, and various allowances, such as income support, job search, and relocation allowances.

Plaintiffs were separated from their employment as garment sample sewers and pattern makers for Federated on January 31, 2003. The following May, plaintiffs petitioned the Department to obtain a certification of eligibility for trade adjustment assistance benefits. After a brief investigation, Labor denied the petition. *See Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 68 Fed. Reg. 36,846 (June 19, 2003). The Department gave as its reason for denial that "[t]he investigation revealed that worker separations at the subject firm are not attributable to increases in imports or a shift in production to a foreign country, but rather are attributable to a change in the company's production technology, which resulted in substitution of the manual labor by [a] computer design program." *Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance* ("*Initial Determination*"), Administrative Record ("A.R.") at 15–16.

Following the denial, plaintiffs requested that Labor reconsider their application for adjustment assistance benefits. In a letter to the Department from one of the former employees, Mr. Pasquale Bilello, plaintiffs explained the basis for their request for reconsideration and provided details on the relevant former operations of Federated:

> The Women's Ready to Wear Pattern Making and Sample Sewing Department of Federated Merchandising Group of New York consisted of eight employees, a Director of Pattern Services, three Pattern Makers, each capable of draping fabric fittings on a fit mannequin to show the respective Brand Director for their comments, a Sample Cutter, who cut the hard paper patterns out of the correct fabric, paying attention to detail and accuracy, four Sample Sewers, who are responsible for sewing all the cut parts together to be sure to maintain Quality and Accuracy of seam widths and garment integrity, so it will reflect the fit and balance that the Pattern Maker required.

Bilello Letter, A.R. at 26. Mr. Bilello challenged in particular the Department's finding of fact that the addition of a computer design program was the reason Federated reduced the number of employees, arguing that plaintiffs had performed sewing and other manual operations that could not be performed by a computer:

> The Pattern Maker must still go through the same steps as was done before, ask for a print out of the corrected pattern, have it cut and sewn together, view it on a mannequin, and have it fit on a live model to be viewed with the Brand Director. The Pattern Maker will make any adjustments needed, have it reen-

> tered into the computer and then send it to the proper supplier so that they may start production of the stock garments.

Id. According to Mr. Bilello, the manual nature of the work leads to the conclusion that in order for Federated "to produce the same amount of patterns and sewn samples with half the staff that they had before the 'Lay-Off,' they must send the bulk of their patterns and sample making to an outside source." *Id*.

Labor contacted a representative of Federated to make additional inquiries in response to plaintiffs' request for reconsideration. After this additional investigation, Labor determined again that plaintiffs were not eligible for trade adjustment assistance benefits. Labor stated that the additional investigation revealed that "a computer program had reduced the need for manpower, although a minimal number of workers were retained to input data and create samples. The [company] official also stated unequivocally that production performed by the petitioning worker group had not been outsourced domestically or internationally." *Notice of Negative Determination Regarding Application for Reconsideration for Federated Merchandising Group, a Part of Federated Department Stores, New York, NY*, A.R. at 30, 68 Fed. Reg. 56,327 (Sept. 30, 2003) ("*Determination upon Reconsideration*").

II. JURISDICTION AND STANDARD OF REVIEW

This court is granted exclusive jurisdiction of any civil action commenced to review final determinations of the Secretary of Labor with respect to the eligibility of workers for adjustment assistance under the Trade Act of 1974. *See* 28 U.S.C. § 1581(d)(1) (2004). Upon review, findings of fact by the Secretary of Labor are conclusive if supported by substantial evidence. *See* 19 U.S.C. § 2395(b). Denials of certification for adjustment assistance benefits will be affirmed upon judicial review if the Department's determination is supported by substantial evidence and is otherwise in accordance with law. *Woodrum v. Donovan*, 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd*, 737 F.2d 1575 (Fed. Cir. 1984). "Substantial evidence has been held to be more than a 'mere scintilla,' but sufficient enough to reasonably support a conclusion." *Former Employees of Swiss Indus. Abrasives v. United States*, 17 CIT 945, 947, 830 F. Supp. 637, 639–40 (1993) (citing *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987)). This Court has noted that "because of the *ex parte* nature of the certification process, and the remedial purpose of the [trade adjustment assistance] program, the Secretary is obliged to conduct his investigation with the utmost regard for the interests of the petitioning workers." *Abbott v. Donovan*, 7 CIT 323, 327–28, 588 F. Supp. 1438, 1442 (1984) (internal quotations and citation omitted). In evaluating the evidence underlying the Secretary's conclusions, the court may consider only the administrative record before it. *See* 28 U.S.C. § 2640(c); *Int'l Union v. Reich*, 22 CIT 712, 716, 20 F. Supp. 2d 1288, 1292 (1998).

III. Discussion

Plaintiffs claim two errors in the Department's denial of certification. First, they contend that the record evidence is not consistent with the ultimate findings. Second, plaintiffs allege that they were denied due process because they were unable "to be confronted with the employer's statements and to present evidence in rebuttal." *Pls.' Mot. for J*. at 2.

Section 222 of the Act requires the Secretary of Labor to certify a group of workers as eligible to apply for adjustment assistance benefits if a significant number or proportion of the workers in the workers' firm or subdivision of the firm have become separated from employment, and if one of two further sets of conditions are met. First, under subsection (a)(2)(A) of section 222, such workers may qualify if sales or production of the employing firm or subdivision have decreased absolutely, if imports of articles like or directly competitive with articles produced by the firm or subdivision have increased, and if the increase in imports contributed importantly to plaintiffs' separation and to the decline in the sales or production of the firm or subdivision. 19 U.S.C. § 2272(a)(2)(A).[1] Second, under subsection (a)(2)(B), the workers may qualify if there has been a

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[1] The specific requirements of section 222 of the Act, as codified at 19 U.S.C. § 2272 (West Supp. 2004), are as follows:

(a) In general

A group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) shall be certified by the Secretary as eligible to apply for adjustment assistance under this part pursuant to a petition filed under section 2271 of this title if the Secretary determines that—

(1) a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated; and

(2)(A)(i) the sales or production, or both, of such firm or subdivision have decreased absolutely;

(ii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased; and

(iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision; or **(B)(i)** there has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

(ii) (I) the country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

(II) the country to which the workers' firm has shifted production of articles is a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

(III) there has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

shift in production by the firm or subdivision of articles like or directly competitive with articles produced by the firm or subdivision to a foreign country, and if any of the following conditions are met: (1) the shift in production was to a country with which the United States has a free trade agreement, (2) the shift in production was to a country that is a beneficiary under one of various trade preference programs, or (3) there has been or is likely to be an increase in imports of articles like or directly competitive with articles produced by the firm or subdivision. 19 U.S.C. § 2272(a)(2)(B).

The Department's *Initial Determination* and the Federal Register notice announcing it both stated that plaintiffs had been denied eligibility because the Department's investigation revealed that neither the "increased imports" requirement under subsection (a)(2)(A), nor the "shift in production to a foreign country" requirement under subsection (a)(2)(B), had been met. *Initial Determination*, A.R. at 15; 68 Fed. Reg. at 36,846. The *Initial Determination* based both of these conclusions of law on the same findings of fact: "The investigation revealed that worker separations at the subject firm are not attributable to increases in imports or a shift in production to a foreign country, but rather are attributable to a change in the company's production technology, which resulted in substitution of the manual labor by [a] computer design program." *Initial Determination*, A.R. at 15–16. The *Initial Determination* included one other finding of fact but did not explain how that finding affected the Department's conclusions, stating that "[t]he investigation did not reveal the nature of sales and production, because all paper patterns and sample garments produced at the subject facility are used in-house and are not sold to outside customers." *Id.* at 15. Because it referred to "sales and production," this finding of fact appeared to pertain to the criterion in subsection (a)(2)(A)(i) that "the sales or production, or both, of such firm or subdivision have decreased absolutely." 19 U.S.C. § 2272(a)(2)(A)(i).

In its *Determination on Reconsideration*, Labor concluded that there had been "no error or misinterpretation of law or of the facts which would justify reconsideration of the Department of Labor's prior decision." *Determination on Reconsideration*, A.R. at 33; 68 Fed. Reg. at 56,327. The final determination characterized the prior decision as having denied eligibility "because the 'contributed importantly' group eligibility requirement of [19 U.S.C. § 2272(a)(2)(A)(iii)], was not met, nor did the subject firm shift production to a foreign source in the relevant period." *Id.*; A.R. at 32, 68 Fed. Reg. at 56,327. In describing the investigation culminating in the Department's *Initial Determination*, the *Determination on Reconsideration* stated as follows: "The investigation revealed that the subject firm did not import products like or directly competitive with paper patterns and sample garments during the relevant time period of 2001 to April of 2003, nor did it transfer production abroad." *Id*. This finding of fact did not appear in the *Initial Determination*.

The *Determination on Reconsideration*, like the *Initial Determination*, appears to base the denial of eligibility primarily on the Department's findings of fact that "worker separations at the subject firm are not attributable to increases in imports or a shift in production to a foreign country, but rather are attributable to a change in the company's production technology, which resulted in substitution of the manual labor by [a] computer design program." *Initial Determination*, A.R. at 15–16.

The court concludes that a finding of fact that the Department identified as pivotal to its decision, *i.e.*, the finding that the worker separations were attributable to the substitution of manual labor by a computer design program, is not supported by substantial evidence in the administrative record. The evidence on the record that is relevant to this finding does not support the finding and instead appears to contradict it. The evidence at issue, placed on the record by the reopened investigation, consists of an exchange of e-mail communications between a Labor official and a representative of Federated. The Labor official's e-mail message to the Federated representative stated as follows:

> Basically, the petitioners are appealing our finding that their layoffs were attributed to the fact that their job functions were replaced with a computer program, which reduced the need for manual labor.
>
> Specifically, they say that a computer cannot make the decisions required of the pattern makers or physically create a sample garment. They allege that their production must have outsourced to another (potentially foreign) facility. Can you please comment on the petitioners' allegations in terms of whether there is any truth to it?

A.R. at 28. The Federated representative responded in this way:

> There was a need to downsize the area due to work process. Due to a decreasing need for pattern samples, the area did not necessitate having three pattern making associates (productivity reports show a decrease of patterns made over time). At the same [time], as in all aspects of our business, we looked at [ ] how we could leverage technology, and as such, we incorporated a new computer program for this department. We retained one sample maker to produce manual samples as needed and another to enter the data into the computer. This has not been outsourced either domestically or internationally.

Id.

In its *Determination on Reconsideration*, Labor stated that "a computer program had reduced the need for manpower, although a minimal number of workers were retained to input data and create samples." A.R. at 30. This finding mischaracterizes the communication of the Federated representative, quoted above. The Federated official, alluding to a "need to downsize the area due to work process" and "a decrease of patterns made over time," stated that due to a "decreasing need for pattern samples," the area in which the plaintiffs worked "did not necessitate" maintaining the previous number of employees. A.R. at 28. Although the Federated official also referenced, in the same response, the incorporation into the operation of a new computer program, the official did not state that the new computer program was the reason or the principal reason for the separation of the employees. To the contrary, the official's use of the words "at the same time" to introduce the subject of the new computer program indicates that any effect of the new computer program on employment was separate and apart from the "decreasing need for pattern samples." The response, read in the context of all the evidence of record, fails to support the Department's finding of a causal link between the new computer program and the separation of the employees. Instead, the response points to the decreasing need for "pattern samples" (referred to elsewhere in the proceeding as paper patterns and sample garments) as the cause of the separations.

Because of the discrepancy between Labor's conclusion and the Federated official's explanation for the workers' separation, the court is unable to conclude that Labor's denial of plaintiffs' request for eligibility is based on substantial evidence. *See Former Employees of Sun Apparel of Tx. v. United States Sec'y of Labor*, Slip Op. 04–106 at 17–18 (Ct. Int'l Trade Aug. 20, 2004). That discrepancy, standing alone, requires that the court remand this matter for a reopening of the administrative proceeding. The court notes, moreover, that Labor's mischaracterizing the e-mail exchange truncated the investigation by precluding an inquiry into the reasons underlying the reduced need for "pattern samples." Absent such an inquiry, Labor was not in a position to rule out the possibility that the cause or causes of the reduced need for pattern samples satisfy the criteria of 19 U.S.C. § 2272.

The court further observes that the statement by the Federated official that "[t]his has not been outsourced either domestically or internationally" does not suffice to rule out the possibility of plaintiffs' qualifying for trade adjustment assistance based on shifts in production to a foreign country. The official's unsupported statement, which is susceptible to different meanings, is too vague and indefinite to support a finding that no qualifying shift in production occurred that could have satisfied the criteria of 19 U.S.C. § 2272(a)(2)(B). That statement may have indicated, for example, only that Federated did not specifically contract with a foreign vendor for the garment samples and patterns formerly made by plaintiffs. In that event, the work performed by plaintiffs nevertheless may have been supplanted by work performed abroad, as part of a larger process of making imported apparel items.

