SLIP OP. 04–119

BEFORE: RICHARD K. EATON, JUDGE

AMERICAN BEARING MANUFACTURERS ASSOCIATION, PLAINTIFF, v. UNITED STATES, DEFENDANT, AND PEER BEARING CO., NINGBO MOS GROUP, NINGBO CIXING BEARING, NINGBO HUANCHI GROUP, WANGXIANG GROUP CORP., NINGBO GENERAL BEARING CO., LTD., JIANGSU GENERAL BALL AND ROLLER CO., LTD., DEFENDANT-INTERVENORS.

COURT NO. 03–00280
PUBLIC VERSION

[Plaintiff's motion for judgment upon an agency record denied; United States International Trade Commission's negative final determination sustained]

Dated: September 16, 2004

Covington & Burling (*Harvey M. Applebaum, David R. Grace, Karin L. Kizer, Nathan T. Daschle, Ariadna Vazquez*), for Plaintiff.

James M. Lyons, Acting General Counsel, United States International Trade Commission (*Charles A. St. Charles*), for Defendant.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch; *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch (*Claudia Burke*), for Defendant.

Coudert Brothers, LLP (*Matthew J. McConkey*), for Defendant-Intervenor Peer Bearing Co.

Wilmer Cutler Pickering, LLP (*Jason E. Kearns, John D. Greenwald, Jack A. Levy, Lisa M. Pearlman*), for Defendant-Intervenors Ningbo Mos Group, Ningbo Cixing Bearing, Ningbo Huanchi Group, Wangxiang Group Corp., Ningbo General Bearing Co., Ltd., Jiangsu General Ball and Roller Co., Ltd.

OPINION

EATON, *Judge*: Before the court is plaintiff American Bearing Manufacturers Association's[1] ("ABMA") U.S.C.I.T. Rule 56.2 motion

[1] The American Bearing Manufacturers Association is a trade association, a majority of whose members produce ball bearings or parts thereof. *See* Compl. ¶2.

for judgment upon an agency record challenging the United States International Trade Commission's ("ITC") final determination made pursuant to 19 U.S.C. § 1673d(b)(1)(A) (2000), that an industry in the United States is neither materially injured, nor threatened with material injury, by reason of dumped imports of ball bearings, and parts thereof, from the People's Republic of China.[2] *See* Ball Bearings From China, 68 Fed. Reg. 17,963 (ITC Apr. 14, 2003) (notice of final determination); Ball Bearings From China, USITC Pub. 3593, Inv. No. 731–TA–989 (Apr. 2003), List 2, Doc. 408 ("Final Determination"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). For the reasons below, the court sustains the Final Determination.

BACKGROUND

On February 13, 2002, in response to a petition filed by ABMA, the ITC instituted an investigation of ball bearings from the People's Republic of China. *See* Ball Bearings From China, 67 Fed. Reg. 8039, 8040 (ITC Feb. 21, 2002) (notice of institution of investigation). As with ball bearings in prior investigations,[3] those subject to the instant investigation were found to "cover[ ] a continuum of products in many sizes and configurations," and the ITC treated the continuum as the domestic like product. *See* Final Determination at 8. Ball bearings are used in a wide range of products and industries, including the automotive, aerospace, agriculture, and construction industries. *See* Staff Report at II–11.

The ITC gathered information with respect to domestic and imported ball bearings for the period of January 2000 to December

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[2] The United States Department of Commerce found that the subject imports had been sold at less than fair value. *See* Certain Ball Bearings and Parts Thereof From the P.R.C., 68 Fed. Reg. 10,685 (ITA Mar. 6, 2003) (notice of final determination of sales at less than fair value). The scope of the ITC's investigation covered

> all antifriction bearings, regardless of size, precision grade, or use, that employ balls as the rolling element (whether ground or unground) and parts thereof (inner ring, outer ring, cage, balls, seals, shields, etc.) that are produced in China. Imports of these products are classified under the following categories: antifriction balls, ball bearings with integral shafts and parts thereof, ball bearings (including thrust, angular contact, and radial ball bearings) and parts thereof, and housed or mounted ball bearing units and parts thereof. The scope includes ball bearing type pillow blocks and parts thereof; and wheel hub units incorporating balls as the rolling element. With regard to finished parts, all such parts are included in the scope of the petition. With regard to unfinished parts, such parts are included if (1) they have been heat-treated or (2) heat treatment is not required to be performed on the part. Thus, the only unfinished parts that are not covered by the petition are those that will be subject to heat treatment after importation.

Mem. INV–AA–035 (Mar. 21, 2003), List 2, Doc. 393 ("Staff Report") at I–1 n.1.

[3] The most recent prior investigation of ball bearings was a five-year review of orders on bearings from China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom, completed in June 2000. *See* Certain Bearings from China, France, Germany, Hung., Italy, Japan, Rom., Sing., Sweden, and U.K., USITC Pub. 3309, Invs. Nos. AA–1921–143, 731–TA–341, 731–TA–343–345, 731–TA–391–397, and 731–TA–399 (June 2000) Vol. I ("2000 Review") at 3.

2002. Following its investigation made pursuant to 19 U.S.C. § 1677(7)(C)(i)–(iii), the ITC concluded that the domestic ball bearing industry was not being materially injured by reason of the subject imports. *See* 19 U.S.C. § 1673d(b)(1)(A)(i); Final Determination at 30. The ITC also determined that the domestic ball bearing industry was not threatened with material injury by reason of the subject imports. *See* 19 U.S.C. § 1673d(b)(1)(A)(ii); Final Determination at 33. ABMA appealed the ITC's final negative material injury and threat of material injury determinations to this Court pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i).

STANDARD OF REVIEW

The court will hold unlawful "any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted). It "requires 'more than a mere scintilla,' . . . but is satisfied by 'something less than the weight of the evidence.' " *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). In conducting its review, the court must take into account not only the evidence on the record that justifies the ITC's findings, but also "whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (citing *Atl. Sugar*, 744 F.2d at 1562). However, the court's function is not to reweigh the evidence but rather to ascertain "whether there was evidence which could reasonably lead to the Commission's conclusion. . . ." *Matsushita*, 750 F.2d at 933. The possibility of drawing two inconsistent conclusions from the record evidence does not, in itself, prevent the ITC's determinations from being supported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).

DISCUSSION

ABMA contests, as unsupported by substantial evidence or otherwise not in accordance with law, the ITC's findings with respect to (1) whether the volume of subject imports was significant, (2) whether the effect of the subject imports on domestic prices was significant, (3) whether the subject imports have had a significant adverse impact on the domestic industry, and (4) whether the domestic

industry is threatened with material injury by reason of the subject imports.

1. *Volume*

The ITC's volume determination requires an evaluation of "whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i). Here, the ITC concluded that the volume of subject imports was not significant, "rely[ing] primarily on *value* measures for apparent consumption, domestic shipments, and subject imports, as [it had] in prior ball bearing investigations, and for the same reasons."[4] Final Determination at 14 (emphasis added) (citing Ball Bearings From China, USITC Pub. 3504, Inv. No. 731–TA–989,(May 2002) at 11; 2000 Review at 39; Ball Bearings, Mounted or Unmounted, and Parts Thereof, From Arg., Aus., Braz., Can., H.K., Hung., Mex., P.R.C., Pol., Rep. Korea, Spain, Taiwan, Turk. and Yugoslavia, USITC Pub. 2374, Inv. No. 701–TA–307 (Apr. 1991) at 19–20; Antifriction Bearings (Other Than Tapered Rolling Bearings) and Parts Thereof, from F.R.G., Fr., Italy, Japan, Rom., Sing., Swed., Thail., and U.K., USITC Pub. 2185, Invs. Nos. 303–TA–19–20, 731–TA–391–399 (May 1989) ("USITC Pub. 2185") at 67, 69, 71; Tapered Roller Bearings and Parts Thereof, and Certain Housings Incorporating Tapered Rollers From Hung., P.R.C., and Rom., USITC Pub. 1983, Invs. Nos. 731–TA–341, 344 and 345 (June 1987) ("USITC Pub. 1983") at 16).[5] While the ITC recognized that there

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[4] Information on complete ball bearings, ball bearing balls, and ball bearing parts other than balls was gathered by both value and quantity. Final Determination at 13 (citing Staff Report, tbls. III–5–III–7). As discussed *infra* Part 2, the ITC collected data on a total of fifteen products, including twelve complete ball bearings (products 1–12) and three loose ball bearing balls (products 13–15). *See* Staff Report at V–3–V–4.

[5] With respect to the significance of the volume of subject imports, as measured by value, the ITC found:

> [A]pparent domestic consumption declined during the POI, with the *value* of complete ball bearings, ball bearing balls, and other ball bearing parts dropping by $305.4 million, or 10 percent, between 2000 and 2002. This decline was split almost evenly between nonsubject imports, which declined by $153.6 million, and the domestic like product, which declined by $163.1 million. As overall domestic consumption, domestic like product shipments, and nonsubject imports all fell, the volume of subject imports increased over the POI. The *value of subject imports* of complete ball bearings, ball bearing balls, and other ball bearing parts increased by 8.5 percent between 2000 and 2002. The market share held by subject imports *as measured by value* increased from 3.9 percent in 2000 to 4.7 percent in 2002. The *value of subject imports* of complete ball bearings increased by 5.6 percent between 2000 and 2002, and the market share held by subject imports of complete ball bearings increased from 4.1 percent in 2000 to 4.8 percent in 2002. Shipments of domestically produced and nonsubject complete ball bearings declined by 8.0 and 17.2 percent respectively between 2000 and 2002. However, the market share held by the domestic like product increased, from 68.6 percent in 2000 to 70.4 percent in 2002. Thus, any market share gained by subject imports came at the expense of nonsubject imports rather than the domestic like product. While the volume of subject

were "limitations presented by using value measures rather than quantity measures, such as the difficulty in determining whether changes in value totals are caused by changes in product mix or changes in price," it nonetheless decided to "rely on value-based indicators as the best measure for a continuum product that includes a vast and disparate grouping of items differing in size, configuration, application, and precision." Final Determination at 14–15.

ABMA argues that the ITC: (1) failed to adequately consider import *quantity* data in determining whether the volume of subject imports was significant, (2) failed to offer an adequate explanation for not considering such data, (3) failed to respond to arguments advocating the use of import quantity data, and (4) failed to consider the impact of unfairly traded imports in the context of the ball bearing marketplace. *See* Pl.'s Conf. Mem. Supp. Mot. J. Admin. R. ("Pl.'s Mem."); Pl.'s Reply Mem. Supp. Mot. J. Admin. R. ("Pl.'s Reply"). The court will address each argument in turn.

First, ABMA asserts that 19 U.S.C. § 1677(7)(C)(i) requires the ITC to consider the quantity of imports,[6] and that the ITC failed in its obligation when it allegedly "ignored substantial record evidence demonstrating that the volume of imports of complete Chinese ball bearings [based on quantity] was significant." Pl.'s Mem. at 17, 18. ABMA states that "[a]lthough the quantity data are included in the Staff Report, the Commission relegated its discussion of volume by unit-quantity to a footnote."[7] *Id.* at 17. Second, claiming that "import data measured in quantity for complete ball bearings pointed to a

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> imports increased over the POI at a time when apparent domestic consumption slowed, the increases were modest, as was the absolute volume of subject imports in the U.S. market throughout the POI. At the end of the POI subject imports from China accounted for only 4.7 percent of apparent domestic consumption of complete ball bearings, ball bearing balls, and other ball bearing parts, and that market share had increased by less than one percentage point over the POI. The domestic like product accounted for over two-thirds of apparent domestic consumption, and this share increased over the POI. As noted, the small amount of market share gained by subject imports came at the expense of nonsubject imports. We find that the volume and the increase in volume of subject imports are not significant either in absolute or relative terms.

Final Determination at 21–23 (citations to record omitted) (emphasis added).

[6] In support of its argument, ABMA points to legislative history concerning causation, i.e., the ITC's determination of whether material injury is *by reason of* imports, which states: "The ITC investigates the conditions of trade and competition and the general condition and structure of the relevant industry. It also considers, among other factors, the *quantity*, nature, and rate of importation of the imports subject to the investigation. . . ." SEN. REP. NO. 96–249, at 74 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 460 (emphasis added).

[7] In this regard, ABMA cites the following discussion of quantity data found in footnote 111 of the Final Determination:

> Measured by quantity, subject imports increased by 10.4 percent between 2000 and 2002, and market share rose from 20.8 percent to 26.4 percent. [*See* Staff Report, tbl. C–1–A]. Domestic market share fell from 35.9 percent to 32.9 percent, while nonsubject import share fell from 43.3 percent to 40.8 percent. *Id.* The market share of open market shipments of complete ball bearings held by subject imports as measured by value increased from 4.6 percent in 2000 to 5.4 percent in 2002. Calculated from [Staff Report, tbls. III–5,

different conclusion than the one the Commission reached using value to measure imports," ABMA argues that "the Commission at a minimum should have evaluated both sets of data [i.e., value and quantity data,] and explained why the volume numbers were not significant, instead of dismissing without a reasoned explanation data that contradicted its conclusion." *Id.* at 19 (citing *Altx, Inc. v. United States*, 167 F. Supp. 2d 1353, 1359 (2001), *aff'd* 370 F.3d 1108 (Fed. Cir. 2004)). Third, ABMA argues that the ITC "failed to address the domestic industry's arguments that Chinese imports were significant when measured by unit-quantity." *Id.* at 18. Fourth, ABMA contends that the ITC's finding that the volume of subject imports, as measured by value, was not significant fails to take into consideration the specific characteristics of the marketplace, in particular, that the ball bearing market is price sensitive. *Id.* at 21.

Finally, ABMA argues that *Torrington Co. v. United States*, 16 CIT 220, 230, 790 F. Supp. 1161, 1172–73 (1992), *aff'd* 991 F.2d 809 (Fed. Cir. 1993), cited in the Final Determination, held that it was permissible for the ITC to use value data in the context of its determination of whether to cumulate the imports, pursuant to 19 U.S.C. § 1677(7)(G), but does not support the use of value data to evaluate the significance of import volume in the context of a material injury determination. *See* Pl.'s Mem. at 18; Pl.'s Reply at 3.

The ITC responds that its "primary reliance on value-based measures of the volume of subject imports was supported by substantial evidence and otherwise in accordance with law." Def.'s Conf. Mem. Opp'n Pl.'s Mot. J. Agency R. ("Def.'s Resp.") at 15. First, the ITC argues that 19 U.S.C. § 1677(7)(C)(i) does not require the ITC to use quantity-based measures of volume, and urges the court to defer to the ITC's primary reliance on value-based measures of volume as a permissible construction of the statute. *Id.* (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). In addition, the ITC insists that it considered the quantity data in the record and identifies express references to such data in the Final Determination. *Id.* at 19 (citing Final Determination at 17 n.75, 18 nn.81–83, 22 nn.111, 114) ("The fact that references to quantity data appeared in footnotes does not detract from their discussion by the ITC, and is consistent with the ITC's reasonable reliance primarily upon value indicators."). Second, the ITC states that it not only considered ABMA's arguments urging the use of import quantity data, but also considered its past practice, and the value and quantity data on the record gathered in the course of its investigation. *Id.* at 15; *see* citation to past investigations *supra* at 6. Third, the ITC asserts that it "explained its primary reliance on value data at length,"

C–1–A]. Measured by quantity, subject imports increased from 21.0 percent of open market shipments of complete ball bearings in 2000 to 26.6 percent in 2002. *Id.*

Final Determination at 22 n.111.

specifically in its discussion of the conditions of competition. *Id.* at 20 ("The ITC's path in relying on value-measures was abundantly clear."). Fourth, with respect to considerations of the marketplace, such as price sensitivity, the ITC argues that ABMA "rest[s] [its arguments] on a presumption that ball bearings are highly price sensitive," but the ITC "did not find the ball bearing market to be marked by a high degree of price sensitivity. . . ." *Id.* at 23 (citing Final Determination at 19).

As to its reliance on *Torrington*, the ITC argues that the court "expressly affirmed the ITC's practice of using value measures of import volume." Def.'s Resp. at 16. The ITC asserts that the court's holding in *Torrington* is on point with the issue involved here, "notwithstanding its consideration of subject import volume under a provision of the statute concerned with cumulation." *Id.* at 17. According to the ITC,

> [n]ot only is the product at issue ball bearings, as it was in *Torrington*, the statute is silent as to the means of measuring volume and the use of a value-based measurement is reasonable. The subject ball bearing imports consist of a vast array of configurations, applications, and precision ratings of ball bearings, units incorporating ball bearings, individual balls and races, and other ball bearing parts. Therefore, as in *Torrington*, "construction of aggregate data regarding the quantity of [ball bearing] imports would have been impractical due to variations in product sizes and weight per unit between complete bearings and parts."

Id. at 18 (quoting *Torrington*, 16 CIT at 230, 790 F. Supp. at 1173). The ITC urges the court to sustain its conclusion that the volume of subject imports was not significant.

With respect to the ITC's decision to rely primarily on value data to measure volume, the court finds the ITC's construction of 19 U.S.C. § 1677(7)(C)(i) to be reasonable. When faced with a question of statutory construction, the court must "determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998) (citation omitted). The court's inquiry starts with the plain language of the statute, as the statute's text is "Congress's final expression of its intent, [thus] if the text answers the question, that is the end of the matter." *Id.* at 882 (citations omitted); *Chevron*, 467 U.S. at 842. However, if the statute's language does not compel a particular interpretation, the court must use "all 'traditional tools of statutory construction' to determine whether 'Congress had an intention on the precise question at issue' before we consider deference to an agency interpretation." *Candle Corp. of Am. v. United States Int'l Trade Comm'n*, 374 F.3d 1087, 1093 (Fed. Cir. 2004) (quoting *Chevron*, 467 U.S. at 483 n.9). Should the court find that "a statute

is ambiguous or Congress intentionally leaves interpretive gaps in the language of a statute, courts must defer to agency interpretations of that statute so long as those interpretations are not 'arbitrary, capricious, or manifestly contrary to the statute.' " *Comm. for Fairly Traded Venezuelan Cement v. United States*, 372 F.3d 1284, 1289 (Fed. Cir. 2004) (quoting Chevron, 467 U.S. at 844). "In other words, if Congress has left room for an agency to interpret a statute, courts can only inquire as to whether an agency's construction of that statute is a reasonable interpretation." *Id.* (quotation omitted).

Turning to the statute in question here, 19 U.S.C. § 1677(7)(C)(i) directs the ITC to evaluate the significance of the volume of imports of the subject merchandise, either in absolute terms or relative to production or consumption in the United States, but does not specify whether the volume of imports is to be measured in terms of the value of imports, the quantity of imports, a combination of both, or indeed by some other measure. Nor does the legislative history clearly favor a particular interpretation. While, as ABMA points out, the legislative history mentions that the ITC considers the "quantity" of imports, it also states that quantity is but one of many factors it considers. SEN. REP. NO. 96–249, at 74 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 460 ("[The ITC] also considers, among other factors, the quantity, nature, and rate of importation of the imports subject to the investigation. . . ."). What is clear, however, is that Congress recognized that in determining the significance of the volume, price effect, and impact of imports in the U.S. market, the ITC must evaluate the facts of each particular case, and the industry involved, and make its material injury determination accordingly. *See* SEN. REP. NO. 96–249, at 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474 ("The significance of the various factors affecting an industry will depend upon the facts of each particular case. Neither the presence nor the absence of any factor . . . can necessarily give decisive guidance with respect to whether an industry is materially injured, and the significance to be assigned to a particular factor is for the ITC to decide. It is expected that in its investigation the Commission will continue to focus on the conditions of trade, competition, and development regarding the industry concerned."); *see also Nat'l Ass'n of Mirror Mfrs. v. United States*, 12 CIT 771, 778, 696 F. Supp. 642, 647 (1988) ("The Commission has discretion to make a reasonable interpretation of the facts."); *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1087–88 (1988) ("[T]he Commission's determinations must be based upon an independent evaluation of the factors with respect to the unique economic situation of each product and industry under investigation."). The decision of whether to rely primarily on quantity data, value data, or both, to measure the significance of import volume is precisely the type of decision that Congress has entrusted the ITC to make in light of the facts and circumstances of each particular case. "In other

words, . . . Congress has left room for [the ITC] to interpret [the] statute, [thus the] court[ ] can only inquire as to whether [the ITC's] construction of that statute is 'a reasonable interpretation.' " *Comm. for Fairly Traded Venezuelan Cement*, 372 F.3d at 1289 (quoting *Chevron*, 467 U.S. at 844).

Mindful of the ITC's responsibilities in administering the antidumping statute, the court finds the ITC's construction of 19 U.S.C. § 1677(7)(C)(i), with respect to its primary reliance on value-based indicators to evaluate the significance of the subject imports, to be reasonable in light of wide variations in the size, configuration, application, and precision of ball bearings. *See Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 n.5 (Fed. Cir. 1992) (noting the ITC qualifies as an agency that "is by virtue of its responsibilities under the Act and its expertise, entitled to the benefit of *Chevron* deference."); *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1380 (Fed. Cir. 2001) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)) (concluding that "*Chevron* deference is due at least to those statutory interpretations that are articulated in any 'relatively formal administrative procedure' . . ."). The court's reasoning in *Torrington* is instructive. In *Torrington*, the court reviewed the ITC's construction of the term "volume" in 19 U.S.C. § 1677(7)(G), the statute that authorizes the ITC to cumulate imports under certain circumstances.[8] As with the statute in issue here, the cumulation statute did not expressly require the ITC to use either quantity or value data to evaluate the significance of import volume. *Torrington*, 16 CIT at 230, 709 F. Supp. at 1172. In holding that "it was reasonable for the Commission to use value-based indices when considering the volume of imports," the court noted the variations in ball bearings' "sizes and weight per unit between complete ball bearings and parts." *Id.* at 230–31, 709 F. Supp. at 1173. The court found that accepting the plaintiff's argument that the ITC "must analyze the volume of imports in terms of quantity could lead to absurd results in investigations involving industries producing low quantities of high-value merchandise." *Id.*

Similarly, here the ITC explained why using quantity data could produce misleading results as to the impact of the subject imports on the domestic industry: "[I]t would present a distorted picture of the market to consider a commodity bearing costing less than one dollar as equivalent to a precision bearing costing hundreds or even thousands of dollars." Final Determination at 15 n.62. The ITC found that the size, configuration, application, and precision of complete and partial ball bearings vary widely. *Id.* at 15. Thus, the same con-

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[8] The cumulation statute provides that "the Commission shall cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which" certain criteria have been satisfied, "if such imports compete with each other and with domestic like products in the United States market." 19 U.S.C. § 1677(7)(G)(i).

siderations that led the *Torrington* court to find the ITC's construction of the term "volume" to be reasonable are present here and militate in favor of this court finding the ITC's construction of 19 U.S.C. § 1677(7)(C)(i) to be reasonable.

In addition, the ITC's use of value-based indicators to evaluate volume in the context of a ball bearing investigation is consistent with its past practice. "An action by the ITC becomes an 'agency practice' when a uniform and established procedure exists that would lead a party, in the absence of notification of change, reasonably to expect adherence to the established practice or procedure." *Ranchers-Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999) (internal citation omitted). In prior investigations of ball bearings dating back to 1987, the ITC relied, at least in part, on value-based indicators in the course of its material injury analysis. *See, e.g.*, USITC Pub. 1983 at 29; USITC Pub. 2185 at 67, 141; 2000 Review at 43; *see also Torrington*, 16 CIT at 230, 790 F. Supp. at 1170 (noting ITC's use of value-based measurements to ascertain import volumes of bearing products in other determinations). In the Final Determination, the ITC stated that it would rely primarily on value-based indicators as it had done in past ball bearing investigations, "and for the same reasons." Final Determination at 14. In the past, value-based measures have been found to be preferable where, as here, the products under investigation vary in size, quality and application. *See, e.g.*, USITC Pub. 1983 at 5. "Although not determinative, the construction of a statute by those charged with its administration is entitled to great deference, particularly when that interpretation has been followed consistently over a long period of time." *United States v. Clark*, 454 U.S. 555, 565 (1982) (citation omitted); *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 274–75 (1974) ("[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration."); *Tex. Crushed Stone Co. v. United States*, 35 F.3d 1535, 1541 n.7 (Fed. Cir. 1994) ("Prior agency practice is relevant in determining the amount of deference due an agency's interpretation."). Thus, both past practice and deference to the ITC's construction of the volume statute under *Chevron* support the ITC's use of a value-based measure of volume.

Having found it permissible for the ITC to use a value-based measure of volume, the court turns to ABMA's arguments with respect to whether substantial evidence supports the ITC's volume determination. ABMA's arguments are not persuasive. First, ABMA contends that "import data measured in quantity for complete ball bearings pointed to a *different* conclusion than the one the Commission reached using value to measure imports. . . ." Pl.'s Mem. at 19 (emphasis added). The ITC was faced with the difficult question of how to conduct its analysis when the subject imports and the domestic like product were characterized by a wide variety of sizes and appli-

cations. In order to conduct its analysis, the ITC reasonably chose value as its measure of volume. Whether the record might support alternate findings based on other data is, of course, not the issue. The question is "whether there was evidence which could reasonably lead to the Commission's conclusion. . . ." *Matsushita*, 750 F.2d at 933. "It is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence." *Maine Potato Council v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985) (citation omitted); *United States Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996) (decision about what weight to give a particular piece of evidence is "at the core of [the] evaluative process"). The volume data on the record, based on value, indicate that while apparent domestic consumption decreased, and the share of consumption held by the subject imports increased over the period of investigation, the share of consumption held by the domestic like product increased as well. *See* Staff Report, tbl. C–4–A. Nonsubject complete ball bearing import shipments declined over the period of investigation, leading the ITC to conclude that "any market share gained by subject imports came at the expense of nonsubject imports" rather than the domestic like product. Final Determination at 23. The ITC found that the purchasers' questionnaire responses supported this conclusion. *Id.* n.117 (citing Staff Report at II–16) ("Thirty-two of 35 responding purchasers reported that other imports were the most competitive alternative to subject imports."). That another conclusion might be reached using another set of data is not significant, where, as here, the ITC used permissible data to reach its conclusion.

