U.S. Customs and Border Protection

Slip Op. 10–45

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, v. UNITED STATES, Defendant, and PAKFOOD PUBLIC COMPANY LIMITED et al., Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 08–00283

ORDER AND JUDGMENT

The court having held an in-court status conference on April 28, 2010, the purpose of which was to discuss Defendant's Consent Motion to Sever Cases and to Enter Judgment ("Defendant's Consent Motion"), Plaintiff Ad Hoc Shrimp Trade Action Committee appearing by and through its counsel, Nathaniel Rickard, Picard, Kentz & Rowe, LLP, Defendant United States appearing by and through its counsel, Stephen Tosini, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, Defendant-Intervenors Pakfood Public Company Limited et al. appearing by and through their counsel, Jonathan Freed, Trade Pacific, PLLC, Defendant-Intervenors Thai Union Seafood Co., Ltd. and Thai Union Frozen Products Public Co., Ltd. appearing by and through their counsel, Warren Connelly, Akin, Gump, Strauss, Hauer & Feld, LLP, Defendant-Intervenors Andaman Seafood Co., Ltd. et al. appearing by and through their counsel, Jay Campbell, White & Case, LLP; at which time all parties consented to the entry of judgment requested in Defendant's Consent Motion; the court having reviewed all pleadings and papers on file herein; and good cause appearing therefor, it is hereby

ORDERED, ADJUDGED and DECREED that Defendant's Consent Motion is GRANTED as to the requested entry of judgment; and it is further

ORDERED, ADJUDGED and DECREED that, pursuant to *Ad Hoc Shrimp Trade Action Comm. v. United States*, 675 F. Supp. 2d 1287 (CIT 2009), judgment be, and hereby is, entered in favor of Defendant United States and against Plaintiff Ad Hoc Shrimp Trade Action Committee.

Dated: April 29, 2010
New York, New York

/s/ Evan J. Wallach
EVAN J. WALLACH, JUDGE

Slip Op. 10–46

HITACHI HOME ELECTRONICS (AMERICA), INC., Plaintiff, v. UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND ROSA HERNANDEZ, PORT DIRECTOR, UNITED STATES CUSTOMS AND BORDER PROTECTION, (OTAY MESA) SAN DIEGO, CALIFORNIA, Defendants.

Before: Jane A. Restani, Chief Judge
Court No. 09–00191

[Defendants' motion to dismiss without prejudice action challenging rate of duty granted; plaintiff's cross-motions for consolidation and summary judgment denied.]

Dated: April 30, 2010

Sidney N. Weiss for the plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Justin R. Miller*); *Paula S. Smith*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of counsel, for the defendants.

OPINION

Restani, Chief Judge:

Introduction

This customs duty rate matter is before the court on the motion of defendants, the United States, United States Customs and Border Protection, and Rosa Hernandez, the Port Director for (Otay Mesa) San Diego, California (collectively, "Customs"), to dismiss for lack of subject-matter jurisdiction pursuant to USCIT Rule 12(b)(1), and on plaintiff Hitachi Home Electronics (America), Inc.'s ("Hitachi") cross-motions for consolidation of this case with Court Numbers 07–00422, 08–00128, 08–00226, and 09–00056, pursuant to USCIT Rule 42(a), and summary judgment, pursuant to USCIT Rule 56. For the reasons below, the court grants Customs' motion to dismiss without prejudice and denies Hitachi's cross-motions.

Background

Hitachi imported plasma flat panel televisions made and/or assembled in Mexico into the United States at the port of (Otay Mesa) San Diego, California between June 1, 2003, and December 27, 2005.

(First Am. Compl. 1.) The televisions were liquidated as dutiable under subheading 8528.12.72 of the Harmonized Tariff Schedule of the United States ("HTSUS"), at a rate of 5.0% ad valorem. (*Id.* at 7.) Hitachi claims that the televisions qualify for duty-free treatment under the North American Free Trade Agreement ("NAFTA") in accordance with General Note 12 of the HTSUS. (*See id.* at 8.) Hitachi does not present an alternative challenge to the tariff classification of its televisions under subheading 8528.12.72, HTSUS. (*Id.*)

Hitachi filed several timely protests, beginning with Protest Number 2506–05–100031 in May 2005, and filed supporting documentation and claims pursuant to 19 U.S.C. § 1520(d) for duty-free treatment under NAFTA. (*Id.* at 2, Ex. 1.) Hitachi requested an application for further review ("AFR") for Protest Number 2506–05–100031. (*See* Mem. in Supp. of Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction ("Def.'s Br.") 3.) That protest became the lead protest, and Hitachi's other protests were suspended pending issuance of the response to the AFR. (*Id.*) Customs did not take any action on the AFR or allow or deny any of the protests. (*See* First Am. Compl. 3.)

Hitachi and Customs point to slightly different reasons for Customs' inaction. According to Hitachi, Customs had put Hitachi's protest on hold pending a final decision, following a notice and comment period, on whether to issue a revocation of two prior classification rulings. (*See* Zisser Decl. 3–5.) The revocation, which limited the types of plasma flat panel televisions eligible for NAFTA duty-free treatment, was issued in October 2006. *Revocation of Ruling Letters & Treatment Relating to the Tariff Classification of Certain Plasma Modules*, 40 Cust. B. & Dec. 35 (Oct. 12, 2006). In January 2007, Hitachi contacted Customs, discovered that another Customs attorney was assigned to its case, and volunteered to submit additional information. (Zisser Decl. 5–6.) Customs requested additional information in February 2007, and Hitachi submitted it in March 2007. (*Id.* at 6.)

According to Customs, shortly after Hitachi's AFR, Samsung International, Inc. ("Samsung"), filed protests and an AFR for its imports of "identical or substantially identical" merchandise. (Def.'s Br. 3.) Customs "did not intend to rule on either the Samsung or Hitachi AFR until it had considered all the relevant information submitted by both protestants." (*Id.* at 4.) Samsung submitted additional information in August 2007. (*Id.* at 3.) In November 2007, while Customs was assessing the AFRs, Hitachi filed a summons in Court Number 07–00422.[1] (Def.'s Br. 4.) Customs asserts that it had drafted a re-

[1] Court Number 07–00422 relates to four protests. (First Am. Compl. Ex. 1.) Three of the protests were filed in May 2005—Protest Number 2506–05–100031, involving entries from

sponse to Hitachi's AFR by then, but could not issue any decision on any of Hitachi's or Samsung's protests under 19 C.F.R. §§ 174.25(b)(2)(ii) and 177.7(b) because a related case was pending before this Court.[2] (Def.'s Br. 4; Def.'s Reply Br. 22–23.) Hitachi subsequently filed summonses in Court Numbers 08 00128,[3] 08–00226,[4] and 09–00056.[5] The summonses in Court Numbers 07–00422, 08–00128, 08–00226, and 09–00056 invoke this Court's 28 U.S.C. § 1581(a) jurisdiction, alleging that Hitachi's protests were denied by operation of law two years after the protests were filed.[6] (*See* First Am. Compl. Exs. 1–4.)

June to September 2003; Protest Number 2506–05–100036, involving entries from October to December 2003; and Protest Number 2506–05–100037, involving entries from January to March 2004. (*Id.*) The fourth, Protest Number 2506–05–100069, involving entries from April to June 2004, was filed in October 2005. (*Id.*)

[2] Section 174.25(b)(2)(ii) requires that an AFR "contain . . . [a]llegations that the protesting party . . . [h]as not received a final adverse decision from the Customs courts on the same claim with respect to the same category of merchandise and does not have an action involving such a claim pending before the Customs courts." 19 C.F.R. §174.25(b)(2)(ii). Section 177.7(b) states that "[n]o ruling letter will be issued with respect to any issue which is pending before the United States Court of International Trade." *Id.* § 177.7(b). Interpreting these regulations broadly, Customs has developed an administrative practice of declining to rule on any protest involving an issue in a pending case before this Court, even if the protesting party is not one of the parties to the court case. (*See* Def.'s Mem. in Reply to Pl.'s Opp'n to Def.'s Mot. to Dismiss & in Opp'n to Pl.'s Mot. for Summ. J. ("Def.'s Reply Br.") 22–23.) The court need not evaluate the validity of this practice at this time, but it may be appropriate for Customs to reevaluate its practice at some point to prevent unnecessary delay in the disposition of protests by importers who do not have cases pending before the court.

[3] Court Number 08–00128 relates to Protest Number 2506–05–100073, filed in November 2005, involving entries from July to September 2004. (First Am. Compl. Ex. 2.)

[4] Court Number 08–00226 relates to Protest Number 2506–06–100009, filed in January 2006, involving entries from October to December 2004, and Protest Number 2506–06–100029, filed in May 2006, involving entries from January to March 2005. (First Am. Compl. Ex. 3.)

[5] Court Number 09–00056 relates to Protest Number 2506–06–100069, filed in August 2006, involving entries from April to June 2005, and Protest Number 2506–06–100089, filed in November 2006, involving entries from July to September 2005. (First Am. Compl. Ex. 4.)

[6] Samsung also filed summonses seeking review of the denial of NAFTA duty-free treatment for its plasma flat panel televisions. Samsung filed the first in April 2008 initiating Court Number 08–00136, which relates to Protest Number 2506–05–100070, filed in October 2005. In May 2008, Samsung filed a summons in Court Number 08–00165, which relates to six protests filed between November 2005 and May 2007. Samsung voluntarily dismissed the actions without prejudice in November 2009. On November 16, 2009, Samsung requested accelerated disposition of its protests, and on December 17, 2009, the protests were deemed denied pursuant to 19 U.S.C. § 1515(b). In January 2010, Samsung refiled, seeking review of the denial of its seven protests under this Court's 28 U.S.C. § 1581(a) jurisdiction. Samsung has filed a summons but has not yet filed a complaint in the action, which is Court Number 10–00015. *See* USCIT R. 3(a)(1) (providing that a § 1581(a) action may be commenced by the filing of a summons without a concurrent complaint). Pursuant to USCIT Rule 83, Samsung's case was placed on the reserve calendar for eighteen months and may be removed, *inter alia*, when a complaint is filed. *See* USCIT R. 83(a)–(b).

This action, Court Number 09–00191, arises from Hitachi's importation of plasma flat panel televisions made or assembled in Mexico between November 19, 2005, and December 27, 2005. (*See id.* at 1, Ex. 5.) Hitachi filed a timely protest, Protest Number 2506–07–100010, on March 6, 2007. (*Id.* at 4–5.) Customs never denied the protest. (*Id.* at 4.) In May 2009, Hitachi filed a summons and complaint in this action, citing the basis for the court's jurisdiction as 28 U.S.C. § 1581(a), because its protest was denied or deemed denied after two years under 19 U.S.C. § 1515(a), or 28 U.S.C. § 1581(i), if jurisdiction did not exist under 28 U.S.C. § 1581(a). (Compl. 4; *see* First Am. Compl. 7.) The complaint, and the subsequent First Amended Complaint filed in July 2009, also referenced Court Numbers 07–00422, 08–00128, 08–00226, and 09–00056. (Compl. 2; First Am. Compl. 2.)

