FINAL RESULTS
OF REDETERMINATION
PURSUANT TO COURT REMAND
DUPONT TEIJIN FILMS USA, LP, MITSUBISHI POLYESTER FILM OF AMERICA, LLC, AND TORAY PLASTICS (AMERICA), INC., V. UNITED STATES AND POLYPLEX CORPORATION LIMITED
COURT NO. 02-00463

SUMMARY

The Department of Commerce (Commerce) has prepared these results of redetermination pursuant to the remand order of the U.S. Court of International Trade (the Court) in Dupont Teijin Films USA, LP, Mitsubishi Polyester Film of America, LLC, and Toray Plastics (America), Inc., v. United States and Polyplex Corporation Limited, USCIT Slip Op. 03-167 (December 17, 2003), Court No. 02-00463 (Dupont Teijin II). The matter before the Court in Dupont Teijin II is Commerce's interpretation, upon remand, of the statutory phrase "countervailing duty imposed" in the context of companion antidumping and countervailing duty (CVD) investigations.[1] In Dupont Teijin II, the Court sustained Commerce's interpretation of "countervailing duty imposed" as explained in the Final Results of Redetermination Pursuant to Court Remand dated August 11, 2003 (Redetermination), stating that Commerce provided "a reasoned analysis for its new interpretation of the statute and, accordingly, the court concludes that Commerce has adequately explained the rationale for its definitional change." See Dupont Teijin II at 8-9.

However, the Court again remanded this case to Commerce instructing it to: (1)"fully address Polyplex's concern that petitioners could unfairly control the respondents' fate in an AD determination and resulting AD order by filing an extension and/or alignment request in the countervailing duty investigation;" (2) explain how it will "fairly and consistently apply its interpretation of 'imposed' when a final determination or an amended final determination issues on the same day as a countervailing duty order on the subject merchandise due to a petitioner's alignment request;" and, (3)"seek to restore the parties, as far as is possible, to the position they would have been had they been able to act on the Department's new interpretation of 'imposed,' and the court's determination in this matter, prior to the

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[1] This is the second remand in this proceeding. In the Court's first opinion, it found that Commerce improperly excluded Polyplex Corporation Limited (Polyplex), a company with an antidumping duty (AD) margin greater than *de minimis*, from the AD order on polyethylene terephthalate film, sheet, and strip (PET film) from India based on a zero percent AD cash deposit rate. Commerce calculated the zero percent cash deposit rate by reducing the AD margin by the export subsidies found in the companion CVD investigation. See Dupont Teijin Films USA, LP, Mitsubishi Polyester Film of America, LLC, and Toray Plastics (America), Inc., v. United States and Polyplex Corporation Limited, 273 F. Supp. 2d 1347 (July 9, 2003) (Dupont Teijin I).

issuance of the Amended Final Determination."[2] See Dupont Teijin II at 13-14.

BACKGROUND

On December 21, 2001, Commerce published its Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Polyethylene Terephthalate Film, Sheet and Strip From India, 66 Fed. Reg. 65893 (December 21, 2001) (Preliminary Determination). In its Preliminary Determination, Commerce calculated net prices for the two respondents' U.S. sales (Polyplex and Ester Industries Limited (Ester)) by increasing the reported prices by the amount of the export subsidies calculated in the companion CVD investigation. See Preliminary Determination at 65896. This resulted in a weighted-average dumping margin of 1.38 percent for Polyplex. See Preliminary Determination at 65898.

Both the petitioners (plaintiffs, here and in Dupont Teijin I) and Ester argued that Commerce's adjustment to U.S. prices for export subsidies is contrary to its previous practice and 19 U.S.C. §1677a(c)(1)(C) (which states that Commerce will increase U.S. price by any countervailing duty "imposed" to offset an export subsidy). In its final determination in the AD investigation, Commerce agreed with petitioners' and Ester's arguments on this point. See Final AD Determination at Comment 1. Commerce explained that in AD investigations, its practice is to reduce the percentage AD margin by the export subsidy rate calculated in a concurrent CVD investigation, rather than increase U.S. price by the amount of the export subsidies. See id. Commerce noted that this adjustment is not made "in the margin calculation program, but in the cash deposit instructions issued to the Customs Service." See id. Commerce completed its CVD investigation and found that Polyplex's weight-averaged, net subsidy rate from export subsidy programs, after accounting for program-wide changes, was 18.66 percent, *ad valorem*. See Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India; 67 FR 34905, 34906 (May 16, 2002) (Final CVD Determination). In the Final AD Determination, Commerce "calculated a weighted-average dumping margin of 10.34 percent for Polyplex before adjusting the margin for export subsidies for which the Department determined to impose countervailing duties, if a CVD order is issued." See Final AD Determination, 67 FR at 34901. In the cash deposit instructions for Ester and Polyplex, Commerce reduced each respondent's AD margin by its net export subsidy rate, as advocated by both the petitioners and Ester. This adjustment resulted in a zero rate for Polyplex.

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[2]See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from India, 67 Fed. Reg. 34899, 34901 (May 16, 2002), and accompanying Issues and Decision Memorandum (Final AD Determination), as amended, 67 Fed. Reg. 44175 (July 1, 2002) (Notice of Amended Final Antidumping Duty Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Polyethylene Terephthalate Film, Sheet, and Strip from India) (Amended Final AD Determination).

In its Final AD Determination, Commerce stated that "because the rate for Polyplex is zero, after adjusting the dumping margin for the export subsidies in the companion affirmative countervailing duty investigation, Polyplex will be excluded from the antidumping duty order." See id. Following the publication of the Final AD Determination, the petitioners argued, pursuant to 19 U.S.C. §1673d(e), that Commerce made ministerial errors in calculating the AD margin for Ester. Commerce agreed, and on July 1, 2002, published its Amended Final AD Determination in which it amended the final determination by correcting a ministerial error and issued its AD order on PET film from India. On the same day that it published its AD order on PET film from India, Commerce published its CVD order on PET film from India. Notice of Countervailing Duty Order: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India; 67 FR 44179 (July 1, 2002) (CVD Order).

