Slip Op. 11–38

RHI Refractories Liaoning Co., Ltd., Plaintiff, and Vesuvius USA Corporation, and Yingkou Bayuquan Refractories Co., Ltd., Plaintiff-Intervenors, v. United States, Defendant, and Resco Products, Inc. Defendant-Intervenor.

RHI Refractories Liaoning Co., Ltd., and RHI Refractories (Dalian) Co., Ltd., Plaintiffs, v. United States, Defendant, and Resco Products, Inc. Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Court Nos. 10–00307 and 10–00309

[The court grants Plaintiffs' motion to consolidate and motion to stay.]

Dated: April 14, 2011

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OPINION & ORDER

Barzilay, Judge:

I. Introduction

Plaintiffs RHI Refractories Liaoning Co., Ltd. and RHI Refractories (Dalian) Co., Ltd. ("Plaintiffs") move the court to consolidate No. 10–00307 with No. 10–00309, and to stay the proceeding pending the final resolution of cases currently before the Federal Circuit, *GPX Int'l Tire Corp. v. United States*, Nos. 2011–1107, 2011–1108, 2011–1109 (Fed. Cir. filed Dec. 8, 2010) (collectively, "*GPX Tires*").[1]

[1] For identical reasons, Plaintiff-Intervenors Vesuvius USA Corporation and Yingkou Bayuquan Refractories Co., Ltd. (together, "Vesuvius") agree with Plaintiffs' motions. *See generally* Vesuvius Resp. to Mot. to Consolidate; Vesuvius Resp. to Mot. to Stay.

See generally Pls. Mot. to Consolidate; Pls. Mot. to Stay. Those appeals stem from a line of cases previously resolved in the Court of International Trade under the same name. *GPX Int'l Tire Corp. v. United States*, Slip Op. 10112, 2010 WL 3835022 (CIT Oct. 1, 2010); *GPX Int'l Tire Corp. v. United States*, 34 CIT ___, 715 F. Supp. 2d 1337 (2010); *GPX Int'l Tire Corp. v. United States*, 33 CIT ___, 645 F. Supp. 2d 1231 (2009); *GPX Int'l Tire Corp. v. United States*, Slip Op. 09–11, 2009 WL 362136 (CIT Feb. 12, 2009); *GPX Int'l Tire Corp. v. United States*, 32 CIT ___, 587 F. Supp. 2d 1278 (2008). In the holding of paramount importance to the present action, the Court determined that the U.S. Department of Commerce ("Commerce" or "the Department") could not simultaneously apply antidumping and countervailing duties to imports from a non-market economy, if the agency derived the former by using the non-market economy antidumping duty calculation methodology and failed to account for the possible imposition of double remedies. *GPX Int'l Tire Corp.*, 33 CIT at ___, 645 F. Supp. 2d at 1240–46. Plaintiffs complain that Commerce committed a similar error in the two administrative proceedings presently under review. Compl. ¶ 20, *RHI Refractories Liaoning Co. v. United States*, No. 10–00307 (CIT filed Nov. 19, 2010); Compl. ¶ 21, *RHI Refractories Liaoning Co. v. United States*, No. 10–00309 (CIT filed Nov. 19, 2010). Plaintiffs predicate their request to consolidate on purported common questions of law and fact in the antidumping and countervailing duty proceedings, Pls. Mot. to Consolidate 3–6, and the prayer for a stay on three points: the double remedy claims in Court Nos. 10–00307 and 1000309 mirror the issues under review at the Federal Circuit in *GPX Tires*, and a decision on those appeals necessarily will affect the case at bar; a stay will preserve judicial resources and help to avoid unnecessary briefing; and the requested stay will not harm or prejudice any party. Pls. Mot. to Stay 4–7.

Defendant United States ("Defendant" or "the Government") and Defendant-Intervenor Resco Products, Inc. ("Resco") oppose the motions and argue, with respect to consolidation, that the cases involve separate issues, statutes, administrative records, and parties,[2] that

[2] Defendant alleges that with the consolidation of these cases, Vesuvius could inappropriately challenge Commerce's countervailing duty determination. Def. Opp'n to Mot. to Consolidate 5. This statement overlooks the court's earlier ruling, which found that Vesuvius does not have standing to participate in Court No. 10–00309, the action contesting the subject countervailing duty determination. *RHI Refractories Liaoning Co. v United States*, Slip Op. 1112, 2011 WL 335601 (CIT Jan. 31, 2011) (denying Vesuvius's request to participate as plaintiff-intervenor). Though Defendant's concerns suggest, perhaps inadvertently, that the court will struggle to manage the case and understand the substance of the briefs, the court remains well-aware of the procedural posture and relevant laws in the underlying action, and will limit Vesuvius's briefs to the antidumping duty determination should the case reach the merits.

the number of distinct issues outnumber those in common, that the existence of a single common question – potential double remedies – does not render consolidation appropriate and, therefore, that the court should address each action individually. Def. Opp'n to Mot. to Consolidate 2–8; Def.-Intervenor Opp'n to Mot. to Consolidate 3–7. To that effect, Defendant also contends that combining the two actions may cause the court unnecessary confusion, Def. Opp'n to Mot. to Consolidate 3–4, while Defendant-Intervenor avers that Plaintiffs would not suffer injury in the absence of consolidation. Def.-Intervenor Opp'n to Mot. to Consolidate 8. On the request to stay, Defendant and Defendant-Intervenor offer the following remarks in opposition: Plaintiffs' double remedy claim does not track the issues before the Federal Circuit in *GPX Tires*; Court Nos. 10–00307 and 10–00309 involve issues other than the double remedy claims not present in *GPX Tires*, rendering a stay inappropriate; the distinct records in these cases require individual review on the merits; judicial efficiency alone does not warrant a stay; the unknown end date for litigation in *GPX Tires* will cause undue delay in the present case; Plaintiffs will not suffer hardship absent a stay; and Plaintiffs have not demonstrated they likely will succeed on the merits. Def. Opp'n to Mot. to Stay 5–9; Def.-Intervenor Opp'n to Mot. to Stay 3–8. For the reasons below, the court grants the motions and consolidates Court No. 10–00307 with Court No. 10–00309 as Consol. Court No. 10–00307, and stays the joint action pending the final resolution of *GPX Tires*.

II. Discussion

A. The Court Grants Plaintiffs' Motion to Consolidate

Rule 42(a) of the Court permits the consolidation of cases "involv-[ing] a common question of law or fact . . . to avoid unnecessary cost or delay." USCIT R. 42(a). This rule affords the court "broad discretion to grant or deny" the request. *Fed.-Mogul Corp. v. United States*, 16 CIT 964, 966, 809 F. Supp. 102, 105 (1992) (citing *Manuli, USA, Inc. v. United States*, 11 CIT 272, 277, 659 F. Supp. 244, 247 (1987)). Of the factors that the court may consider in reaching its decision when two cases involve common legal or factual threads, judicial economy sits chief among them. *See id.*; *Manuli, USA, Inc.*, 11 CIT at 278, 659 F. Supp. at 248.

The court grants Plaintiffs' request to consolidate Court Nos. 10–00307 and 10–00309 as Consol. Court No. 10–00307. The unifying issue in the action – double remedies – necessarily touches upon common questions of law and fact inherent in both administrative proceedings under review. The resolution of this question necessarily

determines how the proceedings will continue and which antidumping and countervailing duty questions will remain after the Federal Circuit acts in *GPX Tires*. Defendant and Defendant-Intervenor exaggerate the problems that may arise as a result of consolidated litigation. That this question potentially may require examination of two separate statutory regimes does not undercut the court's ability to complete a proper analysis. Moreover, while the cases involve separate questions, administrative records, and parties, the court easily can avoid any perceived confusion through a carefully crafted scheduling order that clearly identifies the relevant record and states which parties may participate in the discussion on the particular question. Finally, a streamlined resolution of the chief issue will facilitate judicial economy and prevent unnecessary, duplicate briefing.

B. The Court Grants Plaintiffs' Motion to Stay

The Supreme Court long ago stated that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket." *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936); *accord Diamond Sawblades Mfrs.' Coal. v. United States*, Slip Op. 10–40, 2010 WL 1499568, at *2 (CIT Apr. 15, 2010). The decision when and how to stay a proceeding rests "within the sound discretion of the trial court." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citations omitted). However, the court risks abusing that discretion if it fails to "weigh the competing interests and maintain an even balance, giving due consideration to the interests of the litigants, the court, and the public." *Diamond Sawblades Mfrs.' Coal.*, 2010 WL 1499568, at *2 (citing *Tak Fat Trading Co. v. United States*, 24 CIT 1376, 1377 (2000) (not reported in F. Supp.)) (quotation marks omitted); *accord Cherokee Nation of Okla.*, 124 F.3d at 1416. Normally, the party requesting a stay must clearly identify the "hardship or inequity" in moving forward with the case "if there is even a fair possibility that the stay . . . will work damage to some one else."[3] *Landis*, 299 U.S. at 255. However, "[a]bsent a showing that there is at least a fair possibility that the stay will work damage to some one else, there is no require-

[3] Defendant suggests that the court should assess Plaintiffs' stay request under the four prong test established by the Supreme Court in *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009) ("(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."). Def. Opp'n to Mot. to Stay 3–5. In that opinion, the Supreme Court articulated the appropriate test that a federal appellate court should use to determine whether to hold a final order in abeyance while it evaluates the legality of that order. *Nken*, 129 S. Ct. at 1756–57, 1760–61. This case presents facts that render *Nken*

ment that [the movant] make a strong showing of necessity or establish a clear case of hardship or inequity to warrant the granting of the requested stay." *An Giang Agric. & Food Imp. Exp. Co. v. United States*, 28 CIT 1671, 1677, 350 F. Supp. 2d 1162, 1167 (2004) (internal quotation marks & ellipses omitted) (citing *Landis*, 299 U.S. at 255; *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983)).

