(Slip Op. 02–85)

FAG ITALIA, S.P.A., FAG BEARINGS CORP, SKF USA INC., AND SKF INDUSTRIE S.P.A., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR AND PLAINTIFF

Consolidated Court No. 97–11–01984

(Dated August 7, 2002)

ORDER

TSOUCALAS, *Senior Judge:* This matter comes before the Court pursuant to the decision (May 24, 2002) of the Court of Appeals for the Federal Circuit ("CAFC") in *FAG Italia, S.p.A. v. United States,* 291 F.3d 806 (Fed. Cir. 2002), vacating in part the judgment of this Court in *FAG Italia, S.p.A. v. United States,* Slip Op. 00–82, 2000 Ct. Intl. Trade LEXIS 83 (CIT 1999).

Specifically, in accordance with the precedent set by the CAFC in *SKF USA Inc. v. United States,* 263 F.3d 1369 (Fed. Cir. 2001), the CAFC held that this case shall be remanded to Commerce for explanation "why [Commerce] uses a different definition of 'foreign like product' for price-based calculations for normal value than [Commerce] does for calculations of constructed value." *FAG Italia, S.p.A.,* 291 F.3d at 808. Accordingly, it is hereby

ORDERED that this case is remanded to Commerce to provide the necessary explanations; and it is further

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

(Slip Op. 02–86)

NIPPON STEEL CORP., NKK CORP., KAWASAKI STEEL CORP., AND TOYO KOHAN CO., LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND WEIRTON STEEL CORP., DEFENDANT-INTERVENOR

Court No. 00–09–00479

[ITC injury determination vacated.]

(Dated August 9, 2002)

Willkie Farr & Gallagher *(William H. Barringer; James P. Durling; Daniel L. Porter; Sean M. Thornton; Karl von Shriltz)* for plaintiffs.

Lyn M. Schlitt, Office of General Counsel, *James M. Lyons,* Deputy General Counsel, U.S. International Trade Commission *(Laurent M. deWinter),* for defendant.

Schagrin Associates *(Roger B. Schagrin),* for defendant-intervenor.

OPINION

RESTANI, *Judge:* This matter comes before the court as a result of the court's decision in *Nippon Steel Corp. v. United States,* 182 F. Supp. 2d 1330 (Ct. Int'l Trade 2001) *("Nippon I"),* in which the final affirmative injury determination of the International Trade Commission (the "Commission") in *Tin- and Chromium-Coated Steel Sheet From Japan,* 65 Fed. Reg. 50005, USITC Pub. 3300, Inv. No. 731–TA–860 (final determ.) (Aug. 2000) (hereinafter "Final Determination") was remanded. Although the court found the Commission's subsidiary conclusions with respect to subject import volume supported, at least minimally, by substantial evidence, the court ordered the Commission to reevaluate its analysis of the effect of subject imports on domestic pricing, as well as its conclusions with respect to causation. Nippon Steel Corporation, NKK Corporation, Kawasaki Steel Corporation, and Toyo Kohan Co., Ltd., (collectively "Nippon" or "Plaintiffs"), respondents in the underlying investigation, contest the Commission's March 4, 2002 affirmative injury determination pursuant to remand ("Redetermination") on the grounds that the Commission's analysis of price effects and causation remain unsupported by substantial evidence.[1]

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). The court will uphold the Commission's determination in an antidumping investigation unless it is "unsupported by substantial evidence in the administrative record or is otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

OVERVIEW

The crucial question of price effects and ultimate causation of material injury arise in the context of an industry with peculiar conditions of

[1] In its original challenge to the Commissioners' affirmative determination, Plaintiffs claimed both a lack of substantial evidence for the ITC's determination and prejudicial Congressional interference. The court found insufficient evidence to support the latter challenge. Although the court's finding that ITC had no substantial evidence for its decision may be relevant to Plaintiffs' claim of undue Congressional influence, there is no purpose to revisiting that issue because the case is fully disposed on the alternative ground.

competition. Chairman Koplan in dissent succinctly summarized these conditions, which cannot be seriously disputed by the parties or the Commission majority. He stated as follows:

> The following conditions of competition unique to the U.S. tin plate industry, which were identified in the preliminary determination, are central to my analysis: (1) tin plate is almost always sold in the United States pursuant to annual contracts that establish fixed prices and target volumes; (2) reliable delivery is extremely important to the purchasers—the domestic can making [industry]—because food must be canned as soon as possible after it reaches the canning facility;[2] (3) the purchasers have consolidated and are now highly concentrated (the six largest purchasers account for more than three-quarters of apparent domestic consumption); (4) several of the major purchasers operate canning facilities on the grounds of Weirton's mill and commit to buy a minimum volume of steel from Weirton;[3] (5) non-subject imports entered the U.S. market in a larger volume than subject imports from Japan during the period of investigation (POI) and non-subject imports occupied a greater market share than did imports from Japan; (6) most domestic producers, including petitioner Weirton, are located either on the East Coast or in the Midwest and focus their sales in regions near their mills; and (7) demand in the canning industry is affected by the harvest of agricultural goods used for canned foods.[4]

Tin- and Chromium-Coated Steel Sheet From Japan, 65 Fed. Reg. 50005, USITC Pub. 3300, Inv. No. 731–TA–860 (final determ.) (Koplan, S., dissenting) (Aug. 2000) (footnotes added). The court also notes that the U.S. producers are largely long established integrated steel producers. A new domestic producer of tin-milled products, which is said to have a cost advantage, was present during the POI.

Both dissenters found evidence of no price effects due to subject imports, based on the manner of price negotiation and setting, and the seemingly incontrovertible evidence that domestic reliability problems were a tremendous concern to the purchasers. The majority cites no evidence that can sustain its opposite conclusion.

Further, upon review of the Redetermination, the court finds that the Commission has failed to comply with the court's instructions in *Nippon I,* and either conceded, or failed to contest evidence that leads inexorably to a finding that subject imports have not caused material harm to the domestic industry.

The Commission failed to follow the court's instructions on selection and compilation of data. First, it maintained a particular purchaser's separate facilities and product types in disaggregated form. Second, the Commission ignored the court's directive to justify limiting the range of price comparisons to only those instances in which sales were ultimately

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[2] There are contractually set performance times the can producers must meet. The other dissenting commissioner noted that there are some minor non-food uses.

[3] Weirton Steel Corporation has the largest tin mill in the United States.

[4] Lack of demand was not cited as a reason for harm.

made from both Japanese and U.S. suppliers. Lastly, at times it relied solely on underselling data for one year.

In its analysis of underselling, the Commission ignored explanatory information provided by large purchasers where: (1) Silgan cited quality and service as being its two most important purchasing priorities and explained that unique manufacturing capabilities led to its decision to purchase from some off-shore sources; (2) Crown stated that it based its purchases of Japanese imports on quality considerations; and (3) the Commission failed to determine the extent to which purchasers' measurements of determinative price differentials are borne out by the purchasing histories of these purchasers.

Furthermore, in regard to the correlation between subject imports and pricing, the Commission: (1) failed to address Nippon's contention that a large purchaser—[ ]—paid increasing domestic prices at the same time it increased its purchases of subject imports; (2) failed to address the correlation between the introduction of subject import by another purchaser [ ] in 1999 and the subsequent rise in domestic prices between 1999 and 2000; (3) addressed another purchaser's [ ] ability to secure price decreases from its domestic suppliers, yet conceded that non-subject import volume largely accounted for the price decline; and (4) failed to address the lack of correlation between Silgan's purchases of subject imports and pricing, where Nippon specifically cited Silgan as evidence of a lack of correlation. Lastly, the Commission failed to assess the extent of the domestic lead-time price premium in relation to the underselling margin.

The Commission failed to take into account relevant market factors in determining price sensitivity. First, it conceded that factors such as quality and service are generally ranked higher than price by purchasers, yet concluded that the market is characterized by a high degree of price sensitivity. Furthermore, the Commission asserted that quality and reliability are important only for the purpose of qualifying suppliers, yet failed to rebut the assertion that purchasers ranked price as a low consideration in choosing among *qualified* purchasers.

The Commission failed to adequately address Nippon's contention that negotiations run on separate tracks according to different procedures and criteria. In its analysis, the Commission: (1) failed to support its conclusion that purchasers reallocate volume following the conclusion of price negotiations; (2) conceded that the existence of supply agreements cuts against the finding that competition from subject imports impacted domestic prices; (3) conceded that delivery time issues operate to limit the absolute amount of the domestic market that imports could obtain, yet failed to evaluate purchaser perceptions with respect to the domestic industry's lead-time advantage as an explanation for keeping negotiations on separate tracks with volume allocated among domestic versus foreign producers; and (4) conceded that Weirton was unable to submit any documents indicating that it set its prices

with reference to foreign importers, and provided insubstantial justification for Weirton's failure to give such support.

In its lost sale analysis, the Commission relied on a lost sale allegation, where it ignored evidence on the record undermining the likelihood that a significant sale was lost for price reasons. Also, the Commission inadequately responded to the court's concerns regarding whether on-time performance and quality concerns were the predominant cause of harm to the domestic TCCSS industry. The Commission: (1) failed to cite the sources of its individual purchaser volume data throughout its analysis; (2) appeared to use numbers from Table TCCSS–1, for its analysis of purchaser BWAY, while for the remaining purchasers it inexplicably appeared to use figures from tables in the Staff Report that conflict with Table TCCSS–1; (3) supported its position with "trends" over two year periods of time, which ignore that the full set of data indicates that there had been no clear trend at all; and (4) never accounted for the year 2000, and at times limited its analysis to the change from 1998 to 1999.

The Commission inadequately responded to the court's concerns regarding whether non-subject imports were the predominant cause of harm to the domestic TCCSS industry. It apparently conceded that non-subject import volume prevails over subject imports industry wide, and failed to provide sufficient evidence that there is a correlation between subject import volume and harm to the domestic industry on the West Coast where subject imports are concentrated. Further, by comparing bids over two year periods, the Commission created trends for pricing in the marketplace, where again no actual trends exist.

As the following discussion demonstrates, with relatively low subject import volume and market share, no substantial evidence of adverse price effects caused by subject imports and no valid links establishing causation of material injury, this case compels the conclusion that this record will support only a negative determination.

DISCUSSION

With respect to the effect of subject imports on domestic pricing, the court in *Nippon I* generally ordered the Commission on remand to: (1) reconsider its underselling findings taking into account inconsistencies in the manner in which the data were presented; (2) explain its methodology for making price comparisons for underselling; (3) indicate the basis for calculating the yearly average margin of underselling and for concluding that such margins are significant; (4) reassess its conclusions with respect to a correlation between subject import competition and domestic prices; (5) reevaluate its price sensitivity finding in light of evidence in the record; and (6) indicate the data and context upon which it bases its findings regarding lost sales. In addition, the court ordered the Commission to reassess causation taking into consideration the role of nonprice factors in purchasing decisions as well as that of non-subject imports.

I. Effect of Subject Imports on Domestic Prices

Nippon claims that the Commission failed to comply with the court's following directives: (1) to present data on customer purchase prices "in a way that will facilitate review of pricing/volume trends" and "in a reasonably consistent manner with respect to purchaser and product grouping"; and (2) to "indicate the basis for its * * * underselling analysis," and why underselling margins in 1999 were significant.[5] *Nippon I* 182 F. Supp. 2d at 1356.

A. Methodology for Making Price Comparisons

In the Preliminary Determination, the Commission analyzed underselling by comparing weighted average f.o.b. prices and quantities for U.S. producers with those for Japanese producers. *See* Preliminary Determination at V–6. In the Final Determination, however, the Commission based its underselling findings on data that included separate bidding information for a particular purchaser's[6] three different tin-mill products purchased at each of its three facilities, while other large purchasers submitted a unified pricing chart detailing a single bid price for each supplier. *See* Final Determination at 15–16. Nippon argued that data for this purchaser was consequently "over-represented" on account of the Commission's methodology of counting "instances" of underselling without regard to the actual volumes purchased.

The court in *Nippon I* ordered the Commission to "present the data in a reasonably consistent manner with respect to purchaser and product grouping, as well as the expression of prices bid and paid." 182 F. Supp. 2d at 1343. Nippon claims that the Commission has not complied with the court's directive by continuing to "rely on the number of instances of underselling without first taking into account how the underlying data is grouped." *Id.* at 1342.