On July 9, 2003, the Court remanded Commerce's final AD determination for further consideration consistent with the Court's opinion in Dupont Teijin I. The issue in Dupont Teijin I was whether Commerce improperly excluded Polyplex from the AD order on PET film from India because the company's AD margin, after adjusting for CVD export subsidies in the cash deposit instructions, was determined to be zero. The Court stated that there is no statutory authority to exclude an exporter with a dumping margin greater than *de minimis* simply because its cash deposit rate is zero percent. Thus, the Court stated that "[i]f Commerce continues to calculate a dumping margin of 10.34 percent for Polyplex, Polyplex must be subject to the antidumping duty order, whether or not it is given a cash deposit rate of zero because of expected offsetting countervailing duties." See Dupont Teijin, 273 F. Supp. 2d 1347, 1352. The Court also noted that Commerce "may set forth {a} new interpretation of the disputed statutory terms," as long as it provides a reasoned analysis for the ultimate methodology it adopts." Id. at 1353, n.11.

In Commerce's first redetermination upon remand, it continued to calculate a dumping margin for Polyplex of 10.34 percent and therefore, it included Polyplex in the AD order despite its cash deposit rate of zero percent. In its first redetermination, Commerce explained that, in light of the Court's expressed concerns, it "now interprets 19 U.S.C. §1677a(c)(1)(C) as requiring an increase in the respondent's export or constructed export price by the amount of countervailing duties imposed pursuant to a countervailing duty order." See Redetermination at page 8. Commerce explained, in detail, its interpretation of the term "imposed" in the context of investigations. Commerce determined that, upon reviewing the statute as a whole and the legislative history of the export subsidy offset provision, the statute could be read to provide that once a CVD order is issued, CVD duties have been "imposed." As such, once the CVD order has been issued, Commerce is required, in an AD determination, to adjust the respondent's export price or constructed export price by the amount of countervailing duties imposed. Accordingly, Commerce stated that during the investigation of PET film from India, the CVD order was not issued prior to the final AD determination; thus, Commerce "was not required by 19 U.S.C. §1677a(c)(1)(C) to increase export prices by any countervailing duties

calculated in the companion countervailing duty investigation." See Redetermination at 8.[3] Commerce concluded:

> Pursuant to the above analysis of 19 U.S.C. §1677a(c)(1)(C), and the Court's instructions, Commerce will include Polyplex with{in} the AD order because Commerce has calculated a 10.34 percent dumping margin for Polyplex. In addition, in order to prevent assessment of both antidumping and countervailing duties to compensate for the same cause of unfairly priced imports, in its cash deposit instructions, Commerce will adjust Polyplex's antidumping margin to account for countervailable export subsidies calculated in the companion countervailing duty investigation.

However, the Court again remanded this case to Commerce instructing it to: (1)"fully address Polyplex's concern that petitioners could unfairly control the respondents' fate in an antidumping determination and resulting antidumping duty order by filing an extension and/or alignment request in the countervailing duty investigation;" (2) explain how it will "fairly and consistently apply its interpretation of 'imposed' when a final determination or an amended final determination issues on the same day as a countervailing duty order on the subject merchandise due to a petitioner's alignment request;" and, (3)"seek to restore the parties, as far as is possible, to the position they would have been had they been able to act on the Department's new interpretation of 'imposed,' and the court's determination in this matter, prior to the issuance of the Amended Final Determination." See Dupont Teijin II at 13-14.

On February 17, 2004, we issued our draft second redetermination to interested parties, in which we addressed the Court's concerns. Polyplex filed comments on the draft second redetermination on February 23, 2004, and the petitioners filed rebuttal comments on February 26, 2004. After considering these comments, we have made no changes to the position that we expressed in the draft second redetermination. We have included this position, and responded to interested parties' comments, below.

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[3] It has been argued by the parties to the litigation that Commerce's past interpretation of the AD Agreement violated the United States' World Trade Organization (WTO) obligations. See *e.g.* Redetermination at Comment 4. Article 6.6 of GATT 1947 provides that "no product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization." As Commerce explained in its Redetermination and its responses to the Court, Commerce has historically interpreted the "imposed" language of the statute to mean "assessment" of antidumping duties as a result of administrative reviews, as opposed to cash deposits stemming from an investigation which are not duties to which parties are "subjected" as a result of the same situation of dumping or export subsidization. Thus, Commerce explained that its past interpretation of this provision was in full compliance with its international obligations.

DISCUSSION

A. Fully address Polyplex's concern that petitioners could unfairly control the respondents' fate in an antidumping determination and resulting antidumping duty order by filing an extension and/or alignment request in the countervailing duty investigation

As a preliminary matter, 19 U.S.C. §1671d(a)(1) directs Commerce to align a CVD investigation with a companion AD investigation if the petitioner requests such an alignment:

> Within 75 days after the date of the preliminary determination under section 703(b), the administering authority shall make a final determination of whether or not a countervailable subsidy is being provided with respect to the subject merchandise, except that when an investigation under this subtitle is initiated simultaneously with an investigation under subtitle B, which involves imports of the same class or kind of merchandise from the same or other countries, the administering authority, if requested by the petitioner, shall extend the date of the final determination under this paragraph to the date of the final determination of the administering authority in such investigation initiated under subtitle B. (emphasis added).

If a term is not defined in the statute, the courts will construe the "statutory term in accordance with its ordinary or natural meaning." See F.D.I.C. v. Meyer, 510 U.S. 471, 476 (1994). The term "shall" denotes a mandatory obligation upon Commerce to align a CVD investigation with a companion AD investigation if the petitioner requests such an alignment. On September 28, 2001, the petitioners in this proceeding filed a timely written request for such an alignment. Thus, even if the parties in this proceeding had known how Commerce would interpret the term "imposed" found in 19 U.S.C. §1677a(c)(1)(C), and respondents contested the alignment, Commerce does not have the authority to deny the petitioners' request for alignment of the investigations. The alignment provision was set forth by Congress, and thus Commerce is obligated, by law, to comply with its requirements.