Second, ABMA argues that the ITC "ignored" quantity data and arguments made with respect thereto. It is clear from the Final Determination that the ITC neither ignored the quantity data in the record nor disregarded relevant arguments presented by the parties. In a section titled "Data Issues," the ITC discussed its decision to rely "primarily," not exclusively, on value data in the record. The ITC itself expressed that it "considered quantity data where appropriate." Final Determination at 15. Indeed, the ITC discussed quantity data as it related to demand, apparent domestic consumption, and shipments. *See, e.g.*, Final Determination at 17 n.75, 18 nn.81–83, 22 nn.111, 114. Moreover, the ITC plainly considered the parties' arguments with respect to the question of whether to use value or quantity data to measure apparent domestic consumption, domestic shipments, and the volume of subject imports. *Id.* at 13–14 (articulating ABMA's, a domestic producer's, and the respondents' arguments for and against the use of value and quantity data). While the ITC reached different conclusions with respect to the use of the various data, there is every indication that it took ABMA's arguments into account. Thus, ABMA's claim is without merit.

Finally, ABMA's argument that the ITC failed to take into consideration the characteristics of the marketplace, such as the importance of price, is unpersuasive. In the Final Determination, the ITC discussed the conditions of competition at length, and had before it information with respect to the importance of price in purchasing decisions. *See* Final Determination at 19. For example, the ITC determined on the basis of questionnaire responses that "[p]rice is a moderately important factor in purchasing decisions for ball bearings." *Id*. In reaching this determination, it found persuasive that

> [o]nly nine purchasers ranked [price] as the most important factor . . . , but 21 ranked it second and 18 ranked it third; quality was ranked as the most important factor by 31 respondents. Of the 22 purchasers that changed suppliers, 11 mentioned price as a reason for their change; other cited reasons were poor delivery and quality or performance problems.

Id. (citations to record omitted). "It is the Commission's task to evaluate the evidence it collects during its investigation. Certain decisions, such as the weight to be assigned a particular piece of evidence, lie at the core of that evaluative process." *United States Steel Group*, 96 F.3d at 1357. Here, the ITC considered how price sensitive the ball bearing market reportedly was, examined the evidence, and drew a different conclusion than the one reached by ABMA. That being the case, it is clear from the record that the ITC took the characteristics of the marketplace into account. Thus, the court finds no error in the ITC's conclusion with respect to the price sensitivity of the ball bearing market. Therefore, as the evidence on the record reasonably supports the ITC's conclusion that the volume of the subject imports, as measured by value, was not significant, it is sustained.

2. *Price Effects*

The ITC's price effects determination requires an evaluation of whether:

> (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii). Here, the ITC concluded that the subject imports did not have significant price effects. *See* Final Determination at 27. In reaching this conclusion, the ITC gathered data for

twelve complete ball bearing products and three loose ball bearing ball products.[9] *See id.* at 23 (citing Staff Report at V–3–V–4).

With respect to underselling, the ITC found that the subject imports had many times undersold the domestic like product, frequently by large margins. However, "there was no consistent correlation between subject import prices and domestic like product prices." *Id.* at 24. Thus, underselling was not found to be significant. In addition, the ITC found "no clear nexus between underselling and loss of domestic sales." *Id.* at 25. The ITC observed that "[d]omestic sales quantities fell similarly both for products where subject imports undersold the domestic like product and for products for which there were no reported sales of subject imports," and "confirmed allegations of domestic sales and revenues lost to subject imports over the POI are insignificant, amounting to less than one percent of the value of domestic producers' commercial shipments over the period." *Id.* (citing Staff Report, tbls. V–45–V–56, V–21, V–22). With respect to price-suppression and price-depression, the ITC found that "[t]he record . . . does not support a conclusion that subject imports suppressed or depressed prices for the domestic like product to a significant degree," noting that "[t]here is no consistent correlation between the presence of subject imports and the erosion of prices for the domestic like product." *Id.* at 26. The ITC acknowledged that declines in domestic prices for some products coincided with underselling by the subject imports. *Id.* "[H]owever, for three of these products . . . the subject imports lost sales as well." *Id.* The ITC also examined the domestic industry's revenue losses and found them to be "modest in light of the size of the ball bearing market."[10] *Id.* The ITC found that the observed declines in some domestic prices occurred during a time when apparent domestic consumption contracted and demand declined. *Id.* at 27. The ITC thus concluded that the subject imports did not have significant price effects.

ABMA attacks the reliability and usefulness of the pricing data on which the ITC based its price effects determination. First, ABMA contends that the sample of products for which the ITC collected pricing information "represented an arbitrarily small sample of the thousands of ball bearing models sold in the U.S. market. . . ." Pl.'s

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[9] A description of each of the fifteen products, including the model number, components, dimensions, and "ABEC" (Annular Bearing Engineering Committee) tolerance or precision grade, is contained in the Staff Report. *See* Staff Report at V–3–V–4. ABEC tolerance refers to a product's level of running accuracy and speed capability. The higher the tolerance, the greater the running accuracy and high speed capability. *Id.* at I–6 n.11.

[10] To illustrate, the ITC noted:

> Had the domestic industry maintained the same price and the same market share in 2002 as it had commanded in 2000 for products 1, 3, 5, 7, 8, 9, 11, and 12 sold to end users, the increase in revenue would have been less than $8.0 million. The domestic industry's commercial sales in 2002 were $1.734 billion.

Final Determination at 26–27 (citations to record omitted).

Mem. at 23; Pl.'s Reply at 6 ("The ITC did not analyze a broad enough sample of products to make an informed judgment on the impact of Chinese imports on domestic prices."). ABMA argues that the ITC collected data for only seven complete ball bearings because, of the twelve complete ball bearings, five differed from the other seven only based on whether they had a tolerance of ABEC 1 or ABEC 3—a distinction ABMA contends is without commercial significance. Pl.'s Mem. at 23–24; Pl.'s Reply at 8 ("The practical harm of the ITC's error in separating ABEC 1 ball bearings from ABEC 3 ball bearings is that, by collecting information that was commercially meaningless, it tainted the questionnaire pricing data and rendered its subsequent conclusions unsupported by substantial evidence."). ABMA asserts that "[w]ith thousands of product types in the industry, [the ITC's] decision to limit the number of products to only 7 complete ball bearing part numbers and three types of loose balls would necessarily yield unrepresentative and unreliable pricing data."[11] Pl.'s Mem. at 25.

Next, ABMA asserts that the ITC committed legal error by failing to investigate what it characterizes as certain "discrepancies" between publicly available data from the Bureau of Labor Statistics ("BLS") and the data collected by way of questionnaires. *See* Pl.'s Mem. at 25; Pl.'s Reply at 8 (citing *Timken Co. v. United States*, 264 F. Supp. 2d 1264, 1280 (2003)) ("[BLS] data pointed to flaws in the data the ITC staff collected, and . . . the ITC was legally required to investigate these discrepancies."). In proceedings before the ITC, ABMA presented BLS data which it claimed showed, *inter alia*, that the "prices for radial ball bearings fell approximately 10 percent" from 2000 to 2002 and that "prices for other types of antifriction bearings generally rose by varying amounts." Final Determination at 25 n.130 (citing Staff Report, figs. V–37 & V–38). ABMA argued that these data supported the conclusion that subject imports depressed domestic prices because radial bearings accounted for almost all of Chinese imports. *Id.* The ITC rejected this conclusion "in the absence of significant information on market conditions pertaining to the other types of antifriction bearings." *Id.* ABMA urges the court to find that the ITC acted arbitrarily by rejecting the BLS data without investigating "the apparent discrepancy between its arbitrary narrow selection of pricing data and the publicly available data." Pl.'s Mem. at 26.

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[11] ABMA mentions in passing that by segregating ABEC 1 data and ABEC 3 data the ITC departed from prior practice without explaining why it did so. Pl.'s Mem. at 24. The ITC rejects ABMA's contention, arguing "the ITC has no practice of including particular model numbers or specifications in pricing product lists." Def.'s Resp. at 26 n.10. ABMA cites no authority for this position in its memorandum, and the single ITC investigation cited in its Comments on Draft Questionnaires at 5 n.8 is not enough to establish a "practice." Therefore, the court is unconvinced by ABMA's argument.

Finally, ABMA takes issue with the ITC's finding that "the fact that domestic prices for certain pricing products (e.g., products 13, 14, 15) fell despite no reported subject import sales in those categories would tend to support the. . . conclusion . . . that factors other than subject imports were affecting prices." Final Determination at 25 n.130. In this regard, ABMA argues that "the ITC inappropriately relied on declining prices for domestically produced *balls*, for which there were no competing imports, to conclude that the declining prices of *complete ball bearings* were not caused by subject imports."[12] Pl.'s Reply at 9 (emphasis in original).

The ITC argues that each of ABMA's contentions is without merit. First, the ITC claims that "the individual products for which the ITC obtained pricing information reflected a reasonable sample of total sales of the subject imports and domestic like product." Def.'s Resp. at 25. The ITC states it collected pricing information for fifteen products, including twelve complete ball bearings (not seven as ABMA contends) and three loose ball bearing balls, broken out by distribution channel (i.e., sales to end users and sales to distributors). The data collected "permitted a total of 30 potential comparisons in each of the 12 quarters for which price data was requested." *Id.* at 26. The products selected "focused on the intersection of the Chinese product [comprised mostly of radial ball bearings] and the competing, radial portion, of the domestic like product. . . ." *Id.* at 26–27. Thus, "the 15 products represent a very significant sample, particularly in terms of competition between the subject imports and the domestic like product." *Id.* at 27. Second, with respect to the relevance of the products' ABEC tolerances, the ITC notes that "the higher tolerance (ABEC 3) reflects greater running accuracy and higher speed capability." *Id.* at 26 (citing Staff Report at I–6 n.11). "Therefore, ABEC tolerance differences indicated likely price difference between items that otherwise have the same model number, components, and dimensions." *Id.*

Next, the ITC addresses ABMA's argument that BLS data indicated subject imports depressed domestic prices. The ITC "examined . . . price data published by the Bureau of Labor Statistics," and did "not reach [the] conclusion [that the subject imports de-

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[12] ABMA also contends that "the Commission misinterpreted the [Average Unit Value or "AUV"] data for the ball bearing models for which questionnaire pricing data were compiled." Pl.'s Mem. at 23. In response, the ITC asserts:

> The ITC did not base its price effects findings on average unit values. Rather, for each of the 15 specific products, the ITC compared the weighted average sales price of the specific imported product in the specific quarter with the weighted average price of the same domestic product for the specific product in the specific quarter.

Def.'s Resp. at 32. It appears that the ITC compared weighted-average f.o.b. prices and quantities of the domestic like product and the subject imports for each quarter in the period of investigation. *See* Staff Report at V–3–V–22. There is no reference to AUVs in the Final Determination. ABMA's argument is thus misplaced.

pressed domestic prices] in the absence of significant information on market conditions pertaining to the other types of antifriction bearings." Final Determination at 25 n.130. In other words, the BLS data did not cover as wide a spectrum of merchandise as the questionnaires or provide information on the conditions of the marketplace. In addition, the ITC points out that ABMA does not contest the ITC's decision not to rely on BLS data.[13] *See* Def.'s Resp. at 28. As such, "any conflict plaintiff perceives between other record information and the BLS data was resolved with the ITC's uncontested determination that it could not assign the BLS data the weight advocated by the domestic producers." *Id*.

Finally, the ITC argues that its consideration of domestic prices for loose ball bearing balls in reaching its conclusion that "factors other than subject imports were affecting prices," Final Determination at 25 n.130, was proper for the following reasons. First, "the scope of the subject merchandise and the domestic like product included antifriction balls and other parts of ball bearings as well as complete ball bearings." Def.'s Resp. at 29 (citing Final Determination at 4). Second, "[t]he decline in prices for [loose ball bearing balls] notwithstanding the absence of competing subject imports is certainly relevant when the issue is whether prices of the domestic like product were depressed by the subject imports." *Id*. at 30. Third, the "reference to products 13, 14 [and] 15 was an illustration of information on the record that contradicted the inference plaintiff sought by emphasizing the BLS data." *Id*. The ITC argues that it supported its price effects determination with a discussion of the record evidence, e.g., increases in domestic prices for several products where there was competition from the subject imports, significant sales of the subject imports in but a few categories, modest revenue losses to the domestic industry in light of the overall market, and other market conditions such as a decline in demand. *Id*. at 32. Thus, the ITC urges the court to find that its price effects finding is supported by substantial evidence and otherwise in accordance with law.

It is clear that the ITC was justified in its conclusions with respect to price correlation. Based on the data collected, the ITC made price comparisons and found that although the subject imports undersold the domestic like product, there was no consistent correlation between the prices of the domestic like product and the competing subject imports. With respect to underselling, the ITC found:

> For several products, prices for the subject imports and the domestic like product did not move in the same direction. This is also true on an aggregated basis. According to aggregate data

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[13] ABMA confirmed that it "does not contend that the ITC was required to rely on [BLS] data." Pl.'s Reply at 8.

> presented by petitioner ABMA for eight ball bearing products sold to end users for which data on U.S. and Chinese products were obtained, domestic prices for complete ball bearings, when weighted by volume, actually rose between 2000 and 2001, as subject import prices dropped, and were essentially the same in 2002 as in 2000. Aggregate prices of subject imports for the same eight products fell by 6.1 percent between 2000 and 2002. This apparent lack of correlation is confirmed by the pricing data for products for which no sales of subject imports were reported. Domestic prices for sales of products 13, 14, and 15 all declined although no subject import sales were reported during the POI.

Final Determination at 24–25 (citations to record omitted). Similarly, with respect to price-suppression and price-depression, the ITC found:

> For several products where there was competition from the subject imports, prices for the domestic like product actually rose during the POI. We are mindful of petitioner's argument that such increases in prices were caused by the loss of volume discounts as large-volume sales were lost to subject imports, leaving higher prices for smaller sales volumes. However, there were few product categories in which subject imports gained sufficient sales, indicating that these sales were not being lost to subject imports on price competition. For example, for product 3 to end users, product 5 to end users, product 7 to distributors, and product 11 to end users, sales volume for both the domestic like product and subject imports fell over the POI. The price reported for end-user purchases of domestically produced product 1 rose by 27.6 percent between the first quarter of 2000 and the fourth quarter of 2002, and sales fell by 76.3 percent, or by 5.0 million units. Sales of the subject imports rose by only 172,099 units.

Id. at 26 (citations to record omitted). The evidence on the record, as summarized in the Staff Report, supports these findings.

Turning to ABMA's arguments, the court finds, as an initial matter, that the ITC collected data for fifteen products, including twelve complete ball bearings[14] and three loose ball bearing balls. ABMA's main complaint with respect to the sample of products the ITC selected is that the ITC distinguished otherwise identical products by ABEC tolerance, which, in ABMA's view, was not a commercially significant distinction to make. However, it appears that distinctions

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[14] The following products competed with the domestic like product: products 1 (Staff Report, tbl. V–1), 3 (*id.*, tbl. V–4), 5 (*id.*, tbl. V–6), 7 (*id.*, tbls. V–7, –8), 8 (*id.*, tbl. 9), 9 (*id.*, tbls. V–11, –12), 11 (*id.*, tbls. 14, –15), and 12 (*id.*, tbls. V–16, –17).

among various ABEC classes are commercially significant. *See* Staff Report at I–6 n.11 ("Tolerance classes are 1, 3, 5, 7, and 9 (higher numbered classes correspond to higher tolerances); these classes define the minimum and maximum manufacturing ranges for bearings (for example, such tolerances govern the allowable variation limits on bore size, diameter, width, and thickness as well as other error limitations)."). In this case, the pricing information gathered from questionnaire responses revealed pricing distinctions among otherwise identical products. For example, product 1 and product 2 are both described as "608ZZ-Radial ball bearing, single row, deep groove. 8mm bore, 22mm OD, 7mm width, with two shields," but differ in that product 1 has an ABEC tolerance of 1 and product 2 has an ABEC tolerance of 3. *Id*. at V–3. In sales to end users, these products commanded different prices quarter to quarter.[15] *Compare* Staff Report, tbl. V–1 *with* tbl. V–3. Thus, the court agrees with the ITC that "distinctions based on ABEC tolerances [were] meaningful in the price analysis. . . ." Def.'s Resp. at 26 n.10. The court finds no error on the ITC's part in distinguishing products by ABEC tolerance.

ABMA also argues that the sample of products selected by the ITC is not representative of the ball bearing market as a whole. While it is the ITC's burden "to collect all data necessary to its investigation," generalized allegations that a sample of products is not representative are not enough to meet the threshold requirement to support such a claim. *Kern-Liebers USA, Inc. v. United States*, 19 CIT 87, 113, 114–15 (1995) (not reported in the Federal Supplement), *aff'd sub nom United States Steel Group v. United States*, 96 F.3d 1352 (Fed. Cir. 1996) (citing *Gen. Motors Corp. v. United States*, 17 CIT 697, 703, 827 F. Supp. 774, 781 (1993)). Rather, ABMA must "point[ ] to . . . quantitative evidence to indicate that the sampled data relied on by the Commission was not representative." *United States Steel Group*, 96 F.3d at 1366; *see also Kern-Liebers*, 19 CIT at 114–15 (finding "generalized affidavits" submitted by plaintiff "were of uncertain probative value and lacked much of the specific information the Commission uses in conducting pricing comparisons."). Here, ABMA asserts that there were "thousands of product types in the industry," and that the ITC's sample "would necessarily yield unrepresentative and unreliable pricing data," but cites no record evidence to support this claim. Pl.'s Mem. at 25. This broad allegation is not specific enough to meet the requisite threshold showing. Moreover, the court notes that the selection of products chosen by the ITC encompasses many of the products proposed by ABMA in its Comments on Draft Questionnaires, e.g., products 3, 4, 5, 6, 7, 8, 9, and 10. *See* Petitioner's Comments on Draft Questionnaires, Pub. R. Doc. 53 at

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[15] Over the period of investigation prices for product 1 ranged between $0.48 and $0.64 per unit, whereas prices for product 2 ranged between $0.27 and $0.33 per unit. Staff Report, tbls. V–1, V–3.

5–6. Thus, ABMA has failed to make the requisite threshold showing to establish that the sample selected by the ITC was unrepresentative.

The court next turns to ABMA's argument that the ITC failed to provide the legally required explanation of how it reconciled the discrepancies between the pricing data it collected and the publicly available data. ABMA cites *Timken Co. v. United States*, 264 F. Supp. 2d 1264 (2003), for the proposition that "where the 'ITC actively precludes itself from receiving relevant data or [m]akes no effort to seek relevant [contrary] data . . . then such actions will be found to be contrary to law.' "[16] Pl.'s Mem. at 26–27. The *Timken* court quoted this language from *Mitsubishi Electric Corp. v. United States*, 12 CIT 1025, 1058, 700 F. Supp. 538, 564 (1988), *aff'd* 898 F.2d 1577 (Fed. Cir. 1990), where the court reviewed the ITC's decision to invoke the "product line" provision of the antidumping statute, 19 U.S.C. § 1677(4)(D).[17] The *Mitsubishi* court found that the ITC had failed in its duty to conduct a thorough investigation, where 19 U.S.C. § 1677(4)(D) was concerned, by not requesting reasonably available data that would have permitted the "separate identification of production," pursuant to the statute. The court stated:

> The Court is not in a position to determine what information is available to permit separate identification of production, but to review those type of decisions left to the discretion of the ITC. However, where the ITC actively precludes itself from receiving relevant data or takes no effort to seek relevant data contrary to § 1677(4)(D), which directs the ITC *shall* assess domestic production where available data exists and where that data is

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[16] In *Timken*, the court concluded that the ITC's finding regarding foreign producers' high capacity utilization rates could not be sustained. The ITC had based its capacity utilization finding on questionnaire responses and had rejected secondary information presented by Timken on the ground that "the reporting basis used in such [secondary] data was undefined." *Timken*, 264 F. Supp. 2d at 1280. The court remanded the matter to the ITC, reasoning: "With this impetus, it is logical to find that the Commission erred by not inquiring into the basis used by the [foreign] producers to report their capacity." *Id*. In other words, the court found that under the ITC's own reasoning, it had acted inconsistently. The ITC had rejected certain data because its reporting basis was undefined, yet it had made no effort to define the reporting basis of the questionnaire data it affirmatively relied upon.

[17] At the time of that decision, 19 U.S.C. § 1677(4)(D) read as follows:

> The effect of subsidized or dumped imports shall be assessed in relation to the United States production of a like product *if available data permit* the separate identification of production in terms of *such criteria* as the *production process* or the producer's profits. If the domestic production of the like product has no separate identity in terms of such criteria, then the effect of the subsidized or dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes a like product, for which the necessary information can be provided.

19 U.S.C. § 1677(4)(D) (1985) (as quoted in *Mitsubishi*, 12 CIT at 1057, 700 F. Supp. at 563).

> reasonably available for the ITC to collect and consider, then such actions will be found to be contrary to law.

Mitsubishi, 12 CIT at 1058, 700 F. Supp. at 564 (citation omitted).

ABMA essentially argues that the ITC was not thorough in its investigation, i.e., that it failed to investigate certain perceived discrepancies between BLS statistics and questionnaire data. However, unlike *Mitsubishi*, this is not a case where the ITC shirked its duty to conduct a thorough investigation, or actively avoided seeking information where it had an obligation to do so. In the Final Determination, the ITC discussed the data that ABMA argues the ITC should have relied upon, and drew a conclusion that differed from the one ABMA urged with respect to price-depression. Final Determination at 25 n.130 (discussing BLS data and party arguments). Upon considering the BLS data, the ITC stated:

> We do not reach [the] conclusion [that BLS data indicate that the Subject Imports depressed domestic prices] in the absence of significant information on market conditions pertaining to the other types of antifriction bearings. Moreover, the fact that domestic prices for certain pricing products (e.g., products 13, 14, 15) fell despite no reported subject import sales in those categories would tend to support the opposite conclusion; namely, that factors other than subject imports were affecting prices.

Id. The ITC looked at the BLS data, found it wanting because it did not cover a broad enough spectrum of the subject merchandise, and therefore concluded it was not probative of the market as a whole. Because the ITC had data from the questionnaires that it felt covered the market more completely, it chose to adopt the conclusion it believed was based on more complete data. Therefore, it is clear that the ITC reviewed the BLS data, sought to analyze it in context, and reached a different conclusion with which ABMA does not agree. The court finds no error on the ITC's part in this regard.

ABMA's remaining argument, that the ITC improperly relied on information with respect to loose ball bearing balls, is similarly without merit. As the ITC points out, the scope of the ITC's investigation encompassed "all antifriction bearings, regardless of size, precision grade, or use, that employ balls as the rolling element (whether ground or unground) *and parts thereof* (inner ring, outer ring, cage, *balls*, seals, shields, etc.) that are produced in China." Staff Report at I–1 n.1 (emphasis added). Therefore, the ITC acted consistently with the scope of the investigation in examining pricing for loose ball bearing balls. The ITC relied on such information in its price effects analysis to confirm a lack of correlation between domestic prices and the price of subject imports. *See, e.g.*, Final Determination at 25 ("This apparent lack of correlation is confirmed by the pricing data for products for which no sales of subject imports were reported. Domestic prices for sales of products 13, 14, and 15 all declined al-

though no subject import sales were reported during the POI."); *id.* at 25 n.130 ("Moreover, the fact that domestic prices for certain pricing products (e.g., products 13, 14, 15) fell despite no reported subject import sales in those categories would tend to support the opposite conclusion; namely, that factors other than subject imports were affecting prices.").[18] The ITC's discussion of price declines for loose ball bearing ball products clearly served as additional support for its conclusion that "factors other than subject imports were affecting prices," and was not the sole basis for its price effects finding. *See* Final Determination at 25 n.130. In addition, the ITC considered sales of products where the subject imports did compete with the domestic like products and found increases in domestic prices even where some subject import prices dropped. Final Determination at 26 (citing Staff Report, tbls. V–1 (product 1), V–15 (product 11)). In accordance with its authority to determine the significance and weight of any particular piece of evidence, the ITC was justified in finding that declines in domestic prices of loose ball bearing balls, despite the absence of imports, were meaningful in determining whether the subject imports were adversely impacting domestic prices. *See United States Steel Group*, 96 F.3d at 1357.

3. *Impact*

When examining the impact of imports on the domestic industry, the ITC is required to evaluate:

> all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—
>
> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices,
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
>
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, includ-

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[18] ABMA objects, arguing that loose ball bearing balls composed, by value, "only .33 percent of the total U.S. market in 2002," and thus does not constitute support for the finding that Chinese ball bearings did not cause price declines. Pl.'s Mem. at 27. Pricing data for products 13, 14, and 15 accounted for 3.4% of domestic producers' sales, and thus, according to the ITC, 0.33% was a meaningful percentage. Def.'s Resp. at 30. The court finds that the use of this evidence is justified in light of other evidence tending to support the ITC's claims.

> ing efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (V) in [an antidumping duty] proceeding . . . , the magnitude of the margin of dumping.

19 U.S.C. § 1677(7)(C)(iii). These factors must be evaluated "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." *Id*.

Here, the ITC found that the subject imports did not have a significant adverse impact on the domestic industry, saying:

> The domestic industry remained profitable throughout the POI. Operating income as a percentage of net sales was 4.4 percent in 2002, although it was down from 6.9 percent in 2000. Some erosion in the position of the domestic industry occurred over the POI. Shipments for all bearings declined, whether measured by value or by quantity, as did net sales. Capacity utilization rates declined. The number of production and related workers declined, as did hours worked and total wages paid, although hourly wages increased. Productivity also fell.
>
> Not all performance and financial indicators for the U.S. industry declined throughout the POI. The market share held by domestic producers, production capacity for complete ball bearings, and unit values of domestic shipments all increased over the period, as did the value of domestic producers' shipments between 2001 and 2002.
>
> Total capital expenditures fell during the POI, but five of the 20 reporting producers incurred substantial amounts of capital expenditures during each year of the POI. Expenditures on research and development declined over the POI but were somewhat higher in 2002 than in 2001. Additionally, a significant number of firms, including not only [certain] companies, which face little or no competition from subject imports, but also [other firms], who are members of ABMA, answered in the negative when asked if the firm had experienced any actual negative effects on its return on its investment or its growth, investment, ability to raise capital, existing development and production efforts, or the scale of capital investments, as a result of subject imports.
>
> The current decline in the performance of the domestic industry has occurred during a period of reduced demand. Indeed, the drop in apparent domestic consumption, at 10.0 percent, was sharper than the decline in the value of domestic shipments, which declined by only 8.0 percent during the same time period. The domestic industry did not lose market share to subject imports, but rather gained market share. The increase in

> the market share held by subject imports over the POI was less than one percentage point. The total increase in the value of subject imports of complete ball bearings, ball bearing balls, and other ball bearing parts was equivalent to only 6.2 percent of the decline in the total value of domestic shipments during the POI. Subject imports did not have a significant negative effect on the price received for the domestic like product.
>
> We already have found that neither the volume nor the increase in volume of subject imports was significant and that subject imports did not have a significant effect on the price of the domestic like product. In light of those findings, we do not find that subject imports have had a significant adverse impact on the domestic industry producing the domestic like product.

