Slip Op. 05–1

NSK LTD., NSK CORP., NSK PRECISION AMERICA, INC., *et al.* Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN U.S. CORP., *et al.* Defendant-Intervenors.

Before: WALLACH, Judge
Consol. Court No.: 03–00437
PUBLIC VERSION

[United States Department of Commerce's Final Results are sustained.]

Dated: January 3, 2005

Crowell & Moring, LLP, (*Matthew Philip Jaffe*, *Robert A. Lipstein*, and *Grace W. Lawson*) for Plaintiffs and Defendant-Intervenors NSK Ltd., NSK Corp., NSK Precision America, Inc.

Barnes, Richardson & Colburn, (*Donald J. Unger*, *Kazumune V. Kano*, and *Carolyn D. Amadon*) for Plaintiffs and Defendant-Intervenors NTN Corp., NTN Bearing Corp. of America, American NTN Bearing Manufacturing Corp., NTN Driveshaft, Inc., and NTN-BCA Corp.

Stewart and Stewart, (*Terence P. Stewart*, *William A. Fennell*, and *Lane S. Hurewitz*) for Plaintiff and Defendant-Intervenor Timken U.S. Corp.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director; *Paul D. Kovac* and *Claudia Burke*, Attorneys, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; and *Peter G. Kirchgraber*, *Philip Curtin*, *Elizabeth Doyle*, *Marisa Goldstein*, *Peter Kaldes*, *Barbara Tsai*, Attorney Advisors, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant United States.

OPINION

Wallach, Judge:

I
INTRODUCTION

In this action, Plaintiffs NSK Ltd., NSK Corp., and NSK Precision America, Inc. (collectively, "NSK"); NTN Corp., NTN Bearing Corp. of America, American NTN Bearing Manufacturing Corp., NTN Driveshaft, Inc., and NTN-BCA Corp. (collectively, "NTN"); and

Timken U.S. Corp. ("Timken") challenge the final results of an administrative review issued by the United States Department of Commerce ("Commerce") in *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and Singapore: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Review in Part, and Determination Not to Revoke Order in Part*, 68 Fed. Reg. 35,623 (June 16, 2003) ("Final Results"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2003). For the following reasons, Commerce's determination is sustained.

II
BACKGROUND

On May 15, 1989, Commerce published in the Federal Register the final results in the antidumping duty orders on ball bearings ("BBs") and parts thereof from Japan. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan*, 54 Fed. Reg. 20,904 (May 15, 1989) ("Original Investigation"). On June 25, 2002, Commerce published a notice of initiation of the thirteenth administrative review of the subject Japanese BBs, covering a period of review ("POR") of May 1, 2001, through April 30, 2002. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 67 Fed. Reg. 42,753 (June 25, 2002) ("Initiation of the Thirteenth Administrative Review").

On March 10, 2003, Commerce published the preliminary results in this administrative review in *Ball Bearings and Parts Thereof From Japan: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Administrative Review, and Notice of Intent To Rescind Administrative Review*, 68 Fed. Reg. 11,357 (March 10, 2003) ("Preliminary Results"). Commerce issued the Final Results on June 16, 2003. The scope of this order covers antifriction balls, ball bearings with integral shafts, ball bearings (including radial ball bearings) and parts thereof, and housed or mounted ball bearing units and parts thereof.[1] Final Results, 68 Fed. Reg at

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[1] Imports of these products are classified under the following Harmonized Tariff Schedules (HTSUS) subheadings:

> 3926.90.45, 4016.93.00, 4016.93.10, 4016.93.50, 6909.19.5010, 8431.20.00, 8431.39.0010, 8482.10.10, 8482.10.50, 8482.80.00, 8482.91.00, 8482.99.05, 8482.99.2580, 8482.99.35, 8482.99.6595, 8483.20.40, 8483.20.80, 8483.50.8040, 8483.50.90, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.60.80, 8708.70.6060, 8708.70.8050, 8708.93.30, 8708.93.5000, 8708.93.6000, 8708.93.75, 8708.99.06, 8708.99.31, 8708.99.4960, 8708.99.50, 8708.99.5800, 8708.99.8080, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90.

Final Results, 68 Fed. Reg at 35,623.

35,623. In the Final Results, Commerce found a 2.68% weighted-average margin for NSK Japan and 4.51% for NTN. *See id.* at 35,625.

III
STANDARD OF REVIEW

This court will sustain any determination, finding, or conclusion of Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. 1516a(b)(1)(B) (2004); *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1368 (Fed. Cir. 1999). "[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 217, 59 S. Ct. 206, 83 L. Ed. 126 (1938)). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966) (citing *Keele Hair & Scalp Specialists Inc. v. FTC*, 275 F.2d 18, 21 (5th Cir. 1960)).

In looking at Commerce's statutory interpretation, this court must go through a two-step analysis. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The court examines, first, whether "Congress has directly spoken to the precise question at issue," in which case courts, "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43; *see Household Credit Servs. v. Pfennig*, 541 U.S. 232, 124 S. Ct. 1741, 1746–47, 158 L.Ed. 2d 450 (2004). Whenever Congress has "explicitly left a gap for the agency to fill," the agency's regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843–44. "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the [agency's] application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' " *Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965) (quoting *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153, 67 S. Ct. 245, 91 L. Ed. 136 (1946)).

IV
ANALYSIS

A
Commerce's Practice of Zeroing Is Supported by Substantial Evidence and Is In Accordance with Law

NSK argues that Commerce's decision to assign a zero margin to export price ("EP") or constructed export price ("CEP") sales made above normal value ("NV")[2] is impermissible under U.S. antidumping law. NSK's Motion for Judgment on the Agency Record ("NSK's Motion") at 7. NSK argues that 19 U.S.C. § 1677(34) (2003) "reformulates the first requirement of section 731" that U.S. sales below fair value are dumped while those that are above fair value are not. *Id.* at 10. NSK further claims that the definition of dumping margin in 19 U.S.C. § 1677(35)(A)[3] "reaffirms that dumping only exists when NV exceeds the EP or CEP *of the subject merchandise*, which section 771(25) defines as 'class or kind of merchandise within the scope of an investigation, a review.' " *Id.* (emphasis in original). NSK thus concludes that the focus of any antidumping proceeding is the *class* of merchandise involved. *Id.* (emphasis added). In turn, pursuant to 19 U.S.C. § 1673(1) (2003), NSK claims that "Commerce may impose antidumping duties only when the determination is that *a class or kind of foreign merchandise* is being, or is likely to be, sold in the United States at less than fair value." *Id.* at 8 (emphasis in original).

NSK cites *Taiwan Semiconductor Indus. Ass'n v. Int'l Trade Comm'n*, 266 F.3d 1339, 1345 (Fed. Cir. 2001), in which the Federal Circuit stated that the U.S. International Trade Commission ("ITC") must analyze " 'contradictory evidence or evidence from which conflicting inferences could be drawn . . . to ensure that the subject imports are causing the injury in a tangential or minimal way." *Id.* at 9; Issues and Decision Memorandum at 11. NSK notes that the court in *Taiwan Semiconductors* said that injury to domestic industry may not be present merely in the face of less than fair value imports. Issues and Decision Memorandum at 11. NSK argues that Commerce's zeroing methodology impairs analysis of "contradictory evidence or evidence from which conflicting inference would be drawn" that would allow for an unbiased margin calculation. *Id.* at 11. Commerce's methodology, NSK posits, violates the statute because it "trivializes" U.S. sales above fair value as a "single U.S. sale below

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[2] Commerce's zeroing methodology assigns a zero value to export price and constructed export price sales made above normal value, as opposed to factoring in all home market sales, both above and below normal value, in the margin calculation.

[3] Pursuant to 19 U.S.C. § 1677(35)(A), "[t]he term 'dumping margin' means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise."

NV can produce a dumping margin, even though there exist hundreds of sales for which the opposite is true." NSK's Motion at 8–9. NSK suggests that Commerce's methodology may lead to punitive antidumping margins, disallowed by the Federal Circuit.

Defendant argues that Commerce's zeroing practice is in accordance with U.S. antidumping law. Defendant's Response in Opposition to Timken Company's, NSK's, and NTN's Motions for Judgment Upon the Agency Record ("Defendant's Response") at 14–15. Defendant states that this practice has been upheld by this court and the Federal Circuit in a number of cases. In particular, Defendant cites to *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004), in which the Federal Circuit upheld Commerce's zeroing methodology as reasonable under the statutory scheme. *Id.* at 15.

Defendant further argues that NSK's position that Commerce's margin-calculation methodology violates 19 U.S.C. § 1673 is without substance. First, Defendant refutes NSK's argument that its zeroing methodology violates 19 U.S.C. § 1673 by arguing that 19 U.S.C. § 1673 applies to investigations whereas 19 U.S.C. § 1675 covers administrative reviews and requires the dumping analysis to be conducted on an entry-by-entry basis. Issues and Decision Memorandum at 15. Second, Defendant argues that NSK's reliance on *Taiwan Semiconductors* is erroneous since the Federal Circuit in that case addressed statutory injury in an ITC investigation and not Commerce's margin-calculation methodology. *Id.* Defendant argues that *Taiwan Semiconductors* does not support NSK's argument that sales at above normal value are "contradictory evidence" in calculating a dumping margin or that Commerce's not giving those sales equal consideration is evidence of bias. *Id.* Defendant also says that, in *Corus Staal BV v. United States*, 259 F. Supp. 2d 1253 (CIT 2003) (citing *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 20 CIT 558 (1996)), the court stated that "Commerce's justification for zeroing, to protect against masked dumping, was valid and offset any bias." *Id.* at 16.

Timken supports Commerce's use of the zeroing methodology. Timken argues that NSK's reliance on *Taiwan Semiconductors* is erroneous because the case concerns an ITC injury investigation and not zeroing methodology. *Id.* at 13. Timken states that *Timken* affirmed Commerce's zeroing methodology as a reasonable interpretation of the statute. Response of Timken US Corporation, Plaintiff and Defendant-Intervenor, to the Rule 56.2 Motions of NSK Ltd., et al. and NTN Corporation, et al. ("Timken's Response") at 19.

Commerce's zeroing methodology has been directly upheld by this court[4] and most recently by the Federal Circuit in *Timken*:

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[4] *See NSK Ltd. v. United States*, 28 CIT ____, Slip Op. 04–105 at 12 (Aug. 20, 2004); *SNR Roulements v. United States*, 28 CIT ____, Slip Op. 04–100 at 27 (Aug. 10, 2004); *PAM, S.p.A. v. United States*, 265 F. Supp. 2d 1362, 1370–73 (CIT 2003); *Corus Staal BV v.*

> [w]e conclude Commerce based its zeroing practice on a reasonable interpretation of the statute. First, while the statutory definitions do not unambiguously preclude the existence of negative dumping margins, they do at a minimum allow for Commerce's construction . . . . Here, because Commerce's zeroing practice is a reasonable interpretation of the statutory language, we do not question it in light of other reasonable possibilities.

354 F.3d at 1342.

NSK argues that Commerce's zeroing methodology contradicts 19 U.S.C. § 1673 because it ignores the requirement that antidumping duties may only be imposed when a class or kind of merchandise is being, or likely to be, sold in the U.S. at less than fair value and it relies on *Taiwan Semiconductors* to bolster its argument. NSK's Motion at 9. NSK's reliance on *Taiwan Semiconductors* is misplaced. As Defendant and Timken point out, *Taiwan Semiconductors* involves the ITC and an ITC injury determination. Issues and Decision Memorandum at 13–16. NSK has taken this so-called requirement of considering "contradictory evidence" out of context, particularly since the language quoted by NSK suggests specific applicability to the ITC:

> To reach an affirmative material injury determination, the "by reason of" statement in the statute requires the *Commission* to find both material injury and record evidence to show that the subject imports caused the injury. In other words, to properly make a material injury determination, the *Commission* must analyze "*contradictory evidence or evidence from which conflicting inferences could be drawn*," *to ensure that the subject imports are causing the injury, not simply contributing to the injury in a tangential or minimal way.*

Taiwan Semiconductors, 266 F.3d at 1345 (internal citations omitted) (emphasis added).

The Federal Circuit in *Timken* neither references *Taiwan Semiconductors* in its analysis nor considers the "contradictory evidence" language in its analysis. In fact, language in *Timken* rejects NSK's argument that Commerce needs to look at the class or kind of merchandise rather than entry-by-entry:

> Commerce's methodology for calculating dumping margins makes practical sense. Commerce calculates dumping duties on an entry-by-entry basis. 19 U.S.C. § 1675(a)(2). Its practice of

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United States 259 F. Supp. 2d 1253, 1260–65 (CIT 2003); *Timken Co. v. United States*, 240 F. Supp. 2d 1228, 1242–44 (CIT 2002); *Bowe Passat*, 20 CIT at 570–72; *Serampore Indus. Pvt. Ltd. v. United States*, 11 CIT 866, 873–74 (1987).

> zeroing negative dumping margins comports with this approach.

354 F.3d at 1342.

Considering the policy underpinning the statute, an entry-by-entry approach to calculating dumping margins may yield more accurate results, since offsetting dumping margins with sales greater than NV would allow foreign companies to practice selective dumping. *See Timken*, 354 F.3d at 1342–43. Zeroing "legitimately combats the problem of masked dumping, where certain profitable sales serve to 'mask' sales at less than fair value." *Id.* (citing *Serampore Indus.*, 11 CIT at 874; *Bowe Passat*, 20 CIT at 572). NSK has not distinguished this case from *Timken* in a fashion which would justify an alternate result.[5] Commerce's methodology is a reasonable interpretation of the U.S. statute.

2
Commerce's Zeroing Methodology Is Reasonable Despite the WTO Decisions in *EC – Bed Linen* and *U.S. – Hot-Rolled Steel*

NSK argues that the WTO decisions in *European Communities - Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS/141/R (Oct. 30, 2000) ("*EC - Bed Linen* Panel Report"), *aff'd*, WT/DS141/AB/R (Mar. 1, 2001) ("*EC – Bed Linen* Appellate Body Report") (collectively, "*EC – Bed Linen*") and *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (July 24, 2001) ("*U.S. – Hot-Rolled Steel*") show that Commerce has interpreted and applied the U.S. statute in a WTO-inconsistent manner. NSK's Motion at 11–13. In *EC - Bed Linen*, the WTO Panel found that the EC's zeroing methodology, similar to that used by Commerce, was WTO-inconsistent.[6] In *U.S. – Hot-Rolled Steel*, the WTO Appellate Body found that Commerce's methodology with regards to affiliated party transactions lacked even-handedness. NSK uses *U.S. – Hot-Rolled Steel* to illustrate that the antidumping law's "fair comparison" requirement is not met when there is bias inherent in the methodology. Issues and Decision Memorandum at 12.

Defendant argues that *EC – Bed Linen* is " 'not sufficiently persuasive to find Commerce's practice unreasonable.' " Defendant's Response at 16 (citing *Timken*, 354 F.3d at 1344). In addition to the fact that the Federal Circuit in *Timken* has stated that *EC – Bed Linen*

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[5] In fact, NSK fails to cite or explain the effect of *Timken* on its arguments in any of its filings.

[6] NSK states that it "**rests its case on U.S. antidumping law.** Our discussion of the WTO Panel decisions serves only to demonstrate that international legal authorities concur that NSK is right and Commerce is wrong." NSK's Motion at 11 n. 27 (emphasis in original).

provides no bases on which to challenge Commerce's zeroing methodology, Defendant points out that WTO decisions are not binding or precedential to this court. *Id.* Defendant notes that *Timken* holds Commerce's methodology reasonable even in light of the URAA's "fair comparison" requirement that NSK claims has been violated. *Id.* (citing *Timken*, 354 F.3d at 1343).

Timken says that the WTO's decisions in *EC – Bed Linen* and *U.S. – Hot-Rolled Steel* do not affect the validity of Commerce's zeroing methodology. Timken states that the Federal Circuit in *Timken* pointed out that *EC – Bed Linen* did not involve the U.S. and dealt with an antidumping investigation and not a review; moreover, the Federal Circuit found "Commerce's zeroing practice to be a reasonable interpretation of the statute, even in light of *EC – Bed Linen*. . . ." Timken's Response at 20 (citing *Timken*, 354 F.3d at 1345). With regards to *U.S. – Hot-Rolled Steel*, Timken argues that this "decision is inapposite" as it did not pertain to zeroing, but rather dealt with Commerce's arms length test. *Id.*

The Federal Circuit said in *Timken* that Commerce's zeroing practice is a reasonable interpretation of the statute even in light of *EC – Bed Linen*. 354 F.3d at 1345. The *Timken* court pointed out that the "decision is not binding on the United States," much less U.S. courts, and found that the decision is not "sufficiently persuasive to find Commerce's [zeroing] practice unreasonable." *Id.* at 1344. Moreover, the Federal Circuit agreed with this court's reasoning that *EC – Bed Linen* could be distinguished in its applicability because the case did not involve the U.S. and it dealt with an antidumping investigation as opposed to an antidumping review. *Id.* In light of *Timken*, this court finds that Commerce's zeroing methodology is reasonable, as a matter of law.

NSK says that the WTO Appellate Body's decision in *U.S. – Hot-Rolled Steel* highlights the "fair comparison" requirement under U.S. antidumping law which NSK argues has not been met with Commerce's use of zeroing. The Federal Circuit in *Timken* found misplaced the similar "fair comparison" argument made in that case with regard to *EC – Bed Linen*. *Timken*, 354 F.3d at 1344. Section 1677b(a) states that "fair comparison shall be made between the export price and constructed export price and normal value." 19 U.S.C. § 1677b(a). "In order to achieve a fair comparison with the export price and constructed export price," the statute lays out how to calculate "normal value." *Id.* at § 1677(b)(a)(1)–(8); *see Timken*, 354 F.3d at 1344. The Timken court stated that the "fair comparison" requirement is specifically defined in the context of normal-value-calculation and that

> § 1677b(a) does not impose any requirements for calculating normal value beyond those explicitly established in the statute and does not carry over to create additional limitations on the calculation of dumping margins. The SAA supports our conclu-

> sion. SAA at 820 ("To achieve such a [fair] comparison, section 773 [§ 1677b] provides for the selection and adjustment of normal value to avoid or adjust for differences between sales which affect price comparability."). This court has also previously recognized that the explicit statutory adjustments help make a "fair, 'apples-to-apples' comparison" between normal value and EP or CEP. *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1313 (Fed. Cir. 2001) (quoting *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995)).

Timken, 354 F.3d at 1344.

Furthermore, while *U.S. – Hot-Rolled Steel* focuses on whether the U.S. law regarding sales between affiliated parties prevented the distortion of normal value, zeroing deals with Commerce's methodology of assigning a zero margin to EP or CEP sales made above NV. The WTO decision in *U.S. – Hot-Rolled Steel* sheds no light on Commerce's zeroing practice. As this court has found in the previous section that Commerce's zeroing methodology is supported by substantial evidence and is in accordance with law, the *EC – Bed Linen* and *U.S. – Hot-Rolled Steel* decisions at the WTO do not affect the court's findings.

B
Commerce's Application of the 99.5 Percent Arm's Length Test Is In Accordance With Law

On November 15, 2002, Commerce published notice of its planned change in methodology for a test used in antidumping proceedings to discern whether comparison market sales between affiliated parties were made at arm's length and thus may be considered within the "ordinary course of trade." *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 69,186 (Nov. 15, 2002) ("*Antidumping Proceedings*"). Section 1677b(a)(1) implemented the requirement in Article 2.1 of the Agreement on Implementation of Article VI of the General Agreement ("AD Agreement") on Tariffs and Trade 1994 ("GATT") that investigating authorities exclude sales that are not made in the "ordinary course of trade" from the calculation of normal value. Prior to November 2002, Commerce applied what was commonly known as the "99.5 percent test" which stated that

> comparison market sales by an exporter or producer to an affiliated customer are treated as having been made at arm's length, and may be considered to be within the ordinary course of trade, if prices to that affiliated customer are, on average, at least 99.5 percent of the prices charged by that exporter or producer to unaffiliated comparison market customers.

Antidumping Proceedings, 67 Fed. Reg. at 69,186.

In July 2001, the WTO Appellate Body issued its report in *U.S. – Hot-Rolled Steel* which said the 99.5 percent test was inconsistent with Article 2.1 of the AD Agreement. At the WTO, the U.S. and Japan entered into arbitration proceedings over the appropriate period of time in which the U.S. could implement the Appellate Body's decision; the U.S. was granted until November 23, 2002.