Moreover, it is Labor's responsibility, not the responsibility of the company official, to determine whether a former employee is eligible for benefits. *See Former Employees of Sun Apparel of Tx.*, Slip Op. 04–106 at 17 (citing *Former Employees of Marathon Ashland Pipeline v. Chao*, 370 F.3d 1375, 1385 (Fed. Cir. 2004)). Labor had a duty to investigate the cause or causes of the reduced need for pattern samples, a fact potentially significant to plaintiffs' qualifying for benefits under the Act.

IV. Conclusion

The court will remand this matter to the Department for completion of the investigation with regard to plaintiffs' claims. Specifically, Labor must determine why Federated experienced a reduction in the need for garment samples and patterns in the time period leading up to plaintiffs' separation. It must then determine whether, in light of that new information, plaintiffs qualify for eligibility under 19 U.S.C. § 2272.

The court further concludes, based on the decision to remand this matter for further proceedings consistent with this opinion, that it is unnecessary to address plaintiffs' claim that the manner in which Labor conducted the investigation constituted a denial of due process.

V. Order

For the foregoing reasons, it is hereby

ORDERED that plaintiffs' motion for judgment on the agency record is granted; and it is further

ORDERED that Labor's Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance for former employees of Federated Merchandising Group is not supported by substantial evidence on the record; and it is further

ORDERED that this matter is remanded for further proceedings consistent with this opinion; and it is further

ORDERED that the Department of Labor will have ninety (90) days to complete the additional investigation required and file the remand results; and it is further

ORDERED that plaintiffs will have twenty (20) days from the date of the filing of the Labor remand results to file a brief with regard to those results; and it is further

ORDERED that defendant will have twenty days (20) from the filing of plaintiffs' brief to file a response.

Slip Op. 05–17

CANDLE ARTISANS, INC., Plaintiff, vs. UNITED STATES INTERNATIONAL TRADE COMMISSION, DEANNA TANNEROKUN, Chairman, and UNITED STATES BUREAU OF CUSTOMS AND BORDER PROTECTION, ROBERT C. BONNER, Commissioner, Defendants.

BEFORE: Pogue, Judge
Court No. O3–00538

[Plaintiffs' motion for judgment on the agency record denied; judgment entered for Defendants.]

Decided: February 7, 2005

Morgan Lewis & Bockius LLP (*Mark N. Bravin, Yiota G. Souras*) for Plaintiff Candle Artisans, Inc.

James M. Lyons, Acting General Counsel, *Rhonda M. Hughes*, Acting Assistant General Counsel, *Neal J. Reynolds*, Attorney, Office of the General Counsel, U.S. International Trade Commission, for Defendant U.S. International Trade Commission.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidsdon*, Deputy Director, *David S. Silverbrand*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Charles Steuart*, Attorney, Office of the Chief Counsel, United States Bureau of Customs and Border Protection, Of Counsel, for Defendant U.S. Bureau of Customs and Border Protection.

OPINION

POGUE, Judge: In this action, Plaintiff alleges that Defendants unlawfully deprived it of its share of 2001 and 2002 distributions under the Continued Dumping and Subsidy Offset Act of 2000. 19 U.S.C. § 1675c (2000)("Byrd Amendment" or "the Act"). Specifically, Plaintiff claims that Defendants (1) unlawfully interpreted the provisions of the Byrd Amendment and the Tariff Act so as to cause only those affected domestic producers who had waived confidentiality to appear on the list provided by the ITC to Customs and (2) failed to provide adequate notice of their interpretation of the two laws.

This matter is before the Court on Plaintiff's motion for judgment upon the agency record. The Court has jurisdiction under 28 U.S.C. § 1581(i). The Court denies Plaintiff's motion and grants judgment for Defendants.

BACKGROUND

The Plaintiff's action stems, in part, from a September 4, 1985 antidumping petition filed by the National Candle Association, alleging material injury or threat of material injury to a domestic industry from imports of petroleum wax candles from China.[1] *Petroleum Wax Candles From the People's Republic of China*, 50 Fed. Reg. 39,743 (Dep't. Commerce Sept. 30, 1985) (initiation of antidumping duty investigation). Plaintiff participated in the ITC's investigation to the extent that it responded to an ITC questionnaire, and indicated its support for the National Candle Association's petition. *See* Candle Artisans' Producer's Questionnaire, P.R. Doc. No. 2 at 1, 5 (May 28, 1986). After concluding its investigation, the Department of Commerce published an antidumping order covering the Chinese imports. *Petroleum Wax Candles from the People's Republic of China*, 51 Fed. Reg. 30,686, 30,686–87 (Dep't Commerce Aug. 28, 1986) (antidumping duty order).

Fourteen years later, Congress passed the Byrd Amendment. The Byrd Amendment directs that funds collected pursuant to antidumping and countervailing duty orders be annually distributed to "affected domestic producers" ("ADPs"). 19 U.S.C. § 1675c(a). The Byrd Amendment defines an "affected domestic producer" as any party who was a petitioner or supporter of an antidumping or countervailing duty petition, and who remains in operation. 19 U.S.C. § 1675c(b)(1).

Under the Byrd Amendment, Defendant International Trade Commission ("ITC") is directed to forward to Defendant United States Bureau of Customs and Border Protection ("Customs") a list of ADPs ("the eligibility list"). 19 U.S.C. § 1675c(b), (d). Customs, in turn, is directed to publish the eligibility list in the Federal Register at least thirty days before it distributes any of the collected duties, so that ADPs may file certifications of their eligibility, and submit a claim to receive a portion of the collected duties. 19 U.S.C. § 1675c(d)(2). The Act also authorizes Customs to promulgate, by regulation, procedures to be followed in distributing collected duties. 19 U.S.C. § 1675c(c).

Pursuant to the Byrd Amendment, on December 29, 2000, Defendant ITC transmitted to Defendant Customs a list of affected domestic producers for all antidumping and countervailing duty orders then in effect, including the 1986 order covering petroleum wax candles from China. In the letter accompanying the list ("the explanatory letter"), Defendant ITC explained that it believed provisions of the Byrd Amendment were in conflict with § 777[(b)(1)(A)] of the Tariff Act of 1930. *See* Letter from Stephen Koplan, Chairman, ITC, to the Hon. Raymond Kelly, Comm'r of Customs, P.R. Doc. No. 4 at 1 (Dec. 29, 2000). Section 777(b)(1)(A) deals with the confidentiality of certain information provided to the ITC, including any information designated as proprietary by the party providing the infor-

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[1] The Court notes that the facts of this case are similar to those in *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 27 CIT _____ , 285 F. Supp. 2d 1371 (2003). Familiarity with the Court's opinion in that proceeding is presumed.

mation. 19 U.S.C. § 1677f(b)(1)(A). ITC maintains that its practice is to regard indications of support for a petition as confidential information. *See* Stipulations Agreed to By the ITC and Candle Artisans, Inc. ("Stipulations"), Attach. 1 to Pl.'s Mot. J. Agency Rec. ("Pl.'s Mot.") at paras. 4 & 5; *see also* 19 C.F.R. § 201.6(a)(1).[2] Moreover, the words "Business Confidential" appeared at the top of the pages of the questionnaire used in evaluating the petroleum wax candle petition. *See* Stipulations, Attach. 1 to Pl.'s Mot. at paras. 4 & 5., Producer's Questionnaire (Blank), P.R. Doc. No. 1 at 2–38.

Having explained its belief that there was a conflict between the Byrd Amendment and the Tariff Act (and accompanying ITC regulations regarding confidentiality), Defendant ITC placed on the eligibility list only the names of those ADPs who had affirmatively waived the confidentiality of their questionnaire responses. *See* Stipulations, Attach. 1 to Pl.'s Mot. at para. 3. Defendant ITC published the list as provided to Customs on its website by early 2001, along with the explanatory letter. *See* Stipulations, Attach. 1 to Pl.'s Mot. at para. 8. In June 2001, Customs published a notice of the receipt of the list and its online publication. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 33,920, 33,920–21 (Dep't Treasury June 26, 2001) (proposed rule). The June 26, 2001 notice also stated that the list would be updated as necessary, and asked that any issues regarding the list be brought to ITC's attention. *Id.*

In August 2001, Customs published, in accordance with the Byrd Amendment, a notice of proposed distribution in the Federal Register. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 40,782 (Dep't Treasury Aug. 3, 2001) (notice of intent to distribute offset). This notice contained an updated list of ADPs, *id.* at 40,785–99, but was not accompanied by any explanation of the effects of the Tariff Act or the ITC's confidentiality regulation. *Id.* at 40,782–83. The notice also stated that certifications for ADPs claiming distributions under the Byrd Amendment had to be filed by a certain date (either October 2, 2001, or within ten days of the publication of a Final Rule regarding distributions).[3] *Id.* at 40,783.

Plaintiff's name did not appear on the eligibility list at any time during 2001. Plaintiff did not file for certification for that year. On

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[2] The ITC argues that this regulation, which defines "business confidential information," is broad enough to encompass indications of petition support. *See infra* note 6.

[3] The final rule regarding distributions was published in the Federal Register on September 21, 2001. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546, 48,553 (Dep't Treasury, Sept. 21, 2001) (final rule). The rule requires that certifications be filed within sixty days of the publication of notice of intent to distribute in the Federal Register. 19 C.F.R. § 159.63(a)(2002). This deadline for certification filing ensures that Customs meets its own statutory deadline for calculating and distributing claimants' shares of collected duties. 19 U.S.C. § 1675c(c).

July 3, 2002, Customs published a new notice of intent to distribute collected duties, accompanied by the list of ADPs.[4] *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 67 Fed. Reg. 44,722, 44,724–41 (Dep't Treasury July 3, 2002) (notice of intent to distribute offset for fiscal year 2002). This notice required that certifications of eligibility to receive distributions be filed by September 3, 2002. *Id.* at 44,722. Plaintiff's name did not appear on the list of affected domestic producers published with the July 3, 2002 Federal Register notice. *See id.* at 44,725.

In March, 2003, Plaintiff became aware of a competitor's press release, in which the competitor announced its forthcoming receipt of a Byrd Amendment distribution. Pl.'s Mot. at 6. Plaintiff then wrote to Defendants, informing them that it felt it had been wrongfully excluded from the lists for 2001 and 2002, and requesting its share of distributions for those years. *Id.* Defendants responded that they could not provide relief for 2001 or 2002, but that Plaintiff's name would appear on forthcoming eligibility lists. *See id.* at 7. In the instant claim, Plaintiffs ask the Court to direct that Customs distribute to them their share of duties for both 2001 and 2002.

STANDARD OF REVIEW

Where the Court takes jurisdiction pursuant to 28 U.S.C. § 1581(i), it will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see* 28 U.S.C. § 2640(e).

DISCUSSION

In *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 27 CIT ____ , 285 F. Supp. 2d 1371 (2003), the Court held that plaintiffs' failure to timely file applications for distribution of Byrd Amendment moneys could not be excused because there was adequate notice of the filing deadlines. *Id.* at ____ , 1375–76. Plaintiffs in that case alleged that the failure to timely file should be excused, as ITC's confidentiality statute and regulation had been abrogated by the passage of the Byrd Amendment. *Id.* at ____ , 1377. Plaintiffs also argued that the ITC's failure to give notice of its interpretation of the confidentiality statute and regulation to cover petition support was a violation of the Administrative Procedure Act. *Id.* at ____ , 1378.

Plaintiff's case here mainly reiterates the claims described above. However, Plaintiff argues a point that was never directly raised in

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[4] The Court notes that the list of ADPs was not static. According to Customs, the eligibility list was continuously updated from the time it appeared on Customs' website as ADPs that had initially not been listed demonstrated their eligibility for certification. Def. Customs' Opp'n to Pl.'s Mot. J. Agency R. at 15–16.

that case, and which should be addressed. Specifically, Plaintiff questions whether the ITC could enforce its interpretation of 19 U.S.C. § 1677f(b)(1)(A)[5] and 19 C.F.R. § 201.6(a)(1)[6] (that support for petitions ought be maintained as confidential) without having any regulation directly stating this interpretation. In essence, in addition to arguing that ITC and Customs should have provided more direct notice of the "harmonization" of the Byrd Amendment[7] and 19 U.S.C. § 1677f(b)(1)(A), as was argued in *Cathedral Candle Co.*, Plaintiff here also argues that the ITC should have provided notice of its interpretation of 19 U.S.C. § 1677f(b)(1)(A) and 19 C.F.R. § 201.6(a)(1) to cover support for petitions.