1. Standardization of Pricing Data

With respect to the "expression of prices bid and paid," the court expressed dissatisfaction with the Commission's unexplained division of data into two separate groups, *i.e.,* according to those purchasers who reported prices in dollar amounts and those who reported prices in terms of the discount rate from an industry list price. *See Nippon I,* 182 F. Supp. 2d at 1340 n.18. First, the Commission had not indicated the yearly list prices to which the discount rates were applied, thereby precluding the court from converting the discount rates into dollar prices, or vice versa, assuming it was inclined to do so. Simply presenting year-to-year discount rates without taking into consideration the list price may be misleading inasmuch as an increase in the list price may outstrip an increase in the discount rate. Second, the Commission's use of bifurcated data hinders review of the Commission's determinations with respect to pricing trends across the *entire* market.

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[5] Nippon does not contest the Commission's explanation of its reliance on bidding data submitted by purchasers.

[6] This purchaser is [ ].

On remand, the Commission stated that "[b]ecause of the different manners in which purchasers reported data, and differences in product mix between purchasers, we find that calculating a single rate across all purchasers would not be appropriate." Redetermination at 10. Nippon does not contest the Commission's explanation for its decision not to convert discount rates into prices, or vice versa.

2. Selection and Compilation of Price Comparison Data

With respect to purchaser and product grouping, the court in *Nippon I* found that the Commission failed to explain why it based its underselling calculations "solely on the number of individual bids from purchasers that purchased from both Japanese and domestic suppliers in a particular year, irrespective of volume," or "why it chose to reject the quarterly weighted average price calculations made in the Preliminary Determination." 182 F. Supp. 2d at 1341. The court specified that "where the Commission chooses to limit its underselling analysis to a subset of the pricing data available, the Commission must indicate the criteria it used for making the price comparisons." *Id.*

The court also ordered the Commission on remand to "account for differences in the way that data is reported in order to ensure that its calculations are accurate." *Id.* The court reasoned that "the Commission cannot ignore the manner in which the data is presented, and the Commission cannot rely on the number of instances of underselling without first taking into account how the underlying data is grouped." *Id.* Specifically, the court indicated that the Commission failed to explain why a particular purchaser's three facilities were counted separately, or why for this particular purchaser it counted separately each type of product purchased by an individual canning company, other than stating that the purchaser had reported its data in this manner. *Id.*

On remand, the Commission recompiled the data on price comparisons. The Commission created a new table counting Japanese bids below, within the range of, and above domestic bids, with the corresponding subject import volume. The Commission provided separate bidding data for the purchaser that had reported data for each of its three facilities as well as for three different varieties of TCCSS—[ ].

The Commission explained that it continued to separate out the particular purchaser's data from the rest of the purchasers for two reasons: (1) "[b]ecause the company's data were based on average unit values ("AUVs"), rather than discount rates, consolidation of the firm's data into single annual price figures posed the risk of masking price differences based on product mix or geographical considerations"; and (2) the purchaser "reported data on the basis of a May–April fiscal year that straddles individual calendar years and does not conform to the calendaryear basis on which other purchasers reported data." Redetermination at 9.

Nippon claims that by segregating data for one purchaser and indicating corresponding volume, the Commission "does not place underselling in context," and that "the Commission's emphasis on the increased

volume of underbid subject imports in 1999 for purchasers other than [the segregated purchaser] and in 1999/2000 for [the same purchaser] is directly contradicted by the lack of correlation between subject import purchasers and domestic price suppression or depression for numerous individual purchasers." Pl. Br. at 2.

The court finds that the Commission's decision to keep in disaggregated form the particular purchaser's separate facilities and product types is not adequately explained or cannot be explained. Further, the court finds that the Commission has not addressed the court's principal concern—as stated in the opinion and during the summary judgment hearing—that the decision to narrow the pool of comparisons to only those instances in which sales were ultimately made from both Japanese and U.S. suppliers is seemingly unprecedented and might give skewed results. For example, by not considering instances in which bids were received from both U.S. and Japanese producers, yet purchases ultimately were made only from suppliers from one of the countries, the Commission does not assess sales actually lost. The use of such a narrow data sample also renders a misleading picture of underselling frequency, as the number of total comparisons is artificially lowered. Because the Commission ignored the court's directive to justify limiting the range of price comparisons in the manner it did, or indicate any prior application of such a limitation, the court determines that the Commission inappropriately relied on an apparently skewed picture of the extent of underselling.

Furthermore, the Commission's analysis relies solely on underselling data for one year, apparently discounting the importance of its acknowledgment that there was no underselling of any significance in 1997 or 1998. Having dispensed with the use of a trend analysis of underselling data, the Commission may not rely, as it has done in this case, on trends in subject import market share and domestic pricing to substantiate the significance of its one-year data on underselling. The court therefore finds that the Commission has not complied with its instructions to indicate the criteria for its decision to limit its underselling analysis to particular data and to explain the selection and compilation of data on underselling. Without this information, the Commission's analysis cannot be supported by substantial evidence because there is no logical connection between the facts found and the choice made. *See Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962).

B. Underselling Analysis

In *Nippon I,* the court ordered the Commission to explain why the margin of underselling was significant, considering in particular the purchaser questionnaire responses regarding the price differential likely to induce a switch of suppliers. The court also ordered the Commission to explain whether any of the underselling reflected premiums paid to domestic producers for superior lead times.

1. Margin of Underselling

In the Final Determination, the Commission calculated an underselling margin of 2.156 percent, and found that a there was "a significant increase in the magnitude of the underselling," where "[i]n 1997 Japanese bids were generally not underselling domestic bids. In 1998, Japanese bids undersold domestic bids by 0.70 percent on average and by 1999, when subject import volume was greatest, the magnitude of underselling had risen to 5.77 percent on average." Final Determination at 16.

In *Nippon I,* the court found that the Commission had not met its burden of establishing why, assuming the margins actually exist, the margins are significant because (1) the Commission cited a non-existent table;[7] (2) the rate of increase in the margin was of limited probative value in the absence of any analysis of the range of price differentials that purchasers indicated would induce them to switch suppliers; and (3) the Commission did not analyze whether the domestic producers' undisputed lead-time advantage accounted for the margin of underselling.

On remand, the Commission found that "Japanese bids were often within the range of or higher than U.S. bids in 1997 and 1998, but were generally lower than U.S. bids in 1999," and that "[t]he instances of lower Japanese bids in 1999 represent higher volumes of subject imports than in previous years." Redetermination at 9.[8] Having dispensed with relying on an average margin, the Commission on remand focused on the margins of underselling for several larger purchasers in 1999, the only year in which it found generally lower Japanese prices.[9] From the purchaser responses', the Commission derived an overall range—two to six percent—of a price differential that would induce a switch of suppliers for 1999,[10] and concluded that the underselling margins are "generally near or at the ranges found by responding purchasers to be significant * * *." Redetermination at 12–13.

Nippon argues that the Commission's reliance on an aggregate range of price differentials and underselling margins masks that four of the six major purchasers indicated in their questionnaire responses and elsewhere that the actual underselling margins were not significant to their purchasing decisions. Nippon further argues that for one of the remaining two purchasers—[ ]—the reported price differential is not borne out by its actual purchasing history. Thus, Nippon concludes that only one major purchaser's—[ ]—underselling margin fell within its reported price differential.

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[7] On remand, the Commission indicated that the mis-cited table was in fact "Table 1—Requested by Commissioner Hillman for INV. No. 731–TA–860 (final) Tin- and Chromiumcoated Steel from Japan," which consolidated pricing data from the Staff Report.

[8] As indicated, the Commission found that "calculating a single rate across all purchasers would not be appropriate" due to "differences in product mix between purchasers" and therefore analyzes underselling data for individual purchasers. Nippon does not contest the Commission's decision to analyze underselling data on an individual purchaser basis.

[9] The Commission indicated that these margins in 1999 were as follows: [ ]. See Redetermination at 11; Purchaser Questionnaire, IV–8.

[10] The Commission noted purchaser responses as follows: [ ]. See Redetermination at 12 n. 34.

The court determines that the Commission has ignored explanatory information provided by large purchasers that give context to their responses' determinant price differential. First, [ ] did not give a price differential, instead referring the Commission to its response to Question IV–7, in which it described its purchasing criteria as follows:

> We choose steel suppliers based on 1) quality, 2) service and 3) price, in that order of importance. As a result of longer lead times (part of service) we purchase significantly less material from non-domestic producers than from U.S. sources * * *. [U]nique manufacturing capabilities of some off-shore sources drive us to purchase from them irrespective of their prices which, in most cases, are higher than U.S. producer prices.

[ ] Questionnaire Response at Question IV–7. Second, [ ] specified in its response that it "did not select the Japanese based on price, but on quality performance." [ ] Questionnaire Response at Question IV–8. Third, the margin of underselling cited by the Commission, *Redetermination* at 8, for [ ] in 1999 is not the margin found in Table V–16, [ ], below the stated determinant price differential. Rather than address these inconsistencies, the Commission merely reiterates its aggregate range figures and states that they were "generally near or at the ranges reported by purchasers to be significant * * *" ITC Br. at 3. The Commission cannot ignore purchaser comments that would give meaning to their estimates of the price differential that would induce a switch of suppliers. The Commission has also failed to determine the extent to which purchaser measurements of determinative price differentials are actually borne out by the purchasing history of these particular purchasers.[11]

The court notes that the form of the question in the Purchaser Questionnaires is a likely source of the apparent disconnect between purchaser responses regarding the slight determinative price differential and their indication that other criteria drove their pricing decisions, as well as their actual purchasing history. The questionnaire asks purchasers how much *higher* Japanese prices would have to be before they switch to a *domestic producer.* Since the Commission is attempting to analyze the extent of underselling, a more relevant question is how much *lower* Japanese prices would have to be before the purchasers would switch to a Japanese producer. Such a question necessarily would take into account purchasers' non-price considerations in making a switch of supplier. Thus, the data relied upon by the Commission in addressing the effect of underselling below a certain margin is questionable at best, as are the conclusions drawn therefrom.

2. Correlation between Subject Imports and Domestic Prices

The court in *Nippon I* found that the Commission had ignored "evidence apparently contradicting a finding of a correlation" between sub-

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[11] For example, the Commission fails to address Nippon's contention that [ ], which accounted for the bulk of the instances of underselling calculated by the Commission, represented that a [ ] increase in subject import prices would cause it to switch to domestic suppliers, but domestic purchases by this purchaser actually *increased* from 1998 to 1999, in spite of an underselling margin that increased from [ ] percent in 1998 to [ ] percent in 1999. *See* [ ] Questionnaire Response at Question IV–8; Staff Report at V–12–13.

ject import purchases and domestic price suppression and depression, holding that "where data is available," and "relied on by respondents, the Commission must address the individual purchaser data in some manner." 182 F. Supp. 2d at 1344. The court reasoned that "[p]ricing trends for a particular large purchaser may indicate the lack of a correlation between the existence of competition with Japanese imports and a decline in prices paid by that particular purchaser," and that where data on general pricing trends were admittedly mixed, the Commission should use available data to determine whether a correlation existed for particular purchasers. *Id.* The court therefore instructed the Commission to address data that apparently showed that: (1) the largest purchasers of subject imports generally paid increased prices to domestic suppliers and (2) those who purchased no subject imports were able to secure price decreases from their domestic suppliers.

On remand, the Commission reiterated its findings that subject imports generally undersold domestic producers in 1999, and that increased import volume coincided with reduced domestic volume:

> For the largest purchasers, the data indicate that (1) Japanese discount rates were higher in 1999 than the U.S. rates for the same customer; (2) Japanese prices were lower in 1999 than U.S. prices for the same customer; (3) the volumes of bids accepted from Japanese suppliers by every purchaser increased from 1997 to 1999; and (4) the volumes of bids accepted from domestic suppliers by every purchaser except Silgan decreased in 1999 compared to the volumes of bids accepted over prior periods.

Redetermination at 25.[12]

In accordance with the court's instructions, the Commission also reexamined the individual purchaser data cited by respondents as undercutting its correlation finding. The Commission first discounted the importance of evidence that a particular purchaser—[ ] paid prices apparently higher than its competitors did, notwithstanding the fact that the bulk of its purchases were from Japan. The Commission reasoned that comparing the average annual price among purchasers is likely to be of limited probative value due to the variations in product specifications among them.

