[PUBLIC VERSION]

(Slip Op. 02–70)

USINOR, BEAUTOR, HAIRONVILLE, SOLLAC ATLANTIQUE, SOLLAC LORRAINE, AND USINOR STEEL CORP., ET AL., PLAINTIFFS *v.* UNITED STATES OF AMERICA, DEFENDANT, AND BETHLEHEM STEEL CORP., ISPAT INLAND, INC., LTV STEEL CO., INC., NATIONAL STEEL CORP., AND U.S. STEEL GROUP, A UNIT OF USX CORP., DEFENDANT-INTERVENORS

Consolidated Court No. 01–00010

[Review Determination (affirmed in part, remanded in part).]

(Decided July 19, 2002)

Weil, Gotshal & Manges LLP (A. Paul Victor, Gregory Husisian, Amy Dixon,) New York, for Plaintiffs Usinor, Beautor, Haironville, Sollac Atlantique, Sollac Lorraine, and Usinor Steel Corporation.

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I

INTRODUCTION

WALLACH, *Judge:* Plaintiffs Usinor, Beautor, Haironville, Sollac Atlantique, Sollac Lorraine, and U.S. importer Usinor Steel Corporation (collectively "French Producers"), and plaintiffs Thyssen Krupp Stahl AG, EKO Stahl GmbH, Stahwerke Bremen GmbH, and Salzgitter (col-

lectively "German Producers") move for judgment upon the agency record pursuant to USCIT Rule 56.2, challenging the United States International Trade Commission's ("Commission" or "ITC") final determination in the five-year administrative review ("Sunset Review") of antidumping and countervailing duty orders on corrosion resistant carbon steel products ("CRCS") from France and Germany, conducted under 19 U.S.C. § 1675(c) (1999). Plaintiffs contest the Commission's determination that revocation of the countervailing duty orders and antidumping duty orders on certain carbon steel products from specified countries, including corrosion-resistant carbon steel from France and Germany, would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom,* 65 Fed. Reg. 75,301 (Dec. 1, 2000) ("Notice of Commission's Determination").

II

BACKGROUND

In August 1993, the Commission determined that the domestic CRCS industry was materially injured or threatened by material injury by reason of less than fair value ("LTFV") and subsidized imports of CRCS from, among other countries, France and Germany. *See Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom,* USITC Pub. 2664, Inv. Nos. 701–TA–319–332, 334, 336–342, 344 and 347–353 and 731–TA–573–579, 581–592, 594–597, 599–609, and 612–619 (Final) (Aug. 1993) ("Original Determination"). Accordingly, the Department of Commerce published antidumping and countervailing duty orders covering the subject merchandise from these countries. *See Countervailing Duty Order and Amendment to Final Affirmative Countervailing Duty Determination: Certain Steel Products From France,* Part VI, 58 Fed. Reg. 43,759 (Aug. 17, 1993); *Countervailing Duty Orders and Amendment to Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Germany,* Part VI, 58 Fed. Reg. 43,756 (Aug. 17, 1993); *Antidumping Duty Order and Amendments to Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from France,* 58 Fed. Reg. 44,169 (Aug. 19, 1993); *Antidumping Duty Orders and Amendments to Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-resistant Carbon Steel Flat Products*

and Certain Cut-to-Length Carbon Steel Plate From Germany, 58 Fed. Reg. 44,170 (Aug. 19, 1993).

On September 1, 1999, the Commission concurrently instituted sunset reviews[1] concerning the countervailing duty and antidumping orders on certain carbon steel products from France and Germany with sunset reviews regarding CRCS from Australia, Canada, Japan, and Korea.[2] *See Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom,* 64 Fed. Reg. 47,862 (Sept. 1, 1999). On December 3, 1999, the Commission decided to conduct full reviews.[3] *See Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom,* 64 Fed. Reg. 71,494 (Dec. 21, 1999).

Pursuant to 19 U.S.C. § 1675a(a)(7), the Commission "cumulated" likely volume and price effects from all countries under review. *See* Notice of Commission's Determination. The Commission summarizes its cumulation reasoning as follows:

> The Commission * * * determined the subject imports from each of the individual countries would not be likely to have no discernable impact if the orders were revoked * * * In determining whether it should cumulate subject imports, the Commission next found that, although price and volume trends of the subject imports of the six countries varied, none were sufficiently distinct from the others as to preclude any country's subject imports from cumulation.

Defendant United States International Trade Commission's Opposition to Plaintiffs' Motion for Summary Judgment on the Agency Record ("Defendant's Opposition") at 6 (footnotes omitted).

Following cumulation, the Commission next determined that revoking the subject orders would severely impact the domestic CRCS industry. The Commission stressed its findings that the domestic industry would be faced with significant volume and price declines for its product

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[1] Under 19 U.S.C. § 1675a, the Commission conducts a sunset review, following a previous countervailing duty or antidumping order based on a finding of material injury to the domestic industry, to determine if the material injury is likely to continue or recur if the orders are revoked. In making this likelihood determination, the agency must consider "the likely volume, price effect, and impact of the imports of the subject merchandise on the industry if the order is revoked," taking into account, among other things, its prior injury determination. Thus, the causation inquiry in sunset reviews is inherently predictive and necessarily relies on past findings to predict future trends. In addition, if it complies with the requirements of 19 U.S.C. § 1675a, the Commission has the discretion to cumulate the various imports under review.

[2] The Commission's review also encompassed other carbon steel products, namely, cut-to-length steel plate and cold-rolled carbon steel flat products.

[3] Sunset reviews may take one of two forms, a "full sunset review" or an "expedited sunset review." In particular, the agency's obligation to conduct fact-gathering beyond the facts available is what distinguishes a full sunset review from the expedited version. The Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316 at 879–80 (1994), distinguishes between a "full [sunset] review" involving "fact gathering," and an "expedited review" based on "facts available" as follows:

> The facts available may include prior agency determinations involving the subject merchandise as well as information submitted on the record by parties in response to the notice of initiation. * * * [T]he agencies may decide separately whether the responses are inadequate and whether to issue a determination based on the facts available without further fact-gathering. [Section 1675(c)(3)] is intended to eliminate needless reviews. * * * If parties provide no or inadequate information in response to a notice of initiation, it is reasonable to conclude that they would not provide adequate information if the agencies conducted a full-fledged review. However, when there is sufficient willingness to participate and adequate indication that parties will submit information requested throughout the proceeding, the agencies will conduct a full review.

Statement of Administrative Action at 879–80.

given its determination that the nations under review had high levels of excess capacity coupled with cost margins that necessitate maximum employment of capacity:

> The Commission found that revocation of the orders would likely lead to significant volume and price declines for the domestic corrosion-resistant steel industry. The commission found that there was considerable production capacity, as well as excess capacity to produce corrosion-resistant steel in the countries exporting the subject merchandise, which was particularly relevant in light of the need of subject producers to maximize capacity utilization in order to remain profitable.

Defendant's Opposition at 3.

Ultimately, the Commission voted on November 2, 2000 in support of a determination that on a cumulated basis, the antidumping and countervailing duty orders with respect to those countries should remain in place. *See Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom,* Inv. Nos. AA1921–197 (Review), 701–TA–231, 319–320, 332, 325–328, 340, 342, and 348–350 (Review), and 731–TA–573–576, 578, 582–587, 604, 607–608, 612, and 614–618 (Review) (Nov. 27, 2000) ("Review Determination").

Plaintiffs' action contests the Commission's determination not to revoke the antidumping and countervailing duty orders on CRCS from France and Germany.

III

STANDARD OF REVIEW

The court will uphold the Commission's determination unless it is unsupported by substantial evidence on the record or otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B) (1994). Substantial evidence is "more than a mere scintilla" it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of New York v. NLRB,* 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938); *Matsushita Elec. Indus. Co., Ltd. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984). In applying this standard, we affirm the agency's factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions. *Olympia Indus., Inc. v. United States,* 22 CIT 387, 389, 7 F. Supp. 2d 997, 1000 (1998) (citing *Atlantic Sugar, Ltd. v. United States,* 744 F.2d 1556, 1563 (Fed. Cir. 1984)). The court may not reweigh the evidence or substitute its own judgment for that of the agency. *See Granges Metallverken AB v. United States,* 13 C.I.T. 471, 474, 716 F. Supp. 17, 21 (1989) (citations omitted). Additionally, "absent some showing to the contrary, the Commission is presumed to have considered all of the evidence in the record." *See Nat'l Ass'n of Mirror Mfrs. v. United States,* 12 CIT 771, 779, 696 F. Supp. 642, 648 (1988) (citations omitted).

The possibility of drawing two inconsistent conclusions from the same evidence does not mean that the agency's finding is unsupported by substantial evidence. *See Chefline Corp. v. United States,* 170 F. Supp. 2d 1320, 1325 (CIT 2001). In other words, the Commission's determination will not be overturned merely because the plaintiff "is able to produce evidence * * * in support of its own contentions and in opposition to the evidence supporting the agency's determination." *Id.* (citing *Torrington Co. v. United States,* 14 CIT 507, 514, 745 F. Supp. 718, 723 (1990) (internal quotation omitted), *aff'd,* 938 F.2d 1276 (Fed. Cir. 1991).

In reviewing an agency's construction of a statute that it administers, this court addresses two questions outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The first question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, this court and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If, however, Congress has not spoken directly on the issue, this court addresses the second question of whether the agency's interpretation "is based on a permissible construction of the statute." *Id.* "To survive judicial scrutiny, an agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation." *Koyo Seiko Co. v. United States,* 36 F.3d 1565, 1570 (Fed. Cir. 1994). Thus, when faced with more than one reasonable statutory interpretation, "a court must defer to an agency's reasonable interpretation * * * even if the court might have preferred another." *NSK Ltd. v. United States,* 115 F.3d 965, 973 (Fed. Cir. 1997) (citations omitted); *U.S. Steel Group v. United States,* 225 F.3d 1284, 1285–86 (Fed. Cir. 2000); *cf. United States v. Mead Corp.,* 533 U.S. 218, 121 S. Ct. 2164, 150 L.Ed. 292 (2001).

IV

ANALYSIS

A

SINCE THE COMMISSION'S DECISION TO CUMULATE THE FRENCH AND GERMAN PRODUCERS' IMPORTS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE A REMAND IS NECESSARY

The Commission's entire analysis of the imports from the six cumulated countries is relatively brief and states that the reviewed imports maintained a market presence even while burdened under the subject orders, and concludes that revocation would adversely impact a weakened domestic industry. As the French Producers point out, nearly the entire discussion of the Plaintiffs' imports and their particular characteristics are contained in the following three paragraphs:

> Subject imports from Australia, Canada, France, Germany, Japan, and Italy have remained in the U.S. market in the years since the orders were imposed. The continuing presence of these subject imports in the domestic market indicates that subject foreign pro-

> ducers continue to have the contacts and channels of distribution necessary to compete in the U.S. market.
>
> The corrosion-resistant steel industries in the subject countries devote considerable resources to export markets. While capacity utilization rates have topped [ ] percent in each of the subject countries during the period of review, there appears to be available excess capacity in each country.
>
> We are mindful that the volume of the subject imports has decreased from the time the orders were imposed. Yet in the context of this particular industry, including its weakened condition, we find that a likelihood exists that even a small post-revocation increase would have a discernable impact on the domestic industry.

Review Determination at 71–72 (footnotes omitted).

The Plaintiffs challenge the Commission's cumulation decision. The French Producers assert that "[b]y grouping all countries together for purposes of its analysis, the Commission failed to explore important differences in the willingness and/or ability of the French Producers to participate in the U.S. market, and thus failed to provide individual analysis of the imports from each country required by the statute and the SAA." Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment Upon the Agency Record" ("French Motion") at 3. Largely mirroring the French Producers, the German Producers assert that "[t]hroughout the CRCS Sunset Review proceeding, German Producers reasonably believed that they would satisfy the 'no discernable impact' test * * * " Brief of Plaintiffs Thyssen Krupp Stahl AG, Stahlwerke Bremen GMBH, Eko Stahl GMBH, and Salzgitter AG In Support of Motion Under Rule 56.2 For Judgment Upon the Agency Record ("German Motion") at 2.

The Plaintiffs argue that, based on the record evidence, the Commission was required to undertake a country specific analysis with regard to their imports and that cumulation prevented the Commission from reaching an accurate determination. Specifically, the French Producers complain that "the Commission ignored uncontroverted record evidence demonstrating that the French Producers are unable to increase exports to the U.S. market due to capacity constraints and existing commitments to customers within the EU, and, consequently, that the French CRCS imports could not have a discernable impact on the domestic industry." French Motion at 3. They also claim the Commission's cumulation of French imports was based on an unsupported conclusion that "all imports would compete under similar conditions of competition and there would be a reasonable overlap in competition." *Id.* According to the French Producers, this conclusion was "reached without consideration of *any* of the record evidence which showed that French imports would not compete under the same conditions of competition as other subject imports and the domestic like product." *Id.* (emphasis in original).

The German Producers echo these complaints. They assert that the following factors should have led the Commission to conclude that no

discernable impact would be likely if the subject orders were lifted, thereby barring cumulation:

> (1) the decline in German CRCS imports after the AD/CVD Orders were issued in 1993 resulted from market factors (i.e., the switch in customer demand from CRCS to microalloy products), rather than from the impact of the Orders; (2) German CRCS imports into the United States were negligible from 1997—March 2000 (.022 percent of domestic CRCS and 2.2 percent of total CRCS imports into the United States); (3) German CRCS mills were operating at full capacity in 2000; (4) German CRCS mills would continue to operate at full capacity in the foreseeable future; and (5) there was no likelihood that German imports into the United States would increase to non-negligible levels.

German Motion at 2–3. Like the French Producers, the German Producers claim the Commission's conclusion regarding available excess capacity in Germany was unsupported by substantial evidence. In short, the German Producers aver that "when the Commission issued its Sunset Review determination, negligible quantities of German CRCS were being imported into the United States * * * and German mills were operating at full capacity." *Id.* at 13. (internal citations omitted).

Due to the Commission's total failure to analyze or rebut evidence submitted by the Plaintiffs, the court concludes that its decision to cumulate is not supported by substantial evidence. General analysis of all producers under review without any discussion of evidence that weighs against cumulation cannot satisfy the cumulation standard.

1

THE "NO DISCERNABLE IMPACT" STANDARD DOES NOT NECESSARILY CONFLICT WITH INTERNATIONAL OBLIGATIONS

The statute, without imposing specific numerical boundaries, precludes cumulation of a country's imports if the Commission finds that such imports are likely to have "no discernible adverse impact on the domestic industry." The statute, however, provides no analysis upon which the Commission should rely in determining whether there is "no discernible adverse impact." 19 U.S.C. § 1675a(a)(7) (1995) provides:

> (7) Cumulation. For purposes of this subsection, the Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 751(b) or (c) [19 USCS § 1675(b) or (c)] were initiated on the same day, if such *imports would be likely to compete with each other and with domestic like products* in the United States market. *The Commission shall not cumulatively assess the volume and effects of imports* of the subject merchandise in a case in which it determines that such imports are *likely to have no discernible adverse impact on the domestic industry.*

Id. (emphasis added). The Commission and the German Producers present the court with competing standards for cumulation under this provision, one based solely on import volume and one based on import impact.

The Uruguay Round Agreements Act's ("URAA"), Pub. L. No. 103–465, § 220(a), 108 Stat. 4809, 4858 (1994), legislative history provides little guidance as to the application of the "no discernable impact" standard. Tracking the language of the statute, it provides that "it is appropriate to preclude cumulation {in five-year reviews} where imports are likely to be negligible." S. Rep. No. 103–412, p. 51 (1994).

Against this backdrop, the German Producers contend that the Commission has violated its international obligations. In particular, they claim that the "express language of [Article VI of the General Agreement on Tariffs and Trade 1994] [hereinafter, "Antidumping Agreement"] requires the Commission to consider whether imports from Germany would be negligible upon revocation." German Motion at 9. The German Producers cite Articles 11.3, 3.3, and 5.8 of the Antidumping Agreement. Article 3.3 states that cumulation shall occur only where "the volume of subject imports is not negligible * * *" and Article 5.8 provides that "the volume of dumped imports shall normally be regarded as negligible if the volume of the dumped imports from a particular country is found to account for less than 3 percent of imports of the like product in the importing Member, unless countries which individually account for less than 3 percent of the imports of the like product in the importing Member collectively account for more than 7 percent of imports of the like product in the importing Member."

Hence, the German Producers argue that "[s]ince the Commission did not consider whether German imports would exceed 3 percent of total imports upon revocation, or whether imports from all subject countries which were individually less than 3 percent would cumulatively be less than 7 percent if the Orders were revoked, the Commission's determination was contrary to U.S. international obligations." German Motion at 10.

The Commission contends that its analysis of the French and German Producers' evidence is consistent with the proper reading of 19 U.S.C. § 1675a(a)(7). The Commission claims that the "no discernable impact" provision is not tantamount to a "negligibility assessment." Defendant's Opposition at 15. It argues that "[a]s the plain language of the provision indicates the required determination is whether there is likely to be a discernable *impact*, not whether the likely volume appears significant in the abstract." *Id.* at 14 (emphasis in original). In other words, the Commission argues that the standard is not driven solely by volume, such that an inherently negligible level of imports may yield a discernable impact when viewed in context of the domestic industry. Indeed, the Commission faults the Plaintiffs for mischaracterizing the proper analysis under the statute as one that turns on volume, stating that the "Usinor plaintiffs ignore that the Commission's responsibility is to determine whether revocation would likely lead to a discernable adverse impact." Defendant's Opposition at 20.

Moreover, the Commission attacks the German Producers' contention that the Commission was obligated to abide by any predefined nu-

merical parameters. The Commission cites the Senate Report accompanying the cumulation provision, which provides:

> * * * The Committee believes that it is appropriate to preclude cumulation where imports are likely to be negligible. However, the Committee does not believe that it is appropriate to adopt a strict numerical test for determining negligibility because of the extraordinary difficulty in projecting import volumes into the future without precision. Accordingly, the Committee believes that the "no discernable impact standard" is appropriate in sunset reviews.

S. Rep. No. 103–412, p. 51 (1994). In addition, the Commission cites *Neenah Foundry Co. v. United States,* 155 F. Supp. 2d 766 (CIT 2001), wherein the court states:

> if [Congress] had intended that the ITC consider only import volume in deciding whether cumulation was precluded, it would have restricted its enactment. It did not. Congress chose "no discernable adverse impact," and *impact* in the context of U.S. unfair trade law, by any definition, encompasses more than volume of imports."

Id. at 776 (emphasis in original). As a result, the Commission claims that since the Commission's actions are consistent with U.S. law, the WTO Antidumping Agreement is inapplicable. *See Defendant's Opposition* at 15–16. The Defendant also cites *Campbell Soup Co. Inc. v. United States,* 107 F.3d 1556, 1564 (Fed. Cir. 1997) and *Fujitsu Gen. Am., Inc. v. United States,* 110 F. Supp. 2d 1061, 1083 (CIT 2000), *aff'd*, 283 F.3d 1364 (Fed. Cir. 2002)) for the general proposition that where the statute is unambiguous it will prevail over a conflicting international obligation.

The court in *Fujitsu,* based upon its conclusion that 19 U.S.C. § 1677g(b) was unambiguous, upheld the Commission's reading of the statute, despite the Petitioner's claim that this reading failed to comply with the Antidumping Agreement. The court, taking note of 19 U.S.C. § 3512(a)(1), which provides that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect," declined to override the Commission:

> Even assuming the instruction of 19 U.S.C. § 1677g(b) were somehow inconsistent with the WTO Antidumping Agreement, however, an unambiguous statute will prevail over an obligation under the international agreement. * * * As 19 U.S.C. § 1677g(b) unambiguously provides that interest on antidumping duty payments must be compounded in accordance with 26 U.S.C. § 6621, even if we were so inclined, this Court cannot alter or repeal the clear instruction of the statute.

Fujitsu at 1083 (citing *Fed. Mogul Corp. v. United States,* 63 F.3d 1572, 1581 (Fed. Cir. 1995)).

However, this court has also repeatedly held that the Commission is to administer the antidumping laws in a manner consistent with international obligations. *See Hyundai Elecs. Co., Ltd. v. United States,* 23 CIT

302, 53 F. Supp. 2d 1334 (1999); *McCulloch v. Sociedad Nacional,* 372 U.S. 10, 21–22, 83 S.Ct. 671, 9 L. Ed. 2d 547 (1963); *Caterpillar, Inc. v. United States,* 941 F. Supp. 1241, 1247–48 (CIT 1996). Notably, in *Hyundai,* the court states, "[T]he Statement of Administrative Action to the URAA, H.R. Doc. No. 103–316 (1994), at 669, provides that the URAA was 'intended to bring U.S. law fully into compliance with U.S. obligations under [the Uruguay Round] agreements.' Accordingly, the Antidumping Agreement is properly construed as an international obligation of the United States." The court goes on to state that "[w]hen confronted with a conflict between an international obligation and U.S. law, * * * absent express language to the contrary, a statute should not be interpreted to conflict with international obligations." *Hyundai,* 53 F. Supp. 2d at 1334. This canon of statutory construction emerged from the decision in *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 2 L. Ed. 208 (1804), in which the Supreme Court stated:

> It has also been observed that an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.
>
> These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.

Id. at 118; *see also Federal Mogul,* 63 F.3d at 1581; *Footwear Distribs.,* 18 C.I.T. at 408, 852 F. Supp. at 1091. Moreover, although *Chevron* states that a reasonable interpretation of an ambiguous statute by an agency should ordinarily be afforded deference, where international obligations arise, the reasonability of the agency's interpretation must be gauged against such obligations. *See Hyundai,* 53 F. Supp. 2d at 1334 ("Chevron must be applied in concert with the Charming Betsy doctrine when the latter doctrine is implicated."); *DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council,* 485 U.S. 568, 574–75, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress * * * This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy,* 2 Cranch 64, 118 (1804)")(citations omitted); *See also* Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is the Charming Betsy Sinking?,* 24 Fordham Int'l L.J. 1533 (2001).

Indeed, the *Hyundai* court conducted its own analysis to determine whether the Department of Commerce regulation at issue conflicted with the Antidumping Agreement. The *Hyundai* court ultimately concluded that the regulation, (despite a WTO ruling to the contrary), was in accord with the Antidumping Agreement. The court notes that no such analysis regarding the cumulation provision's relationship with

the Antidumping Agreement is present in the Review Determination and that the Defendant merely dismisses it within its Opposition Brief.