With respect to Polyplex's concern that a petitioner could unfairly control a respondent's fate by requesting that a CVD investigation be aligned with a companion AD investigation, we note that even if the alignment provision were discretionary, the record in this proceeding does not support the conclusion that the petitioners manipulated or controlled the results of the AD determination by requesting alignment of the CVD determination. The petitioners filed their request for alignment twenty-four days before publication of the preliminary CVD determination and eighty-three days before publication of the preliminary AD determination. Moreover, Polyplex's manipulation concerns spring from Commerce's interpretation of the term "imposed" in 19 U.S.C. §1677a(c)(1)(C), an interpretation that was not known to the petitioners at the time they filed their request for alignment.

Thus the record does not indicate that the petitioners manipulated the AD margin in this proceeding by requesting that Commerce align the CVD investigation with the companion AD investigation.

B. Explain how Commerce will fairly and consistently apply its interpretation of "imposed" when a final determination or an amended final determination issues on the same day as a countervailing duty order on the subject merchandise due to a petitioner's alignment request

Commerce's final determinations are solely based on information on the record at the time of the determination. Thus, if a CVD order is issued on the day that a final AD determination is issued, Commerce would likely adjust export prices and constructed export prices to reflect the "imposed" countervailing duties. However, these are not the facts in this proceeding. Here, the CVD order was published after Commerce issued the Final AD Determination. This Court has held that "any information received by Commerce after the particular determination at issue is not part of the reviewable record." See Alloy Piping Product, Inc. v. United States, 201 F. Supp. 2d 1267, 1280 (CIT 2002)(citing to Intrepid v. Pollock, 15 C.I.T. 84, 85 (1991))(Alloy Piping). Moreover, pursuant to 19 U.S.C. §1516a(b)(1), the Court's judicial review of a final determination in an administrative review is also limited to a review of evidence developed in the administrative review. Information received by Commerce after it issued its final determination cannot be considered by Commerce in this segment of the proceeding. Commerce's final determinations are final. Therefore, if a CVD order is published after Commerce has issued its final AD determination, the adjustment to U.S. price for countervailing duties imposed to offset export subsidies must be made in Commerce's cash deposit instructions to U.S. Customs and Border Protection (CBP). Commerce should not make this adjustment by revising its margin calculations in an amended final AD determination. Although, as discussed below, there are limited circumstances under which final determinations may be amended, those circumstances do not apply in this case.

19 U.S.C. §1673d(e) provides that Commerce shall "establish procedures for the correction of ministerial errors in final determinations" noting that ministerial errors include "errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial." Additionally, 19 C.F.R. §351.224(e) provides that Commerce will "correct any ministerial error by amending the final determination or final results of review." Thus, Commerce's authority to amend its final determinations is limited to amendment in order to correct unintentional errors that occurred while operating upon record information before it when it issued the determinations. Past cases addressing this issue before the Court, see, *e.g.*, Alloy Piping at 1286, have recognized that the ministerial error provision is a limited statutory provision for amending final determinations. See also Badger-Powhatan v. United States, 633 F. Supp. 1364, 1369 (April 2, 1986)(Badger-Powhatan) (in which the Court noted that the ministerial error provisions do "not give the agency authority to upset final decisions where no errors have occurred").

As provided above, Commerce received a ministerial error allegation following the issuance of the Final AD Determination and amended its determination because it found that it had made a ministerial error. Although Commerce issued a CVD order on the same day that it issued its Amended Final AD Determination, countervailing duties had not been imposed to offset export subsidies at the time of the Final AD Determination, and thus Commerce did not err by failing to increase U.S. prices by such duties in its final AD determination. Hence, if an amended final AD determination is issued on the same day as a CVD order on the same merchandise, Commerce cannot rely upon the ministerial error provision to reflect the duties imposed by a CVD order in its amended final AD determination.

While Commerce is aware of two other circumstances under which it will issue an amended final determination, those circumstances do not exist in this case. First Commerce will issue an amended final determination following a Court order which determines that, at least in part, Commerce's underlying final determination was flawed, based upon record evidence before Commerce. Such an amended final determination, which is published following a "Timken Notice," see Timken Co. v. United States, 893 F. 2d 337 (Fed. Cir. 1990), results from an express granting of relief by the Court. See 28 USC 2643(c). Issuance of such an amended final determination is dependent entirely upon a Court's final and conclusive decision, and not Commerce's authority to modify its calculations following issuance of the final determination.

The second circumstance arises out of the statutory relationship between Commerce and the International Trade Commission (ITC). Specifically, this circumstance occurs when Commerce's and the ITC's final affirmative determinations vary in terms of the merchandise found to be sold at less than fair value (LTFV) and the merchandise found to be causing injury. In Badger-Powhatan, the Court considered a situation where Commerce calculated a dumping margin for the class or kind of merchandise identified in the petition, but the ITC determined that only a subclass of this merchandise was causing material injury to an industry in the United States. The plaintiff claimed that Commerce erred by failing to recalculate the dumping margin based solely on sales of the subclass of merchandise that was found to be causing material injury. Intervenor Rubinetterie A. Giacomini, S.P.A., argued that "a recalculation of the LTFV margin would constitute a prohibited second final determination." See Badger-Powhatan at 1368. The Court disagreed, explaining that the legislative history of the statute indicated that Congress intended for Commerce to publish an AD order based only upon a calculation of margins for the merchandise which was found to be dumped and found to be injuring the domestic industry. See id. at 1371 - 1373. Thus, the Court held that when there was an inconsistency between the merchandise that Commerce found to be dumped and the merchandise that the ITC found to be causing material injury, Commerce was required to modify its calculations in issuing the AD order to reflect the findings of the ITC. See id.

If, pursuant to Badger-Powhatan, Commerce publishes an AD order in which it explains changes it made to the final AD margin based on an ITC determination, the notice containing the order is not an "amended final AD determination," but is instead a notice which identifies a modification to the overall weighted-average margin to reflect the change in the merchandise covered by the order, based

on the ITC determination. When Commerce issues its final determination, the record is closed for purposes of accepting new information. Subsequently, the ITC may make an injury determination which affects the scope of Commerce's order. When this occurs, the dumping margin in the AD order will differ from that in Commerce's final AD determination, not because Commerce has changed any of the calculated margins used to derive the weighted-average margin, as it does in amended final determinations, but because the scope of the order differs from that of the final AD determination. In such situations, Commerce has not amended its final decision or calculations, rather it has only restricted the scope of the order to reflect the affirmative determinations of both agencies.

