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Remand Redetermination
Slip Op. 15-37
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Gold East Paper (Jiangsu) Co. v. United States
Court No. 10-00371; Slip Op. 15-37 (CIT 2015)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

A. SUMMARY

The Department of Commerce ("Department") prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade ("CIT" or the "Court"), issued on April 22, 2015, in *Gold East Paper (Jiangsu) Co. v. United States*, Court No. 10-00371, Slip Op. 15-37 (CIT 2015) ("*Gold East III*"). These final remand results concern *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 59217 (September 27, 2010), as amended by *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Order*, 75 FR 70203 (November 17, 2010), (collectively, "*Final Determination*").[1]

In *Gold East III*, the Court remanded the Department's conclusion that no information generally available to it at the time of the *Final Determination* supports a finding that the market economy purchase ("MEP") prices for certain inputs from Thailand during the period of

[1] We hereby remind the parties and inform the Court of the fact that on January 28, 2015, the Department initiated a proceeding, pursuant to section 129 of the Uruguay Round Agreements Act, concerning the final determination in the coated paper antidumping investigation; the section 129 proceeding is currently ongoing. *See* Letter to Interested Parties from Eric Greynolds, Acting Office Director, dated January 28, 2015 (Available through ACCESS in the section 129 segment of A-570-958). This litigation also covers the coated paper antidumping investigation, but raises matters not at issue in the section 129 determination.

investigation ("POI") may have been distorted because of countervailable export subsidies.[2] Additionally, the Court ordered that the Department explain its decision not to rely on the differential pricing ("DP") analysis in determining whether targeted dumping by APP-China[3] is pervasive and widespread.[4]

The Department issued the draft remand redetermination and invited comments on June 1, 2015. On June 15, 2015, APP-China and Petitioners[5] submitted comments on the draft remand.[6]

B. MEP Inputs from Thailand

Background

In the *Final Determination*, the Department rejected APP-China's MEP prices for inputs from South Korea and Thailand because it previously found that those countries maintained broadly available, non-industry-specific export subsidies and thus determined that exports from those countries may have benefited from those subsidies during the POI.[7] APP-China appealed the Department's determination, and the Court's decision in *Gold East I* remanded the issue of

[2] *See Gold East III* at 11.
[3] Gold East Paper (Jiangsu) Co., Ltd., Ningbo Zhonghua Paper Co., Ltd., and Global Paper Solutions (collectively, "APP-China").
[4] *See Gold East III* at 11.
[5] Appleton Coated LLC, NewPage Corporation, S.D. Warren Company d/b/a/ Sappi Fine Paper North America, Verso Corporation, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (collectively, "Petitioners").
[6] *See* Letter from APP-China entitled "APP-China's Comments on Draft Results of Redetermination Certain Coated Paper Suitable for High-Quality Graphics Using Sheet-Fed Presses from the People's Republic of China," dated June 15, 2015 ("APP-China's Comments"); Letter from Petitioners entitled "Remand from the Court of International Trade, Slip Opinion 15-37, *Gold East Paper (Jiangsu) Co. v. United States*, CIT Consol. Court No. 10-00371, Antidumping Duty Investigation of Certain Coated Paper from the People's Republic of China, Petitioners' Comments on the Department's Draft Third Remand Redetermination," dated June 15, 2015 ("Petitioners' Comments"). On June 4, 2015, the Department granted APP-China's request for an extension to submit comments, *see* Letter from the Department entitled "Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: APP-China's Request for Extension of Time to File Comments on the Department's Draft Remand," dated June 4, 2015; *see also* Letter from APP-China entitled "APP-China's Request for Extension to Comment on Draft Results of Third Redetermination Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China," dated June 3, 2015.
[7] *See Final Determination* and accompanying Issues and Decision Memorandum ("IDM") at Comment 17.

inputs from South Korea and Thailand to the Department.[8] The Court held that although the Department need not perform "a formal investigation" on whether the MEP prices are subsidized, there must be some positive evidence on the record to permit the Court to evaluate whether the Department's decision is supported by substantial evidence.[9] The Court directed the Department to either reopen the record and make particularized findings in support of its decision to reject the South Korean and Thai price data, or to reverse its decision not to use such price data and to recalculate the margin.[10] In the First Remand Redetermination, the Department reversed its decision not to use APP-China's MEP prices for inputs from South Korea and Thailand in accordance with the Court's instructions.[11]

In *Gold East II*, the Court again remanded the Department's decision to use APP-China's MEP prices for inputs from South Korea and Thailand.[12] The Court held the fact that the Department had found it appropriate to disregard prices from those countries in past determinations does not give rise to a valid inference of "the existence" during the POI of generally-available, non-industry-specific subsidy programs.[13] The Court opined that "Commerce must either abide by the standard set out in *Fuyao Glass* or propose another reasonable means of evaluating whether it has sufficient evidence to support a belief or suspicion that the market economy inputs in the particular case at hand were subsidized."[14] In accordance with *Gold East II*, the Department reopened the record to allow interested parties to supplement the record with other information regarding whether there is a reason to believe or suspect that