Although the Senate Report and the language of the statute appear to conflict with the Antidumping Agreement, it is still unclear whether they in fact may be read in harmony. The URAA simply states that cumulation shall not occur where the subject imports are "negligible," while in the above Senate Report the Senate Committee states that it "does not believe that it is appropriate to adopt a *strict* numerical test for determining negligibility * * *." S. Rep. No. 103–412, p. 51 (1994) (emphasis added). Indeed, the test for negligibility under article 5.8 of the Antidumping Agreement is preceded with the language "shall normally." AD Agreement, Article 5.8. The fact that imports under review "shall normally" be deemed negligible as per the numerical test may imply that the test is not absolutely binding at all. In other words, the "shall normally" language may afford the importing country some flexibility to decline to apply the numerical test under certain circumstances.[4] Under this reading of the "shall normally," it is possible that the Antidumping Agreement's test does not violate the Senate Report's prohibition.

In fact, the Statement of Administrative Action to accompany the Uruguay Round Agreements, ("SAA"), H.R. Doc. No. 103–316, reprinted in 1994 U.S.C.C.A.N. 4040, 4212 (1994), summarizes the various articles within the Antidumping Agreement and discusses the degree to which Unites States' law conforms with or differs from the Agreement, including how the United States intends to implement WTO's "normally" language with regard to home market sales. It provides:

> The Administration has adopted the standard in the Antidumping Agreement that sales in the home market "normally" will be considered of sufficient quantity to render the home market viable if they are five percent or more of sales to the United States. **The Administration intends that Commerce will normally use the five percent threshold except where some unusual situation renders its application inappropriate.**

SAA at 821 (emphasis added). It is possible that this interpretation of "normally" to mean "generally," may serve as a model for applying the Antidumping Agreement's test for negligibility. However, other than the SAA's handling of the "normally" language in the home market sales context, the court is unaware of any authority that indicates the "shall normally" language is permissive, nor did the parties provide any such authority. In fact, the reverse may also be true, such that the Antidumping Agreement's numerical test for negligibility is absolute. In

[4] Counsel for the German Producers conceded during oral argument that Article 5.8's numerical test is not mandatory in every case due to the term "normally," but argued that the Commission must have a very compelling reason for declining to apply the test.

this event, the Commission's position would directly oppose the Antidumping Agreement.[5]

On remand, the Commission must address these possibilities as part of its overall duty to administer the antidumping laws in accordance with its international obligations. The Commission may ultimately conclude that departing from the Antidumping Agreement's numerical test is consistent with the Antidumping Agreement based upon the "shall normally" language. In this event, the Commission must discuss and explain how and why the numerical test is not applicable in this instance. In the alternative, the Commission must further discuss how and why its position is irreconcilable with the Antidumping Agreement and the impact of the SAA on the proper interpretation of the statute. The Commission may not simply disregard the Antidumping Agreement by loosely invoking court decisions that stress the primacy of domestic law where a conflict with international law arises. Rather, it must first expressly identify and analyze such a conflict before relying on those decisions.

2

THE COMMISSION'S NO DISCERNABLE IMPACT FINDING, IN LIGHT OF RECORD EVIDENCE CONCERNING THE PLAINTIFFS' CAPACITY UTILIZATION, IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Even if the Commission is not bound by a precise numerical rule, the Commission must still base its conclusion on the record evidence before it. Here, the Commission failed to analyze country data specific to both the French and German Producers, which materially undermines the assertion that their imports would have a discernable impact on the domestic industry. Despite claiming to perform a country-by-country assessment prior to cumulation, the Commission failed to sufficiently explain why the submitted evidence detailing capacity utilization within France and Germany does not undermine the Commission's conclusion that the subject imports would not be likely to have no discernable impact if the subject orders were lifted. As a result, its decision to cumulate is not supported by substantial evidence.

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[5] In addition, the SAA acknowledges Article 5.8's numerical test, and that the Commission has yet to incorporate its own numerical test, and it calls for changes in U.S. law. With regard to article 5.8, the SAA reiterates the language of the negligibility test and states that the "U.S. International Trade Commission * * * currently does not have any specified numerical thresholds for negligible imports." SAA at 812. In addition, the SAA prefaces its entire breakdown of the Antidumping Agreement with the observation that the Antidumping Agreement "does require a number of changes in U.S. law, such as new standards for determining whether * * * import volumes are negligible * * *." SAA at 807. Given the SAA's discussion of Article 5.8 and the apparent need to change U.S. law, one could argue that 19 U.S.C. § 1675a(a)(7)'s "no discernable impact standard" may differ from the Antidumping Agreement precisely because it lacks any numerical parameters, as a result supporting the Commission's interpretation. In that event, U.S. law may simply be in conflict with the Antidumping Agreement and it is the legislature's duty to resolve such a conflict. However, the court notes that 19 U.S.C. § 1675a became effective on January 1, 1995, following the SAA, and pursuant to § 291 of the URAA as well as Presidential Proclamation No. 6780, *To Implement Certain Provisions of Trade Agreements Resulting From the Uruguay Round of Multilateral Trade Negotiations, and for Other Purposes,* 60 Fed. Reg. 15,845 (1995). As such, it is possible that the "no discernable impact" standard was actually drafted with an eye towards implementing the Antidumping Agreement, thereby rendering the Commission's position potentially untenable. *See* Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is the Charming Betsy Sinking?,* 24 Fordham Int'l L.J. 1533, 1543 (2001) (Judge Restani and Professor Bloom argue that where a statute implementing an international agreement is ambiguous and the international agreement is clear, the latter may be viewed as secondary legislative history).

The heart of the Commission's cumulation decision is its finding that "there was still excess production capacity in each of the six countries despite the fact that high capacity utilization rates had been reported for each." Defendant's Opposition at 16. It substantiates its position by stressing that the proper time frame in which to assess the Plaintiffs' capacity utilization rates is 1997 to *March* 2000. It further claims that the Plaintiffs' attempts to present evidence outside that time frame are unwarranted and impermissibly request the Commission to "reweigh the evidence."

The Defendant-Intervenors defend the Commission's refusal to consider capacity utilization evidence for the year 2000's remaining quarters, citing *Kenda Rubber Indus. Co., Ltd. v. United States,* 10 CIT 120, 126 630 F. Supp. 354, 359 (1986) for the proposition that "the Commission has discretion to examine a period that most reasonably allows it to determine whether a domestic industry is injured by [Less Than Fair Value] imports." Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record Filed by Defendant-Intervenors Bethlehem Steel Corporation, LTV Steel Company, Inc., National Steel Corporation, and United States Steel LLC ("Defendant-Intervenors Opposition") at 37. Accordingly, the Commission asserts that it "was quite reasonable for the Commission to rely on full-year figures to be more probative for predicting future utilization rates than the partial 2000 figures presented by German subject producers." Defendant's Opposition at 22.

Nonetheless, in making a present material injury determination, the Commission must address record evidence of significant circumstances and events that occur between the petition date and the vote day. The antidumping and countervailing duty laws are intended to balance the future competitive environment between the domestic industry and various foreign importers. *See Imbert Imp., Inc. v. United States,* 331 F. Supp. 1400, 1406 n.10 (1971) (citations omitted), *aff'd*, 60 CCPA 123, 475 F.2d 1189 (1973). Administrative integrity requires that the Commission not employ its discretion to blind itself to evidence that may materially impact its imposition of remedial duties. The Commission fails to demonstrate or explain why analyzing full year figures as opposed to the contested partial figures for 2000 would be more probative of future imports. If the Commission is really engaged in a predictive analysis, purposefully excluding evidence of capacity levels closest in time to the possible revocation of the orders is improper. A discernable impact determination in this case can only be made if the materially relevant evidence properly in the record is addressed.

The court is guided by the present injury determination rationale articulated in *Chr. Bjelland Seafoods A/S v. United States,* 19 CIT 35 (1992). In that case, the court held that the Commission in making a present injury determination must consult evidence within a time frame as close as possible to the vote day. The court stressed that agency discretion while valid, must not override this basic principle and that

older information on the record provides a historical backdrop against which to analyze fresher data:

> Although the entirety of the administrative record must be evaluated, a finding of "present" injury must reference a time period which is as nearly contemporaneous to vote day as possible and for which reliable record evidence is available. This is not to say that the ITC may not exercise its discretion in choosing the most appropriate time frame for its investigation. Nor does the court mean to preclude the ITC from addressing the possibility that negative effects of a present material injury are latent. The court merely observes that, within the time frame established by the ITC for its investigation, relatively older information serves to provide a historical frame of reference against which a "present" (i.e., as recent to vote day as possible, given the limitations of the collected data) material injury determination is to be made, and without which any assessment of the extent of changed circumstances would be impossible. Indeed, the ITC has previously acknowledged as much.

Chr. Bjelland Seafoods, 19 CIT at 43 (citations omitted).

At the very least, the Commission's assertion that Plaintiffs' imports will have a likely discernable impact based on excess capacity is undermined when juxtaposed with the evidence directly preceding the vote day. The court notes that the Commission does not offer a reason, either in the Review Determination or during oral argument, to exclude this evidence beyond the mere assertion that full year data is more probative of future import behavior in the instant case.[6] Hence, upon remand, the Commission must address this evidence and clarify its basis for excluding the evidence if it continues to do so.

a

FRENCH PRODUCERS

Relying on the data during this period, the Commission points to declining utilization and increasing excess capacity for the French as a proper basis for cumulation and its decision not to revoke the subject orders. The Commission offers this analysis: "[a]lthough French subject producers had reported capacity utilization rates over [ ] percent in 1997 and 1999, capacity utilization rates had declined by [ ] percent from [ ] to [ ] percent during that period. Capacity utilization rates were [ ] in 1999, down [ ] percent from 1998." Defendant's Opposition at 18 (citing Staff Report INV-X–221 (Oct. 18, 2000) ("Staff Report") at CORROSION Table IV–4).

With French capacity utilization exceeding [ ] percent and no discussion of the French data, the court fails to see how the Commission could logically lump the French Producers with all the producers under review based on its assertion that the average capacity utilization ex-

[6] During oral argument, Government counsel offered the unsupported assertion that because capacity utilization data varies between quarters, partial yearly figures should be excluded. The court notes that, contrary to the Commission's assertion during oral argument that evidence concerning German excess capacity outside the period of review was entirely unsolicited, the German Producers furnished such evidence, at least in part, in response to the Commission's own questionnaires. *See* German Group Response to Commission Written Questions of September 29, 2000 at 13.

ceeded [ ] percent. As the French Producers state, "[a] country with [ ] excess capacity obviously can increase production and ship its goods anywhere; but a country with [ ] excess capacity (as the French Producers had at the end of the POR), just as obviously cannot." Reply Brief of Plaintiffs Usinor, Beautor, Haironville, Sollac Atlantique, Sollac Loraine, and Usinor Steel Corporation ("French Reply") at 10. Indeed, at the end of the POR, French capacity was [ ]. *See* Staff Report at TABLE CORROSION-IV–4.

The Commission presents the court with a host of *post hoc* rationales and speculative theories why the ultimate conclusion in the Review Determination is warranted. For example, the Commission makes the argument that if French demand were far outpacing capacity "it would seem logical that French subject producers would make plans to increase their capacity significantly." Defendant's Opposition at 19. In addition, the Commission also states "there was evidence that French and European demand was softening." *Id.* at 20. Moreover, the Commission simply declares that much of the French Producers' evidence regarding capacity utilization "is far from disputed," and makes the assertion that "the domestic producers presented evidence that these high capacity figures may not accurately reflect French capacity utilization rates." *Id.* at 19 (footnotes omitted). If evidence existed, the Commission should have properly included it as part of a greater analysis of the French Producers' data in its sunset review. However, the Commission failed to do so and cannot expect to cure the absence of this discussion with unsubstantiated refutations during judicial review.[7]

An agency determination must be supported by concurrent agency reasoning and not by *post hoc* reasoning by the agency or its counsel. Indeed, the Supreme Court has said that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfg. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50, 12 L. Ed. 36 (1983).

As a result, the court finds the Commission's decision to cumulate French imports, in light of its treatment of the French capacity utilization data, unsupported by substantial evidence. If it still wishes to cumulate French CRCS on remand, the Commission must properly address this data and sufficiently demonstrate its reasoning.

b

GERMAN PRODUCERS

Similarly, the Commission, in determining that German Producers had significant excess capacity, failed to address key evidence demonstrating a marked increase in capacity utilization during the second and

[7] The court is particularly troubled by the late appearance of these counterarguments, given the French specific information submitted to the Commission prior to this action. This includes evidence that France is a growing net importer of CRCS, that French Producers have in fact requested customers to cancel orders due to overwhelmed capacity, and that according to U.S. customs data, French prices averaged and peaked far higher than domestic like product prices. *See* French Reply at 3 (citing internal French Producer communications, French Motion, Attachment 4, Exhibit 9; French Producer's Opening Memorandum at 14). None of this facially persuasive evidence is mentioned or rebutted in the Review Determination.

third quarters of 2000 as well as the foreseeable future. The Commission claims German capacity utilization rates were properly examined from 1997 to the first quarter 2000, and that the German Producers are incorrectly seeking to override a legitimate exercise of agency discretion, stating "[i]t was quite reasonable for the Commission to rely on full-year figures to more probative for predicting future utilization rates than the partial 2000 figures presented by German subject producers." Defendant's Opposition at 22. Although there was excess capacity during the period reviewed, this alone does not absolve the Commission from examining material evidence to the contrary. The record evidence does demonstrate intermittent excess German capacity, with utilization rates of [ ] percent in 1997, [ ] percent in 1998, and [ ] percent in 1999, [ ] percent in interim January-March 1999, and [ ] percent in interim January-March 2000, existed. *See* Staff Report at CORROSION Table IV–5. Against this backdrop, the Commission argues that "[g]iven the essential nature of high capacity utilization rates, the Commission reasonably found that subject producers possessed the incentive to increase their subject imports to the United States in the absence of restraining effects of the orders," and that "in the original investigations, despite comparable high capacity utilization rates, German subject producers shipped ever increasing volumes of LTFV imports to the U.S. market," in its Opposition Brief. Defendant's Opposition at 23. This conclusion ignores evidence submitted by the German Producers demonstrating a marked upswing in capacity utilization during the last two quarters of 2000 and projections that German capacity would be very strained for the foreseeable future, even with no upswing in exports to the United States.[8]

As a result, and for the same reasons articulated in the preceding discussion of French capacity utilization, the court finds the Commission's decision to cumulate German imports, in light of its treatment of the German capacity utilization data, unsupported by substantial evidence. In its remand determination, the Commission must properly address this data and include a greater discussion of its reasoning, including a more fully articulated rationale for relying on full year figures, if the Commission still chooses to exclude data outside the period of review.

3

THOUGH IT IS NOT STATUTORILY REQUIRED TO RESPOND TO EACH PIECE OF EVIDENCE PRESENTED BY THE PARTIES, THE COMMISSION CANNOT IGNORE EVIDENCE THAT MATERIALLY UNDERMINES ITS FINDINGS AND CONCLUSIONS

The Commission repeatedly, in response to the French and German Producers' allegations that it failed to consider or respond to evidence strongly militating in favor of decumulation, invokes *Dastech Int'l, Inc.*

[8] The German Producers provided various projections to the Commission that German mills would be operating at full capacity for the "foreseeable future." The Commission apparently did not consider any of this evidence. *See, e.g.,* SR Con at PLATE-II–7–8 (September 2000 World Economic Outlook); GG DOC. APP. 9/22/00, at exhibits 11, 12, 13, 21, 22); GG Q. RES. 9/29/00; GG 10/27/00, at 3–4, 6, 11–13.

v. USITC, 21 CIT 469, 963 F. Supp. 1220 (1997), for the proposition that "[t]he ITC or [Commission] is presumed to have considered all the evidence in the record." *Id.* at 1226. In fact, the Commission appears to employ *Dastech* as a talismanic justification for the total absence of any specific discussion regarding either the French or German imports.

Citations to the *Dastech* proposition are found throughout the Commission's opposition brief. *See* Defendant's Opposition at 11, 18, 24, 29. The Commission first prefaces its overall approach to the German and French data, defending any missing "detailed discussion for subject imports from each of the six subject countries." *Id.* at 17. It states that "[t]he question is not the precise manner in which the Commission presented the reasons for its determination but whether it considered subject imports from each country and its finding [sic] are supported by substantial evidence." *Id.* As such, the Commission attempts to refute the Plaintiffs' evidence with unsupported assurances that the relevant data has been considered and factored into what it alleges to be a persuasive Review Determination amply supported by substantial evidence. For example, with regard to the German Producers' submitted projections of German capacity utilization rates, the Commission states that "although the Commission did not mention these 'projections,' it does not mean that they were not considered." Defendant's Opposition at 24 (citing *Dastech Int'l,* 21 CIT at 475, 963 F. Supp. at 1226). In addition, regarding the Plaintiff's submission of data concerning the overlap of competition between the subject imports, the Commission again states that there is no statutory requirement for a separate discussion on this matter and that "[r]egardless of whether specific evidence is discussed, '[t]he [ITC] is presumed to have considered all [of] the evidence in the record.'" *Id.* at 29 (quoting *Dastech Int'l,* 21 CIT at 26 475, 963 F. Supp. at 1226).

Regardless of any presumption in its favor, the Commission is in no way absolved under *Dastech* of its responsibility to explain or counter salient evidence that militates against its conclusions. The court is troubled by the repeated generic invocation of *Dastech* as a shield against examination of the Commission's failure to present required analysis of the record evidence. *Dastech* prefaces its entire discussion of this presumption with the requirement that the ITC present a "'reviewable, reasoned basis'" for its determinations and added that "[e]xplanation is necessary, of course, for this court to perform its statutory review function." *Dastech Int'l,* 21 CIT at 475, 963 F. Supp. at 1226 (quoting *Bando Chem. Indus., Ltd. v. United States,* 17 CIT 798, 799 (1993). Moreover, *Dastech* cites *Granges Metallverken AB,* 13 CIT at 478, which states that "it is an abuse of discretion for an agency to fail to consider an *issue* properly raised by the record evidence" though there is no statutory requirement that the Commission respond to each piece of evidence presented by the parties. *Id.* (emphasis added) (citing *Timken Co. v. United States,* 10 CIT 86, 97, 630 F. Supp. 1327, 1337–38 (1986), rev'd in part, *Koyo Seiko Co. v. United States,* 20 F. 3d 1156 (Fed. Cir. 1994)). *Das-*

tech also cites *Roses, Inc. v. United States,* 13 CIT 662 (1989), which indicates that the presumption the agency has considered all the evidence is rebuttable and that "the burden is on the plaintiff to make a contrary showing." *Id.* at 668 (citations omitted).

Moreover, the Commission's responsibility to answer to evidence that undermines the Commission's findings and conclusions has recently been reiterated by the court in *ALTX, Inc. v. United States,* 167 F. Supp. 2d 1353 (CIT 2001). In that case, the Commission was made aware of certain key evidence, but declined to discuss it, instead including only superficial mention of that evidence in its final determination. This court ultimately found the determination unsupported by substantial evidence:

> The Final Determination merely cites to record evidence containing data on subject import indicators throughout the POI. This offhanded reference to annual data cannot, by itself, constitute an acknowledgment of Plaintiffs' arguments, much less a reasoned explanation for discounting them, as the statute requires. Furthermore, whatever discretion the Commission may have to reject deliberately the conclusions found in the agency's Staff Report, *it may not through its silence simply ignore a Staff Report analysis that contradicts the Commission's own conclusions where an interested party has specifically brought the possibly conflicting evidence to the agency's attention* * * *.

Id. at 1359 (emphasis added).

> *While the ITC need not address every argument and piece of evidence, it must address significant arguments and evidence which seriously undermines its reasoning and conclusions.* When considered individually, every discrepancy discussed here might not rise to the level of requiring reconsideration of the overall disposition, but taken as a whole, the court finds that the ITC decision is not substantially supported and explained.

Id. at 1373 (emphasis added)(footnotes omitted).

As in *ALTX,* the evidence here is not peripheral or ancillary to the Commission's determination. Rather, it has direct and material bearing on the proper resolution of the various issues presented to the Commission, and it calls the accuracy and legitimacy of the Commission's findings and conclusions squarely into question. As a result, unsupported assertions that this evidence was addressed and considered without greater discussion in the Review Determination is unsatisfactory and the Commission cannot rely on the presumption set forth in *Dastech* to avoid its obligations. While a foolish consistency may be the hobgoblin of little minds, every party before an agency of the United States has a right to expect a fair and logical determination containing as much analysis as is necessary to adequately demonstrate the basis for its conclusions.

B

THE COMMISSION'S CONCLUSIONS REGARDING THE OVERLAP OF COMPETITION BETWEEN THE IMPORTS OF THE CUMULATED NATIONS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

In addition to satisfying the no discernable impact standard, the Commission must also determine that "a reasonable overlap of competition" exists between imports from different countries and with the domestic like products. *Wieland Werke, AG v. United States,* 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989). The Commission states that it generally considers four factors to determine whether competition overlap is likely: (1) the degree of fungibility between the imports from different countries and between imports and the domestic like product; (2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product; (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and (4) whether the imports are simultaneously present in the market. *See* Review Determination at 23 (citing *Wieland Werke,* 13 CIT at 563).

The Commission correctly points out that it is "not required to exhaustively explain how each of the factors that it considered led to its conclusion that the subject imports would likely compete under similar conditions of competition." Defendant's Opposition at 28 (citing *Wheatland Tube Co. v. United States,* 161 F.3d 1365, 1369–70 (Fed. Cir. 1988) ("An explicit explanation is not necessary, however, where the agency's decisional path is reasonably discernable.")). Indeed, the Plaintiffs do not take issue with this general proposition, but instead attack the factual basis of the Commission's findings regarding the above factors. The court concludes that the thread of the Commission's analysis is discernable and the Plaintiffs do no more than engage in a reweighing of the evidence.

1

THE COMMISSION'S CONCLUSIONS AND REASONING REGARDING FUNGIBILITY OF THE SUBJECT IMPORTS IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The Commission held that the subject imports are entirely interchangeable with the domestic like product. The Commission "found that subject imports and the domestic product are essentially fungible. In the original investigations, domestic producers and importers reported that the domestic and imported products were broadly interchangeable and purchasers frequently reported that domestic corrosion-steel and imports from each subject country were comparable, including subject imports from France and Germany." Defendant's Opposition at 32 (footnotes omitted). Indeed, the Commission relying on clear statements and tables makes the basis for its conclusion highly discernable in the Review Determination:

> In these reviews, the record indicates that domestically produced and imported corrosion-resistant steel are essentially fungible

> products. Both share the same essential chemical and physical properties. U.S. mills producing and selling corrosion-resistant steel reported that domestically produced and imported products are used interchangeably. Additionally, a majority of importers also reported that domestically produced and imported corrosion-resistant steel are broadly interchangeable.