In late July 2009, Customs filed a motion to dismiss this case for lack of subject-matter jurisdiction. In September 2009, Hitachi filed a cross-motion for consolidation of this case with Court Numbers 07–00422, 08–00128, 08–00226, and 09–00056 and to designate the First Amended Complaint in this case as the consolidated complaint. (Pl.'s Opp'n to Defs.' Mot. to Dismiss & Pl.s' Cross Mots. for Summ. J. & Consol. 1.) Hitachi also filed a cross-motion for summary judgment. (*Id.*) Hitachi's argument in support of its cross-motion is slightly different from the claim asserted in the First Amended Complaint, as Hitachi now argues with respect to all of the actions that jurisdiction is proper under 28 U.S.C. § 1581(i) and that Hitachi is entitled to summary judgment to recover the amounts protested because Hitachi's protests were allowed by operation of law after Customs failed to allow or deny the protests within the two-year period required by 19 U.S.C. § 1515(a). (Pl.'s Br. in Opp'n to Defs.' Mot. to Dismiss & in Supp. of Pl.'s Cross-Mots. for Summ. J. & for Consol. ("Pl.'s Br.") 12–43.) Hitachi alternatively argues that jurisdiction is proper under 28 U.S.C. § 1581(a) because Hitachi's protests were denied by operation of law after the two-year period. (*Id.* at 43–46.)

Discussion

Hitachi has the burden of establishing jurisdiction under 28 U.S.C. § 1581(a) or (i). *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). Under § 1581(a), the court has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515]." 28 U.S.C. § 1581(a). Section 1581(i) provides:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section . . . , the Court of International Trade shall have exclusive jurisdiction of

> any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
> (1) revenue from imports . . . or
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

Id. § 1581(i). Whether the court has jurisdiction over this case under § 1581(a), § 1581(i), or neither depends on the effect of Customs' failure to take action on the protest within two years. The statute imposing the two-year requirement, 19 U.S.C. § 1515(a), provides:

> Unless a request for an accelerated disposition of a protest is filed in accordance with subsection (b) of this section the appropriate customs officer, within two years from the date a protest was filed in accordance with [19 U.S.C. § 1514], shall review the protest and shall allow or deny such protest in whole or in part. Thereafter, any duties, charge, or exaction found to have been assessed or collected in excess shall be remitted or refunded . . . . Upon the request of the protesting party, . . . a protest may be subject to further review by another appropriate customs officer, . . . subject to the two-year limitation prescribed in the first sentence of this subsection. . . . Notice of the denial of any protest shall be mailed in the form and manner prescribed by the Secretary. . . .

19 U.S.C. § 1515(a). The implementing regulations use similar language. *See* 19 C.F.R. § 174.21(a) ("[T]he port director shall review and act on a protest . . . within 2 years from the date the protest was filed."); *id.* § 174.29 ("The port director shall allow or deny in whole or in part a protest . . . within 2 years from the date the protest was filed.").

I. Jurisdiction under § 1581(i) and Deemed Allowance Claim

Hitachi contends that the court has jurisdiction under 28 U.S.C. § 1581(i) because 19 U.S.C. § 1515(a) requires Customs to act on a protest within two years, and Customs' failure to comply with that requirement results in an allowance of Hitachi's protest by operation of law. (Pl.'s Br. 1–2.) Hitachi seeks a windfall, asking the court to refund its duties on summary judgment because of the deemed allowance. (*See id.* at 3.) The court will not do so, as the law does not support Hitachi's "deemed allowance" contention. Even a statutory deadline using the word "shall" is "directory and not mandatory when

no restraint is affirmatively imposed on the doing of the act after the time specified and no adverse consequences are imposed for the delay." *Canadian Fur Trappers Corp. v. United States*, 691 F. Supp. 364, 367 (CIT 1988) (internal quotation marks and citation omitted).

Here, neither the statute nor the regulations specifies any consequences for the failure to allow or deny a protest within the two-year period. As has long been held, the time period is not mandatory, and § 1515(a) does not deprive Customs of power to act on the protest after the two-year period. *See Canadian Fur Trappers*, 691 F. Supp. at 367. Rather, § 1515(a) "is regulatory in character and prescribes the period of time . . . in which the obligations and responsibilities of [Customs] officials are to be performed." *Knickerbocker Liquors Corp. v. United States*, 432 F. Supp. 1347, 1349 (Cust. Ct. 1977). The nature of the statutory deadline is quite different from the mandatory statutory requirements for the notice of denial under § 1515(a). *See Sea-Land Serv., Inc. v. United States*, 735 F. Supp. 1059, 1063 & n.7 (CIT 1990).

Further, the legislative history of § 1515 does not indicate that Congress intended Custom's failure to decide a protest within two years to be a deemed allowance. Prior to 1970, § 1515 provided for ninety days for review of protests. *See* Tariff Act of 1930, Pub. L. No. 71–361, § 515, 46 Stat. 590, 734. If Customs did not take any action on the protest within ninety days, Customs "los[t] all jurisdiction thereof," and the matter was automatically referred to the Customs Court (the predecessor to this Court). *H.K. Wheeler, Inc. v. United States*, 9 Cust. Ct. 30, 33–34 (1942). The Customs Courts Act of 1970, Pub. L. No. 91–271, § 208, 84 Stat. 274, 285–86, amended this provision to eliminate such automatic referrals and increase the time for administrative review, *see* H.R. Rep. No. 91–1067, at 10, 28–29 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 3188, 3196. As introduced, the bill would have amended § 1515(a) to state that "[t]he appropriate customs officer shall review a protest filed in accordance with section 514 of this Act and may allow or deny such protest in whole or in part" and provided for constructive denial of protests. S. 2624, 91st Cong. § 208, 115 Cong. Rec. 19,453 (1969). The Senate Committee on the Judiciary deleted the constructive denial provision and replaced the wording of the first sentence of § 1515(a) with the current version. *See* S. Rep. No. 91–576, at 2–3 (1969); 115 Cong. Rec. 37,810, 37,815 (1969) (as introduced, July 14, 1969). Although the Committee characterized the revised § 1515(a) as imposing "an obligation on the Bureau of Customs to act on the merits of all protests within 2 years," "[a]n overall limit of two years," and "a maximum period of 2 years," it stated that "[i]mporters concerned about unreasonable delay at the

administrative level are fully protected by the new provision in section [1515(b)] for obtaining accelerated disposition of a protest." S. Rep. No. 91–576, at 11, 28. The Committee's statement that § 1515, as amended, "requires the Department of the Treasury to allow a protest or expressly deny it in whole or part within two years from the date that the protest was filed," *id.* at 4, does not compel the conclusion that Hitachi's protest was allowed because it was not *expressly* denied within two years. As discussed *supra*, § 1515(a) is directory and not mandatory because, *inter alia*, it does not provide a consequence for Customs' failure to either allow or deny a protest. *See Canadian Fur Trappers*, 691 F. Supp. at 367; *Knickerbocker Liquors*, 432 F. Supp. at 1349.

Hitachi also argues that "allow" means "to permit something to happen by doing nothing." (Pl.'s Br. 28.) There is no support for such a definition in customs law. While statutes, regulations, and cases recognize that Customs' inaction may be a deemed denial in some unusual circumstances, *see, e.g.*, 19 U.S.C. § 1515(b); *China Diesel Imps., Inc. v. United States*, 17 CIT 498, 499 (1993); 19 C.F.R. § 174.21(b); *id.* § 174.22(d), no authority has ever recognized that Customs' inaction may result in a deemed allowance. Additionally, recognition of inaction as a deemed allowance would be wholly inconsistent with § 1581(i) jurisdiction.

Although § 1581(i) is "a broad residual jurisdictional provision, . . . its scope is strictly limited, and . . . the protest procedure cannot be easily circumvented." *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1293 (Fed. Cir. 2008) (internal quotation marks and citation omitted). Section 1581(i) "is not to be used generally to bypass administrative review by valid protest and denial." *Cherry Lane Fashion Group, Inc. v. United States*, 712 F. Supp. 190, 193 (CIT 1989). It "may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987).

Jurisdiction under § 1581(a) would have been available if Hitachi had waited for a denial of its protest. It also could have been available if Hitachi had requested an accelerated disposition of its protest pursuant to 19 U.S.C. § 1515(b). Section 1515(b) allows an importer to request accelerated disposition at any time after the filing of the protest and provides that "[f]or purposes of [28 U.S.C. § 1581], a protest which has not been allowed or denied in whole or in part within thirty days following the date of mailing . . . of a request for

accelerated disposition shall be deemed denied on the thirtieth day following mailing of such request." 19 U.S.C. § 1515(b).[7]

Hitachi cannot show that § 1581(a) relief would be manifestly inadequate. As numerous cases have held, delays in the protest and denial procedure do not render the remedy provided under § 1581(a) manifestly inadequate where the importer has not used the procedure for accelerated disposition and deemed denial. *See, e.g.*, *Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1551 (Fed. Cir. 1983) (holding that eighteen-month delay did not make judicial review under § 1581(a) deficient where "importers not only failed to utilize the procedure for obtaining accelerated consideration of its protest but also resorted to additional review procedure"); *Inner Secrets/Secretly Yours, Inc. v. United States*, 869 F. Supp. 959, 966 (CIT 1994) (stating that "delays inherent in the protest procedures do not render these procedures manifestly inadequate" because an importer can seek accelerated review); *China Diesel*, 17 CIT at 498–99 (holding that accelerated review and deemed denial are available for exclusion protests and that "[h]aving waited five months from the filing of its protest . . . to bring suit in this court, plaintiff now cannot make out a case that the accelerated protest procedures were manifestly inadequate"). Thus, the court lacks jurisdiction under 28 U.S.C. § 1581(i).

II. Jurisdiction under § 1581(a)

The court does not have jurisdiction under 28 U.S.C. § 1581(a) to rule on the duty rate dispute, either, as Customs has not yet denied the protest, and the structure and legislative history of 19 U.S.C. § 1515 confirm that Customs' inaction was not a deemed denial. Whereas § 1515(a) does not provide for deemed denial, § 1515(b) explicitly provides for deemed denial after an importer has request accelerated disposition of its protest.[8] *See* 19 U.S.C. § 1515. If Congress had intended that a protest be deemed denied after two years of

[7] The corresponding regulation states that "[i]f the port director fails to allow or deny a protest which is the subject of a request for accelerated disposition within 30 days from the date of mailing of such request, the protest shall be deemed to have been denied at the close of the 30th day . . . ." 19 C.F.R. § 174.22(d).