This case does not involve discrepancies between the ITC's and Commerce's results. Thus, this "exception" does not apply. In the instant case, Commerce's calculations were limited to the record before it when it made its calculations. If any new factual information had come to Commerce's attention in this case, including the publication of the CVD Order, either before, or on the same day of, the issuance of the Amended Final AD Determination, Commerce could not have amended its Final AD Determination to reflect that new information, because such information does not fall under the statutory definition of "ministerial errors."

In brief, the statute expressly limits Commerce's authority to make changes after it issues final determinations. The statute lists the situations in which Commerce amends its final determinations and the arguments it may consider to amend such decisions. It is not a matter of equity, but a matter of clear statutory language, with which Commerce must comply.

To further clarify, as Commerce articulated in Comment 3 of its initial Redetermination, in an investigation, 19 U.S.C. §1677a(c)(1)(C) requires Commerce to add export subsidy rates "imposed" to its calculation of export price. The term "imposed," as we described and the Court upheld, may be interpreted to mean "issuance of the countervailing duty order." If, after the CVD order has been issued:

> ...Commerce issues a final determination in a companion antidumping duty investigation, Commerce will increase a respondent's export or constructed export price by the amount of countervailing duties imposed. If, however, a CVD order has not been issued prior to issuance of the final determination in the companion antidumping duty investigation, Commerce will adjust its calculations through its cash deposit instructions to prevent assessment of both antidumping and countervailing duties to compensate for the same cause of unfairly priced imports.

See Redetermination at 8. Thus, Commerce may only modify its export price and constructed export price calculations before the issuance of the Final AD Determination. For such a modification to occur, the CVD order must be published before or at that time.

C. Seek to restore the parties, as far as is possible, to the position they would have been had they been able to act on the Department's new interpretation of 'imposed,' and the court's determination in this matter, prior to the issuance of the Amended Final Determination.

As Commerce has explained above, it was required to align the CVD investigation with the AD duty investigation once the petitioners requested alignment, pursuant to the mandatory language of 19 U.S.C. §1671d(a)(1). Furthermore, Commerce was not permitted to amend its final AD determination to adjust Polyplex's export prices and constructed export prices to reflect the issuance of the CVD order, pursuant to the requirements of 19 U.S.C. §1673d(e). Thus, it is Commerce's position, given the specific restrictions imposed by the statute, that the parties would be in the same position had they been able to act on Commerce's new interpretation of "imposed," and the court's determination in this matter.

This case has presented Commerce with a factual scenario which it has never faced before - how to treat a respondent in companion AD and CVD investigations when the respondent's AD margin is greater than *de minimis* and its CVD rate to offset export subsidies is at least as great as the dumping margin. We believe the Court's rulings require Commerce to include Polyplex within the AD order. Therefore, in light of Commerce's limited authority to amend final determinations and the statutory requirement to align CVD investigations with companion AD investigations, when the petitioner requests such an alignment, Commerce has, to the fullest extent of its authority, restored the parties to the position they would have been in had they been able to act on the Department's new interpretation of 'imposed,' and the court's determination in this matter, prior to the issuance of the Amended Final Determination.

INTERESTED PARTY COMMENTS

Comment 1: Commerce failed to fully address Polyplex's concern that petitioners could unfairly control the respondents' fate in an antidumping duty investigation by filing an extension and/or alignment request in a companion countervailing duty investigation

Polyplex contends that Commerce's draft second redetermination fails to address how "petitioners could unfairly control the respondent's fate... and how simultaneously-issued antidumping duty orders are to be treated," as requested by the Court. See Polyplex's comments dated February 23, 2004, at 2-3 (emphasis in original)(Polyplex's Comments). Specifically, Polyplex states that its concerns were that, in light of Commerce's interpretation of 19 U.S.C. §1677a(1)(A)(1), a procedural

request for alignment of the final AD and CVD determinations and orders could "lead to an absurd and incorrect result in future cases as it will in this case." See Polyplex's Comments at 3-4. Polyplex does not dispute Commerce's interpretation of 19 U.S.C. §1675d(a)(1) as being mandatory, nor does Polyplex claim that petitioners "intentionally" manipulated the situation in this case." See Polyplex's Comments at 3. However, Polyplex argues that petitioners could determine whether AD duties are imposed by requesting alignment in all future cases, thereby nullifying the adjustment to export and constructed export price required by 19 U.S.C. §1677a(c)(1)(C). Polyplex believes to answer the Court's remand, Commerce should explain why an extension request that can lead to a "make-or-break margin adjustment" is reasonable when the statute can be read to require an adjustment for CVD duties imposed so long as they are "simultaneously investigated" and "are not imposed AFTER the AD order." See Polyplex's Comments at 4-5 (emphasis in original). Polyplex posits that Commerce's new interpretation of 19 U.S.C. §1677a(1)(A)(1) "leads to inequitable results among the parties." See Polyplex's Comments at 5.

Polyplex states that the "absurd result of a procedural extension request determining methodology and outcome" could not be the intent of Congress in drafting the statute. Polyplex, citing Badger-Powhatan, argues that Commerce "focuses too closely on what is contained in the statute without considering what is missing from the express statutory scheme." See Badger-Powhatan v. United States, 633 F. Supp. 1364, 1370 (CIT 1986).

Lastly, Polyplex argues that Commerce failed to follow its own regulations when it aligned the final CVD determination with the AD determination pursuant to a request from the petitioners that was not filed within five days of publication of the preliminary CVD determination, as required by 19 C.F.R. §351.210(i). Polyplex notes that, while the Court declined to determine whether the petitioners' request for alignment was untimely (it was filed before Commerce published the preliminary CVD determination), any other reading of the regulatory requirement is "ultra vires, arbitrary and capricious." See Polyplex's Comments at 6.