Review Determination at 72 (citing Staff Report at CORROSION-I–16–18 and CORROSION-II–18–19).[9] Hence, the court concludes that the Commission's fungibility findings are substantiated.

2

THE COMMISSION'S CONCLUSIONS REGARDING CHANNELS OF DISTRIBUTION FOR THE SUBJECT IMPORTS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

The Commission found that both domestic product and subject imports "moved in similar channels of distribution." *Id.* at 33. According to the Commission, the record evidence demonstrates that the "majority of both the domestic like product and imported product is sold to distributors, service centers/converters, and manufacturers/end users and that both are used in the automotive, industrial and construction industries." Defendant's Opposition at 33 (footnotes omitted). This discussion is also clear and the evidence upon which it is based is readily ascertainable:

> The vast majority of U.S. produced and imported corrosion-resistant steel was sold to distributors, service centers/converters, and manufacturers/end users. Both the domestic and imported product are used in the automotive, industrial and construction industries, with about 40 percent of corrosion-resistant steel being used by the automotive industry.

Review Determination at 73 (citing Staff Report at CR at CORROSION-II–1).[10]

The Commission's reasoning and supporting evidence are readily discernable. Hence, the court concludes that the Commission's channels of distribution findings are substantiated.

3

THE COMMISSION'S CONCLUSIONS REGARDING SIMULTANEOUS MARKET PRESENCE AND GEOGRAPHICAL OVERLAP FOR THE SUBJECT IMPORTS IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The court finds that on the basis of the previous two factors the Commission's conclusion regarding geographical overlap is supported by

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[9] Although the French assert their imports should be differentiated as "niche" products, the original determination found that imports from nearly all the subject countries include some niche products. *Id.* (citing Original Determination at 172–173).

[10] Although the German Producers assert, citing Commissioner Askey's dissent, that German products are channeled, to a greater extent, to automotive end users as opposed to distributors and end users in construction related industries, the Commission sufficiently demonstrates that this fact alone does not isolate German imports from other imports under review. The Commission could have reasonably concluded that based on the "consolidation of purchasing power in the automotive industry, with end users having their own distributors and service centers," Review Determination at 73, 75, that this distinction does not erase the distribution channel overlap between German imports and other imports. *See* Defendant's Opposition at 34.

substantial evidence. The Commission could reasonably conclude that since the domestic and imported products are used in the same sectors, there is most likely a geographical overlap as well. *See* Review Determination at 73. Moreover, it is established that the subject imports have been in the United States simultaneously since the imposition of the orders. *Id*.[11]

C

THE COMMISSION'S CONCLUSIONS REGARDING THE CONDITIONS OF COMPETITION ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

The conditions of competition section focuses on describing the landscape of corrosion-resistant steel consumption and is based primarily on data culled from importer and producer respondents. *See* Review Determination at 74–78. The section details the end uses of corrosion steel, factors that influence purchasing decisions, and the general upswing in demand for such products from 1997–1999.

The Commissions findings in this part of its analysis are not in dispute, and its conclusions are clear. Accordingly, the Commission's determination regarding conditions of competition is supported by substantial evidence.

D

THE COMMISSION'S FINDINGS REGARDING THE "WEAKENED" CONDITION OF THE DOMESTIC INDUSTRY ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

Both Plaintiffs attack the Commission's determination that the domestic industry is in a weakened state. While the French Producers accuse the Commission of having a skewed perspective stemming from a misplaced desire to protect the overall domestic steel industry, the German Producers take issue primarily with the Commission's findings given the observation that the domestic industry's recovery is an "American success story" as an admission that the industry is in fact stronger than ever. However that observation, made by counsel for the domestic industry, must be read in context:

> This is in an American success story, a win for the international trading system, which condemns dumping and seeks to curb subsidies. But the end of the story is not yet written. Our industry is in trouble * * *. They're at risk. Their market capitalization has dropped by 40 percent since the beginning of this year. Bankruptcies have occurred, and still more companies are in jeopardy. The return on investment on corrosion resistant mills is declining sharply and is now unacceptable * * *. This industry is highly vulnerable.

Transcript of Public Hearing of September 13, 2000 ("Tr.") at 45. This is not the portrait of a healthy industry, but rather a plea for the continued protection of that industry. Although the industry may have enjoyed significant benefits from the imposition of the subject antidumping orders, the statement above says only that they are not enough.

[11] In any case, the Plaintiffs do not dispute the Commission's findings with regard to this factor.

The French Producers argue that the Commission's conclusions regarding the state of the domestic industry were erroneously guided by "what it characterized as the need for CRCS to serve as a 'profit center' * * *." French Motion at 18. The French Producers argues that this bias produced a vulnerability conclusion that "flies in the face of the record evidence." *Id.* (footnotes omitted).

In support of their argument, the French Producers offer their own reading of the record evidence, which, according to them, reveals a domestic industry that is benefiting from sharply growing demand. The French cite domestic CRCS industry figures that indicate expanding capacity and profitability. For example, they point out that CRCS demand has surged as a result of CRCS usage in the United States automotive, construction, and appliance industries, stating that "[i]ndependent forecasts show that demand is likely to grow by nearly 6.3% in the North American market in 2001 * * *" *Id.* at 19. The French Producers also claim that "[w]ith demand and capacity utilization rates sharply up, the U.S. industry has been investing heavily in new CRCS production (at an average of $[ ] million for each full year of the POR) * * *. [and] plans to continue its record investments in future CRCS capacity to cope with increasing demand. * * *" *Id.* at 20 (footnotes omitted). The French Producers also cite increases in the profitability of the domestic CRCS industry, stating that "[t]he operating income of the U.S. industry averaged [ ] during the POR, which amounted to an aggregate operating income of $ [ ]" *Id.* at 20–21 (footnotes omitted). Insisting that none of this evidence was disputed, the combination of these figures, according to the French Producers paints a robust portrait of the domestic industry that undermines the Commission's vulnerability determination.

Thus, they surmise the Commission's conclusion was unduly motivated by "misplaced concerns about the health of the steel industry production and sales of material *other* than the 'domestic like product.'" *Id.* (emphasis in original). In short, the French accuse the Commission's vulnerability analysis of incorrectly focusing on the welfare of the overall domestic steel industry as opposed to the CRCS domestic industry. They argue "[b]y doing so, the Commission ignored the very function of a sunset review, which is to assess the prospective impact of *subject* merchandise on the U.S. industry's production and sales *solely* of the 'domestic like product'—not other steel products." *Id.* at 22 (citing 19 U.S.C. § 1675a(2) (1999)) (emphasis in original).

In fact, however, the Commission based its decision on record evidence that sharply contradicts the figures proffered by the French Producers. While the French Producers focus exclusively on the gross trends in the industry (i.e., generally increasing profits and capital expenditures), they fail to deal with the industry's declining operating margins. For example, the Commission makes clear that:

> While net sales volumes and values increased from 1997 through 1999, operating income decreased continuously from 1997 to 1999,

> by a total of $[ ] million. Capacity utilization levels fell from [ ] percent in 1997 to [ ] percent in 1999. Per-short-ton sales values and [Cost of Goods Sold] for the combined domestic producers decreased for the same period but unit sales values decreased more than the decline in total unit costs. Operating profit margins, which are critical to the ability of corrosion-resistant steel firms to remain in operation and to make necessary investments, dropped by almost half, from [ ] percent to [ ] percent. Moreover, comparison of the interim periods of January-March 1999 with January-March 2000 show further decline in a number of key financial indicators, including unit net sales values, operating income, and operating income margin.

See Defendant's Opposition at 40 (citing Staff Report at CORROSION-III–6; Staff Report at CORROSION-III–13; Staff Report at Table CORROSION-III–1; Staff Report at Table CORROSION-III–6; Staff Report at Table CORROSION-III–7). The French Producers do not address this aspect of the domestic industry's condition. As the Commission demonstrates, the continued viability of an industry with rapidly declining profit margins is in question. Moreover, the Commission clarifies the domestic industry's expansion in capacity was merely designed to meet the shift in demand from electro-galvanized CRCS to "hot-dipped" CRCS, as indicated by testimony by the domestic industry. Defendant's Opposition at 42 (citing Tr. at 50). Similarly, the French Producers erroneously premise their analysis on the time frame during which the subject orders were in effect. As the Commission stresses, the French Producers fail to grasp the Commission's statutory duty to "carefully assess *current* trends and competitive conditions" in gauging vulnerability. Defendant's Opposition at 41 (emphasis in original). In contrast, the French Producers juxtapose the domestic industry in 1999, the final year of the period of review, with the domestic industry in1992, the year prior to the subject orders going into effect. In other words, "Plaintiff's arguments show nothing more than the domestic industry's ability to recover when shielded from unfair trade practices." Defendant's Opposition at 41. Indeed, the SAA echoes this proposition and expressly warns against concluding that there is no possibility of continued or recurring injury simply based on improvement following the imposition of an order.[12]

Hence, the court finds that based on substantial evidence before the Commission, it could reasonably conclude that the domestic industry was in a weakened state.

E

THE COMMISSION'S FINDINGS REGARDING VOLUME, PRICE, AND IMPACT OF THE CUMULATED IMPORTS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In addition to challenging the Commission's cumulation decision, the Plaintiffs take issue with the final conclusions of the Commissions' sun-

[12] "The Commission should not determine that there is no likelihood of continuation or recurrence of injury simply because the industry has recovered after the imposition of an order * * * because one would expect that the imposition of an order * * *. would have some beneficial effect on the industry." SAA at 884.

set review. In sunset reviews, the Commission ultimately determines whether revocation of antidumping or countervailing duty orders is likely to lead to a continuation or recurrence of material injury to the domestic industry. *See* 19 U.S.C. § 1675a(a)(1). Under the statute, the Commission analyzes the likely volume, price effect and impact of subject imports if the orders are revoked. *See Id.* Sunset reviews are prospective in nature, requiring the Commission to engage in "a counter-factual analysis: it must decide the likely impact in the reasonably foreseeable future of an important change in the status quo—the revocation or termination of a proceeding and the elimination of its effects on volumes and prices of imports." SAA at 884. The Commission is directed to 1) take into account its previous injury determination; 2) assess whether any improvement in the state of the domestic industry is related to the order or to the suspension agreement under review; and 3) assess whether the industry is vulnerable to material injury if the order is revoked or the suspension agreement is terminated. *See* 19 U.S.C. § 1675(a)(1). Hence, the Commission's analysis is inherently predictive in nature and relies on previous findings.

1

THE COMMISSION'S VOLUME FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In finding that volume would likely be significant in the absence of the orders, the Commission noted that during the original investigations, the volume of the subject imports increased overall and that these imports dropped significantly following the issuance of the orders. Defendant's Opposition at 34. The Commission's conclusion was heavily grounded on its findings regarding excess capacity in the cumulated nations:

> In 1999 estimated corrosion-resistant steel production capacity for the subject imports was [ ] million short tons. Total production capacity in the subject countries was greater than U.S. apparent consumption for 1999 of [ ] million short tons, a total even more significant considering that additional capacity of 5.1 million tons currently used to produce non-subject corrosion-resistant steel (such as microalloy) can also be used to produce the subject merchandise.

Review Determination at 79 (citing Staff Report at CORROSION-IV–5, 6, Supplemental Memorandum INV-X 1999 at Tables CORROSION IV–4, 5, 6, and 7; Supplemental Memorandum INV-X–229 at Tables RES-SUPP 2, 3, 4, 5, and 6). The Commission found that coupled with the "incentive to utilize production capacity due to high fixed productions costs, the Commission found subject producers were likely to commence significant exports to the United States upon revocation of the orders." Defendant's Opposition at 35.

Since the court deems the Commission's findings regarding Plaintiffs' excess capacity to be unsupported by substantial evidence and the Commission's volume findings are similarly unsupported. The Commis-

sion's findings of likely volume in the absence of the subject orders is heavily reliant on the notion that the Plaintiffs have capacity to spare; that conclusion cannot stand alone.

In addition, it is incongruous for the Commission to assert that the Plaintiffs are "export oriented" without sufficiently considering their export relation to the European Union ("EU" or "EC"). The Commission states:

> The European Community was in existence for some time prior to the original investigations, although further steps at integration and expansion have taken place since the original investigations. While these steps could have the potential to reduce to some degree exports of EU countries to the United States compared to the original investigation, we are not convinced that there has been a shift of such a fundamental nature as to make significant exports to the United States unlikely. With respect to adoption of a common currency, we believe that it is too early to judge its likely effects on trade outside the EU.

Review Determination at 39, n.155. However, this appears to be in direct conflict with the Commission's analysis in *Stainless Steel Plate from Sweden,* Inv. No. AA 1921–114 (review), USITC Pub. No. 3204 (July 1999), wherein it concluded that Swedish steel imports would not lead to the recurrence of material injury based, inter alia, on its finding that the producer's "primary marketing focus is, an will continue to remain, the European market." Moreover, in *Pressure Sensitive Tape from Italy,* Inv. No. AA1921–167 (Review), USITC Pub. No. 3157 (February 1999), the Commission observed that the European Union member states "have significantly integrated their economies within the EC 1992 initiative and the recent adoption of a common currency, the euro" in support of its conclusion that the producer under review would constrain its exports to the EU.

Although each sunset review must be based on the particular set of facts before the Commission, the Commission may not disregard previous findings of a general nature that bear directly upon the current review. The Commission correctly asserts that:

> "each injury or investigation is *sui generis*, involving a unique combination and interaction of many economic variables; and consequently, a particular circumstance in a prior investigation cannot be regarded by the Commission as dispositive of the determination in a later investigation."

Defendant's Opposition at 25 (quoting *USEC, Inc. v. United States,* 132 F. Supp.2d 1, 14 (CIT 2001) (quoting *U.S. Steel Group v. United States,* 18 CIT 1190, 1213, 873 F. Supp. 673, 695 (1994)). However, contrary to the Commission's interpretation, the German Producers do not assert that the "Commission is bound to reach the same result that was reached in other investigations, involving other products and other factual circumstances." *Id.* Rather, the quoted observations regarding EU markets are general in nature and do not depend on the specific products at issue.

Although the court is aware that the EU market dynamics for CRCS products may be vastly different from its dynamics in the cited determinations, the Commission's discussion fails to make any such distinctions and it appears to contradict itself. Here, the German Producers have submitted uncontraverted evidence that over [ ] percent of its exports were absorbed by the EU and Germany during the POR. *See* Report by Ekhard Leitner on the "German Cold Rolled and Corrosion Resistant Steel Industries in 2000 and Beyond" at 30–31 (originally attached to German Groups' Prehearing Brief on Cold Rolled Products). As such, the Commission must explain why, in light of its past determinations, the increased market coordination of EU member states that the Commission has acknowledged in the past is not likely to offset potential imports to the United States in this instance.

2

THE COMMISSION'S PRICE EFFECT FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The Commission found that in the event the subject antidumping orders were lifted, the domestic industry would suffer from adverse price effects. In short, the Commission contends that the various producers under review would aggressively price their imports, through underselling, price depression, and price suppression, which the Commission also contends would arrive in heavy volume. *See* Review Determination at 81–83. Most importantly, the Commission, in addition to finding the subject imports to be highly interchangeable with the domestic like product, found that price was a significant factor in the purchasing decisions of domestic CRCS consumers. *Id.*

The Commission stresses its findings of pricing trends made during the Original Investigation and its duty to factor those findings into its predictive analysis of price trends in a sunset review. The Commission points to its Original Review findings that the price of the subject imports declined at a faster rate than domestic like product, in conjunction with increases in volume. In addition, the Commission found that there was significant overselling and under selling of subject imports. *See* Original Determination at 190–91.

Hence with regard to the German Producers, the Commission is justified in relying more heavily upon its previous findings than upon the pricing data submitted by the German Producers covering the POR. It may be true that the German Producers did not resort to aggressive pricing measures during the POR, however, this is not necessarily more probative of future behavior. Since, as discussed, the Commission is tasked with predicting the characteristics of importer behavior in the absence of the subject antidumping orders, it logically based its findings regarding price impact upon its previous determination, where it observed importer pricing behavior in a mirror environment.

Nonetheless, the Commission's price effect findings are unsupported by substantial evidence; they do not logically follow from the Commission's flawed volume analysis. The relationship between the imports'

potential price effect and their volume is obvious. If, as the Plaintiffs argue, the potential import volume is truly limited due to strained capacity, then the attendant price effects cannot be as pronounced as the Commission argues. Accordingly, the Commission cannot justifiably rely on its previous price effect findings alone. Rather, upon remand the Commission must reassess the potential price effects in a manner that takes into account the Commission's revised volume analysis.

3

THE COMMISSION'S CONCLUSIONS REGARDING THE IMPACT OF THE SUBJECT IMPORTS THOUGH NOT INHERENTLY FLAWED CANNOT STAND WITHOUT THE OTHER SUBSIDIARY FINDINGS

The Commission's findings regarding the impact of potential imports from the subject countries were largely predicated upon its assessment of the domestic industry's weakened condition. *See* Review Determination at 83–86. As discussed, the Commission found that the domestic industry, despite the positive impact of the orders is still in a very precarious economic position warranting continued protection. *Id.* As discussed, the court does not find fault in this portion of the Commission's review determination. Therefore, the court concurs with the Commission's impact finding to the extent that it stems from its domestic industry assessment. Given the sensitive nature of the domestic industry's condition, the Commission could reasonably find that significant increases in import volumes coupled with price declines would lead to significant injury. It is similarly reasonable to predict that such trends would "have a direct adverse impact on the industry's profitability as well as its ability to raise capital and make and maintain necessary capital investments." *Id.* at 86.

However, this component of the Commission's analysis cannot stand in the absence of the other subsidiary components of the Commission's analysis. In short, the actual impact the weakened domestic industry may face is obviously connected to the actual volume of the subject imports. Therefore, although the domestic industry is in a weakened state, the likely volume of potential imports has not been sufficiently established. As a result, the potential injury about which the Commission warns is insufficiently supported.

4

THE COMMISSION HAS NOT DEMONSTRATED THAT THE OUTCOME IT PREDICTS IF THE SUBJECT ORDERS ARE LIFTED IS "LIKELY"

The Commission's analysis of production capacity, among other things, may also be premised on an improper construal of the statutory term "likely," which is not expressly defined. The Commission's reliance on the SAA, does not clarify whether the Commission's predicted outcome is merely possible as opposed to probable. The Commission asserts that "[t]he mere existence of contrary evidence or the possibility of 'more than one likely outcome,' does not mean that the Commission's

determination is in error," Defendant's Opposition at 20–21, the Commission cites the SAA:

> The determination called for in these types of reviews is inherently predictive and speculative. There may be more than one likely outcome following revocation or termination. The possibility of other likely outcomes does not mean that a determination that revocation or termination is likely to lead to continuation or recurrence of dumping or countervailable subsidies, or injury, is erroneous, as long as the determination of likelihood of continuation or recurrence is reasonable in light of the facts of the case. In such situations, the order or suspended investigation will be continued.

SAA at 883.

The Federal Circuit has previously held that "undefined terms in a statute are deemed to have their ordinarily understood meaning." *Koyo Seiko,* 36 F.3d at 1571 n.9. Resort to dictionary sources Webster's Dictionary and Black's Law Dictionary demonstrates that "likely" is tantamount to "probable," not merely "possible." *See* Webster's Ninth New Collegiate Dictionary, at 692 (1990); Black's Law Dictionary (6th ed., 13th reprint) at 834 (1998). Under the standard articulated in *Chevron,* the court concludes that the meaning of the term is clear and terminates its inquiry there.[13]

Certainly, as the SAA says, multiple "likely" outcomes are *possible* under the statute. The Commission, however, must demonstrate that its interpretation of the evidence is *one* of them. The Commission, relying solely on the above passage in support of its meager discussion of the Plaintiffs' evidence, does not demonstrate how its understanding of the impact and scope of potential future imports are more than one *possibility,* as opposed to one *likelihood,* among many. The court remands the matter to the Commission to determine, in the manner required by law, whether the recurrence or continuation of injury is likely, based on a more complete explanation of its findings.

V

CONCLUSION

The Review Determination is remanded to the Commission. To withstand judicial scrutiny, the Commission must sufficiently articulate the basis of its conclusions. In particular, the Commission must address the Plaintiffs' evidence regarding capacity utilization and the impact of the EU. As the Supreme Court says, the basis for the Commission's determination cannot be hidden, an administrative agency must disclose the basis of its order, clearly indicating that it has not overstepped the bounds of its discretion. *Burlington Truck Lines v. United States,* 371

[13] The court came to the same conclusion regarding the same statutory term in *Usinor Industeel, et al. v. United States, et al.,* No. 01–0006, Slip-Op 02–39 (CIT 2002).

U.S. 156, 167–68, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962).[14] The Commission must discuss the key issues in its determination and is not free to simply leave the parties or the court to guess whether these issues were properly factored into the Commission's analysis. *See, e.g., SEC v. Chenery Corp.,* 318 U.S. 80, 94, 63 S. Ct. 454, 87 L. Ed. 626 (1943). In addition, the Commission must further discuss its obligations under the Antidumping Agreement vis-a-vis 19 U.S.C. § 1675a(a)(7) and must fully explain whether its position can be reconciled with, or unavoidably contradicts, the Antidumping Agreement. Finally, to the extent the Commission determines that its decision to cumulate and the findings on which it is based is no longer valid, it must revise its subsidiary sunset review findings regarding volume, price, and impact of the Plaintiffs' potential imports. Its failure to do so here has resulted in a Review Determination that is unsupported by substantial evidence.

[PUBLIC VERSION]

(Slip Op. 02–81)

CHEFLINE CORP, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND STAINLESS STEEL COOKWARE COMMITTEE, DEFENDANT-INTERVENOR

Court No. 00–05–00212

[Agency determination affirmed.]

(Decided August 5, 2002)

Hogan & Hartson LLP (Lynn G. Kamarck, Craig A. Lewis), for Plaintiffs.

Lyn M. Schlitt, General Counsel; *Marc A. Bernstein,* Acting Assistant General Counsel; *Laurent M. de Winter,* Attorney, Office of General Counsel, U.S. International Trade Commission, for Defendant.

King & Spalding (Joseph W. Dorn, Stephen A. Jones, Christine E. Savage), for Defendant-Intervenor.