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[5] 19 U.S.C. § 1677f(b)(1)(A) states:

(A) In general

Except as provided in subsection (a)(4)(A) of this section and subsection (c) of this section, information submitted to the administering authority or the Commission which is designated as proprietary by the person submitting the information shall not be disclosed to any person without the consent of the person submitting the information, other than–

(i) to an officer or employee of the administering authority or the Commission who is directly concerned with carrying out the investigation in connection with which the information is submitted or any review under this subtitle covering the same subject merchandise, or

(ii) to an officer or employee of the United States Customs Service who is directly involved in conducting an investigation regarding fraud under this subtitle.

[6] 19 C.F.R. § 201.6(a)(1) provides, in part:

(a) *Definitions.* (1) *Confidential business information* is information which concerns or relates to . . . other information of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information. The term "confidential business information" includes "proprietary information" within the meaning of section 777(b) of the Tariff Act of 1930 (19 U.S.C. [§] 1677f(b)).

[7] Plaintiff appears to make the argument, made also in *Cathedral Candle Co.*, that no harmonization of the Byrd Amendment is possible, because the Byrd Amendment trumps the confidentiality provisions of 19 U.S.C. § 1677f(b)(1)(A) and 19 C.F.R. 201.6(a)(1). In support of this claim, at oral argument, Plaintiff referred to the Court's statement in *Cathedral Candle Co.* that "[t]he Byrd Amendment directs the ITC to prepare a list of all petitioners and petition supporters still in business." *See Cathedral Candle Co.*, 27 CIT at ____ , 285 F. Supp. 2d at 1376. Plaintiff makes too much of the Court's phrasing, especially as the Court in that case went on to find that the Byrd Amendment is, in fact, ambiguous on the topic of whether the ITC's confidentiality statutes and regulations apply. *Id.* at ____ , 1377. While Plaintiff further appears to argue that even to the extent it was ambiguous, the statute clearly reserves to Customs the right to interpret it, *see* Pl.'s Reply Defs.' Resps. Pl.'s Mot. J. Agency R. at 7. Plaintiff has not resolved the question of how Customs, whatever its own interpretation, is supposed to force the ITC to reveal information it has long held to be confidential. Plaintiff claims that 19 C.F.R. § 201.6(g), which requires that any information received in confidence by the ITC be maintained in confidence unless its disclosure is required by law, furnishes the answer to this question, forcing the ITC's disclosure as required by law. *See* Pl.'s Mot. at 13. The ambiguity of the Byrd Amendment, however, precludes such an approach. Rather, as this Court concluded in *Cathedral Candle Co.*, it is for the agencies to reconcile the competing statutory requirements.

As the Court stated in *Cathedral Candle Co.*:

> Neither the statute nor the regulation explicitly require that the identity of petition supporters or the fact of their support be maintained as confidential information. However, the questionnaires distributed in the candle antidumping investigation were labeled "Business Confidential," thereby putting respondents on notice that their answers were not to be made publicly available, and bringing the provisions of 19 U.S.C. § 1677f(b)(1)(A) into play. The ITC's regulation does not require notice. Moreover, the ITC interprets its regulation to permit the agency to maintain information in confidence, where its release could either hurt the [ITC]'s ability to obtain information in future investigations or harm the business competitiveness of questionnaire respondents.

Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 27 CIT at ___ , 285 F. Supp. 2d at 1376–77 (2003) (internal citations omitted). Plaintiff argues that the ITC acted outside the bounds of law by interpreting 19 U.S.C. § 1677(f)(b)(1)(A) and 19 C.F.R. § 201.6(a)(1) to hold petition support confidential without any formal notice or regulation making clear that particular interpretation.

Plaintiff's argument fails for the identical reason that the notice argument failed in *Cathedral Candle Co.* The ITC's interpretation of 19 U.S.C. § 1677f(b)(1)(A) and 19 C.F.R. § 201.6(a)(1) to preclude the ITC's revelation of petition support was, if a rule at all, an interpretative rule which merely clarified the agency's position regarding the meaning of a statute or its own regulations. At least one court addressing this issue has held that publication of an interpretive rule is only required where that interpretive rule reflects a change in policy. *Knutzen v. Ebenezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1351 (10th Cir. 1987). Here, ITC's confidential treatment of support for petitions does not appear to represent a change in policy: it merely is the application of an old policy in a new situation. Moreover, as the Court held in *Cathedral Candle Co.*, "even if the publication of all interpretive rules is required under the Freedom of Information Act, 5 U.S.C. § 552, it is not clear that it was necessary for Plaintiff[ ] here to be apprised of the particular interpretation adopted by the Defendants in order to act to protect [its] rights under the Byrd Amendment." *Cathedral Candle Co.*, 27 CIT at ___ , 285 F. Supp. 2d at 1379 & n.12.

As in *Cathedral Candle Co.*, Plaintiff here presumably had all the information necessary to understand its rights under the Byrd Amendment. Plaintiff presumably knew that it had supported an antidumping petition and that the Byrd Amendment directed distributions to those who had done so. Had it been concerned at all with receiving such distributions, Plaintiff was in no way precluded from contacting Customs or the ITC. In fact, had Plaintiff been protecting its own interests, and diligently following the publications in the Federal Register, its first course of action upon finding its name not listed would have been to contact Customs or the ITC.[8]

Plaintiff also appears to argue that even had there been notice of the ITC's interpretation of its regulation to cover petition support, that interpretation would not have been "in accordance with law." Plaintiff argues that because the Court in *Cathedral Candle Co.* stated that nothing in the governing statutes or regulations explicitly mandates that the fact of support must be kept confidential, such support does not in fact constitute business confidential information, and must be segregated by the ITC and publicly released. *See* Pl.'s Mot. at 14, 16. This goes too far: the mere fact that the statute and regulation do not explicitly require confidentiality of support does not mean that such confidentiality is not called for. Indeed, the regulation requires that any information of commercial value, the disclosure of which might impede the ITC's ability to gather information in the future or which might hurt a respondent's competitive position, not be disclosed. *See* 19 C.F.R. § 201.6(a)(1).

Thus, there are two criteria for determining whether information may not be released. First, the data must be "of commercial value." *Id*. It seems obvious to the Court, for the reasons enunciated below,

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[8] While it is generally accepted that publication in the Federal Register constitutes notice to all persons within the United States of the notice's contents, Plaintiff argues that the Court should not "impute knowledge of the labyrinthine passages of the Federal Register when there is evidence to the contrary," citing *Sundstrom v. United States*, 419 U.S. 934, 937 (1974). *See* Pl.'s Mot. at 19. However, the passage to which Plaintiff cites is from Justice Douglas' dissent from denial of certiorari in the case, and as such can offer the Plaintiff no substantial support. Moreover, most of the other cases which Plaintiff offers for the proposition that Federal Register notice is constitutionally inadequate where property rights are at issue involved vested property rights rightfully implicating the Takings Clause, not eligibility to apply for a prospective benefit. *See Mennonite Bd. Missions v. Adams*, 462 U.S. 791 (1983) (involving tax sale sale of real property); *cf. The Covelo Indian Community v. FERC*, 895 F. 2d 581, 587–88 (9th Cir. 1990) (actual notice not required where injury is purely speculative). Here, the damage to the claimed property interest is purely speculative if only because, even had Plaintiff properly been listed as an ADP by Defendants, it would still have had to apply for the benefits. Whether or not it applied would be the final measure of whether it actually was owed any benefits, and until such application, the property right in the distribution, and any injury thereto, would have remained speculative. This makes the case under consideration fundamentally different from *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In that case, Plaintiff's already had a vested right in a common trust fund. *Id.* at 307. The case centered around the possible altering of their ownership (and benefits) out of the common trust stemming from a petition for a binding judicial settlement of accounts. *Id.* at 309. The Court held that plaintiffs were unable to respond to this proposed settlement because of inadequate notice, and therefore, their already vested property rights in the trust holdings were jeopardized. *Id.* at 316–17. In the case at bar, however, Plaintiff has no vested right in the Byrd Amendment distribution. It is only, at best, eligible to apply for the benefits. Under the holding in *Lyng v. Payne*, wherein farmers who were eligible to apply for disaster relief funds sued on due process grounds under the belief that publication of the eligiblity rules in the Federal Register was deficient, where a benefit is contingent on application, and is not already vested or being received, there is no inherent due process right. *Lyng v. Payne*, 476 U.S. 926, 942 (1983). Moreover, publication in the Federal Register is "more than ample." *Id.*

that the fact of petition support is of commercial value. Like customer lists or prices, support for a petition is not information that would be considered uninteresting or meaningless by competitors, customers, or suppliers. Its value, like that of customer lists or prices, is strategic: knowing whether a given company had supported or failed to support a petition could influence other companies' behavior, as regards the petition itself, as regards the company whose position is revealed, or as regards the market as a whole. Second, revelation of support (or lack of support) for a petition must be likely to be detrimental to the ITC's mission or to a respondent's competitive position. *Id.*; *see also* Def. ITC's Resp. Pl.'s Mot. J. Agency R. at 17. Antidumping duty petitions are often subject to dispute, and support for the petition, or lack thereof, is a factor in the ITC's analysis. *See Suramerica de Aleaciones Laminadas, C.A. v. U.S.*, 44 F.3d 978, 984 (Fed. Cir. 1994). The ITC's failure to treat indications of support or opposition as confidential may affect its ability to obtain this information. Moreover, public knowledge as to support or lack thereof may result in compromised relationships with competitors and with downstream customers. Thus, it is not an unreasonable reading of the regulation for ITC to hold the disclosure of support as likely to interfere with the agency's ability to gather information.

Accordingly, because indications of petition support (or the lack thereof) are of commercial value, and because revelation of such data could harm either the respondent or the ITC, it is not an unreasonable reading of the regulation for ITC to hold support as "business confidential information."

Plaintiff also argues that it should not be held accountable for the ITC's self-designation of questionnaire information as confidential ("Business Confidential" was written at the top of each page of the questionnaire, other than the cover page, and the instructions to the Questionnaire warned respondents that responses were subject to the provisions of 19 U.S.C. § 1677f). *See* Pl.'s Mot. at 16; *see also* Producer's Questionnaire (Blank), P.R. Doc. No. 1. In supporting this argument, Plaintiff claims that the ITC's treatment of petition support as confidential is undermined by the fact that the ITC (a) publicly identified Plaintiff's status as a respondent and (b) "strongly alluded to" Plaintiff's support in public documents. *See* Pl.'s Mot. at 14. First, there is no indication that the mere identity of Plaintiff as the respondent to a questionnaire implicates any of the concerns of either 19 U.S.C. § 1677f or 19 C.F.R. § 201.6(a)(1). The first page of the questionnaire, upon which the name and address of the recipient is written, was not labeled "Business Confidential" by the ITC. *See* Producer's Questionnaire (Blank), P.R. Doc. No. 1 at 1. Candle Artisans does not claim that it itself designated that information as confidential, so there is no way by which 19 U.S.C. § 1677f could come into play with regard to the mere identity of Plaintiff as a respondent. Moreover, because, to the extent that Plaintiff made candles covered by the proposed petition, it was required by law to fill out the petition in its entirety, Producer's Questionnaire (Blank), P.R. Doc. No. 1 at 1, public revelation of the fact that the questionnaire had been filled out by Plaintiff could not be considered information subject to either 19 U.S.C. § 1677f or 19 C.F.R. § 201.6(a)(1).

Finally, the document in which Candle Artisans claims that the ITC strongly alludes to its support, *see* Pl.'s Mot. at 14, consists entirely of a chart listing all domestic candle producers alongside the notation that some producers supported the petition and some did not. *See* Candles from the People's Republic of China, Determination of the Commission in Investigation No. 731–TA–282 (Final) Under the Tariff Act of 1930, Together with the Information Obtained in the Investigation, USITC Publication 1888, P.R. Doc. No. 3 at A–12–A–14 (Aug. 1986). This information is so general that it cannot be said to reflect at all on Candle Artisans' particular position regarding the petition. Thus, none of Plaintiff's arguments compel a different result from that in *Cathedral Candle Co.*

CONCLUSION

While Plaintiff's claim raises a slightly different argument than was made by plaintiffs in *Cathedral Candle Co.*, the Court is nonetheless persuaded that the ITC was not required to engage in notice-and-comment rulemaking in order to apply its interpretation of 19 U.S.C. § 1677(f)(b)(1)(A) and 19 C.F.R. § 201.6(a)(1) to hold Plaintiff's indication of support for the underlying antidumping petition confidential. Therefore, because it cannot be shown that Defendants' dismissal of Plaintiffs' applications as untimely was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, Plaintiff's motion for judgment on the agency record is denied, and judgment is entered for Defendants.

Slip Op. 05–18

WITEX, U.S.A., INC., ET AL., Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Consol. Court No. 98–00360

[Defendant's Motion for Reconsideration denied]

Decided: February 7, 2005

Aitken Irvin Berlin & Vrooman, LLP (*Bruce Aitken*, *Bruce de Grazia*, and *Virginie Lecaillon (consultant)*) for the Plaintiff Witex U.S.A., Inc.

