(Slip Op. 02–111)

UNITED STATES, PLAINTIFF *v.* T.J. MANALO, INC., DEFENDANT

Court No. 00–07–00372

[Plaintiff's motion for summary judgment denied.]

(Decided September 11, 2002)

Robert D. McCallum, Jr., Assistant Attorney General; *Barbara S. Williams,* Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Vickie Shaw,* Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, Of Counsel; for Plaintiff.

OPINION

RIDGWAY, *Judge:* In this action, filed on behalf of the U.S. Customs Service ("Customs"), the Government seeks to recover unpaid customs duties, fees, and accrued pre-liquidation interest totaling $772,995.55 (as well as pre- and post-judgment interest) allegedly owed by Defendant T.J. Manalo, Inc. ("TJM"). The Government's pending motion for summary judgment asserts that Customs' liquidation of an entry and assessment of duties are final and conclusive where—as here—the importer failed to file an action in this Court challenging Customs' denial of its protest.

Jurisdiction lies under 28 U.S.C. §§ 1582(3) (1988).[1] For the reasons set forth below, the Government's motion is denied.

I. BACKGROUND

In the four-year period between February 15, 1990 and February 14, 1994, TJM made at least 147 entries of merchandise through the port of Cincinnati, Ohio—46 entries in 1990–91; 31 entries in 1991–92; 20 en-

[1] While all statutory citations in this opinion are to the 1988 version of the U.S. Code, the pertinent text of the cited provisions was the same at all times relevant herein.

tries in 1992–93; and 50 entries in 1993–94.[2] Complaint ¶¶ 8, 15, 22, 29 and Exhibits referenced therein; Answer ¶¶ 8, 15, 22, 29. Each of those entries was covered by a continuous customs bond issued to TJM by Intercargo Insurance Company ("Intercargo"),[3] with a maximum bond limit of $100,000.00. Under the terms of that bond, TJM and Intercargo are jointly and severally liable for duties, taxes and charges payable on entries made under it. Complaint ¶¶ 5–6, Exhibit A; Answer ¶¶ 5–6.

Customs timely liquidated each of the 147 entries, assessing additional duties and fees based on an increase in the appraised value of the merchandise. Specifically, Customs determined that the importer and the foreign manufacturer were related, which affected the transaction value, which was the basis on which the merchandise had been appraised.[4] *See generally* HQ 547591 (Apr. 21, 2000); Plaintiff's Statement of Undisputed Facts ¶ 5; Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Plaintiff's Brief") at 1–2. Customs forwarded bills to TJM and Intercargo for the balance due, but the sum went unpaid. *See generally* Complaint ¶¶ 11–13, 18–20, 25–27, 32–34; Answer ¶¶ 13, 20, 27, 34; Plaintiff's Statement of Undisputed Facts ¶¶ 7–8. TJM protested the liquidations, but they were upheld by Customs in a ruling letter; and, on June 19, 2000, the lead protest was denied. *See* HQ 547591 (Apr. 21, 2000); Plaintiff's Statement of Undisputed Facts ¶ 5; Counsel for Defendant's Brief in Support of Motion for Leave to Withdraw as Counsel (Apr. 12, 2002) ("Motion for Leave to Withdraw") at 2.

For some reason, TJM elected not to file an action in this Court challenging Customs' denial of its protests; and, to date, it has paid nothing on the balance due. *See* Plaintiff's Statement of Undisputed Facts ¶ 8; Motion for Leave to Withdraw at 2. In contrast, Intercargo deposited duties in the amount of $100,000.00 (the limit under its bond), and filed a separate action contesting Customs' liquidation of TJM's entries.[5] *See* Complaint, *XL Specialty Ins. Co. v. United States,* Court No. 00–12–00544 (CIT filed Dec. 4, 2000). TJM has not sought to become a plaintiff, or otherwise participate, in that case.

II. STANDARD OF REVIEW

Summary judgment is a favored procedural device "to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986) (*quoting* Fed. R. Civ. P. 1). Under USCIT

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[2] Analysis of the records in a related case, *XL Specialty Ins. Co. v. United States,* Court No. 00–12–00544 (CIT filed Dec. 4, 2000), suggests that several entries made during the four-year period may have been omitted (probably inadvertently) from the Summons and Complaint in this action. *See* Letter from Court to Counsel for Plaintiff (Sept. 10, 2002), with Enclosure. *See also* Summons, *XL Specialty Ins. Co. v. United States,* Court No. 00–12–00558 (CIT filed Dec. 20, 2000) (involving seven entries at issue in the case at bar).

Although it is irrelevant to the motion at bar, it appears that the merchandise at issue was men's sweaters, which TJM generally imported from Hong Kong and sold to retailers such as J.C. Penney, Lazarus, and Bloomingdale's. *See* HQ 547591 (Apr. 21, 2000).

[3] Intercargo was formerly known as International Cargo and Surety Company, and is now known as XL Specialty Insurance Company.

[4] "Transaction value" is defined as "the price actually paid or payable for merchandise when sold for exportation to the United States," with certain adjustments. 19 U.S.C. § 1401a(b)(1) (1988).

[5] Intercargo was originally named as a co-defendant in this action. After Intercargo paid all sums owed by it under the bond, the Government filed a consent motion to dismiss Intercargo from the case. That motion was granted. *See* Order (dated Apr. 4, 2001).

Rule 56(c), summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and the moving party "is entitled to * * * judgment as a matter of law." *See Celotex Corp.,* 477 U.S. at 322–23; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48 (1986). Moreover, where a motion for summary judgment is filed and properly supported, an adverse party "may not rest upon the mere allegations or denials" of the pleadings to defeat it. USCIT Rule 56(h). To the contrary, the opposing party must set forth specific facts "by affidavits or as otherwise provided in [Rule 56]" showing that there is a genuine issue for trial. *Id*. Further, all facts set forth in the movant's Statement of Material Facts are deemed admitted, unless specifically controverted by an opposing Statement of Material Facts filed by the adverse party pursuant to USCIT Rule 56(h).