Final Determination at 28–30 (citations to record omitted).

ABMA argues that the ITC's impact determination is neither supported by substantial evidence, nor is otherwise in accordance with law. With respect to compliance with 19 U.S.C. § 1677(7)(C)(iii), ABMA argues that the ITC gave no indication in the Final Determination that it considered each of the factors required under the statute, and that the ITC did not consider the impact factors in light of the business cycle and conditions of competition in the industry. *See* Pl.'s Mem. at 29, 31. With respect to whether substantial evidence supports the ITC's impact determination, ABMA argues that the ITC ignored evidence with respect to "declines during the POI in (1) operating income as a percentage of net sales, (2) domestic shipments, (3) net sales, (4) capacity utilization, (5) employment, (6) total wages, (7) productivity, (8) total capital expenditures, and (9) research and development expenses." *Id.* at 29. In addition, ABMA argues that the ITC erroneously "relied upon a 4.4 percent operating income to net sales as evidence of profitability," a percentage that "was . . . considerably lower than the industry's historical profitability levels of between 6–8 percent and the levels during the 1989 antidumping investigation, when the Commission determined that the industry was injured." *Id.* at 30 (footnote omitted). ABMA further argues that the ITC "appears to have erroneously concluded that the industry's negative economic factors were the result of a decrease in demand," but that other record evidence "contradicts this conclusion." *Id.*

Moreover, ABMA argues that the ITC misapplied its causation analysis by allegedly "subjugat[ing] its consideration of impact to its consideration of volume and price effects . . . [thus] fail[ing] to explain its analysis." Pl.'s Mem. at 33–34. ABMA contends that this is apparent from the Final Determination, where the ITC stated:

> We already have found that neither the volume nor the increase in volume of subject imports was significant and that subject imports did not have a significant effect on the price of the domestic like product. *In light of those findings, we do not*

> *find that subject imports have had a significant adverse impact on the domestic industry producing the domestic like product.*

Id. at 33 (quoting Final Determination at 22) (emphasis as in Pl.'s Mem.). ABMA argues that the language of the ITC's impact determination clearly shows that the ITC "considered impact on the domestic market to be a product of the other two mandatory factors, rather than an independent factor deserving its own consideration." *Id.*

With respect to compliance with 19 U.S.C. § 1677(7)(C)(iii), the ITC argues that it is clear from the Final Determination that it considered the statutory impact factors and took account of the condition of the industry in light of the business cycle and conditions of competition. *See* Def.'s Resp. at 33–35 (quoting Final Determination at 28–29, 29–30). As it considered the factors enumerated in the statute, the ITC argues that there is no basis for ABMA's argument that it failed to consider the impact of the subject imports as an independent factor in its causation analysis, and not just as a product of its volume and price effects findings. *Id.* at 36–37.

As to ABMA's substantial evidence arguments, the ITC states that it is "under no obligation to place dispositive weight on the pieces of information highlighted by plaintiff or the interpretations plaintiff would attach to those piece of information." Def.'s Resp. at 33. The ITC asserts that it did not, contrary to ABMA's assertion, "find that reduced demand was the cause of any injury but, rather, that the industry performed better than would have been expected in the face of reduced demand, and that the subject imports did not have a significant negative effect on the price received for the domestic like product." *Id.* at 35.

The court finds that the ITC complied with 19 U.S.C. § 1677(7)(C)(iii) in making its impact determination. Contrary to ABMA's argument, it is clear that the ITC considered each of the factors enumerated in the statute and the evidence on record concerning the domestic industry's financial and performance indicators. For example, based on evidence summarized in the Staff Report, the ITC found that the evidence indicated declines in operating income as a percentage of net sales, shipments, capacity utilization rates, the number of production and related workers, hours worked, total wages paid, and productivity. Final Determination at 28–29 (citations to record omitted). However, it also found that the domestic industry remained profitable during the period of investigation,[19] *id.*,

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[19] ABMA objects to the significance of the ITC's conclusion that the domestic industry remained profitable despite a decline in profitability during the period of investigation, arguing that profitability was "considerably lower than the industry's historical profitability levels. . . ." Pl.'s Mem. at 30. In the Final Determination, the ITC observed that "[o]perating income as a percentage of net sales was 4.4 percent in 2002, although it was down from 6.9 percent in 2000." Final Determination at 28. A decline in profitability over the period of investigation would not in itself detract from the finding that the domestic industry "re-

and noted increases in the domestic producers' market share, production capacity for complete ball bearings, unit values of domestic shipments, and the value of domestic producers' shipments. *Id.* Significantly, some domestic firms responded to ITC questionnaires indicating that they had not suffered any negative impact by reason of the subject imports.[20] *See* Staff Report at D–3. The underlying record supports these findings. In addition, the statute itself makes it clear that "[t]he presence or absence of any factor which the Commission is required to evaluate under [19 U.S.C. § 1677(7)(C)] . . . shall not necessarily give decisive guidance with respect to the determination by the Commission of material injury." 19 U.S.C. § 1677(7)(E)(ii); *Comm. for Fair Beam Imps.*, 27 CIT at ___ , slip op. 03–73 at 36 (quoting *Am. Spring Wire Corp. v. United States*, 8 CIT 20, 23, 590 F. Supp. 1273, 1277 (1984)) ("[T]he 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.' ").

Next, the court does not agree that the ITC failed to consider the performance of the domestic industry in the context of prevailing market conditions during the period of investigation, as it is required to do by the statute. Indeed, such consideration is at the heart of the ITC's analysis. In the Final Determination, the ITC recited the conditions of competition in the industry it found relevant to its determination. *See* Final Determination at 16–21 (discussion of demand, supply, distribution and pricing, market segmentation,

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mained profitable," as the overall profitability rate for the domestic industry in 2002, 4.4% operating income to net sales, was positive, thus indicating some level of profitability. *See* Staff Report at VI–3 ("Thirteen producers out of the total of 20 had an operating income for all periods and no producers had an operating loss for the entire period."); *id.*, tbl. VI–2. Moreover, that the domestic industry's profitability levels here were lower than they were found to be in a prior investigation, where the ITC found material injury by reason of imports, does not undermine the ITC's finding. As this court has held, "[f]indings in related determinations regarding threat or material injury are generally not dispositive on subsequent determinations. . . . [T]he Commission does not and cannot determine a specific profitability level injurious because the statute directs the Commission to evaluate a number of factors in determining the condition of the domestic industry." *Torrington*, 16 CIT at 226, 790 F. Supp. at 1169 (citations omitted). That is, each of the ITC's determinations is *sui generis*. *See Comm. for Fair Beam Imps. v. United States*, 27 CIT ____ , ____ slip op. 03–73 at 20 (June 27, 2003), *aff'd without opinion* 95 Fed. Appx. 347 (Fed. Cir. 2004) (citation omitted) ("[I]t is [a] 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."). Operating income as a percentage of net sales is one factor among those the ITC must consider in making its impact determination. Here, even though operating income as a percentage of net sales was lower than it has been in the past the ITC found that the domestic industry "remained profitable." The court finds no error with the ITC's impact determination in this respect.

[20] Of the twenty companies that responded, six of them answered "No" to the ITC's question of whether the firm had experienced "any actual negative effects" on return on investment, growth, ability to raise capital, existing development and production efforts, or capital investments "as a result of imports of ball bearings from China." Staff Report at D–3.

among other economic factors). For example, the ITC took into consideration the decline in demand experienced by the domestic industry during the period of investigation. It compared the rate at which apparent domestic consumption dropped with the decline in the value of domestic shipments, and found that the evidence showed a sharper rate of decline in apparent domestic consumption. Final Determination at 29; *see* Staff Report at II–11 ("Most U.S. producers and importers reported that demand for ball bearings was flat or decreased during 2000–2002."). The ITC noted that in spite of the reduction in demand, the domestic industry gained market share. *Id.* at 29–30. These findings, together with its finding that the subject imports increased their market share by "less than one percentage point" are borne out by the record. *See* Staff Report, tbl. C–4–A.

ABMA is correct that volume, price effects, and impact each require independent consideration. *See* Pl.'s Mem. at 33. The ITC has not failed in that obligation. Consistent with the statute, the ITC considered the factors enumerated in 19 U.S.C. § 1677(7)(C)(iii). Mentioning the ITC's volume and price effects findings in the context of its impact determination does not necessarily mean that its impact analysis was "subjugated" to its volume and price effects findings. Accepting this argument would require the court to overlook the analysis of the impact factors performed by the ITC and the findings it made with respect thereto. At base, ABMA's arguments go to the weight the ITC assigned to the observed declines in several of the statutory factors, such as operating income as a percentage of net sales, domestic shipments, net sales, capacity utilization, and employment indicators. This assignment of weight, however, is within the ITC's discretion. *Nat'l Ass'n of Mirror Mfrs.*, 12 CIT at 778, 696 F. Supp. at 647. The court may not reweigh the evidence, or substitute its judgment for that of the agency. *Matsushita*, 750 F.2d at 933. As the court finds the ITC's impact analysis to be supported by substantial evidence and otherwise in accordance with law, it is sustained.

4. *Threat of Material Injury*

Next, the court turns to the ITC's finding that the domestic ball bearing industry was not threatened with material injury by reason of the subject imports. In making its threat determination, the ITC is directed by statute to consider certain factors,[21] which must be analyzed "as a whole in making a determination of whether further

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[21] The factors are:

(I) [factor pertaining to countervailable subsidies],

(II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,

dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted. . . ." 19 U.S.C. § 1677(7)(F)(ii). "The presence or absence of any factor which the Commission is required to consider under [19 U.S.C. § 1677(7)(F)(i)] shall not necessarily give decisive guidance with respect to the determination." *Id.* "An affirmative threat determination must be based upon 'positive evidence tending to show an intention to increase the levels of importation,' " not mere speculation. *Metallverken Nederland B.V. v. United States*, 14 CIT 481, 488, 744 F. Supp. 281, 287 (1990) (quoting *Am. Spring Wire v. United States*, 8 CIT at 28, 590 F. Supp. at 1280).

ABMA's first challenge to the ITC's threat determination focuses on its finding with respect to Chinese production capacity. Pursuant to 19 U.S.C. § 1677(7)(F)(i)(II), the ITC found that during the period of investigation:

> subject foreign producers reportedly operated at high rates of capacity utilization and devoted a significant portion of their exports to markets other than the United States. The Chinese producers that responded to our questionnaires likely do not represent the entire Chinese industry producing ball bearings. Unreported capacity presumably existed during the entire POI, but did not lead to a significant volume of subject imports or significant negative price effects. We have no basis to conclude that this situation will change in the imminent future.

Final Determination at 31–32 (citations to record omitted). Thus, the ITC relied on questionnaire responses indicating high capacity utilization levels. As summarized in the Staff Report, questionnaire re-

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(III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,

(IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,

(V) inventories of the subject merchandise,

(VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,

(VII) [factor pertaining to agricultural products],

(VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

19 U.S.C. § 1677(7)(F)(i)(I)–(IX). Factors I and VII were not relevant to the ITC's determination.

sponses indicated that capacity utilization was 87.0% in 2000, 82.9% in 2001, and 85.1% in 2002, and these rates were projected to increase in 2003 and 2004. *See* Staff Report at VII–4. Moreover, the record indicates that during the period of investigation roughly two-thirds of Chinese producers' total export shipments of complete ball bearings went to markets other than the United States, and roughly half of Chinese producers' ball bearing balls went to other markets as well. *See id.*, tbls. VII–1–A, VII–2.

ABMA's arguments do not persuade the court that the ITC's analysis is not supported by substantial evidence. ABMA contends that there is record evidence that the ITC failed to take into consideration.[22] In particular, ABMA discusses what it dubs "official reports," which, it argues, conflict with the data reported in questionnaire responses. Pl.'s Mem. at 35 (citing Pl.'s Prehearing Br., Ex. 7 (*World Bearings China Outlook*)). For example, ABMA argues that the *World Bearings China Outlook* report, published by The Freedonia Group in 2000, predicts[23] increases in exports of ball bearings from China, whereas the Staff Report projections indicate a decline in exports, both in quantity and value terms. *See id.*; Staff Report, tbl. VII–1. This shows, in ABMA's view, that data from the questionnaire responses was unreliable. For its part, the ITC asserts that ABMA has merely "point[ed] to . . . information domestic parties placed on the record, [and] characterize[d] them as 'official' " which in itself "does not establish an absence of substantial evidence support for the ITC's finding." Def.'s Resp. at 38.

The court declines ABMA's invitation to reweigh the evidence on the record. First, it is presumed that the ITC has considered all of the information on the record. *See Rhone Poulenc, S.A. v. United States*, 8 CIT 47, 55, 592 F. Supp. 1318, 1326 (1984) ("Absent some showing to the contrary, the Commission is presumed to have considered all evidence in the record."). Here, however, the brief containing

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[22] In objecting that the ITC ignored evidence that suggests that Chinese production capacity was much higher than it was reported to be in the foreign producer questionnaire responses, ABMA criticizes the ITC's use of questionnaire responses. Pl.'s Mem. at 34–35 (objecting to the ITC's use of questionnaire data to conclude that China was operating at high capacity utilization levels, arguing that such data "is of questionable value because it represents a mere fraction of the Chinese industry."). In finding that "subject foreign producers reportedly operated at high rates of capacity utilization," the ITC relied on responses it received to foreign producer questionnaires, acknowledging that "[t]he Chinese producers that responded to our questionnaires likely do not represent the entire Chinese industry producing ball bearings." Final Determination at 31–32 (citing Timken Prehearing Br., Vol. 1, at 38–43); Staff Report at VII–2 n.12 (noting ITC received 42 useable responses out of 175 sent out to Chinese ball bearing manufacturers). The ITC "is not required to gather 100% coverage in the questionnaire responses before it can make a determination." *United States Steel Group v. United States*, 18 CIT 1190, 1203, 873 F. Supp. 673, 688 (1994), *aff'd* 96 F.3d 1352 (Fed. Cir. 1996).

[23] The Freedonia Group appears to base its predictions on forecasts with respect to supply and demand, bearing sales by application, and bearing shipments by type. *See* Pl.'s Prehearing Br., Ex. 7 (*World Bearings China Outlook*).

the report submitted by ABMA was cited by the ITC in the Final Determination. Final Determination at 26 n.134 (citing Pl.'s Prehearing Br.). Even if it could be shown that the ITC did not consider this report, however, the court would not find that it undermined the substantiality of the record evidence supporting the ITC's finding on capacity utilization, because it does not appear to be any more reliable or accurate than the actual data obtained from the Chinese producers. Although ABMA refers to *World Bearings China Outlook* as an "official" report, the report itself bears no indicia of officiality and is apparently an analysis by a private market research firm. In addition, although the report makes certain predictions about Chinese bearing production, it makes no reference to its methodology. In particular, it in no way ties its conclusions to excess Chinese capacity. The weight to give to a piece of evidence is a matter within the ITC's discretion, and it is for the ITC to resolve conflicts in the record. *Matsushita*, 750 F.2d at 933. As noted by the ITC, no party has come forth with evidence that unreported capacity in China, which was apparently for production of products other than the subject merchandise, could result in the increased production of ball bearings in the imminent future. Taking into consideration the ITC's finding that the volume of subject imports was not presently affecting domestic prices in any significant way, and the lack of evidence that would indicate any imminent change in the volume of subject imports, the existence of unreported capacity did not provide a basis for an affirmative threat finding. Thus, the ITC's finding with respect to capacity is sustained.

ABMA next challenges the ITC's finding with respect to inventories. The ITC found that "[i]nventories of complete ball bearings held by producers in China have not grown significantly over the POI, and inventories held by importers in the United States at the end of 2002 were at the lowest level of the POI. Consequently, inventory levels do not support an affirmative threat determination." Final Determination at 33. ABMA claims that the ITC "failed to appreciate China's large inventories," Pl.'s Mem. at 36, arguing that although the ITC referred to the lack of significant growth in Chinese inventories over the period of investigation, it "failed to acknowledge that China's inventories were still high in absolute terms." *Id.* The ITC argues that since the levels of inventory did not result in injury during the period of investigation, there was no reason to believe that these same levels would result in injury in the future. *See* Def.'s Resp. at 39.

The statute instructs the ITC generally that it shall consider "inventories of the subject merchandise. . . ." 19 U.S.C. § 1677(7)(F)(i)(V). It does not provide any further guidance as to what significance the ITC should attach to this factor, or the method by which it should be evaluated. Here, the ITC clearly considered inventories when it evaluated whether there was any significant

growth in the level of inventories held by Chinese producers over the period of investigation. Not finding any significant growth,[24] and also noting that U.S. importer inventories were at their lowest at the end of 2002,[25] the ITC did not find that inventory levels supported an affirmative threat determination.

The authority to make a judgment as to the significance of inventory levels or what level of inventories is considered high or low rests with the ITC, in light of the facts of each case. *See Chung Ling Co. v. United States*, 16 CIT 843, 846, 805 F. Supp. 56, 61 (1992) ("[D]iscretion to make reasonable judgments and inferences in interpreting evidence and determining the overall significance of any particular fact or piece of evidence" rests with the ITC). The inquiry with which the court is concerned is whether the evidence reasonably supports the ITC's decision. It was reasonable for the ITC to conclude that since inventories in China did not significantly change over the period of investigation and ended lower in 2002 than in 2001, such inventories did not support a finding that subject imports posed an *imminent* threat of material injury. As the evidence supports the ITC's findings with respect to inventories they are sustained.

Finally, ABMA challenges the ITC's finding with respect to future price effects. The ITC found:

> [A]t their current volume levels, subject imports did not have significant price-depressing or -suppressing effects on the domestic like product during the POI. Because we do not believe that there is a likelihood of substantially increased import volumes, we conclude it is likely that the subject imports will continue not to have significant price effects in the imminent future.

Final Determination at 32–33. ABMA argues that the ITC acted contrary to the statute by relying on its findings with respect to current price effects, Pl.'s Mem. at 37, but does not suggest a method that

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[24] The underlying record supports this finding. End of period inventory levels in China of complete ball bearings were at 74,744 in 2002, down from 74,830 in 2001 and up from 72,419 in 2000. Those levels were projected to drop in 2003, to 41,159, and again in 2004, to 38,567. Staff Report, tbl. VII–1–A. U.S. importers' end of period inventory levels of complete ball bearings were at 49,428 in 2002, down from 54,691 in 2001 and 51,263 in 2000. *Id.*, tbl. VII–3.

[25] The ITC states that its inquiry with respect to inventories is

> whether inventories at the end of the period, whether held in China or by U.S. importers, significantly exceed year-end inventories earlier in the period. This is because inventories are an integral, inescapable consequence of manufacture and sale of products, and do not, in themselves, indicate a threat of increased subject import shipments separate from any capacity and production analysis, unless those inventories are highest at the end of the period.

Def.'s Resp. at 38–39.

the ITC should have applied.[26] Rather, ABMA proposes the following:

> Faced with continued competitive pressure from aggressively priced Chinese imports, the domestic industry would be forced to cut prices even more [than they did during the period of investigation] in order to avoid losing more sales, revenue, and market share. Moreover, these low prices and the significant underselling would be likely to generate greater demand for Chinese products.

Id. at 38. According to the ITC, this "alternate scenario" amounts to speculation, and as such is an insufficient basis upon which to make a threat determination. Def.'s Resp. at 40 (citing 19 U.S.C. § 1677(7)(F)(ii)).

The court is not convinced that the ITC has made any error with respect to its future price effects finding. While "[a] threat of material injury determination necessarily involves a prediction of the future," speculation may not be the basis of an affirmative threat determination. *Comm. for Fair Beam Imps.*, 27 CIT at ___ slip op. 03–73 at 41. ABMA's proposed sequence of future events, while plausible, amounts to mere speculation and is not the basis for an affirmative threat determination. "That [ABMA] can point to evidence of record which detracts from the evidence which supports the Commission's decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive." *Matsushita*, 750 F.2d at 936. ABMA has not shown that the ITC's findings with respect to capacity, inventories, and future price effects are unsupported by the evidence but rather has urged a different interpretation of the record evidence than that made by the ITC. No challenge has been made to the ITC's findings with respect to the remaining factors. The ITC's threat determination satisfies the substantial evidence standard, and accordingly, it is sustained.

CONCLUSION

For the reasons stated above, ABMA's motion for judgment upon an agency record is denied, the ITC's Final Determination is sus-

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[26] Nothing in the threat statute forbids the ITC from considering the volume and price effects findings it is obligated to make with respect to present material injury. While the "absence of any *indicia* of *present* injury is not considered conclusive that *threat* of injury does not exist," the findings made with respect to whether there is present material injury are relevant. *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 17 CIT 146, 150, 818 F. Supp. 348, 354 (1993) (emphasis in original) (citing *Rhone Poulenc*, 592 F. Supp. at 1323–24 (citing H. REP. NO. 317, 96th Cong., 1st Session 47 (1979)); *Goss Graphics Sys., Inc. v. United States*, 216 F.3d 1357, 1362 (Fed. Cir. 2000) ("For a threat determination, § 1677(7)(F)(i) sets forth relevant economic factors the ITC must consider, including material injury caused by imports or sales for importation."). Therefore, it was not improper for the ITC to consider its findings with respect to price effects.

tained, and this case is dismissed. Judgment shall be entered accordingly.

Slip Op. 04–121

ANSHAN IRON & STEEL COMPANY, LTD., *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA Defendant, and UNITED STATES STEEL CORPORATION, and GALLATIN STEEL COMPANY, *et al.*, Defendant-Intervenors.

PUBLIC VERSION
Before: WALLACH, Judge
Consol. Court No. 02–00088

[United States Department of Commerce's Final Results Pursuant to Remand are Remanded]

Decided: September 22, 2004

Lafave & Sailer, LLP, (*Francis J. Sailer, Arthur J. Lafave III*), for Plaintiffs Anshan Iron & Steel Co., Ltd., and Benxi Iron & Steel (Group) Co., Ltd.

White & Case, LLP, (*William J. Clinton, Adams C. Lee, Robert G. Gosselink, William J. Moran*) for Plaintiff Shanghai Baosteel Group Corp., Baosteel America, Inc., and Baosteel Group International Trade Corp.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director; *Stephen C. Tosini*, Trial Attorney, U.S. Department fo Justice, Civil Division, Commercial Litigation Branch; *Patrick V. Gallagher*, Senior Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for Defendant.

Skadden, Arps, Slate, Meagher & Flom, LLP, (*John J. Mangan*), for Defendant-Intervenors United States Steel Corp.

Schagrin Associates, (*Roger B. Schagrin*) for Defendant-Intervenors Gallatin Steel Co., IPSCO Steel Inc., Steel Dynamics, Inc. and Weirton Steel Corp.

Wiley, Rein & Fielding, LLP, (*Timpthy C. Brightbill*), for Defendant-Intervenors Nucor Corp.

OPINION

WALLACH, Judge:

I
Introduction

This matter is before the court following remand to the United States Department of Commerce, International Trade Administration (the "Department," "Commerce" or "ITA"). In *Anshan Iron & Steel Company, Ltd., et al., v. United States*, 27 CIT ___, Slip. Op. 03–83 (July 16, 2003) ("*Anshan I*"), this court remanded Commerce's

determination contained in *Final Determination of Sales at Less Than Fair Value: Certain Hot Rolled Carbon Steel Flat Products from the People's Republic of China*, 66 Fed. Reg. 49,632 (Sept. 28, 2001) ("Final Determination") and the accompanying *Issues and Decision Memorandum for the Less than Fair Value Investigation of Certain Hot Rolled Carbon Steel Flat Products from the People's Republic of China: April 1, 2000 through September 30, 2000* (Sept. 21, 2001) ("Decision Memo"). Pub. Doc. 349, Appendix to Memorandum of Law in Support of Baosteel's Rule 56.2 Motion for Judgment Upon The Agency Record ("Baosteel App.") Attachment 4. Plaintiffs Anshan Iron & Steel Company, Ltd., New Iron & Steel Company, Ltd. and Angang Group International Trade Corporation ("Plaintiff Anshan" or "Anshan"); Benxi Iron & Steel Company, Ltd., Benxi Steel Plate Company, Ltd., and Benxi Iron & Steel Group International Economic and Trade Company, Ltd. ("Plaintiff Benxi" or "Benxi"); and Shanghai Baosteel Group Corporation, Baosteel American, Inc., and Baosteel Group International Trade Corporation ("Plaintiff Baosteel" or "Baosteel") (collectively "Plaintiffs") had moved for judgment upon the agency record pursuant to USCIT Rule 56.2, challenging certain aspects of Commerce's decision. Pursuant to this court's ruling in *Anshan I*, Commerce reconsidered certain aspects of its Final Determination and issued its Final Results Pursuant to Remand (Nov. 7, 2003) ("Remand Results"). Plaintiffs now challenge Commerce's continued reliance upon surrogate values for Plaintiffs' self-produced intermediate inputs.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). For the reasons set forth below, Commerce's Redetermination is remanded for action consistent with this opinion.

II
Background

Plaintiffs produce and export certain hot-rolled carbon steel flat products from China. In the process of producing hot-rolled steel, Plaintiffs utilize both purchased and self-produced inputs. Among their self-produced intermediate inputs are electricity generated from the processing of purchased coal, as well as oxygen, nitrogen, and argon gases. These inputs are produced from various purchased materials, including, *inter alia*, iron ore, scrap, coal, water, and other chemicals. *See Anshan I*, Slip. Op. 03–83 at 3–4.