The court concludes that conditions favor a stay pending a final decision by the Federal Circuit in *GPX Tires*. "A court may properly determine that it is efficient for its own docket and the fairest course for the parties to enter stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Diamond Sawblades Mfrs.' Coal.*, 2010 WL 1499568, at *2 (citation & quotation marks omitted). The double remedies issue serves as the keystone that will dictate the future course of the litigation. Because briefing already has commenced in *GPX Tires* and the delay will not continue for an indefinite period, a stay will promote judicial economy and preserve the resources of the parties and the court. For example, if the Federal Circuit upholds the Court's analysis of the double remedy issue, it may render moot the questions related to the countervailing duty proceeding. A different result from the Federal Circuit could cause Defendant to request a voluntary remand and, thus, metamorphose any intermediate decision of this court into a superfluous moot opinion, or at the very least complicate any appeal from this court. Moreover, Plaintiffs repeatedly have represented that they likely will not pursue their claims if the Federal Circuit renders an opinion adverse to their interests on the double remedy question. Pls. Mot. to Stay 4, 6; Joint Status Report 7, *RHI Refractories Liaoning Co. v. United States*, No. 10–00309 (CIT filed Feb. 8, 2011). On the other hand, Defendant and Defendant-Intervenor have not stated that they will suffer harm as a result of a stay,[4] *see generally* Def. Opp'n to Mot. to Stay; Def.-Intervenor Opp'n to Mot. to Stay, and the court previously explained that a stay would not affect the Government's ability

inapplicable. Unlike the movant in *Nken*, Plaintiffs do not wish to delay the effect of the underlying antidumping and countervailing duty orders, for the Government may continue to enforce the orders, and collect the duties and related cash deposits; instead, applicants merely wish to temporarily suspend "the conduct or progress of litigation before the court," *id.* at 1758 (citations, quotation marks & brackets omitted), so that the Federal Circuit may resolve novel and complex questions that necessarily will affect the viability of their claims. For these reasons, the court declines to use the test in *Nken* to review Plaintiffs' request.

[4] Notably, the Government cannot claim that the current situation will "compel it to stand aside while a litigant in another case settles the rule of law that will define the rights of both," as the United States participates as a party in both *GPX Tires* and this case. *An Giang Agric. & Food Imp. Exp. Co.*, 28 CIT at 1675 n.5, 350 F. Supp. 2d at 1166 n.5 (citation, quotation marks & brackets omitted).

to enforce the orders or collect the relevant duties and cash deposits. Finally, staying the case would best serve the public by allowing the Federal Circuit to render an authoritative decision on the double remedy issue. To permit otherwise, especially in view of the importance of the double remedy issue and its effect on the antidumping and countervailing duty schemes, would allow for potentially disparate judicial opinions to cloud the legal marketplace and undermine Congress's vision of the Court as the body that provides uniform review of the nation's international trade laws.

III. Conclusion

For the foregoing reasons, the court hereby

ORDERS that Plaintiffs' motion to consolidate is **GRANTED**;

ORDERS that, pursuant to USCIT R. 42(a), Court Nos. 10–00307 and 10–00309 are consolidated into a single action as Consol. Court No. 10–00307;

ORDERS that Plaintiffs' motion to stay is **GRANTED;**

ORDERS that Consol. Court No. 10–00307 is stayed pending the final resolution of *GPX Tires*. Within 30 days of the final disposition of *GPX Tires*, including the resolution of any appeals therefrom, the parties shall file a joint status report and scheduling order which informs the court of their preferred course of action; and further

ORDERS that Defendant's motion for entry of scheduling order in Court No. 10–00309 is **DENIED** as moot.

Dated: April 14, 2011
New York, New York

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, JUDGE

Slip Op. 11–39

AMANDA FOODS (VIETNAM) LTD., et al., Plaintiffs, –v– UNITED STATES, Defendant, – and – AD HOC SHRIMP TRADE ACTION COMMITTEE, Defendant-Intervenor.

Before: Pogue, Chief Judge
Consol.[1] Court No. 08–00301

[Affirming Department of Commerce's final results of redetermination pursuant to second court remand]

[1] The actions consolidated herein include Court Nos. 08–00347 and 08–00325, the latter of which has been dismissed by stipulation between the parties.

Dated: April 14, 2011

Mayer Brown LLP (*Matthew J. McConkey* and *Jeffery C. Lowe*) for Plaintiff Amanda Foods (Vietnam) Ltd.

Thompson Hine LLP (*Matthew R. Nicely* and *David S. Christy*) and *Winston & Strawn LLP* (*William H. Barringer*) for Consolidated Plaintiffs Ca Mau Seafood Joint Stock Company; Cadovimex Seafood Import-Export and Processing Joint-Stock Company; Cafatex Fishery Joint Stock Corporation; Can Tho Agricultural and Animal Products Import Export Company; Coastal Fisheries Development Corporation; C.P. Vietnam Livestock Co., Ltd.; Cuulong Seaproducts Company; Danang Seaproducts Import Export Corporation; Investment Commerce Fisheries Corporation; Minh Hai Export Frozen Seafood Processing Joint-Stock Company; Minh Hai Joint-Stock Seafoods Processing Company; Ngoc Sinh Private Enterprise; Nha Trang Fisheries Joint Stock Company; Nha Trang Seaproduct Company; Phu Cuong Seafood Processing & Import-Export Co., Ltd.; Sao Ta Foods Joint Stock Company; Soc Trang Aquatic Products and General Import-Export Company; Thuan Phuoc Seafoods and Trading Corporation; UTXI Aquatic Products Processing Company; Viet Foods Co., Ltd.; Kim Anh Co., Ltd.; and Phuong Nam Co., Ltd.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; Franklin E. White, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*), and, of counsel, *Jonathan M. Zielinski*, Attorney, Office of the Chief Counsel for Import Administration, Department of Commerce, for Defendant United States.

Picard Kentz & Rowe LLP (*Andrew W. Kentz*, *Jordan C. Kahn*, and *Nathaniel M. Rickard*) for Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee.

OPINION

Pogue, Chief Judge:

INTRODUCTION

This consolidated action is again before the court following a second remand of the final results of the second administrative review of the antidumping ("AD") duty order covering frozen warmwater shrimp from the Socialist Republic of Vietnam.[2]

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[2] *See* Final Results of [Second] Redetermination Pursuant to Court Remand (Dec. 2, 2010) ("*Second Remand Results*") (filed with the court on Dec. 9, 2010 [Dkt. No. 94]); *Amanda Foods (Vietnam) Ltd. v. United States*, __ CIT __, 714 F. Supp. 2d 1282, 1295–96 (2010) ("*Amanda II*") (remanding Final Results of Redetermination Pursuant to Court Remand (Mar. 3, 2010) ("*First Remand Results*")); *Amanda Foods (Vietnam) Ltd. v. United States*, __ CIT__, 647 F. Supp. 2d 1368, 1382 (2009) ("*Amanda I*") (remanding *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 73 Fed. Reg. 52,273 (Dep't Commerce Sept. 9, 2008) (final results and final partial rescission of AD duty administrative review) ("*Final Results*")). The period of review ("POR") covers entries made from February 1, 2006 through January 31, 2007. *Final Results*, 73 Fed. Reg. at 52,273.

At issue is the Department of Commerce's assignment, to Plaintiffs,[3] of a dumping rate higher than the average of the zero and *de minimis* rates assigned to the individually investigated respondents in the review.[4]

In its *Second Remand Results*, Commerce changed course and, after corroborating the reasonableness of doing so, assigned to the Plaintiffs the average of the zero and *de minimis* rates received by the individually investigated respondents. This decision comports with the court's remand order in *Amanda II*, relies on a reasonable interpretation of the AD statute, and is supported by substantial evidence. Therefore, as explained more fully below, the *Second Remand Results* are affirmed.