However, summary judgment cannot be awarded by default. Thus, a nonmovant's failure to respond to a summary judgment motion in conformity with the requirements of Rule 56 does not automatically entitle the moving party to judgment. The rule provides that summary judgment shall be entered only "if appropriate." USCIT R. 56(e). Accordingly, a court has an independent obligation to determine, on the basis of the parties' submissions, whether a movant is entitled to judgment as a matter of law.[6] *See*, *e.g.*, *Precision Specialty Metals, Inc. v. United States,* 24 CIT ____, ____, 116 F. Supp. 2d 1350, 1359–60 (2000), *appeal docketed*, No. 02–1233 (Fed. Cir. Feb. 27, 2002), *modified*, 25 CIT ____, 182 F. Supp. 2d 1314 (2001). In short, summary judgment may be inappropriate even where the motion is completely unopposed. *Precision Specialty Metals,* 24 CIT at ____, 116 F. Supp. 2d at 1359–60.

This is just such a case. The Government's motion here is unopposed. Indeed, TJM is no longer represented in the action, and appears to be in default.[7] And, as set forth in greater detail below, there is no dispute as to any material fact. Nevertheless—based on the Government's moving papers, as well as the Court's independent review of the file in this mat-

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[6] Indeed, "if the party who fails to respond is acting pro se, some courts undertake a 'duty' to examine other documents filed in the case to determine whether a *question of fact* remains," rather than simply granting summary judgment based on the face of the motion. 11 *Moore's Federal Practice* § 56.10[3][b] (3d ed. 1997) (emphasis added) (*citing Filipos v. Sidovar,* 77 F. Supp. 2d 636, 637–38 (E.D. Pa. 1999) (when pro se plaintiff failed to respond to summary judgment motion, court *sua sponte* scrutinized complaint to ascertain whether issue of material fact existed, and independently sought to identify potential legal basis for claim to determine whether defendant entitled to judgment as a matter of law, noting court's "duty to construe pro se complaints liberally")).

Some courts have read Rule 56(c) to require the trial court to make an independent search of the record for evidence of a genuine dispute of material fact *even when the nonmovant is not pro se. See* 11 *Moore's Federal Practice* § 56.10[3][b]; William W. Schwarzer, et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure* (Federal Judicial Center 1991) ("FJC Monograph") 49 n.219, and cases cited there. But, as a matter of both practice and policy, requiring trial courts to scour "the depositions, interrogatory answers and, and other papers" in case files "would often impose an unmanageable burden." *Id*.

[7] TJM was initially represented by counsel in this action. However, TJM's counsel later sought leave to withdraw, citing TJM's failure to communicate with counsel in the preparation of its defense and its failure pay its legal fees. *See* Motion For Leave to Withdraw. That motion was granted, and TJM was accorded additional time to retain substitute counsel and to file a response to the Government's motion for summary judgment. All papers since counsel's withdrawal have been served on TJM at all last known addresses, and through deposit with the Clerk of the Court addressed to TJM's attention, in accordance with USCIT Rule 5(b). Still, there has been no communication whatsoever from TJM.

Under the circumstances, the Court initially explored the Government's interest in seeking a default judgment under USCIT Rule 55. However, as the Government correctly noted, a default judgment would be inappropriate in light of the relatively advanced stage of this litigation. *See* Letter from Counsel for Defendant (Aug. 26, 2002) at 3–4 (*quoting* 10 *Moore's Federal Practice* § 55.10[2][b] (default intended for use "at the initial stages of a lawsuit")).

ter and in the related action, *XL Specialty Ins. Co.*—the conclusion is inescapable that, under the specific circumstances presented here, the matter is not ripe for summary judgment.

III. ANALYSIS

A. Existence of A Genuine Dispute of Material Fact

Pursuant to USCIT Rule 56(h), all facts set forth in the Government's Statement of Undisputed Facts are deemed admitted unless properly controverted by the opposing party. Here, the Government properly argues that—because TJM failed to file any opposition to the Government's motion for summary judgment—the Government's statement of material facts is deemed admitted. *See, e.g., United States v. Continental Seafoods, Inc.,* 11 CIT 768, 773–74, 672 F. Supp. 1481, 1486–87 (1987).

An independent review of the file in this matter confirms that there is no genuine dispute as to any material fact. *See generally Filipos,* 77 F. Supp. 2d at 637–38 (where pro se plaintiff failed to respond to motion for summary judgment, court scrutinized complaint in search for dispute of material fact). Under the Government's theory of the case, the Government must establish, in essence, (1) that TJM entered the merchandise at issue; (2) that Customs liquidated the entries, assessing additional duties and fees; and (3) that, although it protested the liquidations, TJM never brought an action in this forum challenging Customs' denial of its protests. None of these points is in dispute.

In its Complaint, the Government alleged that TJM entered the merchandise at issue. *See* Complaint ¶¶ 8, 9, 15, 16, 22, 23, 29, 30. In its Answer, TJM admitted each of those allegations. *See* Answer ¶¶ 8, 9, 15, 16, 22, 23, 29, 30. It is thus undisputed that TJM entered the merchandise at issue.

Similarly, in its Complaint, the Government alleged that Customs liquidated the relevant entries with an increase. *See* Complaint ¶¶ 10, 17, 24 and 31. And, although TJM did not outright admit those allegations, it denied them only "for lack of knowledge or information sufficient to form a belief as to the truth of the matter asserted." *See* Answer ¶¶ 10, 17, 24, 31. In other words, TJM did not affirmatively dispute that the relevant entries were liquidated with an increase. Even more to the point, the Government attached to its Complaint the entry papers for the entries at issue here. TJM never challenged the authenticity of those papers, which indisputably establish that Customs timely liquidated the entries with an increase.[8]

Finally, a review of the files of the U.S. Court of International Trade reveals that TJM has never commenced an action contesting challenging Customs' denial of its protests in this matter. *See generally Grimes v. Pinn Bros. Constr. Co.,* No. C–01–2787, 2002 U.S. Dist. LEXIS 3631, at *4–5 (N.D. Cal. Feb. 26, 2002) ("It is proper for a court to take judicial notice of the contents in court files in other lawsuits.") (*citing Mullis v.*

[8] Moreover, in its Answer, TJM asserted as an affirmative defense that Customs' liquidation of the entries was contrary to law. *See* Answer ¶ 36. In effect, that claim constitutes an admission that Customs liquidated the merchandise against TJM's interests.

United States Bank. Ct., 828 F.2d 1385, 1388, n.9 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040 (1988)).

In short, based not only on TJM's failure to controvert the allegations in the Government's Statement of Undisputed Facts, but also on an independent review of the file in this action, it appears that—as the Government contends—there is no dispute as to any material fact in this matter.