[8] *See Gold East Paper (Jiangsu) Co. v. United States*, 918 F. Supp. 2d 1317 (CIT 2013) ("*Gold East I*").
[9] *Id.*, at 1324.
[10] *Id.*
[11] *See Final Results of Redetermination Pursuant to Court Remand*, Court Order No. 10-00371, Slip Op. 13-74 (CIT 2013), dated January 13, 2014 ("First Remand Redetermination") at 16.
[12] *See Gold East Paper (Jiangsu) Co. v. United States*, 991 F. Supp. 2d 1357 (CIT 2014) ("*Gold East II*").
[13] *Id.*, at 1365.
[14] *Id.*, at 1364 (quoting *CS Wind Vietnam Co. v. United States*, 971 F. Supp. 2d 1271, 1292).

input prices from South Korea and Thailand may have been subsidized during the POI.[15] Both Petitioners and APP-China submitted new factual information on this issue.[16]

With respect to Thailand's tax coupon program, Petitioners placed on the record the Department's determinations in the *2013 Thailand Shrimp Investigation*; alleged modifications to the law governing the tax coupon program during the POI; and the alleged *ad valorem* export coupon rates that were applicable during 2009 for inputs exported from Thailand.[17,18] In response to the Department's finding in the draft results of the second remand redetermination that we did not countervail the tax coupon program until the *2013 Thailand Shrimp Investigation*, Petitioners cited a line of the Department's past determinations concerning the Tax Certificates for Export program, which Petitioners alleged was governed by the same law that governs the tax coupon program in the *2013 Thailand Shrimp Investigation*.[19]

In the Second Remand Redetermination,[20] the Department accepted the MEP prices for inputs from Thailand upon concluding that no information generally available to it at the time of the *Final Determination* supports a finding that the MEP prices for inputs from Thailand during

[15] *See* the Department's letter to all interested parties, dated August 20, 2014.
[16] *See* Petitioners' letter, entitled, "Remand from the Court of International Trade, slip opinion 14-79, *Gold East Paper (Jiangsu) Co. v. United States*, CIT Consol. Court No. 10-00371, Antidumping Duty Investigation of Certain Coated Paper from the People's Republic of China: Submission of New Information," dated August 25, 2014 ("Supplemental Factual Information"); *see also* APP-China's letter, entitled "APP-China's Submission of New Factual Information: Certain Coated Paper from China," dated August 25, 2014.
[17] *See Certain Frozen Warmwater Shrimp From Thailand: Final Negative Countervailing Duty Determination*, 78 FR 50379 (August 19, 2013) ("*2013 Thailand Shrimp Investigation*").
[18] *See* Supplemental Factual Information at 2-3, Exhibit 1.
[19] *See* Petitioners' letter, entitled, "Remand from the Court of International Trade, Slip Opinion 14-79, *Gold East Paper (Jiangsu) Co. v. United States*, CIT Consol. Court No. 10-00371, Antidumping Duty Investigation of Certain Coated Paper from the People's Republic of China, Petitioners' Comments on the Department's Draft Second Remand Redetermination," dated October 8, 2014 ("Petitioners' Comments on Draft Second Remand Results"), at 14, fn. 47. We note that the correct name of the program the Department countervailed as an export subsidy in *Certain Apparel From Thailand; Final Results of Countervailing Duty Administrative Review*, 62 FR 63071 (November 26, 1997) ("*1997 Apparel Review*") is "Tax Certificates for Export." *See* more discussion on this program in section D ("Discussion of Interested Parties' Comments") below.
[20] *See Final Results of Redetermination Pursuant to Court Remand*, Court Order No. 10-00371, Slip Op. 14-79 (CIT 2014), dated July 2, 2014 ("Second Remand Redetermination").

the POI may have been distorted because of countervailable export subsidies.[21] With regard to the Tax Certificates for Export program in particular, the Department declined to rely on the subsidization determinations regarding this program that were made in the 1980s and 1990s because they were not sufficiently contemporaneous with the POI of this underlying investigation.[22] The Department interpreted the Court's standard for determining the existence of generally available non-industry-specific export subsidies as necessitating "a particularized finding of subsidization during the POI."[23] The Department noted that it disagreed with the Court-created standard and maintained that in countervailing duty proceedings, if the Department has countervailed an export subsidy in a prior determination, unless parties provide us with the evidence that the program has been terminated and flow of the residual benefits has ceased, the Department will normally find that the subsidy is still in existence.[24] Notwithstanding the disagreement with the Court's standard, the Department followed the Court's order and declined to rely on the subsidization determinations concerning the Tax Certificates for Export program that were made in the 1980s and 1990s.[25]

In *Gold East III*, the Court held that the Department's practice for evaluating whether it has reason to believe or suspect that prices may have been subsidized is not at odds with its prior decisions in this case.[26] Rather, the Court found that until the second remand results the Department did not clearly explain its practice in either the *Final Determination* or the First

[21] *Id.*, at 10.
[22] *Id.*, at 9-10.
[23] *Id.*, at 16.
[24] *Id.*
[25] *Id.*
[26] *Gold East III* at 14; the Court also observed that because the Department acknowledged that Thailand's Tax Certificates for Export program had been countervailed in the *1997 Apparel Review*, and Petitioners had placed on the record the law in 2009 governing the program to show the program existed in 2009, the Department could have reasonably inferred that the tax coupon program continued to exist during the POI (*id.*, at 12).