BACKGROUND[5]

A. *Amanda I*

In its original *Final Results*, rather than averaging the two mandatory respondents' zero and *de minimis* margins to calculate dumping margins for cooperative non-individually investigated respondents entitled to a separate rate ("Plaintiffs" or "the separate rate companies"), the Department of Commerce ("Commerce" or the "Department") assigned to Plaintiffs the same rates assigned to them previously in the original investigation leading to the AD order. *Final Results*, 73 Fed. Reg. at 52,275. Those rates, of course, were based on sales made prior to the AD order.[6] To Commerce, these rates were

[3] Plaintiffs are cooperative, non-individually investigated respondents in the administrative review, *see* Section 777A(c) (2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677f-1(c) (2) (permitting Commerce to limit its examination to a subset of the respondents for whom review was requested, where it is not practicable to determine individual dumping margins for all respondents) (all further citation to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition). Plaintiffs have established their entitlement to a rate separate from that of the Vietnam-wide entity. *See Amanda I*, __ CIT at __,647 F. Supp. 2d at 1374 & n.9 (quoting *Decca Hospitality Furnishings, LLC v. United States*, 29 CIT 920, 921, 391 F. Supp.2d 1298, 1300 (2005) ("While Commerce presumes that all companies [operating in a non-market economy, such as Vietnam] are under state-control, a company may rebut this presumption, and therefore qualify for an antidumping duty rate separate from the [country]-wide rate, if it demonstrates *de jure* and *de facto* independence from government control.")).

[4] All individually-investigated respondents' margins were zero or *de minimis*. *Final Results*, 73 Fed. Reg. at 52,274–75.

[5] While some of the court's conclusions are summarized in the Background section of this opinion, familiarity with the court's decisions in *Amanda I* and *Amanda II* is presumed.

[6] Separate rate companies that were individually examined in the first administrative review of this antidumping duty order were assigned the rate they received in the first review. *Id.* However, none of the rates assigned based on rates from the first review are at issue in this case.

appropriate, as the most recent rate that Plaintiffs had received in a prior proceeding, because they were "reflective of the range of commercial behavior demonstrated by exporters of subject merchandise during a very recent period in time." *Id.*

In *Amanda I*, the court found Commerce's decision unsupported by the record, as the factors cited – that thirty-five uncooperative companies received margins based on adverse facts available in the second review, and that Commerce found the circumstances of the second review to be similar to those of the preceding review[7] – are unrelated to the pricing behavior of cooperative separate rate companies during the second POR. *Amanda I*, __ CIT at __, 647 F. Supp. 2d at 1381. The court therefore remanded Commerce's decision, directing the Department to assign to Plaintiffs the weighted average of the mandatory respondents' rates, or to provide justification, based on substantial evidence on the record, for using another rate. *Id.* at 1382.

B. *Amanda II*

In its first remand redetermination, the Department continued to defend the rates assigned to Plaintiffs in the *Final Results* of the second review. *First Remand Results* 13. Specifically, the Department argued that the AD statute articulates a preference against the use of zero or *de minimis* margins when calculating rates for non-individually investigated respondents. *Id.* at 14. In addition to this statutory interpretation, the Department pointed to the presence of noncooperative respondents in the first and second reviews, as well as the calculation of transaction-specific above-*de minimis* dumping margins for at least one mandatory respondent in the second review. To Commerce, these factors constituted evidence that continued dumping under the AD duty order made assigning to Plaintiffs the average of the mandatory respondents' zero and *de minimis* rates inappropriate in this case. *Id.* at 14–18.

In *Amanda II*, the court concluded that the Department's statutory interpretation was unreasonable and therefore not entitled to deference. As the court explained, the statute specifically contemplates, as potentially reasonable, the assignment to non-individually investigated companies of the average of the zero and *de minimis* rates received by individually investigated companies. *Amanda II*, __ CIT at __, 714 F. Supp. 2d at 1291–92. Consequently, Commerce's contrary prohibition on the use of these rates could not be reasonable. Furthermore, as a factual matter, the court concluded that neither the

[7] *See Final Results*, 73 Fed. Reg. at 52,275; Issues & Decision Mem., A-552–802, APR 06–07 (Sept. 2, 2008), Admin. R. Pub. Doc. 231 (adopted in *Final Results*, 73 Fed. Reg. at 52,273), Cmt. 6 at 19.

minimal transaction-specific positive dumping margins of one mandatory respondent nor the presumption of dumping imputed to non-cooperating respondents constituted substantial evidence in support of the rates assigned to the separate rate companies. *Amanda II*, 714 F. Supp. 2d at 1292–96. The Department's first redetermination on remand therefore failed to comply with the court's remand order in *Amanda I*. Accordingly, the court again remanded, instructing the Department to "employ a reasonable method [for calculating Plaintiffs' rates], which may 'includ[e] averaging the estimated weighted average dumping margins determined for the exporter and producers individually investigated.'" *Id.* at 1296 (quoting 19 U.S.C. § 1673d(c)(5)(B)). Moreover, the court instructed the Department to "assign to Plaintiffs dumping margins for the second POR which are reasonable considering the evidence on the record as a whole." *Id.* The court also ordered that Commerce could reopen the evidentiary record to the extent necessary. *Id.* (noting that neither Petitioner nor the Plaintiffs objected to reopening the evidentiary record of this review).

C. *Second Remand Results*

In its second redetermination pursuant to court remand, in order to provide supplementary evidence sufficient to properly support the assignment of a rate to the separate rate companies, the Department reopened the record. *Second Remand Results* 4. Specifically, Commerce requested Plaintiffs to provide quantity and value ("Q&V") data for all POR sales on a shrimp count-size specific basis. *Id.* at 5. The Department then compared the count-size specific data for each Plaintiff to the count-size specific weighted-average normal value of the mandatory respondents in the second administrative review. *Id.*[8]

"After having conducted these analyses, the Department determined that the record, with the additional count-size specific Q&V data, does not show evidence of dumping by the 23 Plaintiffs during this POR." *Id.* Having thus corroborated the reasonableness of assigning to Plaintiffs the average of the mandatory respondents' zero and *de minimis* rates as their dumping rates for this POR, Commerce applied this methodology. *Id.* at 6.

[8] Commerce explains that "[t]he methods employed in making these comparisons included estimated adjustments such as: 1) calculating an average unit value ("AUV") of each count size from the Q&V data; 2) unit of measure conversions; 3) a matching of count sizes between the Q&V data and the weighted-average normal values [ ], and; 4) gross price to net price conversions for each count-size specific AUV to approximate the gross to net price deductions made in a typical dumping margin analysis." *Second Remand Results* 5.

While Plaintiffs "fully support" the *Second Remand Results*, Comments on the [*Second Remand Results*] on Behalf of [Pls.] 2, Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee ("AHSTAC"), the Petitioner, argues that the *Second Remand Results* are contrary to law because Commerce's explanation for its determination of Plaintiffs' rates in this review does not comport with a reasonable reading of the statute.[9]

STANDARD OF REVIEW

"The court will sustain the Department's determination upon remand if it complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law." *Amanda II*, __ CIT at __, 714 F. Supp. 2d at 1288 (quoting *Jinan Yipin Corp. v. United States*, __ CIT __, 637 F. Supp. 2d 1183, 1185 (2009) (citing 19 U.S.C. § 1516a(b)(1)(B)(i))).

DISCUSSION

Commerce's methodology for calculating separate rates for Plaintiffs in the *Second Remand Results* is a reasonable interpretation of the agency's authority under the AD statute, and was reasonably applied and supported by substantial evidence on the record.

As the court has previously observed, the statute does not address the methodology that Commerce must use when, as in this case, assigning dumping margins to companies that were not individually investigated in an administrative review. *See Amanda II*, __ CIT at __, 714 F. Supp. 2d at 1289 (explaining that Commerce generally relies in such situations on 19 U.S.C. § 1673d(c)(5) (the "all others rate" provision), which applies to investigations of sales at less than fair value prior to the imposition of an AD duty order).

In *Amanda II*, the court held that Commerce may not categorically exclude averaging the zero and *de minimis* rates received by all individually investigated respondents from the Department's consideration of reasonable methodologies for determining rates for companies not individually investigated. *Id.* at 1291–92. This is because the

[9] *See* Def.-Intervenor's Reply to Pls.' Comments on [*Second Remand Results*] ("Def.-Int.'s Br.") 6 ("[W]hen Commerce elected to reopen the record, the agency chose not to adjust [normal values] to reflect the differing experiences of Plaintiffs and the mandatory respondents, nor did Commerce gather information necessary to calculate dumping margins in accordance with the statute."); 7 ("A determination to assign *de minimis* margins based on an individualized analysis of the Plaintiffs that is incapable of determining whether these parties had, in fact, dumped subject merchandise during the review period is not reasonable is therefore contrary to law." (citation omitted)); 8 ("Commerce's comparison of Plaintiffs' Q&V data to the mandatory respondents' unadjusted [normal values] does not prove the absence of dumping by Plaintiffs.").

statute explicitly contemplates averaging the zero and *de minimis* rates received by individually investigated respondents as a reasonable methodology for assigning an estimated 'all others rate' in cases where all rates calculated for individually investigated respondents are zero or *de minimis*. *Id.*[10]

In its *Second Remand Results*, Commerce changed course and employed the methodology provided by the statute as a reasonable approach for assigning rates to non-individually investigated companies in proceedings where all rates calculated for mandatory respondents are zero or *de minimis*. *See Second Remand Results* 8–9; *Amanda II*, __ CIT at __, 714 F. Supp. 2d at 1291; 19 U.S.C. § 1673d(c)(5)(B). Accordingly, the methodology employed in the *Second Remand Results* comports with a permissible reading of the AD statute, and is therefore not contrary to law. *Amanda II*, __ CIT at __, 714 F. Supp. 2d at 1291; *see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (an agency acts contrary to law if it acts based on an impermissible construction of its statutory authority).