OPINION

POGUE, *Judge:* On September 26, 2001, this Court remanded certain aspects of the United States International Trade Commission's ("Commission") final determination in *Porcelain-on-Steel Cooking Ware from China, Mexico, and Taiwan, and Top-of-the-Stove Stainless Steel Cooking Ware from Korea and Taiwan,* Inv. Nos. 701–TA–267 & 268 (Review) and 731–TA–297–299, 304 & 305 (Review), USITC Pub. 3286, (March

[14] This is particularly true, where, the agency is engaged in activities with broad potential impact. Here, the questions at issue are not relevant only to the parties. Rather, in the larger sense, they relate to the willingness of the United States, through its agencies, to fulfill its freely assumed international obligations. It is the essence of *Charming Betsy* that such duties are not lightly disregarded. The reputation of this nation as one based on rule of law, not transient individual interest, requires a full and fair analysis within the bounds of the law.

2000) ("Review Determination"). *See Chefline v. United States,* 25 CIT ____, 170 F. Supp. 2d 1320 (2001)("Chefline I").[1]

The remand order directed the Commission to reconsider its decision to cumulate top-of-the-stove stainless steel cookware from Korea and Taiwan. In the event that the Commission should decide not to cumulate, the Commission was instructed to reconsider whether revocation of the orders on Korean top-of-the-stove cookware would likely lead to continuation or recurrence of material injury to the domestic industry, within a reasonably foreseeable time.

After reopening the record, the Commission determined that there was not enough evidence to support cumulating subject imports from Korea and Taiwan, and affirmed its determination that subject imports from Korea would, upon revocation of the antidumping and countervailing duty orders, likely result in injury to the United States market within a reasonably foreseeable time. Plaintiffs Chefline Corporation, Inc., Daelim Trading Co., Ltd., Dong Won Metal Co., Ltd., Hai Dong Stainless Steel Co., Ltd., Kyung Dong Industrial Do., Ltd., Namyan Kitchenflower Co., Ltd., O'bok Stainless Steel Co., Ltd., and Sam Yeung Industrial Co., Ltd. (collectively "Plaintiffs" or "Chefline") contest the Commission's affirmative determination of antidumping and countervailing duty orders on top-of-the-stove stainless steel cookware from Korea. After review of the issues raised by the Plaintiff, we uphold the Commissions' determination.

STANDARD OF REVIEW

The Commission's determination will be upheld unless it is unsupported by substantial evidence in the administrative record or is otherwise not in accordance with the law. *See* 19 U.S.C. § 1516a(b)(1)(B)(I)(1994).

Substantial evidence is "more than a mere scintilla," *Consol. Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938), but "something less than the weight of the evidence." *Consolo v. Fed. Mar. Comm'n,* 383 U.S. 607, 620 (1966). The Court's function is not to re-weigh the evidence but rather to ascertain whether there exists "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co.,* 305 U.S. at 229.

ANALYSIS

I. Cumulation

Under 19 U.S.C. § 1675a(a)(7), either a finding that imports will have no discernible adverse impact on the domestic industry or a finding that there is no reasonable overlap of competition between imports from different countries is sufficient to preclude cumulation. *See also Neenah Foundry Co. v. United States,* ____ CIT ____, ____, 155 F. Supp. 2d 766, 771 (2001). In our original review of the Commission's sunset determination we found that there was not substantial evidence supporting

[1] Familiarity with the court's earlier opinion is presumed.

either a finding of reasonable overlap of competition between Korean and Taiwanese imports or a finding that Taiwanese imports would have a discernible adverse impact.

Upon remand, the Commission sought to supplement the record by sending questionnaires to over forty companies in Taiwan, in order to gather information on the nature of Taiwanese subject imports. Remand Determ. at 8. Although none of the Taiwanese producers provided data in response to the questionnaires, the Commission was able to collect information from telephone conversations with Taiwanese producers and importers of Taiwanese top-of-the-stove stainless steel cooking ware. *Id.*

Although one Taiwanese manufacturer stated that it produced high-end merchandise, the Commission was unable to ascertain whether the Taiwanese high-end merchandise was equivalent to high-end merchandise sold in the U.S. market. In another telephone conversation, an importer of subject merchandise from Korea and Taiwan indicated that "although Taiwan had the capability of producing higher-end stainless steel cooking ware, Taiwan producers were not as good at producing it." *Id.* The Commission also found that the average unit value of cooking ware from Taiwan is substantially less than that for cooking ware from Korea, suggesting that recent imports from Taiwan were probably not high-end cooking ware. Based on this new information, the Commission concluded that subject imports from Taiwan were of a lower quality than the Korean product. *See* Remand Determ. at 6. Therefore, the Commission found that there was no reasonable overlap of competition between subject imports from Korea and Taiwan and declined to cumulate subject imports from the two countries. *See Id.* at 5 (holding that because the finding of no reasonable overlap is "dispositive of the cumulation issue, we do not address the issue of no discernible adverse impact"). On the limited record here, the evidence of Taiwanese production is sufficient for a reasonable person to conclude that the Taiwanese producers do not sell high-end products. Accordingly, we find the Commissions decision not to cumulate imports from Taiwan and Korea to be supported by substantial evidence.

II. Antidumping and Countervailing Duty Orders on Top-of-the-Stove Stainless Steel Cooking Ware from Korea

Because the Commission determined there was not enough evidence to support cumulating subject imports from Korea and Taiwan, it was required to reexamine the determination that revocation of the antidumping and countervailing duty orders on Korean subject imports would be likely to lead to a continuation or recurrence of material injury within a reasonably foreseeable time. The Commission found that even without cumulating subject imports, the orders regarding Korean subject imports should not be revoked.

A. Rebuttal Comments

As a preliminary matter, Chefline appeals the Commission's rejection of Chefline's rebuttal comments and asks the Court to take judicial notice of these comments.

1. Background

In the remand proceeding, the Commission reopened the record "for the limited purpose of (1) seeking basic information regarding subject product from Taiwan and (2) seeking to cure the possible inclusion of non-subject products in official import data." Letter from USITC to Hogan & Hartson, LLP (Dec. 10, 2001), Pl.'s App. 1, at 1. The Commission asked all interested parties to submit two sets of comments. The first set of comments was limited to information on the likelihood of overlap of competition between Taiwanese and Korean imports with the domestic like product, whether using a value-based instead of a quantity-based statistic would be a more accurate measure of subject import volume, and "the extent to which non-subject merchandise from Korea and Taiwan is included in United States [HTSUS] 7323.93.00.30 (i.e. the ratio of subject to non-subject merchandise)." *Id.* at 2. These comments, due by December 28, 2001, could include new factual information.[2]

The parties were also informed that they could submit a second set of comments "responding to other parties' first sets of comments or to new information released to the parties by the Commission too late to be included in the first set of comments." *Id.* The Commission made clear that these comments, due at the close of business on January 4, 2001, could *not* include any new factual information. *Id.*[3]

As part of their first set of comments, Defendant-Intervenor Stainless Steel Cookware Committee provided a sworn affidavit by the Executive Vice President of the Cookware Manufacturers Association ("CMA"), Hugh Rushing. *See* Comments on Remand by the Stainless Steel Cookware Committee at Ex. 1 ("Rushing Affidavit")(Dec. 20, 2001), Def.-Int.'s Conf. App. at 16 ("Committee's Remand Comments").[4] The Rushing Affidavit, based on CMA data, estimated that 97 percent of Korean 7323.93.0030, HTSUS, imports were top-of-the-stove stainless steel cookware. On January 7, several days after the end of the comment period, Chefline submitted rebuttal comments on the Rushing Affidavit to the Commission.

The Commission rejected Chefline's comments for being untimely and containing new information, in violation of its instructions. Chefline argues that nothing in the Commission's statute or regulations addresses this type of situation and that 19 U.S.C. § 1677m(g), contrary to the Commission's suggestion, does not apply to new information sub-

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[2] Originally, the scheduled deadline was December 10, 2001. The Commission, however, notified parties that this date was extended to December 28, 2001. *See* Correspondence from George Deyman to Lynn Kamarck, Def.-Int. App. at Ex. 15 (Dec. 11, 2001).

[3] The deadline for the second set of comments was also extended from January 2, 2002 to January 4, 2002. *See* Correspondence from George Deyman to Lynn Kamarck, Def.-Int. App. at Ex. 15 (Dec. 11, 2001).

[4] CMA is a voluntary trade association representing United States and Canadian manufacturers and importers of cookware. *See* Rushing Aff. ¶ 1.

mitted by parties to the case; rather, Chefline argues that 19 U.S.C. § 1677m(g) is only applicable for new information obtained by the Commission. Pl.'s Mem. Supp. Mot. J. Agency R. at 18 ("Chefline Br."). Chefline also claims that the "Commission was clearly wrong to reject this data," because "[t]he Rushing Affidavit clearly provided information beyond the parameters of the instructions to the parties regarding written submissions." *Id.* at 17. Lastly, Chefline contends that the information contained in the rebuttal comments is public information of the type for which judicial notice is appropriate.

2. Commission's Rejection of Chefline's Comments

A) Commission's Statutory Guidelines

The Commission gathers new information pursuant to 19 U.S.C. § 1677m(g). Section 1677m(g) provides that:

> Information that is submitted on a timely basis to the administering authority or the Commission during the course of a proceeding under this subtitle shall be subject to comment by other parties to the proceeding within such reasonable time as the administering authority or the Commission shall provide. The administering authority and the Commission, before making a final determination under section 1671d, 1673d, 1675, or 1675b of this title shall cease collecting information and shall provide the parties with a final opportunity to comment on the information obtained by the administering authority or the Commission (as the case may be) upon which the parties have not previously had an opportunity to comment. Comments containing new factual information shall be disregarded.

19 U.S.C. § 1677m(g).[5] Although Chefline claims that section 1677m(g) applies only to new information obtained by the Commission, rather than new information submitted by parties, *see* Chefline Br. at 18, the statute also includes information "that is *submitted* on a timely basis to the administering authority or the Commission." 19 U.S.C. § 1677m(g)(emphasis supplied). Furthermore, the Commission is required to close the record "prior to the time the agency's determination is made, and * * * the parties to the proceeding [are to] be permitted a final opportunity to comment on all information obtained by the agency upon which the parties have not yet had an opportunity to comment." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103–826 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040 at 871 ("SAA").[6] Both 1677m(g) and the SAA expressly include information submitted to the agency, such as that at issue here.

Chefline further argues that the Commission's regulations do not even address remand proceedings, particularly when such proceedings allow for new information to be submitted for the record. Chefline Br. at

[5] It is within the agency's discretion to set a reasonable time frame for gathering information. 19 U.S.C. § 1677m(g). Any information given to the agency by the date it sets is considered timely. *Id.*

[6] The SAA is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

18. Section 1677m(g), however, refers to final determinations made under 19 U.S.C. § 1675, among others. The determination at issue is a sunset review remand determination. Sunset reviews are made pursuant to section 1675(c). Although the Commission's procedural regulations do not contain provisions specifically directed to remand proceedings, the reference to section 1675 is sufficient to permit application of the regulation to remand proceedings conducted within the context of a sunset review proceeding.[7]

B) Rushing Affidavit

Chefline also argues that the Rushing Affidavit does not address the limited issues upon which the Commission allowed new factual submissions. According to the Commission's letter new information could be submitted to help it determine "the extent to which non-subject merchandise from Korea and Taiwan is included in United States [HTSUS] 7323.93.00.30 (i.e. the ratio of subject to non-subject merchandise)." Letter from USITC to Hogan & Hartson, LLP at 2 (Dec. 10, 2000), Pl.'s App. 1 at 1. The Rushing Affidavit estimated the aggregate United States market for top-of-the-stove stainless steel cookware and stainless steel bakeware. It then extrapolated from this information to determine the percentage of imports from Korea and Taiwan under HTSUS item number 7323.93.00.30.

Thus, the Affidavit attempts to determine the extent to which subject and non-subject merchandise from Korea and Taiwan is included in 7323.93.00.30, HTSUS, concluding that such items constitute 97 percent and 3 percent, respectively, of imports under the HTSUS number. Accordingly, without determining whether the Rushing Affidavit supports the Commission's finding, as will be discussed *infra* page 16–17, we find that the Affidavit addresses the precise issue contemplated by the Commission's directive.

3. Judicial Notice

Chefline also asks the Court to take judicial notice of the information proffered to rebut the Rushing Affidavit because it is public information. *See* Chefline Br. at 18. The court takes judicial notice pursuant to Fed. R. Evid. 201(c). Although the court is mindful of the deference owed to the Commission in the administration of antidumping laws, judicial notice is proper when "credible evidence from outside the record indicates a significant error" in the agency's determination. *Union Camp Corp. v. United States,* 23 CIT 264, 269, 53 F. Supp. 2d 1310, 1324 (1999). The result of judicial notice "is effectively no different from a reversal for reconsideration because a fact relied on is unsupported by the evidence." *Borlem S.A.-Empreedimentos Industriais v. United States,* 913 F.2d 933, 940 (Fed. Cir. 1990).

Here, Chefline submitted scope determinations and customs rulings indicating that HTSUS 732.93.0030 includes numerous non-subject

[7] Chefline also did not object when the Commission provided a schedule for submissions and delineated the type of submissions appropriate for each date.

product categories other than ovenware and several newspaper articles discussing the composition of the cookware and bakeware industry. *See* Korean Producers' Comments (Jan. 4, 2002), Attach. 1, 2. Although the scope descriptions and customs rulings discuss non-subject articles contained in HTSUS 7323.93.00.30 besides kitchenware and bakeware, they do not contradict the information contained in the Rushing Affidavit. It is apparent from the calculations in the affidavit that the Rushing Affidavit uses the term "bakeware" as a catch-all category. *See* Rushing Aff. ¶ 4.[8] Such a catch-all category would include the various articles Chefline presents in the submitted scope reviews.

Also, according to the articles submitted with Chefline's rebuttal comments, the bakeware industry grew between 5 and 10 percent in 1999. As a result, Chefline argues that bakeware constitutes a larger percentage of 7323.93.00.30, HTSUS, than Rushing's estimate. These articles, however, also present data that the stainless steel cookware industry grew by as much as 15 percent. *See, e.g., New NPD Hometrak Data Reveals Kitchenware Gains,* HFN Weekly (Apr. 3, 2000), Korean Producers' Comments (Jan. 4, 2002), Attach. 2. No comparison is contained within the articles between stainless steel bakeware and top-of-the-stove cookware; rather, the articles focus on one segment of the industry. It is plausible that even though the bakeware industry grew, the relative percentages of bakeware and top-of-the-stove stainless steel cookware remain the same. Therefore, the agency could reasonably conclude that top-of-the-stove stainless steel cookware still constitutes 97 percent of merchandise imported under 7323.93.0030, HTSUS.

Although the articles offered by Chefline demonstrate that there is another way to interpret the Rushing Affidavit, they do not contradict the evidence already on the record. As a result, it is not proper for this Court to take judicial notice of Chefline's rebuttal comments.

4. Conclusion Regarding Chefline's Rebuttal Comments

There is nothing in the record to suggest that Chefline did not have every opportunity to file new factual information, pursuant to the Commission's timeline.[9] Here, Chefline failed to present new information during the period assigned by the Commission. Moreover, Chefline did not ask for an extension of the Commission's schedule in order to gather information on the Rushing Affidavit. Finally, Chefline did not offer any cause or necessity for the untimeliness of its submission. The Commission's decision to reject Chefline's untimely submissions is therefore in accordance with law.

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[8] Rushing stated that:

> [t]he CMA estimated that the total [annual] value[s] of shipments of stainless steel bakeware (including ovenware) in the U.S. market in 1997, 1998, and 1999, were [ ], respectively. In contrast, the CMA's estimates of the total shipments (including imports) of top-of-the-stove stainless steel cookware during those years were [ ], respectively. Thus, based on the aggregated market for top-of-the-stove stainless steel cookware and stainless steel bakeware, stainless steel bakeware accounted for only 2.4 to 2.9 percent of the total market in 1997–1999.

Rushing Aff. ¶ 4.

[9] According to Defendant-Intervenor Stainless Steel Cookware, the Rushing Affidavit was actually submitted on December 20, 2001, eight days before the closing of the record. Therefore, Chefline still had time after the Rushing Affidavit was submitted to give the Commission rebuttal comments containing new information.

B. Section 1675a(a)(1)

Pursuant to section 1675a(a)(1), the Commission analyzes the likely volume, price effects, and impact of subject imports if the orders are revoked. Chefline challenges only the Commission's affirmative determinations with respect to likely volume and price effects. Chefline also claims that the data used by the Commission in its analysis of the likely volume of imports from Korea overstates the amount of Korean subject imports.

1. Likely Volume

A) Data Issues

The imports at issue here are entered into the U.S. under 7323.93.0030, HTSUS.[10] This provision is a basket provision, including not only top-of-the-stove stainless steel cookware but products such as stainless steel bakeware and ovenware.[11] In the original sunset review, the Commission based its affirmative determination calculation on the quantity of subject imports. The Commission subtracted the volume of imports of cookware reported by responding firms from the total volume of imports under subheading 7323.93.0030, HTSUS, to arrive at the volume of subject imports from non-responding firms. This methodology, however, did not adjust for non-subject articles contained in the HTSUS heading and therefore overstated imports from non-responding producers. In Chefline I, this Court held that although it may be reasonable to rely on official import statistics given the lack of other data, the Commission either had to adjust the data for non-subject articles or explain the reason for its change in methodology.

The Commission then reopened the record in order to correctly adjust for the amount of non-subject articles accounted for in the official import statistics for 7323.93.0030, HTSUS. Defendant-Intervenor Stainless Steel Cookware submitted the Rushing Affidavit, based on information compiled by CMA. *See* Rushing Aff. ¶ 1. The CMA compiles statistics on the size of the U.S. market for various goods, such as top-of-the-stove cookware, bakeware (including ovenware), and kitchenware. *Id.* at ¶ 3. As noted above, according to the CMA's information, stainless steel bakeware, used as a catch-all category for all non top-of-the-stove stainless steel cookware, accounted for only 2.4 to 2.9 percent of the to-

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[10] In the original investigation the goods were entered under 653.94, TSUS, also a basket provision. The Commission was able to adjust the total volume of imports reported under the TSUS number to account for the volume and quantity of non-subject merchandise classified under the subheading. *Top-of-the-stove Stainless Steel Cookware from Korea and Taiwan,* Inv. 701–TA–267–268 (Final) and 731–TA–304–305 (Final), USITC Pub. No. 1936 (Jan. 1987) at A–34 & n.1, A–35 & n.1 ("Original Determ."). Since the time of the original investigation, the U.S. adopted the HTSUS. Also, the Commission was unable to gather the same type of information available in the original investigation that allowed the Commission to account for non-subject imports. Therefore, in the present investigation the Commission was unable to adjust for non-subject imports in the same manner as it had in the past.

[11] Subheading 7323.93.0030, HTSUS, in relevant part, provides:

7323	Table, kitchen or other household articles and parts thereof, of iron or steel; iron or steel wool; pot scourers and scouring or polishing pads, gloves and the like, of iron or steel:
* * * * * * *	
7323.93.00	Other: Of stainless steel
* * * * * * *	
7323.93.0030	Other: Cooking ware

tal U.S. market for stainless steel cookware and bakeware for the years 1997 through 1999. *Id.* at ¶ 4. Rushing argued that

> [b]ased on the percentage of the aggregate market for top-of-the-stove stainless steel cookware and stainless steel bakeware accounted for by stainless steel bakeware, which is less than 3 percent * * * [one could] estimate that, during 1997–1999, over 97 percent of imports from Korea and Taiwan under HTSUS item number 7323.93.00.30 were top-of-the-stove stainless steel cookware.

Id. at ¶ 6.

Chefline contends that the Rushing Affidavit does not address the key remand issue—"the extent to which non-subject merchandise from Korea and Taiwan is included in the [HTSUS 7323.93.00]." Chefline's Br. at 12. Rushing does, however, address this issue by estimating the percentage of subject merchandise included in 7323.93.00.30, HTSUS, based on data assembled from the U.S. market. Although this information does address the key issue on remand, we agree with Chefline that Rushing makes several unsupported "assumptions." Rushing does not explain why it is reasonable to assume that the composition of Korean imports reflects the composition of the U.S. market as a whole. Accordingly, the affidavit alone, without additional support, would not support the Commissions' affirmative antidumping and countervailing duty determination. *See Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962)(The agency must articulate a satisfactory explanation for its actions including a "rational connection between the facts found and the choice made.").

The Commission, however, recognized the limited application of the CMA data and Rushing Affidavit. *See* Remand Determ. at 12 n.33. As a result, the Commission did not rely solely on the Rushing Affidavit when deciding to adjust the official import statistics by three percent. The Commission also looked at data from the Korean Metal Ware Industry Association ("KMWIA") to determine if it supported Rushing's premise. *Id.* ("We recognize that the CMA data measures the entire U.S. market and not specifically imports from Korea. However, we believe this information is the most probative information available on the record, particularly given that the information provided by the Korean producers themselves corroborates it.").

KMWIA maintains statistics on the value and quantity of Korean stainless steel cookware shipments to the U.S. It reported the value of Korean shipments of subject merchandise in 1997 as [ ], and in 1998 as [ ]. *See* Korean Producers' Resp. to Notice of Institution of Sunset Reviews, C.R. 4 at 25 (March 23, 1999). The Commission then compared the Korean respondents' data to official import statistics that indicated that in the same years total imports from Korea under HTSUS 7323.93.00.30 were [ ] and [ ], respectively. Based on this information, the Commission concluded that between 94.4 and 98.8 percent of imports reported under 7323.93.00.30, HTSUS, are subject imports. This calculation supports Rushing's estimate. As a result, the Commis-

sion decision to use the official import data as adjusted for non-subject imports is supported by substantial evidence.

B) All Relevant Economic Factors

When evaluating the likely volume of imports of the subject merchandise, the Commission is directed to consider "all relevant economic factors." 19 U.S.C. § 1675a(a)(2). These economic factors include, but are not limited to,

> A) any likely increase in production capacity or existing unused production capacity in the exporting country,
> B) existing inventories of the subject merchandise, or likely increases in inventories,
> C) the existence of barriers to the importation of such merchandise into countries other than the United States, and
> D) the potential for product-shifting if the production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.

Id. According to Chefline, the Commission erred when it found that an increase in imports from Korea would result in an increase in sales of Korean product in the direct sales channel[12] of distribution. Chefline also contends that the Commission's determination that the volume of subject merchandise from Korea would increase was based on miscalculation and speculation.

