[PUBLIC VERSION]

(Slip Op. 03–73)

THE COMMITTEE FOR FAIR BEAM IMPORTS, ET AL., PLAINTIFFS, *v.* UNITED STATES, AND THE UNITED STATES INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND SALZGITTER AG STAHL UND TECHNOLOGIE, ET AL., DEFENDANT-INTERVENORS

Court No. 02–00531

[Plaintiffs' Motion for Judgment upon an Agency Record is denied.]

(Decided: June 27, 2003)

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Shearman & Sterling, *Jeffrey M. Winton*, (*Christopher M. Ryan*), for Defendant-Intervenors Stahlwerk Thuringen Gmbh, TradeARBED, Inc., ProfilARBED, S.A., and Aceralia Corporacion Siderurgica, S.A.

OPINION

I. INTRODUCTION

BARZILAY, *Judge*: Plaintiffs, The Committee for Fair Beam Imports and its individual members, Nucor Corporation, Nucor-Yamato Steel Company, and TXI Chaparral Steel Company, (collectively "Fair Beam" or "domestic industry") challenge the final negative material injury and the final negative threat of material injury determinations of the United States International Trade Commission ("ITC" or "Commission"), set forth in *Certain Structural Steel Beams from China, Germany, Luxembourg, Russia, South Africa, Spain and Tai-*

wan, Invs. Nos. 731–TA–935–936 and 938–942 (Final), USITC Pub. No. 3522 (June 2002) ("*Final Determination*" or "*Beams II*")[1] and made pursuant to 19 U.S.C. §§ 1671d(b) and 1673d(b) (1999). This court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(1) and 28 U.S.C. § 1581(c). For the reasons outlined below, Fair Beam's USCIT R. 56.2 Motion for Judgment upon an Agency Record is denied.

II. BACKGROUND

A. *Procedural History.*

On May 23, 2001, the domestic industry filed petitions with the United States Department of Commerce ("Commerce") and the Commission which led to investigations by both concerning structural steel beams of certain specifications[2] imported from China, Germany, Luxembourg, Russia, South Africa, Spain, and Taiwan ("subject countries" or "respondents").[3] Preliminary results were issued by the Commission on July 16, 2001, and by Commerce, on December 28, 2001. In May 2002, Commerce issued its final determinations. *See* 67 Fed. Reg. 35,479–35,490 & 35,497. A hearing was held before the Commission on May 15, 2002.[4] Notice of the Commission's final determination was published in the Federal Register on June 27, 2002. *See* 67 Fed. Reg. 43,340. A panel of five Commissioners found no present material injury from subject imports. One Commissioner, however, dissented from the panel's negative determination with regard to threat of material injury.

B. *The product and the U.S. market.*

Structural steel beams are load-bearing support members in the construction of large steel structures, such as buildings, bridges, towers, pre-fabricated homes, ships, and equipment. Demand for structural beams fluctuates in tandem with construction activity which in turn tracks aggregate U.S. economic activity. *Certain Structural Steel Beams from China, Germany, Luxembourg, Russia, South Africa, Spain, and Taiwan*, Staff Report to the Commission on Invs. Nos. 731–TA–935–936 and 938–942 (Final) at I–6 & II–10 (June 3, 2002) ("*Staff Report*") in *Administrative Record*, List 2, Doc. No. 169.

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[1] This opinion cites to the version of this document included in *Administrative Record*, List 2, Doc. No. 170.

[2] The subject of this investigation is "doubly-symmetric shapes, whether hot-or coldrolled, drawn, extruded, formed or finished, having at least one dimension of at least 80 mm (3.2 inches or more), whether of carbon or alloy (other than stainless) steel, and whether or not drilled, punched, notched, painted, coated, or clad." *E.g.*, *Notice of Final Determination of Sales at Less than Fair Value: Structural Steel Beams from the People's Republic of China*, 67 Fed. Reg. 35,479 (May 20, 2002). The court notes that no scope or domestic like product issues are raised in this appeal.

[3] Initially, Italy was also investigated. However, upon a finding of no dumping by Commerce, the ITC discontinued its investigation of Italian structural beams. For the same reason, one company from the People's Republic of China was eliminated from the investigation. The court further notes that no cumulation issues are raised in this appeal.

[4] "*ITC Hearing Tr.*" will signify the transcript of this administrative hearing, portions of which are included in tab 5 of Plaintiffs' Appendix.

In the U.S. market, there are two types of purchasers of structural steel beams: distributors (or service centers) and end users (or fabricators).[5] *Id.* at II–1. Imported product is mostly sold to distributors; end users, however, typically buy from domestic suppliers. Distributors keep inventories while end users do not. Domestic mills charge the same price to both distributors and end users. In the event an end user buys from a distributor, it accordingly pays a higher price. Purchasers rank domestic product superior in availability and delivery time[6] to imported product, but inferior in price. *Id.* at II–13. On the other hand, domestic and imported product are perceived to be comparable in product quality and consistency. Purchasers of structural steel beams report evaluating factors such as price, quality, and availability in determining whether to purchase domestic or imported beams and rank these factors in a descending order of importance.[7] *Id.* at II–12.

The short-term price elasticity of U.S. demand for structural steel beams is low reflecting lack of substitutes for steel beams in construction, especially after the design phase of construction is complete. *Id.* at II–9. In other words, once the quantity of beams requested is set, later price variation will have no or little effect.[8]

On the supply side, the price elasticity of domestic supply is lower than that of the subject countries' supply. *Staff Report* at II–16 & 17. That is, subject countries can respond to price changes in the U.S. market faster than domestic producers can in terms of increasing shipments to the U.S. market.[9] The price elasticity of supply is dependent on excess capacity, ability to shift production or alter capacity, inventories, and availability of alternate markets. The relatively greater flexibility of the subject countries is partially due to the existence of home markets and alternate export markets from which they are able to divert products to the U.S. market with relative ease.

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[5] Construction companies are the ultimate users of the finished product.

[6] There is a three to five month "lead time" for subject imports whereas the lead time for domestic beams is shorter, *Final Determination* at 23, although not by "very much," *ITC Hearing Tr.* at 26 (testimony of domestic executive). Orders for beams are therefore necessarily a function of perceptions of future demand and not of current demand conditions.

[7] Price comes before all else under normal circumstances according to testimony offered at the administrative hearing. *See ITC Hearing Tr.* at 49 ("Price is the defining factor in determining who receives the order."). The ITC in the *Final Determination*, however, paid virtually no heed to this information because of its implicit finding that in a time of supply shortage, purchasers are willing to pay more to circumvent the domestic unavailability of the product—which determination is more fully explained below. In connection with the price variable, the court also notes that at the administrative hearing at least one respondent witness denoted respondents as price takers. *See id.* at 199–200. In other words, respondents normally peg their price to that of the market leader, Nucor, a domestic producer. In this period, however, because Chaparral Steel, another domestic producer, "was playing a little bit havoc with the market," Chaparral Steel's price was matched. *Id.* at 200.

[8] Potential long-run substitutes for structural steel beams include reinforced concrete, structural tubing or wood. *Staff Report* at II–10 & 11. The *Staff Report* also indicated that "building design typically precedes construction and material purchases by months or even years," which period can be termed "the long-run" in this context. *Id.* at II–11.

[9] The *Staff Report* estimated that for every one percent increase in U.S. price, domestic producers could increase shipments either by one or two percent, as opposed to ten or twenty percent by subject countries. *Staff Report* at II–17.

The largest share of cost in the production of structural steel beams is that of steel scrap, the raw material from which beams are produced. *Id.* at V–I. Thus, the supply of beams is tied to the price of steel scrap.[10] It has also been determined that in offers domestic producers use price lists whereas sales of subject imports are on a transaction-by-transaction basis, price and quantity being determined by the then existing market conditions.[11] *Staff Report* at V–7.

C. *The ITC's findings in the Final Determination.*

In the *Final Determination*, the ITC evaluated the prevailing market conditions during the period of investigation ("POI"). *See Final Determination* at 17–21. Consulting Census Bureau statistics, the ITC determined that nonresidential construction activity in the United States, which is an indicator of U.S. demand for structural steel beams, increased from 1999 to 2000 and declined in 2001. Using its own questionnaires and official Commerce import statistics, the ITC further observed that apparent U.S. consumption of steel beams rose from 4.96 million short tons in 1999 to 6.23 million in 2000, and then declined to 4.81 million in 2001.

The ITC next noted that the domestic industry experienced supply difficulties during 1999 and the first half of 2000. The ITC based this finding on questionnaire responses of fortyfive purchasers, eighteen of which (sixteen of thirty-one distributors) represented that they either were put on "allocation" during this time period by domestic producers or were otherwise unable to meet their requirements from domestic suppliers. The ITC further noted questionnaire responses of the largest domestic producers which confirmed that purchasers were "allocated a portion of production based on historical levels of purchases" in applicable products.[12] *Staff Report* at II–2. The ITC also referenced news articles in trade publications which reported a domestic supply shortage in this time period.[13]

The ITC's finding of domestic supply shortage was informed by an additional observation that imports of structural steel beams from Japan became subject to a June 2000 antidumping duty order, and imports of structural steel beams from Korea became subject to antidumping and countervailing duty orders in August 2000.

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[10] During this period of investigation, scrap prices increased throughout 1999, reaching a peak in January 2000, and followed a general declining trend for the rest of the period, arriving at a low in November 2001. *Staff Report* at V–1.

[11] In the *Final Determination*, the ITC observed that domestic producers on occasion deviated from list prices. *Final Determination* at 26 n.100.

[12] These domestic producers, Nucor-Yamato and TXI, together produced approximately [[ ]] of domestic structural steel beams in 2001. *Staff Report* at III–2. The *Staff Report* further pointed out that Nucor denied putting its Berkeley plant customers on "allocation" and that a Northwestern Steel & Wire Company witness testified that this domestic producer, which eventually went out of business, "was begging for orders" during this time. *Staff Report* at II–2 n.3.

[13] Another piece of evidence supporting the existence of domestic shortage during the POI is the observation that the "average lead time" for domestic producers' delivery increased in 2000 from its 1999 level. *Staff Report* at II–2 n.4; *Final Determination* at 18. The court additionally notes that counsel for Fair Beam all but conceded the presence of a supply shortage at oral argument before this court. *Oral Arg. Tr.* at 9:16–17 ("there was clearly a shortage").

Finally, the ITC noted the changes to domestic production during the POI. Two new domestic mills (Nucor and TXI) became operational during 1999 with a third (Steel Dynamics, Inc.) expected to become operational in 2002. On the other hand, another domestic firm (Northwestern Steel & Wire Company) completely shut down its operations in May 2001.

i. Subject import volumes.

In a material injury investigation, the statute requires the Commission to determine whether a domestic industry "(i) is materially injured, or (ii) is threatened with material injury * * * by reason of imports." 19 U.S.C. § 1673d(b)(1). The statute defines "material injury" as "harm which is not inconsequential, immaterial, or unimportant." § 1677(7)(A). In making a material injury determination, the statute first requires the ITC to consider the "volume" of subject imports already determined to be sold at less-than-fair value. § 1677(7)(B)(i)(I). In particular, the ITC shall consider whether the volume of subject imports (or any change therein) in either absolute or relative terms is "significant" during the POI. § 1677(7)(C)(i).

In the *Final Determination*, the ITC observed that the volume of subject imports rose from 331,436 short tons in 1999 to 772,809 in 2000, and then fell to 300,150 in 2001 (to a level lower than its 1999 level). *Final Determination* at 21. The value (as opposed to quantity) of subject imports followed a similar curve. These numbers represented a market penetration by subject imports of 6.7% in 1999, 12.4% in 2000, and 6.2% in 2001. The ITC linked the rise in U.S. market penetration of subject imports to its finding that the domestic industry was experiencing supply difficulties. Accounting for the gap in time between order placement and delivery, the ITC noted that changes in volume of subject imports trailed the domestic supply conditions, with the domestic shortage and its subsequent alleviation responsible for the rise and in part for the later fall of subject imports during the POI. *Id.* at 23.

Before the ITC, the domestic industry had argued that the increase in demand during 2000 was "relatively modest," and therefore the domestic industry could satisfy "real" demand with their supplies—which argument was an attempt to dispute the domestic shortage finding of the ITC. The ITC responded by noting that instead of contemporaneous demand conditions, perceptions about future demand are what stimulate orders. *Id.* at 22. As evidence of purchasers' expectations of strong future demand during the POI, the ITC cited testimony by one fabricator and the predictions of a trade publication, which incidentally also reported "major concerns about steel availability." *Id.* at 22–23. In the ITC's scenario of events, expected strong demand and limited domestic supply led to an increase in purchases of subject imports (especially by distributors). The ITC further acknowledged that by the third quarter of 2000, the domestic supply situation improved and, after import volumes had

reached their peak in August 2000, orders for subject imports began to fall. *Id.* at 23.

Further, the ITC remarked that subject import volumes started to fall "well before" the filing of the May 2001 petition that initiated the present investigation. *Id.* at 23–24. Consistent with this observation, the ITC pronounced that the filing of the petition had "limited" impact on the decline of subject import volumes in 2001 and, accordingly, the ITC did not "reduce the weight" accorded to the 2001 data. The ITC finally concluded that resolution of domestic shortages coupled with decline in demand led to a decline in subject import quantities in this period.

After thus accounting both for the upward movement of subject import volumes from 1999 to 2000 and their decline from 2000 to 2001, the ITC went on to say: "[I]n light of the foregoing conditions of competition and the lack of price effects discussed below, we find that the volume of subject imports is not significant." *Id.* at 24.

ii. Price effects.

The statute also requires the ITC to consider the "effect of imports * * * on prices in the United States for domestic like products." § 1677(7)(B)(i)(II). In particular, the ITC is required to analyze whether "there has been significant price underselling" of imports compared with domestic products and whether "the effect of imports * * * otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree." § 1677(7)(C)(ii)(I) & (II).

Comparing domestic prices with subject import prices, the ITC first found that prices of subject imports reflected "a mixed pattern of overselling and underselling" the domestic product during the POI. *Final Determination* at 25. In particular, subject imports undersold the domestic product in 90 of 147 quarterly comparisons. *Id.*; *Staff Report* at V–17 & V–18. The ITC noted that product 1, a type of structural steel beams (wide-flange beams of 8 to 14 inches), experienced the "most intense" competition because it was the most widely sold and additionally had the most complete pricing data from the subject countries. *Final Determination* at 26. Isolating the price information for this product, the ITC observed that prices of product 1 exhibited 22 occasions of underselling and 32 occasions of overselling. To estimate underselling more accurately, the ITC also conducted a second comparison which incorporated the differing delivery times of subject imports and domestic product. In this comparison, the incidence of underselling for product 1 increased to 27 and that of overselling decreased to 25. Even though in this instance underselling occurred more frequently than overselling, the ITC nevertheless emphasized that "still more tonnage was over-

sold."[14] *Id.* at 26 n.100; *Staff Report* at V–9 & V– 10.

While also acknowledging that other products under investigation exhibited greater incidence of underselling, the ITC noted that the domestic product was typically sold at a premium, the existence of which was established at the administrative hearing by testimony of four domestic industry witnesses (also characterizing the premium of $10 to $40 per ton as "small") and one respondents witness (adding that the premium could more than double in a "very weak market").[15] *Final Determination* at 25 n.98; *ITC Hearing Tr.* at 232. The ITC attributed the more frequent occurrence of underselling (as opposed to overselling) to the premium. The ITC additionally observed that subject imports continued to increase even though some subject import prices were higher than domestic price levels. *Final Determination* at 27. The ITC concluded that "[t]hese factors all serve to diminish the significance of the underselling that was observed." *Id.*

Next, the ITC noted that in 2000 the volume of imports was at its highest level when both domestic and subject import prices were highest. Prices of subject imports sharply rose from 1999 to their peak in 2000 and declined in 2001, following a trend similar to that of subject import volumes. *Id.*; *Staff Report* at V–9 to V–16. The ITC thus pronounced that "factors other than competition from subject imports were responsible for price movement of the domestically produced product." *Final Determination* at 27. In identifying domestic shortages as the likely culprit, the ITC observed that "[p]rice increases are a natural function of supply shortages." *Id.* at 28.

The ITC further noted that once the domestic supply shortage was alleviated, prices along with subject imports declined. According to the ITC, "the sharp decline in prices observed during 2001 cannot be a function of that year's subject import volumes, which declined sharply, [and it] also cannot be a function of subject imports entering the U.S. market in 2000 at rising prices that were sometimes above those for the domestically produced product." *Id.* The reason for the fall in price, the ITC determined, was the misestimation of the 2001 demand (which in fact declined from its 2000 level) by purchasers who placed their orders earlier and the consequential rise in distributors' inventories—which can also be termed as an "oversupply" in the market.[16] *Id.* at 28–29.

The ITC ended its price effects analysis by stating that:

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[14] Despite the domestic industry's objections, the ITC used actual sale prices rather than list prices in comparisons because this method was the Commission's customary practice and because the record established that domestic producers on occasion deviated from list prices. *Final Determination* at 26 n.100 (citing Fair Beam's Prehearing Brief before the agency).

[15] The premium is due to some non-price considerations, such as domestic producers' geographical proximity. *See ITC Hearing Tr.* at 200. Testimony was also presented to the effect that the premium was exacerbated in recent years due to strong dollar. *See id.* at 204.

[16] Fair Beam submitted to the ITC the conclusions of an econometric model which predicted that subject imports affected prices with a nine month lag. *See Final Determination* at 29 n.107. The ITC found that the model failed because it did not take into account changes in domestic supply capabilities. To rebut the predictions of the model the ITC cited testimony from industry players to the effect that price competition occurs when an order is placed.

> We cannot conclude that the record indicates that either the inventory overhang or the resulting price declines were the function of the subject imports. High and increasing subject import prices during the portion of 2000 when subject import volumes increased cannot explain subsequent price declines. Nor, in light of the subject import pricing and volume patterns, can there be any nexus between the subject imports and business decisions by steel service centers to increase purchases that proved, in retrospect, to be wrong. We consequently conclude that the subject imports did not have significant price-depressing or -suppressing effects.

Id. at 29–30.

iii. Impact.

The last component of a material injury determination is the analysis of the impact of subject imports sold at less-than-fair value on the domestic industry.[17] The ITC is statutorily required to consider "all relevant economic factors" that bear on "the business cycle and conditions of competition" in the industry, including changes in output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and R&D. § 1677(7)(C)(iii). In addition, the 1994 amendments to the statute now require the ITC to consider the size of dumping margins determined in an antidumping investigation.[18] § 1677(7)(C)(iii)(V); The Uruguay Round Agreements Act, Statement of Administrative Action ("SAA") at 850, *reprinted in* 1994 U.S.C.C.A.N. at 4040, 4184. No single factor is dispositive. *See* § 1677(7)(E)(ii) ("The presence or absence of any factor which the Commission is required to evaluate under subparagraph (C) * * * shall not necessarily give decisive guidance" to a material injury determination).

In the *Final Determination*, the ITC observed that apparent U.S. consumption of structural steel beams, domestic output indicators (such as capacity, capacity utilization, production, and U.S. shipments), domestic sales revenues (including per unit sales values, the domestic industry's operating income and margins), employment indicators (such as number of workers, productivity, hours worked, and wages paid)—all followed a pattern of increase from 1999 to 2000 and decline from 2000 to 2001. *Final Determination* at 31–34; *Staff Report* at VI–2. In contrast, the ITC found that domestic producers' inventories, hourly wages, and R&D steadily increased, and industry capital expenditures decreased from 1999 to 2001. More

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[17] Besides volume, price, and impact, the ITC "may [also] consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." § 1677(7)(B)(ii).

[18] Here, the ITC's consideration of dumping margins was limited to a listing of amended dumping margins for companies in subject countries. *Final Determination* at 30 n.110. The *Final Determination*'s consideration of dumping margins is, however, not on review before the court because it was not raised.

significantly, the ITC determined that the domestic industry's market share (as measured by domestic output's share in U.S. consumption), despite a "modest" decline in 2000, was actually higher in 2001 than it was in 1999 (specifically, 81.1% in 1999, 79.8% in 2000, and 90.3% in 2001). *Final Determination* at 31–32. Thus, the ITC dubbed the 2000 loss of market share by the domestic industry a "temporary phenomenon." *Id.* at 32.

The ITC concluded that domestic industry's overall performance improved from 1999 to 2000, when imports were at their peak, and that none of the components that led to decline in performance from 2000 to 2001 were a result of the increase in imports. *Id.* at 33. The ITC attributed the decline in prices of the 2000–2001 period to increasing supply and declining demand for this period. Accordingly, the ITC determined that "the subject imports did not have a significant adverse impact on the domestic structural steel beams industry." *Id.* at 34.

iv. Threat of material injury.

The statute also protects the domestic industry from a threat of material injury (as opposed to a present material injury) on account of imports sold at less-than-fair value in the U.S. market. To be able to conclude that the domestic industry is thus threatened, the ITC must find whether "further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued." § 1677(7)(F)(ii). The ITC is required to evaluate the threat factors outlined in section 1677(7)(F)(i).

In the *Final Determination*, the ITC first looked at subject import volume and market penetration, emphasizing that, even though increasing in the beginning of the POI, both variables exhibited a sharp decline at the end of the POI. *Final Determination* at 36. The ITC found "no current shortages of domestic supply and no likelihood of shortages in the imminent future." *Id.* In connection with this finding, the ITC stressed that TXI had solved its problems at its Petersburg mill and a new Steel Dynamics, Inc. mill was in the works. Further, although the subject countries projected an increase in imports in both 2002 and 2003, the projections fell short of their peak in 2000. *Id.* at 37. The subject countries had ready markets at home and abroad, and that, although there was some "ability to shift exports from other markets to the United States," it was "unlikely that subject imports [would] increase to significant levels," given the decline in subject imports in 2001.[19] *Id.* Capacity utilization in the subject countries persisted at high levels during the POI, and further increases in both capacity and capacity utilization were anticipated in 2002 and 2003; the ITC thus found that there was no indi-

[19] Here, the ITC noted outstanding antidumping duty orders against Russia by Korea and Taiwan and against South Africa by Australia. *See Final Determination* at 37 n.141.

cation in the record of an "imminent" increase in subject volumes. Moreover, subject countries presented testimony (by one of their executives) rebutting the contention that an impending increase in subject imports was likely. *Id*. at 38 n.142; *ITC Hearing Tr.* at 201–202.

The ITC additionally pointed to the lack of any significant price effects in the POI and predicted that such would continue in the imminent future. *Final Determination* at 38. With respect to subject countries' inventories, the ITC observed that despite an increase in inventories, not all of the inventoried beams were suitable for sale in the United States because they did not conform to the U.S. standard. Moreover, even though other products which could be substituted for structural steel beams in production were subject to U.S. safeguards tariffs (as in the case of hot-rolled bar)—with the implication that more structural steel beams could be produced—, the ITC maintained that "[n]evertheless, as previously noted, we do not believe that the presence or potential for additional productive capacity in the subject countries is likely to lead to substantially increased imports." *Id*. at 39.

Finally, the ITC decided that the domestic industry was not in a "vulnerable state" because the industry remained "profitable overall" despite variable performances of individual producers and was also "characterized by the recent and imminent expansion of capacity at new and efficient production facilities." *Id*. The ITC concluded:

> Accordingly, we find that material injury by reason of subject imports will not occur absent issuance of antidumping orders against the subject imports. We therefore conclude that the domestic structural steel beams industry is not threatened with material injury by reason of the subject imports.

Id.

III. DISCUSSION

The court must uphold the Commission's determinations unless they are unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence 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 (1938).

A. The ITC is under no obligation to follow its prior factual determinations in subsequent investigations.

Parties' arguments.