Nippon asserts that the Commission's explanation ignores the court's instructions. The court agrees that, by focusing only on comparative

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[12] The court in *Nippon I* did not find error in the Commission's findings regarding general pricing and volume trends per se, and instead evaluated the extent to which the Commission addressed Nippon's contentions regarding the lack of correlation. Nippon now alleges that the Commission's finding of a general decline in subject import pricing is contradicted by evidence that [ ] accepted Japanese bids that were higher than certain accepted bids in 1999. Nippon inappropriately focuses on isolated bits of data that on the whole do not necessarily undermine the Commission's conclusions regarding overall trends.

Nippon also disputes the Commission's finding that "the volumes of bids accepted from Japanese suppliers by every purchaser increased from 1997 to 1999," on the ground that one purchaser—[ ] purchased subject imports for the first time in 1999, another—[ ]—increased its purchase of subject imports by only insignificant amounts, and another—[ ] decreased subject import purchases between 1998 and 1999. Nippon also alleges that the Commission's finding that "the volumes of bids accepted from domestic suppliers by every purchaser except Silgan decreased in 1999 compared to volumes of bids accepted over prior periods" is false. Nippon contends that two purchasers—[ ] increased domestic purchases, while another—[ ]—had reduced domestic purchases by a slight amount from 1997 to 1998, and increased domestic purchases from 1998 to 2000. The court in *Nippon I,* however, sustained the Commission's finding of low but significant subject import volume as an isolated finding and does not revisit the issue, except as it affects the ultimate causation conclusion. *See Nippon I,* 182 F. Supp. 2d at 1335–40.

pricing, the Commission ignored its instructions to address Nippon's contention that "the largest purchasers of subject imports generally paid increased prices to domestic suppliers." Although the court noted an apparent inconsistency in pricing trends for this purchaser in comparison to other purchasers, it is clear that the court did not restrict the Commission's analysis to comparative pricing across the industry. Thus, the Commission fails to address the contention that a large purchaser—[ ]—paid increasing domestic prices at the same time it increased its purchases of subject imports between 1997 and 1999. As this particular purchaser accounts for the bulk of the instances of underselling that the Commission determined to be significant, the individual purchasing history is of critical importance.

The Commission did address, however, the case of a particular purchaser—[ ]—who was able to secure price decreases from its domestic suppliers notwithstanding the lack of any purchases from Japan until 1999. The Commission noted that the purchaser's bid range of the discount rate did in fact increase over the POI, but attributed the price decline to (1) the purchaser's inability to settle at prices "substantially at odds" with its competition; (2) its purchase of substantial volumes of non-subject imports. The Commission found, however, that this purchaser's experience "indicates that non-subject imports also impacted domestic prices, but is in no way inconsistent with the conclusion, based on the experience of other purchasers, that subject imports had a significant impact as well." Redetermination at 26. Having found that a particular purchaser's non-subject imports volume largely accounted for the price decline, the Commission attempts to circumvent the implications of its concession by stating that it was "not inconsistent" with a finding that subject imports also had an impact based on the experience of other purchasers. The use of circumlocution and vaguely referencing other purchasers' experiences hardly constitutes supporting its individual purchaser determinations with substantial evidence.

The Commission also analyzed whether another purchaser—[ ]—increased its prices to domestic suppliers in 1999 despite the introduction of lower-priced bids from Japanese suppliers. The Commission found that "the data * * * do not indicate that * * * prices paid to domestic producers actually increased in 1999," as the prices were [ ] Although prices paid by this purchaser were stable from 1998–1999, the Commission omits that after the introduction of lower-priced subject import purchases in 1999, prices increased for all domestic producers over the period 1999 to 2000, the time period which the court was clearly instructing the Commission to address. Thus, in the absence of any explanation of why this lack of correlation is somehow insignificant, the court rejects the Commission's treatment of this third producer's data.

Lastly, the Commission did not address data from Silgan on the grounds that the court only drew its attention to three other purchasers, namely [ ]. The Commission omits that the court specifically instructed it to address individual purchaser data where such data is available and

"relied on by respondents." The Commission does not dispute that the respondents specifically cited the case of Silgan as evidence of a lack of correlation.

In sum, the court finds that the Commission's treatment of individual pricing data does not comply with the court's instructions and certainly does not constitute a serious analysis of large purchaser's pricing data trends that at least facially invalidates its overall correlation determination.

3. Domestic Producers' Price Premium due to Lead-Time Advantage

The court in *Nippon I* found that the Commission failed to analyze "whether the undisputed lead-time advantage held by the domestic industry in fact translated into an ability to maintain a price premium over imports, which may or may not account for the margin of underselling." 182 F. Supp. 2d at 1342. On remand, the Commission concedes that domestic producers did enjoy a lead time advantage over their Japanese competitors, and acknowledged that quicker product delivery translates into an ability to exact a price premium due to the benefit to purchasers in being able to modify purchase orders on shorter notice. Redetermination at 13. Nevertheless, the Commission found that this phenomenon was diminished by: (1) the existence of supply contracts that allow suppliers to know several quarters ahead of time how much TCCSS they are required to deliver to their customers, as evidenced by purchaser testimony regarding the superior on-time delivery of Japanese importers; and (2) purchasers' uniform assessment that Japanese TCCSS is superior in quality to domestic TCCSS.

The Commission's explanation is inconsistent with its findings regarding price sensitivity and alternative causation. The Commission found that superior on-time delivery and quality were not to such an extent as to account for purchasers' decision to switch to Japanese suppliers, *see* section C.1, *infra,* but were somehow of such an extent to minimize the price premium attributable to the domestic lead-time advantage. Even if the conceded price premium due to an acknowledged lead-time advantage were somewhat diminished, the price premium may still eclipse the underselling margin. The Commission failed to assess the extent of the price premium in relation to the underselling margin.

C. Conditions of Competition relating to Price Effects

1. Price Sensitivity

In the Final Determination, the Commission found that the TCCSS market is characterized by a high degree of price sensitivity, notwithstanding evidence that "lowest price" was ranked by purchasers seventh of approximately ten factors in terms of importance in decisionmaking. The court in *Nippon I* found that the Commission's price sensitivity finding was not supported by substantial evidence where it rested solely on evidence of market concentration (in terms of both supply and demand) and on the price specificity used in negotiations. 182 F. Supp.

2d at 1345–48. The court also held that "if the Commission chooses to rely on price sensitivity * * * it must assess other aspects of the TCCSS industry that would tend to reduce, if not entirely vitiate, the importance of price in purchaser decision-making," such as on-time delivery or product quality, or at least evaluate the responses regarding the price differential sufficient to induce a switch of suppliers. *Id.* at 1346.

On remand, having discounted the effect of domestic lead-time advantage, the Commission averred that the "high degree of price sensitivity" substantiates the significance of underselling. The Commission acknowledged that purchasers generally ranked "lowest price" as less important than other considerations in questionnaire responses. Nevertheless, the Commission concluded that because bids are only solicited from qualified suppliers[13] "purchasing decisions are *sometimes, or even usually*, based *mainly* on price." *Id.* at14–15 (emphasis added). The Commission further indicated that once a supplier is qualified, "the quality and reliability of that supplier's product have already been established, leaving price and volume the primary remaining factors to be negotiated." *Id.* at 15 n.47.

The Commission then restated its previous findings from the Final Determination regarding price specificity, i.e., that "[p]urchaser documents indicate that very modest changes in the discount rate could mean the difference between winning or losing contracts," and that "[p]rice is negotiated intensely in annual contract negotiations, often down to the hundredths of one percent." *Id.* at 15–16.[14] Lastly, the Commission indicated that the fact that purchasers entered into buying alliances to improve their negotiating position "emphasize[s] the central role of obtaining lower prices to the purchasers of TCCSS," although the Commission determined that such developments ultimately had a limited impact on prices during the POI. *Id.* at 16–17.[15]

Nippon argues that the Commission's finding that once a supplier is qualified, quality and reliability are no longer important considerations is unsupported by substantial evidence where questionnaire responses demonstrate that purchasers emphasize quality and reliability when choosing among qualified suppliers. The record shows that non-price factors are in fact major determinants in purchasers' decision-making, even after suppliers are deemed "qualified." *See* Staff Report at II–11 to 12.[16] Questions III–18 and IV–11 of the purchaser questionnaires clearly ask purchasers to rank the importance of "lowest price" and other considerations in choosing among qualified suppliers only. Neither the

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[13] The Commission defines qualified suppliers as those suppliers that have proven that they can deliver the desired quality and quantity in a steady and reliable manner. Redetermination at 15.

[14] The Commission relied upon a questionnaire response and an internal document of two particular purchasers, one of which involved a price difference of [ ] and the other [ ].

[15] Although the court found that the Commission's decision to discount purchaser consolidation, in isolation, was not error, there is no doubt that the opposite conclusion reached by the dissents is supported. This factor has implication for the ultimate causation decision. The Commission must assess the strength of its subsidiary findings in arriving at its final determination.

[16] The court notes the Commission's normal skepticism as to the purchasers' ranking of price considerations, but here such generalized skepticism is unwarranted. On-time reliable performance was particularly important in the TCCSS market and the Commission cannot ignore this fact in assessing purchasing decision-making.

Commission nor the Defendant-Intervenors attempt to rebut this fact. Rather, they merely reiterate that the Commission acknowledged the importance of other factors such as quality, sidestepping the court's admonition in *Nippon I* that simply noting the importance of other factors does not constitute analysis sufficient to support its conclusion. 182 F. Supp. 2d at 1346. Furthermore, the insertion of qualifying phrases such as "sometimes or even usually" and "mainly on price" only serve to undercut the Commission's overall determination that the market is characterized by a "high degree" of price sensitivity.

Although the Commission in all cases need not make specific findings with respect to price sensitivity, this condition of competition is of particular importance when the margin of underselling is slight, debatable or not markedly or universally greater than the amount of a price differential determinative of purchasing decisions, and even more so when evidence credibly indicates that non-price factors outrank the importance of price in purchaser decision-making. As the Commission has not met its burden of assessing purchaser decision making in the context of relevant market factors, the court finds the Commission's conclusion of price sensitivity unsupported by substantial evidence.

2. Negotiating Practices

In the Final Determination, the Commission found that the record reflected aggressive pricing of subject imports "has been used by at least some purchasers in their price negotiations with the domestic suppliers." Final Determination at 16. The court in *Nippon I* held that the Commission's analysis of contract negotiating practices was unsupported by substantial evidence because the Commission inappropriately rejected four large purchasers' entire testimony, and had inadequately considered evidence "support[ing] the purchaser's contention and fundamental point that negotiations run on separate tracks according to different procedures and criteria." 182 F. Supp. 2d at 1346–47. The court explained that: (a) the overlap of time in negotiation was not inconsistent with supply compartmentalization; (b) the Commission failed to adequately consider supply agreements that limit price competition to domestic suppliers; (c) the Commission did not adequately analyze the significance of long import lead times; and (d) the Commission failed to address Weirton's submission of contemporaneous pricing documents citing domestic competition, but not import competition, when it should have been motivated to submit such documentation if it existed.

a. Contemporaneity versus Compartmentalization

On remand, the Commission reiterated its findings that negotiations did not take place consecutively, and that there was a substantial overlap in time periods for negotiating. *See* Redetermination at 17. By emphasizing in *Nippon I* that the time overlap was of little consequence in light of Nippon's fundamental claim that negotiations were compartmentalized, the court drew the Commission's attention to evidence that a large TCCSS purchaser delayed concluding negotiations with foreign

producers until it had secured a certain level of volume from domestic producers, and that foreign prices aren't established until negotiations with domestic mills are concluded. *See* 182 F. Supp. 2d at 1347 n.32. The Commission did not address the extent to which such a division of major and minor tonnage and bifurcation of price negotiation was representative of TCCSS purchasers' practices. Rather, the Commission stated that the evidence suggests that "under the contract terms, while prices may be set, volumes are not; therefore, even after negotiations with domestic suppliers are concluded, purchasers can reallocate volume to non-domestic suppliers during the year (without breaking the contract) based on lower prices of imports," and that "[d]omestic producers testified that, even if a purchaser breached a contract, they were not likely to sue on and terminate the contract." Although the Commission theorizes that volume can be reallocated based on lower prices of imports, the Commission fails to cite any evidence as to whether such reallocation in fact occurred. The mere possibility that subject import pricing could induce a purchaser to reallocate volume even after prices have been set does not speak to the issue of whether prices are set wholly independently at the outset. The issue here is likely price effects.

b. Supply Agreements

On remand, the Commission determined that supply agreements were not a large factor in the market, where it found only two supply agreements limiting price competition to domestic producers, both of which pre-date the increase in subject imports, and would not have prevented purchasers from using "the possibility of additional purchases of foreign product to improve their negotiating position with domestic suppliers." Redetermination at 23–24.