Plaintiffs provided a factors of production database to the Commerce Department on February 26, 2001, in which they reported their consumption of coal and other material, energy, and labor factors used to produce the intermediate inputs. Commerce confirmed the accuracy of the reported factors during on-site verification.

In its Preliminary Determination, Commerce assigned surrogate values to Plaintiffs' intermediary inputs rather than including valu-

ations for Plaintiffs' factors of production database. *See Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From the People's Republic of China*, 66 Fed. Reg. 22,183 (May 3, 2001) ("Preliminary Determination"). In order to calculate selling and general expenses, Commerce averaged the 1999–2000 financial statements of two Indian steel producers; Tata Iron and Steel Company, Ltd. ("TATA") and Steel Authority of India, Ltd. ("SAIL"). *Id.* at 22,193. To calculate profit, Commerce used excerpts of TATA's 2000–2001 financial statement. *Id.*

On September 21, 2001, Commerce issued its Decision Memo, and on September 28, 2004, Commerce issued its Final Determination. Commerce continued to value the intermediate energy inputs based upon the reported factor usage rates for each of the inputs, rather than valuing the inputs used to produce the intermediate inputs. Decision Memo at 17. For general expenses and profit, Commerce relied solely on an excerpt of TATA's 2000–2001 financial statement. *Id.* at 23–24. On October 15, 2001, and October 31, 2001, Plaintiffs Anshan, Benxi and Baosteel requested an opportunity to comment on what they considered new information referenced in Commerce's final determination. Commerce rejected this request and returned plaintiffs' letters, stating that they contained untimely argument.

On July 16, 2003, this court ruled that Commerce had deviated from its established practice of valuing factors of production of self-produced intermediate inputs without adequately addressing the deviation, and that Commerce should have adjusted Baosteel's factors of production to reflect its decision to treat Baosteel's defective hot-rolled sheets as non-prime merchandise under investigation sold in the home market. *Anshan I*, Slip. Op. 03–83 at 18, 30. Accordingly, Commerce was directed to either provide an adequate explanation for its deviation from previous practice, or assign surrogate values to Plaintiffs' factors of production for its self-produced intermediate inputs, and to "adjust Plaintiff Baosteel's factors of production calculations in order to reflect Commerce's decision not to treat Baosteel's defective sheets as a byproduct." *Id.* at 18, 34. Familiarity with the decision in *Anshan I* is presumed.

On November 7, 2003, Commerce filed Final Results Pursuant to Remand stating that it had

> (1) provided an explanation for its methodology in assigning surrogate values to Respondents' self-produced factors in this investigation; and (2) adjusted Baosteel's reported factors by adding the total amount of defective hot-rolled sheet produced during the period of investigation ("POI") to the total amount of merchandise under investigation in the denominator of the factor of production ratios.

Remand Results at 1.

III
Standard of Review

In reviewing Commerce's Final Determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1999); *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT 1150, 1152 (2001). "Substantial evidence has been defined as "more than a 'mere scintilla,' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion .' " *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938)). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–5 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987)); *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir., 1984); *see also Negev Phosphates, Ltd. v. United States*, 12 CIT 1074, 1076–77 (1988) (holding that the court neither weighs the evidence nor substitutes its own judgment for that of the agency). However, "[t]he court will find a determination unlawful where Commerce has failed to carry out its duties properly, relied on inadequate facts or reasoning, or failed to provide an adequate basis for its conclusions." *Rhone-Poulenc, Inc. v. United States*, 20 CIT 573, 575 (1996) (citing *Budd Co. Ry. Div. v. United States*, 1 CIT 67, 70–76 (1980); *Indus. Fasteners Group v. United States*, 2 CIT 181, 190 (1981)).

IV
Analysis

A
Commerce's Valuation of Plaintiffs' Intermediate Inputs Continues to be Unsupported by the Evidence and Not in Accordance With Law

In *Anshan I* this court held Commerce's valuation of Plaintiff's inputs to be unsupported by substantial evidence and not in accordance with law. *Anshan I*, Slip. Op. 03–83 at 6. Thus, the court directed Commerce to "either (1) provide an adequate explanation for its deviation from previous practice, or (2) assign surrogate values to Plaintiffs' factors of production for its self-produced intermediate inputs." *Id.* at 18.

Commerce now claims to have clarified its position concerning the valuation of self-produced inputs in the two years since the Final De-

termination. Remand Results at 14–16. Commerce claims that currently, it matches the valuation of inputs to the respondent's actual manufacturing experience unless to do so would either make a minimal difference, or "a significant element of cost would not be adequately accounted for in the overall factors build up." Defendant's Response to Plaintiffs' Comments Concerning Defendant's Final Remand Determination ("Defendant's Response") at 7 (quoting Remand Results at 15). To establish what it now describes as a case-by-case approach, Commerce enumerates several past and present cases as examples. Remand Results at 4–5. To establish past practice Commerce cites *Notice of Final Determination of Sales at Less Than Fair Value: Coumarin from the People's Republic of China*, 59 Fed. Reg. 66,895, 66,901 (December 28, 1994) ("*Coumarin from China*") in which factors of production for self-produced inputs were *not* directly valued because their percentage in the overall process was so small that their valuation would not increase accuracy.

Commerce points out that in *Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China*, 62 Fed. Reg. 61,964 (Nov. 20, 1997) ("CTL Plate"), where sufficient data was available and verified, the factors of production for self-produced intermediate inputs *were* directly valued. In *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products from the People's Republic of China*, 65 Fed. Reg. 1,117 (January 7, 2000) ("*Cold-Rolled I*"), Commerce notes, where the accuracy of the data could not be determined, the factors of production for intermediate inputs were *not* directly valued. Commerce also provides more recent examples of its approach to valuing factors of production for self-produced intermediate inputs. In *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Structural Steel Beams from the People's Republic of China*, 66 Fed. Reg. 67,197 (December 28, 2001) ("*Steel Beams*") and *Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Ukraine*, 67 Fed. Reg. 55,785 (Aug. 30, 2002) ("*Wire Rod*"), Commerce did not value the inputs into self-produced factors because there was no record evidence that the surrogate companies produced these inputs. Remand Results at 14–15. In the most recent case cited, *Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 37,116 (June 23, 2003) ("*Frozen Fish from Vietnam*"), Commerce articulated the policy of valuing factors of production which go into self-produced intermediate inputs unless one of two conditions apply. The first, as reflected in *Coumarin from China*, is when the percentage of these factors is so small as to be insignificant; the second, as reflected in *Cold Rolled I*, *Steel Beams*, and *Wire Rod*, is

when significant elements are not adequately accounted for or the accuracy of the information needed cannot be determined.[1] *Frozen Fish from Vietnam*, 68 Fed. Reg. at 37,121.

In its Remand Results, Commerce repeatedly emphasizes its goal of accuracy and concludes that, because the limited evidence on the record, *i.e.* TATA's excerpted 2000–2001 financial statement, "does not contain any statements that TATA self-produced any type of power," its decision to assign surrogate values to Plaintiffs' self-produced factors results in a more accurate calculation than assigning surrogate values to the inputs into these self-produced factors. Remand Results at 3 and 10, n.1.

Plaintiff Anshan disputes Commerce's Remand Results, claiming that they are neither in keeping with Commerce's standard practice nor in accordance with this court's instructions in *Anshan I*. Anshan argues that in assigning surrogate values to intermediate inputs, Commerce cites to previous decisions which either do not support its decision here or which directly contradict its reasoning here. Comments of Plaintiffs Anshan and Benxi on the Final Results Pursuant to Remand Issued by Defendant ("Anshan's Comments") at 1–2.

Anshan argues that of the three cases which Commerce cites to support its decision, only one, *Coumarin from China*, actually allows for the administrative short cut of valuing intermediate inputs. Plaintiff Anshan points out that in that instance, Commerce both acknowledged its departure from standard practice and justified it by noting that it had no significant impact on the calculation of normal value. *Id.* at 2. Anshan distinguishes *Cold-Rolled I* by pointing out that there Commerce "could not clearly determine what portion of self-produced energy factor went into direct steelmaking," and because it was a one issue adverse facts available case, there was no further explanation. *Id.* at 3 (citing *Cold Rolled I*, 65 Fed Reg at 1,125). Whereas "[t]he record in the present case contained complete and verified factors of production for electricity and industrial gases." *Id.* at 4, n. 3 (citing *Anshan I*, Slip. Op. 03–83 at 17). Anshan points out that in *CTL Plate* Commerce utilized the reported and verified intermediate input factors of production submitted by the respondents. Anshan quotes Commerce's statement in *CTL Plate* that "[i]t is the Department's practice to collect data on all direct inputs actually used to produce the subject merchandise, including any indirect inputs used in the in-house production of any direct input." *Id.* at 3 (citing *CTL Plate*, 62 Fed. Reg. at 61,976).

Anshan claims that Commerce has disregarded the Court's holding in *Anshan I*, and that Commerce should have recognized, as it did in *Cold Rolled II*, "that TATA did, in fact produce a significant

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[1] This court does not rely on subsequent determinations for precedential value. Thus, determinations subsequent to September 28, 2001, the date of the final results in the instant matter, may not be used to establish commerce's standard practice.

amount of the electricity it consumed during the year relevant to this case." *Id.* at 6 (citing *Anshan I*, Slip. Op. 03–83 at 17). In response to Commerce's claim that its overarching desire is to "generate the most accurate result," Plaintiff states that "The Department's use of semantics here is disingenuous, at best." *Id.* at 3.

Plaintiff Baosteel argues that Commerce failed to provide a reasonable explanation for its continued refusal to calculate normal value based on Baosteel's actual factors of production. Baosteel argues that Commerce's entire argument is premised on speculation that TATA did not produce its own power, based on TATA's excerpted 2000–2001 financial statement.[2] Baosteel's Comments on The Department's Remand Determination ("Baosteel's Comments") at 2–3. Baosteel points out, however, that all parties are aware that TATA does in fact produce its own electricity. Baosteel claims that "[Commerce's] entire determination on remand stems from its unsupported belief that TATA does not self-produce electricity and that because of this unsupported belief the Department speculates about the existence of a *potential* 'imbalance in the representative capital costs from the surrogate company.' " *Id.* at 3. (emphasis in original) (citing *Anshan I*, Slip. Op. 03–83 at 16, n.7.)[3]

Baosteel further argues that Commerce's claim that valuation of the factors of production for intermediate inputs is prohibitively difficult is contradicted by commerce's valuation of such inputs in *CTL Plate*. *See* Baosteel's Comments at 10.

As this court pointed out in *Anshan I*, Commerce is generally at liberty to discard one methodology in favor of another where neces-

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[2] The court reiterates here, as stated in *Anshan I*, under *Asociacion Columbiana de Exportadores de Flores v. United States*, 13 CIT 13, 15 (1989), *aff'd* 901 F.2d 1089 (Fed. Cir. 1990), "Speculation is not support for a finding. . . ."

[3] Indeed, Commerce acknowledged TATA's electricity production capabilities in a recent determination. *See Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From the People's Republic of China*, 67 Fed. Reg. 31,235, 31,239 (May 9, 2002) ("Cold-Rolled II"). In *Cold-Rolled II*, Commerce stated:

> In this case, as explained below, to value overhead, selling general and administrative ("SG&A"), interest, and profit, we are relying on the 2000–2001 financial statements of Steel Authority of India Limited ("SAIL") and TATA Steel ("TATA"), both of whom are Indian integrated steel producers of cold-rolled steel. The financial statements of both companies . . . indicate that during the 2000–2001 financial year SAIL and TATA self produced approximately 60 and 54 percent, respectively, of the electricity they consumed.

Id. Commerce's decision in the present case therefore directly contradicts its previous acknowledgment that, during the year in question, TATA produced a significant amount of the electricity it consumed.

Anshan I, Slip. Op. 03–83 at 16.

The Court in *Anshan I* held that it was entitled to take judicial notice of *Cold Rolled II*. *Id.* (citing *Borlem S.A. - Empreedimentos Industriais v. United States*, 913 F.2d 933, 937 (Fed. Cir. 1990) and *Union Camp Corp. v. United States*, 23 CIT 264, 278 (1999)).

sary to calculate a more accurate dumping margin, however, Commerce must, *inter alia*, explain the basis for its change of methodology and demonstrate that its explanation is in accordance with law and supported by substantial evidence. *Cultivos Miramonte S.A. v. United States*, 21 CIT 1059, 1064, 980 F. Supp. 1268, 1274 (1997); *Fujian Mach.*, 178 F. Supp. 2d at 1327–28. In *Anshan I*, Plaintiff's had disputed Commerce's decision, in its Final Determination, to "value respondents' energy inputs (*i.e.*, oxygen, argon, nitrogen, and electricity) through the use of surrogate valuation, rather than based on surrogate valuation of the factors going into the production of those inputs." Decision Memo at 17. Commerce had determined that Plaintiffs' capital intensive process would result in inaccuracies because these "capital costs . . . do not appear on TATA's financial statements and would not be included in the normal value under respondents' preferred methodology." *Id.* Commerce's reasoning was based on the assumption that, because TATA purchased energy inputs, it did not also self-produce these inputs. *Id.* The court found this assumption to be speculative and unfounded. *Anshan I*, Slip. Op. 03–83 at 16. Commerce was relying on an incomplete version of TATA's 2000–2001 financial statement. *Id.* Its reasoning was directly contradicted by the complete version of this data which was on the record in another investigation. *Id.* at 16–17. The court thus found that Commerce was not justified in its deviation from its established practice as reflected in *CTL Plate* (where Commerce refused to disregard the reported and verified intermediate input factors of production that had been submitted by the respondents).[4] *See Id.* at 8–9.

> The court held that:
>
> > [i]n valuing Plaintiffs' intermediate inputs, Commerce [had] deviated from its well-established practice of assigning surrogate values to the factors of production for those intermediate inputs without providing an adequate explanation for such deviation. Commerce's failure to rely on Plaintiffs' submitted and verified factors of production [was] inconsistent with the statute's directive to use the best available information to construct a nonmarket economy ("NME") product's normal value as it would have been if the NME were a market economy country.

Id. at 6–7.

Deference is due to Commerce's decisions and the reviewing court may not substitute its judgment for that of Commerce. *See Davis v.*

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[4] See also *Anshan I*, Slip. Op. 03–83 at 8, n. 2 (citing *Coumarin from China*, 59 Fed. Reg., at 66,899 and *Silicomanganese From the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review*, 65 Fed. Reg. 31,514, 31,515 (May 18, 2000) and accompanying Issues and Decision Memorandum (May 18, 2000), for the proposition that the Department's established practice is to value self-produced inputs using the value of the factors of production employed to manufacture the input).

Califano, 599 F.2d 1324 (1979) ("Neither this court nor the district court may substitue its judgement as to facts or credibility for the judgment of the administrative law judge."). Here Commerce, the finder of fact, has based its conclusion on a false premise; that TATA did not self-produce electricity. *See id*. at 1326. " 'If the (administrative law judge) does not have before him sufficient facts on which to make an informed decision, his decision is not supported by substantial evidence'." *Id*. at 1327 (citing McGee v. Weinberger, 518 F.2d 330, 332 (5th Cir. 1997)). This court has consistently held that deference is not due an agency determination which relies upon inadequate factual basis or is inconsistent with congressional intent. *See, e.g.*, *Rhone-Poulenc Inc.*, 20 CIT at 575 (citing *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368, 106 S. Ct. 681, 88 L. Ed. 2d 691 (1986); *Budd Co. Ry. Div.*, 1 CIT at 70–76; *Indus. Fasteners Group v. United States*, 2 CIT 181, 190 (1981)). Here the lack of complete factual basis, *i.e.*, the incomplete financial statement of TATA, is made all the more egregious by the acknowledged existence, on the record in *Cold Rolled II*, of TATA's complete financial statement.

Defendant frames one issue for review as follows: "whether Commerce's determination that the surrogate market company did not self-produce electricity, based upon the partial financial statement upon the record of this segment of proceedings, is supported by substantial evidence." Defendant's Response at 2. *Evidence cannot be substantial if Commerce is aware that the conclusion it supports is false. See Budd Co. Ry. Div.*, 1 CIT at 70–76. Commerce attempts to justify its position by stating that: "[t]he source of the information from the *Cold-Rolled II* investigation is the complete 2000–2001 TATA financial statement. The complete TATA financial statement for 2000–2001 is not on the record of the present case." Remand Results at 12. Commerce also argues that it was the Plaintiffs' failure to place TATA's full financial statement on the record that causes them now to bear the consequences of its omission. Defendant's Response at 11 (citing *Mannesmannreohren-Werke AG v. United States*, 120 F. Supp. 2d 1075, 1085 (CIT 2000)). This argument ignores both this court's holding in *Anshan I* and Commerce's statutory obligation to use the best available information. *See* 19 U.S.C. 1677b(c)(1) (1999).

Once again this court finds that "deference is not owed to a determination that is based on data the agency generating those data indicates are incorrect." *Anshan I*, Slip. Op. 03–83 at 16, n. 7 (citing *Union Camp Corp.*, 23 CIT at 278). Although the court took explicit notice of the information at issue in *Anshan I*, Commerce states that because the court did not order the record to be reopened, it must rely upon the record evidence limited to this case. Defendant's Reply at 11. In order to make the matter clear, the court will now order the record re-opened and the entire TATA financial statement for

2000–2001 admitted. Accordingly, Commerce's Remand Results are remanded on the issue of valuation of factors of production.

B
Commerce's has Adjusted Plaintiff Baosteel's Factors of Production for Defective Hot-Rolled Sheets and is Now In Accordance With Law.

In *Anshan I*, this court instructed Commerce to "adjust Plaintiff Baosteel's factors of production calculations in order to reflect Commerce's decision not to treat Baosteel's defective sheets as a byproduct." *Anshan I*, Slip. Op. 03–83 at 34. The parties do not now contest that Commerce has complied with this instruction, and thus Remand Results are affirmed as to this issue.

V
Conclusion

The court has found no reasonable basis for failure to consider TATA's complete financial statement. Defendant having disregarded the court's previous order, Defendant is hereby directed to reopen the record of this case, admit TATA's complete financial statement, and consider that information in its redetermination. Upon consideration of TATA's complete financial statement, Commerce is hereby once again directed to reconsider its factors of production analysis by either providing an adequate explanation for what the court has herein found to be a deviation from previous practice, or assigning surrogate values to Plaintiffs' factors of production for their self-produced intermediate inputs. If Commerce concludes that the value obtained from reliance upon Plaintiff's values for its factors of production for self-produced intermediate inputs would not fulfill its statutory obligation to use the best available information, it must specifically describe how the information is unreliable.

Thus, if Commerce again finds that, even in light of the complete financial statement for TATA from 2000–2001, it is appropriate to deviate from its established practice, it must address the analysis set forth in *Frozen Fish from Vietnam*. To this end, Commerce must state whether and how the facts in this case lead to the conclusion that either (a) as in *Coumarin from China*, the percentage of self-produced intermediate inputs valued directly is insignificantly small so as to make the choice not to value the factors that went into those inputs irrelevant, or (b) as in *Cold Rolled I* and *Steel Beams* the accuracy of the evidence could not be determined or there was no evidence that the surrogate country self-produced inputs.

For the foregoing reasons, the Court remands this case for action in accordance with this opinion.

Slip Opinion 04–131

NIPPON STEEL CORPORATION, NKK CORPORATION, KAWASAKI STEEL CORPORATION and TOYO KOHAN CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, WEIRTON STEEL CORPORATION, Defendant-Intervenor.

Court No. 00–09–00479
Public Version

[ITC second remand determination remanded.]

Dated: October 14, 2004

Willkie Farr & Gallagher (*William H. Barringer, Christopher Dunn, James P. Durling, Daniel L. Porter,* and *Robert E. DeFrancesco*) for plaintiffs.

Lyn M. Schlitt, Director of Office of External Relations, *James M. Lyons,* General Counsel, *Marc A. Bernstein,* Assistant General Counsel, United States International Trade Commission (*Laurent de Winter* and *Neil Joseph Reynolds*) for defendant.

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

OPINION

RESTANI, Chief Judge:

Before the court is the United States International Trade Commission's ("Commission" or "ITC") second remand determination concerning tin- and chromium-coated steel sheet ("TCCSS") imports from Japan. In its original determination, the Commission concluded that the United States TCCSS industry was materially injured by reason of TCCSS imports from Japan ("subject imports") that were sold at less than fair value ("LTFV"). *Tin- and Chromium-Coated Steel Sheet From Japan*, 65 Fed. Reg. 50,005, USITC Pub. 3300, Inv. No. 731–TA–860 (final determ.) (Aug. 2000) (A.R. 2–148) [hereinafter *Final Determination*]. Although the court found the Commission's conclusions with respect to subject import volume supported by substantial evidence, the court ordered the Commission to reevaluate its analysis of the effect of subject imports on domestic pricing as well as its conclusions with respect to causation. *Nippon Steel Corp. v. United States*, 182 F. Supp. 2d 1330, 1356 (Ct. Int'l Trade 2001) ("*Nippon I*").

On remand, the Commission again determined that the domestic industry was materially injured by reason of subject imports. *Tin- and Chromium-Coated Steel Sheet from Japan*, Inv. No. 731–TA–860 (final determ.) (March 2002) (A.R. 2–261R) [hereinafter *First Remand Determination*]. After reviewing the Commission's explanations and the evidence, the court found otherwise. *Nippon Steel Corp. v. United States*, 223 F. Supp. 2d 1349 (Ct. Int'l Trade 2002) ("*Nippon II*"). The court held that uncontested evidence established that LTFV subject imports did not have a material effect on domestic

prices and that there was no valid reason to discount non-price factors or non-subject imports as the predominant cause of material injury. *Id.* Furthermore, the court found that a remand for reconsideration or recalculation was not necessary because the Commission had "demonstrated an unwillingness or inability to address the substantial claims made by the respondents or the concerns expressed by the court in *Nippon I* . . ." *Id.* at 1371–72. Instead, the court vacated the affirmative injury finding and directed the Commission to enter a negative material injury determination. *Id.* at 1372.

The Commission appealed the court's decision in *Nippon II*. The Court of Appeals for the Federal Circuit held that this court abused its discretion by not returning the case to the Commission for further analysis. *Nippon Steel Corp. v. United States*, 345 F.3d 1379, 1381 (Fed. Cir. 2003) ("*Nippon III*"). The Federal Circuit explained that "to the extent that the Court of International Trade engaged in refinding the facts (*e.g.*, by determining witness credibility), or interposing its own determinations on causation and material injury itself, [it] . . . exceeded its authority." *Id.* The Federal Circuit vacated the court's decision in *Nippon II* and remanded the case to the Commission to "attend to all the points made by the Court of International Trade, especially those of [*Nippon II*] which the Commission [had] not yet had the opportunity to address." *Id.* at 1382.

Therefore, the Commission considered the case on a second remand. In its second remand determination, the Commission determines that the domestic industry was materially injured by reason of Japanese imports. *Tin- and Chromium-Coated Steel Sheet from Japan*, Inv. No. 731–TA–860 (Feb. 2004) (A.R. 2–263R) [hereinafter *Second Remand Determination*].[1] Nippon Steel Corporation, NKK Corporation, Kawasaki Steel Corporation, and Toyo Kohan Co., Ltd., (collectively "Nippon" or "Plaintiffs"), challenge this determination on the grounds that the Commission's findings of price effects and causation remain unsupported by substantial evidence. For the reasons set forth below, the Commission's affirmative material injury determination is remanded with instructions to issue a negative material injury determination.

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[1] The Commission made this determination in a 4–2 vote. Chairman Okun, Vice Chairman Hillman, and Commissioners Miller and Lane join in the majority views. Commissioners Koplan and Pearson dissent. Commissioner Koplan reaffirms his original dissenting views, finding that an industry in the United States is not materially injured by reason of subject imports from Japan. *See Tin- and Chromium-Coated Steel Sheet from Japan*, Inv. No. 731–TA–860 (Final), Publication 3337 (Aug. 2000) at 21. Commissioner Pearson did not participate in either the original vote or the vote on the first remand. He adopts as his own the views of the Commission's Original Determination in Sections I and II ("Domestic Like Product" and "Conditions of Competition") and the dissenting views of Commissioner Koplan.

JURISDICTION AND STANDARD OF REVIEW

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

OVERVIEW

TCCSS is a tin-coated flat-rolled steel product, primarily used in the production of containers for the food processing industry.[2] The domestic TCCSS industry is characterized by unique conditions of competition. For example, there are a relatively small number of buyers and sellers: Seven domestic suppliers ("suppliers" or "producers"), two dozen importers, and six major U.S. purchasers.[3] In addition, the majority of U.S. suppliers are located in the Eastern and Midwestern United States and typically supply facilities in those areas.[4] Although Japanese suppliers compete more heavily in the West, they supply purchasers throughout the United States. *Id.* at II–7, Table II–1. Non-subject imports, on the other hand, compete only in the East and Midwest, and during the period of investigation entered the U.S. market in larger volumes than Japanese imports. *Id.* at II–7, IV–5. *Id.* Nonetheless, domestic mills account for the majority of U.S. consumption.[5] Furthermore, TCCSS is almost always sold pursuant to annual contracts that establish fixed prices and target volumes. Prior to entering into a contract, however, the majority of purchasers require suppliers to demonstrate an ability to make reliable deliveries, supply high-quality product and specialty items, and provide quality service. *Id.* at II–10. These non-price considerations are important factors to TCCSS purchasers. *Id.*

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[2] Other uses of TCCSS include oil filters, snuff containers, bottle tops, paint containers, pails, furniture, aerosol cans, toys, household utilities, computer applications, film canisters, and bake ware. *Final Staff Report* at I–6, II–1 (A.R. 2–145, 2–146) [hereinafter *Staff Report*].

[3] Domestic purchasers have recently become more concentrated. In 1990, the six largest purchasers accounted for only [ ]% of tin mill consumption. *Staff Report* at V–6. In 1999, however, they accounted for nearly [ ]% of apparent domestic consumption. *Id.* These six purchasers have used this significant gain in market power to obtain lower prices from their suppliers. *Id.* at V–7. Where necessary, the court will refer to these purchasers as follows: Purchaser A is [ ]; Purchaser B is [ ]; Purchaser C is [ ]; Purchaser D is [ ]; Purchaser E is [ ]; and Purchaser F is [ ].