Fair Beam charges that determinations made in the *Final Determination* (which Fair Beam denotes as *Beams II*) are "factually and logically inconsistent with the underlying record" and also with an

earlier ITC decision, *Certain Structural Steel Beams from Japan*, Inv. No. 731–TA–853 (Final), USITC Pub. No. 3308 (June 2000) ("*Beams I*") in *Pls.' App.* tab 3. *See Pls.' Br.* at 8. In *Beams I*, the ITC found that the domestic industry was materially injured or threatened with material injury by reason of structural steel beams imported from Japan.[20] *Beams I* at 3. Fair Beam makes this argument by focusing on the language found in a recent United States Court of International Trade case, *Usinor v. United States*, Slip Op. 02–70 (July 19, 2002) ("*Usinor*"). The *Usinor* court, while acknowledging that "each injury or investigation is *sui generis*, involving a unique combination and interaction of many economic variables," emphasized that the ITC "may not disregard previous findings of a general nature that bear directly upon the current review." *Usinor* at 39 (quotation omitted). In *Usinor*, the issue was whether the ITC can assert in one case that the countries in the European Union ("EU") were "export oriented," poised to export to the United States, after having found in an earlier case that the primary marketing focus of one European country was the European market. *Id.* at 38–39. According to *Usinor*, the "observations regarding EU markets [were] general in nature and [did] not depend on the specific products at issue." *Id.* at 39–40. The *Usinor* court accordingly ordered the ITC to sufficiently explain its contradictory positions. Basing its argument on *Usinor*, Fair Beam contends that observations on "general market dynamics" are sufficiently "of a general nature." *Pls.' Br.* at 9. Fair Beam adds that "*Beams I* and *Beams II* involved the same product, the same domestic producers, the same volume trends, the same manifestation of injury, in overlapping periods of investigation." *Id.*

On the other hand, the ITC emphasizes the *sui generis* nature of injury investigations. *See Def.'s Br.* at 8. ITC cites prior cases of this Court which rejected the argument, among others, that the ITC was required to use the same volume and price analysis in subsequent investigations for the same product. *See id.* at 9 (citation omitted). The ITC stresses the difference between "agency practice," which would have precedential value, and case-specific determinations, which would not. *See id.* at 10 (citing *Ranchers-Cattlemen Action Legal Foundation v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999)). The ITC concludes that because *Beams I* or *Beams II*'s factual determinations are not "of a general nature" under *Usinor*, but based on specific facts, *Beams II* need not have followed *Beams I*. *See id.* at 10–11.

The ITC argues in the alternative that even assuming such factual determinations are "of a general nature," the "ITC acts in accordance with law when it either follows or distinguishes such determina-

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[20] This determination was subsequently adopted with respect to Korea by virtue of almost identical administrative records in both cases. *See Certain Structural Steel Beams from Korea*, Invs. Nos. 701–TA–401 and 731–TA–854 (Final), USITC Pub. No. 3326 (August 2000). In *Beams I* material injury and threat of material injury determinations were not unanimous, with three Commissioners finding material injury and the other three finding threat of material injury.

tions." *Id.* at 11 (citation omitted). The ITC points to footnote 105 in *Beams II*, where the Commissioners rejected the argument that *Beams I* would have any precedential bearing on the present investigation and further indicated that, in any event, the two investigations were factually different. For the ITC, footnote 105 serves to distinguish the *Beams II* investigation from the *Beams I* investigation sufficiently.

The arguments of Defendant-Intervenors Stahlwerk Thuringen Gmbh *et al.* ("Stahlwerk") and Salzgitter AG Stahl und Technologie ("Salzgitter") center on the rejection of Fair Beam's *Usinor* analysis. Specifically, Stahlwerk argues that the determinations of *Beams II* concerning volume, price, and impact are not "of a general nature," but fact-specific. *See Stahlwerk's Br.* at 7–8. Stahlwerk presents a doomsday scenario in which, were the court to agree with Fair Beam, the ITC would subsequently be required to consider "hundreds" of its prior determinations in every investigation in search of consistency. *Id.* at 9.

Salzgitter adds that the *Usinor* court clearly adhered to the familiar standard of substantial evidence and that the plaintiff in *Usinor* was challenging the ITC's construction of a statute, not fact findings.[21] *See Salzgitter Br.* at 6.

Comparative Analysis of Beams I and the Final Determination (or Beams II).

An agency that engages in formal adjudication may not render arbitrary and inconsistent decisions. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 47 (3d Cir. 1981). Should the agency choose to deviate from a practice it consistently employed in the past for the evaluation and testing of a set of facts, it must delineate and give reasons for its subsequent change of policy as to provide adequate guidance to parties affected by its actions and to present the reviewing court with a discernable basis to judge the discrepancy. *See Sec'y of Agriculture v. United States*, 347 U.S. 645, 652–53 (1954); *British Steel PLC v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997).

At the same time, it is an equally well-established proposition that the ITC's material injury determinations are *sui generis*; that is, the agency's findings and determinations are necessarily confined to a specific period of investigation with its attendant, peculiar set of circumstances. *See U.S. Steel Group v. United States*, 18 CIT 1190, 1213, 873 F. Supp. 673, 695 (1994) (quotation omitted). In *Beams I*, the period of investigation was from 1997 to 1999; in *Beams II*, from

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[21] The court questions this argument. It can find no indication in *Usinor* that the *Usinor* court was engaged in statutory construction with respect to the "export oriented" nature of the EU.

1999 to 2001. Given the dynamic nature of the economy, rarely would circumstances and their multi-faceted interactions defining a period of material injury investigation exhibit sufficient similarity to those of another period.

Fair Beam is correct in that *Beams I* and *II* involved the same product, and subject imports were present in the U.S. market at noticeable and increasing levels in both periods of investigation. Yet the statute dictates the ITC to attach importance only to those increases in subject import quantities and to those price effects of the subject imports which are deemed "significant." § 1677(7)(C)(i) & (ii). Accordingly, the ITC first acknowledged in footnote 105 of the *Final Determination* that subject imports in *Beams I* "were entering the U.S. market at low and declining prices even after a period when the domestic industry was having difficulty satisfying demand."[22] *Final Determination* at 28 n.105. In contrast, a finding was made in the *Beams II* investigation that both subject import volumes and prices were increasing during the first portion of the POI.

Second, the ITC further noted in the *Final Determination* that "the peak subject import volume and the increase in subject import volume in [*Beams I* were] substantially greater than in [*Beams II*]." *Id.* As a third observation, the ITC offered that in *Beams I* "the subject imports undersold the domestic like product in the *vast majority* of pricing comparisons." *Id.* (emphasis supplied). In *Beams II*, on the other hand, under- and overselling were approximately of equal frequency for product 1, the most widely traded product among structural steel beams and, even though more underselling than overselling occurred for other products, underselling was mitigated by the price premium. The ITC finally concluded in the *Final Determination* that "[a]s the accompanying discussion indicates, the record in these investigations is substantially different." *Id.*

The court agrees with the ITC that these three observations are of crucial importance to distinguish the underlying factual pattern of *Beams II* from that of *Beams I*. In a material injury determination, the ITC is required to determine whether a material injury to the domestic industry (or a threat thereof) occurred "by reason of" subject imports that are sold in the U.S. market at less-than-fair value. § 1671d(b)(1). That is, the record must support a sufficient nexus between the injury (or threat of injury) and subject imports. *See Goss Graphics Sys. v. United States*, 22 CIT 983, 989–90, 33 F. Supp. 2d 1082, 1089 (1998). Moreover, "evidence of *de minimis* (e.g., minimal or tangential) causation of injury does not reach the causation level required under the statute." *Gerald Metals, Inc. v. United States*, 132

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[22] The ITC in *Beams I* made a finding of supply shortage in the U.S. market in the fourth quarter of 1997 and the first two quarters of 1998. *Beams I* at 10. The ITC further observed that supply shortage "quickly reversed as subject imports escalated in March 1998 and surged thereafter through the first quarter of 1999," that "[t]he import surge far exceeded the prior shortfall in supply," and that "imports gained market share at the expense of the domestic industry." *Id.* at 11. Fair Beam represents that thereby the ITC in *Beams I* compared the size of the domestic shortage to the increase in subject imports.

F.3d 716, 722 (Fed. Cir. 1997), *quoted in Coalition for the Preservation of Am. Brake Drum and Rotor Aftermarket Mfrs. v. United States*, 22 CIT 520, 523, 15 F. Supp. 2d 918, 922 (1998). In the *Final Determination* here, the ITC was unpersuaded by the argument that aggressive price cutting by the subject countries was what allowed subject imports to penetrate the U.S. market and subsequently cause injury to the domestic industry. Instead, the ITC attributed the rise in subject import volumes to a temporary domestic supply shortage observed during this period.

The ITC based its finding of domestic supply shortage on three separate pieces of evidence: questionnaire responses of purchasers and of domestic producers, and contemporaneous news articles in industry publications. The ITC noted that "[p]rice increases are a natural function of supply shortages." *Final Determination* at 28. The ITC further observed that subject import volumes were increasing alongside prices. According to the ITC, the rise in both the subject imports and prices was thus a consequence of the domestic supply shortage.

In *Beams II*, the domestic industry was temporarily unable to satisfy demand.[23] The domestic producers' inability to satisfy demand resulted in a supply shortage or an excess demand in the market. As purchasers competed for fewer available products, prices rose. In addition, the supply of the domestic industry was relatively more inelastic than the supply of the subject countries vis a vis the U.S. market. *See Staff Report* at II–16 & II–17. That is, subject producers could react to a rise in U.S. prices faster than their domestic counterparts in terms of increasing shipment to the U.S. market. As the subject countries diverted their goods to the U.S. market to satisfy excess demand, subject import quantities began to rise and, as expected, this phenomenon was observed alongside an increase in prices.[24] Accordingly, the domestic shortage was, more likely than not, responsible for the rise in both subject import volumes and prices.

In *Beams I*, however, prices were declining as the subject import volumes were increasing. In addition, the ITC found significantly more underselling than overselling the domestic product by subject imports. These two observations serve to show that in *Beams I* a more immediate connection could have been made between subject imports and falling prices. That is, it was likely that persistent price cutting by foreign exporters had led to the increase in subject import

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[23] The domestic supply shortage may have been partially due to the exit of Japanese and Korean beams from the U.S. market, as the ITC implied, or to a positive shift in demand or to some other cause not easily discernable from the record. In any event, the "cause" of the domestic shortage is not relevant to the disposition of this case.

[24] The court notes that in the absence of subject imports the price rise may have been higher. Not explicitly discussing this possibility, the ITC nevertheless found that the price effects were not significant. It should also be noted that non-subject imports (other than Japanese and Korean beams which left the market due to the antidumping order) also increased from 1999 to 2000. *See Final Determination* at 23 n.89; *Staff Report* at IV–6 & n.8. This fact further undermines the contention that price cutting by subject countries caused the volumes of subject imports to rise.

volumes by spurring purchases of imports over the domestic product where a domestic supply shortage by itself would have resulted in an increase in price. Accordingly, in *Beams I* the finding of domestic shortage was not as significant as in the *Final Determination* here.

As urged by the ITC, this court also notes that in *Beams I* "[n]othwithstanding the decrease from 1998 levels, the 1999 volume of subject imports represent[ed] a 728-percent increase over the 1997 volume." *Beams I* at 12. In contrast, the volume of subject imports in *Beams II* showed a net decline over the POI. As a parallel observation, the domestic industry gained market share over the POI in *Beams II* (despite the dip in 2000) and lost market share in *Beams I*. This distinction between *Beams I* and *II* lends credence to the assertion that in *Beams I* subject imports penetrated the market in numbers which went beyond a temporary exploitation of a domestic shortage whereas in *Beams II* the rise in subject import volumes was a "temporary phenomenon." The court finally observes that subject countries in the two investigations were different, a factor which plays an especially important role in a threat determination. As a result, the court finds (as did the ITC) that *Beams I* does not constitute legal precedent for *Beams II* and the ITC's consideration of *Beams I* in footnote 105 of the *Final Determination* is sufficient to distinguish the two investigations factually.[25]

In addition, the court rejects Fair Beam's argument that *Beams II*'s factual findings concerning "general market dynamics" are "of a general nature" under *Usinor*. The "general market dynamics" Fair Beam refers to is presumably the statutory framework the ITC is required to follow in every material injury determination. There is nothing in the statute or case law that requires the ITC to take as precedent any prior factual finding that was reached within this framework. In *Usinor*, the finding "of a general nature" pertained to a particular attitude toward the market of subject producers in question. Specifically, the *Usinor* court said that the ITC cannot reasonably claim that European countries are not export-oriented in one case and later retract that position without explanation. While *Usinor* correctly supports the need for consistency in the ITC's determinations, as well as the need for reasoned explanation, this court observes that there is no finding in *Beams II* that is likely to be governed by *Usinor*. The findings in *Beams II* are confined to observations on economic variables, which are necessarily volatile. Fair Beam does not point to any determination in *Beams II* (or in *Beams*

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[25] Fair Beam claims that the *Final Determination* should have addressed *Beams I* more extensively, beyond a mere footnote. The ITC responds that *Beams II* did not have to distinguish *Beams I* at all and, assuming that it did, footnote 105 in *Beams II* constitutes an adequate consideration of *Beams I*. The court observes that because Fair Beam raised *Beams I* as an "underlying theme" of its arguments before the agency, the ITC was correct in addressing *Beams I* in footnote 105. *Final Determination* at 28 n.105; *Altx, Inc. v. United States*, 25 CIT _____, _____, 167 F. Supp. 2d 1353, 1374 (2001) (the agency "must address significant arguments and evidence which seriously undermines its reasoning and conclusions"). In footnote 105, the ITC first pointed out that Fair Beam's *Beams I* argument called for no "response" as a "legal matter" and, to the extent the argument had merit as a "factual matter," the ITC sufficiently addressed the crucial distinctions between *Beams I* and *II* in concluding that the two investigations had substantially different records.

I) that bears on particular, persistent attitudes of trading countries which, because they persist within a sufficiently short interval of time, would arguably have called for the same treatment by the ITC in different investigations undertaken also close in time. In addition, the fact that similar patterns are observed in different investigations with regard to some of the variables does not preclude a different interpretation of the patterns after viewing the entire economic environment as a whole. In fact, the statute requires the ITC to evaluate patterns in a context, instead of encouraging an analysis of each piece in isolation.

B. The ITC's finding regarding the significance of subject import volume is supported by substantial evidence and is otherwise in accordance with law.

Parties' arguments.

Fair Beam next argues that the *Final Determination's* findings are unsupported by substantial evidence. Fair Beam continues to compare the *Final Determination* to *Beams I* in this portion of its arguments before the court, specifically with respect to similar volume trends found in the two investigations. *See Pls.' Br.* at 11. In addition, Fair Beam contends that the *Final Determination* should have compared the size of the domestic shortage with the size of the increase in subject import volumes as *Beams I* did. *Id.* at 12. That subject import volumes exceeded the domestic shortage may have meant that the surge in subject imports was not solely due to the domestic supply shortage.

Fair Beam also maintains that the *Final Determination* should have taken into account the impact of the filing of the petition on subject import volumes. *See id.* at 13. Fair Beam argues that the decrease in subject imports in the later part of the POI may have been in part due to the petition. Fair Beam points out that [[ ]] importer withdrew from the market upon the filing of the petition. *See id.* at 14 (citing Fax from TradeARBED to its customers (dated June 7, 2001) in *Pls.' App.* tab 8 ("As is normal while under [an] investigation we are withdrawing from the market effective immediately.")).[26]

The ITC counters that, even if there was a sharp increase in subject import volumes, the statute requires the ITC to concentrate on the significance of such increase. *See Def.'s Br.* at 12. The ITC also contends that the *Final Determination* was correct in not discounting post-petition data because the decrease in subject import volumes preceded the filing of the petition. *See id.* at 13. Moreover, the

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[26] At the administrative hearing an ARBED executive elaborated, "we never completely withdrew from the market." *ITC Hearing Tr.* at 199. The ITC appears not to have considered the letter as evidence in its determination on post-petition data. However, consistent with the court's evaluation of contradictory evidence under the substantial evidence standard, the court defers to the ITC's treatment of the letter in the *Final Determination*.

Commissioners did not completely ignore the petition, but decided that it had a "limited" impact. *Id.*

Subject import volume analysis.

There is substantial evidence on the record to support the ITC's finding that the volume of subject imports was not "significant." First, as noted earlier, there is substantial evidence in the record to support the existence of a domestic supply shortage in the U.S. structural steel beams market. Second, there is substantial evidence in the record to support the ITC's analysis of relationships among economic variables during the POI. Consulting data on both the subject import volumes and supply conditions, the ITC noted that the subject import quantities followed (with a temporal lag) the domestic supply conditions. Subject imports started to increase in response to the domestic supply shortage in 1999 and declined between 2000 and 2001 when the shortage was shrinking. Moreover, the ITC observed that in the beginning of the POI, purchasers overestimated future demand for structural steel beams, and towards the end of the POI, demand either declined or flattened with contraction in economic activity and construction. The ITC pointed to specific sources of information and evidence in support of these findings in the form of testimony, published articles, and statistics.

On the other hand, Fair Beam can point to no evidence in support of its argument that the rise in the subject import volumes was "significant." Fair Beam continues to engage in what this court considers a fruitless comparison between *Beams I* and the *Final Determination*. In addition to what has been explored above, the court notes that, even though the subject import volumes rose and fell (thus demonstrated a similar pattern) in both periods of investigation, the market penetration by subject imports in the *Final Determination* was far from its magnitude in *Beams I*.

Fair Beam is additionally concerned that the relative sizes of the domestic shortage and subject import volumes should have been noted in the *Final Determination* as they had been in *Beams I*. However, there is nothing in the statute or case law which requires the ITC to compare the size of a shortage, the existence of which has been confirmed, with the increase in subject import volumes. The statute solely mandates the ITC to consider the volume of subject imports and assess its significance. *See* §§ 1677(7)(B) & (C). Because the precise course this analysis should take is not specified, the court must defer to reasonable and factually supported applications of the ITC's methods. *Usinor* at 6–7 ("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") (citing *Olympia Indus., Inc. v. United States*, 22 CIT 387, 389, 7 F. Supp. 2d 997, 1000 (1998)); *BIC Corp. v. United States*, 21 CIT 448, 462, 964 F. Supp. 391, 404 (1997) ("be-

cause Congress has granted the Commission broad discretion to choose its methodology, [the court] will not disturb the Commission's choice unless it is unreasonable") (citation omitted).

The court further observes that, as noted above, the *Beams I* decision is not legally binding on the ITC in subsequent investigations and, therefore, does not serve as a framework for subsequent ITC determinations as far as the size of a domestic shortage or any other factual determination is concerned. Quite the contrary, *Beams I* and the *Final Determination* possess sufficient factual differences the most important of which (for our purposes here) is the fact that in *Beams I* the subject imports continued to persist in the U.S. market far above their levels in the beginning of the period. Had the increase in subject imports in *Beams I* been due to a domestic shortage then present, the subsequent decline in volumes when the shortage disappeared would have been expected to mirror the increase in approximate magnitude. More importantly, to the extent the ITC in the *Final Determination* attributed the rise in subject import volumes to the domestic shortage, the Commissioners properly evaluated and observed the two variables together in finding that they followed a similar curve with a lag.

Finally, as urged by the ITC, the statute gives it discretion to reduce the weight it accords to post-petition data. *See* § 1677(7)(I). That is, the ITC "may" discount such data, with the implication that, where proper, it need not. *Id.* Here, the ITC observed that the decline in subject import volumes preceded the filing of the petition by a sufficient interval. Therefore, the ITC decided that the petition had a "limited" impact on the fall in subject import volumes at the end of the POI. Instead of the mere filing of the petition, the ITC determined that the alleviation of domestic supply shortage coupled with weak demand in this period contributed to the decrease in subject import volumes. The ITC's treatment of post-petition data was accordingly reasonable and supported by the record.

C. The ITC's determination that there were no adverse price effects is supported by substantial evidence and is otherwise in accordance with law.

Parties' arguments.

Fair Beam next challenges the ITC's determination that the prices of structural steel beams were not suppressed by subject imports. *See Pls.' Br.* at 17. In particular, Fair Beam takes issue with the *Final Determination* which found (i) that underselling was not widespread, (ii) that underselling was mitigated by the premium the domestic product fetches in the market, and (iii) that there was more overselling than underselling with respect to product 1. Fair Beam quotes another ITC material injury determination where the ITC observed that "in a commodity market characterized by intense price-based competition, a mixed pattern of under- and overselling is to be

expected; such a pattern, together with increasing volume of subject imports, indicates that subject imports played a substantial role in the price declines in this market." *Certain Stainless Steel Plate from Belgium, Canada, Italy, Korea, South Africa, and Taiwan*, USITC Pub. No. 3188 (May 1999) at 19. Fair Beam maintains that when price comparisons were adjusted by lag time, there was more underselling than overselling for product 1 and that the data from 2000 shows "high margins" of underselling. *Pls.' Br.* at 16. Fair Beam next questions the ITC's finding of lack of causation between the increase in the volume of subject imports and the subsequent price declines. *Id.* at 17. Fair Beam emphasizes that a "price war" resulted from the entry of subject imports to the U.S. market, which, it claims, was ignored by the ITC. *Id.* at 18. Consistent with its "price war" theory, Fair Beam also rejects the ITC's observation that because the peak in import volumes coincided with the peak in prices, the increase in both was due to a shortage in domestically supplied steel beam. For Fair Beam, this observation ignores the delayed price effects of subject imports "due to the build-up of inventories." *Id.* at 19. Fair Beam argues that "subject imports triggered a buying spree by service centers, which led to large inventory build-ups, and which ultimately caused a domestic price collapse." *Id.* at 20.

The ITC first argues that the ITC thoroughly considered the record data of underselling. *See Def.'s Br.* at 16. The ITC provides numbers in support of its position that "large quantities" of beams were oversold at "substantial margins," even in 2000. *Id.* at 18. The ITC urges that under- and overselling data should be evaluated in context. In particular, the ITC emphasizes that a price war, if any, did not start until the third quarter of 2000, well into the POI. The ITC cites case law to show that "the ITC need not find underselling significant merely because there are more instances of underselling than overselling." *Id.* (citations omitted). The ITC further points out that in *Timken Co. v. United States*, the Court upheld the ITC's conclusion that the price premium for the domestic product mitigated the significance of underselling. 20 CIT 76, 87–88, 913 F. Supp. 580, 590 (1996).

Price effects analysis.

The court finds that the ITC's negative determination with respect to the significance of price underselling is supported by substantial evidence in the record. In the *Final Determination*, the ITC first engaged, as required by the statute, in a comparison of prices of domestic and imported product. The ITC used the tabulations of domestic and import prices contained in the *Staff Report*. In these price comparisons, employing two slightly different methodologies, the ITC found a "mixed pattern" of under- and overselling and further noted that, for product 1, the incidences of underselling, despite slightly outnumbering overselling when a lag was incorporated, were never-

theless less infrequent than overselling in the absence of the lag.[27] The ITC additionally observed that quantity oversold was greater than quantity undersold. The ITC proceeded to attribute the admittedly frequent occurrence of underselling for other products to the price premium the domestic product commands in the U.S. market. The existence of a price premium for domestic product was supported by testimony from both sides at the administrative hearing. As urged by the ITC, the court notes that the *Timken* decision stands for the proposition that the ITC may discount incidences of underselling on account of this price premium, where appropriate, as this premium mitigates underselling that is observed. *Timken*, 20 CIT at 87–88, 913 F. Supp. at 589–90.[28] Moreover, the court agrees with the ITC that the "significance" of price effects does not turn on a sole finding of more instances of underselling than overselling.

The statute also requires the Commission to determine whether "the effect of imports * * * otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree." § 1677(7)(C)(ii)(II). The court finds that the ITC's finding with respect to this second component of price effects analysis is supported by the record. In addition to the elimination of the supply shortage, the ITC in the *Final Determination* found that the price decline at the end of the POI was a result of weak demand in this period and a rise of distributors' inventories. The record contains sufficient evidence to support this finding of the ITC, as well as its implications. In particular, the record indicates that demand for structural steel beams rose from 1999 to 2000 and flattened in 2001. Moreover, testimony and published articles cited in the *Final Determination* supported the observation that in the beginning of the POI, purchasers had a more rosy outlook on the condition of the economy and the market, which at the end proved to be unwarranted. The record contained evidence of a developing domestic supply shortage in the beginning of the POI and its subsequent resolution. Moreover, the court notes that, as explained earlier, the

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[27] Contrary to Fair Beam's assertion, that the ITC in another investigation (that of stainless steel plate) found a mixed pattern of under- and overselling coupled with rising import volumes "significant" for purposes of price effects is not binding on the ITC in a subsequent investigation, as the court noted throughout this opinion regarding the ITC's factual determinations.