In addition, Commerce confirmed the reasonableness of using this approach with supplementary evidence. *Second Remand Results* 9 (explaining that Commerce "compared [ ] supplementary Q&V data [obtained from] the 23 Plaintiffs to a weighted-average [normal value] for the mandatory respondents," and concluded that the comparisons "yielded information that provided no evidence that the 23 Plaintiffs were dumping during the POR"). The Department interpreted this supplementary evidence to support the conclusion that averaging the mandatory respondents' zero and *de minimis* rates in this case would result in rates that were reasonably reflective of the non-individually investigated companies' pricing behavior. *See id.* In other words, because the Q&V data indicated that the count-size specific U.S. sales of the separate rate respondents were in line with the mandatory respondents' count-size specific weighted-average normal values, the Department inferred that the separate rate compa-

[10] ("Simply put, when a statutory provision specifically lists 'averaging the [zero and *de minimis*] estimated weighted average dumping margins determined for the exporters and producers individually investigated' as the sole provided example of 'a reasonable method to establish the estimated all-others rate' when all mandatory respondents' margins are zero or *de minimis*, 19 U.S.C. § 1673d(c)(5)(B), it is impermissible to interpret this provision as expressing a preference against the use of such methodology in such situations. This must particularly be the case when the 'authoritative expression by the United States concerning the interpretation and application of . . . this Act,' 19 U.S.C. § 3512(d) (referring to the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316 (1994), reprinted in 1994 U.S.C.A.A.N. 404 ("SAA")), expressly states that the allegedly disfavored methodology is in fact '[t]he expected method in such cases.'" (citing SAA, 1994 U.S.C.A.A.N. at 4201) (footnote omitted)).

nies' pricing behavior was not out of line with the behavior of the mandatory respondents, who were found not to be dumping. Because this inference is not unreasonable,[11] the application of Commerce's chosen methodology for determining Plaintiffs' rates in this case was supported by substantial evidence. *See Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

AHSTAC complains that the Department did not calculate dumping margins for Plaintiffs in accordance with the statutory requirements of Sections 1675(a)(2)(A),[12] 1677a(a),[13] and 1677b.[14] Def.-Int.'s Br. 4–7. But Commerce is not required to calculate dumping margins for Plaintiffs in the same way as it calculates the margins of individually investigated respondents. *See* 19 U.S.C. § 1677f-1(c) (providing a general rule for determining dumping margins under Section 1675(a), as well as an exception, applicable where it is not practicable to make individual weighted average dumping margin determinations for all respondents). Were this not so, then that portion of the statute which allows the Department to limit its examination to a subset of the respondents for whom review was requested, *id.*, would be rendered meaningless - an impermissible result that renders impermissible the statutory construction which leads to it. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks and citation omitted)).

Rather, all that was required of Commerce on remand was to use a reasonable method to calculate Plaintiffs' margins in this review, and to support the chosen margins with a reasonable reading of the

[11] AHSTAC argues that, "[a]s the Department [could] not be certain that the products sold by the separate rate companies were not similar to the products having the highest reported Normal Values within each count size range, for each margin calculation the agency should [have] employ[ed] as Normal Value the highest reported Normal Value within each count size range."Def.-Int.'s Br. 5 (quotation marks and citation omitted). Here, however, where Commerce did not select the Plaintiff separate rate companies for full review, but rather was testing whether it was appropriate to apply the statutorily permitted methodology, it was not unreasonable for Commerce to use count-size specific weighted-average normal values, rather than the highest normal values available. While AHSTAC would have preferred another approach, it does not allege that Commerce erred in its calculations or that the results were aberrational.

[12] 19 U.S.C. § 1675(a)(2)(A) (generally, in determining dumping margins during administrative reviews of AD duty orders, Commerce shall determine the normal value, export price (or constructed export price), and the dumping margin for each entry).

[13] *Id.* at § 1677a(a) (determination of export price).

[14] *Id.* at § 1677b (determination of normal value).

evidence on the record. *Amanda II*, __ CIT at __, 714 F. Supp. 2d at 1296. Commerce has done so. It has applied a methodology specifically contemplated in the AD statute as a reasonable approach under similar circumstances, *id.* at 1291, and has reasonably corroborated the resulting rates with supplemental record evidence that a reasonable mind could accept as sufficient to support its conclusion – that the average of the mandatory respondents' zero and *de minimis* rates yields rates that are not unreasonably reflective of Plaintiffs' actual pricing behavior. *See Second Remand Results* 9.

CONCLUSION

For all of the foregoing reasons, the Department's *Second Remand Results* are AFFIRMED. Judgment will be entered accordingly.

It is **SO ORDERED**.

Dated: April 14, 2011
New York, N.Y.

/s/ Donald C. Pogue
DONALD C. POGUE, CHIEF JUDGE

Slip Op. 11–40

LEGACY CLASSIC FURNITURE, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Judge
Court No. 10–00352

[*Motion to intervene by proposed Defendant-Intervenors is denied.*]

Dated: April 14, 2011

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Mark E. Pardo*; *Max F. Schutzman*; *Andrew T. Schutz*) for Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*; Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Douglas G. Edelschick*); for Defendant.

King & Spalding, LLP (*Joseph W. Dorn*, *Stephen A. Jones*, *J. Michael Taylor*, *Daniel L. Schneiderman*, *Steven R. Keener*) for Proposed Defendant-Intervenors.

OPINION AND ORDER

CARMAN, JUDGE:

Before the Court is the Motion to Intervene as Defendant-Intervenor filed by the American Furniture Manufacturers Committee for Legal Trade and Vaughan-Basset Furniture Company, Inc. (collectively, "AFMC"). (ECF No. 12, "Motion.") The Motion is opposed

by both Plaintiff (ECF No. 22, "Pl.'s Opp.") and Defendant (ECF No. 21, "Def.'s Opp."). For the reasons that follow, the Motion is denied.

I. *Background:*

This action arises out of Plaintiff's challenge to the results of a scope proceeding in which the Department of Commerce determined that the "Heritage Court Bench" imported by Plaintiff fell within the scope of an antidumping duty order covering wooden bedroom furniture from China. (Def.'s Opp. at 2.) AFMC filed its motion to intervene as of right on January 10, 2011 under USCIT R. 24(a)(1) ("the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute").

The scope inquiry was initiated by Commerce via a notice sent to all interested parties, including AFMC. (*See* Motion, Ex. 1.) The notice indicated that, "[o]n the basis of Legacy's request, and our review of the case record, the Department has concluded that it cannot determine—based solely on Legacy's request and the descriptions of the merchandise [received by Commerce]—whether Legacy's Heritage Court Bench is included in the scope of the order." (*Id.*) As a result, Commerce solicited "written arguments and factual information" from interested parties. (*Id.*)

In response, AFMC filed an entry of appearance and administrative protective order ("APO") application. (Motion, Ex. 2.) Commerce thereafter placed AFMC on the APO service list. (Motion, Ex. 3.) No party (including Legacy and AFMC) thereafter submitted any factual information or written argument to Commerce, nor did any party file rebuttal comments. (Motion at 4.)

II. *Party to the Proceeding*

The dispute between the parties is on the question of whether AFMC was a party to the relevant scope proceeding. (*See* Motion at 2–10; Pl.'s Opp. at 4–7; Def.'s Opp. at 39.) According to AFMC, it has an unconditional right to intervene provided by 28 U.S.C. § 2631(j)(1)(B), which states that "in a civil action under section 516A of the Tariff Act of 1930 . . . an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right." (Motion at 1–2.)

No party contests that AFMC is an interested party within the meaning of 28 U.S.C. § 2631(j)(1)(B), and the Court thus presumes that AFMC is, indeed, an interested party. The dispute here centers on whether AFMC was a "party to the proceeding."

The meaning of the phrase "party to the proceeding" is provided by Commerce's regulations: "'Party to the proceeding' means any interested party that actively participates, through written submissions of

factual information or written argument, in a segment of a proceeding." 19 C.F.R. § 351.102(b)(36). The Court of Appeals for the Federal Circuit ("CAFC"), in a non-precedential opinion, has stated that, in order to intervene, the interested party's participation must "reasonably convey the separate status of a party" and "be meaningful enough to put Commerce on notice of a party's concerns." *Laclede Steel Co. v. United States*, 1996 U.S. App. LEXIS 16167, *5 (Fed. Cir. 1996). The necessary level of participation requires more than "the filing of procedural documents alone," such as "a combined entry of appearance and request for access to business proprietary information." *RHI Refractories Liaoning Co., Ltd. v. United States*, Slip Op. 11–12, 35 CIT ___, ___ F. Supp. 2d ___, 2011 WL 335601 at *2 (Jan. 31, 2011). Where an interested party responded to a questionnaire from the Department seeking information to use in selecting respondents, that party was a party to the proceedings. *Union Steel v. United States*, 33 CIT ___, 617 F. Supp. 2d 1373, 1378 (2009). However, a party that submits an APO application and notice of appearance and then engages in private settlement discussions with other parties is not a party to the proceedings, as the settlement conferences did not constitute "participation . . . *before the agency itself*." *Dofasco Inc. v. United States*, 31 CIT 1592, 1598, 519 F. Supp. 2d 1284, 1289 (2007) (emphasis added).