[8] The corresponding regulation also explicitly provides for deemed denial of protests of certain merchandise but does not provide for any similar consequence for failure to allow or deny a protest within two years. *Compare* 19 C.F.R. § 174.21(a) ("Except [for protests relating to exclusion of merchandise] as provided in paragraph (b) of this section, the port director shall review and act on a protest . . . within 2 years from the date the protest was filed."), *with id.* § 174.21(b) ("Any protest [involving exclusion of merchandise] which is not allowed or denied in whole or in part before the 30th day after the day on which the protest was filed shall be treated as having been denied on such 30th day for purposes of 28 U.S.C. 1581.").

inaction by Customs, it would have expressly so provided. *See Knickerbocker Liquors*, 432 F. Supp. at 1349. Instead, "[t]he intent of Congress is clearly evidenced by the contrasting statutory provisions relating to a protest subject to accelerated disposition." *Id.*

As discussed *supra*, the Senate Committee on the Judiciary "eliminated the constructive denial procedure" originally included in the bill that became the Customs Courts Act of 1970.[9] S. Rep. No. 91–576, at 30. The Committee rejected the procedure because it did not provide for notice after the expiration of the two-year period, which would impose on the importer the burden of following the timing of the protest and determining when to file a case in the Customs Court. *Id.* at 29. Nevertheless, a conclusion that § 1515 provides for a deemed denial after two years is untenable where Congress deleted explicit language to that effect.

In *Knickerbocker Liquors*, the Customs Court held that the end of the two-year period described in § 1515(a) does not automatically begin the 180-day limitation period for filing a court action under 28 U.S.C. § 2631(a)(1) where Customs has not sent a notice of denial of the protest. 432 F. Supp. at 1349–51. The court "declined to treat [§ 1515(a)] as providing a constructive denial of the protest." *United States v. Ataka Am., Inc.*, 826 F. Supp. 495, 503 (CIT 1993). "[N]ormally a notice of denial is required to trigger jurisdiction, even after the expiration of the two-year period."[10] *China Diesel*, 17 CIT at 499.

Hitachi relies heavily on *China Diesel*. In that case, Customs had failed to act on the plaintiff's protest of the formal exclusion of its merchandise from entry into the United States within 30 days as required by 19 C.F.R. § 174.21(b) (1992), which did not have a deemed denial provision at the time. *Id.* at 498. The court concluded that "[i]n the absence of any stated reason for the *extraordinary* delay occasioned by Customs in this case, the court may assume that Customs has no reason for not acting on the protest within the time required by its own regulations" and accordingly "presume[d] that the protest has been denied for all intents and purposes and that jurisdiction

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[9] The bill provided for an additional subsection (c) to § 1515, stating:

> CONSTRUCTIVE DENIAL OF PROTEST.—Any protest which has not been allowed or denied in whole or in part in accordance with paragraph (a) of this section and which is not deemed denied in accordance with paragraph (b) of this section, shall be deemed to be denied after two years have elapsed from the date the protest was filed in accordance with [19 U.S.C. § 1514].

S. 2624, 91st Cong. § 208, 115 Cong. Rec. 19,453 (1969)

[10] Only one case, in dicta, has noted that "Customs' failure to reply to a protest within the two-year time limit might constitute a denial of that protest." *Tikal Distrib. Corp. v. United States*, 970 F. Supp. 1056, 1064 (CIT 1997).

attaches under 28 U.S.C. § 1581(a)." *Id.* at 499.[11]

China Diesel is not relevant here. Apart from the statutory changes that were enacted post—*China Diesel*, Hitachi's goods have not been completely and indefinitely excluded from entry into the United States. Instead, Hitachi's only claim is that the duties it paid upon ntry of its goods should be refunded. Customs has offered a reason for the delay, the need to examine all of the issues surrounding Hitachi's and Samsung's similar protests and now this lawsuit. In such a circumstance, there is no reason to presume that Hitachi's protest is denied. Rather, because Hitachi has not complied with the normal jurisdictional procedures, such as requesting accelerated disposition of the protest, the court lacks jurisdiction under 28 U.S.C. § 1581(a). *See Cherry Lane*, 712 F. Supp. at 193 (holding that the passage of 110 days without action on a protest of exclusion violated the thirty-day limit in the regulation but was not a deemed denial under 28 U.S.C. § 1581(a) because the importer did not comply with the applicable procedures).

Conclusion

Because the court lacks subject-matter jurisdiction over this action, it is dismissed without prejudice. Hitachi may request accelerated disposition of its protest under 19 U.S.C. § 1515(b).[12] If Hitachi's protest is then denied or deemed denied, Hitachi may refile pursuant to 28 U.S.C. § 1581(a).[13] Hitachi's cross-motion for summary judgment is denied, and its cross-motion for consolidation is denied as moot.

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[11] The delay was more than a year beyond notice of the failure to meet the regulatory deadline.

[12] Hitachi argues in its reply brief that an accelerated disposition of its protest under § 1515(b) is not possible because the two-year period has lapsed, and alternatively, that a request for accelerated disposition would be futile. (Pl.'s Reply Br. 14–15). These arguments lack merit. Section 1515(b) permits a request for accelerated disposition of a protest any time after filing, and nothing prohibits an importer from filing a request after two years. *See* 19 U.S.C. § 1515(b). Although Customs might refuse to act on Hitachi's request while the Samsung case is pending before this Court, and it appears that Customs would deny Hitachi's protests on the merits, the request would not be futile because Customs' failure to act on the protest would work a deemed denial that the court would have jurisdiction to review under 28 U.S.C. § 1581(a). *See id.*

[13] In its reply brief, Hitachi requests a remand of Court Numbers 07–00422, 08–00128, 08–00226, 09–00056, and 09–00191 if the court determines that it lacks jurisdiction. (Pl.'s Reply Br. 16–17.) A remand is not appropriate because the expiration of the two-year period did not deprive Customs of power to act on the protests. *See Alberta Gas Chems., Inc. v. United States*, 515 F. Supp. 780, 785–86 (CIT 1981).

Dated this 30th day of April, 2010.
New York, New York.

/s/ Jane A. Restani
JANE A. RESTANI CHIEF JUDGE

ERRATA

Please make the following change to *Hitachi Home Electronics (America), Inc. v. United States*, No. 09–00191, Slip Op. 10–46:

Page 1, counsel list: strike the following:

- "*Sidney N. Weiss* for the plaintiff." and replace with:
- "*Sidney N. Weiss*; *The Zisser Law Group* (*Steven B. Zisser*), of counsel, for the plaintiff."

May 4, 2010.

Slip Op. 10–47

MID CONTINENT NAIL CORPORATION, DAVIS WIRE CORPORATION, MAZE NAILS (DIVISION OF W.H. MAZE COMPANY) AND TREASURE COAST FASTENERS, INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 08–00224
Public Version

[Plaintiffs' motion for judgment on the agency record in targeted dumping case is denied and judgment is entered for the defendant.]

Dated: May 4, 2010

Wiley Rein, LLP (*Adam Henry Gordon* and *Maureen Elizabeth Thorson*) for the plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David F. D'Alessandris*); Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*William G. Isasi*, *Hardeep K. Josan* and *Brian Soiset*), of counsel, for the defendant.

OPINION

Restani, Chief Judge:

Introduction

This court action challenges the Department of Commerce's ("Commerce") final determination rendered in a targeted antidumping duty investigation of certain steel nails from the United Arab Emirates ("UAE"). *See Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value*, 73 Fed. Reg. 33,985 (Dep't Commerce June 16, 2008) ("*Final Determination*"). The plaintiffs, Mid Continent Nail Corporation, Davis Wire Corporation, Maze Nails and Treasure Coast Fasteners, Inc., collectively the domestic industry, submitted a motion for judgment on the agency record. For the reasons stated below, the court denies the plaintiffs' motion and grants judgment on the agency record in favor of the United States.

Background

I. Targeted Dumping

Targeted dumping analysis is "an alternative method for determining the existence of margins of dumping in an investigation . . . ." *Targeted Dumping in Antidumping Investigations; Request for Comment*, 72 Fed. Reg. 60,651, 60,651 (Dep't Commerce Oct. 25, 2007)

("*Request for Comment*"). The purpose of this methodology is to enable Commerce to identify dumping when a seller is providing lower prices to only certain United States purchasers "by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise." 19 U.S.C. § 1677f-1(d)(1)(B); *see Request for Comment*. By contrast, during an ordinary antidumping investigation, Commerce determines "whether the subject merchandise is being sold in the United States at less than fair value . . . by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise" or by "comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise." 19 U.S.C. § 1677f-1(d)(1)(A).

II. Commerce's Investigation of Certain Steel Nails from the UAE

In May 2007, the plaintiffs filed petitions with Commerce concerning certain steel nails from the UAE. *Certain Steel Nails from the People's Republic of China and the United Arab Emirates: Initiation of Antidumping Duty Investigations*, 72 Fed. Reg. 38,816, 38,817 (Dep't Commerce July 16, 2007). In July 2007, Commerce initiated a targeted dumping investigation of certain steel nails from the UAE for the period of April 1, 2006, through March 31, 2007. *Id.* In August 2007, Commerce selected Dubai Wire FZE ("DW"), "the largest producer/exporter of nails from the UAE," as the mandatory respondent in the investigation. *Certain Steel Nails From the United Arab Emirates: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 73 Fed. Reg. 3945, 3945 (Dep't Commerce Jan. 23, 2008) ("*Preliminary Determination*"). In October 2007, the plaintiffs submitted an allegation of targeted dumping against DW. *Id.*

In its *Preliminary Determination*, published on January 23, 2008, Commerce used the methodology it had accepted in a previous investigation to conclude that targeted dumping had occurred at an anti-

dumping duty (AD) margin of 4.47%.[1] *Id.* at 3950. At that time, however, Commerce stated that it intended to develop a new methodology to assess DW's alleged targeted dumping and requested comments on the matter. *Id.* at 3947.

On April 21, 2008, Commerce informed the plaintiffs of its new methodology ("the nails test") and set a sixteen day deadline for comments.[2] (Pls.' Confidential App. in Supp. of Pls.' Rule 56.2 Mot. for J. Upon the Agency R. ("Pls.' App.") Tab 10 at 7–9.) The nails test consists of two stages. *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 Fed. Reg. 26,371, 26,372 (Dep't Commerce May 9, 2008) ("*Proposed Methodology*"). The first stage, the "standard deviation test," requires Commerce to calculate a standard deviation for all of the sale prices of an item from a particular exporter. *Id.* Commerce then must add together the volume for all of the items sold at a price below one standard deviation from the weighted-average price. *Issues and Decision Memorandum* at 19. If this combined volume exceeds thirty-three percent of the total volume of sales of that item from the particular exporter, the first stage of the test is satisfied. *Id.* The second stage of the test, the gap test, is satisfied if the volume of sales that qualify under a price gap comparison[3] exceeds five percent "of the total [volume] of sales of subject merchandise to the allegedly targeted customer." *Proposed Methodology*, 73 Fed. Reg. at 26,372, *amended by Issues and Decision Memorandum* at 20 n.6.