[4] Due to high transportation costs, most U.S. suppliers maximize shipments east of the Rockies. *Id.* at II–1, n.1.

[5] Over the period of investigation, domestic producers accounted for approximately [ ]% of U.S. consumption. *Id.* In addition, several major purchasers operate canning facilities on the grounds of U.S. mills and commit to buy a minimum volume of steel from those suppliers. *Id.*

DISCUSSION

In the final phase of an antidumping duty investigation, the Commission determines whether an industry in the United States is materially injured by reason of the imports under investigation. 19 U.S.C. § 1673d(b). Material injury is defined as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A). An affirmative material injury determination requires the Commission to find that the volume, price effects, and impact of the subject imports are significant, and that the material injury was by reason of the subject imports. *Id.* § 1677(7)(B); *see also Gerald Metals, Inc. v. United States*, 22 CIT 1009, 1012–13, 27 F. Supp. 2d 1351, 1354–55 (1998). In this case, the court previously upheld the Commission's determination of a small but significant volume, and Plaintiffs did not challenge the Commission's findings on impact. *Nippon I*, 182 F. Supp. 2d at 1340. Thus, the court now reviews the Commission's findings regarding (I) price effects, and (II) causation.

I. Price Effects

In evaluating the effect of subject imports on domestic prices, the Commission must consider whether there has been "significant price underselling by the imported merchandise," and whether the effect of such imports "otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree." 19 U.S.C. § 1677(7)(C)(ii). In addition, the Commission must evaluate price effects within the context of the "conditions of competition that are distinctive to the affected industry." *Id.* § 1677(7)(C)(iii). In *Nippon II*, the court held that the Commission's finding of significant price effects was unsupported by substantial evidence. 223 F. Supp. 2d 1351–52. Specifically, the court found that the Commission (A) failed to explain its selection and compilation of price comparison data, (B) did not support its finding of significant underselling, (C) ignored evidence contradicting a finding of domestic price depression, and (D) did not consider the industry's unique conditions of competition. *Id.* The Commission addresses these concerns in its Second Remand Determination, however, the record as a whole continues to demonstrate that subject imports did not have a significant effect on domestic prices.

A. Selection and Compilation of Price Comparison Data

The Commission has "broad discretion in analyzing and assessing the significance of the evidence on price undercutting." *Copperweld Corp. v. United States*, 12 CIT 148, 161, 682 F. Supp. 552, 565 (1988). It must, however, "provide a reasonable explanation as to why it chose the evidence used to support its findings." *Bratsk Aluminum Smelter v. United States*, No. 03–00200, Slip Op. 04–75 at 10 (Ct. Int'l Trade June 22, 2004). In *Nippon II*, the court held that the Commission failed to provide a reasonable explanation as to why it

(1) separated out Purchaser A's different facilities and product types, (2) considered only bids that ultimately culminated in final sales, and (3) analyzed underselling data for only 1999.

1. Considering Purchaser A's Data Separately

The court previously held that the Commission failed to explain its decision to keep Purchaser A's separate facilities and product types in disaggregated form. *Nippon II*, 223 F. Supp. 2d at 1355. As a result, the Commission now calculates a single aggregate unit price for Purchaser A's facilities and products and then includes that data in its price comparison tables.[6] Plaintiffs challenge the Commission's aggregation of this data with respect to the bid and volume comparison table, Table Second Remand 3 ("Table 3").[7] Plaintiffs point out that after the Commission aggregated Purchaser A's data, the number of subject underselling bids decreased but the volumes associated with those bids increased. *Pl.'s Resp.* at 4. Therefore, Plaintiffs argue that the Commission must have incorrectly calculated or erroneously listed volumes associated with these underselling bids. *Id.* The Commission responds that it accurately prepared Table 3 by aggregating the purchaser's data, and listing the average annual Japanese bids, and the volumes associated with those bids, in the appropriate column. *ITC Reply* at 5.

The Commission fails to address why aggregation of Purchaser A's data altered Table 3's total volume calculation.[8] Although the Commission notes that the actual number of bids decreased due to aggregation, it fails to explain why the volumes associated with low bids increased, while those with high bids decreased. Indeed, the Commission's assertion that "concerns over over-representation arise only with respect to the number of bids, and not with respect to the

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[6] In its Second Remand Determination, the Commission also amended Purchaser B's pricing data, a portion of which was inadvertently omitted from the Staff Report. *Second Remand Determ.* at 21. Plaintiffs argue that the Commission erroneously set out Purchaser B's data and submit their own version. *Pl.'s Resp.* at 14 n.2. The parties' disagreement seems to stem from how to round the numbers. While the Commission rounds the data to the first decimal point, Plaintiffs round the data to the second. Because this slight discrepancy does not affect price effects or causation analyses, the Commission's compilation of Purchaser B's data is reasonable. *See Second Remand Determ.* at Revised Table V–9 (Revised); *Pl.'s Resp.* at Corrected Table V–9 (Revised).

[7] Table 3 compares Japanese and U.S. bids by listing the number of Japanese bids and the total volume associated with those bids in the respective column: "Below all U.S. bids," "within the range of all U.S. bids," "above all U.S. bids," "no comparable final U.S. bid," or "initial Japanese bid but no final Japanese bid." *Second Remand Determ.* at 24.

[8] In particular, the total volume of Japanese bids "below all U.S. bids" in the Commission's First Remand Determination was [ ]. *First Remand Determ.* at 10. In Table 3, however, that number increased to [ ]. *Second Remand Determ.* at 24. In addition, the total Japanese volume associated with bids "above all U.S. bids" in the earlier determination was [ ], but [ ] in Table 3. Although the Commission used Purchaser B's amended pricing data in Table 3, it does not attribute this volume discrepancy to Purchaser B's new data.

volume of sales won by the Japanese suppliers," seems to suggest that aggregation would not alter total volume calculations. *Second Remand Determ.* at 24 n.97. Because the Commission has failed to explain this volume discrepancy in Table 3, it is unreasonable for it to rely on this data in its underselling analysis. *See infra* n.13.

2. Considering Only Bids Resulting in Final Sales

In addition, the court previously held that the Commission's consideration of only those bids that ultimately resulted in final sales might give skewed results. *Nippon II*, 223 F. Supp. 2d at 1355. The Commission now explains that consideration of only final bids will not lead to skewed results because only three purchasers submitted initial bid data, and even those were superseded by final bids.[9] In addition, the Commission explains that it is long-standing Commission practice to rely on weighted averaging data to assess underselling margins, and weighted averaging—which gives greater prominence to higher volume sales, and thus requires that prices have some associated volume—cannot evaluate initial bids that were not awarded any volume.

Because the Commission provides reasonable explanations for its consideration of only final bids and its reliance on weighted average pricing data to assess underselling margins, the court upholds the Commission's use of these methodologies.[10] *See Nucor Corp. v. United States*, 318 F. Supp. 2d 1207, 1257 (Ct. Int'l Trade 2004) (quoting *Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1050, 700 F. Supp. 538, 558 (1988)) (holding that it is within the Commission's "discretion to select a particular methodology and as long as substantial evidence supports that choice, the [c]ourt reviewing such methodology will sustain the [agency's] decision").

3. Analyzing Underselling Data for Only 1999

The court also held that the Commission had dispensed with the use of a trend analysis of underselling data, and was instead relying only on evidence of underselling in 1999. *Nippon II*, 223 F. Supp. 2d at 1355. The court found that this focus on underselling data for only 1999 was inconsistent with the Commission's analysis of volume trends and domestic pricing patterns for the entire period of investi-

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[9] Nonetheless, the Commission considers these initial bids in Table Second Remand 2 (simple averages) and in Table Second Remand 3 (bid and volume comparison). *Second Remand Determ.* at 20, 24.

[10] Although Plaintiffs challenge the Commission's use of this weighted average underselling data on the grounds that it ignores the fact that some purchasers actually increased their domestic volume even though Japanese prices decreased, the Commission compares purchaser pricing and volume data elsewhere in its determination. *See Second Remand Determ.* at Revised Table TCCSS–1.

gation. *See id.* ("the Commission may not rely, as it has done in this case, on trends in subject import market share and domestic pricing to substantiate the significance of its one-year data on underselling"). As a result, the Commission now relies on weighted average pricing and bid comparison data in its Second Remand Determination to support its finding of a trend of significant underselling. Therefore, contrary to Plaintiffs' assertion, the Commission addresses the court's concern by assessing underselling trends over the period of investigation. *See* discussion *infra* at Section I.B.1.

B. Significance of Underselling

The statute requires the Commission to determine whether "there has been significant price underselling by the imported merchandise as compared with the price of domestic like products . . ." 19 U.S.C. § 1677(7)(C)(ii)(I). In determining the significance of underselling, "[i]t is within the Commission's discretion to make reasonable interpretations of the evidence . . ." *Maine Potato v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985). It must, however, "articulate a 'rational connection between the facts found and the choice made.' " *Bowman Transp. Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). In this case, the Commission fails to articulate a rational connection between the record evidence and its findings with regards to underselling. In particular, its findings that (1) there was a trend of increased underselling over the period of investigation, (2) underselling was significant in 1999, and (3) underselling margins were not attributable to the domestic industry's lead time advantage, are not supported by substantial evidence.

1. The ITC's Finding of a Trend of Increased Underselling is not Supported by Substantial Evidence

As discussed above, the Commission relies on weighted average pricing and bid comparison data to support its finding that there was a trend of significant underselling over the period of investigation. Neither of these data, however, supports the Commission's conclusion.

First, the Commission contends that the weighted average underselling data in Table Second Remand 1 shows increasing levels of subject underselling over the period of investigation. In fact, only two purchasers listed in that table experienced widening underselling margins over the period of investigation.[11] Two other purchasers experienced decreasing margins, two had mixed patterns of under-

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[11] Purchaser B's margins increased: [ ], and Purchaser E's margins increased: [ ]. *Second Remand Determ.* at 19.

selling and overselling, and two only reported data for 1999.[12] Two purchasers' data out of eight is not substantial evidence of a trend of increased underselling over the period of investigation.

_____ Second, the Commission asserts that Table 3 (a bid and volume comparison) shows a pattern of increased underbidding over the period of investigation. Table 3 reveals that the number of Japanese bids "below all U.S. bids" increased from 1997 to 1999, but decreased from 1999 to 2000. *Second Remand Determ.* at 24. The Table also shows that in 1997 and 1998 there were more Japanese bids "within the range of all U.S. bids" than "below all U.S. bids."[13] Therefore, Table 3 does not support the Commission's finding of a trend of increased underbidding over the period of investigation.

2. The ITC's Finding of Significant Underselling in 1999 is not Supported by Substantial Evidence

In its First Remand Determination, the Commission focused its underselling analysis on the margins of several large purchasers in 1999, the only year in which it found generally lower Japanese prices. *First Remand Determ.* at 12–13. Specifically, the Commission evaluated responses to Question IV–8, in which purchasers estimated the price differential that would induce them to switch suppliers, and found that 1999 underselling margins were "generally near or at the ranges found by responding purchasers to be significant. . . ." *Id.*

The court held that the Commission's finding was unsupported by substantial evidence because the wording of Question IV–8 was not relevant to underselling, and the Commission ignored explanatory responses and individual purchasing histories in assessing purchasers' estimates of price differentials. *Nippon II*, 223 F. Supp. 2d at 1351. In its Second Remand Determination, although the Commission provides a reasonable explanation for its continuing reliance on Question IV–8 in assessing determinative price differentials, its conclusion that underselling margins in 1999 were significant remains unsupported by substantial evidence.

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[12] Purchaser D's margins decreased: [ ]. Similarly, [ ] margins decreased: [ ]. Purchaser A's data shows a mixed pattern of underselling and overselling: [ ]. [ ] data also shows a mixed pattern: [ ]. And Purchasers C and F only list underselling margins for 1999. *Id.*

[13] In 1997, there were [ ] Japanese bids below, [ ] within the range of, and [ ] without a comparable U.S. bid. *Id.* In 1998, there were [ ] Japanese bids below, [ ] within the range of, and [ ] without a comparable U.S. bid. *Id.* In 1999, there were [ ] Japanese bids below, [ ] within the range of, and [ ] without a comparable U.S. bid. *Id.* In 2000, there were [ ] Japanese bids below, and [ ] within the range of all U.S. bids. *Id.* Although the Commission also relies on the volume listed in Table 3 to support its finding, it fails to explain discrepancies in this data. *See* discussion *supra* Section I.A.1. As a result, the court will not address the Commission's arguments in this regard.

a. The ITC's Continuing Reliance on Question IV–8 for some Purposes is Reasonable

Question IV–8 asked purchasers to estimate "during 1999, approximately how much higher would the price for the imported product have to have been before [they] would have purchased U.S.-produced [TCCSS] instead." Purchaser Questionnaires at IV–8. The court noted that this question was not phrased to illicit responses relevant to underselling, and proposed that a better question would ask purchasers "how much *lower* [subject] prices would have to be before [they] would switch from a domestic to a Japanese producer." *Nippon II*, 223 F. Supp. 2d at 1357 (emphasis in original).

In response to the court's concern, the Commission reopened the record on remand and asked purchasers a rephrased question. *Notice and Scheduling of Remand Proceedings*, 69 Fed. Reg. 2361 (Jan. 15, 2004). The Commission asked purchasers "whether [they were] willing to pay more for TCCSS from one source versus the other during the [period of investigation];" and "if yes, how much more . . . and for what reason or reasons. . . ." *Memo from De Filippo to the Commission* (Jan. 23, 2004), (A.R. 2–262R), at 3, ITC App., Tab 17, at 3. This questioning, however, failed to generate any substantive responses.[14]

Although Plaintiffs argue that this rephrased question, like the original, does not address how much lower subject merchandise would have to be to induce purchasers to switch from domestic suppliers, it is unlikely that any question would have generated substantive responses, considering that the relevant information is four years old. As a result, it is not unreasonable for the Commission to continue to rely on responses to Question IV–8 to assess purchaser estimates of price differentials in 1999. *See* 19 U.S.C. § 1677e(a)(1) (authorizing the Commission to rely on facts otherwise available when necessary information is missing from the record). The Commission also points out that the court in *Acciai Speciali Terni, S.p.A. v. United States*, 19 CIT 1051, 1059 (1995), found that purchaser responses to an almost identical question were relevant to assessing the importance of price differentials between subject and domestic merchandise on purchase decisions in the market. Because the Commission was unable to obtain more relevant information, and because the Commission's reliance on a similar question was previously upheld by this court, the Commission's continued reliance on Question IV–8 for some purposes is reasonable.

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[14] The Commission attributes the lack of response to various problems, including that some purchaser representatives no longer worked at the companies, some never responded to the Commission's inquires, and some no longer kept information from that time period. *Id*. at 3–4.

b. Responses to Question IV–8 do not show that Underselling Margins in 1999 were Significant

Purchaser responses to Question IV–8 varied. Six purchasers provided a numerical estimate of the price differential at which they would switch suppliers, one gave an estimate of zero, and three gave explanatory responses indicating that price was not their most important purchasing consideration. Based on the numerical responses, the Commission derived an overall range—two to six percent—of a price differential that would induce a switch of suppliers for 1999, and concluded that underselling margins were generally within this range and therefore significant. *First Remand Determ.* at 12–13. The court in *Nippon II*, however, criticized this finding because the Commission ignored explanatory responses giving context to purchaser estimates, and failed to determine the extent to which purchasers' numerical responses were actually borne out by individual purchasing history. *Nippon II*, 223 F. Supp. 2d at 1351.

i. Explanatory Responses

Purchasers B, D, and A provided explanatory responses to Question IV–8 suggesting that they did not switch suppliers in 1999 based on price. *See Purchaser B Questionnaire Resp.*[15] (stating that it "[chose] steel suppliers based on 1) quality, 2) service, and 3) price, in that order of importance . . . unique manufacturing capabilities of some off-shore sources drive us to purchase from them irrespective of their prices which, in most cases, are higher than U.S. producer prices"); *Purchaser D Questionnaire Resp.*[16] (stating that it "did not select the Japanese [suppliers] based on price, but on quality performance, and the[ ] ability to demonstrate this quality to domestic suppliers, thereby proving that [Purchaser D's] expectations for quality could be achieved"); *Purchaser A Questionnaire Resp.*[17] (stating that "pricing is not the main factor. [Purchaser A] is developing long-term global partners that have lowest cost and highest performance. This decision can be more geographical driven than price driven."). Nonetheless, the Commission concludes that these explanatory responses do not undermine its finding of significant underselling in 1999 because other record evidence shows that these purchasers considered price to be an important factor in their purchasing decisions.[18] Even without consideration of these explanatory

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[15] [ ].

[16] [ ].

[17] [ ].

[18] The Commission discusses, at length, other statements suggesting that these purchasers considered price to be an important purchasing consideration. Because the Commission fails to establish how these other statements, unlike purchaser responses to Question IV–8, relate to determinative price differentials in 1999, they are not relevant here. Nevertheless,

responses, however, the Commission fails to point to substantial evidence that Purchaser B, D, or A considered the margin at which they bought subject imports in 1999 to be significant.

First, the Commission contends that Purchaser B's purchasing history shows a correlation between underselling margins and purchasing decisions. *Second Remand Determ.* at 39. The Commission notes that in 1999, Purchaser B increased its purchases of Japanese imports at the same time prices decreased. A simple correlation between underselling and purchasing, however, is insufficient to establish that underselling margins were significant. *See Nippon I*, 182 F. Supp. 2d at 1342 ("a rapid rate of increase nonetheless may be immaterial if, for example, the margin never goes above a price differential that would cause purchasers to change suppliers to any *significant* degree") (emphasis added). In fact, notwithstanding lower Japanese prices in 1999, Purchaser B continued to obtain the vast majority of its TCCSS from U.S. suppliers.[19] Therefore, 1999 underselling margins were not to such an extent to induce Purchaser B to change suppliers to any significant degree. This evidence shows that Purchaser B did not consider 1999 margins to be significant.

Second, the Commission asserts that Purchaser D's purchasing patterns show that price was an important part of its purchasing decisions because it purchased subject merchandise in 1999 at a price that was significantly lower than the lowest domestic bid. *Second Remand Determ.* at 32. Plaintiffs argue that Purchaser D's purchasing history shows an increase in purchases from domestic suppliers over the period of investigation. *Pl.'s Resp.* at 8. The issue is whether Japanese underselling margins in 1999 were significant. In 1999, Purchaser D paid approximately $70 less for Japanese imports than for U.S. merchandise.[20] Notwithstanding this price difference, however, Purchaser D obtained nearly ninety-nine percent of its TCCSS from U.S. suppliers that year. *See id.* at Revised Table TCCSS–1. Similar to Purchaser B's data, this evidence indicates that Japanese underselling was not significant enough to induce Purchaser D to

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all of the statements are discussed below. *See* discussion *infra* Section II.

[19] In 1998, Purchaser B bought [ ] of Japanese TCCSS at a discount rate of [ ]%, and [ ] of U.S. TCCSS at a discount rate of [ ]%. In 1999, Purchaser B bought [ ] of Japanese TCCSS at a discount rate of [ ]%, and [ ] of U.S. TCCSS at a discount rate of [ ]%. *Second Remand Determ.* at Revised Table TCCSS–1. Therefore, Purchaser B continued to buy [ ]% of its TCCSS from U.S. suppliers in 1999. The margin of underselling was [ ]% in 1998, and [ ]% in 1999. *Id.* at 19, Table Second Remand 1. This was the narrowest margin of all the large purchasers in 1999.

[20] In 1998, Purchaser D purchased only domestic TCCSS—[ ] at a price of $[ ]. *Second Remand Determ.* at Revised Table TCCSS–1. In 1999, Purchaser D purchased [ ] Japanese TCCSS at a price of $[ ] and [ ] domestic TCCSS at $[ ]. *Id.* This was an underselling margin of [ ]%. *Id.* at 19, Table Second Remand 1.

substantially switch suppliers in 1999. It shows that Purchaser D did not consider 1999 underselling margins to be significant.

Third, the Commission asserts that Purchaser A considered 1999 underselling margins to be significant because it bought more TCCSS from domestic suppliers that year in response to narrowing underselling margins. Plaintiffs argue that the purchasing history contradicts the Commission's underselling analysis. From 1998 to 1999, although Japanese prices fell and U.S. prices rose, Purchaser A bought less Japanese merchandise and more U.S. product.[21] Contrary to the Commission assertion, this purchasing data indicates that Purchaser A shifted volume in 1999 for reasons other than price. It does not support a finding of significant underselling that year.

Therefore, notwithstanding the explanatory responses, purchasing histories show that Purchasers B, D, and A did not consider the price at which Japanese imports undersold domestic TCCSS in 1999 to be significant.

ii. Numerical Estimates

Six purchasers responded to Question IV–8 with numerical price differentials.[22] Of these six, the underselling margins for two purchasers fell within their estimated price differentials, indicating that they considered the margin at which they purchased Japanese imports in 1999 to be significant.[23] Two supportive responses out of nine is not substantial evidence showing that 1999 underselling margins were significant. Rather, it indicates the opposite.

3. The ITC Fails to Substantially Support its Finding that Premiums Paid for Superior Domestic Lead Times were Minimized by other Factors

Evidence of underselling has been found to be less significant where there are price premiums for superior domestic lead times. *See Committee for Fair Beam Imports v. United States*, No. 02–00531, Slip Op. 03–73 at 14 (Ct. Int'l Trade June 27, 2003) (noting that "the ITC may discount incidences of underselling on account of [a] price premium, where appropriate, as this price premium mitigates underselling that is observed"); *Timkin Co. v. United States*, 20

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[21] In 1998, Purchaser A bought [ ] of domestic TCCSS at a price of $[ ], and [ ] of Japanese TCCSS at a price of $[ ]. *Id.* In 1999, it purchased [ ] of domestic TCCSS at a price of $[ ] and [ ] of Japanese TCCSS at a price of $[ ]. *Id.* The margin of underselling narrowed from [ ]% in 1998 to [ ]% in 1999. *Id.* at 19, Table Second Remand 1.

[22] *See* Purchaser Questionnaire Responses at IV–8 [ ].

[23] The corresponding underselling margins for 1999 were as follows: [ ]. *Second Remand Determ.* at 19, Table Second Remand 1. Therefore, the underselling margins for Purchasers E and F fell within their reported determinative price differentials.

CIT 76, 87–88, 913 F. Supp. 580, 589–90 (1996) (discussing how ITC "concluded that factoring in the price premium for domestic [products] made the relatively small margins of underselling even less significant"); *Trent Tube Div., Crucible Materials Corp. v. United States*, 14 CIT 386, 402, 741 F. Supp. 921, 935 (1990) (according less weight to consistent underselling based on domestic price premium due to customer preferences and lead time differences); *Roses, Inc. v. United States*, 13 CIT 662, 665–66, 720 F. Supp. 180, 183 (1989) (finding 62 out of 110 instances of underselling insignificant because price premiums for locally-grown roses based on freshness and an ability to supply the flowers on a short-term need basis).

In *Nippon I*, the court held that the Commission failed to analyze whether the undisputed lead-time advantage held by the domestic industry translated into price premiums over imports, and accounted for the margin of overselling. 182 F. Supp. 2d at 1342. In its First Remand Determination, the Commission responded that although the domestic lead time advantage "can give purchasers more flexibility in modifying their purchase orders on shorter notice, which can translate into a price premium," it was diminished by other factors, and thus not responsible for underselling margins. *First Remand Determ.* at 13. The court held, however, that even if the price premium were somewhat diminished, it "may still eclipse the underselling margin." *Nippon II*, 223 F. Supp. 2d at 1360. Without assessing the extent of the price premium in relation to underselling margins, the court held that the Commission's findings were unsupported by substantial evidence. *Id.*

In response to the court's concerns, the Commission reopened the record on its second remand to obtain additional information regarding the existence and size of any such premium.[24] As discussed above, however, it was unsuccessful in obtaining any substantive responses. *See* discussion *supra* Section I.B.2.a. As a result, the Commission continues to rely on the original record to support its finding that a premium, if it did exist, was offset by premiums paid for superior Japanese quality or other factors.[25] *Second Remand Determ.* at 50–56. Plaintiffs argue that the Commission again fails to assess the price premium in relation to underselling margins. *Pl.'s Resp.* at 14.

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[24] The Commission asked purchasers "whether [they were] willing to pay more for TCCSS from one source versus the other during the [period of investigation];" and "if yes, how much more . . . and for what reason or reasons. . . ." *Memo from DeFilippo to Commission* at 3.

[25] The Commission also contends that since the original record does not contain evidence of a specific and consistent premium, it must not exist. In its First Remand Determination, in contrast, the Commission cited purchaser testimony suggesting otherwise: "Japanese imports . . . have historically been priced lower than U.S. supplies because of the flexibility U.S. can makers must give up when they use imported product." *First Remand Determ.* at 13 n.37 (quoting *Conference Tr.* at 70).

Without evidence of the extent or size of price premiums, the Commission has no support for its belief that premiums paid for faster domestic lead times were minimized by premiums paid for superior Japanese quality or other factors, and thus did not translate into underselling margins.[26] An affirmative determination cannot be supported by speculation. The Commission may rely on the less than perfect available information, but it must be actual information.

C. Domestic Price Depression or Suppression

An affirmative injury determination also requires a finding that subject imports "depress[ ] prices to a significant degree or prevent[ ] price increases, which otherwise would have occurred, to a significant degree." 19 U.S.C. § 1677(7)(C)(ii)(II). The Commission here bases its finding of domestic price depression and suppression on the following evidence: (1) The domestic industry's cost-price squeeze, (2) a lost sale allegation, and (3) purchaser pricing data. This evidence, however, does not substantially support the Commission's finding of significant price depression or suppression.

1. The ITC's Cost-Price Squeeze Analysis does not Substantially Support a Finding of Price Depression or Suppression

An industry is in a cost-price squeeze situation if it is unable to raise prices to cover the cost of goods sold. Here, the Commission finds that the domestic industry experienced a cost-price squeeze over the period of investigation because the industry's overall cost of goods sold increased in relation to its net sales. *Second Remand Determ.* at 26–27. Plaintiffs challenge this finding on the grounds that the two domestic mills that compete most directly with Japanese imports reported positive operating margins during the period of investigation. *Pl.'s Resp.* at 6.