Neville Peterson LLP (*Maria E. Celis* and *John M. Peterson*) for the *Amicus Curiae* in support of Witex U.S.A, Inc., et al., Congoleum Corporation.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, *Amy M. Rubin*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Yelena Slepak*, Attorney, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, for Defendant.

Pogue Judge: In this action, on November 15, 2004, the Court entered an opinion and order denying the parties' cross-motions for summary judgment, pursuant to 28 U.S.C. § 2643 (b) (2000) and USCIT Rule 56(d). The Court came to the conclusion that additional evidence and testimony was needed to determine the meaning for the term "tileboard," as used by Heading 4411.19.30 of the Harmonized Tariff Schedule of the United States. *See Witex, U.S.A., Inc. v. United States*, slip op. 04–144 (CIT Nov. 15, 2004). As part of that opinion, the Court ordered the parties to prepare an order governing preparation for trial. *Id.* at 33.[1] Four days before the parties were to submit this order, the Defendant filed a motion for reconsideration[2] claiming: (a) that the Court erroneously interpreted its argument; (b) that rather than arguing that "tileboard" had a commercial desig-

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[1] The Court has identified the following issues for trial: 1. What is the commercial meaning of the term "tileboard"? 2. If there is not a definite, uniform and general commercial meaning of the term "tileboard," does the commercial usage in the trade inform the common meaning of the term "tileboard"? 3. What is the common meaning of the term "tileboard"? 4. What does it mean to "simulate tile"? 5. What is the identity of plaintiff's merchandise?

In preparing the order governing preparation for trial, the parties were also directed, to the extent possible, to narrow the scope of the issues for trial.

[2] Defendant designates it's motion as requesting "Rehearing, Modification and/or Reconsideration" pursuant to USCIT Rule 59(a). That Rule, entitled "New Trials; Rehearings; Amendment of Judgments," provides that "[a] new trial or rehearing may be granted . . . on all or part of the issues . . . (1) in an action in which there has been a trial by jury . . . ; [or] (2) in an action *tried* without a jury or in an action *finally determined*. . . ." (Emphasis added). Courts have liberally construed Rule 59(a) to include any matter which is appealable, *Nat'l Corn Growers Ass'n v. Baker*, 9 CIT 571, 576, 623 F. Supp. 2d 1262, 1274 (1985) (denial of a preliminary injunction valid grounds for a reconsideration), or for which the court has issued a decision foreclosing further arguments pertaining thereto, *Cf. Precision Speciality Metals, Inc. v. United States*, 25 CIT 1375, 1381 & n.8, 182 F. Supp. 2d 1314, 1321 & n.8 (2001) (allowing reconsideration of a previously decided issue for which direct attack was barred under the law of the case doctrine). In contrast, in this case, when the Court denied summary judgment on November 15, 2004, it did not issue a "final determination." In fact, the complete reverse was true. The Court denied summary judgment precisely for the purpose of collecting additional evidence. Consequently, no rights of appeal attached, nor were the parties barred from making further argument or producing more evidence on the matter.

That the court has held that Rule 59(a) should be read broadly in no way allows parties to file motions under Rule 59(a) for reconsideration of interlocutory orders. As the court noted in *Nat'l Corn Growers Ass'n v. Baker*, 9 CIT 571, 584, 623 F. Supp. 2d 1262, 1274 (1985), "[o]n its face, Rule 59 provides for rehearings in actions which have been tried and gone to judgment, which is not the case here." The court then noted that 59(a) has been construed broadly, insofar as "courts 'have experienced no difficulty in concluding that a motion for rehearing or reconsideration [may be] made . . . *after the entry of an appealable order* is within coverage of Rule 59.' " *Id.* (quoting *Gainey v. Bhd. of Ry. & S.S. Clerks*, 303 F.2d 716, 718 (3rd Cir. 1962)) (emphasis added).

nation, it was arguing that its definition should be defined by "industry standards"; (c) the common and commercial meanings are the same; and (d) therefore, a trial would be unnecessary and futile. The Court disagrees.

Further investigation will yield one of three results: (1) the Court will find a commercial designation for "tileboard" that conflicts with the common meaning; (2) that there is a commercial meaning and it does not conflict with the common meaning; or (3) no commercial meaning exists. Regardless of the Court's eventual determination regarding this question, competent testimony will be useful, if not necessary, in all three scenarios.

First, if the Court finds that there is a commercial designation, and that this designation conflicts with the common meaning, then the Court has discharged its duty under *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) and 28 U.S.C. § 2643 (b) (2000) to determine the correct classification of the articles in question. Whether the Defendant is right that the Court has erroneously interpreted its argument to be based on commercial designation rather than "industry standards" is immaterial. The Court has an independent duty to determine the correct meaning of a tariff term regardless of whether the parties have raised the argument, *id*.

The Defendant's contention that the commercial and dictionary definitions are the same assumes facts not in evidence. The Court could not determine the commercial designation based on the record evidence produced in the parties' cross-motions for summary judgement. *Witex*, slip-op 04–144 at 31–32. Consequently, any claim regarding the consistency, or inconsistency, of the commercial and common meaning is premature. If it is the Defendant's claim that the common and commercial meanings may be read to be consistent, then the Court should know what the commercial meaning is before pegging the common meaning to it.

The second alternative is that the common and commercial meanings will be the same. However, because (a) there is a slight tension in the dictionary definitions, and (b) an established commercial designation trumps any inconsistent common meaning, the established commercial designation will arrest all doubts as to the term's meaning. Not only will that foreclose arguments as to alternative readings of the dictionary definitions, it will also preclude having to change the common meaning with evolving processes for manufacturing "tileboard" as the Defendant's proposed theory of construction appears to require. Accordingly, there is sufficient justification to investigate the possibility of a commercial designation even under this scenario.[3]

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[3] The reason the Court has demanded testimony is well demonstrated by the Defendant's own representations to the Court. In its Motion for Summary Judgment, the Defendant argued that "tileboard": "(i) is not laminated, (ii) is usually embossed with a pattern, (iii) is

Third, the Court may conclude that there is no commercial designation. Nevertheless, a trial would still be required for the Defendant to prove its theory of an "industry standard." Although courts on rare occasion have taken judicial notice of authoritative sources defining an industry standard, *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698–99 (finding the Explanatory Notes were bolstered by the USDA regulation's *definition* of a term because the *definition* constituted "reliable information"); *Rocknel Fastners, Inc. v. United States*, 267 F.3d 1354, 1357–1361 (Fed. Cir. 2001) (relying on ANSI Standards' *definition* of the term), *accord Boen Hardwood Flooring, Inc. v. United States*, 357 F.3d 1262, 1265 (Fed. Cir. 2004) (implicating that Voluntary Product Standards are considered within the commercial designation framework), the Defendant's evidence is a far cry from these sources. Accordingly, as the cases cited by the Defendant admit, competent testimony is still required if the Defendant wishes to inform the dictionaries with "industry standards." *See S.I. Stud, Inc. v. United States*, 17 CIT 661, 662–666 (1993) (relying on dictionaries, expert testimony and product brochures) aff'd, *S.I. Stud, Inc. v. United States*, 24 F.3d 1394, 1395 (Fed. Cir. 1994) (affirming district court's result because its definition was supported by "mechanical and dictionary definitions . . . and the testimony of experts before the Court."); *Texas Instruments Inc. v. United States*, 475 F. Supp. 1183, 1186 (1979) (relying on common dictionaries and expert testimony).

Accordingly, the Court concludes that trial testimony is required; the Defendant's motion is therefore DENIED. The parties shall

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coated with an epoxy or other [liquid] finish to resemble ceramic tile, (iv) is water-resistant and (v) is only used on walls." *Witex*, slip-op 04–144 at 7 (citations omitted). In its Motion for Reconsideration, the Defendant claimed that the Court missed the point that "tileboard" is "a large (often, 4x8 feet), thin board that is continuously worked along any of its edges (*e.g.*, bullnosed, beveled), possesses a hard, moisture-resistant, glossy, decorative coating that simulates tiles and is used for interior finishing. In addition, tileboard is primarily used on walls and ceilings, frequently in bathrooms and laundry rooms." Def.'s Mot Reh'g, Modification, and/or Recons. at 11. The Defendant does not offer any explanation as to why it arrives at two different definitions, in its two motions.

Moreover, Defendant's failure to offer any kind of precise definition makes the Court's deliberations difficult. Rather, all the Defendant offers is a "description." The Court has no idea what the required elements of "tileboard" are under the Defendant's proposed "description." This failure is even more troubling because, in its Motion for Summary Judgment, the Court drew the Defendant's attention to the need to offer a judicially manageable standard for "moisture resistance". *Witex*, slip op. 14–144 at 30 n.26. The Defendant has utterly failed to correct that error here. Likewise, the Defendant proposes that tileboard must "simulate tile." Reply to Pl.'s Opp'n Def.'s Mot Reh'g, Modification, and/or Recons. at 5–6. There are many ways a product may simulate tile. Without offering so much as a possible meaning, the Defendant has in essence delegated to the Court the function of determining the definition of "simulat[ing] tile." If the Defendant insists on leaving the analysis of this crucial issue to the Court's discretion, it cannot object as to the means the Court will use in resolving this question.

jointly prepare an order governing preparation for trial and submit it to the Court by March 7, 2005.

It is so ORDERED.

Slip Op. 05–19

ALLEGHENY LUDLUM CORP., J&L SPECIALTY STEEL, INC., BUTLER ARMCO INDEPENDENT UNION, UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC, and ZANESVILLE ARMCO INDEPENDENT ORGANIZATION, Plaintiffs, v. UNITED STATES, Defendant, and THYSSENKRUPP ACCIAI SPECIALI TERNI, S.p.A. AND THYSSENKRUPP AST USA, Defendant-Intervenors.

Before: Pogue, Judge
Court No. 03–00919

[Commerce's Determination remanded]

February 8, 2005

COLLIER SHANNON SCOTT, P.L.L.C. (*David A. Hartquist*, *Kathleen W. Cannon*, *Eric R. McClafferty*), for Plaintiffs.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Assistant Director, *David D'Alessandris*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Robert E. Nielsen*, Senior Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for Defendant United States Department of Commerce.

HOGAN & HARTSON, L.L.P. (*Lewis E. Leibowitz*, *Lynn G. Kamarck*), for Defendant-Intervenors.

POGUE, JUDGE: Plaintiff ("Allegheny") seeks this Court's review of Commerce's application of its latest methodology for determining when the privatization of a foreign firm extinguishes a subsidy that is the basis for a countervailing duty order. The case arises from the privatization of the Italian state-owned steel group ILVA. ILVA, during much of the 1980's and early 1990's, was subsidized by the Government of Italy ("GOI") through major restructurings and bailouts.[1] After investigating the subsidies, but prior to ILVA's privatization, the Department of Commerce ("Commerce") issued an order imposing countervailing duties on ILVA's importations into the United States. *See Stainless Steel Sheet and Strip in Coils from Italy*, 64 Fed. Reg. 30,624 (Dep't Commerce June 8, 1999) (final affirmative

[1] In *Acciai Speciali Terni S.p.A. v. United States*, slip op. 04–140 (CIT Nov. 12, 2004), the court analyzed a case similar to the one at issue here under a different Commerce methodology. The court found that that methodology employed an impermissible "per se" test. *Id.* at 21.

countervailing duty determination). Plaintiff now challenges Commerce's determination that these subsidies were extinguished upon the privatization of ILVA and, therefore, the modification of the countervailing duty order. The Court finds that Commerce's determination is not supported by substantial evidence and remands this determination for further consideration consistent with this opinion.

BACKGROUND

ILVA's privatization was initiated on December 12, 1992 when the Italian Council of Ministers gave their approval for the privatization. *See* Dep't of Commerce Mem. from Deputy Assistant Sec'y, Imp. Admin., Group I to James J. Jochum, Assistant Sec'y for Imp. Admin., *Re: Issues and Decision Memorandum for the Determination under Section 129 of the Uruguay Round Agreements* (Oct. 24, 2003), P.R. Doc. No. 33[2], Pl.'s Ex. 1 ("*Determination*") at 3. The GOI established a holding company, Istituto per la Riconstruzione Industriale ("IRI"), to initiate a restructuring and privatization plan. *Id.* The plan called for the demerger of ILVA into two corporations: AST (the entity in controversy in this case) and ILVA Laminati Piani S.R.L. ("ILP"), and placed the remaining assets and liabilities in ILVA Residua which was to be liquidated. *Id.* To advise with the sale of AST, IRI hired a private consultant, Barclays de Zoete Wedd Limited ("BZW"), and commissioned a valuation study by Istituto Mobiliare Italino S.p.A.("IMI"). *Id.* at 3,5. IRI requested that the latter devise a valuation of AST so as to provide an "appropriate" rate of return to prospective purchasers. Istituto Mobiliare Itlaliano S.p.A., Company Appraisal of "Acciai Speciali Terni" (August 25, 1993), Pl.'s Ex. 5 at 3.