In rebuttal comments, the petitioners counter Polyplex's contentions. First, they note that the alignment scheme is a statutory one, specifically provided by 19 USC 1675d(a)(1). They contend that this is not an equity issue, subject to interpretation beyond the confines of the statute, as argued by Polyplex. See Petitioners' Draft Remand Results Comments dated February 26, 2004, at 4 (Petitioners' Opposition). Second, they argue that despite Polyplex's arguments, Commerce's draft second redetermination does not result in "absurd and incorrect results," but is the only reasonable outcome consistent with the statutory guidelines provided to Commerce by Congress. Id. at 4.

More specifically, with respect to the issue of whether domestic industries could unfairly control the respondents' fate in an AD determination and resulting AD order by filing an extension and/or alignment request in a companion CVD investigation, the petitioners argue that Congress granted domestic industries the statutory right to request alignment and that requesting alignment "cannot be construed as unfair manipulation of the process by petitioners." See id. at 4. The petitioners also state that, despite Polyplex's claims of "unfairness," 19 U.S.C. §1677a(c)(1)(C) provides protection for

petitioners, and "as petitioner is the party intended to be protected by the statute, this result is hardly unfair or inequitable." See id. at 4-5. Lastly, with regard to Polyplex's claims of potential manipulation by the domestic industry in cases of parallel AD and CVD investigations, the petitioners maintain that "gaming the system...would be both difficult and unlikely" in light of the fact that petitioners must request alignment within five days of the preliminary CVD determination and there are often significant changes in both the AD and CVD margins from preliminary to final determinations.

The petitioners also disagree with Polyplex's characterization of the outcome and factual situation in Badger-Powhatan as analogous to this case. The petitioners argue that Polyplex's interpretation and characterization of the findings in that case are overly "liberal," explaining that Badger-Powhatan addressed "a gap in the statute" which does not exist in this case. See Petitioners' Opposition at 3 and 5, citing Badger-Powhatan at 1370. The petitioners state that Polyplex "is seeking to reopen the record (in this case) and insert a fact that occurred after the record closed, namely that countervailing duties were subsequently imposed on {Polyplex's} imports in a separate investigation," see Petitioners' Opposition at 3, whereas in Badger-Powhatan the Court ordered a calculation from "information already available in the administrative record." See Badger-Powhatan at 1372 (emphasis added). The petitioners further distinguish Badger-Powhatan by noting that 19 U.S.C. § 1673e(a) "explicitly instructs the Department to issue an order on those products for which the Commission has issued an affirmative injury determination" and unlike Polyplex's contention, the statute does not require a recalculation of the AD margin for a subsequent CVD order. See id. at 3-4.

Commerce's Position:

At the heart of Polyplex's concern is its belief that Commerce's interpretation of the phrase "countervailing duties imposed," which is found in 19 U.S.C. §1677a(c)(1)(C), is unreasonable because it could allow a request for alignment or postponement in a CVD investigation to determine the outcome of a companion AD investigation. However, the Court found Commerce's interpretation of "imposed" to be reasonable, noting that "{t}he Department reasonably considers a countervailing duty to be imposed in an investigation upon the issuance of a countervailing duty order." See Dupont Teijin II, at 12. Indeed, as the petitioners note, the Court specifically agreed with Commere's position that countervailing duties cannot be considered imposed at the time that Commerce issues its final CVD determination.

> Part I [of the statute] makes clear that an affirmative finding of countervailable subsidies alone does not constitute the imposition of countervailing duties because the ITC must then determine whether imports benefitting by those subsidies cause or threaten material injury to the domestic industry.

See Petitioners' Opposition at 2, citing Dupont-Teijin II at 11.

Moreover, as directed by the Court in Dupont Teijin II, Commerce has addressed Polyplex's concern regarding the petitioner's ability to control a respondent's fate through an alignment request. As noted above, pursuant to the mandatory language of 19 U.S.C. §1671d(a)(1), Commerce is required to align final CVD and AD determinations in companion investigations (*i.e.*, postpone the final CVD determination), if a petitioner requests such an alignment.[4] This statutory obligation is clear on its face and Commerce's reading of that language in this case is not absurd, as indicated by Polyplex. When the language of a statute is clear, the agency cannot decide, on its own, to override the clear intent of Congress and interpret words such as "shall" to be anything but mandatory.

With respect to manipulation on the part of the petitioners, we note, as did the petitioners, that there is no certainty following a preliminary determination in a CVD or AD investigation that the outcome in the final determination will be the same as the outcome in the preliminary determination. Even more relevant, with respect to the facts of this case, the petitioners requested alignment before the preliminary CVD determination, thus they did not know the outcome of the preliminary determination which, if known, might have allowed them to speculate as to the outcome of the final determination. The instant proceeding is the first in which the respondent's AD margin is greater than *de minimis* and its CVD rate to offset export subsidies, calculated in the aligned CVD investigation, is at least as great as the AD margin. Only in this rare and limited circumstance has the question of manipulation, by way of an alignment request, arisen. Furthermore, even if the petitioners request an alignment, Commerce will continue to follow its established practice of reducing AD cash deposits for countervailing duties that it *determined to* impose to offset export subsidies. Finally, petitioners may request alignment of parallel AD and CVD investigations for a number of other reasons, such as a desire to argue both cases before the ITC simultaneously, rather than a desire to manipulate the AD margin.

Additionally, with respect to the outcome of Badger-Powhatan, Commerce does not believe that the Court's decision in that case speaks to the issue of alignment and the imposition of countervailing duties, as found in 19 USC 1677a(c)(1)(C). Thus, we disagree with respondents' characterization of that case.