B. Entitlement to Judgment As A Matter of Law

The Government's motion also argues that it is entitled to judgment as a matter of law. *See generally* Plaintiff's Brief at 4–6. In support of that claim, the Government points to 19 U.S.C. § 1514(a), which provides (with limited exceptions, not relevant here)[9] that a liquidation is final upon all persons unless protested, and a civil action contesting denial of the protest is commenced in the U.S. Court of International Trade:

> *[D]ecisions of [Customs],* including the legality of all orders and findings entering into the same, as to—
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> * * * * * * *
>
> (2) the classification and rate and amount of duties chargeable;
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
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> * * * * * * *
>
> (5) the liquidation or reliquidation of an entry * * *
>
> *shall be final and conclusive* upon all persons * * * unless a protest is filed in accordance with this section, or *unless a civil action contesting the denial of a protest,* in whole or in part, *is commenced in the United States Court of International Trade* * * *.

19 U.S.C. § 1514(a) (1988) (emphasis added).

To commence an action in this Court, a party must file an action within 180 days after the date of mailing of notice of denial of a protest. 28 U.S.C. § 2636(a)(1) (1988). In addition, a party must pay "all liquidated duties, charges, or exactions * * * at the time the action is commenced * * *." 28 U.S.C. § 2637(a) (1988). *See Nature's Farm Prods., Inc. v. United States,* 819 F.2d 1127, 1128 (Fed. Cir. 1987); *see also* H.R. Rep. No. 96–1235 at 57 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3769 ("*prior to* the institution of a suit [under 28 U.S.C. § 1582(3)] contesting the denial of a protest * * *, all liquidated duties, charges or exactions must have been paid.") (emphasis added).

Here, it is undisputed that TJM has never filed an action in this Court challenging the denial of its protests. Nor has TJM ever paid any of the sum due. The Government's motion contends that Customs' liquidation of the entries at issue is therefore final and conclusive as to TJM, and that TJM is liable for the increased duties, fees and interest. *See* Plaintiff's Brief at 4.

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[9] Under 19 U.S.C. § 1514(a)(5), virtually all liquidations—even those contrary to law—are final unless properly challenged in this Court. The only exceptions are "deemed liquidations." *See United States v. Cherry Hill Textiles, Inc.,* 112 F.3d 1550 (Fed. Cir. 1997).

According to the papers filed in this action, TJM contemplated two affirmative defenses to the Government's allegations.

TJM's first affirmative defense is that the Government's claims are barred by the statute of limitations. *See* Answer ¶ 35. However, as the Government correctly notes, it is well-settled law that there is no statute of limitations in an action of this nature. *See* Letter from Counsel for Plaintiff (Aug. 26, 2002) at 3. *See generally United States v. Ataka Am., Inc.,* 17 CIT 598, 600, 826 F. Supp. 495, 497 (1993) ("[t]he general rule is that the United States is exempt from statutes of limitations unless Congress has expressly provided otherwise.") (*citing United States v. City of Palm Beach Gardens,* 635 F.2d 337, 339 (5th Cir. 1981), *citing Guaranty Trust Co. v. United States,* 304 U.S. 126, 132–33 (1938)).

As its second defense, TJM has contended that Customs' liquidation of the entries at issue was "contrary to law." *See* Answer ¶ 36. But, in its motion for summary judgment, the Government emphasizes that—as discussed above—if TJM wished to contest the validity of the liquidations, it was obligated to timely commence an action in this Court and to pay "all [outstanding] liquidated duties, charges, or exactions." *See* Plaintiff's Brief at 4; 19 U.S.C. § 1514(a) (1988); 28 U.S.C. §§ 2636, 2637 (1988). In essence, the Government argues that TJM cannot use this case to collaterally attack the validity of Customs' actions—that is, that, having failed to wield the "sword" by availing itself of the opportunity to affirmatively assert its claims by initiating an action in this Court, TJM is precluded from raising the same arguments as a "shield" in the Government's collection action.

On the strength of its case-in-chief and its responses to TJM's affirmative defenses, the Government's motion contends that it is entitled to judgment as a matter of law. However, given the facts and circumstances of this case, that is a troubling proposition.

As discussed above, TJM's surety is challenging in a related case the validity of Customs' liquidation of virtually all (if not all) of the entries at issue here. Indeed, it appears that the grounds raised by the surety are the same as those asserted by TJM in its protests. *Compare* HQ 547591 (Apr. 21, 2000) *and* Complaint, *XL Specialty Ins. Co.* If the surety were later to prevail in the related case, any judgment entered at this time in this action would effectively constitute a "windfall" for the Government.

The Government now acknowledges that these are uncharted waters. *See* Audiotape: Teleconference of Court with Counsel for Plaintiff (Sept. 9, 2002) ("9/9/02 Audiotape"). Although the postulated scenario would not be a case of inconsistent decisions *per se* (because the grounds asserted by the Government here do not go to the validity of the liquidations), and although the Government's legal arguments appear (at least as a general proposition) to be unexceptionable, it would nevertheless be premature—and arguably unseemly—to give the Court's imprimatur to

the Government's efforts to collect additional duties and fees for liquidations that may yet be determined to have been unlawful.[10]

In sum, while it appears that there is no dispute as to any material fact, it is less clear whether the Government is "entitled to * * * judgment as a matter of law." USCIT R. 56(c). In any event, even where a movant has met its burden, a court retains the discretion to deny summary judgment—notwithstanding the seemingly mandatory language of Rule 56(c), which states that the court "shall" grant summary judgment "forthwith" if there are no genuine disputes of material fact and the movant is entitled to judgment as a matter of law. Rule 56 is thus "far less mandatory" than the language of the rule would indicate. 11 *Moore's Federal Practice* § 56.32[6].

"There is long-established doctrine holding that a court may deny summary judgment if it believes further pretrial activity or trial adjudication will sharpen the facts and law at issue and lead to a more accurate or just decision, or where further development of the facts may enhance the court's legal analysis." *Id*. *See also id.* n. 18 (citing cases). *See also* FJC Monograph at 49, and cases cited there (noting that, in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 255, the Supreme Court "recognized that there may be cases where there is no manifest material factual dispute but the trial judge nevertheless 'believe[s] that the better course would be to proceed to a full trial'").