In December 1993, IRI publicly announced its intention to sell AST and ILP through advertisements in the Italian and foreign newspapers. *Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 3. Interested parties were required to submit information about themselves such as copies of their incorporation and bylaws. *Id.* at 3 n.4. In response, nineteen private industrial and financial entities had expressed interest by January 7, 1994. *Id.* at 4. During this period, the bulk of AST's debt was placed in ILVA Residua. *Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 8. IRI also commissioned another valuation study, by Pasfin Servizi Finanziari ("Pasfin"), to determine what price it could get for AST. *Id.* at 5.

With nineteen potential bidders, IRI inaugurated the second stage of the bidding process. *Id.* at 4. In this stage, IRI required that the interested parties submit preliminary, non-binding cash offers for

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[2] Documents contained on the public record are cited as "PR," followed by the document list in which they are contained, followed by the document number. Documents in the confidential record are cited as "CR," followed by the document list in which they are contained, followed by the document number.

100 percent of AST's shares. *Id*. Pursuant to these requirements, four parties submitted non-binding purchase offers. In March, IRI set forth the requirements for the final stage of bidding, compelling submission of final offers by May 13, 1994 (allowing two months to conduct due diligence), *see id.*, and requiring a guarantee for the purchase of AST, *see* Dep't of Commerce Mem. from Deputy Assistant Sec'y, Imp. Admin., Group I to James J. Jochum, Assistant Secretary for Imp. Admin., *Re: Issues and Decision Memorandum for the Determination under Section 129 of the Uruguay Round Agreements Act* (Oct. 24, 2003), C.R. Doc. No. 11, Pl.'s Ex. 9 ("*Confidential Determination*") at 6. There is also a suggestion in the record that IRI would favor bids from parties that included Italian investors. *Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 6. Only two parties submitted final bids: KAI Italia S.r.L. ("KAI") (Defendant-Intervenor TKAST's predecessor in interest) and Ugine (a French steel producer). *Id*. at 4. However, IRI disqualified Ugine's final bid as nonconforming with the bidding requirements, because it did not bid for 100 percent of AST's shares, and thereby awarded the sale to KAI. *Id*. KAI, in part, based its bid on a valuation study prepared by Morgan Grenfell in May which it submitted as part of the Record. *Confidential Determination*, C.R. Doc. No. 11, Pl.'s Ex. 9 at 7. The amount bid for AST was well in excess of the two market valuation studies prepared for AST and above that prepared by KAI's own consultant. *Id*. Additionally, after the final bids were submitted and Ugine had been disqualified leaving KAI as the only purchaser in the running, IRI empowered BZW to further negotiate with KAI to improve the offer. *Confidential Determination*, C.R. Doc. No. 11, Pl.'s Ex. 9 at 3. As a result of these negotiations, KAI ended up paying more than it had bid for AST. *Id*.

PROCEDURAL HISTORY

This case arises from an administrative review made pursuant to Section 129 of the Uruguay Round Agreements Act, 19 U.S.C. § 3538 (2000) ("Section 129"). The Section 129 review followed the World Trade Organization Appellate Body's Decision ("WTO") in *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R (Dec. 9, 2002). Section 129 authorizes Commerce to revise its determinations to make them consistent with WTO decisions. *See* 19 U.S.C. § 3538(b). Plaintiff brought a timely appeal of the Section 129 Determination and the Court has jurisdiction over Allegheny's complaint under 28 U.S.C. § 1581(c).

STANDARD OF REVIEW

The Court reviews Commerce's decision to determine whether it is supported by substantial evidence and in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(2002).

DISCUSSION

Under Commerce's new methodology for determining when the privatization of a firm extinguishes a subsidy,[3] Commerce creates three stages of inquiry in which the presumption that a subsidy is countervailable shifts between the importer and interested parties looking to impose a countervailing duty. First, Commerce asks whether a countervailable subsidy was conferred prior to the sale of the company. *Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 Fed. Reg. 37,125, 37,127 (Dep't Commerce June 23, 2003) ("Methodology"). If Commerce finds that a non-recurring subsidy was conferred, Commerce creates a baseline presumption that the subsidy is countervailable over the corresponding useful life of the recipient's assets. *Id.*

Nevertheless, an interested party may rebut this presumption where that party demonstrates that a "privatization occurred in which the government sold its ownership of all or substantially all of a company or its assets . . . and that the sale was an arm's-length transaction[4] *for* fair market value." *Id.* (emphasis added). If the sale was not an arm's-length transaction for fair market value, Commerce will find that the presumption has not been overcome and the subsidy will remain countervailable. Conversely, if Commerce concludes that the sale was at arm's-length for fair market value, any "pre-sale subsidies will be presumed to be extinguished in their entirety and, therefore, non-countervailable." *Id.*

Despite a finding that the assets have been sold at arm's-length for fair market value, an interested party may rebut this latter presumption of extinguishment upon a demonstration that "at the time of the privatization, the broader market conditions necessary for the transaction price to reflect fairly and accurately the subsidy and benefit were not present, or were severely distorted by government action (or, where appropriate, inaction)," *id.* (footnote omitted), such that "the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action," *id.* at 37,128. If a party demonstrates that broader market distortions existed, the subsidy will remain countervailable; if a party does

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[3] Promulgated in 2003, Commerce's new methodology seeks to address concerns raised by the Federal Circuit's opinion in *Delverde Srl v. United States*, 202 F.3d 1360, 1365 (Fed. Cir. 2000) ("Delverde III") as well as by the WTO.

[4] The definition of an arm's-length transaction used by Commerce is "a transaction negotiated between unrelated parties, each acting in its own self-interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties." *Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 4–5. Neither this definition nor Commerce's finding that the sale occurred at arm's-length is at issue in this case.

not demonstrate such distortions, the duties will be deemed extinguished. *Id.*

In this case, TKAST concedes that AST did receive non-recurring countervailable subsidies from the GOI; therefore, this issue is not in dispute. However, TKAST submits that the presumption that the subsidy remained countervailable was overcome by the sale of AST in an arm's-length transaction for fair-market value and that distorting factors did not upset an inference that the sale extinguished the subsidy. Allegheny does not challenge Commerce's methodology. Rather, Allegheny contends that Commerce's determinations violated its own methodology and are not supported by substantial evidence as discussed below.

A. THE SIGNIFICANCE OF A FAIR MARKET VALUE DETERMINATION

Under the countervailing duty law, a firm receives a subsidy if it gets something it did not pay for, i.e., when a government sells assets for less remuneration than the assets are worth, the buyer receives a benefit from that government. *See* 19 U.S.C. § 1677(5)(E)(iv) (a benefit includes the sale of goods "provided for less than adequate remuneration"); *cf. United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (May 10, 2000) at 25 ("The question whether a 'financial contribution' confers a 'benefit' depends, therefore, on whether the recipient has received a 'financial contribution' on terms more favorable than those available to the recipient in the market."). As applied to the purchase of a firm which has received a prior subsidy, if a buyer does not remunerate the government for the value of the company plus the value of the subsidy at the time of purchase, then the buyer receives a benefit. For example, if a firm is valued at $100 million, and the government contributes a $50 million value to the firm, then the value of the firm is $150 million (assuming no depreciation or appreciation between the time of the subsidy and sale and that the contribution actually conferred an economic value of $50 million[5]).

The fair market value of the company takes into account all of a company's liabilities and assets including assets that were incurred with government support. Therefore, the payment of fair market

[5] The observation that the value of a given subsidy may have depreciated, or not have conferred future value to a firm, was discussed in *Allegheny Ludlum Corp. v. United States*, 246 F. Supp. 2d 1304, 1310, 26 CIT ____ , ____ , (2002). That a subsidy may not confer an actual economic value equal to the monetary amount of the subsidy simply reflects the reality that the government often has other interests than economic profit such as full employment or granting favor to certain constituents. For example, the government may have provided the upkeep of obsolete facilities to keep workers employed even though such upkeep would not be justified in terms of cost feasibility.

value means that the *purchasing firm* did not receive more than it paid for (assuming the government did not distort the market in a manner affecting the sale.) That the aggregation of the monetary amount of past subsidies is not an appropriate benchmark for whether the purchase price reflected the value of the subsidies has been firmly established and warrants no further consideration here. *See Acciai Speciali Terni S.p.A. v. United States*, slip op. 04–140 at 21 & n.13 (CIT Nov. 12, 2004), *Allegheny Ludlum Corp. v. United States*, 246 F. Supp. 2d 1304, 1310, 26 CIT ___ , ___ , (2002).

Appropriately, Commerce's inquiry focuses on whether the sale price was at fair market value. When a company or assets are sold under a transparent competitive bidding system, the potential buyers will, at least theoretically, push the purchase price to its fair market value. Therefore, the winning firm will not get more value than that for which it paid.[6] However, this theoretical analysis assumes that the bidding process will drive the sale price so as to reflect the value of the company (including the subsidy) and its assets. This assumption is somewhat precarious under the facts and circumstances of a privatization. The seller, a government which has manifested an interest in conferring benefits on domestic industries by virtue of past subsidies, may have motives other than recouping the highest price for the company and its assets, and therefore may constrain or manipulate the sales process to benefit domestic industries or serve some other governmental interests. *Delverde III*, 202 F.3d at 1369. One cannot simply assume that the invisible hand of the market will work its magic where there are so many interests at work and the hand of the government is so visible. *See United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R (Dec. 9, 2002) at 61 (during privatizations "market conditions are not necessarily always present and they are often dependent on government action."). That the sale process may be open to manipulation, or otherwise distorted, is recognized by 19 U.S.C. § 1677(5)(F) and case law.[7] *See, e.g., Allegheny Ludlum v. United States*, 367 F.3d 1339 (Fed. Cir. 2004), *cf. Saarstahl AG v. United States*, 78 F.3d 1539, 1544 (Fed. Cir. 1996). Both require Commerce to look behind a sale to ensure that competi-

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[6] This assumes, among other things, that the threat of countervailing duties is not factored into the purchase price. If they are, the purchase price will be reduced. Therefore, if the United States does not impose countervailing duties, the purchaser will obtain a windfall, i.e., the amount of money that buyers thought would be countervailed. This point was not addressed by either party and the Court will not raise it *sua sponte*.

[7] Pursuant to 19 U.S.C. § 1677(5)(F):

> 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.

tive bids were made, and that the government did not distort the terms of the sale, such that the sale price truly reflected the value of the privatized company or assets as would be assigned by the market in a sale between private parties under the terms of the sale. *Cf. Allegheny*, 367 F.3d at 1347.

Commerce's new methodology recognizes this concern insofar as it frames "the basic question [of whether a subsidy has been extinguished as] whether the full amount that the company or its assets (including the value of any subsidy benefits) were actually worth under prevailing market conditions was paid, and paid through monetary or equivalent compensation." *Methodology*, 68 Fed. Reg. at 37,127. Accordingly, "[a] primary consideration in this regard normally will be whether the government failed to maximize its return on what it sold, indicating that the purchaser paid less for the company or assets than it otherwise would have had the government acted in a manner consistent with the normal sales practices of private, commercial sellers in that country."[8] To conduct this inquiry, the new methodology sanctions two approaches: (1) an inductive approach, using a benchmark analysis wherein Commerce compares the sales price with "comparable benchmark prices" and (2) a deductive approach using a process of sale analysis wherein Commerce looks at "process factors" to determine if the sale was manipulated or distorted such that the bid accepted by the government would not reflect the fair market value of the company or assets. *Id.*

In this case, Commerce made a threshold determination that the sale was at arm's-length because the seller, AST, and the purchaser, TKAST, were unrelated. *Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 4–5. Accordingly, it proceeded into its second line of analysis to determine whether the arm's-length sale was at fair market value. Commerce concluded that there was "no evidence in the record of any contemporaneous sales of companies comparable to AST nor any appropriate market benchmark price." *Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 5. Consequently, Commerce, applying its methodology, was to base its conclusion solely on whether it could infer that fair market value was paid from the manner AST was sold. In considering the sale process, Commerce identified a non-exhaustive list of factors: (1) Did the government perform an objective analysis of the value of the company? (2) Were there artificial barriers to entry which precluded potential competitors from not participating in the process? (3) Did the government accept the highest bid? and (4) Were there committed investment requirements?[9] *Determination*, P.R.

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[8] The Court notes that Commerce did not discuss the norm regarding the sale of steel companies, or any company, in Italy or elsewhere. Without this benchmark, it becomes difficult for a Court to review a determination that a given sale process is, or is not, atypical.

[9] Allegheny at times attempts to read the methodology strictly and, under this strict reading, alleges that Commerce did not apply its own methodology to the facts. For ex-

Doc. No. 33, Pl.'s Ex. 1 at 5 (citing *Methodology* 68 Fed. Reg. at 37,127).