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[4] Polyplex contends that, in this case, the petitioners request for alignment was untimely because they did not file it within the five day period starting the day after Commerce published its preliminary CVD determination, as required by 19 C.F.R. §351.210(i) (which states that an alignment request "... must be submitted in writing within five days of the date of publication of the preliminary countervailing duty determination ..."). Commerce disagrees with Polyplex's interpretation of 19 C.F.R. §351.210(i). Webster's New World Dictionary defines "within" as "not beyond in distance, *time*, degree, range, scope, etc." (emphasis added) and "beyond" as "farther on in time than; later than." 19 C.F.R. §351.210(i) was drafted to prevent late requests for alignment by the petitioners. The petitioners in this proceeding filed their alignment request prior to publication of the preliminary CVD determination. Thus, the request was not in violation of the regulatory prohibition on late alignment requests.

As a final point, we are addressing Polyplex's concern that postponing a preliminary CVD determination (as opposed to alignment of AD and CVD cases), upon request by petitioners, might result in a respondent's inclusion or exclusion from an AD order in a companion investigation as a result of Commerce's new definition of "imposed." Although no such request was made in this case, 19 U.S.C. §1671b(c)(1) is distinguishable from the statutory provision for alignment in that it permits, but does not require, Commerce to postpone a determination. Thus, Commerce will consider the facts and circumstances in each CVD investigation before granting a petitioner's request to postpone the preliminary CVD determination.

Comment 2: Commerce is required, and has the authority, to amend its final AD determination to adjust for the subsequent imposition of countervailing duties to offset export subsidies

Polyplex argues that since Commerce has determined that countervailing duties are "imposed" when the CVD order is issued, Commerce is required to amend its final AD determination in order to comply with the intent of 19 U.S.C. §1677a(c)(1)(C) since the AD and CVD orders were issued simultaneously. Polyplex supports its argument by reading together three provisions in the Tariff Act of 1930, as amended (the Act): 19 U.S.C. §1673, 19 U.S.C. §1673e(a)(1), and 19 U.S.C. §1677a(c)(1)(C).[5] Polyplex concludes that these statutory provisions *"compel"* Commerce to adjust Polyplex's export and constructed export price as "CVD duties have been imposed' (as interpreted by the Department) prior to the antidumping duty order." See Polyplex's Comments at 8 (emphasis in original).

Polyplex disagrees with Commerce's position in its draft second redetermination that the provision for correcting ministerial errors "expressly limits Commerce's authority to make changes after it issues final determinations." See Polyplex's Comments at 9 and 19 U.S.C. §1673d(e). Specifically, Polyplex argues that the ministerial error provision does not limit Commerce's authority to make changes to its final determinations given the other statutory provisions (19 U.S.C. §1673, 19 U.S.C. §1673e(a)(1), and 19 U.S.C. §1677a(c)(1)(C)) that require it to increase U.S. price for CVD duties imposed as a result of the ITC's affirmative injury (or threat of injury) determination. Polyplex cites Badger-Powhatan, where the Court held that Commerce must recalculate the AD margin in light of an ITC final determination that changed the scope of the investigation, explaining that

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[5]19 U.S.C. §1673 authorizes Commerce to impose AD duties "in an amount equal to the amount by which the normal value exceeds the export price (or constructed export price) for the merchandise." 19 U.S.C. §1673e(a)(1) requires Commerce "publish an antidumping duty order which directs customs officers to assess an antidumping duty equal to the amount by which normal value of the merchandise exceeds the export price (or constructed export price) of the merchandise." 19 U.S.C. §1677a(c)(1)(C) requires Commerce to increase export price (or constructed export price) by the amount of CVD export subsidy duties.

> neither the statute, as indicated nor the legislative history explicitly refers to the question of recalculation when the ITA and ITC final determinations vary in scope. When such a legislative gap occurs, the court can infer that Congress did not consider the problem at issue. In such a case, it is incumbent on the court to consider the policies underlying the statutory provisions.

See Badger-Powhatan at 1371.

In its draft second redetermination, Commerce stated that there were two circumstances, other than the ministerial errors provision, that allowed Commerce to amend a final AD determination. The first was a Court-ordered remand and the second was when the scope of the ITC final determination differed from that appearing in Commerce's final determination, as was the case in Badger-Powhatan. See Draft Remand Results at 7. Polyplex maintains that the instant proceeding involves a Court-ordered remand where the "Court's order specifically authorizes the Department to reconsider and amend its final AD determination 'to seek to restore the parties. . . to the position they would have been had they been able to act' on the Department's new interpretation of imposed." See Polyplex's Comments at 11. Further, Polyplex asserts that to deny the CVD export subsidy adjustment would be "arbitrary and capricious." See id. at 12. Citing several court decisions ordering Commerce to recalculate its results upon redetermination, Polyplex argues that Commerce has the authority to open the record of a case to correct decisions based on errors or erroneous facts when failing to would lead to an erroneous result.[6] Polyplex believes that Commerce's failure to make the adjustment results in Commerce "knowingly relying on incorrect data, fully recognizing that its reliance will lead to an erroneous result." See Polyplex's Comments at 12.

Lastly, Polyplex disagrees with Commerce's argument that the "imposed" CVD duties "constitutes new information on the record." See id. at 13. Polyplex asserts that Commerce was cognizant of the amount of the CVD duties that would be imposed in the event of an affirmative ITC determination from the date of publication of the CVD final determination on May 16, 2002. Moreover, if Commerce "considers the CVD duties determined in the final CVD determination *or* imposed in the CVD order to be 'new information on the record of the AD case,' then (Polyplex argues that) the Department does not have any information on the record based on which to adjust Polyplex's cash deposit rate down from the CVD duties." See id. Accordingly, Polyplex argues that if the Court accepts Commerce's "new information" argument as justification for not making the export subsidy CVD adjustment, then Commerce must also not adjust the cash deposit rates by countervailing duties. Therefore, Polyplex concludes that Commerce would be subjecting Polyplex to "duplicate and

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[6]Borlem S.A. v. United States, 718 F.Supp. 41, 47 (Ct. Int'l Trade 1989) citing Alberta Gas Chemicals, Ltd. v. Celanese Corp., 650 F. 2d 9 (2nd Cir. 1981). Id. citing Greene County Planning Bd. V. Fed. Power Commission, 559 F.2d 1227, 1233 (2nd Cir. 1976). cert. denied, 434 U.S. 1086 (1978). Borlem S.A. v. United States, 913 F. 2d 933, 938 (Fed. Cir. 1990).

double-count{ed}... duties," which it claims is contrary to both the Act and Commerce's WTO obligations.[7]

The petitioners dismiss Polyplex's reading of the statute as requiring Commerce to adjust the export price (or constructed export price) in the final AD determination for the export subsidies found in a subsequent CVD order. The petitioners argue that if Commerce recalculated the dumping margin based on Polyplex's argument pursuant to 19 U.S.C. §1673e(a), then the record of an investigation would never close and the dumping margin would be subject to recalculations based on any possible event or new fact that occurred prior to the date of the AD order. See Petitioners' Opposition at 6.