Nippon alleges that the Commission ignored supply agreements on the record,[17] and that the Commission's findings do not detract from the clear evidence that agreements limiting price competition to domestic suppliers are prevalent in the TCCSS industry. Nippon further argues that the prevalence of such agreements is consistent with Weirton's practice of calculating its "pricing allowance range solely according to pricing data of domestic producers," as the court noted in *Nippon I,* 182 F. Supp. 2d at 1348.

The Commission does not address Nippon's arguments relating to the prevalence and impact of supply agreements, and merely states that it acknowledged that the existence of supply agreements "cut against a finding that competition from subject imports impacted domestic prices." ITC Br. at 10. Thus, the court finds that the Commission has conceded this point.

c. Lead Times

The court instructed the Commission to analyze "whether the acknowledged difference in lead times cause purchasers to consider foreign supply 'supplementary,' and allocate predetermined volumes to

[17] Specifically, Nippon alleges that the Commission did not address supply agreements between [ ] on the record.

foreign and domestic supply sources." *Nippon I,* 182 F. Supp. 2d at 1347. On remand, the Commission stated that "the ability of purchasers to use lower foreign prices to obtain more favorable domestic prices could be limited if it were generally understood that foreign product, because of longer lead times, could only occupy a small residual or supplementary portion of the domestic market." Redetermination at 20. The Commission conceded that "delivery time issues do operate to limit the absolute amount of the domestic market that imports could realistically hope to obtain." *Id.* The Commission found, however, that "[t]he substantial share of the market acquired by imports * * * rebuts the notion that imports can only occupy a niche position in the U.S. TCCSS market and are therefore inherently incapable of impacting the overall pricing environment." *Id.* at 21. The Commission reasons that "in an industry with relatively few players each possessing very good market knowledge," domestic producers would have felt compelled to offer lower prices to defend their market share against "rapidly rising import volumes." *Id.* at 22.

Nippon contends that market knowledge is in fact limited among TCCSS market participants, as evidenced by data for two purchasers accounting for a substantial percentage—[ ]—of the increase in subject imports over the POI that [ ].

The court finds that the Commission has mischaracterized the court's instructions, creating a straw-man argument that is easily refuted. The court did not order the Commission to determine whether subject imports could only capture a limited percentage of the market. Rather, the court instructed the Commission to evaluate purchaser perceptions with respect to the domestic industry's lead-time advantage as a potential explanation for keeping negotiations on separate tracks with volume allocated among domestic versus foreign producers. Naturally, the Commission in conducting this analysis would need to evaluate whether such a condition of competition, if it in fact existed, would have an effect on the ability of subject imports to have an effect on domestic prices. The Commission has avoided addressing this issue. Furthermore, the Commission reliance on the acceleration of subject import volume is misplaced, as the rate of increase of subject imports says nothing about allocation of volume based on risks involved in a substantial lead-time differential.[18]

d. Weirton Documentation regarding Price Competition

On remand, the Commission conceded that Weirton was unable to submit any contemporaneous documents citing import price competition, and that the lack of such documents supports the view that import and domestic contract negotiations are compartmentalized. Nevertheless, the Commission assigned little weight to the absence of such documents, in light of the fact that "purchasers failed to provide any

[18] In *Nippon I,* the court drew the Commission's attention to the Staff Report's indication that most U.S. producers were reported as being capable of delivery within 6 to 8 weeks, while most importers had lead times in the 3 to 4.5 month range. *See* Staff Report at II–13.

documentation regarding their contract negotiations with importers of Japanese product * * *." Redetermination at 22.

Nippon claims that purchasers did in fact submit documentation regarding contract negotiations with importers of Japanese product. Nippon Br. at 10 (citing Redetermination at 17 n.51). Nippon further argues that the Commission's reliance on the purported lack of such evidence is a red herring inasmuch as it does not detract from the fact that "Weirton had every incentive to submit documentary evidence of subject import competition, but could only submit documents demonstrating that its prices were calculated with reference to only domestic competitors." *Id.*

As with supply agreements, the Commission concedes that the lack of Weirton documents regarding Japanese pricing undermines a finding that subject imports had an adverse impact on domestic pricing. Nevertheless, the Commission responds that, although Nippon indicated that some evidence regarding purchaser's negotiations with foreign suppliers was in fact in the record, Nippon omits that none of the evidence substantiates its claim that subject foreign producers set their prices solely in reaction to prices previously agreed by domestic producers.

The court finds that the Commission's justification for assigning little weight to the lack of documentation regarding import price competition is unpersuasive. The court in *Nippon I* underscored the importance of Weirton's supporting documentation, as the only pricing documents submitted by Weirton apparently showed that its pricing range was determined without regard to foreign prices. 182 F. Supp. 2d at 1347–48. The court clarified that in the absence of any other pricing documentation or evidence that subject import prices fell outside of Weirton's predetermined range or that Weirton was somehow forced below its minimum price level, the court could not sustain the Commission's decision to discount the importance of Weirton's inability to substantiate the assertion that Weirton's prices were set at least in part in reaction to the presence of lower-priced Japanese imports. *Id.* Even if the Japanese producers did not submit purchaser documents on their contract negotiations with importers of subject merchandise, this fact is irrelevant to factors affecting how domestic producers set their pricing. The Commission's attempt to refute Nippon's argument speaks only to how foreign producers set their prices and says nothing about how *domestic producers* set their pricing, the fundamental issue in determining whether the presence of subject imports had an effect on domestic pricing in this case.

In sum, the Commission has not given the court any basis for sustaining its treatment of conditions of competition with regard to the effect of subject imports on domestic pricing.

3. Lost Sales and Revenue

The court in *Nippon I* found that the Commission's conclusions regarding the confirmed lost sales allegation[19] did not reflect the purchas-

[19] In the Final Determination, the Commission relied upon [ ] confirmation of [ ] lost sales allegation.

ing history data provided for the particular purchaser, and directed the Commission to "indicate the specific data upon which it relied" in confirming the allegation, notwithstanding the Commission investigator's inability to find a competing import price for the sale while conducting the on-site verification. 182 F. Supp. 2d at 1349–50.

On remand, the Commission stated that it reexamined the one lost sales allegation that the Commission determined to be confirmed by the purchaser. The Commission specified that the allegation is consistent with a lost sale of [ ] tons of chromium coated steel to a particular purchaser's—[ ]—in fiscal year 2000 where Japanese producers had underbid all domestic producers, including the producer making the allegation—[ ]. Redetermination at 28.[20] The Commission found that the volume of the lost sale, combined with that of the three lost revenue allegations, represented a substantial percentage—[ ] percent—of the market, and was therefore significant. The Commission indicated, however, that it is difficult for suppliers to identify lost sales events because annual contracts are awarded to multiple suppliers, rather than spot sales with a single supplier.

Nippon argues that the lost sale allegation remains unsupported by substantial evidence on the ground that the producer making the allegation would have lost these sales even in the absence of Japanese competition.[21]

First, it appears that the Commission is confirming a lost sale allegation that may not have been made and wasn't verified, as the Staff Report indicates that Weirton claimed it lost a sale—also involving [ ] short tons—to a Japanese producer on a quote given in *October of 1998,* not December of 1998. *Compare* Staff Report at V–22 to 25 & Table V–14 *with* Redetermination at 28. Second, if the Commission is in fact referring to the lost sale allegation described in the Staff Report, the Commission's phraseology obscures the fact that the alleged lost sale involved a rejected U.S. price of $650, when 1998 bids by Weirton to the relevant facility in FY2000 never went below [ ], and in fact was [ ] for double rolled chromium coated steel sheet ("CCSS"). Furthermore, the Commission omits that the purchaser cited longterm commitments with its Japanese supplier,[22] and that Weirton did not bid seriously for its West Coast business, thereby supporting Nippon's contention that Weirton would have lost the sale to another domestic supplier in the absence of Japanese competition.[23] Lastly, the Commission's reliance on this single lost sale allegation is undermined by the purchaser's representation that any such sale was lost for several reasons: price, quality,

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[20] The Commission explains for the first time that although the lost sale allegation involved a December 1998 quote for a 1999 delivery, the most relevant data provided by the purchaser is actually its [ ] purchases because [ ]. Nippon does not contest the Commission's application of 1998 bid quotes to FY2000 purchase volumes. The Commission does not indicate whether this lagtime was applied for [ ] in its underselling analysis, thereby casting further doubt on its conclusions of significant underselling.

[21] Specifically, Nippon alleges that [ ].

[22] The Declaration of [ ], C.R. Docs. 222–223, Nippon Appendix at Tab 8, states that:

[ ]

[23] In the Declaration, [ ] states that [ ].

delivery time, and whether the producer can supply globally. *See* Staff Report at V–25. Although in other circumstances a lost sale allegation might be confirmed and relied upon by the Commission even though other domestic producers underbid the producer making the allegation, the Commission's reliance on this particular lost sale allegation is unsupported because it ignores record evidence undermining the likelihood that a significant sale was lost for price reasons attributable to imports.

II. Causation

The court in *Nippon I* instructed the Commission to determine whether quality and delivery time issues as well as non-subject imports "'may have such a predominant effect in producing the harm as to * * * prevent the [subject] imports from being a material factor.'" *Nippon I,* 182 F. Supp. 2d at 1350 (citing *Taiwan Semiconductor Indus. Ass'n v. United States,* 59 F. Supp. 2d 1324, 1329 (Ct. Int'l Trade 1999)). On remand, the Commission found that it was not persuaded by "inconsistent and contradictory" testimony that purchasers turned to Japanese sourcing solely because of domestic quality and delivery time problems or non-subject import competition.[24] The Commission concluded that, the significant volume of subject imports at declining prices, and the frequent underselling of the domestic like product, had adversely affected the domestic TCCSS industry.

A. U.S. On-Time Performance and Quality

In the Final Determination, the Commission had acknowledged that there was documentary evidence that showed domestic producers' on-time performance was poor during the POI.[25] It was not persuaded, however, by what it found to be inconsistent and contradictory purchaser testimony that these purchasers turned to Japanese sourcing because of non-price reasons. The Commission based this determination solely on the supposedly internally contradictory testimony of U.S. Can representatives.

In *Nippon I,* the court remanded on the issues of quality and on-time delivery, finding the Commission's reasons for rejecting purchaser testimony to be ill-founded and its conclusions incapable of being reviewed properly. 182 F. Supp. 2d at 1351–52. First, the court cited the Staff Report describing U.S. Can's purchasing history as showing two sets of pricing data for U.S. Steel, while Weirton was not listed at all. Second, the court found that Mr. Yurco had consistently stated U.S. Can shifted sourcing from Weirton to other domestic producers. Third, the court determined that the Commission failed to address U.S. Can's stated concerns with Weirton's on-time performance problems, or Weirton's performance requirements in its supply contract with U.S. Can. Fourth,

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[24] The Commission had earlier discounted other causes and was not specifically ordered to reassess them, although it was ordered to reassess its overall decision to attribute material injury to subject imports.

[25] At times during the POI one major producer's on time performance did not reach 50%.

the court indicated that the Commission failed to analyze whether quality problems were indeed prevalent among U.S. producers.

On remand, the Commission found that quality and delivery time problems do not preclude a finding that price factors adversely affected the domestic TCCSS industry. In support of its analysis, it considered the circumstances of four large purchasers, who have increased purchases of subject imports. In each case, the Commission found that low prices played an important role in the decisions of the purchasers to shift toward subject imports. The Commission considered testimonial evidence from the producers that delivery and quality issues were the predominant reasons for shifting volume to subject imports, and determined that the testimony did not preclude a finding that subject imports made a material contribution to the injury.

As a preliminary matter, the Commission failed to cite the sources of its individual purchaser volume data throughout its analysis. For its analysis of BWAY, it appeared to use numbers from Table TCCSS–1, while for the remaining purchasers it inexplicably appeared to use figures from tables in the Staff Report that for some reason conflict with Table TCCSS–1. In addition, the Commission supported its position with "trends" over limited periods of time, ignoring the full set of data, and omitting that a fluctuating year-by-year analysis at best would indicate that there had been no clear trend at all. Lastly, the Table TCCSS–1 shows bid and volume numbers for the years 1997 through 2000, yet the Commission never accounted for the year 2000, and at times limited its analysis to the change from 1998 to 1999. The Commission's apparent tunnel-vision is misleading and violates the court's directive to analyze and present data in a manner that facilitates review.