In this case, it is beyond cavil that the better course is to defer judgment pending a final disposition in the related case, *XL Specialty Ins. Co.*—particularly since the defendant in this case is absent. In light of the identity of interests between the defendant in this case and the plaintiff in the other case, the prosecution of that case conceivably may enure to the benefit of the defendant here. The outcome of that case may enlighten and inform the actions of the Court and the Government in this case as well. Moreover, the passage of time will not prejudice the Government. If the Government prevails in the other case, it will be free to renew its motion here, and there will be no pall hanging over it. If, on the other hand, the surety prevails, the Government can reevaluate its position and decide, for example, whether it wishes to abandon this action or to renew its motion. Even the Government now appears to concede that summary judgment would be inappropriate at this time, and that this action should be stayed pending the outcome of *XL Specialty Ins. Co. See* 9/9/02 Audiotape.

IV. CONCLUSION

For the reasons discussed above, the Government's unopposed motion for summary judgment is denied as premature. A separate order will enter accordingly.

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[10] As counsel for the Government recently noted, if the surety prevails in the related case, Customs will reliquidate the entries at issue there—which include all (or virtually all) of the entries at issue here. Summary judgment in favor of the Government in this case thus would leave the Government in a position to collect on entries that were reliquidated. As counsel for the Government put it, the Government would then be "pursuing an action on liquidations that doesn't [sic] exist anymore." 9/9/02 Audiotape. Counsel advised that she has found no precedent on point. *Id*.

(Slip Op. 02–112)

ALLEGHENY LUDLUM CORP., ET AL., PLAINTIFFS *v.*
UNITED STATES, DEFENDANT

Court No. 01–00236

[Plaintiffs' Motion for Judgment Upon an Agency Record denied]

(Decided September 12, 2002)

Collier Shannon Scott, PLLC, David A. Hartquist, (Jeffrey S. Beckington), Adam H. Gordon, for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, United States Department of Justice; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *(Lucius B. Lau)* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Scott D. McBride*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for Defendant.

OPINION

I. INTRODUCTION

BARZILAY, *Judge:* Plaintiffs, Allegheny Ludlum Corp., AK Steel Corp., Butler Armco Independent Union, J & L Specialty Steel, Inc., North American Stainless, United Steelworkers of America, AFL-CIO/CLC, and Zanesville Armco Independent Organization ("the domestic industry"), contest the final results in *Stainless Steel Plate in Coils From Taiwan: Final Rescission of Antidumping Duty Administrative Review,* 66 Fed. Reg. 18,610 (Apr. 10, 2001) *("Final Rescission"),* by the U.S. Department of Commerce (the "Department," "Commerce" or "Government"). The domestic industry asks the court to remand the Department's final determination with instructions to complete the first administrative review of Respondent Ta Chen's sales of stainless steel plate in coils ("SSPC") from Taiwan. For reasons outlined below, the court denies Plaintiffs' motion.

II. BACKGROUND

For the purposes of its review, the Department investigated imports of SSPC produced by Yieh United Steel Corporation ("YUSCO"), exported from Taiwan, and sold in the United States by Ta Chen Stainless Pipe Co., Ltd., and its wholly owned U.S. subsidiary, Ta Chen International Corp. ("Ta Chen").

In the initial investigation, covering January 1, 1997 through December 31, 1997, the Department had to determine whether a "substantial portion of Ta Chen's U.S. sales were below acquisition costs by comparing the total value of stainless steel plate sold below acquisition cost to the total value of all stainless steel plate sales made by Ta Chen during the period of investigation ("POI")." *Notice of Final Determination of Sales at Less Than Fair Market Value: Stainless Steel Plate Coils from Taiwan,* 64 Fed. Reg. 15,493 (March 31, 1999). The Department found

that Ta Chen was selling YUSCO's merchandise at prices below its acquisition costs, and thus was engaging in middleman dumping. To reflect this middleman dumping, the Department calculated a cash deposit rate of 10.20 percent on sales produced by YUSCO and sold to the United States through Ta Chen. The Department determined a rate of 8.02 percent for YUSCO alone.

On July 7, 2000, the Department published a notice of initiation of antidumping duty administrative review of sales by YUSCO and Ta Chen for the period of November 4, 1998 through April 30, 2000. *Initiation of Antidumping Duty and Countervailing Duty Administrative Reviews and Requests for Revocations in Part,* 65 Fed. Reg. 41,942 (July 7, 2000). On July 10, 2000, the Department issued a questionnaire to YUSCO and Ta Chen. On July 19, 2000, YUSCO withdrew its request for review and requested that the Department rescind the review. YUSCO claimed that none of its subject merchandise entered the United States during the period of review ("POR"), and therefore, the review was inappropriate. On August 16, 2000, Petitioners filed comments opposing YUSCO's request for rescission, and alleged that Ta Chen's U.S. affiliate, Ta Chen International (CA) Corp. (TCI), sold YUSCO's merchandise during the period of review and additionally had unsold inventory. On July 31, 2000, Ta Chen stated that it did not make any U.S. sales, shipments, or entries of subject merchandise during the POR, and requested not to answer the Department's questionnaire. On August 1, 2000, the Department asked Ta Chen supplemental questions concerning POR shipments of merchandise falling under a particular Harmonized Tariff Schedule ("HTS") number. Ta Chen responded that these were cut-to-length stainless steel plate and not subject merchandise. On August 24, 2000, the Department denied Ta Chen's request to not answer the supplemental questions and issued them. Ta Chen responded on August 31, 2000 and September 5, 2000, and stated that of Ta Chen's sales during the POR, all merchandise entered before the POR. Ta Chen also stated that while YUSCO sold subject merchandise to TCI during the POR, this merchandise entered the United States and was resold after the POR.

On September 12, 2000, petitioners submitted comments and argued that the Department should review TCI's resales of YUSCO's merchandise as constructed export price ("CEP") sales. On September 19, 2000, the Department, at the domestic industry's request, conducted an inspection of Customs documentation at the U.S. Customs Service ("Customs") in Long Beach, California. A review of a random sampling of entries during the POR revealed that none of the entries were of subject merchandise, because they were entered prior to suspension of liquidation. *See Memo to the File from Carrie Blozy and Juanita H. Chen* (October 19, 2000). Later, on September 26, 2000, the Department informed Ta Chen of its review of TCI's sales, and asked that Ta Chen submit its response by October 10, 2000. Ta Chen failed to answer. On October 24, 2000, the Department informed petitioners that as a result of its inspection and further inquiry by Customs, the Department was questioning

whether to continue its administrative review. *See Memo to the File Juanita H. Chen through Edward Yang* (October 25, 2000).