Evidence of a cost-price squeeze generally supports a finding of domestic price suppression. *See Gerald Metals, Inc.*, 22 CIT at 1023, 27 F. Supp. 2d at 1362 (discussing how an ITC Commissioner could not find "clear evidence of a cost-price squeeze, [and thus] conclude[d] that price suppression could not be attributed to the LTFV imports to a significant degree"). In this case, however, because of the particular conditions of competition, the court previously instructed the Commission to assess individual purchaser data to determine whether a correlation between subject imports and domestic pricing existed. *Nippon I*, 182 F. Supp. 2d at 1344. Therefore, although the

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[26] Contrary to the Commission's assertion, neither Purchaser B nor [ ] Questionnaire Responses are supportive of its conclusion. *See Purchaser B Questionnaire Resp.* at IV (noting that "foreign mills" have unique capabilities); [ ] (responding that Japanese TCCSS has superior quality and U.S. producers have consistent supply and a lead time advantage).

record shows that the domestic industry generally may have been experiencing a cost-price squeeze,[27] the Commission's finding of a correlation between subject import pricing and U.S. pricing must be supported by individual pricing data. *Id.*; *see also Altx, Inc. v. United States*, No. 00–08–00477, Slip Op. 02–65 at 43 (Ct. Int'l Trade July 12, 2002) ("It is true that the Commission need not find an exact correlation between subject import pricing and domestic pricing. Nevertheless, the Commission's cursory look at general net declines over the POI is insufficient.").

2. The ITC's Reliance on a Lost Sale Allegation is Improper

The Commission also finds that evidence of a lost sale indicates that the domestic industry's prices were suppressed. A lost sales allegation refers to the situation in which the domestic industry is unable to make a sale because of the presence of lower priced imports. *Copperweld Corp.*, 12 CIT at 169 n.15, 682 F. Supp. at 572 n.15. Although evidence of a lost sale may be probative of price suppression, the lack of such evidence ordinarily will not vitiate a Commission's determination. *USX Corp. v. United States*, 11 CIT 82, 86, 655 F. Supp. 487, 491 (1987). Where the Commission chooses to rely on findings of lost sales, however, it must support such findings with substantial evidence. *Nippon II*, 223 F. Supp. 2d at 1364–65.

In *Nippon II*, the court held that the Commission improperly relied on the lost sale allegation because it was unsupported by the record and undermined by evidence that the sale was lost for non-price reasons. *Id.* at 1352. In its Second Remand Determination, the Commission again cites this lost sale allegation as evidence of domestic price suppression. *Second Remand Determ.* at 81. Plaintiffs argue that the lost sale is unsupported by substantial evidence. *Pl.'s Resp.* at 23. Because the record (a) does not correspond with the volume and pricing data of this alleged lost sale, and (b) indicates that the lost sale, if it did occur, was due to non-price reasons, the Commission's reliance on this lost sale is improper.

a. Purchaser A's Data does not Support the Alleged Lost Sale

The lost sale at issue involves an allegation by a particular domestic producer, claiming that it lost a sale in October 1998 to Purchaser

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[27] Although some domestic producers reported positive operating margins during the period of investigation, the record shows that the industry's overall cost of goods sold increased in relation to its net sales values over the period and unit sales declined. The cost of goods sold in relation to net sales values throughout the period was as follows: [ ]. *Staff Report* at VI–2, Table VI–1. Unit sales declined from [ ]. *Id.* at VI–3, Table VI–2.

A because of a lower Japanese bid.[28] On its second remand, the Commission finds that the lost sales allegation is confirmed by Purchaser A's 2000 record data. *Second Remand Determ.* at 81. Plaintiffs correctly point out, however, that the lost sales allegation is not reflected in Purchaser A's volume or pricing data.[29]

First, Purchaser A's volume data does not correspond to that of the alleged lost sale. In 2000, Purchaser A bought approximately 6,000 short tons more of Japanese TCCSS than was alleged lost by the U.S. purchaser at the relevant facility.[30] Contrary to the Commission's assertion, these volumes are not "fully consistent." Second, Purchaser A's pricing data does not correspond to that of the lost sale. The Commission concedes that the U.S. producer's bid at the relevant facility was "well above" the alleged price per ton.[31] *Second Remand Determ.* at 83. As a result, it alternatively points to a bid that the U.S. producer made at a different facility, which is closer in price to the one allegedly lost. *Id.* The Commission fails to note that rather than losing that bid, the U.S. producer was awarded that sale.[32] The record simply does not support the volume and price values of the alleged lost sale.

b. Purchaser A's Comments Undermine the Commission's Finding that the Lost Sale was due to Lower Japanese Prices

Apparently because the record does not support the alleged lost sale, the Commission emphasizes the fact that Purchaser A agreed with the allegation. Although Purchaser A agreed with the lost sale allegation, the court in *Nippon II* held that other statements by Purchaser A indicated that the sale was lost because of non-price reasons. 223 F. Supp. 2d at 1365–66. Specifically, the court noted that

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[28] [ ] alleges that it lost a $[ ] million sale to Purchaser A—a bid of $[ ] for [ ] short tons of TCCSS. *Staff Report* at V–23, Table V–14.

[29] Plaintiffs suggest that Purchaser A's 1999 data is the proper place to find the alleged lost sale because the bid was allegedly made in October 1998. *Pl.'s Resp.* at 23. Because Purchaser A's fiscal year 2000 covers the period from May 1999 to April 2000, however, it is reasonable for the Commission to assume that a bid made in October 1998 would cover shipments made in calendar year 1999. *Staff Report* at V–16, Table V–4. Nonetheless, the lost sale is not reflected in Purchaser A's 1999 or 2000 data.

[30] [ ] reported that it lost a bid for [ ] short tons of TCCSS in 2000, but Purchaser A bought [ ] short tons of Japanese TCCSS that year, [ ] of which was at its [ ] facility. *Staff Report* at V–12–V–16, Table V–4a–V–4c. Although the Commission cites data from both Purchaser A's [ ] facilities in an attempt to verify the allegation, it argued in its First Remand Determination that the sale was lost at Purchaser A's [ ] facility. Neither facility's data, however, supports the allegation.

[31] In 2000, [ ] made a bid of $[ ] at Purchaser A's [ ] facility, which does not correspond to the alleged $[ ] lost bid. *Id.* at V–13, Table V–4a.

[32] In 2000, [ ] made a bid of $[ ] at Purchaser A's [ ] facility. Purchaser A accepted that bid and bought [ ] tons of TCCSS at that price. *Staff Report* at V–14, Table V–4b.

Purchaser A (1) emphasized non-price factors when agreeing with the lost sale allegation, (2) testified that it had long-term commitments with its Japanese supplier at the relevant facility, and (3) noted that the particular U.S. producer did not bid seriously for its West Coast business. *Id*. Although the Commission asserts otherwise, these statements continue to show that if the sale was lost, it was because of non-price factors.

First, when Purchaser A agreed with the lost sale allegation, it emphasized that "price is not the only factor in contract selection; quality and delivery time are also critical, and whether the firm can supply globally." *Staff Report* at V–25. The Commission interprets this statement to mean that Purchaser A considered price to be a significant factor in its purchasing decisions, and as a result, the sale was lost to lower priced Japanese imports. *Second Remand Determ*. at 86. The Commission's interpretation of this statement stretches it beyond recognition. Rather it appears that Purchaser A bought Japanese imports instead of this particular U.S. purchaser's merchandise because of quality, delivery, and global considerations.

Second, Purchaser A noted that it had long-term commitments with its Japanese supplier.[33] The Commission argues that because Purchaser A also indicated that the Japanese suppliers were willing to offer more attractive prices, the sale was lost because of lower-priced Japanese imports. On the contrary, however, this statement clearly indicates that Purchaser A awarded Japanese suppliers with tonnage because of deepening commitments and plans to develop new products.

Third, Purchaser A stated that the particular U.S. supplier did not bid seriously for its West Coast business, suggesting that the sale would have been lost to another domestic supplier in the absence of Japanese competition.[34] The Commission argues that purchasing history shows that the U.S. supplier bid consistently and competitively on Purchaser A's business at that facility throughout the pe-

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[33] "In [ ], we had a different competitive dynamic. The Japanese mills . . . have long been our dominant suppliers at this location, reflecting the ease of shipping steel from Japan to the west coast. [ ] was able to pick up a substantial portion of our business at [ ] [in 1998] because [it] accepted our invitation to deepen the supplier relationship and discuss multi-year supply commitments. We currently have a [ ] year contract with [it]. . . . We also have been working with [ ] to develop new products. . . . Since [Purchaser A] was willing to deepen its commitment to [ ] as a long term purchaser, [ ] was willing to offer more attractive prices to reflect that larger volume commitment. Note that much of [ ] gain came from our other Japanese supplier. . . ." *Purchaser A Questionnaire Resp.*, Decl. of [ ], at 5.

[34] A representative stated that "[ ] never really bid for [ ] business. The [ ] bid index was always [ ] percent higher than the lowest bid, and consistently one of the highest among the domestic mills. In addition, it has never been willing to place a significant volume of steel on the west coast. [ ] has historically refused to freight equalize – which places [it] at an impossible competitive disadvantage on the west coast." *Id*.

riod. Purchaser A's purchasing history reveals, however, that the U.S. supplier's bids were significantly higher than other U.S. bids, which were ultimately accepted.[35] Purchaser A's statement as well as its purchasing history do not support the Commission's conclusion that the lost sale was due to lower Japanese prices.

Therefore, Purchaser A's statements undermine the Commission's finding that the alleged lost sale was due to lower Japanese prices.

3. Purchaser Pricing Data does not Substantially Support a Finding of Domestic Price Depression or Suppression

In its Final Determination, the Commission linked a general decline in domestic prices to overall underselling trends in Japanese pricing. *Final Determ.* at 15. As discussed above, the court held that although the Commission is not required in all cases to determine the relationship between subject imports and domestic prices on an individual purchaser basis, "where the other data is mixed and where data is available to determine whether such a correlation existed for particular purchasers, and is relied on by respondents, the Commission must address the individual purchaser data in some manner." *Nippon I*, 182 F. Supp. 2d at 1344. Nonetheless, in its First Remand Determination, the Commission failed to do so. *Nippon II*, 223 F. Supp. 2d at 1358–59. In its Second Remand Determination, the Commission evaluates the pricing data of four of the six large purchasers and finds a correlation between Japanese imports and the price at which they bought domestic TCCSS. *Second Remand Determ.* at 42–50. Plaintiffs argue that purchasers' pricing data reveal no such correlation. *Pl.'s Resp.* at 13.

The four purchasers whose pricing data was evaluated by the Commission—Purchasers A, C, D, and B—did not buy Japanese imports at significant margins of underselling.[36] *See* discussion *supra* Section I.B. These four purchasers apparently operated to some de-

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[35] Relevant U.S. bids on tin-plate at Purchaser A's [ ] facility were as follows: [ ]. *Staff Report* at V–13, Table V–4a. The U.S. supplier similarly over bid other U.S. suppliers for other products at that facility. *See id.* at V–12, Table V–4a [ ].

[36] Although the Commission did not evaluate Purchasers E and F for purposes of determining domestic price depression and/or suppression, the court notes that their pricing data supports the conclusion that domestic prices were generally depressed over the period of investigation. Purchaser E's pricing data reveals a general increase in discount rates: 1997 - U.S. [ ]%, Japanese [ ]%; 1998 - U.S. [ ]%, Japanese [ ]%; 1999 - U.S. [ ]%, Japanese [ ]%; 2000 - U.S. [ ]%, Japanese [ ]%. *Second Remand Determ.* at Revised Table TCCSS–1. Purchaser F's pricing data similarly reveals a general increase in discount rates: 1997 - U.S. [ ]%, Japanese [ ]; 1998 - U.S. [ ]%, Japanese [ ]%; 1999 - U.S. [ ]%, Japanese [ ]%; 2000 - [ ]. *Id.* Further, the estimated price differentials of Purchasers E and F fell within the margins at which they bought subject TCCSS in 1999, indicating that those underselling margins were significant. *See supra* n.23.

gree on the West Coast.[37] As discussed below, the record as a whole indicates that Japanese imports did not have a significant effect on domestic prices over the period of investigation.

a. Purchaser A

The court in *Nippon II* held that the Commission failed to explain its finding of significant price depression in light of the fact that Purchaser A, which accounted for the bulk of the instances of underselling, paid increasing domestic prices between 1997 and 1999. 223 F. Supp. 2d at 1358. In response, the Commission evaluates the pricing data and finds that Purchaser A did not pay increasing domestic prices throughout the period, and that Purchaser A's volume levels correlated with Japanese underselling margins over the period of investigation. *Second Remand Determ.* at 44. Plaintiffs argue that the pricing data shows that Japanese prices did not affect domestic prices. *Pl.'s Resp.* at 12.

Purchaser A's pricing data indicates that U.S. suppliers were able to raise prices notwithstanding lower Japanese prices. Specifically, Purchaser A paid more for domestic TCCSS and less for Japanese TCCSS over the period of investigation.[38] Although the Commission argues that Purchaser A bought higher volumes of Japanese imports in response to lower prices, the issue here is price effects. The Commission's evaluation of volume shifts is not relevant in this context. *See Nippon II*, 223 F. Supp. 2d at 1358 n.12 ("[t]he court . . . sustained the Commission's finding of low but significant subject import volume as an isolated finding and does not revisit the issue, except as it affects the ultimate causation conclusion."). Therefore, Purchaser A's pricing data shows a lack of correlation between subject imports and domestic prices.

b. Purchaser C

In *Nippon II*, the court also held that the Commission had not adequately explained its finding of a correlation between Japanese imports and domestic prices, considering that Purchaser C was able to secure domestic price decreases between 1997 and 1998 without making any subject import purchases until 1999. 223 F. Supp. 2d at 1358–59. The Commission now explains that the link between Japa-

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[37] Purchaser A had facilities in [ ]. Staff Report at V–12–V–16. Purchaser C appears to have had locations in [ ]. Purchaser D appears to have had locations in [ ]. *Purchaser D Questionnaire Resp.* at I–2. And Purchaser B appears to have had locations in [ ]. On the other hand, Purchasers E and F appear to have had [ ].

[38] Because of consolidation, Purchaser A's pricing data is different from that in the First Remand Determination. Nonetheless, the price at which Purchaser A bought U.S. TCCSS generally increased: 1997- $[ ]; 1998 - $[ ]; 1999 - $[ ]; 2000 -$[ ]. Revised Table TCCSS–1. And the price at which Purchaser A bought Japanese TCCSS generally decreased: 1997 - $[ ]; 1998 - $[ ]; 1999 - $[ ]; 2000 - $[ ]. *Id.*

nese imports and Purchaser C's ability to secure domestic price decreases was Purchaser F. *Second Remand Determ.* at 46–47. Because Purchaser F bought Japanese imports in 1998 and was in a purchasing alliance with Purchaser C, the Commission reasons that Purchaser F probably shared Japanese pricing information with Purchaser C.[39] Based on this information, the Commission finds a correlation between Japanese imports and the price at which Purchaser C bought U.S. TCCSS. Plaintiffs argue that this "possible indirect effect" does not establish a correlation between Japanese imports and U.S. prices.[40] *Pl.'s Resp.* at 13.

In the absence of concrete record evidence, the Commission's "belief" that Purchaser F "likely" informed Purchaser C of Japanese pricing does not constitute substantial evidence. Moreover, Purchaser F did not buy Japanese imports until 1998, and reported that it was not until "late '98" when it decided to take advantage of price variances it observed between foreign and domestic mills. *Purchaser F Questionnaire Resp.* at II–2. Therefore, contrary to the Commission's conclusion, the record fails to demonstrate a connection between Japanese imports and the 1997 and 1998 prices Purchaser C paid for domestic TCCSS.

c. Purchaser D

In *Nippon II*, the court also held that the Commission failed to address why Purchaser D bought more expensive domestic TCCSS between 1999 and 2000, despite lower Japanese prices. 223 F. Supp. 2d at 1359. The Commission responds that this price increase was related to the filing of the antidumping petition. *Second Remand Determ.* at 49. Plaintiffs do not challenge this explanation.

Under 19 U.S.C. § 1677(7)(I), the Commission may consider whether any change in price effects since the filing of the petition is related to the pendency of the investigation, and if so, it may reduce the weight accorded to that data. In this case, the Commission points to evidence indicating that the filing of the antidumping petition in October 1999 had an effect on domestic pricing in 2000.[41]

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[39] A purchaser representative explained how alliances work: "[I negotiate] with the U.S. mills for [other purchasers]. . . . I would meet with each mill and come to some resolution on pricing. . . . For all of the alliance member's volumes. . . . Once I got that done, I would call a meeting and inform the members of the alliance what the arrangement was for the upcoming year." *Hearing Transcript* (June 29, 2000), at 240, (A.R. 1–74), ITC App., Tab 19, at 22 [hereinafter *Hr'g Tr.*].

[40] Although Plaintiffs also argue that the Commission's discussion of purchasing alliances is inconsistent with its findings regarding consolidation, purchasing alliances and consolidation are different issues. In addition, Plaintiff's argument regarding the effect of non-subject imports is discussed below. *See* discussion *infra* Section II.B.

[41] *Purchaser F Memo* [ ] (stating that "Weirton's successful petition with the ITC has halted Japanese imports [ ]; *Purchaser F Memo* [ ] (regarding negotiation strategies with Nippon for 2000, "Off to a great start in '99 only to have Weirton's petition to the ITC terminate the flow of material for now"); *Purchaser B Memo*

Thus, the Commission's decision to place less weight on data for 2000 is reasonable.

From 1998 to 1999, the price at which Purchaser D bought domestic merchandise remained stable. The Commission contends that because of the domestic industry's cost-price squeeze, this stable pricing indicates that Japanese underselling prevented domestic price increases that would have otherwise occurred. *Second Remand Determ.* at 48. Plaintiffs argue that nothing in the record shows that U.S. suppliers would have raised Purchaser D's prices in 1999. *Pl.'s Resp.* at 13. Although Purchaser D paid the same price for domestic TCCSS in 1998 and 1999, it did not buy Japanese imports until 1999. Given the insignificant levels of underselling with regard to this purchaser, it is only the general cost-price squeeze analysis that could support a finding of price suppression. The pricing to Purchaser D is not supportive.

d. Purchaser B

Finally, the court in *Nippon II* found that the Commission failed to address Purchaser B's data. 223 F. Supp. 2d at 1359. The Commission now examines the pricing data and finds a correlation between Japanese underselling and domestic price depression. Plaintiffs argue that there was no correlation because Purchaser B bought increasing volumes of domestic TCCSS over the period of investigation. The issue here, however, is price effects. From 1997 to 2000, Purchaser B obtained wider U.S. and Japanese discount rates.[42] Although this evidence indicates a correlation between Japanese imports and domestic price depression over the period of investigation, Purchaser B did not consider underselling margins in 1999 to be significant and there was not a significant trend of underselling over the period of investigation. Consequently, this evidence is problematic. The most that can be said of the pricing data is that it pulls in two directions.

Thus, the Commission's conclusion as to price depression or suppression is only supported by the generalized sub-conclusion of a cost-price squeeze. Neither lost sales analysis nor particularized pricing data positively correlates with Japanese import pricing. If the pricing data is viewed in the context of particularized underselling data it supports a negative determination. If viewed in the context of the generalized cost-price squeeze conclusion it is slightly

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[ ] (noting that Purchaser B said it would not place business with Weirton because of Weirton's involvement in antidumping proceeding).

[42] Purchaser B's pricing data in over the period of investigation was as follows: 1997 - U.S. [ ]%, Japanese [ ]%; 1998 - U.S. [ ]%, Japanese [ ]%, 1999 - U.S. [ ]%, Japanese [ ]%; 2000 - U.S. [ ]%, Japanese [ ]%. *Second Remand Determ.* at Revised Table TCCSS–1.

supportive of price suppression. Overall, it is not helpful to the question of price depression or suppression.

D. Conditions of Competition

The material injury statute directs the Commission to evaluate all relevant economic factors, including price effects, "within the context of the . . . conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C); *Nucor Corp.*, 318 F. Supp. 2d at 1215. In its Final Determination, the Commission found that U.S. prices were affected by the industry's high degree of price sensitivity and by the use of Japanese prices in domestic negotiations. *Final Determ.* at 8, 16. The court in *Nippon II* held that the Commission failed to assess these findings in the context of the "peculiar conditions of competition" of the TCCSS industry. 223 F. Supp. 2d at 1350.

1. Price Sensitivity

An industry is price sensitive if small differences in price will induce purchasers to shift from one supplier to another. *Second Remand Determ.* at 57–58. Price sensitivity is relevant to a material injury analysis because the more price sensitive the market, the greater the ability of lower-priced imports to impact the domestic industry's sales and prices. *Id.* at 58. In this case, the Commission previously found that the TCCSS market was characterized by a high degree of price sensitivity. *Final Determ.* at 8. The court in *Nippon II* held that this finding was unsupported by substantial evidence, noting that the record indicated that non-price factors outrank the importance of price in purchasing decisions. 223 F. Supp. 2d at 1361. In its Second Remand Determination, although the Commission provides a somewhat plausible explanation for its decision to give less weight to non-price factors highly ranked in purchaser questionnaires, the record shows that the TCCSS market is only low to moderately price sensitive.

a. The ITC's Decision to Give Less Weight to Purchaser Responses to Questions IV–11 and III–18 is Reasonable

In purchaser questionnaires, non-price factors, including quality and on-time delivery were consistently ranked as more important than price. As a result, the court instructed the Commission to consider these non-price factors in assessing whether the TCCSS market is price sensitive. The Commission now explains that it accords less weight to the high ranking of non-price factors in purchaser questionnaires because (1) the wording of Question IV–11 is misleading, and (2) Questions IV–11 and III–18 do not take into account the qualification process in the TCCSS industry.

First, Question IV–11 asks purchasers to rate various factors as "very important," "somewhat important," or "not important" to their

purchasing decisions. Overall, "lowest price" was ranked seventh of approximately ten factors.[43] *Staff Report* at II–12, Table II–4. The Commission gives less weight to this high ranking of non-price factors, however, because it finds that the wording of question IV–11 is misleading. Specifically, Question IV–11 refers to "lowest price" rather than simply "price." The Commission contends that while price may be a key factor to purchasers' sourcing decisions, obtaining the "lowest price" may not be crucial if other factors are not satisfactory. *Second Remand Determ*. at 61. Plaintiffs do not challenge this theory. Because price is the only factor in Question IV–11 to use a superlative modifier such as "lowest," the wording may in fact be misleading.[44]

Second, the Commission explains that the high ranking of non-price factors in response to Questions IV–11 and III–18[45] may not be accurate because the questions do not take into account the qualification process in the TCCSS industry. Plaintiffs argue that the Commission is merely repeating its previous arguments and not addressing the court's concerns. The Commission, however, is directly responding to the court's concern that it consider whether Questions IV–11 and III–18 refer to the post-qualification stage. *Nippon II*, 223 F. Supp. 2d at 1361 (noting that neither the Commission nor the Defendant-Intervenors attempted to rebut the fact that "Questions III–18 and IV–11 of the purchaser questionnaires clearly ask purchasers to rank the importance of 'lowest price' and other considerations in choosing among qualified suppliers only"). Moreover, the court agrees with the Commission that because Questions IV–11 and III–18 do not reference a certain stage of the qualification process, their answers may not be entirely accurate with regard to purchaser considerations. Nonetheless, the responses cannot be discounted entirely.

The TCCSS industry is characterized by long-term relationships established through a qualification process. Purchasers begin by buying limited quantities from suppliers, and only after a potential supplier has proven that it can deliver the desired quality and quan-

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[43] Higher ranking factors included product quality, availability, product consistency, reliability of supply, delivery time, and technical support/service. *Id*.

[44] Subsequent to this investigation, the Commission changed the wording in Question IV–11 from "lowest price" to "price" to eliminate the discrepancy between how price is treated in relation to the other factors. *Id.* at n.259.

[45] Question III–18 asks purchasers to "[p]lease list, in order of their importance, the three major factors generally considered by [their] firm in deciding from whom to purchase [TCCSS] for any one order (examples include current availability, extension of credit, prearranged contracts, price, quality of product, range of supplier's product line, traditional supplier, etc.)." Purchaser Questionnaires at III–18. Price was identified in the top three considerations by 11 out of 15 purchasers, more than any other factor other than quality. *Staff Report* at II–11, Table II–3.

tity in a steady and reliable manner does it become qualified as a supplier. *Staff Report* at II–10. Thus, when a qualified supplier enters negotiations with a purchaser, the general quality and reliability of that supplier's product has been established, leaving price and volume the essential factors to be negotiated. *See Hr'g Tr.* at 66–67 ("If you're not through the qualification process, which is determined by all these other non-price factors, you don't get a chance to offer your price."). Questions IV–11 and III–18, however, do not ask purchasers to rank the importance of these factors at a certain stage of the qualification process, and do not reflect the fact that although quality and on-time delivery may be important considerations at the pre-qualification stage, price may be a more important factor after qualification. Thus, it is reasonable for the Commission to accord somewhat less weight to the responses to Questions IV–11 and III–18, where purchasers ranked non-price factors as more important than price in their purchasing decisions.

Even though the Commission has provided a credible explanation for its decision to give less weight to these responses, it may not ignore the fact that quality and on-time delivery are nonetheless critically important considerations to TCCSS purchasers. *See Staff Report* at II–10 ("quality was most frequently reported as the critical consideration in their purchasing decisions"); *Koplan Dissent* at 2 ("reliable delivery is extremely important to purchasers . . ."); *Final Determ.* at 8 ("The record indicates that non-price factors such as product quality, product consistency, and on time delivery are very important in choosing suppliers.").

b. The Record Shows that the TCCSS Market is Low to Moderately Price Sensitive

In its two prior determinations, the Commission found that the TCCSS market was "highly" price sensitive. *Final Determ.* at 8; *First Remand Determ.* at 17. The Commission now contends that the market is merely "price sensitive." *Second Remand Determ.* at 63. Because the four categories of evidence relied upon by the Commission support a finding of low to 37 moderate price sensitivity, the Commission's analysis should reflect that less expensive subject imports had a low to moderate ability to effect domestic sales and prices.