Remand Redetermination.[27] According to the Court, the Department simply stated that it determined in the past that South Korea and Thailand maintain broadly available non-industry specific export subsidy programs and merely declared from citations to same that those programs were in existence during the POI.[28] However, the Court found that in the second remand results the Department articulated its practice by explaining that "in countervailing duty proceedings 'if the Department has countervailed an export subsidy in a prior determination, unless parties provide us with the evidence that the program has been terminated and flow of residual benefits has ceased, we will normally find that the subsidy is still in existence.'"[29]

Analysis

In accordance with *Gold East III*, and consistent with its normal practice, the Department finds that it has reason to believe or suspect that export prices for goods from Thailand may have been subsidized during the POI such that export prices for all goods from Thailand are presumed to be distorted and not reliable.[30] The Department countervailed Thailand's Tax Certificates for Export program as an export subsidy in past countervailing duty investigations and/or reviews (*e.g.*, the *1997 Apparel Review*) prior to this instant investigation, and no party provided evidence in the underlying proceeding that the program has been terminated and the flow of residual benefits has ceased. Despite the opportunities to provide such evidence in the original investigation and subsequently in response to Commerce's reopening of the record in the second remand, APP-China has not provided any evidence that the tax coupon program has been terminated and the flow of benefits has ceased.[31] In countervailing duty proceedings, if the

[27] *Id.*, at 13.
[28] *Id.*, at 13.
[29] *Id.*, at 13, n.16 (citations omitted).
[30] *See Peer Bearing Company-Changshan v. United States*, 27 CIT 1763, 1772, 298 F. Supp. 2d 1328, 1337 (CIT 2013); *see also Gold East III* at 13, fn. 17.
[31] *Cf.* 19 CFR 351.526(d)(1).

Department has countervailed an export subsidy in a prior determination, unless parties provide us with the evidence that the program has been terminated and the flow of residual benefits has ceased, we will normally find that the subsidy is still in existence.[32] In light of the foregoing, the Department has reason to believe or suspect that the MEP prices of certain inputs from Thailand may have been subsidized. Accordingly, the Department did not rely on the MEP prices for certain inputs from Thailand and instead used surrogate values for purposes of normal value calculations in the draft results of this remand redetermination.

C. Targeted Dumping Determination

Background

In the *Final Determination*, the Department applied its average-to-transaction comparison methodology ("A-T") to all of APP-China's sales. In *Gold East I*, the Court held, however, that the Department improperly withdrew its regulation 19 CFR 351.414(f)(2), which states that the application of targeted dumping should "normally" be limited to those sales that "constitute targeted dumping"[33] and ordered the Department to apply the Limiting Rule—*i.e.*, applying A-T only to targeted sales and applying the average-to-average comparison methodology ("A-A") to non-targeted sales ("mixed A-T/A-A").[34] In the First Remand Redetermination, the Department applied the standard A-A comparison methodology to all sales to calculate the dumping margin for APP-China because the resulting weighted-average margin under either A-A or mixed A-T/A-A is *de minimis*.[35]

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[32] *Gold East III*. at 13, fn.16 (citations omitted).

[33] *See Antidumping Duties; Countervailing Duties*, 62 FR 27296 (May 19, 1997) ("*Final Rule*"), at 27416. This so-called "Limiting Rule" refers to 19 CFR 351.414(f)(2):

> Limitation of average-to-transaction method to targeted dumping. Where the criteria for identifying targeted dumping under paragraph (f)(1) of this section are satisfied, the Secretary normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping under paragraph (f)(1)(i) of this section.

[34] *See Gold East I* at 11.

[35] *See* First Remand Redetermination at 14.

In the Second Remand Redetermination, we continued to apply A-A to calculate APP-China's dumping margin and declined to use the Cohen's *d* test as part of the DP analysis to determine whether the situation was not "normal" under the targeted dumping regulation because the DP analysis was not in effect at the time of the *Final Determination*.[36] Petitioners claimed that the Cohen's *d* test under the DP analysis was an "additional means" of examining whether the targeted dumping by APP-China should have been found "pervasive" and the exception to the limiting rule under the regulation should have been applied.[37] Further, Petitioners claimed that the Department did not provide a reasonable explanation for why the agency should not utilize the Cohen's *d* test for determining "pervasiveness" under the prior targeted dumping methodology.[38] The Court held that analysis of pervasiveness appears distinct from the "normal" targeted dumping "remedy" articulated in our targeted dumping regulation (*i.e.*, the Limiting Rule).[39] Accordingly, the Court ordered that we determine whether the Cohen's *d* test is, or is not, better suited to determine "pervasiveness" in accordance with our prior regulation than the *Steel Nails* test.[40]

Analysis

In *Gold East III*, the Court continued to find the Department's withdrawal of the targeted dumping regulation to be improper.[41] In accordance with our withdrawn targeted dumping

[36] *See* the Second Remand Redetermination at 25.
[37] *See Gold East III* at 24; *see also* Petitioners' Comments on the Second Remand Redetermination at 3-8.
[38] *See Gold East III* at 25; Petitioners' Comments on the Second Remand Redetermination at 6.
[39] *See Gold East III* at 28.
[40] *Id.*, at 27-28; *see also Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstance*s, 73 FR 33977 (June 16, 2008) and accompanying issues and decision memorandum at comments 1 through 8; *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less than Fair Value*, 73 FR 33985 (June 16, 2008) and accompanying issues and decision memorandum at comments 1 through 8 (collectively, "*Steel Nails*").
[41] *Id.*, at 18.

regulation and the Court's instructions in *Gold East III*, we have applied the mixed A-T/A-A methodology for the final results of this third remand redetermination.[42]