On December 4, 2000, the Department published a notice of preliminary rescission of its review as a result of the absence of entries into the United States of subject merchandise during the period of review. *Preliminary Rescission of Antidumping Duty Administrative Review: Stainless Steel Plate in Coils From Taiwan,* 65 Fed. Reg. 75,760. On April 10, 2001, the Department published its notice of final rescission of antidumping duty administrative review. *Stainless Steel Plate in Coils From Taiwan: Final Rescission of Antidumping Duty Administrative Review,* 66 Fed. Reg. 18,610.

On December 7, 2001, Plaintiffs filed their Memorandum in Support of Rule 56.2 Motion for Judgment upon the Agency Record. They seek a remand to Commerce for the purpose of continuing the review and withdrawing the rescission.

III. STANDARD OF REVIEW

This court will sustain the Department's antidumping duty determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1999); *Fujian Machinery and Equipment Import & Export Corporation v. United States,* 25 CIT ____, ____, 178 F. Supp. 2d 1305, 1310 (2001). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (citations omitted), *aff'd*, 810 F.2d 1137 (1987).

Additionally, "agency interpretations of statutes which they are charged with administering shall be sustained if permissible, unless Congress has directly spoken to the precise question at issue." *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1190 n.9 (Fed. Cir. 1990) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45, (1984)).

IV. DISCUSSION

Plaintiffs contend that Commerce's decision to rescind the administrative review for Ta Chen is not supported by substantial evidence and not in accordance with law. Plaintiffs argue that the "Department erred by rescinding the administrative review contrary to its own general policy and that, in any event, the Department's policy underlying the rescission is unlawful under the statute." *Pls.' Mem. in Supp. of Rule 56.2 Mot. for J. upon the Agency Record ("Pls.' Br.")* at 1.

A. Commerce did not improperly depart from a general policy of placing the burden on the Respondent to link U.S. sales made during the first period of review to pre-suspension entries.

Plaintiffs object to the Department's rescinding the review of Ta Chen, without forcing Ta Chen to complete the process of answering the questionnaire that Commerce had sent them. Plaintiffs point to a "gen-

eral policy" that places "on the respondent the burden of linking U.S. sales made during the first POR to pre-suspension entries." *Pls.' Br.* at 7. In this case, Commerce, at the request of the Plaintiffs, conducted its own investigation to link the sales during the POR to entries prior to the POR. Plaintiffs contend that despite Commerce's access to information that supported Ta Chen's claim, Commerce should have insisted that Ta Chen provide redundant information to verify the link.

Defendant does not contest Plaintiffs' view that it has a general practice of placing the burden on "parties to demonstrate the link between sales during the period of review and entries made prior to the period." *Def.'s Br.* at 17. Initially, Commerce did request that Ta Chen demonstrate that the sales were linked to pre-POR entries. However, in the interim, it discovered through its own investigation evidence of the link. Neither party disputes that such investigatory power is within Commerce's authority. Neither the statute at issue nor the regulations promulgated by Commerce require the Department to request information from parties to prove what it already has substantial evidence to support.

The statute, 19 U.S.C. § 1675(2)(A), requires "the administering authority" to "determine the normal value and export price (or constructed export price) of each entry of the subject merchandise and the dumping margin for each such entry." The statute does not place specific burdens on the parties, but leaves to Commerce to develop a methodology to "determine" if dumping took place. Commerce's methodology is outlined in the regulations enacted to implement the statute. *See* 19 C.F.R. 351.213(d) (2002). The regulations allow the Secretary to "rescind an administrative review, in whole or only with respect to a particular exporter or producer, if the Secretary concludes that, during the period covered by the review, there were no entries, exports or sales of the subject merchandise, as the case may be." 19 C.F.R. 351.213(d)(3).

In the absence of a statutory or regulatory restriction on Commerce to rely on information it discovered through self-initiated investigation, the Department is bound only by previous past practice. The government does not dispute that it is generally Commerce's practice to place the burden on foreign respondents to link sales to entries made prior to the review. *See Def.'s Br.* at 17. The government does not dispute that agencies must adhere to their prior practices or provide an explanation for a departure. *Id.* However, the government points out it asked Ta Chen for the relevant information, and after that request, and before Ta Chen fully responded, Commerce, at the urging of the Plaintiffs, discovered that the sales in question were linked to entries outside the POR. Commerce therefore explained, and justified its deviating from the general practice of requiring the respondent to provide information, because an additional demonstration linking sales and entries would be redundant with what was already on the record before the agency. The court will not interfere with Commerce's discretion in this matter as its actions were a permissible interpretation of the statute and regulations

regarding rescissions. With no statutory, regulatory, or binding practice to prevent Commerce from relying on this information its decision is in accordance with law.

B. Commerce's regulations are not contrary to law.

Commerce has promulgated a policy, applied in this case, that,

> [s]ales of merchandise that can be demonstrably linked with entries prior to the suspension of liquidation are not subject merchandise and therefore are not subject to review by the Department. Merchandise that entered the United States prior to the suspension of liquidation (and in the absence of an affirmative critical circumstances finding) is not subject merchandise within the meaning of 771(25) of the Act.

Certain Stainless Steel Wire Rods From France: Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 47,874, 47, 875 (Sept. 11. 1996).

Section 771(25) (codified at 19 U.S.C. § 1677(25) (1999)) of the Act, referenced in the policy above defines subject merchandise as,

> the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order under this subtitle or section 1303 of this title, or a finding under the Antidumping Act, 1921.

What the policy enunciated in *French Wire Rod* and Section 771(25) makes clear is that when Commerce is investigating whether dumping is occurring during a POR, it must analyze the data for imports into the United States' market during a discrete period of time. In this case the period of review was from November 4, 1998 through April 30, 2000. 66 Fed. Reg. at 18,610. The policy of linking sales to pre-suspension entries merely restates the obvious proposition that merchandise that does not fall wtihin the period in question, is not to be considered in that period. This policy was addressed by this Court in *STC Corporation et al. v. United States,* where the Court

> [found] that the employment of Commerce's link test results in a more accurate administration of the dumping statute because it properly excludes irrelevant sales from the dumping determination.

21 CIT 1379, 1383 n.2, 990 F. Supp. 829, 832 n.2 (1997) (citing *Rhone Poulenc,* 899 F.2d at 1191; *Federal-Mogul Corp. v. United States*, 18 CIT 1168, 1172, 872 F. Supp. 1011, 1014 (1994).

Plaintiffs contend that the policy of linking sales, outlined in *French Wire Rod*, is contrary to the statute because it defines merchandise which enters before the period of review as falling outside the definition of "subject merchandise" under the statute. They argue that because the statute limits the definition of subject merchandise to the "class or kind," meaning the physical nature of the merchandise, anything that further limits the category is impermissible. *See Pls.' Br.* at 10.