The petitioners disagree with Polyplex's claim that Commerce erred in not adjusting Polyplex's export price and constructed export price for the CVD export subsidies found. The petitioners agree with Commerce that amended final determinations are a statutorily created exception to the "finality" rule, used specifically to correct ministerial errors, as discussed in Commerce's draft second redetermination. In this case, the petitioners argue that the dumping margin was calculated correctly because at the time that the final AD determination was issued, CVD duties were not yet imposed. Therefore, the petitioners offer, the record was closed for accepting new factual information when Commerce issued its AD Final Determination.

As explained above, the petitioners also argue that Polyplex's reliance on Badger-Powhatan is misplaced. The petitioners maintain that Badger-Powhatan addressed "a gap in the statute which did not instruct the Department in what methodology to use to calculate estimated antidumping duties or cash deposits." See Petitioners' Comments at 5, citing Badger-Powhatan at 1370. However, the petitioners state that no "gap" exists here because there are no "interstitial silences" in statutory scheme. The petitioners assert that the statute is clear: "1) only imposed countervailing duties may be added to export price, 2) countervailing duties are not imposed until an order is issued, and 3) petitioners have an absolute statutory right to delay issuance of a CVD order until the AD order also issues." See Petitioners' Opposition at 5.

As a last point, the petitioners note that there are various ways in which the domestic industry may control the timing of the issuance of AD and CVD orders, and alignment requests are just one of these methods. They argue that domestic industries can control the timing of the issuance of a CVD order by filing a CVD petition after an AD petition is filed. They further argue that they can request postponement of the issuance of a final determination if the preliminary determination is *de minimis*, although such a request does not require Commerce to grant such a postponement, as provided above.

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[7]As a matter of fact, Commerce notes that Polyplex's characterization of cash deposits as duplicative duties is incorrect. No duties are applied to a particular respondent's merchandise until completion of the first administrative review, at which time duties are assessed.

In any case, the petitioners argue that just because the domestics have control, in part, of the timing of CVD and AD investigations, this does not make, as Polyplex states, the entire system subject to unfair manipulation.

Commerce's Position:

Contrary to Polyplex's claim, the statute does not allow for Commerce to amend its final AD determination if countervailing duties are subsequently imposed on or before the time when Commerce issues its AD order. Although 19 U.S.C. §1673(e)(a)(1) requires Commerce, in its AD orders, to direct customs officers to assess an antidumping duty equal to the amount by which normal value exceeds export or constructed export price, nowhere does it state that Commerce is permitted to recalculate export price or constructed export price to reflect countervailing duties imposed between the issuance of the final AD determination and the issuance of the order. Indeed, even the Department's regulations do not provide for such a requirement. For example, 19 C.F.R. §351.211 (b)(1) directs Commerce to publish an AD order that instructs CBP to assess antidumping duties in accordance with instructions issued *at the completion of each review* (or in accordance with instructions issued by Commerce shortly after the end of the anniversary month if Commerce does not receive a timely request for review). It does not, however, compel Commerce, prior to issuing an AD order, to revise its final AD determination to account for subsequently imposed countervailing duties.

On the other hand, 19 U.S.C. §1673d(c)(1)(B), in describing the effects of final affirmative AD determinations, notes that Commerce shall determine the estimated weighted average dumping margin and order the posting of a cash deposit in an amount based on the estimated weighted average dumping margin. Thus, the statute provides that Commerce's AD order is to be based on the dumping margin calculated in the final AD determination, rather than a margin calculated thereafter. Thus, if anything, this statutory scheme indicates that Congress anticipated that the Department would not modify its calculations following the issuance of a final determination except to correct ministerial errors. This exception does not apply here because, absent any "imposed" countervailing duties, the Department did not err in its final AD determination by not adjusting U.S. price for countervailing duties.

The AD order is not a medium for expressing a redetermination, but is, instead, a medium for implementing Commerce's and the ITC's findings. In Royal Business Machines, Inc. v. United States, 507 F. Supp. 1007, 1012 - 1023 (CIT 1980) the CIT stated that "the issuance of a final antidumping duty order is purely a ministerial act." The Court went on to state that "{i}t follows that the final order must express the result of the previous determinations without alterations ... ." See id. The two exceptions allowing for orders that differ from final determinations, a specific Court order or the Badger-Powhatan factual scenario, did not exist in this case.

Furthermore, contrary to Polyplex's claim, Badger-Powhatan does not directly address the issue under consideration here. Badger-Powhatan, addressed the question of whether Commerce's AD order properly reflected the ITC's final determination in the proceeding. However, here, the question is whether Commerce, in its AD order, should reflect a determination that was made in a separate proceeding and issued after it issued its final AD determination. The statute makes it clear that Commerce's AD order is dependent upon, and must reflect, the ITC's final determination in the proceeding. However, it does not require Commerce to issue an AD order that reflects a subsequent determination in a separate proceeding. Moreover, in Badger-Powhatan, Commerce ordered CBP to assess antidumping duties on two products at a rate that was not equal to the AD rate that it calculated for those products in its final AD determination. In the case at hand, Commerce properly reflected the ITC's final injury determination in its AD order and issued an AD order that is consistent with its final AD determination. Thus, the fact pattern in Badger-Powhatan is distinguishable from the facts in the instant proceeding.