Pursuant to section 129(g)(1)(C) of the Uruguay Round Agreements Act ("URAA"), Commerce solicited public comment on proposed modifications to its methodology to bring it into conformity with U.S.-WTO obligations. *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 53,339 (Aug. 15, 2002). After considering the comments and rebuttal comments, Commerce published its change in methodology:

> The new test will provide that, for sales by the exporter or producer to an affiliate to be included in the normal value calculation, those sales prices must fall, on average, within a defined range, or band, around sales prices of the same or comparable merchandise sold by that exporter or producer to all unaffiliated customers. The band applied for this purpose will provide that the overall ratio calculated for an affiliate be between 98 percent and 102 percent, inclusive, of prices to unaffiliated customers in order for sales to that affiliate to be considered "in the ordinary course of trade" and used in the normal value calculation. This new test is consistent with the view, expressed by the WTO Appellate Body, that rules aimed at preventing the distortion of normal value through sales between affiliates should reflect, "even-handedly," that "both high and low-priced sales between affiliates might not be 'in the ordinary course of trade.' "

Antidumping Proceedings, 67 Fed. Reg. at 69,187. This revised methodology, the "98–102 percent test," was to be applied "in all investigations and reviews initiated on or after November 23, 2002." *Id*. at 69,197.

Commerce initiated the Thirteenth Administrative Review at issue on June 25, 2002. NSK requested Commerce to employ the 98–102 percent test to calculate NSK's NV, but Commerce used the 99.5 percent test. NSK requested that Commerce use the 98–102 percent test in the final determination, since it provided evidence that Commerce had included sales to certain customer codes with arm's length ratios above 102 percent. NSK's Motion at 5. Commerce rejected NSK's request and NSK has now brought this matter before this court.

Commerce's Use of the 99.5 Percent Test Was Appropriate in the Present Case

NSK argues that Commerce's decision to use the 99.5 percent test and failure to instead use the 98–102 percent test violates U.S. law. NSK's Motion at 15. NSK argues that *Timken Co. v. United States*, 240 F. Supp. 2d 1228 (CIT 2002), *aff'd*, 354 F.3d 1334 (Fed. Cir. 2004), which upheld the 99.5 percent test as a reasonable interpretation of U.S. statute, is not applicable to this case because at issue is Commerce's use of the 99.5 percent test in the Final Results on June 16, 2003, "seven months after it stipulated that this test was unlawful." *Id.* at 15–17. NSK posits "whereas a statute or an agency regulation will have retroactive effect only if clear intent is present, retroactive application of agency and judicial decisions is the rule rather than the exception." *Id.* at 17. NSK claims that Commerce has wrongly framed this issue as a change in methodology or practice as opposed to a regulatory or rule change.[7] Plaintiffs' Reply Memorandum in Support of Motion for Judgment on the Agency Record ("NSK's Reply") at 7.

NSK argues that the selective prospectivity used by Commerce breaches the principle that similarly situated parties should be treated the same in similar situations, such as at the time of the case decision and case initiation. NSK's Motion at 17–18. While NSK concedes that these legal principles do not apply to WTO dispute settlement decisions, it claims that:

> they [WTO dispute settlement decisions] certainly apply to a judgment by the United States promulgated so as to implement the WTO decision . . . Therefore, when Commerce applied the 99.5 test seven months after the United States declared it unlawful, Commerce violated the legal presumption that this review should be decided based on the law existing at the time of the AFB13 final determination.

Id. at 19.

NSK argues that Commerce's application of the 99.5 percent test in this case works a "manifest injustice" and has lead erroneously to the inclusion of sales in NSK's NV calculation. *Id.* at 18–19 (referencing *Verizon Tel. Cos. v. United States*, 269 F.3d 1098, 1109 (D.C. Cir. 2001)). Furthermore, NSK claims, because the WTO Appellate Body found the 99.5 percent test inconsistent with WTO obligations in July 2001, parties were to be on "full notice" that the test was invalid and they could not rely on the test. *Id.*

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[7] During Oral Argument, counsel for NSK, however, stated that Commerce's change from the 99.5 Percent to the 98–102 Percent Test was a "change in methodology."

Defendant argues that the application of the 99.5 percent test to NSK's sales in the Final Results was in accordance with the law.[8] Defendant states that the Federal Circuit and this court have affirmed the 99.5 percent test on many occasions and that Commerce's implementation of the 98–102 percent test was "entirely prospective in nature." Defendant's Response at 17. Defendant points out that the present case was initiated on June 25, 2002, five months before November 23, 2002, the day on which the 98–102 test went into effect. Although NSK points out that "agency regulation[s] will have retroactive effect only if clear intent is present," Defendant argues that the general rule disfavoring retroactivity applies to administrative regulations. *Id.* at 21–22 (citing *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 102 F. Supp. 2d 486, 493 (CIT 2000)). Here, Defendant argues, Commerce only intended prospective application of this "new rule" and there is no evidence of a clear intent of retroactive application. *Id.* at 22.

Defendant posits that NSK brought this challenge to the effective date of the new test in the improper forum: "nothing precluded NSK from challenging this implementation date in court when Commerce first announced the date after a thorough notice-and-comment proceeding."[9] *Id.* at 19–20. Defendant also states that *Timken* sustained Commerce's use of the 99.5 percent test even though the court was aware that Commerce was in the process of changing its test. *Id.* at 20. Defendant states that WTO decisions have no binding effect under U.S. law and the executive branch is to decide whether and in what manner to implement adverse reports. *Id.* (referencing 19 U.S.C. §§ 3533, 3538; SAA, H.R. Doc. No. 103–316 at 1032). Defendant also argues that there has been no "manifest injustice" here as both the POR and most of the review process occurred before the announcement of the new test. *Id.* at 23.

Timken argues that the 99.5 percent test is not illegal, that this court and the Federal Circuit have both deemed the test reasonable on numerous occasions, and that Commerce agreed to modify its test because of the WTO Appellate Body ruling "without repudiating or otherwise calling into doubt the validity of its prior methodology."

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[8] During Oral Argument, counsel for Defendant argued that the arm's length change in ownership test is not codified into U.S. law and that it is just an interpretation of the law. Thus, counsel stated that the change is "not a change in the law, it is just a change in the practice."

[9] During Oral Argument, counsel for NSK stated that the Commerce's change from the 99.5 Percent Test to the 98–102 Percent Test did not undergo notice and comment procedures. The November 15, 2002, Federal Register, however, states that "[o]n August 15, 2002, [Commerce] solicited comments on [its] proposed modification to practice with respect to treatment of affiliated party sales in the comparison market. We received numerous comments submitted pursuant to this notice, as discussed below." *Final Rule*, 67 Fed. Reg. at 69,187 (internal citations omitted) (referring to *Request of Public Comment Pursuant to section 129(g)(1)(C) of the Uruguay Round Agreements Act*, 67 Fed. Reg. 53,339 (Aug. 15, 2002)).

Timken's Response at 21–22. Timken says that retroactivity is not a favored principle in the law which also applies to administrative regulations. *Id.* at 22–23. Timken points out that Commerce set a specific implementation date for its new test, which made its temporal application clear. Furthermore, Timken draws the distinction that the presumption in retroactivity more strongly applies in cases of changes in the law as opposed to revisions; in this case, argues Timken, Commerce's revised arm's length is "analogous to a change in law."[10] *Id.* at 24.

Commerce's prospective application of the 98–102 percent test and use of the 99.5 percent test prior to November 23, 2002, is in accordance with law. The Supreme Court has stated that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

Here, Commerce specifically stated in the Federal Register notice instituting the change from the 99.5 percent test to the 98–102 percent test that the new test was to be applied "in all investigations and reviews *initiated* on or after November 23, 2002." *Antidumping Proceedings*, 67 Fed. Reg. at 69,197 (emphasis added). The 99.5 percent test itself, as Defendant states, was not codified but is instead explained in the preamble to the regulation, 19 C.F.R. § 351.403, and went through notice and comment procedures.[11] *See* Defendant's Response at 17 (citing *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27,296, 27,355 (May 10, 1997)). Similarly, the 98–102 percent test was a change in the mathematical application of the regulation's methodology which went through notice and comment procedures.[12] Commerce thus provided adequate notice to

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[10] During Oral Argument, however, counsel for Timken stated that the change in test is a "methodological change."

[11] Additionally, as Defendant and Timken note, the 99.5 percent test was never deemed illegal by a U.S. court and was found to be a reasonable interpretation of the statute. *NSK Ltd. v. Koyo Seiko Co.*, 190 F.3d 1321, 1327–28 (Fed. Cir. 1999). In fact, this court upheld the use of the 99.5 percent test as reasonable after it had been deemed WTO-inconsistent by the Appellate Body in *U.S. – Hot Rolled Steel* and after Commerce had published in the Federal Register its request for comments on the proposed change in its arm's length policy on August 15, 2002. *Timken v. United States*, 240 F. Supp. 2d 1228, 1240 n. 17 (CIT 2002). The court, however, does not believe that the validity of the 99.5 percent test is relevant to the discussion. It only addresses the issue in passing because Plaintiff NSK alleged that Commerce was enforcing an "illegal" test when this was not the case.

[12] Counsel for NSK during oral argument claimed that a prospective start date of a new methodology based upon the *initiation* date of an administrative proceeding departs from Commerce's usual practice. Counsel cited as an example Policy Bulletin 94.4 (March 25, 1994) which states that the change implemented by the Bulletin "should be used in all investigations and reviews for which a preliminary determination has not been reached by

parties involved in antidumping proceedings that there would be a prospective change in its arm's length methodology from a definitive point forward. Despite its arguments to the contrary,[13] NSK had no reasonable expectation at the Initiation of the Thirteenth Administrative Review that any other methodology other than the 99.5 percent arm's length would be used to calculate normal value. The notice and comment period for the change in the test was only published in the August 15, 2002, Federal Register, two months after the review had begun.

NSK also has provided insufficient evidence that Commerce has applied this prospective change in a selective manner. The Supreme Court has held that in the context of a federal court applying a new judicial rule that selective prospectivity is prohibited. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991). A similar prohibition should be applied to administrative agency changes in methodology for there is the same underlying policy reason why selective prospectivity is undesirable: similarly situated litigants might receive disparate treatment which undermines the rule of law. *See id*. While NSK has cited a number of reviews to support its argument of selective prospectivity, it has seemingly confused the *initiation* of a review with the *period of review* in these cases: all the reviews it has cited were *initiated after* November 23, 2002.[14]

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the issue date of this bulletin, and in all final determinations in which the issue has been raised in comments from interested parties." Changes in methodology through Policy Bulletins differ from those done through formal notice and comment proceedings published in the Federal Register. Because Commerce went through the necessary procedures required under U.S. law to change its methodology based on an adverse WTO adjudicatory decision, the effective date on which the new methodology would take effect in an administrative proceeding was within Commerce's discretion.

[13] NSK argues that all parties to antidumping proceedings were on notice after the July 2001 WTO Appellate Body's decision in *U.S. – Hot-Rolled Steel* that the 99.5 percent test methodology was invalid and that they could not rely on the application of the test. While WTO adjudicatory decisions may be persuasive, they are not binding on Commerce or this court. *See* Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994), Statement of Administrative Action ("SAA"), H.R. Doc. No. 103–826, at 822 (1994) at 1032; *Timken*, 354 F.3d at 1344; *Hyundai Elec. Co. v. United States*, 23 CIT 302, 311 (1999). Where the specific procedures, pursuant to 19 U.S.C. §§ 3533 and 3538, have not been followed, and U.S. law changed, a finding by a WTO Panel or the Appellate Body has no applicability in U.S. law and creates no binding legal precedent in U.S. courts. During Oral Argument, counsel for NSK could not provide to the court any authority to support NSK's position.

[14] In NSK's Reply at 9 n.7, it cites: *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 67 Fed. Reg. 78,772 (Dec. 26, 2002); *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 68 Fed. Reg. 3009 (Jan. 22, 2003); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 68 Fed. Reg. 9048 (Feb. 27, 2003); *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 68 Fed. Reg. 14,394 (Mar. 25, 2003); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 68 Fed. Reg. 19,498 (Apr. 21, 2003); *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 68 Fed. Reg. 27,771 (May

There is no evidence that Commerce has treated similarly situated parties in a disparate manner. Commerce "unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers," *see SEC v. Chenery Corp.*, 332 U.S. 194, 202, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947), and it has applied this change in its arm's length methodology in a purely prospective manner. Commerce's use of the 99.5 percent test in this case is in accordance with law.

C
Commerce's Determination To Recalculate NTN's Indirect Selling Expenses Is In Accordance with Law

NTN reported its indirect selling expenses based on the ratio of the selling expenses to U.S. sales value in its questionnaire response. Rule 56.2 Motion and Memorandum for Judgmenton the Agency Record Submitted on Behalf of Plaintiffs NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc. And NTN-BCA Corporation ("NTN's Motion") at 3. The ratio resulting from NTN's submitted data was [Ratio A]. Timken in its case brief submitted to Commerce during the administrative review informed Commerce that NTN's reported ratio was incorrect. Commerce then recalculated NTN's ratio as it was unable to replicate NTN's results and arrived at a higher ratio of [Ratio B].

NTN argues that Commerce incorrectly made adverse adjustments to its U.S. indirect selling expenses without providing NTN an opportunity to comment. *Id.* at 2. NTN argues that Commerce should have used NTN's reported data or reconciled the differences in the ratios prior to making an adverse facts available judgment. *Id.* NTN argues that Timken has provided no direct evidence to challenge NTN's data and that it adequately responded to Timken's allegations. *Id.* at 5; Plaintiffs and Defendant-Intervenors, NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc. and NTN-BCA Corporation Response to the Timken U.S. Corporation's Rule 56.2 Motion for Judgment on the Agency Record ("NTN's Response") at 3, 4. NTN argues that, pursuant to 19 U.S.C. §§ 1677m(d) & 1677e, it should have been allowed to explain the apparent deficiencies in its data. NTN's Motion at 6 (citing *NTN Bearing Corp. v. United States*, 104 F. Supp. 2d 110, 142 (CIT 2000)).

Defendant argues that Commerce's determination to recalculate NTN's indirect selling expense ratio was in accordance with the law.

21, 2003). During Oral Argument, counsel for NSK stated that he recognized that these cited Federal Register notices were for initiations of countervailing duty administrative reviews and indicated that he had cited them in error.

Defendant's Response at 23. Defendant states that Commerce neither ignored relevant facts nor applied facts available. *Id.* at 24. Defendant says that NTN's reported its indirect selling expense ratio at [Ratio A], but that Commerce was not able to duplicate NTN's numbers. *Id.* at 25. Thus, after NTN explained that the expenses it had listed in its filings were not only indirect selling expenses but also were expenses taken into account in other parts of its responses, Commerce recalculated the indirect selling expense ratio utilizing the information NTN provided for the review and did not rely on the use of facts available. *Id.* at 25–27. Commerce applied a [Ratio B] indirect selling expense ratio for the Final Results. *Id.* at 25–26. Defendant argues that NTN's argument that it did not have the opportunity to address apparent inconsistencies fails because Commerce did not apply facts available and thus never determined that a deficiency existed. *Id.* at 28.

Timken argues that Commerce correctly calculated NTN's indirect selling expense ratio and that, because Commerce could not arrive at the same numbers that NTN did in calculating its ratio, it could not determine whether NTN's data was distortive and thus recalculated the ratio. Timken's Response at 14. Timken supports Commerce in arguing that Commerce did not impose facts available to NTN's indirect selling expenses and thus did not have to meet the notification requirement of 19 U.S.C. § 1677m. *Id.* at 8. Timken further claims that Commerce failed to determine accurate U.S. prices for and to attribute a correct amount of selling expenses to NTN's sales. Timken U.S. Corporation's Memorandum in Support of its Rule 56.2 Motion for Judgment on the Agency Record ("Timken's Motion") at 22.

Commerce was well within its discretion to test the accuracy of NTN's indirect selling expense ratio as reported. After being unable to duplicate NTN's submitted calculations through its inquiry, Commerce found that NTN had double-counted its indirect selling expenses, i.e. that those expenses had been captured elsewhere. Defendant's Response at 27–28. Commerce then adjusted the indirect selling expense ratio calculation to prevent the duplicative accounting of these expenses: it did not disallow the expenses altogether. *Id.* Rather, it says it based its determination on a different analysis of the *actual facts* as supplied by NTN. By its nature, a "facts available" analysis necessarily implies that Commerce used facts where the actual facts are an insufficient basis for a complete analysis. *See* 19 U.S.C. § 1677e(a); *NTN Bearing Corp. v. United States*, 368 F.3d 1369 (Fed. Cir. 2004). Commerce recalculated "the indirect selling expense ratio using NTN's record information provided for in this review"; it did not apply a facts available analysis pursuant to 19

U.S.C. § 1677e, as argued by NTN.[15] *Id.* at 25. NTN has not established that Commerce's methodology is either unlawful or unsupported by substantial evidence, and accordingly, it must be sustained. *See generally NTN Bearing Corp.*, 368 F.3d at 1369.

D
Commerce's Acceptance of NTN's Allocation Methodology for the Calculation of Indirect Selling Expenses Is in Accordance with Law

NTN argues that Commerce correctly accepted its allocation methodology (other than for those certain expenses Commerce moved) because

> rather than *allocating* certain [affiliate expenses relating to non-subject merchandise, these expenses were removed before the allocation of expenses] that are not clearly related to either subject or non-subject merchandise took place. This methodology simply does not distort the margin calculations.

NTN's Response at 11–12. Defendant also argues that Commerce's decision to accept NTN's allocation methodology as far as NTN's removal of expenses attributable to non-subject merchandise was proper. Defendant's Response at 29.

Timken claims that Commerce erroneously accepted NTN's allocation methodology. Timken argues that Commerce incorrectly double-allocated [certain expenses to non-subject merchandise] sales and thus accepted a distortive allocation. Timken's Motion at 21–22.

Commerce was within its discretion to accept NTN's allocation methodology as reported. Pursuant to 19 C.F.R. § 351.401(g)(1) (2003)[16], Commerce is permitted to consider allocated expenses when the "method does not cause inaccuracies or distortions." The

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[15] NTN argues that Commerce had applied facts available because Commerce used NTN's reported cost data for different purposes than that for which it had been submitted. Counsel for NTN argued during oral argument that, while Commerce thus had not explicitly used facts available in this case, Commerce had used an "effective/*de facto*" facts available analysis. For the existence of such a *de facto* facts available analysis, counsel cited *Kaiyuan Group Corp. v. United States*, Slip Op. 04–51, 2004 Ct. Int'l Trade LEXIS 75 (May 14, 2004). *Kaiyuan* concerned a nonmarket economy antidumping administrative review and the court found that Commerce's collapsing methodology was not in accordance with law. *Kaiyuan* did not add a new concept of effective/*de facto* facts available to the law.

[16] Under 19 C.F.R. § 351.401(g) Allocation of expenses and price adjustments,

> (1) In general. The Secretary may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided the Secretary is satisfied that the allocation method used does not cause inaccuracies or distortions.
>
> (2) Reporting allocated expenses and price adjustments. Any party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions.

party reporting the allocation expenses must explain to Commerce, under 19 C.F.R. § 351.401(g)(2), "why the allocation methodology does not cause inaccuracies or distortions." Section 351.401(g)(4) also provides that Commerce cannot "reject an allocation method solely because the method includes expenses incurred, or price adjustments made, with respect to sales of merchandise that does not constitute subject merchandise or a foreign like product (whichever is applicable)." Defendant argues that nothing in U.S. law further explains how the allocation of selling expenses must be undertaken and thus the court should accept Commerce's methodology if it is reasonable. Defendant's Response at 30 (citing *Koenig & Bauer-Albert AG v. United States*, 15 F. Supp. 2d 834, 844 (CIT 1998)).

Both 19 U.S.C. § 1677a(d), the relevant statute, and the regulation, 19 C.F.R. § 351.401(g), give little direction on allocation methodology, and thus Commerce enjoys discretion in choosing its methodology. *See Timken Co. v. United States*, 209 F. Supp. 2d 1373, 1381 (CIT 2002); *NSK Ltd. v. United States*, 245 F. Supp. 2d 1335, 1378–79 (CIT 2003). In both *Timken* and *NSK*, this court upheld an allocation methodology regarding expenses connected with non-scope merchandise similar to that used by Commerce in this case. There is no reason to depart from previous decisions finding Commerce's methodology reasonable.

Defendant has also provided sufficient evidence to support its findings. Defendant states that Commerce was "satisfied that NTN properly removed only indirect selling expenses from its allocation pool attributable to non-subject merchandise." Defendant's Response at 29. Commerce further found that NTN, in its questionnaire and final responses, had

> [removed the total amount of expenses that were unrelated to subject merchandise and calculated the indirect selling expense ratio based on the remaining total figures.]

Id. at 30 (internal citations omitted). Based on NTN's questionnaire and supplemental responses, Commerce determined that NTN's "[allocation methodology] was not distortive." *Id.* Given the standard of review, the court may not reweigh the evidence or substitute its own

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(3) Feasibility. In determining the feasibility of transaction-specific reporting or whether an allocation is calculated on as specific a basis as is feasible, the Secretary will take into account the records maintained by the party in question in the ordinary course of its business, as well as such factors as the normal accounting practices in the country and industry in question and the number of sales made by the party during the period of investigation or review.