In the *Final Rule* where the targeted dumping regulation containing the Limiting Rule was originally adopted, the Department stated that:

> …the Secretary will normally limit the application of average-to-transaction comparisons exclusively to those sales in which the criteria for determining targeted dumping are satisfied. The preamble to the proposed regulations states that it would be "unreasonable and unduly punitive" to apply the transaction-to-average approach to all sales where, for example, targeted dumping accounted for only one percent of a firm's total sales. The preamble also states that the approach would not always be limited in application "because there may be situations in which targeted dumping by a firm is so pervasive that the average-to-transaction method becomes the benchmark for gauging the fairness of that firm's pricing practices."[43]

Thus, in the Second Remand Redetermination in response to Petitioners' argument that APP-China's targeted dumping is so pervasive that the Department should apply the alternative A-T methodology to all of APP China's sales, we indicated that the only circumstances that may support a decision to apply A-T to all sales include when "targeted dumping by a firm is so pervasive that the A-T method becomes the best benchmark for gauging the fairness of that firm's pricing practices," or, alternatively, when "the targeted dumping practice is so widespread it may be administratively impractical to segregate targeted dumping pricing from the normal pricing behavior of a company."[44] In this instance, the percentage of APP-China's sales that were found to be targeted was not pervasive.[45] Under the *Steel Nails* test, the sales found to be

[42] After rejecting the MEP prices for inputs from Thailand as surrogate value, the difference of the dumping margins under the two methodologies (A-A and mixed A-T/A-A) is significant. The weighted-average dumping margins calculated are *de minimis* under A-A, and 3.64 percent under mixed A-T/A-A, respectively. Hence, we applied mixed A-T/A-A to calculate APP-China's dumping margin.
[43] *See Final Rule* at 27375.
[44] *See* the Second Remand Redetermination at 24-25.
[45] *See First Remand Redetermination* at 18; *see also* the Department's memorandum to the file entitled, "Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Analysis of the Final Remand Redetermination Margin Calculation for APP-China," dated January 13, 2014.

targeted represent a relatively small number of total sales by sales volume.[46] While the Department did not have a bright-line test to determine pervasiveness under the withdrawn targeted dumping regulation, we find that the percentage of targeted sales is insufficient to demonstrate that the targeted dumping is so pervasive or widespread as to justify the departure from the normal rule under the targeted dumping regulation.[47] Thus, it was not an abnormal situation because the alleged targeted dumping was neither pervasive, nor widespread under the *Steel Nails* test.

We decline to employ the Cohen's *d* test and the DP analysis to measure the pervasiveness of targeted dumping under the targeted dumping regulation. As stated above, the evaluation of "abnormality" and "pervasiveness" is conducted under the withdrawn targeted dumping regulation, used in determining whether to apply A-T to all sales under the Limiting Rule. The Cohen's *d* test and the DP analysis were not designed to be an additional test for determining "pervasiveness" or "abnormality" under the withdrawn targeted dumping regulation. Not only was the DP analysis not in existence during the POI, but the DP analysis was designed and developed after the targeted dumping regulation was withdrawn. Accordingly, the DP analysis was not designed to evaluate, and does not address, "abnormality" contemplated in the withdrawn targeted dumping regulation (*i.e.*, "{t}he Secretary will *normally* limit the application

[46] *See* the Department's memorandum, entitled, "Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Analysis of the Draft Third Remand Redetermination Margin Calculation for APP-China," dated June 1, 2015 ("APP-China Draft Results Analysis Memo").

[47] The Court questioned the Department's statement that the level of targeted dumping remained the same from the first remand redetermination to the second remand redetermination because Department only made changes to normal value, rather than to U.S., prices in the second remand redetermination. To clarify, under the *Steel Nails* test, the methodology involved a two-stage test to determine whether there is a pattern of export prices that differ significantly among purchasers, regions, or periods of time in accordance with section 777A(d)(1)(B)(i) of the Tariff Act of 1930, as amended ("the Act"). Thus, regardless of whether the Department accepted any or all of APP-China's MEPs from Thailand or South Korea, no changes were made to APP-China's U.S. prices between the first and second remands, which are the basis for measuring targeted dumping under the *Steel Nails* test.

of average-to-transaction comparisons…").[48] Rather, the Department adopted and began using the DP analysis only after it withdrew the targeted dumping regulation, as a different approach for determining whether application of the A-T method is appropriate in a particular situation pursuant to 19 CFR 351.414(c)(1) and consistent with section 777A(d)(1)(B) of the Act. Accordingly, we continue to decline to apply the Cohen's *d* test and the DP analysis for determining "pervasiveness" under the withdrawn targeted dumping regulation in this final remand redetermination.

D. Discussion of Interested Parties' Comments

On June 15, 2015, APP-China commented that it disagreed with our conclusion that the Department has reason to believe or suspect that the MEP prices of certain inputs from Thailand may have been subsidized. Petitioners, on the other hand, agreed with our conclusion. With respect to targeted dumping, Petitioners averred that we should reconsider our decision not to rely on the DP methodology to measure the pervasiveness of targeted dumping while APP-China did not comment on the issue.