[28] The *Timken* court stated:

> The Commission concluded that factoring in the price premium for domestic other special quality bars made the relatively small margins of underselling even less significant. [ ] Thus, the Commission appropriately examined whether there had been "significant price underselling" by the subject imports. *See* 19 U.S.C. § 1677(7)(C)(ii)(I). Evidence of underselling has been found to be less significant where there were price premiums for domestic products. *See Roses, Inc. v. United States*, 13 CIT 662, 665–66, 720 F. Supp. 180, 183 (1989) (62 out of 110 instances of underselling found insignificant because price premiums for locally-grown roses based on freshness and an ability to supply the flowers on a short-term need basis). *See also Trent Tube Div., Crucible Materials v. United States*, 14 CIT 386, 402, 741 F. Supp. 921, 935 (1990) (consistent underselling given less weight based on domestic price premium due to customer preferences and lead time differences, small volume of imports a consideration), *aff'd*, 975 F.2d 807 (Fed. Cir.1992). Thus, the Court cannot say that the Commission's conclusion was erroneous.

rise of subject import prices from 1999 to 2000 and their subsequent decline in 2001 cannot be ascribed to the similar trajectory of subject import volumes since the introduction of subject imports into the U.S. market would have led to a more immediate fall in prices due to ensuing competition.

Here, Fair Beam seems to be advancing a type of "price lag" theory arguing that, if subject imports had a delayed impact on prices, the later fall in prices could be attributable to the rise in volumes at the beginning of the POI. Fair Beam's reading of events taking place during this period and their interaction may have some plausibility if a lag in price effects could be properly assumed. However, under the substantial evidence standard, this court is charged to uphold the ITC's reasonable inferences from facts contained in the record. "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990) (citation omitted). In other words, the court cannot give effect to alternative theories advanced by Plaintiffs or accord more weight to supporting facts highlighted by Plaintiffs, however plausible they may be, as long as the ITC's theory of events are also reasonable and supported by substantial evidence.

Moreover, the ITC did entertain Fair Beam's argument that subject imports may have had a delayed impact on prices and rejected the argument. First, the ITC found that prices in the U.S. structural steel beam market are determined on the spot when offer and acceptance take place (even for the domestic producers). *See Final Determination* at 26 n.100. Second, the ITC rejected the "price lag" predictions of Fair Beam's econometric model reasoning that the model was flawed. *See id.* at 29 n.107.

At the end of its price effects analysis, the ITC announced, "[w]e cannot conclude that the record indicates that either the inventory overhang or the resulting price declines were the function of the subject imports * * * * We consequently conclude that the subject imports did not have significant price-depressing or -suppressing effects." *Id.* at 29–30. The ITC's decision was informed by its repeated observations in the *Final Determination* that the movements or activity in the U.S. structural steel beam market during the POI were explainable by factors wholly unrelated to subject imports with potentially unfair prices. The ITC was correct in highlighting that a finding of "significant" price effects necessarily requires an accompanying finding of causal relationship between prices and subject imports.

D. The ITC's determination that subject imports had no adverse impact is supported by substantial evidence and is otherwise in accordance with law.

Parties' arguments.

Fair Beam next charges that the ITC failed to consider that the domestic industry suffered large losses in sales and revenues. *See Pls.' Br.* at 21. Fair Beam argues that in the *Final Determination*, the ITC dismissed this evidence as "anecdotal," whereas in *Beams I* the ITC represented a similar condition as "further evidence of the negative effects of subject imports," which inconsistency is allegedly unsupportable under *Usinor*. *Id.* at 22.

The ITC argues that the *Final Determination* properly weighed the lost sales and revenues data. *See Def.'s Br.* at 22. The ITC argues that since the decline in domestic industry performance occurred from 2000 to 2001 when subject imports were declining, a link could not be established between subject imports and alleged lost sales and revenues. *See id.* In addition, the *Final Determination* found no adverse price effects. The combination of these two observations led the ITC to discount as "anecdotal" the lost sales and revenues data.

Salzgitter points out that "the performance of the domestic industry tracked the rise and fall of apparent U.S. consumption." *Salzgitter Br.* at 13. Thus, the decline in performance was not a function of imports. Salzgitter emphasizes that at the end of POI, the domestic industry actually gained market share (a "historic high"). *Id.* Salzgitter observes that the ITC construed this phenomenon as imports "filling shortages" and not "displacing domestic production."

Impact analysis.

Contrary to Fair Beam's assertion, the ITC's analysis involved a reasoned consideration of the lost sales and revenues data based on an extensive and detailed staff report. In a footnote to the *Final Determination*, the ITC observed that because there was underselling of subject imports, it was "not surprising that there were some confirmed lost sales and revenues." *Final Determination* at 26 n.102. The domestic industry "submitted 27 lost sales and 173 lost revenue allegations," alleged lost sales totaling $[[ ]] million and alleged lost revenues totaling $[[ ]] million. *Staff Report* at V–18 & App. E. In the *Staff Report*, the ITC staff confirmed or "partially" confirmed 17 lost sales allegations of $24.1 million and 49 lost revenue allegations of $786,411. *Id.* at V–18 & V–19. The ITC staff added that a "large number of lost revenues allegations involve sales or quotations made after January 1, 2002" and that "[b]ecause of time constraints, and because purchasers don't always keep records of unsuccessful bids, some purchasers were unable to confirm or deny some specific allegations." *Id.* at V–19. In the *Final Determination*, considering the *Staff Report*, the ITC pronounced that "[b]ecause these allegations

concern a period later than that for which the Commission collected pricing data, the record does not indicate whether they are indicative of overall pricing or underselling trends." *Final Determination* at 26 n.102. Moreover, the ITC stressed that the lost sales and revenue data was "anecdotal" and could not "outweigh the patterns" contained in "the pricing data overall." *Id.* The court finds the ITC's reasons to be sound and consistent with the underlying record.

Further, the ITC is not required to accord more weight to any factor of impact analysis at the expense of other factors. Specifically, "[n]o factor, standing alone, triggers a *per se* rule of material injury." *Am. Spring Wire Corp. v. United States*, 8 CIT 20, 23, 590 F. Supp. 1273, 1277 (1984) (citation omitted). Accordingly, the fact that the ITC decided to de-emphasize confirmed lost sales and revenues data does not detract from its finding of no impact because assigning different weights to different pieces of evidence is fully within the ITC's discretion.

The court finally notes that there is substantial evidence on the record in support of the ITC's finding that subject imports did not adversely impact the domestic industry. As required by the statute, the ITC in the *Final Determination* considered "all relevant economic factors * * * within the context of the business cycle and conditions of competition." § 1677(7)(C)(iii). In the *Final Determination*, the ITC noted that over the POI, the domestic industry actually gained market share, that the domestic industry's performance was improving as the subject import volumes were increasing, and that the later retardation in variables designed to measure the domestic industry's "health" could not be ascribed to subject imports. The court agrees that improvements in the output indicators (and other "health" factors) would likely not have been observed alongside increases in subject import volumes, had subject imports had an injurious present effect on the domestic industry. Further, as the ITC stated, the observed decline in output indicators at the end of the POI was likely not the result of the rise in subject imports on account of the intervening time between these two events. It may be that, as Salzgitter recommends, domestic output fell (as well subject import quantities) along with falling demand for structural steel beams in this period. For these reasons and given that the ITC found no "significant" volume and price effects in the POI, the court concludes that the ITC's no adverse impact finding is supported by the record and is otherwise in accordance with law.

E. The ITC's determination of no threat of material injury is supported by substantial evidence and is otherwise in accordance with law.

Parties' arguments.

In support of its argument that the ITC erred in finding no threat of material injury, Fair Beam first cites the testimony of a foreign ex-

ecutive who stated that U.S. prices were "gorgeous," and that foreign producers are able to "react" quickly and are profit oriented. *Pls.' Br.* at 23. According to Fair Beam, this is evidence of the opportunistic nature of foreign producers who move quickly to take advantage of price differentials across markets. This part of Fair Beam's argument stresses an inability to learn from past lessons. In particular, in *Beams I* German and Spanish producers said they would not "opportunistically take advantage of shortterm opportunities" and were thereby excluded from that investigation. However, "[w]hat happened next?* * * No sooner was the ink dry" on *Beams I*, then they returned and took advantage of short-term opportunities. *Id.* at 24.

Fair Beam further points to current excess capacity of foreign producers. *See id.* at 25. In *Beams I*, the ITC relied on a similar condition as part of its threat determination, whereas in the *Final Determination*, the ITC focused on the existence of markets other than the U.S. where foreign producers could sell their products. According to Fair Beam, the *Final Determination's* focus ignores a number of facts. *Id.* at 26–27. First, the foreigners demonstrated an ability to quickly penetrate and shift their exports to the U.S. market during the POI. Second, foreign producers projected an increase of exports to the U.S. in 2002 and 2003. Third, foreign capacity is expected to increase in the future. Similarly, Fair Beam also criticizes the ITC's failure to assign sufficient importance to increasing foreign inventories. *See id.* at 27. Because the ITC found that some of the foreign inventories were not suitable for the U.S. market, Fair Beam observes that "[s]ubject foreign producers can meet home market demand with such inventories, while shifting production to ASTM products," which are U.S.-market-compatible. *Id.* at 28. Fair Beam further points out that "the scope of the merchandise subject to investigation [was] nearly identical in *Beams I* and *Beams II*. Therefore, assuming there is some merit to the contention regarding different ASTM standards, it would equally be true for the inventories in both *Beams I* and *Beams II*." *Id.* Finally, Fair Beam contends that the ITC improperly disregarded evidence concerning the "vulnerability" of the domestic industry. *See id.* at 29.

The ITC counters that significant increases in imports were not imminent. *See Def.'s Br.* at 23. The ITC highlights a number of factors. First, the volume of imports was declining at the end of the POI. Second, the domestic capacity was increasing. Third, even though foreign producers projected an increase in imports in 2002 and 2003, the projections were still below 2000 levels (the high in volume). Fourth, foreign producers had other markets in which to sell their products. Five, the U.S. prices were traditionally higher (thus, the U.S. prices were not any more "attractive" than they had always been).

The ITC also argues that the *Final Determination* properly evaluated existing foreign capacity and potential to shift the goods to the

United States. The ITC claims that these two factors are "insufficient to warrant an affirmative threat determination absent positive evidence showing that increased levels of importation are actually imminent." *Id.* at 26 (citing *inter alia BIC*, 21 CIT at 464, 964 F. Supp. at 405 ("Conjecture and speculation are not enough; there must be positive evidence tending to show an intention to increase levels of importation.") (quotation omitted)). The ITC posits that the *Final Determination* adequately explained why foreign producers had no incentive to increase imports to the United States. Among other matters, the *Final Determination* explained that not all steel beams of foreign production were suitable for U.S. consumption because they did not meet U.S. standards. *See id.* at 27.

The ITC next maintains that the *Final Determination* sufficiently considered the "vulnerability" of the U.S. industry. *See id.* at 29. The ITC emphasizes that the domestic industry was about to expand capacity and "new and efficient" facilities were about to open. The ITC indicates that while "vulnerability" is a proper factor to consider in threat analysis, it is not a substitute for statutory criteria. *See id.* at 30 (citing *NEC Corp. v. Dep't of Commerce*, 23 CIT 987, 999, 83 F. Supp. 2d 1339, 1342–43 (1999)).

Stahlwerk argues that subject imports were declining at the end of the POI ("for six straight quarters") and, therefore, it was reasonable for the ITC to assume that such a trend would continue. *Stahlwerk Br.* at 25–26. With respect to U.S. prices being attractive for foreign producers to enter the market in the future, Stahlwerk stresses the price premium, implying that the U.S. prices will always be higher. *See id.* at 26. With respect to foreign unused capacity, Stahlwerk ponders why such capacity would not prevent subject imports from falling towards the end of POI. *See id.* at 27. With respect to the domestic industry's "vulnerability," Stahlwerk argues that the ITC did consider the industry's overall profitability with "new and efficient" mills in the works and that the ITC was not required to analyze the "unusually sensitive" nature of the industry to subject imports, once the ITC decided that the subject imports were not about to rise significantly. *See id.* at 28–29. Salzgitter adds that the ITC's negative threat determination followed logically from its negative material injury determination. *See Salzgitter* at 14.

Threat Analysis.

In a threat of material injury determination, the ITC must find whether "further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued." § 1677(7)(F)(ii). The pertinent factors outlined in the statute for a finding of threat of material injury are: (II) latent production capacity (or an imminent increase thereof) in the subject countries, taking into account alternative export markets; (III) "significant" increase in volume or market penetration of subject imports

indicating "likelihood of substantially increased imports;" (IV) likely "significant" suppression of price as to lead to an increase in future demand for imports; (V) inventories; (VI) ability of subject countries to shift production to subject merchandise; (VIII) "actual and potential negative effects" on the domestic industry's development; and (IX) "any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of" subject imports.[29] § 1677(7)(F)(i). The ITC must evaluate the statutory factors "as a whole" in making a threat determination. § 1677(7)(F)(ii). No such factor will "necessarily give decisive guidance with respect to the determination." *Id.* Moreover, the statute specifies that a threat determination cannot be based on a "mere conjecture or supposition." *Id.* Because section 1677(7)(F)(i) directs the ITC to consider all relevant economic factors in a threat investigation, the ITC has "no discretion in this matter." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 984 (Fed. Cir. 1994); § 1677(7)(F)(i) (providing that the ITC "shall" consider all relevant economic factors).

The court agrees with the ITC and Defendant-Intervenors that there is substantial evidence in the record to support the *Final Determination's* negative threat of material injury determination. A threat of material injury determination necessarily involves a prediction of the future. By warning that a "mere conjecture" is not enough to sustain an affirmative threat determination and by outlining non-discretionary factors to be evaluated, the statute aims to limit hypothesizing that naturally accompanies such a prediction. The Commissioner who dissented from the negative threat determination of the ITC pointed out that the outlook of the U.S. structural steel beam industry at the end of the POI was somewhat mixed. *See Separate and Dissenting Views of Commissioner Lynn M. Bragg, Certain Structural Steel Beams from China, Germany, Italy, Luxembourg, Russia, South Africa, Spain, and Taiwan*, Invs. No. 731–TA–935– 942 (July 2002) at 6 in *Administrative Record*, List 2, Doc. No. 171. The dissenting Commissioner especially noted among conditions adverse to the domestic industry's health: the substantial decline in the domestic industry's operating income, declining domestic capital stock and restricted access to capital, domestic start-up operations that are especially vulnerable to competitive forces, weak U.S. demand and increasing domestic inventories, increasing cost/price ratio indicating dampening profits, capacity increases in subject countries (especially in China), subject countries' allegedly demonstrated ease to shift production to U.S.-market-compatible product, domestic prices that persisted at higher levels than prices

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[29] As stated by the ITC, the statutory factors (I) and (VII) are not relevant to this investigation and, therefore, not considered in this opinion. *See Final Determination* at 35 n.130.

abroad, projected shipment increases by the subject countries, and projected capacity utilization increases in the subject countries. *See id*. at 6–8.

The court notes, however, that these arguably unfavorable facts regarding the existence of a threat were evaluated by the majority of the Commissioners and rejected. The ITC's duty in making a threat of material injury determination is to evaluate the non-discretionary statutory factors. The statute, *inter alia*, requires the ITC to conduct renewed analyses of subject import volumes and price effects regarding threat of material injury. In particular, the ITC shall examine whether there has been a "significant" increase in subject import volumes during the POI such that their continuing future presence in the U.S. market is "likely" and whether subject imports are "likely" to depress prices as to increase future demand for imports. *See* § 1677(7)(F)(i)(III) & (IV). Accordingly, the ITC observed that at the end of the POI, both subject import volumes and prices were declining. In connection with its earlier finding that a domestic shortage was responsible for the rise in the subject import volumes, the ITC determined that "there was no likelihood of shortages in the imminent future" and, therefore, a similar rise in subject import volumes was not likely to occur in the future. *Final Determination* at 36. As urged by Fair Beam, the subject countries demonstrated an ability to shift shipment to the U.S. market with relative ease; however, given that the subject countries' shipments to the United States increased as a response to a temporary domestic shortage during the POI and subject imports left the U.S. market once the shortage was resolved, the ITC further predicted that a "significant" increase in subject imports was "unlikely."

Further, faced with declining prices at the end of the POI, the ITC could not but observe that imports were not likely to be spurred by favorable prices. Even though U.S. prices remained higher than prices elsewhere at the end of the POI, this was generally so and, therefore, this factor was not likely to encourage further imports in this specific period. In addition, as urged by the ITC counsel during oral argument, the pertinent comparison is not that the U.S. prices remained higher than prices abroad at the end of the POI, as expected, but that the U.S. prices were for the most part lower in 2001 than they had been in 2000.[30] *Oral Arg. Tr.* 34:5–21. Moreover, the ITC found no "significant" volume and price effects for the POI and asserted that there was no indication that these phenomena were likely to change in the imminent future.

With respect to subject countries' production capacity, the ITC noted that, even though an increase had been projected, there was no indication that such an increase would manifest itself as an im-

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[30] There is a suggestion in the record that an improvement in price at the very end of the POI took place as domestic producers responded to the onset of this investigation by increasing prices. *See Purchasers' Questionnaires* at 13 Question III–31 in *Pls.' App.* tab 11.

minent increase in subject import volumes. *Final Determination* at 37. As required by the statute, the ITC further indicated that subject countries had alternate markets at home or abroad to expend their capacity. With respect to subject countries' inventories, the ITC noted an increase during the POI, but also observed that not all structural beams inventories abroad were suitable for sale in the U.S. market by virtue of failing to satisfy the U.S. standard.[31] *Id.* at 38. With respect to the domestic industry's production capacity, the ITC pointed out that "new and efficient" facilities had already been completed or were about to be completed.[32] *Id.* at 38–39. All of these determinations concerning the statutory factors, provided for in section 1677(7)(F)(i)(II), (V) and (VI), were based on the detailed *Staff Report* and testimony presented at the administrative hearing.

Fair Beam also charges that the ITC did not consider the "vulnerability" of the domestic industry. The court notes, however, that the consideration of "vulnerability" of the domestic industry is not specifically provided for in the statute as part of the required analysis.[33] While it is proper for the ITC to consider "vulnerability" among "relevant economic factors," § 1677(7)(F)(i), it cannot be the sole basis of an affirmative threat determination in the presence of other statutory criteria that have not been fulfilled. *See NEC*, 23 CIT at 999, 83 F. Supp. 2d at 1342–43.[34] Moreover, the ITC in the *Final Determination* did consider the "vulnerability" of the domestic industry in indicating that despite varying performances of individual players, the domestic industry remained "profitable overall." *Final Determination* at 39. The views of the dissenting Commissioner bring to the attention of the court a number of arguably unfavorable conditions

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[31] By merely mandating that the ITC consider "inventories of subject merchandise," § 1677(7)(F)(i)(V), the statute is not clear about whether the domestic industry's inventories are also to be considered. The ITC in the *Final Determination* nevertheless considered the level of domestic inventories during the POI and observed that although increasing "in absolute terms," domestic inventories declined "relative to imports and U.S. shipments of imports from 1999 to 2000." *Final Determination* at 38. "In 2001, these inventories declined from 2000 levels in absolute terms but were greater in relative terms than in either 1999 or 2000. However, the ratios of inventories to imports and to shipments of imports were at extremely low levels throughout the period of investigation." *Id.*

[32] Implicit in this observation is the consideration of the statutory factor (VIII). § 1677(7)(F)(i) (requiring consideration of "actual and potential negative effects" of imports on the domestic industry's development).

[33] The "vulnerability" language appears in the legislative history of the Uruguay Round Agreements Act. *See* SAA at 885 ("In material injury determinations, the Commission considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they also may demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports.").

[34] The *NEC* court stated:

> In a threat determination, "vulnerability analysis" is appropriate and relevant to consider as "among other relevant economic factors." [ ] 19 U.S.C. § 1677(7)(F)(i) (1994). Underlying vulnerability analysis is the principle that the foreign industry must "take the domestic industry as [it] finds it." *Hosiden Corp. v. Advanced Display Mfrs. of Am.*, 85 F.3d 1561, 1569 (Fed.Cir.1996) (quoting *Iwatsu Elec. Co. v. United States*, 15 CIT 44, 57, 758 F.Supp. 1506, 1518 (1991)). In *Goss Graphics*, the Court endorsed the use of "vulnerability analysis," so long as "the Commission did not substitute its finding of vulnerability for consideration of the statutory criteria." *Goss Graphics* [*v. United States*, 22 CIT 983, 1004, 33 F. Supp. 2d 1082, 1101 (1998)]. Accordingly, an affirmative threat determination based solely on a finding of vulnerability coupled with the presence of statutory factors would be the kind of temporal connection disapproved of in *Gerald Metals*[, 132 F.3d at 716.] Yet the "by reason of" standard is met if the Commission can articulate a causal connection between the threat of injury to the domestic industry and the subject imports themselves, while avoiding attributing the threat from non-import factors to threat from subject imports. *See Goss Graphics*, [ ]33 F.Supp.2d at 1103 (affirming the Commission's conclusion that, "[t]he vulnerability of the industry in combination with the adverse trends of increased subject imports and the small number of pending sales created the threat of material injury.").

surrounding the domestic industry in this period, especially towards the end of the POI, making it vulnerable to dumped imports. A decline in domestic industry's sales revenues and operating income in the 2000–2001 period was also acknowledged by the ITC panel in its impact determination. *Final Determination* at 33. There, the ITC determined that the declining trends were not due to subject imports, but at least in part ascribable to a decline in demand. As the statute requires a causal link between a threat of material injury finding and subject imports, § 1673d(b)(1), and as the record establishes a number of favorable conditions pertaining to the domestic industry, the court cannot say that the majority of the Commissioners' treatment of the domestic industry's adverse trends was unreasonable and factually unsupportable.

IV. CONCLUSION

In light of the foregoing, the court sustains the ITC's negative material injury and negative threat of material injury determinations in *Certain Structural Steel Beams from China, Germany, Luxembourg, Russia, South Africa, Spain and Taiwan*, Invs. Nos. 731–TA–935–936 and 938–942 (Final), USITC Pub. No. 3522 (June 2002). Accordingly, the court denies Plaintiffs' Motion for a Judgment upon an Agency Record. Judgment will be entered accordingly.

(Slip Op. 03–79)

DUPONT TEIJIN FILMS USA, LP, MITSUBISHI POLYESTER FILM OF AMERICA, LLC, AND TORAY PLASTICS (AMERICA), INC., PLAINTIFFS, *v.* UNITED STATES, DEFENDANT, AND POLYPLEX CORPORATION LIMITED, DEFENDANT-INTERVENOR.

Consol. Court No. 02–00463

[ITA's antidumping duty determination remanded.]

(Dated: July 9, 2003)

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Coudert Brothers LLP (*Kay C. Georgi* and *Mark P. Lunn*) for defendant-intervenor.

OPINION

RESTANI, *Judge:* This matter is before the court on a motion for judgment upon the agency record pursuant to USCIT Rule 56.2 by Dupont Teijin Films USA, LP, Mitsubishi Polyester Film of America, LLC, and Toray Plastics (America), Inc. (collectively "Plaintiffs"), petitioners in the underlying antidumping duty ("AD") investigation. *See Polyethylene Terephthalate Film, Sheet, and Strip From India*, 67 Fed. Reg. 34,899 (Dep't Commerce May 16, 2002) (final) [hereinafter "*Final Determination*"]. In its *Final Determination*, the Department of Commerce ("Commerce") found that polyethylene terephthalate film, sheet, and strip ("PET film") from India are being sold, or are likely to be sold, in the United States at less than fair value ("LTFV"). *Id.* at 34,899. Plaintiffs challenge only one aspect of the *Final Determination*: Commerce's decision to exclude from the antidumping duty order PET film produced in India by defendant-intervenor Polyplex Corporation Limited ("Polyplex").