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[1] The P/2 test provides "that where the weighted-average net price to an alleged targeted purchaser or region is more than 2 percent lower than the weight-average net price to non-targeted purchasers or regions in [merchandise]/month combinations representing a preponderance of the targeted quantity, a 'pattern' of 'significant' price differences" exists. *Issues and Decision Memorandum for the Final Determination of the Less-Than-Fair-Value Investigation of Coated Free Sheet Paper from the Republic of Korea*, A-580–856, POR 10/01/05–09/30/06, at 3–4 (Oct. 17, 2007), *available at* http://ia.ita.doc.gov/frn/summary/KOREA-SOUTH/E7–21035–1.pdf (last visited Apr. 29, 2010).

[2] The plaintiffs point out that they were afforded only fourteen days to comment because Commerce made clarifications on April 24, 2008. *See Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Certain Steel Nails from the United Arab Emirates (UAE)*, A-520–802, at 4 (June 6, 2008) ("*Issues and Decision Memorandum*"), *available at* http://ia.ita.doc.gov/frn/summary/UAE/E8–13490–1.pdf (last visited Apr. 29, 2010).

[3] To perform a price gap comparison, Commerce must:

> [D]etermine the total [volume] for which the difference between (i) the sales-weighted average price to the allegedly targeted customer and (ii) the next higher sales-weighted average price to a non-targeted customer exceeds the average price gap (weighted by sales value) for the non-targeted group. Each of the price gaps in the non-targeted group would be weighted by the combined sales associated with the pair of prices to non-targeted customers that make up the gap.

Proposed Methodology, 73 Fed. Reg. at 26,372, *amended by Issues and Decision Memorandum* at 20 n.6.

The plaintiffs filed their case brief in response to the nails test on May 7, 2008. (*See* Pls.' App. Tab 13.) On May 9, 2008, Commerce published the nails test and provided the public thirty days to comment. *Proposed Methodology,* 73 Fed. Reg. at 26,372. Commerce subsequently extended this deadline until June 23, 2008. *Antidumping Methodologies for Proceedings that Involve Significant Cost Changes Throughout the Period of Investigation (POI) / Period of Review (POR) that May Require Using Shorter Cost Averaging Periods; Request for Comment and Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 Fed. Reg. 32,557, 32,557 (Dep't Commerce June 9, 2008). On June 16, 2008, however, Commerce published its *Final Determination*, which adopted the nails test, and used it to calculate a dumping margin of zero. *Final Determination*, 73 Fed. Reg. at 33,988. In addition, Commerce determined that it had properly calculated DW's financial expense rate without including the financial expenses of Global Fasteners Ltd. ("GF"), an entity that Commerce had previously collapsed with DW. *Issues and Decision Memorandum* at 28–30. Finally, Commerce also allowed a revised scrap offset that included the sale price of extraneous materials that were not the by-product of nail production. *Id.* at 30–31.

In August 2008, the plaintiffs filed a complaint contesting the *Final Determination*. In February 2009, the plaintiffs filed a motion for judgment on the agency record pursuant to USCIT Rule 56.2.

Standard of Review

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold Commerce's final determinations in AD investigations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Discussion

I. Reasonable Time under 19 U.S.C. § 1677m(g)

The plaintiffs allege that Commerce's actions deprived them of their due process rights under the Fifth Amendment. (Pls.' Mem. of Law in Supp. of Pls.' Rule 56.2 Mot. for J. Upon the Agency R. ("Pls.' Mem.") 16.) The plaintiffs claim that by providing the domestic industry only sixteen days to comment on the nails test, Commerce did not afford enough time to submit meaningful comments to demonstrate all of the nails test's errors. (*See Id.* at 17–24.) In support of their position that the comment period was unreasonable, the plaintiffs cite the facts that Commerce needed "several months" to develop

the nails test, that Commerce typically affords parties fifty days to comment on preliminary determinations,[4] and that Commerce provided the public over thirty days to comment. (*Id.*) This claim lacks merit.

Congress has provided a fair process for commenting within the statutory language of 19 U.S.C. § 1677m. *See* 19 U.S.C. § 1677m(g). Subsection (g) provides that:

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

19 U.S.C. § 1677m(g). Whether or not a constitutional due process right exists in these circumstances is an issue that need not be decided here because such a right would not require any more time to be afforded to the plaintiffs than is already required by statute. If Commerce provides a time period for comments that is unreasonable, it would be in violation of the statute. *Compare* 19 U.S.C. § 1677m(g), *with Borden Inc. v. United States*, 23 CIT 372, 375 n.3 (1999), *rev'd on other grounds*, 7 F. App'x 938, 938–39 (2001) (holding that "[t]he court applies a rule of reason in evaluating administrative due process claims"). Accordingly, the court considers the plaintiffs due process argument as a claim that Commerce violated the statutory due process requirement of 19 U.S.C. § 1677m(g).

Generally, "[w]here a right to be heard exists, due process requires that right be accommodated at a meaningful time and in a meaningful manner." *Barnhart v. United States Treasury Dep't*, 588 F. Supp. 1432, 1438 (CIT 1984). Recognizing that "[w]ith more time most parties could improve the quality of their comments," courts ask whether there is "evidence that given more time [a plaintiff] would

[4] Under 19 C.F.R. § 351.309(c)(1)(i), any interested party for a final determination in an antidumping investigation, may submit a case brief "50 days after the date of publication of the preliminary determination or results of review . . . unless the Secretary alters the time limit." 19 C.F.R. § 351.309(c)(1)(i).

have, in fact, provided more meaningful comments." *Sichuan Changhong Electric Co. v. United States*, 466 F. Supp. 2d 1323, 1328 (CIT 2006). If, however, a plaintiff makes thoughtful comments that Commerce addresses in its determination, then, "as a practical matter, [the plaintiff] was not substantially deprived of an opportunity to be heard before the agency." *Borden*, 23 CIT at 375 n.3. This understanding has previously led the court to conclude that a comment period as brief as four days can be reasonable. *See Sichuan*, 466 F. Supp. 2d at 1329.

Despite having a full opportunity to demonstrate that the comment period was unreasonable by presenting the court with additional critiques of the nails test that they were not previously afforded the opportunity to develop, the plaintiffs have failed to provide any new and convincing arguments. Although the plaintiffs filed a thorough case brief, the court notes that most of their arguments are similar, if not identical, to the ones raised at the administrative level. (*Compare* Pls.' App. Tab 13, *with* Pls.' Mem.) The plaintiffs claim that they would have made many additional arguments if they were afforded more time to comment, yet now provide only one such example. (Pls.' Mem. 22.) They argue that the mean price was incorrectly used to calculate the standard deviation. (*Id.*) The plaintiffs contend that if the statistically correct median price were used, Commerce might have found dumping in this case. (*Id.*) Contrary to the plaintiffs claim, however, the use of a mean to calculate a standard deviation is, by definition, a perfectly acceptable statistical method. Christine Ammer & Dean S. Ammer, *Dictionary of Business and Economics* 397 (1977). Although median can be substituted for mean in certain situations, such a substitution is not required. *See generally* Yulia Gel, Weiwen Miao & Joseph L. Gastwirth, *The Importance of Checking the Assumptions Underlying Statistical Analysis: Graphical Methods for Assessing Normality*, 46 Jurimetrics J. 3, 26 (2005). In addition, such claims are merely speculative—the plaintiffs do not offer any numerical evidence to support their contention that using a median would yield a different result.[5]

There is no evidence before the court, therefore, to suggest that the plaintiffs would have provided more meaningful comments if they were afforded additional time to comment. Accordingly, the court holds that Commerce afforded the plaintiffs a reasonable time to comment under 19 U.S.C. § 1677m(g).

[5] Furthermore, the plaintiffs have failed to establish that it would have been futile to seek additional time for comment. The plaintiffs stated at oral argument that although no formal request was made, informal conversations with Commerce indicated that a request would be denied. Given the lack of a record on this, and in the context of this case there is no reason to presume what Commerce would have done in the face of a formal request.

II. The Nails Test

The plaintiffs challenge the *Final Determination* on the grounds that the nails test violates 19 U.S.C. § 1677f-1(d)(B) and 19 C.F.R. § 351.414(f)(1)(i) and therefore, Commerce's conclusion is not supported by substantial evidence. Specifically, the plaintiffs argue that in investigating their claim of targeted dumping, Commerce improperly considered only identical products, used a statistically invalid methodology, and unreasonably defined terms. (Pls.' Mem. 24–25.) This claim lacks merit.

Under 19 U.S.C. § 1677f-1(d)(1)(B), which essentially defines the targeted dumping remedy, Commerce "may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise," but only if "there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time." 19 U.S.C. § 1677f-1(d)(B). In addition, 19 C.F.R. § 351.414(f)(1)(i) provided that Commerce must use "standard and appropriate statistical techniques" when determining whether sales qualify for this section. 19 C.F.R. § 351.414(f)(1)(i).[6]

Generally, courts lack an "independent authority to tell the [agency] how to do its job" when a statute does not specify "any Congressionally mandated procedure or methodology for assessment of the statutory tests." *U.S. Steel Group v. United States*, 96 F.3d 1352, 1362 (Fed. Cir. 1996). This silence has been interpreted as "an invitation" for an agency administering unfair trade law to "perform its duties in the way it believes most suitable" and courts will uphold these decisions "[s]o long as the [agency]'s analysis does not violate any statute and is not otherwise arbitrary and capricious." *Id.*

A. Commerce's decision to consider only identical products is supported by substantial evidence.

The plaintiffs first claim that Commerce's decision to test only identical products was in violation of the clear language of 19 U.S.C. § 1677f-1(d)(B), which instructs Commerce to consider "comparable merchandise." (Reply Br. of Mid Continent Nail Corp., Davis Wire Corp., Maze Nails and Treasure Coast Fasteners, Inc. 7.) Identical

[6] Commerce withdrew 19 C.F.R. § 351.414(f) on December 10, 2008. *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations* ("*Revocation*"), 73 Fed. Reg 74,930, 74,932 (Dep't Commerce, Dec. 10, 2008). At the time of the *Final Determination*, however, this regulation was effective.

merchandise is comparable merchandise. *See* 19 U.S.C. § 1677(16). In some cases it may be a smaller subset of all comparable merchandise. *Id.*[7] In a case such as this, however, where the great bulk of the allegedly targeted sales had identical matches, the statutory language does not require Commerce to do more.[8] (Def.'s Supp. Br. and Confidential App. 2.) Based on this record, the court concludes that Commerce's decision to consider only identical merchandise was supported by substantial evidence and was in accordance with law.