Comment 1: MEPs of Inputs from Thailand

APP-China's Comments

APP-China argues that the Department's conclusion that we have reason to believe or suspect that the MEP prices of certain inputs from Thailand may have been subsidized does not comply with *Gold East III*, because our conclusion is not supported by the evidentiary record and is not in accordance with law.[49] In particular, APP-China claims that the applicable legal standard established in the Federal Circuit's ruling in *AK Steel*[50] required that the Department point to evidence to support a reasonable inference that the government's control continued into

[48] *See Final Rule* at 27375.
[49] *See* APP-China's Comments at 2.
[50] *See AK Steel Corp. v. United States*, 192 F. 3d 1367 (Fed. Cir. 1999) ("*AK Steel*").

the POI.[51] Further, APP-China claimed that subsequent CIT decisions[52] require that "specific and objective evidence" support a belief that MEPs may be subsidized.[53] Additionally, APP-China argues that the evidence (*i.e.*, the *1997 Apparel Review*) that the Department relied on in the draft remand does not satisfy the *Fuyao II*[54] standard.[55]

According to APP-China, the Tax Certificates for Export program is not generally available to every Thai exporter. APP-China argues that the Department's determination in the *1991Carbon Steel Review*[56] found that the purpose of the program is to rebate indirect taxes and import duties on inputs used to produce exports, and because no evidence on the record indicates that APP-China's suppliers used imported materials to produce inputs sold to APP-China, they do not qualify for the program. Furthermore, APP-China argues that the program in and of itself is not a countervailable subsidy because the program is countervailable only to the extent that it confers a rebate in excess of the Department's calculated allowable rebate of import duties and indirect taxes on physically incorporated inputs. APP-China contends that the Department should reach the same conclusion as it did regarding the Thai Investment Promotion Act ("IPA") subsidy in the Second Remand Redetermination where it countervailed the subsidy on a case-by-case basis. Additionally, APP-China argues that it is natural for an exporter not to use or benefit from the alleged subsidy. For support, APP-China points to *2001 Hot-Rolled Carbon Steel Flat Products*[57] where the Department did not countervail the Tax Certificates for Export program

[51] *See* APP-China's Comments at 4.
[52] For support, APP-China cited, for example, *China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 264 F. Supp. 2d 1229 (CIT 2003), *China Nat'l Mach. Imp & Exp. Corp. v. United States*, 293 F. Supp. 2d 1334 (CIT 2003), and *CS Wind*, 971 F. Supp.2d 1271, 1292-93 (CIT 2014).
[53] *See* APP-China's Comments at 4-5.
[54] *See Fuyao Glass Indus. Group Co. v. United States*, 29 CIT 109 (2005) ("*Fuyao II*").
[55] *See* APP-China's Comments at 5-7.
[56] *See Carbon Steel Butt-Weld Pipe Fittings From Thailand; Preliminary Results of Countervailing Duty Administrative Review*, 56 FR 55283 (October 25, 1991) ("*1991 Carbon Steel Review*").
[57] *See Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 FR 50410 (October 3, 2001) ("*2001 Hot-Rolled Carbon Steel Flat Products*").

after concluding that the program was not used by any Thai companies. Lastly, APP-China challenges that Petitioners' own evidence that the Thai government modified the program in 2009 erodes the presumption that the Tax Certificates for Exports program, which was countervailed in 1997, remained unchanged in 2009.

Petitioners' Comments

Petitioners comment that the Department correctly concluded that there is a reason to believe or suspect that MEP prices of inputs from Thailand may have been subsidized.[58] Petitioners further assert that evidence of a generally-available, non-industry specific export subsidy, in conjunction with their evidence concerning the existence of the program during the POI, led the Department to conclude that there was reason to believe or suspect that the MEP prices of certain inputs from Thailand may have been subsidized. Finally, Petitioners comment that the Department's determination in the draft remand is consistent with its past determinations, citing *Wind Towers from Vietnam*.[59, 60]

Department's Position:

APP-China's contentions are without merit. If the Department countervailed an export subsidy in a prior determination, unless parties provide evidence that the program has been terminated and the flow of residual benefits has ceased, the Department will normally find that the subsidy is still in existence.[61] The Department countervailed Thailand's Tax Certificates for

[58] *See* Petitioners' Comments at 3.
[59] *See Utility Scale Wind Towers From the Socialist Republic of Vietnam Final Determination of Sales at Less Than Fair Value*, 77 FR 75984 (December 26, 2012) ("*Wind Towers from Vietnam*").
[60] *See* Petitioners' Comments at 6.
[61] *See Certain Corrosion-Resistant Carbon Steel Flat Products; Cold-Rolled Carbon Steel Flat Products; and Cut-to-Length Carbon Steel Products from Germany*, 65 FR 16,176 (March 27, 2000) and accompanying IDM at Comment 1 ("Likelihood of Continuation or Recurrence of Countervailing Duty"); *Final Results of New Shipper Reviews of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China* ("*Final Results*"), 67 Fed. Reg. 10,665 (Mar. 8, 2002).