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). The court will uphold Commerce's determination in an antidumping duty investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000).

FACTUAL & PROCEDURAL BACKGROUND

On May 17, 2001, Plaintiffs, domestic producers of PET film, simultaneously filed an antidumping duty petition against imports of PET film from India and Taiwan and a countervailing duty petition against PET film from India. Commerce published notice of its initiation of both investigations on June 13, 2001.[1] *See Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India and Taiwan*, 66 Fed. Reg. 31,888 (Dep't Commerce June 13, 2001) (initiation); *Polyethylene Terephthalate Film, Sheet, and Strip (PET film) from India*, 66 Fed. Reg. 31,892 (Dep't Commerce June 13, 2001) (initiation). Commerce preliminarily determined that PET film from India is being, or is likely to be, sold in the United States at LTFV. *Polyethylene Terephthalate Film, Sheet, and Strip from India*, 66 Fed. Reg. 65,893, 65,894 (Dep't Commerce Dec. 21, 2001) (prelim.) [hereinafter "*Preliminary Determination*"].

In the *Preliminary Determination*, Commerce calculated the export price,[2] or, where appropriate, the constructed export price[3] for

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[1] The period of investigation was April 1, 2000, through March 31, 2001.

[2] The statute defines "export price" as:
the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted* * * *

Polyplex's exports in accordance with section 772(a) of the Tariff Act of 1930, 19 U.S.C. § 1677a. *See id.* at 65,895–96. Commerce then increased Polyplex's export price (sometimes referred to as "U.S. price") "by the amount of the *export subsidy* found in the companion countervailing duty investigation on PET film from India."[4] *Id.* at 65,896 (emphasis added). This adjustment caused Polyplex's estimated dumping margin[5] to fall below statutory *de minimis* levels. *Id.* at 65,898 (reporting Polyplex's weightedaverage dumping margin,[6] as adjusted, as 1.38 percent); *see* 19 U.S.C. § 1673b(b)(3) (2000) (requiring Commerce to "disregard any weighted average dumping margin that is * * * less than 2 percent *ad valorem* or the equivalent specific rate for the subject merchandise."). Commerce therefore preliminarily determined to exclude Polyplex from the antidumping duty order. *See Prelim. Determ.*, 66 Fed. Reg. at 65,898. After publishing its *Preliminary Determination*, Commerce issued and received an additional supplemental questionnaire for respondent Polyplex, conducted a verification of respondents' questionnaire responses, reviewed case briefs and rebuttal briefs, and held a public hearing. *Final Determ.*, 67 Fed. Reg. at 34,899.

In the *Final Determination*, Commerce again found that PET film from India is being sold, or is likely to be sold, in the United States at LTFV, but the Department continued to exclude Polyplex from the affirmative determination. *Id.* Commerce had calculated a weighted-average dumping margin of 10.34 percent for Polyplex, but it "adjusted the antidumping duty *cash deposits*[7] for the export subsidies found in the companion countervailing investigation *rather than adjusting net U.S. price*." *Id.* at 34,900–01 & n.2 (citing Issues & Decision Mem. at cmt. 2) (emphasis added). The domestic industry, petitioners below and Plaintiffs here, had contested the methodology used in the *Preliminary Determination*, arguing that the statute only

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19 U.S.C. § 1677a(a) (2000). In other words, Commerce uses export price where foreign producers sell merchandise directly to unaffiliated purchasers in the United States. *See Prelim. Determ.*, 66 Fed. Reg. at 65,895.

3 "Constructed export price" is

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted* * * *

19 U.S.C. § 1677a(b). Commerce thus calculates constructed export price when sales to unaffiliated purchasers take place after importation into the United States. *See Prelim. Determ.*, 66 Fed. Reg. at 65,896.

4 The basic economic theory behind these types of adjustments "is that in parallel AD and CVD investigations, if the Department finds that a respondent received the benefits of an export subsidy program, it is presumed the subsidy contributed to lower-priced sales of subject merchandise in the United States market by the amount of any such export subsidy." Issues & Decision Mem. for the Final Determ. in the Antidumping Duty Investigation of PET film from India at cmt. 1, 67 ITA Doc. 34,899, *summarized at* 67 Fed. Reg. 34,899 (May 16, 2002) [hereinafter "Issues and Decision Memorandum"]. The offset is designed to prevent the "double application" of duties when the subsidies and dumping are related. *Id.*

5 A "dumping margin" is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A) (2000).

6 A "weighted average dumping margin" is "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." *Id.* § 1677(35)(B).

7 After Commerce makes an affirmative final determination that subject merchandise is being sold at LTFV, it orders the producers or exporters to pay cash deposits for estimated antidumping duties on future entries, which are "based on the estimated weighted average dumping margin." *Id.* § 1673d(c)(1)(B) (2000).

authorizes Commerce to increase a producer's U.S. price by the amount of countervailing duties "actually 'imposed' (i.e., assessed) on the subject merchandise" rather than by the amount of estimated countervailable export subsidies. Issues & Decision Mem. at cmt. 1 (quoting Petitioners' Case Br. at 3). Commerce agreed that its "longstanding practice in an investigation is to offset the AD cash deposit rate by the export subsidy cash deposit rate" rather than adjusting the dumping margin calculation.[8] *Id.* Nonetheless, Commerce excluded Polyplex from the antidumping duty order, explaining that "[i]f the Department's calculations in an investigation result in a zero cash deposit rate, then in reality, there exists no dumping upon which an affirmative determination could be based as to that particular respondent."[9] *Final Determ.*, 67 Fed. Reg. at 34,901; *see Antidumping Duty Order*, 67 Fed. Reg. at 44,176 (excluding Polyplex). This action followed.

DISCUSSION

The crux of Plaintiffs' argument is that Polyplex must be included in the antidumping duty order because it has a dumping margin of 10.34 percent, despite its cash deposit rate of zero. Plaintiffs argue that the statute, legislative history, agency regulations, and the Statement of Administrative Action ("SAA") all support their view that an exclusion from an antidumping duty order is only allowed if the producer has a *de minimis* dumping margin. Commerce argues that the statute is silent or ambiguous on this issue, its interpretation of the statute is reasonable, and that Commerce's decision to exclude Polyplex from the antidumping duty order is entitled to *Chevron* deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (holding that if a statute is silent or ambiguous on a specific issue, courts must defer to the administrating agency's permissible construction of it).

The Department's construction of the antidumping statute is a question of law, so the court must first "determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I. v. United States*, 157 F.3d 879, 881 (Fed.

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[8] This practice, according to Commerce, "is a result of the practical administrative difficulties in applying the results of an ongoing CVD investigation to calculationsin an ongoing AD investigation." Issues & Decision Mem. at cmt. 1.

[9] The *Final Determination* and accompanying Issues and Decision Memorandum both discuss and explain the methodology used to offset Polyplex's figures for the export subsidies as an adjustment to the cash deposit rate rather than U.S. price in accordance with longstanding Department practice. Both the *Final Determination* and the antidumping duty order, however, contain a chart with the manufacturers/exporters of PET film and their corresponding dumping margins. Next to Polyplex's name, rather than listing the calculated dumping margin of 10.34 percent, five asterisks appear with a footnote explaining that Polyplex was excluded "because the rate for Polyplex is zero after adjusting the *dumping margin* for the export subsidies in the companion countervailing duty order." *Notice of Amended Final Antidumping Duty Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 67 Fed. Reg. 44,175, 44,176 (Dep't Commerce July 1, 2002) (emphasis added) [hereinafter "*Antidumping Duty Order*"]. While this footnoted explanation directly conflicts with the stated reasoning in the *Final Determination* and the detailed discussion on this point in the Issues and Decision Memorandum, it is clear from the record as a whole that Commerce adjusted the cash deposit rate, not Polyplex's export price or the dumping margin, in excluding Polyplex from the antidumping duty order. Commerce conceded this point at oral argument in response to the court's questions.

Cir. 1998). The court looks at the plain language of the statute, legislative history, and the canons of statutory construction in ascertaining the intent of Congress. *See id.* at 881–82; *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 470–79 (1997). "The expressed will or intent of Congress on a specific issue is dispositive." *Ilva Lamiere E Tubi S.R.L. v. United States*, 196 F. Supp. 2d 1347, 1349 (Ct. Int'l Trade 2002) (citing *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233–37 (1986)). Only if the court concludes that the statute is vague or silent on an issue should the court reach the issue of *Chevron* deference. *See Bd. of Governors Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986); *Timex*, 157 F.3d at 881–82. Under *Chevron*, the court will uphold Commerce's interpretation of the antidumping laws if such an interpretation is reasonable given the express terms of the provisions at issue, the objectives of those provisions, and the objectives of the antidumping scheme as a whole. *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1379–80 (Fed. Cir. 2001) (affording *Chevron* deference to Commerce's interpretations of ambiguous statutory terms articulated in the course of an antidumping determination); *Windmill Int'l Pte. v. United States*, 193 F. Supp. 2d 1303, 1305–06 (Ct. Int'l Trade 2002) (citing *Mitsubishi Heavy Indus. v. United States*, 22 CIT 541, 545, 15 F. Supp. 2d 807, 813 (1998)).

In the present case, the law is clear that producers with dumping margins over two percent must be included in an affirmative final determination of sales at less than fair value. Under 19 U.S.C. § 1673d, Commerce engages in a two-step process in making an antidumping determination in an initial investigation. First, Commerce must decide whether the subject merchandise is being, or is likely to be, sold in the United States at LTFV. 19 U.S.C. § 1673d(a)(1). To make this determination, Commerce compares the normal value of the merchandise in the home market to the export price of the same merchandise. If the normal value exceeds the export price, the merchandise is being sold at LTFV and the producer is "dumping." *See id.* § 1677(34) (defining "dumping" as "the sale or likely sale of goods at less than fair value"). Commerce is instructed to "disregard any weighted average dumping margin that is *de minimis*." *Id.* § 1673d(a)(4). A *de minimis* margin is one that is "less than 2 percent *ad valorem* or the equivalent specific rate for the subject merchandise." *Id.* § 1673b(b)(3). Thus, producers with *de minimis* dumping margins must be excluded from an antidumping duty order. *See id.* § 1673d(a)(4); 19 C.F.R. § 351.204(e)(1) (explaining that a producer with a *de minimis* dumping margin will be excluded from an affirmative final determination); Uruguay Round Agreements Act, SAA, H.R. Doc. No. 103–316 at 844 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040 ("Exporters or producers with *de minimis* margins will be excluded from any affirmative determination.").

If Commerce makes an affirmative finding that imports are being sold at LTFV, it must calculate the estimated weighted average dumping margin for each individually-investigated, determine the estimated "all-others rate" for exporters and producers not individually investigated, and order the producers or exporters to post an "appropriate" cash deposit or bond, which is "based on the estimated weighted average dumping margin." 19 U.S.C. § 1673d(c)(1)(B); *see Auto Telecom Co. v. United States*, 15 CIT 231, 233, 765 F. Supp. 1094, 1097 (1991) (emphasizing the two distinct inquires in (1) making a dumping determination and (2) ordering a cash deposit rate).[10] After Commerce makes its antidumping determination, if the United States International Trade Commission makes an affirmative finding of material injury to the domestic industry by reason of dumped imports, Commerce must issue an antidumping duty order. *See* 19 U.S.C. §§ 1673d(c)(2) & 1673e. The AD order is ministerial in nature, "the first step in the mandatory assessment of antidumping duty." *Royal Business Machines, Inc. v. United States*, 1 CIT 80, 86, 507 F. Supp. 1007, 1012–13 (1980).

As discussed, Commerce's dumping margin determination is distinct from its later order of cash deposits for subject entries. In this determination, however, Commerce collapsed these two inquiries when it improperly excluded Polyplex based on a zero cash deposit rate when its dumping margin was greater than *de minimis*. There is no statutory authority to exclude an exporter because its cash deposit rate, but not its dumping margin, is zero. *See* 19 U.S.C. § 1673d. Therefore, Commerce's decision to exclude Polyplex from the AD order on that basis is not in accordance with law.

The antidumping statute requires the Department make a final determination of whether the subject merchandise is being sold at LTFV and to "disregard" producers with *de minimis* dumping margins. Commerce cannot disregard a producer based only on a zero cash deposit rate. Upon remand, Commerce must calculate Polyplex's dumping margin after making the adjustments to export price required by 19 U.S.C. § 1677a and Commerce's reasonable interpretations thereof.[11] If Commerce continues to calculate a dumping margin of 10.34 percent for Polyplex, Polyplex must be subject to

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[10] The limits of Commerce's discretion in setting cash deposit rates is not at issue here. Plaintiffs do not challenge the zero cash deposit rate. They merely seek to keep Polyplex subject to the discipline of an antidumping duty order, which may require future periodic reviews and ultimately the assessment of duties.

[11] At oral argument on March 27, 2003, the court focused on the applicability of 19 U.S.C. § 1677a(c)(1)(C), which requires Commerce to increase the price used to establish export price by "the amount of any *countervailing duty imposed* on the *subject merchandise* * * * to offset an export subsidy," and the meaning of the emphasized terms. The parties agreed that the provision applies during AD investigations, but disputed whether the provision allows Commerce to adjust Polyplex's U.S. price here. Plaintiffs maintained that the statute only allows Commerce to increase U.S. price for CVD duties actually assessed so as to avoid double liability. Commerce argued that the statute was silent or ambiguous on the question of whether an offset was allowed for countervailable subsidies found in a companion CVD investigation but not yet finally assessed and, therefore, that its interpretation allowing the offset would be entitled to deference. The court ordered additional briefing by the parties on this issue but has determined that, because Commerce did not apply this provision in its *Final Determination* to offset for the export subsidies, but instead adjusted the cash deposit rates, the issue is not ripe for review. On remand, Commerce may set forth its new interpretation of the disputed statutory terms. Plaintiffs will have an opportunity to voice their views on the administrative record, and Commerce will have to consider their arguments and address

the antidumping duty order, whether or not it is given a cash deposit rate of zero because of *expected* offsetting countervailing duties.

CONCLUSION

Accordingly, Plaintiffs' motion for judgment on the agency record is granted and the *Final Determination* is remanded for further consideration consistent with the court's opinion.

(Slip Op. 03–80)

NEC SOLUTIONS (AMERICA), INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANTS.

Consol. Court No. 01–00147

[Partial Summary Judgment for Plaintiff. Publication on Customs Electronic Bulletin Board of Dep't of Commerce e-mail indicating that suspension of liquidation has been terminated is notice for the purposes of deemed liquidation pursuant 19 U.S.C. § 1504(d).]

(Dated: July 9, 2003)

Paul, Weiss, Rifkind, Wharton & Garrison (*Robert E. Montgomery, Jr.* and *Jesse A. Nicol*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*James A Curley*), *Chi S. Choy*, Office of Chief Counsel, United States Bureau of Customs and Border Protection, *William J. Kovatch, Jr.*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This consolidated matter is before the court on cross-motions by Plaintiff NEC Solutions (America), Inc. ("NEC") and Defendant (the "Government") for summary judgment pursuant to USCIT Rule 56. NEC challenges the timeliness of liquidation of certain color television imports by the United States Customs Service ("Customs").[1] NEC argues that it is entitled to a refund of cer-

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them in its redetermination. Commerce must follow the statute and provide a reasoned analysis for the ultimate methodology it adopts.

[1] On February 4, 2003, pursuant to section 1502 of the Homeland Security Act of 2002, P.L. 107–296, 116 Stat. 2178 (Nov. 25, 2002), the President of the United States transmitted to the House of Representatives a "Reorganization Plan Modification for the Department of Homeland Security" (the "Plan") which, effective March 1, 2003, renamed the U.S. Customs Service the "Bureau of Customs and Border Protection." H.R. Doc. 108–32, at 4 (2003). While Customs's authority and responsibilities have been incorporated by the Bureau of Customs and Border Protection, the events and decisions at issue here occurred well before this change. For that reason and for ease of evaluation, the court will refer to the agency as "Customs" throughout.

tain antidumping duties because Customs failed to timely liquidate related entries within six (6) months of receiving notice that a court-ordered suspension of liquidation had been lifted and, therefore, entries should be deemed liquidated at the rate asserted at entry pursuant to 19 U.S.C. § 1504(d), as amended in 1993 by the North American Free Trade Agreement Implementation Act., Pub. L. No. 103–182, § 641, 107 Stat. 2057, 2204–05 (1993). In support of its claim, NEC argues that Customs received actual notice that the suspension had been lifted through an electronic message (the "e-mail") issued by the United States Department of Commerce ("Commerce"), and constructive notice when the decision was presumably received by the United States Department of Justice ("Justice").

JURISDICTION & STANDARD OF REVIEW

Plaintiff NEC paid all related duties and interest assessed by Customs and filed multiple protests pursuant to 19 U.S.C. § 1515. NEC timely filed this action within 180 days after Customs mailed notice of the denial of Plaintiff's protests. The court has subject matter jurisdiction over the denial of Customs protests under 28 U.S.C. § 1581(a) (2002).[2] Summary judgment is appropriate when the record, viewed in the light most favorable to the nonmoving party, shows no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. USCIT R. 56(d).

BACKGROUND

This matter involves the liquidation of color television merchandise manufactured by NEC Corporation and imported by NEC Home Electronics (USA), Inc. into the United States during a seven-year period from April 1, 1982 until February 28, 1989.[3] During that time, the importation of televisions from Japan was subject to a 1971 antidumping duty order. *See Television Receiving Sets, Monochrome and Color, From Japan*, 36 Fed. Reg. 4597 (Dep't of Treas. Mar. 8, 1971). Commerce conducted several administrative reviews of the

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[2] The Government initially argued that the court lacked jurisdiction over certain entries (Nos. 110–08696269, 110–086972002, 110–08699792, 110–08699792, 110–0701457, and 110– 08706373) because the protest (No. 5501–00–100371) was not filed within 90 days after liquidation as required by 19 U.S.C. § 1514(a). The Government later conceded that the protest was in fact timely transmitted by facsimile to its Dallas/Fort Worth office during business hours but, due to time zone differences, Defendant inadvertently misinterpreted the transmission time on the document, which was sent at 5:04 Eastern Standard Time/4:04 Central Standard Time. After recognizing this error, the Government withdrew its jurisdictional objection as to these entries. Def.'s Br. in Reply to Plaintiff's Opposition to the Cross-Motion for Summary Judgment, filed Feb. 7, 2003.

[3] Plaintiff NEC Solutions (America) Inc., previously known as NEC Technologies, Inc., is the successor-in-interest to NEC Home Electronics (USA), Inc.

antidumping order over this period.[4] Because NEC has withdrawn its challenge as to the fourth administrative review period,[5] only the duties paid on entries subject to the fifth through tenth administrative reviews remain in dispute.

A. Fifth Through Eighth Review Period

NEC's entries made between April 1, 1983 and February 28, 1987 were covered by Commerce's fifth through eighth administrative review periods. *See* chart, *supra* n. 4. Commerce consolidated these entries into a single administrative review.[6] NEC subsequently challenged Commerce's calculation of the dumping margin, which covered several manufacturers. *See NEC Home Electronics, Ltd. v. United States*, 18 CIT 336 (1994), *aff'd in part, rev'd in part*, 54 F.3d 736 (Fed. Cir. 1995). The matter was twice remanded to Commerce, the latter of which required that Commerce redetermine the foreign market value of NEC's merchandise for comparison with the U.S. price in order to determine the proper dumping margin. *See NEC Home Electronics, Ltd. v. United States*, 22 CIT 167, 172, 3 F. Supp. 2d 1451, 1456 (1998). Commerce's second remand resulted in a revised antidumping margin for these periods.[7] *See Final Results of Redetermination* (Dep't Commerce November 30, 1998). On July 21, 1999, the court sustained those final results, *see NEC Home Electronics, Ltd. v. United States*, 59 F. Supp. 2d 1337 (Ct. Int'l Trade 1999), and the injunction suspending liquidation of Plaintiff's entries covered by the fifth through eighth review periods was lifted when the decision became final on September 19, 1999.[8]

Although, 19 U.S.C. § 1516a(e) required that, because the duty rates were changed from Commerce's original published results, Commerce publish "notice of the court decision * * * within ten days from the date of the issuance of the court decision," Commerce admits that it failed to do so. Several months later, on June 23, 2000, Commerce sent an e-mail to Customs stating that "RECORDS AT THE

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4 The entries at issue were imported by NEC during the following administrative review periods:

Administrative Review Period	
4th (moot)	April 1, 1982 to March 31, 1983
5th	April 1, 1983 to March 31, 1984
6th	April 1, 1984 to February 28, 1985
7th	March 1, 1985 to February 28, 1986
8th	March 1, 1986 to February 28 1987
9th	March 1, 1987 to February 29, 1988
10th	March 1, 1988 to February 28, 1989

5 On April 20, 2001, Commerce issued liquidation instructions to Customs applying a zero margin to NEC's entries made during the fourth administrative review period. Because these entries were liquidated at the rate asserted by Plaintiff at the time of entry, NEC concedes that its request for declaratory judgment as to these entries are now moot.

6 The consolidated administrative review resulted in a final dumping margins of 18.21 percent (5th period), 7.37 percent (6th period), 7.16 percent (7th period), and 22.90 percent (8th period). *See Television Receivers, Monochrome and Color, From Japan*, 55 Fed. Reg. 35,517 (Dep't Commerce Aug. 28, 1989) (final admin. review).

7 The remand resulted in substantially lower final dumping margins of 2.20 percent (5th period), 7.37 percent (6th period), 7.16 percent (7th period), and 22.90 percent (8th period).

8 The decision became final sixty (60) days after the opinion was issued, when the time to appeal expired without the filing of an appeal. *See Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1379 (Fed. Cir. 2002).

DEPARTMENT OF COMMERCE INDICATE THAT *THERE SHOULD BE NO UNLIQUIDATED ENTRIES* OF TELEVISION RECEIVERS MONOCHROME AND COLOR, FROM JAPAN * * * HELD BY CUSTOMS FOR ANTIDUMPING PURPOSES DURING THE PERIOD 03/10/1971 THROUGH 02/28/1999* * * * " June 23rd e-mail e-mail from Paul Schwartz, Director, Trade Enforcement & Control to Directors of Field Operations, Port Directors, subject ADD–0175202–TV–JP (the "email") (emphasis added).[9] The e-mail went on to state that if any Customs import office was suspending liquidation on these entries, Customs officers should report specific information to Commerce within twenty (20) days. Customs then posted the message on the "Customs Electronic Bulletin Board," which the Government concedes can be accessed by the public. *See* May 22, 2003, Letter from James A. Curley, Attorney for Defendant ("*May 22nd Curley Letter*").

On January 10, 11, and March 26, 2001, Commerce sent electronic messages to Customs stating that the order suspending liquidation had been lifted, and that the entries were to be liquidated at specific antidumping duty rates. Between February 2001 and June 2001, various Customs ports issued liquidation notices and bills to NEC with respect to the fifth through eighth period entries. NEC filed twenty (20) protests arguing, *inter alia*, that the merchandise had already been liquidated by operation of law pursuant to 19 U.S.C. § 1504(d). NEC argued that Customs received notice that the suspension had been lifted through Commerce's June 23, 2000 e-mail and, because the entries were not liquidated within six months (December 23, 2000), the entries should have been deemed liquidated. Customs denied NEC's protests on grounds that the entries had been liquidated within six months of Commerce's January 10, 11, and March 26, 2001 e-mails providing specific liquidation instructions, which Customs concluded were the starting point for the six-month period. NEC timely challenged the fifth through eighth period entries on December 10, 2001.