(4) Expenses and price adjustments relating to merchandise not subject to the proceeding. The Secretary will not reject an allocation method solely because the method includes expenses incurred, or price adjustments made, with respect to sales of merchandise that does not constitute subject merchandise or a foreign like product (whichever is applicable).

judgment for that of Commerce. *See Granges Metallverken AB v. United States*, 13 CIT 471, 474 (1989). Commerce's decision to accept NTN's allocation methodology is thus supported by substantial evidence and is in accordance with law.

E
Commerce's Decision to Accept NTN's Reported Costs and Not Apply Facts Available Is Supported by Substantial Evidence and Is In Accordance With Law

Timken argues that Commerce improperly relied on NTN's reported cost data and wrongly concluded that the data captured NTN's actual experience. Timken's Motion at 15. Timken argues that the information NTN provided regarding its standard cost variance was insufficient. *Id.* at 18–19. Cost decreases in relatively small amounts, Timken states, can be explained by the variances reported, but not changes of the magnitude that NTN reported. *Id.* at 19.

Defendant argues that Commerce's determination to accept NTN's reported cost data was proper. Defendant's Response at 32–33. Commerce found that NTN had adequately explained the "[cost variances]." *Id.* at 34. Because NTN answered fully all of Commerce's requests for information, Defendant states that Commerce's decision to not apply facts available pursuant to 19 U.S.C. § 1677e(a)[17] is supported by substantial evidence. *Id.* at 33, 37–38.

NTN argues that Commerce correctly accepted its reported costs. NTN states that Commerce did not question the accuracy of is cost of production or constructed value data and was satisfied that NTN had fully responded to Commerce's request for information. NTN's Response at 3. NTN claims that it provided and Commerce accepted its explanation for the variance in its costs from the previous years. NTN also argues that Commerce rightly did not use facts available in this case as NTN provided complete and accurate responses to re-

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[17] Pursuant to 19 U.S.C. § 1677e Determinations on the basis of the facts available,

(a) In general. If –

(1) necessary information is not available on the record, or

(2) an interested party or any other person–

(A) withholds information that has been requested by the administering authority or the Commission under this title,

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677n of this title,

(C) significantly impedes a proceeding under this subtitle, or

(D) provides such information but the information cannot be verified as provided in section 1677n(i) of this title, the administering authority and the Commission shall, subject to section 1677n(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

quests and Commerce was satisfied with its submissions. *Id.* at 9–10.

Commerce acted within its discretion in accepting NTN's reported cost data. Commerce considered the record with the questionnaire responses, supplemental questionnaire responses, administrative briefs and rebuttal briefs in reaching its conclusion. Defendant's Response at 37. With regards to its change in costs, Commerce found that NTN in its Section D questionnaire response set out its general cost accounting methodology and explained how the changes in its plants and processes could affect its reported costs. *Id.* at 34. Commerce found that NTN's providing of a "meticulous spreadsheet" to address Timken's allegation of radically changing costs from the previous reviews was convincing. *Id.* at 35–36. Furthermore, in its supplemental questionnaire which concerned how NTN's cost variances affected reported costs, Commerce determined that NTN provided sufficient explanation of its variance calculation methodology for specific products. *Id.* at 34–35. Commerce also found that

> [i]n addition to its questionnaire responses, NTN's November 6, 2002, submission explained to Commerce why [cost variances]. For example, NTN pointed to a [change in production costs]. Specifically, NTN provided Commerce with an exhibit that explained that the [cost changes were based on a demonstrated change in procedures]. In addition, NTN detailed how [the global change affected specific parts].

Id. at 35 (internal citations omitted). Because Commerce determined that NTN had submitted the requested information in a timely, useable manner, it correctly found that it did not need to utilize facts available pursuant to the statute to calculate NTN's antidumping margin. Commerce's decision to accept NTN's reported cost data and not apply facts available is supported by substantial evidence and is in accordance with law.

V
CONCLUSION

For the foregoing reasons Commerce's Review in *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and Singapore: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Review in Part, and Determination Not to Revoke Order in Part*, 68 Fed. Reg. 35,623 (June 16, 2003) is sustained.

Slip Op. 05–7

JAZZ PHOTO CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Court No. 04–00514
Before: Judge Timothy C. Stanceu

[Motion for *ex parte* temporary restraining order denied]

Decided: January 25, 2005

Neville Peterson LLP (*John M. Peterson*, *George W. Thompson*, *Curtis W. Knauss*, *Maria E. Celis* and *Catherine Chess Chen*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, *Stefan Shaibani*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Beth Brotman* and *Paul Pizzeck*, United States Customs and Border Protection, Department of Homeland Security, of counsel, for defendant.

OPINION AND ORDER

STANCEU, Judge:

Plaintiff Jazz Photo Corporation ("Jazz) moves this court *ex parte*, pursuant to USCIT Rule 65(b), for a ten-day temporary restraining order enjoining United States Customs and Border Protection ("Customs") from "sampling, handling, removing, transporting, destroying or testing any of the merchandise" that plaintiff entered for consumption at Newark, New Jersey, on September 12, 2004, under Entry No. DT4–0028917–9. Pl.'s Application for a T.R.O. at 1; *see* Compl. ¶ 15. Because plaintiff has not made a showing of immediate and irreparable injury sufficient to warrant an *ex parte* temporary restraining order, the motion must be denied.

I. BACKGROUND

The merchandise at issue in this litigation consists of "lens-fitted film packages" ("LFFPs"), commonly referred to as "disposable cameras" or "one time use cameras," from the People's Republic of China.[1] *See* Compl. ¶ 23. Customs excluded the subject LFFPs from entry into the United States, deeming them to be inadmissible under a general exclusion order that the U.S. International Trade Commission ("ITC") issued in 1999 under Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (2000) ("Section 337"). *See* Compl. ¶¶ 14, 16. In the ITC's investigation under Section 337, Fuji Photo Film Co., Ltd. ("Fuji"), claiming infringement of its various

[1] Background on previous importations of Jazz's LFFPs is provided in the opinion of this court in *Jazz Photo Corporation v. United States*, Slip Op. 04–146 (Ct. Intl. Trade Nov. 17, 2004), *appeal docketed*, No. 05–1096 (Fed. Cir. Nov. 19, 2004).

patents used in manufacturing LFFPs, had sought an order to exclude from entry into the United States the LFFPs of various importers, including Jazz, that are in the business of "refurbishing" (with new film and other components) and re-importing LFFPs originally manufactured and sold by Fuji and its licensees. *See In the Matter of Certain Lens-Fitted Film Packages*, USITC Inv. No. 337–TA–406, Pub. No. 3219 (1999).

The current litigation arose from the denial by Customs of Jazz's administrative protest, filed September 26, 2004, in which Jazz contested the exclusion of the LFFPs from entry. *See* Compl. ¶ 17. After Customs denied the protest on October 8, 2004, plaintiff brought this action to contest the denial of the protest, invoking this court's jurisdiction under 28 U.S.C. § 1581(a) (2004). *See id.* ¶¶ 2, 18.

In its present motion, plaintiff maintains that a temporary injunction "will do nothing more than preserve the *status quo* with respect to the excluded merchandise at bar *pendente lite*." Pl.'s Application for a T.R.O. at 2. Jazz argues that an order to this effect would permit the government to respond to, and the court to fully consider, Plaintiff's Application for a Preliminary Injunction Restraining Defendant from Sampling or Testing the Imported Merchandise Except by Order of Court ("Plaintiff's Application for a Preliminary Injunction") that was filed simultaneously with Jazz's motion for the temporary restraining order on January 3, 2005. *Id.* at 2. In Plaintiff's Application for a Preliminary Injunction, Jazz demands court supervision over the sampling and testing by Customs of the excluded merchandise, which plaintiff describes as currently located "in Customs bonded storage." Plaintiff's Application for a Preliminary Injunction at 6 n.3. Plaintiff refers to the reasoning set forth in its Application for a Preliminary Injunction to support its request for a temporary restraining order.

II. DISCUSSION

Rule 65(b) of this Court's rules sets forth the "immediate and irreparable injury" standard applying to motions for *ex parte* temporary restraining orders. The Rule provides as follows:

> A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) *it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition*, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.

USCIT R. 65(b) (emphasis added). In Plaintiff's Application for a Temporary Restraining Order, Jazz certifies that it served a copy of this motion on defendant's attorneys. *See* Pl.'s Application for a T.R.O. at 1 n.1. However, Jazz fails to show that immediate, irreparable injury will befall Jazz if its application for a temporary restraining order is not granted. Such a showing is required in order for this court to grant "the extraordinary equitable relief that is a temporary restraining order." *Warner-Lambert Co. v. United States*, 24 CIT 205, 208 (2000).

Jazz supplies the court with a variety of reasons to support its request for a temporary restraining order, including the unconvincing argument that Customs must attain leave of court before conducting any future sampling or testing of the imported merchandise that is the subject of this action. *See* Pl.'s Application for a T.R.O. at 2; Pl.'s Application for a Preliminary Injunction at 4–5. Jazz directs attention to the holding of this Court in *Washington International Insurance Co. v. United States*, 25 CIT 207, 218, 138 F. Supp. 2d 1314, 1326 (2001), quoting specifically the language in the opinion stating that "[j]urisdiction over Customs' actions is measured at the time the summons is filed. Once entries are properly before the Court, Customs is powerless to exert authority over these entries in the absence of a Court order." The holding in *Washington International Insurance Co.*, however, does not support plaintiff's contention.

In relevant part, *Washington International Insurance Co.* addressed the issue of whether Customs has the authority, absent a court order, to reliquidate entries after the jurisdiction of this Court under 28 U.S.C. § 1581(a) has attached to an action to contest the denial of an administrative protest challenging the original liquidations. In that situation, this Court held the agency's action in reliquidation to be null and void, reasoning that reliquidation of the entries after the commencement of litigation essentially would divest the Court of jurisdiction to preside over the action. *See Washington International Insurance Co.*, 25 CIT at 218, 138 F. Supp. 2d at 1326. The Court concluded that holding otherwise "could unilaterally hinder the judicial process and arbitrarily divest this Court of jurisdiction over legitimate legal claims." *Id.*

Jazz does not, and indeed could not, maintain that this court will be divested of jurisdiction to hear this matter if Customs conducts some sampling or testing of the merchandise that Customs excluded from entry. Nor does Jazz convince this court that some sampling or testing will prevent Jazz from proceeding with this litigation. This court finds nothing in the holding of *Washington International Insurance Co.*, or elsewhere, that would deprive defendant of the opportunity to sample or test the subject merchandise within the limits of the permissible process of discovery. To the contrary, defendant United States must be permitted to conduct proper discovery and

prepare its defense in this action in accordance with this Court's rules. *See* USCIT R. 26(b)(1).

Jazz makes the further argument that any information that may be produced from post-exclusion sampling or testing amounts to "post-litigation 'evidence." *See* Pl.'s Application for a Preliminary Injunction at 7–8. Jazz demands that the court, at the very least, prevent Customs from sampling and/or testing the subject merchandise "until [the] plaintiff has had the opportunity to depose the Customs officials who made the protested decision to exclude" the subject merchandise. *Id.* at 7. Jazz posits that such a deposition is central to this litigation because it may reveal whether "Customs instructed its port officers to exclude plaintiff's goods on the basis of improper or illegal factors." *Id.* at 8. The court finds this argument unpersuasive. Plaintiff is challenging the denial by Customs of its protest of the determination to exclude its merchandise from entry, based on the ITC's general exclusion order. The court reviews the protest denial *de novo*, as required by 28 U.S.C. § 2640(a)(1). In this *de novo* proceeding, plaintiff bears the burden of proving that the decision of Customs to exclude the merchandise was incorrect. *See Universal Elec. Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997) (citing 28 U.S.C. § 2639(a)(1)). Even were plaintiff able to show that the decision to exclude the merchandise was based on insufficient evidence or "improper factors," such a showing would not be central to this litigation because it would be insufficient to satisfy the burden of proof required of plaintiff by statute.

Jazz also contends that court supervision over any sampling or testing of the subject merchandise is necessary in order to protect the integrity of Jazz's "Master Lot Number" system, *i.e.*, the inventory control system under which the LFFPs were refurbished. *See* Pl.'s Application for a Preliminary Injunction at 6–7. According to Jazz, the Master Lot Number system is an internal tracking system developed to ensure, *inter alia*, that the used camera cases ("shells") from which the imported disposable cameras were produced were subject to a patent-exhausting first sale in the United States.[2] *See id.* at 6–7. "Accordingly, any separation of goods from their constituent entries, or removal of goods from their packages, whether for testing or otherwise, could impair plaintiff's ability to present its case-in-chief." *Id.* at 7.

Jazz has not shown how the presentation of its case will be impaired by the defendant's selection and handling of samples such

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[2] The importance of proving where the shells that were used to refurbish the imported disposable cameras were first sold stems from the United States Court of Appeals for the Federal Circuit's holding in *Jazz Photo Corporation v. International Trade Commission*, 264 F.3d 1094 (Fed. Cir. 2001), *cert. denied*, 536 U.S. 950 (2002). In *Jazz Photo Corporation*, the Court of Appeals for the Federal Circuit held that LFFPs that underwent a patent-exhausting first sale in the United States and that are refurbished by a process constituting "permissible repair" do not violate the intellectual property rights of the patent holder.

that Jazz would suffer immediate or irreparable injury. It is in the interest of each party to preserve identifying information during the selection and handling of samples, including preservation of all cartons and other packaging, so that the samples will have probative value. This identifying information would include, but would not necessarily be limited to, marks on packages that could identify plaintiff's Master Lot Numbers, which plaintiff relied upon in presenting its case in *Jazz Photo Corporation*, Slip Op. 04–146, a case involving "substantially identical [disposable] cameras." Pl.'s Application for a Preliminary Injunction at 2. Neither party reasonably could expect to gain an advantage in litigation from sampling that is conducted carelessly or in bad faith, and plaintiff has made no showing that defendant intends to conduct sampling in this way. Moreover, the court is not aware of anything that would prevent plaintiff from conducting its own sampling during the discovery process. The court expects that the parties will extend to each other the cooperation in discovery that is contemplated by the Rules of this Court.

Next, Jazz argues that the testing process will destroy the merchandise tested, thus inflicting Jazz with economic harm. Jazz asserts that:

> any testing of plaintiff's merchandise which attempts to determine whether the goods have been "permissibly repaired" or whether the goods underwent a first sale in the United States is necessarily destructive testing. Such testing involves, at a minimum, the removal of the goods from their outer packaging and the removal of inner packages and labels, rendering the goods unsalable. It may also involve opening the camera shells, breaking the light-tight boxes, and exposing the film, rendering the camera not only unsalable but also unusable.

Pl.'s Application for a Preliminary Injunction at 8. Jazz argues that any such "destructive testing" will impair its "property interest" in the subject LFFPs, pointing out that Jazz is free to export the excluded disposable cameras and sell such merchandise in other markets. *See id*. The shortcoming of this argument is the lack of any showing that defendant, absent an *ex parte* temporary restraining order, will subject to destructive testing so great a quantity of the imported LFFPs as to cause plaintiff economic harm. Absent such a showing, this court will not presume that defendant intends to conduct sampling and testing, or other aspects of discovery, unreasonably, uncooperatively, or in bad faith.

The remaining arguments made in Jazz's applications for injunctive relief present evidentiary issues that do not address whether Jazz will suffer immediate, irreparable harm if a temporary retraining order is not issued. Such issues are not ripe for decision during this early stage of the litigation.

III. CONCLUSION

The factual assertions and arguments advanced by plaintiff do not constitute a showing of immediate and irreparable injury. Therefore, it is hereby ORDERED that Plaintiff's Application for a Temporary Restraining Order is denied.

Slip Op. 05–8

JAZZ PHOTO CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Court No. 04–00629
Before: Judge Timothy C. Stanceu

[Motion for *ex parte* temporary restraining order denied]

Decided: January 25, 2005

Neville Peterson LLP (*John M. Peterson*, *George W. Thompson*, *Curtis W. Knauss*, *Maria E. Celis* and *Catherine Chess Chen*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, *Stefan Shaibani*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Beth Brotman* and *Paul Pizzeck*, United States Customs and Border Protection, Department of Homeland Security, of counsel, for defendant.

OPINION AND ORDER

STANCEU, Judge:

Plaintiff Jazz Photo Corporation ("Jazz") moves this court *ex parte*, pursuant to USCIT Rule 65(b), for a ten-day temporary restraining order enjoining United States Customs and Border Protection ("Customs") from "sampling, handling, removing, transporting, destroying or testing any of the merchandise" that plaintiff entered for consumption at Newark, New Jersey under Entry Nos. DT4–0029007–8, DT4–0029101–9 and DT4–0029005–2, on September 9, 2004. Pl.'s Application for a T.R.O. at 1; *see* Compl. ¶ 16. Because plaintiff has not made a showing of immediate and irreparable injury sufficient to warrant an *ex parte* temporary restraining order, the motion must be denied.

I. BACKGROUND

The merchandise at issue in this litigation consists of "lens-fitted film packages" ("LFFPs"), commonly referred to as "disposable cameras" or "one time use cameras," from the People's Republic of

China.[1] *See* Compl. ¶¶ 26, 35. Customs excluded the subject LFFPs from entry into the United States, deeming them to be inadmissible under a general exclusion order that the U.S. International Trade Commission ("ITC") issued in 1999 under Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (2000) ("Section 337"). *See* Compl. ¶¶ 17, 18. In the ITC's investigation under Section 337, Fuji Photo Film Co., Ltd. ("Fuji"), claiming infringement of its various patents used in manufacturing LFFPs, had sought an order to exclude from entry into the United States the LFFPs of various importers, including Jazz, that are in the business of "refurbishing," with new film and other components, and re-importing LFFPs originally manufactured and sold by Fuji and its licensees. *See In the Matter of Certain Lens-Fitted Film Packages*, USITC Inv. No. 337–TA–406, Pub. No. 3219 (1999).

The current litigation arose from the denial of Jazz's administrative protest, filed October 5, 2004, in which Jazz contested the exclusion of the LFFPs from entry. *See* Compl. ¶ 19. This denial occurred by operation of law because the port director at Newark neither allowed nor denied Jazz's administrative protest "before the 30th day after the day on which the protest was filed." 19 U.S.C. § 1499(c)(5)(B). Plaintiff brought this action to contest the denial of the protest, invoking this court's jurisdiction under 28 U.S.C. § 1581(a) (2004). *See id.* ¶¶ 2, 21.

In its present motion, plaintiff maintains that a temporary injunction "will do nothing more than preserve the *status quo* with respect to the excluded merchandise at bar *pendente lite*." Pl.'s Application for a T.R.O. at 2. Jazz argues that an order to this effect would permit the government to respond to, and the court to fully consider, Plaintiff's Application for a Preliminary Injunction Restraining Defendant from Sampling or Testing the Imported Merchandise Except by Order of Court ("Plaintiff's Application for a Preliminary Injunction") that was filed simultaneously with Jazz's motion for the temporary restraining order on January 3, 2005. *Id.* at 2. In Plaintiff's Application for a Preliminary Injunction, Jazz demands court supervision over the sampling and testing by Customs of the excluded merchandise, which plaintiff describes as currently located "in Customs bonded storage." Plaintiff's Application for a Preliminary Injunction at 6 n.3. Plaintiff refers to the reasoning set forth in its Application for a Preliminary Injunction to support its request for a temporary restraining order.

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[1] Background on previous importations of Jazz's LFFPs is provided in the opinion of this court in *Jazz Photo Corporation v. United States*, Slip Op. 04–146 (Ct. Intl. Trade Nov. 17, 2004), *appeal docketed*, No. 05–1096 (Fed. Cir. Nov. 19, 2004).

II. DISCUSSION

Rule 65(b) of this Court's rules sets forth the "immediate and irreparable injury" standard applying to motions for *ex parte* temporary restraining orders. The Rule provides as follows:

> A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) *it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition*, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.

USCIT R. 65(b) (emphasis added). In Plaintiff's Application for a Temporary Restraining Order, Jazz certifies that it served a copy of this motion on defendant's attorneys. *See* Pl.'s Application for a T.R.O. at 1 n.1. However, Jazz fails to show that immediate, irreparable injury will befall Jazz if its application for a temporary restraining order is not granted. Such a showing is required in order for this court to grant "the extraordinary equitable relief that is a temporary restraining order." *Warner-Lambert Co. v. United States*, 24 CIT 205, 208 (2000).