1. BWAY

The Commission found BWAY to be inconsistent in its testimony that its pattern of purchases reflected its attempt to broaden its portfolio of suppliers due to quality and delivery concerns, and its need to supply geographically diverse operations. BWAY specifically cited its concern with the on-time performance of Weirton, yet increased its purchases from Weirton from 1998 to 1999.[26] The Commission concluded that increasing its supply from Weirton is inconsistent with BWAY's quality concerns, thus pointing to the predominance of price as a determining factor in purchaser decision-making.

Nippon responds that BWAY's testimony is not inconsistent, as it testified that, "[I]n 1998 and 1999 we had a series of delivery and quality disappointments with U.S. mills," not just Weirton. Hr'g Tr., P.R. Doc. 74, Nippon App. Tab 4, at 198.[27] Between 1998 and 1999, BWAY in fact reduced purchases from another producer—[ ] by [ ] tons, and a lower amount—[ ] tons—was shifted to Japanese suppliers in 1999, the only year in which BWAY purchased from Japanese subject importers. In the

[26] Specifically, the Commission indicated that BWAY [ ].

[27] BWAY's questionnaire response [ ].

same year, purchases from domestic suppliers also increased and purchases from non-subject importers were double that of the subject imports. Thus, it is not inconsistent that BWAY increased purchases from Weirton notwithstanding quality and delivery problems, given that it was also experiencing similar problems with another domestic producer from which BWAY reduced its purchase volume.

2. Crown

The Commission noted on remand that Crown's questionnaire response attributed its increased purchases of subject imports in 1999 to quality- and performance-driven West Coast shortage of supply from two domestic suppliers.[28] Redetermination at 35. The Commission found Crown's stated quality concerns to be inconsistent because Crown's data showed that it had directed significant volume requirements to markedly *lower-priced* TCCSS from Japan, beginning in 1999, and that it in fact qualified a particular domestic producer—[ ]—and sourced TCCSS from [ ] U.S. mills in 1999. The Commission indicated that it would expect to see *higher* prices paid to Japanese producers where superior quality was the supposed predominant factor behind Crown's purchase decisions.

Nippon responds that the Commission's focus on the lower prices of subject imports sidesteps Crown's explanation of its problems with the two West Coast suppliers, and that the data supports such explanation.[29] Either a showing of adequate West Coast supply of quality TCCSS, or a showing of East Coast suppliers willing to fill the void would provide sufficient evidence of inconsistency in Crown's testimony. The court finds that the Commission has failed to provide any specific evidence that would contradict Crown's explanation for its shift to Japanese sources. The fact that Japanese prices were generally lower than domestic prices does not negate the verifiable claims of quality and performance concerns with West Coast suppliers.

Furthermore, Crown's qualification of a particular producer—[ ]—is not necessarily inconsistent with its stated quality concerns, since a supplier's drop in performance may not be of such an extent as to entirely preclude it from being a qualified source of supply. In addition, Crown's significant increase of its purchases of TCCSS from the particular producer in both 1999 and 2000 is not necessarily inconsistent with its quality concerns, as Crown in fact significantly reduced its purchases from two other domestic suppliers—[ ] and [ ]—with quality concerns that may have been more extensive. Under the unique facts of this case there is no support for the Commission's assumption that if domestic producers switch from lower quality producers, they would not be expected to pay lower prices. The Commission does not provide substantial evidence to discount the purchaser testimony that quality and

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[28] The Commission specified that Crown attributed the shift to Japanese sources to [ ]

[29] Nippon indicates that Crown's data show a decrease in purchases from [ ] of [ ] tons corresponds to a [ ] ton increase in purchases from subject importers.

on-time considerations in a certain geographic area were the dominant factors in its purchasing decisions.

3. Silgan

The Commission found that Silgan described its purchases of subject imports as being primarily for specialized applications that are either not available from a U.S. producer or of a quality level not obtainable from a U.S. producer. Redetermination at 36. Silgan attributed its increase in purchases of TCCSS from Japan as a result of its acquisition of Campbell's Soup, which used small quantities of TCCSS produced by Nippon because of its superior quality and according to certain unique specifications not available from U.S. domestic producers. *Id.* The Commission also cited Silgan's testimony that it terminated Weirton as a supplier for failing to meet Silgan's quality and service requirements. Finally, Silgan stated that if it were to purchase according to price, it would purchase from Brazil, Korea and Taiwan.

The Commission found Silgan's testimony inconsistent because most of Silgan's specialized purchases could in fact be made from U.S. producers. It acknowledged that most of the increase in Silgan's purchases was attributable to its acquisition of Campbell's, but it asserts that [ ]. The Commission also acknowledges that Silgan [ ] and [ ], but discounted this evidence because Silgan [ ] its purchases of Japanese subject imports. Finally, the Commission states that deciding not to purchase from Brazil, Korea, and Taiwan reflects its priority rankings where [ ].

Nippon argues that the Commission ignores the extent of the quality concerns documented by Silgan in its dealings with [ ] and other U.S. mills. The court agrees that Silgan's testimony is entirely consistent with the evidence relating to its quality problems. On remand, the Commission has made no further effort to determine whether the extensive quality concerns with domestic producers were not the reason Silgan increased subject imports. Furthermore, the Commission acknowledges that the acquisition of Campbell's was the predominant factor in the increase in subject import prices paid by Silgan, but does not explain why it finds inconsistent Silgan's explanations for not shifting its purchases to domestic TCCSS producers when Silgan testified they are perceived to be of inferior quality. The Commission is correct to perceive that Silgan's priorities appear to be [ ], in that order, but fails to recognize that the same ranking of priorities explains why Silgan chose not to purchase from Brazil, Korea, and Taiwan, and explains why Silgan would shift its purchases toward subject imports. The Commission fails to cite substantial evidence indicating that Silgan's predominant purchasing decision was not based on its stated quality and on-time performance concerns.

4. U.S. Can

U.S. Can had testified that delivery time and quality reasons were the two reasons U.S. Can reduced its volume from a particular producer—[ ]. On remand, the Commission conceded that it erred in finding Mr. Yurco's testimony to be inconsistent in its prior determination. The

Commission maintained, however, that U.S. Can's stated concerns about ontime delivery and quality, and its desire to source globally were not supported by the record. The Commission based its conclusion on a domestic producer's—[ ]—records showing that on-time performance rates did not drop below contractual levels for sourcing from another supplier until late in the POI, that is [ ]. Further, the Commission found that U.S. Can documents discuss quality issues only after volume was reduced from the particular domestic producer.[30]

First, simply because performance rates prior to 1999 were not yet so poor that they were grounds for sourcing from another supplier does not mean that performance was not a concern. Second, U.S. Can's internal documents indicate that quality problems persisted with the domestic producer "for a long period of time," a fact that is not negated by statements in the same document that the problems had improved over this time. Thus, contrary to the Commission's conclusion, the evidence indicates that the producer had a track record of quality problems in supplying U.S. Can and consistently failed to meet delivery time, such that the Commission's rejection of U.S. Can's testimony regarding volume reductions is not well-founded.

B. Non-Subject Imports

On remand, the Commission was required to examine whether non-subject import volume and pricing did not constitute the predominant source of injury sufficient to sever the link to causation by subject imports in light of the conditions of competition, particularly regional distribution of shipments.

1. Volume

The court in *Nippon I* instructed the Commission to address Nippon's concern that non-subject imports were predominant in the regions where the majority of domestic shipments were concentrated. 182 F. Supp. 2d at 1354–55. On remand, the Commission indicated that the record showed that: (1) the financial performance of U.S. mills primarily competing on the West Coast "mirrored" the poor performance of domestic mills competing on the East Coast; (2) the rapid increase in subject imports entered both regions at comparable levels; and (3) subject import pricing was aggressive across the country.

Specifically, the Commission presented evidence of poor performance by a particular producer—[ ]—which sells [ ] percent of its shipments on the West Coast. Specifically, from 1997 to 1999, this producer experienced a significant drop in operating income, net sales in terms of value and volume, and gross profits. Simply noting the declining performance of West Coast TCCSS producers is not sufficient to establish that subject imports were not precluded from being the source of that harm. To find subject imports a material cause, even on the West Coast where non-subject imports were not the predominant imports, the Commission needed to determine whether there is a *correlation* between the suppos-

[30] The Commission also states that there was a [ ].

edly declining U.S. mills' West Coast revenues, specific instances of underbidding by producers of subject imports, and a subsequent shift in volume to those subject imports. The Commission's assertion that subject import volume increased in comparable amounts on the West Coast and East Coast, without specific supporting evidence, such as an increase in volume that correlates in some way to instances of subject import underbidding, does not meet this requirement, nor does the Commission's assertion that subject importers bid aggressively industry wide.

2. Non-subject Import Pricing

On remand, the Commission was first required to reassess non-subject underselling by either providing further explanation for how it divided non-subject importers into "countries that are sources of high-quality TCCSS" and "those whose principal sales advantages are favorable prices and/or discounts," or grouping non-subject importers in one set for comparison to bids made by subject importers. *Nippon I,* 182 F. Supp. 2d at 1355–56. The Commission responded by providing Table TCCSS–4 comparing final bids submitted by suppliers of subject imports versus final bids by suppliers of non-subject imports. The Commission found a marked reversal in terms of pricing in the marketplace. Whereas in 1997–98 final bids submitted by subject import suppliers were higher than final bids from non-subject import suppliers, in 1999–00 the subject importers overbid less than one half of the time.

It is unclear why the Commission chose to analyze this chart in two year increments when there is only one recorded instance in 2000 where subject and non-subject importers made final bids for the same purchaser. The Commission omits that a year-to-year trend analysis indicates that there is no clear pattern to the bidding relationship of subject and non-subject importers, and certainly not a marked reversal in terms of pricing in the marketplace. In 1997, non-subject importers underbid subject importers twice and overbid twice. In 1998, non-subject underbidding increased to six instances, while overbidding decreased to three instances. Finally in 1999, non-subject underbidding retreated to four instances, while overbidding increased to three.

The Commission was also required to construct a table comparing Japanese prices directly to non-subject prices. The Commission submitted Table TCCSS 5 and 6 comparing actual weighted average prices and discount rates for subject imports and non-subject imports. Once again it found a marked reversal in terms of pricing in the marketplace, finding a trend from higher Japanese prices (and lower discount rates) to lower Japanese prices (and higher discount rates). Once again the Commission's analysis of the data is misleading. By collapsing data for the years 1997–98, the Commission masks the similarity between the years 1997 and 1999. In 1997 there were two instances of non-subject underbidding of Japanese imports and one instance of Japanese underbidding. In 1999, there were two instances of non-subject underbidding, one instance of Japanese underbidding, and one instance where bids

were the same. In 1998, the numbers are the same as 1999, except there is one additional instance of non-subject underbidding. Contrary to the Commission's assertion, there is no evidence to support a finding of a marked reversal in terms of pricing in the marketplace.

The Commission has inadequately responded to the court's concerns regarding whether non-subject imports were the predominant cause of harm to the domestic TCCSS industry, so as to undermine the finding of harm by subject imports.[31]

CONCLUSION

The record reflects that the increased subject import volume must be attributed largely to purchaser priorities that are unrelated to price. Purchasers began sourcing more merchandise from subject importers because of poor performance and quality issues with domestic producers. Further, few domestic producers ship to the West, where the majority of imports from Japan are sold. The record also reflects that the market conditions were such that the effect of subject imports on domestic prices did not cause material harm. Purchasers reported that they conduct their price negotiations with domestic suppliers first, and then conduct negotiations with importers to meet additional needs. Annual contracts, setting a fixed price and volume targets, require domestic producers to meet only other domestic prices, and there is no evidence that purchasers shifted volume after signing the contracts to lower priced subject imports. Lower Japanese prices reflect that the domestic industry is able to charge a price premium for its leadtime delivery advantage over subject importers. Lastly, throughout the POI non-subject importers held a larger market share than subject importers from Japan, and an even larger market share on the East Coast, where domestic suppliers are concentrated.