B. Ninth and Tenth Review Periods

NEC's entries made between March 1, 1987 and February 28, 1989, were covered by Commerce's ninth and tenth review periods. The margins for these entries were determined in separate administrative reviews.[10] NEC and others challenged those final results. The courtordered suspensions of liquidation on these entries were terminated when the actions were dismissed by agreement of the parties. *See* Order of Dismissal, *Zenith Electronics Corp. v. United States*, Consol. Court No. 89–04–00212 (Ct. Int'l Trade Dec. 2, 1993);

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[9] There was an exception for certain entries of televisions produced by another manufacturer that continued to be enjoined from liquidation by court order.

[10] In its final results, Commerce assigned final dumping margins of 16.32 percent (9th) and 22.90 percent (10th). *See Television Receivers, Monochrome and Color, From Japan*, 54 Fed. Reg. 13,917 (Dep't Commerce April 6, 1989) (final admin. review); *Television Receivers, Monochrome and Color, From Japan*, 55 Fed. Reg. 2399 (Dep't Commerce June 24, 1990) (final admin. review).

Order of Dismissal, *Zenith Electronics Corp. v. United States*, Consol. Court No. 90–02–00058 (Ct. Int'l Trade June 20, 1996). There was no formal publication regarding the dismissals and is not clear that any is required as the rates did not change.

Nevertheless, it was not until several years later, on April 28, 2000 and May 15, 2000, that Commerce transmitted liquidation instructions by e-mail. Customs liquidated the entries between June and September of 2000. NEC filed nine (9) related protests arguing again that the entries should be deemed liquidated under 19 U.S.C. § 1504(d). With respect to the ninth and tenth periods, NEC raised a different argument, claiming that Customs had received notice when Justice, which NEC argues represents Customs as legal counsel, received the orders dismissing the cases. As before, the protests were denied on the ground that the entries were properly liquidated within six (6) months of Customs's receipt of specific liquidation instructions from Commerce. On April 24, 2001, NEC timely challenged the results of the ninth and tenth period administrative reviews. Pursuant to motion by NEC, the court subsequently consolidated NEC's action related to the ninth and tenth period entries with NEC's action related to the fifth through eighth period entries.

DISCUSSION

Section 1504(d) of Title 19 requires that Customs liquidate entries within six (6) months after receiving "notice" that a suspension of liquidation of such entries has been removed.[11] 19 U.S.C. § 1504(d), as amended in 1993 by the North American Free Trade Agreement Implementation Act., Pub. L. No. 103–182, § 641, 107 Stat. 2057, 2204–05 (effective December 8, 1993). If Customs fails to timely liquidate the entries after receiving notice, the entries are "deemed" liquidated at the rate asserted at the time of entry. *See Fujitsu Gen. Am., Inc. v. United States* ("*Fujitsu*"), 283 F.3d 1364, 1376 (Fed. Cir. 2002) ("[I]n order for a deemed liquidation to occur, (1) the suspension of liquidation that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; and (3) Customs must not liquidate the entry at issue within six months of receiving such notice."). According to Commerce, Customs typically receives the relevant notice in the form of an e-mail from Commerce providing explicit liquidation instructions. The Federal

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[11] Section 1504(d) provided, in relevant part:

> [W]hen a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry * * * within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry * * * not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

Section 1504(d) was amended in 1994, but the amendment applies only to administrative reviews commenced on or after January 1, 1995. The administrative reviews covering the fifth through the eighth periods were commenced prior to January 1, 1995. The parties agree that later amendments do not affect this case.

Circuit, however, has recognized that other methods of notice are sufficient.

In *International Trading Co. v. United States*, the court rejected the Government's argument that Customs receives notice, for the purposes of § 1504(d), only when it receives specific liquidation instructions from Commerce.[12] 281 F.3d 1268, 1276 (Fed. Cir. 2002) ("*Int'l Trading*"). The court concluded that, when the suspension is lifted by publication in the Federal Register, publication itself was sufficient to provide the requisite notice to Customs. *Id.* at 1275.[13] The court notes that *Int'l Trading* was addressing a slightly different situation than that here. In that case, "suspension was removed upon publication of the final results in the Federal Register" *Id.* at 1271. Here, the suspensions terminated by the issuance of a final and conclusive court decision. *See, e.g.*, *Hosiden Corp. v. Advanced Display Mfrs. of America*, 85 F.3d 589, 590–91 (Fed. Cir. 1996). In *Fujitsu*, the court concluded that publication in the Federal Register of notice regarding a final court decision constituted § 1504(d) notice of the lifting of suspension.

> It is just as important that there be "an unambiguous and public starting point for the six-month liquidation period" under these circumstances as it is when liquidation of entries is suspended pending an administrative review and thereafter the suspension is removed when the final results of the review are announced. We therefore conclude that Customs received notice of the removal of the suspension of liquidation on September 16, 1997, when Commerce published notice of the *Fujitsu General* decision in the Federal Register.

Fujitsu, 283 F.3d at 1381–82 (quoting *Int'l Trading*, 281 F.3d at 1275). Taken together, *Int'l Trading* and *Fujitsu* make clear that, while specific liquidation instructions from Commerce may be sufficient,[14] they are not the exclusive method of § 1504(d) notice. The question before the court, therefore, is whether the communications raised by NEC are adequate.

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[12] In rejecting the Government's argument that notice required liquidation instructions, the court reasoned that "[a]dopting that position would require the courts, after the fact, to examine informal and non-public communications between Commerce and Customs to determine whether and when those communications constituted 'liquidation instructions.'" *Int'l Trading*, 281 F.3d at 1276.

[13] In accepting publication as a sufficient means of notice, the court reasoned that:

> [T]he Federal Register is a familiar manner of providing notice to parties in antidumping proceedings * * * * Moreover, the date of publication provides an unambiguous and public starting point for the six-month liquidation period, and it does not give the government the ability to postpone indefinitely the removal of suspension of liquidation (and thus the date by which liquidation must be completed) as would be the case if the six-month liquidation period did not begin to run until Commerce sent a message to Customs advising of the removal of suspension of liquidation.

Int'l Trading, 281 F.3d at 1275.

[14] In *Fujitsu* and *Int'l Trading Co.*, the Court of Appeals found that publication *before* Commerce's transmission of specific liquidation instruction served as § 1504(d) notice and, therefore, the court did not address whether the instructions themselves were sufficient. Liquidation instructions may contain confidential information and may not be public. The court does not decide what affect liquidation instructions have when there is no public notice that they have issued.

A. Fifth through Eighth Review Periods

With respect to entries during the fifth through eighth review periods, NEC argues that it is entitled to a refund of certain duties because Customs failed to liquidate those entries within six months of receiving Commerce's June 23rd e-mail. NEC argues that, because Commerce failed to timely liquidate the entries, those goods should have been deemed liquidated under § 1504(d) at the rate asserted at the time of entry. Defendant responds that the June 23rd e-mail was not sufficient to put Customs on notice because it did not (1) expressly notify Customs that the suspension of liquidation had lifted on entries from the fifth through eighth review periods; or (2) provide the precise duty rate to be applied. According to Defendant, Customs "could not have known from a reading of the e-mail that suspension of liquidation of entries covered by the fifth through eighth administrative reviews was removed." Citing *Mitsubishi Elec. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994) ("Customs has a merely ministerial role in liquidating antidumping duties," and "merely follows Commerce's instructions in assessing and collecting duties.").

The court notes from the outset that this problem arises from Commerce's admitted failure to properly publish notice of the court's final decision in this matter, as required by 19 U.S.C. § 1516a(e). Defendant contends that this failure, due to an alleged administrative oversight,[15] has no consequence because § 1516a(e) is directory rather than mandatory. *Fujitsu*, 283 F.3d at 1382 ("[T]here is no language in section 1516a(e) that attaches a consequence to a failure by Commerce to meet the ten-day publication requirement, let alone the consequence of deemed liquidation under section 1504(d)."). While that may be technically correct, had Commerce properly published notice of the opinion, as required, the court would not need to

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[15] According to the Government, this administrative oversight occurred, in part, because of Commerce's "time consuming" publication process.

> When a draft of the amended results is prepared, it is circulated through a chain of reviewers, which include the case analyst, case attorney, program manager, office director, senior attorney, and the responsible Deputy Assistant Secretary. After the review is completed, the amended results are placed in final form and signed by the Assistant Secretary. The amended results then are forwarded to the Central Records Unit where they are certified and sent to the Federal Register for publication.

May 22nd Curley Letter. Commerce's self-imposed bureaucracy, however, is no excuse for delay. Commerce is aware of its statutory obligations and should have crafted its procedures accordingly. The Government brazenly claims that an interested party who believes it will be injured by a delay "is not without remedy" because it can seek relief by petitioning for a writ of mandamus. Citing *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990). The idea that a party must seek such an extraordinary remedy to ensure that Commerce simply fulfills its statutory responsibilities is untenable. By delaying liquidation in this manner, Commerce undermines both the antidumping duty laws and Congress' intent to settle importers' liabilities promptly.

In 2002 and the first four months of 2003, Commerce published a total of eight (8) amended final determinations, none of which were published within the requisite ten days. The most egregious violations occurred (a) 1 year and 3 months, (b) 3 years and 1 month, and (c) 5 years and 8 months after the reviewing court's decisions became final. According to Defendant, there is presently one matter pending before this court concerning a delay of eight years and two months. Such delays are unacceptable. And, of course, here there was no publication at all. The Government argues that "Commerce now has new procedures under consideration that are expected to prevent significant delays in publishing amended final determinations." *Id.* Whether that is true remains to be seen, and the Government has not committed to meet the statutory deadline at all. In the meantime, the court finds no excuse for Commerce's failure to comply with the statute and will likely craft future orders under the presumption that Commerce will fail to timely publish.

"referee" whether other, less formal, communications are sufficient for § 1504(d) purposes.

Determining the sufficiency of notice under § 1504(d) poses a problem because, as Defendant concedes, the statute does not define or otherwise explain the requirements for such notice. While it is clear from *Int'l Trading* and *Fujitsu* that publication in the Federal Register of the agency's final results or the court's final decision are sufficient, it is less clear what is not. The Government, for obvious reasons, advocates a strict approach. For example, Defendant argues that, other than specific liquidation instructions, a sufficient notice must plainly read that "suspension has been lifted." In *Fujitsu*, however, the court held that publication of notice of the decision in that case met the requirements of § 1504(d) despite the fact that neither the court decision nor Commerce's Federal Register notice specifically mentioned suspension. *Fujitsu*, 283 F.3d at 1383. Defendant next argues that any § 1504(d) notice not mentioning suspension must contain the applicable duty rate. It is true that, in *Int'l Trading*, the court held that inclusion of the duty amount, in the absence of express language that the suspension has been lifted, is sufficient. 281 F.3d at 1276 ("'[N]otice' of the duty to be paid is, in effect, notice of the removal of suspension."). The court, however, did not hold that informing Customs of the applicable duty rate was the exclusive alternative method of providing § 1504(d) notice or that is was a strict requirement. While the absence of the duty rate from the June 23rd e-mail places this situation outside the facts of *Fujitsu* and *Int'l Trading*, it does not necessarily doom NEC's case.[16]

Despite Defendant's arguments to the contrary, *Fujitsu* and *Int'l Trading* do not specify the requirements for § 1504(d) notice, except to state that notice should be "unambiguous." The issue, therefore, is whether this particular e-mail unambiguously provided notice to Customs that the suspension had been lifted. The first sentence of the first paragraph provides that "there should be no unliquidated entries of [subject imports] held by Customs for antidumping purposes." The second paragraph identifies an exception for televisions from another manufacturer. "With respect to unliquidated entries of [the other manufacturer's merchandise] that are the subject of [a] court ordered injunction, the Commerce Department continues to be enjoined from ordering the liquidation of these entries until the court disposes of the litigation or dissolves the injunctions." The third paragraph provides that, "with the exception of [the entries discussed in paragraph 2], if any Customs import office is suspending liquidation of entries of this merchandise for antidumping purposes" the officer should respond to Commerce.[17] After receiving the

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[16] The court notes that, once Customs has notice that suspension has been lifted, there is nothing to prevent it from obtaining the applicable duty rates from Commerce. Customs has six full months to get this done.

[17] According to Defendant, Commerce received several responses to its inquiry, which were the basis for the formal liquidation instructions issued more in January and March 2001.

e-mail, Customs posted the message to its Customs Electronic Bulletin Board, which can be accessed by both Customs officials and the public.[18]

Commerce argues that its purpose in distributing the message was not to notify Customs of the removal of suspension but, instead, to inquire as to whether any unliquidated entries remained. According to Commerce, the June 23rd e-mail was part of a larger project undertaken to have Customs identify a wide variety of unliquidated entries involving numerous antidumping investigations. Commerce contends that, at the time, it did not know whether Customs was holding any unliquidated entries and that the e-mail was only an inquiry.[19] When viewed in the context of Commerce's failure to publish the requisite notice, this *post hoc* approach to investigating the status of outstanding entries makes sense. Commerce likely realized that it had failed to notify Customs in this matter, which apparently happens frequently, *supra* n. 15, and was attempting to discretely assess the situation. Commerce's purpose in issuing the e-mail, however, is irrelevant. The only question is whether this message notified Customs that suspension had been lifted.

To anyone reasonably familiar with customs law, the juxtaposition of the mandate "there should be no unliquidated entries" with the exception for certain goods for which a Commerce liquidation order "continues to be enjoined" could only mean that there are no remaining suspensions, court-ordered or otherwise, on subject entries, except for those identified. June 23rd e-mail, ¶¶1, 2. Reviewing the June 23rd e-mail as a whole, the court finds that a reasonable Customs official, with knowledge in these matters, would have read the message to provide unambiguously that any suspension of liquidation on NEC's entries had been removed. It is important to note that Customs then posted the message to its Electronic Bulletin Board, which is apparently "a familiar manner" for Customs to disseminate Commerce's liquidation information to Customs officials. Messages are posted only where Commerce expressly "allows disclosure to the public," therefore, there is no question that Commerce was aware that both Customs and the public (i.e. the parties) would have access to this information. *May 22nd Curley Letter at* ¶2. As such, the court

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[18] According to counsel for Defendant,

> When Commerce sends an electronic message to Customs, the message is forwarded to Customs Automated Commercial System ("ACS") for internal distribution. If Commerce's message allows disclosure to the public, Customs, in addition, will send the message to the ACS Administrative Bulletin Board for Automated Broker Interface, which can be accessed by brokers who file electronically with Customs, and to an ACS representative who will then post the message on Customs Electronic Bulletin Board, *which can be accessed by the public*.

May 22nd Curley Letter (emphasis added).

[19] Commerce argues that, while it knew there should be no unliquidated entries because the suspension had been lifted, it did not know whether unliquidated entries remained and, therefore, was proceeding under a "mistake of fact." First, this was not a mistake of fact. Commerce was simply proceeding with imperfect knowledge Second, the court notesthat Commerce did not know whether unliquidated entries existed because, as we have seen here, Commerce frequently forgets to properly inform Customs that entries should be liquidated. Therefore, any "mistake" was self-inflicted, for which the court finds no excuse.

concludes that Commerce's June 23rd e-mail to Customs, which was subsequently posted to the Customs Electronic Bulletin Board, is sufficient to serve as § 1504(d) notice. NEC's entries during the fifth through eighth review periods should therefore have been deemed liquidated at the rate asserted at the time of entry. Consequently, the court grants summary judgment to NEC as to these entries and orders Defendant to refund any additional duties imposed.

B. Ninth and Tenth Review Periods

With respect to ninth and tenth review periods (and as alternative grounds for the fifth through eighth), NEC argues that Customs received notice that the suspension of liquidation had been lifted when the opinions dismissing the matter, and thereby lifting the suspensions, were received by Justice. NEC's argument is largely founded on an interrogatory response in which a Justice representative states that he represented "the defendant, the United States" in this matter. NEC argues that, because Customs is an agency of the United States, Justice is presumably its counsel and, therefore, Customs had constructive notice by way of Justice's ethical obligation to keep its client informed. In *Fujitsu*, 283 F.3d at 1379, the court squarely rejected this argument, finding that service of an opinion on Justice was not service on Customs because "[t]he Justice Department represented Commerce." NEC argues that, if the CAFC had the facts of this case, it would have decided differently. Whether that is true, the court cannot know. For the purposes of this case, however, the court remains bound by *Fujitsu*. As such, the court finds that Defendant is entitled to summary judgment as to entries related to the ninth and tenth review periods.

CONCLUSION

For the foregoing reasons, the court finds that the June 23rd e-mail from Commerce to Customs provided notice, for the purposes of § 1504(d), that the court order suspending liquidation of entries during the fifth through eighth review periods had been lifted. Because Customs did not liquidate within six months, the entries should have been deemed liquidated. NEC is entitled to a refund of any additional duties imposed. The court grants summary judgment to NEC as to these entries. With respect to the ninth and tenth review periods, NEC's constructive notice argument is foreclosed by *Fujitsu*. The court grants summary judgment to Defendant as to these entries.

The parties are hereby ordered to confer and Plaintiff should file an appropriate proposed judgment sheet with the court indicating the proper amount be refunded, with interest if applicable, within

twenty (20) days. Defendants may file any objections within seven (7) days thereafter.

[PUBLIC VERSION]

(Slip Op. 03–82)

SAAB CARS USA, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 00–00041

[Plaintiff's motion for summary judgment is denied, and Defendant's motion for summary judgment is denied.]

(Date: July 14, 2003)

Gibson, Dunn & Crutcher LLP (*Judith A. Lee* and *Brian J. Rohal*) for plaintiff Saab Cars USA, Inc.

Peter D. Keisler, Assistant Attorney General; *John J. Mahon*, Acting Attorney in Charge; and *Barbara S. Williams*, Civil Division, Commercial Litigation Branch, United States Department of Justice; *Paula Smith*, Office of Assistant Chief Counsel, International Trade Litigation, United States Bureau of Customs and Border Protection, Of Counsel, for defendant United States.

OPINION

GOLDBERG, *Senior Judge:* Saab Cars USA, Inc. ("SCUSA") imports into the United States automobiles from Swedish manufacturer Saab Automobile AB ("Saab Auto"). SCUSA protested the United States Customs Service's[1] ("Customs") liquidation of several entries of automobiles that were appraised at transaction value. In the protests, SCUSA argued that an allowance in value should be granted for defects present in the automobiles at importation. Customs denied SCUSA's protests.

SCUSA timely appealed Customs' denial of those protests to the Court of International Trade on January 20, 2000. On March 6, 2001, SCUSA filed a motion for summary judgment requesting a partial refund of duties for the defective automobiles. Customs filed a cross-motion for summary judgment on June 4, 2001, requesting that the Court dismiss this action. For the reasons that follow, both parties' motions for summary judgment are denied.

[1] The United States Customs Service has since become the Bureau of Customs and Border Protection per the Homeland Security Act of 2002, § 1502, Pub. L. No. 107–296, 116 Stat. 2135, 2308–09 (Nov. 25, 2002), and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108–32, p. 4 (Feb. 4, 2003).

I. BACKGROUND

SCUSA imports into the United States automobiles manufactured by Saab Auto. The automobiles purchased by SCUSA from Saab Auto are subject to a warranty agreement (the "Warranty"). The terms of the Warranty are contained in the Warranty Policy and Procedures Manual dated January 11, 1995, and updated by warranty policy letters. According to SCUSA, the terms of the Warranty reimbursed SCUSA for the following specific repair expenses: (1) "pre-warranty," which covers [ ], but does not include damage from [ ]; (2) new car warranty, covering the car when it [ ]; (3) emission warranty, when [ ]; (4) perforation warranty, which covers [ ]; and (5) the importer's own extended warranty. *Warranty Manual*, Plaintiff's Exhibit 1 (Confidential), ¶4.2.1.

To claim reimbursement from Saab Auto under the terms of the Warranty, the retailer must submit the repairs to SCUSA's AS–400 Warranty System. The AS–400 Warranty System is a database system designed for SCUSA to track the automobile repairs which correspond to each Vehicle Identification Number ("VIN"). The AS–400 Warranty System also runs a series of "edits" to confirm that the repair was subject to the Warranty. In addition, Saab Auto requires SCUSA (along with other importers) to audit dealers' warranty repair claims to [ ]

At issue in this case are entries of automobiles SCUSA imported from Saab Auto between June of 1996 and July of 1997. At the time of importation, SCUSA declared the transaction value of the automobiles to be the price it paid Saab Auto for defectfree automobiles. While the vehicles were still at the port, SCUSA claims it identified defects in certain automobiles. The defects were repaired by SCUSA. The costs associated with the repairs are "port repair expenses" and are documented either through the AS–400 Warranty System or through invoices sent to SCUSA. The total port repair expenses claimed by SCUSA are [ ].

Prior to expiration of the Warranty period, but after the vehicles were shipped from the port, additional defects were discovered in the vehicles. To restore the vehicles to defectfree condition the dealers repaired the vehicles. The costs associated with those repairs represent SCUSA's "warranty expenses." The total warranty expenses claimed by SCUSA at the outset of this litigation was [ ].

Customs liquidated the entries, appraising the vehicles at their transaction values. SCUSA protested the liquidations, requesting allowances under 19 C.F.R. § 158.12 for "damage [or] latent manufacturing defects." The following protests were filed by SCUSA to request the allowances: (1) protest number 0502–98–100033, filed on June 30, 1998; (2) protest number 0502–98–100041, filed on September 14, 1998; (3) protest number 0502–99–100003, filed on January 12, 1999; and (4) protest number 0502–99–100008, filed on March 26, 1999. The protests correspond to the following entry numbers:

PROTEST NUMBER	**ENTRY NUMBER** (112–
0502–98–100033	9896032–6*, 9903676–1*, 9850980–0*, 9873165–1*, 9876403–3*, 9885094–9*, 9906444–1*, 9915803–7*, 9888725–5*, 9891683–1*, 9910140–9*, 9978449–3, 9011040–0, 9995282–7
0502–98–100041	9805210–8*, 9814363–4*, 9818038–8*, 9822519–1*, 9826593–2*, 9970288–3*, 9978449–3, 9801057–7*, 9964040–6*, 9964123–0*, 9940682–4*, 9022943–2, 9026932–1, 9974345–7, 9929365–1, 9930525–7, 9933194–3, 9958484–4, 9968124–4, 9983272–2, 9986698–5, 9006647–9, 9016015–7, 9018813–3, 9030595–0, 9943632–6, 9947519–1, 9950291–1
0502–99–100003	9016015–7, 9018813–3
0502–99–100008	9936275–3
* SCUSA and Customs have now agreed that the Court does not possess jurisdiction over these entries because they were not timely protested.	

SCUSA penned the following in each of its protests:

> We protest the appraised value of automobiles contained in the entries set forth in Attachment A.
>
> The automobiles listed in these entries were purchased by [SCUSA] from Saab Automobile AB. SCUSA ordered perfect merchandise from Saab Automobile AB. Despite this order, some of the vehicles delivered contained latent manufacturing defects at the time of importation. Section 158.12 of the Customs Regulations, 19 C.F.R. 158.12, provides that 'merchandise which is subject to ad valorum or compound duties and found by the port director to be partially damaged at the time of importation shall be appraised in its condition as imported, with an allowance made in the value to the extent of the damage.' *See Samsung Electronics America, Inc. vs. United States*, 106 F.3d 376 (CAFC 1997).
>
> Therefore, pursuant to 19 C.F.R. § 158.12, an allowance in the value of the imported vehicles set forth in the protested entries should have been made to the [*sic*] reflect the extent of the defects. We hereby request that the protested entries be reliquidated and that the vehicles set forth therein be appraised in the condition as imported. In addition, we request that Customs delay its consideration of this protest until the

> Court of International Trade ("CIT") has issued its decision on remand in the *Samsung* case. Based on instructions from the Court of Appeals, the anticipated CIT decision will clarify how the § 158.12 allowance will be implemented[2].

SCUSA Protest, Nos. 0502–98–100033 (June 30, 1998), 0502–98–100041 (Sept. 14, 1998), 0502–99–100003 (Jan. 12, 1999), 0502–00–100008 (March 26, 1999). These protests were denied by Customs on August 9, 1999, citing "no evidence of damage at time of import" as the only reason for denial.