1. Channels of Distribution

One of the economic factors the Commission took into consideration was the different channels of distribution for top-of-the-stove stainless steel cookware. Two markets exist for the sale of top-of-the-stove stainless steel cookware: direct sales and retail.[13] Presently, the majority of sales of subject imports occur in the retail market. Domestic merchandise, however, has generally been sold in the direct sales market.[14] The Commission held, however, that upon revocation of the orders that it was likely Korean producers of subject merchandise would increase their participation in both the retail and direct sales markets.[15] The Commission also found that an increase in retail sales of subject imports

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[12] The direct sales market includes companies that sell directly to the end-consumer, i.e. the "demonstration" or "door-to-door" market. *See* Committee's Prehearing Br. at Ex. 13, Aff. Keith L. Peterson ¶ 3; *see also* Staff Report at I–16 n.10. The direct sales market for the cookware industry is "predominantly a market for premium-quality stainless steel cookware," Def.-Int. Br. at 43; *see also* Remand Determin. at 16; Hrg. Tr., P.R. 153 at 34 (Mr. Reigle), the quality of which is at issue here.

[13] Retailers include "off-price retailers, mail order sellers, mass retailers, department stores, and gourmet stores." *Porcelain-on-Steel Cooking Ware from China, Mexico, and Taiwan, and Top-of-the-Stove Stainless Steel Cooking Ware from Korea and Taiwan, Staff Report to the Commission,* C.R. 33 at II–3(Feb. 29, 2000)("Staff Report").

[14] The retail market, however, "represents a growing share of sales by U.S. producers." Remand Determ. at 17 n.53 (citing Staff Report at Table III-A–4). U.S. producers now sell 31.1 percent of their total shipments to retail outlets in comparison to 16.4 percent in 1997. Therefore, it is reasonable for the Commission to conclude that the volume of Korean imports in the retail sector will have a greater affect on the domestic industry than in past years.

[15] In general, the Commission is not required to conduct a segmented market analysis. *See Nippon Steel Corp. v. United States,* 182 F. Supp. 2d 1330, 1337 n.12 (2001)("There is no statutory requirement that the Commission conduct a 'market segmentation' analysis in any particular case."); *Copperweld Corp. v. United States,* 12 CIT 148, 162, 682 F. Supp. 552, 566 (1988). Section 1677(4)(A)defines the relevant industry as the "domestic producers as a whole of a like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of that product."

would negatively impact direct sales of domestic top-of-the-stove-stainless steel cookware.

The Commission based its finding that subject merchandise was likely to increase in both the retail and direct sales market on Korea's everchanging participation in the U.S. stainless steel market. During the original period of investigation, Korean respondents sold primarily low- and mid-range cookware. *See* Remand Determ. at 17. By 1997, Korean producers' presence in the lowrange market decreased because of the influx of low-range imports from China, Indonesia, and Taiwan, amongst others. *See* Remand Determ. at 17. In response, Korean producers focused on the mid- and high-range market. *Id.* at 17. The domestic industry was also increasingly focused on the high-range market. *Id.* This record indicates that the composition of Korean imports shifted over time. The Commission's affirmative determination was based on the conclusion that this trend was likely to continue.

Moreover, the Commission found that Korean producers have already penetrated the direct sales market. Korean producers calculated their participation in the direct sales market as [ ] percent. The Korean producers estimated percentage of subject imports in the direct sales channel, however, does not reflect the Korean producers' share of total sales in the direct sales market. *See* Def.-Int. Br. at 48. Rather, it represents merely the value of subject imports sold in the direct sales channel compared to total sales of subject imports. The significance of this number is, therefore, limited. Furthermore, Korean producers concede that there is a possibility that merchandise sold to wholesalers or distributors may have been resold to direct sales companies and not accounted for in the [ ] percent calculation, Korean Producers' Posthearing Br., C.R. 20, at Ex. 1, 35–36, further limiting the significance of Korean producers' calculation.

In determining the likely volume of top-of-the-stove stainless steel cookware the Commission also took into account the composition of Korean producers' U.S. sales offices. Several employees in the U.S. sales offices of Korean respondents were previously affiliated with U.S. stainless steel cookware producers as either sales representatives or distributors thereby eliminating some of the barriers to entering the direct sales market. Hrg. Tr., P.R. 153 at 37. This, coupled with Korean producers' interest in increasing exports to the U.S., further supports the Commission's conclusion that subject imports are likely to increase in the direct sales sector. *See* Remand Determ. at 16 n.52; (citing Memorandum from [ ] to U.S. producer Regal Ware Inc., Committee Prehearing Br., Ex. 18 at 1 (Jan. 22, 1999)(seeking assistance in removing the antidumping duty orders because they have been "insurmountable stumbling blocks for exporting stainless steel cooking ware from Korea to the States.")).

Even though Korean respondents indicate that subject imports only account for a small percentage of the direct sales market, the Commission considers not only the present portion of the market but the likeli-

hood of increased volumes. The statute and legislative history are clear: the Commission is not required to find that subject imports currently compete in the U.S. market. *See* SAA at 884 ("The likelihood of continuation or recurrence of material injury standard is prospective in nature, and, thus, a separate determination regarding current material injury is not necessary."). The Commission instead uses the "current state of the market and the behavior of subject imports over the life of the orders to predict what is likely to occur upon revocation of the orders." Def.-Int. Br. at 50. According to the SAA, "under the likelihood standard, the Commission will engage in a counter-factual analysis: it must decide the likely impact in the reasonable foreseeable future of an important change in the status quo." SAA at 883–84. The Commission conducted such an analysis—it found, based on the previous behavior of Korean producers, that the subject imports would likely increase in the direct sales channel and thereby further harm domestic producers.

2. Other Relevant Economic Factors

The Commission's finding that subject imports in the direct sales channel are likely to increase upon revocation of the orders is just one of the many findings relied upon by the Commission when it determined that subject imports, overall, would likely increase. The Commission also found that Korea had the flexibility to increase shipments to the U.S.[16]

Section 1675 directs the Commission to consider any likely increase in production capacity or existing unused capacity in the exporting country. The Commission found that due to a decline in U.S. capacity since the original investigation, the U.S. market is now more vulnerable to an increase in Korean subject imports. *See* Remand Determ. at 15 ("Thus, an increase in subject imports from Korea at the expense of the domestic industry would not need to be as large in absolute terms as it was during the original period of investigation to be significant under current conditions.").

The Commission then attempted to determine Korean capacity levels. Both KMWIA and the domestic industry submitted data to the Commission on Korean production capacity. *See* Staff Report at IV–19, Table IV–7. Neither group, however, could agree on the production capacity or capacity utilization estimates. *See id.*[17]

Even though the production capacity information was in dispute, the record indicates that Korean producers have the flexibility to increase shipments to the U.S. regardless of the stated capacity utilization. *See* Remand Determ. at 15 n.44 & n.47 (citing to Staff Report at IV–19, Table IV–7). According to the Korean respondents, during the period of

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[16] Although the Commission did not focus on barriers to exports from Korea to third-country markets, it did note that South Africa also imposed antidumping duties on Korean cookware. *See* Remand Determ. at 16 n.51; Staff Report at IV–18.

[17] For example, in 1997 KMWIA estimated Korean production capacity as 18,700,000 units while the petitioners' estimated Korean production capacity at [ ] units. Staff Report at IV–19, Table IV–7. Disagreement also existed with regards to capacity utilization. In 1997 KMWIA estimated capacity utilization at 97.7% while the petitioners' estimated it at [ ] percent. *Id.* The domestic industry argued that KMWIA was "concealing Korea's true stainless steel cookware production capability." *Id.* at IV–18 (citing Petitioners' Prehearing Br. at 58–69).

review capacity utilization was between 89.8 and 97.7 percent. *See* Staff Report at Table IV–7. Specifically, in interim 1998 capacity utilization was 89.8 percent and in interim 1999 it was 91.9 percent. *Id.* During this same period, however, subject imports increased 45 percent by value. *Id.* at C–5, Table C–2; *see also* Hrg. Tr., P.R. 153 at 37.

The Commission also determined that "importers of the subject Korean merchandise maintained high levels of inventory (as a percentage of importers' shipments) throughout the review period." Remand Determ. at 16. The high levels of inventory, according to the Commission, "indicate * * * a commitment to having a sizeable presence in the United States." *Id.*

The Commission compiled data on U.S. importers' end-of-period inventories of imports from Korea. *See* Staff Report at IV–9, Table IV–4. The Commission found that U.S. importers held substantial inventories, specifically [ ] Korean units in 1997, [ ] units in 1998, [ ] units in interim 1998, and [ ] units in interim 1999. *Id.* The ratio to imports for those same years was [ ]%, [ ]%, [ ] %, and [ ]%, respectively. *Id.* Dissenting Vice Chairman Deanna Tanner Okun cites to Korean respondents end-of-period inventories, which declined during the period of review. *See* Remand Determ. at 26 (citing Staff Report at Table IV–6). The total amounts of inventory, however, could reasonably be found to be relatively high. Furthermore, although the Commission could have interpreted the information in a different manner, the data can reasonably be interpreted to support the Commission's conclusion.

According to the Commission, Korean producers also "have substantial flexibility to shift exports to the United States." Remand Determ. at 15. Korean producers consistently exported between 63 and 68 percent of their merchandise. Exports to the U.S., however, constituted less than one third of these exports. Also, the distribution between the home market, the U.S., and other export markets varied from year to year. Therefore, the evidence supports the conclusion that there is the flexibility to shift exports to the U.S.

2. Likely Price Effects

In evaluating the likely price effects of subject imports, the Commission considers whether there is likely to be significant underselling by the subject imports as compared with domestic like products and whether the subject imports are likely to enter the United States at prices that would have a significant depressing or suppressing effect on the price of domestic like products. 19 U.S.C. § 1675a(a)(3).

According to the SAA, "the Commission must consider its prior injury determinations, including the * * * price effect * * * on the industry during the period preceding the issuance of an order." SAA at 884. In the original investigation, the Commission found that subject imports were underselling the domestic product. The Commission also found that pricing trends revealed a causal link between subject imports and harm to the domestic industry.

During the present review period domestic products were sold primarily to distributors and the subject imports were sold primarily to retailers, limiting the amount of comparative data. Even with the limited data, however, the Commission determined that there was a significant underselling. Remand Determ. at 19; Staff Report at V–25. The data for the retail market demonstrated that subject imports undersold the domestic product in every quarter since 1997, Staff Report at V–25, supporting the Commissions finding of underselling.[18]

Furthermore, the Commission found that the domestic industry is sensitive to price-based competition.[19] Although purchaser questionnaire responses identified quality as the most important factor in purchasing decisions, these same questionnaires also demonstrate that price is an important factor. *See* Staff Report at II–26, Table II–2 (indicating that the most important factors used in purchasing decisions, as reported by U.S. purchasers, are product consistency, product quality and price). Furthermore, it is reasonable for the Commission to infer that when consumers consider products to be of comparable quality, they focus more on the other factors used in purchasing decisions, such as the cost of the good. *See* Staff Report at II–28–29.[20] Here, the Commission found that subject imports were "closing * * * the quality gap" and were of a comparable quality to domestically produced top-of-stove stainless steel cookware. Remand Determ. at 19; *see also* Committee's Prehearing Br. at Ex. 13, Aff. Keith Peterson ¶¶ 7.1, 7.2; Hrg. Tr., P.R. 153 at 35 (discussing how a domestic producer lost an account when the importer switched from domestic to Korean suppliers "because the quality of the Korean product was just as good * * * and the price was much lower"). Domestic products, therefore, are sensitive to competition from the lower priced subject imports. *See, e.g.,* Hrg. Tr., P.R. 153 at 35 (discussing several domestic producers who were forced to lower prices to compete with Korean imports).

The Commission determined that as the quality of domestic products and subject imports become more and more similar "price is likely to play an even greater role in competition in the foreseeable future, and that the prices charged for subject imports will influence the prices received by the domestic industry." Remand Determ. at 19. The Commis-

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[18] Moreover, pricing in the retail market affects pricing in the direct sales market. "[D]irect sales customers frequently compare the prices at retail with the prices offered through direct sales." Hrg. Tr., P.R. 153 at 38. Therefore, even if subject imports do not dramatically increase in the direct sales market, underselling in the retail market will have price effects throughout the industry.

[19] Chefline argues that the Final Determination contradicts the Commission's finding of price sensitivity. *See* Chefline's Br. at 34; *Porcelain-On-Steel Cooking Ware from China, Mexico, and Taiwan, and Top-of-the-Stove Stainless Steel Cooking Ware from Korea and Taiwan,* Inv. Nos. 701–TA–267 and 268 (Review) and 731–TA–297–299, 304 & 305 (Review), USITC Pub. No. 3286 (March 2000), P.R. 206 at II–22. The section of the Final Determination to which Chefline refers, however, discusses U.S. demand elasticity. An analysis of the U.S. demand elasticity demonstrates that the *overall* demand for top-of-the-stove stainless steel cookware is not affected by price. The Commission, however, refers to "substitution elasticity" when looking at the effect of price on consumer's choice between goods of comparable quality. Staff Report at II–35. Substitution elasticity focuses on the degree to which subject imports and the domestic product compete head-to-head for customers on the basis of price. *See Id.* at II–35 n.78. The data in this section supports the Commission's findings.

[20] Chefline argues that quality is the most important purchasing factor for consumers. The Commission, however, does not need to make a finding that price is the "most" important factor, but rather must determine whether or not subject imports have a price-suppressing or depressing effect. In this case, the Commission could reasonably conclude that the price of subject imports negatively influence domestic prices.

sion's finding regarding price effects is, as a result, supported by substantial evidence and in accordance with law.

CONCLUSION

For the foregoing reasons, the Commission's remand determination is affirmed.

(Slip Op. 02–99)

PRINCESS CRUISES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 94–06–00352 (98–03–00463)

[On remand, the Court considered Plaintiff's arguments (1) that the Harbor Maintenance Tax ("HMT") should not be imposed on passenger cruises that begin and end at ports which are exempt from the HMT, but which make layover stops at ports covered by the HMT, (2) that the "value" on which the HMT is assessed should only be the actual cost of transportation, and (3) that Defendant was not entitled to recover any interest on underpaid HMT or Arriving Passenger Fee ("APF") amounts prior to the date on which it issued bills for the principal amounts. Defendant argued that the Court of Appeals for the Federal Circuit decided in *Princess Cruises, Inc. v. United States*, 201 F.3d 1352 (Fed. Cir. 2000), that layover stops alone give rise to HMT liability and that this Court is bound to follow that decision. Defendant also argued that the Court should defer to Customs' rulings on the proper calculation of the "value"of the cruise on which the HMT is assessed and that it had both a regulatory and common law basis for assessing interest from the time the HMT and APF payments originally became due. *Held:* (1) Based on the Federal Circuit's decision in *Princess*, Plaintiffs are liable for payment of the HMT on passengers who disembark the ship at layover ports covered by the HMT, but only after the issuance of HQ 112511 (Jan. 27, 1993), which resolved the ambiguity in the statute and regulation on this issue; (2) Customs' method of calculating the "value" of the cruise fare for HMT assessment purposes is correct except for the inclusion of "port taxes," charges for "U.S. Customs and U.S. Immigration and Naturalization services," and the inclusion of charges for airfare and certain land-based services and commissions prior to 1993, which are inconsistent with the HMT statute; and (3) Defendant is entitled to interest on the underpaid APF amounts from the time they were originally due. Therefore, Plaintiff's motion for partial summary judgment is granted in part, and Defendant's cross-motion for summary judgment is granted in part.]

(Dated August 29, 2002)

Gibson, Dunn & Crutcher LLP (Judith A. Lee and *Brian J. Rohal)* for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Lara Levinson* and *Michael Duclos),* and *Scott Falk* and *Vickie R. Shaw,* Office of Chief Counsel, United States Customs Service, of counsel, for Defendant.

OPINION

MUSGRAVE, *Judge:* In this consolidated action, plaintiff Princess Cruises, Inc. ("Princess") contests the assessment and calculation of the

Harbor Maintenance Tax ("HMT")[1] on passenger cruise ships by defendant the United States Customs Service ("Customs") and Customs' assessment of pre-billing interest on allegedly underpaid HMT and Arriving Passenger Fee ("APF")[2] amounts. This matter began in 1991, when Customs' Pacific Region, Regulatory Audit Division initiated audits of Princess's APF payments for 1986 to 1991 and its HMT payments for 1987 to1991. As a result of the audit, in January 1993 Customs notified Princess that it owed $405,383 for underpaid APF principal, $231,572 for APF interest, $259,560 for underpaid HMT, and $103,779 for HMT interest. Princess filed a timely protest of these assessments on March 23, 1993. On December 22, 1993 the protest was granted in part and denied in part by Customs Headquarters. In March 1994 Princess paid the amount it still owed for the audit period along with payments for 1992 and 1993.

In June 1994, Princess brought this action appealing the partial denial of its protest. Princess subsequently moved for summary judgment on the issues of (1) whether the APF should be assessed on cruises that originate or arrive directly from a port that is exempt from the APF, (2) whether the HMT should be assessed on cruises that begin and end at ports that are exempt from the tax, but make layover stops at ports subject to it, and (3) whether the "value" of the cruise on which the HMT is assessed should include anything more than the actual cost for transportation. This Court held that the APF applied only to cruises that originated or terminated at a port subject to the APF and that the HMT was unconstitutional as applied to passenger cruises in light of the Supreme Court's decision in *United States Shoe Corp. v. United States*, 523 U.S. 360 (1998), *aff'g* 114 F.3d 1564 (Fed. Cir. 1997), *aff'g* 19 CIT 1284, 907 F. Supp. 408 (1995) (holding the HMT unconstitutional as applied to exports). *See Princess Cruises, Inc. v. The United States*, 22 CIT 498, 15 F. Supp. 2d 801 (1998). Having found the HMT unconstitutional, the Court did not consider the other issues raised by Princess regarding the assessment and calculation of the HMT. The Court of Appeals for the Federal Circuit reversed this Court's holdings on both the APF and the HMT issues. *See Princess Cruises, Inc. v. United States,* 201 F.3d 1352 (Fed. Cir. 2000). The appellate court determined that Customs' APF regulation was entitled to deference, and that Customs' ruling interpreting the HMT statute and regulation was also entitled to deference. *See id*. at 1360, 1362. Both issues were "remand[ed] for a determination of Princess's * * * liability that is consistent with this decision." *Id.*

On August 25, 1995, while its first cause of action was pending before this Court, Princess received a letter from Customs stating that it still owed $237,192 in underpaid HMT and a bill for $108,772 in interest on this amount. Princess contends that no explanation was given as to the

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[1] The HMT is a tax on port use calculated at a rate of 0.125 percent of the value of the commercial cargo. It was enacted pursuant to the Water Resources Development Act of 1986, Pub. L. No. 99–662, Title XIV, § 1402, 100 Stat. 4266 (1986), and is codified at 26 U.S.C. § 4461–62.

[2] The APF is a fee for "the provision of customs services in connection with * * * the arrival of each passenger aboard a commercial vessel or commercial aircraft from a place outside the United States * * *." 19 U.S.C. § 58c(a)(5).

basis for these bills, and that it contacted several Customs officials in an attempt to discern why it was being billed when it thought it had paid in-full the amount due. On November 15, 1995 Princess filed a protest with Customs challenging this assessment. While the protest was pending, Princess contacted a Customs auditor who was involved in the original audit. The auditor agreed that Princess should not still owe any principal HMT, but thought that the bill for interest might be for "pre-billing" interest, although he was not certain. In March 1997 Princess filed a supplement to its protest noting the auditor's belief that no additional HMT principal was due and arguing that no pre-billing interest should be assessed in this case.

On September 4, 1997 the Customs office at the Port of Los Angeles issued a partial denial of the protest in which it cancelled the bill for interest, concluding that it was duplicative of an earlier one, and agreed that Princess had already paid most of the $237,129 in HMT principal that was claimed in Customs' August 1995 letter. Nevertheless, Customs also informed Princess that, after further review of this matter, the Customs office in Indianapolis determined that Princess owed an additional $500,200. On October 8, 1997 Customs issued three bills to Princess totaling $687,139.66. On February 19, 1998 Princess paid these bills, with interest. Princess then brought a second action before this Court, which was consolidated with the earlier action on remand.

For the reasons that follow, the Court holds that Princess is not liable for the HMT on cruises which made only layover stops at HMT covered ports prior to the issuance of HQ 112511 (Jan. 27, 1993), which resolved the ambiguity in the statute and regulation on this issue. The Court also holds that Customs should not have included "port taxes" and charges for "U.S. Customs and U.S. Immigration and Naturalization services" in the cruise "value"on which the HMT was assessed, but was otherwise correct in assessing the HMT on the price paid for the cruise, exclusive of land-based services and commissions. Accordingly, the Court holds that Princess is not liable for pre-billing interest on these HMT amounts. Nevertheless, the Court holds that Customs is entitled to pre-billing interest on the APF amounts.[3] Therefore, Princess's motion for summary judgment is granted in part and Customs' cross-motion for summary judgment is granted in part.

I. JURISDICTION AND STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 1581(a) the Court has jurisdiction over Princess's appeals from the partial denial of its protests, and pursuant to 28 U.S.C. § 1581(i) the Court has jurisdiction over Princess's claim for restitution of the amount of HMT that it allegedly overpaid. Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

[3] Princess has abandoned the arguments against Customs' assessment of APF principal that the Federal Circuit remanded to this Court. *See Princess Cruises*, 201 F.3d at 1362.

moving party is entitled to a judgment as a matter of law." CIT Rule 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986).

II. ASSESSMENT OF HARBOR MAINTENANCE TAXES FOR LAYOVER STOPS

The HMT is "a tax on any port use," 26 U.S.C. § 4461(a), and "port use" is defined as "the loading of commercial cargo on, or * * * the unloading of commercial cargo from a commercial vessel at a port," 26 U.S.C. § 4462(a)(1). "The term 'commercial cargo' means any cargo transported on a commercial vessel, including passengers transported for compensation or hire." 26 U.S.C. § 4462(a)(3)(A). Ports in Alaska, Hawaii, and possessions of the United States are exempt from the tax. 26 U.S.C. § 4462(b). Although the statute itself does not explain how the HMT is to be assessed on passengers, 19 C.F.R. § 24.24(e)(4) states that "when a passenger boards or disembarks a commercial vessel at a port within the definition of this section, the operator of that vessel is liable for the payment of the port use fee." In HQ 112511 Customs addressed for the first time the issue of whether a passenger who "temporarily goes ashore and subsequently gets back on the vessel [at a layover stop] is considered to have 'disembarked' or 'boarded' at that port for purposes of 19 C.F.R. § 24.24(e)(4) so as to incur liability on behalf of the vessel operator for the payment of a port use fee." Customs concluded that cruise operators are liable for the HMT on passengers who leave the vessel at these interim stops and that there is a rebuttable presumption that every passenger does so.