B. Commerce's use of standard deviation is statistically valid.

The plaintiffs claim that Commerce's use of standard deviation in the nails test is unreasonable because "[a] standard deviation is simply a descriptive measure of a population; in other words, standard deviation measures *describe* the dispersion of data, and then *calculate* how spread out prices are from the average price." (Pls.' Mem. 26.) The plaintiffs go on to claim that "[a]t the most basic level, then, the Department's starting point violated the regulatory requirement that it use a 'standard and appropriate' statistical technique to determine whether targeting was occurring" because, contrary to Commerce's assertion, "the standard deviation cannot validly be used as a method to calculate a 'relative measure.'" (*Id.*)

Generally, a standard deviation is defined as "a measure of the tendency of individual values to differ from the mean." Christine Ammer & Dean S. Ammer, *Dictionary of Business and Economics* 397 (1977). "The standard deviation is the most common measure of dispersion," which is "the total spread of the values in a frequency distribution." *Id.* at 122. In statistics, a frequency distribution is "the organization of data to show how often certain values or ranges of values occur." *Id.* at 170.

As previously described, the nails test uses standard deviation to measure the dispersion of values in an exporter's price data, to aid in identifying which of the exporter's sales were relatively low compared

[7] If Commerce must use other comparable merchandise to compare to U.S. sales, it must make adjustments to get close to a price which may be compared. 19 U.S.C. § 1677b(a)(6)(C)(ii); 19 C.F.R. § 351.411. These adjustments provide an opportunity for the introduction of inaccuracies into the process.

[8] In fact, [[ ]] percent of the allegedly targeted sales had identical matches. (Def.'s Supp. Br. and Confidential App. 2.)

to others.[9] *See Proposed Methodology*, 73 Fed. Reg. at 26,372. After the dispersion is identified, the nails test requires Commerce to use the thirty-three percent test to determine whether a "pattern" existed under the statute. *Id.* Thus, contrary to the plaintiffs' assertions, Commerce's use of standard deviation was, by definition, statistically valid because it was used to measure the dispersion of the sales prices.[10] This aspect of the nails test, therefore, is not in violation of 19 U.S.C. § 1677f-1(d)(B)(i).

C. The nails test's definitions of "pattern" and "differ significantly" do not violate 19 U.S.C. § 1677f-1(d)(B)(i).

The plaintiffs further challenge Commerce's definitions of "pattern" and "differ significantly" as arbitrary, unexplained, and unreasonable. (Pls.' Mem. 26.) Particularly, the plaintiffs claim that Commerce's use of thirty-three percent in its "pattern" definition and five percent in its "differ significantly" definition are seemingly random values with no meaning. (*Id.* at 36–38.) The plaintiffs contend that, in this case, these unreasonable definitions cause the nails test to overlook obvious targeting.[11] (*Id.* at 24–25.) This claim lacks merit.

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[9] The plaintiffs also contend that Commerce's reliance on the word "low" is *ultra vires* because it is not used within the statute. (Pls.' Mem. 27.) Although the plaintiffs are correct that the word "low" does not appear within the language of 19 U.S.C. § 1677f-1(d)(B), Commerce explains that this interpretation "strikes a balance between two extremes, the first being where *any* price below the average price is sufficient to distinguish the alleged target from others . . . and the second being where only prices at the very bottom of the price distribution are sufficient to distinguish the alleged target from others." *Issues and Decision Memorandum* at 16.

[10] Based on the evidence, the court is not convinced that the P/2 test is an inherently better test. The P/2 test, which draws a hard line at two-percent, is arguably only well suited for a particular type of market. Hypothetically, if the prices of the market greatly varied, most prices are likely to satisfy the two-percent requirement and this test may capture too many sales. Alternatively, if the prices were nearly uniform, few sales would satisfy the two-percent threshold and the test may not capture enough. In contrast, a standard deviation can be calculated for all types of dispersions and therefore, provides Commerce with a consistent method to analyze all markets.

[11] The plaintiffs spend several pages in their brief detailing hypothetical data sets in an attempt to illustrate this point and thus, expose Commerce's test as unreasonable. (*See* Pls. Mem. 30–34.) The plaintiffs argue that these examples clearly illustrate "targeted dumping" under 19 U.S.C. § 1677f-1(d)(B)(i), but would not be classified as such under Commerce's test. (*Id.*) The plaintiffs further contend that much like these examples, the facts of this case clearly support a finding of targeted dumping and that any finding otherwise cannot be supported by substantial evidence. (*Id.* at 38–39.) The plaintiffs' examples, however, are unconvincing because they oversimplify a market. Each example contains only a few hypothetical prices spread out at a great variance, creating a market where all of the extremely low prices fall within one standard deviation of the average price. (*See id.* at 30–34.) Such a result occurs because the hypothetical markets also contain extremely high prices that offset the low ones. (*See Id.*) The price variation of these markets are unrealistic, and therefore, raise few practical concerns regarding this methodology.

As previously discussed, Commerce included a thirty-three percent threshold requirement in its definition of "pattern." *Issues and Decision Memorandum* at 19. Commerce explained that it considered thirty-three percent reasonable for establishing a pattern of activity. *Id.* The court has no reason to disagree.

Commerce defined "differ significantly" as any situation when the five percent price gap test is satisfied. *Id.* at 20–21. Commerce stated that it considered a five percent difference as significant, when used in combination with the thirty-three percent threshold, under the statutory language. *Id.* at 21. Although these tests may create a standard that is more difficult to satisfy than the domestic industry would have preferred, the nails test "does not violate any statute and is not otherwise arbitrary and capricious." *U.S. Steel Group*, 96 F.3d at 1362. In other AD contexts, and for a long period of time five percent tests have been used to measure significance for AD purposes. *See, e.g.*, 19 U.S.C. § 1677b(a)(1)(C) (1994) (using five percent test to determine home market viability); *id.* § 1677b(a)(1)(B)(ii)(II) (1994) (using five percent test to determine third-country market viability); 19 C.F.R. § 351.403(d) (1998) (using five percent test to determine whether to "calculate normal value based on the sale by an affiliated party"). Furthermore, plaintiff has done nothing to attempt to establish that on this record the five percent requirement is unreasonably high. The various aspects of the nails test do not violate the statutory language of 19 U.S.C. § 1677f-1(d)(1)(B)(i) and are applied reasonably based on this record.[12]

III. *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations* ("*Revocation* "), 73 Fed. Reg 74,930 (Dep't Commerce, Dec. 10, 2008).

In December 2008, Commerce issued an "interim final rule for the purpose of withdrawing the regulatory provisions governing the targeted dumping analysis in antidumping duty investigations." *Revocation*, 73 Fed. Reg. at 74,930. Commerce explained that it "may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping, contrary to the

[12] The plaintiffs also contend that Commerce's test masks targeted dumping because it improperly averages all sales, both allegedly targeted and non-targeted to calculate the average-mean price. (Pls.' Mem. 28.) The plaintiffs claim that this practice is "distorting or biasing the comparison to a finding that targeting does not exist." (*Id.* at 28–29.) While including the alleged targeted sales in the average-mean calculation could lower the mean, excluding such sales could lead to the opposite result, perhaps raising the mean too high and increasing the chance that an otherwise non-targeted sale be classified as targeted. An inclusion of these prices, therefore, is no less reasonable than the exclusion that the plaintiffs desire.

Congressional intent. In that case, these provisions would act to deny relief to domestic industries suffering material injury from unfairly traded imports." *Id.* at 74,931. The plaintiffs now cite these statements as evidence to support their arguments that given more time they could have provided more meaningful comments and that the nails test violates 19 U.S.C. § 1677f-1(d)(B).

Contrary to this proposition, courts have made it clear that unreasonableness cannot be inferred from a subsequent withdrawal. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (holding that an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates"); *GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1238 (CIT 2009) (holding that "[i]f the statutes are ambiguous, it does not matter whether Commerce's new interpretation of the statutes conflicts with its old interpretation, because the court is now looking at Commerce's new interpretation and will give that interpretation deference if it is reasonable").

Furthermore, in the *Revocation*, Commerce stated that it "believes the withdrawal of this rule is not significant. Withdrawal will allow the Department to exercise the discretion intended by the statute and, thereby, develop a practice that will allow interested parties to pursue all statutory avenues of relief in this area." *Revocation*, 73 Fed. Reg. at 74,931. Commerce also provided that it "is not replacing these provisions with new provisions. Instead, the Department is returning to a case-by-case adjudication, until additional experience allows the Department to gain a greater understanding of the issue." *Id.* By its very terms, therefore, the *Revocation* is not an admission by Commerce that the nails test is unlawful—it merely demonstrates that Commerce is dubious as to whether this particular methodology should be universally applicable and announces that Commerce will continue to search for a widely applicable test.[13] Accordingly, the *Revocation* has no effect on the court's conclusions in this case.

[13] The court notes that the nails test has been used by Commerce in three subsequent investigations, two of which occurred after the issuance of the *Revocation*. *See Polyethylene Retail Carrier Bags from Indonesia: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 74 Fed. Reg. 56,807, 56,809 (Dep't Commerce Nov. 3, 2009); *Polyethylene Retail Carrier Bags From Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 74 Fed. Reg. 55,183, 55,188 (Dep't Commerce Oct. 27, 2009); *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 40,485, 40,485 (Dep't Commerce July 15, 2008).

IV. Commerce's Financial Expense Rate Calculation

During its investigation, Commerce determined that DW had no viable home market, and therefore, based normal value on constructed value, which required it to consider DW's costs. *Preliminary Determination*, at 3948–49; 19 U.S.C. § 1677b(a)(4), (e). The plaintiffs challenge Commerce's decision to calculate DW's financial expense rate without including the financial expenses of GF. (Pls.' Mem. 39–40.) Specifically, the plaintiffs assert that Commerce departed from its established practice of using a combined financial expense rate in cases involving collapsed entities. (*Id.* at 45.) This claim lacks merit.

Commerce's authority to collapse affiliated producers into a single entity for the purposes of an antidumping investigation, codified in 19 C.F.R. § 351.401(f),[14] has been affirmed by the court. *See Queen's Flowers de Colom. v. United States*, 981 F. Supp. 617, 622 (CIT 1997). When dealing with collapsed entities, Commerce has established a "normal methodology of calculating the financial-expense ratio based on the financial statements at the highest level of consolidation normally prepared by the companies." *Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Certain Softwood Lumber Products From Canada*, A-122–838, POR 05/22/2002–04/30/2003, at 83 (Dec. 13, 2004) ("*Softwood Lumber*"), *available at* http://ia.ita.doc.gov/frn/summary/canada/E4–3751–1.pdf (last visited Apr. 29, 2010). "[W]here consolidated audited financial statements do not exist and are not easily prepared, [Commerce has deemed] it appropriate to base the interest expense calculation on the audited financial statements of the respondent." *Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Frozen Concentrated Orange Juice from Brazil — May 1, 1998, through April 30, 1999*, A-351–605, at comment 2 (Oct. 11, 2000), *available at* http://ia.ita.doc.gov/frn/summary/brazil/00–26074–1.txt (last visited Apr. 29, 2010). If "using merely one company's financing information would not yield a more accurate result," Commerce has "based financing expenses on the unconsolidated financial statements for the [collapsed] entities . . . ." *Id.* In such a case, "the highest level of consolidation is the individual financial statements of each

[14] 19 C.F.R. § 351.401(f)(1) provides that:

> In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production.