As the Commission's concessions and uncontested evidence lead inexorably to the conclusion that lower priced subject imports did not have a material effect on domestic prices, and in the absence of any valid reason to discount non-price factors or non-subject imports as the predominant cause of material injury, the court remands with instructions for the Commission to revoke the antidumping duty order. Remand for reconsideration or recalculation is not necessary in this case, as not only are the Commission's conclusions unsupported by substantial evidence, it has also demonstrated an unwillingness or inability to address the substantial claims made by respondents or the concerns expressed by the court in *Nippon I,* leaving the only reasonable conclusion from the evidence on the record to be that subject imports were not a material cause of injury to the domestic TCCSS industry.[32] The Commission's determination is vacated and the Commission is directed to enter a negative determination.

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[31] The court acknowledges that there may be more than one sufficient cause of material injury. The question is whether the evidentiary links for causation of material injury by subject imports are severed.

[32] Because neither Defendant nor Defendant-Intervenor has suggested threat of material injury as an alternative basis for an affirmative injury finding the court declines to remand for consideration of threat.

(Slip Op. 02–87)

CORUS GROUP PLC, CORUS UK LTD., CORUS STAAL BV, CORUS PACKAGING PLUS NORWAY AS, CORUS STEEL USA INC., AND CORUS AMERICA INC., PLAINTIFFS *v.* GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ROBERT C. BONNER, COMMISSIONER, U.S. CUSTOMS SERVICE, AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND WEIRTON STEEL CORP., DEFENDANT-INTERVENOR, AND BETHLEHEM STEEL CORP., NATIONAL STEEL CORP, AND U.S. STEEL CORP., DEFENDANT-INTERVENORS

Court No. 02–00253

[Motion for preliminary injunction denied. Partial summary judgment for defendants.]

(Dated August 9, 2002)

Steptoe & Johnson LLP (Richard O. Cunningham, Peter Lichtenbaum, and *Arun Venkataraman)* for plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, *Lucius B. Lau,* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, for defendants George W. Bush, President of the United States, and Robert C. Bonner, Commissioner, United States Customs Service.

Lyn M. Schlitt, General Counsel, *James M. Lyons,* Deputy General Counsel, United States International Trade Commission *(Mary Elizabeth Jones* and *Mark B. Rees),* for defendant United States International Trade Commission.

Schagrin and Associates (Roger B. Schagrin) for defendant-intervenor Weirton Steel Corporation.

Skadden, Arps, Slate, Meagher, & Flom LLP (Robert E. Lighthizer, John J. Mangan, James C. Hecht) for defendant-intervenors Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation.

OPINION

RESTANI, *Judge:* This matter is before the court on Plaintiffs' motion for preliminary injunctive relief pursuant to USCIT R. 65(a). Plaintiffs Corus Group PLC, Corus UK Ltd., Corus Staal BV, Corus Packaging Plus Norway AS, Corus Steel USA Inc., and Corus America Inc. (collectively "Corus") seek preliminary injunctive relief to enjoin Defendant United States Customs Service ("Customs") from (1) collecting additional duties imposed on Plaintiffs' tin mill product imports, as of March 20, 2002, pursuant to the President's March 5, 2002 Steel Products Proclamation; (2) liquidating any and all unliquidated entries of Plaintiffs' tin mill products that have entered and will continue to enter the United States; and (3) taking any other action regarding Plaintiffs' tin mill products. The International Trade Commission ("ITC" or "Commission") moves to dismiss for lack of jurisdiction pursuant to USCIT R. 12(b)(2) and for failure to state a claim pursuant to USCIT R. 12(b)(5). Defendants George W. Bush, President of the United States, and Robert C. Bonner, Customs Commissioner (collectively the "Administration") filed a separate motion to dismiss for failure to state a claim or, in the

alternative, a Rule 56 motion for summary judgment.[1] Corus filed a cross-motion for summary judgment.

BACKGROUND

On March 7, 2002, the President of the United States issued a proclamation pursuant to Section 201, *et seq.,* of the Trade Act of 1974 ("Act"). *Proclamation No. 7529—To Facilitate Positive Adjustment to Competition From Imports of Certain Steel Products,* 67 Fed. Reg. 10553 (March 7, 2002) *("§201 Proclamation").* The President imposed safeguard measures to counteract serious injury, or the threat of serious injury, found by the ITC. With respect to certain tin mill products, the President imposed an *ad valorem* duty increase of thirty (30) percent for the first year of the § 201 remedies.[2] Corus is, among other things, a foreign producer of tin mill products.

Corus challenges the invocation of § 201 safeguard provisions on three grounds: (1) that the ITC votes supporting an affirmative injury determination were improperly counted with respect to tin mill products ("Count I"); (2) that Commissioner Dennis M. Devaney was not a legal member of the ITC at the time of his vote because there was not an ITC vacancy at the time of his appointment ("Count II"); and (3) that Commissioner Devaney was not a legal member of the ITC at the time of his vote because he was not lawfully appointed by then President William Jefferson Clinton ("Count III"). Corus seeks a preliminary injunction to enjoin enforcement of the resulting duty increase and to prevent liquidation of all present and future unliquidated entries of Corus's tin mill products. Defendants collectively oppose injunctive relief.

For the purposes of this opinion, the court has consolidated Plaintiffs' Motion for Preliminary Judgment with the ITC's motion to dismiss for lack of jurisdiction and Count I on the merits (ITC's method of counting votes).

DISCUSSION

I. Jurisdiction

As an initial matter, the ITC moves to dismiss on grounds that the court lacks jurisdiction to review Counts II and III.[3] Section 1581(i) provides in relevant part that the court:

> shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
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> * * * * * * *
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> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue.
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> * * * * * * *

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[1] The ITC concurs in the alternative motion for summary judgment filed by the Administration. ITC Br. at 27.

[2] Duties decrease over the final two years of the remedial period. *§201 Proclamation* at ¶ 9(b).

[3] The ITC concedes jurisdiction as to Count I. The Administration does not dispute jurisdiction under any count.

> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i) (2000). The ITC argues that the issue of whether Commissioner Devaney was properly appointed involves questions of Presidential power and, therefore, falls outside the jurisdiction of the court.[4] The Commission's position ignores the fact that this claim arises in the context of a suit challenging the imposition of tariffs.[5] Plaintiffs' claim that § 201 safeguards are invalid because of an improperly seated Commissioner clearly raises issues regarding whether the ITC properly carried out the laws providing for tariffs, duties, fees, or other taxes on the importation of merchandise and whether such laws are properly administered. Accordingly, the court has jurisdiction pursuant to 28 U.S.C. § 1581(i).

II. ITC's Method of Counting Votes

Corus argues that, although the ITC presented an "equally divided" affirmative injury determination to the President, the ITC vote was neither affirmative nor divided with respect to tin mill products. Under Section 202(b) of the Act, the Commission must determine "whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." 19 U.S.C. § 2252(b)(1)(A) (2000).[6] In order to render its injury determination, the Commission undertakes an investigation upon the filing of: (1) a domestic injury petition; (2) an executive branch referral; (3) a resolution of either the Committee on Ways and Means of the House of Representatives or the Committee on Finance of the Senate; or (4) on its own motion. *Id.* In this case, both the United States Trade Representative and Senate Committee on Finance requested an investigation of certain steel products.[7] *USTR Request to Initiate Section 202 Investigation,* (June 22, 2001), http://www.usitc.gov/steel/ER0622Y1.pdf (last visited August 9, 2002); *Resolution directing the International Trade Commission to make an investigation into certain steel imports under section 201 of the Trade Act of 1974* (July 26, 2001), http://www.senate.gov/~finance/steelresolution.pdf (last visited August 9, 2002).

Six Commissioners participated in the underlying investigation at issue here. Commissioners Koplan, Okun, Hillman, and Miller deter-

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[4] Although the court is not bound by the decision of a co-equal court, another judge of the court has already determined that review of Commissioner Devaney's status is appropriate under § 1581(i). *Nippon Steel Corp. v. United States,* Slip Op. 01–153 (Ct. Int'l Trade Dec. 28, 2001) (challenge to ITC sunset review injury determination).

[5] The ITC argues that, because most of the discovery in *Nippon* involved White House documents, the court should acknowledge that the subject matter does not involve matters regarding international trade. The court finds the ITC's argument relying on the location of documents unpersuasive.

[6] For the purposes of this action, Plaintiffs do not challenge the role of the Commission or its factual determinations. Plaintiffs do not challenge the exercise of discretion granted to the President.

[7] The steel products covered by the request included: (1) certain carbon and alloy flat products; (2) certain carbon and alloy long products; (3) certain carbon and alloy pipe and tube products; and (4) certain stainless steel and alloy tool steel products. *USTR Request* at Attachment I. The specific products and exceptions identified are numerous and can be found within the request. The tin mill products at issue here fall within HTS subheadings 9903.73.37 through 9903.73.39.

mined that the U.S. tin mill producers constitute the industry producing articles "like or directly competitive with the imported article, tin mill steel." *Steel,* Inv. No. TA–201–73, USITC Pub. 3479 Vol. I, at 48–49 & 71 n.367 (Dec. 2001) (hereinafter *"Determination").* Of these four, only Commissioner Miller determined that imports of tin mill products caused serious injury to the U.S. tin mill industry. *Id.* at 74 & n.402.

Two Commissioners adopted a broader definition of the domestic industry and the like product corresponding to the subject imported merchandise. Commissioner Bragg identified the domestic industry as U.S. producers of carbon and alloy flat products. *Id.* at 272–73. Commissioner Devaney identified the domestic industry as U.S. producers of flat-rolled steel products. *Id.* at 36 n.65 & 45 n.137. Tin mill products are a sub-set of the larger product categories identified by Commissioners Bragg and Devaney. *See ITC Staff Report,* Vol. II, Tables FLAT–3 & FLAT 10. Both Commissioners found that imports of products in larger categories caused serious injury to the domestic industry.

The Commission combined the affirmative votes of Commissioners Bragg and Devaney on the broader categories with that of Commissioner Miller on tin mill products and, pursuant to 19 U.S.C. § 2252(f), reported to the President that it was "equally divided" with respect to tin mill products.[8] *Determination* at 1 n.1. 19 U.S.C. § 1330(d)(1) provides that the President may consider an equally divided vote of the Commission to be either an affirmative determination or a negative determination.[9] The President elected to adopt the affirmative injury determination, *§ 201 Proclamation* at ¶ 4, and, pursuant to § 2253(a)(1)(A),[10] granted relief to the domestic tin mill industry in the form of an initial additional 30% tariff on tin mill imports. *See § 201 Proclamation* at ¶ 9(b). Corus argues that the affirmative votes of Commissioners Bragg and Devaney should not have been counted towards the tin mill injury determination because neither Commissioner specifically analyzed tin mill products. Corus argues that the aggregation of Commissioners Bragg and Devaney constitutes a "fundamental misconstruction of the Section 201 statute" employed by the ITC, accepted by the President, and carried out by Customs. Corus argues that, had the votes of Commissioners Bragg and Devaney been properly discarded with respect to tin mill products, the Commission vote would have been

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[8] The Commission explained its determination as follows:

> Chairman Koplan, Vice Chairman Okun, and Commissioner Hillman determine that carbon and alloy tin mill products are not being imported into the United States in such increased quantities as to be a substantial cause of serious injury; Commissioners Bragg, Miller, and Devaney make an affirmative determination regarding imports of carbon and alloy tin products.

Determination at 25.

[9] 19 U.S.C. § 1330(d)(1) provides, in relevant part, that:

> In a proceeding in which the Commission is required to determine * * * under [section 2252 of this title,] whether increased imports of an article are a substantial cause of serious injury, or the threat thereof, as described in subsection (b)(1) of that section (hereafter in this subsection referred to as "serious injury") * * * and the commissioners voting are *equally divided* with respect to such determination, then the determination agreed upon by either group of commissioners may be considered by the President as the determination of the Commission."

Id. (emphasis added).

[10] Upon receiving a report from the Commission containing an affirmative injury determination, the President is directed to take all appropriate and feasible action within his power to facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs. 19 U.S.C. § 2253(a)(1)(A).

3–1 in the negative, thereby precluding the imposition of § 201 tariffs on tin mill products.

Because the Act vests the President and ITC with "very broad discretion" and does not specifically provide for judicial review, the court's review is extremely limited. *Maple Leaf Fish Co., v. United States,* 762 F.2d 86, 89 (Fed. Cir. 1985).

> In international trade controversies of this highly discretionary kind—involving the President and foreign affairs—this court and its predecessors have often reiterated the very limited role of reviewing courts. *See, e.g., American Association of Exporters and Importers v. United States,* 751 F.2d 1239, 1248–49 (Fed. Cir. 1985); *Florsheim Shoe Co. v. United States,* 744 F.2d 787, 793, 795–97 (Fed. Cir. 1984). For a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.