Princess challenged Customs' ruling in its original motion for summary judgment in this action. On appeal, the Federal Circuit held that both 26 U.S.C. § 4461–62 and 19 C.F.R. § 24.24(e)(4) were ambiguous with regard to layover stops by cruise ships and gave *Chevron* deference[4] to Customs' interpretation of the regulation. *See Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1359 (Fed. Cir. 2000). Now, on remand, Princess incorporates by reference the arguments regarding the assessment and calculation of the HMT that were made before this Court by the plaintiffs in *Carnival Cruise Lines, Inc. v. The United States*, Consolidated Court No. 93–10–00691.

In *Carnival Cruise Lines*, 26 CIT____, ____ F. Supp. 2d ____, 2002 WL 1768896, 2002 Ct. Intl. Trade LEXIS 78 (2002), the Court rejected Carnival's argument that the Supreme Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), *aff'g*, 185 F.3d 1304 (Fed. Cir. 1999), invalidated the reasoning behind the Federal Circuit's decision in *Princess Cruises*, but concluded that Carnival should not be held liable for HMT payments on cruises which made only layover stops at HMT covered ports prior to the issuance of HQ 112511. *Carnival Cruise Lines*, 26 CIT at ____, ____F. Supp. 2d at ____, 2002 WL 1768896 at *3–4, 2002 Ct. Intl. Trade LEXIS at *11, 16. This holding was based on the Federal Cir-

[4] Under the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), if a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844.

cuit's finding that the HMT statute and regulation were both ambiguous, *see Princess Cruises,* 201 F.3d at 1359, that court's earlier determination in *International Business Machine Corp. v. United States,* 201 F.3d 1367, 1371–72 (Fed. Cir. 2000), that the HMT is an internal revenue tax, and the Supreme Court's holding in *Gould v. Gould*, 245 U.S. 151, 153 (1917), that "[i]n case of doubt [statutes levying taxes] are construed most strongly against the government and in favor of the citizen." *Carnival Cruise Lines*, 26 CIT at ____, ____F. Supp. 2d at ____, 2002 WL 1768896 at *4, 2002 Ct. Intl. Trade LEXIS at *14–15. Nothing in the present case leads the Court to a different conclusion on this issue.[5] Thus, for the reasons more fully set forth in *Carnival Cruise Lines,* the Court holds that Princess is not liable for the HMT assessed on layover stops prior to January 27, 1993, when HQ 112511 was issued.

III. Calculation of the "Value" of the Cruise Fare

Princess also incorporates by reference the arguments made in *Carnival Cruise Lines* regarding the calculation of the "value" of the cruise fare use to determine the amount of HMT due. The statute imposing the HMT provides that "[t]he amount of the tax imposed * * * on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved." 26 U.S.C. § 4461(b). Elsewhere, the HMT statute defines the term "value" in the context of the transportation of passengers as "the actual charge paid for such service or the prevailing charge for comparable service if no actual charge is paid." 26 U.S.C. § 4462(a)(5)(B). Customs' regulation, 19 C.F.R. § 24.24(e)(4)(i), essentially follows the language of the statute, stating that "[t]he fee is to be based upon the value of the actual charge for transportation paid by the passenger or on the prevailing charge for comparable service if no actual charge is paid." In HQ 112511 (Jan. 27, 1993) Customs addressed what it "consider[ed] 'transportation costs' for purposes of 19 C.F.R. 24.24(e)(4)" stating:

> In calculating the value of the "actual charge for transportation paid by the passenger" * * * it was Customs' position that this should include those expenditures which comprise the normal fare the cruise line would charge a passenger for a particular trip, including any travel agent's commission and those transportation and lodging costs included in the overall cruise package in bringing the passenger to and from the port of embarkation, provided the passenger actually availed himself of such transportation and lodging. ([HQ] 543896, dated May 13, 1987). * * *
>
> Upon further review of this matter, Customs remains of the opinion that the "transportation costs" for passengers of cruise vessels includes all "embarkation-to-disembarkation" costs as reflected on passenger tickets, including commissions paid to travel agents, port taxes, charges for pilotage, U.S. Customs and U.S. Immigration and Naturalization services, wharfage, and "suite amenities" provided

[5] Although Customs' asserts that "[t]he Federal Circuit held * * * that Customs properly collected HMT from Princess Cruises at layover stops," in actuality the Federal Circuit held that Customs' ruling was entitled to *Chevron* deference and remanded the matter for this Court to determine Princess's HMT liability consistent with that decision.

> they are contracted and paid for prior to the commencement of the voyage (*i.e.*, included in the cost of the ticket). However, after numerous discussions with representatives of the cruise industry, Customs is now of the opinion that the costs of land-based lodging and connecting air transportation are not to be included in Customs' calculation of the transportation costs under consideration regardless of whether a passenger avails himself of such transportation and lodging. Although this position represents a divergence from [HQ] 543896 cited above, Customs believes this revised position constitutes an equitable resolution of this matter. * * *

In HQ 112844 (Oct. 28, 1993) Customs reaffirmed its conclusions in HQ 112511 except with regard to travel agents' commissions, on which it concluded that:

> [T]he inclusion of the entire amount of a travel agent's commission in the calculation of the aforementioned transportation costs without regard to whether any portion of such commission is attributable to the costs of land-based lodging and connecting air transportation is inconsistent with our position that the transportation costs include all "embarkation-to-disembarkation" costs. Accordingly, accurate apportionment of travel agents' commissions clearly distinguishing that portion of the commissions attributable to land-based lodging and connecting air transportation will result in the exclusion of any such costs from Customs' calculation of the "value of the actual charge for transportation paid by the passenger" for purposes of [19 C.F.R. §] 24.24(e)(4).

In *Carnival Cruise Lines*, Carnival argued that Customs' interpretation was inconsistent with the statute, the relevant caselaw, and the Internal Revenue Service's interpretations of similar taxes, and contended that charges for services, amenities, and "pass through" charges should be excluded from the fare amount on which the HMT is imposed, and Customs countered that the Court was required to defer to its interpretation of the statute. *Carnival Cruise Lines*, 26 CIT at ____, ____F. Supp. 2d at ____, 2002 WL 1768896 at *6, 2002 Ct. Intl. Trade LEXIS at *19–20. Nevertheless, the Court concluded that the intent of Congress was clear when the disputed language was read in the context of the entire statute,[6] and that one of the fundamental aspects of the HMT is that it is assessed based on "value" rather than tonnage or simply as an equal assessment on all vessels using a port. 26 CIT at ____, ____F. Supp. 2d at ____, 2002 WL 1768896 at *6, 2002 Ct. Intl. Trade LEXIS at *20. Therefore, the Court reasoned that when 26 U.S.C. § 4462(a)(5)(B) defines "value" in the context of the transportation of passengers for hire as "the actual charge paid for such service" the phrase "such service" refers to the shipboard service that the passenger is buying, which in the case of a cruise includes services and amenities as well as transportation. *Id*. Thus the Court rejected Carnival's argument

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[6] "Where the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. 837, 842 (1984).

that the HMT should be calculated based on basic transportation costs alone.

The Court also found that it was consistent with the statute to include the percentage of any travel agent commission attributable to making shipboard arrangements as part of the overall shipboard service. 26 CIT at ____, ____F. Supp. 2d at ____, 2002 WL 1768896 at *6, 2002 Ct. Intl. Trade LEXIS at *21. Nevertheless, the Court found that it was inconsistent to include, as Customs had, port taxes and Customs and Immigration and Naturalization Service charges in the cruise "value" since they are additional charges imposed by the relevant government agencies, not part of the cruise service. *Id.* Thus the Court concluded that the HMT for passenger cruise ships is properly calculated based on the costs included in the cruise fare, excluding costs for air transportation to the port of embarkation and land-based services, the percentage of travel agents' commissions attributable to the air transportation and land-based services, port taxes, and Customs and Immigration and Naturalization Service charges. *Id.*

Once again, nothing in the present case leads the Court to a different conclusion than the one reached in *Carnival Cruise Lines*. Therefore, Princess is entitled to a refund to the extent that it paid the HMT on amounts that should have been excluded from the cruise "value."

IV. Assessment of Interest on Underpaid Harbor Maintenance Taxes and Arriving Passenger Fees

The central issue arising from Princess's second protest, regarding the August 1995 letter and bills and the subsequent corrections, is Customs' assessment of what Princess terms "pre-billing" interest. Customs explains that the later bills result from the fact that Princess's earlier payments were allocated between principal and interest, and although Princess thought it had paid the principal in-full, it actually had not since some of the payment went to interest which had accrued since the time the principal should have been paid under Custom's interpretation of the HMT and APF statutes. *See* Oral Argument Tr. at 23–27 (Jan. 30, 2002). Customs contends that there has been no "double billing," as Princess alleges, in terms of the aggregate amount of principal and interest demanded. *See id.* at 27. Customs asserts a regulatory and common law basis for these interest assessments. *See id.* at 19. First, it relies on 19 C.F.R. § 113.64(e), which provides for the exoneration of "the United States and its officers from any risk, loss or expense arising out of entry or clearance of the carrier, or handling of the articles on board" through an international carrier bond. *See* Def.'s Mem. in Supp. of its Cross-Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. at 8–11. Alternatively, Customs relies a line of cases originating with *United States v. Billings*, 232 U.S. 261 (1914), for the principal that it is entitlement to interest on equitable grounds to prevent unjust enrichment. *See* Def.'s Mem. in Supp. of its Cross-Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. at 13–16.

Concerning the international carrier bond, Princess argues that 19 C.F.R. § 113.64(e) "does not *create* any independent liability on the part of the carrier" Pl.'s Mot. For Summ. J. at 16 n.8 (emphasis in the original). Moreover, Princess argues the statute of limitations for collecting liquidated damages under the bond has expired and that in any event Customs cannot recover more than the face amount of $50,000.00 on the International Carrier Bond. *See id*. at 16–18. Princess also argues that Customs has no equitable right to "pre-billing" interest in light of the fact that it delayed roughly 18 months between March 1994, when it received Princess's payment for the original bills, and August 1995, when it issued bills for the remaining amounts due, and was unable to explain the basis for the later bills until its reply brief in the present litigation. *See* Pl.'s Resp. to Def.'s Cross-Mot. for Summ. J. and Reply to Def.'s Opp'n to Pl.'s Mot. for Summ. J. at 13–19. Princess maintains that the equities lie in its favor given the efforts it has had to put forth to obtain an explanation for the bills it received. *Id*. at 19.

As a preliminary matter, since the Court holds that Princess is not liable for the HMT assessed on cruises which made only layover stops at ports subject to the HMT prior to January 27, 1993 it follows that Princess is not liable for interest on these principal amounts. Turning to the issue of the interest assessed on the APF principal, the Court agrees with Princess that 19 C.F.R. § 113.64(e) does not create an independent right to collect interest, but rather provides a means of recovery once the right to recovery is established. Nevertheless, while Customs' inability to provide Princess with an explanation for the actual basis for some of its bills until late in this litigation is appalling, the Court holds that the relevant equitable inquiry focuses on when Customs was entitled to the principal APF amounts at issue. The Federal Circuit concluded that Customs' interpretation of the APF statute was reasonable, notwithstanding the remanded arguments that Princess has abandoned. *See Princess Cruises*, 201 F.3d at 1362. Thus, Customs is correct in stating that it "lost" the interest it could have earned had it received these APF payments in the ordinary course of business during the period covered by the audit. *See* Def.'s Mem. in Supp. of its Cross-Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. at 14. Therefore, the Court holds that Customs has an equitable right to recover pre-billing interest from Princess on the APF principal.

V. CONCLUSION

For the forgoing reasons Princess's motion for summary judgment is granted in part as to (1) the retroactive application of HQ 112511, regarding the assessment of the HMT for layover stops, (2) the inclusion of "port taxes" and charges for "U.S. Customs and U.S. Immigration and Naturalization services," (3) the inclusion of charges for airfare and certain land-based services and commissions prior to the issuance of HQ 112511 and HQ 112844, and (4) the assessment of "pre-billing" interest on the HMT principal assessed by Customs. Customs' cross-motion for summary judgment is granted as to all other issues presently before the

Court. The parties shall confer with each other (i) in an effort to reach a stipulation on the amount of a final judgment in this matter and (ii) regarding such additional proceedings as may be necessary in this action, and shall submit a status report to the Court on the results of their conference within 60 days.

(Slip Op. 02–100)

NIPPON STEEL CORP., KAWASAKI STEEL CORP., THYSSENKRUPP ACCIAI SPECIALI TERNI SP.A AND ACCIAI SPECIALI TERNI (USA), INC., PLAINTIFFS *v.* U.S. INTERNATIONAL TRADE COMMISSION DEFENDANT, AND ALLEGHENY LUDLUM CORP., AK STEEL CORP., BUTLER ARMCO INDEPENDENT UNION, ZANESVILLE ARMCO INDEPENDENT UNION, AND UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC, DEFENDANT-INTERVENORS

Consolidated Court No. 01–00103

[Plaintiffs' motion for summary judgment as to Counts One and Two of the complaints denied; ITC's cross-motion for summary judgment as to Counts One and Two of the complaints granted.]

(Dated August 30, 2002)

Gibson, Dunn & Crutcher, LLP (Joseph H. Price, Douglas R. Cox, Gracia M. Berg, Gregory C. Gerdes), for Plaintiff Nippon Steel Corporation.

Arent Fox Kintner Plotkin & Kahn, PLLC (Robert H. Huey, Matthew J. Clark, Nancy A. Noonan, Steven F. Hill, Timothy D. Osterhaus), for Plaintiff Kawaski Steel Corporation.

Hogan & Hartson, LLP (Lewis E. Leibowitz, Steven J. Routh, David G. Leitch, T. Clark Weymouth, David P. Kassebaum), for Plaintiffs ThyssenKrupp Acciai Speciali Terni Sp.A. and Acciai Speciali Terni (USA), Inc.

Lyn M. Schlitt, General Counsel, United States International Trade Commission; *James M. Lyons,* Deputy General Counsel, United States International Trade Commission *(Gracemary Rizzo Roth-Roffy, Mark B. Rees),* for the ITC.

Collier Shannon Scott, PLLC (Kathleen W. Cannon, Michael J. Coursey, Eric R. McClafferty, John M. Herrmann, Grace W. Kim, David A. Hartquist, R. Alan Luberda), for Defendant-Interveners Allegheny Ludlum Corporation, AK Steel Corporation, Butler Armco Independent Union, Zanesville Armco Independent Union, and the United Steelworkers of America, AFL-CIO/CLC.

OPINION AND ORDER

EATON, *Judge:* This matter is before the court on cross-motions for summary judgment pursuant to USCIT R. 56, as to Counts One and

Two[1] of the complaints filed by Nippon Steel Corporation ("Nippon"), Kawasaki Steel Corporation, ThyssenKrupp Acciai Speciali Terni Sp.A and Acciai Speciali Terni (USA), Inc. (collectively "Plaintiffs"). On December 28, 2001, this court granted discovery with respect to the matters at issue in Counts One and Two by its opinion in *Nippon Steel Corporation v. United States International Trade Commission,* Slip Op. 01–153, 25 CIT ___ (Dec. 28, 2001), familiarity with which is presumed.

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (2000).[2] Where a party challenges the findings of an antidumping review the court will hold unlawful "any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law * * *." 19 U.S.C. § 1516a(b)(1)(B)(i). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(c); *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986). Here, there being no "genuine issue as to any material fact," summary judgment is appropriate. Oral argument was heard on August 14, 2002. For the reasons set forth below, the court finds that Dennis M. Devaney was validly appointed a commissioner of the United States International Trade Commission ("ITC") and that his vote with respect to the final results was lawfully cast, and grants summary judgment as to Counts One and Two in favor of the ITC.

BACKGROUND

By their complaints in this consolidated action, Plaintiffs challenge the ITC's affirmative material injury determination in the context of the five-year sunset review of imports of grain-oriented silicon electrical steel from Italy and Japan. *See Grain-Oriented Silicon Elect. Steel from Italy and Japan,* 66 Fed. Reg. 12,958 (Mar. 1, 2001); *see also* USITC Pub. No. 3396 (Feb. 2001) *("Final Results").* Counts One and Two of these complaints claim that the vote by which the *Final Results* were reached was not in accordance with law because Dennis M. Devaney, one of those voting, had not validly been appointed an ITC commissioner.

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[1] Each Plaintiff filed a complaint in this consolidated action. While Counts One and Two of each complaint take issue with the manner of Dennis M. Devaney's appointment as a commissioner of the United States International Trade Commission with respect to: (1) the validity of the recess appointment; and (2) the existence of a vacancy, they do not do so in the same order. For purposes of this opinion, the court follows the order of the Nippon complaint. In Count One, Plaintiffs assert that the actions by which Mr. Devaney assumed office were not lawfully completed during a Senate recess and, therefore, "[b]ecause Dennis Devaney's alleged appointment to the ITC was invalid, his vote [on the final results was] invalid." (Compl. at ¶ 18.) Plaintiffs further allege that "[a]s a result of Dennis Devaney's invalid vote and determination, the Commission's determination * * * was not in accordance with law." *(Id.* at ¶ 19.) In like manner, Plaintiffs' Count Two alleges that, because no vacancy existed at the time Mr. Devaney assumed office, Mr. Devaney was not lawfully appointed and, thus, ineligible to vote on the Commission's determination leading to the final results. (Compl. at ¶¶ 25, 26.) Because of these alleged irregularities, Plaintiffs ask the court to "[d]eclare unlawful Dennis Devaney's vote and determination with regard to the [final results]" and "[d]eclare that the ITC shall instruct the U.S. Department of Commerce to revoke the antidumping order[s] * * *." (Compl. at 10, 11.)

[2] This court held that "as the question of who is entitled to cast a vote on an [International Trade Commission] final determination is surely a question of procedure, it is surely within the competence of this court to hear such question. Thus, the court finds that it has jurisdiction, within the context of an affirmative finding of injury in a five-year sunset review, to hear procedural questions relating thereto, including the claims found in Counts One and Two of Plaintiffs' complaints." *Nippon,* Slip Op. 01–153 at 10–11, 25 CIT at ___.

The facts with respect to Mr. Devaney's disputed appointment can be briefly stated. The term of ITC Commissioner Thelma Askey expired on December 16, 2000, and she continued to serve as a commissioner pursuant to the ITC's holdover provision, 19 U.S.C. § 1330(b)(2), until such time as her successor was "appointed and qualified."[3] The United States Senate, having commenced an intersession recess on December 15, 2000, reconvened at 12:01 p.m. on January 3, 2001. On January 2, 2001, Mr. Bob J. Nash, Assistant to the President and Director of Presidential Personnel for President William J. Clinton, prepared a memorandum ("Nash Memorandum") "in a form routinely used for such purposes"[4] by which he conveyed to the Executive Clerk's Office the "President's approval of Mr. Devaney's appointment" (Def.'s Mem., Ex. 4 ("Nash Decl.") at ¶ 4) pursuant to the "Recess Appointments Clause" of the Constitution[5] as a commissioner of the ITC. While Mr. Nash states that he "cannot recall * * * whether the President conveyed his approval of the appointment directly to me orally or in writing" he does state that he "would not have prepared this memorandum had Mr. Devaney's recess appointment to the ITC not received the President's consideration and had I not been certain of the President's personal approval of the appointment."[6] *(Id.)* The Nash Memorandum was received by the Executive Clerk's Office between 10:00 a.m. and 11:00 a.m. on January 3, 2001, and during the course of its processing, various White House personnel affixed their initials to it, together with the time of day either manually or by stamp. Based on the authorization provided by the Nash Memorandum, a "Recess Appointment Order"[7] "in a form routinely used by then President Clinton to make recess appointments" was prepared, and President Clinton's autopenned signature was affixed thereto. (Def.'s Resp. to Pls.' Third Set of Req. for Admis., Interrogs., and Prod. of Docs. at 4–5; *see* Pls.' Mem. Supp. Mot. Summ. J. ("Pls.' Mem.") App., Ex. 5 at 4–5.) All of this was completed prior to the Senate reconvening at 12:01 p.m. on January 3, 2001. The United States Senate commenced an intrasession recess on January 8, 2001, and reconvened on

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[3] The holdover provision provides: "any commissioner may continue to serve as a commissioner after an expiration of his [statutory] term of office until his successor is appointed and qualified." 19 U.S.C. § 1330(b)(2).

[4] This memorandum is designated as being "For the President" "Via the Executive Clerk" and refers to documents for the President's signature. *(See* Nash Decl. Attach.) At oral argument counsel for the ITC could not confirm that there were, in fact, documents attached.

[5] The Recess Appointments Clause reads: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3.

[6] On this point Mr. Nash also states:

> The President's personal approval was required of all presidential appointments and my office would implement the President's decision. I never approved the preparation of an appointment document for a particular appointee unless I had previously ascertained that the President had personally approved the appointment. I would receive such approval directly from the President or, in rare instances (which did not occur here), through the Chief of Staff when the Chief of Staff was specifically instructed by the President to inform me of the President's approval of the appointment.

(Nash Decl. at ¶ 2.)

[7] The "Recess Appointment Order" reads as follows:

> I hereby appoint Dennis M. Devaney, of Michigan, to be a member of the United States International Trade Commission for a term expiring December 16, 2009, until the end of the next session of the Senate of the United States and no longer, subject to the conditions prescribed by law.
>
> s/William J. Clinton
> THE WHITE HOUSE
> January 3, 2001

January 20, 2001. Ms. Askey participated in ITC business until at least January 12, 2001, and received the salary and other perquisites of an ITC commissioner until January 16, 2001. Mr. Devaney took the oath of office on January 16, 2001. On January 18, 2001, President Clinton signed Mr. Devaney's formal commission[8] which was dated January 3, 2001. Mr. Devaney cast his vote with respect to the *Final Results* at a meeting of the commissioners of the ITC on February 23, 2001.

By its *Final Results,* the ITC sustained the existing antidumping duty orders on grain-oriented electrical silicon steel from Italy and Japan by finding that "revocation of the[se] antidumping duty orders * * * would be likely to lead to continuation or recurrence of material injury to an industry in the United States * * *." *See Final Results* at 1. The ITC reached this finding by a three-to-three—i.e., evenly divided—vote and, thus, the antidumping duty orders remained in effect pursuant to 19 U.S.C. § 1677(11) (2000).[9] The three persons voting in the affirmative were Mr. Stephen Koplan, Ms. Marcia Miller and Mr. Dennis M. Devaney.