However, as the language of the statute excerpted above makes clear, subject merchandise is that class or kind "within the scope of * * * a re-

view." That entries must be placed within, or outside, the period of review to be subject to a review is plain on its face. Merely because some merchandise shares the same physical characteristics does not mean it can be arbitrarily investigated in any POR. The statute explicitly defines "subject merchandise" as that which shares common physical characteristics *and* falls within the temporal scope of a review. The Plaintiffs' reasoning attempts to confuse this simple idea, but the argument is unavailing. Commerce's policy is in accordance with law.

C. Continuing the review to set a cash deposit rate is not necessary.

Plaintiffs insist that the review should go forward to set an updated cash deposit rate, even if there are no entries. Plaintiffs ground their argument in the policy that the deposit rate should be based on the most recent data available, and sales of entries prior to suspension of liquidation would provide such information. *Pls.' Br.* at 13. Plaintiffs ask that review of sales during the first administrative POR should not be rescinded, "and the Department's policy should be ended." *Id.*

Defendant counters that neither statute nor regulation requires that reviews must go forward to set a new deposit rate, even in the absence of entries. *Def.'s Br.* at 19. In this case Commerce calculated dumping margins at time of entry. To be consistent, updating the cash deposit rate would require new entries. However, there were no entries during the period of review, therefore there is nothing on which to base an updated cash deposit rate.

Plaintiffs cite to previous case law by this Court holding, "'the statutory scheme requires that estimated antidumping duties be as closely tailored to actual dumping duties as is reasonable given data available to [International Trade Adminstration] at the time the antidumping order is issued.'" *Pls.' Br.* at 13, (quoting *Badger-Powhatan, A Div. of Figgie Intern. v. United States*, 10 CIT 241, 249–250, 633 F. Supp. 1364, 1372–73 (1986) (footnote omitted)). While the court agrees that deposit rates should be as accurate and valid as possible, this does not mean rates should be set in the absence of "data available" as is the fact in this case.

D. Commerce's regulations do not support review.

The last prong of Plaintiffs' argument is that Department's regulations require continuing the review. Plaintiffs cite to the regulatory requirement that annual reviews

> will cover, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation under this part or suspension of investigation to the end of the month immediately preceding the first anniversary month.

19 C.F.R. § 351.213(e)(1)(ii). They contend that the language requires review in the case of any entries, exports or sales during the period of review.

To require a review in the case of any of the three circumstances would essentially read out of the regulation the qualifying clause "as ap-

propriate." Commerce has validly promulgated a policy that sales linked to entries prior to liquidation will not be considered subject merchandise for the purpose of administrative reviews. *See supra*. Under this policy a review of sales linked to pre-suspension entries would not be appropriate.

CONCLUSION

For the foregoing reasons Plaintiffs' motion for judgment on the agency record is denied. The case is dismissed. Judgment will be entered accordingly.

(Slip Op. 02–113)

CO-STEEL RARITAN, INC., GS INDUSTRIES, KEYSTONE CONSOLIDATED INDUSTRIES, INC., AND NORTH STAR STEEL TEXAS, INC., PLAINTIFFS *v.* U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANT, AND ALEXANDRIA NATIONAL IRON AND STEEL CO. AND SIDERURGICA DEL ORINOCO, C.A., INTERVENOR-DEFENDANTS

Court No. 01–00955

[Results of remand to the International Trade Commission affirmed.]

(Dated September 13, 2002)

Collier Shannon Scott, PLLC (Paul C. Rosenthal, Kathleen W. Cannon, R. Alan Luberda and *John M. Herrmann)* for the plaintiffs.

Lyn M. Schlitt, General Counsel, *James M. Lyons,* Deputy General Counsel, and *Karen Veninga Driscoll,* Attorney, United States International Trade Commission, for the defendant.

Baker & McKenzie (Kevin M. O'Brien and *Thomas Peele)* for intervenor-defendant Alexandria National Iron and Steel Company.

White & Case LLP (David P. Houlihan, Lyle B. Vander Schaaf, Frank H. Morgan, Joseph H. Heckendorn and *Jonathan Seiger)* for intervenor-defendant Siderurgica del Orinoco, C.A.

DeKieffer & Horgan (J. Kevin Horgan, Marc E. Montalbine and *Merritt R. Blakeslee)* for proposed intervenor-defendants Saarstahl AG and Saarsteel Inc.

MEMORANDUM AND ORDER

AQUILINO, *Judge:* In its slip opinion 02–59, 26 CIT ____, ____ F.Supp.2d ____ (June 20, 2002), familiarity with which is presumed, the court remanded for reconsideration that part of the determination of defendant International Trade Commission ("ITC") *sub nom. Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela,* 66 Fed.Reg. 54,539 (Oct. 29, 2001), which terminated investigations with regard to subject imports from Egypt, South Africa and Venezuela. In response to that order, defendant's

counsel have filed *Views of the Commission on Remand* (Aug. 16, 2002) to the effect that

> imports of wire rod from Egypt, South Africa and Venezuela are not negligible, and that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of wire rod from Egypt, South Africa and Venezuela that are allegedly sold in the United States at less than fair value.

Included in the written analysis in support of this conclusion is the following:

> * * * [W]e reconsidered negligibility based on Commerce's modified scope issued April 10, 2002. * * * [W]e considered official Commerce import statistics for the period of August 2000 through July 2001, supplemented with importer responses regarding imports of the products which have now been excluded by Commerce from the scope of investigations (1080 tire cord quality wire rod and 1080 tire bead quality wire rod, corresponding to the quality designations, definitions and applications Commerce designated). The importers that submitted data on the modified scope accounted for 94.9 percent of U.S. imports of wire rod from the subject countries in 2000 and 88.9 percent of imports from all countries in 2000. Based on the modified scope, Egypt has a share of total imports of 1.5 percent; Germany, * * * percent; South Africa, 2.8 percent; and Venezuela, 2.3 percent. Each of these countries is below the negligibility threshold of three percent of total imports. The aggregate import share of these four countries, however, is * * * percent, which exceeds the aggregate negligibility level of seven percent prescribed by statute. 19 U.S.C. §1677(24)(A)(i) and (ii). We therefore find, pursuant to 19 U.S.C. §1677(24)(A)(ii), and the Court's Order, that subject imports from Egypt, South Africa, and Venezuela are not negligible for purposes of our present material injury analysis.[1]

The plaintiffs move for expedited entry of final judgment, affirming this determination upon remand, on the stated ground that it "could potentially eliminate the need for future litigation arising out of that determination", given the ITC's "soon-to-be issued final determinations in the underlying agency investigations".