SCUSA filed a timely summons before the Court on January 20, 2000, and filed the complaint on August 11, 2000. SCUSA has submitted to the Court the VINs and corresponding repair descriptions for all of the entries protested. The Court, upon cursory review of the repair descriptions submitted as evidence by SCUSA, estimates there are approximately 108,000 port and Warranty repairs covered by the protests. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a).

II. STANDARD OF REVIEW

This case is before the Court on SCUSA's motion for summary judgment and Customs' cross-motion for summary judgment. The court will grant summary judgment "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 moving party is entitled to a judgment as a matter of law." USCIT R. 56(d). A party opposing summary judgment must "go beyond the pleadings" and by his or her own affidavits, depositions, answers to interrogatories, and admissions to file, designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "While it is true that Customs' appraisal decisions are entitled to a statutory presumption of correctness, *see* 28 U.S.C. § 2639(a)(1), when a question of law is before the Court, the statutory presumption of correctness does not apply." *Samsung Electronics America, Inc. v. United States*, 23 CIT 2, 5, 35 F. Supp. 2d 942, 945–46 (1999) (citing *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997)) (hereinafter "*Samsung III*").

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[2] Customs contends that SCUSA's protest was not valid because it did not meet the specificity requirements of 19 U.S.C. § 1514(c), *see infra* at 8–15. Customs quoted only the last paragraph of SCUSA's three-paragraph protest in its initial brief, which is misleading when arguing that the language of the protest is insufficient. Customs later contended that it only quoted the last paragraph because the first two were "merely introductory." However, the Court has found that many of the specificity requirements were addressed in the first two paragraphs omitted by Customs.

III. DISCUSSION

A. Jurisdictional Issues

The Court has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a) (2000). Therefore, a prerequisite to jurisdiction by the Court is the denial of a valid protest. *Washington Int'l Ins. Co. v. United States*, 16 CIT 599, 601 (1992). Based on the following analysis, the Court concludes that SCUSA filed a valid protest, and thus the Court has jurisdiction.

A protest is required to "set forth distinctly and specifically" the following information: (1) "each decision * * * as to which protest is made"; (2) "each category of merchandise affected by each decision * * * "; and (3) "the nature of each objection and the reasons therefor." 19 U.S.C. § 1514(c)(1) (2000). The implementing regulations expand the requirements, specifying that the protest must include "[a] specific description of the merchandise affected by the decision as to which protest is made"; and "[t]he nature of, and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal." 19 C.F.R. § 174.13(a) (2002).

In the seminal case *Davies v. Arthur*, 96 U.S. 148 (1877), the Supreme Court articulated the rationale for the specificity required of protests:

> Protests * * * must contain a distinct and clear specification of each substantive ground of objection to the payment of the duties. Technical precision is not required; but the objections must be so distinct and specific, as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated.

Davies v. Arthur, 96 U.S. at 151.

Customs contends that the protests filed by SCUSA were not "distinct and specific," since SCUSA did not (a) tie specific repairs to specific entries and give the dollar amounts for the repairs; (b) state the amount of the allowance claimed; or (c) identify the claimed defects. Under Customs' reasoning, the protests' deficiencies undermined the rationale for requiring specificity, namely to notify Customs of the true nature of SCUSA's protests so that Customs could correct any defect. Customs argues that this case is similar to *Washington*, because the claimed deficiencies in the protests would " 'eviscerate the protest requirements mandated by Congress and effectively require

Customs to scrutinize the entire administrative record of every entry in order to divine potential objections and supporting arguments which an importer meant to advance.' " Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, 11 (June 4, 2001)(quoting *Washington*, 16 CIT 601, 604).

The Court concludes that Customs' argument is not persuasive. In *Washington*, the principal case upon which Customs relies, the court held that an importer's protest of a Customs' classification ruling was not valid because it did not counter with its own asserted classification. In that context, the Court found that the protests deficiencies required Customs to analyze the entire administrative record to determine every possible classification the importer could assert, and argue against each possibility.

The critical distinction between this case and *Washington* is that SCUSA is not challenging a classification. There is no alternative classification for SCUSA to propose. Ideally, in challenging a classification an importer would provide Customs with the alternative(s) so that Customs could analyze sample evidence to determine the classification for the entire shipment. In this case SCUSA has provided Customs with the regulation to apply: SCUSA protested the liquidation under 19 C.F.R. § 158.12, requesting an allowance for defective merchandise. Unlike the protest in *Washington*, Customs does not have to contemplate all of the statutory and regulatory provisions pertaining to liquidation to determine why SCUSA is protesting the liquidation. Customs' real concern with SCUSA's protests is that the protests will require Customs to evaluate the evidence of each repair to determine if the repaired defect existed at the time of importation, admittedly a time-consuming task. But the task remains the same even if SCUSA listed all of the various defects in its protest. Customs would still have to analyze the evidence of repairs for every automobile, since the defects claimed are not uniform throughout the entries. Customs simply cannot avoid sifting through the entire evidentiary record in this type of claim.

Although SCUSA's protests are distinct and specific in the spirit of *Davies*, SCUSA's protests must contain the statutory and regulatory required elements for a valid protest. Because SCUSA has set forth in its protest all of the required elements, SCUSA has filed valid protests and the appeal from them is properly before the Court.

(1) SCUSA's protests identified the decision protested

The regulations require the protestant to identify the decision "with respect to each category, payment, claim, decision, or refusal." 19 C.F.R. § 174.13(a). SCUSA identified each entry which it protested under § 158.12 and identified the decision as to which the protest was made, "the appraised value of automobiles contained in the entries set forth in Attachment A." Attachment A lists the entry

numbers for entries of both defective and non-defective vehicles. Customs contends that SCUSA was required to identify each defective vehicle, not simply identify entries that contained some defective vehicles. By including non-defective vehicles in the protests, Customs complains it is required to go through every entry and ascertain which vehicles were defective. The statute does not require that level of specificity in the protests, and as previously discussed, *supra* at 9–11, Customs cannot avoid sifting through each entry to evaluate the evidence of defects.

(2) SCUSA identified the category of merchandise

SCUSA identified the only category of the merchandise at issue, namely referring to "automobiles," and attaching the contested entries to the protest.

(3) SCUSA identified the nature of each objection

SCUSA set forth the nature of its objection and the reason therefor in the identical language of each of its protests:

> SCUSA ordered perfect merchandise from Saab Automobile AB. Despite this order, *some of the vehicles delivered contained latent manufacturing defects at the time of importation*. Section 158.12 of the Customs Regulations, 19 C.F.R. 158.12, provides that 'merchandise which is subject to ad valorum or compound duties and found by the port director to be partially damaged at the time of importation shall be appraised in its condition as imported, with an allowance made in the value to the extent of the damage.' *See Samsung Electronics America, Inc. vs. United States*, 106 F.3d 376 (CAFC 1997).
>
> Therefore, *pursuant to 19 C.F.R. § 158.12, an allowance in the value of the imported vehicles set forth in the protested entries should have been made to the* [sic] *reflect the extent of the defects*. We hereby request that the protested entries be reliquidated and that the vehicles set forth therein be appraised in the condition as imported. In addition, we request that Customs delay its consideration of this protest until the Court of International Trade ("CIT") has issued its decision on remand in the *Samsung* case. Based on instructions from the Court of Appeals, the anticipated CIT decision will clarify how the § 158.12 allowance will be implemented.

SCUSA Protest (emphasis added). The language of the protests and Attachment A's do not reference the specific vehicles that were defective or the types of latent defects, or tie the defects to specific vehicles. However, these are not fatal flaws in the protests. In *Mattel v. United States*, the court stated that the "one cardinal rule in construing a protest is that it must show fairly that the objection afterwards made at the trial was in the mind of the party at the time the

protest was made and was brought to the knowledge of the collector *to the end that he might ascertain the precise facts* and have an opportunity to correct the mistake and cure the defect if it was one that could be obviated." 72 Cust. Ct. 257, 260, 377 F. Supp. 955, 959 (1974)(citing *Bliven v. United States*, 1 Ct. Cust. 205, 207 (Ct. Cust. App. 1911)). Customs contends the absence of precise facts makes the protests invalid. As they stand, the protests clearly notified Customs of the reason for the protests, latent defects in the automobiles. The protests should have then prompted Customs to seek the precise factual evidence necessary to evaluate the protests. SCUSA's protests clearly contest the appraised values of the entries because many of the vehicles allegedly contained latent defects, and clearly request an allowance commensurate with those defects under § 158.12.

There is one problem with SCUSA's protests that limits the Court's jurisdiction. It is clear that SCUSA had in mind at the time of protest defective automobiles that had already been repaired; however, SCUSA could not have had in mind defects to automobiles that had not been repaired before the protests were filed. Therefore, the Court does not have jurisdiction over the automobiles that were repaired after the date SCUSA filed its protests with Customs.[3] *See Mattel*, 72 Cust. Ct. at 260, 377 F. Supp. at 959 ("a protest * * * must show fairly that the objection afterwards made at the trial was in the mind of the party at the time the protest was made"). As a result, the Court does not have jurisdiction over vehicles repaired after June 30, 1998, that were in the entries covered by protest 0502–98–100033. The Court does not have jurisdiction over vehicles repaired after September 14, 1998, that were in the entries covered by protest 0502–98–100041. The Court does not have jurisdiction over vehicles repaired after January 12, 1999, that were in the entries covered by protest 0502–99–100003. Finally, the Court does not have jurisdiction over vehicles repaired after March 26, 1999, that were in the entries covered by protest 0502–99–100008.

Customs and SCUSA agree that twenty-one entries which SCUSA challenged in the initial complaint were not protested in a timely manner. Therefore, the Court dismisses for lack of jurisdiction entries 112–9805210–8, 112–9814363–4, 112–9818038–8, 112–9822519–1, 112–9826593–2, 112–9896032–6, 112–9903676–1, 112–9850980–0, 112–9873165–1, 112–9876403–3, 112–9885094–9, 112–9906444–1, 112–9915803–7, 112–9888725–5, 112–9891683–1, 112–9910140–9, 112–9970288–3, 112–9801057–7, 112–9964040–6, 112–

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[3] SCUSA styled its request for re-liquidation as § 1514 protests, most of which were filed within 90 days of liquidation, and therefore were protested timely. Section 158.12, which provides for a refund of duties if the goods were defective at the time of importation, has no time limit to request the refund. Because SCUSA filed its request as a protest, the Court does not opine at this time on whether SCUSA could have filed a request for reconsideration under § 1520 or directly under § 158.12, and then protest a denial of that request. *See, e.g.*, HRL 547062, May 7, 1999 (In a section § 158.12 claim, Protestant first filed a claim under § 520(c) of the Tariff Act to seek a reduction in the appraised value because the goods were defective when imported. Protestant later filed a protest when the § 520(c) claim was rejected.).

9964123–0, and 112–9940682–4. The Court retains jurisdiction over vehicles repaired prior to their respective protest dates in the remaining 24 entries: 112–9978449–3, 112–9011040–0, 112–9995282–7, 112–9978449–3, 112–9022943–2, 112–9026932–1, 112–9974345–7, 112–9929365–1, 112–9930525–7, 112–9933194–3, 112–9958484–4, 112–9968124–4, 112–9983272–2, 112–9986698–5, 112–9006647–9, 112–9016015–7, 112–9018813–3, 112–9030595–0, 112–9943632–6, 112–9947519–1, 112–9950291–1, 112–9016015–7, 112–9018813–3, and 112–9936275–3 (collectively, the "subject entries").

B. The Evidence Submitted by SCUSA

19 C.F.R. § 158.12 allows an importer to claim an allowance in value for merchandise partially damaged at the time of importation.[4] "A protestant qualifies for an allowance in dutiable value where (1) imported goods are determined to be partially damaged at the time of importation, and (2) the allowance sought is commensurate to the diminuation in the value of the merchandise caused by the defect." *Samsung III*, 23 CIT at 6, 35 F. Supp. 2d at 946. Customs opposes SCUSA's claims under § 158.12 because (A) § 158.12 does not cover damaged goods when the damage was not discovered at importation; and (B) SCUSA has not provided adequate evidence to overcome the presumption of correctness afforded Customs' denial of SCUSA's protests.

(1) Section 158.12 Covers Damage Undiscovered at Time of Importation

Customs' first challenge to the substance of SCUSA's claim under § 158.12 is that this section does not apply to latent damage which was undiscovered at the time of importation. SCUSA, however, argues that the section applies to defects existing at the time of importation, even if those defects remain undiscovered until some time after entry.

The United States Code is silent on the interpretation of 19 C.F.R. § 158.12. In the face of Congress's silence, the Court will defer to Customs' interpretation of its own regulations. *See Torrington Co. v. United States*, 82 F.3d 1039, 1050 (Fed. Cir. 1996). The Court will give no deference to an interpretation advanced solely for litigation purposes. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988) ("[W]e have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, * * * "); *see also Chrysler Corp. v.*

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[4] The relevant part of § 158.12 reads:

(a) *Allowance in value.* Merchandise which is subject to *ad valorem* or compound duties and found by the port director to be partially damaged at the time of importation shall be appraised in its condition as imported, with an allowance made in the value to the extent of the damage. However, no allowance shall be made when forbidden by law or regulation * * * *

19 C.F.R. § 158.12 (2002).

United States, 24 CIT 75, 80 at n. 4; 87 F. Supp. 2d 1339, 1344 (2000) (the court refused to defer to Customs' interpretation of its regulation advanced solely for litigation purposes); *RHP Bearings Ltd. v. United States*, 23 CIT 967, 982 n. 10, 83 F. Supp. 2d 1322, 1336 (1999) (U.S. Department of Commerce's *post hoc* rationale for its determination, as set forth during litigation, is given no deference).

Customs cites no prior headquarters rulings or administrative actions that interpret the regulation to apply only to defects discovered at the time of importation. A review of prior Customs rulings on this point reveals quite the opposite. *See, e.g.*, Headquarters Ruling Letter ("HRL") 547060 (March 8, 2000) ("value adjustments can only be made where there is clear and convincing evidence to establish that the merchandise was defective *at the time of importation*") (emphasis added), HRL 546761 (Sept. 23, 1999) ("clear and convincing evidence to establish that the merchandise was *defective at the time of importation*") (emphasis added), HRL 227971 (June 29, 1999) (noted that the *Samsung Electronics America, Inc. v. United States*, 19 CIT 1307, 904 F. Supp. 1403 (1995) ("*Samsung I*"), Court found that "remoteness of time of discovery of defects goes to the weight of evidence," when defects were not discovered until customers made returns "quite some time" after importation), HRL 547042 (June 17, 1999) (defects discovered "after importation"), HRL 547062 (May 7, 1999) (protest under 19 C.F.R. § 158.12 granted when protest was filed more than one year after entry), HRL 543061 (May 24, 1983) ("defects discovered within the statutory protest period" is one factor to determining if an allowance should be given). Customs consistently emphasized that its concern was whether the defects existed at the time of importation, and not whether, at importation, the port director discovered the defects. It is quite clear that this anemic argument by Customs has been advanced purely for litigation, and as such, the Court will give no deference to Customs' purported interpretation of 19 C.F.R. § 158.12. Therefore, the Court turns to the language of the regulation to determine its meaning.

Section 158.12 reads, in part, "[m]erchandise * * * found by the port director to be partially damaged at the time of importation shall be appraised in its condition as imported * * * * " 19 C.F.R. § 158.12. Customs emphasizes "found by the port director * * * at the time of importation," interpreting the regulatory language to mean that the port director had to find the damage at the time of importation in order for § 158.12 to apply to the subject entries. SCUSA emphasizes "partially damaged at the time of importation" to conclude that the regulatory language only requires that the damage claimed under § 158.12 existed at the time of importation. Under SCUSA's interpretation the port director did not need to find the damage at the time of importation.

The Court adopts SCUSA's interpretation of the language of § 158.12. If the intended result was to limit § 158.12 claims to dam-

ages discovered at the time of importation, the regulation could have easily been written to read "found by the port director *at the time of importation* to be partially damaged." That version of the regulation may have limited claims under § 158.12 to goods with damage ascertainable to the port director at the time of importation.[5] However, as the regulation now stands, the language limits claims under § 158.12 to goods partially damaged when imported, whenever that damage is discovered. The regulatory language further supports the Court's interpretation because § 158.12 contains no time limit on claims under the section. Further, the Statement of Administrative Action ("SAA") provides interpretative guidance, stating that "[w]here it is discovered subsequent to importation that the merchandise being appraised is defective, allowances will be made." SAA, H.R. Doc. No. 153, Pt. II, 96th Cong., 1st Sess. (1979). The language of the SAA points to discovery of the defect sometime after the merchandise is imported, arguably contradicting Customs' new assertion that the discovery must be made at the time of importation. At minimum, the SAA certainly does not support a requirement that the port director discover the defect at importation.

It is also notable that the regulation's history in this Court, offered by Customs, does not contradict the Court's interpretation of § 158.12. As Customs correctly points out, the series of *Samsung* cases does not directly address whether § 158.12 covers damage which was not discovered by the port director at the time of importation. *See Samsung I*; *Samsung Electronics America, Inc. v. United States*, 106 F.3d 376 (Fed. Cir. 1997) ("*Samsung II*"); *Samsung III*; *Samsung Electronics America, Inc. v. United States*, 195 F.3d 1367 (Fed. Cir. 1999) ("*Samsung IV*").

Customs final argument against SCUSA's interpretation of § 158.12 is that Congress intended to cover instances of partially defective goods, in which the defect was not discovered until later, in 19 U.S.C. § 1313(c). Section 1313(c) gives refunds of duties as drawback for latent manufacturing defects when the goods are destroyed or re-exported. Customs is mistaken that § 1313(c) was meant to cover the situation in the current case. Section 1313(c) does not apply when duty refunds are claimed for defective goods and the goods are not destroyed or re-exported. The plain language of § 1313(c) does not include under its purview all instances of defects discovered after importation, and thus does not preclude § 158.12 from applying in the present case. Therefore, § 158.12 applies to defects existing at the time of importation, whether or not the defects were discovered by the port director at the time of importation.

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[5] Even Customs admits that in practice it has not read the regulation so strictly as to require the port director to have found the damage at the time of importation. In a footnote, Customs acknowledges it has been lenient in allowing importers to claim allowances under § 158.12 when the port director could have found the defects at the time of importation, such as defects discovered shortly after importation. *See Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment*, p. 19 n. 12.

(2) SCUSA has shown that material issues of fact exist in its claim for an allowance under 19 C.F.R. § 158.12

Customs requires the protestant to establish the elements of 19 C.F.R. § 158.12 by a preponderance of the evidence. *Fabil Mfg. Co. v. United States*, 237 F.3d 1335, 1340–41 (Fed. Cir. 2001). In *Samsung III*, the court set forth three requirements for an importer to successfully claim an allowance under 19 C.F.R. § 158.12. First, the importer must show that it contracted for "defect-free" merchandise. *Samsung III*, 23 CIT at 4–5, 35 F. Supp. 2d at 945. Second, the importer must be able to link the defective merchandise to specific entries. *Samsung III*, 23 CIT at 6, 35 F. Supp. 2d at 945–46 (citing *Samsung II*, 106 F.3d at 379, n.4). Third, the importer must prove the amount of the allowance value for each entry. *Id*.

Regarding the first requirement, SCUSA has easily shown that it contracted for "defect-free" merchandise. Saab Auto, the manufacturer, provided service agreements for defects in the merchandise. *See Samsung II*, 106 F.3d at 379 (agreements between manufacturer and importer that some merchandise will be defective merely acknowledges the commercial reality that some goods will be defective, and does not mean that the importer contracted for defective merchandise). SCUSA also warranted to its customers that the goods were free of defects. *See id*. (evidence that importer warranted to its customers that the goods were defectfree demonstrated that importer ordered defect-free merchandise). And finally, SCUSA and Saab Auto have a close corporate relationship, implying that Saab Auto would not sell SCUSA defective merchandise. *See id*. at 379 (the close corporate relationship between manufacturer and importer implies that the importer would not provide defective equipment to its consumers).

SCUSA has shown there are material issues of fact regarding the second factor. *Samsung III* required the importer to establish by a preponderance of the evidence which entries had defects at the time of importation. 23 CIT at 7–9, 35 F. Supp. 2d at 946–47. The importer in *Samsung III* did not provide sufficient evidence, offering only the consumer warranties and internal documents showing that claims for defects not existing at the time of importation were rejected. 23 CIT at 7–8, 35 F. Supp. 2d at 947–48. SCUSA provides the evidence the Court in *Samsung III* sought: descriptions of repairs to each vehicle, and connects each vehicle repaired to a specific entry through the VINs. *See Samsung III*, 23 CIT at 8, 35 F. Supp. 2d at 947 ("a claimant should provide specific descriptions of the damage or defect alleged and, in some manner, relate that defective merchandise to a particular entry"). What remains for trial is to develop the factual record to "independently confirm the validity" of the repair records in order to establish that the defects did indeed exist at the time of importation. *Id*. SCUSA will have the opportunity at trial to provide expert testimony that the described defects existed at the

time of importation, or show through the defect descriptions that "the damage is recognizable as a true manufacturing defect." *Id.*, *see E.I. Dupont de Nemours and Co. v. United States*, 24 CIT 1301, 1302–04, 123 F. Supp. 2d 637, 639–41 (2000) (pursuant to 28 U.S.C. § 1581(a), the importer is permitted to present new evidence to develop the Court's record).

The third and final requirement for a successful claim under 19 C.F.R. § 158.12 is a showing by a preponderance of the evidence of the amount of the allowances for each entry of the defective vehicles. *Samsung III*, 23 CIT 9–11, 35 F. Supp. 2d at 948–50. SCUSA has detailed repair records that indicate the costs for each repair. Through the VINs, SCUSA can tie the repair costs to each entry. Trial is necessary to independently verify the amount of the allowances. Therefore, SCUSA has created a material issue of fact regarding the amount of the allowances, which will be resolved at trial.

IV. CONCLUSION

The Court does not have jurisdiction over several entries because the protests were untimely filed. Additionally, the Court lacks jurisdiction over claims for vehicle repairs that occurred after the vehicles' respective protest dates. However, the Court denies SCUSA's motion for summary judgment and denies Customs' cross-motion for summary judgment. Factual questions remain regarding whether the defects existed at the time of importation, and the amount of allowances tied to those defects. *See Samsung II* at 380, n.4 ("Samsung thus bears the burden of proving, for instance, that the costs to repair defects under consumer warranties were incurred to repair defects in existence at importation, and not, for instance, those caused by its own mishandling or by consumer misuse of the equipment."). The factual record to be developed at trial will include any new, relevant evidence produced by SCUSA to meet the burden of proof on its 19 C.F.R. § 158.12 claim.

Slip Op. 03–84

YANCHENG BAOLONG BIOCHEMICAL PRODUCTS COMPANY, LTD., PLAINTIFF, *v.* UNITED STATES OF AMERICA, DEFENDANT, AND CRAWFISH PROCESSORS ALLIANCE, *ET AL.*, DEFENDANT-INTERVENORS

Court No. 01–00338

[Pursuant to United States Court of International Trade Rule 7(e) and Rule 63, this Court issued an Order to Show Cause providing Defendant with an opportunity to present evidence why it should not be held in contempt. After consideration of the evidence presented at the hearing held on June 4, 2003, Defendant's Response to the

Court's Order to Show Cause of May 21, 2003, Defendant's Response to the Court's Inquiries of June 4, 2003, Plaintiff's Memorandum on Damages to be Awarded Based on a Finding of Contempt for Violation of the Injunction Against Liquidation of Subject Entries, Defendant's Response to Plaintiff's Memorandum on Damages, and Plaintiff's Comments on Defendant's Response to the Court's Inquiries, this Court holds that Defendant's actions which resulted in the liquidation of twenty-eight entries on January 3, 10, and 17, 2003, were contumacious of this Court's order enjoining the liquidation of certain entries. Plaintiff's Motion to Clarify Or, Alternatively, Extend Injunction Against Liquidation of Entries is denied as unnecessary.]