Taken as a whole, the regulation and the cases cited above indicate that, unlike AFMC, a party will be considered a "party to the proceeding" only when that party provides factual information or promotes a legal position before Commerce. AFMC merely filed a notice of appearance and an APO application, but never submitted factual materials or argument. The Court holds that AFMC was therefore not a party to the proceeding for purposes of intervention under 28 U.S.C. § 2631(j)(1)(B).

It is worth briefly addressing two arguments raised by AFMC. First, AFMC argues that its actions "placed itself in a position to submit rebuttal comments," which it never had a chance to submit because "Legacy failed to submit any comments or factual information" and there was "nothing for the AFMC to rebut and no reason to file comments." (Motion at 4.)

This argument is unavailing because it suggests that the determination of whether a party is a party to the proceeding may rely upon that party's subjective intent. But intent is irrelevant without some action that conveys that intent to Commerce, as the CAFC held in *Laclede Steel*, 1996 U.S. App. LEXIS 16167 at *5 (stating that the party must convey to Commerce its "separate status" in a manner sufficient to "put Commerce on notice of a party's concerns.").

Second, AFMC argues that it must be a party to the proceeding simply by virtue of having been placed on the APO service list. In support of this argument, AFMC reasons that "Congress directed that the disclosure of proprietary information is limited to 'interested parties who are *parties to the proceeding*.'" (Motion at 5 (*quoting* 19 U.S.C. § 1677f(c)(1)) (emphasis added by AFMC).) In support of this argument, AFMC also points to a Department of Commerce regulation, 19 C.F.R. § 351.305(b), which AFMC characterizes as "restrict-[ing]" APO access to "representatives of a party to the proceeding." (*Id.*) More significantly, AFMC suggests that 19 C.F.R. § 351.102(b)(36) (which defines a party to the proceeding as one that submits factual information or legal argument) conflicts with 19 U.S.C. § 1677f(c)(1), and that "[i]t is black letter law that an agency's regulation cannot be inconsistent with Congressional direction." (*Id.* at 8.)

The Court rejects the argument that 19 C.F.R. § 351.102(b)(36) conflicts with 19 U.S.C. § 1677f(c)(1) or 19 C.F.R. § 351.305(b). Those provisions do not define "party to the proceeding," and therefore are not in conflict with 19 C.F.R. § 351.102(b)(36), which *does* provide that definition. Title 19, U.S.C. § 1677f(c)(1) says, in relevant part:

> Upon receipt of an application (before or after receipt of the information requested) which describes in general terms the information requested and sets forth the reasons for the request, the administering authority or the Commission shall make all business proprietary information presented to, or obtained by it, during a proceeding (except privileged information, classified information, and specific information of a type for which there is a clear and compelling need to withhold from disclosure) available to interested parties who are parties to the proceeding under a protective order . . . regardless of when the information is submitted during a proceeding.

This statutory language does not define "party to the proceeding." The Court, following Commerce's regulatory definition of "party to the proceeding" as well as the prior decisions of the CAFC and C.I.T. on this question, rejects the notion that mere addition to the list sufficed to confer "party to the proceeding" status on AFMC.

CONCLUSION

In light of the above discussion, and upon consideration of the motion of AFMC to intervene, the responses of Plaintiff and Defendant, and the other papers and proceeding herein, it is hereby

ORDERED that AFMC's motion to intervene is denied.

Dated: April 14, 2011
New York, NY

/*s Gregory W. Carman*/
GREGORY W. CARMAN, JUDGE

Slip Op. 11–41

ARCH CHEMICALS, INC. and HEBEI JIHENG CHEMICALS, CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and CLEARON CORPORATION and OCCIDENTAL CHEMICAL CORPORATION, Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Consol. Court No. 08–00040

CLEARON CORPORATION and OCCIDENTAL CHEMICAL CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and ARCH CHEMICALS, INC. and HEBEI JIHENG CHEMICALS, CO., LTD., Defendant-Intervenors.

[The United States Department of Commerce's Final Results of Redetermination pursuant to remand are sustained in part and remanded.]

Dated: April 15, 2011

Blank Rome LLP (*Peggy A. Clarke*), for plaintiffs/defendant-intervenors Arch Chemicals, Inc. and Hebei Jiheng Chemical Company, Ltd.

Gibson, Dunn, & Crutcher LLP (*Daniel J. Plaine*, *J. Christopher Wood*, and *Andrea F. Farr*) for plaintiffs/defendant-intervenors Clearon Corporation and Occidental Chemical Corporation.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David D'Alessandris*); Office of Chief Counsel for Import Administration, United States Department of Commerce (*Brian Soiset*), of counsel, for defendant United States.

OPINION AND ORDER

Eaton, Judge:

INTRODUCTION

One issue remains in this consolidated action[1] following a second remand. *See Arch Chemicals, Inc. v. United States*, 33 CIT __, Slip Op. 09–71 (July 13, 2009) (not reported in the Federal Supplement) ("*Arch Chemicals I*"); *Arch Chemicals, Inc. v. United States*, Consol. Ct. No. 08–00040, Order (Apr. 22, 2010) (granting additional voluntary remand).

Plaintiffs/defendant-intervenors Clearon Corporation and Occidental Chemical Corporation ("defendant-intervenors"), domestic pro-

[1] This action includes court numbers 08–00040 and 08–00043. *See Arch Chemicals, Inc. v. United States*, Consol.Court No. 08–00040, Order (May 12, 2008) (consolidating cases).

ducers of chlorinated isocyanurates,[2] challenge the grant of a by-product offset to Hebei Jiheng Chemical Company, Ltd. ("Jiheng") for the portion of chlorine gas discharged during chlorine liquefaction. They ask the court to remand the case again to the Department of Commerce (the "Department" or "Commerce"), with instructions to eliminate this portion of the by-product offset from its calculation of normal value. Commerce, together with plaintiffs/defendant-intervenors Arch Chemicals, Inc. and Jiheng ("plaintiffs"), ask the court to sustain the grant of the offset. Jurisdiction is had pursuant to 28 U.S.C. § 1581(c) (2006) and 19 U.S.C. § 1516a(b)(1)(B)(i).

For the reasons that follow, the Final Results of Redetermination Pursuant to Court Order Granting Voluntary Remand (the "Second Remand Results") are sustained in part and remanded.

BACKGROUND

In *Arch Chemicals I*, the court sustained in part and remanded the final results of the first administrative review of the antidumping duty order on chlorinated isocyanurates from the People's Republic of China ("PRC"). *See* Chlorinated Isocyanurates from the PRC, 73 Fed. Reg. 159 (Dep't of Commerce Jan. 2, 2008) (final results of antidumping duty administrative review); Chlorinated Isocyanurates from the PRC, 73 Fed. Reg. 9,091 (Dep't of Commerce Feb. 19, 2008) (amended final results of antidumping duty administrative review). Notably, on remand, the court instructed Commerce to "reexamine each of Jiheng's claimed by-product offsets." *Arch Chemicals I*, 33 CIT at __, Slip Op. 09–71 at 44.

Commerce filed the Final Results of Redetermination Pursuant to Court Order (the "First Remand Results") on December 22, 2009. In the First Remand Results, the Department concluded that Jiheng was eligible for by-product offsets for its production of chlorine, ammonia gas, hydrogen, and recovered sulfuric acid. In their comments on the First Remand Results, both the plaintiffs and defendant-intervenors challenged a number of issues. In response to these comments, the Department asked for a voluntary remand to reexamine the issues raised by the parties. Commerce filed the Second Remand Results on June 21, 2010.

In the Second Remand Results, the Department found that: (1) Jiheng was eligible for by-product offsets for the portions of hydrogen and chlorine gas that were recycled in the production of hydrochloric acid; (2) Jiheng's sulfuric acid by-product surrogate value should be

[2] "Chlorinated isocyanurates are derivatives of cyanuric acid, described as chlorinated s-triazine triones. . . . [They are] available in powder, granular, and tableted forms." *Arch Chemicals I*, 33 CIT at __, Slip Op. 09–71 at 3 n.1 (citation omitted).

revalued to reflect properly the purity level of the sulfuric acid by-product reported by Jiheng; and (3) Jiheng should receive a by-product offset for that portion of chlorine gas discharged during chlorine liquefaction. Second Remand Results at 1–2. Plaintiffs fully support the Second Remand Results and defendant-intervenors challenge only the third determination.

STANDARD OF REVIEW

The court must uphold a final determination by the Department in an antidumping proceeding unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence does not exist when "Commerce's conclusion is not based on a reasonable inference drawn from the evidence in the record." *Rhodia, Inc. v. United States*, 28 CIT 1278, 1283, 185 F. Supp. 2d 1343, 1349 (2001).