Looking at these factors, Commerce observed that there were some anomalies in the sale of AST. Most significantly, although the bidding process started with nineteen interested firms, all the firms except TKAST dropped out of the competition or were disqualified. *Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 4. More specifically, the GOI (a) required bidders to guarantee their bids, *Confidential Determination*, C.R. Doc. No. 11, Pl.'s Ex. 9 at 6; (b) gave a short period to conduct due diligence, *Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 6; (c) turned over incomplete documents to the bidders, *Confidential Determination*, C.R. Doc. No. 11, Pl.'s Ex. 9 at 5; (d) may have required the winning firm to have a partnership with an Italian firm,[10] *Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 6; and (e) required committed investments such as restrictions on alienation and maintenance of production and employment at certain levels, *Confidential Determination*, C.R. Doc. No. 11, Pl.'s Ex. 9 at 7–8. Commerce found that these restrictions may have deterred firms, especially foreign firms, from bidding on AST. *Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 6. Nonetheless, Commerce found that these factors did not seriously distort the sales process and that the sale price was higher than that reflected in objective valuation studies conducted by third parties. *Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 5, 12, *Confidential Determination*, C.R. Doc. No. 11, Pl.'s Ex. 9 at 7. As Commerce concluded:

> On the one hand, there were some real and perceived barriers in the bidding process that might have limited the number of potential purchasers. On the other hand, there is substantial record evidence that the privatization of AST was accomplished through a fair-market-value transaction.

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ample, at one point Allegheny claims that a government must "accept the highest bid" to extinguish the subsidy. *See* Pl.'s Rule 56.2 Mem. Law Supp. Mot. J. Agency R., at 18–19 ("Pl.'s Mem."). According to Allegheny, given that the word "highest" is a word of comparison, because the GOI only considered one bid, its acceptance thereof could not have been the acceptance of the "highest" bid. Therefore, according to Allegheny, the methodology requires a finding that the subsidy was not extinguished because the GOI did not accept the "highest bid." The Court considers this hyper-technical reading of the methodology unpersuasive. These factors are non-exhaustive and are intended to assist Commerce in determining whether fair market value was paid which it is required to do by law; moreover, these factors must be read in a manner that promotes the ultimate goal of determining whether fair market value was paid. Application of the factors enunciated in Commerce's new methodology, without regard to how these factors promote the ultimate goal of determining whether fair market value was paid, is a misapplication of Commerce's methodology, *Methodology*, 68 Fed. Reg. at 37,127, and accordingly is not in accordance with law, *Allegheny Ludlum*, 367 F.3d at 1344.

[10] Commerce did not make a definitive factual finding in this regard. Commerce noted that there was suspicion that this was the case. *Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 6.

Id. at 8. Allegheny alleges that Commerce's analysis does not comport with its methodology and its conclusion is unsupported by substantial evidence. The Court disagrees with Allegheny's former contention but agrees that Commerce's decision is not supported by substantial evidence.

i. PROCESS FACTORS DO NOT SUPPORT AN INFERENCE THAT FAIR MARKET VALUE WAS TENDERED

The Court agrees with Allegheny that an inference that the sale process resulted in a sale at fair market value is not supported by substantial evidence as explicated by Commerce in its determination. Allegheny contends that if TKAST's competitors had dropped out of the competition, a rational bidder would not be induced to offer the full market value for the company. Pl.'s Mem. at 18; *cf. Enserco, L.L.C. v. Drilling Rig Noram 253*, 126 F. Supp. 2d 443, 447 (S.D. Tex. 2000). TKAST and Commerce counter that Allegheny has not accurately summarized the facts. *See Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 12. Rather, when TKAST bid for AST, at least one other bidder was still in the competition and submitted a final bid (although later it was rejected). *Id.*

Theoretically, at least where bidding is in a one-time winner-take-all auction form, a competitor is induced to bid its valuation of the company. Given that bidders only bid once under such an auction model, a competitor cannot rebid a higher price if its competitors outbid it. Therefore, assuming bidder A has no knowledge of its opponent's bid, if bidder A does not bid close to the valuation of the company, another bidder will win, and bidder A will lose the competition (and therefore a financial opportunity). Consequently, TKAST contends, with the specter of competition looming, TKAST had every incentive to bid a price it considered to be fair market value. The Court agrees with TKAST and Commerce that a reasonable inference can be drawn that TKAST had an incentive to bid its valuation of AST. *See Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 12.

However, the Court also agrees with Allegheny that this fact alone is insufficient to prove that the sale price reflected the fair market value of AST in light of Commerce's findings that there were real and perceived barriers in the bidding process. Because of these barriers, the process itself does not provide a basis to conclude that the GOI maximized the return on what it sold to justify a fair market value determination. There is too much uncertainty. TKAST may have bid in good faith on what it perceived fair market value to be; however, it may have had special knowledge, it may have wrongly assessed AST's assets, or it may not have been in the position to offer fair market value, such that in a situation with multiple bidders, its bid would have been woefully inadequate. This concern is particularly acute here, where the short period of time permitted to conduct due diligence was acknowledged by a bidder as a significant obstacle in crafting a reliable valuation of AST. *Confidential Determination*, C.R. Doc. No. 11, Pl.'s Ex. 9 at 5. Because of this complication, the Court agrees with Allegheny that Commerce's analysis of the sale process, by itself, cannot support a reasonable inference that fair market value was tendered, especially given that TKAST must overcome the presumption that prior subsidies remain countervailable.

ii. OBJECTIVE VALUATIONS AND THE CONCLUSION THAT FAIR MARKET VALUE WAS TENDERED

Commerce implicitly recognized this short-coming and proposed an additional justification that the sale price was at, or above, fair market value. *See Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 12 ("However, as discussed in the *Analysis* section above, we continue to find that certain other aspects of the bidding process might have served to limit the number of bidders. Nevertheless, the three independent valuations of AST show that the GOI received fair market value for AST. . . . The valuations provide relevant evidence that the real or perceived restrictions did not result in a non-competitive skewed process.").[11] Commerce looked at three independent valuation studies of AST conducted by disinterested third parties. Finding that the sale price was above AST's valuation in these studies, Commerce concluded that at least fair market value was tendered by TKAST. *Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 12, *Confidential Determination*, C.R. Doc. No. 11, Pl.'s Ex. 9 at 9.

Before proceeding to analyze whether Commerce's conclusion is supported by substantial evidence, the Court notes that Commerce discussed this as part of its "objective analysis" of its process of sale analysis. According to the Court's reading of Commerce's methodology, the process of sale analysis looks into the manner the sale was conducted.[12] Consequently, following Commerce's "process" methodology, it is the fact that a government sought objective valuations, and relied on those valuations, that is important. But by using the valuations to prove the sale price was for fair market value, Commerce is comparing a resulting sale price to a benchmark. Commerce

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[11] The Court further notes that the Determination's discussion on fair market value incorporates the Confidential Determination, *Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 4, which placed weight on the fact that the bid was above the valuation studies' estimate, *Confidential Determination*, C.R. Doc. No. 11, Pl.'s Ex. 9 at 9.

[12] By way of comparison, 19 U.S.C. § 1592(e) authorizes Customs to seek damages against parties who negligently or fraudulently misclassify their products entering the United States. According to the case law, a defendant may assert a defense that he acted with reasonable care, *inter alia*, if he obtained the advice of counsel, and relied on that advice, in classifying his products. *United States v. Optrex Am., Inc.*, slip op. 04–79 (CIT July 1, 2004). In allowing this defense, the case law is not suggesting that counsel's advice was accurate – rather, if the Government is prosecuting a claim, most likely that advice was wholly erroneous. Rather, it is the fact that advice of counsel was sought which demonstrates that the defendant exercised reasonable care. In other words, it is the process of seeking advice that is probative, not the actual advice received.

is not using the valuations to prove the validity of the *procedure* used to sell the company. In so doing, Commerce opens the door to claims that the valuation studies were inaccurate.[13] Moreover, by opening the door to a claim that it was not following its own methodology, Commerce undermines its own contention that there were no "benchmarks" by which to compare the sale price. In fact there were: the valuation studies.

Setting aside this methodological objection, Allegheny seeks to discredit the valuations as having been engineered by the GOI to boost projections of future rates of return at the expense of devaluing the present value of AST.[14] In assessing Allegheny's argument, the Court is mindful that courts grant considerable deference to an agency's review of valuation studies. *Cf. New Haven Inclusion Cases*, 399 U.S. 392, 434–35 (1970) (" 'The judicial function is to see to it that the Commission's 'estimate' is not a mere 'guess' but rests upon an informed judgment based upon an appraisal of all . . . relevant . . . facts . . . , and is not at variance with the statutory command.' ") (quoting *Freeman v. Mulcahy*, 250 F.2d 463, 473 (1st Cir. 1957)) with *Allegheny*, 367 F.3d at 1344 (noting the Commerce must consider all the facts and circumstances behind a privatization). Consideration of valuation studies requires extensive fact finding and expertise a court does not have when reviewing agency determinations. This does not mean that agencies have carte blanche to ignore facts, misread studies, or otherwise use valuation studies such that their factual findings are unsupported by substantial evidence. *Id*. The agency must explain its rationale in adopting a valuation study such that a court may follow and review its line of analysis, its reasonable assumptions, and other relevant considerations. *Id*.

Granting this deference owed to Commerce, the Court nonetheless finds that, in this case, Commerce has not adequately explained its adoption of the valuation studies, especially in light of Allegheny's objections. In its determination, Commerce noted that "[w]e consider these studies timely as they were conducted prior to the agreement on the final transaction price. Further, the studies are objective and complete since they were conducted by independent parties and contained information typically considered by sellers contemplating

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[13] The accuracy of the valuations may, or may not, be relevant to whether a government sought objective advice and reasonably relied on those valuations.

[14] At oral argument, the Government and TKAST argued that Allegheny did not raise this argument before Commerce and waited until its reply brief to raise the argument in this proceeding. The Court agrees that arguments not raised before Commerce may not be raised before a reviewing court and that a party may not raise an argument for the first time in its reply brief. However, the Court deems that Allegheny adequately raised this argument below, *see* Petitioner's Case Brief, Attachment to Letter from David A. Hartquist, Kathleen W. Cannon & Eric R. McClafferty, Collier Shannon Scott, PLLC, to Sec'y of Commerce, Re: *Stainless Steel Sheet and Strip in Coils from Italy*, C.R. Doc. No. 9 at 12–14 (Sept. 26, 2003) at 12–14, and adequately raised this argument in its initial brief before the Court, Pl.'s Mem. at 21–27.

such a sale." *Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 5. Allegheny challenges the IMI study's write-down of certain assets and addition of certain "provisions" to AST's balance sheet, and claims that the two subsequent studies adopted these distorted values. Pl.'s Mem. at 21–27. Commerce did not address these concerns in its Determination.[15] Nor did Commerce make a determination that the studies reflected any of the committed investment requirements or that the concurrent subsidies were reflected in the IMI or Pasfin studies.[16]

It is not inappropriate for Commerce to rely on valuation studies when, and to the extent, these valuation studies consider all of the facts and circumstances of the value of a privatized firm.[17] However, when a valuation study, or valuations studies, have not considered all the facts and circumstances, reliance thereon is misplaced. *Cf. Delverde III*, 202 F.3d at 1367. Because a court does "not defer to the agency's conclusory or unsupported suppositions," *McDonnell Douglas Corp. v. United States Dept. of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (citing *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)), Commerce's adoption of these studies cannot be grounded in substantial evidence.[18] Furthermore, whatever the merits of Com-

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[15] In its market distortion analysis, Commerce argues that it does not have to address the GOI decisions about which assets and liabilities to place in AST because these decisions were not in the nature of a governmental function or governmental regulation but instead were similar to the action of a private seller. *Determination*, P.R. Doc. No. 33, Pl.'s Ex. 1 at 14. This response does not in any way validate Commerce's decision to rely on the valuations in determining fair market value.

[16] The Court is mindful that Commerce only made an explicit finding that the Morgan Grenfell valuation study considered AST's debt after AST's debt write-down in December. *See Confidential Determination*, C.R. Doc. No. 11, Pl.'s Ex. 9 at 7. Commerce never indicated that the other two studies included the concurrent subsidies or that any of the studies contemplated any committed investment requirements. *Cf. Confidential Determination*, C.R. Doc. No. 11, Pl.'s Ex. 9 at 7. The fair market price for AST should reflect AST's "core value" combined with the value of any prior and concurrent subsidies (subsidies conferred during the privatization of a company) and committed investment requirements. Accordingly, the prior subsidy and concurrent subsidy analyses are inextricably linked when Commerce infers fair market value from valuation studies. Consequently, either the purchasing firm remunerated the government for of all of these values or did not remunerate the government for all of these values. Moreover, the Court notes that although some conclusions may be logically deducible from the facts, e.g., that the committed investments would lower the valuation therefore any error would be harmless or that the IMI study was based on the same level of debt write-off that actually occurred five months after the study was commissioned, Commerce must make these considerations explicit. *Cf. Siderca v. United States*, slip op. 04–133 (Oct. 27, 2004) at 29 n.15 (noting that the Court should not be left to guess if Commerce considered certain facts and how it reached its conclusions); *see also infra* note 18.