19 C.F.R. § 351.401(f)(1).

company." *Softwood Lumber* at 83.

In this case, Commerce collapsed DW and GF, but concluded that it was not necessary to include GF's financial expenses in the financial expense ratio calculation because GF "did not sell the merchandise under consideration in the United States and its home market was not viable during the [period of investigation] . . . ." *Issues and Decision Memorandum* at 29. Although Commerce stated at oral argument that it had the proper documentation to include GF's financial expenses in its calculation, Commerce maintained that its practice is to categorically exclude such expenses for the purposes of consistency because financial documents from companies that do not sell merchandise in the US are not always readily available. In response to this information, the plaintiffs acknowledged Commerce's normal practice, but argued that the degree of intertwining was anything but normal in this case. Some level of intertwining, by definition, will always exist between collapsed entities and the plaintiffs have failed to show that the intertwining in this case is so advanced beyond the norm that Commerce must deviate from its practice. There has been no showing that Commerce's decision to follow its usual methodology is inherently flawed. Commerce's decision to calculate DW's individual financial expense rate, therefore, was supported by substantial evidence and was not arbitrary because it was based on the financial statements of DW, which produced the merchandise. *See Gulf States Tube Div. of Quanex Corp. v. United States*, 981 F. Supp. 630, 647–48 (CIT 1997).

V. DW's Scrap Adjustment

Finally, the plaintiffs challenge Commerce's decision to accept the second portion of DW's claimed scrap "offset" as a reduction to its reported cost of production as not supported by substantial evidence. In support of this proposition, the plaintiffs cite to record evidence that a significant portion of these items included materials "clearly unrelated to the cost of producing nails," and therefore, should not have been included in the scrap "offset." (Pls.' Mem. 46–49.) In addition, the plaintiffs claim that the record demonstrates that: (1) the sale price of the miscellaneous items did not approximate the purchase cost, (2) the cost of the miscellaneous items were not included in the cost of production, and (3) the cost related to the revenues from the sale of scrap were not included in DW's reported cost of production. (*Id.*)

Under 19 C.F.R. § 351.401(b), Commerce may make adjustments "to export price, constructed export price, or normal value," so long as the Secretary ensures that "[t]he interested party that is in possession of

the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment," and does not "double-count adjustments." 19 C.F.R. § 351.401(b)(1)–(2). Commerce has clarified its typical practice regarding by-product offsets as:

> [A] respondent must first provide and substantiate the quantity of by-product it produced from subject merchandise during the [period of review]. Thus, in order to grant a by-product offset, it is [Commerce's] practice to require respondents to provide sufficient documentation of the actual amount of by-product produced. The reason for this practice is that [Commerce] must determine whether the respondent's production process for subject merchandise actually generated the amount of scrap claimed as a by-product offset.

Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review and New Shipper Review of Wooden Bedroom Furniture from the People's Republic of China , A-570–890, POR 01/01/2006–12/31/2006, at 70 (Aug. 11, 2008), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E8–19303–1.pdf (last visited Apr. 29, 2010).

In its cost verification, Commerce found that DW included the sale of extraneous materials as an offset because it had previously improperly added the cost of such items to its manufacturing cost. (Pls.' App. Tab 17 at 17–18.) Although Commerce incorrectly agreed with DW's description of this cost correction a "scrap offset," its decision to allow DW to back out improperly added costs is supported by its cost verification.[15] (*See Id.*) Any further discrepancies raised by the plain-

[15] The plaintiffs cite several previous issues and decision memoranda in support of their proposition that the inclusion of these materials do not meet Commerce's "scrap offset criteria that the scrap offset must be related to the generation of scrap during the production of the merchandise under consideration . . . ." (Pls.' App. Tab 22 at 5.) Although if a true scrap offset were at issue, this argument might have weight, these decisions do not provide such a requirement given the circumstances of this case. *See Issues and Decision Memorandum for the Final Results of Polyethylene Retail Carrier Bags ("PRCBs") from the People's Republic of China ("PRC")*, A-570–886, POR 08/1/05–7/31/06, at 10–11 (March 10, 2008), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E8–5300–1.pdf (last visited Apr. 29, 2010); *Issues and Decision Memo for the Antidumping Duty Administrative Review of Stainless Steel Flanges from India — February 1, 2005 through January 31, 2006*, A-533–809, at comment 2 (Aug. 13, 2007), *available at* http://ia.ita.doc.gov/frn/summary/INDIA/E7–15810–1.pdf (last visited Apr. 29, 2010). Further, in those investigations, Commerce indeed denied the by-product offset because the producer could not substantiate the type of scrap generated. *Id.* This information, however, was only necessary because Commerce needed to verify that the amount of the scrap offset claimed was correct, not whether the materials sold qualified for such an offset. *See Id.* Thus, these examples do not aid plaintiffs.

tiffs are *de minimis* and do not render the determination unsupported or arbitrary.[16]

Conclusion

For the aforementioned reasons and based on this record, the court concludes that utilization of the "nails test" for the targeted dumping analysis was reasonable and Commerce's determinations were supported by substantial evidence, and in accordance with law. Accordingly, the plaintiffs' Rule 56.2 motion for judgment on the agency record is denied. Judgment, therefore, will be entered for the defendant.

Dated: This 4th day of May, 2010
New York, New York.

/s/ Jane A. Restani
JANE A. RESTANI CHIEF JUDGE

Slip Op. 10–48

MID CONTINENT NAIL CORPORATION, DAVIS WIRE CORPORATION, MAZE NAILS (DIVISION OF W.H. MAZE COMPANY) AND TREASURE COAST FASTENERS, INC., Plaintiffs, v. UNITED STATES, Defendant, and ILLINOIS TOOL WORKS, INC. AND PASLODE FASTENERS (SHANGHAI) CO., LTD., Defendant-Intervenors.

Before: Jane A. Restani, Chief Judge
Court No. 08–00225
Public Version

[Plaintiffs' motion for judgment on the agency record in targeted dumping case is denied and judgment is entered for the defendant.]

Dated: May 4, 2010

Wiley Rein, LLP (*Adam Henry Gordon* and *Maureen Elizabeth Thorson*) for the plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David F. D'Alessandris*); Office of Chief Counsel for Import

[16] The plaintiffs argue that the evidence on the record demonstrates that the scrap adjustment was overstated. First, the plaintiffs point to the fact that the record indicates that DW purchased wire rod at an average cost per metric ton of [[ ]] and sold the extraneous wire rod at a price of [[ ]] and [[ ]], resulting in an offset value that backed out more cost than DW initially put in. (Pls.' App. Tab 25 at 4.) The difference between these prices, however, results in a difference in value that is less than [[ ]] percent of the total value of the total scrap. The record also indicates that the aggregate of DW's output weighed [[ ]] pounds, which exceeds the input quantity of [[ ]] pounds. (Pls.' App. Tab 17 at 18.) The difference between these two values, however, is only [[ ]] pounds.

Administration, U.S. Department of Commerce (*William G. Isasi*, *Hardeep K. Josan* and *Brian Soiset*), of counsel, for the defendant.

McDermott, Will & Emery, LLC (*David John Levine*) for the defendant-intervenors.

OPINION

Restani, Chief Judge:

Introduction

This court action challenges the Department of Commerce's ("Commerce") final determination rendered in a targeted antidumping duty investigation of certain steel nails from the People's Republic of China ("PRC"). *See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 33,977 (Dep't Commerce June 16, 2008) ("*Final Determination*"). The plaintiffs, Mid Continent Nail Corporation, Davis Wire Corporation, Maze Nails and Treasure Coast Fasteners, Inc., collectively the domestic industry, submitted a motion for judgment on the agency record. For the reasons stated below, the court denies the plaintiffs' motion and grants judgment on the agency record in favor of the United States.

Background

I. Targeted Dumping

Targeted dumping analysis is "an alternative method for determining the existence of margins of dumping in an investigation . . . ." *Targeted Dumping in Antidumping Investigations; Request for Comment*, 72 Fed. Reg. 60,651, 60,651 (Dep't Commerce Oct. 25, 2007) ("*Request for Comment*"). The purpose of this methodology is to enable Commerce to identify dumping when a seller is providing lower prices to only certain United States purchasers "by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise." 19 U.S.C. § 1677f1(d)(1)(B); *see Request for Comment*. By contrast, during an ordinary antidumping investigation, Commerce determines "whether the subject merchandise is being sold in the United States at less than fair value . . . by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise" or by "comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise." 19 U.S.C. § 1677f-1(d)(1)(A).

II. Commerce's Investigation of Certain Steel Nails from the PRC

In May 2007, the plaintiffs filed petitions with Commerce concerning certain steel nails from the PRC. *Certain Steel Nails from the People's Republic of China and the United Arab Emirates: Initiation of Antidumping Duty Investigations*, 72 Fed. Reg. 38,816, 38,817 (Dep't Commerce July 16, 2007). In July 2007, Commerce initiated a targeted dumping investigation of certain steel nails from the PRC for the period of April 1, 2006, through March 31, 2007. *Id.* In September 2007, Commerce selected Illinois Tool Works Inc. and Paslode Fasteners (Shanghai) Co., Ltd. ("Paslode") and Xingya Group ("Xingya") as the mandatory respondents in the investigation. *Certain Steel Nails From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances and Postponement of Final Determination*, 73 Fed. Reg. 3928, 3930 (Dep't Commerce Jan. 23, 2008) ("*Preliminary Determination*"). In December 2007, the plaintiffs submitted an allegation of targeted dumping against Paslode and Xingya. *Id.* at 3931.

In its *Preliminary Determination*, published on January 23, 2008, Commerce used the methodology it had accepted in a previous investigation to conclude that targeted dumping had occurred.[1] *Id.* at 3939–40. The following month, Commerce amended its *Preliminary Determination* to correct significant ministerial errors with respect to the calculation of Paslode's antidumping duty (AD) margin. *See Certain Steel Nails From the People's Republic of China: Amended Preliminary Determination of Sales at Less Than Fair Value*, 73 Fed. Reg. 7254 (Dep't Commerce Feb. 7, 2008) ("*Amended Preliminary Determination*"). In the *Amended Preliminary Determination*, Commerce calculated an AD margin of 4.70 percent for Paslode whereas Xingya's AD margin remained unchanged at 44.57 percent. *Id.* at 7255. At that time, however, Commerce stated that it intended to develop a new methodology to assess Paslode and Xingya's alleged targeted dumping and requested comments on the matter. *Preliminary Determination*, 73 Fed. Reg. at 3939.