Id. There is no statutory or regulatory provision enumerating how the Commission should count its vote, and this manner of counting votes does not appear to conflict with the overall § 201 scheme. The court, therefore, cannot find that there has been a clear misconstruction of the statute or a significant procedural violation.

In the alternative, Corus asks the court to construe the absence of such a provision as a limitation—i.e., that for the ITC to count its votes in this manner would be to act outside the statutory authority granted by Congress. The Federal Circuit has already determined that Congress granted the ITC broad authority to reach its determination. "The same factors which have led, in this kind of discretionary case, to strict confinement of the court's intervention *vis-a-vis* the President are equally applicable to the ITC in its 'escape clause' functioning." *Id.* at 89–90. Under the statute, the Commission is required to render an injury determination and transmit that determination to the President. Congress imposed no qualifications upon the ITC's authority in this respect.

Moreover, it is clear that the Commissioners considered tin mill products in their analysis. Commissioner Bragg found as follows: "I determine that certain steel products are being imported in such increased quantities as to be a substantial cause of serious injury to the domestic industries producing: (1) carbon and alloy flat products (including slab, hot-rolled sheet and strip, corrosion resistant, grain oriented electrical steel, and tin mill products.)" *Determination* at 269 (separate views on injury of Commissioner Lynn M. Bragg). Commissioner Devaney defined the domestic industry "appl[ying] the same basic analysis as the majority. However, he finds a single like product consisting of all flat products." *Determination* at 36 n.65. Commissioner Devaney expressly stated that his findings should be applied to the more narrow categories determined by the majority. "Commissioner Devaney joins in the analysis of the majority, related to injury, as presented here. He further finds that if the analysis is performed over the entire industry as he has defined it, the result is the same, i.e., the industry is seriously injured." *Determination* at 52 n.186; *see also* Determination at 58 n.224 (same

regarding causation). Thus, both commissioners made affirmative injury and causation findings with respect to tin mill products because, in their analyses, these products are included in the larger category of carbon and alloy flat products.

The court finds that the Commission's method of counting votes is not a clear misconstruction of the governing statute, a significant procedural violation, or action outside the scope of the ITC's delegated authority.

III. Preliminary Injunction

Pursuant to USCIT R. 65(a), Corus seeks a preliminary injunction to enjoin Customs from collecting additional duties on its tin mill products or liquidating its entries. A preliminary injunction is an extraordinary remedy which may issue only upon a clear showing by the moving party that it is entitled to such relief. *See Trent Tube Div., Crucible Materials Corp. v. United States,* 14 CIT 587, 744 F. Supp. 1177 (1990). In order to obtain a preliminary injunction, Corus must demonstrate that: (1) without a preliminary injunction, Corus will suffer immediate irreparable harm; (2) there is likelihood of success on the merits; (3) the public interest would be better served by the requested relief; and (4) the balance of hardship on all the parties favors plaintiffs. *See Zenith Radio Corp. v. United States,* 710 F.2d 806, 809 (Fed. Cir. 1983).

In reviewing the factors, the court employs a "sliding scale." *Chilean Nitrate Corp. v. United States,* 11 CIT 538, 539 (1987). Consequently, the factors do not necessarily carry equal weight. *FMC Corp. v. United States,* 3 F.3d 424, 427 ("If a preliminary injunction is granted by the trial court, the weakness of the showing regarding one factor may be overborne by the strength of the others. * * * [Conversely], the absence of an adequate showing with regard to any one factor may be sufficient, given the weight or lack of it assigned the other factors, to justify [its] denial."). The crucial factor is irreparable injury. *Elkem Metals Co. v. United States,* 135 F. Supp. 2d 1324, 1329 (Ct. Int'l Trade 2001); *Nat'l Hand Tool Corp. v. United States,* 14 CIT 61, 65 (1990) ("[t]he critical question * * * is whether denial of the requested relief will expose the applicant to irreparable harm."). "Failure of an applicant to bear its burden of persuasion on irreparable harm is ground to deny a preliminary injunction, and the court need not conclusively determine the other criteria." *Bomont Indus. v. United States,* 10 CIT 431, 437, 638 F.Supp. 1334, 1340 (1986); *see also Chilean Nitrate Corp.,* 11 CIT at 539 (denying preliminary injunction solely on grounds that moving party failed to establish irreparable harm).

A. Irreparable Harm

1. Collection

Corus first argues that, without preliminary injunctive relief, it will be forced to close its Bergen, Norway plant. Generally, where a party is required to fundamentally alter its business operations during litigation in order to comply with a challenged Government action, that party suffers irreparable harm. *See, e.g., CPC Int'l v. United States,* 19 CIT

978, 979–81, 896 F. Supp. 1240, 1243–45 (1995); *Am. Frozen Food Inst. v. United States,* 18 CIT 565, 570, 855 F. Supp. 388, 393–94 (1994).

Corus contends that its Bergen, Norway plant is uniquely dependent upon U.S. tin mill sales revenues to meet its operating costs. Corus argues that it cannot absorb the additional safeguard duties for U.S. sales if it results in the Bergen plant operating at a loss.[11] Corus estimates that the projected losses for 2002 will be approximately [ ]. Plaintiffs do not expressly attribute the entire loss to the impact of the safeguard provision but implies so by projecting that future litigation without a preliminary injunction will result in similar losses in 2003 and 2004. Corus contends that the Bergen plant cannot be modified to produce other products. Corus argues that operating losses resulting from the safeguard provision will force it to permanently close the Bergen plant, costing 279 jobs. Corus argues that closing the Bergen the plant will have a significant and irreversible adverse impact upon its business operations.

There is no bright line test for determining irreparable harm. Defendants argue that mere economic injury is insufficient. *See, e.g., Neenah Foundry Co. v. United States,* 86 F. Supp. 2d 1308, 1313 (Ct. Int'l Trade 2000). Defendants point out that, in previous cases, Plaintiffs' burden has been met by parties demonstrating that they will go out of business in the absence of injunctive relief. Citing *Queen's Flowers de Colombia v. United States,* 20 CIT 1122, 125, 947 F. Supp. 503, 506 (Ct. Int'l Trade 1996); *Am. Air Parcel Forwarding Co., v. United States,* 4 CIT 94, 98 (1982). Contrary to Defendants' implication, there is no requirement that a party seeking injunctive relief establish imminent failure. Although Corus need not establish that it is on the verge of bankruptcy, Plaintiffs nevertheless bear an "extremely heavy burden." *Shandong Huarong General Group Corp. v. United States,* 122 F. Supp. 2d. 1367, 1369 (Ct. Int'l Trade 2000).

At oral argument, Corus presented two witnesses, Richard Maxwell, Finance Controller and Director of Corus Packaging Plus Norway AS ("CPP Norway"), and Stig Hauge, Managing Director, CPP Norway. Both testified as to the present standing of Corus, and CPP Norway in particular, after the implementation of § 201 tariffs. The crux of the testimony suggested that CPP Norway, a separate legal entity from the other Corus affiliates, could not independently absorb the § 201 tariffs.[12] Both witnesses testified that the Bergen plant is uniquely dependent upon U.S. sales revenues to meet its operating costs. Both testified that the Norway factory was not sufficiently profitable to attract investment for upgrades that might allow it to produce articles other than tin mill products. Both witnesses testified that, as a result, the Bergen plant

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[11] Corus argues that, because the U.S. tin mill market is subject to a "high degree of price sensitivity", Corus cannot raise the prices of its merchandise in the United States. Citing *Affidavit of Jean-Paul Meijer* (Financial Controller of Corus Packaging Plus Norway AS), ¶ 2.

[12] Corus America Inc. is the importing arm of Corus. It actually pays the tariff and then charges that fee back to Corus. It is unclear which affiliate is ultimately charged with paying the tariff, but for the purposes of this argument, the court assumes the cost is charged to CPP Norway. Plaintiffs conceded at oral argument that they could show irreparable harm from duty collection only as to entries from CPP Norway, the owner of the Bergen plant.

would have to raise prices or absorb the tariffs. The witnesses testified that their customers had already indicated they would seek alternative suppliers should CPP Norway raise its prices. The witnesses testified that CPP Norway has only a few customers and that a long-term separation would likely sever those business relationships. The only alternative available, Corus argues, would be to absorb the tariffs. The witnesses testified that CPP Norway would operate at a loss if it were forced to absorb the tariffs. Corus argues that sound business principles would require it to close the plant rather than operate at a loss. In short, although it has not made concrete plans to do so at any particular time, Corus argues that the effects of the § 201 safeguards will force it to close the Bergen, Norway plant.

Every increase in duty rate will necessarily have an adverse affect on foreign producers and importers. That is particularly true with regards to the 30 % increase imposed under the safeguard provision. If the court were to find irreparable harm under these facts, the court would likely be required to do so in any challenge to a duty increase because every plaintiff could argue that increased tariffs would cause revenue shortfalls possibly resulting in either operating at a loss or plant closure at some future date. On balance, Corus has shown that it may suffer an adverse economic impact, but to find irreparable harm here would effectively create a *per se* irreparable harm rule in similar challenges—a result likely contrary to the extraordinary nature of the remedy. *Am. Spring Wire Corp. v. United States,* 7 CIT 2, 6, 578 F.Supp. 1405, 1408 (1984).

The court finds that Corus has not provided sufficient evidence that the Bergen plant is in danger of imminent closure. At best, Corus has suggested that CPP Norway cannot sustain the damage caused by § 201 tariffs over a long period of time. The court anticipates that it will issue its final decision on Counts II and III within a few months if not weeks. While Corus has arguably presented evidence of economic injury, that is insufficient. *See S.J. Stiles Ass. v. Snyder,* 646 F.2d 522, 525 (C.C.P.A. 1981) ("A preliminary injunction will not issue simply to prevent a mere possibility of injury, even where prospective injury is great."). Accordingly, there is little chance of irreparable harm in advance of a final court ruling.

2. Liquidation

Corus seeks to enjoin liquidation on grounds that, because neither the statute nor governing regulations authorize a reliquidation or refund, Corus will be denied effective and meaningful judicial review. Corus argues that, even if it succeeds on the merits, it will be unable to recover any excessive duties paid on entries in the past or interim and, therefore, will be irreparably harmed. Denial of effective and meaningful judicial review as a result of a court's refusal to grant a preliminary injunction can constitute irreparable harm. *See Zenith Radio Corp. v. United States,* 710 F.2d 806, 810 (Fed. Cir. 1983); *NMB Sing. Ltd. v. United States,* 120 F. Supp. 2d 1135, 1139–40 (Ct. Int'l Trade 2000).

According to counsel for the Administration, Customs normally liquidates entries on a 314-day cycle from the date of entry. *Def.s' Response to the Court's Inquiry Concerning Liquidation of Entries Subject to the President's 201 Proclamation,* at 2 (dated August 5, 2002). A steel entry filed on March 20, 2002, the effective date of the § 201 remedy, would normally liquidate on or about January 30, 2003. Liquidation of a steel product entry covered by an antidumping or countervailing duty order may take substantially longer because that entry is automatically suspended until Customs receives liquidation instructions from the Department of Commerce. Plaintiffs allege that their entries are not currently suspended. The court realizes that there are no guarantees on when liquidation will occur, but, as discussed, the court intends to resolve the matter quickly therefore harm from liquidation is not likely. Moreover, the parties have not explained why 28 U.S.C. § 1581(i) would not provide a post-liquidation remedy.[13] The absence of a statutory refund process would not seem to be a bar to relief as the court may fashion equitable remedies. Thus, liquidation also appears an unlikely cause of irreparable harm here.

B. Public Interest

Congress has expressly entrusted the issuance of safeguard measures to the President of the United States. *Maple Leaf Fish Co.,* 762 F.2d at 89. Revocation of a Presidential mandate prior to a final determination that it violates the law would seem to be counter to the public interest. The public interest is also served by ensuring that government officials are appointed in a constitutional manner and in accordance with Congressional intent, and that trade laws are administered properly. *See, e.g., Ugine-Savoie Imphy v. United States,* 121 F. Supp. 2d 684, 690 (Ct. Int'l Trade 2000). The court cannot reasonably quantify these interests for comparison separately from the likelihood of success on the merits and, instead, finds that this factor favors neither side.