Jazz supplies the court with a variety of reasons to support its request for a temporary restraining order, including the unconvincing argument that Customs must attain leave of court before conducting any future sampling or testing of the imported merchandise that is the subject of this action. *See* Pl.'s Application for a T.R.O. at 2; Pl.'s Application for a Preliminary Injunction at 4–5. Jazz directs attention to the holding of this Court in *Washington International Insurance Co. v. United States*, 25 CIT 207, 218, 138 F. Supp. 2d 1314, 1326 (2001), quoting specifically the language in the opinion stating that "[j]urisdiction over Customs' actions is measured at the time the summons is filed. Once entries are properly before the Court, Customs is powerless to exert authority over these entries in the absence of a Court order." The holding in *Washington International Insurance Co.*, however, does not support plaintiff's contention.

In relevant part, *Washington International Insurance Co.* addressed the issue of whether Customs has the authority, absent a court order, to reliquidate entries after the jurisdiction of this Court under 28 U.S.C. § 1581(a) has attached to an action to contest the denial of an administrative protest challenging the original liquidations. In that situation, this Court held the agency's action in reliquidation to be null and void, reasoning that reliquidation of the entries after the commencement of litigation essentially would divest the Court of jurisdiction to preside over the action. *See Washing-*

ton International Insurance Co., 25 CIT at 218, 138 F. Supp. 2d at 1326. The Court concluded that holding otherwise "could unilaterally hinder the judicial process and arbitrarily divest this Court of jurisdiction over legitimate legal claims." *Id.*

Jazz does not, and indeed could not, maintain that this court will be divested of jurisdiction to hear this matter if Customs conducts some sampling or testing of the merchandise that Customs excluded from entry. Nor does Jazz convince this court that some sampling or testing will prevent Jazz from proceeding with this litigation. This court finds nothing in the holding of *Washington International Insurance Co.*, or elsewhere, that would deprive defendant of the opportunity to sample or test the subject merchandise within the limits of the permissible process of discovery. To the contrary, defendant United States must be permitted to conduct proper discovery and prepare its defense in this action in accordance with this Court's rules. *See* USCIT R. 26(b)(1).

Jazz makes the further argument that any information that may be produced from post-exclusion sampling or testing amounts to "post-litigation 'evidence." *See* Pl.'s Application for a Preliminary Injunction at 7–8. Jazz demands that the court, at the very least, prevent Customs from sampling and/or testing the subject merchandise "until [the] plaintiff has had the opportunity to depose the Customs officials who made the protested decision to exclude" the subject merchandise. *Id.* at 7. Jazz posits that such a deposition is central to this litigation because it may reveal whether "Customs instructed its port officers to exclude plaintiff's goods on the basis of improper or illegal factors." *Id.* at 8. The court finds this argument unpersuasive. Plaintiff is challenging the denial of its protest of the determination to exclude its merchandise from entry, based on the ITC's general exclusion order. The court reviews the protest denial *de novo*, as required by 28 U.S.C. § 2640(a)(1). In this *de novo* proceeding, plaintiff bears the burden of proving that the decision of Customs to exclude the merchandise was incorrect. *See Universal Elec. Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997) (citing 28 U.S.C. § 2639(a)(1)). Even were plaintiff able to show that the decision to exclude the merchandise was based on insufficient evidence or "improper factors," such a showing would not be central to this litigation because it would be insufficient to satisfy the burden of proof required of plaintiff by statute.

Jazz also contends that court supervision over any sampling or testing of the subject merchandise is necessary in order to protect the integrity of Jazz's "Master Lot Number" system, *i.e.*, the inventory control system under which the LFFPs were refurbished. *See* Pl.'s Application for a Preliminary Injunction at 6–7. According to Jazz, the Master Lot Number system is an internal tracking system developed to ensure, *inter alia*, that the used camera cases ("shells") from which the imported disposable cameras were produced were

subject to a patent-exhausting first sale in the United States.[2] *See id.* at 6–7. "Accordingly, any separation of goods from their constituent entries, or removal of goods from their packages, whether for testing or otherwise, could impair plaintiff's ability to present its case-in-chief." *Id.* at 7.

Jazz has not shown how the presentation of its case will be impaired by the defendant's selection and handling of samples such that Jazz would suffer immediate or irreparable injury. It is in the interest of each party to preserve identifying information during the selection and handling of samples, including preservation of all cartons and other packaging, so that the samples will have probative value. This identifying information would include, but would not necessarily be limited to, marks on packages that could identify plaintiff's Master Lot Numbers, which plaintiff relied upon in presenting its case in *Jazz Photo Corporation*, Slip Op. 04–146, a case involving "substantially identical [disposable] cameras." Pl.'s Application for a Preliminary Injunction at 2. Neither party reasonably could expect to gain an advantage in litigation from sampling that is conducted carelessly or in bad faith, and plaintiff has made no showing that defendant intends to conduct sampling in this way. Moreover, the court is not aware of anything that would prevent plaintiff from conducting its own sampling during the discovery process. The court expects that the parties will extend to each other the cooperation in discovery that is contemplated by the Rules of this Court.

Next, Jazz argues that the testing process will destroy the merchandise tested, thus inflicting Jazz with economic harm. Jazz asserts that:

> any testing of plaintiff's merchandise which attempts to determine whether the goods have been "permissibly repaired" or whether the goods underwent a first sale in the United States is necessarily destructive testing. Such testing involves, at a minimum, the removal of the goods from their outer packaging and the removal of inner packages and labels, rendering the goods unsalable. It may also involve opening the camera shells, breaking the light-tight boxes, and exposing the film, rendering the camera not only unsalable but also unusable.

Pl.'s Application for a Preliminary Injunction at 8. Jazz argues that any such "destructive testing" will impair its "property interest" in the subject LFFPs, pointing out that Jazz is free to export the ex-

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[2] The importance of proving where the shells that were used to refurbish the imported disposable cameras were first sold stems from the United States Court of Appeals for the Federal Circuit's holding in *Jazz Photo Corporation v. International Trade Commission*, 264 F.3d 1094 (Fed. Cir. 2001), *cert. denied*, 536 U.S. 950 (2002). In *Jazz Photo Corporation*, the Court of Appeals for the Federal Circuit held that LFFPs that underwent a patent-exhausting first sale in the United States and that are refurbished by a process constituting "permissible repair" do not violate the intellectual property rights of the patent holder.

cluded disposable cameras and sell such merchandise in other markets. *See id.* The shortcoming of this argument is the lack of any showing that defendant, absent an *ex parte* temporary restraining order, will subject to destructive testing so great a quantity of the imported LFFPs as to cause plaintiff economic harm. Absent such a showing, this court will not presume that defendant intends to conduct sampling and testing, or other aspects of discovery, unreasonably, uncooperatively, or in bad faith.

The remaining arguments made in Jazz's applications for injunctive relief present evidentiary issues that do not address whether Jazz will suffer immediate, irreparable harm if a temporary retraining order is not issued. Such issues are not ripe for decision during this early stage of the litigation.

III. CONCLUSION

The factual assertions and arguments advanced by plaintiff do not constitute a showing of immediate and irreparable injury. Therefore, it is hereby ORDERED that Plaintiff's Application for a Temporary Restraining Order is denied.

Slip Op. 05–9

UNITED STATES, Plaintiff, v. NATIONAL SEMICONDUCTOR CORPORATION, Defendant.

Before: MUSGRAVE, JUDGE
Court No. 03–00223

[In the plaintiff's civil interest penalty suit arising from defendant's two voluntary prior disclosures to the United States Bureau of Customs and Border Protection, each party moved for summary judgment. Because resolution of this matter requires fact finding and interpretation, both motions are denied.]

Dated: January 26, 2005

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department of Justice, (*Stefan Shaibani*); and Office of the Chief Counsel, U.S. Bureau of Customs and Border Protection (*Scott McBride*), of counsel, for the plaintiff.
Horton, Whiteley & Cooper (*Robert Scott Whiteley*), for the defendant.

OPINION AND ORDER

National Semiconductor Corporation ("NSC") undervalued certain integrated circuits and micro-assemblies imported between 1993 and 2000. The undevaluations resulted in $948,159.13 in unpaid mer-

chandise processing fees and were due to erroneous statements on entry documents. NSC reported the matters to the United States Bureau of Customs and Border Protection ("Customs") via two voluntary prior disclosures.[1] After determining that NSC's conduct had been negligent, which NSC does not here dispute, Customs sent notices assessing civil interest-only penalties of $228,924.75 and $21,915.46 with respect to each disclosure in accordance with 19 U.S.C. § 1592(c)(4)(B).[2] NSC disputed these charges. The United States therefore brought this action, consolidating both penalty notices.

At this stage, each party requests summary judgment on the amount, if any, of the customs penalty to be imposed. The government's briefs argue that summary judgment is appropriate because Customs' assessments are proper and that Customs is entitled to judgment as a matter of law for the full interest penalty amounts. It argues that section 1592(c)(4)(B) does not mandate mitigation of penalties in prior disclosure cases but permits collecting the full amount of interest without mitigation, that the interest penalty only partially compensates the government for its "monetary losses," and that no mitigation of interest penalties is warranted in this instance.

The government also argues that since interest under the statute is calculated only from the date of liquidation, not from the date of entry, the statute operates as mitigation in its own right. According to the government, Customs' policy since at least 1986 has been that "further" mitigation in voluntary disclosure situations is unwar-

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[1] The November 13, 1998 disclosure proceeded from a lengthy review of NSC's customs compliance procedures undertaken by NSC with the assistance of an independent consultant. Specifically, the review determined that inaccurate values had been stated for U.S.-origin components of the micro-assemblies, the articles had been mis-classified, and certain "assists" had not been properly included as additions to the transaction value for the merchandise. Plaintiff's Proposed Findings of Uncontroverted Fact ("PPFUF") at 16. The March 3, 2000/May 29, 2001 disclosure concerned another group of importations involving similar "assist" undervaluations that were later discovered by an NSC employee. PPFUF at 25.

[2] The prior disclosure statute, 19 U.S.C. § 1592(c)(4), provides in pertinent part as follows:

> If the person concerned discloses the circumstances of a violation of subsection (a) of this section before, or without knowledge of, the commencement of a formal investigation of such violation, with respect to such violation, merchandise shall not be seized and any monetary penalty to be assessed under subsection (c) of this section shall not exceed - . . .
>
> * * *
>
> (B) if such violation resulted from negligence or gross negligence, the interest (computed from the date of liquidation at the prevailing rate of interest applied under section 6621 of Title 26) on the amount of lawful duties, taxes, and fees of which the United States is or may be deprived . . .

19 U.S.C. § 1592(c)(4).

ranted, absent extraordinary circumstances,[3] because "further" mitigation would only provide "unscrupulous" importers with an incentive to violate the customs laws, not least because such would provide them with an "interest free government loan."

NSC's motion for summary judgment responds that the Customs' guideline on "mitigation" for voluntary disclosure situations was and is not in accordance with 19 U.S.C. § 1592(c)(4). That statute provides that "any monetary penalty to be assessed under subsection (c) of this section *shall not exceed* . . . the interest on the amount of lawful duties" (italics added). By contrast, Customs' guideline read as follows at the time NSC initiated its prior disclosures:

> In actual revenue-loss cases involving a prior disclosure where the degree of culpability is determined to be negligence or gross negligence, the claim for monetary penalty *shall be equal to* the interest computed from the date of liquidation on the amount of the actual loss of revenue resulting from the violation.

19 C.F.R. Pt. 171 App. B(E)(3) (as of Apr. 1, 2000) (italics added).[4] Continuing, NSC urges consideration of the fourteen factors addressed by the Court in *United States v. Complex Machine Works. Co.*, 23 CIT 942, 949–50, 83 F.Supp.2d 1307, 1315 (1999), arguing that such would mitigate against the imposition of a substantial penalty.

Subject matter jurisdiction here is bestowed by 28 U.S.C. § 1582(1). In accordance with USCIT Rule 56(a), summary judgment is appropriate if the Court determines that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986). "Under this standard, the court *must* reach a conclusion that there is no factual issue and that the applicable laws warrant judgment in favor of the movant; absent such a conclusion, there can be no summary judgment." *Precision Specialty Metals, Inc. v. United States*, 24 CIT 1016, 1023, 116 F.Supp.2d 1350, 1359 (2000) (emphasis in original). In a summary judgment motion,

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[3] Pl.'s Br. at 6–7, referencing PPFUF at 35–36 (referencing *Customs' Fines, Penalties & Forfeitures Handbook* (April 1986) (stating that there will be "*No Further Mitigation* of Prior Disclosure Dispositions In the *Absence of Extraordinary* Factors") (emphasis in original)).

[4] The guideline was amended shortly thereafter, effective July 24, 2000:

> Duty Loss Violation. The claim for monetary penalty shall be equal to the interest on the actual loss of duty computed from the date of liquidation to the date of the party's tender of the actual loss of duty resulting from the violation. Customs notes that there is no monetary penalty in these cases if the duty loss is potential in nature. Absent extraordinary circumstances, no mitigation will be afforded.

19 C.F.R. Pt. 171 App. B(F)(2)(f)(a) (2001). *See* 65 Fed. Reg. 39087 (June 23, 2000).

the movant bears the burden of demonstrating that there is no genuine issue of material fact. *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985). "In determining if a party has met its burden the court does not 'weigh the evidence and determine the truth of the matter,' but rather the court determines 'whether there is a genuine issue for trial.' " *G&R Produce Co. v. United States*, 26 CIT 1247, 1249, 245 F. Supp.2d 1304, 1307 (2002) (quoting *Anderson*, 477 U.S. at 249). Furthermore, "[t]he court views all evidence in the light most favorable to the non-moving party, drawing inferences in the nonmovant's favor." *Id.* (referencing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Considering the parties' essential arguments, the Court notes that NSC correctly points out that "shall be equal to" in Customs' guideline(s) does not comport with the statute's sliding-scale language. *Cf. United States v. Yuchius Morality Company, Ltd.*, 26 CIT 1224, 1235 (2002) ("Congress has chosen to adopt only maximums, as opposed to prescribing precise penalties, for proven violations under 19 U.S.C. §1592"). But, to the extent that Customs' actual practice is in accordance with the statute, the argument amounts to a tempest in a teacup. As pointed out by the government, there is nothing in the regulations or guidelines that would preclude a request for mitigation under any circumstances. *Cf.* 19 C.F.R. § 171.1, § 171.2, § 171.11, Pt. 171 App. B(G) (2001).

Under Customs' view, those circumstances must be "extraordinary." The perspective is not unreasonable, and, of course, the prudent exercise of judicial discretion would consider opposing viewpoints without subjugating judicial independence,[5] but considering the government's argument that the prior disclosure statute amounts to mitigation in its own right, because it only partially compensates the government (*i.e.*, "deprives" it of interest from the date of entry), the Court concludes that the argument is also wide of the mark. Until liquidation, the customs duties (and, by implication, interest) owed on a particular importation are uncertain. *Cf.* 19 C.F.R. § 159.1 ("[l]iquidation means the final computation or ascertainment of the duties or drawback accruing on an entry"); 19 C.F.R. Pt. 171 App. B(F)(2)(f)(a) (2001) ("Customs notes that there is no monetary penalty in these cases if the duty loss is potential in nature"). The government's monetization of the matter, upon which interest could be based, is not made certain until such time.

Lastly, the government opposes consideration of the *Complex Machine* factors, as argued by NSC, in the context of this prior disclo-

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[5] *See, e.g., United States v. Valley Steel Products Co.*, 15 CIT 268, 271 (1991) ("[t]he amount of the penalty to be assessed is within the sound discretion of the Court, but only after a violation of section 592 has been proven"). *Cf. United States v. Menard, Inc.*, 64 F.3d 678, 680 (Fed. Cir. 1995) (observing that the amount of the civil penalty is within the sound discretion of the trial court).

sure matter for negligence. However, *United States v. ITT Industries, Inc.*, 28 CIT ___ , 343 F.Supp.2d 1322 (2004), would proceed to consider some, if not all (as applicable), of those factors in context of a prior disclosure. *See* 343 F.Supp.2d at 1343–44. As in that case, this Court is confronted with appeals to exercise discretion to determine the appropriate amount of the penalty, if any, and the parties' collective assertion that there are no genuine issues of material fact to be resolved by a trial. Undoubtedly, the parties would rather that this matter be summarily resolved, but the reality is that the parties argue contrary interpretations of fact. As observed in *ITT Industries*:

> The Court cannot undertake this analysis on summary judgment. Because the Court has discretion to determine the appropriate penalty amount, . . . the Court is required to weigh evidence, make credibility determinations, and draw inferences from the facts, functions strictly delegated to a fact-finder or jury. . . . As the Court cannot properly perform these functions on summary judgment, the Court must deny the parties' motions on this particular issue and order a trial.

Id. The cross-motions at bar are therefore denied, and the plaintiff is hereby ordered to set this matter for trial.

Slip Op. 05–10

NSK LTD. and NSK CORPORATION, *et al.*, Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN U.S. CORP, Defendant-Intervenors.

Before: WALLACH, Judge
Consol. Court No.: 02–00627

JUDGMENT ORDER

Upon consideration of the Department of Commerce's ("Commerce") Remand Determination, filed pursuant to this Court's decision and Order in *NSK Ltd. v. United States*, Slip Op. 04–105 (August 20, 2004); the parties having filed no comments contesting Commerce's Remand Determination; the Court having reviewed Commerce's Remand Determination and all pleadings and papers on file herein, and good cause appearing therefor, it is hereby

ORDERED that Commerce's Remand Determination is in accordance with this Court's Remand Order of August 20, 2004; and it is further

ORDERED that Commerce's Remand Determination is sustained.

SLIP OP. 05–11

BEFORE: RICHARD K. EATON, JUDGE

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INDUSTRIAL DIVISION OF THE COMMUNICATION WORKERS OF AMERICA (IUE-CWA), AND FIVE RIVERS ELECTRONICS INNOVATION, LLC, PLAINTIFFS, v. UNITED STATES, DEFENDANT, AND KONKA GROUP CO., PHILIPS ELECTRONICS NORTH AMERICA CORP., PHILIPS CONSUMER ELECTRONICS CO OF SUZHOU LTD, WAL-MART STORES, INC., PRIMA TECHNOLOGY, INC., XIAMEN OVERSEAS CHINESE ELECTRONIC CO., SICHUAN CHANGHONG ELECTRIC CO., TCL CORP., AND APEX DIGITAL, INC., DEF.-INTERVENORS.

CONSOL. COURT NO. 04–00270

[Plaintiffs' motion for preliminary injunction granted]

Dated: January 27, 2005

Collier, Shannon, Scott, PLLC (*Mary Tuck Staley*), for Plaintiffs International Brotherhood of Electrical Workers, Industrial Division of the Communication Workers of America (IUE-CWA), and Five Rivers Electronics Innovation, LLC.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael David Panzera*), for Defendant United States.

White & Case, LLP (*Adams C. Lee*), for Defendant-Intervenor Konka Group Co.

Hunton & Williams, LLP (*Richard P. Ferrin* and *William Silverman*), for Defendant-Intervenors Philips Electronics North America Corp. and Philips Consumer Electronics Co. of Suzhou Ltd.

McDermott, Will & Emery, LLC (*Raymond Paul Paretzky*), for Defendant-Intervenor TCL Corp.

Sonnenschein Nath & Rosenthal (*Philip Steven Gallas*), for Defendant-Intervenor Wal-Mart Stores, Inc.

Willkie, Farr & Gallagher, LLP (*Daniel Lewis Porter*), for Defendant-Intervenors Prima Technology, Inc. and Xiamen Overseas Chinese Electronic Co.

Wiley, Rein & Fielding, LLP (*Charles Owen Verrill, Jr.*), for Defendant-Intervenor Sichuan Changhong Electric Co.

O'Melveny & Myers, LLP (*Veronique Lanthier*), for Defendant-Intervenor Apex Digital, Inc.

MEMORANDUM OPINION

EATON, *Judge*: Before the court is the motion for a preliminary injunction of the International Brotherhood of Electrical Workers, the Industrial Division of the Communication Workers of America, and Five Rivers Electronics Innovations, LLC ("Plaintiffs") seeking to enjoin liquidation of certain entries of color television receivers from the People's Republic of China (the "Subject Merchandise") entered within the 90-day period preceding the preliminary determination in this matter. *See* Certain Color Television Receivers From the People's Republic of China, 68 Fed. Reg. 66,800, 66,808–10 (ITA Nov. 28,

2003) (prelim. determination) ("Preliminary Critical Circumstances Determination"). Should the motion be granted, liquidation would be enjoined pending a final decision on the merits in the underlying antidumping action. Defendant, the United States, on behalf of the Department of Commerce ("Commerce" or the "Department"), does not object to the issuance of a preliminary injunction. Defendant-Intervenors, Sichuan Changhong Electric Co, Ltd. ("Sichuan"), Wal-Mart Stores, Inc. ("Wal-Mart"), and Apex Digital, Inc. ("Apex"), however, do object to the issuance of a preliminary injunction, and urge denial of the motion.[1] The court has the authority to grant the requested relief. *See* 28 U.S.C. § 1585 (2000); 28 U.S.C. § 2643(c)(1) (2000); 28 U.S.C. §1651(a)(2000).[2] For the reasons set forth below, the court grants Plaintiffs' motion.