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[1] The P/2 test provides "that where the weighted-average net price to an alleged targeted purchaser or region is more than 2 percent lower than the weighted-average net price to non-targeted purchasers or regions in [merchandise]/month combinations representing a preponderance of the targeted quantity, a 'pattern' of 'significant' price differences" exists. *Issues and Decision Memorandum for the Final Determination of the Less-Than-Fair-Value Investigation of Coated Free Sheet Paper from the Republic of Korea*, A-580–856, POR 10/01/05–09/30/06, at 3–4 (Oct. 17, 2007), *available at* http://ia.ita.doc.gov/frn/summary/KOREA-SOUTH/E7–21035–1.pdf (last visited Apr. 29, 2010).

On April 21, 2008, Commerce informed the plaintiffs of its new methodology ("the nails test") and set a sixteen day deadline for comments.[2] (Pls.' Documentary App. Accompanying Mem. of Law in Supp. of Pls.' Rule 56.2 Mot. for J. Upon the Agency R. ("Pls.' App.") Tab 6–8.) The nails test consists of two stages. *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 Fed. Reg. 26,371, 26,372 (Dep't Commerce May 9, 2008) ("*Proposed Methodology*"). The first stage, the "standard deviation test," requires Commerce to calculate a standard deviation for all of the sale prices of an item from a particular exporter. *Id.* Commerce then must add together the volume for all of the items sold at a price below one standard deviation from the weighted-average price. *Issues and Decision Memorandum* at 20. If this combined volume exceeds thirty-three percent of the total volume of sales of that item from the particular exporter, the first stage of the test is satisfied. *Id.* The second stage of the test, the gap test, is satisfied if the volume of sales that qualify under a price gap comparison[3] exceeds five percent "of the total[volume] of sales of subject merchandise to the allegedly targeted customer." *Proposed Methodology*, 73 Fed. Reg. at 26,372, *amended by Issues and Decision Memorandum* at 21 n.15.

The plaintiffs filed their case brief in response to the nails test on May 7, 2008. (*See* Pls.' App. Tab 9.) On May 9, 2008, Commerce published the nails test and provided the public thirty days to comment. *Proposed Methodology*, 73 Fed. Reg. at 26,372. Commerce subsequently extended this deadline until June 23, 2008. *Antidumping Methodologies for Proceedings that Involve Significant Cost Changes Throughout the Period of Investigation (POI)/Period of Review (POR) that May Require Using Shorter Cost Averaging Periods; Request for Comment and Proposed Methodology for Identifying and Analyzing*

[2] The plaintiffs point out that they were afforded only fourteen days to comment because Commerce made clarifications on April 24, 2008. *See Investigation of Certain Steel Nails from the People's Republic of China: Issues and Decision Memorandum*, A-570–909, POI 10/01/0603/31/07, at 4 (June 6, 2008) ("*Issues and Decision Memorandum*"), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E8–13474–1.pdf (last visited Apr. 29, 2010).

[3] Under its methodology, Commerce must:

> [D]etermine the total [volume] for which the difference between (i) the sales-weighted average price to the allegedly targeted customer and (ii) the next higher sales-weighted average price to a non-targeted customer exceeds the average price gap (weighted by sales value) for the non-targeted group. Each of the price gaps in the non-targeted group would be weighted by the combined sales associated with the pair of prices to non-targeted customers that make up the gap.

Proposed Methodology, 73 Fed. Reg. at 26,372, *amended by Issues and Decision Memorandum* at 21 n.15.

Targeted Dumping in Antidumping Investigations; Request for Comment, 73 Fed. Reg. 32,557, 32,557 (Dep't Commerce June 9, 2008). On June 16, 2008, however, Commerce published its *Final Determination*, which adopted the nails test, and used it to calculate an AD margin of zero percent for Paslode and 21.24 percent for Xingya. *Final Determination*, 73 Fed. Reg. at 33,981.

In August 2008, the plaintiffs filed a complaint contesting the *Final Determination*. In February 2009, the plaintiffs filed a motion for judgment on the agency record pursuant to USCIT Rule 56.2.

Standard Of Review

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold Commerce's final determinations in AD investigations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Discussion

I. Reasonable Time under 19 U.S.C. § 1677m(g)

The plaintiffs allege that Commerce's actions deprived them of their due process rights under the Fifth Amendment. (Mem. of Law in Supp. of Pls.' Rule 56.2 Mot. for J. Upon the Agency R. ("Pls.' Mem.") 12–20.) The plaintiffs claim that by providing the domestic industry only sixteen days to comment on the nails test, Commerce did not afford enough time to submit meaningful comments to demonstrate all of the nails test's errors. (*See Id.* at 15.) In support of their position that the comment period was unreasonable, the plaintiffs cite the facts that Commerce needed "several months" to develop the nails test, that Commerce typically affords parties fifty days to comment on preliminary determinations,[4] and that Commerce provided the public over thirty days to comment. (*Id.*) This claim lacks merit.

Congress has provided a fair process for commenting within the statutory language of 19 U.S.C. § 1677m. *See* 19 U.S.C. § 1677m(g). Subsection (g) provides that:

> Information that is submitted on a timely basis to the administering authority or the Commission during the course of a proceeding under this subtitle shall be subject to comment by other parties to the proceeding within such reasonable time as the administering authority or the Commission shall provide. The

[4] Under 19 C.F.R. § 351.309(c)(1)(i), any interested party for a final determination in an antidumping investigation, may submit a case brief "50 days after the date of publication of the preliminary determination or results of review . . . unless the Secretary alters the time limit." 19 C.F.R. § 351.309(c)(1)(i).

> administering authority and the Commission, before making a final determination . . . shall cease collecting information and shall provide the parties with a final opportunity to comment on the information obtained by the administering authority or the Commission . . . upon which the parties have not previously had an opportunity to comment. Comments containing new factual information shall be disregarded.

19 U.S.C. § 1677m(g). Whether or not a constitutional due process right exists in these circumstances is an issue that need not be decided here because such a right would not require any more time to be afforded to the plaintiffs than is already required by statute. If Commerce provides a time period for comments that is unreasonable, it would be in violation of the statute. *Compare* 19 U.S.C. § 1677m(g), *with Borden Inc. v. United States*, 23 CIT 372, 375 n.3 (1999), *rev'd on other grounds*, 7 F. App'x 938, 938–39 (2001) (holding that "[t]he court applies a rule of reason in evaluating administrative due process claims"). Accordingly, the court considers the plaintiffs due process argument as a claim that Commerce violated the statutory due process requirement of 19 U.S.C. § 1677m(g).

Generally, "[w]here a right to be heard exists, due process requires that right be accommodated at a meaningful time and in a meaningful manner." *Barnhart v. United States Treasury Dep't*, 588 F. Supp. 1432, 1438 (CIT 1984). Recognizing that "[w]ith more time most parties could improve the quality of their comments," courts ask whether there is "evidence that given more time [a plaintiff] would have, in fact, provided more meaningful comments." *Sichuan Changhong Electric Co. v. United States*, 466 F. Supp. 2d 1323, 1328 (CIT 2006). If, however, a plaintiff makes thoughtful comments that Commerce addresses in its determination, then, "as a practical matter, [the plaintiff] was not substantially deprived of an opportunity to be heard before the agency." *Borden*, 23 CIT at 375 n.3. This understanding has previously led the court to conclude that a comment period as brief as four days can be reasonable. *See Sichuan*, 466 F. Supp. 2d at 1329.

Despite having a full opportunity to demonstrate that the comment period was unreasonable by presenting the court with additional critiques of the nails test that they were not previously afforded the opportunity to develop, the plaintiffs have failed to provide any new and convincing arguments. Although the plaintiffs filed a thorough case brief, the court notes that most of their arguments are similar, if not identical, to the ones raised at the administrative level. (*Compare*

Pls.' App. Tab 9, *with* Pls.' Mem.) The plaintiffs claim that they would have made many additional arguments if they were afforded more time to comment, yet now provide only one such example. (Pls.' Mem. 18.) They argue that the mean price was incorrectly used to calculate the standard deviation. (*Id.*) The plaintiffs contend that if the statistically correct median price were used, Commerce might have found dumping in this case. (*Id.*) Contrary to the plaintiffs claim, however, the use of a mean to calculate a standard deviation is, by definition, a perfectly acceptable statistical method. Christine Ammer & Dean S. Ammer, *Dictionary of Business and Economics* 397 (1977). Although median can be substituted for mean in certain situations, such a substitution is not required. *See generally* Yulia Gel, Weiwen Miao & Joseph L. Gastwirth, *The Importance of Checking the Assumptions Underlying Statistical Analysis: Graphical Methods for Assessing Normality*, 46 Jurimetrics J. 3, 26 (2005). In addition, such claims are merely speculative—the plaintiffs do not offer any numerical evidence to support their contention that using a median would yield a different result.[5]

There is no evidence before the court, therefore, to suggest that the plaintiffs would have provided more meaningful comments if they were afforded additional time to comment. Accordingly, the court holds that Commerce afforded the plaintiffs a reasonable time to comment under 19 U.S.C. § 1677m(g).

II. The Nails Test

The plaintiffs challenge the *Final Determination* on the grounds that the nails test violates 19 U.S.C. § 1677f-1(d)(B) and 19 C.F.R. § 351.414(f)(1)(i) and therefore, Commerce's conclusion is not supported by substantial evidence. Specifically, the plaintiffs argue that in investigating their claim of targeted dumping, Commerce improperly considered only identical products, used a statistically invalid methodology, and unreasonably defined terms. (Reply Br. of Mid Continent Nail Corporation, Davis Wire Corporation, Maze Nails and Treasure Coast Fasteners, Inc. ("Pls.' Reply") 6–10.) This claim lacks merit.

Under 19 U.S.C. § 1677f-1(d)(1)(B), which essentially defines the targeted dumping remedy, Commerce "may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to

[5] Furthermore, the plaintiffs have failed to establish that it would have been futile to seek additional time for comment. The plaintiffs stated at oral argument that although no formal request was made, informal conversations with Commerce indicated that a request would be denied. Given the lack of a record on this, and in the context of this case there is no reason to presume what Commerce would have done in the face of a formal request.

the export prices (or constructed export prices) of individual transactions for comparable merchandise," but only if "there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time." 19 U.S.C. § 1677f-1(d)(B). In addition, 19 C.F.R. § 351.414(f)(1)(i) provided that Commerce must use "standard and appropriate statistical techniques" when determining whether sales qualify for this section. 19 C.F.R. § 351.414(f)(1)(i).[6]

Generally, courts lack an "independent authority to tell the [agency] how to do its job" when a statute does not specify "any Congressionally mandated procedure or methodology for assessment of the statutory tests." *U.S. Steel Group v. United States*, 96 F.3d 1352, 1362 (Fed. Cir. 1996). This silence has been interpreted as "an invitation" for an agency administering unfair trade law to "perform its duties in the way it believes most suitable" and courts will uphold these decisions "[s]o long as the [agency]'s analysis does not violate any statute and is not otherwise arbitrary and capricious." *Id.*

A. Commerce's decision to consider only identical products is supported by substantial evidence.

The plaintiffs first claim that Commerce's decision to test only identical products was in violation of the clear language of 19 U.S.C. § 1677f-1(d)(B), which instructs Commerce to consider "comparable merchandise." (Pls.' Reply 7.) Identical merchandise is comparable merchandise. *See* 19 U.S.C. § 1677(16). In some cases it may be a smaller subset of all comparable merchandise. *Id.*[7] In a case such as this, however, where all or virtually all the allegedly targeted sales had identical matches, the statutory language does not require Commerce to do more.[8] (Def.'s Supp. Br. and Confidential App. 2.) Based on this record, the court concludes that Commerce's decision to consider only identical merchandise was supported by substantial evidence and was in accordance with law.