C. Balance of Hardship

Corus argues that the Government and domestic industry will suffer only negligible harm should a preliminary injunction be granted. That position is counter to the determinations at the core of this matter—that a tariff increase is necessary to counter-act serious injury or the threat of serious injury as determined by Commission and adopted by the President. Defendant-intervenors represent the domestic producers and present contrary affidavits and testimony stating that domestic industry presently suffers from both decreased domestic consumption of tin mill products and, at least prior to the § 201 relief, increasing market share of low-priced subject imports. Defendant-intervenors argue that a preliminary injunction would effectively revoke the § 201 increases causing low-priced imports to flood the market. Defendant intervenor's evidence was weak on the causal relationship be-

[13] The parties seem to have focused on on 28 U.S.C. § 1581(a) which provides protest denial review of decisions of the Secretary of Treasury, not the President or ITC.

tween imports and injury, but the Commission's affirmative injury determination itself would appear to be some support for the domestic industry's hardship claim.[14] Further, defendant-intervenors provided some evidence that imposition of the § 201 relief has provided opportunities to improve their liquidity, which could be lost if § 201 duties were not collected.

Corus too has submitted some evidence of hardship. *See* discussion *supra* § III, A, 1. While the economic injury suffered by Corus under the § 201 safeguard provisions may be insufficient to establish the requisite irreparable harm, the court finds it persuasive to support hardship. On balance, the court finds that both parties likely have shown some hardship and cannot conclude at this point that injury suffered by one in the absence of § 201 safeguards outweighs injury suffered by the other in their presence.

D. Likelihood of Success on Merits

As discussed, *supra* § III, the court analyzes the four preliminary injunction factors on a sliding scale. Because Corus makes, at best, a weak showing of irreparable harm and does not prevail on either balance of hardship or public policy grounds, Corus must make a heightened showing that it is likely to succeed on the merits. As discussed, *supra* § II, the court finds that the ITC did not act contrary to law in counting the votes of individual Commissioners. Consequently, Corus must demonstrate that it is very likely to succeed on the merits of Counts II and III.[15] Both counts attack the validity of Commissioner Devaney's appointment and his consequent vote on the § 201 safeguards.[16]

1. Count II: Vacancy

Corus first argues that, at the time of Devaney's appointment, there was not a vacancy to be filled. The term of Commissioner Devaney's predecessor, Thelma J. Askey, ended on December 16, 2000. She maintained her position pursuant to 19 U.S.C. § 1330(b)(2) (2000), which authorizes a departing Commissioner to remain in office as a "holdover" "until his successor is appointed and qualified." Corus argues that, because Commissioner Askey had neither resigned nor been removed prior to Commissioner Devaney's putative appointment on January 3, 2001, no vacancy existed on that date for the President to "fill" by recess appointment. Citing *Wilkinson v. Legal Services Corp.,* 865 F.Supp. 891, 900–01 (D.D.C. 1994), *rev'd on other grounds,* 80 F.3d 535 (D.C. Cir. 1996) (construing the Legal Services Corporation Act of 1974, codified at 42 U.S.C. § 2996b, to read that a vacancy does not occur upon the expira-

[14] The court has not been asked to review the Commission's determination for this purpose, and has not done so.

[15] Briefing and argument is not complete on these two counts.

[16] Defendants argue that Counts II and III should be dismissed because Corus did not raise appointment issues before the ITC and, therefore, did not exhaust its administrative remedies. Corus argues that the Commission was aware of the questions surrounding Commissioner Devaney's appointment and to raise them would be futile. In addition, Defendants argue that, even if Commissioner Devaney's appointment was technically flawed, his actions were authorized by the *de facto* officer doctrine. *See Ryder v. United States*, 515 U.S. 171, 180 (1995) ("The *de facto* officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient."). For the purposes of ruling on the preliminary injunction, the court assumes that Plaintiffs' claim would survive these particular challenges.

tion of a term of office but only upon the resignation, death, or removal of a sitting officer); *Mackie v. Clinton,* 827 F. Supp. 56 (D.D.C. 1993), *vacated as moot,* 1994 WL 163761 (D.C. Cir. Mar. 9 1994) (construing the appointment provision of the Postal Reorganization Act of 1970, as codified in 39 U.S.C. § 202(b), to read the same).

Defendants argue that the Act establishes that the end of one Commissioner's term necessarily creates a "vacancy." Section 330(b) of the Act, provides that:

> The term of office of each commissioner appointed after such date shall expire 9 years from the date of the expiration of the term for which his predecessor was appointed, except that—
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> (2) any commissioner may continue to serve as a commissioner after an expiration of his term of office *until his successor is appointed and qualified.*

19 U.S.C. § 1330(b)(2) (emphasis added). Defendants cite *Staebler v. Carter* for the proposition that similar statutory language has been construed to recognize the creation of a vacancy at the time a Commissioner's term expires. 464 F. Supp. 585, 588–90 (D.D.C. 1979) (construing the appointment provision of the Federal Election Campaign Act, as codified in 2 U.S.C. § 437c(a)(2)(B) to read that a vacancy is created upon the expiration of the predecessor's term).

In the primary cases relied upon by the parties, *Staebler, Wilkinson,* and *Mackie,* the district courts struggled with the vacancy issue. The courts recognized that there was little guidance to determine when a vacancy is created. In each case, the court ultimately resorted to a construction of the governing statute. The parties here ask the court to engage in similar statutory construction with respect to the "appointed and qualified" language of the holdover provision. The parties debate whether Commissioner Askey's holdover position terminated upon Devaney's appointment, thus creating a vacancy. In *Swan v. Clinton,* 100 F.3d 973 (D.C. Cir. 1996), the only circuit case on point, the court found that "a more natural reading of 'qualified' [for purposes of similar language in the National Credit Union Administration Act] mean[s] that the requirements for assuming office have been fulfilled, which could be either by nomination with Senate confirmation or *by recess appointment." Id.* at 986 (emphasis added). *Swan* is not binding and may be distinguishable, but it certainly does not assist Plaintiffs. At best, Plaintiffs can establish that the question of whether a vacancy exists under § 1330 is open.[17] As such, Plaintiffs cannot establish that it is very likely to succeed to on this issue.

2. Count III: Recess Appointment

The President is constitutionally empowered "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commis-

[17] The court notes that the issue of whether a vacancy existed at the time of Commissioner Devaney's appointment is presently under review for final, not preliminary, resolution in *Nippon Steel Corp. v. United States,* Court No. 01–00103 (Ct. Int'l Trade) (J. Eaton) *("Nippon* 01–00103").

sions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. Under the recess appointment clause, the President may appoint officers without the normally requisite advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. On December 15, 2000, the Senate and House adjourned *sine die.* On December 16, 2000, Commissioner Askey's term as Commissioner of the ITC expired. On the morning of January 3, 2001, a recess appointment order was prepared and executed by the White House Executive Clerk's office appointing Mr. Devaney as a Commissioner to the ITC. The Senate reconvened at 12:01 p.m. on the same day. It is important to note that Plaintiffs did not object to Defendants' statement of material fact that the order was executed before the Senate reconvened and, therefore effectively conceded that the appointment, in the ordinary sense of the word, was made during a recess.[18]

Corus challenges the sufficiency of Commissioner Devaney's appointment arguing that the appointment is not valid for the purposes of the recess appointment clause until the President signs a "commission," which did not occur until after the Senate reconvened.[19] Plaintiffs cite *Marbury v. Madison,* 5 U.S. 137, 157 (1803), for the proposition that, until the President's "last act" is complete—i.e. the signature, the appointment is incomplete. While *Marbury* describes the commission as "conclusive evidence" of the appointment, *id.* at 157, it is not clear that the commission is the only sufficient evidence. The court finds that Plaintiffs have not shown that they are highly likely to prevail on this issue.

CONCLUSION

Because Plaintiffs' challenge to the imposition of a tariff underlies its argument as to the status of a Commissioner, the court has jurisdiction pursuant to 28 U.S.C. § 1581(i). The ITC's Motion to Dismiss on jurisdictional grounds is denied. With respect to the ITC's aggregation of votes, the court does not find a clear misconstruction of the governing statute. As in *Maple Leaf Fishing Co.,* it is enough for this case that the ITC made the ultimate injury determination in a manner that does not violate any statutory provision. 762 F.2d at 90. Moreover, the court finds that Congress delegated broad authority to the President and Commission under § 201 and, therefore, the Commission did not act outside its authority in presenting its determination as "equally divided". Defendants' Motion for Summary Judgment is granted as to Count I. As for the preliminary injunction, Plaintiffs' weak showing of imminent irreparable harm and questionable showing of likelihood of success on the merits are insufficient to justify preliminary injunction. Plaintiffs' motion for a preliminary injunction is DENIED.

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[18] This concession may create a factual scenario significantly different than that in *Nippon* 01–00103.

[19] Commissioner Devaney took the oath of office on January 16, 2001. The Commission was signed on January 18, 2001.

(Slip Op. 02–88)

NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., NSK LTD., NSK CORP., KOYO SEIKO CO., LTD., AND KOYO CORP. OF U.S.A., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR AND PLAINTIFF

Consolidated Court No. 98–01–00146

(Dated August 12, 2002)

ORDER

TSOUCALAS, *Senior Judge:* On the above-captioned matter, the Court received the following: (a) *Draft Results of Redetermination Pursuant to Court Remand ("Draft Results")* in *NTN Bearing Corp. v. United States,* 26 CIT ____, 186 F. Supp. 2d 1257 (2002), and *Final Results of Redetermination Pursuant to Court Remand ("Remand Results")* in *NTN Bearing Corp. v. United States,* 26 CIT ____, 186 F. Supp. 2d 1257 (2002), issued by the United States Department of Commerce, International Trade Administration ("Commerce"); (b) *Comments Regarding the Remand Determination ("Preliminary Comments")* by NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation ("NTN") dated July 15, 2002, and addressing Commerce's *Draft Results;* and (c) a letter by The Timken Company ("Timken") of July 24, 2002, advising the Court of Timken's intent to file comments in response to those comments that might be filed by NTN in response to Commerce's *Remand Results,* and Timken's response to NTN's comments regarding Commerce's *Remand Results* dated August 5, 2002.[1]

In its *Preliminary Comments,* NTN asserts that Commerce erred in refusing to exclude those sales where the gross unit price plus billing adjustment equaled zero from NTN's dumping margin. NTN maintains that the Court's order that mandated Commerce to exclude NTN's zero-priced sales from NTN's dumping margin should have encompassed NTN's zero-priced sales as well as those NTN's sales where the gross unit price plus billing adjustment equaled zero. Pointing to the fact that NTN's margin was raised, rather than lowered, after Commerce has made Commerce's recalculation, NTN concludes that the abnormality of such effect is a per se indication of Commerce's misinterpretation of the Court's order. Commerce contends that Commerce's actions were in accordance with the Court's order remanding the underlying case, and Timken supports Commerce's position.

[1] Timken's response addresses the arguments raised by NTN in *Preliminary Comments* as if these comments were submitted by NTN in response to Commerce's *Remand Results.* The Court assumes that Timken's actions are caused by NTN's failure to submit NTN's response to Commerce's *Remand Results.* In the fashion analogous to that of Timken, the Court assumes that NTN's failure to submit comments to Commerce's *Remand Results:* (a) constitutes a waiver of NTN's right to submit comments to Commerce's *Remand Results;* and (b) indicates NTN's desire to stand by the arguments raised by NTN in NTN's *Preliminary Comments.*

The Court agrees with Commerce and Timken. Indeed, a zero-priced sale (that is, a transaction made inherently for no consideration) is a form of business dealing that is entirely different in nature from a sale where the gross unit price plus billing adjustment equaled zero (that is, a transaction made for a consideration that was eventually offset by an adjustment given for certain business reasons). Furthermore, the fact that NTN's margin rose as a result of Commerce's recalculation has absolutely no relevance to the issue of interpretation of the Court's mandate, since the change in margin was caused by Commerce's correction of a ministerial error.[2] Therefore, this Court, having received and reviewed the aforesaid documents holds that Commerce duly complied with the Court's remand order, and it is hereby

ORDERED that the *Remand Results* are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

[2] Commerce initially relied on incorrect cost of production data provided by NTN. Commerce corrected this oversight and, consequently, recalculated NTN's margin for Commerce's *Remand Results*. Had NTN been unhappy with Commerce's recalculation, NTN should have asserted its grievances accordingly. The Court, however, fails to fancy a viable legal theory which prohibits an agency from correcting its calculative error as long as the agency applies the correct legal principle.