Export program as an export subsidy in the *1997 Apparel Review*.[62] Even though the parties had opportunities to provide evidence on this issue in the original investigation and subsequently, when the Department reopened the record on remand, parties placed no evidence on the record that shows that the program has been terminated and the flow of benefits has ceased. Accordingly, consistent with our normal practice, we have a reason to believe or suspect that the MEP prices of inputs from Thailand may have been subsidized.[63]

In *Gold East III*, the Court held that the Department's practice for evaluating whether it has reason to believe or suspect that prices may have been subsidized is not at odds with its prior decisions in this case.[64] Rather, the Court found that until the second remand results the Department did not clearly explain its practice in either the *Final Determination* or the First Remand Redetermination.[65] According to the Court, the Department simply stated that it determined in the past that South Korea and Thailand maintain broadly available non-industry specific export subsidy programs and merely declared from citations to same that those programs were in existence during the POI.[66] However, the Court found that in the second remand results the Department articulated its practice by explaining that "in countervailing duty proceedings 'if the Department has countervailed an export subsidy in a prior determination, unless parties provide us with the evidence that the program has been terminated and flow of residual benefits

[62] *See Certain Apparel From Thailand: Preliminary Results of Countervailing Duty Administrative Review*, 62 FR 46475, 46477 (September 3, 1997); unchanged in *1997 Apparel Review*.
[63] As in the Second Remand Redetermination, we do not rely on export subsidy determinations made after the POI of the underlying investigation in this remand proceeding. While the Tax Coupon Program and the Tax Certificates for Export may have been authorized under the Tax and Duty Compensation of Exported Goods Produced in the Kingdom Act of 1981, we relied on our determinations regarding the Tax Certificates for Export program made prior to the POI of the underlying investigation.
[64] *Gold East III* at 14; the Court also observed that because the Department acknowledged that Thailand's Tax Certificates for Export program had been countervailed in the *1997 Apparel Review*, and Petitioners had placed on the record the law in 2009 governing the program to show the program existed in 2009, the Department could have reasonably inferred that the tax coupon program continued to exist during the POI (*id.*, at 12).
[65] *Id.*, at 13.
[66] *Id.*, at 13.

has ceased, we will normally find that the subsidy is still in existence.'"[67] In light of the Court's clarification in *Gold East III* that the Department's practice is not at odds with its prior decisions, the Department is following its normal practice.

APP-China claims that it is "rather perplexed" that the Department reached a different conclusion from the same evidence. The Department understood *Gold East I* and *Gold East II* as rejecting its normal practice. In *Gold East III*, however, the Court clarified that the Department's practice was not at odds with its prior decisions and that the Department simply did not sufficiently explain to the court what its practice was until the second remand determination. Be that as it may, given the Court's clarification that the Department's normal practice is not at odds with its decisions, we see no reason to depart from our normal practice here.

APP-China claims that the applicable legal standard is established in the Federal Circuit's ruling in *AK Steel*[68] and in subsequent decisions of the CIT.[69] As an initial matter, we note that *AK Steel* did not involve the matter at issue here, a determination by the Department in an antidumping duty proceeding to avoid the use of prices that it has reason to believe or suspect may have been subsidized. Rather, *AK Steel* involved a determination of countervailability in the first instance in a countervailing duty proceeding. The Federal Circuit in *AK Steel* explained that "substantial evidence" to support a determination is "more than a mere scintilla," and "means such relevant evidence as reasonable mind might accept as adequate to support a conclusion."[70] Here, the Department relied upon its own prior findings in countervailing duty proceedings that countervailed Thailand's Tax Certificates for Export program as an export subsidy. These findings, which led to the imposition of countervailing duties on Thai products, provide

[67] *Id.*, at 13, n.16 (citations omitted).
[68] *See AK Steel Corp. v. United States*, 192 F. 3d 1367 (Fed. Cir. 1999) ("*AK Steel*").
[69] *See* APP-China's Comments at p.4, n.2.
[70] *See AK Steel*, 192 F. 3d at 1371.

substantial evidence to support the Department's belief or suspicion that prices of exports from Thailand may have been subsidized.

The Department need not conduct a formal investigation as to whether the export subsidy continues to exist. Nor is the Department required to conduct a formal investigation into whether APP-China's suppliers benefited from the subsidies. Granted, if APP-China provided relevant evidence concerning the program or its suppliers, the Department would have considered such record evidence, but the Department is not required to investigate APP-China's suppliers and their company-specific practices. The standard "reason to believe or suspect" that prices of inputs "may have" been subsidized is a more lenient standard than the actual finding of subsidization of the suppliers in question. This standard is satisfied in this case.

Moreover, we find that Petitioners' evidence (*e.g.*, modifications to the law governing the Tax Certificates for Export program) purported to show the existence of the program during the POI is unnecessary for finding a reason to believe or suspect that the prices of inputs from Thailand may have been subsidized. Put simply, the fact that the Department countervailed the Tax Certificates for Export program prior to the POI of this underlying investigation, combined with APP-China's failure to provide evidence that the program was terminated and the flow of the benefits has ceased, provide sufficient basis to believe or suspect that the export subsidy continues to exist or the flow of the benefits has not ceased, and thus that the prices for the inputs "may have" been subsidized. Accordingly, whether Petitioners' evidence provides an additional basis for the reason to believe or suspect finding is not necessary for us to decide at this time.

We disagree with APP-China's assertion that our conclusion regarding the MEP prices of inputs from Thailand is not in accordance with the law, because it does not meet the *Fuyao II* test. The Court's decisions in this litigation, as clarified by *Gold East III*, neither prohibit nor require

us to apply the *Fuyao II* test. The Court in *Gold East III* expressly held that while *Fuyao II* provides useful guidance for evaluating the sufficiency of evidence upon which the Department bases its belief or suspicion that prices are subsidized, it is not the only "reasonable method."[71] In fact, the Courts have upheld the Department's rejection of certain MEP prices based on the Department's subsidization determination from a prior investigation.[72] Accordingly, we decline to apply the *Fuyao II* analysis and will follow our normal practice.