DISCUSSION

I. By-Product Offsets

> The antidumping statute "does not mention the treatment of by-products," and Commerce has not filled the statutory gap with a regulation. *See Guangdong Chems. Imp. & Exp. Corp. v. United States*, 30 CIT 1412, 1422, 460 F. Supp. 2d 1365, 1373 (2006). Generally, however, the Department's practice has been to grant an offset to normal value, *for sales of by-products generated during the production of subject merchandise*, if the respondent can demonstrate that the by-product is either resold or has commercial value and re-enters the respondent's production process. *See Ass'n of Am. School Paper Suppliers v. United States*, 32 CIT __, __, Slip Op. 08–122 at 17 (Nov. 17, 2008) (not reported in the Federal Supplement). Thus, the burden rests with the respondents (here, the plaintiffs) to substantiate by-product offsets by providing the Department with sufficient information to support their claims. *See id.* at __, Slip Op. 08–122 at 18–23.

Arch Chemicals I, Slip Op. 09–71 at 6 (footnote omitted) (emphasis added).

II. Jiheng's By-Product Offset for Impure Chlorine Gas Discharged During Liquefaction

Defendant-intervenors argue that Commerce's decision to grant a by-product offset for impure chlorine gas discharged at the chlorine liquefaction stage of Jiheng's manufacturing process is not supported

by substantial evidence because "it is based on a factually incorrect characterization of the stage of production at which the by-product is produced." Comments of Clearon Corporation and Occidental Chemical Corporation Regarding Final Results of Second Redetermination Pursuant to Court Remand ("Def.-Ints.' Comm.") 2. Specifically, defendant-intervenors contend that because liquefaction is not part of the production of subject merchandise, but rather part of the production of a separate product, i.e., liquid chlorine, "Commerce should not have used the value of the by-product resulting from this part of the manufacturing process to offset the cost of producing subject merchandise." Def.-Ints.' Comm. 2.

As defendant-intervenors describe the process, "Jiheng uses purified chlorine gas to produce two distinct main products: chlorinated isocyanurates (the subject merchandise) and liquid chlorine sold in bottles." Def.-Ints.' Comm. 2. In the course of producing the two products, Jiheng generates impure chlorine gas.[3] Def.-Ints.' Comm. 3. According to defendant-intervenors, "there is a clear separation between Jiheng's production of subject merchandise and its production of liquid chlorine." Def.-Ints.' Comm. 4. They insist that, although both processes use purified chlorine gas as an input, "production of the two products is entirely separate following the purification of chlorine gas." Def.-Ints.' Comm. 4.

Based on their characterization of the production process, defendant-intervenors contend that Commerce should not have granted Jiheng a by-product offset for the impure chlorine gas discharged at liquefaction because "[i]t is axiomatic that a by-product must be an unavoidable outcome of the respondent's production of subject merchandise in order to receive a by-product credit." Def.-Ints.' Comm. 6. As further stated by defendant-intervenors, "[l]iquefaction relates solely to the production of liquid chlorine for sale, and neither the purified chlorine gas used for liquefaction nor the liquid chlorine itself is ever used in the production of subject merchandise." Def.-Ints.' Comm. 6.

Commerce, meanwhile, asks the court to sustain the Second Remand Results, asserting that the Department properly granted an offset for impure chlorine gas discharged during liquefaction because it was generated during the production of the subject merchandise. Defendant's Reply to Clearon Corporation's Comments on Second Remand Results ("Def.'s Rep.") 5. Most significantly, Commerce takes issue with defendant-intervenors' characterization of the production

[3] Impure chlorine gas is produced during several stages of the manufacturing process, but defendant-intervenors only object to the by-product offset for the impure chlorine gas discharged at the liquefaction stage.

process. According to the Department, chlorine gas is first generated as a result of electrolysis, which occurs at an early point in the production process. For Commerce, the impure chlorine gas that is later discharged during liquefaction was nothing more or less than the chlorine gas that had been subject to further processing. According to the Department,

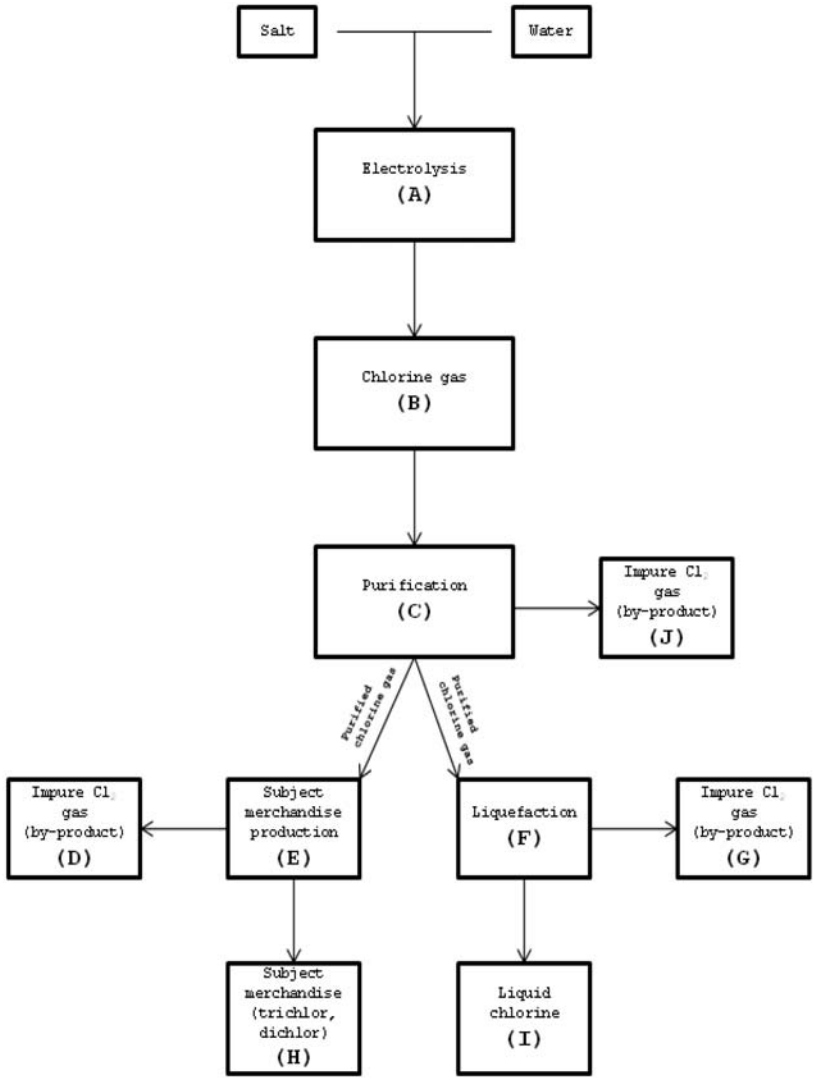
> Commerce determined that though the liquefaction of chlorine gas was not related to the production of subject merchandise, the impure chlorine gas discharged at this stage was created during electrolysis, not during liquefaction, because liquefaction was merely a further processing of chlorine gas created during electrolysis. Because the costs of the inputs that undergo electrolysis are captured in the factors of production for subject merchandise, the costs of producing the discharged impure chlorine gas are attributable to subject merchandise production.

Def.'s Rep. 4 (citations omitted).

III. Analysis

The remaining question in this case is whether the impure chlorine gas that resulted in the disputed credit is discharged during the production of subject merchandise. As this Court has held, under the Department's methodology, the key to determining if a substance is eligible to be treated as a by-product is "whether the respondent's production process for subject merchandise actually generated the amount of [by-product] claimed as a by-product offset." *Mid Continent Nail Corp. v. United States*, 34 CIT __, __, Slip Op. 10–47 at 19 (May 4, 2010) (not reported in the Federal Supplement) (citation omitted). Here, the court agrees with defendant-intervenors that this by-product does not result from the production of subject merchandise. That is, because the impure chlorine gas, that is the subject of the disputed credit, was discharged at a production stage that resulted solely in the production of non-subject merchandise, the gas is ineligible for the credit Commerce granted.

That this is the case is most clearly illustrated by referencing the following, greatly simplified, schematic:



As can be seen, chlorine gas is produced by electrolysis early in the process (A, B). Thereafter, the chlorine gas is purified (C), but then the process branches into two parts. One branch results in subject merchandise (H), and impure chlorine gas (D) is discharged. No party disputes that plaintiff should receive an offset for the impure chlorine gas discharged at (D).

The other branch of Jiheng's process, however, results in the production of liquid chlorine (I), which is non-subject merchandise that Jiheng offers for sale. During the liquefaction process (F) that results in this liquid chlorine, impure chlorine gas (G) is also discharged as a by-product. The Department insists that because the impure chlorine gas generated at (G) is derived from the chlorine gas (B) that is produced during purification (C), an offset is warranted. It is apparent, however, that substantial evidence does not support this result. Jiheng produces two products,[4] not one, from the purified chlorine gas, and the impure chlorine gas that is the subject of the credit is derived from the production of the second product, liquid chlorine.