(Dated: July 16, 2003)

deKieffer & Horgan (J. Kevin Horgan), Washington, D.C., for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *A. David Lafer*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Paul D. Kovac*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Arthur D. Sidney*, Attorney, United States Department of Commerce, of Counsel, for Defendant.

Adduci, Mastriani & Schaumberg, L.L.P. (*Will E. Leonard, Mark R. Leventhal, John C. Steinberger*), Washington, D.C., for Defendant-Intervenors.

OPINION

CARMAN, *Chief Judge:* Before this Court are the Court's Order to Show Cause issued on May 21, 2003, and Plaintiff's, Yancheng Baolong Biochemical Products Company, Ltd. ("Yancheng"), Motion to Clarify Or, Alternatively, Extend Injunction Against Liquidation of Entries filed on November 6, 2003. After certain facts had been revealed in the course of telephone conferences with the parties, the Court issued an Order to Show Cause providing an opportunity for the United States ("Government"), to present evidence why it should not be held in contempt of this Court's injunctive order of August 2001. Like other courts created under Article III of the Constitution, this Court "has the inherent power to determine the effect of its judgments and issue injunctions to protect against attempts to attack or evade those judgments." *United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1054 (Fed. Cir. 1996). For the reasons set forth below, the Court holds that Defendant was in contempt of this Court's order of August 2001 when certain entries were liquidated in January 2003.

BACKGROUND

At the June 4, 2003 Show Cause Hearing, counsel for Defendant and counsel for Plaintiff agreed to the following facts. (Hr'g Tr. at 4–5.) In August 2001, on a consent motion, this issued a preliminary injunction ("August 2001 Preliminary Injunction"), enjoining the liquidation of any and all unliquidated entries of crawfish tail meat from the People's Republic of China exported by Plaintiff that were covered by *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, and Final Partial Rescission*

of Antidumping Duty Administrative Review, 66 Fed. Reg. 20,634 (Apr. 24, 2001) (Agreed Statement of Facts at ¶1.) The injunction was issued pursuant to 19 U.S.C. § 1516a(c)(2), which authorizes the United States Court of International Trade ("CIT") to "enjoin the liquidation of some or all entries of merchandise covered by a determination * * * upon a request by an interested party for such relief." 19 U.S.C. § 1516a(c)(2) (2000). The August 2001 Preliminary Injunction specifically stated that Defendant shall be enjoined from liquidating the subject entries "during the pendency of this action," and "that the entries subject to this injunction shall be liquidated in accordance with the final court decision as provided in 19 U.S.C. § 1516a(e).[1]" (Aug. 2001 Prelim. Inj. at 1–2.) The injunction covered thirty-one entries: twenty-eight at the Port of Los Angeles, California; three at the Port of Norfolk, Virginia. (Hr'g Tr. at 67; *see also* Def.'s Conf. Submission of 04/10/03.)

On August 15, 2002, after consideration of Plaintiff's motion for judgment upon the agency record, the Court entered judgment in favor of Defendant sustaining the Department of Commerce's ("Commerce") determination. (Agreed Statement of Facts at ¶2); *see also Yancheng Baolong Prods. Co., Ltd. v. United States*, 219 F. Supp. 2d 1317 (Ct. Int'l Trade 2002), *appeal docketed*, No. 03–1059 (Fed. Cir. Nov. 5, 2002). Plaintiff filed a Notice of Appeal to the United States Court of Appeals for the Federal Circuit ("Federal Circuit") on October 4, 2002. (*Id.* at ¶3.)

On November 1, 2002, Commerce sent instructions to the United States Customs Service, now organized as the Bureau of Customs and Border Protection ("Customs"), directing Customs to liquidate the subject entries. (Hr'g Tr. at 19.) On November 6, 2002, Plaintiff filed a Motion to Clarify Or, Alternatively, Extend Injunction Against Liquidation of Entries ("Plaintiff's Motion to Clarify") in this Court. (Agreed Statement of Facts at ¶4.) In that motion, Plaintiff asserted that Plaintiff's counsel had been informed by Defendant's counsel that unless Plaintiff obtained an injunction pending appeal, the subject entries would be liquidated. (Pl.'s Mot. to Clarify at 3.) As stated in the Motion to Clarify, Plaintiff's position was "that the injunction already issued by the Court in this action remains in effect without any further intervention by the Court." (*Id.* at 4.) Plaintiff stated that Defendant's counsel would consent to a new injunction pending appeal. (*Id.* at 3.) However, according to Plaintiff, the Crawfish Pro-

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[1] The full text of 19 U.S.C. § 1516a(e) is as follows:

(e) Liquidation in accordance with final decision

If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit—

(1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and

(2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section,

shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

cessor Alliance, the Louisiana Department of Agriculture and Forestry, and Bob Odom, Commissioner, (collectively "Defendant-Intervenors") would not consent to an injunction pending appeal because of the possible effect it could have on Defendant-Intervenors' ability to collect under the statute allowing domestic industries to receive distributions of antidumping duties.[2] (*Id*.) Neither Defendant-Intervenors nor Defendant responded to Plaintiff's Motion to Clarify.

On November 8, 2002, Customs sent liquidation instructions to its field offices directing the liquidation of all shipments of the subject merchandise exported by Yancheng and entered, or withdrawn from warehouse, for consumption during the period of review at an antidumping duty rate of 201.63% of the entered value. (*Id*. at ¶5.) On January 3, 2003, fourteen of the subject entries at the Port of Los Angeles were liquidated. (*Id*. at ¶7.) On January 10, 2003, one entry at the Port of Los Angeles was liquidated. (*Id*. at ¶8.)

The time for Defendant and Defendant-Intervenors to respond to Plaintiff's Motion to Clarify expired on December 15, 2002, and the Court scheduled a telephone conference with the parties on January 15, 2003, to discuss Plaintiff's pending motion. (*Id*. at ¶9.) At that conference, the Court indicated that the Court considered clarification unnecessary because the original preliminary injunction was still in effect. (*Id*.) On January 17, 2003, thirteen more entries at the Port of Los Angeles were liquidated. (*Id*. at ¶10.) On the same date, January 17, 2003, Customs issued new instructions to its field offices to stop the liquidation of the entries. (*Id*. at ¶11.)

Over the next several months, the parties continued settlement negotiations attempting to resolve this matter and submitted status reports to the Court regarding the parties' continued effort to discover the relevant facts. (*Id*. at ¶¶12–19.) On April 10, 2003, the Government submitted a chart to the Court that listed which entries covered by the August 2001 Preliminary Injunction had been liquidated. (*Id*. at ¶ 16.) On May 5, 2003, counsel for Defendant submitted a list of the names and last known addresses of the importers and sureties involved. (*Id*. at ¶ 20.) At the request of the Court, the Government sent a letter to the importers and sureties involved notifying them that "[n]otwithstanding the Court's injunctive order issued on August 2, 2001, the government issued liquidation instructions to [Customs]." (*Id*. at ¶ 21; Letter from A. David Lafer, Senior Trial Counsel, Commercial Litigation Branch, United States Department of Justice, to Importer/Surety of 05/06/03.) Of the thirty-one entries covered by the August 2001 Preliminary Injunction, twenty-eight entries at the Port of Los Angeles were liquidated; the three entries at the Port of Norfolk remained unliquidated as of June 4, 2003. (Hr'g Tr. at 32, 67.)

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[2] The Byrd Amendment, 19 U.S.C. § 1675c.

On May 21, 2003, this Court issued an Order to Show Cause affording the Government an opportunity to present evidence why it should not be held in contempt of this Court's August 2001 Preliminary Injunction for issuing instructions to liquidate and for its actions on January 3, January 10, and January 17, 2003, wherein twenty-eight out of the thirty-one subject entries were liquidated.

PARTIES' CONTENTIONS

I. DEFENDANT'S CONTENTIONS

It is the Government's position that the August 2001 Preliminary Injunction dissolved when this Court entered judgment in favor of Defendant on August 15, 2002. (Def.'s Resp. to the Ct.'s Order to Show Cause of May 21, 2003 ("Def.'s Br.") at 2, 5.) The Government contends that because liquidation was not enjoined pending appeal, Commerce was acting within its powers to instruct Customs to liquidate the subject entries on November 1, 2002, and for the liquidations to take place in January 2003. (*Id.* at 8.)

As the basis for its argument, the Government relies on *Fundicao Tupy S.A. v. United States*, 841 F.2d 1101, 1103 (Fed. Cir. 1988).[3] In its argument, the Government focuses on the Federal Circuit's description of preliminary injunctions in *Fundicao Tupy.* (Def.'s Br. at 8–9.) Defendant cites the Federal Circuit's use of quoted language from MOORE'S FEDERAL PRACTICE: "[a preliminary injunction] is *ipso facto* dissolved by a dismissal of the complaint or the entry of a final decree in the cause." (Def.'s Br. at 8–9 (quoting *Fundicao Tupy*, 841 F.2d at 1103).)

The Government contends that *Fundicao Tupy* articulates a general rule that preliminary injunctions dissolve when the CIT enters judgment on the merits. (*Id.* at 9.) The Government contends that *Fundicao Tupy* is "a precedential decision" regarding preliminary injunctions and that "only the [Federal Circuit] sitting en banc is empowered to overturn" that decision. (*Id.* at 16–17 (citing *Newell Cos., Inc. v. Kenny Mfg. Co.*, 864 F.2d 757, 765 (1988)).) Therefore, the Government contends that any opinion of the Federal Circuit issued after the 1988 decision in *Fundicao Tupy* should be construed in a manner that is consistent with the holding in *Fundicao Tupy.* (*Id.* at 13.)

First, the Government outlines its interpretation of the holding in *Timken Co. v. United States*, 893 F.2d 337, 341 (Fed. Cir. 1990).[4] Ac-

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[3] In *Fundicao Tupy*, the CIT denied the plaintiff's motion for a preliminary injunction suspending liquidation. *Fundicao Tupy*, 841 F.2d at 1102. Noting conflicting decisions within the Court regarding preliminary injunctions, the CIT enjoined liquidation pending an interlocutory appeal to the Federal Circuit of the CIT's decision to deny the plaintiff's motion for a preliminary injunction. *Id.* at 1103. However, before the Federal Circuit could hear oral arguments on appeal, the CIT dismissed the plaintiff's case on the merits. *Id.* The Federal Circuit dismissed the plaintiff's interlocutory appeal of the CIT's decision not to grant the preliminary injunction as moot. *Id.* at 1104.

[4] In *Timken*, the CIT denied a preliminary injunction and remanded the case to Commerce to redetermine the dumping margin. *Timken*, 893 F.2d at 338. After remand, the CIT affirmed Commerce's redetermination and en-

cording to Defendant, the *Timken* court held that if the CIT renders an opinion that is "not in harmony" with the agency's original determination, "it is necessary to suspend liquidation until there is a conclusive decision in the action." (Def.'s Br. at 11 (citing *Timken*, 893 F.2d at 341).) The Government asserts that this type of automatic injunction following a CIT decision that is "not in harmony" with the agency's original determination is referred to as a "Timken-injunction." (*Id.*) Defendant contends that a "Timkeninjunction" continues to suspend liquidation throughout the appeals process. (*Id.*) However, Defendant asserts that if the CIT issues a decision that is "in harmony" with the agency's original determination, there is no automatic "Timken-injunction." (*Id.*) Therefore, any preliminary injunction issued by the CIT dissolves when the CIT enters judgment on the merits and liquidation is not suspended during the appeals process absent a new injunction pending appeal. (*Id.*)

Next, the Government attempts to distinguish the Federal Circuit's holding in *Hosiden Corp. v. United States*, 85 F.3d 589 (Fed. Cir. 1996)[5] from the case at bar. (*Id.* at 14–15.) The Government contends that *Hosiden* is distinguishable because the CIT's decision in *Hosiden* was "not in harmony" with the agency's original determination. (*Id.* at 15.) The Government contends that "suspension of liquidation [in *Hosiden*] pending the issuance of a final and conclusive decision [on appeal] was required following the holding in *Timken* (irrespective of whether a preliminary injunction was in effect)." (*Id.*) The Government argues that any other construction of *Hosiden* would be impermissible and "flatly inconsistent with the holding of [*Fundicao Tupy*]." (*Id.* at 14.)

Similarly, Defendant contends that the Federal Circuit's 2002 decision in *Fujitsu General American, Inc. v. United States*, 283 F.3d

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tered judgment for the Government. *Id.* Before any appeal had been filed, the plaintiff sought a writ of mandamus to compel Commerce to publish notice of the CIT's decision under § 1516a(e), which states that "notice of the court decision shall be published within ten days from the date of the issuance of the court decision." *Id.* The CIT granted the plaintiff's writ of mandamus ordering Commerce to publish notice of the CIT decision. *Id.* at 339. The Government appealed the CIT's order granting the writ. *Id.* at 338. The Government argued that a decision of the CIT was not a final decision under § 1516a(e) for the purposes of publication "until an appeal was decided by the Federal Circuit or the time for appeal had expired." *Id.* at 339. In analyzing the text of § 1516a(e), the Federal Circuit distinguished between liquidation which required a "final decision in the action" and publication which only required a "court decision." *Id.* at 340. The Federal Circuit held that even though a CIT decision was not 'final' for the purposes of § 1516a(e) when appeal had been taken to the Federal Circuit, Commerce was required to publish notice of a CIT decision within 10 days of issuance because § 1516a(e) did not use the word 'final' in mandating that "notice of the *court decision* shall be published within 10 days." *Id.* (emphasis added).

[5] In *Hosiden*, a preliminary injunction had been issued by the CIT in the underlying case. *Hosiden*, 85 F.3d at 590–591. The CIT affirmed the International Trade Commission's amended determination on remand. *Hosiden Corp. v. United States*, 852 F. Supp. 1050, 1061 (Ct. Int'l Trade 1994). In its decision, the CIT ordered Commerce to revoke an antidumping duty order against the plaintiffs, refund cash deposits, and terminate the administrative reviews within ten days. *Id.* The Government then published a "Notice of court decision" stating that the antidumping order would be revoked "if the case is not appealed, or is affirmed on appeal." *Hosiden*, 85 F.3d at 590 (quoting *Electroluminescent High Information Content Flat Panel Displays and Display Glass Therefor From Japan; Court Decision and Suspension of Liquidation*, 59 Fed. Reg. 23,690 (May 6, 1994)). Before an appeal on the merits could be heard, the plaintiff obtained a writ of mandamus from the CIT requiring Commerce to immediately revoke the antidumping duty order and end the suspension of liquidation. *Id.* Appealing the writ, the Government argued that "by statute such action shall not be taken until the issuance of a 'final decision,' defined as the decision upon appeal to the [Federal Circuit] when such appeal is taken." *Id.* The Federal Circuit vacated the writ of mandamus and held that "[i]n accordance with 19 U.S.C. § 1516a(e), entries of merchandise for which liquidation has been suspended by court order remain subject to suspension of liquidation until there is a 'final court decision in the action.'" *Id.* (citing 19 U.S.C. § 1516a(e)).

1364 (Fed. Cir. 2002)[6] is also distinguishable from the case at bar. (*Id.* at 13, 15–17.) The Government argues that "the statements made by the *Fujitsu* Court about the preliminary injunction were not a necessary part of that Court's holding; thus, they are dicta." (*Id.* at 16.) Defendant asserts that the suspension of liquidation in *Fujitsu* was required under *Timken*, regardless of the issuance of a preliminary injunction in that case, because the trial court had issued a decision "not in harmony" with the agency's original determination. (*Id.*) The Government contends that "even if the *Fujitsu* Court intended to hold that the trial court's preliminary injunction survived during the appellate process, such a holding conflicts with the appellate court's earlier decision in [*Fundicao Tupy*]." (*Id.*) Thus, the Government contends that such a holding should not be followed. (*Id.* at 16–17.)

The Government concludes that because the CIT's decision in this case is "in harmony" with the agency's original determination, there is no "Timken-injunction" and the general rule as expressed in *Fundicao Tupy* applies: the preliminary injunction expired when the CIT entered a decision on the merits. (*Id.* at 11, 17.) Therefore, Defendant contends that the August 2001 Preliminary Injunction dissolved on August 15, 2002, when this Court issued its decision on the merits, and, as a result, the Government should not be held in contempt of the Court's injunction for issuing instruction to liquidate in November 2002 and for liquidating the entries in January 2003. (*Id.* at 17.) Further, Defendant argues that the August 2001 Preliminary Injunction was open to different interpretations because it merely stated that the Government was enjoined from liquidating the entries "during the pendency of the action." (*Id.* (citing Aug. 2001 Prelim. Inj. at 1).) Defendant contends that "the law is not exactly clear concerning how long an action is pending." (*Id.*)

Alternatively, the Government contends that even if the Court is unpersuaded by the arguments regarding the force and effect of the preliminary injunction, the Government cannot be held in contempt because its construction of the case law was reasonable. (*Id.*) Defendant asserts that because its application of the Federal Circuit's pre-

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[6] In *Fujitsu*, the CIT issued a preliminary injunction suspending liquidation of the subject entries. *Fujitsu*, 283 F.3d at 1369. After granting Commerce's request for remand to recalculate the dumping margin at issue, the CIT affirmed Commerce's redetermination. *Id.* Thereafter, the plaintiff appealed to the Federal Circuit, and the Federal Circuit affirmed the CIT's decision. *Id.* The plaintiff's time to petition the Supreme Court for certiorari expired in October 1996. *Id.* Almost one year later, in September 1997, Commerce published notice of the Federal Circuit's decision. *Id.* The subject entries were liquidated in November and December 1997. *Id.* The plaintiff filed three protests which challenged the liquidation of the subject entries. *Id.* The CIT granted summary judgment in favor of the Government holding that the CIT lacked jurisdiction to review two of the protests and dismissing the third protest on the merits. *Id.* at 1370. The plaintiff's third protest claimed that the subject entries were already deemed liquidated under 19 U.S.C. § 1504(d) and therefore, the liquidation in 1997 was unlawful. *Id.* Under § 1504(d), Customs must liquidate entries within six months of receiving notice of removal of the suspension of liquidation or else the entries are deemed liquidated at the rate asserted at the time of entry. *Id.* at 1370. On appeal, the Federal Circuit affirmed the decision of the CIT holding that suspension of liquidation was not removed under § 1504(d) until there had been a "final court decision within the plain meaning of § 1516a(e)" and that "there is not a 'final court decision' in an action that originates in the [CIT] and in which there is an appeal to the Federal Circuit until, following the decision of the Federal Circuit, the time for petitioning the Supreme Court for certiorari expires without the filing of a petition." *Id.* at 1379.

cedent was reasonable, it cannot be held in contempt because the Government's actions were not a "willful obstruction of justice." (*Id.*)

At the Show Cause Hearing, the Government presented the testimony of Ms. Barbara Tillman, United States Department of Commerce, Director of the Office of Antidumping, Countervailing Duty Enforcement 7. (Hr'g Tr. at 10–11.) At the hearing, the Government also asserted that it was "standard practice" to request an injunction pending appeal in cases where the CIT issues a decision "in harmony" with the agency's determination. (Hr'g Tr. at 47.) The Court asked Defendant to submit specific cases in which this took place. (*Id.*) Defendant provided the Court with a list of sixteen cases in which the CIT or the Federal Circuit issued an injunction after the CIT rendered a decision on the merits, even though a preliminary injunction had already been issued.[7] (Def.'s Resp. to the Ct.'s Inquiries of June 4, 2003 ("Def.'s Resp. Br.") at 2–3.) Although Defendant listed the various cases and attached copies of the orders entered, Defendant did not make any further contentions regarding those cases or their impact on the present matter. (*See id.* at 2–3.)

Additionally, the Government contends that contempt is not proper in this instance because Plaintiff was not harmed by the liquidation of the subject entries. (Def.'s Br. at 18.) Defendant asserts that Plaintiff has the right to protest the liquidations under 19 U.S.C. § 1514 and that after a protest has been filed, the entries are "deemed suspended" until the litigation is resolved. (*Id.* at 18–19.) The Government asserts that such a protest is the "sole remedy" made available to Plaintiff and that "there is no cognizable harm since [P]laintiff may protest the liquidation and potentially recover the amount it claims." (*Id.*)

II. PLAINTIFF'S CONTENTIONS

In Plaintiff's Motion to Clarify, Plaintiff takes the position that the Court's August 2001 Preliminary Injunction remains in effect throughout the appeals process. (Pl.'s Mot. to Clarify at 3–4.) Plaintiff quotes *Fujitsu* in support of its contention that "well-established precedent" indicates that no intervention is required by the Court in order to suspend the liquidation of entries on appeal if a preliminary injunction has been entered. (*Id.* at 4.) Plaintiff contends that requiring the plaintiff to seek an additional injunction after the CIT has issued a decision on the merits would burden the courts and the plaintiffs. (*Id.*) Plaintiff asserts that relitigating the merits of every preliminary injunction would only force courts and litigants to "bear the inconvenience and expense of repeatedly returning to the issue" of whether liquidation should be suspended during the action. (*Id.*)

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[7] Although the Government's submission lists seventeen cases, 2 and 3 are repetitious. (*See* Def.'s Resp. Br. at 2.)

In Plaintiff's Comments on Defendant's Response to the Court's Inquiries of June 4, 2003 ("Plaintiff's Rebuttal"), Plaintiff contends that the Government failed to carry its burden at the Show Cause Hearing. (Pl.'s Rebuttal at 3.) Plaintiff questions whether or not Ms. Tillman was the appropriate witness for the Government to call because her testimony only revealed that she acted on the advice of Government counsel and did not base Commerce's instructions to liquidate upon any analysis of the legal precedent or upon any consideration of the possible implications of the August 2001 Preliminary Injunction. (*Id.* at 2–3.) Plaintiff also asserts that the cases that Defendant lists in its response "only serve to impeach the testimony of its own witness and undermine the credibility of [Defendant's] legal position." (*Id.* at 3.) Plaintiff notes that such a late submission of new evidence deprives the Court and Plaintiff "of any opportunity to explore the circumstances under which [the orders] were granted." (*Id.*)

In addressing the issue of damages, Plaintiff requests that the Court prohibit Defendant from assessing or collecting antidumping duties on the entries that were liquidated in violation of the Court's August 2001 Preliminary Injunction. (Pl.'s Mem. on Damages to be Awarded Based on a Finding of Contempt for Violation of the Inj. Against Liquidation of Subject Entries ("Pl.'s Mem. on Damages") at 3.) Plaintiff cites CIT Rule 63, which provides that if a party is found in contempt of an order of this Court, the Court shall enter an order that "fixes the fine, if any, imposed by the court, which fine shall include the damages found, and naming the person to whom such fine shall be payable." (*Id.* at 1–2 (citing USCIT R. 63).) Rule 63 also states that "a reasonable counsel fee, necessitated by the contempt proceeding, may be included as an item of damages." (*Id.* at 2.)

Plaintiff asserts that the liquidation in January 2003 has "rendered the litigation moot as to 90% of the subject entries." (*Id.* at 5.) Plaintiff contends that prohibiting Defendant from collecting duties for these entries would serve to deprive the Government of the benefits of its unlawful conduct. (*Id.* at 3–4.) Plaintiff also requests that the Court order Defendant to pay all attorney's fees and costs incurred in connection with this litigation, or at least all of the attorney's fees associated with counsel's efforts to enforce the Court's injunction and the costs of participating in the contempt proceedings. (*Id.* at 5–6.) In support of its request for attorney's fees, Plaintiff's counsel notes that Shapiro, d/b/a First Coast Meat and Seafood, although not a party to this action, is an importer of the subject entries protected by the August 2001 Preliminary Injunction and has paid the attorney's fees and costs associated with enforcing the Court's injunctive order. (*Id.* at 2.) Plaintiff's counsel contends that all of Shapiro's entries have been liquidated and that but for Defendant's unlawful liquidations, Shapiro would not have accumulated these fees. (*Id.* at 2, 5–6.)