Intervenor-defendant Alexandria National Iron and Steel Company ("ANSDK") responds with a request that the court not affirm the foregoing determination, rather the ITC's original preliminary determination, on the grounds that the Commission has either misinterpreted the court's slip opinion 02–59 or "demonstrated clearly the procedural and legal defects that flow from the approach used by the [ITC]" and also that its remand determination misapplies 19 U.S.C. §1677(24). On its part, intervenor-defendant Siderurgica del Orinoco, C.A. ("Sidor") objects to the *Views of the Commission on Remand* as being based, at least in part, upon an unlawful reopening of the ITC record; as failing to fol-

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[1] *Views of the Commission on Remand,* pp. 10–11 (footnotes omitted). The reference "Commerce's modified scope" is to that Department's *Notice of Preliminary Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Germany,* 67 Fed.Reg. 17,384 (April 10, 2002).

The figure(s) with regard to Germany have been omitted from this public report in the interest of confidentiality.

low the plain meaning of the Trade Agreements Act of 1979, as amended; and as not being based on evidence that corresponds to the modified scope.[2]

I

Also before the court now is a motion for leave to intervene herein out of time by Saarstahl AG and Saarsteel Inc. as parties defendant. The defendant has declined to consent to this motion, and the plaintiffs actively oppose it. These adverse reactions are well-founded.

The motion avers that Saarstahl is a German producer of carbon and certain alloy steel wire rod and "an interested party who was a party to the proceeding in connection with which th[is] matter arose" within the meaning of 28 U.S.C. §2631(j)(1)(B) and 19 U.S.C. §1677(9)(A). *Cf.* 28 U.S.C. §2631(k)(1). That is, Saarstahl has been a party to the administrative proceedings before the International Trade Administration, U.S. Department of Commerce ("ITA") and ITC from the beginning[3] and has been directly implicated by the latter's above-cited, original, affirmative, preliminary determination of reasonable indication of material injury to the domestic industry by reason of German exports to the United States that has been the core of this case. As such, it had a right to intervene herein pursuant to the foregoing statutory authority and USCIT Rule 24(a), independent of any subsequent ITA modification of the scope of the investigation(s), which, in the *Views of the Commission on Remand,* continues to implicate imports from Germany in an affirmative manner.

Of course, Saarstahl's able counsel understand, even concede, this circumstance in now positing their motion "out of time" pursuant to Rule 24(a), which provides that, in an action described in 28 U.S.C. §1581(c), which this case is,

> a timely application shall be made no later than 30 days after the date of service of the complaint as provided for in Rule 3(f), unless for good cause shown at such later time for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; or (2) under circumstances in which by due diligence a motion to intervene under this subsection could not have been made within the 30-day period.

They must also understand that this rule does not amount to permissive intervention in a case of this kind. *See Geum Poong Corp. v. United States,* 26 CIT ____, ____ F.Supp.2d ____, Slip Op. 02–84, pp. 4–5 and n. 5 (Aug. 6, 2002), *appeals docketed,* Nos. 02–1573, 02–1578 (Fed.Cir. Aug. 30 and Sept. 6, 2002). Indeed, on September 6, 2002, this court granted the motion of another "interested" German producer for leave to intervene as a party defendant in *Committee for Fair Beam Imports v. United States,* CIT No. 02–00531, wherein the same counsel as here correctly

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[2] This statement of Sidor objections has been followed by a formal motion for oral argument thereon, which motion can be, and it hereby is, denied, given the quality of the papers submitted on all sides.

[3] *See, e.g.,* ITA *Notice of Preliminary Determination, supra* n. 1, 67 Fed.Reg. at 17,384 (Case History).

confirmed that such a motion "must" be filed no later than 30 days after the date when a complaint is filed.

The sum and substance of their motion in this case is stated to be that,

> [b]ecause plaintiffs are now attempting to use this litigation regarding the Commission's preliminary determination to influence [it]s final investigation, intervention is appropriate at this time. The Commission's rescission in its remand determination of its earlier negligibility determination with respect to Egypt, South Africa, and Venezuela raises the possibility that the seven-percent exception to the negligibility statute will be triggered. If this occurs, German imports will be rendered non-negligible, notwithstanding that they fall below the three-percent negligibility threshold. Saarstahl respectfully submits that this substantial change in its posture in the Commission's investigations constitutes good cause for its intervention out of time.

Saarstahl Motion for Leave to Intervene, third page (footnote omitted). This court cannot concur. On its face, the foregoing reasoning is not equatable with the "good cause" spelled out by the above rule. Secondly, the goal of complaints filed in court about preliminary agency determinations invariably is to correct perceived errors—in anticipation of a final determination in accordance with law. Finally, to repeat, Saarstahl has been, and remains, implicated in this matter, one way or the other. Hence, it is not subject to the exception(s) to the 30-day standard of USCIT Rule 24(a), *supra,* and its motion made pursuant thereto must therefore be, and the same hereby is, denied.

II

As for the interested parties that have sought and obtained in a timely manner leave to intervene herein as defendants, both ANSDK and Sidor contend that the *Views of the Commission on Remand* misapply the statute which governs this case, 19 U.S.C. §1677(24), and was discussed in slip opinion 02–59. But the ITC correctly interpreted that opinion as not directing it to base its remand determinations, including its domestic like product and industry findings, entirely on the ITA's modified scope.[4] Moreover, the commissioners report that they do not believe that their domestic like product and industry findings would be different if they were based on the modified scope because

> the record reflects a continuum of wire rod products without clear dividing lines, including no clear dividing line between 1080 tire cord wire rod, 1080 tire bead wire rod, as described in Commerce's modified scope of investigations, and other high quality specialized wire rod products. Under these circumstances, the Commission does not treat each item of merchandise to be a separate domestic like product that is only "like" its counterpart in the scope, but rather considers the continuum itself to constitute the domestic like product.[5]

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[4] *Views of the Commission on Remand,* p. 8.

[5] *Id.* at 8–9 (footnotes omitted).