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[6] Commerce withdrew 19 C.F.R. § 351.414(f) on December 10, 2008. *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations* ("*Revocation* "), 73 Fed. Reg 74,930, 74,932 (Dep't Commerce, Dec. 10, 2008). At the time of the *Final Determination*, however, this regulation was effective.

[7] If Commerce must use other comparable merchandise to compare to U.S. sales it must make adjustments to get close to a price which may be compared. 19 U.S.C. § 1677b(a)(6)(C)(ii); 19 C.F.R. § 351.411. These adjustments provide an opportunity for the introduction of inaccuracies into the process.

[8] In fact, [[ ]] percent of the allegedly targeted sales had identical matches. (Def.'s Supp. Br. and Confidential App. 2.)

B. Commerce's use of standard deviation is statistically valid.

The plaintiffs claim that Commerce's use of standard deviation in the nails test is unreasonable because "[a] standard deviation is simply a descriptive measure of a population; in other words, standard deviation measures describe the dispersion of data, and then calculate how spread out prices are from the average price." (Pls.' Mem. 24.) The plaintiffs go on to claim that "[a]t the most basic level, then, the Department's starting point violated the regulatory requirement that it use a 'standard and appropriate' statistical technique to determine whether targeting was occurring" because, contrary to Commerce's assertion, "the standard deviation cannot validly be used as a method to calculate a 'relative measure.'" (*Id.*)

Generally, a standard deviation is defined as "a measure of the tendency of individual values to differ from the mean." Christine Ammer & Dean S. Ammer, *Dictionary of Business and Economics* 397 (1977). "The standard deviation is the most common measure of dispersion," which is "the total spread of the values in a frequency distribution." *Id.* at 122. In statistics, a frequency distribution is "the organization of data to show how often certain values or ranges of values occur." *Id.* at 170.

As previously described, the nails test uses standard deviation to measure the dispersion of values in an exporter's price data, to aid in identifying which of the exporter's sales were relatively low compared to others.[9] *See Proposed Methodology*, 73 Fed. Reg. at 26,372. After the dispersion is identified, the nails test requires Commerce to use the thirty-three percent test to determine whether a "pattern" existed under the statute. *Id.* Thus, contrary to the plaintiffs' assertions, Commerce's use of standard deviation was, by definition, statistically valid because it was used to measure the dispersion of the sales prices.[10] This aspect of the nails test, therefore, is not in violation of 19 U.S.C. § 1677f-1(d)(B)(i).

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[9] The plaintiffs also contend that Commerce's reliance on the word "low" is *ultra vires* because it is not used within the statute. (Pls.' Mem. 24–25.) Although the plaintiffs are correct that the word "low" does not appear within the language of 19 U.S.C. § 1677f-1(d)(B), Commerce explains that this interpretation "strikes a balance between two extremes, the first being where *any* price below the average price is sufficient to distinguish the alleged target from others . . . and the second being where only prices at the very bottom of the price distribution are sufficient to distinguish the alleged target from others." *Issues and Decision Memorandum* at 17.

[10] Based on the evidence, the court is not convinced that the P/2 test is an inherently better test. The P/2 test, which draws a hard line at two-percent, is arguably only well suited for a particular type of market. Hypothetically, if the prices of the market greatly varied, most prices are likely to satisfy the two-percent requirement and this test may capture too many sales. Alternatively, if the prices were nearly uniform, few sales would satisfy the

C. The nails test's definitions of "pattern" and "differ significantly" do not violate 19 U.S.C. § 1677f-1(d)(B)(i).

The plaintiffs further challenge Commerce's definitions of "pattern" and "differ significantly" as arbitrary, unexplained, and unreasonable. (Pls.' Mem. 33–35.) Particularly, the plaintiffs claim that Commerce's use of thirty-three percent in its "pattern" definition and five percent in its "differ significantly" definition are seemingly random values with no meaning. (*Id.*) The plaintiffs contend that, in this case, these unreasonable definitions cause the nails test to overlook obvious targeting.[11] (*Id.* at 35.) This claim lacks merit.

As previously discussed, Commerce included a thirty-three percent threshold requirement in its definition of "pattern." *Issues and Decision Memorandum* at 20. Commerce explained that it considered thirty-three percent reasonable for establishing a pattern of activity. *Id.* The court has no reason to disagree.

Commerce defined "differ significantly" as any situation when the five percent price gap test is satisfied. *Id.* at 21–22. Commerce stated that it considered a five percent difference as significant, when used in combination with the thirty-three percent threshold, under the statutory language. *Id.* at 22. Although these tests may create a standard that is more difficult to satisfy than the domestic industry would have preferred, the nails test "does not violate any statute and is not otherwise arbitrary and capricious." *U.S. Steel Group*, 96 F.3d at 1362. In other AD contexts, and for a long period of time five percent tests have been used to measure significance for AD purposes. *See, e.g.*, 19 U.S.C. § 1677b(a)(1)(C) (1994) (using five percent test to determine home market viability); *id.* § 1677b(a)(1)(B)(ii)(II) (1994) (using five percent test to determine third-country market viability); 19 C.F.R. § 351.403(d) (1998) (using five percent test to

two-percent threshold and the test may not capture enough. In contrast, a standard deviation can be calculated for all types of dispersions and therefore, provides Commerce with a consistent method to analyze all markets.

[11] The plaintiffs spend several pages in their brief detailing hypothetical data sets in an attempt to illustrate this point and thus, expose Commerce's test as unreasonable. (*See* Pls. Mem. 28–31.) The plaintiffs argue that these examples clearly illustrate "targeted dumping" under 19 U.S.C. § 1677f-1(d)(B)(i), but would not be classified as such under Commerce's test. (*Id.* at 32.) The plaintiffs further contend that much like these examples, the facts of this case clearly support a finding of targeted dumping and that any finding otherwise cannot be supported by substantial evidence. (*Id.* at 29–30.) The plaintiffs' examples, however, are unconvincing because they oversimplify a market. Each example contains only a few hypothetical prices spread out at a great variance, creating a market where all of the extremely low prices fall within one standard deviation of the average price. (*See id.* at 28–31.) Such a result occurs because the hypothetical markets also contain extremely high prices that offset the low ones. (*See Id.*) The price variation of these markets are unrealistic, and therefore, raise few practical concerns regarding this methodology.

determine whether to "calculate normal value based on the sale by an affiliated party"). Furthermore, plaintiff has done nothing to attempt to establish that on this record the five percent requirement is unreasonably high. The various aspects of the nails test do not violate the statutory language of 19 U.S.C. § 1677f-1(d)(1)(B)(i) and are applied reasonably based on this record.[12]

III. *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations* ("*Revocation*"), 73 Fed. Reg 74,930 (Dept. Commerce, Dec. 10, 2008).

In December 2008, Commerce issued an "interim final rule for the purpose of withdrawing the regulatory provisions governing the targeted dumping analysis in antidumping duty investigations." *Revocation*, 73 Fed. Reg. at 74,930. Commerce explained that it "may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping, contrary to the Congressional intent. In that case, these provisions would act to deny relief to domestic industries suffering material injury from unfairly traded imports." *Id.* at 74,931. The plaintiffs now cite these statements as evidence to support their arguments that given more time they could have provided more meaningful comments and that the nails test violates 19 U.S.C. § 1677f-1(d)(B).

Contrary to this proposition, courts have made it clear that unreasonableness cannot be inferred from a subsequent withdrawal. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (holding that an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates"); *GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1238 (CIT 2009) (holding that "[i]f the statutes are ambiguous, it does not matter whether Commerce's new interpretation of the statutes conflicts with its old interpretation, because the

[12] The plaintiffs also contend that Commerce's test masks targeted dumping because it improperly averages all sales, both allegedly targeted and non-targeted to calculate the average-mean price. (Pls.' Mem. 25–26.) The plaintiffs claim that this practice is "distorting or biasing the comparison to a finding that targeting does not exist." (*Id.* at 26.) While including the alleged targeted sales in the average-mean calculation could lower the mean, excluding such sales could lead to the opposite result, perhaps raising the mean too high and increasing the chance that an otherwise non-targeted sale be classified as targeted. An inclusion of these prices, therefore, is no less reasonable than the exclusion that the plaintiffs desire.

court is now looking at Commerce's new interpretation and will give that interpretation deference if it is reasonable").

Furthermore, in the *Revocation*, Commerce stated that it "believes the withdrawal of this rule is not significant. Withdrawal will allow the Department to exercise the discretion intended by the statute and, thereby, develop a practice that will allow interested parties to pursue all statutory avenues of relief in this area." *Revocation*, 73 Fed. Reg. at 74,931. Commerce also provided that it "is not replacing these provisions with new provisions. Instead, the Department is Court No. 08–00225 Page 16 returning to a case-by-case adjudication, until additional experience allows the Department to gain a greater understanding of the issue." *Id.* By its very terms, therefore, the *Revocation* is not an admission by Commerce that the nails test is unlawful—it merely demonstrates that Commerce is dubious as to whether this particular methodology should be universally applicable and announces that Commerce will continue to search for a widely applicable test.[13]Accordingly, the *Revocation* has no effect on the court's conclusions in this case.

Conclusion

For the aforementioned reasons and based on this record, the court concludes that utilization of the "nails test" for the targeted dumping analysis was reasonable and Commerce's determinations were supported by substantial evidence, and in accordance with law. Accordingly, the plaintiffs' Rule 56.2 motion for judgment on the agency record is denied. Judgment, therefore, will be entered for the defendant.

Dated: This 4th day of May, 2010
New York, New York.

/s/ Jane A. Restani
JANE A. RESTANI CHIEF JUDGE

[13] The court notes that the nails test has been used by Commerce in three subsequent investigations, two of which occurred after the issuance of the *Revocation*. *See Polyethylene Retail Carrier Bags from Indonesia: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 74 Fed. Reg. 56,807, 56,809 (Dep't Commerce Nov. 3, 2009); *Polyethylene Retail Carrier Bags From Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 74 Fed. Reg. 55,183, 55,188 (Dep't Commerce Oct. 27, 2009); *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 40,485, 40,485 (Dep't Commerce July 15, 2008).