Lastly, Plaintiff contends that Defendant's claim regarding protesting these liquidations under 19 U.S.C. § 1514 is without merit. (Hr'g Tr. at 57–58.) Plaintiff asserts that a protest is not the appropriate mechanism to enforce an injunctive order of this Court. (*Id.* at 59.) Plaintiff contends that protests are used to challenge certain actions of Customs, but in this instance, Customs was merely following Commerce's instructions to liquidate and the protest mechanism is not appropriate for challenging the instructions of Commerce. (*Id.* at 58.) Plaintiff notes that the Government's witness, Ms. Tillman, testified that she was unaware of any instance in which Customs was able to overrule a decision by Commerce. (*Id.*) Therefore, Plaintiff contends that a finding of contempt by this Court is the only appropriate remedy in this case. (*Id.*)

ANALYSIS

To establish liability for civil contempt, three elements must be proven by clear and convincing evidence: (1) a valid order of the court existed; (2) Defendant had knowledge of the order; and (3) Defendant disobeyed the order. *Ammex, Inc. v. United States*, 193 F. Supp. 2d 1325, 1327–1328 (Ct. Int'l Trade 2002) (citations omitted). A court should not hold a party in contempt if there is a "fair ground of doubt as to the wrongfulness of the [party's] actions." *Id.* at 1328 (alteration in original) (citing *Preemption Devices, Inc. v. Minn. Mining & Mfg. Co.*, 803 F.2d 1170, 1173 (Fed. Cir. 1986)).

___ "The absence of wilfulness does not relieve a party from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) (citing *United States v. United Mine Workers*, 330 U.S. 258, 303–304 (1947); *Penfield Co. of Cal. v. Sec. & Exch. Comm'n*, 330 U.S. 585, 590 (1947); *Maggio v. Zeitz*, 333 U.S. 56, 68 (1948)). The purpose of civil contempt is remedial; therefore, the intent of the defendant does not matter. *Id.* at 191 ("An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.").

1. A valid order of the Court existed.

The first issue for this Court to decide is whether this Court's August 2001 Preliminary Injunction was a valid court order still in effect at the time of Defendant's actions in November 2002 and January 2003. Under § 1516a(e), once enjoined, liquidation may occur only after a "final court decision in the action." 19 U.S.C. § 1516a(e). As discussed below, the Court holds that the decision of August 15, 2002, sustaining Commerce's determination, was not a "final court decision in the action" as required for liquidation under § 1516a(e). After consideration of the Federal Circuit's holdings in *Timken*, *Hosiden*, and *Fujitsu* and the language of § 1516a, the Court finds

that the August 2001 Preliminary Injunction was a valid court order suspending liquidation throughout the appeals process.

The August 2001 Preliminary Injunction was issued "pursuant to 19 U.S.C. § 1516(c)(2)." (Aug. 2001 Prelim. Inj. at 1.) The injunction states that the Government is enjoined from liquidating the subject entries "during the pendency of this action" and that "entries subject to this injunction shall be liquidated in accordance with the final court decision as provided in 19 U.S.C. § 1516a(e)." (*Id.* at 1–2.) The CIT does not grant preliminary injunctions suspending liquidation in antidumping and countervailing duty cases under the auspices of the Court's general equitable powers. Rather, the Court has been instructed by Congress that such injunctive relief may be granted in antidumping and countervailing duty cases upon a proper showing: "the [CIT] may enjoin the liquidation of some or all entries of merchandise covered by a determination * * * upon a request by an interested party for such relief and a proper showing that the relief requested should be granted under the circumstances." 19 U.S.C. § 1516a(c)(2). The Federal Circuit has instructed that this Court must weigh four factors to determine if a "proper showing" to grant such injunctions has been made: (1) the immediate and irreparable harm that the moving party will suffer absent the injunction; (2) the likelihood of success on the merits; (3) the public interest served by the injunction; and (4) the balance of hardship favors the moving party. *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (citations omitted); *see also OKI Elec. Indus. v. United States*, 669 F. Supp. 480, 483 (Ct. Int'l Trade 1987) (citations omitted). Once enjoined under § 1516a(c)(2), liquidation of the entries must proceed under subsection (e) which reads:

> If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or the United States Court of Appeals for the Federal Circuit—
>
> (1) entries of merchandise * * * entered * * * after the date of publication in the Federal Register * * * of a notice of the court decision, and
>
> (2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section,
>
> shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of issuance of the court decision.

19 U.S.C. § 1516(a)(e). Therefore, until there is a "final court decision" within the meaning of § 1516a(e), the liquidation of the entries remains suspended. As the case law supports, in order to give full effect to § 1516a(e), liquidation must remain suspended under a preliminary injunction issued pursuant to § 1516a(c)(2) until the parties have exhausted their appeals.

The Court disagrees with Defendant's analysis of the Federal Circuit precedents on this issue. This Court has reasoned that *Timken* was concerned with avoiding the "yo-yo" effect that would accompany switching between Commerce's original determination, an amended determination approved by the CIT after remand, and a possible subsequent decision by the Federal Circuit. *LaClede Steel Co. v. United States*, 928 F. Supp. 1182, 1186–1187 (Ct. Int'l Trade 1996) (citing *Timken*, 893 F.2d at 342); *see also Melamine Chems., Inc. v. United States*, 732 F.2d 924, 934 (Fed. Cir. 1984). Here, Defendant is asking this Court to find that the preliminary injunction dissolved after the CIT's decision, thus ignoring a possible subsequent decision by the Federal Circuit. In its submission, the Government overlooks the plain language of § 1516a(e) and instead draws what it describes as a distinction between the treatment of injunctions following decisions of the CIT that are "in harmony" and those that are "not in harmony" with the agency's determination. (Def.'s Br. at 11, 15, 16.)

Contrary to the Government's assertion that *Timken* created a new type of injunction, in fact, the Federal Circuit in *Timken* interpreted and applied the statutory language of § 1516a(e). *See Timken*, 893 F.2d at 339–341. After a detailed analysis of the statute's language and legislative history, the Federal Circuit determined "what is meant by the word 'final' in the heading and the body of § 1516a(e)." *Id.* at 339. The court concluded that "[w]e are of the opinion that an appealed CIT decision is not a 'final court decision' within the plain meaning of § 1516a(e)." *Id.* The Federal Circuit was persuaded by "the fact that the term 'final court decision' must be read together with the words that follow, specifically, 'in the action.' An 'action' does not end when one court renders a decision, but continues through the appeal process." *Id.* The Federal Circuit determined that "§ 1516a(e) does not require liquidation in accordance with an appealed CIT decision, since that section requires that liquidation take place in accordance with the final court decision in the action." *Id.* at 340. However, the Federal Circuit distinguished between § 1516a(e)'s requirements for liquidation "in accordance with the final court decision in the action" and the requirements for publication of the "notice of the court decision." *Id.* at 340. The Federal Circuit held that Commerce was required to publish notice of CIT decisions within ten days of issuance because § 1516a(e) does not use the word 'final' in mandating that "'notice of the *court decision* shall be published within ten days from the date of issuance.'" *Id.* at 340 (emphasis added) (quoting 19 U.S.C. § 1516a(e)).

Timken did not create a new type of injunction; rather, the Federal Circuit interpreted the meaning of "final court decision in the action." *Id.* The Federal Circuit reasoned that "final" under § 1516a(e) must be given the same meaning as "final" under 28 U.S.C. § 2645(c), which states that "[a] decision of the [CIT] is final and

conclusive, unless retrial or rehearing is granted * * * or an appeal is taken to the [Federal Circuit]." *Id.* at 339–340 (quoting 28 U.S.C. § 2645(c)). The *Timken* court held that in order to satisfy the requirements for liquidation under § 1516(e), a CIT decision must be conclusive: "the decision can no longer be attacked, either collaterally or by appeal." *Id.* at 339.

Although the *Timken* court stated that "[i]f the CIT (or this court) renders a decision which is not in harmony with Commerce's determination, then Commerce must publish notice of the decision within ten days of *issuance*," the Federal Circuit continued that "§ 1516a(e) indicates that if the CIT (or this court) issues such an adverse final decision, then all entries after publication of notice of that adverse decision will be liquidated in accordance with the *final*, i.e. *conclusive*, court decision in the action. However, since there is no way to know what the *conclusive* decision will be at the time notice of the CIT decision is published, it is necessary to suspend liquidation until there is a conclusive decision in the action." *Id.* at 341. Dissolving the preliminary injunction after an "in harmony" CIT decision would allow liquidation to occur immediately, possibly depriving the Federal Circuit of jurisdiction and the opportunity to issue an "adverse decision." As the Federal Circuit held in *Zenith*, the Federal Circuit no longer has jurisdiction to decide a case if the subject entries have been liquidated. *Zenith*, 710 F.2d at 810.

This Court is unpersuaded by Defendant's contention that the August 2001 Preliminary Injunction was ambiguous because the law is "not exactly clear concerning how long an action is pending." (Def.'s Br. at 17 (citing Aug. 2001 Prelim. Inj. at 1).) In *Timken*, the Federal Circuit resolved this ambiguity: "An 'action' does not end when a court renders a decision, but continues through the appeal process." *Timken*, 893 F.2d at 339.

The later decisions of the Federal Circuit also support this Court's finding that the August 2001 Preliminary Injunction was a valid court order suspending liquidation throughout the appeals process. In *Hosiden*, the Federal Circuit vacated the CIT's writ of mandamus and held that "[i]n accordance with 19 U.S.C. § 1516a(e), entries of merchandise for which liquidation has been suspended by court order remain subject to suspension of liquidation until there is a 'final court decision in the action.' " *Hoisden*, 85 F.2d at 590 (citing 19 U.S.C. § 1516a(e)). The Federal Circuit reasoned that "[s]tatute and precedent are clear that the decision of the [CIT] is not a 'final court decision' when appeal has been taken to the Federal Circuit." *Id.* at 591. The Federal Circuit quoted *Timken* in concluding that "§ 1516a(e) requires that liquidation, once enjoined, remains suspended until there is a '*conclusive* court decision which decides the matter, so that subsequent entries can be liquidated in accordance with that conclusive decision.' " *Id.* (quoting *Timken*, 893 F.2d at 342).

In 2002, the Federal Circuit explicitly affirmed the CIT's holding that a preliminary injunction granted by the Court suspending liquidation did not dissolve until "the time for petitioning the Supreme Court for a writ of certiorari expired." *Fujitsu*, 283 F.3d at 1379. Although the court considered many questions in *Fujitsu*, the pertinent determination is the Federal Circuit's holding that the "removal of the suspension of liquidation" under § 1504(d) did not occur until after the time for petition for writ of certiorari had expired. *Id.* at 1378–1379. Citing its decision in *Timken*, the Federal Circuit reasoned that suspension of liquidation was not "removed" until there had been a "final court decision within the plain meaning of § 1516a(e)." *Id.* at 1379 (citing *Timken*, 893 F.2d at 339). The court stated that "there is not a 'final court decision' in an action that originates in the [CIT] and in which there is an appeal to the Federal Circuit until, following the decision of the Federal Circuit, the time for petitioning the Supreme Court for certiorari expires without the filing of a petition." *Id.* Nowhere in *Hosiden* or in *Fujitsu* does the Federal Circuit focus on the "in harmony" or "not in harmony" aspect of the CIT's decisions. Rather, the deciding factor in this line of cases is the finality of a court decision for the purposes of liquidation under § 1516a(e).

Further, the Government's reliance on *Fundicao Tupy* is misplaced. The Federal Circuit's decision in *Fundicao Tupy* has no precedential value in this case because it speaks in generalities about preliminary injunctions and does not specifically address the statutory language of § 1516a(e). Regardless of the quoted "Hornbook" language involving the purpose and effect of preliminary injunctions in *Fundicao Tupy*, the appellate court held that it lacked jurisdiction because the controversy had been rendered moot by the trial court's decision on the merits. *Fundicao Tupy*, 841 F.2d at 1103–1104. The Federal Circuit specifically held that the remedy plaintiff sought, an order forcing the trial court to enter a preliminary injunction suspending liquidation, could not be granted. *Id.* In other words, the CIT may not issue a preliminary injunction after it has entered a judgment on the merits. *See id.* That holding has no bearing on the question now before the Court in applying § 1516a(e). In this case, an injunction pursuant to § 1516a(c)(2) was properly issued by the Court on August 2, 2001. The question before the Court now is whether or not that injunction continues to suspend liquidation throughout the appeals process.

If the Court were to hold that the preliminary injunction dissolved when the CIT issued a decision "in harmony" with the original agency determination, this would place an unnecessary burden on the courts and on the parties. First, a new framework would need to be developed for determining if a CIT decision was "in harmony" or "not in harmony" with the agency determination. For instance, in *Fujitsu*, Commerce had requested a voluntary remand for recalcula-

tion of the dumping margin before the Court had considered the merits. *Fujitsu*, 110 F. Supp. 2d at 1065. The Government categorizes the CIT's affirmance of Commerce's recalculation after the voluntary remand as "not in harmony" with the agency's determination (Def.'s Br. at 15), yet the argument could be made that such a decision is in fact "in harmony" because the CIT merely affirmed the agency's voluntary redetermination. Further, there is no clear indication what categorization would be given to a CIT decision that affirmed in part and remanded in part an agency determination. An appeal of the affirmed aspect of the determination could be considered "in harmony," but an appeal of the redetermination on remand could be considered "not in harmony." Forcing the Court and the parties to make such distinctions would be burdensome and unnecessary.

As Plaintiff notes, if the Court were to adopt Defendant's position, the parties would be forced to seek the consent of the opposing party, come before the Court, and prove the same four factors that had already been analyzed and decided by the Court before issuing the initial preliminary injunction. (*See* Pl.'s Rebuttal at 6.) Adopting Defendant's position would weaken the Court's ability to order remand and would effectively punish the plaintiff if the Court were to order a remand. If a redetermination were to be upheld by the Court, the plaintiff would have to bear the costs of reentering the Court to seek an injunction pending appeal to preserve its statutory right to appellate review. If the opposing party, or an intervening party as in this case, were to withhold consent, then the Court would presumably need to weigh the necessary factors before deciding to issue a new injunction. If the Court were to assume this "harmony/not in harmony" distinction, the Government would be given an advantage in the litigation wherein withholding consent for a new injunction could result in the liquidation of the subject entries and deprive the plaintiff of a meaningful appeal. In other words, the Federal Circuit would be deprived of jurisdiction because no justiciable issue would remain for the court to decide. That is exactly what would have happened in this case if the three entries at the Port of Norfolk had been liquidated.

Although not fully articulated until this action, it appears that the Government has previously taken the position that preliminary injunctions dissolve when the CIT issues an "in harmony" decision. (*See* Def.'s Resp. Br. at 2–3.) As mentioned in Defendant's contentions, the Government cites sixteen instances in which the Court issued injunctions under similar circumstances. (*Id.*)[8]

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[8] The Defendant cites the following cases in its submission to the Court. Although Defendant attached copies of the orders, the Defendant did not attach copies of the underlying motions which were more revealing of the intent of the parties. Relevant portions have been excerpted from the motions.

1. *Timken Co. v. United States*, Consol. Ct. No. 01–00127. Order granting consent application for an injunction pending appeal signed on March 11, 2003.
2. *Acciai Speciali Terni S.p.A. v. United States*, Ct. No. 01–00051. Order granting consent application for an In-

(*Id*.) However, the Court is not swayed by these prior issuances of injunctions pending appeal. It would appear that all of the motions came before the Court on consent or were unopposed.[9] The Court acted to the benefit of the parties to expedite the litigation by granting the motions. Citing such orders after Defendant has violated the Court's August 2001 Preliminary Injunction hints at "experimentation with disobedience of the law" in order to effect change within the law, something that courts do not look upon favorably. *See McComb*, 336 U.S. at 192.

The Court holds that the August 2001 Preliminary Injunction did not dissolve when the Court issued a decision on the merits in August 2002; therefore, a valid court order was in existence at the time that Defendant issued instructions to liquidate in November 2002 and liquidated the subject entries in January 2003.

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junction Pending Appeal "to the extent that the preliminary injunction issued by this Court on April 18, 2002 is no longer in effect" signed on March 6, 2003.

3. *RHP Bearings Ltd. v. United States*, Ct. No. 98–07–02526. "[I]t is NSK-RHP's position that the Court has not made a final decision in this case. [citing *Fujitsu*]. Counsel for the United States disagrees: It is the United States' position that the preliminary injunction previously entered by the Court was dissolved when the Court entered final judgment. [citing *Fundicao Tupy*]." (Consent Motion for Entry of Injunction Pending Appeal at 2.) Order signed on February 20, 2003.
4 *Ausimont S.p.A. v. United States*, Ct. No. 98–10–03063. Order granting consent application for an injunction pending appeal signed on February 6, 2003.
5. *Allegheny Ludlum Corp. v. United States*, Ct. No. 99–06–00369. Order granting consent application for an injunction pending appeal signed on January 6, 2003.
6. *Allegheny Ludlum Corp. v. United States*, Ct. No. 01–00236. Order granting consent application for an injunction pending appeal signed on January 6, 2003.
7. *NTN Bearing Corp. of Am. v. United States*, Consol. Ct. No. 98–01–00146. "In all other litigations before this Court and the Federal Circuit, NSK has never had to renew, continue or obtain a new preliminary injunction when the decision of this Court has been appealed to the Federal Circuit or when the Federal Circuit has remanded a proceeding to this Court after appeal." (Motion to Affirm the Validity of Preliminary Injunction Already Entered in Litigation, or, In the Alternative, Motion for Entry of Injunction Pending Appeal at 2.) Order signed on November 21, 2002.
8. *Koyo Seiko Co., Ltd. v. United States*, Consol. Ct. No. 98–06–02274. Order granting consent application for an injunction pending appeal signed on November 21, 2002.
9. *Torrington Co. v. United States*, Consol. Ct. No. 99–08–00462. Order granting consent application for an injunction pending appeal signed on November 21, 2002.
10. *Alloy Piping, Prods. Inc. v. United States*, Consol. Ct. No. 01–00099. "On August 2, 2002 [plaintiff's counsel] was notified by [defendant's counsel] that in the Department of Justice's view, the original preliminary injunction, entered * * * on May 4, 2001, must be amended to remain operative during the pendency of the appeal. * * * While [plaintiff] believes that the original preliminary injunction * * * remains in effect until appellate process is exhausted (i.e., once judgment becomes final pursuant to [*Hosiden*]), the Government takes the position that an amended preliminary injunction must be entered. Unless enjoined by an amended order of this Court, Defendant, United States, asserts that it would be able to issue instructions to liquidate, and proceed with liquidation * * * * " (Consent Motion for Amended Preliminary Injunction at 2.) Order signed on August 21, 2002.
11. *Koyo Seiko Co., Ltd. v. United States*, Ct. No. 99–01–00001. Order granting consent application for an injunction pending appeal signed on August 7, 2000.
12. *Hoogovens Staal BV v. United States*, Consol. Ct. No. 96–10–02394. Order granting consent application for an injunction pending appeal signed on June 20, 2000.
13. *Micron Tech., Inc. v. United States*, Ct. No. 97–02–00205. "[C]ounsel for Micron was * * * apprised by [Commerce] that under Commerce's reading of the April 21, 1997 preliminary injunction, it is no longer barred from liquidating the entries that were covered by the preliminary injunction * * * * Micron believes that this Court's injunction of April 21, 1997, enjoining liquidation 'during the pendency of this litigation,' continues to bar the liquidation of the subject entries until the final court decision is rendered in this case. [citing *Hosiden*]." (Pl.'s Motion to Continue, Pending Appeal, the Preliminary Injunction at 3.) Order signed on May 24, 2000.
14. *E.I. DuPont de Nemours v. United States*, Ct. No. 97–08–01335. Order granting plaintiff's motion to grant and restore the court's preliminary injunction pending appeal signed on November 23, 1999.
15. *Böhler-Uddeholm Corp. v. United States*, Ct. No. 95–08–01024. Order granting plaintiff's motion for an injunction pending appeal signed on October 21, 1999.
16. *FMC Corp. v. United States*, Ct. No. 01–00807, C.A.F.C. No. 03–1323. Order granting consent application for an injunction pending appeal signed by Judge Bryson of the U.S. Court of Appeals for the Federal Circuit on April 29, 2003.

[9] The Court is unable to determine the parties' positions regarding the motions in *E.I. DuPont de Nemours v. United States*, Ct. No. 97–08–01335, and *Böhler-Uddeholm Corp. v. United States*, Ct. No. 95–08–01024, because the orders do not indicate consent and the original motions cannot be readily accessed by the Court.

2. The Court finds that Defendant had knowledge of the order.

The August 2001 Preliminary Injunction was submitted on a consent motion. (Mot. for Prelim. Inj. at 3.) The Government was served with the preliminary injunction in August 2001. Defendant does not contest the fact that Defendant had knowledge of the injunction and the Government's witness, Ms. Tillman, testified that she had actual knowledge of the injunction. (Hr'g Tr. at 13–14.) Therefore, the Court finds that Defendant had knowledge of the Court's August 2002 Preliminary Injunction when it issued liquidation instructions in November 2002 and liquidated the subject entries in January 2003.

3. The Court finds that Defendant disobeyed the order.

As set forth in the background above, at the Show Cause Hearing, the parties stipulated to the statement of facts. On November 1, 2002, Commerce issued instructions to Customs to liquidate the entries covered by the August 2001 Preliminary Injunction. (Hr'g Tr. at 19.) Such liquidation took place on January 3, 2003; January 10, 2003; and January 17, 2003. (Agreed Statement of Facts at ¶¶7, 8, 10.)

Defendant contends that the Government cannot be held in contempt if there is "doubt as to the wrongfulness" of it actions. (Def.'s Br. at 7.) As analyzed above, the wrongfulness of liquidating entries covered by a valid injunction is not in doubt. The purpose of civil contempt is remedial; therefore, it does not matter with what intent the defendant did the prohibited act. *See McComb*, 336 U.S. at 191. Defendant also contends that it should not be held in contempt of this Court's August 2001 Preliminary Injunction because Plaintiff has an alternative remedy at law: a protest under 19 U.S.C. § 1514. (Def.'s Br. at 18–19.) The Court rejects the Government's contention that a protest under § 1514 is the appropriate remedy for this matter. As Plaintiff contends, a protest would be futile because Customs was merely following the instructions of Commerce when it liquidated the subject entries in January 2003. *See, e.g., Springfield Indus. v. United States*, 655 F. Supp. 506, 507 (Ct. Int'l Trade 1987) ("The specific conduct of [Customs] * * * will be ministerial only * * * a protest against [Customs' conduct] is hopeless and the exhaustion of administrative remedies would be futile."). The proper means to enforce an order of this Court against the Government is to seek relief in this Court; it is not to file a protest with Customs.

The three elements for civil contempt as articulated by this Court in *Ammex, Inc. v. United States* have been fully satisfied. Therefore, the Court holds that Defendant was in contempt of the August 2001 Preliminary Injunction when Commerce issued instructions to liquidate the subject entries in November 2002 and when Customs liquidated certain entries in January 2003.

4. The Court reserves decision regarding damages.

Plaintiff asks this Court to award costs and attorney's fees under CIT Rule 63. (Pl.'s Mem. on Damages at 2.) Civil contempt may be punished by a remedial fine, which compensates the party protected by the injunction for the effects of the other party's noncompliance. *United Mine Workers*, 330 U.S. at 303–304. However, the full effect of the Government's noncompliance with the Court's August 2001 Preliminary Injunction will not be known until the Federal Circuit decides the underlying case on appeal and the parties have had an opportunity to petition for a writ of certiorari. The Court reserves decision on damages until such time.

CONCLUSION

For the reasons set forth above, the Court holds Defendant in contempt of this Court's August 2001 Preliminary Injunction for it actions in November 2002 when Commerce issued liquidation instructions to Customs and for its actions in January 2003 when Customs liquidated the subject entries. As discussed in the analysis, the Court holds that the August 2001 Preliminary Injunction clearly suspended liquidation throughout the appeals process; therefore, Plaintiff's Motion to Clarify is denied as unnecessary. The Court reserves decision on the issue of damages until all appeals of the underlying case have been exhausted.