The Court in *Gold East III* clarified that its prior opinions are not at odds with the Department's normal "practice," which we follow here.[73] Furthermore, the Court held that *Gold East III* controls if "anything in this opinion could be construed as inconsistent with its reading of the prior opinions."[74]

Further, to the extent that APP-China points to *2001 Hot-Rolled Carbon Steel Flat Products*,[75] arguing that one of the *Fuyao II* prongs is not met because the determination demonstrates that it is natural for exporters not to use export subsidies, the argument is misplaced. First, as we explained above, we are not applying *Fuyao II* in this case. Second, even if this consideration was relevant, simply because one company in an unrelated industry, which was a mandatory respondent in *2001 Hot-Rolled Carbon Steel Flat Products* investigation, did not use a particular program, it does not mean that as a general matter Thai exporters would not take advantage of available export subsidies.

Finally, we disagree with APP-China's assertion that the Tax Certificates for Export program is not an export subsidy and we should have reached the same conclusion on the tax

[71] *See Gold East III* at 15.
[72] *See, e.g., Peer Bearing Company-Changshan v. United States*, 298 F. Supp. 2d 1328, 1337 (CIT 2003).
[73] *See Gold East III* at 14.
[74] *Id.* at 16.
[75] *See Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 FR 50410 (October 3, 2011) ("*2001 Hot-Rolled Carbon Steel Flat Products*").

program as we did regarding the IPA programs. Prior to the *2013 Thailand Shrimp Investigation* which post-dated the underlying investigation, the Department did not countervail the IPA as an export subsidy *per se*. Rather, as explained in the Second Remand Redetermination, we countervailed a program under the IPA in *2001 Hot-Rolled Carbon Steel Flat Products* because the IPA benefits were *de facto* specific to a steel-sheet industry within the meaning of section 771(5A)(D)(iii)(I) of the Act, and the program was not administered in a manner in accordance with 19 CFR 351.519(a)(4)), even though the Department determined that the Board of Investment assistance under the IPA did not constitute an export subsidy. In *2005 PET Resin Investigation*,[76] we did not countervail the program under the IPA as an export subsidy because we determined that the IPA did not generally require an export commitment. Our prior determinations concerning the IPA program's countervailability were industry-specific and depended upon the type of monitoring program employed by each particular industry.

Unlike the IPA, we countervailed the Tax Certificates for Export program as an export subsidy, first in the *1989 Iron Pipe Investigation*[77] and later in the *1997 Apparel Review*. As stated above, APP-China provided no evidence that indicates that the Tax Certificates for Export program has been terminated or that the flow of benefits has ceased. Accordingly, we see no basis on the record that would support a finding that the export subsidy program has been

[76] *See Final Negative Countervailing Duty Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Thailand*, 70 FR 13462 (March 21, 2005) ("*2005 PET Resin Investigation*").
[77] *See Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: Malleable Iron Pipe Fittings From Thailand*, 54 FR 6439 (February 10, 1989) ("*1989 Iron Pipe Investigation*"); we described the program as follows: "Under the "Tax and Duty Compensation of Exported Goods Produced in the Kingdom Act" (Tax and Duty Act), the {government of Thailand} issues tax certificates to exporters of record to rebate indirect taxes and import duties levied on inputs into exported products."

terminated and the flow of benefits has ceased. Accordingly, the Department has reason to believe or suspect that MEP prices of inputs from Thailand may have been subsidized.[78]

Comment 2: Targeted Dumping Determination

Petitioners' Comments

In response to the Department's rationale for rejecting the DP analysis to determine the dumping margin for APP-China, Petitioners argue that the DP analysis using the Cohen's *d* test was specifically designed to measure the degree of "pervasiveness" of patterns of pricing differences and to determine when the A-T comparison methodology should be applied to all sales. For support, Petitioners cite to *Xanthan Gum*[79] and other proceedings where the Department applied the DP analysis to determine when to apply the A-T comparison methodology to calculate a dumping margin.[80] Pointing to the fact that the Department withdrew the targeted dumping regulation in the same year as its adoption of the DP analysis as evidence, Petitioners claim that the *Steel Nails* test was never designed to determine pervasiveness or abnormality in the sense of the Department's original targeted dumping regulation.[81]

APP-China's Comments

APP-China did not comment on this issue.

Department's Position

Petitioners' comments are without merit. The issue before the Court is the interpretation of the term "normally" under the withdrawn regulation, *i.e.*, whether targeted dumping by APP-China is so pervasive or widespread such that applying A-T to all sales is warranted. In the

[78] Petitioners argue that Thailand's IPA provides separate and independent grounds for the Department to reject the MEP prices; however, the Court in *Gold East III* already rejected Petitioners' arguments and sustained the Department's subsidization determination regarding the IPA.
[79] *See Xanthan Gum From the People's Republic of China: Final Determination of Sakes at Less Than Fair Value*, 78 FR 33351 (June 4, 2013) ("*Xanthan Gum*").
[80] *See* Petitioners' Comments at 10.
[81] *See* Petitioners' Comments at 9.