[17] The Court is not implying that Commerce must accept or reject a valuation study in total. Rather, it may be appropriate for Commerce to adopt such portions as it deems relevant, add, and detract values so as to determine the true valuation of assets.

[18] Other anomalies give the Court pause. First, the price TKAST bid for AST was actually higher than the valuation range provided by the study it commissioned and the price it

merce's and TKAST's arguments before the Court, such arguments cannot be a substitute for a reasoned decision by the agency on the record. *Al Tech Specialty Steel Corp. v. United States*, slip op. 04–114 at 51 (CIT Sept. 8, 2004) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962)). Accordingly, the Court remands this case to Commerce to consider Allegheny's objections to the valuation studies.[19]

B. IF FAIR MARKET VALUE WAS CONFERRED, ALLEGHENY HAS NOT OVERCOME THE PRESUMPTION THAT FAIR MARKET VALUE EXTINGUISHED THE SUBSIDY

If Commerce concludes that fair market value has been tendered, the presumption shifts, i.e., the presumption then becomes that the subsidy was extinguished, but the presumption, in turn, may be rebutted upon a showing that the sale process was distorted through government intervention. *Methodology* 68 Fed. Reg. at 37,127. The Methodology defines this consideration as follows:

> A party can, however, obviate this presumption of extinguishment by demonstrating that, at the time of the privatization, the broader market conditions[ ] necessary for the transaction price to reflect fairly and accurately the subsidy benefit were not present, or were severely distorted by government action

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eventually paid was significantly higher than the maximum valuation for AST. *Confidential Determination*, C.R. Doc. No. 11, Pl.'s Ex. 9 at 7. Second, IRI did not rely very heavily on its valuation studies. After receiving a bid that was noticeably higher than the projected value for AST, *Confidential Determination*, C.R. Doc. No. 11, Pl.'s Ex. 9 at 7, IRI then proceeded to negotiate a price for the following months, *id.* at 3. This does suggest that IRI was interested in securing the highest obtainable price for AST, but also, that it did not place great weight on the studies. At oral argument, TKAST presented an explanation for this, i.e., that during the post-bidding negotiations changes occurred which may have changed the value of the assets on the table. Oral Argument Before Judge Donald C. Pogue in *Allegheny Ludlum v. United States*, Jan. 18, 2005 at 1:58:56 (statement of Lewis E. Leibowitz). However, this explanation did not appear in the Determination and therefore constitutes a post-hoc rationalization. Moreover, TKAST's argument casts doubt on whether any of the valuation studies was completely based on the transaction that actually occurred. If there were negotiations regarding the assets TKAST would assume, which changed from the assets the valuation studies valued, then these valuation studies could not have been "complete" or "timely." To make a determination as to whether a valuation study is timely or complete, Commerce must make an express determination that a valuation study valued the total package being sold, adjust the valuation study to reflect the total package being sold, or explain why any changes between the assets considered in the valuation study did not materially deviate from the valuation of the assets sold, if it wants to rely on valuation studies. In sum, Commerce must make a determination that no benefit was conferred because the purchaser fully remunerated the government for the "package" of assets acquired – whatever form the subsidy/subsidies assume(s). *See* 19 U.S.C. 1677(5)(B) & (E)(iv); *see also Delverde*, 202 F.3d at 1364–67.

[19] Allegheny has also raised objections as to Commerce's concurrent subsidies methodology. Because the Court has considered concurrent subsidies in context of the prior subsidies analysis, the Court deems any further discussion unnecessary until Commerce issues a remand determination. Allegheny may raise any properly preserved arguments at that time.

> (or, where appropriate, inaction).[ ] In other words, even if we find that the sales price was at "market value," parties can demonstrate that the broader market conditions were severely distorted by the government and that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action.

Id. (footnotes omitted); *cf. United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R (Dec. 9, 2002) at 62 ("However, governments may choose to impose economic or other policies that, albeit respectful of the market's inherent functioning, are intended to induce certain results from the market."). The regulations further specify what types of distortions will rebut the presumption that fair market value has been extinguished:

> 1. Basic Conditions: For example, are the basic requirements for a properly functioning market sufficiently present in the economy in general as well as in the particular industry or sector, including free interplay of supply and demand, broad-based and equal access to information, sufficient safeguards against collusive behavior, effective operation of the rule of law, and adequate enforcement of contracts and property rights?
>
> 2. Legal and Fiscal Incentives: Has the government used the prerogatives of government in a special or targeted way that makes possible, or otherwise significantly distorts the terms of, a sale in a way that a private seller could not, *e.g.*, through special tax or duty rates that make the sale more attractive to potential purchasers generally or to particular (*e.g.*, domestic) purchasers, through regulatory exemptions particular to the privatization (or privatizations generally) affecting worker retention or environmental remediation, or through subsidization or support of other companies to an extent that severely distorts the normal market signals regarding company and asset values in the industry in question?

Id.

Allegheny contends that through repeated bailouts and other manipulations of the Italian steel sector, the GOI distorted the market. Pl.'s Mem. at 28–31. Allegheny asserts that, without government assistance, AST would have gone bankrupt long before its privatization. *Id.* at 29–30. Although this consideration is not a type of distortion envisioned by the methodology, because Commerce must consider all of the facts and circumstances of a privatization, the Court will read Commerce's methodology broadly and will consider all distortions raised by the parties that may be lawfully considered relevant. *See Fiskars, Inc. v. Hunt Mfg. Co.*, 221 F.3d 1318, 1322 (Fed. Cir. 2000) (noting the presumption that agencies act in accordance with law); *see also Methodology* Fed. Reg. at 37,127 (noting the list includes only "some factors" that might be considered). Nevertheless, even under this reading of Commerce's methodology, the Court is not persuaded that Allegheny's arguments are sufficient to carry its burden.

First, under countervailing duty law, the inquiry focuses on whether a *purchasing firm* received a financial contribution and benefit. *See Delverde III*, 202 F.3d at 1367 (the statute requires "Commerce to make a determination that a *purchaser* of corporate assets received both a financial contribution and benefit from a government, albeit indirectly through the seller, before concluding that the purchaser was subsidized.") (emphasis added), *cf.* Uruguay Round Trade Agreements Act Statement of Administrative Action, H. Doc. 103–316 at 257 (1994) ("subparagraph (E) reflects the 'benefit-to-the-recipient' standard which long has been a fundamental basis for identifying and measuring subsidies under U.S. CVD practice, and which is expressly endorsed by Article 14 of the Subsidies Agreement."). When a sale is for fair market value, the true value of the subsidy has, at least theoretically, been factored into the purchase price. At this price, a purchaser whose reservation price is at fair market value should be indifferent to buying the company or assets or investing its money elsewhere. Consequently, the purchaser would not be the receiver of this "benefit" as required by law.

For example, a government may build a state-of-the-art facility for the production of widgets even though the factor costs in that country, e.g., labor or resource costs, place that country at a significant comparative disadvantage in the operation of the facility. When the government sells the facility, theoretically, these high factor costs will be considered in the purchase price – they will depress the purchase price (from the construction price) to reflect these high factor costs. The ultimate purchaser does not necessarily receive a benefit because it pays the value of the facility given market conditions (assuming the facility is sold under competitive market conditions) – the market should price the facility at the point where it is just profitable enough to justify the operation of the facility. At least part of the money the government spent would be a sunk cost (and sunk benefit) and does not confer a benefit on the purchaser. *Cf. Certain Steel Products from Austria*, 58 Fed. Reg. 37,217, 37,264 (DOC July 9, 1993) (final affirmative countervailing duty determination).[20]

Second, as the WTO Appellate Body has recently concluded:

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[20] The Court has some discomfort with the fact that a government may induce its industry to compete against U.S. industries through use of devices such as committed investment requirements. For example, by a government requiring a company to maintain production for a period of time, and so reducing the purchase price to make this feasible, that government is injecting distortions into the international market, i.e., creating potential competition that would not exist but for government intervention. Nevertheless, the Court is constrained by the case law to disregard this type of distortion because there is no benefit to

> [O]nce a fair market price is paid for the equipment, its *market value* is redeemed, regardless of the utility the firm may derive from the equipment. Accordingly, it is the *market value* of the equipment that is the focal point of analysis, and not the equipment's *utility value* to the privatized firm.

United States – Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R (Dec. 9, 2002) at 51. In this case, given that Commerce's methodology and its Section 129 determination are intended to implement WTO rulings, this factor is relevant. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). Additionally, the WTO Appellate Body decisions have persuasive weight here because nonconformance of U.S. practice may result in retaliatory tariffs against U.S. exporters – a result that negates the U.S.'s benefit from the international agreement. *Cf. McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). Accordingly, were the agency to construe an ambiguous statute so as to benefit domestic interests in violation of international agreements, retaliatory tariffs would result, a penalty which Congress presumably would wish to avoid. Consequently, courts should prefer adhering to international law standards unless otherwise indicated by Congress. *See, e.g.*, *id.* at 20–21; *cf.* The Federalist No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961) ("It is of high importance to the peace of America that she observe the laws of nations towards [its treaty partners], and to me it appears evident that this will be more perfectly and punctually done by one national government. . . .); *see also Allegheny*, 367 F.3d at 1348 (citing *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . as understood in this country."); *Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1582 (Fed. Cir. 1995). Because Congress has not statutorily created an unavoidable conflict with the WTO, *cf. The Chinese Exclusion Case*, 130 U.S. 581 (1889), there exists no reason not to look to the WTO for assistance in interpreting U.S. law. *See* 19 U.S.C. § 3512 ("no provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is *inconsistent with any law* of the United States shall have effect") (emphasis added).

Allegheny appears to base its distortion argument not on the market value, but on the utility value of these past distortions. Based on the record as it stands, the Court cannot conclude that these past

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the purchasing firm. Such constraint, however, does not limit the requirement that Commerce determine that *no* benefit be conferred on the purchasing firm.

distortions can provide a basis to overcome the presumption that a purchase at fair market value extinguished the subsidy.

CONCLUSION

Commerce's determination that fair market value was tendered is not supported by substantial evidence. On remand, Commerce must reconsider its determination consistent with this opinion. If Commerce continues to rely on the valuations studies, Commerce should justify its use of the valuation studies in face of Allegheny's challenges. Finally, Commerce must reconsider its analysis of concurrent subsidies in accordance with this opinion.

Commerce shall have until May 9, 2005 to submit its remand determination. The parties shall have until May 23, 2005 to submit comments on the remand determination. Rebuttal comments shall be submitted by June 6, 2005.

SO ORDERED.

Slip Op. 05–20

BEFORE: CARMAN, JUDGE

CHURCH & DWIGHT CO., INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 02–00763

[Upon consideration of motion papers regarding Defendant's motion for relief from judgment, Defendant's motion is denied. Defendant is hereby ordered to pay to Plaintiff the outstanding balance of duty refund pursuant to their Stipulated Judgment, plus any interest as may be required by law.]

Dated: February 8, 2005

Hogan & Hartson, LLP (*Lewis E. Leibowitz*, *William D. Nussbaum*), Washington, D.C., for Plaintiff.

Peter D. Keisler, Assistant Attorney General, U.S. Department of Justice; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, U.S. Department of Justice; *Bruce N. Stratvert*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Beth C. Brotman*, Of Counsel, U.S. Customs and Border Protection, for Defendant.

OPINION

CARMAN, JUDGE: Defendant United States moves for relief from judgment under USCIT R. 60(a)–(b). Defendant requests relief from the Stipulated Judgment on Agreed Statement of Facts by either modifying or vacating the judgment. (*See Church & Dwight Co., Inc.*

v. United States, Court No. 02–00763, Stipulated J. on Agreed Statement of Facts (July 15, 2004) ("Stipulated Judgment").) Pursuant to the parties' Stipulated Judgment, this action was decided on July 15, 2004, and the Clerk of the Court entered final judgment. This Court denies Defendant's motion from relief from judgment.