The ANSDK thesis is that, if the change in scope had resulted in a change in the domestic like-product definition, then the result could well have been different now, but, in the absence of change in the latter, the negligibility determination under the statute does not change. ANSDK's Comments, pp. 13–14. *Accord:* Sidor Objections, p. 6. Both intervenor-defendants focus on footnote 29 to the *Views of the Commission on Remand* stating that, upon "[r]eading 19 U.S.C. §1673b(a)(1) together with 19 U.S.C. §1677(24)(A)(i), it is clear that the 'merchandise' referred to in the negligibility provision is subject merchandise." Each considers this a meaningful misreading of the two statutory sections. *E.g.,* ANSDK Comments, p. 15 ("The lack of * * * reference to 'subject merchandise' in Section 1677(24) strongly indicates that the merchandise is to be identified with reference to the domestic-like product from all countries"); Sidor Objections, p. 7 ("The choice of the 'domestic like product' rather than 'subject merchandise' in the negligibility provision must be viewed as a deliberate one").

Perhaps, each misunderstands the ITC's note. Sidor, for example, argues that, to

> construe the statute in the manner suggested by the Commission * * * means that the term "merchandise" in section 1677(24)[A](i) is "subject merchandise" both in the numerator and the denominator of the negligibility ratio. There is no logical or consistent way of interpreting the statute to avoid this result if section 1673b(A)(1)'s use of the term "subject merchandise" is interpreted as defining merchandise in section 1677(24)[A](i).

Sidor Objections, p. 10. While it is indeed clear that the purview of the negligibility section(s) of the statute is subject merchandise, it does not necessarily follow that 19 U.S.C. §1677(24)(A)(i) must be parsed as if actually written with "subject" supplementing either "merchandise", the "numerator", or "such merchandise", the "denominator", in that section, nor do the *Views of the Commission on Remand* show otherwise. To repeat,

> [t]he importers that submitted data on the modified scope accounted for 94.9 percent U.S. imports of wire rod from the subject countries in 2000 and 88.9 percent of imports from all countries in 2000.[6]

Whereupon the percentages of *total* imports from all countries for Egypt, Germany, South Africa, and Venezuela were calculated and reported therein and quoted hereinabove.

ANSDK interprets the ITC's reaction to slip opinion 02–59 as "discomfort"[7] purportedly so "severe"[8] as to have engendered "misunderstanding"[9] and "significant difficulties"[10] in reading it correctly. In

[6] *Id.* at 11 (footnote omitted).
[7] ANSDK Comments, pp. 1, 2, 4.
[8] *Id.* at 2.
[9] *Id.* at 4.
[10] *Id.* at 5.

short, ANSDK argues that "the Commission did not do what the Court instructed."[11] It makes this argument by pointing out that this court did not direct the ITC "to create a new record based on events occurring months later"[12], or "to reopen the record eight months later and pretend that a different record existed before the Commission in October, 2001"[13], or to "create makeshift data bases for individual issues."[14] Of course, slip opinion 02–59 would not and did not direct the agency in such a manner. Rather, it left reconsideration of the issue of negligibility up to the discretion of the ITC in the light of the law and the facts and circumstances discussed therein. And the court does not now find that the *Views of the Commission on Remand* are somehow violative of that opinion and order.

ANSDK recites *in haec verba* Defendant's Motion for Reconsideration and Stay dated July 22, 2002 with apparent approval and support. But that motion was carefully weighed and then denied by the court on August 7, 2002. To the extent ANSDK now seeks in its own right reconsideration of slip opinion 02–59[15], suffice it to state that all of the points raised have already been found wanting of any relief at this stage of the proceedings.

Sidor points out that slip opinion 02–59 did not order the defendant to re-open its record and argues that, for it to have done so on its own, was unlawful and

> broadened the implications of the Court's decision such that the legitimacy of all future Commission negative preliminary determinations will be judged based on later developed data.

Sidor Objections, p. 5. The court has difficulty accepting this prophecy on the record developed.

Be that as it may, Sidor also projects from the record that imports of subject merchandise from Germany will imminently account for more than three-percent of total imports, thereby excluding them from cumulation with those from Egypt, South Africa, and Venezuela. Apparently, this argument to the effect that the ITC first consider negligibility in the context of threat of material injury pursuant to 19 U.S.C. §1677(24)(A)(iv) was made to the agency, which declined to do so, given the structure and language of section 1677(24)(A) as a whole. *See Views of the Commission on Remand,* pp. 11–12, n. 33. And the court cannot conclude that this declination by the ITC was not in accordance with law.

The *Views of the Commission on Remand* proceed then to report the considerations of fungibility, geographic overlap, channels of distribution, and simultaneous presence of domestic like product and subject imports in concluding that there is a reasonable overlap among them

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[11] *Id.* at 9.
[12] *Id.* at 5.
[13] *Id.* at 6.
[14] *Id.* at 9.
[15] *See id.* at 10–13.

from Egypt, South Africa, and Venezuela and other subject imports, and between all of them and the domestic like product.[16] Finally, in determining that there is a reasonable indication that the domestic industry is materially injured by reason of subject imports from Egypt, South Africa, and Venezuela that are allegedly sold in the United States at less than fair value, the ITC assessed the conditions of competition, the volume and price effects of the cumulated subject imports, and the impact of cumulated subject imports.

Sidor points out that the only reason the ITC found imports from Egypt, South Africa, and Venezuela not to be negligible is because it aggregated them with those from Germany. In addition to contesting the negligibility of the German imports and therefore their cumulation, as indicated above, Sidor takes the position that subject imports from Venezuela have remained negligible in their own right and should not be cumulated because, of the foregoing factors, the ITC misinterpreted or misapplied fungibility, geographic overlap, channels of distribution, and domestic-market trends. In sum, Sidor contests the presence of substantial evidence on the record in support of the ITC's cumulation of subject imports from Venezuela. *See generally* Sidor Objections, pp. 21–24. But that standard applies to final Commission determinations per 19 U.S.C. §1516a(b)(1)(B)(i), whereas the standard of review for the preliminary determination at bar remains more narrow, to wit, whether or not it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 19 U.S.C. §1516a(b)(1)(A). The court cannot and therefore does not conclude that the *Views of the Commission on Remand* run aground for any of these reasons, given the fleeting statutory mandate that the ITC determine preliminarily whether there is at least a "reasonable indication" that an industry in the United States is materially injured by reason of imports of subject merchandise that are not negligible. 19 U.S.C. §1673b(a)(1).

III

In view of the foregoing, the *Views of the Commission on Remand* should be affirmed. Final judgment will enter accordingly.

So ordered.

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[16] *See Views of the Commission on Remand,* pp. 12–19.