In reaching this conclusion, the court is mindful that all parties agree that were plaintiff to manufacture only the volume of subject merchandise that was the object of this review, it would have consumed less purified chlorine gas than was actually used during the dual processes that resulted in the subject merchandise and in the liquid chlorine. Tr. of Civ. Cause for Or. Arg. at 8, 21, 29. In other words, the chlorine gas that is diverted, after purification, from production of subject merchandise to production of bottled chlorine gas, is in excess of the amount required to make subject merchandise. While the amount of purified chlorine gas used in the production of the liquid chlorine is apparently not quantified on the record, the fact remains that more purified chlorine gas is consumed in the production of both subject and non-subject merchandise than would be needed to produce subject merchandise alone. Thus, the impure chlorine gas that results from production of liquid chlorine is also in excess of what would have been discharged had Jiheng only produced the subject merchandise. Thus, the impure chlorine gas that resulted was not a by-product discharged during the production of subject merchandise. Rather, it was a by-product of the production of liquid chlorine.

Commerce's arguments to the contrary are not persuasive. The Department's primary argument is that, because the cost of the inputs used to make the chlorine gas from which all of the impure chlorine gas was later discharged were all incurred prior to liquefaction, the cost of making the impure chlorine gas was accounted for prior to liquefaction—and thus should provide an offset to the subject merchandise. This argument, however, is undermined by its treatment of the impure chlorine gas discharged at the purification stage (J). The gas discharged at that point is not the subject of an offset to the subject merchandise alone, but is allocated between subject and

[4] Jiheng, in fact, produces more than two products.

non-subject merchandise. *See* Def.-Ints.' Comm. 6 ("Because purification is common to the production of both subject merchandise and liquefied chlorine, Commerce correctly allocated only a portion of this by-product to subject merchandise.").[5] Thus, it is difficult to see why the allocation made at (J) would not have been continued by excluding the impure chlorine gas discharged from the manufacture of the non-subject merchandise from the by-product offset.

In addition, because Jiheng's process consumes more purified chlorine gas than would be needed to produce the subject merchandise alone, the Department's argument that the costs associated with the eventual discharge of the impure chlorine gas were incurred early in the process lose their force. As noted, it is undisputed that the sole reason for the liquefaction process is to produce the liquid chlorine. That being the case, it is apparent that the discharge of the impure chlorine gas, for which the disputed offset was granted, was unrelated to the production of subject merchandise. Thus, it appears that those costs were incurred to produce two products, only one of which is subject merchandise. Therefore, it is immaterial that the costs to produce all of the chlorine gas were incurred at a point in Jiheng's process before it branched into the production of two products. What matters is that the by-product was not generated in the production of subject merchandise.

The court finds Commerce's grant of a by-product offset for impure chlorine gas discharged as a result of liquefaction of purified chlorine gas is not supported by substantial evidence. Commerce is directed on remand to eliminate that portion of the chlorine gas by-product offset relating to impure gas discharged during liquefaction (G) and recalculate the antidumping margin for Jiheng on that basis.

CONCLUSION

The Department's two uncontested determinations, regarding the eligibility for by-product offsets for the portions of hydrogen and chlorine gas that were recycled in the production of hydrochloric acid and the revaluation of Jiheng's sulfuric acid by-product surrogate

[5] Commerce and plaintiffs argue that defendant-intervenors failed to exhaust their administrative remedies regarding an argument raised about the allocation at (G) because defendant-intervenors only raised this argument about inconsistent allocation methodologies in their comments on the draft of the Second Remand Results, but not in any of the earlier administrative proceedings. However, the cases cited in support of their failure to exhaust claim, *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007) and *Bridgestone Americas, Inc. v. United States*, 34 CIT __, 710 F. Supp. 2d 1359 (2010), involved situations where the parties invoked arguments in court they simply *never* raised at the administrative level, as opposed to defendant-intervenors only raising them to the agency in a later remand, but not an earlier one. The court is satisfied that defendant-intervenors properly exhausted their administrative remedies by raising this issue first at the agency level.

value, are sustained. For the reasons stated, Commerce's Second Remand Results are remanded as to the by-product offset relating to impure chlorine gas discharged during liquefaction. Remand results are due on or before July 15, 2011. Comments to the remand results are due on or before August 15, 2011. Replies to such comments are due on or before August 29, 2011.

Dated: April 15, 2011
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 11–42

FLINT HILLS RESOURCES, LP, Formerly Known as KOCH PETROLEUM GROUP, LP Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Chief Judge
Court No. 06–00065

[Plaintiff's motion to assign action to three-judge panel denied.]

Dated: April 19, 2011

Phelan & Mitri (*Michael F. Mitri*), *Galvin & Mlawski* (*John J. Galvin*) for the Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Todd M. Hughes*, Deputy Director; (*Tara K. Hogan*), Attorney-in-Charge, Commercial Litigation Branch, Civil Division, United States Department of Justice for the Defendant.

OPINION AND ORDER

Pogue, Chief Judge:

INTRODUCTION

This action puts at issue the interpretation and retroactivity of an amended statute regarding a drawback claim for taxes paid on the importation of Plaintiff's goods.[1] Currently, the action is assigned to a single judge, but Plaintiff now moves for re-assignment to a three-judge panel.

DISCUSSION

A case may be assigned to a three-judge panel if it "(1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs

[1] Drawback is the refund of import duties where the importer re-exports the imported products. *See* 19 U.S.C. § 1313 (2006).

laws." 28 U.S.C. § 255(a); *see also* USCIT R. 77(e). This authority, however, "for reasons of judicial economy and efficiency, . . . should be used sparingly," *Nat'l Corn Growers Ass'n v. Baker*, 10 CIT 517, 522, 643 F. Supp. 626, 631 (1986), and specifically where the benefits of using such a panel outweigh the disadvantages of doing so. *Sony Elecs. Inc. v. United States*, 25 CIT 336, 143 F. Supp. 2d 970, 973–74 (2001).

Here, two considerations weigh against such an assignment. First, the case has been assigned to its present judge for almost three years. In general, "motions for reassignment to a three-judge panel, made after the case has been assigned to a single judge, will be viewed with disfavor." *Nat'l Corn Growers Ass'n*, 643 F. Supp. at 631. Here, the judge currently assigned to the case is familiar with the litigation not only from her three-year assignment but because she is also presiding over a related test case, *Shell Oil Co. v. United States*, Court. No. 08–00109.

In addition, Plaintiff's reason for requesting assignment to a three-judge panel is that Plaintiff disagrees with the decision of the Federal Circuit in *Aectra Refining and Marketing, Inc. v. United State*, 533 F. Supp. 2d 1318 (2007), *aff'd*. 565 F. 3d 1364 (Fed. Cir. 2009), *reh'g. and reh'g. en banc den'd.* (Fed Cir. 2009). But a three-judge panel is not intended to serve as an appellate body, *see*, *e.g.*, *Seattle Marine Fishing Supply Co. v. United States*, 13 CIT 227, 709 F. Supp. 226 (1989), and certainly not to review the decision of a higher court.

Therefore, upon consideration of Plaintiff's motion for assignment to a three-judge panel, Plaintiff's motion is hereby DENIED.

Dated: April 19, 2011
New York, N.Y.

/s/ Donald C. Pogue
DONALD C. POGUE, CHIEF JUDGE

Slip Op. 11–43

NSK CORPORATION, et al., Plaintiffs, and FAG ITALIA S.P.A., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 06–00334

[The court sustains the fourth remand determination of the U.S. International Trade Commission.]

Dated: April 20, 2011

Crowell & Moring LLP (*Matthew P. Jaffe*, *Robert A. Lipstein*, and *Carrie F. Fletcher*), for Plaintiffs NSK Corporation, NSK Ltd., and NSK Europe Ltd.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Max F. Schutzman* and *Andrew T. Schutz*), for Plaintiff-Intervenors FAG Italia S.p.A., Schaeffler Group USA, Inc., Schaeffler KG, The Barden Corporation (U.K.) Ltd., and The Barden Corporation.

Steptoe & Johnson (*Herbert C. Shelley* and *Alice A. Kipel*), for Plaintiff-Intervenors SKF Aeroengine Bearings UK and SKF USA, Inc.

United States International Trade Commission, *James M. Lyons* (General Counsel), *Neal J. Reynolds* (Assistant General Counsel for Litigation), and *David A.J. Goldfine*, Office of the General Counsel, for Defendant United States.

Stewart and Stewart (*Terence P. Stewart*, *Eric P. Salonen, Elizabeth A. Argenti*, and *Philip A. Butler*), for Defendant-Intervenor The Timken Company.