BACKGROUND

On May 29, 2003, following a petition by the Plaintiffs, Commerce conducted an antidumping investigation of color television receivers from the People's Republic of China ("P.R.C.").[3] As part of that investigation, Commerce examined Plaintiffs' claim for a critical circumstances determination,[4] and preliminarily concluded that critical cir-

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[1] The other Defendant-Intervenors in this action, Konka Group Co., Philips Electronics North America Corp., Philips Consumer Electronics Co. of Suzhou Ltd., TCL Corp., Prima Technology, Inc., and Xiamen Overseas Chinese Electronic Co., take no position with respect to Plaintiffs' motion.

[2] Title 19 U.S.C. § 1516a(c)(2) grants this court the power to enjoin liquidation of entries during litigation of antidumping and countervailing duty determinations.

> In the case of a determination described in paragraph (2) of subsection (a) of this section by the Secretary, the administering authority, or the Commission, the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.

In addition, this court has broad injunctive power, as it "possesses all the powers in law and equity of, or as conferred by statute upon, a district court of the United States. . . ." 28 U.S.C. § 1585; *Borlem S.A.-Empreedimentos Industrias v. United States*, 913 F.2d 933, 937 (Fed. Cir. 1990) ("[T]he legislative history of 28 U.S.C. § 1585 provides the Court of International Trade 'with all the necessary remedial powers in law and equity possessed by other federal courts established under Article III of the Constitution.' "). Moreover, 28 U.S.C. § 2643(c)(1) authorizes the Court of International Trade to "order any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition."

[3] *See* Certain Color Television Receivers From Malaysia and the P.R.C., 68 Fed. Reg. 32,013 (ITA May 29, 2003) (notice of initiation).

[4] The critical circumstances statute was enacted to serve as a deterrent to "exporters whose merchandise is subject to an investigation from circumventing the intent of the law by increasing their exports to the United States during the period between initiation of an investigation and a preliminary determination by the Authority." H.R. REP. NO. 96–317 at 63 (1979); *see Coal. for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 112 n.38, 44 F. Supp. 2d 229, 252 n.38 (1999) (quoting S. REP. NO.

cumstances existed. *See* Preliminary Affirmative Critical Circumstances Determination, 68 Fed. Reg. at 66,808–09. On final determination, however, Commerce found that the facts did not warrant a finding of critical circumstances. *See* Certain Color Television Receivers from the P.R.C., 69 Fed. Reg. 20,594, 20,596 (ITA April 16, 2004) (final determination) ("Final Negative Critical Circumstances Determination"). In the underlying action, among other things,[5] Plaintiffs appeal the Final Negative Critical Circumstances Determination to this court. Should Plaintiffs prevail in their appeal with respect to critical circumstances, any unliquidated Subject Merchandise entered within 90 days prior to the Preliminary Affirmative Critical Circumstances Determination would be liquidated with the ultimately determined antidumping duties. *See* 19 C.F.R. § 351.206(a) (2000); *see also* 19 U.S.C. § 1673d(c)(4)(A)–(B) (2000).[6]

DISCUSSION

Injunctive relief is an "extraordinary remedy" that is to be granted sparingly. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993) (not reported in the Federal Supplement); *PPG Indus., Inc. v. United States*, 11 CIT 5, 6 (1987) (citing *Am. Air Parcel Forwarding Co. v.*

103–412 at 38 (1994) "This provision is 'designed to address situations where imports have surged as a result of the initiation of an antidumping or countervailing duty investigation, as exporters and importers seek to increase shipments of the merchandise subject to investigation into the importing country before an antidumping or countervailing duty order is imposed.' ").

[5] Although the final determination with respect to critical circumstances was negative, the final determination with respect to dumping was affirmative. *See* Final Negative Critical Circumstances Determination, 69 Fed. Reg. at 20,594. In addition to appealing the critical circumstances determination, Plaintiffs appeal Commerce's determination with respect to the calculation of the dumping margins, an aspect of the antidumping final determination not germane to the instant motion. *See id.*, *see also* Certain Color Television Receivers from the P.R.C., 69 Fed. Reg. 35,583 (ITA June 25, 2004) (am. final determination).

[6] This provision states:

> If the determination of the administering authority under [19 U.S.C. § 1673d(a)(3)] is affirmative, then the administering authority shall—
>
> (A) in cases where the preliminary determinations by the administering authority under [19 U.S.C. § 1673b(b), relating to dumping, and (e)(1), relating to critical circumstances] were both affirmative, continue the retroactive suspension of liquidation and the posting of a cash deposit, bond, or other security previously ordered under [19 U.S.C. § 1673b(e)(2)];
>
> (B) in cases where the preliminary determination by the administering authority under [19 U.S.C. § 1673b(b)] was affirmative, but the preliminary determination under [19 U.S.C. § 1673b(e)(1)] was negative, shall modify any suspension of liquidation and security requirement previously ordered under [19 U.S.C. § 1673b(d)] to apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date which is 90 days before the date on which suspension of liquidation was first ordered. . . .

19 U.S.C. § 1673d(c)(4)(A)–(B) (2000).

United States, 1 CIT 293, 298, 515 F. Supp. 47, 52 (1981)). In order to prevail on a motion for a preliminary injunction, Plaintiffs must show (1) that they will be immediately and irreparably injured; (2) that there is a likelihood of success on the merits; (3) that the balance of hardship on all the parties favors Plaintiffs; and (4) that the public interest would be better served by the relief requested. *Am. Spring Wire Corp. v. United States*, 7 CIT 2, 3, 578 F. Supp. 1405, 1406 (1984).

A. *Irreparable Injury*

This motion presents the question of the applicability of the holding in *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983), to the Final Negative Critical Circumstances Determination. Under *Zenith*, in the context of an annual review,[7] irreparable injury to domestic producers is presumed to result from the prospect of liquidation of the entries at issue, since "liquidation would indeed eliminate the only remedy available. . . ." *Id.* at 810. Plaintiffs argue that the facts of this case require the application of *Zenith*. For their part, Defendant-Intervenors insist that the facts more closely resemble those present in *American Spring Wire* and, therefore, irreparable injury cannot be presumed, but must be actually demonstrated.

According to Plaintiffs, absent the imposition of a preliminary injunction, they will suffer irreparable injury, because the Subject Merchandise entered during the 90-day period prior to the Preliminary Determination will be subject to liquidation. Should such liquidation take place, and should Plaintiffs prevail on the merits with respect to their critical circumstances claim, they insist that liquidation would eliminate the only remedy available to them, and thus they will be irreparably harmed. Plaintiffs argue that their remedy would be eliminated because (1) the entries would be liquidated free of any antidumping duty, and (2) there is no provision in law for reliquidation of these entries with the finally-determined antidumping duty. *See Zenith*, 710 F.2d at 810 ("Once liquidation occurs, a subsequent decision by the trial court on the merits of [plaintiff's]

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[7] Several changes were made to the provisions for administrative reviews pursuant to the amendments made by the Uruguay Round Agreements Act in 1994. *See* Eugene T. Rossides & Alexandra Maravel United States Import Trade Law, 41–12 (vol. 2 1997) (citing *Krupp Stahl A.G. v. United States*, 15 CIT 169 (1991) (not reported in the Federal Supplement), *Interredec, Inc. v. United States*, 11 CIT 45, 652 F. Supp. 1550 (1987)). Section 751 of the Tariff Act of 1930 (19 U.S.C. § 1675(a)) was amended to conform to those changes, and now provides for review, *upon request*, of (1) the dumping duty or net countervailable subsidy or (2) compliance with a suspension agreement (and the net countervailable subsidy or margin) at least once during each 12-month cycle beginning on the anniversary of the date of the issuance or a notice of suspension pursuant to an agreement. Prior to these changes, section 751 contained automatic review provisions. Thus, the administrative review in *Zenith* was automatic in nature. *See id*; Title 19 U.S.C. § 1675(a) (2000).

challenge can have no effect on the dumping duties assessed on entries of television receivers during the . . . review period."). Plaintiffs state:

> Failure to enjoin liquidation of the entries at issue in the negative critical circumstances determination would result in those entries being liquidated by the Bureau of Customs and Border Protection without the assessment of any antidumping duties. If entries from Changhong are liquidated prior to a decision by this Court on the merits of this appeal, plaintiffs will suffer irreparable harm. . . . Plaintiffs will be irreparably harmed because if the entries are liquidated without duties, the injury that the domestic industry experienced as a result of those imports during the 90 days prior to the Preliminary Affirmative Critical Circumstances Determination will not be offset. Moreover, if liquidation of the entries subject to this action is not enjoined, the parties' and the Court's efforts, and any order the Court issues, effectively may be nullified, and plaintiffs will be without recourse or remedy with respect to the entries subject to this action should the Court eventually rule in its favor on the merits of this action.

Pls.' Am. Consent Mot. at 3 (internal citation omitted).

As such, Plaintiffs claim that their situation is the same as that of the plaintiff in *Zenith*. In *Zenith*, Commerce conducted an annual administrative review of an antidumping duty order on television receivers from Japan. During the review, Commerce found *de minimis* dumping margins, and directed liquidation of entries made during the review without antidumping duties. Zenith challenged Commerce's administrative review determination in this Court and moved for a preliminary injunction. After its motion was denied, Zenith appealed to the United States Court of Appeals for the Federal Circuit, which reversed and held that Zenith would suffer irreparable injury if liquidation of the entries were not enjoined:

> [L]iquidation would indeed eliminate the only remedy available to Zenith for an incorrect review determination by depriving the trial court of the ability to assess dumping duties on Zenith's competitors in accordance with a correct margin on entries in the '79–'80 review period. The result of liquidating the '79–'80 entries would not be economic only. In this case, Zenith's statutory right to obtain judicial review of the determination would be without meaning for the only entries permanently affected by that determination.

Zenith, 710 F.2d at 810.

Zenith has regularly been followed by this Court. *See, e.g., SKF USA Inc. v. United States*, 28 CIT ___, 316 F. Supp. 2d 1322, 1327 (2004) (citing *Zenith*, 710 F.2d at 809–10); *OKI Elec. Indus. Co. v.*

United States, 11 CIT 624, 632, 669 F. Supp. 480, 486 (1987) (finding liquidation and automatic assessment to cause irreparable harm, not only because of economic loss, but also by deprivation of meaningful judicial review); and *Ugine-Savoie Imphy v. United States*, 24 CIT 1246, 1250, 121 F. Supp. 2d 684, 688 (2000) (finding irreparable harm in a sunset review appeal).

For their part, Defendant-Intervenors claim that the facts of this case more closely resemble those of *American Spring Wire*. *American Spring Wire* involved an application by domestic manufacturers for a preliminary injunction following a final negative antidumping determination. The domestic manufacturers produced no affidavits or other meaningful evidence demonstrating actual irreparable injury. Rather, they relied on the *Zenith* holding of the year before. The court in *American Spring Wire*, however, distinguished *Zenith* on the grounds that *Zenith* involved judicial scrutiny of an annual review, not of a final determination. The court found it important that administrative reviews focus on discrete periods of time, and affect finite numbers of entries. Thus, the unique nature of an administrative review required the holding in *Zenith*:

> [I]f a court [examining an administrative review determination] does not enjoin liquidation of entries pending resolution of challenges to the section 751 [annual] review [(19 U.S.C. § 1675(a))] then under consideration, the practical effect will be to moot the controversy and, at the same time, deprive appellants of their right to judicial review of the agency's section 751 [annual] review determination.

Am. Spring Wire, 7 CIT at 5, 578 F. Supp. at 1407. However, the *American Spring Wire* court found that the facts before it were different from those in *Zenith*:

> [t]he unique aspect of section 751 [annual] administrative reviews—their capacity for eluding judicial scrutiny because of their periodic nature—is simply not present here. This action centers on final negative injury determinations under 19 U.S.C. §§ 1671d and 1673d (1982). Those determinations, unlike their section 751 counterpart, are not transitory. They will, as a practical matter, extend *in futuro*, unless upset by an intervening judicial decision. And should this court ultimately reverse the Commission's negative injury determinations, antidumping and countervailing duties can still be assessed at that time on all unliquidated as well as future entries pursuant to an affirmative injury determination. Thus, unlike in the section 751 [annual] review context, plaintiffs will unquestionably have meaningful judicial review regardless of whether an injunction now issues.

Id.

Following *American Spring Wire*, this Court has limited *Zenith* to its facts, and required an independent showing of the irreparable harm when a preliminary injunction against liquidation is sought in litigation arising from a final antidumping or countervailing duty determination. The Court has reached this result regardless of whether the determination is affirmative or negative. For example, in *Altx, Inc. v. United States*, 26 CIT 735, 211 F. Supp. 2d 1378 (2002), the court denied an injunction sought during litigation of an International Trade Commission ("ITC") affirmative injury determination on the grounds that the moving party would not suffer irreparable harm should the requested injunction be denied. "*Zenith* does not apply here because the instant case involves an appeal of [an] injury determination in an investigation, rather than an administrative review." *Id.* at 737, 211 F. Supp. 2d at 1380. *See Bomont Indus. v. United States*, 10 CIT 431, 435, 638 F. Supp. 1334, 1338 (1986) (declining to enjoin liquidation in an action contesting a final determination because the applicant failed to "prove irreparable injury along with the other requirements for such extraordinary relief"); *accord*, *Dupont Teijin Films USA v. United States*, 27 CIT ___ , slip op. 03–157, at 4 (Dec. 4, 2003) (not reported in the Federal Supplement) (denying an injunction request made during litigation of an affirmative less-than-fair-value ("LTFV") determination on the same grounds; "the court has repeatedly held that liquidation of entries alone does not constitute irreparable harm" even in the context of a negative LTFV determination where the Department reversed itself on remand); *Altx*, 26 CIT at 737, 211 F. Supp. 2d at 1381. In *Sandoz Chems. Corp. v. United States*, 17 CIT 1061, 1061 (1993) (not reported in the Federal Supplement), the court declined to enjoin the liquidation of entries of sulfur dyes pending resolution of a judicial challenge to a negative final injury determination, because the effects of the ITC's determination controlled liquidation of all future entries, and not just those of a discrete time period. The court explained the difference between an administrative review and an affirmative or negative injury determination:

> An administrative review governs liquidation of entries made during a discrete time period and does not necessarily control liquidation of all future entries. Because the statute makes no provision for reliquidation after a successful judicial challenge, judicial review loses the greatest part of its effect once liquidation of the entries at issue occurs. If liquidation is enjoined pending judicial resolution of a dispute, the statute provides for liquidation in accordance with the final court decision. . . . Unlike an annual review, a negative injury determination affects liquidation of all future entries, not just those made within a specific time period. In such a situation, liquidation does not substantially curtail available judicial remedies. . . . "Negative injury determinations . . . will, as a practical matter, extend *in*

> *futuro*, unless upset by an intervening judicial decision. And should this court ultimately reverse the Commission's negative injury determinations, antidumping and countervailing duties can still be assessed at that time on all unliquidated as well as future entries pursuant to an affirmative injury determination."

Id. at 1063 (internal citations omitted).

The court finds the facts of the instant case to be distinguishable from the facts of *American Spring Wire*, and to more closely resemble those of *Zenith*. First, the critical circumstances determination only affects entries made during a discreet period, i.e., the 90-day period prior to the Preliminary Affirmative Critical Circumstances Determination, and has no effect *in futuro*. Second, if an injunction is not granted, and the entries made during the 90-day period are liquidated, then those entries will elude judicial review because the entries will have been liquidated without the ultimately-decided antidumping duties. Thus, absent an injunction, should entries of the Subject Merchandise be liquidated without the application of the finally-determined antidumping duties, Plaintiffs would lose the only remedy available to them should they ultimately prevail on the issue of critical circumstances. Therefore, in accordance with *Zenith*, Plaintiffs have established that, absent an injunction, they will be irreparably injured.

B. *Likelihood of Success on the Merits*

Although *Zenith* compels an affirmative finding with respect to irreparable harm, the United States Court of Appeals for the Federal Circuit has made clear that irreparable injury alone is not dispositive of the decision to grant an injunction. *See FMC Corp.*, 3 F.3d at 430 (stating that "[n]owhere in *Zenith* does it suggest that the harm suffered by FMC entitles FMC to an injunction absent a showing of likelihood of success on the merits."). Still, while it remains the movant's burden to demonstrate the likelihood that it will prevail on the merits of its case, the magnitude of the demonstrated harm can lessen that burden. *See Timken Co. v. United States*, 6 CIT 76, 569 F. Supp. 65, (1983). The Court explained:

> [Although] a showing that the moving party will be more severely prejudiced by a denial of the injunction than the opposing party would be by its grant does not remove the need to show some probability of prevailing on the merits, it does lower the standard that must be met. In such a circumstance it will ordinarily be sufficient that the movant has raised questions which are "serious, substantial, difficult and doubtful."

Id. at 80, 569 F. Supp. at 70 (internal citation omitted). As has been demonstrated, Plaintiffs have made a strong showing with respect to irreparable injury. Thus, the requirement that Plaintiffs demon-

strate a likelihood of success on the merits will be satisfied by raising " 'serious, substantial, difficult and doubtful' questions that are the proper subject of litigation" in cases "[w]here it is clear that the moving party will suffer substantially greater harm by the denial of the preliminary injunction than the non-moving party would by its grant. . . ." *Ugine-Savoie Imphy*, 24 CIT at 1251, 121 F. Supp. 2d at 689 (quoting *PPG Indus., Inc.*, 11 CIT at 8).

Here, Plaintiffs claim that they have satisfied this standard by disputing the Department's use of corrected information. Plaintiffs explain that:

> After correction of clerical errors, the Department found that Changhong had a margin that exceeded 25%, thereby meeting the history of dumping criterion. Stated differently, although the Department analyzed the volume of imports differently, the actual import data were not materially different between the preliminary and final determinations. Again, the only factual difference between the preliminary and final determination was the size of the dumping margins. Yet, when it issued its amended determination to correct for clerical errors, the Department did not address the significance of this change in light of the critical circumstances finding. Given the importance of the size of the margin in its preliminary affirmative finding of critical circumstances, the Department should have reevaluated its final negative critical circumstances finding in light of these new margin calculations. The Department's failure to undertake this analysis resulted in a determination that was not supported by substantial evidence and was not in accordance with law. This significant, unaddressed change, could have resulted in an affirmative finding of critical circumstances.

Pls.' Mem. in Resp. to the Court's Order at 4. In other words, Plaintiffs claim that adjustments made to correct clerical errors should have been made, not only to the final determination, but also to the Final Negative Critical Circumstances Determination.

Defendant-Intervenors dispute Plaintiffs' argument, claiming that "Commerce did not base its final negative critical circumstances determination on Changhong's margin, and the change in the margin due to clerical error correction is irrelevant to Commerce's negative finding." Wal-Mart's Opp'n to Pls.' Am. Consent Mot. for Prelim. Inj. ("Wal-Mart's Opp'n") at 8.

While it is clear that there is disagreement as to the validity of Plaintiffs' argument, it is equally clear that they raise a substantial question that goes to the heart of Plaintiffs' critical circumstances claim. Thus, Plaintiffs have raised sufficiently serious and difficult questions regarding the validity of Commerce's Final Negative Criti-

cal Circumstances Determination to satisfy the likelihood of success on the merits requirement.

C. *The Balance of Hardships*

Before granting a preliminary injunction, the court must also "determine which party will suffer the greatest adverse effects as a result of the grant or denial of the preliminary injunction" in order to determine the balance of hardships. *Ugine-Savoie Imphy*, 24 CIT at 1250, 121 F. Supp. 2d at 688. Plaintiffs have already demonstrated substantial hardship by their showing of the irreparable harm that would result absent an injunction. *See* discussion *supra*, at 6–12; *see also Timken*, 6 CIT at 82, 569 F. Supp. at 71 (holding that "hardship" to plaintiff is the "complete loss of its right to judicial review").[8]

Defendant-Intervenors argue that Plaintiffs' claim of potential hardship falls short of tipping the balance of hardships in favor of Plaintiffs. *See* Sichuan's Opp'n to Pls.' Mot. for Prelim. Inj. at 3; Wal-Mart's Opp'n at 11.