Second Remand Redetermination, we explained that the percentage of APP-China's sales which was found to be targeted is neither pervasive nor widespread under the *Steel Nails* test; and thus we concluded that the application of A-T to all sales was not warranted.[82]

The Court held that analysis of pervasiveness appears distinct from the normal targeted dumping remedy articulated in our targeted dumping regulation (*i.e.*, the Limiting Rule).[83] Accordingly, the Court ordered that we determine whether the DP analysis is, or is not, better suited to determine "pervasiveness" in accordance with our prior regulation than the *Steel Nails* test.[84] We determine that the DP analysis is not better suited for such a determination.

First, the Cohen's *d* test and the DP analysis were not designed to be an additional test for determining "pervasiveness" or "abnormality" under the withdrawn targeted dumping regulation. Not only was the DP analysis not in existence during the POI, but the DP analysis was designed and developed after the targeted dumping regulation was withdrawn. Accordingly, the DP analysis was not designed to evaluate, and does not address, abnormality as contemplated in the withdrawn targeted dumping regulation (*i.e.*, "{t}he Secretary will *normally* limit the application of average-to-transaction comparisons exclusively to those sales in which the criteria for determining targeted dumping are satisfied.").[85] Rather, the Department adopted and began using the DP analysis only after it withdrew the targeted dumping regulation, as a different approach for determining whether the application of the A-T method is appropriate in a particular situation pursuant to 19 CFR 351.414(c)(1) and consistent with section 777A(d)(1)(B) of the Act.

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[82] *See* the Second Remand Redetermination at 24-25.
[83] *See Gold East III* at 28.
[84] *Id.*, at 27-28; *see also Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstance*s, 73 FR 33977 (June 16, 2008) and accompanying issues and decision memorandum at comments 1 through 8; *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less than Fair Value*, 73 FR 33985 (June 16, 2008) and accompanying issues and decision memorandum at comments 1 through 8 (collectively, "*Steel Nails*").
[85] *See Final Rule* at 27375.

Second, the targeted dumping regulation and the DP methodology have different objectives and measure different characteristics of a respondent's export sales to the United States. Under the targeted dumping regulation, we examined the pervasiveness of targeted sales that were allegedly dumped. The *Steel Nails* test used under the targeted dumping regulation measured what a normal range of weighted-average export prices was through the Standard Deviation Test and then determined whether the alleged weighted-average export prices were *lower* than that norm *via* the Gap Test.[86] These alleged sales were presumed dumped (*i.e.*, export prices lower than the weighted average dumping margin). In fact, under the targeted dumping regulation, a petitioner, during an investigation, must have identified certain alleged sales that differed significantly (*i.e.*, were lower) in terms of purchasers, region, or time periods and put forth evidence to support the claim in order for the Department to apply the *Steel Nails* test to those sales specified in the allegation.[87] The Department did not test whether the export sales to other purchasers, regions, or time periods may have been targeted.[88]

In contrast, the DP analysis does not require an allegation that a particular subset of sales is dumped. Under the DP analysis, the Cohen's *d* test looks at pervasiveness of patterns of pricing differences on a respondent's entire set of export sales, which considers prices that are

[86] *See Final Determination*, at Comment 4; *see also* the Department's memorandum to the File, "Less-Than-Fair-Value Investigation on Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Targeted Dumping Analysis of Mandatory Respondents-Final Determination," dated September 20, 2010, at 2-3.

[87] *Id.; Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 FR 248,92, 24,897 (May 6, 2010); *Certain Oil Country Tubular Goods from the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination*, 74 FR 59,117, 59,118 (November 17, 2009); *High Pressure Steel Cylinders From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value*, 76 FR 77,964, 77,968 (December 15, 2011).

[88] *See Certain Oil Country Tubular Goods from the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination*, 74 FR 59,117, 59,118 (November 17, 2009); *High Pressure Steel Cylinders From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value*, 76 FR 77,964, 77,968 (December 15, 2011).

higher, and prices that are lower, than the normal value. In *Xanthan Gum*, one of the early cases where the Department first applied the DP analysis to determine the weighted-average dumping margin, we explained the reason for utilizing the Cohen's *d* test in response to an interested party's comment that the Department should consider only lower priced sales in the DP analysis:

> {I}t is reasonable for the Department to consider both lower priced and higher priced sales in the Cohen's d analysis because higher priced sales are equally capable as lower priced sales to create a pattern of prices that differ significantly.… Accordingly, both higher and lower priced sales are relevant to the Department's analysis of the exporter's pricing behavior.[89]

We disagree with Petitioners' assertion that "the *Steel Nails* test was never designed to determine pervasiveness or abnormality in the sense of the Department's original regulation."[90] In fact, the Court in *Gold East III* explicitly disagreed with Petitioners' claim that "pervasiveness" is a new issue that the *Steel Nails* test did not test for.[91]

Accordingly, we applied the *Steel Nails* test and absent evidence that the situation is not normal, we apply the A-T method for targeted sales and the A-A method for non-targeted sales in accordance with the Court's prior order to apply the limiting rule under the withdrawn regulation in this final remand redetermination.

[89] *See Xanthan Gum* and accompanying IDM at Comment 3.
[90] *See* Petitioners' Comments at 9.
[91] *See Gold East III* at 25.

E. FINAL RESULTS OF REDETERMINATION

For the foregoing reasons, the Department made no change to the weighted-average dumping margin calculated in the draft remand redetermination as a result of parties' comments on the draft remand redetermination. These final results of redetermination resulted in a final weighted-average dumping margin for APP-China of 3.64 percent.

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

10 July 2015
Date