BACKGROUND

This matter involves the classification and duty rate for palm fatty acids distillate ("PFAD") imported by Church & Dwight Co., Inc. ("Church & Dwight") from 1997 through 2002. The United States Customs Service, now the United States Bureau of Customs and Border Protection ("Customs"), classified the subject merchandise under tariff provision 3824.90.40 of the Harmonized Tariff Schedule of the United States ("HTSUS"), subject to duty at 4.6% *ad valorem*. In 2002 and 2003, Church & Dwight timely protested Customs' classification of the subject merchandise, claiming that the proper classification was the duty free tariff provision HTSUS 1511.90.00. When Customs denied the protests, Church & Dwight timely commenced an action in this Court. In subsequent negotiations during 2003 and 2004, the parties agreed that the proper classification for the subject merchandise was HTSUS tariff provision 3823.19.20, subject to duty at 2.3% *ad valorem*.[1]

On July 7, 2004, parties filed the Stipulated Judgment. On July 15, 2004, this Court ordered this action decided, and the Clerk of the Court entered final judgment. On November 17, 2004, Plaintiff wrote a letter to this Court complaining of Defendant's noncompliance with the Stipulated Judgment. Although Customs has partially paid the duty refund to Plaintiff, Defendant disputes the full amount owed for the reliquidated entries. Plaintiff contends that the Stipulated Judgment unambiguously states that the subject merchandise is to be reliquidated "at the rate of 2.3% *ad valorem*." Defendant claims it intended the language to read "at the rate in effect at the time of entry." On November 23, 2004, this Court convened an in-chambers conference to discuss the dispute. Thereafter, Defendant moved for relief from judgment pursuant USCIT R. 60. Plaintiff opposed this motion. In their motion papers, the parties agree that the amount in dispute is $101,436.68, not including interest.

DISCUSSION

This matter comes before this Court because a dispute has arisen between the parties regarding the performance of their Stipulated

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[1] This Court notes that the subject merchandise was entered into the customs territory of the United States during the years from 1997 through 2002. The tariff provisions at issue did not change during this period, but the duty rates varied for HTSUS tariff provision 3823.19.20, with a 2.3% duty rate for the years from 2000 to 2002.

Judgment. This Court notes that the final judgment was ordered on July 15, 2004, but this dispute was not brought to the attention of this Court until four months later. Although Defendant subsequently moved for relief from judgment, it was the Plaintiff that requested this Court's guidance on how to proceed in light of Defendant's non-compliance and instigated the in-chambers conference to resolve the dispute.

Courts look favorably upon stipulations, where parties negotiate and come to an agreement on their own terms. *See Hemstreet v. Spiegel, Inc.*, 851 F.2d 348, 350 (Fed. Cir. 1988) ("The law strongly favors settlement of litigation, and there is a compelling public interest and policy in upholding and enforcing settlement agreements voluntarily entered into.") (citation omitted). This Stipulated Judgment was negotiated, approved, signed and submitted by opposing parties. This Court then ordered this action decided on July 15, 2004, and the Clerk of the Court entered final judgment. This Court holds that if a party were able to unilaterally disavow a stipulated judgment of agreed statement of facts, which was entered into in good faith, the public policy underlying negotiated agreements would be undermined.

The provision at issue is paragraph 4 of the Stipulated Judgment: "The parties agree that the imported merchandise is classifiable as '[i]ndustrial monocarboxylic fatty acids; acid oils from refining: . . . Other: . . . Derived from coconut, palm-kernel oil' under sub-heading 3823.19.20, HTSUS at the rate of 2.3% *ad valorem*."

This statement plainly and ordinarily means that the subject merchandise will be reliquidated at the rate of 2.3% *ad valorem* for all entries included in this case. Although both parties negotiated drafts and signed the final stipulation, Defendant contends "[i]t was never Customs' intention, however, to agree to a duty rate other than the general duty rates in effect for subheading 3823.20, HTSUS, *at the time that the subject entries were filed*." (Def.'s Mem. in Supp. of Its Mot. for Relief from J. ("Def.'s Mot.") at 2 (emphasis added) (citing Decl. of Beth C. Brotman ("Brotman Decl.") at ¶ 4).) Defendant contends that it erroneously or mistakenly did not include the provision "at the time the subject entries were filed" as intended. Grounded in its contention that this is a remedial mistake or error, Defendant claims relief from judgment pursuant USCIT R. 60 or unilateral mistake pursuant to principles of contract law. (Def.'s Reply Br. in Supp. of Mot. for Relief from J. and in Opp'n to Pl.'s Resp. ("Def.'s Reply Br.") at 8.)

A. USCIT R. 60

Defendant contends it committed unintended error, mistake, inadvertent mistake, excusable neglect and mistake under USCIT R. 60(a) and (b). (Def.'s Mot. at 8 n. 5, 9, 10.) USCIT R. 60(a) and (b) allow discretionary relief from a judgment or order:

> (a) Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of any party and after such notice, if any, as the court orders. . . .
>
> (b) On motion of a party or upon its own initiative and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (4) the judgment is void; . . . or (6) any other reason justifying relief from the operation of the judgment. . . .

An examination of the case law interpreting Fed. R. Civ. P. 60(a) lends guidance to the definition and scope of "clerical mistake."[2] No longer literally read as a mistake confined to a clerk, this phrase now "merely describes the type of error identified with mistakes in transcription, alteration or omission of any papers and documents which are traditionally or customarily handled or controlled by clerks but which papers or documents may be handled by others." *Porter v. United States*, 84 Cust. Ct. 191, 194, C.D. 4857, 493 F. Supp. 591, 593 (1980) (citing *In re Merry Queen Transfer Corp. v. O'Rourke*, 266 F. Supp. 605, 607 (E.D.N.Y. 1967)). *Merry Queen* offers further guidance on the applicability of subsections Rule 60(a) and (b) by explaining that a "clerical mistake under Rule 60(a) may be differentiated from the mistake or inadvertence referred to in Rule 60(b)(1), upon the ground that the latter applies primarily to errors or omissions committed by an attorney or by the court which are not apparent on the record." *Merry Queen*, 266 F. Supp. at 607 (citation omitted); *see also Porter*, 84 Cust. Ct. at 194 ("It is well settled that a clerical error specifically refers to error of transcription, copying or calculation.") (citation omitted). In the present case, Defendant admits attorney error, not clerk-type error; therefore, subsection (a) is inapplicable. Accordingly, relief from the alleged attorney mistake in this case must be sought under subsection (b).

The moving party has the burden to present facts sufficient to demonstrate mistake, inadvertence, surprise or excusable neglect under USCIT R. 60(b)(1). *See Washington Int'l Ins. Co. v. United States*, 16 CIT 480, 483, 793 F. Supp. 1091, 1093 (1992). This Court will then determine, based on specific facts presented to it, whether there exists mistake, inadvertence, surprise or excusable neglect sufficient to grant relief under Rule 60(b). *Id*. The record reflects that both Defendant and Customs had experienced counsel reading, com-

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[2] USCIT R. 60 is modeled after Fed. R. Civ. P. 60. Since they are substantially similar, Fed. R. Civ. P. 60 case law provides guidance in interpreting the application of the USCIT R. 60.

menting and approving the negotiated drafts of the Stipulated Judgment. Customs' counsel approved the language of paragraph 4 of the Stipulated Judgment. (Brotman Decl. ¶ 2, 4; *see also* Letter from Stratvert to Nussbaum of 3/17/04, at 2.) In fact, Customs' counsel admits in her declaration that she "overlooked the fact that paragraph 4 [ ] indicated that the goods were to be classified under subheading 3823.19.20 *at the rate of 2.3%*" (emphasis original) and once she "determined (erroneously) that this paragraph did not need to be changed, [she] did not consider the paragraph any further." (Brotman Decl. ¶ 3.) Defendant's counsel also admits that "[t]here were a number of iterations to this process leading up to the final version of the Stipulated Judgment as filed with the Court by the parties" (Def.'s Mot. at 2), where Defendant's counsel made extensive comments to drafts and also approved the final version of the Stipulated Judgment (Def.'s Reply Br. at 6). This Court observes that Defendant's assertion that it somehow overlooked the plain language of paragraph 4, which states that the subject merchandise was to be reliquidated at a rate of 2.3%, is either disingenuous or amounts to carelessness.

This Court has found that "[n]either ignorance nor carelessness on the part of a litigant or his attorney provides grounds for relief under Rule 60(b)(1)." *Napp Systems, Inc. v. United States*, 22 CIT 1106, 1107 (1998) (citing *Avon Products, Inc. v. United States*, 13 CIT 670, 672 (1989) (citations omitted)); *see also Sutherland v. ITT Continental Baking Co.*, 710 F.2d 473, 476–77 (8th Cir. 1983) ("Rule 60(b) has never been a vehicle for relief because of an attorney's incompetence or carelessness."). Negligence is also not a ground for relief under Rule 60(b)(1). *See Greenspahn v. Joseph E. Seagram & Sons, Inc.*, 186 F.2d 616, 619 (2d Cir. 1951) ("[I]f the defendant was guilty of gross carelessness in making the mistake, his negligence will dispose the court not to exercise its discretion in his favor [under Rule 60(b)(1)]."). This Court finds that Defendant's attorneys' actions of overlooking a mistake in numerous iterations of a written agreement amount to carelessness, which is insufficient for relief under USCIT R. 60(b)(1). Accordingly, this Court also finds this carelessness bars relief under the alternative grounds found in USCIT R. 60(b)(4) and (6). In the absence of finding an enumerated ground for relief under USCIT R. 60, this Court holds that Defendant should not be granted relief from judgment.

B. Contract Law

This Court holds that the Stipulated Judgment is an enforceable agreement governed by contract law.[3] *See Anita's New Mexico Style*

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[3] Since this Court holds that this Stipulated Judgment is an enforceable contract and Defendant acknowledges its authority to sign a stipulated judgment, this Court will not per-

Mexican Food, Inc. v. Anita's Mexican Foods Corp., 201 F.3d 314, 319 (4th Cir. 2000) ("Because a stipulated judgment is analogous to a consent order or decree, it is also treated as a contract for the purposes of enforcement sought here."). Defendant contends unilateral mistake under principles of contract law. (Def.'s Reply Br. at 8.) Plaintiff agrees that the Stipulated Judgment is governed by principles of contract law but argues that unambiguous terms are accorded their ordinary meaning in contract law. (Pl.'s Mem. in Opp'n to Def.'s Mot. for Relief from J. ("Pl.'s Opp'n") at 6.) A unilateral mistake is only remedial if the mistaken party can show that the mistake "has a material effect on the agreed exchange of performances" and either "(a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake." Restatement (Second) of Contracts § 153 (1981). The record does not support a finding of unconscionable behavior by the Plaintiff or that the Plaintiff had reason to know of Defendant's mistake or Plaintiff's fault caused Defendant's mistake regarding paragraph 4. On the contrary, the record reflects that throughout a series of drafts negotiated between parties, Defendant approved the draft language of paragraph 4 as the final language, only commenting that the paragraph was misnumbered. (Letter from Stratvert to Nussbaum of 3/17/04, at 2.)

A basic tenet of contract law is that unambiguous terms, absent fraud or duress, are given their ordinary meaning. *See King v. Dept. of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997); *Torres v. Walker*, 356 F.3d 238, 245 (2d Cir. 2004) ("If a contract is clear, courts must take care not to alter or go beyond the express terms of the agreement, or to impose obligations on the parties that are mandated by the unambiguous terms of the agreement itself.") (citation omitted); *McCarthy v. Am. Int'l Group, Inc.*, 283 F.3d 121, 124 (2d Cir. 2002) ("Unambiguous terms are to be given their plain and ordinary meaning. . . .") (citations omitted); *Assicurazioni Generali S.p.A. v. Black & Veatch Corp.*, 362 F.3d 1108, 1116–17 (8th Cir. 2004) ("The enforcement of contracts according to their unambiguous terms, however, serves an important purpose in the law. . . . Where an agreement is clear, the parties are entitled to rely on an expectation that it will be enforced as written."); *United States v. Bielak*, 660 F. Supp. 818, 826 (N.D. In. 1987) ("One of the basic precepts of contract law is that a contract must give effect to the clear and unambiguous terms of a contract when construing it.") (citations omitted). There is no claim of fraud or duress in the record.

This Court holds that contract principles bar Defendant from attempting to create ambiguity where none exists. *See Torres*, 356 F.3d

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mit Defendant to subsequently assert that it lacked authority by simply trying to fashion the agreement as a "settlement compromise."

at 245 ("A party cannot create an ambiguity in an otherwise plain agreement merely by urg[ing] different interpretations. . . .") (citations omitted). In *Torres*, the Second Circuit found that "the language of the stipulation plainly and unambiguously provided for the payment of [ ] attorneys' fees." *Torres*, 356 F.3d at 245. Paragraph 4 states that "[t]he parties agree that the imported merchandise is classifiable. . . under sub-heading 3823.19.20, HTSUS at the rate of 2.3% *ad valorem*." This Court, as in *Torres*, finds that the language of the Stipulated Judgment is plain and unambiguous. Accordingly, Plaintiff is entitled to the full amount of the duty refund as stated in paragraph 4, which the parties agree is $101,436.68 in compliance with the terms of the Stipulated Judgment, plus any interest as may be required by law.

CONCLUSION

For the aforementioned reasons, Defendant's motion for relief from judgment is denied. Accordingly, Defendant is ordered to pay to Plaintiff the outstanding balance due pursuant to the Stipulated Judgment, plus any interest as may be required by law.