With respect to Mr. Devaney's assumption of office and subsequent vote, Plaintiffs claim:

> Mr. Devaney's purported recess appointment to the ITC on January 3, 2001 was invalid because (a) there was not a "vacancy" on the ITC to which he lawfully could have been appointed, and (b) the President did not sign the commission appointing Mr. Devaney to office during the recess of the Senate that ended on January 3, 2001. In light of this invalid appointment, Plaintiffs respectfully request that this Court find that Mr. Devaney's vote in the *[Final Results]* was *ultra vires* and, accordingly, direct that the subject orders be revoked pursuant to the three-to-two vote of lawful ITC commissioners in favor of a negative determination.

(Pls.' Mem. at 1–2 (citation omitted); *see also Nippon* Compl. Count One at ¶¶ 18, 19; Count Two at ¶¶ 27, 28.)

The ITC disputes Plaintiffs' claims and asserts that Mr. Devaney was validly appointed:

> On the morning of January 3, 2001, before the end of the intersession recess that preceded the 107th Congress, former President Clinton appointed Dennis M. Devaney to the International Trade Commission ("ITC" or "Commission"), replacing Thelma Askey. Ms. Askey had been serving on the Commission in a "holdover" capacity since the expiration of her statutory term of office in December 2000. Commissioner Devaney's recess appointment was perfected by a recess appointment order, which was routinely used

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[8] For purposes of this opinion, "formal commission" means a commission meeting the requirements of 5 U.S.C. § 2902(a) (2000) which states: "the Secretary of State shall make out and record, and affix the seal of the United States to, the commission of an officer appointed by the President. The seal of the United States may not be affixed to the commission before the commission has been signed by the President."

[9] This subsection provides: "If the Commissioners voting on a determination * * * are evenly divided as to whether the determination should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination." 19 U.S.C. § 1677(11).

to make recess appointments, and executed prior to the end of the above-mentioned recess.

(Def.'s Mem. Supp. Cross-Mot. Summ. J. ("Def.'s Mem.") at 1.)

DISCUSSION

A. Mr. Devaney Was Validly Appointed

1. The Distinction Between an Appointment and a Commission

The court first turns to the question of whether Mr. Devaney was lawfully appointed pursuant to the Recess Appointments Clause. On this issue, Plaintiffs' primary argument is that a recess appointment requires the president to sign a commission to make it complete. Thus, Plaintiffs argue that, since Mr. Devaney's formal commission was not signed prior to 12:01 p.m. on January 3, 2001, his appointment was not completed during a recess of the Senate and thus he was not validly appointed.

At the outset it is worth noting that, although Article II, Section 2, Clause 3 of the Constitution is commonly called the Recess Appointments Clause, the word "appointment" is not found in the text of the clause itself. Rather, the President is empowered "during the Recess of the Senate" to "fill up all Vacancies * * * by granting Commissions." As there is no reason to assume that "filling up Vacancies" constitutes anything other than the presidential act of appointment, however, the court will refer to it as such hereafter. *See The Federalist No. 67* (Alexander Hamilton) (The Recess Appointments Clause authorizes the President to make "temporary appointments.").

In order to determine whether President Clinton properly exercised his authority with respect to Mr. Devaney, *Marbury v. Madison,* 5 U.S. 137 (1803), is instructive. While important for other reasons,[10] this case was a dispute over the appointment, with the advice and consent of the Senate, of a justice of the peace for the "county of Washington." *Id.* at 155. As such, it involved the exercise of a president's power of appointment under the "Appointments Clause," Article II, Section 2, Clause 2 of the Constitution.[11] While the particular matter at issue was the delivery of Mr. Marbury's commission, Justice Marshall examined matters relating to the appointment that are pertinent to the case at bar.

Throughout his opinion, Justice Marshall makes explicit the distinction between the presidential act of appointment, and the granting of a commission. *See Marbury,* 5 U.S. at 156 ("The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one in the same * * *."). As such, the appointment and the commission serve functions independent of one another: the appointment being the act of conferring the office; and the commission being

[10] Justice Marshall ultimately found that the Supreme Court did not have jurisdiction to hear the case, thus establishing the doctrine of judicial review. Hence, his discussion of the appointment itself might be described as dicta. Numerous courts having relied on its reasoning, however, the court is confident in using the opinion as persuasive precedent.

[11] The Appointments Clause reads: "and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States * * *." U.S. Const. art. II, § 2, cl. 2.

evidence of the appointment. Thus, the act of appointment by the president is "a voluntary act," *id.* at 155, that demonstrates the president's will to appoint. The commission, on the other hand, serves as conclusive evidence of the exercise of that presidential will. *See id.* at 157 (indicating that even when the appointment and the commission are, in practice, indistinguishable, "still, the commission is not necessarily the appointment; though conclusive evidence of it."). This distinction has been followed in other cases. *See Kilburn v. United States,* 15 Ct. Cl. 41, 47 (1879) (citing *Marbury* and stating "The acts of appointing to office and commissioning the person appointed are two separate and distinct acts * * *."); *O'Shea v. United States,* 28 Ct. Cl. 392, 401 (1893) ("The commission, whatever its form, is but evidence of the fact that the President has exercised his constitutional power of appointment * * *.").

2. The Presidential Act of Appointment

What constitutes an act of appointment sufficient to create rights to an office is an "open and unequivocal act" on the part of an appointing authority. *Bennett v. United States,* 19 Ct. Cl. 379, 385 (1884) (citing *Marbury,* 5 U.S. at 385); *see Horner v. Acosta,* 803 F.2d 687, 694 (Fed. Cir. 1986); *see also Nat'l Treasury Employees Union v. Reagan,* 663 F.2d 239, 244–46 (D.C. Cir. 1981) (holding that notification sent to plaintiffs of their selection to federal jobs was an unconditional appointment, even though the required appointment forms had not yet been completed). The requirement of an open and unequivocal act may be met through various means. *See Watts v. Office of Pers. Mgmt.,* 814 F.2d 1576, 1580 (Fed. Cir. 1987) (recognizing regular appointing procedures "do not necessarily exclude other rituals that may be devised to signalize an appointment * * *."). Here, the essence of Mr. Nash's declaration is that President Clinton performed the necessary open and unequivocal act by communicating directly to Mr. Nash that he, i.e., President Clinton, had "personally approved" (Nash Decl. at ¶ 2) the appointment of Mr. Devaney. In addition, the other activities that occurred prior to the Senate reconvening on January 3, 2001, including the various notations on the Nash Memorandum and the autopenned signing of the Recess Appointment Order, demonstrate that the President performed the "open and unequivocal act" necessary for an appointment.

3. The Commission as Evidence of the Appointment

Next, the question arises as to the role of the commission. Plaintiffs urge that the execution of the commission is part of an appointment process and is "the last act that must be completed to vest an individual with a right to office * * *." (Pls.' Mem. at 22 (citing 12 Op. Att'y Gen. 304, 306 (1867); Dep't of Justice, Off. Legal Counsel Mem. for Fred F. Fielding, Counsel to the President, of March 22, 1984).) Plaintiffs point to the language of the Recess Appointments Clause that a president may "fill up Vacancies * * * by granting Commissions" as proof that the granting of the commission is a necessary part of an act of appointment.

This contention, however, is at odds with Justice Marshall's conclusion that an appointment and a commission "can scarcely be considered

as one and the same," *Marbury,* 5 U.S. at 156, and that the commission, while evidence of the appointment, is not necessarily the appointment itself. As such, it would appear that the Framers used the words "by granting Commissions," not to make the act of appointment and the signing of the commission a single deed, but: (1) to distinguish appointments made under the Appointments Clause from those made pursuant to the Recess Appointments Clause; and (2) to provide for the temporary nature of these recess appointments. First, in order to put the distinction between the two appointments clauses into relief, the Framers put the power of granting commissions (the receipt of which, in the ordinary course, would be the right of any "Officer of the United States," in any event, *see* Article II, Section 3 of the Constitution,[12]) solely in the hands of the president. *The Federalist No. 67* (Alexander Hamilton) ("The relation in which that clause stands to the other, which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other, for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate."). While the Senate is in session the president normally does appoint by means of signing the commission. This is because such appointment comes at the end of a process: nomination; confirmation; and appointment. During a recess, however, there is no equivalent process, merely the sole act of appointment by the President. *See id.* ("[T]he succeeding clause is evidently intended to authorize the President, SINGLY, to make temporary appointments * * *."). Thus, the provision allowing the president to "fill up Vacancies * * * by granting Commissions" does not add a requirement that a commission be granted to make an appointment complete. Rather, it makes clear that the president may act alone in making these appointments, without relying on any other person or body to perform a necessary preliminary act. Second, the phrase "by granting Commissions," must be read together with the words that follow them, making the entire phrase "by granting Commissions which shall expire at the End of their [the Senate's] next Session." By using these words the Framers limited recess appointments to a fixed term ending with the closure of the next Senate session. *The Federalist No. 67* (Alexander Hamilton) ("The time within which the power is to operate * * * 'to the end of the next session' of that body, conspire to elucidate the sense of the provision * * *."). Thus, while commissions evidencing appointments made pursuant to the Appointments Clause may demonstrate entitlements to office of varying duration, those made pursuant to the Recess Appointments Clause cannot extend beyond the Senate's next session. *Id.* ("[T]he succeeding clause is evidently intended to authorize the President * * * to make temporary appointments."). Therefore, the court finds that the granting of a commission is not necessary to complete a presidential act of appointment made pursuant to the Recess Appointments Clause and,

[12] Article II, Section 3 of the Constitution states that the President "shall Commission all the Officers of the United States."

thus, Mr. Devaney's recess appointment did not require a commission to make it complete.

4. Means Other Than a Commission May Show That the President's Power With Respect to Conferring Office is at an End

Finding that the commission is not the appointment itself, but rather, evidence of it does not end the inquiry, however, for as evidence of an appointment the commission serves two purposes. First, it proves an official's right to office and to the powers and duties the office affords. Second, and this is particularly noteworthy with respect to officials not removable at will, it demonstrates that the president's authority with respect to the office is at an end. *See Marbury,* 5 U.S. at 157 ("Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be * * * the signature of the commission.").[13] In keeping with the distinction between the appointment and the commission, though, Justice Marshall recognized that a commission is not the sole means of proving an appointment. *Id.* at 156 ("[I]f an appointment was to be evidenced by any public act, *other than the commission,* the performance of such public act would create the officer; and if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it." (emphasis added)); *see also Bennett,* 19 Ct. Cl. at 385. Where, as with a commissioner of the ITC, the president may not remove an office holder at will, there must be some point at which the office is placed beyond the president's power. Here, there is ample evidence of public acts sufficient to put Mr. Devaney's appointment as an ITC commissioner beyond the authority of the president to remove him. First, and most significant, is the Recess Appointment Order which unequivocally states: "I hereby appoint Dennis M. Devaney * * * to be a Member of the United States International Trade Commission," and bears the authorized autopenned signature of the president.[14] In addition, the various notations made by White House personnel demonstrate that the act of appointment was revealed to others. These things having been done while the Senate was still in recess, the office was put beyond President Clinton's power to rescind Mr. Devaney's appointment. As a result, sufficient open and unequivocal acts

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[13] Plaintiffs also contend that, although Mr. Devaney's formal commission was signed on January 18, 2001, this writing would not serve as an appointment pursuant to the Recess Appointments Clause, because the Senate was not then in recess and because the document was "backdated" to January 3, 2001. However, were the court to accept Plaintiffs' argument that a formal commission is necessary to complete an appointment, Mr. Devaney would still validly be appointed as his formal commission was signed on January 18, 2001, during a Senate recess. The court is aware that the making of appointments during an intrasession recess is not without controversy. The long history of the practice (since at least 1867) without serious objection by the Senate, however, demonstrates the legitimacy of these appointments. *See generally* Michael A. Carrier, *When is the Senate in Recess for Purposes of the Recess Appointments Clause?,* 92 Mich. L. Rev. 2204 (1994). In addition, the date inscribed on the commission would not change its effective date from its date of execution, i.e., January 18, 2001. *See also Bennett,* 19 Ct. Cl. at 386.

[14] Had the court found that a commission is needed to complete an appointment, the Recess Appointment Order would suffice. The Constitution does not prescribe any form for a commission, nor does it require that a commission have a manual signature. Thus, the autopenned signature on the Recess Appointment Order would appear to satisfy any requirement for the "granting of a Commission." Plaintiffs object that the recess appointment order does not fulfill the requirements of 5 U.S.C. § 2902. There is, however, no reason why the Recess Appointment Order could not fulfill the constitutional requirement of a "Commission" and another writing fulfill the requirements of 5 U.S.C. § 2902.

were performed to give Mr. Devaney "a right to his commission, or enable him to perform his duties without it." *Marbury,* 5 U.S. at 156.

B. Mr. Devaney's Appointment Filled a Vacancy

1. Under the ITC's Holdover Provision, the Vacancy and the Filling of the Vacancy Occur Simultaneously

Plaintiffs' next argument is that since Ms. Askey continued in office as a holdover, no vacancy existed to which Mr. Devaney could be appointed. (Pls.' Mem. at 5 ("On the date of Mr. Devaney's purported recess appointment, all six of the positions provided by law for ITC commissioners were occupied by incumbents. Although the fixed term of office of one of those incumbents had previously expired, that commissioner continued to hold her office pursuant to a statute that was specifically enacted to prevent the creation of vacancies upon the expiration of ITC commissioners' terms of office.").) Plaintiffs, however, read too little into the ITC's holdover statute. Rather than providing that the presence of a holdover commissioner eliminates the possibility of a successor assuming the holdover's place, the statute specifically provides for the end of the holdover's service upon a successor being "appointed and qualified." The statute, then, both provides for the continuance in office of a commissioner, and for the termination of that officer's service upon a new commissioner taking office. Thus, Plaintiffs' assertion that no vacancy existed for Mr. Devaney to fill is refuted by the plain language of the holdover statute. The court having found that President Clinton completed the presidential act of appointment during a Senate recess, a vacancy was created and simultaneously filled with the completion of that act.[15] As such, Ms. Askey's continuance in service ended and a vacancy on the ITC was created concurrently with Mr. Devaney's appointment.

2. The Requirement That an ITC Commissioner be "Qualified"

Plaintiffs further contend that Mr. Devaney could not replace Ms. Askey during a Senate recess because of the statutory language allowing her to hold over until a successor was "appointed and qualified." Under Plaintiffs' theory, Ms. Askey remained in office throughout the interses-

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[15] This holding is at odds with that found in *Staebler v. Carter,* 464 F. Supp. 585 (D.D.C. 1979). The court in *Staebler* found that a vacancy occurs on the expiration of an officeholder's term:

> to the extent that "vacancy" is defined in the statute, it is defined as occurring at the conclusion of the statutory six-year term of office, rather than as coming about by the termination of a * * * holdover entitlement.
>
> Clause (a)(2)(C), while not directly defining the term "vacancy," comes close to doing so. That clause mandates that a "vacancy occurring other than by expiration of a term of office" shall be filled only for the remainder of the unexpired term. The plain implication of that language is that a vacancy does indeed occur as a result of and contemporaneously with the expiration of the term of office—not some subsequent time. * * *

Id. 589–590. Here, the ITC holdover provision contains language similar to that the *Staebler* court found persuasive. Subsection 1330(b), provides for staggered nine-year terms for the six commissioners. *See* 19 U.S.C. § 1330(b)(1). The statute further provides that: "any commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. * * *" 19 U.S.C. § 1330(B)(1). Under the reasoning in *Staebler,* this language indicates that a vacancy occurs at the end of a term. While this court generally agrees with the analysis found in *Staebler,* it parts company with that court in its conclusion that "a vacancy does indeed occur as a result of and contemporaneously with the expiration of office—not some subsequent time * * *." *Staebler,* 464 F. Supp. at 590. Although another theory may not be needed here, since the result with respect to Mr. Devaney would remain the same, it seems to the court that the plain meaning of the words "any commissioner may continue to serve as a commissioner after an expiration of his [statutory] term until his successor is appointed and qualified," 19 U.S.C. § 1330(b)(2), is that the vacancy occurs simultaneously with the appointment and qualification of a successor.

sion recess because Mr. Devaney could only be "qualified" by Senate confirmation.[16] In support of this contention Plaintiffs rely on *Mackie v. Clinton,* 827 F. Supp. 56 (D.D.C. 1993), where, pursuant to 39 U.S.C. § 202(b), a member of the Board of Governors of the United States Postal Service was continued in office after expiration of his term for a period not to exceed one year or until his "successor has qualified." *Id.* at 57. In *Mackie* the court found that the purported successor was not entitled to office because he was not confirmed by the Senate and had thus not "qualified." *Id.* at 57–58 ("It seems plain from the express language of the statute that Governor Nevin holds and occupies the office of Governor through December 8, 1993, unless he dies, resigns, is lawfully removed or some 'successor has qualified,' i.e., has been nominated by the President and confirmed by the Senate."). The *Mackie* court provided no analysis, reason, or citation for its conclusion that "qualified" meant "confirmed." In like manner, Plaintiffs also rely on *Wilkinson v. Legal Services Corporation,* 865 F. Supp. 891 (D.D.C. 1994), *rev'd and remanded on other grounds,* 80 F.3d 535 (D.C. Cir. 1996), *cert. denied,* 519 U.S. 927 (1996), where that court found a recess appointment to the Board of the Legal Services Corporation to be invalid. *See id.* at 900 ("The plain meaning of this language is that each member of the Board remains as a Director after the person's term has expired until the new Director has been 'appointed' by the President and 'qualified,' i.e., confirmed by the Senate."). As in *Mackie,* the *Wilkinson* court at no point explains why the word "qualified" should be found to mean "confirmed." While neither of these opinions make its reasoning explicit, it can be presumed that these courts believed that only through the process of Senate confirmation could the qualifications of a prospective officeholder be examined and found adequate.

On the express point of the meaning of the word "qualified," however, the court agrees with the holding in *Swan v. Clinton,* 100 F.3d 973 (D.C. Cir. 1996), where the Court of Appeals for the District of Columbia Circuit found that the word "qualified," in the context of a holdover statute, allows for the filling of offices both by means of the Appointments Clause and the Recess Appointments Clause.[17] *Id.* at 986 ("Rather, a

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[16] Plaintiffs also insist that because Ms. Askey continued to perform the duties of an ITC commissioner until at least January 12, 2001, and received the salary and the other perquisites of office until January 16, 2001, no vacancy existed on January 3, 2001, to which Mr. Devaney could be appointed. Without in any way passing on the legitimacy or illegitimacy of their behavior, the court finds that (absent a resignation by Ms. Askey) neither Ms. Askey nor the ITC had the authority to determine the term of office of any commissioner, or determine when a vacancy existed. This being the case, the matters cited by Plaintiffs are irrelevant to the question of whether a vacancy existed to which Mr. Devaney could be lawfully appointed within the meaning of the Constitution and relevant statutes. It is to these that the court must look to determine if he was lawfully serving as an ITC commissioner on February 23, 2001, when the vote on the *Final Results* was taken.

[17] The Circuit Court goes to some lengths to point out that the statute being construed had been amended in 1978, and the phrase "successor has been appointed and qualified" was changed to read "successor has been qualified." *See Swan,* 100 F.3d at 986. As there is no legislative history or other reason to suppose that the change was intentional, it seems likely that the words "been appointed and" were inadvertently omitted. *See* House Rep. No., 95–1383 at 26, *reprinted in* 1978 U.S.C.C.A.N. 9260, 9298.

more natural reading[18] of 'qualified' on its own would have it mean that the requirements for assuming office have been fulfilled, *which could be either by nomination with Senate confirmation or by recess appointment."* (emphasis added)). Thus, under *Swan* either the Senate or, when appropriate, the president acting alone, can pass on the adequacy of a prospective officeholder's qualifications. Further evidence to support this view can be found in the statute that was the genesis of the phrase "appointed and qualified"—the Tenure of Office Act of 1867[19]:

> The give-and-take between early Presidents and Congresses reveals the historic tension between the legislature and the executive over the power to make recess appointments. * * *
>
> The tension ultimately spawned the Army Appropriation Act of 1863, which was reenacted as part of the Tenure of Office Act in 1867. The Tenure of Office Act entitled all civil government employees "to hold such office until a successor shall have been in like manner [by and with the advice and consent of the Senate] appointed and qualified."

Wilkinson, 865 F. Supp. at 897–98 (footnotes and citations omitted; bracketing in original) ("The Tenure of Office Act * * * was the precursor of numerous federal 'holdover' provisions. In fact, there may be as many as sixty such provisions in the current United States Code."). By enacting the Tenure of Office Act, Congress intended to prevent a president from appointing successor officials unless they were confirmed by the Senate. This intention is evidenced by the statute's requirement

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[18] An even more natural reading of "qualified" would find that the word means that the appointee has fulfilled the requirements for assuming office by, for example: being a member of the bar, attaining a certain age, or having passed an exam or taking the oath of office. An examination of dictionary sources tends to support this as the natural reading, e.g.: "To make oneself competent *for* something, or capable of holding some office, exercising some function, etc., *by* fulfilling some necessary condition; *spec.* by taking an oath, and hence *U.S.:* To make oath, to swear *to* something (Bartlett, 1848). Also, to become eligible for an old-age pension." Oxford English Dictionary, *available at* http://dictionary.oed.com/cgi/entry/00194218 (last visited Aug. 30, 2002); *"qualified adj.* 1. Possessing the necessary qualifications; capable or competent <a qualified medical examiner>. 2. Limited; restricted. * * *" *Black's Law Dictionary,* at 1254 (7th ed. 1999).

This view is further supported by usage of "qualified" in other legal contexts. *See, e.g.,* Office of Legal Counsel, United States Department of Justice, *Presidential Appointees—Resignation Subject to the Appointment and Qualification of a Successor,* 3 U.S. Op. Off. Legal Counsel 152, 155, 162 n.2 (1979), 1979 OLC Lexis 25, 1979 WL 16555 ("The terms of Chief Justice Warren's retirement, established in the correspondence between him and the President, are that the Chief Justice's retirement will take effect upon the qualification of his successor * * *. The term 'qualification' or 'qualifies' refers in this context to the taking of the two oaths prerequisite to holding Federal judicial office, (1) the oath to support the Constitution required by Article VI, Clause 3 of the Constitution of all officers of the United States, and (2) that required by 28 U.S.C. 453 of each Justice or judge before performing the duties of his office."). Indeed, 19 U.S.C. § 1330(a) sets out the qualifications for an ITC commissioner:

> The United States International Trade Commission * * * shall be composed of six commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. No person shall be eligible for appointment as a commissioner unless he is a citizen of the United States, and, in the judgment of the President, is possessed of qualifications requisite for developing expert knowledge of international trade problems and efficiency in administering the duties and functions of the Commission. A person who has served as a commissioner for more than 5 years (excluding service as a commissioner before January 3, 1975) shall not be eligible for reappointment as a commissioner. Not more than three of the commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable.