Defendant-Intervenors assert that

> Plaintiffs' claim of "great hardship" is unfounded. . . . Further, plaintiffs' claim that an injunction would preserve the *status quo* is incorrect. The status quo is that the entries are eligible for liquidation. An injunction would deny liquidation of the entries, thus imposing a hardship on importers such as Wal-Mart by creating a disruptive open-ended contingency that would remain on the importers' books until the Court issues its final decision in this action and any appeals from that decision are resolved. *See Elkem*,[9] 135 F. Supp. 2d at 1335–36 (discussing the commercial uncertainty resulting from suspension of liquidation).

Wal-Mart's Opp'n at 11.

The *Timken* case is instructive in the consideration of these claims. Like Defendant-Intervenors in this case, the *Timken* defendant-intervenors were importers claiming economic loss as a

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[8] In consenting to this motion, Defendant, the United States, says "if [Plaintiffs] were to prevail upon the merits [of this case], [Plaintiffs] would not have a remedy through either Commerce or Customs administrative proceedings to compensate for the harm caused by the absence of an injunction." United States' Mem. in Resp. to the Court's Oct. 25, 2004 Order at 5.

[9] Defendant-Intervenor's reliance on *Elkem* to show that Wal-Mart and other importers will suffer a hardship that outweighs Plaintiffs' hardship is misplaced. *Elkem* concerned an application for a preliminary injunction in the context of the reconsideration of a final affirmative antidumping determination. Following the *American Spring Wire* line of cases, *Elkem* held that "the failure . . . to [demonstrate] irreparable harm significantly raises the burden imposed on [p]laintiff to prove a likelihood of success on the merits." *Elkem Metals Co. v. United States*, 25 CIT 186, 196, 135 F. Supp. 2d 1324, 1334–35 (2001). Here, the burden imposed on Plaintiffs to prove a likelihood of success on the merits is less because, in accordance with *Zenith*, irreparable harm is presumed.

hardship. The *Timken* plaintiffs, on the other hand, faced the loss of a judicial remedy if the preliminary injunction were denied. *See generally Timken*, 6 CIT at 81–82, 569 F. Supp. at 71. The court granted the preliminary injunction holding that, when the economic loss claimed by defendant-intervenors

> [is] balanced against the hardship to Timken – complete loss of its right to judicial review if the liquidation of these entries is not enjoined – the balance of hardships tips decidedly in Timken's favor.

Id at 82, 569 F. Supp. at 71. Here, as in *Timken*, the court finds that the economic loss faced by Defendant-Intervenors does not outweigh the prospect of the loss of their legal remedy faced by Plaintiffs. As a result, the balance of hardships favors Plaintiffs.

D. *The Public Interest*

It is well-settled that the public interest is served by "ensuring that [Commerce] complies with the law, and interprets and applies [the] international trade statutes uniformly and fairly." *See, e.g.*, *Ugine-Savoie Imphy*, 24 CIT at 1252, 121 F. Supp. 2d at 690 (internal quotation omitted). In addition, the public interest is best served when all parties can obtain effective judicial review. *See SKF*, 28 CIT at ___ , 316 F. Supp. 2d at 1329 (stating "the public interest may be best maintained by 'the procedural safeguard of an injunction pendente lite to maintain the status quo of the unliquidated entries until a final resolution of the merits.' "). "[G]ranting Plaintiffs' motion for preliminary injunction will ensure judicial review of Commerce's determination and will further the public interest of an accurate assessment of antidumping duties." *Id*.

Here, Plaintiffs are in a similar position to that described by the court in *SKF*. Plaintiffs seek this preliminary injunction to ensure that the entries made 90 days prior to the Preliminary Affirmative Critical Circumstances Determination are subject to any ultimately-determined antidumping duties. Thus, the court finds Plaintiffs' motion for preliminary injunction to ensure judicial review of Commerce's determination furthers the public interest of an accurate assessment of antidumping duties.

CONCLUSION

As Plaintiffs have satisfied their burden of establishing that a preliminary injunction enjoining the Bureau of Customs and Border Protection from liquidating its entries of Subject Merchandise is proper, the court grants the Motion for a Preliminary Injunction. The parties shall consult and submit a proposed joint Preliminary Injunction Order within ten days of the filing of the order accompanying this Memorandum Opinion.

Slip Op. 05–12

BEFORE: HONORABLE RICHARD W. GOLDBERG, SENIOR JUDGE

SNR ROULEMENTS, KOYO SEIKO CO., LTD., KOYO CORPORATION OF U.S.A., NSK CORPORATION, NSK BEARINGS EUROPE, LTD., NSK LTD., NTN-BCA CORPORATION, NTN BOWER CORPORATION, NTN-DRIVESHAFT, INC., AMERICAN NTN BEARING MANUFACTURING CORP., NTN BEARING CORPORATION OF AMERICA, NTN CORPORATION, INA-SCHAEFFLER KG, INA USA CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and THE TORRINGTON COMPANY, Defendant-Intervenor.

Consol. Court No. 01–00686

JUDGMENT ORDER

Upon consideration of the United States Department of Commerce's Final Results of Redetermination Pursuant to Court Remand ("Redetermination Results") filed pursuant to the Court's decision in *SNR Roulements v. United States*, Slip Op. 04–100 (Aug. 10, 2004), and all other papers filed herein, and no parties having filed comments regarding the Redetermination Results, it is hereby

ORDERED that the Redetermination Results are sustained in all respects.

SO ORDERED.

Slip Op. 05–13

HONORABLE RICHARD W. GOLDBERG, SENIOR JUDGE

NITROGEN SOLUTIONS FAIR TRADE COMMITTEE, Plaintiff, v. UNITED STATES, Defendant, and JSC NEVINNOMYSSKIJ AZOT INC., TRANSAMMONIA, INC. AND J.R. SIMPLOT COMPANY, Defendant-Intervenors.

PUBLIC VERSION
Court No. 03–00260

[ITC's final negative injury and threat determination sustained.]

Date: January 31, 2005

Akin, Gump, Strauss, Hauer & Feld, LLP (*Valerie A. Slater* and *Margaret Chisholm Marsh*) for Plaintiff Nitrogen Solutions Fair Trade Committee.

James Lyons, Acting General Counsel, *U.S. International Trade Commission* (*Michael Kenneth Haldenstein*) for Defendant United States.

White & Case, LLP (*Walter J. Spak, Frank H. Morgan*, and *Lyle B. Vander Schaaf*) for Defendant-Intervenors JSC Nevinnomysskij Azot Inc. and Transammonia, Inc.
Miller & Chevalier Chartered (*Peter J. Koenig*) for Defendant-Intervenor J.R. Simplot Company.

OPINION

GOLDBERG, Senior Judge: In this action, Plaintiff Nitrogen Solutions Fair Trade Committee challenges the final negative injury and threat determination of the United States International Trade Commission ("ITC") in the antidumping proceedings involving *Urea Ammonium Nitrate Solutions from Belarus, Russia and Ukraine*, 68 Fed. Reg. 18673 (Apr. 16, 2003) ("Notice of Determination") and USITC Pub. 3591, Inv. Nos. 731–TA–1006, 1008, and 1009 (Apr. 2003) ("Views of the Commission") (together, the "*Final Determination*"). Pursuant to USCIT Rule 56.2, Plaintiff moves for judgment on the agency record.

For the reasons that follow, the Court sustains the *Final Determination*.

I. *BACKGROUND*

Plaintiff is an association of domestic producers of urea ammonium nitrate ("UAN"). Notice of Determination at 18674. UAN is a liquid nitrogen fertilizer used primarily in the United States ("U.S.") for row crops. Views of the Commission at 5. It is a commodity product; UAN from different sources (including imports) is commingled throughout the distribution system. *Id.* at 14. Natural gas is an important material input used to produce UAN, accounting for over half of its cost of production. *Id.* In late 2000 and early 2001, natural gas prices in the U.S. increased dramatically. *Id.* During this same period, domestic UAN prices rose, domestic UAN consumption fell and the volume of UAN imports to the U.S. increased. *Id.* at 13–16. In addition, the domestic UAN industry lost market share and suffered financially. *Id.* at 25. Natural gas prices began to normalize in mid 2001. *Id.* at 18. Imports also began to decline, although remained at historically high levels. *Id.*

On April 19, 2002, Plaintiff filed petitions with the U.S. Department of Commerce and the ITC alleging that UAN from Belarus, Lithuania, Russia and Ukraine was being sold in the U.S. at less than fair value and was causing material injury or threatening to cause material injury to the domestic UAN industry. The ITC initiated an antidumping investigation on that same day. 67 Fed. Reg. 20994 (Apr. 29, 2002). On June 4, 2002, the ITC issued a unanimous affirmative preliminary injury and threat determination as to UAN imports from Belarus, Russia and Ukraine (the "subject imports"), and determined that imports from Lithuania were negligible. *Urea Ammonium Nitrate Solutions from Belaus, Russia, and Ukraine*, 67 Fed. Reg. 39439 (June 7, 2002) and USITC Pub. 3517, Inv. Nos.

731–TA–1006, 1008, and 1009 (June 2002) ("Preliminary Views of the Commission") (together, the "*Preliminary Determination*").

The ITC then commenced its final investigation. On April 10, 2003, the ITC issued the *Final Determination*, unanimously concluding that the domestic UAN industry was not materially injured or threatened with material injury by reason of the subject imports. Views of the Commission at 34.

This appeal followed. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(c).

II. *STANDARD OF REVIEW*

The Court must sustain the *Final Determination* unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" taking into account the record as a whole. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (citation 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) (citations omitted).

In conducting its review, the Court must consider "not only the evidence on the record that justifies the ITC's findings, but also whatever in the record fairly detracts from its weight." *Am. Bearing Mfrs. Ass'n v. United States*, 28 CIT ___ , ___ (2004) (citations omitted). However, the Court "may not reweigh the evidence or substitute its judgment for that of the ITC." *Dastech Int'l, Inc. v. USITC*, 21 CIT 469, 470, 963 F. Supp. 1220, 1222 (1997). Instead, the Court's function is to ascertain "whether there was evidence which could reasonably lead to the [ITC]'s conclusion[.]" *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Id.* (citation omitted).

III. *DISCUSSION*

A. The ITC's Determination that Subject Imports Did Not Undersell Domestic UAN Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

In making its final injury and threat determination, the ITC was required to consider the effect of subject imports on domestic UAN prices. 19 U.S.C. § 1677(7)(B)(i)(II). As part of this evaluation, the ITC was further required to consider whether there had been "significant price underselling" by subject imports compared with the price of domestic UAN during the period of investigation. *Id.* § 1677(7)(C)(ii)(I). In the *Final Determination*, the ITC found that

prices of imported UAN were generally *higher* than domestic UAN from 1999 to 2001 and for the interim periods of January-September 2001 and January-September 2002 (together, the "period of investigation"). Views of the Commission at 20. Relying in part on this underselling analysis, the ITC ultimately concluded that there was no evidence of significant price effects by reason of the subject imports. *Id*. at 21.

Plaintiff advances four arguments for why the ITC's underselling analysis is not supported by substantial record evidence or otherwise in accordance with law. For the reasons set forth below, the Court sustains this aspect of the *Final Determination*.

1. The ITC Appropriately Excluded Sales Data That Did Not Involve Comparable Quantities of UAN.

Plaintiff argues that the ITC erred by excluding from consideration in its underselling analysis certain sales data from a significant importer into three of the U.S. cities under investigation ([ ]). *See* Plaintiff's Memorandum In Support of Its Rule 56.2 Motion for Judgment on the Agency Record ("Pl.'s Br.") at 17. In the *Final Determination*, the ITC declined to consider this importer's sales made by [ ] because sales using this form of transport "[did] not involve comparable quantities" and "were generally much larger than the sales of domestic UAN." Views of the Commission at 21 n.101. Plaintiff contends that the ITC should not have excluded these sales because: (1) except for one significant importer, none of the sales data gathered during the investigation distinguished sales based on transportation modes or shipment quantities, rendering impossible any comparisons on these bases among non-excluded sales and (2) most producers (including the significant importer in question) did not report volume discounts, indicating that prices for large and small quantity sales were comparable.[1] Pl.'s Br. at 17–20. According to Plaintiff, this erroneous exclusion resulted in a flawed set of sales data that skewed the ITC's underselling analysis. *Id*. at 20.

The Court finds that the ITC appropriately excluded from its underselling analysis sales made by [ ] because they did not involve comparable quantities of UAN. First, the Court finds that the ITC had a sufficient data set from which it could reasonably make a distinction between the excluded sales and other reported sales. Using its final questionnaire, the ITC collected monthly sales data for certain U.S. cities from domestic UAN producers and UAN import-

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[1] Plaintiff also argues at length that the [ ] sales should not have been excluded because they were made at the same distribution level as domestic UAN sales. Pl.'s Br. at 18. However, in the *Final Determination*, the ITC never concluded that these sales did not compete with domestic UAN or were at a different level of trade. Plaintiff's arguments concerning this point are, therefore, irrelevant.

ers over the period of investigation. *See* Plaintiff's Appendix to Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record ("Pl.'s App."), App. 12 (Form of Final Questionnaire) at 13. It was not necessary for the final questionnaire to request per-sale information on the mode of transport because, contrary to Plaintiff's contention, the ITC did not exclude sales on the basis of their mode of transport. The *Final Determination* clearly indicates that the sales in question were excluded solely because of their incomparable quantities. *See* Views of the Commission at 21 n.101. Although these large quantities were possible only "because of the way in which the product [was] sold," this does not equate to a distinction based on mode of transport. *Id.* at 21. In addition, the Court finds that it was not necessary for the final questionnaire to require per-sale quantity information for all UAN producers. The per-sale quantity of the excluded sales was so large that, even if it were assumed that the monthly sales volume reported by each domestic producer represented a single sale, the sales in question nonetheless represented significantly higher quantities in nearly every month of comparison. *See* Defendant's Appendix to Defendant's Response in Opposition to Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record ("Def.'s App."), List 2, Doc. 108 (ITC Staff Report for INV–AA–031 dated Mar. 11, 2003) at E–1a–E–2c. As such, the Court finds that the ITC collected sufficient data upon which to base its decision to exclude the sales contested by Plaintiff.

Second, the Court finds that the ITC appropriately used its discretion when declining to compare sales involving significantly different quantities. The ITC, "as the trier of fact, has considerable discretion in weighing the probative value and relevance of evidence." *Hyundai Electronics Indus. v. United States*, 21 CIT 481, 485 (1997). "The [ITC] weighs the evidence as the trier of fact in these cases, and has authority to reject or discount data that it determines is unreliable." *Mitsubishi Materials v. United States*, 20 CIT 328, 332, 918 F. Supp. 422, 426 (1996). The ITC's decision to place less weight on sales price comparisons involving different quantities has been upheld previously by this Court. *See Floral Trade Council v. United States*, 20 CIT 595 (1996). In *Floral Trade*, the ITC's stated reason for according less weight to incomparable sale quantities was a concern that different quantities may have affected relative prices. *Id.* at 603. The *Floral Trade* court found this explanation to be reasonable. *Id.* The instant case presents similar concerns. The significant importer's excluded sales were so large as to be of a fundamentally different order of magnitude than sales by domestic producers. *See* Def.'s App., List 2, Doc. 108 (ITC Staff Report for INV–AA–031 dated Mar. 11, 2003) at E–1a–E–2c. Sales of large volumes may affect product prices, lim-

iting the value of price comparisons.[2] Although Plaintiff contends that relative prices were not affected in this case because this significant importer reported that it did not offer discounts, Pl.'s Br. at 18, this argument is unconvincing. The significant importer did not have to identify a discount because, as noted by Plaintiff, the majority of its 2001 sales were at the lower price offered for [ ] sales. *Id*. at 17. This lower price is the importer's predominant selling price and therefore need not result from a discount *per se*.

Accordingly, the ITC's exclusion of the [ ] sales of a significant importer was reasonable and the resulting sales data set provides substantial evidentiary support for the ITC's underselling analysis.

2. The ITC Reasonably Relied on Sales Data and Representations Submitted by a Significant Importer During the Final Investigation.

Plaintiff contends that the ITC erred by relying on the sales data and representations of a significant importer during the final investigation, resulting in a flawed set of sales data that skewed the ITC's conclusions. Pl.'s Br. at 20. Plaintiff asserts that this significant importer failed to include sales data for New Orleans in its responses to the final investigation questionnaire. *Id*. In support of this contention, Plaintiff points to this importer's preliminary investigation questionnaire responses, which included data on a significant amount of New Orleans sales. *Id*. at 21–22. Plaintiff contends that this significant importer misrepresented its New Orleans sales to the ITC by claiming that sales reported in the preliminary investigation did not meet the revised pricing parameters of the final investigation questionnaire. *Id*. The final investigation questionnaire required this importer to report only those sales made on a [ ] basis to the receiving points of U.S. customers in certain U.S. cities and their proximate locations. *See* Def.'s App., List 2, Doc. 207 (Importer's Questionnaire Responses of [ ] dated Dec. 13, 2002) at 8. Plaintiff argues that the ITC ignored substantial record evidence indicating that the New Orleans sales data produced by the significant importer during the preliminary investigation was in fact responsive to the final questionnaire. Pl.'s Br. at 21. Specifically, Plaintiff notes that this importer's questionnaire responses indicated that (1) [ ] percent of its product was delivered within [ ] miles of

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[2] The ITC has previously found that different sales quantities can limit the value of price comparisons. *See Spring Table Grapes from Chile and Mexico*, 731–TA–926 and 927 (Preliminary) (June 2001), USITC Pub. 3432 at 16 n.101 (limited utility of price comparisons due to smaller quantities of subject imports); *Bicycles From China*, 731–TA–731 (Final) (June 1996), USITC Pub. 2968 at 14 n.103–04 (Chairman Watson and Commissioner Crawford) (comparisons entitled to less weight due to difference in quantities sold); *Fresh Cut Roses from Colombia and Ecuador*, 731–TA–684 and 685 (Final) (Mar. 1995), USITC Pub. 2862 at I–22 (usefulness of comparison limited by different quantities).

its initial shipping location and [ ] percent of its product was delivered to [ ]; (2) the importer could not comment on [ ]; and (3) the importer typically quoted selling prices on a [ ] basis for product delivered [ ] and on a [ ] basis for product delivered [ ]. *See* Def.'s App., List 2, Doc. 207 (Importer's Questionnaire Responses of [ ] dated Dec. 13, 2002) at 8, 18–19. Plaintiff argues that the ITC's reliance on obviously incomplete sales data for New Orleans skewed the ITC's underselling analysis, rendering it unsupported by substantial evidence. Pl.'s Br. at 23.

The Court finds that the ITC reasonably relied on the sales data and representations submitted by the significant importer in question during the final investigation. First, the ITC appropriately used its discretion to assess the credibility and reliability of the information it received during the investigation. *See Chefline Corp. v. United States*, 25 CIT 1129, 1136, 170 F. Supp. 2d 1320, 1330 (2001) ("[I]t is within the [ITC]'s discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence.") (citation omitted). The ITC is under no legal obligation to perform an onsite verification or audit of final questionnaire responses in an antidumping investigation. *See Titanium Metals Corp. v. United States*, 25 CIT 648, 663, 155 F. Supp. 2d 750, 765 (2001) (noting that "Congress has not required the [ITC] to conduct verification procedures for the evidence before it, or provided a minimum standard by which to measure the thoroughness of [an ITC] investigation") (citation omitted); *see also Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1058, 700 F. Supp. 538, 564 (1988) (ITC has discretion in verifying data received but may not actively preclude itself from receiving relevant or contrary data). Here, the importer in question submitted the required certification as to the accuracy and completeness of its final questionnaire responses. *See* Pl.'s App., App. 15 (Importer's Questionnaire Responses of [ ] dated Dec. 18, 2002) at 1. Choosing not to rely solely on this certification, the ITC took additional steps to ensure that the data was reliable. The ITC conducted multiple telephone conversations with this importer between December 2002 and March 2003 in order to make certain that this importer first understood the revised pricing parameters of the final questionnaire and then had provided data for all responsive sales. *See* Def.'s App., List 2, Doc 112 (ITC Staff Handwritten Notes from Dec. 2002-Mar. 2003) at 17, 26; *id.*, List 2, Doc 209 (Letter Accompanying Revised Importer's Questionnaire of [ ] dated Mar. 4, 2003) at 2. The ITC was told by the importer and its counsel that they understood the parameters of the final questionnaire and that sales out of New Orleans were not made in a manner that met these parameters. It was within the ITC's discretion to rely on questionnaire responses verified in this way.