Additionally, Polyplex is incorrect when it argues that this case falls squarely within the court-ordered remand exception. The Court has directed Commerce, upon remand, to address several issues arising from its new interpretation of "countervailing duties imposed." It has not ordered Commerce to recalculate Polyplex's AD margin using the methodology offered by Polyplex. Accordingly, in this redetermination Commerce has complied fully with the Court's order by analyzing the statute, and its obligations under the statute, as they apply to the issues under consideration.

Although we agree with Polyplex's contention that Commerce possesses certain inherent powers to correct its erroneous decisions[8], the issue here is whether Commerce, in the absence of an erroneous final decision, has the authority to alter its final determination based on a subsequent event. While investigations resulting in the exclusion from an AD or CVD order may be distinguishable from most cases, the Department does not believe that it has the authority to modify its calculations between the issuance of a final determination and an order, except under the rare circumstances described above.

Finally, Commerce's position in this remand does not conflict with its decision in the final AD determination on PET film from India to adjust Polyplex's AD cash deposit rate by the countervailing duty determined to offset export subsidies. In adjusting the AD cash deposit rates, Commerce was not changing its margin calculations after the final determination, nor was it relying on new information (as

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[8] For example, in Badger Powhattan, not only did Commerce correct ministerial errors by issuing an amended final AD determination in the underlying proceeding, but, in response to the plaintiff's action, it relied upon its inherent power to correct errors by seeking a remand in order to recalculate the less-than-fair-value margin in accordance with the calculation methodology proposed by the plaintiff. Thus, in the appropriate setting, Commerce may exercise its inherent power to reconsider, and alter, prior decisions that it considers to have been made in error.

the CVD rates were on the record at the time of the final AD determination). Rather, it was equitably attempting to take into consideration the existence of the countervailing duty cash deposits. Commerce's adjustment to the AD cash deposit rates was equitable, appropriate and consistent with its practice in other parallel AD/CVD investigations. Moreover, this practice is consistent with Commerce's interpretation of "imposed" which was affirmed by the Court in Dupont-Teijin II. Furthermore, the Court has already affirmed the reasonableness of this cash deposit adjustment and it is not being challenged in this litigation. Rather, the initial issue before the Court in this proceeding was whether an adjustment to the cash deposit rate warrants exclusion from the order if the end result is a "zero" cash deposit rate. The Court has held that a zero cash deposit rate does not warrant exclusion from the order and thus Commerce, on remand, has determined to include Polyplex in the AD order on PET film from India.

Comment 3: Commerce failed to restore the parties, as far as possible, to the position they would have been had they been able to act on Commerce's new interpretation of 'imposed,' and the court's determination in this matter, prior to the issuance of the Amended Final Determination.

Polyplex states that the parties to this proceeding have not been placed in the position they would have been in had they been able to act on Commerce's new interpretation of "imposed," and the Court's determination in this matter, prior to the issuance of the Amended Final Determination. According to Polyplex, if they had, Polyplex would have opposed the petitioners' request for alignment/extension on the grounds that it was untimely filed. As a result, Polyplex presumes that the CVD determination and CVD order would have been in place prior to the AD final determination and Commerce would have accounted for the CVD export subsidy adjustment and ultimately excluded Polyplex from the AD order. See Polyplex's Comments at 14.

Further, Polyplex states that had it known Commerce's new definition of "imposed" it would have requested that Commerce take into account the CVD export subsidy adjustment after the ITC final determination. Polyplex maintains that the adjustment would have been allowed in light of Badger-Powhatan and the fact that the resulting margin would have been *de minimis*.[9] See id.

The petitioners dismiss each of Polyplex's points. First, the petitioners state that had Polyplex objected to the petitioners' early filing of the alignment request, the petitioners would have filed another request one day after publication of the preliminary CVD determination. Thus, the outcome of the case would be the same. Second, the petitioners argue that Polyplex's letter requesting that Commerce take into account the CVD export subsidy adjustment after the ITC final determination would not have any

[9]Polyplex attached the two letters it would have submitted to its comments. As explained above, the first requests Commerce take into account the ITC final determination and the second urges Commerce to reject petitioners' request for alignment/extension as untimely.

effect on the outcome of the case because the record of the case was closed and the CVD order was not on the record. Thus, the petitioners maintain that the letter "would have been rejected as requesting a reopening of the record to add new information." See Petitioners' Opposition at 7-8.

Commerce's Position:

Polyplex's revisions to the history of this case do not allow Commerce to restore it to the position it envisions. As explained above, the petitioners' request for alignment was not untimely and thus, Commerce was obligated by the statute to align the final CVD and AD determinations in the PET film from India proceedings. Thus, even if Polyplex had protested alignment, this fact would not have prevented the Department from meeting its statutory obligations and aligning the cases.

In addition, even if Polyplex had requested that Commerce amend its final AD determination to take into account the CVD duty (which was not yet "imposed," but that was to shortly be "imposed") to offset export subsidies, as explained above, Commerce was not permitted to make such an amendment, pursuant to the requirements of 19 U.S.C. §1673d(e). Although, in the letter in Annex A of its comments, Polyplex characterizes Commere's failure to adjust U.S. price for countervailing duties as an inadvertent mistake because Commerce's actions are not in harmony with its current interpretation of "imposed," changes in policy subsequent to a final determination do not give rise to ministerial errors.

Finally, Commerce did, in fact, take into consideration the ITC final determination when it issued both its AD and CVD orders, but the ITC final determination did not alter the fact that countervailing duties were not yet "imposed" at the time that Commerce issued the final determinations that lead to the AD and CVD orders. Thus Commerce cannot seek to restore the parties, as requested by the Court, by relying upon the decision in Badger Powhattan.

Thus, it remains Commerce's position, given the specific restrictions imposed by the statute and the Court's ruling in Dupont Teijin I, that the parties would be in the same position had they been able to act on Commerce's new interpretation of "imposed," and the court's determination in this matter.

Results of Redetermination

In conclusion, Commerce believes that its interpretation of the statute, considering countervailing duties offsetting export subsidies to be "imposed" when a CVD order has been issued, results in Polyplex's inclusion within the AD order, given the statutory restraints and the Court's initial ruling on this matter.

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James J. Jochum
Assistant Secretary
for Import Administration

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Date