OPINION

BARZILAY, Judge:

I. Introduction

With the lion's share of issues resolved in five earlier opinions, the U.S. International Trade Commission's ("the Commission") second sunset review of antidumping duty orders covering ball bearings from France, Germany, Italy, and Japan now pays the court a final visit before it assuredly heads to the Federal Circuit.[1] *Views of the Commission on Remand*, Inv. Nos. 731-TA-394-A, 731-TA-399-A (Mar. 1, 2011) ("*Fourth Remand Determination*"). In the latest remand results, the agency found that subject imports would likely not have a significant adverse impact or cause injury to the domestic industry in

[1] The court presumes familiarity with the procedural history of the case. *See NSK Corp. v. United States*, Slip Op. 10–133, 2010 WL 5017145 (CIT Dec. 9, 2010) ("*NSK V*") (affirming in part and reminding in part third remand determination); *NSK Corp. v. United States*, 34 CIT ___, 712 F. Supp. 2d 1356 (2010) ("*NSK IV*") (affirming in part and remanding in part second remand determination); *NSK Corp. v. United States*, 33 CIT ___, 637 F. Supp. 2d 1311 (2009) ("*NSK III*") (remanding first remand determination for agency's failure to provide substantial evidence and failure to comply with court's remand instructions); *NSK Corp. v. United States*, 32 CIT ___, 593 F. Supp. 2d 1355 (2008) ("*NSK II*") (denying motion for rehearing); *NSK Corp. v. United States*, 32 CIT ___, 577 F. Supp. 2d 1322 (2008) ("*NSK I*") (affirming in part and remanding in part second sunset review).

the absence of the antidumping duty orders.[2] *Fourth Remand Determination* at 15–17. Although the Commission continues to mischaracterize the court's remand instructions and to mistakenly insist that the court compelled this result, *see infra* p. 4 and note 4, the court nevertheless sustains the agency's findings for the reasons below.

II. Standard of Review

The Court will hold as unlawful any Commission determination "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

III. Discussion

In the final two pages of the *Fourth Remand Determination*, after providing a thorough procedural history and stating its intention not to reopen the record[3], the Commission reasoned that subject imports from Japan "are not likely to have a significant [adverse] impact on the industry upon revocation." *Fourth Remand Determination* at 16. The agency in turn found that subject imports from Japan likely will not "lead to continuation or recurrence of material injury to a domes-

[2] In *NSK V*, the court did not believe "that the existing record, taken as a whole" could support an affirmative determination on these remaining questions and, consequently, invited the Commission to reopen the record at its discretion. 2010 WL 5017145 at *6. Although the agency reopened the record after the first remand proceeding to collect additional data on non-subject imports, *Fourth Remand Determination* at 14 n.59, the agency declined to do so this time, stating that the existing record supported its affirmative findings on these issues. *Id.* at 1516; *see* Status Report and J. Scheduling Order at 2, *NSK Corp. v. United States*, No. 06–00334 (CIT filed Dec. 20, 2010). The court interprets this decision as a finding by the Commission that reopening the record would cause no significant change to the relevant body of evidence.

[3] The Commission contends that the court, on several previously resolved issues, did not specifically identify deficiencies with the record or suggest data that the agency might seek to collect on remand. *See, e.g.*, *Fourth Remand Determination* at 9 n.39, 14. However, the court's previous opinions belies the Commission's claim. *See, e.g.*, *NSK V*, 2010 WL 5017145, at *6 ("[T]he Commission must account for the tripartite nature of the United States ball bearing market and decide whether the interplay and competition between subject imports, non-subject imports, and domestic ball bearings would prevent subject imports from achieving the requisite level of impact."); *NSK IV*, 34 CIT at ___, 712 F. Supp. 2d at 1368 ("[T]he Commission must demonstrate that some incentive likely would draw a discernible amount of the subject United Kingdom goods specifically to the United States market in the absence of the order."). Moreover, the court did not merely "disagree[]" with the agency's previous determinations, as the Commission suggests. *Fourth Remand Determination* at 14. Rather, the court asked the agency to point to particular data in the record and rationally connect it to the underlying determinations, an instruction within the purview of permissible judicial review. *See Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

tic industry" absent the orders. *Id.* at 17. As a result, the Commission could not offer substantial evidence to warrant the continued application of antidumping duties on imports of the subject merchandise from Japan.[4]

The remaining parties supplied numerous comments on the Commission's *Fourth Remand Determination*. Plaintiffs NSK Corporation, NSK Ltd., and NSK Europe Ltd. ("NSK") urge the court to sustain the agency finding and to order Defendant to revoke the antidumping duty orders on ball bearings from Japan and the United Kingdom, and terminate the collection of antidumping duty cash deposits on those imports. NSK Comments 2–11. Plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A. (together, "JTEKT") echo these sentiments. JTEKT Comments 5–10. Another group of comments, filed by Plaintiff-Intervenors FAG Italia S.p.A., Schaeffler Group USA, Inc., Schaeffler KG, The Barden Corporation (U.K.) Ltd., and the Barden Corporation ("Schaeffler") and Plaintiff-Intervenors SKF USA Inc. and SKF Aeorengine Bearings UK ("SKF"), advance the following claims: ambiguous language in NSK's complaints unambiguously demonstrates that the antidumping duty orders on ball bearings from France, Germany, and Italy remain subject to review in this proceeding; the Commission must reconsider its injury determinations for those orders; and that, by declining to de-cumulate Japanese imports from other ball bearings, the agency made a single injury determination applicable to the remaining antidumping duty orders on imports from France, Germany, and Italy.[5] Schaeffler Comments 2–11; SKF Comments 4–11. Finally, Defendant-Intervenor The Timken Company ("Timken") points to a bevy of record evidence on

[4] The Commission makes clear that it would not have made these findings but for the court's conclusion in *NSK V* that the record taken as a whole "cannot establish that the cumulated subject imports from France, Germany, Italy, and Japan would have a significant adverse impact on the domestic bearings industry in the event of revocation of the orders." *Fourth Remand Determination* at 17; *accord NSK V*, 2010 WL 5017145, at *6–7. The agency alleges that the court "compelled" it to reach these conclusions and that it had "no alternative." *Fourth Remand Determination* at 2, 17. However, the court did not direct the agency to reach such a conclusion and, in fact, highlighted the Commission's inherent discretion to reopen the record and reach a different result. *NSK V*, 2010 WL 5017145, at *6–7.

[5] With these arguments, Schaeffler and SKF once again attempt to inject legal issues related to ball bearings from France, Germany, and Italy into the proceeding. The court previously declined to enlarge the litigation to cover these questions, *NSK Corp. v. United States*, 32 CIT ___, ___, 547 F. Supp. 2d 1312, 1320 (2008) (noting that case limited to imports from Japan and United Kingdom), and because the deadline to file a request to revisit these issues expired long ago, USCIT R. 59(b), the court will not rehear these claims at this late stage of the proceeding. Finally, despite assertions to the contrary, the court previously has affirmed the Commission's practice of treating an injury determination based on cumulated imports as an independent, country-specific determination. *See, e.g.*, *Gerald Metals, Inc. v. United States*, 22 CIT 1009, 1027, 27 F. Supp. 2d 1351, 1366 (1998).

non-subject imports and effectively asks the court impermissibly to step into the shoes of the Commission and re-weigh the facts on its own accord, cure certain substantial evidence defects by judicial fiat, and remand the proceeding anew so that the agency may enter an affirmative injury determination. *Compare* Timken Comments 4–28, *with Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379, 1381 (Fed. Cir. 2003) ("[O]nly the Commission may find the facts and determine causation and ultimately material injury.").

The court sustains the Commission's determination. That the court may have limited the Commission's options on remand is of no moment; "[e]ven though a reviewing court's decision that substantial evidence does not support a particular finding may have the practical effect of dictating a particular outcome, that is not the same as the court's making its own factual finding." *Nucor Corp. v. United States*, 371 F. App'x 83, 90 (Fed. Cir. 2010) (unpublished); *accord Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006); *Atl. Sugar, Ltd.*, 744 F.2d at 1561. Because the record presently constituted does not support an affirmative finding of material injury or causation and the Commission has declined to reopen the record, the court upholds the agency's negative conclusions with respect to imports of the subject merchandise from Japan.

Finally, the court declines to grant NSK and JTEKT's request for relief at this time. To succeed in their claim, NSK and JTEKT would need to prove the following four factors: "(1) the threat of immediate irreparable harm; (2) the likelihood of success on the merits; (3) [that] the public interest would be better served by the relief requested; and (4) [that] the balance of hardship on all the parties favors plaintiffs." *GPX Int'l Tire Corp. v. United States*, 32 CIT ___, ___, 587 F. Supp. 2d 1278, 1284 (2008) (citation omitted). NSK and JTEKT do not discuss, let alone satisfy, these conditions in their comments. *See generally* NSK Comments; JTEKT Comments. Moreover, Defendant has made clear that it intends to appeal the court's decision and, given the unique facts and complex legal issues in this case, the court likely would grant a request by the Government to stay pending appeal the portion of the requested judgment that would require the revocation of the orders and the cessation of the collection of duties.

IV. Conclusion

For the foregoing reasons, the court hereby

ORDERS that the Commission's negative determinations on likely significant adverse impact and causation are **SUSTAINED**; and further

ORDERS that the agency's administrative conclusions in the *Fourth Remand Determination* are **SUSTAINED**.

The court shall enter judgment accordingly.

Dated: April 20, 2011
New York, New York

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, JUDGE