Second, the Court's review of the record evidence supports the ITC's conclusion that this importer's New Orleans sales did not meet the final questionnaire pricing parameters. This significant importer's questionnaire responses indicated that [ ] percent of its product was delivered to [ ] and that sales of this nature were quoted on a [ ] basis – *not* [ ] as required by the final questionnaire pricing parameters. *See* Def.'s App., List 2, Doc. 207 (Importer's Questionnaire Responses of [ ] dated Dec. 13, 2002) at 8, 18–19. Given that a very high percentage of this importer's total sales did not meet the final questionnaire's pricing parameters, it is not surprising that this importer did not report sales for *one* of the five U.S. cities under investigation. Indeed, the Court notes that a member of Plaintiff's trade committee, [ ], also did not report sales data for New Orleans *or any other city* due to the revised pricing parameters of the final questionnaire. *See id.*, List 2, Doc. 108 (Final Staff Report dated Mar. 11, 2003) at V–22. Further, given the proximity of New Orleans to the Mississippi river system, it is also not surprising that New Orleans sales were received by customers at points further inland, resulting in delivery terms which were non-responsive to the final questionnaire's pricing parameters. In addition, none of this importer's [ ] were proximate to New Orleans. *See id.*, List 2, Doc. 76 (Importer's Questionnaire Responses of [ ] dated May 6, 2002) at 31. Although this evidence is not necessarily reflective of the actual receiving points of this importer's New Orleans sales, Plaintiff is unable to point to any direct contradicting evidence other than its own interpretation of the importer's questionnaire responses. In light of the entire record, the Court finds that Plaintiff's alternative reading is insufficient to upset the substantial evidence standard.

Third, Plaintiff's interpretation of the questionnaire responses seems implausible. Under Plaintiff's reading of the questionnaire responses, [ ] percent of the importer's sales occurred within 100 miles of its shipping locations and [ ] percent of its sales occurred over 500 miles from its shipping locations. These percentages total more than 100 percent - a result unexplained by Plaintiff. Plaintiff's reading of this importer's questionnaire responses does indicate that there were certain ambiguities in these responses, leading to the possibility of alternative inferences. However, even if the Court were inclined to agree with Plaintiff's strained interpretation, the Court's standard of review prevents it from reevaluating the evidence. *See Koyo Seiko Co. v. United States*, 24 CIT 364, 366, 110 F. Supp. 2d 934, 936 (2000) ("It is not within the court's domain . . . to reject a finding on grounds of a differing interpretation of the record.") (citations omitted).

Accordingly, the ITC's reliance on this significant importer's questionnaire responses was reasonable and the resulting New Orleans

sales data set provides substantial evidentiary support for the ITC's underselling analysis.

3. The ITC Appropriately Accepted Sales Data and Pricing Arguments Submitted by a Significant Importer in an Ex Parte *Communication with the ITC Fourteen Days Before the Record Closed.*

Plaintiff contends that the ITC erred by considering, for purposes of its underselling analysis, certain sales data and pricing arguments submitted by a significant importer on March 3, 2003, fourteen days before the record closed. Pl.'s Br. at 24. Plaintiff argues that the ITC's consideration of this information was not in accordance with law because: (1) the information was submitted more than five months after comments were due on the questionnaire used by the ITC to collect sales and pricing data; (2) the information was communicated in verbal form during an *ex parte* communication, which violated the ITC's requirement that such comments be submitted in written form and served on all parties; and (3) the ITC delayed releasing the pricing arguments until March 11, 2003, six days before the record closed. *Id.* at 24–28. Plaintiff contends that it was prejudiced by the ITC's improper consideration of this data because it was not allowed sufficient time to defend its interests. *Id.* at 29.

The Court finds that the ITC appropriately accepted sales data and pricing arguments submitted by a significant importer in an *ex parte* communication on March 3, 2003. First, Plaintiff mischaracterizes the nature of the sales data and pricing arguments made by the importer in question. The Court finds that this information was not a belated attack on the final questionnaire format or means of data collection as alleged by Plaintiff; rather, the record indicates that the sales data and pricing arguments were submitted in response to questions posed by the ITC as part of an ongoing dialogue concerning the antidumping investigation. *See* Def.'s App., List 2, Doc. 112 (ITC Staff Handwritten Notes from Dec. 2002-Mar. 2003); *id.*, List 2, Doc. 68 (ITC Staff Handwritten Notes from Apr.-May 2002). Neither the antidumping statute nor the ITC's rules governing this investigation set an earlier deadline by which such responses should have been submitted.

Second, *ex parte* communications are a necessary part of an antidumping investigation and are expressly sanctioned by law. *See* 19 U.S.C. § 1677f(a)(3) (prescribing rules for *ex parte* meetings held by ITC); *United States v. Roses, Inc.*, 706 F.2d 1563, 1567 (Fed. Cir. 1983) ("Dumping investigations do not include and never have included due process adversary hearings, but always have included *ex parte* meetings separately with the contenders."). The antidumping statute and regulations require information to be submitted in written form and served on all parties only in certain contexts. *See, e.g.*,

19 C.F.R. § 207.20(b) (requiring comments on draft final questionnaire to be submitted in writing). Because the Court finds that the arguments made by this importer on March 3, 2003 were not a disguised commentary on the final questionnaire, there is no statutory basis for requiring that these arguments be submitted in writing.

Finally, even if the ITC had violated its own procedures by accepting the March 3, 2003 sales data and pricing arguments or releasing the sales arguments eight days later, Plaintiff has failed to show that it was prejudiced by such actions. A claim of a procedural violation by an agency is actionable only upon a showing of prejudice to a party which is curable on remand. *Allegheny Ludlum v. United States*, 24 CIT 858, 873, 116 F. Supp. 2d 1276, 1291 (2000), *vacated and remanded on other grounds*, 287 F.3d 1276 (Fed. Cir. 2002). Plaintiff was served with the March 3, 2003 sales data *on that same day*. *See* Def.'s App., List 2, Doc. 222 (Certificate of Service dated Mar. 3, 2003). Plaintiff was provided with the March 3, 2003 pricing arguments eight days later – in time for Plaintiff to submit *two* filings with the ITC specifically commenting on the March 3, 2003 sales data and pricing arguments. *See id.*, List 2, Doc. 107 (Plaintiff's Memo Providing Additional Information Requested by the ITC dated Mar. 14, 2003); *id.*, List 2, Doc. 118 (Plaintiff's Final Comments dated Mar. 19, 2003). Although these filings were page and content-limited under ITC regulations, the points raised by Plaintiff in these two filings are *nearly identical* to those made before the Court. As such, the Court finds that Plaintiff was afforded an adequate opportunity to present its views to the ITC concerning the March 3, 2003 sales data and pricing arguments before the administrative record closed.

Accordingly, the ITC's decision to accept the March 3, 2003 sales data and pricing arguments of a significant importer is in accordance with law.

4. The ITC Adequately Addressed Plaintiff's Arguments Concerning the ITC's Underselling Analysis.

Plaintiff argues that the ITC erred because the *Final Determination* did not address certain of Plaintiff's arguments concerning the ITC's underselling analysis. Pl.'s Br. at 29. Under the antidumping statute, the ITC is required to include in its final injury determination "an explanation of the basis for its determination that addresses relevant arguments that are made by interested parties . . . concerning volume, price effects, and impact on the industry." 19 U.S.C. § 1677f(i)(3)(B). Plaintiff contends that the ITC did not consider: (1) Plaintiff's anecdotal evidence of underselling and lost revenues/sales and (2) Plaintiff's arguments concerning the price ramifications of

mixed over- and underselling by high volume imports in a commodity market.[3] Pl.'s Br. at 29–31.

The Court finds that the ITC adequately addressed Plaintiff's arguments concerning the ITC's underselling analysis. First, the ITC plainly referenced anecdotal evidence of underselling in the *Final Determination*. *See* Views of the Commission at 23 ("We also note that none of the petitioners' lost sales or lost revenue allegations was confirmed."). During the investigation, Plaintiff made 45 specific allegations of lost sales and lost revenues – none of which could be confirmed by the ITC. *See* Def.'s App., List 2, Doc. 108 (ITC Staff Report for INV–AA–031 dated Mar. 11, 2003) at V–66. Although Plaintiff submitted anecdotal evidence of underselling later in the investigation, the ITC "has broad discretion in analyzing and assessing the significance of evidence on price undercutting." *Nucor Corp. v. United States*, 28 CIT ___ , ___ , 318 F. Supp. 2d 1207, 1256 (2004) (citing *Copperweld Corp. v. United States*, 12 CIT 148, 161, 682 F. Supp. 552, 565 (1988) (citing S. REP. No. 96–249, at 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. at 474). The ITC reasonably chose to rely on the evidence developed by its staff, rather than Plaintiff, and the Court will not disturb this decision. Further, the Court notes that, at best, Plaintiff's anecdotal evidence simply indicates that *some* underselling occurred during the period of investigation – a fact that was clearly acknowledged in the *Final Determination*. *See* Views of the Commission at 20 (". . . and [ ] short tons was undersold.").

Second, the ITC also plainly referenced Plaintiff's mixed over- and underselling theory in the *Final Determination*. *See id*. at 20 ("Petitioners argue that the picture of underselling/overselling would be more 'mixed' . . ."). The ITC explained that it chose not to adopt Plaintiff's theory because it would have required the ITC to consider sales data that, for the reasons discussed *infra* at III.A.1–2, the ITC reasonably excluded from its data set. Further, the Court notes that, even though the ITC has in the past applied the mixed over- and underselling theory suggested by Plaintiff, it is not required to do so in every investigation. *See Nucor*, 28 CIT at ___ , 318 F. Supp. 2d at 1247 ("It 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.") (citations omitted).

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[3] Plaintiff also argues that the ITC failed to address its concerns about the sales data used to develop the underselling analysis. Pl.'s Br. at 30. Since the Court finds that the ITC used an adequate sales data set, as discussed *infra* at III.A.1–2, this argument is not addressed.

Accordingly, the ITC's consideration and treatment of Plaintiff's arguments concerning the ITC's underselling analysis is in accordance with law.

B. The ITC's Determination that Subject Imports Did Not Depress or Suppress Domestic UAN Prices Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

As part of its required evaluation of the effect of subject imports on domestic UAN prices, the ITC was obligated to consider whether subject imports had significantly depressed or suppressed domestic UAN prices. 19 U.S.C. § 1677(7)(C)(ii)(II). In the *Final Determination*, the ITC found that prices for domestic UAN rose in tandem with natural gas prices, suggesting that domestic prices were not depressed by subject imports. Views of the Commission at 21. Further, the ITC found that the net sales unit values of domestic producers increased more than their unit cost of goods sold ("COGS") during most of the period of investigation, indicating that domestic prices were not suppressed by subject imports relative to costs. *Id.* at 22–23. The ITC concluded that subject imports had not depressed or suppressed domestic UAN prices to any significant degree during the period of investigation. *Id.* at 23. Relying in part on this negative price depression/suppression analysis, the ITC ultimately concluded that there was no evidence of significant price effects by reason of the subject imports. *Id.* at 21.

Plaintiff advances one major argument for why the ITC's price depression/suppression analysis is not supported by substantial record evidence or otherwise in accordance with law.[4] For the reasons set forth below, the Court sustains this aspect of the *Final Determination*.

Plaintiff contends that the ITC erred by using full-year data to examine the correlation between domestic UAN prices and natural gas prices. Pl.'s Br. at 23–24. Plaintiff argues that if the ITC had analyzed half-year data instead of full-year data, it would have found that, in the second half of 2001, the domestic industry's COGS was higher than domestic UAN prices and the domestic UAN industry suffered one of its worst financial performances of the entire period of investigation. *Id.* at 38–40. This time period corresponded with the highest levels of subject imports during the period of investiga-

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[4] Plaintiff also presents two additional arguments countering the ITC's price depression/suppression analysis. First, Plaintiff argues that the ITC's sales data set was flawed, leading to an incorrect price depression/suppression analysis. Pl.'s Br. at 23. Since the Court finds that the ITC used an adequate sales data set, as discussed *infra* at III.A.1–2, this argument is not addressed. Second, Plaintiff contends that the ITC improperly weighed anecdotal evidence of lost sales and lost revenues, which further skewed the price depression/suppression. *Id.* at 24. Since the Court finds that the ITC properly weighed this evidence, as discussed *infra* at III.A.4, this argument is not addressed.

tion, despite falling natural gas prices. *Id.* Plaintiff argues that these facts, revealed only by using half-year data, help establish that the peak volume of subject imports in the second half of 2001 did in fact suppress domestic UAN prices. *Id.* at 24.

The Court finds that the ITC reasonably chose to use full-year pricing data when evaluating the correlation between domestic UAN prices and natural gas prices. First, the ITC's broad discretion in choosing the time frame for its investigation and analysis has consistently been upheld. *See Wieland Werke, AG v. United States*, 13 CIT 561, 567, 718 F. Supp. 50, 55 (1989) (approving three-year period of investigation); *British Steel Corp. v. United States*, 8 CIT 86, 93, 593 F. Supp. 405, 410–11 (1984) (approving analysis of calendar year data rather than quarterly data); *Amer. Spring Wire Corp. v. United States*, 8 CIT 20, 26, 590 F. Supp. 1273, 1279 (1984), *aff'd sub nom.*, *Armco Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985) (approving analysis of calendar year data rather than quarterly data). Neither the antidumping statute nor existing case law requires the ITC to examine half-year data if it reasonably finds that full-year data is probative. *See Amer. Spring Wire*, 8 CIT at 26, 500 F. Supp. at 1279 ("[T]he ITC is not required by the statute to use any particular timeframe for its analysis, although it generally focuses on annual time periods.").

Second, the Court finds that the ITC appropriately exercised its discretion in the selection of the full-year period of analysis in this case. As an initial matter, the Court notes that the ITC's general practice is "to conduct an *annual* analysis of the volume and effects of imports over the period of investigation." *Steel Auth. of India v. United States*, 25 CIT 472, 477, 146 F. Supp. 2d 900, 907 (2001) (emphasis added). It was reasonable for the ITC to follow standard procedure by initially examining the full-year periods in this case. However, unlike the ITC's investigation in *Timken Co. v. United States*, 27 CIT ___, 264 F. Supp. 2d 1264 (2003), the ITC did not ignore more detailed information that it had relied on in an earlier phase of the proceeding. Rather, while employing an overall annual analysis, the ITC also specifically addressed the 2001 half-year data and arguments advanced by Plaintiff. *See* Views of the Commission at 27 ("The petitioners argue that the domestic industry's condition continued to deteriorate after U.S. natural gas prices normalized by the second half of 2001 and that subject imports remained a significant presence in the U.S. market. However . . ."). The ITC simply disagreed with Plaintiff's interpretation of this data. Using Plaintiff's data, the ITC found that subject imports declined between the third and fourth quarters of 2001, citing market factors[5] which reasonably explained the delayed response time to falling (but, the Court notes,

[5] These factors are discussed more fully *infra* at III.C.1.

nonetheless quite high) natural gas prices. *Id*. As such, the Court finds that "plaintiff's position is one which would necessitate judicial reweighing of the evidence to take into account the factors and approach it favors, but this [C]ourt is not at liberty to reweigh evidence in an action such as this." *Roses, Inc. v. United States*, 13 CIT 662, 667, 720 F. Supp. 180, 184 (1989) (finding it permissible for the ITC to rely on annual, as opposed to quarterly, financial data when making its analysis).

Finally, the Court finds that the ITC's determination adequately met the antidumping statute's requirement that "significant" price depression/suppression be considered in the analysis of subject imports' price effects. 19 U.S.C. § 1677(7)(C)(ii)(II). Although half-year data was not used, the record shows that the ITC did consider changes in domestic prices and per unit profit margins during the period of investigation. *See* Views of the Commission at 22 n.106 (explaining that Plaintiff's average unit price data is useful for examining price trends, but not as a surrogate for price comparisons); *id*. at 23 n.108 (analyzing COGS and sales unit values during the period of investigation); Def.'s App., List 2, Doc. 108 (ITC Staff Report for INV–AA–031 dated Mar. 11, 2003) at C–2. The ITC determined that the price depression/suppression caused by subject imports was not "significant[.]" Views of the Commission at 23. Such a determination does not mean that price depression/suppression was nonexistent; rather, the depressive or suppressive effects of subject imports did not rise to an actionable level under the antidumping statute. Plaintiff's own evidence of price suppression reinforces this conclusion, given that Plaintiff points only to data from the second half of 2001 to prove price suppression, Pl.'s Br. at 24, despite the presence of high volume subject imports in response to climbing natural gas and UAN prices during much of the period of investigation. *Id*. at 4. When weighed against the ITC's full data set from the period of investigation – covering three years and an eight month interim period – this data is insufficient to undermine the substantial evidence supporting the ITC's price depression/suppression analysis.

Accordingly, the ITC's selection of full-year data for its analysis of price suppression/depression is in accordance with law.

C. The ITC's Determination that the "Significant" Volume of Subject Imports Was Mitigated by Market Conditions Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

In making its final injury and threat determination, the ITC was required to analyze the volume of subject imports, specifically whether the volume (or increase in volume) of subject imports was significant during the period of investigation, either in absolute terms or relative to domestic UAN production or consumption. *See* 19 U.S.C. § 1677(7)(B)(i)(I); *id*. § 1677(7)(C)(i). In the *Final Deter-*

mination, the ITC found that "[t]he increase in volume of the subject imports both absolutely and relative to domestic consumption over the period of investigation was significant." Views of the Commission at 17. However, the ITC noted that the significance of this volume "must be viewed in the context of prevailing market conditions" – specifically the sharp spike in natural gas prices resulting in higher UAN costs, domestic production cutbacks and high UAN prices. *Id.* at 17–18. The ITC noted that the total volume of subject imports rose and fell roughly in tandem with natural gas prices, citing as a specific example the declining volume of subject imports shipped to Gulf Coast cities during the second half of 2001. *Id.* at 18, 27. The ITC also noted that long lead times between orders and deliveries could have accounted for the somewhat delayed response of subject imports to falling gas prices in the second half of 2001. *Id.* at 27. To draw these conclusions, the ITC relied on data from 2001 and 2002, which included the date the petition was filed. *Id.* at 17–18. However, the ITC found that the decline in subject imports predated petition filing and was instead related to natural gas price effects. *Id.* at 18 n.85.

Plaintiff advances two arguments for why the ITC's volume analysis is not supported by substantial record evidence or otherwise in accordance with law. For the reasons set forth below, the Court sustains this aspect of the *Final Determination*.

1. The ITC's Analysis of the Relationship between Natural Gas Prices and Subject Import Volume Is Reasonable.

Plaintiff contests the ITC's conclusion that the volume of subject imports rose and fell in tandem with natural gas prices. Pl.'s Br. at 31. Plaintiff argues that record evidence instead shows that the total volume of subject imports reached a historical peak in the second half of 2001, as natural gas prices were falling, and remained at "exceptionally high" levels through the first quarter of 2002. *Id.* at 32. Plaintiff argues that only non-subject imports of UAN declined along with natural gas prices – subject imports remained at high volumes and only began to significantly decrease after the antidumping petition was filed. *Id.* For example, Plaintiff notes that subject imports into Gulf Coast cities declined only 1.4 percent during the second half of 2001. *Id.* at 34.

The Court finds that the correlation made by the ITC between natural gas prices and subject import volume is reasonable. First, the Court notes that Plaintiff places great, but misdirected, weight on the fact that subject imports were "exceptionally high" during key points in the period of investigation. Pl.'s Br. at 32. This fact is simply not in dispute. In the *Final Determination*, the ITC itself concluded that the volume of subject imports was "significant" – a factor taken into account in its injury analysis. Views of the Commission at 17. By examining the mitigating role of natural gas price effects on

the significance of subject import volume, the ITC did not impermissibly qualify its conclusion; rather, the agency exercised its statutory right to consider "such other economic factors as are relevant to the determination." 19 U.S.C. § 1677(7)(B)(ii). Plaintiff does not allege (nor could it) that the ITC abused its discretion in considering natural gas prices to be such an economic factor.

Second, the Court finds that the ITC's conclusion regarding natural gas price effects is supported by record evidence. Recognizing the importance of natural gas prices as an economic factor, the ITC indicated during the *Preliminary Determination* its intention to "fully explore" the role of natural gas prices on the domestic UAN industry during the final investigation. Preliminary Views of the Commission at 25–26. The ITC dutifully pursued this line of analysis during the final investigation, collecting information from questionnaire respondents on, *inter alia*, the net cost of natural gas inputs, use of natural gas purchase options, contract terms of natural gas purchases and the effect of natural gas prices on UAN production. *See, e.g.*, Pl.'s App., App. 12 (Form of Final Questionnaire) at 10–11, 21–23 (requesting information related to natural gas usage and effects); *id.*, App. 16 (ITC Staff Report dated Feb. 7, 2003) at V1–V4 (discussing natural gas as a raw material cost affecting pricing); Def.'s App., List 2, Doc. 112 (ITC Staff Handwritten Notes from Dec. 2002–Mar. 2003) (discussing UAN and natural gas data). The ITC compared this information on natural gas with the trends in domestic UAN prices, domestic UAN consumption and the volume of subject imports discerned from other information collected from questionnaire respondents. *See, e.g.*, Pl.'s App., App. 12 (Form of Final Questionnaire); Def.'s App., List 2, Doc. 108 (ITC Staff Report dated Mar. 14, 2003) at V–3, V–18; *id.*, List 2, Doc. 98 (Plaintiff's Pre-Hearing Brief to the ITC dated Dec. 13, 2003) at Ex. 6 (cited by ITC in the *Final Determination*); Views of the Commission at 22 n.103. Based on this substantial evidence, the ITC found a positive correlation between natural gas prices and the volume of subject imports. The ITC had sufficient evidentiary grounds on which to base this conclusion.