While the history of the phrase "appointed and qualified" supports the conclusion in *Swan* that either the Senate (in the context of the Appointments Clause) or the president (in the context of the Recess Appointments Clause) must pass upon a prospective officeholder's qualifications, under this alternate interpretation Mr. Devaney would nevertheless still be qualified for office as a result of his political party enrollment *(see* Nash Memorandum (containing hand written notation of "R" next to Mr. Devaney's name); Def.'s Mem. Ex. 5 (containing "R" designation next to Mr. Devaney's name)) and his having taken the oath of office on January 16, 2001. *(See* Def.'s Mem., Ex. 6 ("Appointment Affidavits").)

[19] The relevant portion of the Tenure of Office Act reads: "every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is, and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified." 14 stat. 430 (1867).

that successor officeholders be "qualified" only by Senate confirmation. *Myers v. United States,* 272 U.S. 52, 166 (1926) ("But the chief legislation in support of the reconstruction policy of Congress was the Tenure of Office Act, * * * providing that all officers appointed by and with the consent of the Senate should hold their offices until their successors should have in like manner been appointed and qualified * * *."). Had Congress intended the word "qualified" to refer to Senate confirmation only, the phrase "in like manner" would be surplusage. Moreover, by providing that a successor official be qualified "in like manner"—i.e., by Senate confirmation—Congress recognized the legitimacy of another Constitutional means of qualification (by the president through the Recess Appointments Clause) and sought explicitly to proscribe its use. In the case at bar, because the words "in like manner" or other words requiring Senate confirmation are absent, there is no reason to conclude that Congress sought to curtail the president's power to appoint ITC commissioners using the Recess Appointments Clause. Thus, it appears that the word "qualified," in the context of the ITC's holdover provision, means that the qualifications of prospective officeholders can be examined and found to be adequate either by the Senate pursuant to the Appointments Clause, or by the president in accordance with the Recess Appointments Clause.

This conclusion is an accord with both *Staebler v. Carter,* 464 F. Supp. 585 (D.D.C. 1979) and *McCalpin v. Dana,* Civil Action No. 82–542 (D.D.C. Oct. 5, 1982) (unpublished decision). In *Staebler* the court rejected the argument that Senate confirmation was required for seating a successor to a member of the Federal Election Commission. At issue was a statutory provision allowing a commission member to hold over until "his successor has taken office as a member of the Commission" pursuant to 2 U.S.C. § 437c(a)(2)(B). *Staebler,* 464 F. Supp. at 588 ("Plaintiff argues that these provisions entitle him to hold office as a member of the Commission until a successor has been nominated and confirmed by the Senate * * *."). The *Staebler* court rejected the idea that the word "qualified" meant "confirmed" based, in part, on its examination of legislative history. While the statute in *Staebler* was not identical to the one at issue here, the analysis is largely the same.[20] First, the *Staebler* court found no evidence in legislative history, or in the plain reading of the statute itself, that Congress intended to prevent the president from filling vacancies by using the Recess Appointments Clause. *Id.* at 591 ("Moreover, there is no basis either in the language of the statute or in its legislative history to support the conclusion that Congress meant to rein in the President in such an unprecedented manner. In the absence

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[20] The court in *Staebler* dismissed the notion that the holdover clause it construed was different from the standard "appointed and qualified" one at issue here:

> One might well conclude that, by omitting the usual language "until a successor is appointed and qualified," Congress contemplated the recess appointment problem and explicitly meant to authorize such appointments. But that, too, would be reading too much into Chairman Hays' statement. It appears to the Court that he, and the Congress generally intended by the inclusion of the holdover provision ultimately adopted to do no more nor less than to follow the customary law and practice with respect to holdovers and their successors.

Staebler, 464 F. Supp. at 592.

of a clearly-expressed legislative intent, the Court will not speculate that the Congress sought to achieve a result which would be both unusual and probably beyond its constitutional power."). As with the provisions examined in *Staebler,* the legislative history of the "appointed and qualified" language found in the conference report dealing with ITC's holdover provision, makes no reference to restricting the president's authority:

> The Committee's amendment would increase the probability that if there is a majority vote for injury, there would be a majority finding on a remedy. The Committee's amendment would: * * *
>
> > (5) Provide that a commissioner whose term has expired may continue in office until his successor has been nominated by the President and confirmed by the Senate * * *.
>
> In the past, there has often been a delay between the time of the expiration of a commissioner's term and the taking of office of his successor. Because any such periods of delay would leave the Commission without an odd number of commissioners and, therefore, without a tie-breaker, the Committee's amendment would continue in office the Commissioner whose term has expired until his successor is confirmed by the Senate and takes office.

S. Rep. No. 94–938, Pt. II, at 58–59 (1976) to accompany the Tax Reform Act of 1976, *reprinted in* 1976 U.S.C.C.A.N. 1, 4083–84. While the conference report uses the words "confirmed by the Senate" it does so in describing the normal course of events—what *The Federalist No. 67* referred to as the "general mode." There is no indication that Congress intended to restrict use of the Recess Appointments Clause or, in fact, that Congress took the Recess Appointments Clause into account. Indeed, the entire import of the conference report's words is that the enactment of the holdover provision would help ensure an odd number of commissioners[21] so as to avoid tie votes. Without more, it is doubtful that Congress intended the result urged by Plaintiffs. *See Staebler,* 464 F. Supp. at 592 ("The Court finds it difficult to believe that, had the Congress intended to take the significant step of attempting to curtail the President's constitutional recess appointment power, or even to legislate in the area of that power, it would [not] have considered the matter with more deliberation or failed to declare its purpose with greater directness and precision."). Indeed, the court in *Staebler*—as has this court—examined several instances where statutes had similar legislative histories to the statute at issue here, and found in none of them evidence that the Congress intended to restrict recess appointments by requiring Senate confirmation. *Id.* at 592–93 ("However, in none of these reports is there any indication that the Committees considered, much less that they intended to rule out, the constitutionally-prescribed

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[21] Because the mechanism for determining what constituted an appropriate remedy for injury to domestic industries was seen by some as not functioning as anticipated, Congress considered adding a seventh commissioner to the ITC in order that there would be a "tie-breaking" vote for remedy determinations. *See* S. Rep. No. 94–938, Pt. II, at 58, *reprinted in* 1976 U.S.C.C.A.N. at 4083. The proposed additional commissioner was not added, however, and an evenly-divided vote of commissioners is now "deemed" to be an "affirmative determination" pursuant to 19 U.S.C. § 1677(11).

recess appointment option. The thrust of all the comments is that continuity in office is important and that the disruption caused by prolonged vacancies should be avoided.").

Finally, the ITC cites the *Staebler* court for the proposition that added legitimacy is given recess appointments "by the fact that presidents have consistently construed holdover language as raising no bar to their recess appointment power." (Def.'s Mem. at 12);[22] *see Staebler,* 464 F. Supp. at 594 ("[T]he history of prior practice demonstrates primarily that various Presidents have acted on the assumption that they have the power to make the appointments, and that the Congress did not challenge this Presidential practice, such as by failure subsequently to confirm the successor or by amendment of the relevant laws. * * * [T]he lack of a challenge, either in the courts by someone with standing to complain, or by the Congress if it felt its prerogatives had been invaded, lends some, albeit not decisive, weight to defendants' ultimate position that McGarry's nomination is valid."); *see also United States v. Midwest Oil Co.,* 236 U.S. 459, 473 (1915) ("[D]etermining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation."); *McLaren v. Fleischer,* 256 U.S. 477, 481 (1921) ("It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons."); *Stuart v. Laird,* 5 U.S. 299 ("[I]t is sufficient to observe, that practice and acquiescence under [the act] for a period of several years * * * has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."). This being the case, the court agrees with the reasoning in *Staebler* that the long history of presidential appointments under the Recess Appointments Clause, without Congressional objection that these appointments violated holdover provisions, adds weight to the ITC's case. Thus, the court holds that Dennis M. Devaney was "qualified" by the act of presidential appointment in compliance with the ITC's holdover provision, and thus filled a vacancy on the ITC within the meaning of the Recess Appointments Clause.

Therefore, the court finds that the appointment of Dennis M. Devaney as a commissioner of the ITC was valid, and that Mr. Devaney lawfully cast his vote with respect to the *Final Results.*

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[22] Many holdover statutes of regulatory agencies employ nearly identical language to that of the ITC's holdover provision found in 19 U.S.C. § 1330(b)(2). *See Wilkinson,* 865 F. Supp. at 898 (listing various holdover statutes of regulatory agencies: 5 U.S.C. § 1202(b) (Merit Systems Protection Board member "may continue to serve until a successor has been appointed and has qualified"); 16 U.S.C. § 792 (member of the Federal Power Commission "shall be appointed * * * until his successor is appointed and has qualified"); 49 U.S.C. § 10301 (Interstate Commerce Commission member "may continue to serve until a successor is appointed and qualified"); 15 U.S.C. § 41 (Federal Trade Commission member "upon the expiration of his term of office * * * shall continue to serve until his successor shall have been appointed and shall have qualified"); 15 U.S.C. § 78d(a) (member of the Securities and Exchange Commission "shall hold office * * * until his successor is appointed and has qualified")).

CONCLUSION

For the reasons set forth above, the court denies Plaintiffs' Motion for Summary Judgment as to Counts One and Two of the complaints, and the court grants the ITC's Cross-Motion for Summary Judgment as to Counts One and Two of the complaints.

(Slip Op. 02–101)

FORMER EMPLOYEES OF BLACK AND DECKER POWER TOOLS, PLAINTIFFS *v.* CHAO, U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 02–00338

(Dated August 30, 2002)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court, having received and reviewed the U.S. Department of Labor's Revised Determination on Remand whereby the plaintiffs were found to be eligible to apply for Trade Adjustment Assistance, and the plaintiffs having stated that no response to the Revised Determination on Remand will be submitted by them, it is hereby

ORDERED that the Revised Determination on Remand filed by the Department of Labor on August 26, 2002, is affirmed in its entirety; and it is further

ORDERED that this case is dismissed.

(Slip Op. 02–102)

M.G. MAHER & CO., INC., ITSELF AND ON BEHALF OF ITS CLIENTS, AND VAN ZYVERDEN, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED PERSONS AND/OR ENTITIES WHO ARE NAMED IN THE UNITED STATES CUSTOMS SERVICE'S HARBOR MAINTENANCE TAX AN OCEAN EXPORTS AND WHO HAVE NOT FILED CLAIMS FOR REFUND THEREOF AS OF DECEMBER 31, 2001, PLAINTIFFS *v.* UNITED STATES, PAUL H. O'NEILL, SECRETARY OF THE TREASURY, AND ROBERT C. BONNER, COMMISSIONER OF CUSTOMS, DEFENDANT

Court No. 01–01134

[Class Action Challenging HMT Refund Claim Regulatory Time Limit Dismissed.]

(Dated August 30, 2002)

Thomas J. Kovarcik and *Steven R. Sosnov,* of counsel, for plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, *Todd M. Hughes,* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Michael M. Duclos), Richard McManus,* Office of General Counsel, United States Customs Service, of counsel, for defendants.

OPINION

RESTANI, *Judge:* This matter is before the court on plaintiffs' motion for class certification and defendants' motion to dismiss. Plaintiffs allege that 19 C.F.R. § 24.24(e) (finally promulgated on July 2, 2001) which established a deadline of December 31, 2001 for filing Harbor Maintenance Tax ("HMT") refund claims is invalid. The court determines that this action shall be dismissed.

BACKGROUND AND JURISDICTION

In *United States v. U.S. Shoe Corp.,* 523 U.S. 360 (1998), the Supreme Court found that the HMT, 26 U.S.C. § 4461 *et seq.,* which applied to nearly all merchandise shipped through the ports of the United States, was unconstitutional as applied to exports by reason of the Export Clause, U.S. Const., Art. I, § 9, cl. 5. *U.S. Shoe,* 523 U.S. at 370.

Parties who filed suit pursuant to the court's residual jurisdiction, 28 U.S.C. § 1581(i), received refunds from the government pursuant to a court approved claims resolution procedure, which has returned hundreds of millions of dollars to the taxpayers of payments made within the two year statute of limitations found at 26 U.S.C. § 2636(i) (2000). Other parties chose to follow an administrative refund route, a remedy which was not clearly available until recognized in *Swisher Int'l., Inc. v. United States,* 205 F. 3d 1358, 1369 (Fed. Cir.), *cert. denied,* 531 U.S. 1036 (2000), as a viable avenue of relief, agency denial of which would result in the availability of jurisdiction in this court under 28 U.S.C. § 1581(a) (2000) (Customs protest denial jurisdiction). Further refunds have been made pursuant to a second court approved claims resolution procedure for § 1581(a) jurisdiction cases.

Ordinarily, § 1581(i) jurisdiction is not available if another provision of § 1581 sets forth an available basis of jurisdiction. *See Miller v. United States,* 824 F. 2d 961, 964 (Fed. Cir. 1987). The court in *Swisher* did not explain why § 1581(i) could be utilized in *U.S. Shoe,* even though in *Swisher* the court found that § 1581(a) was available to parties who filed or could file refund requests. 205 F.3d at 1364. The answer may be that the defendants' insistence that § 1581(a) jurisdiction was not available for denial of protest of rejection of HMT refund requests, as a practical matter, precluded the ready availability of § 1581(a) jurisdiction for early refund seekers, such as *U.S. Shoe.*

Times have changed, however. Both the courts and the United States Customs Service ("Customs") have made it very clear that refunds are to be made for timely HMT export refund requests and that rejection of such refund requests will lead to §1581(a) jurisdiction. Unless *Miller* is no longer good law or an exception exists for these cases, HMT refund seekers must pursue claims through Customs.

Following *Swisher,* in *Thomson Consumer Electronics, Inc. v. United States,* 247 F.3d 1210 (Fed. Cir. 2001), the Court of Appeals allowed HMT importer claims to be brought under 28 U.S.C. § 1581(i), even though § 1581(a) jurisdiction was clearly available. It reasoned that making a purely constitutional claim before Customs as to the validity of a statute would be futile. Excusing exhaustion of statutorily mandated administrative procedures is a strong use of the futility doctrine. *See* 19 U.S.C. § 1514. It would seem unlikely that the statutory procedures may be avoided except in very similar circumstances.

Although Customs says it will readily deny late requests and plaintiffs claim the administrative process is thus an exercise in futility, the court sees many reasons for requiring agency processing of claims here. First, it will be the agency that will verify amounts owed and make refunds, even if it does so pursuant to court order. Second, the agency is entitled to know what claims exist against it and to contemplate disposition of such claims in the first instance. It may be that particular claims may be paid or settled, even if at first glance they appear untimely under the regulation. Finally, both constitutional and statutory claims are made here, unlike *Thomson,* and the relief sought, rescinding of the regulation, may be carried out by Customs. This is not the total legal and practical futility observed in *Thomson.*

The court recognizes, however, that jurisdiction in this area is unsettled, most notably because of the tension among *Miller, Swisher* and *Thomson.* Accordingly, it assumes for the sake of argument that there is 28 U.S.C. § 1581(i) jurisdiction for this action. It also assumes that plaintiffs have filed within the two year statute of limitations of 28 U.S.C. § 2636(i) because the relief they seek is an invalidation of a July 2001 regulation. Finally, plaintiffs attempted to add parties with facial stand-

ing in June 2002.[1] Thus, even though the court would dismiss this action for failure to complete a statutorily required administrative process, in the interest of judicial economy, the court turns to defendants' second ground for dismissal, failure to state a claim.

As a preliminary matter, even though a court normally considers class certification before the merits, it seems particularly important to consider whether there is any point to continuing this matter at all because jurisdiction is uncertain and the discretionary considerations as to whether to certify a class are very difficult.[2] *See Clincher v. United States,* 205 Ct. Cl. 8, 11, 499 F. 2d 1250, 1252 (1974) (class members should not be invited to "board a sinking ship".) Accordingly, accepting all of plaintiffs' factual allegations as true, the court will consider defendants' dispositive legal arguments.

A. 19 C.F.R. § 24.24(e) Is Not Unconstitutional

Plaintiffs argue that when taxes are involved only Congress may establish a statute of limitations. Plaintiffs cite no case that stands for the proposition that when it permits an agency to process tax refund claims, that such agency is prohibited from establishing reasonable time limits to permit the orderly administrative processing of such claims. In *Stearn v. Dep't of the Navy*, 280 F.3d 1376, 1381–84 (Fed. Cir. 2002), the Federal Circuit upheld regulatory time bars of claims against the government. The court finds nothing to prevent application of *Stearn,* a civil service retirement benefits case, to HMT refund claims. Congress may delegate authority under its taxing power in the same manner as under its other powers. *See Skinner v. Mid America Pipeline Co.,* 490 U.S. 212, 223 (1989). Furthermore, the regulatory time limit is not in derogation of the statutory scheme. Rather it restores it. When the court in *Swisher* recognized Customs refund procedure as applicable to these constitutional claims, a gap in the statute of limitations which covers all actions before the court was created. *See* 28 U.S.C. § 2636. Because the refund procedure established by Customs created the gap, Customs surely may remedy this problem by filling the gap. The regulation at issue does nothing more than restore the effect of the statute of limitations enacted by Congress. Customs has rule-making authority under 26 U.S.C. § 4462(i) (2000) and properly exercised it here. There is no unconstitutional delegation of authority.

Recently for purposes of deciding if interest is owed on HMT refunds, the Federal Circuit ruled that the unconstitutional imposition of the HMT on exports does not give rise to a taking claim. *U.S. Shoe v. United States,* 296 F. 3d 1378 (Fed. Cir. 2002). If the unauthorized retention of HMT itself is not a taking, similarly unauthorized limitation of the time period for filing an HMT refund claim is not a taking.

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[1] The original plaintiffs may have opted out or filed timely refund requests. Thus, standing on their behalf may be lacking. The new parties' requests appear barred by the challenged regulation. Because the court is dismissing this action it accepts, without further inquiry, plaintiffs' allegation that one or more of these parties has standing.

[2] The mandatory requirements of USCIT Rule 23(a) would seem to be met. *See Baxter Healthcare Corp. v. United States,* 20 CIT 552, 925 F. Supp. 794 (1996) (finding USCIT Rule 23(a) satisfied, but not Rule 23(b), in HMT case)

If the regulation is authorized it is still not a taking. The HMT Fund is a public fund as to which there can be no taking of private property. *Id.* at 1384. A time limitation on plaintiffs' claims to a refund of amounts paid into that fund is not a taking of their property. Thus analysis of whether the regulatory time limitation is an undue burden on plaintiffs' property is not required.

B. 19 C.F.R. § 24.24(e) does not give rise to a claim under the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 603.

The purpose of the RFA is to address "the high cost to small entities of compliance with uniform regulations." *Mid-Tex Elec. Co-op., Inc. v. FERC,* 773 F.2d 327, 342 (D.C. Cir. 1985). Agencies, however, are relieved of performing this analysis when they certify "that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b) (2000); *see, e.g., State of Michigan v. U.S. Environmental Prot. Agency,* 213 F. 3d 663, 688–89 (D.C. Cir. 2000).

In accordance with § 605(b), Customs certified that a regulatory time limit for filing refund claims would not have a significant economic impact on a substantial number of small entities. *See* 66 Fed Reg. 34813, 34818 (July 2, 2001); 65 Fed. Reg. 78430 (Dec. 15, 2000). Thus, Customs did not perform an RFA analysis. Plaintiffs argue that Customs committed error by concluding that there would be no significant economic impact. They contend that the imposition of a December 31, 2002 deadline for filing refund claims results in the denial of approximately $200 million in HMT refunds for 100,000 exporters.

Defendants argue that plaintiffs grossly exaggerate both the number of potential claimants as well as the amount of unrefunded export HMT payments. Nevertheless, even if these figures are accurate, they are irrelevant to the question of whether Customs was required to conduct an RFA analysis here. Plaintiffs' argument fails because it misconstrues the "economic impact" relevant to an RFA analysis. As the D.C. Circuit has explained: "[I]t is clear that Congress envisioned that the relevant 'economic impact' as *the impact of compliance with the proposed rule* on regulated small entities." *Mid-Tex Elec.,* 773 F. 2d at 342 (emphasis added); *accord State of Colorado v. Resolution Trust Corp.,* 926 F. 2d 931, 948 (10th Cir. 1991).

The court declines to construe the RFA impact at issue here as the amount that might not be recovered because some exporters had insufficient interest in complying with regulations, or in keeping themselves apprised of properly promulgated regulations that they should know would affect their business interests. Customs conclusion when it published the final regulations of no significant impact for RFA purposes is correct. *See* 66 Fed. Reg. 34813, 34816 (July 2, 2001).

Plaintiffs' alternative argument that Customs was arbitrary and capricious in not studying, for the purposes of the "no significant economic impact" finding, the cost of compiling records to make a request is inapposite. Customs searches its records upon receipt of a letter request.

Difficulties of claimants in searching their own records if Customs records are incomplete did not change as a result of the regulation. In fact, the regulation changed no burden. Both before and after the regulation, and even if the court invalidates the regulation, claimants would need to decide whether they have a claim and if so, at least write a letter or fill out a form. Compliance with the regulation imposed no new economic burden.

CONCLUSION

The court observes the *dicta* in *Swisher,* 205 F. 3d at 1368, which that court made in finding no time limit applicable prior to the regulations at issue, that Customs could "impose a time limit in the future." That is just what Customs did. It did so giving ample notice, both that legally required and through practical means, to all concerned, and the regulation gives rise to no cause of action.

Accordingly, this action is dismissed.

(Slip Op. 02–104)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND PEER BEARING CO., DEFENDANT-INTERVENOR

Court No. 98–12–03235

(Dated September 3, 2002)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court, having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand, Timken Company v. The United States,* 26 CIT ____, 201 F. Supp. 2d 1316 (2002) ("Remand Results"), and Timken's concurrence therewith, finds that Commerce duly complied with the Court's remand order, and it is hereby

ORDERED that the *Remand Results* filed by Commerce on July 22, 2002, are affirmed in their entirety; and it is further

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