First, the Commission contends that the record shows that most purchasers were likely to shift suppliers based on small changes in price. *Id.* at 58. Evidence that purchasers shift suppliers in response to small changes in price indicates that a market is price sensitive. Plaintiffs correctly point out, however, that the evidence cited by the Commission leads to precisely the opposite conclusion. *Pl.'s Resp.* at 17. For example, a memo cited by the Commission actually shows that Purchaser A was unwilling to shift volume in light of small price

changes.[46] In addition, evidence that purchasers negotiated discount rates to the hundredth percent does not indicate price sensitivity. *See Nippon I*, 182 F. Supp. 2d at 1345 (noting that "it is [not] apparent why the degree of price specificity in negotiations would be necessarily indicative of price sensitivity"). Finally, purchaser estimates of determinative price differentials indicated that most purchasers were not likely to shift suppliers because of price differentials ranging from two to six percent. *See* discussion *supra* Section I.B.2.b.ii. Therefore, this evidence does not show that the domestic TCCSS market is price sensitive.

Second, the degree of substitutability between products is relevant to whether the market is price sensitive because "the more fungible the product, the more likely that purchasers will make decisions based on price differences . . . [but] when products are highly differentiated, price is less likely to determine product selection." *General Motors Corp. v. United States*, 17 CIT 697, 706, 827 F. Supp. 774, 784 (1993). Although the Commission claims that domestic and Japanese TCCSS are highly substitutable, the record indicates that they actually have at best a moderate degree of substitutability. Although producers reported that Japanese and U.S. merchandise are "relatively close substitutes" with the exception of some Japanese specifications, respondents reported that the two products were less fungible.[47] As a result, the Staff Report estimated the elasticity of substitution, or how easily purchasers switch suppliers when prices change, to be low to moderate.[48] *Id.* at II–17–II–18.

Third, the Commission claims that the market is price sensitive because TCCSS accounts for a large percent of the total cost of production of many purchaser operations, and thus lowering the cost of TCCSS is the most effective way to increase profit margins. Depending on the final product, however, TCCSS can be a very large or relatively small part of the final product cost.[49] Because purchaser questionnaires indicate that TCCSS accounts for approximately half of their total cost of production, the evidence as a whole supports the

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[46] Purchaser A stated that although a competitor made a bid that was two percent below a current supplier, it nonetheless stayed with its current supplier. [ ]. *Purchaser A Questionnaire Resp.*, Decl. of [ ], at 6. Purchaser A explained that winning its business is about "long term supplier relationships . . . not about the lowest price." *Id.*

[47] Respondents specified that product specification distributions, non-price factors, timing of price negotiations, competition-limiting regional factors, and [ ] supply agreements decrease the products' degree of substitutability. *Staff Report* at II–18.

[48] The Commission estimated the range to be [ ]. In other words, a one percent change in price would induce a [ ] percent change in amount of product purchased. *Id.*

[49] The percentage of cost accounted for by TCCSS in a range of end-use products is as follows: tuna can [ ]%; food cans [ ]%; aerosol [ ]%; paint can ring/plugs [ ]%. *Staff Report* at II–5.

conclusion that the market is, at most, moderately price sensitive.

Fourth, the Commission argues that the price sensitivity of the market is reflected by the fact that purchasers consistently rated price as one of the three most important factors in their purchasing decisions. As discussed above, however, purchasers generally rated price as third in importance, after quality and on-time delivery. Therefore, this evidence does not support a finding of high price sensitivity.

In sum, the evidence relied upon by the Commission indicates that the TCCSS market was low to moderately price sensitive—that lower priced subject imports had a low to moderate ability to impact the domestic industry's sales and prices. Contrary to the Commission's assertion, this evidence does not support an affirmative material injury determination. Rather, it supports the opposite conclusion. *See United States Steel Group v. United States*, 18 CIT 1190, 1192, 1213, 873 F. Supp. 673, 680, 695 (1994) (holding that the Commission's negative material injury determination reasonably supported by finding that market was not highly price sensitive, and imports were not greatly substitutable).

2. Negotiation Practices

In its Final Determination, the Commission found that contrary to purchaser testimony, importers often conduct negotiations simultaneously and use aggressive Japanese pricing in domestic negotiations to leverage lower prices. *Final Determ.* at 16. The court held that even if Japanese and domestic negotiations take place contemporaneously, the Commission must still address other evidence indicating that these negotiations run on separate tracks according to different procedures and criteria. *Nippon II*, 223 F. Supp. 2d at 1352, 1361–62. Nonetheless, on its first remand, the Commission again failed to address evidence indicating that (a) price negotiations are bifurcated, (b) a division of major and minor tonnage keeps negotiations compartmentalized, (c) supply agreements prevent foreign price competition in domestic negotiations, (d) different delivery times segregate negotiations, and (e) Weirton did not consider Japanese competition when calculating its prices. *Id.* Although the Commission argues otherwise, this evidence continues to indicate that Japanese and domestic negotiations are compartmentalized.

a. Price Negotiations are Bifurcated

The court held that the Commission failed to address the extent to which bifurcation of price negotiations were representative of purchasers' practices. *Id.* at 1362. In response, the Commission finds that there is a "significant body of evidence on the record" to show that prices of the Japanese product were in fact used to obtain lower

prices from domestic producers.[50] *Second Remand Determ.* at 66. Plaintiffs disagree. *Pl.'s Resp.* at 19. The evidence relied upon by the Commission does not substantially support its position.

First, the Commission continues to rely on internal negotiating memoranda from Purchasers E and F, which the court previously held were irrelevant. *Nippon I*, 182 F. Supp. 2d at 1348, n.37 (noting that only Purchaser F's memo indicates that lower priced Japanese imports were taken into consideration during negotiations with domestic suppliers, but the price discussion appeared incidental). Second, the testimonies of Silgan and U.S. Can actually cut against the Commission's finding that purchasers used subject pricing in domestic negotiations.[51] Third, a U.S. supplier's questionnaire response indicates that it believed that the Japanese price was lower because Japanese volume increased, not because purchasers used aggressive pricing in negotiations.[52] Fourth, Weirton's claims are undermined by the fact that it was unable to document its allegations of Japanese price competition. *See* discussion *infra* Section I.D.2.e. Finally, although the Commission claims that six U.S. suppliers reported lost revenue, only three actually responded affirmatively when asked whether they reduced prices or rolled back announced price increases to avoid losing sales to Japanese competitors. *See* Producer Questionnaires at IV–C. Of those three, only one reported specific instances of lost revenue.[53] *See Staff Report* at V–22. Therefore, contrary to the Commission's finding, there is not significant record evidence indicating that purchasers used subject imports to obtain lower domestic prices. Rather, price negotiations appear to be bifurcated.

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[50] The Commission no longer relies on its theory that purchasers reallocated volume after entering into a contract. *Second Remand Determ.* at 66 n.277.

[51] A Silgan representative testified, "I don't look for the best price. That's as simple as that. . . . I buy around five percent from the Japanese. . . . I can get lower prices from several other sources. I'm am not looking for the lowest price. I'm looking for the best value, which is quality, service, and price." *Hr'g Tr.* at 208. And, a U.S. Can representative testified that "domestic mills do not recognize foreign mill prices as competitive situations that they can — they choose to meet or being asked to meet. They flatly, absolutely do not recognize it. . . . [They] don't compete with the foreign mills. It stops right there. . . ." *Id.* at 224–25.

[52] "In 1997 and 1998, [a Japanese supplier] supplied [ ]% of [Purchaser E's] requirements, which share has increased to [ ]% this year. During the period in question, [the U.S. supplier] has been led to believe that the [Japanese] price was lower than its own, and as a result, [it] lowered its price to maintain its share of this account." [ ].

[53] The Commission concedes that [ ] specific instances of lost revenue involved only four small purchasers. *Second Remand Determ.* at 66. Moreover, one out of four purchasers disagreed with [ ] lost revenue allegations, and one suggested that [ ] lost revenue was due to non-price considerations. *See Staff Report* at V–25 (quoting [ ] statement that "price is not the only consideration; customer orientation is critical for the industry. [ ] has stringent specification requirements.").

b. Purchasers Buy Major Domestic Tonnage and Minor Japanese Tonnage

The court also held that the Commission failed to address the extent to which a division of major and minor tonnage between domestic and subject suppliers kept negotiations on separate tracks. *Second Remand Determ.* at 68–69. The Commission now finds that the fact that purchasers buy more domestic product than subject imports does not mean that domestic negotiations are sealed off from subject import pricing. *Id.* at 69. The Commission contends that the record shows that purchasers developed negotiation strategies encompassing all of their suppliers, domestic and foreign, before beginning negotiations with domestic mills. Plaintiffs argue that the evidence cited by the Commission does not show that subject prices were used in domestic negotiations. *Pl.'s Resp.* at 19–20. Although the evidence cited by the Commission confirms that purchasers bought major tonnage from domestic suppliers and minor tonnage from subject suppliers, it does not show that purchasers used foreign pricing to leverage lower domestic prices.

For example, although an internal memo indicates that Purchaser F planned to allocate more volume from Japanese sources and less from domestic suppliers, it does not show that such volume allocation affected price negotiations.[54] Similarly, although another memo indicates Purchaser F's plan to buy more volume from foreign suppliers and less from domestic sources would save the purchaser money, it does not show that subject pricing was used to leverage lower domestic prices.[55] Finally, the fact that subject import volume increased over the period of investigation does not prove that subject prices were used by purchasers to obtain lower prices. The issue here is price effects.

Therefore, although this evidence confirms that purchasers bought major volumes of domestic product and minor volumes of subject imports and indicates that subject import volume increased over the period of investigation, it does not show that purchasers used foreign pricing to leverage lower domestic prices.

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[54] "We will continue to buy from [ ] but in reduced quantities. Plan is to get [ ] from [ ] and [ ] from [ ] and this WILL cut into tons avail-[able] to them. . . . [ ] is a good steady supplier but will likely lose volume due to foreign and commercial issues." *Purchaser F Memo* [ ].

[55] "We attained an [ ] (domestic/foreign) mix in FY '99 and have targeted to achieve a [ ] mix in FY '00. The average savings . . . is approximately $[ ] / ton." *Purchaser F Memo* [ ].

c. Supply Agreements Limit Price Competition to Domestic Bids

Five purchasers lease facilities from two U.S. suppliers.[56] As part of these leasing arrangements, purchaser/lessees and supplier/lessors enter into supply agreements, which set forth volume and pricing terms for extended periods of time. *Staff Report* at III–3, n.5. Although these supply agreements vary, most require purchasers to buy the majority of their TCCSS from the supplier and require suppliers to compete only with other domestic prices.[57] In *Nippon II*, the court held that the Commission did not address Plaintiffs arguments relating to the prevalence and impact of these supply agreements. 223 F. Supp. 2d at 1363. In response, the Commission now finds that these supply agreements are not prevalent in the industry and do not preclude purchasers from using foreign prices to negotiate lower domestic prices. *Second Remand Determ*. at 72. Plaintiffs correctly assert that the Commission's findings are unsupported by substantial evidence.

First, the Commission finds that supply agreements are not prevalent in the industry because the volume of TCCSS sold pursuant to such agreements over the period of investigation was a small percentage of the total apparent U.S. consumption.[58] The apparent U.S. consumption, however, includes total domestic consumption from all sources. Moreover, the Commission's calculations reveal that the vast majority of TCCSS bought by purchaser/lessees from supplier/lessors were pursuant to supply agreements.[59] The fact that most of the TCCSS bought by four large purchasers from two of the seven domestic suppliers was insulated from Japanese price competition, weighs against the Commission's conclusion that purchasers used Japanese pricing in domestic negotiations.

In addition, the Commission's finding that supply agreements do not preclude purchasers from using foreign prices to negotiate lower

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[56] Purchasers [ ] lease facilities from [ ], and [ ] leases a facility from [ ]. *Staff Report* at III–3.

[57] For example, Purchaser E's supply agreement with [ ] includes the following provisions: "During the term of this supply agreement, [the supplier] agrees to sell to [Purchaser E] [ ] percent of [Purchaser E's] annual prime requirements for Tin Mill Products consumed or processed at the [leased] facility." [ ]. "The price for all Tin Mill Products sold by [the supplier] to [Purchaser E] will be negotiated between the parties on an annual basis. [The supplier] is expected to be competitive with [Purchaser E's] lowest price . . . for domestically produced Tin Mill Products . . ." *Id.* at 3. Therefore, although these agreements require purchasers to buy the majority of their TCCSS from their supplier/lessors, they could buy minor amounts based on price.

[58] On August 6, 2004, the Commission filed a Motion to Correct its May 11, 2004 Brief, to which Plaintiffs did not respond. In that Motion, the Commission determined the percentage of total apparent U.S. consumption associated with supply agreements to be [ ]% in 1997, [ ]% in 1998, and [ ]% in 1999. *ITC Mot. to Correct Brief* at Ex. 1.

[59] The following percentages were bought pursuant to supply agreements over the period of investigation: [ ]. *Id.*

domestic prices is unsupported by substantial evidence. The Commission contends that the language of supply agreements, which imposes an obligation on the supplier, does not preclude a purchaser from using subject prices in negotiations with suppliers. *Second Remand Determ.* at 72–73. Plaintiffs argue that this argument is inconsequential because the record does not show that purchasers used subject imports to leverage lower prices. *Pl.'s Resp.* at 21. The Commission is unable to cite an instance when a purchaser, party to a supply agreement, used subject pricing to negotiate lower domestic prices.[60] Even if such a purchaser attempted to use subject pricing to negotiate lower domestic prices, however, a supplier would be insulated, at least partly, from meeting those prices. Indeed, the record shows that domestic suppliers simply refused to compete with foreign prices. *See Hr'g Tr.* at 224 ("The domestic mills do not recognize foreign mill prices as competitive situations that they can----they choose to meet or being asked to meet. They flatly, absolutely do not recognize it.").

d. Domestic Producers Enjoyed a Lead Time Advantage

The court also held that the Commission failed to evaluate purchaser perceptions with respect to the domestic industry's lead time advantage as a potential explanation for keeping negotiations compartmentalized. *Nippon II*, 223 F. Supp. 2d at 1363. In response, the Commission acknowledges that the proximity of domestic mills to their purchasers generally gives them a lead time advantage, but it finds that this advantage is mitigated by several factors. *Second Remand Determ.* at 75. Specifically, the Commission cites evidence that purchasers minimize (but concededly do not eliminate) longer delivery times by negotiating for core specifications in advance of their production needs, and requiring Japanese suppliers to carry the cost of larger consignment inventories at storage facilities in the United States. *Id.* at 75–77. Plaintiffs argue that this evidence cuts against the Commission's conclusion. *Pl.'s Resp.* at 21. The fact that purchasers negotiate for advance specifications and for consignment inventories with Japanese suppliers but not with domestic suppliers, under-

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[60] The Commission also argues that supply agreements do not prevent purchasers from obtaining the benefit of lower foreign prices negotiated by other purchasers that are not subject to the domestic pricing limitation. For support, the Commission cites a statement from Purchaser A: "Although we are a captive customer of sorts, even [ ] has had to lower its prices to us. We have a three year contract with [ ] for quantity, but renegotiate price annually. The decline in pricing is due entirely to domestic and European competition." *Purchaser A Questionnaire Resp.*, Decl. of [ ], at 7. As Plaintiffs point out, this statement establishes no link between Japanese and domestic prices or negotiations. *Pl.'s Resp.* at 21.

cuts the Commission's finding that U.S. and Japanese negotiations take place on equal footing.[61]

e. Weirton was Unable to Provide Documentation of Alleged Japanese Price Competition

At the public hearing, the Commission requested that Weirton submit documentation to support its claim that subject import pricing damaged its negotiating leverage. In response, Weirton submitted "Competitive Price Allowance" sheets for several purchasers during the period of investigation and conceded that "the competitors listed . . . are always other domestic firms." *See Pet'r Posthr'g Br.*, Ex. 20, at 1, (A.R. 2–104), ITC App., Tab 1, at 4. Based on this information, the court found that Weirton "apparently derives its pricing allowance range solely according to pricing data of domestic producers submitted by its sales department." *Nippon I* 182 F. Supp. 2d at 1348. The Commission disagreed and accorded little weight to Weirton's inability to evidence its Japanese price competition. *First Remand Determ.* at 22–23. The court in *Nippon II* held that the Commission failed to justify its decision to accord little weight to this lack of evidence. 223 F. Supp. 2d at 1364. Nonetheless, the Commission again finds that Weriton's lack of documentation should be accorded little weight. *Second Remand Determ.* at 78–80. Plaintiffs counter that since Weirton claimed to be highly sensitive to the alleged competitive pressures of subject imports, this lack of documentation is significant. *Pl.'s Resp.* at 22.

This court has held that "what a party says, or does not say, concerning its economic condition can be important evidence of injury or lack thereof." *Allegheny Ludlum Corp. v. United States*, 24 CIT 858, 116 F. Supp. 2d 1276, 1299 (2000) (citing *Sunamerica De Aleaciones Laminadas, CA v. United States*, 44 F.3d 978, 984 (Fed. Cir. 1994)). The Defendant-Intervenor here, Weirton, alleges that it adjusted pricing because of Japanese competition. Nonetheless, it is unable to back up this allegation with documentation. The Commission reasons that this lack of documentation is insignificant because purchasers do not specify the identity of suppliers with which they are negotiating, but generally mention offshore suppliers to obtain lower domestic prices. For support, the Commission notes that Weirton only discovered "after the fact" that it was competing with Japanese prices.[62] Under this explanation, however, it is not clear why

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[61] The Commission also points out that purchasers used longer delivery times to negotiate lower foreign prices. *Id.* at 77. This evidence also shows that different lead times led to Japanese and U.S. negotiations being conducted pursuant to different criteria.

[62] A Weirton representative explained, "Do I get specific quotes from Japanese producers? No. Do I get specific quotes from customers saying well this is the Japanese price of the product? No. I only know, just like I know that other competitors, domestic competitors, are quoting different kinds of prices. I don't know specifically who's doing it, so consequently, I

Weirton had documentation regarding specific domestic competitors, did not document "offshore" competition, and did not document Japanese competition "after the fact."

Accordingly, the Commission's explanation for according little weight to this lack of documentation is unsupported by substantial evidence, and the fact that Weirton—a party to this action and principal supporter of the petition—is unable to provide evidence supporting its allegations, is important evidence of lack of injury.

II. Causation

After assessing whether the volume, price effects, and impact of the subject imports on the domestic industry are significant, the statutory "by reason of" language implicitly requires the Commission to "determine whether [these] factors as a whole indicate that the subject imports themselves made a material contribution to the overall injury." *Taiwan Semiconductor v. United States*, 23 CIT 410, 414, 59 F. Supp. 2d 1324, 1329 (1999) (quoting *Gerald Metals, Inc. v. United States*, 132 F.3d 716 (Fed. Cir. 1997)); *see also* 19 U.S.C. § 1673d(b)(1). This "by reason of" language "mandates a showing of causal—not merely temporal—connection between the [subject imports] and the material injury." *Gerald Metals, Inc.*, 132 F.3d at 720. To establish this causal connection, a minimal or tangential contribution to the material harm is insufficient. *Id.* at 722.

As part of this analysis, "the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports." *Statement of Administrative Action*, H.R. Doc. No. 316, 103rd Cong., 2nd Sess. (1994), reprinted in Uruguay Round Agreements Act, Legislative History, Vol. VI, at 851–52. Although the Commission need not find that alternative causes entirely negate the likelihood of subject imports having any adverse impact on domestic pricing, it must determine whether "their combined effect may dilute the effect of the LTFV imports, preventing [them] from being a material factor." *Taiwan Semiconductor v. United States*, 93 F. Supp. 2d 1283, 1291 (Ct. Int'l Trade 2000) (quoting *Gerald Metals, Inc.*, 22 CIT at 1014, 27 F. Supp 2d at 1355 n.8). As explained by this court,

> Frequently, several events—each of which is a necessary antecedent and has an appreciable effect—contribute to overall injury to an industry. In some cases, another event may have such a predominant effect in producing the harm as to make the effect of the LTFV imports insignificant and, therefore, to prevent the LTFV imports from being a material factor. (This is not to say, however, that there may not be more than one mate-

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could not identify that it was a specific Japanese product that was coming in and being competitive or pulling down prices. You only know that after the fact." *Hr'g Tr.* at 150–51.

> rial factor to injury.) In addition, even if no contributing factors independently have a predominant effect, their combined effect may dilute the effect of the LTFV imports, preventing the LTFV imports from being a material factor. The statute requires that the Commission determine whether the LTFV imports themselves made a material contribution to the injury suffered by the domestic industry.

Gerald Metals, 22 CIT at 1015, 27 F. Supp. 2d at 1355.

In this case, the court held that the Commission had not sufficiently ensured that it was accurately attributing the harmful effects to lower-priced subject imports because "[t]he record reflects that the increased subject import volume must be attributed largely to purchaser priorities that are unrelated to price." *Nippon II*, 223 F. Supp. 2d at 1371. In particular, the court held that the Commission had not reasonably explained why injury was not caused by (A) U.S. quality and delivery problems, or (B) non-subject imports.

A. The Record Consistently shows that Purchasers Bought Subject Imports Largely because of U.S. Quality and Reliability Problems

Non-price factors such as product quality and reliable delivery are important considerations to TCCSS purchasers. Many purchasers testified that they experienced U.S. quality and on-time delivery problems over the period of investigation. *Final Determ.* at 26. Nonetheless, in its First Remand Determination, the Commission was not persuaded by this evidence, which it found to be "inconsistent and contradictory" with other record evidence. *First Remand Determ.* at 29–41. In contrast, the court held that the evidence was not inconsistent. *Nippon II*, 223 F. Supp. 2d at 1367–69. In its Second Remand Determination, the Commission continues to find that evidence that purchasers turned to Japanese sourcing solely because of domestic quality and delivery time problems is inconsistent with other evidence showing that purchasers bought subject imports because of price. *Second Remand Determ.* at 87–117. Plaintiffs argue that the record consistently shows that purchasers turned to Japanese imports for these non-price reasons. *Pl.'s Resp.* at 24.

An agency has the discretion to weigh and judge the credibility of conflicting evidence. *Nippon III*, 345 F.3d at 1381; *Chung Ling Co. v. United States*, 16 CIT 636, 648, 805 F. Supp. 45, 55 (1992). While the court may not substitute its judgment for that of the agency, the agency's findings must be reasonable and supported by substantial evidence. *Bratsk Aluminum Smelter*, Slip Op. 04–75 at 10. In this case, because the evidence cited by the Commission reinforces purchaser testimony by showing that purchasers bought subject imports because of quality and delivery considerations, the Commission's finding that they are inconsistent is unreasonable and unsupported by substantial evidence. Contrary to the Commission's implication,

the fact that some of the same evidence indicates that purchasers also considered price when making purchasing decisions does not establish a conflict. Indeed, most purchasers reported that several factors drive their purchasing decisions. The question is whether subject imports made a material contribution to the injury, or whether the combined effect of other factors were of such a magnitude as to prevent subject imports from being a material factor in the injury. *See Taiwan Semiconductor*, 23 CIT at 416, 59 F. Supp. 2d at 1331.

Although some evidence indicates that price was a purchasing factor, the record on the whole consistently shows that purchasers bought subject imports largely because of U.S. quality and reliability problems. In light of this consistent evidence, the Commission cannot reasonably ensure that it accurately attributed harm to lower priced subject imports rather than to these other problems. Moreover, the combined effect of these problems may have prevented lower-priced Japanese imports from being a material factor in the injury. Indeed, the record shows neither that price was a material factor, nor that subject imports had a significant effect on domestic prices. *See* discussion *supra* Section I; *see also Gerald Metals, Inc.*, 22 CIT at 1014, 27 F. Supp. 2d at 1356 (noting that factors as a whole must indicate that LTFV imports themselves made a material contribution to the injury). Consequently, the record fails to show that harm was by reason of subject imports.

1. BWAY

At the public hearing, a BWAY representative testified that due to "a series of delivery and quality disappointments with certain U.S. mills," BWAY made "a strategic decision to diversify its sourcing including additional sourcing [of TCCSS] from abroad." *Hr'g Tr.* at 190. Nonetheless, the Commission finds that other record evidence contradicts BWAY's testimony and shows that BWAY purchased subject imports based on price. *Second Remand Determ.* at 95. The court agrees with Plaintiffs, however, that the record does not support the Commission's conclusion. *Pl.'s Resp.* at 25.

First, BWAY's questionnaire response is consistent with its testimonial evidence. Although the Commission notes that BWAY's questionnaire response states that it decided to take advantage of price differences offered by foreign suppliers over the period of investigation, the next sentence states that BWAY had concerns with domestic supply disruptions and quality problems.[63] Similarly, BWAY stated elsewhere in its questionnaire that although it dropped two U.S. suppliers due to price and commercial terms, it cut two others because of poor performance related to quality and delivery.[64] There-

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[63] [ ].

[64] [ ]. *Id.* at III–15.

fore, BWAY's questionnaire and testimony do not contradict the quality and delivery representations.

Second, BWAY's comparison of domestic and Japanese product corresponds with its hearing testimony, that it considered quality an important purchasing consideration. In its comparison, although BWAY rated U.S. delivery time as superior to the Japanese,[65] it rated the quality of Japanese TCCSS as superior to the U.S.

Third, although the Commission suggests otherwise, BWAY's failure to report any quality or delivery problems with some U.S. suppliers is not inconsistent with its hearing testimony. In the hearing, the BWAY representative stated that BWAY had problems "with certain U.S. mills." *Hr'g Tr.* at 190. In addition, the Commission even concedes that this testimony is backed up by BWAY's questionnaire, in which it reported that it shifted volumes from a certain U.S. supplier because of quality and delivery concerns.[66]

Therefore, the evidence cited by the Commission consistently indicates that BWAY purchased subject imports because of U.S. quality and reliable delivery concerns.

2. Crown

Crown indicated that it increased purchases of Japanese imports in 1999 because of quality and performance problems, and a shortage of West Coast supply.[67] Although the Commission rejects the credibility of Crown's assertion on the grounds that it is inconsistent with other record evidence, the Commission again fails to provide evidence that contradicts Crown's explanation for its shift to Japanese imports.