Finally, the Court finds that the failure of subject imports to decline exactly in tandem with natural gas prices does not refute the existence of a positive correlation. The record reveals, and Plaintiff concedes, that subject imports did begin to slowly decline shortly after the fall in natural gas prices and before the filing of the antidumping petition. *Id.* at 18 n.85 (citing evidence of volume levels supplied by Plaintiff during the final investigation). Further, even among non-subject imports, which Plaintiff notes declined at a faster rate than subject imports, the timing of market exit varied among imports from different countries. Def.'s App., List 2, Doc. 133 (Plaintiff's Post-Hearing Brief dated Feb. 27, 2003) at Ex. 15. This evidence lends support to the ITC's finding that different contractual

terms, including ordering lag times, delayed the response of subject imports from different producers in different countries to changing market conditions in the U.S. Views of the Commission at 27 n.127. Although Plaintiff counters that certain evidence indicates that contract lead times were too short to account for the delay, Pl.'s Br. at 41, there is also record support for the ITC's conclusion. *See* Def.'s App., List 2, Doc. 108 (ITC Staff Report for INV–AA–031 dated Mar. 11, 2003) at II–28 (shipment times ranged from [ ] to [ ]); Appendix to Memorandum of Defendant Intervenors JSC Nevinnomysskij Azot, Inc. and Transammonia, Inc. in Opposition to Plaintiffs' Motion for Judgment on the Agency Record, List 1, Doc. 121 (Commission Hearing Transcript for INV–731–TA–1006, 1008 and 1009 (Final)) at 187–88 (witness noting lead times of [ ] are only for physical delivery and that orders can be placed up to [ ] in advance). As discussed *infra* at III.A.1, the ITC is owed deference in its weighing of the record evidence and Plaintiff has failed to raise sufficiently serious concerns to disturb the ITC's finding.

Accordingly, the ITC's analysis of the relationship between natural gas prices and subject import volume is supported by substantial evidence.

2. The ITC Reasonably Considered Pre- and Post-Petition Data When Comparing Relative Subject Import Volumes.

Plaintiff argues that the ITC erred in considering subject import volumes for the January-September 2002 interim period in its volume analysis. Pl.'s Br. at 33. Plaintiff contends that the decrease in subject imports observed during this period was aberrational; subject import volumes were distorted by the threat of an antidumping petition, which was ultimately filed in April 2002. *Id*.

The Court finds that the ITC exercised appropriate discretion in evaluating post-petition data related to declining subject import volumes. The antidumping statute expressly grants the ITC discretion in weighing post-petition data. 19 U.S.C. § 1677(7)(I) ("[T]he ITC *may* reduce the weight accorded to the data for the period after the filing of the petition in making its determination . . ."") (emphasis added). Cases applying this provision have recognized the ITC's significant discretion in its weighing of such information. *See Altx, Inc. v. United States*, 25 CIT 1100, 1105, 167 F. Supp. 2d 1353, 1361 (2001) (recognizing that the ITC "is not required to discount the relevant data even if the agency finds a change in data to be related to the pendency of the investigation"). Here, the ITC plainly established that subject imports began to decline before the petition filing. Views of the Commission at 17–18. In the *Final Determination*, the ITC took into consideration the possibility that the threat of the petition may have "contributed to the drop in subject imports" toward the end of the period of investigation. *Id*. at 18 n.85. The ITC none-

theless concluded that the decline in subject imports was due, at least in part, to factors other than the antidumping petition, such as natural gas price effects. *Id*. This conclusion was within the ITC's discretion.

Accordingly, the ITC appropriately considered post-petition data which was consistent with pre-petition data demonstrating a trend of declining subject imports.

D. The ITC's Negative Impact Determination Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

In making its final injury and threat determination, the ITC was required to consider the impact of subject imports on domestic UAN producers. 19 U.S.C. § 1677(7)(B)(i)(III). As part of this evaluation, the ITC was further required to "evaluate all relevant economic factors which have a bearing on the state of the industry in the United States." *Id*. § 1677(7)(C)(iii). In the *Final Determination*, the ITC analyzed factors such as "output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development." Views of the Commission at 23. The ITC found that "[w]hile the domestic industry generally reported losses during the period of investigation, the losses [were] not attributable to any significant degree to the subject imports." *Id*. at 25. To make this conclusion, the ITC drew on the results of its pricing and volume analysis. Specifically, the ITC noted that subject imports had not had an adverse effect on industry prices, as demonstrated by the relative lack of underselling and minimal price depression/suppression. *Id*. The ITC also noted that, during the period of investigation, the domestic industry's financial condition was at its worst in 1999, when subject imports had minimal presence (less than [ ] percent of the domestic market). *Id*. at 26. Recognizing that the domestic industry's profitability also declined later in the period of investigation, the ITC attributed this to natural gas price effects, rather than subject imports. *Id*. To support this finding, the ITC noted that the domestic industry experienced significant production curtailments during the period of investigation due to high natural gas prices. *Id*. at 24. In general, the ITC found that unscheduled production curtailments totaled approximately 154,000 tons per month from September to March 2001 and created "a perception in the marketplace (if not reality) that domestic supply was unreliable." *Id*. at 25. Based on these findings, the ITC found that subject imports did not have a significant adverse impact on the domestic industry. *Id*. at 28.

Plaintiff advances one major argument[6] for why the ITC's impact analysis is not supported by substantial evidence or otherwise in accordance with law. For the reasons set forth below, the Court sustains this aspect of the *Final Determination*.

Plaintiff argues that the ITC based its impact analysis, in part, on the incorrect assertion that domestic UAN production was significantly curtailed as a result of high natural gas prices. Pl.'s Br. at 36. Plaintiff contends that record evidence shows that a total of only [ ] tons of domestic production were curtailed specifically due to high natural gas prices during September 2000 to March 2001 – an amount far less than that found by the ITC. *Id.* Plaintiff further contends that the record indicates that millions more tons were curtailed as a result of inventory controls and poor market conditions – causes which Plaintiff attributes to subject imports. *Id.* at 37. Plaintiff argues that this evidence was ignored by the ITC and contradicts the ITC's conclusion that natural gas prices were the cause of the industry's poor condition during the period of investigation. *Id.*

The Court finds that record evidence concerning domestic UAN production curtailments, adequately addressed in the *Final Determination*, supports the ITC's impact analysis. Plaintiff is correct that only [ ] tons of domestic production curtailments were directly attributable to natural gas price effects. *See* Def.'s App., List 2, Doc. 108 (ITC Staff Report for INV–AA–031 dated Mar. 11, 2003) at III–3. However, the ITC does not impermissibly attribute a larger amount of production curtailments to this specific root cause. Rather, building on a detailed comparison of domestic UAN production curtailments, capacity and inventory data during the period of investigation, the *Final Determination* generally notes that significant unscheduled production curtailments occurred during the period of investigation, coinciding with the natural gas price peak. Views of the Commission at 24. This observation is supported by substantial evidence. *See* Def.'s App., List 2, Doc. 108 (ITC Staff Report for INV–AA–031 dated Mar. 11, 2003) at III–3–III–5, Table C–2. It is Plaintiff which baldly asserts a cause for these additional cur-

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[6] Plaintiff also presents three additional arguments countering the ITC's impact analysis. First, Plaintiff argues that the ITC's flawed underselling analysis, used to support the ITC's impact analysis, renders the ITC's negative impact determination unsustainable. Pl.'s Br. at 36. Since the Court sustains the ITC's underselling analysis, as discussed *infra* at III.A, this argument is not addressed. Second, Plaintiff argues that the ITC's erroneous analysis of full-year data, rather than half-year data, obscured the true impact of subject imports on the domestic industry. Since the Court sustains the ITC's decision to use full-year data, as discussed *infra* at III.B, this argument is not addressed. *Id.* at 39. Third, Plaintiff contends that the ITC improperly considered volume data from the interim period, which included the date of the antidumping petition filing, when making its impact determination. *Id.* at 43. Since the Court sustains the ITC's volume analysis and use of data from the interim period, as discussed *infra* at III.C, this argument is not addressed.

tailments – subject imports. Yet, Plaintiff cites to *no* record evidence explaining that *all* production curtailments attributed to "inventory control" and "market conditions" are best understood to be caused *solely* by subject imports. A review of Plaintiff's own evidence reveals why it is unable to provide record support for this correlation. In Exhibit 17 of Plaintiff's Pre-hearing Brief to the ITC, which summarized the detailed production curtailment information reported by U.S. producers for October 2000 to September 2002, Plaintiff categorizes curtailments according to their reported root cause. *Id.*, List 2, Doc. 98 (Plaintiff's Pre-Hearing Brief to the ITC dated Dec. 13, 2003), Ex. 17 at 3. Predictably, "natural gas prices" and "inventory control/market conditions" are listed as categories; however, the summary also includes a *separate* line item for curtailments caused by "subject imports." *Id.* Where Plaintiff makes categorical distinctions among the root causes of production curtailments earlier in an antidumping investigation, the Court will not allow it to later conflate such categories to achieve a desired result.

Accordingly, the ITC's consideration of domestic production curtailments is supported by substantial evidence.

E. The ITC's Negative Threat Determination Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

In making its final injury and threat determination, the ITC was required to analyze whether further dumped imports of UAN were imminent and whether material injury by reason of such imports would occur. 19 U.S.C. § 1677(7)(F)(ii). In the *Final Determination*, the ITC concluded that the domestic UAN industry was not threatened with material injury by subject imports. Views of the Commission at 29. In reaching this conclusion, the ITC found that there was a limited amount ([ ] percent) of additional production capacity from the subject countries that could be diverted to the U.S., since approximately two-thirds of production from the subject countries had already been exported during the period of investigation. *Id.* at 31. The ITC also found that additional UAN was unlikely to shift from the European Union ("EU") to the U.S., despite the imposition of EU antidumping orders on subject imports, since these orders had been in place during the period of investigation and had not caused such a shift. *Id.* at 32. Because it found that subject imports had not caused material injury to the domestic industry during the period of investigation and were not likely to dramatically increase in the future, the ITC made a negative threat determination. *Id.* at 33–34.

Plaintiff advances two arguments for why the ITC's threat determination is not supported by substantial record evidence or other-

wise in accordance with law.[7] For the reasons set forth below, the Court sustains this aspect of the *Final Determination*.

1. The ITC Considered and Reasonably Weighed the Record Evidence Concerning Available Capacity.

Plaintiff argues that the ITC erred by not considering all available capacity data when assessing the likelihood of future imports. Pl.'s Br. at 46. Specifically, Plaintiff contends that the ITC ignored: (1) excess capacity data for the Ukraine and (2) the existence of a Russian producer with excess capacity who failed to respond to the final questionnaire. *Id.* at 46–47.

The Court finds that the ITC adequately considered available capacity data. First, contrary to Plaintiff's contention, the ITC did not focus solely on questionnaire responses when cumulating capacity estimates. In fact, the ITC relied on Plaintiff's own estimate of Ukrainian capacity when it did not receive adequate questionnaire responses from importers in that subject country. *See* Views of the Commission at 31 n.142 ("Even assuming excess capacity in the Ukraine, one third of the total capacity in the Ukraine would only be equivalent to another [ ] percent of domestic apparent consumption."); *id.* at 31 n.143 ("The Ukrainian producers did not respond to the [ITC]'s questionnaires, but petitioners estimate that production capacity for UAN in the Ukraine is [ ] short tons.").

Second, the ITC acted appropriately when it did not include Plaintiff's capacity estimate for the Russian producer who did not respond to the final questionnaire. Plaintiff provided no record evidence that this producer had [ ] or was planning to do so in the future. *See* Def.'s App., List 2, Doc. 124 (ITC Staff Report for INV–AA–036 dated Mar. 21, 2003) at VII–3. The ITC properly declined to consider possible, but undocumented, excess capacity as evidence of a likely increase in imports. *See* 19 U.S.C. § 1677(7)(F)(ii) (threat determination may not be made "on the basis of mere conjecture or supposition"); *see also BIC Corp. v. United States*, 21 CIT 448, 464, 964 F. Supp. 391, 405 (1997) (affirmative threat determination requires "positive evidence tending to show an intention to increase levels of importation") (citation omitted).

Accordingly, the ITC's consideration of available capacity data was in accordance with law and the resulting capacity data set provides substantial evidentiary support for the ITC's threat determination.

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[7] Plaintiff also advances a third argument that threat of material injury is likely because the domestic UAN industry was clearly injured by the subject imports during the period of investigation (contrary to the ITC's conclusion). Pl.'s Br. at 45. Since the Court affirms the ITC's negative present material injury determination, as discussed *infra* at III.D, this argument is not addressed.

2. The ITC Considered and Reasonably Weighed Anecdotal Evidence Concerning the Likelihood of Future High Volume Subject Imports.

Plaintiff argues that the ITC erred by not according proper weight to Plaintiff's anecdotal evidence of likely high volume future imports. Pl.'s Br. at 47. Specifically, Plaintiff contends that the ITC: (1) incorrectly interpreted the terms of a key supply contract between a non-domestic UAN producer and a significant importer, substantially underestimating the amount of likely future imports; (2) placed undue emphasis on the role of high transportation costs in deterring UAN imports, citing the high volume of imports experienced during the period of investigation as counterevidence; and (3) dismissed the significance of EU antidumping measures imposed on subject imports. *Id*. at 47–49.

The Court finds that the ITC adequately considered Plaintiff's anecdotal evidence of material threat. First, the ITC's interpretation of the contested contract, although questionable, does take into consideration the fact that the importer was importing more than [ ] during the period of investigation. *See* Views of the Commission at 33 ("[ ]"). Plaintiff offers no evidence to explain why the contract in question would encourage any importer to bring substantially more UAN into the U.S. than the significant amounts imported during the period of investigation. Given the ITC's recognition that the significant importer in question (among others) had imported substantial quantities of UAN during the period of investigation, the contested contract did not demonstrate that an increase in subject imports above this already significant amount was likely or would likely cause material injury.

Second, the ITC reasonably found that high transportation costs would deter future UAN imports. In the *Final Determination*, the ITC noted that UAN is largely composed of water and must be transported long distances to reach key U.S. cities. Views of the Commission at 15. The ITC also noted that some suppliers even use financial swap instruments to minimize the effects of high UAN transportation costs. *Id*. The ITC found that it was cost-effective to transport high quantities of subject imports to the U.S. during the period of investigation only because UAN prices had reached record highs. *Id*. at 18. The Court finds that this conclusion is supported by substantial record evidence. *See, e.g.*, Def.'s App., List 2, Doc. 108 (ITC Staff Report for INV–AA–031 dated Mar. 11, 2003) at II–1, V–5, V–7, V–10. It was therefore reasonable for the ITC to conclude that transportation costs would serve as an obstacle to future imports as well and to base its threat determination in part on this finding.

Third, the ITC reasonably accorded little weight to the significance of EU antidumping measures imposed on subject imports. Plaintiff's contention that EU antidumping measures significantly increased the volume of subject imports into the U.S. during the pe-

riod of investigation and would continue to do so is not supported by record evidence. The *Final Determination* notes that "[n]otwithstanding the EU orders, subject import volumes in the U.S. market dropped during the latter part of 2001 and interim 2002." Views of the Commission at 32. Plaintiff offers no explanation for why subject imports fell during the period of investigation despite the continuation of EU antidumping measures. Rather, as discussed *infra* at III.B, the record evidence supports the ITC's conclusion that the volume of subject imports tracked natural gas prices and corresponding UAN prices, rather than EU antidumping duties.

Accordingly, the ITC's consideration and treatment of Plaintiff's anecdotal evidence concerning threat of material injury is supported by substantial evidence.

IV. *CONCLUSION*

For the foregoing reasons, the Court sustains the *Final Determination*. Judgment will be entered accordingly.

SLIP OP. 05–14

BEFORE: RICHARD K. EATON, JUDGE

JINFU TRADING CO, LTD., PLAINTIFF, v. UNITED STATES, DEFENDANT, AND SIOUX HONEY ASSOCIATION AND AMERICAN HONEY PRODUCERS ASSOCIATION, DEFENDANT-INTERVENORS.

COURT NO. 04–00597

[Plaintiff's partial consent motion for preliminary injunction granted]

January 31, 2005

Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP (*Adam M. Dambrov* and *Bruce M. Mitchell*), for plaintiff Jinfu Trading Co, Ltd.

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

Collier, Shannon, Scott, PLLC (*Jennifer E. McCadney* and *Michael Joseph Coursey*), for defendant-intervenors Sioux Honey Association and American Honey Producers Association.

MEMORANDUM OPINION

EATON, *Judge*: Before the court is the motion of plaintiff, Jinfu Trading Co, Ltd., for a preliminary injunction pursuant to 19 U.S.C. § 1516a(c)(2) (2000), and USCIT R. 7 and 56.2(a) to enjoin the liqui-

dation of any unliquidated entries of the subject merchandise[1] during the pendency of this antidumping action.[2] Defendant-Intervenors, Sioux Honey Association and American Honey Producers Association, do not object to plaintiff's motion. The United States, on behalf of the Department of Commerce, consents to the granting of the motion, but objects to "the duration of [plaintiff's] proposed preliminary injunction."[3]

The objected-to language in plaintiff's proposed order would enjoin liquidation "pending a final and conclusive court decision in this litigation, including all appeals and remand proceedings. . . ."[4] Pl.'s Proposed Order at 1. Thus, while not objecting to the issuance of an injunction, defendant objects to the issuance of an injunction that extends beyond the final judgment in this court. The position of the United States is consistent with that taken in previous cases that have been the subject of several recent, well-reasoned opinions. *See, e.g., Corus Staal BV*, 28 CIT at ___ , slip op. 04–132 at 1–3; *PAM, S.p.A. v. United States*, 28 CIT ___ , ___ , slip op. 04–66 at 11–15 (June 10, 2004) (not published in the Federal Supplement); *SKF USA Inc. v. United States*, 28 CIT ___ , ___ , 316 F. Supp. 2d 1322, 1333–35 (2004); *Yancheng Baolong Biochem. Prods. Co. v. United States*, 27 CIT ___ , ___ , 277 F. Supp. 2d 1349, 1358–60 (2003).

These cases all hold that a preliminary injunction of this Court, issued pursuant to 19 U.S.C. 1516a(c)(2) (2000), may extend through all appeals. *See, e.g., Corus Staal BV*, 28 CIT at ___ , slip op. 04–132 at 3 ("there is nothing in the statute which limits the court's discre-

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[1] The subject merchandise is honey from the People's Republic of China ("P.R.C.") which was: (1) the subject of the administrative determination, Honey from the P.R.C., 69 Fed. Reg. 64,029 (ITA Nov. 3, 2004) (final results); (2) exported to or imported into the United States by Jinfu Trading Co. and Jinfu Trading (USA), Inc., and was entered or withdrawn from a warehouse for consumption during the period December 1, 2002, through May 31, 2003. Pl.'s Proposed Order at 1.

[2] *See* Plaintiff's Complaint contesting the United States Department of Commerce's finding in Honey from the People's Republic of China, 69 Fed. Reg. 64,029 (ITA Nov. 3, 2004) (final notice and final rescission). Compl. at 6–8.

[3] "We respectfully oppose the duration of Jinfu's proposed preliminary injunction because this term is ambiguous and certain courts have, incorrectly, we believe, concluded that similar language has extended the duration of preliminary injunctions beyond the entry of a final judgment by the [Court of International Trade]."

Def.'s Br. at 1.

[4] This language apparently is adapted from the Judgment Order in *Corus Staal BV v. United States*, 28 CIT ____ , slip. op. 04–132 (Oct. 19, 2004) (not published in the Federal Supplement), which reads

> that defendant, the United States, together with the delegates, officers, agents, servants, and employees of the United States Department of Commerce and the United States Bureau of Customs and Border Protection, shall be, and hereby are, enjoined, during the pendency of this litigation (including all relevant appeals and remands), from liquidation or causing or permitting liquidation of any unliquidated entries of hot-rolled carbon flat steel from the Netherlands. . . .

Corus Staal BV, slip op. 04–132 (J. Order at 1).

tion 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.").

Defendant makes no argument that has not been raised in these previous cases, and makes no factual distinction from these previous cases that would require the court to reach a different result.

Therefore, in order to fully protect plaintiff's rights, and in the interest of judicial economy, plaintiff's proposed order granting an injunction of liquidation will be entered.