First, the evidence cited by the Commission does not contradict Crown's explanation that it shifted to Japanese imports due to a lack of alternate East Coast suppliers. Although the Commission notes that a certain East Coast supplier had ample available capacity that could have been used to supply the volumes Crown sourced from Japan in 1999,[68] it fails to point out that this supplier reported on-time

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[65] Question IV–10 asks purchasers to compare various aspects of U.S. and Japanese TCCSS, including availability, delivery terms and time, price, packaging, consistency, quality, reliability, and service. The fact that BWAY rated U.S. "delivery time" as superior to Japanese is not necessarily inconsistent with its testimony that it was experiencing delivery disappointments with U.S. mills, considering that U.S. mills enjoyed an undisputed lead-time advantage. *Id.* at IV–10.

[66] As it did in its First Remand Determination, the Commission argues that BWAY's purchasing history with [ ] is inconsistent with its hearing testimony. *Second Remand Determ.* at 97–98; *First Remand Determ.* at 33–34. Because the court previously held that this evidence is not inconsistent, it will not address this issue again. *Nippon II*, 223 F. Supp. 2d at 1367.

[67] In its questionnaire response, Crown specified that there was [ ].

[68] [ ] has a production facility in [ ], where the majority of its purchasers are located. *Staff Report* at III–2. Because the court in *Nippon II* held that Crown's

delivery problems associated with railway complications from June 1999 to 2000. *Staff Report* at III-2 n.2. Therefore, even assuming that this supplier had available capacity, the record indicates that it could not meet Crown's West Coast on-time delivery requirements in 1999.[69] Indeed, Crown noted that "delivery performance" was a factor in its decision to buy Japanese imports that year.

Second, Crown's comparison of Japanese and U.S. merchandise bolsters its explanation that it shifted to Japanese imports because of quality considerations. In the comparison, although Crown rated U.S. availability and delivery time as superior to that of the Japanese suppliers, it rated Japanese quality and consistency superior to that of the U.S. *Crown Questionnaire Resp.* at IV–10. In addition, the fact that Crown rated Japanese and U.S. prices as comparable suggests that it purchased from these sources based on factors other than price. *Id.*

Third, evidence that Crown informed a U.S. producer that Japanese prices were lower than U.S. prices neither contradicts its explanation for why it purchased subject imports, nor constitutes substantial evidence that Crown bought subject imports because of price.[70] It is undisputed that Japanese prices were lower than U.S. prices in 1999. The fact that "economic harm to domestic industry occurred when LTFV imports [we]re also on the market is not enough to show that the imports caused a material injury." *Gerald Metals, Inc.*, 132 F.3d at 719.

In sum, the Commission fails to provide substantial evidence to discredit Crown's explanation that it shifted to subject imports because of inadequate U.S. quality and reliable delivery problems.

3. Silgan

Silgan testified that it purchased Japanese imports for specialized applications that were either not available from the domestic industry or of a "quality level" not obtainable from U.S. producers. *Hr'g Tr.* at 200–02. Silgan also attributed its increase in Japanese imports to its acquisition of Campbell's Soup, which used small quantities of TCCSS produced by Nippon because of superior quality and unique

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qualification of [ ] was not necessarily inconsistent with its stated quality concerns, this issue will not be addressed again here. 223 F. Supp. 2d at 1368. In addition, although the Commission asserts otherwise, Crown's failure to criticize five other domestic suppliers' quality and on-time delivery does not constitute substantial evidence that these five domestic suppliers provided Crown with reliable service and high quality product.

[69] The Commission also contends that although six other East Coast producers prefer to keep their shipments within the Eastern U.S. because of freight equalization charges, they could theoretically ship their products to the Western United States. *Second Remand Determ.* at 102–03. The court agrees with Plaintiffs, however, that the theoretical ability to supply West Coast facilities does not undermine Crown's explanation for its shift to Japanese sources. *Pl.'s Resp.* at 27–28.

[70] The U.S. producer is [ ].

specifications not available from U.S. producers. *Id.* at 202. In addition, Silgan testified that it terminated Weirton as a supplier for failing to meet Silgan's quality and service requirements. *Id.* at 200–01. Finally, Silgan stated that if it were to purchase according to price, it would purchase from Brazil, Korea, and Taiwan. Although the Commission finds that this testimony is undermined by other record statements indicating that Silgan based its purchasing decisions on price, it fails to support this finding with substantial evidence.

First, the fact that Silgan increased its purchases of Japanese imports at the same time Japanese producers were underbidding domestic producers is not inconsistent with Silgan's testimony. In fact, it corresponds with Silgan testimony that it increased its purchases of subject imports during the period of investigation due to its acquisition of Campbell's Soup.[71] Moreover, as discussed above, a temporal connection between LTFV imports and material harm is insufficient to establish causation. *Gerald Metals, Inc.*, 132 F.3d at 719 (citing *United States Steel Group v. United States*, 96 F.3d 1352, 1358 (Fed. Cir. 1996)) ("To claim that the temporal link between these events proves that they are causally related is . . . fallacy. . . .").

Second, the Commission concedes that Silgan's questionnaire response and hearing testimony verify that Silgan discontinued buying from Weirton because of quality problems. *Second Remand Determ.* at 114–15. In a weak attempt to discredit this consistent evidence, the Commission reasons that "Silgan made no other comments on this issue in its questionnaire response, did not describe these failures in any detail, and provided no documents to the Commission showing what quality or delivery problems Weirton was having prior to 1998." *Id.* at 115. This lack of particular types of evidence, however, does not undermine otherwise consistent evidence.[72]

Third, other statements by Silgan support its testimony that it purchased Japanese imports because U.S. suppliers were unable to meet certain specifications. A Silgan representative testified, "we purchased . . . wide tin-free steel from Japan . . . because our equipment is designed to run . . . wide coils. . . . No U.S. mill can provide . . . wide tin-free steel. If we buy U.S. produced narrower coils, we lost [a percentage] of our output. This not only affects our costs, but it constrains our capacity." *Hr'g Tr.* at 201. The Commission claims that this statement contradicts its testimony by proving that "Silgan was able to, and did, use the domestic product in place

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[71] In addition, Silgan's purchasing history, which shows an increase in purchases from Nippon in 1999 is fully consistent with Silgan's testimony that it increased Japanese purchases when it acquired Campbell's Soup in 1998. Contrary to the Commission's assertion, Silgan did not testify that it began, but rather that it "continued using" Nippon, and "increased" its purchases from Japan because of this acquisition. *Id.* at 202.

[72] The Commission also points out that Silgan [ ]. That Silgan noted problems with [ ] does not suggest any inconsistencies. [ ].

of the wider product supplied by the Japanese." *Second Remand Determ.* at 117. On the contrary, this statement is consistent with Silgan's testimony that U.S. suppliers could not meet Silgan's "specialized applications."[73] *Hr'g Tr.* at 202.

Accordingly, the record consistently shows that Silgan purchased subject imports largely because of non-price concerns.

4. U.S. Can

U.S. Can testified that it increased its volume of Japanese imports because of U.S. quality and on-time delivery problems, and because of the desire to source TCCSS on a more global basis to serve its increasingly international operations. *Hr'g Tr.* at 196–97. Although the Commission concedes that this testimony is consistent with U.S. Can's testimony at the preliminary staff conference, it finds that it is undermined by other record evidence. The court agrees with Plaintiffs, however, that the statements cited by the Commission are neither inconsistent nor contradictory.

First, purchasing data for 1999 substantiates U.S. Can's hearing testimony that it increased its purchases of Japanese imports while decreasing its purchases of U.S. TCCSS. The Commission asserts that this purchasing history conflicts with another U.S. Can statement: "[U.S. Can] did not favor the Japanese mills and take tons away from Weirton Steel . . . . Japanese tonnage [was] reduced [during certain months in 1999] for reasons of inventory control." *Id.* at 199. Evidence indicating that U.S. Can increased its total 1999 Japanese tonnage is not necessarily inconsistent with testimony that U.S. Can decreased Japanese tonnage during certain months of 1999. Moreover, as Plaintiffs point out this evidence is not relevant to causation. It is undisputed that U.S. Can increased its purchases of Japanese imports in 1999; the issue is whether or not it did so by reason of Japanese pricing.[74]

Second, two internal memos regarding U.S. Can's negotiations with a particular U.S. supplier reinforce U.S. Can's hearing testimony that it increased purchases from Japan due to U.S. reliability problems. Although noting that foreign suppliers were offering "aggressive pricing," both memos emphasized that U.S. Can was experi-

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[73] The Commission also asserts that price is an important factor in Silgan's sourcing decisions. The court in *Nippon II* already addressed this argument, holding that "[t]he Commission is correct to perceive that Silgan's priorities appear to be [ ], in that order, but fails to recognize that the same ranking of priorities explains why Silgan chose not to purchase from Brazil, Korea, and Taiwan, and explains why Silgan would shift its purchases toward subject imports." 223 F. Supp. 2d at 1369. The Commission offers no contrary evidence here.

[74] The Commission's lengthy discussion regarding an alleged correlation between low U.S. prices and U.S. Can's domestic purchasing patterns is similarly off point. Nonetheless, the evidence cited by the Commission parallels U.S. Can's hearing testimony by emphasizing [ ].

encing on-time performance problems with U.S. suppliers and reduced volumes accordingly.[75] Therefore, these internal memos reinforce U.S. Can's hearing testimony.

Third, U.S. Can's rating of U.S. and Japanese TCCSS also supports its hearing testimony. Although U.S. Can rated U.S. delivery time and availability as superior to that of the Japanese, it rated Japanese quality, consistency, and reliability superior to the that of the U.S. suppliers. *U.S. Can Questionnaire Resp.* at IV–10. This supports U.S. Can's testimony that it increased its purchases of Japanese imports due to U.S. quality and reliability problems.[76]

Therefore, the evidence cited by the Commission is fully consistent with U.S. Can's hearing testimony that it increased its purchases of subject imports for reasons other than price.

B. The Record indicates that Non-Subject Imports were a Significant Factor in the U.S. Market

During the period of investigation, non-subject imports accounted for a greater proportion of total U.S. market share than Japanese imports.[77] *Final Determ.* at 10. Nonetheless, the Commission rejected the contention that non-subject imports accounted for declines in domestic pricing, finding that "[a]lthough non-subject imports were a significant factor in the domestic market during the period of investigation, subject imports grew more rapidly and were generally priced more aggressively." *Id.* at 22. The court in *Nippon I* held that this finding was unsupported by substantial evidence because the Commission failed to consider whether non-subject imports were predominant in the regions where the majority of domestic shipments were concentrated, and failed to compile its price comparison data in a manner to facilitate the court's review. 182 F. Supp. 2d at 1354–55. On its first remand, the Commission did not comply with the court's instructions. *Nippon II*, 223 F. Supp. 2d at 1369–71. In its Second Remand Determination, the Commission again finds that non-subject imports were not the predominant cause of injury to the domestic industry during the period of investigation. *Second Remand Determ.* at 127. In making this determination, however, the Commission fails to (1) evaluate whether non-subject import volume

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[75] *Memo to file* from [ ] ("U.S. Can monthly tonnage . . . has been reduced due to service."). *Memo to file* from [ ] ("While we missed [ ] in one quarter in 1997, [ ] did not bring this up as a complaint because of the recognition of their continuing poor service performance. . . . We covered with them that we still are intent with [ ] (and a few other mills with service issues, but not as bad as [ ] to have . . . [penalties] . . . apply when service falls.").

[76] Because the court previously held that "U.S. Can's internal documents indicate that quality problems persisted with the domestic supplier 'for a long period of time,' a fact that is not negated by statements in the same document that the problems had improved over this time," *Nippon II*, 223 F. Supp. 2d at 1369, this issue will not be reexamined here.

[77] [ ]. *Staff Report* at IV–5, Table IV–4.

was predominant in regions where the majority of domestic shipments were concentrated, and (2) reasonably interpret non-subject import pricing data.

1. The ITC Fails to Evaluate whether Non-subject Import Volume was Predominant in Regions where the Majority of Domestic Shipments were made

The majority of U.S. producers are located in the East and Midwest and supply purchasers in those regions. *Staff Report* at II–1. Japanese producers, while competing heavily in the West, supply purchasers throughout the United States. *Final Determ.* at 10. Non-subject producers compete only in the Eastern and Midwestern United States. *Id.* In light of this regional competition, the court instructed the Commission to evaluate whether non-subject imports were predominant in regions where the majority of domestic shipments were concentrated. The court explained that "[e]ven if subject and non-subject market share levels are 'comparable' on the whole, non-subject imports are not necessarily precluded from constituting the predominant source of injury where, as in this case, they are concentrated in regions to which most domestic shipments were made." *Nippon I*, 182 F. Supp. 2d at 1355.

In its Second Remand Determination, the Commission finds a correlation between the increased volumes of subject imports to the West Coast, and the apparent financial declines of the domestic West Coast producers. *Second Remand Determ.* at 122. Plaintiffs argue that because the majority of domestic TCCSS shipments and non-subject import volumes are concentrated on the East Coast, non-subject imports constituted the predominant source of injury during the period. *Pl.'s Resp.* at 34–35. The Commission once again refuses to comply with the court's instructions.[78] By refusing to assess non-subject import volumes in the East and Midwest, the Commission has no basis for ensuring that it did not attribute the harmful effects from non-subject imports to the subject imports.

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[78] The court in *Nippon II* dismissed the Commission's finding that subject imports were the source of the domestic industry's harm because of the declining performance of West Coast TCCSS producers. 223 F. Supp. 2d at 1370. The court noted that "[t]o find subject imports a material cause, *even on the West Coast where non-subject imports were not the predominant imports*, the Commission needed to determine whether there is a correlation between the supposedly declining U.S. mills' West Coast revenues, specific instances of underbidding by producers of subject imports, and a subsequent shift in volume to those subject imports." *Id.* (emphasis added). The Commission relies on this statement to justify its continuing focus on the West Coast even after the court clearly instructed it, in both previous opinions, to assess the East Coast and Midwest regions. A link between subject imports and West Coast revenues is not sufficient to show that subject imports' contribution to the overall harm was material. *See Taiwan Semiconductor*, 23 CIT at 416, 59 F. Supp. 2d at 1330–31 (holding that the Commission must "reasonably find[ ] that the subject imports' contribution to the overall harm is material").

2. The ITC Fails to Reasonably Interpret Non-subject Import Pricing Data

In *Nippon II*, the court criticized the Commission's analysis of the underselling patterns of subject imports compared to non-subject imports. 223 F. Supp. 2d at 1370–71. The court held that by collapsing the data into two-year increments, the Commission obscured the fact that there is no clear pattern when analyzed from year to year. *Id.* On its second remand, the Commission prepared new charts and represented the data. Based on the revised data, the Commission finds that underselling by non-subject imports and subject imports over the period of investigation was "mixed." *Second Remand Determ.* at 125. This mixed data, the Commission contends, establishes that subject imports had more than a minimal or tangential amount of injury on the domestic industry. *Id.* at 126. Plaintiffs argue, on the other hand, that the data is not mixed, but rather when analyzed on an individual purchaser basis, shows that non-subject imports almost always undersold subject imports. *Pl.'s Resp.* at 35.

The Commission presents two charts. The first chart compares the weighted average prices that six large purchasers paid for Japanese and non-subject merchandise over the period of investigation. *Second Remand Determ.* at 124. It reveals that over the period of investigation, three purchasers paid less for non-subject TCCSS, two paid less for Japanese TCCSS, and one paid less for Japanese TCCSS in 1997 and 1998, but more in 1999.[79]

The second chart compares non-subject bids to Japanese bids. Although there were more total non-subject bids "above" than "below" all Japanese bids over the entire period of investigation, from 1997 to 1999, the number of non-subject bids "below all Japanese bids" steadily increased. In addition, in 1999, the year in which the Commission finds the most instances of subject underselling, there were more non-subject bids "below all Japanese bids" than "within" or "above." *Second Remand Determ.* at 125, Table Second Remand 5.

Although subject imports need not be the sole or principal cause of injury, *Nippon III*, at 1381, "a positive correlation concerning non-

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[79] In 1999, Purchaser F paid less for non-subject merchandise: Japanese [ ]% discount rate and non-subject at [ ]% discount rate. *Id.* at 124, Table Second Remand 4. Similarly, in 1997 Purchaser A paid less for non-subject TCCSS: Japanese $[ ] and non-subject $[ ]. In 1997, Purchaser E paid less for non-subject merchandise: Japanese [ ]% and non-subject [ ]% discount rate; and in 1999, the discount rates were both [ ]%. On the other hand, Purchaser C paid less for Japanese TCCSS in 1999: Japanese [ ]%, non-subject [ ]% discount rates. Purchaser B paid less for Japanese TCCSS: 1997 - Japanese [ ]%, non-subject [ ]%; 1998 - Japanese [ ]%, non-subject [ ]%; 1999 - Japanese [ ]%, non-subject [ ]%; 2000 - Japanese [ ]%, non-subject [ ]%. Finally, in 1997 and 1998, [ ] paid less for Japanese, but more in 1999: 1997 - Japanese $[ ], non-subject $[ ]; 1998 - Japanese $[ ], non-subject $[ ]; 1999 - Japanese $[ ], non-subject $[ ]. *Id.* This data is mirrored by individual purchasing data in the Staff Report. *See Staff Report* V–10–V–21.

subject import[s] . . . in conjunction with other factors, may be sufficient to cut the causal connection between subject imports and any harm suffered by the domestic industry." *Altx, Inc. v. United States*, 167 F. Supp. 2d 1353, 1361–63 (Ct. Int'l Trade 2001). In this case, the record not only indicates that non-subject imports potentially had a significant effect on U.S. prices, but it also affirmatively demonstrates that quality and delivery problems affected the domestic industry. These aspects of the record indicate a gap in the causal connection between lower priced imports and material harm to the domestic industry. *See Gerald Metals, Inc.*, 132 F.3d at 721. The record simply does not support a finding that subject imports caused injury to the domestic industry.

CONCLUSION

The Commission's affirmative injury determination is unsupported by substantial evidence. As indicated previously, the record does show some increase in the volume of subject imports, but despite some isolated fragments of positive evidence, the record does not show that subject imports had a significant effect on domestic prices, or that purchasers bought significant volumes of subject imports by reason of lower prices. On the contrary, because the record shows that the effect of subject imports on domestic prices was insignificant and that harm suffered by the domestic industry was not caused by lower-priced Japanese TCCSS, it compels a negative material injury determination. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) ("To reverse the [agency's] finding we must find that the evidence not only *supports* that conclusion, but *compels* it . . .") (emphasis in original).

Regarding price effects, not only was Japanese underselling and domestic price depression or suppression insignificant over the period of investigation, but certain conditions of competition also minimized any effect subject imports could have had on domestic prices. Specifically, lower-priced imports had only a low to moderate ability to impact the domestic industry's sales and prices; Japanese and U.S. price negotiations were compartmentalized; the majority of the industry's product was supplied by domestic producers; several large purchasers bought U.S. TCCSS pursuant to supply agreements that limit price competition domestically; superior domestic lead times seem to translate into price premiums and segregate Japanese and U.S. price negotiations; and the principal supporter of the petition had no documentary evidence of Japanese price competition. Therefore, the record indicates that the effect of subject imports on domestic prices was not significant.

With respect to causation, the record does not show that lower-priced Japanese imports were a material factor in the domestic industry's harm. On the other hand, it does show that purchasers bought increased volumes of Japanese imports because of concerns

with domestic producers' product quality and reliable delivery, and that non-subject imports were an important competitive factor in the domestic market during the period of investigation. Thus, the record shows that the harm suffered by the domestic industry was not by reason of subject imports.

In sum, the record fully supports a negative determination and *will not* support an affirmative one. The court has considered whether to leave to the Commission's discretion, as it ordinarily would, the issue of reopening the record for further investigation, particularly because non-subject imports were not fully studied, but such information would not change the result. It likely would be more support for a negative determination. The agency has had three opportunities to investigate this matter and its attempts to obtain new supportive information on price effects have not been successful. Further, it is not fair to Plaintiffs to delay this matter when lack of adequate investigation is not the primary problem. While flawed, the investigation gathered most of the relevant material. It simply does not support an affirmative determination.

Accordingly, the court concludes that because the Commission is unable to obtain new evidence to significantly supplement the record, due to the passage of time and other reasons, further investigation or reconsideration in this matter is futile. The Commission's Second Remand Determination is remanded with instructions to issue a negative material injury determination.[80] *See* 19 U.S.C. § 1516a ("If the [court's] final disposition of an action brought under this section is not in harmony with the published determination of . . . the Commission, the matter shall be remanded to . . . the Commission, as appropriate, for disposition consistent with the final disposition of the court.").

The court has previously declined to remand this matter for a determination of threat of material injury, largely on the basis that

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[80] The Federal Circuit recently cited *Nippon III* in a footnote, stating that "Section 1516a limits the Court of International Trade to affirmances and remand orders; an outright reversal without a remand does not appear to be contemplated by the statute." *Altx, Inc. v. United States*, 370 F.3d 1108, 1111 n.2 (Fed. Cir. 2004). The Federal Circuit's statement must be read in the context of the principles of administrative law. *See e.g.* 5 U.S.C. § 706 (2000) (Administrative Procedure Act instructing reviewing court to "compel agency action unlawfully withheld or unreasonably delayed," and "hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence . . ."); *Ammex Inc. v. United States*, No.02–00361, Slip Op. 2004–89 at 5 (Ct. Int'l Trade July 20, 2004) (quoting *McDonnell Douglas Corp. v. NASA*, 895 F. Supp. 316, 319 (D.D.C. 1995)) (holding that remand would be inappropriate because "the record was inadequate to support the agency's 'erroneous decision' [which] is different from its 'being inadequate to support any decision or from suffering a procedural deficiency that might necessitate remand.' Otherwise, 'administrative law would be a never ending loop from which aggrieved parties would never receive justice.' "). Moreover, language of § 1516a leaves the nature of any remand open. Neither Congress nor the appellate court could have intended endlessly futile remands. Rather, a remand with specific instructions would appear consistent with case law and the statute.

Weirton neither raised the issue of threat before the court, nor presented a viable threat case in its post-hearing brief before the Commission. *Nippon Steel Corp. v. United States*, No. 00–09–00479, Slip Op. 02–116 (Ct. Int'l Trade Sept. 26, 2002). Upon further review of *Nippon III*, the court concludes that it is better practice for the agency in the first instance to determine whether a threat of injury dispute remains.

The remand determination is to issue within sixty days hereof. Objections thereto may be filed within eleven days thereafter.

SLIP OP. 04–132

CORUS STAAL BV, Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, Defendant-Intervenor.

Court No. 04–00316

[Plaintiff's Partial Consent Motion for Preliminary Injunction Granted.]

Dated: October 19, 2004

Steptoe & Johnson LLP (*Richard O. Cunningham*, *Joel D. Kaufman*, *Alice A. Kipel* and *Troy H. Cribb*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke*), *Barbara J. Tsai*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Skadden, Arps, Slate, Meagher & Flom LLP (*John J. Mangan*) for defendant-intervenor.

MEMORANDUM OPINION

RESTANI, Chief Judge:

Before the court is a partially consented to motion for "preliminary injunction" under 19 U.S.C. § 1516a(c)(2) (2000) to stay liquidation of entries pending litigation in this unfair trade matter. In fact, this statutory injunction is not an ordinary preliminary injunction but a special injunction to prevent liquidation of entries until a final and conclusive judicial decision, as referenced in 19 U.S.C. § 1516a(e), is reached. Such a decision does not occur until all avenues of appeal are exhausted. *See Timken Co. v. United States*, 893 F.2d 337, 339 (Fed. Cir. 1990) (holding that "an appealed CIT decision is not a 'final court decision' within the plain meaning of § 1516a(e)"); *accord Cemex, S.A. v. United States*, No. 04–1058,–1080 at *18 (Fed. Cir.

Sept. 28, 2004); *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1379 (Fed. Cir. 2002).

The only issue before the court is the duration of the injunction. The government asserts that an injunction which extends beyond the end of litigation in this court is unnecessary, and that if an opinion is issued which is not in harmony with its administrative determination, administrative suspension will occur. On the other hand, if the court issues an opinion in harmony with the agency determination, the government states it may commence liquidation despite any rights of appeal.* Of course, plaintiffs may seek an injunction pending appeal, but that would entail further use of attorney and judicial resources. Presumably, there are no unusual fact scenarios which would make this dispute suitable for the statutory injunction at one judicial level but not the next.

Further, given the recent difficulties in this court with liquidation in violation of court orders, *see, e.g.*, *AK Steel Corp. v. United States*, 281 F. Supp. 2d 1318 (Ct. Int'l Trade 2003), it seems prudent to attempt to avoid creating any opportunities for error and to bar any liquidation until all litigation is complete. This disposition is in accord with recent decisions of this court. *See, e.g., PAM, S.p.A. v. United States*, No. 04–00082, Slip Op. 04–66 at 11–15 (Ct. Int'l Trade June 10, 2004), *SKF USA Inc. v. United States*, 316 F. Supp. 2d 1322, 1333–35 (Ct. Int'l Trade 2004), *Yancheng Baolong Biochemical Prods. Co., Ltd. v. United States*, 277 F. Supp. 2d 1349, 1358–60 (Ct. Int'l Trade 2003). In addition, there is nothing in the statute which limits the court's discretion in fashioning an injunction appropriate to the case and the preliminary injunction law of the various circuits, which might indicate a preliminary injunction terminates with the conclusion of litigation in the trial court, does not apply to the special statutory injunction at issue. The injunction lasts according to its terms, which a court may adjust as it sees fit. *See United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) (courts retain power to modify their injunctions). At this time, the court sees no reason why the fullest possible injunction of liquidation should not be granted.

ACCORDINGLY, plaintiff's proposed order granting an injunction of liquidation until a final and conclusive court decision is reached will be entered.

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*The court has ruled the government's policy of proceeding with liquidation within the period for appeal unlawful. *Tianjin Mach. Import & Export Corp. v. United States*, No. 02–00637, Slip Op. 04–125 at 29–32 (Ct. Int'l Trade Oct. 4, 2004).